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## IMPLICATIONS OF WTO AGREEMENT ON CROSS-BORDER FLOW OF DATA & DATA LOCALISATION

**Submitted by:** Dr. James J. Nedumpara and Mr. Sandeep Thomas Chandy, Centre for Trade and Investment Laws, Ministry of Commerce, Government of India. **Email:** headctil@iift.edu

**Note:** The views expressed in this submission reflect only those of the authors. They do not reflect that of the Ministry of Commerce or Government of India or any of its affiliates.

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### ABOUT THE SUBMISSION

1. This submission is in response to the comments sought on the White Paper on Data Protection in India. The arguments in this submission is applicable to the following two chapters:
  - a. Cross-border Flow of Data; and
  - b. Data Localisation
2. The Centre for Trade and Investment Law was set up in the year 2016 by the Ministry of Commerce and Industry, Government of India at the Indian Institute of Foreign Trade. The Centre's primary objective is to provide sound and rigorous analysis of legal issues pertaining to international trade and investment law. The Centre aims to be a thought leader in the various domains of international economic law such as the WTO law, investment law, and legal issues relating to economic integration. The Centre is also conceived as a ready repository of trade and investment related information including updates on ongoing trade negotiations and disputes.

### BACKGROUND

The WTO Agreement and the General Agreement on Trade in Services (GATS) is the primary law governing international trade in services. **As India has ratified both these agreements, any domestic law, regulation or requirement which is inconsistent with these agreements would allow a Member State of the WTO to challenge these inconsistencies before the adjudicating bodies of the WTO.** If the challenge succeeds, then India would be required to comply with the decision either by repealing the inconsistent law or amending it to make it consistent with the WTO norms. Non-compliance with the ruling would permit the Member State which challenged the law to resort to countermeasures which would be detrimental to India's international trade interests. In the *US – Gambling*<sup>1</sup> dispute between Antigua and United

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<sup>1</sup> Appellate Body Report, United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WTO Doc. WT/DS285/AB/R (adopted April 7, 2005);



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States under the GATS, Antigua was permitted to resort to countermeasures on US services, copyright and trademarks amounting to \$21 million per annum.<sup>2</sup>

GATS regulate international trade in services supplied through four modes – Mode 1 (cross-border supply), Mode 2 (consumption abroad), Mode 3 (commercial presence) and Mode 4 (movement of natural persons). The mode relevant for this discussion is Mode 1 – cross-border supply of services. It has been stated in various committees of the WTO that the GATS is a technology neutral agreement. The implication of this being that supply of services through the internet would be regulated by the GATS. It has also been held by the WTO adjudicating bodies in numerous cases that supply of services over the internet is covered by Mode 1 of GATS.<sup>3</sup> **Therefore, it can be fairly stated that the proposed law is required to be consistent with the GATS.**

## OBLIGATIONS UNDER GATS

The cornerstone of the GATS is the principle of non-discrimination. The Members' Schedule of Commitments is also an integral part of the GATS. The principle of non-discrimination embedded in the Most-Favoured-Nation Treatment provision (Article II) of the GATS requires the Member States to not discriminate between two foreign suppliers/services. The discrimination can be alleged only if the services/supplier are held to be "like" in nature. This principle would have implications on cross-border data flow if the proposed law restricts data flow to certain countries, whatever be the reason. If India has committed to sectors which holds cross-border transfer of personal essential to its operations, then any restriction which does not to permit it to do so would tantamount

The GATS may view this restriction as blocking of cross-border supply of services. If India has committed to unrestricted cross-border supply in any of the sectors either in GATS, where transfer of personal data is essential to its operation, then the proposed law would fall foul of the commitments and the principle of non-discrimination.

The primary defence against this GATS inconsistency would be to establish that the particular services/suppliers are not "like" in nature due to their different privacy standards. For Business-to-Business (B2B) transfers, it would require establishing that businesses value privacy standards of the data recipient. While for Business-to-Consumer (B2C) transfers, it would require establishing that consumers hold services/suppliers differently based on their privacy standards.

