

**The London School of Economics and Political  
Science**

*Emergency Safeguard; WTO and the feasibility of  
Emergency Safeguard Measures under the General  
Agreement on Trade in Services*

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## **Abstract**

The General Agreement on Trade in Services (GATS) along with other agreements was concluded in the Uruguay Round of Multilateral Trade Negotiations in 1994. However, negotiations continued within the WTO framework and are still a work in progress on some specific issues under the GATS including the question of Emergency Safeguard Measures, which has been raised in Article X of the GATS as part of its 'built-in agenda'.

The thesis looks at the concept of the Emergency Safeguards Measures (ESMs) in the GATT/WTO and tries to develop an answer to the 'question of ESMs', which is deluding the negotiators and researchers for more than fifteen years. The thesis tries to analyse whether the GATT type ESMs can be transposed to GATS. It also explores that whether ESMs that are modelled on GATT are feasible under GATS, and if feasible, are these really desirable. If these are feasible and desirable then what should be their possible structure remaining within the existing GATT paradigm. The thesis walks through the provisions that already exist in the GATS to meet the circumstances perceived by the countries that are seeking specific ESMs under GATS and whether these provisions address the concerns of the demanders of the concept.

The thesis not only takes into account the academic and legal literature on the subject but also and perhaps more practically, takes into account the dynamics of the negotiations, discussions and debates within the WTO system on the subject. The thesis tries to provide an in-depth analysis of the issue and goes beyond what is already available in the International Trade Law literature on the ESMs under the cross border trade in services. It seeks to answer a question that presently exists in the International Trade Law especially with reference to the law emerging out of WTO.

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## CHAPTER 1

### 1.1 Chapter Introduction

The Chapter starts by providing a summary of the thesis. It then moves on to detail the background and the real world trading environment against which it has been written especially with reference to the existence of provisions for application of Emergency Safeguards Measures (ESM) in the international trade agreements. Identifies the gap that exists in the legal literature and also as an unfinished business under the General Agreement on Trade in Services and the objective of the thesis as an effort to bridge that gap. After providing the basic rationale for writing the thesis, the chapter then goes on to give a broad outline and details the manner in which the thesis has been structured.

The Chapter also introduces the subsequent Chapters of the thesis. These latter Chapters have been organized in terms of the progression of the thought processes with respect to the ESMs. Their structure start from introduction of the concept of ESMs under the original General Agreement on Tariff and Trade (GATT) and its evolution leading up to conclusion of the Agreement on Safeguards and finally leading up to the conclusions.

### 1.2 BACKGROUND: LANDSCAPE

The contemporary rule based liberalized international trading regime, does not allow the importing country to unilaterally and impulsively alter its committed market access conditions. The relatively low barriers to cross border trade and rise in the quantum of imports because of liberalized market access conditions in specified circumstances provide justification to the importing countries to apply some sort of exceptional import restraints that are commonly known as ‘contingency protection’. As the term suggests the concept of ‘contingency protection’ covers the “protection provided to the domestic

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businesses against foreign competition ... by restricting imports; however, provision of this protection is contingent on something that may occur<sup>1</sup>”.

This concept in the context of contemporary international trade and economic law predominantly refers to trade restrictive measures that are taken by governments mainly to counteract injury or threat thereof to domestic producers that is understood to have arisen primarily from the increased imports. The ‘contingency protection provisions’, that are at times also referred to as ‘trade remedy measures’, are now an essential and integral component of most of the post-World War II International Trade Agreements that govern the global trade and economic liberalization process and also the conduct of the rule based cross border trade in goods and more recently also in services. The concept provides incorporation of provisions or remedies in the International Trade Agreements which enables the importing country to impose import restrictions that are contingent on occurrence of certain specified situations and circumstances. The imposition of restrictions on conduct of trade under these provisions are authorized and covered by the Agreements that essentially aim for trade liberalization and governance of this liberalized trade. These trade remedy provisions are basically intended to discourage countries that are signatories to any International Trade Agreement governing conduct international trade under a liberalized regime from taking any extra-legal measures in an emergency situation that is outside the scope of the Agreement and which in its implementation process can jeopardize the Agreement itself. The provisions are thus an effort to ensure that the management of the conduct of International Trade stays within prescribes of the agreed disciplines.

The GATT/WTO legal framework assigns definite meanings and understanding to the concept of contingency protection wherein “the term trade remedy laws refer to three types of national laws that impose trade restrictions under specified conditions”<sup>2</sup>. In principle the GATT/WTO rules permit countries to take contingency protection measures in two types of situations. Firstly the governments are permitted to come to the rescue of their domestic production or manufacturing facilities that are suffering injury or threat thereof when foreign suppliers engage in an unfair competition. Behaviour that can lead to such unfair

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<sup>1</sup> Garner Bryan A, *Black’ Law Dictionary* Thomson Reuters 2009, p 362 & 1343

<sup>2</sup> *Research Handbook in International Economic Law*, Edited Andrew Guzman and Alan O Sykes Edward Elgar, USA, 2007.p 62



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competition in itself can be in two forms; i) it could result when foreign suppliers charge lower than normal prices for their goods because of the ‘subsidies’ the producers or manufacturers are receiving from their government; or ii) because the producers or exporters are ‘dumping goods’ in the market of the importing country. The goods can, however, only be treated as to have been dumped if the criterion laid down in the Article 2 of the WTO’s Agreement on Antidumping<sup>3</sup> have been established and the corrective actions contemplated can also be taken strictly in terms of the Agreement. Likewise, countervailing duties can be levied by an importing country on the goods that are receiving some benefit that may be classified as subsidies that defined as defined in the WTO Agreement on Subsidies and Countervailing Measures<sup>4</sup>. The Countervailing action has also to fully observe the disciplines prescribed under the Agreement. A country is also allowed to ‘escape’ or to put it in other words ‘depart’ from its trade liberalization obligations undertaken by the country through inclusion in its schedule of market access commitments in certain specified situations even when nothing unfair has transpired in the conduct of trade.

In GATT/WTO parlance these ‘provisions’ that allow a signatory country to ‘escape’ from its market access obligations under the Agreement are generally referred to as ‘safeguards measures’. However, the application of the safeguards measures is only possible when the conditions prescribed in the WTO Agreements for the use of the ‘escape clause’ provision have been reached. A Member of the World Trade Organization (WTO) thus has the conditional flexibility to depart from its previously agreed-upon legally binding obligations. This flexibility in practical terms implies that the Member can either withdraw or modify a tariff or a non-tariff market access concession granted by the Member so as to avoid a material adverse effect of some kind to the producers of like or competitive products<sup>5</sup> within the national territory of that Member and which is caused by an otherwise normal and fair import competition. “The heart of the original GATT bargain in 1947 involved the reciprocal reduction of tariff rates, and negotiated ceilings or

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<sup>3</sup> World Trade Organisation, *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, The Legal Texts*, Cambridge University Press, Cambridge. 1999, p 147

<sup>4</sup> World Trade Organisation, *The Legal Texts, The Results of Uruguay Round of Multilateral Trade Negotiations*, Cambridge University Press, Cambridge. 1999, p 231

<sup>5</sup> World Trade Organisation, *Agreement on Safeguards (Article 2), The Legal Texts*, Cambridge University Press, Cambridge. 1999, p 275

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‘bindings’ on tariffs governed by GATT article II. The drafters of GATT anticipated that tariff concessions might become unexpectedly burdensome as a particular matter, however, and provided two principal mechanisms for the adjustments of tariffs commitments. GATT Article XXVIII provides for the renegotiations of tariff commitments once every three years, as well as for ‘out of season’ renegotiations under special circumstances authorised by the membership. In addition, the drafters provided for ‘emergency action on imports of particular products’ in GATT Article XIX, a provision that addressed unexpected import surges<sup>6</sup>’.

In addition to the ‘emergency or general safeguards’ there are other special safeguards that are applied only to specific category of imported products; for instance Article 5 of the Agreement on Agriculture and Article 6 ‘transitional safeguards’ of now defunct Agreement on Textile and Clothing. However, Article XIX<sup>7</sup> of the GATT is the most important of all the permitted exceptions to compliance with the positive market access commitments that are made by the member countries under GATT and is titled as ‘Emergency Action on Imports of Particular Products’. “Article XIX is also often termed as the GATT ‘escape clause’, as it allows GATT members to ‘escape’ from their tariff commitments (and other obligations) under specified circumstances<sup>8</sup>”. The ‘emergency actions’ taken by the Member countries under the provisions of this Article came to be known as Emergency Safeguard Measures.

The provisions of Article XIX are not completely unique, there is a whole array of other Articles in the General Agreement<sup>9</sup> and also in the Marrakesh Agreement Establishing World Trade Organisation “which can be made to fall under the rubric of safeguards<sup>10</sup>”. The broader ‘safeguards complex<sup>11</sup>’ includes provisions which permit members to

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<sup>6</sup> *Research Handbook in International Economic Law*, Edited Andrew Guzman and Alan O Sykes Edward Elgar, USA, 2007. P 62

<sup>7</sup> All Article numbers mentioned in this chapter indicate Articles numbers of GATT 1994 unless otherwise stated or implied.

<sup>8</sup> *Research Handbook in International Economic Law*, Edited Andrew Guzman and Alan O Sykes Edward Elgar, USA, 2007. P 63

<sup>9</sup> The text of the Agreement is hereafter referred to as the ‘General Agreement’ and the institution is addressed as GATT

<sup>10</sup> Bhala Raj, *Modern GATT Law, a Treatise on the General Agreement on Tariffs and Trade*, Sweet & Maxwell London 2005. p. 939

<sup>11</sup> Some of the other safeguard clauses in the General Agreement include Article VI (permits the imposition of anti-dumping and countervailing duties); Article XII (permits the imposition of import restrictions in order to

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withdraw from their trade policy obligations under the Agreement on WTO but only under agreed disciplines and under certain specified situations mentioned in the General Agreement and the Agreement establishing the WTO. Implementation of Article XIX of the General Agreement right from its early days had many conceptual and interpretive concerns, but these concerns received little attention of the Members during the period prior to Tokyo Round (1973-79) of Multilateral Trade Negotiations (MTNs).

In the pre-Tokyo round period the membership structures of the GATT and pattern of international trade flows were fairly different from the current structures and during the period an exporting country rarely challenged an application of any emergency safeguard measures that was applied by an importing country primarily because; i) the dispute settlement system under GATT, before conclusion in 1988 of the Dispute Settlement Understanding (DSU)<sup>12</sup> within the framework of Uruguay Round (UR) of MTNs, was very tedious and often gridlocked; and ii) there were almost constant on-going tariff negotiations amongst the CONTRACTING PARTIES<sup>13</sup> to GATT under the six rounds of MTNs which preceded the Tokyo Round of MTNs. The issues and concerns with coherent application of the ESMs had by the launch of the Tokyo Round<sup>14</sup> attained enough significance to be included in the agenda of MTNs. The Tokyo Declaration provided for the MTNs to “include an examination of the adequacy of the multilateral safeguard system, considering particularly the modalities of application of Article XIX, with a view to furthering trade liberalization and preserving its results<sup>15</sup>”. Despite intensive efforts made in the final stages there was little substantive movement forward in the area of Safeguards in the Tokyo

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safeguard a contracting party's external financial position and its balance-of-payments); Article XVIII (permits contracting parties the economies of which can only support low standards of living and are in the early stages of development to impose tariff and import restrictions); Article XX (permits actions to safeguard public morals, health and safety); Article XXI (permits action to protect essential security interests); Article XXVIII (permits contracting parties to renegotiate concessions in GATT schedules); and Article XXXV (permits the non-application of the General Agreement between particular contracting parties). Article IX.3 of the Marrakech Agreement establishing WTO also provides room for waiving the obligations. Then there are other sector or Agreement specific safeguards like Article 5 of the Agreement on Agriculture.

<sup>12</sup> Dispute Settlement Understanding; Annex 2 to the Marrakesh Agreement Establishing the World Trade Organisation was agreed and implemented in 1988.

<sup>13</sup> General Agreement on Tariffs and Trade in its Article XXV clarifies that whenever the contracting parties (individually) act jointly they are designated as the CONTRACTING PARTIES, the thesis is however relaxed about this subtle differentiations. (text in the bracket added).

<sup>14</sup> The Tokyo Round was the seventh round of MTNs that was held under the auspices of GATT during 1973-79 and 102 countries participated.

<sup>15</sup> The Tokyo declaration issued after the Ministerial meeting laid the agenda and launched the new round of MTNs (14 September 1973), Clause 3 (d)

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Round MTNS and it was not possible to reach any agreement. Declaration issued at the conclusion of the GATT 1982 Ministerial meeting in its paragraph 7(vi), recognized that “there is need for an improved and more efficient safeguard system which provides for greater predictability and clarity and also greater security and equity for both importing and exporting countries, so as to preserve the results of trade liberalization and avoid the proliferation of restrictive measures”. The CONTRACTING PARTIES in launching of the eighth Round of MTNS at Punta Del Este agreed to negotiate “a comprehensive agreement on safeguards (that) is of particular importance to the strengthening of the GATT system and to progress in the Multilateral Trade Negotiations”<sup>16</sup>. In short, the deficiencies in the provisions of the Article XIX and also in the related GATT practices led to the negotiations and conclusion of the Agreement on Safeguards during the Uruguay Round.

The decisions reached by the WTO Panels and the Appellate Body while interpreting key provisions of the Agreement on Safeguard logically should have developed jurisprudence on the subject but these decisions failed to articulate any coherent doctrine as to exactly how and when safeguard measures are allowable. The high rate of disputes and successful challenge by the exporting countries to any application of an ESM by an importing country signifies the apparent inability of Members to comply with the GATT rules that were seen by the importing countries to warrant an application of an Emergency Safeguards Measure. Alternatively, it can be deduced that the rules themselves may have been so structured or were interpreted by the Panels and the Appellate Body (AB) in such a manner so as to cause considerable difficulties for Members to comply with them and thus be reluctant to make use of the ‘escape clause’ provisions unnecessarily. Instead of “providing useful guidance for the resolution of textual conundrum arising out of the weakness of the negotiated text of the Agreement combined with the decisions on the disputed cases makes it all the time more difficult for WTO members to apply safeguard measures. Every emergency safeguards measure that has been taken by any member country and that has been challenged under the DSU of the WTO has been ruled either by the Panel or by the AB to be in violation of the WTO law”<sup>17</sup>.

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<sup>16</sup> World Trade Organisation Ministerial Declaration of 20 September 1986, Part 1, Section D

<sup>17</sup> Sykes Alan O, *The safeguards mess: a critique of WTO jurisprudence*, World Trade Review (2003), 2: 3, 261–295

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The role of the ‘civil society’ in the conduct of national and international affairs and economic relations has also gradually increased in the recent past and in certain instances the civil society influences the international trade flows between the countries more meaningfully than the border measure scheduled by the importing country in its market access commitments. The existence of required conditions for application of one of the three possible trade remedy mechanisms aside there is now also an emerging recognition of need for creation of space with respect to accommodation of the concerns of the civil society in conduct of international trade, but in its existing architecture there are “no public interest dimensions to the WTO; at best, WTO bodies (Panels and AB) can decide, or not, that a national public interest measure that has trade restrictive effects is consistent with WTO law<sup>18</sup>”. Important opinion formers initiative and now starting to propose the broadening of the concepts safeguards measures and adding of a new public policy dimensions to the conduct of international trade under the WTO Agreements. Pascal Lamy<sup>19</sup> in one of his presentations has proposed addition to the existing safeguards regime a new dimension of the public policy<sup>20</sup> concerns that will imply possible broadening of the concept of emergency safeguards through introduction of concepts like ‘collective preference<sup>21</sup>’. Lamy is not alone to have such a strand of thought, “other analysts have also suggested the need to expand the availability of a safeguard for national policies. The proposals are, however, silent whether this should be done by expanding the framework of the WTO through a new Agreement covering ‘public policy’ concerns or expansion of the Agreement on Safeguards and incorporating these ‘public policy’ concerns as one of the conditions for application of Emergency Safeguards along with simplified application criteria.

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<sup>18</sup>Sara Dillon, *International Trade And Economic Law And The European Union*, Hart Publishing, Oxford 2002. P. 4.

<sup>19</sup> Pascal Lamy is presently the Director General of the WTO and prior to that he was Trade Commissioner of the EU.

<sup>20</sup> Lamy Pascal speech, “*Co-Existence between Public Policy and Free Trade: Can We Achieve Good Protectionism?*” Conference of the Greens/European Free Alliance at the European Parliament, Brussels, 5 March 2004. .

<sup>21</sup>Lamy Pascal speech, “*Collective Preferences and Global Governance: What future for the Multilateral Trading System*”, Brussels, 15 September, 2004,

### 1.3 THESIS INTRODUCTION

Despite some improvements in the AoS, over GATT Article XIX provisions, ambiguities and serious apprehensions still exist with respect to practical application of an ESM by an importing country that need to be addressed in order to ensure the integrity of the multilateral system governing the application of ESMs. These concerns include the inability of the DSB to construct a coherent interpretation of the AOS, possible re-emergence of the use of prohibited ‘grey area measures’<sup>22</sup>, and the failure of domestic safeguard regimes of most member countries including some major WTO Members to comply with the multilaterally agreed disciplines on safeguards. Even with the transformation of Article XIX into the WTO’s Agreement on Safeguards<sup>23</sup>, the increase which is visible in the use of some other GATT/WTO sanctioned trade remedy instruments is not reflected in the use of emergency safeguards provisions<sup>24</sup>.

The conclusion of the Agreement on Safeguards (AoS) under the UR (1986 – 95) to some extent revived the use of Emergency Safeguard Measures (ESMs) and subsequently several disputes with respect to application of ESMs were brought under the DSU. The number of application of safeguard measure in the aftermath of WTO’s coming into operation suggests that the member countries are trying to evade use of the ESMs and are instead choosing other available ‘trade remedy instruments’ like ‘antidumping measures’ as it is much easier and flexible to use as it can be applied in a discriminatory and unilateral manner and the country applying the measure does not need to compensate the affected party. These pre-requisites or conditions for application of these measures may be different but in practice there is, however, always a fair amount of “interdependency of protective devices, as well as dispute settlement dynamics which contribute to the incentive structure for WTO members to pick and use from various trade restrictions”<sup>25</sup>.

The GATT covered only international trade in goods. However, the post-World War II growth and constantly increasing importance of the services sector for major economies of

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<sup>22</sup> General Agreement on Tariff and Trade, *Background Note by the GATT Secretariat, "Grey-Area" Measures*, Document No: MTN.GNG/NG9/W/6, 16 September 1987

<sup>23</sup> This aspect has been discussed in some detail in Chapter 3.

<sup>24</sup> LEE Yong-Shik, *Revival of Grey-Area Measures? The US–Canada Softwood Lumber Agreement: Conflict with the WTO Agreement on Safeguards*, *Journal of World Trade* 36(1): 155–165, 2002.

<sup>25</sup> Kent Jones, *The safeguards mess revisited: the fundamental problem*, *World Trade Review* (2004), 3: 1, 83–91.

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the free world led to some, “isolated attempts that were confined to specific issues (insurance and transport) were made as early as in late 1950s<sup>26</sup>”. It was realized in 1970s that internationally agreed disciplines of cross border trade were also required to be developed for the services sector on the pattern of those which were already available for international trade in goods. Drawing from the decisions contained in declaration issued at the conclusion of the Tokyo Round of MTNs, initiatives towards a possible multilaterally agreed agreement covering cross border trade in services were taken in early 1980s<sup>27</sup>. In 1984 the US called for inclusion of trade in services on the trade agenda and development of a framework of rules for international trade in services. The “US proposal was supported by the Israel, Canada and the Nordics and opposed by countries like India, Argentina, Brazil and Cuba<sup>28</sup>”. A number of fundamental principles contained in the General Agreement as its central provisions to the treaty were also recognised as to be successfully applicable to trade in goods, these included concepts such as market access, transparency, MFN and national treatment.

The negotiations on Agreement for international trade in services were eventually included in the Agenda of the Uruguay Round (UR) of Multilateral Trade Negotiations (MTNs). The Punta Del Este Ministerial declaration of 1986, which launched the Uruguay Round of MTNs. This inclusion was bitterly opposed by some major developing countries like Brazil, India, and Yugoslavia. A separate group for negotiations on cross border trade in services was established “with a view to expansion of such trade under conditions of transparency and progressive liberalization”<sup>29</sup>. The five point agenda for the initial phase of negotiations included: i) definition of services and gathering of services data on services; ii) establishment of the broad concepts ...; iii) a multilateral framework ...; iv) determination of existing disciplines and arrangements to trade in services; and v) establishment of regulatory framework...<sup>30</sup>

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<sup>26</sup> Macrory Patrick F J, Arthur E Appleton, Michel G Plummer (Ed), *The World Trade Organization, Legal, Economic and Political Analysis, Volume I*, International Law Institute, Springer, USA 2005 p. 803

<sup>27</sup> The decision of GATT Ministerial Meeting held in 1982 in the context of “SERVICES”..

<sup>28</sup> Macrory Patrick F J, Arthur E Appleton, Michel G Plummer (Ed), *The World Trade Organization, Legal, Economic and Political Analysis, Volume I*, International Law Institute, Springer, USA 2005 p. 805

<sup>29</sup> Koul Autar Krishen, *Guide to WTO and GATT, Economics, Law and Politics*, Kluwer Law International, Hague, 2005 p.482

<sup>30</sup> Macrory Patrick F J, Arthur E Appleton, Michel G Plummer (Ed), *The World Trade Organization, Legal, Economic and Political Analysis, Volume I & II*, International Law Institute, Springer, USA 2005, p. 804

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The conclusion of the Uruguay Round of MTNs in 1994 substantively broadened the scope of multilateral rulemaking in the area of international trade. The system extended its reach into new subject areas and also simultaneously moved towards predictable and effective judicial procedures and dispute settlement. The new areas of Intellectual Property (Agreement on Trade Related Intellectual Property Rights), Investments (Agreement on Trade Related Investment Measures) and International Trade in Services<sup>31</sup> (General Agreement on Trade in Services) were brought under multilaterally agreed and unified disciplines of the Agreement Establishing WTO through the concept of ‘single undertaking’.

The General Agreement on Trade in Services along with an array of different Agreements was annexed to the Marrakesh Agreement Establishing the World Trade Organization, which entered into force on 1<sup>st</sup> January 1995. However, negotiations on some specific issues and some sector specific Agreements were not able to be concluded during the course of the MTNs under the Round and negotiations on these were agreed to be continued. Apart from improved market access conditions in areas such as telecommunications and financial services, the focus of continued negotiations was on four areas of rulemaking: domestic regulation, emergency safeguard measures, government procurement, and subsidies and the relevant mandates for conduct of these negotiations are already provided in the text of General Agreement on Trade in Services (GATS). These provisions at times oblige conduct of negotiations and are also sometimes referred to as the ‘built-in agenda<sup>32</sup>’ of WTO Agreement. With the possible exception of domestic regulation, where WTO Members are committed to negotiating disciplines to avoid unnecessary trade barriers, there has been little progress in other areas, and no agreed outcome is in sight at present.

Even with almost two decades of the conclusion of the UR of MTNs, the GATS is still a work in progress with its framework still under construction. Member countries of the WTO were confronted with the rule making and the work in some key areas including

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<sup>31</sup> World Trade Organisation, *The Legal Texts, General Agreement on Trade in Services*, Cambridge University Press, Cambridge. 1999. (Annex I B to the Marrakesh Agreement Establishing the World Trade Organization). p 284

<sup>32</sup> Some of the WTO Agreements contain provisions for continued negotiations and also specific Agenda for these further negotiations. These treaty provisions are termed as ‘inbuilt agenda’ and 1 examples are; Article X of the GATS and Article 9 of the TRIMs.



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conclusion of negotiations on Emergency Safeguards Measures in international trade in services remains as an unfinished business;

Paragraph 1 of Article X of GATS provides that:

“...there shall be multilateral negotiations on *the question* of emergency safeguard measures based on the principle of non-discrimination. *The results of such negotiations shall enter into effect* on a date not later than three years from the date of entry into force of the WTO Agreement”(emphasis added).

The negotiating mandate provided in the text of the GATS had serious interpretative problems and there is a disagreement amongst the Members of the WTO on the very interpretation of the mandate itself; on what it means, stipulates or intends members to do. Some members focussed on the word “question” to argue that there was no original definitive intention for creating or drafting a provision, specific enabling Article or some other form of creation of strict discipline for application of an ESM that was to be concluded by the agreed time limit. While some others members focus on the phrase “results of such negotiations shall enter into effect...” and argue that the only results that can enter into effect call for positive tangible outcome that precisely imply the drafting of a specific provision, article or agreed discipline on application of ESMs in the services sector. The debate on the mandate itself, till the negotiations stalemated, reflected the deep differences between the member countries that would favour the inclusion of an ESM within the scope of the GATS and those that would rather conclude against such an inclusion<sup>33</sup>. For some developed country members even if all or most of the technical issues faced in devising ESMs for international trade in services can be resolved still these countries would be reluctant to accept ESMs under GATS since in their view, even if feasible, emergency safeguards in services may not be desirable anyway.

The drafters of GATS have structured this framework Agreement for the services sector on the model provided by the GATT despite fundamental differences in the underlying products and dynamics of cross border trade in services and that of trade in goods. It was

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<sup>33</sup> Mario Marconini, *Emergency Safeguard Measures in the GATS: Beyond Feasible and Desirable*, UNCTAD. March 2005.

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felt by some members that guidance for development of specific ESMs under GATS can possibly be drawn from the existing trade remedy provisions already available in the General Agreement governing conduct of international Trade in goods. However, developments of exactly the same tools for international trade in services as are already available for merchandise trade has many conceptual problems and are much more difficult because of different characteristics and the complex nature of the service transactions. Member countries faced formidable challenges in defining and accepting the model provided by the GATT to be equally relevant in the context of services sector. All these challenges combined with the limitations of the GATT model itself had created a complete impasse in the negotiations on ESMs under GATS.

The very feasibility, desirability and practicability of ESMs under GATS is still an open question despite it being part of the built-in agenda<sup>34</sup> of the WTO Agreement and there initially also being an agreed time frame for conclusion of the negotiations on the issue. The Working Party on GATS Rules (WPGR) was confronted with major systemic and political questions that needed to be resolved. There “is no significant progress in the negotiations on the ESMs which continued to be characterized by important divergences of views<sup>35</sup>” till negotiations came to a deadlock.

A solution to the impasse in the negotiations on Emergency Safeguards in the WPGR does not appear to be in sight. It appears that the solution may need to transcend the existing dichotomy created between the feasible and the desirable. This requires undertaking work in two key areas. Firstly to carefully examine and also ultimately put right those arguments which are being put forward as a negotiating strategy. Secondly it is necessary to look at the ‘real concerns’ that negotiators may have in the area of ESMs under GATS and then provide the answer to the very basic ‘question’ put forward in Article X of GATS.

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<sup>34</sup> Some of the WTO Agreements contain provisions for continued negotiations and also contain the directions and agenda for further negotiations, this is termed as ‘inbuilt agenda’ for future negotiations e.g. Article X of the GATS and Article 9 of the TRIMs.

<sup>35</sup> World Trade Organization, *Working Party on GATS Rules*, Report of the Meeting of 10 February, Document No: S/WPGR/M/54 dated 22 February 2006

## 1.4 THESIS OUTLINE AND ORGANISATION

The concept of ESMs with respect to international trade in goods has a fairly long history that goes back to the turn of twentieth century. In the context of contemporary international economic and trade law the concept has been researched, debated and negotiated for more than eighty years. Substantive research on the subject of emergency safeguards measures in merchandise trade has also been undertaken by the international economic law scholars around the world and also by the multilateral institutions like WTO, UNCTAD and the World Bank. The research undertaken either has a pure theoretical slant or focuses only on the economic impact analysis ignoring the ground realities and political dimension of conduct of international trade. The canvass of this research is limited and overwhelming restricted to trade in goods with little work done on the concept in the context of cross border trade in services.

The research undertaken in the area with respect to application of emergency safeguards on trade in the services sector by the multilateral institutions, like the World Bank and UNCTAD, are extremely limited. The analyses and proposals emerging are very guarded with substantive efforts being spent on remaining within the boundaries of political correctness. Practically no definitive recommendations have been made to bridge this important legal gap, to tackle the question posed in Article X: 1 of the GATS and to provide a road map for future.

The thesis analyses the concept of ESMs, its history; issues involved and then goes on to look at main concerns faced in agreeing on development of ESMs under GATS. The thesis looks at the concept of the Emergency Safeguards in the GATT/WTO and tries to develop an answer to the 'question of ESMs based on nondiscrimination' agreed by the WTO members in the Article X of the GATS, which has been eluding, or may be deluding the Member countries of the WTO for the last ten (15) years. The thesis focuses on the Emergency Safeguards Measures (ESMs) already existing in the WTO in the context of international trade in goods and evaluates whether the existing paradigm provided by the General Agreement can possibly be transposed to GATS or provide a model for developing a similarly structured instrument for international trade in services.

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The thesis also assesses whether the GATT type ESMs are essentially required and are feasible under GATS and if these are feasible than what should be their possible structure based on the pre-determined, agreed and mandated 'principle of non-discrimination'. The study undertaken explores as to what instruments or provisions already exist in the Services Agreement to meet the possible circumstances which may be perceived by the member countries that are seeking specific ESMs under GATS and goes on to see that if provisions that are already available in the GATS render the desirability of standalone ESMs redundant, if not then, how the existing provisions do not address the specific concerns of the demanders of the concept. It also evaluates that if specific ESMs are desirable under GATS then what new provisions may be created so as to fulfill this desirability of the requesting Members. The study, amongst others, also tries to find the clues to develop the answer the question raised in Article X of GATS in the existing Regional and Preferential Trade Arrangements.

The thesis primarily limits itself to the short analysis of the concept, its origins and legal provisions of the GATT Article XIX type ESMs with the objective of transposition of this structure available under GATT to GATS. The study then looks at the proposals and possibilities of answering the question of feasibility and desirability of ESMs for International Trade in Services. The pure economic and political perspectives have not been explored in any details but have only been touched upon in the early part but these do crop up at times in the margins of the legal analysis of the emergency safeguards mechanisms under GATT paradigm particularly with reference to the conceptual link of the application of ESMs with the structural adjustments in the economies.

The establishing of the feasibility and desirability and also defining the contours of possible ESMs for the international trade in services is a topic, which has mostly been avoided by the researchers. The debates in the WTO on ESMs in the area of services have also mostly been dominated by the divergences of the views, were circumscribed by the rigidities of the historical negotiating positions of the Member countries and undertaken under the shadow of parallel processes. The discussions have been inconclusive and are now on a standstill. The thesis not only takes into account the academic and legal literature on the subject but also and perhaps more practically, takes into account the dynamics of the negotiations, discussions and debates within the WTO system on the subject. Though the

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thesis has a narrow focus on the stand alone ESMs under the GATS, but its findings can have parallel relations and almost a universal applicability on most of the issues that have remained part of the unfinished business for stretched period of time and on the agenda of different Multilateral Trade Negotiations.

Agreement Establishing the World Trade Organization is primarily a trade agreement embarked upon by politicians and in essence reflects the balance of interests of the Member countries. The thesis takes this important factor into account and tries to provide an in-depth analysis of the issue and goes beyond what is already available in the International Trade Law literature on the ESMs under the cross border trade in services. In short it studies the views of the negotiators on both sides of the intellectual/conceptual divide; i) demandeurs and; ii) opponents of any standalone ESMs under GATS.

The thesis briefly explores the concept, its genesis under the GATT framework, experiences with the concept and intends to propose as how to deal with the question of ESMs left open under Article X of the GATS. It seeks to fill a major gap that presently exists in the International Trade Law especially with reference to the law emerging out of WTO.

The thesis has six (6) chapters; including this Chapter 1;

### **CHAPTER 2: CONCEPT OF ESMs: EVOLUTION THEREOF**

The chapter 2 explores the history of the concept of the ‘escape clause provision’ and also analyses the reasons for incorporating this concept in the GATT/WTO Agreements and its evolution under the General Agreement. The requirements for the application of the ESMs and some important interpretive issues and relationship with other relevant provisions of the General Agreement are also covered in this Chapter. The Chapters looks at the difficulties encountered by the contracting parties in application of the ESMs under Article XIX of GATT.

The Chapter not only looks at the evolution of the concept under Article XIX of GATT but it also provides important basis for subsequent analytical and substantive work undertaken

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in the latter Chapters of the thesis. The efforts made by the GATT Contracting Parties to reform the emergency safeguard provision and make them more relevant and coherent are also touched. The Chapter identifies the problems faced by the concept of ESMs in its application in the merchandise trade and its evolution leading up to the GATT Ministerial meeting at Punta del Este with Emergency Safeguards Measures being included as a separate agenda item for negotiating "... A comprehensive agreement on safeguards..."

### **CHAPTER 3: ESMS: ISSUES and AGREEMENT on SAFEGUARDS**

The chapter looks at the development of the concept from under Article XIX of GATT to an independent Agreement on Safeguards (AoS) under the WTO and resulting jurisprudence has created new balances amongst the Members and requires a review. The Chapter recalls evolution of the concept, underlying reasons for introduction of 'extra-legal'<sup>36</sup> measures like Voluntary Export Restraints (VERs) and development of Agreement on Safeguards (AoS) and its negotiations. The Chapter analyses the development of case law under Article XIX of GATT and the AOS and some relevant internal law provisions of important economies like the EC and the US. This is not an exhaustive exercise but contrarily it is minimal in nature.

