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Introduction

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Preface

The Indian Journal of Legal Affairs and Research is a testament to our unwavering commitment to excellence in legal scholarship. This volume presents a curated selection of articles that reflect the diverse and dynamic nature of legal studies today. Our contributors, ranging from esteemed legal scholars to emerging academics, bring forward a rich tapestry of insights that address critical legal issues and offer novel contributions to the field. We are grateful to our editorial board, reviewers, and authors for their dedication and hard work, which have made this publication possible. It is our hope that this journal will serve as a valuable resource for researchers, practitioners, and policymakers, and will inspire further inquiry and debate within the legal community.

Description

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SERVICES, KNOWLEDGE, AND PROPERTY: RETHINKING THE GATS-IPR NEXUS IN INTERNATIONAL TRADE LAW

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ABSTRACT

Although the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) are conventionally situated as discrete pillars within the architectural design of the World Trade Organization, their substantive ambits converge with growing frequency as the supply of services becomes progressively contingent upon the generation, transmission, and safeguarding of knowledge-based assets. This article interrogates the comparatively neglected juncture between GATS and intellectual property rights (IPR), positing that the prevailing characterisation of these regimes as parallel, rather than intersecting, strands of WTO jurisprudence conceals substantial doctrinal and policy frictions. The cross-border provision of professional, financial, audio visual, and digital services is inherently predicated upon the transnational circulation of copyrighted works, trademarks, trade secrets, and patented technologies; yet the GATS architecture of market access, national treatment, and most-favoured-nation obligations was not conceived with IPR-intensive services as a primary referent.

The article reconstructs the historical bifurcation of the Uruguay Round negotiations that yielded GATS and TRIPS as discrete instruments, examines the textual and jurisprudential points of convergence between them, and interrogates the manner in which the Article XIV general exceptions and Article VI domestic regulation disciplines of GATS engage with IPR protection norms. It further assesses the asymmetric ramifications of this interface for developing economies, which frequently operate as net importers of IPR-protected services and net claimants of regulatory latitude for technology diffusion. Through recourse to WTO dispute settlement jurisprudence and academic commentary, the article advances a more coherent interpretive paradigm for resolving disputes situated at the GATS-IPR boundary and advocates enhanced institutional coordination between the Council for Trade in Services and the Council for TRIPS. The fragmentation between services and intellectual property disciplines will persist in generating regulatory indeterminacy inimical to both trade liberalisation and developmental objectives.

KEYWORDS: *GATS; TRIPS; International trade law, World Trade Organization, Trade in services.*

1. INTRODUCTION

The multilateral trading system administered by the World Trade Organization (WTO) rests upon three principal pillars: The General Agreement on Tariffs and Trade (GATT) for goods, the General Agreement on Trade in Services (GATS) for services, and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) for knowledge assets. These instruments were negotiated and adopted as part of a single undertaking during the Uruguay Round, yet they were drafted by largely separate negotiating groups operating with different conceptual vocabularies and policy priorities.

This article contends that the institutional separation of GATS and TRIPS has produced a doctrinal blind spot: a substantial and growing category of services trade is structurally inseparable from intellectual property protection, yet the interpretive frameworks applied to such trade rarely account for this interdependence in an explicit or systematic manner. Audio visual services depend on copyright; franchising and professional services depend on trademarks and trade secrets; software and data services depend on a composite bundle of copyright, patent, and contractual protections; and an expanding category of digitally delivered services depends on rights regimes that did not exist in their current form when GATS was concluded.

The argument proceeds in five further parts. Part 2 traces the historical and structural bifurcation between GATS and TRIPS. Part 3 identifies the principal points of textual and jurisprudential contact between the two agreements, with particular attention to market access commitments, national treatment, and the Article XIV general exceptions of GATS. Part 4 considers the asymmetric development implications of the GATS-IPR interface. Part 5 evaluates relevant WTO dispute settlement practice. Part 6 proposes a more coherent interpretive and institutional framework, and Part 7 concludes.

