

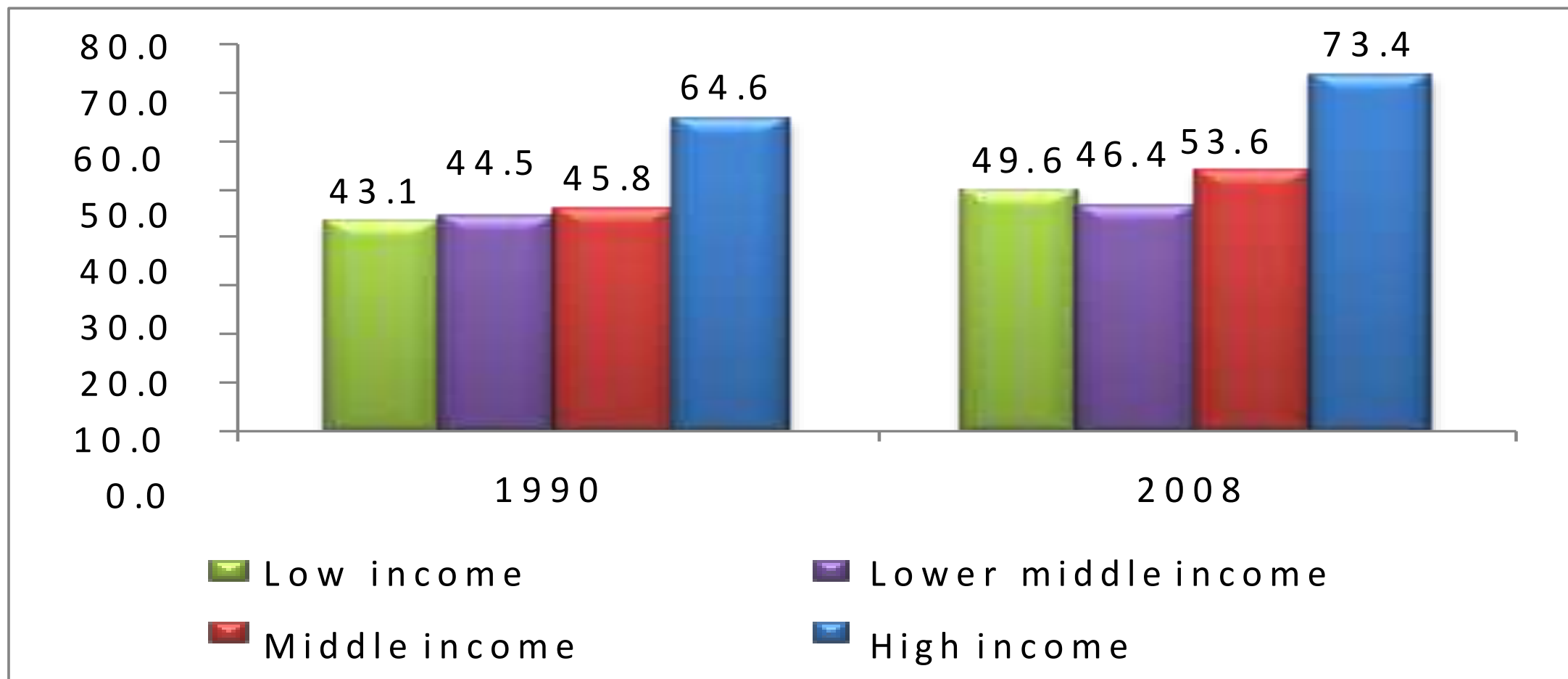
# Trade in Services: Overview & Discussion on Issues of Concern for Indian businesses

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# Importance of Services Trade

- Services represent the fastest growing sector of the global economy, currently accounting for about 60% of world production and employment and nearly 20% of world trade.
- Services sector has also been one of the main drivers of India's economic growth.
- It contributes to more than 50% share in GDP and FDI and around 30% share in total exports and employment.
- **India's share in world services exports is 3.3 % in 2015 (double of India's share in global merchandise exports at 1.6 percent).**

# On the rise: Services to GDP ratios



Source: World Bank, World Development Indicators

# Development of the GATS

- General Agreement on Tariffs & Trade (GATT 1947) covered trade in goods.
- Tokyo Round (1973-79): United States persuaded trade partners to include a multilateral agreement on services under the GATT framework.
- Objections from Developing countries.
- Punta del Este Declaration (1986): It was decided that a multilateral initiative on services was necessary.
- Uruguay Round (1986 - 1993): GATS was one of the major achievements.
- GATS is the first multilateral trade agreement to cover trade in services
- All Members of the WTO are signatories to the GATS and have to assume obligations.