The Chapter tries to identify the additionalities or the deviations, if any, that have been created by the AoS over GATT Article XIX provisions, to the post UR regime relating to application of Emergency Safeguards Measures under the GATT/WTO system. The chapter also briefly refers to the decisions of the Panels and Appellate Body when interpreting key provisions of the law and attempts to analyse the AoS. Most Panel and Appellate body rulings discussed relate to the period prior to the 2007; when negotiations were suspended under the WTO on the issues relevant to the thesis. This brings out major concerns that already exist with the concept of ESMs under the GATT and that render the concept in-coherent in certain ways.

The Chapter has consciously been kept to a minimum so as to retain space for the substantive work that is to follow, therefore, only touches those issues that have a natural

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<sup>36</sup> General Agreement on Tariff and Trade, Note by the Secretariat "*Inventory of Article XIX actions and other measures which appear to serve the same purpose*" (MTN.GNG/NG9/W/2/Rev.1).

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linkage or impact on the manner in which any ESMs can possibly be structured for the services sector drawing from within the GATT/WTO context, this was important as when Ministers agreed at Punta del Este in 1986 to launch Uruguay Round (UR) of Multilateral Trade Negotiations (MTNs); they also decided, “ as part of the Multilateral Trade Negotiations, to launch negotiations on trade in services.... GATT procedures and practices shall apply to these negotiations”.

### **CHAPTER 4: ESMs and GATS,**

Chapter 4 builds on the work already done and tries to evaluate the relevance of discussions held with respect to the development of the ESMs under the GATS. The different formal and informal submissions made by the WTO Members on the issue in the WPGR have been briefly analysed. The proposals have been analysed with respect to their viability for practical application and have also been evaluated against the benchmarks provided by the Article XIX of the General Agreement and WTO's Agreement on Safeguards (AoS) governing the application of ESMs for trade in goods.

This Chapter was essentially required to look at the issues that any structuring of the ESMs under GATS on the paradigm provided by the GATT will have to encounter under the provisions of the regime applicable for merchandise trade. The Chapter is only a reality check with regards to the fact that whether the features that essentially define the application of ESMs under the GATT paradigm for trade in goods can be transposed to GATS so as to create ESMs for cross border trade in services in any coherent manner. In light of the dearth of substantive research already undertaken on ESMs under GATS; the study draws from discussions on the subject in the formal and informal meetings at the WTO the various submissions made by the WTO Member countries to the Working Party on GATS Rules (WPGR).

### **CHAPTER 5: ESM REGIME: ADAPTATION THEREOF under GATS**

The Chapters briefly revisits and analyses and then judges the various viewpoints put forward by different countries on the question of ESMs under GATS in the deliberations held in the Working Party on GATS Rules (WPGR). The Chapters then goes on to look at

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the specificities of the cross border trade in services and evaluates the provisions in the Services Agreement that substantially substitute the need for independent ESMs under GATS but simultaneously remaining within the universe provided by the GATT paradigm. The GATS's nexus with investments under mode 3 of service delivery has created complications with the concept of ESMs under GATS and rapid proliferation of Bilateral Investment Treaties (BITs). The Chapter tries to analyse the proposals, undertakes 'situational analysis' through hypothetical examples and identify circumstances for which ESMs type safety valves are already provided in the Agreement circumstances and also those for which ESMs may be required. An effort has also been made to briefly highlight the possible conflicts and impact of the BITs with respect to the application of any ESMs.

The different possible models for ESMs under GATS that had emerged in the discussions or mentioned in the WPGR have been briefly evaluated followed by a succinct look at the different RTAs with the intention of finding some form of model that can be helpful for development of independent provisions for application of ESMs under GATS. The Chapter near the end looks at all the possible models that were found under the GATT concept and briefly judges these models for their suitability to ESMs under GATS. The Chapter closes by noting that despite strong reservations for undertaking market access commitments in absence of ESMs under GATS, the developing countries have started exploratory meetings for further liberalization and are also taking major liberalization commitments under the RTAs and BITs.

## **CHAPTER 6: CONCLUSIONS**

To put the conclusions drawn in the thesis in right perspectives, the Chapter briefly recalls the background, the negotiating process and different issues involved in development of Emergency Safeguards Measures (ESMs) under General Agreement on Trade in Services (GATS). The Chapter then tries to explore and find solutions to the question of emergency safeguard measures posed in Article X through some other domestic trade policy instruments, not brought under discussions before, that can possibly have nexus with the conduct of cross border trade in services, particularly with respect to mode 3 of delivery. The two areas explored in this context were the Subsidies and Competition policies because



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these, though, not part of the GATT model but these do belong to the box of contemporary domestic economic policy instruments.

The Chapter goes on to draw its own reasons and tries to briefly analyse as to why the negotiations in the WPGR went the way they did; look at the structural problems that are inherently present in the GATS and then goes on to gauge the problems with the WTO system as a whole that may have impacted the development of ESMs. The phenomenon of shift towards the regionalism or other forms of economic integration agreements are also looked at but solely in the context of development of ESMs under GATS. Brief efforts have also been made to look at the evolution and importance of 'collective preference' concerns, lack of capacity and willingness in WTO system to address these concerns, which in turn have created the image and relevancy problems for the WTO. The chapter concludes by analysing that whether the negotiations on development of standalone ESMs under GATS stalled for simple straight forward reasons of limitation of the model, or structural issues with the Services Agreement or simple preference for regionalism despite good faith efforts, or, were there external or unconnected considerations that led the negotiations to failure because of a deliberate policy choice by some important players.

## **CHAPTER 2: CONCEPT OF ESMs: EVOLUTION THEREOF**

### **2.1 INTRODUCTION**

The chapter explores the historical background to the introduction of the concept of ‘escape clause provision’ in the international trade law and also the reasons for incorporating this concept in the GATT/WTO Agreements. The requirements for the application of the ESMs, some important interpretive issues and relationship with other relevant provisions of the General Agreement are also covered in this Chapter. The Chapter after explaining the concept, it looks at the difficulties encountered by the contracting parties in application of the ESMs under Article XIX of GATT. It also briefly analyses the issues of concern and the reasons for the derogation from Article XIX provisions under the General Agreement by some member countries.

The Chapter not only looks at the evolution of the concept under Article XIX of GATT but it also provides important basis for subsequent analytical and substantive work undertaken in the latter Chapters of the thesis. The efforts made by the GATT Contracting Parties to reform the emergency safeguard provision and make them more relevant and coherent derive a lot from this chapter. The Chapter also looks at the problems faced by the concept of ESMs in its application in the merchandise trade leading up to its evolution under the GATT Ministerial meeting at Punta Del Este with Emergency Safeguards Measures being included as a separate agenda item for negotiating “... A comprehensive agreement on safeguards...”

### **2.2 BACKGROUND: CONCEPTUAL**

In the pre-World War II period, the principal organizing principle for developed and developing country economic relationships was colonialism. In the early years of GATT most of the developing countries were either still in the process of or had in the recent past come out of the colonial rule<sup>1</sup> and, therefore, had very little understanding or experience of managing their international trade regimes. The early drafting of the post-war rules on trade policy that were enshrined in the General Agreement were ‘based on the idea of one set of

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<sup>1</sup> Articles 1.2 of the GATT 1947 is a good reminder of the then prevailing ground realities

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rules for all countries'<sup>2</sup>, therefore the original GATT had no development provisions and its applicable rules were the same for the developed and less developed developing countries<sup>3</sup>. The General Agreement initially laid down one set of rules for the conduct of international trade relations amongst all countries irrespective of the fact whether these are developing or developed countries.

Developing countries coming out of colonial rule had very little capacities to manage their domestic trade regimes and international trade relations in any meaningful and comprehensive manner, let alone the creation of workable institutions that were in a position to understand, apply and enforce Contingency Protection instruments provided in the General Agreement including Emergency Safeguards Measures and develop enforcement and surveillance mechanisms. The developed countries already had a long experience that stretched for over a century<sup>4</sup> of dealing with these contingency protection instruments. The developing countries not only lacked understanding of managing sophisticated trade policy instruments but also had little experience and understanding of dynamics of international negotiations and simultaneously lacked physical and intellectual resources to manage the complexities of multilateral trade and the negotiating processes. In the successive rounds of MTNs that were held under the auspices of GATT, the understandings of the developing countries about the issues involved were low and these countries were in general also not very active in the first six rounds of the MTNs and were merely bystanders or outsiders to the negotiating processes that were underway under the aegis of GATT.

In short, the advent of twenty century witnessed the emergence of move towards rule based conduct of International trade in the free world while the colonies were governed through a complex system of colonial preferences. The US was in the process of emerging as an important economic player and it had initiated a process of bilateral trade agreements that formally contained provisions for application of Emergency Safeguards Measures. Treaty

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<sup>2</sup> Hudec Robert E, *Developing Countries in the GATT Legal System*, Trade Policy Research Centre, London, 1987.

<sup>3</sup> The General Agreement recognizes 'developed countries' or 'countries in early stages of development.'

<sup>4</sup> Some the trade remedy legislations (safeguards) were promulgated around the turn of the nineteenth century that included; i) Australia (Industries Preservation Act, 1906, ii) Britain (The Safeguarding of Industries Act of 1921), these have been discussed in Chapter 1.

provisions for application Emergency Safeguards have since generally been an essential component the post-colonial international trade Agreements between independent nations.

### **2.3. ESCAPE CLAUSE: EVOLUTION**

Most of the basic concepts that inspired and subsequently expanded themselves under the post-World War II multilaterally agreed International Trade and Economic Law already existed prior to the War. However, prior to the War these concepts were anticipated only in the context of the bilateral trade relations between different countries which were considered industrially advanced, independent and having some structurally organized managerial systems within their governments. Different International Agreements for governance cross border trade existed in different forms across the globe. However, of all the pre-World War II international trade instruments that probably had the most profound effect on the development of post war regime governing conduct of international trade was the ‘US Reciprocal Trade Agreements Act of 1934 (Act of 1934)’. The Act of 1934 was originally conceived and intended by the US congress to provide a basis for the US executive to enter into bilateral trade agreements only, but the Act had substantive significance on post Second World War multilateral trading system and on the evolution of international trade and economic law. Some fundamental and strategic concepts that are now regarded as essential component of any international trade agreement are generally rooted and derived from this Act of 1934. The concept of ‘emergency safeguards measures’ in the international trade law, as we recognize the concept under GATT/WTO framework also stems from the concepts and formulations that were contained in the ‘Reciprocal Trade Agreements Program’ initiated by the US under its Reciprocal Trade Agreements Act of 1934<sup>5</sup>.

The approach adopted by Cordell Hull, the US Secretary of State<sup>6</sup> in the Reciprocal Trade Agreements Act was incorporated in the Havana Charter. The Article 29 of the first draft

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<sup>5</sup> The Act also provided the paradigms for some other key areas that later became defining features of the GATT system. It also furnished the template for US Congressional advance authorization that enabled the US Executive to conduct negotiations of International Trade Agreements (also commonly known as fast track authority).

<sup>6</sup> Cordell Hull was the US Secretary of State during the World War II. He was in charge of post war planning and viewed as “the Father of the United Nations.” He is known for the key concepts that underlay the Reciprocal Trade Agreements Act of 1934.

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of the Havana Charter was submitted by the United States and contained provisions for “Emergency Action on Imports of Particular Products”. The provisions of Article 29 were modelled on corresponding ‘escape clause’ provisions in the ‘United States - Mexico Reciprocal Trade Agreement of 1942’ concluded pursuant to the Act of 1934<sup>7</sup>.

This ‘escape clause’ subsequently became Article 34 of the draft that emerged from the London meeting of October 1946 but by then it had expanded to contain three additional elements that were over and above the US- Mexico Regional Trading Agreement of 1942. These three elements were included during considerations at London on the proposals made by the US Department of State in its paper titled ‘Suggested Charter of an International Trade Organization of the United Nations’. The additional elements incorporated in the text related to “i)... a product which is the subject of a concession with respect to the preference; ii) the exemption of ‘prior consultation’ under “critical and exceptional circumstances” and; iii) degree of retaliation in “serious cases”, when the Organization “may authorize an affected Member to suspend concessions or obligations in addition to those which may be substantially equivalent to the action originally taken<sup>8</sup>”.

In the New York meeting of early 1947 a definitive decision was taken to include the escape clause in the text of the General Agreement<sup>9</sup>. Changes that were made in the New York and Geneva meetings in the wordings of the escape clause in the draft of the proposed International Trade Organization (ITO) were carried over into the General Agreement as its Article XIX<sup>10</sup>. This Article XIX of GATT corresponded to Article 40 of the Charter for an ITO of the United Nations (The Havana Charter) and differs from the Havana Charter only in some minor ways<sup>11</sup>.

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<sup>7</sup> Hudec Robert E, *Developing Countries in the GATT Legal System*, Trade Policy Research Centre, London, 1987. In the years 1934-42, the United States negotiated reciprocal trade agreements with 27 countries, including sixteen developing countries

<sup>8</sup> These provisions eventually became Paragraph 1(b), 2 and 3 of Article XIX of the General Agreement.

<sup>9</sup> General Agreement on Tariff and Trade, ‘*Drafting History of Article XIX and its Place in GATT, Background Note by the GATT Secretariat*, document no: MTN.GNG/NG9/W/7 dated 16 September 1987. Para 1- 4

<sup>10</sup> The text of the General Agreement is based on the Charter for an International Trade Organization of the United Nations (The Havana Charter), which was drawn up by the Preparatory Committee of the United Nations Conference on Trade and Employment and signed on 30 October 1947.

<sup>11</sup> The difference in wordings are i) absence of the word "relatively" between "such" and "increased quantities" in Paragraph 1(a) of Article XIX; ii) use of the word "critical" in Paragraph 2. In the Havana Charter, the words "of special urgency" were used and iv) absence of Paragraph 4 in Article XIX of GATT.

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The US Congress that authorized the United States' executive in 1945, to negotiate and join an international treaty on trade had also decided that inclusion of an 'escape clause' was to be made a necessary component in all treaties which involved the granting of any concessions by the US. President Truman, in February 1947 accordingly also, issued an Executive Order that mandated an escape clause to be included in every trade agreement negotiated by the United States under the authority of the US Reciprocal Trade Agreements Act of 1934. President Truman's order was later amended and by virtue of the provisions of section 7 of the Trade Agreements Extension Act of 1951 the 'escape clause' (emergency safeguards) eventually became a permanent feature of the US statutory law<sup>12</sup>.

### **2.3. INTERNATIONAL AGREEMENTS: ESCAPE CLAUSE**

Every international trade liberalization Agreement is essentially accompanied by some sort of economic, market and even social and political risks. However, "there are a number of alternative ways to deal with the risk of an agreement. States could, for example, build in escape clauses ..., or other contingencies that concern the parties. This strategy reduces the exposure to risk without reducing the agreement's effectiveness in those states of the world in which the parties want compliance. An alternative strategy would be to weaken the substantive requirements of the agreement. This reduces the benefits of the agreement, but also reduces the level of commitment"<sup>13</sup>. The existence of Emergency Safeguard Measures (ESMs) in any bilateral, plurilateral or multilateral trade agreements is an effort to mitigate and manage these risks. If analysed in a narrow sense the presence of safeguard provisions are rooted in the perceived need for provisioning of some form of safety valve for the domestic industry that can provide it protection from probable unforeseen problems which may crop up because of any trade liberalization that has been undertaken by the importing country under some trade treaty stipulations. However, if these clauses are looked in a broader sense, the concept refers to the treaty provisions which permit a country signatory

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<sup>12</sup> General Agreement on Tariff and Trade, '*Drafting History of Article XIX and its Place in GATT, Background Note by the GATT Secretariat*, document no: MTN.GNG/NG9/W/7 dated 16 September 1987.

<sup>13</sup> Guzman Andrew T. *The Design of International Agreements* European Journal of International Law, September, 2005,

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to an international trade agreement to temporarily deviate from the application of the obligations that it has assumed under the Agreement<sup>14</sup>.

International trade rules distinguish between the ways in which an importing country can respond to 'fair' trade practices on one hand and 'unfair' trade practices on the other<sup>15</sup> hand. The emergency escape clause provisions are available only for use under certain conditions to respond to market disruptions and for specified problems created by imports which are otherwise not in violation of the agreed rules for conduct of cross border trade. In the case of application of ESMs by an importing country, "all that the foreign respondent has done is to compete effectively in accordance with the free market principles<sup>16</sup>". In other words 'emergency safeguards' are measures that are applied to protect domestic industry from competition with imports causing or threatening to cause serious injury to them. These 'safeguard measures' are to be distinguished from some other special safeguards measures which are applied only to a specific category of imported product or do not require the existence of injury to a particular industry<sup>17</sup>.

Some economic scholars feel that to provide a relief or a remedy to domestic producers in situations where nothing unjust has been done by an exporting country to be improper and not credible enough reason to allow a Member country to derogate from its specific obligations under an international treaty. The escape clause provisions in an Agreement to this group of scholars' defeats the basic economic concept of 'comparative advantage' which provides the foundations for modern day conduct of liberalized International Trade<sup>18</sup>. The major strands of arguments that try to justify the necessity thus the existence of escape clause provisions in an international trade agreement can be bifurcated and placed under two broad conceptual paradigms; i) economic; and ii) political.

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<sup>14</sup> Bhala Raj, Modern GATT Law, *A Treatise on the General Agreement on Tariffs and Trade*, Sweet & Maxwell London 2005. p. 939

<sup>15</sup> Jackson John H, Davey William J and Sykes Alan O Jr, *Legal Problems of International Economic Relations, Cases, Materials and Text*. Third Edition, West Group, MINN, 1995. p 596

<sup>16</sup> Bhala Raj, Modern GATT Law, *A Treatise on the General Agreement on Tariffs and Trade*, Sweet & Maxwell London 2005. p 944

<sup>17</sup> GATT Articles XII, Article XVIII: B (Balance of payments) and Article XX along with others like Article 5 of Agreement on Agriculture of the WTO fall under this category.

<sup>18</sup> The contemporary multilateral trading system is based on the philosophy of liberal trade and mutually beneficial specialisation... The concept is known as comparative advantage, developed by David Ricardo. David Ricardo, *Principles of Political Economy and Taxation* (1817)

### 2.3.1. ECONOMIC RATIONALE

The arguments very closely reflect the reality of the overall GATT/WTO regime that is intended not to be a global free trade agreement but is only a negotiated International Trade Agreement focussed on creating a liberalized trading system which is based on multilaterally accepted rules, ‘which are predictable and the system has no shocks<sup>19</sup>’. The underlying philosophy and driving force of multilateral trading system emerging out of GATT/WTO is simply of progressive trade liberalisation with gradual structural adjustments and not that of either a free trade agreement or creation of a Customs Union. Within the economic paradigm, the most important argument for creating the treaty provisions for possible application of emergency safeguards measures (ESMs) is the consideration that the liberalization of international trade has to be ‘without shocks’ and the extremely essential concomitant need of an ‘orderly contraction’; if any shocks have necessarily to occur. The incorporation of ESMs in the Multilateral Trade Agreements is regarded, by the believers of the economic benefits of the ESMs, as essential to facilitate the orderly contraction of the industries that lose out to rapidly enhanced trade flows that are responsible for adverse market circumstances in the importing country. This sudden increase in the trade is also because of the trade liberalization undertaken by the country in terms of an international trade Agreement and that the affected industries simply cannot regain their competitive edge in the new liberalized trade scenario. To avoid any confusion it is of significance to note that orderly contraction is an entirely different concept of adjustment as compared to restoration of competitiveness.

The protection from imports, made possible by the escape clause provisions which have a social significance here, retards the rate of contraction in an import sensitive industry and the relief provided by the escape clause provisions prevents shock to different factors of production, most important of which is labour, are shielded from shocks and injury. The possibilities to emergency safeguard measures create policy space for the governments that “workers are not thrown out of their jobs and their wages are not slashed without warning. Rather the escape clause provisions provide these workers with time space to find new work, or possibly retrain i.e. to adjust positively to import competition and to learn to

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<sup>19</sup> World Trade Organization, *Understanding the WTO*, 3rd edition Geneva 2003



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operate in the context of a new liberalized market<sup>20</sup>”. The orderly contraction argument is not without its critics, economic purists argue that delaying contraction is also an economic vice because the factors of production are used up by an inefficient industry for an extended period which should otherwise be redeployed immediately to more efficient use.

The other argument put forward relates to the restoration of competitiveness as differentiated from orderly contraction. It is argued that measures undertaken pursuant to escape clause (Article XIX of GATT) give an industry, which suffering serious injury or is being threatened to be injured by the ‘new’ liberalized trading environment, time to adjust to the changed operating environment and in the process regain its competitiveness. This argument for application of emergency safeguards measures to restore competitiveness is regarded by some as “fairly straight forward<sup>21</sup>”. Relief provided pursuant to the application of an ESM allows for the restoration of competitiveness by providing “local producers space to improve the competitiveness of their products in face of a surge of competing imports<sup>22</sup>” by increasing the tariff and/or non-tariff barriers. This temporary protection provides the ailing industry time and space to generate profits, reinvest these profits into factors of production so as to reduce its costs and thereby regain its competitive edge and thus be prepared for the circumstances when the temporary protection provided by application of an ESM is eventually removed<sup>23</sup>.

The proponents of this line of argument believe that the international trading community, especially consumers in different countries, benefit in the long term, because efficient competitors re-emerge as they get time to restructure in light of the temporary reprieve which is provided to them through the application of the ESMs. This view of regaining

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<sup>20</sup> Jackson John H, Davey William J and Sykes Alan O Jr, *Legal Problems of International Economic Relations, Cases, Materials and Text*. Third Edition, West Group, MINN, 1995.p 1120

<sup>21</sup> Sykes Alan, ‘Protectionism as a safeguard: A positive analysis of the GATT ‘escape clause’ with Normative Speculations (Jackson John H, Davey William J and Sykes Alan O Jr, *Legal Problems of International Economic Relations, Cases, Materials and Text*. Third Edition, West Group, MINN, 1995, p 600.

<sup>22</sup> Mark Clough, *WTO and EC Safeguard Measures – Legal Standards and Jurisprudence*, Int. T.L.R. 2003 9(3), p70

<sup>23</sup> Kitano Taiju *Did temporary protection induce technology adoption? A study of the US motorcycle industry*\_National Graduate Institute for Policy Studies, Tokyo, May 2011  
<http://www3.grips.ac.jp/~econseminar/adoption.pdf>, visited July 2012. The case of Harley Davidson is cited as a successful ESM policy intervention. Under the temporary protection provided from 1983 to 1987, Harley-Davidson the sole US motorcycle manufacturer, bridged the technology gap with foreign rivals by successfully introducing a new engine.

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competitiveness is regarded by those opposed to this thought as static and that it neglects the negative implications of protection in the long and medium term. It is seen as an approach which is solely from the point of view of the welfare of the industry that is being hurt in the importing country and that the argument disregards the interests of the consumers in the importing country, industry in the exporting country or the world economy as a whole.

Stated differently, application of an ESM is a mechanism for distributing and allocating the costs of market adjustment required because of circumstances created by the trade liberalization which has been undertaken as the consequence of tariff and non-tariff concessions granted under the Trade liberalizing international agreement by the importing country. In the liberalised trading environment and with exchange of market access concessions products of certain industries are displaced by new, more competitive imports and as a consequence of which at least the factors of production in a domestic economy that are mobile should logically shift to the production of the goods that can compete with imports. However, the process of moving the labour, human and physical capital takes much longer time than other factors of production and implies some social adjustment costs. These adjustment costs are at times heavy and to render the system free of shocks these need to be spread and allocated in some way amongst the WTO Members and also within an economy. Emergency Safeguard measures thus allow an importing WTO Member to shift at least some market adjustment costs away from an injured domestic industry to an exporter or exporters in other Member countries, simultaneously the concept also allows the importing country to shift at least some of the costs to its domestic consumers and away from an injured domestic industry.

The leading arguments under the economic paradigm are based on the foundations that the temporary relief provided by the escape clause helps restore the competitiveness and that it also facilitates orderly contraction. The proponents of economic perspective assume that emergency safeguards are purely an economic issue but whereas in actuality in certain cases the application of measure by the importing country can also involve non-economic considerations. This uncorrupted economic perspective ignores the fact that GATT/WTO is primarily a political treaty amongst Member countries which has been negotiated and

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concluded by the political officials. The General Agreement essentially reflects an agreed balance of interests amongst the Member countries and also of the different trade lobbies domestically within the acceding countries.

### 2.3.2. POLITICAL RATIONALE

The existence of Emergency Safeguards provisions is justified under the ‘political paradigm’ as necessarily required escape clause that primarily provides a political safety valve against protectionist pressures. The political officials, who enter into international trade agreements, seek to design these agreements in a manner that in addition to creating new trade flows and economic development, these Agreements should also enhance their domestic political support. Such political gains from trade agreements result in the foremost from market access commitments that benefit domestic exporters and lead them to reward the political officials who manage to obtain these enhanced market access commitments for their products. The hardships that are caused in certain other sectors because of increased imports by virtue of trade liberalization is reluctantly accepted as being the unavoidable price that is required to be paid for easier market access for the exports. Thus an ideal international trade agreement from the standpoint of political officials is the one that maximizes the net political gains relative to political costs<sup>24</sup>.

The public officials who undertake negotiations on behalf of countries becoming party to multilateral trade agreements are invariably not comfortable with giving enhanced market access as there are always uncertainties associated with the future trade impact of the concessions that may be granted by them. Emergency Safeguards provisions in the Agreements, to these political officials, are simply a device for dealing with the political uncertainty associated with the trade liberalization. To the officials ‘safeguards provisions’ thus provide a ‘loophole’ or temporary circumvention mechanism to the International obligations being undertaken by them in the context of an Agreement which in essence is targeting to liberalizing trade and limiting trade protection. These arguments suggest that the existence of escape clause provisions provide comfort and thus encourage and make it

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<sup>24</sup> Guzman Andrew T., "*The Design of International Agreements*" (November 10, 2004). International Legal Studies Program. International Legal Studies Working Papers Series. Paper 8. <http://repositories.cdlib.org/ils/wp/8> ( March 2006)

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possible for the Members of the WTO to offer greater number of market access concessions and undertake larger number of bindings than they would have otherwise done.

Article XIX of the General Agreement merely defines circumstances in which the temporary suspension of concessions was jointly optimal in a political sense for the officials that entered into the market access commitment under the GATT. The “genesis and the negotiating history of the Article suggests that no clear, necessary and causal connection was ever intended between safeguard actions and the promotion of economic welfare or efficiency as conventionally defined under the ‘economic justification’ arguments<sup>25</sup>”.

Simply put, Emergency Safeguard provisions relieves the negotiators and the political decision makers of a Member country of the fear that trade liberalization commitments in to which they may enter once made are irrevocable in terms of the Agreement. The emergency safeguards provisions provide the negotiators with the possibility to reverse the concessions granted though in a limited manner and subject to specific conditions. A Member because of the possibilities created by the safeguards provisions feels liberated to enter into expansive market access deals and thus the existence of the provision enhances chances of Agreement that not only accommodates the self-interests of the Members but, in other word, also helps liberalization.

### 2.3.3 OTHER REASONS

There are other explanations also for incorporation of escape clauses in the International agreements. Another argument about the purpose of Safeguards draws on the public choice theory under which Emergency Safeguard provisions can be regarded as a microeconomic tool to political behaviour. The emergency provisions provide a tool to political decision makers to interfere in a rule based system and accommodate a popular public opinion. The “manner in which these emergency safeguards provisions are structured primarily also reflects therefore the manifestation of the public choice theory”<sup>26</sup> which predicts that political policy makers are generally more concerned about impact of any change in

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<sup>25</sup> Sykes Alan O, *The WTO Agreement on Safeguards*, Oxford University Press New York, 2006. p 60

<sup>26</sup> Michael j Trebilock and Robert Howse, *The Regulation of International trade*, 2<sup>nd</sup> Edition, Routledge, London.2001, p 15-17

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policies, trading environment and regulatory structures on producers than are for the consumers because in general the producers are both better organized and politically more influential than the consumers.

The necessity of escape clause in an Agreement is at times also linked to the lack of effective dispute settlement procedures under that Agreement. This consideration for incorporation of escape clause in an agreement is essentially influenced by two factors that mutually offsetting each other. 'Firstly, it reduces the level of commitment of the states in a manner that corresponds to how the omission of a dispute resolution clause in the Agreement reduces the incentive to comply with the terms of the agreement and not nullify the concessions grant by it, while the existence of the safeguards do oblige that a member applying a safeguard measure maintains a substantially equivalent level of mutually agreed concessions. This requirement only partially offsets the impact of the safeguards provisions on the level of commitment. The state adopting a safeguard measure is given the discretion to determine how to maintain the level of concessions, and this discretion reduces the extent to which the state is constrained in its actions. Secondly, because the escape clause allows a state to suspend its commitment, it reduces the sanction for doing so in a manner corresponding to the way in which the omission of a dispute resolution clause reduces the sanction for a violation. When drafting an agreement, then, states try to consider both the reduced likelihood of compliance with the (other) terms of the agreement and the reduction in total loss if there is such non-compliance<sup>27</sup>. Each of these strategies provides flexibility to the parties in a more nuanced and targeted way than simply including or excluding a dispute resolution provision. However, this reason for incorporating escape clause in the international agreements is not very relevant to GATT/WTO system as it has fairly robust dispute settlement structures.

In simple words, the existence of safeguards provisions in the International Agreements; irrespective of the justification for their existence, provide possibilities to the signatories for deviation from the obligations assumed under the Agreement and that these provisions are essentially aimed to maintain the overall sanctity and integrity of the Agreement.

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<sup>27</sup> Guzman Andrew T. *The Design of International Agreements* European Journal of International Law, September, 2005,

## 2.4. ESCAPE CLAUSE IN GATT

The general escape clause<sup>28</sup> in the form of Article XIX was included in GATT as a result of American desires and the key language of the Article is almost similar to the wordings contained in the US-Mexico Reciprocal Trade Agreement of 1942. Fearing that the lowering of tariff barriers on some particular goods could result in a larger-than-expected import-surge that would hurt domestic firms, the U.S. government insisted that the agreement should include a provision permitting it to re-institute tariffs in the face of large import-surges. The inclusion of the escape clause in GATT is considered as a significant, if not the major, reason as to why United States' Congress agreed to participate in GATT<sup>29</sup>.

This argument appears to be fairly valid and hardly comes as a surprise because the late nineteen forties immediately “followed a period characterized by protectionism – the economic counterpart of political nationalism which had just been defeated – world trade liberalization could only be achieved if framed through a complex system of safeguards. Thus, more than half GATT Articles concern exceptions to tariff concessions, National Treatment and Most Favoured Nation clauses and of the derogation provisions in the General Agreement the most visible is Article XIX<sup>30</sup>”. Inclusion of Emergency Safeguard provisions was seen as a political safety valve for the protectionist pressures and as a window for possible reinstatement, under extra ordinary circumstances, of a tariff or a non-tariff measure, which had been removed or lowered by virtue of commitments made in the context of concessions granted under international trade negotiations.

At the time of introduction of the International Trading System governed by the multilaterally agreed rules of the GATT, the core concepts for ‘provisions for remedial measures’ that defined the practical application of ESMs like ‘cause or threaten injury to domestic industry’ and proportionality of counter measures were already understood and legal jurisprudence on these issues was already available in some advanced countries, but primarily in the context of Antidumping (AD) and Countervailing Duties (CVD) laws that incorporated concepts parallel to emergency safeguards like ‘injury’, ‘investigation’ and

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<sup>28</sup> Prior to 1943 escape clauses to protect against specific risks were contemplated in the trade agreements but a general escape clause as such was never contemplated.

<sup>29</sup> Odell John S, *Negotiating the World Economy*. Cornell University Press. London, 2000 p 159- 166

<sup>30</sup> Didier Pierre, *WTO Trade Instruments in EU Trade Law*, Cameron May, London Reprint 2000, p 295

establishment ‘of causal link’ for application of remedial measure that were already in place in these countries from the turn of the twentieth century<sup>31</sup>.

## 2.5. ESMS UNDER GATT 1947

### 2.5.1 ARTICLE XIX OF GATT

Article XIX of the General Agreement titled “Emergency Actions on Imports of Particular Products” is essentially the principal and general escape clause of the General Agreement. The Article lays down the basic framework of the application of Emergency Safeguard Measures and is still largely the same as it was agreed at the outset of GATT and it has only been amended once. In the Review Session of 1954-55 the CONTRACTING PARTIES agreed to change the term “obligations or concessions” that was appearing in paragraph 3(a) and (b) of the Article to “concessions or other obligations<sup>32</sup>”. The Article XIX prescribes and details certain conditions that are required to exist for the application of “emergency action on imports of particular products” and simultaneously also provides the authority for the use of safeguard measures by an importing country with respect to trade in goods under the GATT.