2. The Historical Bifurcation of GATS and TRIPS

The inclusion of services and intellectual property within the Uruguay Round agenda was itself a contested innovation, driven substantially by developed-country service and knowledge industries seeking multilateral disciplines beyond the goods-centric GATT framework. Negotiating Group 19 (Trade in Services) and the TRIPS[1] negotiating group proceeded on separate tracks, reflecting the prevailing assumption that services and intellectual property, although both 'new' subjects for GATT-derived trade law, presented analytically distinct regulatory problems.

This separation was reinforced by definitional choices. GATS Article I defines trade in services according to four modes of supply, while TRIPS proceeds along the lines of existing intellectual property categories such as copyright, trademarks, geographical indications, patents, and trade secrets. Neither instrument cross-references the other in any operative provision, and the GATS schedules of specific commitments make only sporadic and unsystematic reference to intellectual property considerations within sector-specific limitations.

Scholars have noted that this drafting separation does not reflect an absence of substantive overlap so much as an absence of negotiating capacity, at the time, to address the interface comprehensively. The result is a structural gap that has become increasingly salient as digital and knowledge-intensive services have grown to dominate global services trade.

[1]Marrakesh Agreement Establishing the World Trade Organization 1994, Annexes 1B and 1C.

It is worth pausing on why this separation occurred at all, because the answer is not simply bureaucratic convenience. The Uruguay Round was the first multilateral trade negotiation to bring services and intellectual property within the GATT system in any serious way, and neither subject had an obvious institutional home. GATT itself was a creature of the post war trade in tangible goods; tariff schedules, quotas, and customs valuation were its natural vocabulary. Services and intellectual property were, in a sense, intruders into this framework, and they were treated as such — admitted separately, on separate terms, by negotiators who had little experience reconciling the two[2]

The services negotiators, drawn largely from trade ministries with backgrounds in goods liberalisation, approached GATS through the lens of market access and non-discrimination, borrowing GATT's structural logic of scheduled commitments and exceptions. The intellectual property negotiators, by contrast, were often drawn from a different professional community altogether — patent offices, copyright bureaus, and industry associations representing pharmaceutical, software, and entertainment interests — and they approached TRIPS as an exercise in setting minimum substantive standards, modelled on existing instruments such as the Berne and Paris Conventions.[2] These were, in effect, two different negotiating cultures operating under the same diplomatic roof, each with its own assumptions about what counted as a legitimate trade discipline.

This divergence was not lost on contemporary observers. Several delegations, particularly from developing countries, raised concerns during the Round that treating intellectual property as a freestanding "trade" issue, divorced from the services and goods disciplines it would inevitably affect, risked producing exactly the kind of regulatory blind spots this article identifies[3]. These concerns were largely set aside in the rush to conclude the Round by 1994, not because they lacked merit, but because the negotiating capital required to redesign either agreement around the other

[2] J H Jackson, The World Trading System: Law and Policy of International Economic Relations (2nd edn, MIT Press 1997) 308-312.

[3] Carlos M Correa, 'Trade Related Aspects of Intellectual Property Rights' in Patrick Macrory, Arthur Appleton and Michael Plummer (eds), The World Trade Organization: Legal, Economic and Political Analysis (Springer 2005) vol 1, 367.

was simply unavailable. GATS and TRIPS were each, by that stage, the product of years of painstaking compromise; reopening either to accommodate the other was not a realistic option.

The consequence is visible in the schedules themselves. A Member's GATS schedule of specific commitments in, for example, "computer and related services" or "audio visual services" will typically specify limitations on market access and national treatment by mode of supply, but will rarely, if ever, make explicit reference to the intellectual property regime under which the relevant content or software is protected. The drafters of these schedules were working within a template designed for services as such, not for the bundle of contractual, proprietary, and regulatory interests that actually accompany the cross-border supply of knowledge-intensive services. The schedule tells you whether a foreign supplier may establish a commercial presence; it tells you almost nothing about whether that supplier's underlying intellectual property will be recognised, licensed, or enforced on equivalent terms.