# Structure of the GATS

**GATS consists of the following 7 parts:**

- **Preamble**: Basic objective and principles of the GATS
- **Part I**: Scope and Definitions
- **Part II**: General Legal obligations (Conditional and Unconditional)
- **Part III**: Structure of schedule of specific commitments
- **Part IV**: Enhancement of trade liberalization and gradual improvements of specific commitments
- **Part V and VI**: Institutional and procedural aspects

# Modes of Supply and Scope

Trade in Services is defined as the supply of service through the following:

- **“Cross-border supply” or Mode 1**: Services supplied from one country to another (e.g. IT enabled services)
- **“Consumption abroad” or Mode 2** : Consumers or firms making use of a service in another country (e.g. tourism, medical tourism)
- **“Commercial presence” or Mode 3** : A foreign company setting up subsidiaries or branches to provide services in another country (e.g. foreign banks setting up operations in another country)
- **“Presence of natural persons” or Mode 4** : Individuals travelling from their own country to supply services in another (e.g. consultants/intra-corporate transferee in any sector)

# Examples of the four Modes of Supply (Importing country is Country A)

## **Mode 1: Cross-border**

A user in country A receives services from abroad through its telecommunications or postal infrastructure.

Such supplies may include consultancy or market research reports, tele-medical advice, distance training, or architectural drawings.

## **Mode 2: Consumption abroad**

Nationals of A have moved abroad as tourists, students, or patients to consume the respective services.

# Examples of the four Modes of Supply (Importing country is Country A)

## **Mode 3: Commercial presence**

The service is provided within A by a locally-established affiliate, subsidiary, or representative office of a foreign-owned and – controlled company (bank, hotel group, construction company, etc.).

## **Mode 4: Movement of natural persons**

A foreign national provides a service within A as an independent supplier (e.g., consultant, health worker) or employee of a service supplier (e.g. consultancy firm, hospital, construction company).



# Sales by GATS Modes of Supply

<b>Mode of Supply</b>	<b>Estimated share</b>
<b>1 - cross-border supply</b>	<b>25-30%</b>
<b>2 - consumption abroad</b>	<b>10-15%</b>
<b>3 - commercial presence</b>	<b>55-60%</b>
<b>4 – presence of natural persons</b>	<b>less than 5%</b> Approx. 150 billion USD

# Scope of GATS

- Applies to all measures affecting Trade in Services at every level of government, and non-governmental bodies in the exercise of delegated powers.
- Exception: Services provided in the exercise of governmental authority (i.e., any service supplied on non-commercial basis)
- **Unique feature of GATS**: Members have the flexibility to determine the extent to which they would want to liberalize- in terms of scope of the sector, and specific modes through which services are supplied.
  - **Scheduling of Specific Commitments: With restrictions on 'Market Access' and 'National Treatment'**

# All about Scheduling

# Specific Commitments

Each Member is required to assume specific commitments in designated sectors relating to:

- **Market Access (Article XVI)**
- **National Treatment (Article XVII)**
- **Additional Commitments (Article XVIII)**
- Adopted through negotiations under Article XIX, positive listing provides for inscribing reservations.
- Article XX: What a Schedule should specify.
- Modification of Schedules: Article XXI.

# What is in a Schedule of Specific Commitments?

- **Market access (Art. XVI)**  
*Mostly quantitative restrictions*
- **National treatment (Art. XVII)**  
*Discriminatory restrictions*
- **Additional commitments (Art. XVIII)** *Measures that do not fall under Art. XVI & XVII, usually undertakings.*

## Schedule of Specific Commitments (Art. XX)

Article XX:1 of the GATS requires each Schedule to specify, inter alia:

- terms, limitations and conditions on market access;
- conditions and qualifications on national treatment;
- undertakings relating to additional commitments;
- implementation timeframe (where appropriate); and,
- the date of entry into force of such commitments.