Paragraph 1 of the Article XIX provides that:

If, as a result of *unforeseen developments* and of the effect of the *obligations incurred ...*, any product is being imported ... *such increased quantities* and under such conditions as *to cause or threaten serious injury* to domestic producers in that territory of *like or directly competitive products*, the contracting party shall be free, in respect of such product, and to the extent and *for such time* as may be necessary to prevent or remedy such injury, to *suspend*

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<sup>31</sup> Some the trade remedy legislations that were promulgated around the turn of the nineteenth century were; i) The Canadian Act to Amend the Customs Tariff, 1897, ii) New Zealand (Agricultural Implement Manufacture, Importation and Sale Act, 1905), iii) Australia (Industries Preservation Act, 1906), iv) The United States (the U.S. Revenue Act of 1916), v) Britain (The Safeguarding of Industries Act of 1921), vi) France 1908; and vii) South Africa in 1914. Some of the original antidumping laws were industry-specific, as in New Zealand, or based loosely on earlier competition law, as in the U.S. the American law of 1916 used the ‘intent to restrain competition’ language of the Sherman Act of 1890. Such laws were replaced with statutes more similar to the Canadian law in which a more general “injury from imports” standard was used.

<sup>32</sup> World Trade Organization, *Analytical Index, Guide to GATT law and Practice* Volume I, World Trade Organization Geneva, 1995. p 517.

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*the obligation* in whole or in part or to withdraw or *modify the concession*.(emphasis added).

Paragraphs 2 and 3 of the Article XIX further provide that a party invoking its right under paragraph 1 to suspend or modify concessions must negotiate with adversely affected parties over provision of compensation in the form of alternative trade concession(s). If these compensation negotiations are unsuccessful, paragraph 3 allows the safeguard measure to be taken nonetheless, but permits adversely affected trading partners to suspend ‘substantially equivalent concessions’ in response.

The General Agreement, primarily for reason of being a negotiated legal text that accommodates different and at times conflicting interests, is not straight forward and at places fairly skewed. Article XIX of GATT is no different and fairly mixed to the extent that it is regarded by some as “extraordinarily oblique, even for GATT language, resulting in difficulty in interpretation and uncertainty in application”<sup>33</sup>. The Article also, “lacks detailed substantive and procedural requirements for the application<sup>34</sup>” of measures that must be prescribed to be observed under Member country’s domestic law. Reports emerging out of different Working Parties in early years of GATT like in *Hatter’s Fur Case*<sup>35</sup> and Japan’s accession to GATT combined with parallel discussions in the various review meetings unfolded the understandings of CONTRACTING PARTIES to establish whether or not a measure taken by a contracting party met the requirements prescribed for the application of the Emergency Safeguard Measures (ESMs) under Article XIX.

In Hatter’s Fur Case it was viewed by the Working Party that the “three sets of conditions have to be fulfilled:”

“(a) There should be an *abnormal development* in the imports of the product in question in the sense that:

“(i) the product in question must be imported in *increased quantities*;

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<sup>33</sup> Pierre Didier, *WTO Trade Instruments in EU Trade Law*, Cameron May, London Reprint 2000, p. 227

<sup>34</sup> Lee Yong-Shik, *Safeguard Measures in World Trade: The Legal Analysis*. Kluwer Law International, June 2005. p16

<sup>35</sup> World Trade Organization, Working Party (1950-51) on “*Withdrawal by the United States of a Tariff Concession under Article XIX of the General Agreement*” Complaint of Czechoslovakia against the US (Hatter’s Fur Case – 1951).



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“(ii) the increased imports must be the result of *unforeseen developments* and of the *effect of the tariff concession*; and

“(iii) the imports must enter in such increased quantities and under such conditions as to *cause or threaten serious injury* to domestic producers of *like or directly* competitive products.

“(b) The *suspension* of an obligation or the *withdrawal or modification* of a concession must be limited to the *extent* and the *time necessary* to prevent or *remedy the injury caused or threatened*.

“(c) The contracting party taking action under Article XIX must *give notice ... to consult ...* before the action is taken ... in *critical circumstances ...* consultation ... after the measure is taken provisionally”<sup>36</sup>.(emphasis added).

The Clause (a) of Article XIX from the very early period raised some important interpretive issues. The clause provides that the emergency safeguard measures are permissible to be applied by a contracting party only in situations where ‘unforeseen developments’ occur and where these developments in turn are also associated with ‘the obligations incurred by the contracting party by way of concessions’ granted by the country. As to what constitutes an ‘unforeseen development’, time and space of these developments and determination of the ‘effect of the obligations incurred’ had a natural understanding in the early years of the GATT system as it was expected to be short-lived<sup>37</sup>. The negotiators had made a number of trade concessions in 1947, and the Article XIX provided for their suspension in the event that those concessions had an unforeseen, adverse impact on industries competing with imports for reasons of a sudden surge in import competition. The interpretation of the requirements of Article XIX (1) of GATT became complicated as the General Agreement took a permanent shape and also especially considering the fact that the GATT/WTO system is characterized by an ever-changing set

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<sup>36</sup> World Trade Organization *Analytical Index, Guide to GATT law and Practice*, Volume I, World Trade Organization, Geneva 1995, p.517.

<sup>37</sup>The original GATT negotiations concluded in 1947, with the expectation that GATT would be supplanted within a few years by a new institution which will be called the International Trade Organization (ITO). The General Agreement was provisionally applied from 1 January 1948 to 1 January 1995 until the creation of the WTO in 1995 when it was subsumed by the WTO.

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of commitments<sup>38</sup>, therefore, with the passage of time the interpretation and practical application of the specific requirement of ‘unforeseeability’ under Article XIX started becoming complicated difficult eventually leading to the extent of being problematic.

The Working Party (1950-51) on “*Withdrawal by the United States of a Tariff Concession under Article XIX of the General Agreement*”<sup>39</sup> examined the complaint of Czechoslovakia that the United States, in withdrawing a concession on women’s fur felt hats and hat bodies, had failed to fulfil the requirements of Article XIX. The US argued that the import surge was due to an unforeseen change in fashion and thus was an “unforeseen” consequence of the “obligations incurred” by the US. The Working Party agreed with the fact that the changes of style did not constitute an ‘unforeseen development’ but as to whether the United States had acted appropriately, the same Working Party also agreed with the special circumstances that “the degree to which the change in fashion affected the competitive situation, could not reasonably be expected to have been foreseen by the United States authorities, and that the condition of Article XIX can, therefore, be considered to have been fulfilled”<sup>40</sup>. The report of the Working Party was inconclusive and provided little guidance for future interpretations of the provisions particularly as to what constitutes unforeseen development. Thus as the time lapse between assumption of market access obligations and occurrence of injury or threat of injury to domestic industry increased the interpretation of the provisions of Article XIX of GATT started blurring and subsequent GATT practice, which gradually evolved over time, started ignoring this requirements of the first clause of Article XIX of the General Agreement.

The phrase ‘being imported ... in such increased quantities’<sup>41</sup> was interpreted in disputes in the broader context to cover cases in both situations; where imports may have increased sharply ‘absolutely’ or ‘relatively’ to domestic production<sup>42</sup>. This increase, substantiated in

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<sup>38</sup> Eight Rounds of MTNs have already been concluded and ninth is in progress. The first five Rounds of MTNs primarily focussed on market access commitments which were primarily tariff and non-tariff concessions.

<sup>39</sup> This is commonly referred to as the ‘*Hatter’s Fur Case*’

<sup>40</sup> World Trade Organization, *Analytical Index, Guide to GATT law and Practice*, Volume I, Geneva 1995, p.517

<sup>41</sup> Article XIX 1(a) of GATT

<sup>42</sup> In discussions concerning Article 40 of the Charter (the Article corresponding to Article XIX of GATT) during the Havana Conference, it was agreed to insert the word “relatively” between “such” and “increased”,

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either manner, was regarded as evidence enough for a trade flow situation to qualify to “cause or threaten serious injury to domestic producers.” It is not easy to create direct causal links between imports and adverse circumstances prevailing in a domestic industry as these can have different possible reasons ranging from needs of balancing or modernization replacement to the skill development. It is really difficult to conclusively determine whether the ‘cause’ of any such injury (or threat thereof) to domestic industry is because of ‘increased quantities’ of imports. As is the case in any other international treaty, where ever the text of the General Agreement is vague and cannot be interpreted meaningfully then support from the negotiating history is normally taken<sup>43</sup>. The drafters of the General Agreement have made no reference to any specifics for determination under the ‘injury concept’ like lost profits, unemployment and bankruptcies but chose to leave the term undefined. Perhaps the best inference of this absence of specifics is that they consciously left this open as they did not wanted to constrain the concept unduly by attempting a definition, and in the process allow a variety of factors that may be taken into any such analysis.

The ‘Non-discriminatory’<sup>44</sup> invocation of Article XIX has been a fairly controversial issue right from the early stages of its drafting and has since been a subject of an intensive and protracted but yet unresolved debate. The Report on the Accession of Japan<sup>45</sup> to the GATT viewed that “emergency action under Article XIX would have to be non-discriminatory” and applied to the trade of all contracting parties, including those which were in no way responsible for the creation of the circumstances requiring redress through application of the measure. An independent suggestion that was made to the ad-hoc Committee to add an additional clause to Article XIX that may permit the possible application of Article XIX measures that are only focused on exports originating in countries that are responsible for creating the reasons for the application of measures in

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“so as to make it clear that Article 40 could apply in cases where imports had increased relatively to domestic production, even though there might not have been an absolute increase in imports as compared with a previous base period”.

<sup>43</sup> Vienna Convention on Law of Treaties, Article 32, ‘*Supplementary means of interpretation*’.

<sup>44</sup>Havana Conference Sub-Committee D proposed an Interpretative Note to Article 40, which was the corresponding Article to Article XIX of the General Agreement, the note read as: “It is understood that any suspension, withdrawal or modification under paragraphs 1(a), 1(b) and 3(b) must not discriminate against imports from any Member country”.

<sup>45</sup> General Agreement on Tariff and Trade, *Report of the ‘Ad-Hoc Committee on Agenda and Inter- Sessional Business – 1953’*

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case of “serious disruption of trade conditions<sup>46</sup>” was rejected. The possibility of source specific application of Emergency Safeguards was also suggested by the Executive Secretary of the GATT in one of his informal notes in mid-sixties recommending<sup>47</sup> “as worthy of examination ... to place upon the existing provisions of Article XIX an interpretation... which would ... entitle an importing country to protective measures which would be restricted in application to imports from a supplying country which were in fact creating the disruptive situation”. The suggestions made to the ad hoc Committee and the informal note of the Executive Secretary were bitterly opposed and summarily rejected.

The major exporting developing countries were the real beneficiaries of the notion of ‘non-discriminatory’ application and, therefore, were always very apprehensive and on constant guard so as not to permit any source specific application or allow in whatever form the dilution of the concept of non-discriminatory application of an ESM. This opposition to selectivity in application was repeatedly and vociferously stressed by the major developing countries. In the discussions concerning the EEC’s invocation of Article XIX on imports into the United Kingdom of television sets from Korea and it was viewed “that Article XIX did not provide for the discriminatory application of measures to limit potentially disruptive imports<sup>48</sup>” and any source specific measures were regarded as inconsistent with GATT provisions specifically with MFN provisions enshrined its Articles I and XIII. However, it will be interesting to note that the EEC discriminatory safeguard action was revoked only after conclusion of a Voluntary Export Restraint (VER) arrangement with Korea<sup>49</sup> as from 22 June 1979.

A GATT Secretariat note<sup>50</sup>, supported the contentions of the major developing countries and opined that the emergency actions under Article XIX are to be taken in respect of ‘such

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<sup>46</sup> World Trade Organization, *Analytical Index, Guide to GATT law and Practice*, Volume I, Geneva 1995, p.519. A strong negotiating position was taken by the countries of the Far East, India and Brazil.

<sup>47</sup> General Agreement on Tariff and Trade, Informal note of the Executive Secretary of GATT “*Rationale for Dealing with Market Disruption through the Application of Article XIX*”, 26 May 1964.

<sup>48</sup> General Agreement on Tariff and Trade, Council meeting of March 1978: discussions therein.

<sup>49</sup> With regard to the possibility of using dispute settlement proceedings under the General Agreement to enforce agreements between contracting parties providing for “voluntary export restraints”, it may be noted that a Decision of the CONTRACTING PARTIES provides that “The determination of rights and obligations between governments arising under a bilateral agreement is not a matter within the competence of the CONTRACTING PARTIES”.

<sup>50</sup> General Agreement on Tariff and Trade, Secretariat Note “*Modalities of Application of Article XIX*”, 1978 (23L/4679, Para. 45)

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product’ and not in respect of ‘individual contracting parties’ ... and provisions of Article I (MFN) of the General Agreement will, therefore, apply. Similarly the Panel Report on ‘Norway’s Article XIX Action on Certain textile products’ did not make a finding with respect to invocation of Article XIX itself but the Panel simply pronounced that “emergency action under Article XIX – was subject to the requirements of Article XIII, providing for non-discriminatory administration of quantitative restrictions<sup>51</sup>”.

In the case of an Article XIX action taken by Finland, wherein it had imposed a surcharge on ‘tights’ that were imported below a basic price, and also in case of a similar Article XIX action taken by Canada on import of leather footwear that was also triggered by a price threshold. It was held that “price discrimination was contrary to Article XIX” and that devices like price breaks could produce “such a narrow and selective definition of source that the action could no longer be said to be truly non-discriminatory and conflict with the fundamental principles of the General Agreement”. However, on the contrary in case of trade remedy measure taken by a member country under the WTO Agreement on Antidumping, managed trade agreements through voluntary price undertakings are statutorily acceptable<sup>52</sup> through the provisions for price undertakings.

The 1960 decision of the GATT Working Party on ‘Avoidance of Market Disruption’ provided for a programme of work which though did not lead to the elaboration of any generally applicable solutions to the non-discriminatory aspect of the application of the ESMs, but, though indirectly, it did lead to the negotiation of a set of special discriminatory safeguard measures relating to a single specific industrial sector - cotton textiles. This product and source specific provisioning eventually culminated in providing the only multilaterally accepted derogation from the principle of non-discrimination and structured itself in to the ‘Arrangement Regarding International Trade in Textiles’ also commonly referred to as Multi-Fibre Arrangement (MFA). There is a strong opinion amongst the practitioners that this legally provided derogation from the basic MFN provisions of the

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<sup>51</sup> In 1980 a Panel on “*Norway - Restrictions on Imports of Certain Textile Products*” argued that “to the extent that Norway had acted with effect to allocate import quotas ... to six countries but had failed to allocate a share to Hong Kong, its Article XIX action was not consistent with Article XIII”.

<sup>52</sup> **Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Annex 1 to the Marrakesh Agreement Establishing the WTO. Article 8 (price undertakings) part-1.**

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GATT could have been avoided if Article XIX somehow had been capable of being used in a manner so as to address the specific source from where the exports are originating that are responsible for the market disruption. The developing countries accepted a sector specific derogation from GATT framework but simultaneously tried to ensure that no selectivity of ESM be able to creep in to the general framework itself.

The Panel and Appellate Body decisions in cases of application of Emergency Safeguards Measures under the General Agreement also created a fair amount of case law and jurisprudence. With respect to the ‘extent and time frame’ of the application of measures it was accepted in the ‘*Hatter’s Fur Case*’ that it is not possible to determine in advance the level of import duty that may be necessary to be imposed to enable the industry to compete with overseas suppliers and also to indicate in advance the time frame by which the original tariff concessions should be wholly or partially restored. The Working Party left it to the country applying the measure and viewed that “if and as soon as the industry in the US is in a position to compete with imported supplies without the support of the higher rates of import duty<sup>53</sup>”. There is an accepted and agreed understanding that emergency safeguard actions are not intended to protect domestic producers for an indefinite period of time and are temporary and the application of the measure is not the same as the permanent withdrawal of concessions granted by a country. The emergency safeguard actions necessarily, therefore, have to be ‘temporary and progressively liberalized during the period of their application<sup>54</sup>’. The textual provisions in the Article XIX that relates to ‘in critical circumstances<sup>55</sup>’ have been accepted to mean that safeguard action may be taken by an importing country provisionally in critical circumstances, where the injury or the threat of injury is imminent, without prior consultations.

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<sup>53</sup> The 1951 Report of the Working Party on the “*Withdrawal by the United States of a Tariff Concession under Article XIX*” concluded that “action under Article XIX is essentially of an emergency character.

<sup>54</sup> Regarding the duration of action under Article XIX at the 1946 London Preparatory Conference it was stated during the course of the discussion of Article 29, the draft Article corresponding to Article XIX, that “the Article provided only for a temporary relaxation of commitments, not for a permanent revision”. It was also stated that “the general purpose of Article 29 is to deal with an emergency situation.

<sup>55</sup> At the Havana Conference, it was decided to substitute the words “in circumstances of special urgency” for “in critical circumstances” as a clarifying change. However, this was not among those Charter changes which were brought into the General Agreement in 1948.

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The 1984 Report by the Chairman of the GATT Council with respect to the provision “if agreement among the interested contracting parties with respect to the action is not reached<sup>56</sup>” appearing in the text of the General Agreement noted that “contracting parties have been given the right *to re-establish the balance of rights and obligations ... if this is significantly modified ... the threat of retaliation could have a deterrent effect against the application of safeguard actions ... wherever possible, constructive settlements should be reached involving compensation rather than the retaliatory withdrawal of benefits ...*”(emphasis added). While retaliation is legally permissible under the GATT, it has rarely been the ‘final outcome’ in practice in the disputed cases of application of an emergency safeguards measure. It was only recently in the *US vs. EC Banana Regime* and the *Beef/Hormone* cases that GATT/WTO sanctioned retaliations had also been implemented. Prior to this it was only in the *Netherlands v. US Dairy Quotas* case where the retaliation was actually sanctioned by the CONTRACTING PARTIES. However, this lack of practice of retaliation does not in any way suggest that retaliation either as a concept or as a legal provision is irrelevant simply because it has rarely been used by the affected exporting country. The possibility of retaliation has been instrumental in minimizing the misuse of the ESMs and has been a major deterrent because retaliation has repeatedly been threatened during bilateral consultations on the application of an ESM by an importing country. Had retaliation not been permissible under Article XIX (3) emergency safeguard measures would probably have been used much more frequently<sup>57</sup>.

The Panels and the AB<sup>58</sup> while interpreting the provisions in the text of the Article XIX “to suspend ... the application ... of such substantially equivalent concessions” have invariably accepted that the exporting contracting party which has been effected by the emergency safeguards measure has the right to take retaliatory action. However, to create a balance it has simultaneously to be ensured that the suspension of commitments by the

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<sup>56</sup> Article XIX (C) of GATT.

<sup>57</sup> World Trade Organization, *Analytical Index, Guide to GATT Law and Practice, Volume I, Geneva, 1995*, pp. 539-59. (Till 1995 there were only 11 safeguards instances in which an affected country either cited Article XIX: 3 or made a formal request for retaliation.)

<sup>58</sup> Article XIX 3(a) February 1982 Council discussion of the proposed EEC measures under Article XIX: 3 with respect to Australia. Import restrictions under Article XIX applied by Australia on motor vehicles and on footwear were in effect since 1974/75 and the European Communities intentions were notified in 1982, to suspend tariff concessions granted by the Community on selected imports from Australia “in accordance with the procedures of ...”

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exporting country as a retaliation should not be open-ended because the application of a safeguards measure, which is being retaliated against, has a sunset provision. Right to retaliate is an accepted principle, and at best, it is the nature and the extent of this action and whether or not there existed a substantial equivalence in the safeguards measure and in the retaliatory the action taken which can be disputed. The CONTRACTING PARTIES have never “disapproved” of a countermeasure to a withdrawal pursuant to Article XIX: 3(a), and there is only one instance where the CONTRACTING PARTIES took a ‘formal decision not to disapprove’ proposed compensatory action<sup>59</sup>.

Some other provisions that are contained in the text of Article XIX and that lay down the qualifying circumstances and also legitimize application of an emergency safeguard measure also have some ambiguities about them. These required to be clarified through the case law and GATT jurisprudence emerging out of the findings of the Panels and Appellate Body. These ambiguous textual provisions and that required to be given a meaning through Dispute Settlement process include concepts like; i) being imported ... in such increased quantities; ii) the extent and for such time as may be necessary; iii) substantial interest; iv) to suspend the obligation in whole or in part or to withdraw or modify the concession;; and vii) if agreement among the interested contracting parties with respect to the action is not reached.

### **2.4.2. EVOLUTION OF ESMS UNDER GATT.**

The initial ambiguity and rapidly diminishing relevance of some provisions with passage of time led to the recognition of the need to redefine Article XIX of GATT as early as late 60s i.e. well before the start of the Tokyo Round of MTNs. The rapid economic emergence of Japan along with some other developing countries led to the rise in the use of trade limitation measures that were not permitted under the General Agreement which were undermining the very credibility of the entire GATT Multilateral Trading System. The discussions held in the GATT during that period with respect to the trade limiting mechanisms that were alien to the GATT system focussed primarily on the “selectivity in

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<sup>59</sup> World Trade Organization, *Analytical Index, Guide to GATT Law and Practice*. Volume I, Geneva, 1995.(*Turkish action under Article XIX: 3(a) against the US,1952*)



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application of emergency safeguards measures<sup>60</sup>”. The major exporting developing countries were strongly opposed to introduction of any form of selectivity and the importing countries increasingly turned to the use of forms of safeguard actions, which were specifically not authorized under the GATT rules<sup>61</sup>. These measures were termed as ‘grey area’ measures and were seen as substitutes for the emergency safeguard action and their use probably flourished because of the short comings<sup>62</sup> of Article XIX of the GATT.

Application and improvement of GATT disciplines on ESMs has been a topic under discussion from almost the beginning of the GATT system and the subject accordingly was also included in the agenda of the Tokyo Round<sup>63</sup>, which were the first major MTNs with a broad coverage. The Tokyo Declaration<sup>64</sup> desired that the negotiations on ‘emergency safeguards’ should aim, inter alia, to “include an examination of the adequacy of the multilateral safeguard system, considering particularly the modalities of application of Article XIX, with a view to furthering trade liberalization and preserving its results”. However, despite intensive efforts and some narrowing of differences the focus of the negotiations during the MTNs remained on ‘selectivity’<sup>65</sup> of the applied measures and no agreement was reached.

Even after the conclusion of the Tokyo Round the development of disciplines for emergency safeguards remained under constant consideration in the GATT. The pre-negotiation consultations for the future Round of MTNs included many of the old or conventional GATT issues, some of which were genuine leftovers from the Tokyo Round while in some other cases formal follow-up or continued negotiations had already been agreed in the Tokyo Round outcome. The Tokyo Round results; both the ‘process outcomes’ and the ‘tangible products’, combined with the continued consultations created a

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<sup>60</sup> Didier Pierre, *WTO Trade Instruments in EU Trade Law*, Cameron May, London Reprint 2000, p 297

<sup>61</sup> Like Voluntary Export Restraints (VERs) or the Orderly Marketing Arrangements (OMAs). These grey area measures were widely used to limit competition primarily in the automobiles, steel, footwear and electronic products.

<sup>62</sup> The whole structure of bilateral restrictions on trade in textiles and clothing under the MFA was regarded as a substitute for Article XIX safeguard action.

<sup>63</sup> Though Tokyo Round (1973-79) was the seventh round of MTNs but all previous rounds focused on reduction of Tariffs while Tokyo Round was broad, covered Tariffs, non-tariff measures and ‘framework’ agreements. More than hundred countries participated in the negotiations.

<sup>64</sup> Tokyo Declaration adopted in September 1973, launched the Tokyo Round of MTNs.

<sup>65</sup> Sapir André, *Old and New Issues in EC-US Trade Disputes Paper for the Conference on “Transatlantic Perspectives on US-EU Economic Relations: Convergence, Conflict & Cooperation”*, Harvard University, April, 2002.

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significant link between the Tokyo and the next Round of MTNs that followed it and was launched in Uruguay. The precise nature and depth of these linkages, however, varied from subject to subject and depended on the results achieved in the Tokyo Round MTNs. In the area of emergency safeguards (Article XIX), the Tokyo Round negotiations had failed to move forward. Because of the importance significance of the subject to most newly industrialized countries that feared proliferation of non-GATT permitted measure, the negotiations on ESMs could not just be dropped. Therefore, the failure to reach an Agreement was managed through insertion of a process outcome in the Tokyo Round declaration and agreeing to a plan for continued discussions. In the area of emergency safeguards the Tokyo Round outcome was procedurally and substantively linked to the pre-negotiations of the Uruguay Round<sup>66</sup>. The “GATT Work Programme” of 1979 in the area of emergency safeguards also agreed that “continued negotiations on safeguards constitute an essential element ... and should be carried out as a matter of urgency ...<sup>67</sup>” In 1982 CONTRACTING PARTIES again provided that “the contracting parties undertake, individually and jointly ... to bring into effect expeditiously a comprehensive understanding on safeguards to be based on the principles of the General Agreement<sup>68</sup>”.

The September 1986 Punta Del Este ministerial meeting determined the agenda of the upcoming Uruguay Round. Although of decisive significance, the Punta Del Este meeting was in reality only an episode in a long chain of events that eventually lead to the start of a new GATT round of MTNs. The ministerial meeting in Punta del Este not only was the formal starting point of the Uruguay Round but also represented the closure of another process, that of pre-negotiations<sup>69</sup>. The Punta Del Este Ministerial Declaration, which launched the Uruguay Round of MTNs, in the area of safeguards provided that: “A comprehensive agreement on safeguards is of particular importance to the strengthening of the GATT system and to progress in the Multilateral Trade Negotiations ....” The

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<sup>66</sup> Processes of International Negotiations (PINS) Project, *International Multilateral Negotiations, Approaches to Management of complexity*, Josey-Bass, California, USA, 1994

<sup>67</sup> The programme was to follow up on the Tokyo Round results and was concluded on 29 November 1979,

<sup>68</sup> Ministerial meeting of the CONTRACTING PARTIES November 1982, paragraph 7(vi) of the declaration.

<sup>69</sup> Processes of International Negotiations (PINS) Project, *International Multilateral Negotiations, Approaches to Management of complexity*, Josey-Bass, California, USA, 1994

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declaration then goes on to define the contours of the Agreement on safeguards to be negotiated.

## CHAPTER 3: Article XIX: AoS

### 3.1 CHAPTER INTRODUCTION

To deal with the mandated ‘question of emergency safeguard measures under the General Agreement on Trade in Services’ (Article X of GATS) it is essentially required that the concepts behind ESMs, as it is already practiced in the area of merchandise trade, be understood both with respect to the justifications and also the conditionality’s of its application. The development of the concept from under Article XIX of GATT to an independent Agreement on Safeguards (AoS) under the WTO and resulting jurisprudence has created new balances amongst the Members and requires a review. The Chapter 3 looks at evolution of the concept, underlying reasons for introduction of ‘extra-legal<sup>1</sup>’ measures like Voluntary Export Restraints (VERs) and evolution of Agreement on Safeguards (AoS) and its negotiations. The Chapter also analyses the development of case law under Article XIX of GATT and the AoS and some relevant internal law provisions of important economies like the EC and the US. This is not an exhaustive exercise but contrarily it is fairly minimal in nature.

The Chapter also tries to identify the additionalities or the deviations, if any, that have been created by the AoS over GATT Article XIX provisions, to the post UR regime relating to application of ESMs under the GATT/WTO system. The chapter also briefly refers to the decisions of the Panels and Appellate Body when interpreting key provisions of the law and attempts to analyse the AoS. Most Panel and Appellate body rulings discussed relate to the period prior to the 2007; when negotiations were suspended under the WTO on the issues relevant to the thesis. This brings out major concerns that already exist with the concept of ESMs under the GATT and that render it in-coherent.

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<sup>1</sup> General Agreement on Tariff and Trade, Note by the Secretariat *"Inventory of Article XIX actions and other measures which appear to serve the same purpose"* (MTN.GNG/NG9/W/2/Rev.1).

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The Chapter has consciously been kept to a minimum so as to retain space for the substantive work that is to follow, therefore, only touches those issues that have a natural linkage or impact on the manner in which any ESMs can possibly be structured for the services sector drawing from within the GATT/WTO context, this was important as when Ministers agreed at Punta del Este in 1986 to launch Uruguay Round (UR) of Multilateral Trade Negotiations (MTNs); they also decided, “ as part of the Multilateral Trade Negotiations, to launch negotiations on trade in services.... GATT procedures and practices shall apply to these negotiations”.

The chapter in essence provides the basic understanding about the paradigm provided by the model of the ESMs as it original existed under the GATT and that was subsequently improved by the AoS. This Chapter is central to the thesis as it provides the basic benchmarks against which all the other models or options for developing provisions for application of ESMs under the GATS are evaluated. This bench marking was created by multiple influencing factors that among others included the ‘formulation of the mandate’, ‘interpretation by the members’, the concept of ‘single undertaking’ and GATS structure and relationship with GATT and the provisions of the Marrakesh Agreement Establishing WTO.

### **3.2 BACKGROUND: AoS**

The experience of developing countries with the Tokyo Round (TR) Multilateral Negotiations (MTNs) was not very comforting as in major areas of their concern consensus that was sought by them could not be reached. The Tokyo Round outcome can, at the risk of overgeneralisation, be bifurcated into; i) tangible and; ii) procedural component or outcomes. In most areas of interest to the developing countries there were no substantive decisions and the negotiating outcome was simply limited to a process outcome calling for ‘continued negotiations’. While in areas of substantive interests to the developed countries and also where agreement on multilateral level was not possible, sector specific side agreements were concluded and adopted through mechanism of the ‘voluntary codes<sup>2</sup>’ approach. This plurilateral outcome of exhausting multilateral negotiations was daunting

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<sup>2</sup> The side agreements that were agreed under Tokyo Round MTNs included codes on; Customs Valuation, Government Procurement, Standards, Import Licensing, Subsidies, and Antidumping and Countervailing Duties, International Dairy Arrangement, Trade in Civil Aircraft and Bovine meat Arrangement

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for the developing countries as by mid 1980s (that was also the pre-negotiating period for the UR) these developing countries had already been made to accept and subscribe to most of the disciplines of these 'voluntary codes' through different mechanisms including the conditionality attached to the structural adjustment programmes associated with the funding's provided by the International Financial Institutions like IMF and IBRD.

The decisions contained in the Tokyo Round (TR) Declaration were onerous as well as demanding for the developing countries. These agreements were fairly broad with respect to their coverage and also the scope. The TR Agreements also had great depth<sup>3</sup> for the developing countries while for the developed countries these were only multilateralization of their existing domestic practices. The substantive or tangible part of the outcome comprised of elements like deepened liberalization and the emergence and adoption of plurilateral codes. The procedural component of the outcome provided for a broad framework for continued negotiations primarily on two general counts; i) in areas, though included in the agenda of the MTNs but, where negotiations could not be concluded within the framework of the Tokyo Round and; ii) on continued further liberalization of international trade.

The outcome of Tokyo Round MTNs in its substantive or tangible component had totally failed to develop any understanding on the issues facing the concept ESMs under the GATT. However, in its process outcome, the contracting parties agreed to continue the negotiations on the issue of ESMs, which was fairly sensitive especially for advanced developing countries, with respect to any possibility of selectivity or source specific creeping into the application of emergency safeguards measures. The concerns about possible evolution of ESMs especially their non-discriminatory character was important for more advanced developing countries which apprehended that any dilution of the concept of non-discrimination in the application of the ESMs will open the doors to their being frequently subjected to the measures. The advanced developing countries were, therefore,

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<sup>3</sup> The concept of depth of an international agreement reflects 'the extent to which an Agreement requires states to depart from what they would have done in its absence'. The notion of depth varies from country to country and is itself unsatisfactory because it requires speculation about a counter-factual set of actions, because it is impossible to quantify, and because a single agreement may demand large changes in some states and virtually no changes in others.

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the most vocal in the MTNs and provided the intellectual lead to other developing countries and ensured that their views should sound as voice of consensus representing all developed countries. The advanced developing countries also effectively used external available platforms to forge results, within the developing countries, of their preference on the issues involved through discussions in forums like ‘Group of 77’, South Centre Secretariat<sup>4</sup> and UNCTAD. The issues surrounding the ESMs were complicated and gaps between different viewpoints of major stakeholder were so large that these could not be bridged during the negotiating process; simultaneously the issue was also important enough for a group of important developing countries that it could not be abandoned outright, therefore, was dealt through a process outcome understanding.

The agenda developed after a long drawn negotiating process for the Uruguay Round consisted partly of the unsettled issues from the Tokyo Round like the deadlocked negotiations on safeguards (Article XIX in GATT) and of leftovers from the Tokyo Round comprising of the trade problems that important actors in the GATT process considered to be improperly solved in earlier rounds of negotiations. The Punta Del Este declaration recognized the need for “A comprehensive agreement on safeguards is of particular importance to the strengthening of the GATT system and to progress in the MTNs” and provided for negotiations for an “agreement on safeguards” that; i) shall be based on the basic principles of the General Agreement; ii) shall contain, inter alia, the elements of transparency, coverage, objective criteria for action including the concept of serious injury or threat thereof, temporary nature, structural adjustment, compensation and retaliation, notification, consultation, multilateral surveillance and dispute settlement; and iii) shall clarify and reinforce the disciplines of the General Agreement and should apply to all contracting parties<sup>5</sup>”, this mandate given by the Ministers was a primarily a repetition along with some elaboration of what was agreed at the 1982 Ministerial but in elaboration the specific element of non-discrimination was conspicuous by absence.