It is this gap — between the formal liberalisation promised by a GATS commitment and the substantive conditions under which IPR-dependent services actually move across borders — that the historical record helps to explain but does not excuse. The bifurcation was, at the time, a defensible response to the practical constraints of a single, time-pressured negotiation. It has become considerably less defensible three decades later, when digital delivery has made the entanglement of services and intellectual property the rule rather than the exception. What was once a reasonable division of negotiating labour has hardened, through institutional inertia, into something closer to a structural fault line in the architecture of WTO law — one that neither agreement, read on its own terms, is equipped to address.

3. Points of Contact Between GATS and IPR Disciplines

Despite their separate drafting histories, GATS and TRIPS intersect at several identifiable points. The first is market access. Where a Member has scheduled full market access commitments in a services sector that is substantially IPR-dependent, such as computer and related services or audio visual services, the practical value of that commitment is shaped by the IPR protection standards applicable in the importing market, including enforcement mechanisms, licensing requirements, and the availability of compulsory measures.

The second point of contact is national treatment under GATS Article XVII. A measure that on its face treats domestic and foreign suppliers identically may nonetheless produce de facto discrimination where it interacts with IPR rules that disadvantage foreign rights holders, for example through differential licensing or collecting-society arrangements for copyrighted content[4]. Although the Mexico - Telecoms dispute did not centre on intellectual property as such, its analysis of like services and like service suppliers illustrates how regulatory measures touching on proprietary technology standards can raise national treatment concerns.

The third point of contact is the Article VI domestic regulation discipline, which requires that measures of general application affecting trade in services be administered in a reasonable, objective, and impartial manner. Intellectual property registration, licensing, and enforcement procedures administered by domestic authorities fall squarely within this discipline where they affect the supply of IPR-dependent services, raising the question of whether TRIPS-consistent IPR[5] measures might nonetheless violate GATS domestic regulation standards if administered unreasonably.

The fourth and most doctrinally significant point of contact lies in the Article XIV general exceptions, which permit measures necessary to secure compliance with laws or regulations not otherwise inconsistent with GATS, including those relating to the protection of intellectual property rights. This provision explicitly contemplates IPR protection as a legitimate ground for derogation from GATS obligations, yet the necessity and chapeau requirements developed in GATT and GATS jurisprudence import a proportionality-style analysis that has not been fully tested in the specific context of intellectual property measures[6].

The Appellate Body's general approach to necessity testing, requiring a weighing and balancing of the measure's contribution to the objective, its trade-restrictiveness, and the importance of the interest protected, provides an analytical template that could, in principle, be transposed to disputes

[4] Panel Report, Mexico - Measures Affecting Telecommunications Services, WT/DS204/R, adopted 1 June 2004, paras 7.351-7.354.
[5] General Agreement on Trade in Services 1994, art XIV(c)(iv).
[6] Appellate Body Report, Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, paras 161-164.

concerning IPR-related services measures. However, the absence of a developed body of case law applying this template specifically to IPR-services interfaces leaves considerable interpretive uncertainty.

4. Asymmetric Development Implications

The GATS-IPR interface is not distributionally neutral. Developed economies with strong comparative advantage in knowledge-intensive services, including software, entertainment, financial, and professional services, benefit from the simultaneous operation of liberal market access commitments and robust IPR protection in importing markets. Developing-country Members, by contrast, frequently occupy the position of net importers of such services and net demanders of policy space to support technology absorption, local capacity building, and access to knowledge.

This asymmetry has been extensively documented in the technology transfer literature, which highlights that ambitious market access commitments in IPR-intensive service sectors, absent corresponding flexibilities, can constrain a developing country's ability to pursue industrial policy objectives such as local content requirements or technology-sharing conditions[7]. The interaction between GATS commitments on, for instance, computer and related services and TRIPS minimum standards on software copyright protection can therefore operate to lock in a particular distribution of rents between technology-exporting and technology-importing Members.