# Obligations on market access (GATS Art. XVI)

Obligation to provide “treatment no less favourable than the terms, limitations and conditions provided in the schedule”

MA Limitations/ Restrictions that may be maintained or adopted are limited to:

- (a) Number of service suppliers\*
- (b) Value of transactions or assets\*
- (c) Number of operations or quantity of output\*
- (d) Total number of natural persons\*
- (e) Type of legal entity or joint venture\*
- (f) Foreign capital participation

\* (a) to (e) apply to non-discriminatory restrictions as well. The limitations concerned may be imposed in the form of quotas or via an economic needs test.

# Examples of Market Access limitations

ARTICLE XVI.2 LIMITATIONS	EXAMPLES
a) Number of service suppliers (i.e. numerical quotas, monopolies, exclusive service suppliers or an economics needs test)	<ul style="list-style-type: none"> <li>– Annually established quotas for foreign medical practitioners.</li> <li>– Licence for a new restaurant based on an economic needs test.</li> <li>– Nationality requirements for suppliers of services (equivalent to zero quota for foreigners).</li> </ul>
b) Value of service transactions or assets (i.e. numerical quotas or economics needs test)	Foreign bank subsidiaries limited to x percent of total domestic assets of all banks.
c) Number of service operations or quantity of service output (i.e. designated numerical units in the form of quotas or economics needs test)	Restrictions on broadcasting time available for foreign films.
d) Number of natural persons employed (i.e. numerical quotas or economic needs test)	Foreign labour should not exceed x per cent and/or wages y per cent of total.
e) Type of legal entity or joint venture Commercial presence excludes representative offices.	<ul style="list-style-type: none"> <li>– Foreign companies required to establish subsidiaries.</li> <li>– In sector x, commercial presence must take the form of a partnership.</li> </ul>
f) Participation of foreign capital (i.e. maximum percentage limit on foreign share-holding or the total value of individual or aggregate foreign investment)	Foreign equity ceiling of x per cent for a particular form of commercial presence.



# Limitations on national treatment

- (1) Each Member shall extend “treatment no less favourable than that it accords to its own like services and service suppliers”.
- (2) ... “either formally identical treatment or formally different treatment” ...
- (3) relevant benchmark: no modification of “the conditions of competition” in favour of own like services or service suppliers.

# Sample Schedule

Sector	Market Access	National Treatment	Additional Commitments
Engineering Services	1) None 2) None 3) None except that the establishment would be only through incorporation 4) None	1) None 2) None 3) None except that the establishment would be only through incorporation 4) Unbound	Applications for qualification of foreign engineers shall be processed within 3 months

# Classification issues

# Sectoral descriptions in schedules

- In the majority of cases, schedules combine:
  - W/120 : Services Sectoral Classification List
  - UN CPC provisional Classification (1991)

This comprises of five digits CPC items that act as *sui generis* national definitions.

- Some schedules do not refer at all to CPC (e.g. United States)
- CPC/W120 remains the reference guide for 80-90 per cent of WTO Members in 80 per cent of the sectors.

Note: W/120 and CPC provisional can be inadequate for understanding services which is a developing sector

# W/120: Services Sectoral Classification List

12 categories, 160 sectors or subsectors

## Sectors

*Precise definition is critical as it defines the scope of a commitment*

- Business and professional
- Communications, all types
- Construction
- Distribution
- Education
- Environment
- Financial
- Health and social
- Tourism
- Recreation & cultural
- Transport- all types
- Other

# UN Central Product Classification

- CPC focuses on products, which distinguishes nearly 600 service products in contrast to 300 services activities under (International Standard Industrial Classification - ISIC).
- The explanatory notes of the CPC contain a description of the broad spectrum of outputs or "service products" of heterogeneous service industries, and give sufficiently detailed descriptions of services for the purpose of delineating with some precision the scope of a specific commitment.
- CPC provisional version dated 1991,
- CPC has been under regular revision. Its latest version, i.e. CPC Ver.2.1 which has been released on 11 August 2015.
- It may serve as a complementary tool for scheduling, in particular for those services that are not specifically reflected in W/120

# UN CPC: Example of Engineering

Section: 8 - Business services; agricultural, mining and manufacturing services

**Division: 86 - Legal, accounting, auditing and book-keeping services; taxation services; market research and public opinion polling services; management and consulting services; architectural, engineering and other technical services**