### **3.3 AGREEMENT ON SAFEGUARDS (AoS)**

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<sup>4</sup> South Centre, *Safeguards in GATSs Important for Developing Countries*, Geneva September 2005

<sup>5</sup> GATT Punta Del Este Declaration Ministerial Declaration of 20 September 1986

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In the framework created for the conduct of the negotiations under the Uruguay Round of MTNs a separate negotiating group on emergency safeguards was created with a strong and well defined but complex mandate. The negotiations in the group on emergency safeguards were primarily an extension of a process that was already underway from the Tokyo Round, therefore, the negotiating group was able to get down to real work quickly and substantive proposals for negotiations were tabled before the Group as early as May 1987, when some parallel negotiating groups established other agenda items were still struggling to define their working parameters. Success of the negotiations on Emergency Safeguards in the UR was regarded by some as essential to restore the credibility of the GATT system which provided the basic rules for conduct of international trade in goods. The issues confronting the negotiators were already fairly well known and by as early as April 1987 the Group also had before it a Secretariat Note on “Work Already Undertaken in the GATT on Safeguards<sup>6</sup>”. The note detailed the history of discussions on emergency safeguards under the GATT and also “listed the whole array of reasons as to why the previous negotiations on the emergency safeguards had failed and also covered almost all of the main problems with which the UR negotiators were required to grapple<sup>7</sup>”. The main issue of disagreement during the negotiations was simply whether or not the emergency safeguard measures should be allowed to be applied on a selective basis, this has been a controversial issue and debated intensely from almost the inception of the GATT<sup>8</sup>.

The Uruguay Round of MTNs finally led to development of an independent Agreement on Safeguards (AoS). The use of temporary trade restrictions under its Article XIX and the Agreement on Safeguards authorized under the GATT. However, the advent of the WTO in 1995 added new structures of safeguard provisions contained in the Agreements that covered new areas of trade that were integrated into the system, like new safeguards structure is found in the Article 5 of the Agreement on Agriculture and the General Agreement on Trade in Services’ ( Article X). The Article 6 of now defunct Agreement on Textiles and Clothing (ATC), which transitioned the full integration of textile trade in to the WTO, also provided for a sector specific transitional safeguard regime. Subsequently a

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<sup>6</sup> General Agreement on Tariff and Trade *Work Already Undertaken in the GATT on Safeguards* Document No MTN.GNG/NG9/W/I dated 7 April 1987.

<sup>7</sup> Croome John, *Reshaping the World Trading System, A history of the Uruguay Round*, World Trade Organisation, 1998. p.54

<sup>8</sup> Art. 2.1, AoS



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China specific WTO-plus safeguards regime was created at the time of country's accession in 2001.

The Agreement on Safeguards (AoS) introduces a number of innovations over Article XIX and practices that had over the long years crept into the realm of ESMs. The AoS established the rules for application of the emergency safeguards in trade and goods and “created a new balance of rights and obligations”<sup>9</sup> between the importing Member countries suffering or threatened by ‘serious injury’ and exporting Member country suffering lack of predictability and disruption to its trade flows. The Agreement forbids ‘grey area measures’<sup>10</sup>, and seeks through this prohibition to “re-establish control over safeguards”<sup>11</sup>. The Agreement seeks to end the use of illegal grey area measures through two devices. The first is a simple prohibition on them – Article 11 (1) (b) of the AoS provides that ‘...a Member shall not seek, take or maintain any voluntary export or the import side...’ Second, to diminish the perceived incentives to resort to grey area substitutes, the AoS alerts the rules regarding compensation and retaliation and provides that “All members using safeguards ‘shall endeavour to maintain a substantially equivalent level of concessions’, i.e. to negotiate trade compensation. But if negotiations over compensation are unsuccessful, no right of retaliation exists during the first three years of a safeguard measure that conforms to the legal requirements of the agreement and that follows an absolute increase in the level of imports [Article 8(3)]. Thus, the ‘threat point’ is plainly altered in the compensation negotiations, and nations adversely affected by safeguards actions must settle for less in compensation lest they walk away with nothing for three years”<sup>12</sup>. Under the Agreement on Safeguards (AoS) the automatic right to retaliate against an application of a safeguard measure has been suspended for the first three years, “provided that the safeguard measure has been taken as a result of an absolute increase in imports and that such a measure conforms to the provisions”<sup>13</sup> of the Agreement.

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<sup>9</sup> Macgregor Anne. Case Comment. *The "Unforeseen Developments" Claim in WTO Safeguards Cases and the Pending Panel Against United States Measures on Steel: An Easy Win for the EU*, International Trade Law & Regulation 2002.

<sup>10</sup> Article 11.1 (b) VERs, OMAs "or any other similar measures on the export or the import side"

<sup>11</sup> AoS Chapeau para2

<sup>12</sup> Guzman Andrew and Alan O Sykes Edward Elgar (Edited), *Research Handbook in International Economic Law*, USA, 2007. p.66

<sup>13</sup> Article 8.3 of the AoS

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The Agreement maintains the general non-discriminatory application requirement<sup>14</sup>, but on balance it creates a possibility and does allow an importing country to apply emergency safeguards measures selectively if imports from certain countries have increased in disproportionate percentage<sup>15</sup>. It defines important terms that justify application of an ESM such as 'serious injury'<sup>16</sup>, calls for consultations with affected countries<sup>17</sup>, makes safeguards measures time bound<sup>18</sup> and also lays down that any imposed measures need to be progressively liberalised<sup>19</sup> thus ensuring link of ESMs with adjustment. The Agreement also lays down basic parameters for application of measures like if safeguards measures are taken by an importing country in the form of quantitative restrictions (QR) on imports then these QRs are not allowed to be below the average level of imports over the past three years<sup>20</sup>. Other important elements of the AoS include procedural aspects of application such as the fact that import duties imposed on the product on which provisional emergency safeguards measure has been applied are to be reimbursed should the outcome of the investigation not show serious injury caused by imports<sup>21</sup> i.e. there is no definitive application of the measure.

### 3.3.1. ARTICLE XIX OF GATT AND AOS

The emergency safeguards regime under the WTO is regulated both by the Agreement on Safeguards and Article XIX<sup>22</sup> of the General Agreement. The defence under GATT Article XIX is available as much for violations under GATT as for violations under the Agreement on Safeguards. The Panel on *US-Line Pipe* rightly observed, "A contrary interpretation would ignore the close interrelation between Article XIX and the Agreement on Safeguards. This interrelationship of the AoS with Article XIX of the General Agreement is specifically spelled out in Article 1 of the AOS which reads as "This

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<sup>14</sup> Article 2.2 of the AoS

<sup>15</sup> Article 5.2 (b) of the AoS

<sup>16</sup> Article 4.1.(a) of the AoS

<sup>17</sup> Article 12.3 of the AoS

<sup>18</sup> Article 7.3 and 9.2 of the AoS, provides a maximum of eight years for developed countries and 10 years for developing countries.

<sup>19</sup> Article 7.2

<sup>20</sup> Article 8.1 of the AOS

<sup>21</sup> Article 6 of the AOS

<sup>22</sup> World Trade Organization; *United States: Definitive Safeguard Measures on Imports of Certain Steel Products*: AB-2003-3: Report of the Appellate Body. The Report highlights the 'inseparable package' and 'inseparable relationship' between GATT Article XIX and the Agreement on Safeguards

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Agreement establishes rules for the application of safeguard measures which shall be understood to mean those measures provided for in Article XIX of GATT 1994”.

Article XIX (GATT) and the AoS are both integral parts of the WTO Agreement<sup>23</sup>, are binding on all WTO Members and both require to be complied to when applying an emergency safeguard measure<sup>24</sup>. However, like in case of similar other WTO Agreements, the relationship between the Article XIX of GATT and the AoS was questioned from the very beginning of the WTO. The variance in the wordings of the Article XIX and AOS also gave rise to the controversy.

### 3.3.2. UNFORESEEN DEVELOPMENTS

The requirements of “unforeseen developments” are unambiguously enshrined in Article XIX of the GATT, but not explicitly repeated in the AoS. According to some developing country Members it is a legally meaningful and viable concept, despite the degree of subjectivity involved in defining it. Simultaneously there is another view which is mostly shared by the developed countries that there is no need for the explicit inclusion of the wordings of ‘unforeseen developments’ as the occurrence of ‘serious injury’ already implies a drastic change in trading conditions, which had not been foreseen at the time when the binding commitments were undertaken by a country. Some members also have doubts whether the notion of unforeseen developments under GATT was sufficiently precise to prevent abuse and feels that there is a need for objective tests of emergency situations, based on readily available information or standard practices.

Article XIX of GATT contains the concept and requirement of “unforeseen” developments as its base and then goes on to unfold itself further, this provision or prerequisite is not replicated in the Uruguay Round Agreement on Safeguards.

Paragraph 1 of GATT Article XIX is worded as:

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<sup>23</sup> World Trade Organisation, *The Legal Texts, The Results of Uruguay Round of Multilateral Trade Negotiations*, Cambridge University Press, Cambridge. 1999. Marrakesh Agreement establishing WTO Article II: 2 p 4. The Article provides that “the Agreements and associated legal instruments included in Annexes 1, 2 & 3 ... are integral parts of the WTO Agreement, binding on all Members”.

<sup>24</sup> Article 11.1 of the AOS provides that a safeguard need to be applied both in accordance with GATT Article XIX and the AOS.

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If, as a result of *unforeseen developments* and of the effect of the *obligations incurred* by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product...”

Whereas the corresponding Article 2.1 of the AOS provides that:

A member *may apply a safeguard measure only if that Member has determined that a product is imported into its territory in such increased quantities, absolute or relative to domestic production and under such conditions as to cause or threaten to cause serious injury to the domestic industry....*

The provisions laying the precondition relating to ‘unforeseen developments’ and ‘obligations incurred’ that are contained and central to Article XIX of the General Agreement have not been repeated in the AoS. The AoS makes no reference either to “*unforeseen developments*” or to the “*effect of the obligations incurred by a contracting party under this Agreement*”.

This difference in the wordings was required to be clarified by the dispute settlement system to determine that whether the requirements under GATT Article XIX were still valid in invoking an emergency safeguards measure after coming into effect of the WTO or not as AoS makes no explicit reference to “unforeseen developments” or to the “effects of the obligations incurred”. This discrepancy in the wordings in the text of Article XIX and AoS was a contentious issue in several of the disputes<sup>25</sup> as the absence of the specific qualifying wordings was interpreted and understood by some countries and Panel members

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<sup>25</sup> World Trade Organisation, Appellate Body reports in cases of *Korea-Dairy (2000)*, *Argentina-Footwear (2000)*, *US-Frozen Lamb (2001)* and *US-Steel (2003)* all Reports in these cases discuss the issue of ‘unforeseen developments’ in detail.

to mean that the requirement of “unforeseen development” is no longer applicable<sup>26</sup> under the AoS.

The issue of non-replication of the words or the concept of “unforeseen developments” in the text of the Agreement was confronted in the very first dispute on emergency safeguards, which reached the Panel stage under the AoS<sup>27</sup>. Korea in *Korea--Dairy Products* argued (supported by the United States) that the provisions contained in text of the Agreement on Safeguards after establishment of the WTO now establish the sole articulation of the rules that must be followed in the application of an emergency safeguard measure<sup>28</sup>. However, the European Commission (EC) during the deliberations argued otherwise before the Panel and was of the view that all WTO obligations are generally cumulative and that the provisions of Article XIX of GATT even after the AoS coming into force are still fully applicable. In terms of the interpretations of the EC there was no conflict between the provisions of the first paragraph of Article XIX of the GATT and of Article 2.1 of the AoS. The Panel in this case agreed with Korea that a Member applying a safeguard measure need not prove that an increase in imports was the result of an ‘unforeseen development’ implying that the clause did not add a condition for the adoption of a safeguard measure and the fact that Korea had failed to examine whether the import trends of the products under investigation were the result of ‘unforeseen developments’ was not a violation of Article XIX: 1(a) of the General Agreement. The Panel also reiterated the distinction between ‘unforeseen’ and ‘unforeseeable’, which was also drawn by the Appellate Body in *Korea—Dairy Products*<sup>29</sup>. These findings of the Panel were, however, substantively modified shortly thereafter by the Appellate Body.

Turning to a literal interpretation, the AB has initially favoured a subjectivist approach by equating “unforeseen” to “unexpected” in the important *Hatter's Fur case*, and this approach has consistently been followed in other disputes like *Footwear case*, *Korea--*

<sup>26</sup> The Panel in *Korea Dairy* for example held that GATT Article XIX does not impose any obligation to investigate the ‘unforeseen developments’.

<sup>27</sup> *Korea--Dairy Products*; Korea in 1997 imposed ESMs on imports of skimmed milk powder and preparations in the form of quotas. The European Communities challenged the imposition of the measures. The United States participated as a third party in terms of the ... of the DSU

<sup>28</sup> World Trade Organisation, *Korea--Definitive Safeguard Measure on Imports of Certain Dairy Products*, Report of the Panel, WT/DS98/R, June 21, 1999, p. 26-46.

<sup>29</sup> World Trade Organization, Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products* (“Korea – Dairy”), WT/DS98/AB/R, adopted 12 January 2000. The AB was of the view that the term ‘unforeseen’ implies a lesser threshold than the ‘unforeseeable’.

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*Dairy Products*. The Reports practically complemented the subjective dimension of unforeseen with the requirement of an objective un-foreseeability. “This trend towards the general obligation of un-foreseeability is in line with the general approach in public international law towards the “fundamental change of circumstances”<sup>30</sup>.

The Appellate Body, regarded that the wording “as a result of unforeseen developments” appearing in Article XIX: 1(a) of the General Agreement was, however, not an independent condition on its own for the application of an emergency safeguard measure but it did describe certain circumstances which must be demonstrated as *a matter of fact* in order for an application of an emergency safeguard measure to be consistent with the provisions of Article XIX of the GATT 1994 and the AoS. These findings of the Appellate Body that ‘unforeseen developments’ had to be explored by the country imposing the safeguard measures, were effectively used a year later by Australia and New Zealand in *Lamb Meat* case when they successfully argued<sup>31</sup> that the United States had not fulfilled this requirement<sup>32</sup> before imposing emergency safeguards on their lamb meat exports. The Panel also examined the relationship between GATT Article XIX and the Agreement on Safeguard and reaffirmed the findings in *Korea—Dairy Products*, and *Argentina—Footwear* that the ‘unforeseen development’ is a factual circumstance, which has to be demonstrated as a matter of fact<sup>33</sup> and actual reality based exercise.

The Appellate Body’s rulings in the *Lamb Meat* case fine-tuned the legal requirements on “unforeseen developments” for the domestic authorities entrusted with investigating injury in cases of possible application of emergency safeguards. AB was of the view that “as Article XIX:1(a) of the GATT 1994 requires that ‘unforeseen developments’ must be demonstrated, as a matter of fact, for a safeguard measure to be applied, the existence of ‘unforeseen developments’ is, in our view, a ‘pertinent issue of fact and law’, under Article

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<sup>30</sup> Rodri guez Pablo Marti n, *Safeguards in the World Trade Organization Ten Years After: A Dissociated State of the Law?* Journal of World Trade 41(1): 159-190, 2007. p 162

<sup>31</sup> United States--*Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat*, Report of the Panel, WT/DS177/R and WT/DS178/R, December 21, 2000, paras 7.4-7.45, pp. 25-33.

<sup>32</sup> The US had ignored this requirement of the law and as a matter of fact had not included this legal demand in its investigation processes.

<sup>33</sup> World Trade Organization, Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000. The AB held that the phrase ‘unforeseen developments’ in Article XIX: 1 is grammatically linked to both ‘in such increased quantities’ and ‘under such conditions’.

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3.1, for the application of a safeguard measure, and it follows that the published report of the competent authorities, under that Article, must contain a ‘finding’ or ‘reasoned conclusion’ on ‘unforeseen developments’.

The Appellate Body’s comment in *Argentina – Footwear Safeguard* demonstrates that the required exercise is a reality-based discipline; and the AB had focused on the concept of a ‘clear showing’ of the activity. This concept differs from the presumption of nullification or impairment observed in the law of expectations, which shows that the exercise of a right by one country could give rise to a claim for reparation from another country, a possibility contemplated in the remedy of negotiated compensation<sup>34</sup> under DSU<sup>35</sup>.

The Appellate Body (AB) agreed with the Panel to the extent that the WTO Agreement is a “Single Undertaking” and that Members must comply with all of the WTO obligations. The AB simultaneously concluded that the provisions of both; Article XIX: 1 of the GATT 1994 and Article 2.1 of the AoS apply to any emergency safeguard measure taken under the WTO Agreement. AB further stated that it was under a duty to apply the principle of effectiveness in the interpretation of treaties and also read all applicable provisions in a way that gives meaning to all of them harmoniously.

### **3.3.3. INCREASE IN IMPORTS AND SERIOUS INJURY.**

The AoS provides (Article 2.1) “that safeguard measures may be applied only if a product is imported in such increased quantities (i.e. volumes, not values), either in absolute terms or relative to domestic production, as to cause or threaten to cause serious injury to domestic industry. Here, the increase of imports is measured in relation to domestic production, unlike in anti-dumping and countervailing scenarios, where the relevant comparator may be either domestic production or consumption. The possibility of “relative increases” appears to imply that imports may even fall, as long as by less than domestic production, and still fulfill this requirement. There is no specific numerical threshold in terms of import growth that must be exceeded before action can be taken. However, the

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<sup>34</sup> Carmody Chios *A Theory of WTO Law* Journal of International Economic Law 11(3), 527–557

<sup>35</sup> Article 3.8 of ‘Understanding on Rules and Procedures Governing the Settlement of Disputes’ reads as “In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment...”.

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Appellate Body also clarified that not all increased quantities of imports (absolute or relative) might allow for safeguard action<sup>36</sup>.”

To justify an application of emergency safeguard measure increase in imports<sup>37</sup> must “be such” so as to *cause or threaten to cause serious injury*<sup>38</sup>. However, in the case of *US-Lamb Meat*, the Appellate Body opined that “the standard of ‘serious injury’ set forth in Article 4.1(a) is, on its face, very high. In the *US-Wheat Gluten* Safeguard AB clarified that, “we referred to this standard as ‘exacting’ . . . We believe that the word ‘serious’ connotes a much higher standard of injury than the word ‘material’<sup>39</sup>”. “Serious injury is a high threshold, which raises the expectation that evidence of negative developments in injury indicators should be significant<sup>40</sup>”. The serious injury has been defined in AoS as a significant “overall impairment” in the position of a domestic industry<sup>41</sup>, and the competent authority is required to “evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment”<sup>42</sup>.

For an emergency safeguard measure to qualify as to have been rightly applied a causal link between the increased imports and the injury<sup>43</sup> to the domestic industry has necessarily to be established recognizing the fact that the concept of ‘serious injury’ for application of an ESMs has been determined to be a level of injury above the “material injury” standard used in case of investigations relating to antidumping<sup>44</sup>. This issue of causation has been the subject of controversy in some of the cases addressed by the Appellate Body<sup>45</sup>. Despite the availability of reliable statistical data in the international merchandise trade the

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<sup>36</sup> World Trade Organization, World Trade Report 2009, Geneva. p.53

<sup>37</sup> Article 2.1 of AOS

<sup>38</sup> Article 4.1 (a-b) of the AOS defines serious injury.

<sup>39</sup> Appellate Body Report *US-Wheat Gluten* para124

<sup>40</sup> Stevenson Cliff, *Are World Trade Organization Members Correctly Applying World Trade Organization Rules in Safeguard Determinations?* Journal of World Trade 38(2): 307- 329, 2004 p 312

<sup>41</sup> AoS Article 4.1.a

<sup>42</sup> AoS, Article. 4 .2 (a).

<sup>43</sup> Article 4 .2 (b) AOS

<sup>44</sup> Appellate Body Report *US-Wheat Gluten* Para. 149

<sup>45</sup> Issues on injury and causation were ruled upon in *US-Lamb Meat*, *US-Wheat Gluten* and *Argentine-Footwear*. The Appellate Body declined to rule on the issue in *US-Steel*.



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requirement of evaluating the causes of serious injury or threat thereof to the domestic industry, is not simple. For the application of the emergency safeguards measures a causal link between the imports and injury and its attribution<sup>46</sup> to imports is required to be established which is a demanding agenda for the domestic enforcement institutions.

The timings of injury being experienced by the domestic producers and the increase in imports may coincide but in such circumstances it cannot be ruled out with certainty as to which way the causality between imports and injury is moving in reality. This is especially so when there is only a relative increase in imports, i.e. when the market has shrunk and this has hit the domestic suppliers harder than the foreign suppliers, whose supplies might have remained unchanged. Here the questions arise regarding the methodology to examine such a relationship. The Appellate Body has chosen to follow causation as a correlations approach and has ruled that a coincidence of a higher level of imports and a lower level of domestic activity usually constitutes sufficient evidence that imports have *caused* injury<sup>47</sup>.

The AoS does not require that the ‘increased imports’ necessarily have to be sufficient enough to alone cause injury or even the fact that these increased imports should be the most important cause of injury<sup>48</sup>. In *Lamb and Wheat Gluten*, the AB had recognized multiple causation and reversed the Panel's finding which had demanded that increase in imports to be the only and efficient cause (in and of themselves) of the serious injury. Accordingly, ‘the causal link’ between increased imports and serious injury may exist, even though other factors are also contributing ‘at the same time’, to the situation of the domestic industry<sup>49</sup>.

The AoS only requires that injury caused by other factors is not attributed to import, which is commonly referred to as the non-attribution requirement. This has also been interpreted

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<sup>46</sup> This principle of attribution is common to all the three contingency protection instruments under GATT.

<sup>47</sup> *United States: Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities: Report of the Panel*; Para. 8.95. The Panel felt that “However, this could also reflect market conditions where decreased domestic supply immediately causes increased imports”.

<sup>48</sup> *US Wheat Gluten* Paras. 69-74. The investigating authorities should determine whether the increase in imports, not alone, but in conjunction with the other relevant factors is cause of serious injury

<sup>49</sup> AB Report, *US - Wheat Gluten*, Para. 67 (emphasis is from the report).

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to mean that the factors causing injury need to be distinguished and separated<sup>50</sup>. However, once this has been done it is enough for the investigating authority to show that increased imports, not alone but in conjunction with other relevant factors have caused serious injury<sup>51</sup>. It is difficult to see reason of distinguishing various injury factors, if it is not to show that the import factor is at least an important factor, however, the AoS only requires separation and not ranking of different injury factors<sup>52</sup>.

Article 2.1 of the AoS speaks of a product ‘being imported’ which appears to imply that it is necessary for the competent authorities to examine recent imports, and not just simply trends in imports during any arbitrary period of last several years. Appellate Body in *Argentina--Footwear* with respect to the attribution of increased imports had ruled that ‘such increase’ must be “recent enough, sudden enough, sharp enough and significant enough” so as to cause serious injury and that it was not sufficient to examine “simply trends in imports during the past five years – or, for that matter, during any other period of several years<sup>53</sup>”. This statement precluded the simple comparison of import levels at the end points of the investigation period, as Argentina had done in this case.

However, in another case, “the Appellate Body gave importance of import trends over the entire period of investigation along with an explanation of how these developments supported the investigation authority’s determination that increases in imports were such as to cause/threaten to cause serious injury to domestic industry<sup>54</sup>. In *US – Line Pipe*, the panel pointed out that a finding of increased import quantities was still possible even if imports declined for part of the period of investigation (including towards the end of the investigation period), as long as there clearly was an increasing trend in imports over the relevant time period as a whole<sup>55</sup>”.

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<sup>50</sup> *US-Lamb* para. 178-180) In *US-Lamb Meat*, the Appellate Body states that: “. . . the final identification of the injurious effects caused by increased imports must follow a prior separation of the injurious effects of the different causal factors. If the different factors are not separated and distinguished from the effects of increased imports, there can be no proper assessment of the injury caused by that single decisive factor”.

<sup>51</sup> *US-Wheat Gluten* Para. 78, *US-Line Pipe* Para. 209.

<sup>52</sup> Article 4.2 (b) of the AOS requirement only.

<sup>53</sup> World Trade Organisation, *Argentina--Footwear*, the Appellate Body decision, document No WT/DS121/R, para.131 and 130

<sup>54</sup> Appellate Body Report on *US – Steel Safeguards*, para. 354- 355 and 374 and Panel Report on *US – Line Pipe*, Para. 7.207

<sup>55</sup> World Trade Organization, *World Trade Report 2009*, Geneva. p.53

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The reason for separating the injury factors could be the Appellate Body's interpretation of Article 5.1 of the AoS which limits the application of a safeguard measure to what is required (*US-Line Pipe, paragraph. 260*). "to prevent or remedy serious injury and to facilitate adjustment". Thus under AoS even though the increased imports do not alone need to cause serious injury, the eventual safeguard measure must only remedy the serious injury that has been caused by the increased imports. The import factor is, therefore, necessarily required to be distinguished from other factors<sup>56</sup> to ensure that the safeguard measures are only taken to the extent that necessary to *prevent injury caused by imports*<sup>57</sup>.

### 3.3.4. DOMESTIC INDUSTRY, LIKE PRODUCTS

The definition of the domestic industry under the SGA includes producers of both 'like' and 'directly competitive' products and both of these criteria leave some room for interpretation as to the exact delimitation of the domestic industry. In *US – Lamb*, the United States' authorities included both growers and feeders of live lamb as parts of the domestic industry of lamb meat, apart from lamb breakers and packers and argued that those four groups were "producers as a whole" of the like product, because they constituted a continuous line of production and as such had a substantial coincidence of economic interests (Appellate Body Report on *US – Lamb*, Para. 89). In *the US – Lamb*, Appellate Body was fairly clear as to what determines the domestic industry and viewed that:

As we have indicated, under the Agreement on Safeguards, the determination of the "domestic industry" is based on the 'producers ... of the like or directly competitive products'. The focus must, therefore, be on the identification of the products, and their 'like or directly competitive' relationship, and not on the processes by which those products are produced<sup>58</sup>.

The concept of 'like' or 'directly competitive' products is one of the core concepts in all contingency protection frameworks that have been provided under the GATT. A number of criterion are employed for determining whether products can be regarded as alike or not and the use of the criteria varies appreciably depending on the trade remedy mechanism

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<sup>56</sup> The Appellate Body in the *US-Lamb* case accepted that this method left many methodological questions relating to the non-attribution requirement of Article 4.2 (b) unanswered (*US-Lamb Para. 178*).

<sup>57</sup> This provision is similar to the 'lesser duty provision' that exist in Antidumping and Countervailing Duty Agreements.

<sup>58</sup> Appellate Body on *US – Lamb*, Para. 94.

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that is being contemplated to be applied. The determination of the fact of what constitutes a like product has, generally been made on a case-by-case basis, allowing for “a fair assessment in each case of the different elements that constitute a “similar” product<sup>59</sup>”.

The concept of ‘like’ product has been used in GATT practice not only in the sense of *identical* or *equal* products but also for products with similar qualities to the extent of being mutually substitutable. Panels have recognised; that it is hard for two individual products to be exactly the same in all aspects, but the products to be regarded as ‘like’ can rather share some common features, such as physical characteristics or end uses, while these may simultaneously differ in certain other characteristics and in most cases governments also use such differences in establishing the regulatory distinctions. The GATT dispute settlement system has used this criteria in interpreting this concept of ‘like products’ that exists under different GATT provisions is that “which differences between products may form the basis of regulatory distinctions ... (and) which similarities between products prevents (such distinctions)”<sup>60</sup>.

The concept of “like or directly competitive product” is not defined in the body of the Agreement on Safeguards. Article XIX, 1 (a) of the GATT requires a comparison between the imported products and the domestic product of the importing country, where ‘injury’ is being inflicted on the producers of the domestic product as consequence of the surge in importation. Article 2.1 of the AOS replicates the words used in Article XIX of GATT and refers to increased imports of ‘like’ or ‘directly competitive products’. The same concept of ‘like’ products was also used in Article 6.2 of the now defunct Agreement on Textile and Clothing. The structure of the provisions relating to ‘like’ or ‘directly competitive products’ in Article XIX of GATT and also in the AOS seem to emphasize the exceptional character which is coupled with the concern for possible abuse of the provision. This may lead one to expect application of concept in the narrow scope of the term<sup>61</sup>.

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<sup>59</sup> *Working Party Report on Border Tax Adjustments* (L/3464, adopted on 2 December 1970, 18S/97, 102, para.18). *The Panel Report on “United States - Measures Affecting Alcoholic and Malt Beverages”* (DS23/R, adopted on 19 June 1992, 39S/206, para.5.24).

<sup>60</sup> *Panel Report on “Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages”* (L/6216, adopted on 10 November 1987, 34S/83, 113-115, para.5.5).

<sup>61</sup> Choi Won-Mog, *Like products in International Trade, Towards a Consistent GATT/WTO Jurisprudence*. Oxford University Press, Oxford. 2003 p.146

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The drafting history of the GATT, however, does not seem to support this expectation. The London draft of the ITO charter employed the term ‘like or similar products’ and this language was changed at the New York Conference with ‘like or directly competitive products’ which was incorporated in the General Agreement. This change of words made the scope broader<sup>62</sup>. In the context of Article XIX:1, the two concepts are applied concurrently and whether or not the products are ‘like’ or ‘directly competitive’ makes no material difference to the end result, unlike in the contexts of Article III:2 and Article XI:2 of the General Agreement.

The term ‘like products’, however, has been defined in Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (commonly known as Antidumping Agreement). Article 2.6 of the Antidumping Agreement provides that the; “like product shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration”. The definition of ‘like product’ appearing in the Anti-dumping Agreement is only illustrative by analogy. In defining ‘like products’ relevant factors can include general appearance and usage of products, and whether production of the imports and production of domestic products constitute essentially one and the same industrial process or two different processes. However, the products are directly competing with each other must be determined by product substitutability from the consumer’s perspective. This test has been used in *Quartz watches*, certain categories of glass, *Footwear (France)* and *Footwear (Italy)*. In *Quartz watches*, analogue and digital watches were determined to be directly competing products, as ostensibly interchangeable products which are suitable for the same purposes<sup>63</sup>. Although for determination of injury to domestic industry while creating linkage and causality with increased imports identification of the ‘like’ relevant product is crucial. The definition provided even in the Antidumping Agreement is also inconclusive and, it is difficult to draw any clear principles for the identification of the ‘like products’ from the existing case law. This difficulty and

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<sup>62</sup> The Cuban delegation at the New York conference described the term to mean “different in form but yet competing for the same market”

<sup>63</sup> Certain categories of glass, [1986] O.J. CJ28/7. Beach slippers, [1986] O.J. L340/30; [1987] O.J.L378/30. Quartz watches, [1984] O.J. L106/31, at para.10. Stoneware, [1982] O.J. L369/27.

lack of elaborate case law has created a situation where institutions investigating trade remedy measures in Member countries have a substantial amount of discretion in deciding which products are considered to fall within a category<sup>64</sup>. At the risk of oversimplification, there appear to be two broad approaches that can be distinguished. The first approach has been to define likeness *a priori* in terms of product characteristics, end-use, tariff classification, or a combination of these elements<sup>65</sup>. The WTO case law<sup>66</sup> provides some directions on using an ‘effects’ test when comparing ‘directly competitive’ products. The effects test could include an analysis of the elasticity of substitution across products or cross-price elasticity between products. The determination of domestic industry to gauge injury or effect and remove the cause of increased imports is important.

### 3.3.5. CONSULTATION, RETALIATION RIGHTS AND OTHER PROVISIONS.

Article XIX of GATT and Article 3 of the AoS both are parallel provisions and require countries contemplating to apply an ESM to consult<sup>67</sup> with the exporters of the products before taking emergency safeguards actions and the importing country is only in case of ‘critical circumstances’ allowed to take an ESM prior to the mandated consultations. However, over the years imposing safeguard measures without prior consultations with the exporters has evolved into a common practice and importing countries invariably take a plea of existence of the ‘critical circumstances<sup>68</sup>’. The AoS stipulates that the importing country when imposing an emergency safeguard measure should “endeavour to maintain substantially equivalent level of concessions and other obligations... between it and the exporting Member which would be affected by such a measure ...<sup>69</sup>” This stipulation in practical terms means that a country imposing a safeguard measure against a certain product should ‘compensate’ its affected trading partners by granting a substantially equivalent concession in another area and thus create a new balance in the overall level of

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<sup>64</sup> Clough Mark, *WTO and EC Safeguard Measures – Legal Standards and Jurisprudence*, Int. T.L.R. 2003 9(3), p.72

<sup>60</sup> Panel Report on “*Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*” 1987 (GATT, 1988).

<sup>66</sup> Japan - Taxes on Alcoholic Beverages - Report of the Panel, U 96-2651, WT/DS8/R, WT/DS10/R, WT/DS11/R, 11 July, 1996.

<sup>67</sup> Article XIX (2) of GATT.

<sup>68</sup> Article 6 of the AOS.

<sup>69</sup> Article 8.1 of the AOS.

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concessions. At the minimum a country is required to at least consult the affected countries before imposing the emergency safeguards measure.