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<sup>2</sup> Antigua Declares Trade War on US, 9 Dec. 2012, available at: [www.express.co.uk/news/world/363676/Antigua-declares-trade-war-on-US](http://www.express.co.uk/news/world/363676/Antigua-declares-trade-war-on-US).

<sup>3</sup> Panel Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc. WT/DS285/R (adopted March 13, 2003); Appellate Body Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc. WT/DS285/AB/R (adopted April 7, 2005); Panel Report, *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WTO Doc. WT/DS363/R (adopted Aug. 12, 2009); Appellate Body Report, *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WTO Doc. WT/DS363/AB/R (adopted Dec. 21, 2009); Panel Report, *China — Certain Measures Affecting Electronic Payment Services*, WTO Doc. WT/DS413/R (adopted July 16, 2012).



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The GATS Schedules of Commitments works on the basis of positive listing, i.e., if a sector has not been committed in the schedule then the Member State has not taken any commitment on it. The Schedules modelled on the WTO's Services Sector Classification List provides a list of sectors and sub-sectors on which Member States base their commitments. As cross-border data flow and data localisation are not sectors, the WTO and its adjudicating bodies would follow a broad approach like in *China - Electronic Payment Services*<sup>4</sup> by holding these services as integral to the functioning of other listed sectors. For example, a sector like Travel and Tourism is committed in India's schedule of commitments with full Market Access and National Treatment commitments. Then India would be required to allow cross-border data flow as it would be essential for the running the business in Travel and Tourism sector as booking of international tickets would require a cross-border flow of data. **It is to be noted that India has committed to many such sectors where it can be said that cross-border data flow is essential to its operations.**

## EXCEPTIONS UNDER GATS

Article XIV (General Exceptions) and Article XIV *bis* (Security Exceptions) permits Member States of the WTO to maintain GATS inconsistent measures provided they meet the requirements of either of these provisions. Article XIV(c)(ii) explicitly provides an exception to protection of privacy of individuals. However, for availing this exception it would be required of India to establish before the adjudicating body that the proposed law containing restrictions on cross-border data flow is the least trade restrictive measure reasonably available. If India instead decides to seek the Security Exceptions under Article XIV *bis*, then India would have to demonstrate that data privacy is essential to India's security interests.

Claiming an exception under these provisions for a GATS inconsistent law is quite risky. This is because, while arguing for availing an exception, the Respondent Member States can easily rebut by showcasing lesser and reasonable trade restrictive alternatives. In this context, data localization would be the most difficult to defend as it would require India to demonstrate that blocking of cross-border data flow is the only choice to protect privacy and personal data.

## CONCLUSION

Till date, no law on data protection or privacy has been challenged before the WTO. As such laws are fairly new, it is plausible that it can be challenged in the future. The recent Chinese law on data protection caused US to raise serious concerns in the WTO.<sup>5</sup>

As mentioned above, there is a high potential that GATS would have implications on the proposed law. In such a case, it would be required that drafters craft the proposed law in a GATS consistent manner. If the proposed law is inconsistent with the GATS, then any Member State of the WTO can challenge it before the adjudicating bodies of the WTO. If the challenge

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<sup>5</sup> WTO, Council for Trade in Services, Communication from the United States, Measures Adopted and Under Development by China relating to its Cybersecurity Law, WTO Doc. S/C/W/374, Sept. 26, 2017.



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succeeds then India would be required to comply with the ruling failing which countermeasures can be employed against India by the Complaining State. Both the scenarios would be detrimental to India's international trade interests.

As both, regulations on cross-border flow of data and data localization, impact the cross-border supply of service in more or less the same way, GATS implications would be similar on both. Therefore, the views in the submission would apply to both these regulations in the proposed law.