861 - Legal services

862 - Accounting, auditing and book-keeping services

863 - Taxation services

864 - Market research and public opinion polling services

865 - Management consulting services

866 - Services related to management consulting

867 - **Architectural, engineering and other technical services**

# UN CPC: Example of Engineering

## **Group 867 is divided into the following Classes:**

[8671](#) - Architectural services

[8672](#) - Engineering services

[8673](#) - Integrated engineering services

[8674](#) - Urban planning and landscape architectural services

[8675](#) - Engineering related scientific and technical consulting services

[8676](#) - Technical testing and analysis services

## **Class 8672 is divided into the following Subclasses:**

[86721](#) - Advisory and consultative engineering services

[86722](#) - Engineering design services for the construction of foundations and building structures

[86723](#) - Engineering design services for mechanical and electrical installations for buildings

[86724](#) - Engineering design services for the construction of civil engineering works

[86725](#) - Engineering design services for industrial processes and production

[86726](#) - Engineering design services n.e.c.

[86727](#) - Other engineering services during the construction and installation phase

[86729](#) - Other engineering services



# Issues relating to CPC evolution/ new services

CPC Provisional Code:

## CPC 84: Computer and Related Services:

This Division is divided into the following Groups:

841 - Consultancy services related to the installation of computer hardware

842 - Software implementation services

843 - Data processing services

844 - Data base services

845 - Maintenance and repair services of office machinery and equipment including computers

849 - Other computer services

# Evolution of CRS under CPC Ver. 2.1

**Division 83 Professional, technical and business services (except research, development, legal and accounting services)**

## **8313 Information technology (IT) consulting and support services**

- 83131 IT consulting services
- 83132 IT support services

## **8314 Information technology (IT) design and development services**

- 83141 IT design and development services for applications
- 83142 IT design and development services for networks and systems

## **8315 Hosting and information technology (IT) infrastructure provisioning services**

- 83151 Website hosting services
- 83159 Other hosting and IT infrastructure provisioning services

## **8316 IT infrastructure and network management services**

- 83161 Network management services
- 83162 Computer system management services

## Question to Ponder

1. Is CRS under CPC Provisional the same as IT Services under CPC 2.1?

### **2. Cloud Computing:**

- a) Is it subsumed under CRS Services under CPC Provisional?
- b) Is it covered under CPC 2.1?

What is Cloud Computing?

Is it data processing services?

Telecommunication services or something other?

# Other issues

# MFN: Unconditional application

## Most-Favoured-Nation treatment (Article II)

- Members are to extend immediately and unconditionally to services or services suppliers of all other Members “treatment no less favourable than that accorded to like services and services suppliers of any other country”.
- Very limited one time derogations are possible in the form of Article II-Exemptions. Members were allowed to seek such exemptions before GATS entered into force.

# Other Unconditional Obligations

- Members are required, inter alia, to publish all measures of general application and establish national enquiry points mandated to respond to other Member's information requests.
- Other generally applicable obligations include the establishment of administrative review and appeals procedures and disciplines on the operation of monopolies and exclusive suppliers.

# Domestic Regulations

# Domestic Regulation (Article VI)

- It covers non-discriminatory domestic regulatory measures which are to be administered in a reasonable, objective and impartial manner

Unconditional Obligations (Articles VI:2)	Conditional Obligations (i.e., applicable to sectors where commitments are taken) (Articles VI:1, 3, 5, 7)
<ul style="list-style-type: none"><li>▪ Service suppliers in all sectors shall have access to judicial, arbitral or administrative tribunals or procedures for the <u>prompt review</u> of decisions affecting trade in services, and have access to appropriate remedies.</li><li>▪ In addition, Members shall ensure that administrative reviews are objective and impartial.</li></ul>	<ul style="list-style-type: none"><li>▪ All measures of general application affecting trade in services must be administered in a reasonable, objective and impartial manner;</li><li>▪ Applications for supplying a service must be considered within a reasonable period of time;</li><li>▪ Qualification requirements and procedures, licensing requirements and technical standards shall be based on objective and transparent criteria, not constitute unnecessary barriers to trade in services and, in the case of licensing criteria, not in themselves restrict trade in services;</li><li>▪ Establish adequate procedures to verify the competence of professionals of other Members.</li></ul>



## Recognition (Article VII)

- Article VII of the mandates Members, when applying standards or granting licenses, certificates, etc., to recognize education and other qualifications a supplier has obtained abroad.
- This may be done on an autonomous basis or through agreement with the country concerned.
- However, **Recognition** must not be exclusive, i.e. other Members are to be afforded an opportunity to negotiate their accession to agreements or, in the event of autonomous recognition, to demonstrate that their requirements should be recognized as well.
- Article VII:3 requires that **Recognition** not be applied **as a means of discrimination** between trading partners or **as a disguised trade restriction**.