The AoS also provides for a period of three years after the imposition of a safeguard measure, during which the exporting countries affected by the safeguards measure may not retaliate<sup>70</sup>. This provision in the AoS makes the application of ESMs relatively easy and this prohibition is a substantive change from the regime provided in the past by the Article XIX of GATT. In pre-WTO regime, reciprocity was the dominant concern and the predominated mechanism, but now by virtue of insertion of Article 8.3 of the AOS a basic right of retaliation which was available to an exporting country under GATT 1947 has been since been removed.

### **3.3.6. MEASURES APPLIED, LINKAGES**

The only obligation created by Article 5.1 of the AoS with respect of the type of ESM measure is to” choose measure most suitable for achievement of the objectives” and the type of measure to be applied is not prescribed by the WTO rules. Safeguard measures can, therefore, take different practical forms, such as tariff surcharges; which can be specific, ad valorem, variable, or a combination thereof. The measures can also be in form of quotas or pure quantitative restrictions, or simple tariff-rate quotas.

The analysis of linkages and fair amount of dependency between any application of an ESM and other provisions of the General Agreement are essentially required to evaluate the validity of the safeguards measure applied. The decisions of the Panels and the AB, in the cases of application of emergency safeguard measures by importing countries that were brought before dispute settlement system, have also developed a substantive case law over the years on the relationship and mutual dependencies amongst different provisions of the General Agreement. Linkages with Article I and XIII of the General Agreement have already been touched during our discussions concerning ‘non-discriminatory invocation’ of Article XIX. Some other provisions; like those contained in Article XVIII: A, Article

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<sup>70</sup> Art 8.3. AOS. This only needs to be adhered to if the safeguard measure was taken in response to an absolute (not only a relative) increase in imports.

XXIII<sup>71</sup> and Article XXVIII<sup>72</sup> of the General Agreement also have direct relationship with Article XIX but in most cases these only have a marginal bearing on the development of the case law. Therefore and because of the limitations these are not being discussed here<sup>73</sup> in any detail.

### **3.4. ESMS AND REGIONAL TRADING ARRANGEMENTS**

Regional Trading Arrangements<sup>74</sup> have rapidly gained significance in last few decades both for trade in goods and in last few years also for the cross border trade in services. The application of an ESM in area of merchandise trade by a country that is member of an RTA and also of the WTO needs to be analyzed with respect to the obligations undertaken in the context of both the regional and multilateral Agreements. Some analysis of important ESMs related provisions in the EU and the US domestic law will also facilitate in the understanding of the approach adopted by major economies and the RTA members towards the issue.

Article XXIV of the General Agreement provides the legal basis for members to deviate from their obligations under the GATT for specified reasons and circumstances with respect to RTAs. Article XXIV defines RTAs<sup>75</sup> to mean ‘a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories’.

The application of Article XIX emergency safeguards by member countries of a Customs Union or a Free-trade Area established under Article XXIV of GATT has long been debated and has been a divisive issue. Article XIX is not indicated amongst the exceptions listed under Article XXIV of the GATT. There are differing views on this ‘non-inclusion’

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<sup>71</sup> Article XXIII relates to ‘Nullification or Impairment’ of a benefits accruing to any contracting.

<sup>72</sup> Article XXVIII relates to Modification of Schedules of concessions.

<sup>73</sup> Like Article XXIII, In Hatter’s Fur Case Working Party discussed whether the complaint should be considered in the framework of Article XIX or Article XXIII. Czechoslovakia declined to accept that it would be entitled to take action under Article XIX: 3. Working party was, therefore, established under Article XXIII to examine whether the US action had conformed to the requirements of Article XIX: 1.

<sup>74</sup> The term is being generically used to include Regional Trading Arrangements, Free Trade Agreements, Customs Unions and similar other Agreements..

<sup>75</sup> Article XXIV: 8 (b) of GATT.



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of Article XIX and relate to the fact whether this exclusion should be interpreted to mean that a member of a Customs Union or a Free Trade Area is entitled to be exempted from the application of Article XIX measures, which interpreted will mean that imports from other members of the customs union or free-trade area are excluded from the application of any ESM or that this exclusion of Article XIX from the Articles listed under Article XXIV is not deliberate policy choice but merely an omission or an oversight on the part of the drafters of the General Agreement.

The Regional Trading Agreements between the European Communities and some other European countries<sup>76</sup> that were concluded in late 70s and early 80s contain three provisions or paragraphs<sup>77</sup> that were common to all these Agreements. These common provisions in the RTAs reflected the acceptance of the former view by the EC and these Agreements were conceived on the premise that the omission of Article XIX from amongst those mentioned in Article XXIV: 8(b) was not an omission but a conscious decision and that FTA members were free to exempt other members from possible restrictions imposed under Article XIX<sup>78</sup>.

The issue of application of emergency safeguards measure by a Regional Trading Arrangement while excluding the RTA members was considered by the GATT with respect to the EEC's 1973 Article XIX action on imports of magneto phones from Japan into Italy<sup>79</sup>. The EC regarded that the measure was consistent with Article XXIV and that Article XIX provisions though should apply *erga omnes*, but need not apply to countries that had an agreement with the Community in accordance with Article XXIV. The United States shares the interpretations of the EU and has traditionally been of the view that there is no agreed interpretation by the contracting parties of the relationship between Articles XIX and XXIV. There is, however, a practice in place under other Article XXIV

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<sup>76</sup> The countries with which these agreements were entered into by the EC were: Austria, Iceland, Portugal, Sweden and Switzerland and Liechtenstein.

<sup>77</sup> World Trade Organization, *Analytical Index, Guide to GATT Law and Practice. Volume II*, Geneva, 1995 Page 0839

<sup>78</sup> In EU's case GATT Article XIX type safeguard measures are prohibited in internal trade, a transfer mechanism is in place, mandated by Article 158 of the EC Treaty which is done specifically through the so-called "structural funds".

<sup>79</sup> Working Party on Japan stressed "that the import restrictive measure did not apply to the associated countries and the other members of the Community, while Article XIX required global application".

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arrangements that provides for the exemption of Parties to the arrangement from safeguard actions.

WTO jurisprudence has yet to resolve unambiguously the puzzle of how WTO Members that are also members of a Regional Trade Agreement should conduct investigations and eventually apply safeguards, which are in line with WTO rules. The issues encountered are whether the imports from the region are to be excluded from injury determination or that the safeguard measures are to be applied only to third parties, or are the Members under an obligation to apply all ESMs on a non-discriminatory basis. These issues have been raised in almost all of the Appellate Body proceedings under the AOS so far<sup>80</sup>, but each time AB had skillfully avoided a definitive ruling on this important concern.

The ‘relevant import market’ for application of an ESM in the context of a RTA has been defined in the AOS<sup>81</sup> as the domestic market or territory subject to the injury determination-for cases where a customs union intends to impose a safeguard measure. The Customs Union, for application of an ESM has two options: it can either impose safeguard measures; (i) as a single unit or; (ii) on behalf of a member state<sup>82</sup>. The Panel on *Argentina-Safeguards* with reference to footnote to the Article 1 of the AOS was of the view that, ‘footnote does not concern ‘to whom’ but rather ‘by whom’ a safeguard measure may be applied; this footnote thus creates a requirement of parallelism. The phrase “product ... being imported” is common to both sub-paragraphs of Article 2 of the AOS. In light of the identity of the language in the two sub-paragraphs of Article 2 (conditions) and the absence of any indication that is contrary to this in the text, it is reasonable and

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<sup>80</sup> (1) Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000 (“Argentina – Footwear (EC)"); (2) Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products (“Korea – Dairy”)*, WT/DS98/AB/R, adopted 12 January 2000; (3) Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001 (“US – Wheat Gluten”); (4) Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001 (“US – Lamb”); and (5) Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, adopted 8 March 2002 (“US – Line Pipe”).

<sup>81</sup> Article 2.1 of the AOS. Footnote 1

<sup>82</sup> When a customs union applies a safeguard measure as a single unit, all the requirements of Article 2 of the AOS for the ‘determination of serious injury or threat thereof’ are to be based on the conditions existing in the customs union as a whole.

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appropriate to ascribe the same meaning to this phrase in both Articles 2.1 and Article 2.2 and that it would be inappropriate and unwarranted to do otherwise.

DSB has so far applied this rule of parallelism in the Emergency Safeguards cases and it has been found to be violated, in only one set of circumstances i.e. where a WTO Member takes account of all imports irrespective of their source in the injury determination, but then it excludes regional imports from the application of the safeguard measure<sup>83</sup> like in the case of *Argentina Footwear*. Similarly in case of the *US-Wheat Gluten*, *US-Lamb*, *US-Line Pipe* and in the *US-Steel*, as well, the United States was found to have violated the Agreement on Safeguards, because the US had excluded Mexico and Canada from the application of the emergency safeguard measure while the investigations for the determination of the injury on which the emergency safeguard action was based took account of all imports, including those from Mexico and Canada.

Through this maneuver of parallelism both the Panels and the Appellate Body have circumvented the unresolved enigma of whether GATT Article XXIV can justify a discriminatory safeguard in violation of Article 2.2 of the Agreement on Safeguards. The Appellate Body avoided the question of GATT Article XXIV as it was faced with the choice between parallelism and Article 2.2. The AB in *Turkey-Textiles* made it clear that an otherwise GATT inconsistent measure can only be justified under Article XXIV if the requirements in, inter alia, paragraph 8 of Article XXIV are met<sup>84</sup> but it is worth noting that there are few RTAs which meet the requirements of Article XXIV and have also been approved by the WTO Committee on Regional Trading Arrangements.

### **3.5. INTERNAL LAW PROVISIONS: THE EU and THE US.**

#### **3.5.1. THE NAFTA & UNITED STATES**

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<sup>83</sup>In *Argentina-Safeguards (EC)*, for example, Argentina had made its injury determination based on all imports, including those from MERCOSUR countries. Yet once it applied the safeguard measure, it excluded its MERCOSUR partners. The Appellate Body found that “Argentina’s investigation, which evaluated whether serious injury or the threat thereof was caused by imports from all sources, could only lead to the imposition of safeguard measures on imports from all sources.

<sup>84</sup> World Trade Organisation, *Appellate Body Report, Turkey-Restrictions on Imports of Textile and Clothing Products (‘Turkey-Textiles’)*, WT/DS34/AB/R, adopted 19 November 1999.

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The EC and the United States are the two largest trading entities of the world and whose trading practices and dispute settlements largely influence the behaviour and domestic laws of other Member countries of the WTO. National/domestic laws of both of these major economies which authorize application of emergency safeguard measures within the economic area or the individual country, in case of NAFTA; make no mention of the requirements relating to ‘unforeseen developments’ despite of its being a textual requirement of both Article XIX of General Agreement and also of its associated AOS.

Section 201 of the US Trade Act of 1974, provides the legal framework under the U.S. law for the President to invoke the U.S. rights under Article XIX<sup>85</sup> of the General Agreement. Trade Reform Act of 1974 (Act of 1974) revised the U.S. the then existing statute by removing the required link to trade concessions, which broadened the scope of the statute to include a wide variety of products that were not the subject of tariff concessions. The Act of 1974 also revised the degree of causation required to justify an application of a trade remedy measure by altering the previous language from a “major factor in causing” injury to a “substantial cause,” which subsequently became contentious point in disputed cases under the WTO<sup>86</sup>. Section 201 of the Act of 1974 requires imports to be a substantial cause of injury and thus there is a “valid reason to distinguish and separate the injury factors under US law, which is to assess whether imports are a *substantial* cause<sup>87</sup>”. The Act of 1974 also requires the ITC to determine 'whether an article is being imported into the United States in such increased quantities as to be a substantial cause of the serious injury' suffered or threat of injury, without specifying in the statute any baseline against which to assess the ‘increased quantities’. Surprisingly the US safeguard legislation is more stringent than the requirements of the AOS in this area<sup>88</sup>.

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<sup>85</sup> In addition to Section 201, Trade Act of 1974 (Global Safeguard Investigations), Import Relief for Domestic Industries there are other provisions like Section 421, Trade Act of 1974 (China Safeguard Investigations), Section 422, (China Trade Diversion Investigations) which are China specific provisions.

<sup>86</sup> Christy Ludet, J.D., *Causation on Injury in Safeguards Cases: Why the US Can't Win*, Georgetown University Law Center, 2003.

<sup>87</sup> Alan O. Sykes, *The Persistent Puzzles Of Safeguards: Lessons From The Steel Dispute* JIEL 2004.7(523)

<sup>88</sup> Should there be a conflict between U.S. legislation and the GATT, the federal legislation must prevail. *Algoma Steel Corp., Ltd. v. U.S.*, 7 Fed. Cir. (T) 154, 865 F.2d 240, 10 Int'l Trade Re. (BNA) 2169 (1989), cert. denied, 492 U.S. 919, 109 S. Ct. 3244, 106 L. Ed. 2d 590, 11 Int'l Trade Re. (BNA) 1400 (1989). The GATT does not trump domestic legislation, and if statutory provisions are inconsistent with the GATT it is a matter for the Congress, not the court, to decide and remedy.

## CHAPTER 3

Article XIX of GATT is not directly applicable in the U.S. law and its terms for instance the requirement of the “unforeseen developments” have not been carried or incorporated into the U.S. domestic statute or the enabling legislations. The USITC is not obliged by any US legislation or any other enabling regulations to examine the existence of unforeseen developments in its investigation into the situation of a domestic industry, which is seeking temporary protection through application of ESMs; a fact that was also pointed out by the AB in *Lamb Meat*.

The ITC under section 202 is charged with promptly making an investigation and: “to determine whether an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article which is like or directly competitive with the imported article<sup>89</sup>”. However, here the US ITC’s investigations and causations analysis highlights the most important textual conflict between the U.S. statute and the AOS that is the determination of causation of injury. Not only are the texts themselves different, but the fundamental ideas behind the differing interpretations of those texts have formed the basis for the most contentious and confusing points of the WTO safeguards cases. The conflict can basically be expressed as one of “substantial cause” versus “non-attribution”. The Uruguay Round Agreements Act 1994 of the US, like similar legislations of most of the other Member countries of the WTO, limits the direct effects of the Uruguay Round Agreements in the U.S. courts and provides that “... no provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect<sup>90</sup>”.

The basic provisions in NAFTA have been structured on the Article XXIV of the General Agreement but these provisions have some variances from the Article XIX of GATT. In the context of NAFTA<sup>91</sup> the USITC determines whether, as a result of the reduction or elimination of any duty under the NAFTA, increased imports from Canada or Mexico are a

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<sup>89</sup> American Bar Association, Editor Stewart, Terence P, *The World Trade Organization, The Multilateral Trade Framework For the 21<sup>st</sup> Century and the US implementing Legislation*, Washington, 2001, p 407-35

<sup>90</sup> Uruguay Round Agreements Act, § 102(a) (1), 19 U.S.C. § 3501, (1994). The legislation internalizes the US obligations arising out the Agreements reached in the Uruguay Agreements.

<sup>91</sup> NAFTA Implementation Act, section 302

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substantial cause of serious injury or threat of serious injury to a U.S. industry. If the Commission makes an affirmative determination, it makes a remedy recommendation to the President, who makes the final remedy decision. Section 302 investigations are similar procedurally to investigations under section 201 of the Trade Act of 1974<sup>92</sup>.

There are also provisions in NAFTA that do not exist in the Trade Act of 1974. A member country of NAFTA is prohibited from applying safeguard measures against another NAFTA member country, unless the imports account for a substantial share of the party's total imports and these imports also contribute significantly to the serious injury. Section 801(1) of the NAFTA also limits the application of safeguards against the exporting NAFTA member country to either suspending the further reduction of duty, or increasing the duty to a level not exceeding the lesser of the MFN rate then in effect (the MFN rate is understood to mean the effective rate of import duty on day before the NAFTA took effect). These are provisions are unique to NAFTA and neither Article XIX GATT nor the AOS contains any such limitation.

Similarly under its Section 801(4), the NAFTA member taking the emergency action must provide to the affected member "mutually agreed trade liberalizing compensation" which will substantially have the same trade effects, or be the equivalent to the value of the duties, expected to result from the emergency action. If the parties concerned cannot agree on the compensation, the affected member is entitled to unilaterally take tariff action having trade effects "substantially equivalent" to those of the safeguard action. This positive obligation to compensate under the NAFTA is also not found in Article XIX of GATT or in the AOS<sup>93</sup>.

### 3.5.2 THE EUROPEAN UNION

In the European framework the establishment of the internal market in 1993 obligated the completion of the common commercial policy, and consequently all national measures had to be eliminated<sup>94</sup>. The European Community derives its powers to apply the Emergency

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<sup>92</sup> www.ustr.gov.us visited August 2006, Section 301, NAFTA Implementation Act, 19 U.S.C. 3352.

<sup>93</sup> Nicholas Baggaley, *Trade Liberalization under the GATT, the NAFTA and the EU: Selected Topics. Canada*. [http://www.lib.unb.ca/Texts/JCIM/bin/get.cgi?directory=vol1\\_1/&filename=Baggaley.html](http://www.lib.unb.ca/Texts/JCIM/bin/get.cgi?directory=vol1_1/&filename=Baggaley.html)

<sup>94</sup> Lee Yong-Shik, *Safeguard Measures in World Trade: The Legal Analysis*. Kluwer Law International, Hague, June 2005.

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Safeguard Measures from ‘Title V. Safeguard Measures’ of Regulations 3285/94 of 22 December 1994 (the “Regulation”) and 518/94 of 7 March 1994 on common rules of imports<sup>95</sup>. The EC also has differentiated or source specific safeguard regimes depending on whether the imports are from market-economy countries and these are from non-market-economy countries<sup>96</sup>. The safeguard scheme for imports from market-economy countries, i.e. the EC Regulation 3285/94 enacted to implement the WTO Safeguard Agreement made no distinction between tariff and quantitative safeguard measures<sup>97</sup>. A legal basis for requesting compensatory measures and imposing countermeasures was indirectly provided by Article 23 of the Regulation.

The Regulation 518/94 does not differ much from its predecessor Regulation 288/82 which was repealed. However, despite the similarities there were some differences and the most conspicuous difference between Regulation 518/94 and its predecessor was that the now the new Regulation no longer contained any annexes. While in the case of Regulation 288/82 all national procedures i.e. individual member country measures were listed in the annexes and the regulations provided for procedures concerning national derogations<sup>98</sup>. The Regulation 518/94 practically transposed provisions of the Article XIX of GATT 1994 into the Community law. According to the Regulation, the safeguard measures by the Community must be adopted “with due regard to existing international obligations...” The safeguard measures which may be adopted under these regulations are subject to certain conditions which are same as provided in AOS and these are limited “to the extent and for such time as may be necessary to prevent or remedy the injury caused by the imports and to the product causing the injury”<sup>99</sup>.

The EU Council decided to approve the AOS on 22 December 1994 and the Agreement entered into force on 1 January 1995<sup>100</sup>. The EU legislation on emergency safeguards

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<sup>95</sup> Sykes Alan O, *The WTO Agreement on Safeguards*, Oxford University Press New York, 2006. P 292

<sup>96</sup> KOMURO Norio *Japan’s Safeguard Law and Practice* Journal of World Trade 35(5): 847–972, 2001.

<sup>97</sup> European Community in practice has, however, imposed emergency safeguards only in the form of quotas with nil tariff measures.

<sup>98</sup> Charles Van Sasse Van Ysselt, *Safeguards Measures: The Uruguay Round Agreement on Safeguards and the EC*. Council Regulation 518/94. E.C.L.R. 1994, 15(4), R107-109

<sup>99</sup> Clough Mark, *WTO AND EC Safeguard Measures - Legal Standards and Jurisprudence*, Int. T.L.R. 2003, 9(3), P 73

<sup>100</sup> Official Journal of European Communities No L 336 of 23.12.1994, p.184

measure, like the US, also makes no reference to ‘unforeseen development’. However, the European Union in practice observes the treaty requirements of the “unforeseen development<sup>101</sup>” and the application of any ESMs by the EU during the investigations are, as a practice, required to taken ‘as a result ... of the effect of the obligations incurred by a contracting party’. This lack of statutory provisions has not been the subject of controversy with respect to the EU as is in the case of the US. This is primarily because of differences in the practices of application of the measure.

### 3.6 COMMENTS

If we are to look at Article XIX of GATT and the provisions of concomitant AoS as one of the possible templates for developing any independent ESMs for International Trade in services within the framework of GATS, it is essential to understand the structure of Article XIX of GATT and AoS, as this understanding only can help us in any possible transposition of the GATT concepts. This also requires analysis of the relationships of application of emergency safeguards in trade in goods with provisions contained in other WTO Agreements especially considering the fact that GATS has been modelled on GATT paradigm and setting aside the differences there are several concepts that are not only common but also embedded in both the Agreements; the GATS and the GATT.

The practical application of an ESM, as is understood to mean under the GATT/WTO paradigm, by the domestic regulators is fairly complex; requires strong institutional capacities both at the level of the agitating industry and also the regulators to comply with the mechanics of the process starting from the filing of an application by the industry which requires substantive reliable statistical information, investigations, determination of injury or threat thereof and then the process goes on to finally culminate in the definitive findings; that can sustain detailed legal scrutiny of the WTO dispute settlement system. Any practical application of an ESM to withstand a detailed legal scrutiny is tedious and difficult, as has already been experienced in the case of trade in goods.

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<sup>101</sup>The EU safeguard regulations (3285/94 and 519/94) do not mention “unforeseen developments”. Despite this the EU Commission takes the requirement into account and all safeguard measures taken under the AOS by the EU referred to unforeseen developments



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However, over the years, the system for application of Emergency Safeguards Measures devised by Article XIX of the GATT has started to malfunction in two ways. The first problem arose because the textual requirements of paragraph 1(a) Article XIX became increasingly difficult to apply with the passage of time. The text of the Article required that safeguard measures respond to the consequences of an ‘unforeseen development’ but is silent with respect to the basic fact about ‘unforeseen by whom, at what point in time?’ These questions had a natural answer in 1947 – an ‘unforeseen development’ was something unforeseen by the original GATT negotiators in 1947 and when the original tariff bindings were negotiated. But ten, twenty, or forty years later, this anchor for the unforeseen developments requirement seemed unsuitable, as few things occurring that many years later could have been foreseen in 1947. And “if the anticipations of the original negotiators were no longer the relevant benchmark, what should substitute for them?”<sup>102</sup> These questions have a strong relevance to some of the important questions that logically arise in latter part of the thesis.

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<sup>102</sup> *Research Handbook in International Economic Law*, Edited Andrew Guzman and Alan O Sykes Edward Elgar, USA, 2007, p64

## **CHAPTER 4: ESMs and GATS**

### **4.1 INTRODUCTION: CHAPTER**

Chapter 4 builds on the work already done under earlier chapters and tries to evaluate the relevance of discussions held under the WTO with respect to the development of the ESMs under the GATS. The different formal and informal submissions made by the WTO Members on the issue in the WPGR have briefly been analysed. The proposals with respect to their viability for practical application and have also been evaluated against the benchmarks provided by the Article XIX of the General Agreement and Agreement on Safeguards (AoS) governing the application of ESMs for trade in goods.

The ambitions of the Chapter are modest and majority of its contents is very basic that has more practical than an academic approach. This Chapter was essentially required to look at the issues or concerns that any structuring of the ESMs under GATS on the GATT paradigm will have to encounter under the regime applicable for merchandise trade. The Chapter is only a reality check with regards to the fact that whether the features that essentially define the application of ESMs under the GATT for trade in goods can be transposed to GATS so as to create ESMs for cross border trade in services in any coherent manner. In light of the dearth of substantive research already undertaken on ESMs under GATS; the study draws from discussions on the subject in the formal and informal meetings at the WTO and the various submissions made by the WTO Member countries to the Working Party on GATS Rules (WPGR).

The chapter gives identifies the problems faced in transposing to under GATS the paradigm provided by the GATT and the AoS for the application of ESMs. Almost all elements that constitute the definitive application under the GATT paradigm are assessed against the parallel provisions of GATS. The issues and concerns with the transposition of GATT concepts to GATS and limitations of the GATS in this regards are also looked at. The chapter brings out the difference in the underlying products covered by the GATT and the GATS. The chapter also highlights some specificities of the services sector that hinders

the transposition of the GATT concept of ESMS to the GATS. The impossibility of smooth transposition of GATT concept to GATS is also recognized, that lays the foundation for the remainder of work required to be done under the thesis.

## **4.2. BACKGROUND**

The Punta Del Este ministerial meeting held in September 1986 was the formal starting point of the Uruguay Round of Multilateral Trade Negotiations (MTNs) and termination of the pre-negotiations<sup>1</sup>. Pre-negotiations leading up to the formal launching of the MTNs were fairly controversial primarily over the coverage and the inclusion of new areas of international trade into the agenda of the new Round, in addition to those that were the carryover from the earlier round of MTNs. The leftovers from earlier GATT negotiations had already been picked up for inclusion in the new MTNs from where these stood at the conclusion of the Tokyo Round of MTNs. Negotiators were familiar with these backlog issues and also aware of the negotiating positions of the key countries with respect to these.

The Uruguay Round (UR) was the most comprehensive of the MTNs ever conducted with a fairly broad and demanding agenda. There was, however, a strong and vocal coalition of dissidents led by major developing countries like India and Brazil that was hostile particularly to the idea that the agenda of the multilateral negotiations should include the new issues covering trade in services, intellectual property rights, and trade-related investments, that had not been negotiated before or even agreed to be falling under the purview of the MTNs that were to be conducted within the auspices of GATT. The introduction of new areas of international trade into the pre-negotiations for the upcoming MTNs had already created an atmosphere of almost an open confrontation amongst the negotiating coalitions, as compared with the earlier rounds of MTNs under the GATT.

Punta Del Este Declaration; with respect to negotiations on the cross border trade in services sector provided that these should “aim to establish a multilateral framework of principles and rules for trade in services including elaboration of possible disciplines for

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<sup>1</sup> Zartman, William I (ed) Processes of International Negotiations (PINS) Project, *International Multilateral Negotiations, Approaches to Management of complexity*, Josey-Bass, California, USA, 1994, p 56-57

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individual sectors...” The framework’s purpose was to be the expansion of trade in services “under conditions of transparency and progressive liberalization and as a means of promoting economic growth of all trading partners and development of developing countries”. The developing countries in light of their exacting experience with the Tokyo Round outcome were extremely unenthusiastic towards expanding the scope of the upcoming negotiations especially with respect to the issues new to GATT that were being introduced into the agenda of new round of the MTNs. This reluctance was aggravated by the fact that developing countries also had no structures to handle binding negotiations on such broad scale and covering areas that were little understood and had never been negotiated before within the framework of GATT or elsewhere with the objective of creating multilaterally agreed binding disciplines.

Developing countries had little capacities to undertake any analysis of the new issues introduced for creation of multilaterally agreed disciplines and to gauge in any meaningful manner the possible impact of the outcome of the proposed negotiations. Some narrow analytical capacity that was available with a few of the bigger developing countries was limited only to traditional GATT issues and even these comparatively developed amongst the developing countries were virtually clueless of what the unfolding of the negotiations on the new issues may ultimately lead to. The developing countries were therefore, more inclined to negotiate on what they do not want to be included rather than on what they really want to be included in the agenda of the future MTNs. These developing countries were not capable enough to identify issues that should be included in the agenda of the MTNs so that some balance may eventually emerge in the final outcome (except for the inclusion of agenda item on liberalising the trade in textiles where almost all developing were agreeable).

The previous rounds of MTNs were almost incremental in character and basically oriented towards elaborating, refining and strengthening the provisions already contained in the General Agreement. The UR was to address areas of international trade that hitherto had never been addressed before and that even lacked any sector specific plurilateral or multilateral agreements. To become negotiable, the new issues introduced in the agenda of the MTNs, including cross border trade in services, required to be analysed starting from the

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very basics like delimitation and clarification of the subject<sup>2</sup> under negotiations, creation of possible road maps that may impact the desired or possible outcomes and also maintaining balance amongst diverse and at times conflicting interests involved in the process. As a generally accepted rule for negotiations it is necessary that pre-negotiations should reduce the complexity of the issues that are to be the subject of substantive negotiations, so as to make these negotiable and thus leading to manageable negotiations and workable outcomes. The ultimate goal of the negotiations is anyway to arrive at workable decisions on issues, which is not possible without clear understanding of the issues involved.

The deliberations during the pre-negotiations amongst the members and the other contributory preparatory work to delimit and clarify the new issues involved. The deliberations in the dedicated negotiating group created for developing the multilaterally agreed framework Agreement for the services sector were dependent solely on the analysis undertaken and made available by the OECD secretariat along with some other limited research inputs that were provided by a couple of major individual industrialized countries. No independent third party analytical inputs even from the academia or from any other neutral and credible prospective were, at the time, available to the negotiators. The leading industrial countries like the United States, the EC and Canada were in a very advantageous position and well placed to shape the necessarily required consensual knowledge available with the negotiators in a manner that was more in line with their own specific interests and achieve their negotiating objectives.

This analytical and intellectual dominance of some developed countries was deeply resented by major developing countries like India and Brazil<sup>3</sup>, as these countries had their own aspirations to influence negotiations by structuring negotiating coalitions and leading the developing countries in a manner that will help them to achieve their objectives. There was visible asymmetry with respect to lack of analytical capacities and excessive influence over the building of consensual knowledge that subsequently had a impeding affect and led to the rigidities in the negotiating positions of the negotiating coalitions that eventually emerged.

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<sup>2</sup> Zartman, William I (ed) Processes of International Negotiations (PINS) Project, *International Multilateral Negotiations, Approaches to Management of complexity*, Josey-Bass, California, USA, 1994

<sup>3</sup> China's accession to the WTO was approved in late 2001 and Russian accession process in 2012.

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This capacity constraint combined with the lack of past negotiating experience was complicated by the fact that, unlike Tokyo Round results, everything was to be linked at the end at the end of the Round of talks so as to form part of a ‘single undertaking’. The single undertaking first appeared in the lexicon of GATT/WTO-speak at the beginning of the Uruguay Round in 1986. The idea was to prevent parties from “cherry-picking” results or “harvesting” early outcomes from the negotiations unless all parties agreed. By keeping the whole agenda joined up, to be settled at the end, negotiators believed they were maximizing trade-off opportunities and no-one would be denied negotiating leverage<sup>4</sup>. This concept of ‘single undertaking’ was agreed by the developing countries to avoid the situation that was created at the end of Tokyo Round when side agreements became the centre stage. These side Agreements (codes) not only led to the fragmentation of the GATT system but also led to an unbalanced outcome, as the countries that chose not to participate in negotiations on these codes also lost the capacity to influence the eventual outcome. This concept of single undertaking had a substantive impact on post UR negotiations on issues like the ESMs for the cross border trade in services.

Based solely on the unchallenged analysis made available by the OECD secretariat and by a couple of developed countries, the reforms in trade in services were propagated and unsuspectingly recognized by a large number of the negotiators to have potential economic benefits for almost all the participants irrespective of their stage of economic development. Despite this appreciation of importance and value of liberalizing trade in services, movement forward in “the Group for Negotiations on Services (GNS) was very slow during the first two years of the Uruguay Round<sup>5</sup>” and not very meaningful even thereafter.

### **4.3 GATS: INTRODUCTION**

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<sup>4</sup> World Trade Organization, Low Patrick, *WTO Decision-Making for the Future*, Staff Working Paper ERSD-2011-05, May 2011

<sup>5</sup> Croome John, *Reshaping the World Trading System, A history of the Uruguay Round*, World Trade Organization, 1998, p.102

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The General Agreement on Trade in Services<sup>6</sup> (GATS) was negotiated within the framework of a broad and comprehensive round of MTNs where almost all of areas already covered by the GATT along with new and emerging areas of importance to international trade that were as yet alien to the GATT, like; ‘International Trade in Services’, ‘Trade Related Aspects of Intellectual Property Rights (TRIPS)’ and ‘Trade Related Investment Measures (TRIMS)’ were negotiated simultaneously under the concept of a ‘single undertaking’. The concept of ‘single undertaking’ in practical terms implied that nothing will be taken to have been agreed until outcome on all issues being negotiated are agreed amongst the participants. Thus there were strong cross linkages and inbuilt parallelism on movement forward and progress in negotiations in different negotiating groups. The negotiating process and negotiations per-se are not intended to be discussed in any greater detail in this paper.

The GATS in its architecture and its building block concepts is fairly analogous to the General Agreement on Tariffs and Trade (GATT) and “forms part of the expansion of GATT into the area of services to take account of changes that have occurred in the world economy”<sup>7</sup> but it simultaneously also reflects the specificities of cross border trade in services. The drafters of the GATS took inspiration from the GATT and used the terms and concepts that had already been applied for decades in the international merchandise trade. The ‘GATS is a hybrid Agreement, containing combined features of both ‘top down’ and ‘bottom up’ Agreement<sup>8</sup>, is extraordinarily ambitious, complex and potentially universal’<sup>9</sup> as the Agreement defines cross border supply of services in an all-encompassing manner under its Article XXVIII (b) and it includes production, distribution, marketing, sale and delivery of services.

Both the Agreements (GATT & GATS) aim to achieve progressive liberalisation of world trade, include provisions for most-favoured-nation treatment, national treatment, regional trading arrangements and transparency. The two Agreements are part of a ‘single

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<sup>6</sup> The GATS, Annex 1B to the Agreement Establishing the World Trade Organization that comprises of six Parts, eight Annexes, and nine Ministerial Decisions which are appended and integral to it.