At the same time, it would be a mistake to treat the interface as uniformly disadvantageous to developing countries. Several developing economies have themselves become significant exporters of IPR-intensive services, including business process outsourcing, software development, and audio visual content, and have correspondingly developed an interest in robust enforcement of their own intellectual property in foreign markets. The development implications of the GATS-IPR nexus are therefore better characterised as differentiated and context-specific

[7] UNCTAD, Trade and Development Report 2018: Power, Platforms and the Free Trade Delusion (United Nations 2018) 89-94.

rather than uniformly adverse, although the structural risk of asymmetric rent distribution remains a legitimate concern meriting continued attention in WTO policy discourse.

5. Dispute Settlement Practice

WTO dispute settlement practice directly addressing the GATS-IPR interface remains sparse, a fact that itself testifies to the underdeveloped state of doctrine in this area. The most frequently cited example remains China - Measures Affecting the Protection and Enforcement of Intellectual Property Rights, which, although framed principally as a TRIPS dispute, raised ancillary questions about the relationship between IPR enforcement measures and the conditions of market access for affected goods and related services.

Equally instructive, although not formally adjudicated as a GATS-IPR dispute, is the long-running controversy concerning China's restrictions on the importation and distribution of audio visual entertainment products, which was litigated principally under GATT and China's Accession Protocol but carried significant implications for the treatment of copyrighted content moving through trading and distribution services. The dispute illustrates how IPR-protected content and services distribution measures are frequently litigated under whichever WTO agreement offers the most direct cause of action, rather than through an integrated GATS-IPR analytical framework, reinforcing the fragmentation this article critiques.

The relative absence of disputes squarely targeting the GATS-IPR boundary may reflect strategic litigant behaviour as much as an absence of underlying friction: complainants may prefer to frame claims under TRIPS, where minimum standards are more precisely defined, rather than under GATS[8], where market access commitments vary by schedule and are subject to more open-textured exceptions. This strategic channelling of disputes has, however, left the specific interpretive questions raised by Article XIV(c)(iv) and Article VI in the IPR-services context substantially untested.

[8] UNCTAD, Trade and Development Report 2018: Power, Platforms and the Free Trade Delusion (United Nations 2018) 89-94.

The dispute settlement record offers a useful, if somewhat frustrating, vantage point from which to assess how the GATS-IPR interface actually functions in practice, as opposed to how it appears on the page of the agreements themselves. What emerges from a review of the relevant panel and Appellate Body reports is not a body of jurisprudence squarely confronting the relationship between trade in services and intellectual property protection, but rather a series of disputes that brush against this relationship obliquely, usually because litigants have found it more strategically advantageous to frame their claims under one agreement rather than attempt the more difficult task of arguing across both.

China – Intellectual Property Rights is the dispute most commonly cited in this context, and for good reason: it remains the most direct WTO adjudication of TRIPS obligations to date. Yet even here, the panel's analysis was confined almost entirely to the TRIPS text — thresholds for criminal procedures, the disposal of infringing goods, and the scope of copyright protection for works pending content review — without venturing into the question of how these enforcement standards might interact with the conditions under which IPR-dependent services, such as the distribution or licensing of copyrighted works, are supplied across borders. The dispute illustrates the doctrinal point rather than resolving it: enforcement measures with obvious implications for services trade were litigated entirely within a TRIPS frame, leaving the GATS dimension unexamined by the parties and, consequently, by the adjudicators.

A similar pattern is visible in China – Publications and Audio visual Products, a dispute that, on its face, concerned restrictions on trading rights for imported books, periodicals, and films. The Appellate Body's reasoning proceeded principally under GATT 1994 and China's Accession Protocol, addressing questions of non-discriminatory trading rights and the scope of permissible content-review measures. What the dispute did not do — and arguably could not do, given how the claims were pleaded — was engage with the fact that the products at issue were, in every meaningful sense, vehicles for copyrighted content, and that the distribution restrictions in question had direct consequences for the audio visual and publishing services sectors in which GATS commitments might otherwise have been relevant.