# Exceptions

# General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

- a) necessary to protect public morals or to maintain public order;
- b) necessary to protect human, animal or plant life or health;
- c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:
  - i. the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;
  - ii. the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;
  - iii. safety;
- d) inconsistent with Article XVII, provided that the difference in treatment is aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of other Members;
- e) inconsistent with Article II, provided that the difference in treatment is the result of an agreement on the avoidance of double taxation or provisions on the avoidance of double taxation in any other international agreement or arrangement by which the Member is bound.

# Security Exceptions

1. Nothing in this Agreement shall be construed:

- a) to require any Member to furnish any information, the disclosure of which it considers contrary to its essential security interests; or
- b) to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests:
  - i. relating to the supply of services as carried out directly or indirectly for the purpose of provisioning a military establishment;
  - ii. relating to fissionable and fusionable materials or the materials from which they are derived;
  - iii. taken in time of war or other emergency in international relations; or
- c) prevent any Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

2. The CTS shall be informed to the fullest extent possible of measures taken under paragraphs 1(b) and (c) and of their termination.

# State of play

# Services Negotiations

- GATS Article XIX mandates Members to enter into successive rounds of negotiations in services with a view to achieving a progressively higher level of liberalization.
- The first such round began in early 2000.
- Article XIX:3 requires Members, before the beginning of each round, to carry out an assessment of trade in services in overall terms and on a sectoral basis, for the purpose of establishing the negotiating guidelines and procedures for the round.
- In March 2001 the **Guidelines and Procedures for the Negotiations on Trade in Services** were adopted by the Council for Trade in Services ([S/L/93](#)). These specify the objectives, scope and methods for the negotiations and refers to the "Request-Offer Approach" as the main method of negotiation.
- The Doha Declaration endorses the work already done, reaffirms the negotiating guidelines and procedures, and establishes some key elements of the timetable including, most importantly, the deadline for concluding the negotiations as part of a single undertaking.

# Doha Declaration

*15. The negotiations on trade in services shall be conducted with a view to promoting the economic growth of all trading partners and the development of developing and least-developed countries. We recognize the work already undertaken in the negotiations, initiated in January 2000 under Article XIX of the General Agreement on Trade in Services, and the large number of proposals submitted by members on a wide range of sectors and several horizontal issues, as well as on movement of natural persons. We reaffirm the Guidelines and Procedures for the Negotiations adopted by the Council for Trade in Services on 28 March 2001 as the basis for continuing the negotiations, with a view to achieving the objectives of the General Agreement on Trade in Services, as stipulated in the Preamble, Article IV and Article XIX of that Agreement. Participants shall submit initial requests for specific commitments by 30 June 2002 and initial offers by 31 March 2003.*

# Negotiations continued

- Very little progress
- The Hong Kong Ministerial Declaration of December 2005 reaffirms key principles and objectives of the services negotiations and calls on Members to intensify the negotiations in accordance with the objectives, approaches and timelines set out in Annex C to the Declaration. The Ministerial Declaration also acknowledges that LDCs are not expected to undertake new commitments.
- Annex C contains a more detailed and ambitious set of negotiating objectives: Preference to be given to Modes and Sectors of interest to Developing countries
- Parallel to this: Negotiations on Disciplines for Domestic Regulations have been occurring
- NO progress on Market access.
- Renewed push for DR Disciplines



# Challenges for India

# Barriers to Trade in Services

- Mode 1 Service Delivery: Main impediment is restrictions on data flows. Very limited access in EU markets as a result
- On Mode 4:
  - Overall, the degree of Mode 4 access bound in current GATS schedules is rather shallow.
  - Mode 4 commitments have been undertaken on a horizontal basis by the vast majority of WTO Members.
  - Positive listing of measures: *“Unbound except ...”*
  - Access mostly for those with high-level of training and expertise, often as intra-corporate transferees
  - Over and above this: Qualification and Recognition of Foreign Professionals is cumbersome