<sup>7</sup> Kennedy Matthew, *Services Join GATT: An Analysis of the General Agreement on Trade in Services*, Int. T.L.R. 1995, 1(1), 11-20

<sup>8</sup> A ‘top down’ agreement is one in which all measures and sectors are covered unless they are specifically excluded, while ‘bottom up’ agreement covers only those measures and sectors that are specifically identified.

<sup>9</sup> Sinclair Scott, *GATS, How the World Trade Organization’s new services negotiations threaten democracy*. Canadian Centre for Policy Alternatives Ottawa 2000 p.29

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undertaking' outcome and thus share the same membership, procedures for consultation, dispute settlement and also of enforcement. The tariff schedules under the GATT, in which countries bind their tariff concessions on merchandise imports, find their equivalent in schedules of specific commitments under GATS which define the relevant conditions for conduct of trade in services<sup>10</sup>.

The GATS, creates disciplines for a Member country that is scheduling market access commitments for a specific service sector or its sub-sector separately on the four different modes of delivery of the services which are; cross-border imports (cross border trade: mode 1), the consumption of services in another Member's territory (consumption abroad: mode 2), as well as the services-related activities of foreign established suppliers (commercial presence: mode 3) and foreign natural persons (presence of natural persons: mode 4) in the Member's domestic market. The GATS under its current structure, unlike GATT, also creates no hierarchy of instruments of protection for the domestic producer or supplier of service, both the level and the form of protection are the result of successive negotiations amongst Members of the WTO.

There are also some notable differences in the scope and also the content of the two Agreements. An important differentiating element of the GATS is that many of its obligations are triggered only when a member schedules a specific commitment<sup>11</sup>. This in certain cases seems to make little sense considering that many of GATS obligations have general application, including the transparency requirement that members publish all relevant laws and regulations affecting trade in services within their domestic markets<sup>12</sup>. In GATS there is also an absence of full-fledged counterparts to some important GATT rules and the Agreement in its present form does not "contain any equivalent to the trade remedy mechanisms like emergency safeguards, countervailing duties, and anti-dumping

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<sup>10</sup> World Trade Organization *A Handbook on the GATS*, Geneva, May 2005

<sup>11</sup> The GATS Schedules of Specific Commitments are undertakings by each member to provide a national schedule guaranteeing market access in specific sectors. The market access granted can be subject to any conditions or limitations.

<sup>12</sup> Nicholas Baggaley, *Trade Liberalization Under the GATT, the NAFTA and the EU: Selected Topics*, *Journal of Comparative International Management*, June 1998  
[http://www.lib.unb.ca/Texts/JCIM/bin/get.cgi?directory=vol1\\_1/&filename=Baggaley.html#1](http://www.lib.unb.ca/Texts/JCIM/bin/get.cgi?directory=vol1_1/&filename=Baggaley.html#1)



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measures that could be invoked by affected trading partners”<sup>13</sup> which are available under the GATT and are also frequently used as remedies in specific circumstances in case of international merchandise trade. Some of the other central defining concepts and characteristics governing liberalization of trade in goods under GATT do not carry the same significance or are not applicable under the GATS, for instance, the GATT enshrines the automatic right to full national treatment while the GATS does not, and under GATS the national treatment<sup>14</sup> requirements apply only to the extent that it is allowed according to the terms and conditions of a member's schedule of commitments in respect of the specified service sectors. While quota-free entry (“market access”) and national treatment are the general applicable obligations under the GATT but these only apply under the GATS on a sector-by-sector and mode of delivery basis and that too to the extent that no qualifications (“limitations”) have been scheduled<sup>15</sup> by the binding member country.

The member countries assume obligations through their respective schedule of binding market access commitments that are negotiated with requesting countries on the basis that are agreed multilaterally. Article XX:1 of the GATS contains only one basic obligation governing the assumption of specific commitments in services: each Member is required to submit a schedule of commitments. Pursuant to Article XX:3 of the GATS, the Schedule of a Member forms an integral part of the GATS. Hence, the rules of interpretation that apply with respect to a Schedule are the same as those applicable to the rest of the Agreement. This means that the Schedule of a Member, and the specific commitments contained therein, must be interpreted in accordance with Articles 31 and 32 of the Vienna Convention on the Law of Treaties (“Vienna Convention”). This position was firmly adopted in *US—Gambling* and followed in the footsteps of prior decisions concerning the interpretation of GATT Schedules. Accordingly, the specific commitments of a Member, like any other treaty term, must be interpreted in good faith, in accordance with the ordinary meaning of the Member’s scheduled entries taken in their context and understood in the light of the object and purpose of the GATS and the WTO Agreement more

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<sup>13</sup> Adlung Rudolf, *The GATS Turns Ten: A Preliminary Stocktaking*, World Trade Organization, Staff Working Paper ERSD-2004-05, August, 2004

<sup>14</sup> Article XVII of GATS, (Part III).

<sup>15</sup> World Trade Organization *A Handbook on the GATS* May 2005

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generally. Recourse may also be had to supplementary means of interpretation as appropriate.

Also following in the footsteps of GATT case law is the determination in *US—Gambling* that while a Member's Schedule only binds that Member, it represents a common agreement among all WTO Members<sup>16</sup>. However, as with tariff bindings under the under Article XXVIII of the GATT, Members are able to re-negotiate their schedules or what may be called their market access obligations under Article XXI of GATS or ignore these commitments in specified circumstances.

The GATS rules governing domestic regulations are also weak as compared to GATT, for example, Member governments would not be prevented from operating excessively restrictive standards or licensing and certification systems or subsidize their exports of services. This virtual freedom of national governments to act implies that the commercial value of similar market access and national treatment commitments may thus vary significantly across different service sectors and WTO Members. The GATS also offers more scope to the Members to deviate from the Most-Favoured-Nations (MFN) treatment through their scheduled MFN exemptions; which is one of the few horizontal obligations that apply across almost all services, than is the case under GATT. Moreover, traditional and fundamental building blocks of the GATT, including the prohibition of quantitative restrictions and the automatic guarantee of national treatment with regard to domestic rules and regulations, are also open and negotiable under the GATS<sup>17</sup>.

The GATS has expanded the scope of WTO dispute settlement system, as application of a measure by a member country even on merchandize trade, which has broader and stringent disciplines, can have implications on country's commitments in the services sector. The retaliation by the affected members may also eventually be cross sectoral, like in *EC-Bananas*, the United States and several Latin American countries claimed that the EC

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<sup>16</sup> Leroux Eric H., *Eleven Years of GATS Case Law: What Have we Learned?* Journal of International Economic Law 10(4), 749–793

<sup>17</sup> Members assume market access and national treatment obligations only in sectors they have listed in their national schedules ('bottom-up' scheduling) and only to the extent that they have not inscribed limitations or specific exclusions under one or more of the four modes of supply.

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regime for the importation<sup>18</sup>, sale and distribution of bananas was inconsistent with several of the EC's WTO obligations, including those under the GATS. The EC tried to argue that its banana import regime falls solely under the GATT because; i) the GATT and the GATS may not overlap in application to a measure; and ii) the import regime does not touch the service providers of the complaining parties in their wholesale service activities, but only in their import activities, that is, in their activities in the goods sector. The Panel and the Appellate Body rejected both the arguments of the EC.

The GATS as an international agreement has broader coverage and implications than the GATT. As unlike the GATT, it covers both the 'service' and the 'service provider'. While GATT has a circumscribed mandate and is concerned only with the products not with individual producers or manufacturing of these products. The GATS because of its broad reach that covers service providers is also regarded by some international economic law scholars as "the world's first Multilateral Agreement on Investments since the Agreement also includes the right to set up commercial presence (mode 3) in another country<sup>19</sup>". In short, the reach of GATS is fairly extensive as compared and judged against that which exists for the GATT. The GATS broad reach extends "from cross-border trade to factor flows, and from an essentially tariff-only regime to many more permissible restrictions, including import-displacing subsidies<sup>20</sup>".

### 4.4. ESMs and the GATS

#### 4.4.1. BACKGROUND

The important aspect that is perhaps not so readily understood about the GATS is that it is an 'incomplete' Agreement. It contains not only a "built-in" obligation for the WTO Members to enter into successive rounds of negotiations no later than five years after entry

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<sup>18</sup> In the *EC-Bananas* case, the core issues were the way in which the European Communities established a duty free quota for imports of bananas originating from Africa, Caribbean and Pacific States (ACP) and the manner in which the most-favoured-nation (MFN) quotas under Article XIII of GATT were allocated

<sup>19</sup> Chanda Rupa, *Trade in Services & India Prospects and Strategies*, CENTAD, New Delhi, 2006, p.52

<sup>20</sup> Adlung Rudolf, *Negotiations on Safeguards and Subsidies in Services: a Never-ending Story?* Journal of International Economic Law 2007 10(2):235-265

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into force of the WTO Agreements and periodically thereafter<sup>21</sup>, but it also calls for completion of the GATS framework with specific disciplines on subsidies, emergency safeguards,...<sup>22</sup>”

More than twenty five years after the inception of the Uruguay Round Multilateral Trade negotiations, the framework of GATS and development of some important disciplines under it are still very much under construction, with work outstanding on a number of key issues. The relevant mandates for continuing negotiations in these four areas are contained, respectively, in Articles VI:4, X, XIII, and XV of GATS, this mandate for further negotiations is also referred to as the ‘inbuilt agenda’. The built-in negotiating agenda in GATS positively mandates negotiation for the progressive liberalisation of international trade in services through additional specific commitments by the member countries and also simultaneously instructs negotiators to develop certain GATS rules that could not be agreed upon during the MTNs. The agenda for the continued negotiations though charted a time frame, a road map and also indicated the directions which the further negotiations may take. By doing so the Members agreed to leave these issues open for further negotiations and agreed to agree on the other remaining ruling making aspects later and also on the negotiations for continued liberalization. . This conclusion of inconclusive negotiations was not unique to GATS but was also the case in negotiations in some other areas, like in TRIMs and TRIPs.

At its meeting of 30 March 1995, the Council for Trade in Services established a Working Party on GATS Rules (WPGR)<sup>23</sup> to deal with these outstanding issues from the Uruguay Round (UR) of MTNs. The negotiations on these ‘outstanding issues’ or the ‘built in agenda in the GATS’ were, till recently, undertaken at Geneva in the WPGR, which was a subsidiary body of the ‘Council for Trade in Services’. The WPGR had before it three negotiating mandates: Emergency Safeguard Measures (Article X); Government Procurement (Article XIII); and Subsidies (Article XV). Of these, only the negotiations on

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<sup>21</sup> Article XIX:I of GATS

<sup>22</sup> Macrory Patrick F J, Arthur E Appleton, Michel G Plummer (Ed), *The World Trade Organization, Legal, Economic and Political Analysis, Volume I & II*, International Law Institute, Springer, USA 2005 P. 893

<sup>23</sup> World Trade Organization Document S/C/M/2, Para. 22-25.

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Emergency Safeguards Measures were initially subjected to an agreed time frame with specified deadlines. The deadlines were extended repeatedly and now have finally been replaced by an open-ended time frame through a decision of Council for Trade in Services. The relevant decision now provides that, subject to the outcome of the mandate, the results shall enter into effect not later than the results of the current round of services negotiations<sup>24</sup>.

The GATS in its present shape does not provide for any independent mechanism by which WTO members can temporarily depart from their market access commitments in response to an unanticipated surge in services imports with harmful effects on domestic service suppliers. The establishment of such emergency safeguard measures (ESMs) was considered during the Uruguay Round, but no consensus could be achieved. The GATS merely calls for negotiations ‘on the question of emergency safeguard measures based on the principle of non-discrimination’<sup>25</sup>.

The motivations, as expressed in the WPGR by the WTO Members that were seeking independent ESMs for services sector were essentially the same as were those of the drafters of the General Agreement who initially introduced the concept for trade in goods; namely the perceived need for some form of temporary ‘safety valve’ in the event of unforeseen problems that may be created by the trade liberalisation and ensuing surge in imports. The particular sensitivities surrounding the negotiations on emergency safeguards under GATS are substantially reflected in the relevant mandate laid down in Article X of the GATS. The Article X of GATS reads as:

### Article X: Emergency Safeguard Measures

1. There shall be multilateral negotiations on the question of emergency safeguard measures based on the principle of non-discrimination. The results of such negotiations shall enter into effect on a date not later than three years from the date of entry into force of the WTO Agreement.

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<sup>24</sup> World Trade Organization Document S/L/159 of 17 March 2004

<sup>25</sup> Article X:1 of GATS

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2. In the period before the entry into effect of the results of the negotiations referred to in paragraph 1, any Member may, notwithstanding the provisions of paragraph 1 of Article XXI, notify the Council on Trade in Services of its intention to modify or withdraw a specific commitment after a period of one year from the date on which the commitment enters into force; provided that the Member shows cause to the Council that the modification or withdrawal cannot await the lapse of the three-year period provided for in paragraph 1 of Article XXI.

3. The provisions of paragraph 2 shall cease to apply three years after the date of entry into force of the WTO Agreement.

The first sentence of Article X: 1 of the GATS calls upon the Members to conduct negotiations ‘*on the question*’ of such measures *based on non-discrimination*<sup>26</sup>, while the second sentence seems to presuppose an affirmative answer to the question raised and also a tangible outcome. The second sentence stipulates that ‘*the results shall enter into effect ... not later than three years from the date of entry into force of the WTO Agreement*’. Any such mechanism, should it be agreed to by the Members, would also need to be based on the ‘principle of non-discrimination’ in terms of the negotiating mandate. This stipulation of ‘non-discrimination’ under GATT parlance has generally been equated with Most-Favoured-Nation (MFN) treatment.

The negotiating history of Article X, however, suggests that the use of the phrase “negotiations on the question of emergency safeguard measures” (Article X.1) was meant to imply that prior to elaborating specific provisions, Members may wish to consider the broader question of whether or not it would be desirable to develop an emergency safeguard instrument in the field of trade in services<sup>27</sup>” but for a group of important developing Member countries, Article X appeared to be clear enough that calls for the development and incorporation of an independent and standalone emergency safeguards mechanism under the GATS. For this group of countries the Article X establishes a positive and affirmative requirement that “the results of such negotiations shall enter into

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<sup>26</sup> The agenda for Uruguay Round (Punta Del Este declaration with regards to ESMS had parallel provision that reads as; “iii) shall clarify and reinforce the disciplines of the General Agreement and should apply to all contracting parties”.

<sup>27</sup> Croome John, *Reshaping the World Trading System, A history of the Uruguay Round*, World Trade Organization, 1998

effect on...” these wordings in the text of the Agreement leave no room for not achieving a kind of result that can be put into effect. Therefore, to this group of countries the mandate of the WPGR is not to decide whether or not an ESM provision should be incorporated into the GATS and, if so, to elaborate disciplines providing for such a mechanism but the mandate contained in Article X of GATS is to provide for such a mechanism. This interpretation of the negotiating mandate was crucial to the concern of some members on the “desirability” and the entire exercise of developing standalone ESMs under the GATS.

The negotiations on the development of standalone ESMs under the GATS in the WPGR were complicated for the Member countries as the universe of issues faced by them were new, little understood and, above all, the negotiators had restricted themselves to finding solutions within the limited framework circumscribed by the paradigm provided by the Article XIX of the GATT and AOS while little attention was paid to concerns that were historically associated with this paradigm. The negotiators also ignored the fact that the GATS was fundamentally different to the GATT, not only in its scope but also in its architecture; the discussions in the WP remained embedded in GATT and confined mostly to areas and concepts provided by this model

### **4.4.2 ESMs under GATS**

The GATS within its existing construction does not provide for trade remedy measures like levying of Anti-Dumping or countervailing duties that are available for the merchandise trade under the GATT. However, under GATT there are also some other different provisions that practically have similar end effects as the applications of ESMs, likewise GATS also has provisions that if used will have effects that may be similar in the end results to the application of an ESM as understood under the GATT paradigm. Though the emergency safeguards provisions that follow the paradigm provided by GATT do not as yet exist under GATS but provisions that can be used to serve the purpose or achieve the objectives of the conventional GATT escape clause, (discussed in some detail in chapter 5) do exist in the GATS framework. A member can employ these escape clause provisions in specified circumstances and subject to specific conditions that may in certain cases even involve providing of compensatory adjustments.

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In addition to using the basic exclusion of keeping the sector out of binding commitments or alternatively qualifying the commitments, the GATS also contains some escape clause type provisions that can be used to achieve the results that are normally desired through the application of an ESM by the importing country. These provisions have primarily been developed on the model provided by GATT and include; (i) invoking exception provisions to depart from specific commitments, and even the MFN requirement, in particular situations: balance of payments problems (Article XII), threats to life and health, public morals, and so on (Article XIV), threats to national security interests (Article XIVbis), and problems of financial stability (prudential measures pursuant to the Annex on Financial Services, 2(a)); (ii) Withdrawing, or reducing the depth of, existing commitments through negotiations under Article XXI of the GATS (Modification of Schedules) or Article IX:3 of the Agreement establishing the WTO (Decision- Making: Waiver). While the former approach appears more adequate for permanent changes, the latter is better suited for temporary adjustments in response to exceptional circumstances. Article XII of the GATS is applicable if a member experiences serious balance of payments and external financial difficulties, however, the Article also provides that the restrictions imposed will ‘not discriminate among Members’ and has all the basic ingredients of Article XII of the GATT. Similarly Article XIV of GATS creates provisions for the Member countries to take action if it is “deemed necessary for overriding policy concerns such as protection of life and health or protection of public morals” on the analogy provided by Article XX of the GATT. While Article XXI of GATS enables a member country ‘to withdraw or modify a commitment on a permanent basis’ and almost shadows Article XXVIII of the GATT. However, each possible option has its own specific circumstances where it can be employed and not all options are equally relevant in all cases<sup>28</sup>.”

Unlike the GATT where national treatment and non-discrimination (MFN) are basic general and horizontal commitments that cut across the entire framework of the Agreement, a ‘positive-list’ approach has been adopted in the GATS. This approach implies that market access and national treatment obligations under GATS only apply to services that have been scheduled by the Member country in the positive list of its commitments, and even then only to the extent of limitations, if any, that have been attached to these

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<sup>28</sup> Adlung Rudolf *Negotiations on Safeguards and Subsidies in Services: a Never-ending Story?* Journal of International Economic Law 2007 10(2):235-265



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commitments, these scheduled limitations may even include reservations with respect to retain the right to operate discriminatory measures (GATS Articles XVI and XVII respectively). WTO members are also free to designate the sectors, and the extent of liberalisation commitments, for each of the four modes of supply through scheduling of market access commitments. This fundamental distinction between the GATT and the GATS is also directly relevant to the debate on whether or not to have independent ESM provisions for cross border trade in services.

However, the possibilities to use different provisions that already exist in the GATS to achieve results similar to the application of emergency safeguards combined along with the immense flexibilities available under the Agreement particularly with reference to the scheduling of the commitments, which is not available under the GATT have created an interesting framework and a peculiar situation that is not acceptable for trade in goods. The GATS under its present architecture, in case of need offers contingency protection to domestic producers through mechanisms that are not trade remedy measures in the conventional GATT understanding of the concept and provides for the ‘safeguarding’ of the liberalization commitments through means that are different to and other than application of ESMs under the paradigm provided by the GATT.

In the absence of any standalone and specific provision for application of Emergency Safeguards Measures under the GATS and in a trade flow situation that calls for temporary protection to the domestic producers from foreign imports of like products, the different options that are available to an individual WTO Member under GATS can be bifurcated in to normal or general measures and those measures that have characteristics of the escape clause. The normal or general measures include fundamental steps like; (i) individual members can refrain from scheduling specific commitments in particular sectors or modes, thus retaining full policy discretion, including the right to ban all trade. The only potentially relevant obligations in this regards under the GATS are the MFN requirement and some ‘good governance’ provisions like transparency; (ii) if a sector is bound in the schedule of concessions then limitations can be inscribed under relevant modes of delivery so as to qualify a commitment to disciplines in the scheduled sectors. Possible options in this regards may include specifying numerical quotas, economic needs tests or foreign equity

ceilings in the Market Access column of a schedule or listing discriminatory measures (subsidies, minimum size requirements, etc.) under National Treatment; (iii) GATS is a very flexible Agreement and the flexibilities include the lack of disciplines on subsidies therefore exhausting the GATS' flexibilities and additional scope for action, compared to the GATT, is always an option available to members to take measures that are beyond the coverage of full commitments. The different types of subsidy schemes, whether these are producer- or consumer-focused, essentially serve the same purpose, that is, to strengthen the position of a domestic industry vis-à-vis competitors established abroad. Though the two schemes have in practical terms similar objectives and effects, but these may be subjected to different disciplines, depending on the interpretation and application of the national treatment obligation. This provides countries with the possibility to subsidize import-competing industries and thus achieve reduction in cross-border supplies of services.

#### **4.5. GATT/WTO Concepts: Applicability to GATS**

The discussions amongst WTO Members on the issue of providing specific ESMs in GATS have as yet largely been in the abstract. In the lengthy debates and negotiations that stretched for over a decade, the negotiators have not been able to agree and identify a precise situation, even by way of hypothetical example, in the cross border trade in services that suggest of potential circumstances where application of an ESM might necessarily be required. This state of affairs reflects of the immense gap in the approach and major difference of opinion amongst the interlocutors on the issue.

The Member countries of the WTO who strongly feel the need for specific ESMs under GATS (*proponents or demandeurs*<sup>29</sup>) consider that the existence of ESMs would provide necessary aspect to the solution of the problems in cases where the domestic stakeholders suffers serious injury, or threat thereof, as a consequence of liberalization and regulatory reforms in the services sector which, have also been bound under respective country's schedule of specific market access commitments. For this group of countries the positive answer to 'question of ESM' in Article X of the GATS is an integral component of the overall balance of the outcome of the services negotiations and a constructive outcome

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<sup>29</sup> WTO documents; Some of the demanding countries included Brazil, Peru, Egypt, India, Venezuela, Honduras, Dominican Republic, Argentina, Uruguay and Australia and ASEANS.

would provide the essentially required safety net for services liberalization. These countries felt that the “UR services package was simply a beginning in terms of the number and scope of services commitments that Members have thus far taken to open markets, comparable to the initial limited tariff cutting undertaken when GATT was launched in 1947<sup>30</sup>” and felt that such a safety net would encourage Members to consider certain requests for liberalization, which are not otherwise being contemplated because of lack of the lack of escape clause.

Member countries of the WTO that are demanding specific ESMs under GATS (*demandeurs*) also regard that it is also simultaneously important that most of the defining and substantive features that are embedded in AoS and Article XIX of GATT type emergency safeguards measures are also present in the ESMs that are developed under GATS. This transposition of GATT paradigm to GATS for some of the *demandeurs* was fundamental to the integrity and credibility of any ESMs for services sector within the framework of the WTO. To evaluate the possible transposition of the concepts and provisions embodied in Article XIX of the General Agreement and the AoS to any possible ESMs that may be considered under the GATS, it is of significance to first determine the relevance of the key GATT concepts, regarding trade remedy measures in general and ESMs in particular, to the dynamics of cross border trade in services. This determination essentially requires the examination of the conditions and governing criterion for the application of the ESMs in merchandise trade along with the nature of measures that may be applied. It also calls for having a look at the associated issues like that of duration of measures, compensation, and the rights of Members affected by application of an ESM by an importing Member.

#### **4.6. GATT PARADIGM: TRANSPOSITION ISSUES**

For most contracting parties to GATT the comfortable reference point for starting negotiations on possible development of multilateral disciplines for conduct of cross border trade in the services were the familiar principles and underlying concepts of the General Agreement. The political officials negotiating the development of framework agreement

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<sup>30</sup> Macrory Patrick F J, Arthur E Appleton, Michel G Plummer (Ed), *The World Trade Organization, Legal, Economic and Political Analysis, Volume I & II*, International Law Institute, Springer, USA 2005, p 802

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for the services had previously worked only in the context of GATT so were only knowledgeable about paradigms or different governing concepts of GATT where these officials had used the concept of ESMs primarily as a hedge against the possibility that certain unforeseen adverse market situation may arise.

The decisions of the Panels and Appellate Body (AB) in different disputed Emergency Safeguards actions have brought out some specific pre-requisites or conditions that are relevant to any application of the ESMs in the area of merchandise trade. The defining features that are of real substance to the construction of an ESM<sup>31</sup> under the GATT include the concepts like; i) obligations and unforeseen developments; ii) importation; iii) Like or directly competitive products; iv) increased imports; v) serious injury; vi) causality; vii) compensation; vii); provisions for temporary application, transparency and notifications; and viii) standards of investigation. The jurisprudence developed under GATT with respect to some qualifying provisions for application of ESMs in goods sector like; obligations incurred; unforeseen This required analysis of the discussions held in the WTO that takes into account the views expressed on the different aspects of possible development of standalone ESMs under GATS. This analysis of views from both sides of conceptual divide; the *demandeurs* of the provisions and also of the countries that were not convinced of the feasibility of standalone ESMs under GATS let alone their averseness to the desirability.

### 4.6.1 OBLIGATIONS INCURRED

It is important to have some common and multilaterally agreed system for product classification and its interpretation to provide a common understanding to the obligations incurred by individual Member countries; in absence of these common understandings the basic reference point for defining the obligations incurred remain vague, therefore, predictable application of any ESMs will always be at best elusive. There is as yet no

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<sup>31</sup> Article 2, Paragraph 1 of the AoS reads as; “may apply a safeguard measure to a product only if that Member has determined ... that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products”.

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agreed product classification system for service sectors<sup>32</sup> at the multilateral level as it is in the case for trade in goods in the form of ‘Harmonized Tariff Classification and Coding System’. The negotiations amongst the members on their respective schedule of concessions under GATS were conducted without any mutually agreed understanding on classifications of different categories and sub-categories for the services sectors.

Two main instruments that have been used by Members to describe the sectors/sub-sectors covered in their specific schedule of commitments were the *Services Sectoral Classification List*, (SSCL) established by the GATT Secretariat in 1991 and the United Nation’s Provisional Central Product Classification. The SSCL is based on, and cross-refers to, the CPC, categorizes services in twelve sectors and about 160 sub-sectors. Members have a broad margin of manoeuvre to define the services they are ready to commit on as they are not obliged to use these instruments. This benchmarking flexibility made the scheduling of commitments easy but complicated the comparability of schedules of concessions and determining the likeness of services transactions. The majority of existing GATS schedules are based on the GATT’s *Services Sectoral Classification List*, (SSCL) and follow its structure, headings and codes while some other Members have simultaneously chosen to refer to CPC numbers to define the scope of their commitments. Despite their widespread use, the SSCL and the CPC are not as reliable and precise for identifying and defining service activities as the Harmonized System (“HS”) that is used in the respective schedules of tariff concessions bound in the context of GATT for trade in goods and has a comprehensive classification interpretation system. “The SSCL is generally characterized by a high level of aggregation; as to the CPC, its definitions remain often broad even at a five digit level. To take just one example; services provided by cardiologists and dermatologists cannot be considered "like" despite the fact that they fall under the same CPC category of "specialized medical services" (CPC 93122) but in some sectors, nevertheless, the CPC breakdown refers to clearly-defined activities; of which "taxi services" (CPC 71221) could be one of these examples”<sup>33</sup>.

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<sup>32</sup> Orava Steve, *Commercial Reality (or lack thereof) in the Classification and Definition of Services in the WTO GATS Negotiations*, International Trade Law & Regulation. 2002, p 6. .

<sup>33</sup> Cossy Mireille, *Determining "likeness" under the GATS: Squaring the circle?* Staff Working Paper ERSD-2006-08, World Trade Organization September 2006

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Rapid technological developments have also lead to emergence of new activities which may not be specifically listed in any of the two instruments agreed for being used as the possible reference for the listing. Alternatively<sup>34</sup>, a list of services/activities could be done in the form of a model schedule. Some developing Member countries who saw their specific interests in liberalization under Mode 4 of delivery of services had submitted specific proposals for the harmonization of the categories of services that are used to schedule specific commitments on the movement and presence of natural persons<sup>35</sup>. This was important to these countries so that the schedules of commitments are free of any misinterpretations and subsequent confusions and thus contribute to the predictability and transparency of Mode 4 commitments<sup>36</sup>.

This lack of unified or harmonized and agreed classification and interpretation system for the services sector has already started creating complications as the commitments under taken through bindings made in the respective schedule of concessions by different countries do not necessarily have the common understanding<sup>37</sup> of what in practical terms do these commitments really imply or cover especially in case of dispute where actual obligations undertaken have to be assessed. In the *US Gambling case*; Antigua successfully challenged US Gambling laws which prohibited remote Gambling (internet Gambling). Office of United States Trade Representative was of the view that US did not schedule gambling services and that its schedule was not based on CPC<sup>38</sup>, The Appellate Body upheld, based on modified reasoning, the Panel's finding that the US GATS Schedule included specific commitments on gambling and betting services. Resorting to “document W/120” and the “1993 Scheduling Guidelines” as “supplementary means of interpretation” under Article 32 of the VCLT, rather than the context (Art. 31 of VCLT), the Appellate Body concluded that the entry, “other recreational services (except sporting)”, in the US

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<sup>34</sup>World Trade Organization, Council for Trade in Services, Special Session, Mode 1/Mode 2 Information Note by the Secretariat JOB (05)/205, 22 September 2005

<sup>35</sup> World Trade Organization Document JOB (05)/90 and Room Document dated 29 June 2005.

<sup>36</sup> World Trade Organization *Report of the Meeting held on 21, 22 and 25 February 2005*, Council for Trade in Services Special Session, TN/S/M/14, 26 April 2005, paragraphs 149-151.

<sup>37</sup> World Trade Organization, *Compendium of Classification Proposals* Document JOB (02)/143/Rev.1 dated 24 February 2003.

<sup>38</sup> Chimni B.S. Das BL (Ed) *South Asian Yearbook of Trade and Development, Multilateralism at Cross Roads: Reaffirming Development Priorities*, CENTAD, New Delhi, 2006. p 253

Schedule of concessions must be interpreted as including “gambling and betting services” within its scope.

### 4.6.2 STATISTICAL CONCERNS

The absence of agreed product classification in the services sector and adequate statistical information on imports are factors that pose challenges and invite careful attention, as agreed classifications are essentially required for identifying “like” and “directly competing” products/services for constructing any ESMs that are modelled on GATT. While compilation of proper import and production data is required to determine injury and also ascertaining its causal link with imports. There are also other serious technology driven challenges like applicability of the measures to the growing share of trade in services taking place over electronic networks under modes 1 and 2 of delivery. Therefore, the WTO members when devising an instrument would also have to provide that the measure not only deals with cross border transaction but also with firms that are established under mode 3 and even for situations where there is not even a “border” related transaction.

The correct and timely availability of the statistical information with regards to the trade flows is essential to make the application of an emergency safeguards measure possible, transparent and predictable. The compilation of this necessarily required statistical information is problematic, at times, even for trade in goods let alone for the cross border trade in services. The depth of information, about the trade flow and state of domestic producers of like and directly competitive products, required is greater in services than in merchandise trade is straight forward, this requirement emerges from the simple fact that GATS covers all the four different modes of supply of services, namely; 1) cross-border transactions; 2) consumption abroad; 3) commercial presence; and 4) the movement of natural persons and each mode of delivery has its own specificities and requirements. It is thus easily possible that the execution of one single service transaction embraces elements that, at subsequent stages, fall under different modes<sup>39</sup> of delivery of services. The needs

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<sup>39</sup> A significant number of Members, which have exempt mode 1 from their commitments in sectors such as hotel, restaurant or hospital services (“unbound”), have added a footnote explaining that cross-border supplies of such services are not technically feasible. The question arises, however, given the definition of supply in Article XXVIII (b), whether this is actually the case. While these explanatory footnotes have no legal implications (“unbound” means “unbound” regardless of any further explanations), they may fuel doubts surrounding the distinction between modes 1 and 2.

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for detailed trade flow data are greater for services sector considering its four modes of delivery and undertaking of market access obligations by the countries separately for each mode, but simultaneously the possibilities of getting this required latest updated trade data separately for each mode of delivery is difficult and much less.

There is a general lack of detailed statistical information regarding cross border trade in services and in most cases specific trade flow data with respect to a sub-sector of a service category or sector, given the four modes of delivery of services, is almost impossible to get. The “invisibility” of many service transactions and the simultaneity of production and consumption, which is typical of most services sector also contribute and partly explain the reasons for this lack of reliable statistics. In many countries several services are grouped together and all transactions in the individual services within a group are compiled and tabulated under one generic sectoral or group heading. A common framework of accounting and trade flow data on which members can rely for interpretation of specific commitments is essential “as without which GATS rights and obligations as reflected in the schedules will become so complex that it will become almost impossible to make practical and legal sense of them<sup>40</sup>”. The national governments or the multilateral institutions like World Bank and the IMF despite major efforts are still simply not geared to collect the trade data individually for each service, let alone each subsector or to identify transactions separately under each mode of service delivery.

Data-related issues are relevant both to the determination of surge in imports and to the determination of injury and also for creating a causal link. The reliable trade flow data is thus the crucial challenge in any attempt to demonstrate whether there has been a ‘surge’ in imports of the ‘like or directly competitive’ products. There exists a structural weakness of statistical reporting in the services sector and particularly for subsectors in internationally traded services. Working on the GATT structures, which relies heavily on empirical information, for a service sub-sector to demonstrate injury or a threat thereof and also create a causal link with increased imports is really complicated and appears to be a practical impossibility.