The litigants chose the goods-and-accession-protocol route because it offered a more tractable cause of action; the services and intellectual property dimensions of the dispute were, in effect, left on the table. This pattern of strategic avoidance is not difficult to explain. TRIPS minimum standards are comparatively precise and substantively demanding, making them an attractive basis for a complaint where the facts support a claim of non-compliance. GATS commitments, by contrast, vary considerably from one Member's schedule to the next and are qualified by general exceptions — including the Article XIV(c)(iv) carve-out for IPR-related measures — that introduce an additional layer of necessity-based argument a complainant must satisfy before any inconsistency can be established.[3] Faced with this asymmetry, a complainant with a plausible TRIPS claim has comparatively little incentive to also plead a GATS claim that is harder to win and adds litigation risk without a correspondingly clear benefit.

The result is a dispute settlement record that, read cumulatively, tells us a great deal about how TRIPS standards are interpreted and comparatively little about how the Article XIV(c)(iv) exception, or the Article VI domestic regulation discipline, would actually operate when applied to a measure whose primary justification is the protection of intellectual property in a services context[9]. This is not a criticism of the panels or the Appellate Body, who are bound by the claims as pleaded; it is, rather, a comment on the structural incentives facing litigants, and a reminder that the absence of disputes at a particular legal boundary is not evidence that the boundary is unproblematic — only that no one has yet found it worthwhile to litigate it directly.

6. Towards a Coherent Interpretive and Institutional Framework

This article proposes three interlocking reforms to address the fragmentation identified above. First, at the interpretive level, WTO panels and the Appellate Body (or its successor mechanism) should explicitly recognise IPR-dependent services as an analytical category meriting tailored treatment under GATS market access, national treatment, and domestic regulation disciplines, drawing on the necessity-testing methodology already developed in general exceptions jurisprudence.

[9] UNCTAD, Trade and Development Report 2018: Power, Platforms and the Free Trade Delusion (United Nations 2018) 89-94.

Second, at the institutional level, formalised coordination between the Council for Trade in Services and the Council for TRIPS, potentially through joint working sessions on sectors of mutual concern such as audio visual and digital services, would help ensure that scheduling practices and interpretive guidance evolve in a mutually consistent fashion[10]. Such coordination need not require renegotiation of either agreement but could proceed through interpretive notes or joint statements clarifying the intended relationship between specific commitments and IPR measures.

Third, at the normative level, any future negotiation addressing digital trade, e-commerce, or data flows, all of which sit squarely at the GATS-IPR boundary, should explicitly incorporate development-sensitive flexibilities analogous to those found in the TRIPS Agreement itself, such as transition periods, technology-transfer commitments, and carve-outs for measures necessary to support domestic innovation capacity. Embedding such flexibilities into the design of new disciplines, rather than leaving them to post hoc litigation under Article XIV, would better serve the systemic objective of reconciling trade liberalisation with development policy space.

7. Conclusion

The separate drafting histories of GATS and TRIPS have produced a durable but increasingly strained division of labour within WTO law. As services trade becomes ever more entangled with the creation, licensing, and enforcement of intellectual property, the absence of an explicit interpretive bridge between the two agreements generates regulatory uncertainty and risks an uneven distribution of the gains from trade liberalisation. This article has argued that the necessary corrective lies not in renegotiating either agreement but in developing a more deliberate interpretive methodology, grounded in existing necessity-testing jurisprudence, alongside stronger institutional coordination between the relevant WTO bodies. Such reforms would allow the multilateral trading system to address knowledge-intensive services trade as the integrated phenomenon it has, in practice, become. What the dispute settlement record ultimately confirms is the broader thesis advanced throughout this article: the GATS-IPR interface is not so much

[10] WTO Secretariat, 'Council for Trade in Services: Special Session' S/CSS/W/n series (various), illustrating the absence of systematic cross-referencing to TRIPS Council outputs.

contested as it is avoided, and that avoidance carries its own doctrinal cost. Litigants have consistently found it easier to channel claims through whichever single agreement offers the more tractable cause of action, leaving the harder question — how Article XIV(c)(iv) and Article VI actually constrain IPR-related services measures — untested and, by extension, unresolved. This pattern of strategic bypass should not be mistaken for legal clarity. It is, rather, a symptom of the same structural fragmentation traced from the Uruguay Round onward: two agreements drafted in isolation, now adjudicated in isolation, even where the underlying trade reality is thoroughly entangled.

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