# Examples from different countries

- **US:** H1B and L1 visa fees based on 50:50 Rule
  - Threat to increase minimum wage for H1B to 130,000 USD.
- **UK:** Immigration Service Charge payable by any entity bringing in Intra-Corporate Transferee
- **Singapore:** Recent slowdown on issuance of Employment Passes. Companies have to demonstrate they have recruited and tried to retain Singaporeans
- **Canada:** Labour market tests for International Mobility Professionals
- **Australia:** Categories of workers allowed entry depends on Gazetted Occupations- changes annually

# E-Commerce

- **What do we understand by E-Commerce?**
  - Is it the provision of Internet access services- i.e., the provision of net access for businesses and consumers?
  - Electronic delivery of services, i.e., transactions in which services/ products are delivered to the customer in the form of digitised information flows?
  - Use of the Internet as a channel for *distribution services*, by which goods and services are purchased over the net and delivered to consumer in non-electronic form?
  - Providing a platform for bringing service suppliers and consumers- Online taxi services; Medical services?
  - Is it trade in goods? Trade in services? Or a combination?

# WTO Rules on E-Commerce

- 1998: Temporary Moratorium on Customs Duties on Electronic Transmissions
  - Interpreted as not impacting goods that are physically imported and delivered as a result of an E-Commerce transaction
- Comprehensive work programme (“Work Programme”) to examine all trade-related issues relating to global electronic commerce
  - Not much progress since 1998

# Issues for which no answers

- Services classification relevant for E-Commerce:
  - If Country A has taken commitment for Road Transport services, does it mean it cannot place Market Access/ National Treatment restrictions on Uber/ Ola type services?
  - If Country B has taken commitments in Distribution services, does it mean it cannot place restrictions on Retail services through E-Commerce?
- What sort of Disciplines should govern E-Commerce?

# IPR Concerns

- Copyright, Trademarks protection; How to address Piracy?
- Trademarks: **Brand recognition** is essential in ecommerce for suppliers of goods and services. **Reputation attached to trademarks** and other distinctive signs
- But Trademark protection is territorial, and depends on *use* in a territory
- The use of trademarks on the Internet raises a number of questions.
- Identical or similar trademarks may be owned by different persons in different countries; **Is the current territorially-based system of registration of trademarks sufficient for the emerging borderless electronic marketplace?**
- Conflict between Trademarks and Domain name systems- another issue



# Emerging issues on E-Commerce

- Mounting pressure for negotiations at MC 11- December 2017-
  - Data flows , Privacy
  - Electronic Authentication; Signatures
  - Source Code related concerns
  - Separate WTO Agreement on E-Commerce covering goods and services
- Is India prepared?
- Retail Trade: Controversial and sensitive issue
- Diverse voices within the country on Transport Aggregators:
  - Issues of Capital Dumping
  - CCI case by Meru against Ola/ Uber
- Internal clarity on how much to liberalize? What conditions?

# Heart of the matter: need conceptual clarity

- Internet companies' control over their users' data gives them great power.
- Artificial-intelligence (AI) techniques such as machine learning, extract more value—patterns, predictions and other insights—from raw digital information. Industrial giants such as GE and Siemens now sell themselves as data firms.
- Shift in the way this data is being used.
  - Facebook and Google initially used the data they collected from users to target advertising better. But now newer AI or “cognitive” services, includes translation, visual recognition and assessing someone's personality by sifting through their writings—all of which can be sold to other firms to use in their own products.
- Greater vigilance required by Competition regulators
  - Facebook's USD22 billion purchase in 2014 of WhatsApp, a messaging app with fewer than 60 employees- No one understood why!
  - Newer assessments required on significance of data
  - EU's new General Data Protection Regulation (GDPR), which will start to apply in May 2018, requires online services to make it easy for customers to transfer their information to other providers and even competitors. To reduce the risk of data leaks, the GDPR strengthens people's control over their data: it requires that firms get explicit consent for how they use data. Fines for violations will be steep: up to 4% of global revenues or €20 million.

Thank you