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<sup>40</sup> Steve Orava. *Commercial Reality (or Lack Thereof) in The Classification and Definition of Services In The WTO GATS Negotiations*, Int. T.L.R. 2002, 8(1), 5-11



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However, there are some Member countries (*demandeurs*), which are not convinced with the lack of adequate quality data and problems faced with the possibility of generating it and feel that similar data problems also existed in the goods sector during the early GATT period when different economies had their own systems of product classifications in the goods sector. It is argued that this statistical deficit had not prevented the creation of trade remedy mechanisms under GATT for merchandise trade. This group feels that lack of reliable trade flow data is not a forbidding problem because, individual injury indicators might not be fully reliable for a definitive determination but the combination of various indicators will provide a reasonably comprehensive picture of the state of injury and also its causal link with imports. This line of argument preaches an open and flexible approach towards determination of injury and thus creating subjective grounds for application of ESMs. This approach is excessive flexible and may open the door for abuse of the system.

The Member Countries who seek standalone ESMs under GATS (*demandeurs*) were of the view that issue of statistics can be managed and proposed that the national statistical offices of the country, contemplating the possible imposition of the ESMs, would be the first recourse and if the statistical figures available with it were not sufficient, then statistics that are collated by international organizations and professional associations might be useful alternatives or supplements. It was recognized by these countries that statistics from any one source may not be able to provide all the information necessary to justify an application of an emergency safeguard and that all possible sources would need to be looked at concurrently. It was also indicated that statistics could also be complemented by a qualitative assessment of the injury suffered<sup>41</sup> and simultaneously opined that it would be inappropriate for application of an ESM to aim at the standard of evidence as in criminal law cases.

*Demandeurs* of the ESMs also suggested that the firms constituting the domestic industry or associations representing the domestic industry seeking temporary protection through imposition of ESMs should also provide the data. The proposals also indicate that the data that might be generated by petitioning firms may include elements like decline in profits, returns on investment, occurrence of losses, price reductions, reduction in the number of

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<sup>41</sup>World Trade Organization, document No S/WPGR/M/50, Para. 37 & 42-44.

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domestic suppliers, decline in the growth of output or sales, change in market share and reduced level of capacity utilization. The ASEAN paper submitted to WPGR<sup>42</sup> had also referred to a number of indicators either in absolute or relative terms. If the petitioning industry could not produce data to substantiate their claims, the investigations would conclude that the case for a safeguard had not been made and especially in case if the key question of increased imports causal link with injury or threat thereof could not be addressed by the petitioning industry, the case for a safeguard would fail.<sup>43</sup>

Countries not convinced with the desirability or the need of standalone ESMs under GATS during the negotiations continuously raised questions in relation to the source of statistics that will be used in making a determination of injury and whether data could be provided by sectors or with respect to mode of service supply. This group of member countries was also not convinced with the practical validity of the explanations provided by the *demandeurs* as these clarifications to them do not reflect the ground realities and any form of reliable data on which an ESM action on a GATT model can be based was simply too difficult to compile in the services sector. It was apprehended that the confidence in the system could be undermined if trade and production data of the relevant service sector was not available at the level needed for the credible application of an ESM. It was feared that this lack of credible data might lead to investigations being initiated without a valid or just cause being shown and thus burden enterprises with the task of having to react to investigations being launched on less than solid grounds which in turn may lead to shocks or lack of predictability.

Presently most official data on services is collected through periodic surveys that are not equally detailed as customs data for merchandise trade and also suffer from significant time lags. In the most developed country, the US, for example, Bureau of Economic Analysis authorities do collect data through surveys on the sale of services through foreign-owned affiliates, but such data is reported with a two-year delay while comprehensive benchmark surveys are conducted every five years. The sectors covered are also aggregated, as for

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<sup>42</sup> World Trade Organization, *Working Party on GATS Rules, Concept Paper: Elements of a Possible Agreed Draft of Rules on Emergency Safeguard Measures for Trade in Services (GATS Article X). Communication from ASEANS.* document S/WPGR/W/30 14 March 2000.

<sup>43</sup> World Trade Organization, document No S/WPGR/M/50, Para. 42, 44, & 50.

instance architectural, engineering and construction services are all bundled together as one category. It will be interesting to appreciate here that despite relatively good state of trade flow data that is available for conduct of investigations prior to any definitive application of an ESM and determination of injury to domestic industry, even in case of trade in goods every GATT panel which has scrutinized the application of the safeguards measure had found problems associated with trade or domestic production data that has invariably prevented the panel or AB from upholding the action taken<sup>44</sup> by the importing country.

#### **4.6.3. LIKE SERVICES AND TRANSPARENCY**

The concept of likeness is crucial for an application of ESM under the GATT model and this notion still has problems in the merchandise trade as is evident from a number of disputes that revolved around the issue of likeness of imported products and there were also attempts, though short lived and frustrating to introduce the so-called ‘aim and effects’ test. The Article XIX:1(a) and Article 2: 1 of the AoS trigger the process only when increased imports “...cause or threaten serious injury to domestic producers ...of like or directly competitive products...” The basic criterions for determining likeness under the GATT were initially laid down in the Report of the Working Party on *Border Tax Adjustments* adopted by the Contracting Parties in 1970. The criterions included the product’s end uses in a given market that included consumers’ tastes and habits; the product's properties, nature and even quality.

However it was in the *EC – Asbestos* case, that the AB<sup>45</sup> articulated and summarized the approach for determining likeness under the GATT: “This approach has, in the main, consisted of employing four general criteria in analysing ‘likeness’ (i) the properties, nature and quality of the products; (ii) the end-uses of the products; (iii) consumers' tastes and habits – more comprehensively termed consumers' perceptions and behaviour – in respect of the products; and (iv) the tariff classification of the products. These four criteria comprise four categories of “characteristics” that the products involved might share: (i) the

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<sup>44</sup> World Trade Organization, document No S/WPGR/M/52, Para. 14.

<sup>45</sup> World Trade Organization, document WT/DS135/AB/R, para. 101.

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physical properties of the products; (ii) the extent to which the products are capable of serving the same or similar end-uses; (iii) the extent to which consumers perceive and treat the products as alternative means of performing particular functions in order to satisfy a particular want or demand; and (iv) the international classification of the products for tariff purposes”<sup>46</sup>.

The Appellate Body also went on to clarify that, in the WTO jurisprudence, the determination of likeness is “fundamentally, a determination about the nature and extent of a competitive relationship between and among products”. The important question that arises here then is that whether the approach developed under the GATT to assess likeness of goods can be transposed to under the GATS so as to assess the likeness of intangible services transactions. The criteria developed under GATT case-law for determination of ‘likeness’ under jurisprudence relating to other trade remedy regimes includes; physical properties, classification, end-use and consumer tastes and even substitutability. These parameters cannot be mechanically transposed to apply on cross border services trade as these may not contribute to establishing ‘likeness’ under the GATS; similarly other parameters, such as the regulatory context or an ‘aim and effect’ type approach are also not relevant.

The concept of ‘like services’ and ‘service suppliers’ used in the General Agreement on Trade in Services (GATS) is very much an uncharted territory. The few disputed cases involving national treatment and most-favoured-nation (MFN) treatment claims under the GATS are vague concerning the criteria which should be used to establish ‘likeness’ “there are problems involved in sort(ing) ... what constitutes like or directly competitive services”<sup>47</sup>. Discussions among WTO Members on this subject have remained limited and inconclusive. Perhaps the only point on which everybody agrees is that a determination of “likeness” under the GATS gives rise to a wider range of questions – and uncertainties – than under the GATT. The intangibility of services, the difficulty to draw a line between product and production, the existence of four modes of supply, the combined reference to

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<sup>46</sup> Cossy Mireille, *Determining "likeness" under the GATS: Squaring the circle?* Staff Working Paper ERSD-2006-08, World Trade Organization September 2006, p 16

<sup>47</sup> Sinclair Scott, *GATS, How the World Trade Organization's new services negotiations threaten democracy*. Canadian Centre for Policy Alternatives Ottawa 2000 p.83

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like services and like service suppliers, and the lack of a detailed nomenclature are some of the factors which complicate the task of establishing “likeness” in services trade”<sup>48</sup>. The concept of ‘likeness’ in the context of the national treatment obligations incurred under provisions of Article XVII of the GATS are understood to cover the possible implications of the combined reference to ‘like services and service suppliers’, as well as the relevance and role of the modes of supply in determining ‘likeness’.

The central issue of ‘likeness’ was touched upon in *EC—Bananas* and *Canada—Autos*, where Panels seemed to take the general approach that service suppliers that offer the same services are ‘like’. In those cases, however, the ‘likeness’ issue was not really controversial. The *US—Gambling* dispute represented the first opportunity for a panel to address this question more fully. It declined to do so and a ‘likeness test’, therefore, remains to be fully fleshed out under the GATS<sup>49</sup>.

A related issue is the extent to which the MFN and national treatment obligations will apply across various modes of supply services. This is important to determine for instance, that services supplied over the Internet under mode 1 will qualify ‘like’ similar services that are supplied through a commercial presence under mode 3. In *Canada—Autos*, the Panel applied the national treatment obligation across modes of supply and was of the view that ‘it is reasonable to consider for the purposes of this case that services supplied in Canada through modes 3 and 4 and those supplied from the territory of other Members through modes 1 and 2 are “like” services’. This view of panel is consistent with the fact that nothing in Article XVII or II of GATS prevents, as such, the application of the non-discriminatory standard across various modes of service supply. This ruling does not necessarily mean, that ‘likeness’ will, or should, always be found across modes of supply. This will not be applicable if it can be demonstrated that services provided under different modes of supply effectively pertain to different segments markets and these do not compete mutually than categorizing these services as ‘like’ services will be inappropriate, however,

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<sup>48</sup> Cossy Mireille, *Determining "likeness" under the GATS: Squaring the circle?* Staff Working Paper ERSD-2006-08, World Trade Organization September 2006

<sup>49</sup> Leroux Eric H., *Eleven Years of GATS Case Law: What Have we Learned?* Journal of International Economic Law 10(4), 749–793

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the mode of supply is one factor, among many others, to be taken into account to determine ‘likeness’ in the services sector.

The concern for accommodating the concept of ‘likeness across modes of delivery of services’ has surfaced in some of the WTO bodies, such as the Council for Trade in Services, the Working Party on GATS Rules and most importantly in the *US – Gambling* case. Pursuant to this concept, services and service suppliers would be regarded to be ‘like’ simply by virtue of being the nature of the activity in question, regardless of the mode of supply. Hence, all services and suppliers in a given sector would be presumed to be ‘like’, or, to put it differently, ‘different modes’ of supply could be used to provide a ‘like service’. The main argument in favour of ‘likeness across modes’ was that the text of Article XVII of GATS does not suggest that the mode of supply is relevant for defining likeness. On the face of it, the concept looks straight forward and, hence, appealing, but however, it in turn raises several questions.

The structure of GATS schedules of commitments of individual Member countries,, established in the 1993 and followed by all Members, indicates that binding commitments made by the Members are mode-specific; which implies that, in a given sector, a Member retains the right to bind national treatment for a specific mode and not for another<sup>50</sup>. The concept or puzzle about the ‘likeness across modes’ seems to rest on confusion between ‘modes’ and ‘means’ of supply. A proper standard for comparison has not been discussed and remains yet to be established between foreign and national services and suppliers, based on a series of criteria which most likely will have to factor in the means through which a service is supplied<sup>51</sup> as there is no ‘mode’ of supply for national products and producers. Under GATS the concept has broader implications and is relevant to different provisions or market access limitations which have been scheduled by a Member country and above all in the context of the application of an emergency safeguard measure<sup>52</sup>.

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<sup>50</sup> For instance, in *US – Gambling*, the parties discussed extensively whether services supplied via Internet could be compared with casino gambling, or only with domestic suppliers using remote means.

<sup>51</sup> Cossy Mireille, *Determining "likeness" under the GATS: Squaring the circle?* Staff Working Paper ERSD-2006-08, World Trade Organization September 2006

<sup>52</sup> World Trade Organization, Document, Minutes of the WPGR, S/WPGR/M/47, Para. 8,

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In the services sector the concept of ‘likeness’ also has its own specific concerns particularly regarding transparency, objectivity, and fairness. In provision of services it is fairly challenging even to objectively identify as similar elements of one service and then compare these, an example put forward during negotiations in the WPGR is of writing a ‘simple memorandum’; that from one lawyer might not be exactly ‘like’ that from another lawyer; the quality of the service might be different and following a pure GATT model will imply that all services irrespective of quality will have to be treated at par. The example is of fair amount of practical significance as the service activity which is being investigated is categorized as same, the quality of the service might be different, not substitutable and even be ever-changing.

The problem confronting WTO members was to first sort out what constitutes “like or directly competitive services”. The very nature of services trade makes this determination questionable since most of what is delivered as a service is designed to meet the specific needs of the customer. The concept of “like or directly competitive” assumes greater complexity when it is required to be determined that whether a service supplied on a cross border basis is similar to the one which is supplied through one of the other modes of supply. The intangible nature of providing a service creates additional difficulties to any effort, which tries to compare a foreign service to a domestic service. However, establishing what constitutes the “domestic industry” and “like services” is critical to credibly determine whether imports are causally linked to whatever threat thereof or injury is suffered by a country’s domestic service industry.

The model provided by GATT in determining as to what constitutes a “like or directly competitive product” is also not very helpful for the services sector, as classification instruments currently available for the service sector are less elaborate and reliable than the Harmonised System of classification for trade in goods to determine or pronounce on the likeness of services. In many instances, unlike for the trade in goods and the HS, the fact that two services fall under the same CPC category will not be sufficient to establish their likeness. The CPC defines service activities and is indifferent to the quality or

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characteristics of the supplier<sup>53</sup>. However, on the other hand, there are always strong presumptions that if two services are falling under two different categories of classifications these are bound to be unlike. Hence, CPC can at best be indirectly relevant to compare service suppliers.

The issue of ‘likeness of services’ under the broader framework of GATS is of genuine concern, as the concept of likeness is relevant not only for the application of an emergency safeguard measure, but also, for host of other elements of GATS, like, for the basic issues such as national treatment obligations<sup>54</sup>. Not having the solution in sight of the issue of “like or directly competitive services” during the negotiations in WPGR it was proposed by some Member countries<sup>55</sup>, demanding independent ESMs, to leave this question to prove also to the domestic authorities. Proponents were of the view that onus to establish ‘likeness’ of the services should be left to the authorities of the Member contemplating imposition of safeguards measures. They thus proposed a case-by-case approach which in turn raised valid concerns associated with such an approach regarding transparency, objectivity, and fairness of the determination of the ‘likeness’.

The only case law available in the service sector on the issue is the Panel finding on the *EC – Bananas III*, which was subsequently not reviewed by the Appellate Body, which addressed the issue of ‘like services and service suppliers’ under Article II of the GATS as :

“[I]n our view, the nature and the characteristics of wholesale transactions as such, as well as of each of the different subordinated services mentioned in the head note to section 6 of the CPC, are ‘like’ when supplied in connection with wholesale services, irrespective of whether these services are supplied with respect to bananas of EC and traditional ACP origin, on the one hand, or with respect to bananas of third-country or non-traditional ACP origin, on the other. Indeed, it seems that each of the different service activities taken individually is virtually the same and can only be distinguished by referring to the origin of the bananas in respect of which the service

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<sup>53</sup> The only exception is "Postal and courier services" (CPC 751) which defines postal services as those rendered by "national postal administration", while "courier services" are rendered "other than by the national postal administration"

<sup>54</sup> World Trade Organization Document S/WPGR/M/47. Para. 8,12 & 26; S/WPGR/M/51, Para. 61, 65 & 74.

<sup>55</sup> World Trade Organization Document JOB(04)/4



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activity is being performed. Similarly, in our view, to the extent that entities provide these like services, they are like service suppliers<sup>56</sup>.”

In the *Canada – Autos* case, the panel assessed – very summarily – the likeness of Canadian *vis-à-vis* Japanese companies against the relevant definition contained in the CPC. The Panel found that, contrary to what was claimed by Japan, the Canadian companies cited by Japan did not “seem to be supplying 'wholesale trade services of motor vehicles' as defined in CPC 6111”. Hence, in the absence of domestic “like” suppliers, discrimination could not occur. More generally, using the definition of services activities to deduce the likeness of suppliers will lead to the much criticised panel's conclusion in *Bananas III* that “to the extent that entities provide these like services, they are like service suppliers”.

The Australia–United States Free Trade Agreement (AUSFTA) has defined and broadened the scope of likeness in the context of cross border trade in services. Articles 10.2 and 10.3 of the AUSFTA read as: ‘Each Party shall accord to service suppliers of the other Party treatment no less favourable than that it accords, in like circumstances, to its own service suppliers’ or, respectively, ‘ . . . to service suppliers of a non-Party’ (emphasis added.) Thus, the concept of ‘likeness’ no longer builds on the notion of ‘like services and service supplier’ as in the GATS, but on the existence of ‘like circumstances’. The signatories might thus be able to differentiate between foreign and domestic producers/products for a wider range of factors than would be permissible under the GATS, including factors related to the public policy context in which a service is provided. Furthermore, the explicit reference, as in Article XVII of the GATS, to the treatment of both services and service suppliers has disappeared from this FTA; and the benchmark, in GATS Article XVII:3, of treatment that does not ‘modify the conditions of competition’ has been replaced by a simple reference to ‘treatment no less favourable than . . .’. Nevertheless, it needs to be borne in mind that the scope of relevant AUSFTA obligations, specified in Article 10.1, extends to measures ‘affecting cross-border trade in services by service suppliers of the other Party’, including measures ‘affecting the production, distribution, marketing, sale and

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<sup>56</sup> World Trade Organization *Panel Report on EC – Bananas III*, Para. 7.322.

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delivery’, as well as to measures ‘affecting the purchase or use of, or payment for, a service’ (emphasis added)<sup>57</sup>.

The transformation brought about by the internet in last decade could not be foreseen in 1994 when GATS was agreed. This phenomenal development has created issues with respect to the extent to which different obligations assumed by the Member countries apply across various service sectors and also modes of supply. A point of relevance in context of application of ESM, for instance, is whether the services supplied over the internet under mode 1 of supply can be regarded as ‘like’ similar services supplied through a commercial presence under mode 3<sup>58</sup> and can adverse market circumstances created under any mode of supply of service can be regarded as a ‘like’ service in all modes or in a mode other than identified initially; as the Panel in the *Canada—Autos*, applied the national treatment obligation across modes of supply. The Panel ruled that “it is reasonable to consider for the purposes of this case that services supplied in Canada through modes 3 and 4 and those supplied from the territory of other Members through modes 1 and 2 are “like” services”<sup>59</sup>. With such a broad scope of ‘like’ services, the practical application of ESMs under the GATS gets further complicated and difficult.

### 4.6.4 UNFORESEEN DEVELOPMENTS

The interpretative gap with respect to the question; ‘unforeseen by whom, at what point in time?’ that had developed under Article XIX and also subject of dispute under the AoS, was carried forward into the protracted and long debates in the WPGR. These debates particularly focussed on; whether the concept of ‘unforeseen developments’ was worthwhile and also; as to how the concept of ‘emergency’ (word used in text of Article X of GATS) is different to the concept of ‘unforeseen developments’ (the word used in text of Article XIX of GATT). Some Members countries were of the view that the concepts of ‘emergency’ and ‘unforeseen developments’ have connotations and both describe the general context in which any ESMs that are developed under GATS will require to be

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<sup>57</sup> Adlung Rudolf and Peter Morrison *Less Than The GATS: ‘Negative Preferences’ In Regional Services Agreements* Journal of International Economic Law 13(4), 1103–1143

<sup>58</sup> Leroux Eric H., *Eleven Years of GATS Case Law: What Have we Learned?* Journal of International Economic Law 10(4), 749–793

<sup>59</sup> World Trade Organisation, Panel Report, *Canada – Autos*. This conclusion of the Panel was not appealed before the Appellate Body.

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invoked. For this group of countries, therefore, it was not necessary to include an explicit reference to the concept of ‘unforeseen developments’ in any text which may possibly be drafted. The “situations justifying the invocation of an emergency safeguard measure” or the “context” in which an ESM might be applied should anyway be “out of the extraordinary<sup>60</sup>”. The term “emergency” has both an aspect of suddenness and also of having unforeseen elements. In view of some Members the “unforeseen developments” and the ASEAN paper<sup>61</sup> submitted to the APGR uses this term (the wording of Article X of GATS).

Some other Member countries were of the view that Article X of GATS, unlike Article XIX of GATT, only refers to ‘emergency’ and not to ‘unforeseen developments’ and the key criterion was a sudden increase in foreign supply as the short-term impact of an increase in imports of services could not be anticipated in any objective way. This group of countries felt that if a reference to ‘unforeseen developments’ is made in the text of any standalone provisions for ESMs that are eventually developed under GATS then it would introduce a fourth condition, which was not desirable as the concept was too subjective and would not be operational in practice. It was suggested that the concerns with the concept of ‘unforeseen developments’ were recognized, a fact that is reflected in the use of the word ‘emergency’ in the text and considered that the concept of ‘emergency’ should be applied on case-by-case basis. The mere fact that words ‘unforeseen developments’ were not specifically used in the Article X of GATS is not sufficient, for some countries, to disregard this concept in formulation of any ESMs for services trade. The group, consisting of the countries that are demanding ESMs, was of the view that Article X of GATS and Article XIX of GATT cannot be compared since the two are fundamentally different; the former is essentially a negotiating mandate, while the latter contained substantive rules. It was viewed that the term ‘unforeseen developments’ is more appropriate than the concept of ‘emergency<sup>62</sup>’ as it was important to reflect the idea of ‘unexpected’ in order to make a distinction with normal trade flows, since an increase in trade flows was a logical consequence of liberalization and a reference to ‘emergency’ only

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<sup>60</sup> World Trade Organization *The note from the Chair Job (01)/122* dated August 07, 2001

<sup>61</sup> World Trade Organization, *Working Party on GATS Rules, Concept Paper: Elements of a Possible Agreed Draft of Rules on Emergency Safeguard Measures for Trade in Services (GATS Article X)*.

<sup>62</sup> World Trade Organization, *Working Party on GATS rules, Elements for Establishing an Emergency Safeguard in Services, 28 September 2001. Non paper by Argentina, .*

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was not sufficient. To these Members the concept of ‘unforeseen developments’ was in principle embodied in the concept of ‘emergency’, but whether to make it explicit or not was something that required to be discussed and agreed.

Many Members were apprehensive of the fact that the concept of ‘unforeseen developments’ has a history of different interpretations in the case law under GATT and if this concept is also carried into GATS it will not help but create many complications in the application of any ESMs, if these are developed under GATS. It was also feared in the early stages of the negotiations in the WPGR that the case law available for merchandise trade might find its way into services trade case-law and be used under GATS. The record notes of the discussions held in the meetings and various papers submitted by the members to the WPGR demonstrate that there existed an immense divergence of views on these basic constituting elements.

### **4.6.5 IMPORTS AND DOMESTIC PRODUCTION,**

Application of an ESM under the model provided by the GATT has a direct relationship with the increased ‘imports’ and the ‘domestic production’ in the specific category where the relief through the imposition of the measure is sought. The likely application of emergency safeguards measure is only possible under GATT when imports that cause or threaten to cause serious injury through increase of imports in quantitative terms, absolutely or relative to the domestic production. The concept of ‘importation’ though on the surface appears to be fairly straight forward and something that can possibly and equally be applied either to cross border trade in goods or trade in services but the practical manifestation of the concept ‘importation’ is not similar for international trade in goods and the cross border trade in services. The disciplines provided in the GATT only cover international merchandise trade and do not cover facilities for production of these products and any regime that relates to the production facilities is detached from products and treated as investments<sup>63</sup>.

While it is not simple to disconnect production from the consumption in most categories of the trade in services as there exists simultaneity between the production and consumption

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<sup>63</sup> Investments are not covered by the WTO.

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of the service but these are profoundly different from goods in that they require a certain amount of proximity between the provider of the service and the person receiving the offered product. It follows that even in the situation of cross-border supply of a service (i.e. the supply of a service where both the consumer and the supplier remain in their respective territories when the product is delivered) cannot encompass the transfer of the service itself but rather the result of the service performed. Similarly, consumption of a service abroad includes import to the home country of the result of the service that has already been enjoyed and consumed. Authorities therefore cannot easily detect cross-border movement of services trade and there are statistical concerns.

The notion of ‘domestic production’, which is fairly straightforward for trade in goods but the same simple concept turns fairly complex for the trade in services especially considering its different modes of delivery. The ‘domestic production’ in the case of international trade in goods normally and simply refers to all suppliers operating within the territory of a Member, irrespective of the fact that whether these are owned by the nationals or foreigners in terms of the national treatment provisions<sup>64</sup>. The concept of importation in cross border trade in services cannot be regarded to be straight forward and broadly it refers to a product crossing the frontier under Mode 1, consumption abroad, under Mode 2, the entry or establishment of a service supplier under Mode 3 and Mode 4. The “concept of imports of services is not entirely clear”<sup>65</sup> as it also embraces post-establishment trade under Mode 3 and Mode 4 of delivery. The only notion of importation under GATS that can be compared with importation of goods and possibly be covered under any possible model that can be provided by the GATT is the cross-border trade in services under Mode 1.

The possible application of a safeguards provision first requires dividing the domestic industry into a nationally and a foreign-owned segments. The definition of domestic industry for application of ESMs in the goods sector is provided under Article 4:1 (C) of the AOS and this definition has a possible transposition in case of cross border transactions of services under Mode 1 and Mode 2 of service delivery. However for Mode 3 and Mode

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<sup>64</sup> Article III of GATT

<sup>65</sup> Sinclair Scott, GATS, How the World Trade Organization’s new services negotiations threaten democracy. Canadian Centre for Policy Alternatives Ottawa 2000 p.83

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4, the situation is fairly complicated, as defining ‘domestic’ production involves two different concepts, domestic production under these two modes of delivery refers both to; i) national and foreign suppliers domiciled within the country; and; ii) in certain cases it also refers to national suppliers only, and foreign suppliers despite having a physical presence in the country may be excluded. After establishment of a service provider in the territory of a Member country or in other words when the entry stage has been passed and the service has crossed the border, another issue arises that whether the safeguard action would be taken to protect the existing service suppliers against ‘newly established suppliers’ or ‘new market entrants’. In the context of post-establishment operations (mode 3 & 4) of the service delivery, if an emergency safeguard action is conceived it would logically distinguish amongst national and foreign suppliers and the domestic suppliers, ‘defining domestic production’ only in terms of national suppliers will add a new dimension to the application of ESMs. The differentiation on basis of some threshold of ownership will in turn be a violation of the ‘National Treatment’ requirements laid down under Article XVII of the GATS. The proponents of the ESMs have in the WPGR suggested that if the relevant injury criteria are met by a significant number of national suppliers, whenever governments are able under domestic law to do so, they be entitled to temporarily suspend new foreign establishment<sup>66</sup>.

The determination of injury for any investigations under the GATT model is conditional on the definition of what constitutes domestic industry, the determination of serious injury and/or the threat of serious injury which are defined in Article 4:1 of the Agreement on Safeguards<sup>67</sup> and establishing causal link between imports and injury. The mechanics of injury investigation<sup>68</sup> provided in Article 4:2 of the AOS also uses the concepts of ‘like products’ and ‘domestic production’. Even if the problems of paucity of reliable and comprehensive trade flow data in the services sector are, for a time being set aside, the criteria defined in the AOS has severe limitations on its application in the context of services as the disciplines provided for in Article 4:2(a) and 4:2(b) of the Agreement on Safeguards would apply.

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<sup>66</sup> Adlung Rudolf, *Negotiations on Safeguards and Subsidies in Services: a Never-ending Story?* Journal of International Economic Law 2007 10(2):235-265

<sup>67</sup> Article 4:1 of the AOS,

<sup>68</sup> Article 4:2(a) of the AOS

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Under the GATT model the determination of serious injury in case of investigations for possible application of the ESMS under GATS would have to focus upon; i) cross-border service transactions under Mode 1 and; ii) the effects on domestic industry of consumption abroad under Mode 2. While at the establishment stage under Mode 3 and Mode 4, the notion of increased ‘imports’, which is required to be taken into account in assessing serious injury or threat thereof to a domestic industry, would then presumably relate to an investment flow (Mode 3) or to the movement of natural persons (Mode 4). Any emergency safeguard mechanisms if it were to be contemplated in the context of physical presence of service provider (Mode 3), then the relevant consideration for the determination of injury would be the situation of service suppliers of another Member in relation to service suppliers of national provenance producing ‘like or directly’ competitive products. Application of this criterion will require substitution of the notion of ‘consumption of foreign services’ for the concept of ‘imports’ so as to cover supply through each of the four modes of delivery of services. It will also require that the reference to “domestic industry” be replaced by the concept of “national industry” which in practical terms will imply that despite of having a ‘commercial presence’ foreign service suppliers will always have a possibility to be denied the same domestic law considerations as a nationally owned entity. It is interesting to note here that given the scope of the GATS, not only industries or service provider (i.e. juridical persons), but natural persons will also be subject of an emergency safeguards action.

In circumstances where factors other than increased imports are causing injury to domestic industry then in terms of the model provided by GATT this injury should not be attributed to increased imports and these factors, which are not directly related to trade, would require to be taken into account by the investigating authority<sup>69</sup>. It is generally accepted that macro-economic disruptions and other structural problems that reflect broader economy-wide imbalances do not justify the use of emergency safeguards in individual categories as stipulated under Article 4:2(b) of AOS. It is apprehended by some Members that the situations which impinge on an industry’s ability to adjust to sudden increases in foreign supplies are more likely to arise in services sector than these do in the merchandise

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<sup>69</sup> Article 4:2(b) of AOS ”.

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trade. The logical question that arises here is that would it be desirable and technically possible to separate such situations from other genuinely import related developments. A causality requirement of this kind though in principle may be possible to be developed but in practical terms this causality will be really difficult, rather impossible, to recognize.

ASEAN's paper proposed that the determination of domestic industry should largely be left to the national laws of each member country. There have traditionally been concerns about the use of the definitions found in Article XXVIII of the GATS but the suggestion to leave such an important defining feature to each member to provide its own definition raises serious concerns as a purely subjective definition developed by each member and then subsequently linking such an individualized definition to the determination of injury and thus application of ESM would result in a high level of discretion, confusion, lack of predictability and have implications on the type of safeguard measures imposed. Proposed approach was also undesirable because it would encourage Members "to offer definitions of domestic industry that would allow for the maximum possible use of ESMs, will thus lead to uncertainty and undermine confidence in the ability of the system to deliver reasonable outcomes"<sup>70</sup>. In the informal discussions in the WPGR it was considered as inappropriate to distinguish between established suppliers on the basis of the degree of foreign ownership, as even if the model provided by the GATT is followed such a differentiation will not correspond to the definition of domestic industry used in the Agreement on Safeguards.

A group of *demandeurs* of the ESM also suggested that for determination of injury to the 'domestic industry' could be defined in a manner that excludes those segments of the industry where the percentage of foreign equity is above a certain pre-specified threshold. A question that arises then is that how an established foreign supplier could cause injury to local suppliers in a situation where a Member has already limited foreign ownership of, say 30%. A number of Members felt that it was inappropriate to distinguish between established suppliers on the basis of the degree of foreign ownership. Another question was that if a Member had scheduled a commitment wherein the number of licences for provision of a service for the foreigners was limited to three, then would it be possible for that Member to apply an emergency safeguard measure to any of the those three foreign

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<sup>70</sup> World Trade Organization, document S/WPGR/M47, Para. 20



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suppliers that have been allowed the market access. The invoking of the possible emergency safeguard measures, if these are developed under GATS, therefore, is dependent on how the domestic industry is defined. If the three foreign licensees were part of the domestic industry, they would not be subject to a safeguard measure. If the licensees did not fall within a Member's definition of domestic industry, a safeguard measure could then be applied<sup>71</sup>. Partitioning a sector on the basis of ownership seems odd considering that now many countries have domestic sectors that are largely foreign-owned. With regard to mode 3, it was difficult to understand how a country's commercial output in a particular service sector be threatened by foreign contributions to that very output and the suggested notion of domestic industry seems particularly difficult for Mode 3. To define the domestic industry, one needs to have a clearer idea as to who was to be protected, for what purpose, and against what<sup>72</sup>.

The concept of 'domestic industry' for trade in goods as defined in Article 4.1(c) of the AoS in view of some cannot be used for cross border trade in services. A single set of definitional elements will run into difficulties in different sub-sectors and modes of supply of the services transaction and investigative authorities will have to use different criterion to determine the domestic industry with regard to like or directly competitive products which will probably will have to vary from case to case<sup>73</sup>. Members not convinced with the desirability of ESMs under GATS felt that no clear proposal has been put forward to establish causality in the injury determination in the same service under different modes. There is no methodology suggested to ascertain whether the cross-border supply of legal services by fax, mail, e-mail or telephone was the cause of any injury that has been claimed. Members at lower levels of economic development will face difficulties in amassing all the information required and, therefore, wonder which Members are most likely to use an ESM.

### **4.6.6. DETERMINATION OF INJURY**

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<sup>71</sup> World Trade Organization Document S/WPGR/M/49, Para. 47; S/WPGR/M/51, Para. 66 & 75.

<sup>72</sup> World Trade Organization, document S/WPGR/M/50, Para. 39, 46 & 49; S/WPGR/M/55, Para. 7,9.

<sup>73</sup> World Trade Organization Document S/WPGR/M/52, Para. 19; S/WPGR/M/55, Para 6 & 17.

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The determination of injury in the service sector faces difficult challenges of its own, including the concomitant necessity to establish causality with the imports. The determination of injury under the GATT model in terms of Article 4:1(c) of the AOS requires information on; i) the quantity of imports; and also; ii) domestic production<sup>74</sup> especially where ESMs are being sought on increased imports relative to domestic production<sup>75</sup>. Determination of surge in imports i.e. a sudden increase in the supply of services by foreign suppliers of like and directly competitively services is also important to gauge but because of difficulties with trade data and précis product classification it is difficult to measure. The proponents of the concept were nevertheless not very uncomfortable on this aspect and felt that suddenness should be understood in a relatively broad manner, as part of the enforcing authorities' assessment of the emergency situation and in the context of its effect on the domestic industry<sup>76</sup>. It might, for instance, refer to an increase in supply of a particular service over a period of up to three years, although it could be shorter for other sectors. Example given of 'sudden increase' under mode 2 was that if a Member's ships and other sea going vessels started to get repair and maintenance done predominantly in a neighbouring country, thus causing injury to the domestic ship repair and maintenance industry. This might take place over a period of two to three years and might be perceived as a 'sudden increase' in consumption abroad while under mode 3, foreign retailers' market share might demonstrate a strong surge in supply which caused or threatened to cause injury to local retailers.

There are no GATT type instruments of contingency protection available under GATS and there has as yet been no case that has been brought to the WTO dispute settlement system with respect to cross border trade in services where injury has been claimed by a member country because of the liberalisation undertaken in the sector and some form of temporary protection has been sought. Therefore, it is difficult to comprehend that how would an injury to domestic service supplier will definitely be determined especially when services transactions have myriad problems of statistics, determination of causality and with the

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<sup>74</sup> Article 4:1(c) of the AOS

<sup>75</sup> Case law under AoS views that increased imports must be measured in quantitative or volume terms, and not simply in terms of value, which implies very comprehensive information requirements.

<sup>76</sup> Under GATT in *Argentina--Footwear AB* with respect to the attribution of increased imports had ruled that 'such increase' must be "recent enough, sudden enough, sharp enough and significant enough" so as to cause serious injury

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very basic agreed understanding of the fact as to what constitutes imports. The problems are further complicated when the ‘goods’ and ‘services’ overlap as most traded merchandise have now either services built into them or have strong nexus with them. The fundamental structure and logic of its Article I: 1, in relation to the rest of the GATS, requires that determination of whether a measure is, in fact, covered by the GATS must be made before the consistency of that measure with any substantive obligation of the GATS can be assessed. Article II: 1 of the GATS states expressly that it applies only to “any measure covered by this Agreement”. This explicit reference to the scope of the GATS confirms that the measure at issue must be found to be a measure “affecting trade in services” within the meaning of Article I: 1

Despite long deliberations in the WPGR on the issue, possible sources of injury to domestic service sector are still open to questions like; what is the yard stick to measure the injury; would it be solely an increase in the number and/or an increase in the value of services provided? Would it be in absolute terms or rather in relative terms compared to local service suppliers? Countries proposing ESMs under GATS are of the view that no single criterion might be decisive, the circumstances would have to be examined on case-by-case basis and it might be useful to assess injury in both absolute and relative terms<sup>77</sup>. In view of the statistical concerns combined with the complexity of the services trade and its four Modes of delivery the countries not convinced with the desirability of ESMs under GATS wonder as to how the proponents of independent ESM provisions under GATS propose to determine causality between the service supplier and the threat of serious injury or serious injury was being caused by liberalization undertaken according to a Member's schedule of commitments as differentiated from other factors. It was also considered by some countries that determination of any injury in the service sector should take into account the national economic interests of a Member, including the adverse impact of costs resulting from the imposition of an emergency safeguard measure. The costs can have different forms like, for example, reduction in competition in the retail sector might have adverse consequences for consumers, while an increase in the price of financial and telecommunication services might negatively impact on users.

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<sup>77</sup> World Trade Organization, document No S/WPGR/M/51, para. 66 & 75.

**4.6.7. COMPENSATION, CAUSALITY, PROVISIONAL APPLICATION**

The concepts like; ‘critical circumstances’, ‘duration’, ‘progressive liberalization’, and ‘level of concessions’, ‘review’ and similar other obligations are of critical significance to any application of any ESM under the provisions that are available for trade in goods under the General Agreement. The GATT with respects to emergency safeguards permits the adoption of provisional safeguard measures in ‘critical circumstances’ and conceptually and working on the GATT model, if there are to be put in place any agreed ESMs under GATS, then there appears to be no reason as to why provisional safeguard measures could not also be made to apply to trade in services. This is, however, only possible if the nature of service transactions under any of the available modes of delivery justifies a ‘critical circumstance’ remedy. Similarly other enabling provisions that exist in the AoS and relate to the concepts like, ‘the duration of time for which safeguard measures might be applied’, the interval before reintroduction requisites, progressive relaxation and mandatory review. All these concepts could also be employed in the context of GATS but this all is subject to the proviso that we have a viable emergency safeguards instrument, modelled on the paradigm provided by the GATT, for trade in services in place.

Members of the WTO when trying to follow the GATT model, on a conceptual basis, have no option but to agree that any emergency safeguard measures if developed under GATS must be temporary and these should be progressively liberalized during the period of application. The AoS defining the applicable rules details<sup>78</sup> the length of time for which safeguard measures might be applied, and the interval that must elapse before a new safeguard measure may be introduced on a product that has previously been the subject of a safeguard action. There was also a general shared perception that safeguard actions, if agreed under GATS, like any other trade remedy action under GATT, should only be applied to the extent necessary to prevent or remedy serious injury and to facilitate adjustment<sup>79</sup> which for in the services sector it can mean temporary market access restrictions or temporary suspension of the national treatment principle.

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<sup>78</sup> Article 7 of the AOS, Duration and Review of Safeguard Measures.

<sup>79</sup> Article 5 of the AoS.

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The provisions relating to the other concepts like of ‘compensation’<sup>80</sup> and ‘balance of concessions’ that exist with respect to application of ESMs in the context of trade in goods as such pose little conceptual difficulties if these provisions were also to be transposed to any regime of ESMs for trade in services. The provisions of Article XXI of GATS, dealing with the modification of schedules are relevant in the context ‘compensation’ and ‘balance of concessions’ on the same analogy as are the provisions of Article XXVIII of GATT relevant to its Article XIX. Article XXI of GATS already provides that a Member may modify or withdraw a scheduled commitment at any time after three years from the entry into force of the commitment concerned. Compensatory adjustments or what is called ‘balance of concessions’ should seek to maintain “a general level of mutually advantageous commitments not less favourable to trade than that provided for in Schedules of specific commitments” (Article XXI: 2). However, pending results of negotiations on the question of ESMs under GATS Members are free to modify their schedule of concessions, if need be, even after one year in terms of Article X: 2 of the GATS. A set of procedures were also adopted under Article XXI (Modification of Schedules) on 20 July 1999 which have to be used whenever a Member intends to modify or withdraw its scheduled commitment<sup>81</sup>.

The concept of compensation was primarily intended to work as a potential deterrent against protectionist abuse through the application of emergency safeguard provisions. There was a view that ‘compensation’ requirements render the invocation of (temporary) safeguards too burdensome and, thus, create a bias in favour of (permanent) modifications of scheduled commitments either through negotiations under Article XXVIII of GATT or in case of services trade under Article XXI of the GATS. The concept of ‘compensation’ and ‘modifications of schedules’ are fairly different, the underlying economic challenges are essentially different in case of sudden import surges as compared to longer-term changes in competitive conditions. It was viewed in WPGR that in the case of ESMs under GATS the need for compensation could be made contingent on the type of adjustment envisaged and the nature of the services-industry involved, like in the case of digressive application might not be compensated.

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<sup>80</sup> Article 8:1 of the AOS.

<sup>81</sup> World Trade Organization Document S/C/M/38, section D. The text of the adopted procedure; S/L/80.

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In case of trade in goods there are relatively few complications involved in calculating the compensation that may be required to be extended in case of application of any trade remedy measures (anti-dumping, countervailing duties and emergency safeguards). However, there are a fair number of technical difficulties involved in case of “trade in services under General Agreement on Trade in Services (“GATS”) and also in some other areas like Intellectual Property Rights (“TRIPs”), where working on the GATT model, the quantification for seeking of compensation is difficult to determine”<sup>82</sup>. During the discussions on the issue in the WPGR it was also suggested by some Members that the application of any emergency safeguard mechanism, that is developed under GATS, should also take into account the wider public interest considerations and not only industry-specific considerations. These countries also suggested that Article 3 of AoS could be used as a model in this regard, but at the same time it was apprehended by other Members that the inclusion of the concept of “public interest” will take away the objectivity of measures and also allow for too much leeway to the country that is imposing the measure.

The exact characteristics of Article XXI of GATS need to be taken into account when considering whether the possibilities for modifying commitments provided under Article XXI might obviate the need for a specific emergency safeguard mechanism under GATS and the simultaneous existence of the two provisions will cause an unnecessary overlap. However, in terms of paradigm provided by the GATT the indefinite withdrawal of commitments is not similar as temporary withdrawal of commitments that would presumably be envisioned under an emergency safeguard provision; these are totally two different concepts and have a different basis. The nature of renegotiations of schedule of concessions differs from the concept of ESMs in three important ways; i) in GATS Article XXI action is only available three years after a commitment has been undertaken; ii) Article XXI action cannot be taken until three months after notification of the intention to act; and iii) the obligation to provide compensation for the adverse effects of the modification of a commitment exists from the outset under Article XXI procedures. Article XXI of GATS has its parallel in Article XXVIII of the GATT. For some other member

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<sup>82</sup> Mariusz Maciejewski. Philip Xenophon Pierros, *Specific Performance or Compensation and Countermeasures - Are These Alternative Means of Compliance Under The WTO Dispute Settlement System*. International Trade Law & Regulation 2001

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countries this was not a problem as in practice Article XIX and Article XXVIII had coexisted in the GATT and in early years of GATT many Article XIX actions were settled through compensations under the ongoing Article XXVIII negotiations. In a sense, ESM by these countries were seen as filling the gap between a permanent commitment and a permanent withdrawal.

The proponents' also argued that it is every Member's right to modify or withdraw its commitments, subject to compensation under Article XXI of the GATS and there is no reason why a temporary modification or withdrawal under an ESM could not also be construed as a right. Since the modification or withdrawal proposed was only temporary, the corollary obligation of maintaining a general level of mutually advantageous commitments may be waived, at least during the initial period (first three years) of application. With regards to the duration or life of the ESM, the *demandeurs* of the concept of ESM have generally proposed a three year period from the date of application of an ESM. The reason for suggesting a shorter duration than that provided for goods sector under the Agreement on Safeguards (AoS) has been explained; "as this might help to gain greater support for an ESM among the membership"<sup>83</sup> which is a reason that is detached from the reasons of structural adjustment and achieving competitiveness by the domestic industry that are regarded as *raison-de-tere* of any application of the ESM. Supplementing the proposal it was also proposed that this initial applicable period of three years may have a possibility of an extension of the measure for an additional three years for developing countries which could be seen from the perspective of S&D treatment. However, it was proposed that such an extension may not be automatic but be subject to prior review by the Council for Trade in Services (CTS) confirming that reasonable grounds existed and situations where a longer suspension of commitments was needed, this should lead to the initiation of Article XXI procedures.

### **4.6.8 CHOICE OF MEASURES AND MODAL ISSUES**

The model for the application of an ESM that is provided by GATT does not prescribe any particular 'choice of measures' that may be used to provide relief to the domestic

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<sup>83</sup> World Trade Organization, document No S/WPGR/M/47, Para. 18, 22, & 27.

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producers. However, in practice in case of merchandise trade mostly two kinds of emergency safeguards measures have been used; i) quantitative restrictions (import quotas); and ii) tariff increases<sup>84</sup> (price based) or a mixture of both. Working on the GATT model the choice of options between quantity-based and price-based measures available for imposition of emergency safeguards should also theoretically exist for trade in services in case if an emergency safeguard instrument is developed under GATS on the GATT model. However, any ESM under GATS cannot always be applied on “imports” in the meanings or dimensions that are currently understood for trade in goods. The discussants of the issue in the WPGR felt that ESMs under GATS, because of specificities of services sector, will require to be expressed in regulatory terms and that such regulations will in effect have to be conceptually equivalent to a quantity-based limitation (import quotas) in goods sector and there was a visible focus towards the imposition of quantitative restrictions. To the discussants it was conceptually possible that under Mode 1 of supply of services, a concept of imports equivalent to that used in the Agreement on Safeguards would nearly apply. But under Mode 2, a safeguard measure would need to be in shape of a tax (price based), a quantitative limitation or a regulation of some kind affecting consumption abroad. If consumption abroad were to involve the physical movement of consumers, then it might be the consumers, if they can be identified as user of a specific service. The consumers would be taxed or restricted in some way or a regulation might seek to ration or restrict consumption abroad of the service concerned. If the physical movement of consumers were not involved, then the transaction itself will have to be the target of any application of the ESM.

Merchandise is traded through only one mode of supply that is equivalent only to cross border supply of services (mode 1), but despite being tangible products and having one mode of supply circumvention of an applied measure is of a substantive concern for any country taking any trade remedy action including application of an ESM. The cross border trade in services is recognized in GATS as being conducted by four different modes of supply. There is also the possibility for circumvention by service providers on the analogy of trade in goods. For example, a safeguard action taken by an importing country under

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<sup>84</sup> Article 5:1 AoS.



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mode 3 might lead to circumvention and increased supplies through modes 1, 2 or 4<sup>85</sup>. Modal issues relating to the application of emergency safeguard measures in GATS have always been subject to concerns and questions. Explaining safeguard measures envisaged for mode 2 the proponents of the concept under GATS felt that like for example in case of ship repairs and maintenance in another country, emergency safeguard measures may range from the imposition of fees to outright prohibition so as to reduce the propensity to consume abroad. Thus a safeguard measure will logically be sector-specific and, to the extent possible, mode-specific<sup>86</sup>.

If the GATT model is to be followed for creating ESMs for the services sector, then the possibility that imports through circumvention of applied measures will take place. This circumvention is comparatively much easier in services sector than the goods sector. In cross border trade in services an ESM applied on 'import' through one mode of delivery of a particular service can be comfortably circumvented by the suppliers of the service by entry through another mode of delivery. For example<sup>87</sup>, if an ESM was imposed on legal services through mode 1, the same legal firm may simply setup an establishment through mode 3 and continue its operations. In addition circumvention is also possible when the ESM is applied to all foreign service providers supplying services through any mode, and a foreign service supplier registers as a domestic company to circumvent the measure.

In the absence of explicit import tariff barriers, as compared to goods, over the years, the countries have more intensively regulated services on grounds of protecting consumer interest and ensuring quality and excellence of professional services provided as "most professions are closely regulated and certified, and often self-regulated, usually through sectoral trade associations"<sup>88</sup>. The application of ESMs to mode 1 of delivery in light of examples provided by proponents is doubtful. For example in the case of legal services it is almost impossible to ascertain as to how many memoranda, destined for how many citizens would need to be supplied across border to cause threat of injury or injury to the

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<sup>85</sup> World Trade Organization, document No S/WPGR/M/52, Para. 22.

<sup>86</sup> World Trade Organization, document No S/WPGR/M/47, Para. 8 & 28

<sup>87</sup> Chimni B.S. Das BL (Ed) *South Asian Yearbook of Trade and Development, Multilateralism at Cross Roads: Reaffirming Development Priorities*, CENTAD, New Delhi, 2006. p.256

<sup>88</sup> Suparna Karmakar (2007) "Services Trade Liberalisation and Domestic Regulations: The Developing Country Conundrum," *Global Economy Journal*: Vol. 7: Issue. 1, Article 3, Available at: <http://www.bepress.com/gej/vol7/iss1/3>

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domestic industry. A more complicated picture is created when for example a consumer decides to seek legal advice from a national lawyer who had moved and established a practice abroad under mode 3. That practice might have many clients in its owner's country of origin and might therefore affect other lawyers there. Similarly how would a lawyer's service be placed especially when a country where he is physically located treats him as a foreign service supplier with limited acquired rights.

Exploring whether under mode 4 it might be easier to transpose a goods-type safeguard mechanism and also considering that mode 4, given its scope, could benefit from various regulatory safety nets shows that it makes effective application of a safeguard more difficult as in this case measure like a quota being imposed on top of a quota may be the only possibility. There are unanswered questions about how a safeguard measure could be applied to mode 4 suppliers, which are already present in the territory of a country and only on a temporary basis. Would they be prevented from entering the country in the first place? What measures would be taken regarding persons that had already entered the territory, and how would such measures be enforced? Member countries that are exporters of manpower felt that implications of possible application of any ESM for mode 4 is very important as this mode of supply of service was an extremely important issue for them and they stressed that the focus on mode 3 is not proper and the fact that the specific issue of defining domestic industry might not be as much of a problem for modes 1 or 4 as for other two modes of delivery did not mean that there were no other problems in regard of these modes of supply<sup>89</sup>.

An interesting hypothetical example of a situation that amply brings out the specificities of the services sector and limitations of the GATT model was placed before the WPGR, wherein the advertising sector of a country is liberalized and no limitation exists on any mode of entry for foreign suppliers. As a consequence of the inadequacies in the domestic advertising industry, foreign advertising agencies have started supplying services through all modes and these results in closure of a number of domestic advertising agencies. The consortium of the domestic industry requests an investigation and application of an ESM. In terms of the application, a quota of US \$ 1 million is placed on mode 1 imports. This leads domestic firms to label advertising expenses as consulting fees towards the end of the

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<sup>89</sup> World Trade Organization, document No S/WPGR/M/54, Para 12 & 18; S/WPGR/M/55, Para. 16.

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year when the limit is reached, and consequentially mode 1 imports are not affected. Advertising services are not exported via Mode 2. A cap is fixed on the total sales revenue of foreign advertising agencies operating in the country based on their average revenue in the past three years of operations. In addition, no new agencies are permitted. This causes the MNCs to register as domestic firms. In mode 4, a quota of 5000 visas is placed on the advertising professionals. Thus, in this hypothetical scenario, mode 1 can be circumvented using a legal loophole, mode 3 was not affected on account of registration as a domestic company, while the number of foreign service providers via Mode 4 declined considerably, resulting in a lack of equivalence in application of an ESM in all modes<sup>90</sup>.

It was also opined that discriminatory measures like subsidies could instead be feasible and such subsidies could be effective under any mode of supply, provided that the service suppliers that are to be safeguarded (temporarily protected) could be clearly identified. There is, however, problem with seeking solution through subsidies as these are costly and clearly more affordable for some Members and thus biased against developing countries. Another possible discriminatory safeguard measure can consist of discriminatory taxes, which might be less costly than subsidies and may be technically feasible for any mode of supply<sup>91</sup>. Overall, “mode 3 (commercial presence) is estimated to account for about 50% of all services trade falling under the GATS. From a public policy perspective, there may be less need for national treatment limitations under this mode than under modes 1 and 2”<sup>92</sup>.

A number of other concerns were also expressed on how to ensure that safeguard measures would use the least trade restrictive option and be applied for as short a period of time. The members interested in creating ESMs under GATS viewed that the imposition of fees and charges would be less trade restrictive than an outright restriction and where resources were available, this could also be complemented by subsidies in favour of local suppliers. The *demandeurs* also proposed that in the case of an application of an ESM under mode 3 of delivery of service, a Member will not restrict entry of foreign suppliers as a first option, but might impose, as appropriate, additional conditions for establishing

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<sup>90</sup> Chimni B.S. Das BL (Ed) *South Asian Yearbook of Trade and Development, Multilateralism at Cross Roads: Reaffirming Development Priorities*, CENTAD, New Delhi, 2006

<sup>91</sup> World Trade Organization, document No S/WPGR/M/47, Para. 33, 34 & 36.

<sup>92</sup> Adlung Rudolf, *Negotiations on Safeguards and Subsidies in Services: a Never-ending Story?* Journal of International Economic Law 2007 10(2):235-265

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commercial presence, e.g., a requirement of joint-venture with local co-operatives of smaller local suppliers and where the duration of the safeguard measure exceeded one year, the measure should be progressively liberalized at regular intervals during the period of application.

Mode 3 of delivery of service relates to ‘physical presence’ of the service provider in the country contemplating application of an ESM. Under this Mode regulation will require to be applied at the establishment stage and will imply that the investment flow in to that service sector would be taxed or restricted. Similarly under Mode 4 similar action at the establishment stage would mean that the physical movement of a natural person would be taxed or restricted. In respect of cross border service trade, under Mode 3 or Mode 4, which has already crossed the establishment stage i.e. it is already established. Then output of the foreign provider will be the most likely target of safeguard action, although measures could conceivably be applied elsewhere also e.g. on purchases of inputs.

### **4.6.9 CONDITIONS OF APPLICATION**

Regarding the ‘Conditions of Application’, it has been accepted in the case of trade in goods that the onus of proving the need for the application of an emergency safeguards measure rests with the Member choosing to invoke the ESM. In terms of Article XIX of GATT, AOS and also in light of the WTO jurisprudence developed over the years on the subject the invoking country has to prove the need for application of the provisions. The relevant provisions under AOS stipulate that an emergency safeguard measure may only be applied following an investigation, and also prescribe the procedures that must be followed<sup>93</sup> but as yet no detailed views by any member in the discussions in WPGR have been expressed on ‘applicable procedures’ for ESMs under GATS. For the determination of injury, the concepts contained in Article 4.2(a) of the AOS have been proposed as relevant model and it is viewed by the proponents that the causality requirement in the area of goods, i.e. Article 4.2(b) of the AOS, could be translated into the services context, provided some key terms were modified. The Agreement on Implementation of Article VI of GATT (Antidumping Agreement) was also cited in the WPGR as a possible approach,

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<sup>93</sup> Article 3 of the AoS dealing with investigation was also suggested as a probable starting point during the discussions in the WPGR.

which can be taken when following a GATT model because it provides for the some flexibility in injury determinations and allows for action based on “best information available” and for the possibility of consultations with affected Members during an investigation.

#### **4.7. PUBLIC POLICY CONCERNS**

Public Policy concerns are normally taken into consideration by the domestic investigating authorities when contemplating imposition of a definitive trade remedy measure under GATT. The accommodation of public policy concerns and importance of considering the broader picture when contemplating any imposition of an emergency safeguards measure was brought out and considered as important. The rationale behind giving this importance is that considerations of the consumers’ needs to be taken into account when assessing injury are essential as there is always a possibility that the imports which a domestic industry might consider to be damaging could on the other hand be providing the consumers with more choice and lower costs.

Proponents of the concept of ESMs also did not discount the factor and agreed with the importance of the public policy consideration when imposition of some definitive measure is being considered and viewed that any investigating authority when considering to impose any ESM that may be developed for the services sector would during the investigations also consult and take into account the broadest range of views possible, including those of consumers<sup>94</sup>. The views expressed on the issue were simply within the model provided by GATT for accommodation of public policy concerns. The proposal was that these concerns can be taken care of through enabling regulations and the responsible investigative authority of the country considering imposition of the ESMs can be mandated to consult and take into account the broadest range of views possible, including those of consumers. The investigation should involve as many potentially affected sectors as possible<sup>95</sup>.

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<sup>94</sup> Proponents are all developing countries and have invariably insisted on public policy considerations in the investigations for trade remedy measure under GATT

<sup>95</sup> World Trade Organization, document No S/WPGR/M/47, Para. 25, 28 & 36;

## 4.8. CONCLUSIONS

The GATS has as yet limited life span, practically little jurisprudence on it has developed and the Agreement is still carrying the burden of important unfinished business from the Uruguay Round. However, due to strong opposition from major developing countries; that were opposed to creating multilateral discipline on cross border trade in services, especially with reference to mode 3 of delivery, ‘the GATS could only be finalized in the form of a significant compromise that embodies a weak set of rules and a very fluid mechanism for services liberalization<sup>96</sup>’. The negotiators in the context of the General Agreement on Trade in Services (GATS) faced significant challenges when they tried to craft a comprehensive set of multilaterally agreed disciplines governing trade in services within the context of GATT, and the result is fairly complex and difficult to comprehend. Some obligations, in particular the most favoured-nation treatment (MFN) obligation, apply across the board. Others, ‘like the market access and national treatment obligations, apply only in respect of service sectors of a Member’s choosing. There is overlap between the market access and national treatment obligations, and the relationship between these two disciplines and those on domestic regulation is not clearly established<sup>97</sup>’.

In short, the application of an ESM that is developed on the model provided by the GATT for the services sector under GATS will require to take into account conditions that are similar for applying the measure in case of trade in goods like; i) the situation faced by the domestic industry concerned must result from the implementation of a Member’s commitments undertaken under Part III of the GATS; ii) there is a sudden increase in the supply of the services by supplier(s) of another Member; iii) injury or threat of serious injury must have be determined in the relevant domestic industry; iv) causality between the injury or threat thereof and the increase in supply of the relevant service must be clearly established and; v) the situation must be of the nature of an emergency.

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<sup>96</sup> Hufbauer Gary and Sherry Stephenson *Services Trade: Past Liberalization and Future Challenges* Journal of International Economic Law 10(3), 605–630

<sup>97</sup> Leroux Eric H., *Eleven Years of GATS Case Law: What Have we Learned ?* Journal of International Economic Law 10(4), 749–793

## CHAPTER 4

The analysis undertaken as yet in the context of this thesis brings out the fact that given the intangibility of services; dynamics of cross border trade in services, its four distinct modes of supply there are major issues involved transposing the pure conventional model of ESMS provided by the GATT model to GATS. The work done in the Chapter not only recognizes the almost impossibility with transposition of GATT concept of ESMS to under the GATS but the paradigm being explored also has severe limitations for it to be transposed..

## **CHAPTER 5: ESMS UNDER GATS**

### **5.1 CHAPTER INTRODUCTION**

The Chapters briefly revisits and analyses and then judges the various viewpoints put forward by different countries on the question of ESMS under GATS in the deliberations held in the Working Party on GATS Rules (WPGR). The Chapters then goes on to look at the specificities of the cross border trade in services and evaluates the provisions in the Services Agreement that substantially substitute the need for independent ESMS under GATS but simultaneously remaining within the universe provided by the GATT paradigm. The GATS's nexus with investments under mode 3 of service delivery has created complications with the concept of ESMS under GATS and rapid proliferation of Bilateral Investment Treaties (BITs). The Chapter also tries to analyse the proposals, undertakes a 'situational analysis' through hypothetical examples and tries to identify circumstances for which ESMS type safety valves are already provided in the Agreement circumstances and also those for which ESMS may be required under the GATS. An effort has also been made to briefly highlight the possible conflicts and impact of the BITs with respect to the application of any ESMS.

The different possible models for ESMS under GATS that had emerged in the discussions or mentioned in the WPGR have been briefly evaluated followed by a succinct look at the different RTAs. The RTAs have been explored with the intention of finding some form of model that can be helpful for development of independent provisions for application of ESMS under GATS. The Chapter near the end looks at all the possible models that were found under the GATT concept and briefly judges these models for their suitability to ESMS under GATS. The Chapter closes by noting that despite strong reservations for undertaking market access commitments in absence of ESMS under GATS, the developing countries have started exploratory meetings for further liberalization and are also taking major liberalization commitments under the RTAs and BITs.



## 5.2 GATS: RELEVANT PROVISIONS RECALLED

The case made by the countries demanding standalone provision for application of ESMs under GATS had largely been based on ‘political economy’ grounds; that their existence would promote undertaking of more liberal commitments by the member countries. The assertion was made on the premise that the existence of emergency safeguards provisions in case of necessity will provide the ‘breathing space’ for domestic industries to adjust to import surges created by the trade liberalization. However, within the framework of the GATS, the concept of trade liberalization, unlike for GATT, has a much broader connotation and it covers not only improving market access conditions and extending national treatment to foreign services but also the foreign owned service suppliers a broad and an increasing range of sectors and modes of delivery of services. The GATS in its existing structures, does not necessarily entails domestic deregulation as it recognizes the right of governments to regulate and also to introduce new regulations in order to meet national policy objectives and in that manner the Agreement does not places any new involuntary regulatory demands on the countries and thus can be regarded to lacking the real depth. While on the other hand the trade liberalization in the context of GATT primarily refers to the border measures whereas issues like MFN and National Treatment are dealt and taken care of automatically.

In the services sector an individual WTO Member country has a fairly large number of diverse options to be free and to undertake any measures that it may desire to provide protection to an entire specific domestic service sector or its sub-sector which is delivered through a certain specific mode of delivery of service. Some of the options available to a country for providing protection to its domestic industry and avoid application of the safeguards measures are fairly straight forward, like a Member country may; simply refraining from scheduling any specific commitments in particular sector or its modes of delivery, thus the country will retain full policy discretion, including the right to ban all trade through all modes. The only potentially relevant obligations to such unscheduled service sector are the MFN requirement and provisions relating to transparency, which horizontally cut across all sectors and are enshrined in the Agreement; inscribe limitations under relevant modes of delivery of service and thus

qualify a market access commitment made in the scheduled sectors. In this context there are a number of possible options that can be used by a country to circumscribe its scheduled commitments; these options include measures like specifying some sort of numerical quotas, laying out economic needs tests or foreign equity ceilings in the Market Access column of its schedule of commitments. Some other discriminatory domestic policy instrument like economic size requirements can also be listed as qualifications under the National Treatment in the schedule of commitments. The countries can also take other measures that are beyond the scope of GATS like targeted subsidies and the possibility of subsidizing import competing industries with a view to reducing cross-border supplies (mode 1) or consumption abroad (mode 2) of the services concerned.

### 5.2.1 ONE VIEW POINT: NEGOTIATIONS

Despite the flexible structure of GATS and availability of different provisions in the text of the Agreement there is a group of WTO member countries, mostly comprising of advanced and rapidly developing countries from South East Asia, which continued to demand the development of specific ESMs under GATS (*demandeur*)<sup>1</sup> as this group strongly believes that given the binding nature of commitments<sup>2</sup>, some form of ESM is needed to address on a ‘temporary’ and ‘extraordinary’ basis any possible adverse consequences that may arise in the course of implementation of the new market access commitments. They believe that lack of specific emergency safeguards provisions in the Agreement may have adverse consequences for the service sectors that have been committed in the market access schedule of concession. These adverse effects may take the form of actual injury or threat of serious injury and which may manifest itself through the severe loss of profits or loss of market share of the affected competing domestic service providers, closure of businesses, loss of employment and similar other end effects.

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<sup>1</sup> Negotiations are a dynamic process and countries keep evolving their negotiating positions on specific issues, for instance India initially was a strong proponent of ESMs under GATS but later moved and in latter appeared no more to be demanding ESM under GATS. Therefore the word ‘*demandeurs*’ has been used as a generic term and without implying a fixed group of countries.

<sup>2</sup> As reflected in a Member’s Schedule of market access Commitments.

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A large number of developing Member countries of the WTO, which are at different levels of economic development including most of the ASEAN member countries, during the initial negotiations in the WPGR claimed that the existence of an explicit provision or non-existence of specific provisions providing a 'safety valve' in the form of ESMs under GATS will be the core determinant that will provide the required comfort level to the developing country members for undertaking of any new trade liberalizing commitments the member countries might be able and willing to undertake in the services sector. To these countries, development of specific ESM provisions under the GATS is an integral component of the overall balance in the UR outcome on the services negotiations and would provide an essential safety net for services liberalization. In view of this group of members such a safety net was necessarily required to encourage Members to consider requests made on them for liberalization, which would not otherwise have been contemplated<sup>3</sup>. The existence or not of a 'safety valve' in the form of ESM under the GATS was categorized by these Members almost as a precondition for undertaking new commitments in services<sup>4</sup>. The proponents of the concept of ESMs, asserted that the development of specific ESMs would make it easier for them to persuade their domestic constituencies to accept greater liberalization in the services sector and also encourage the developing country Members to 'bind' the service sector liberalizations that they have already undertaken autonomously. To this group it was this combination of assurances and liberalization that will help them in achieving the essential objective of emergency safeguard action which is primarily to facilitate market adjustments. Development of ESMs would, thus, help governments to alleviate concerns of their constituents with respect to making of new binding commitments<sup>5</sup>.

The debates in the WPGR mostly revolved more around the assertions made by the *demandeurs* that the emergency safeguard measures developed in the specific or standalone form can be the only real reprieve; these assertion precluded consideration or employment of other complementary policy measures, regulations or solutions on the

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<sup>3</sup> World Trade Organization, *Working Party on GATS Rules, Summary of Main Views Expressed by Members on Emergency Safeguard Measures* Note by the Secretariat 2 June 2006 JOB (06)/165

<sup>4</sup> Adlung Rudolf *Negotiations on Safeguards and Subsidies in Services: a Never-ending Story?* Journal of International Economic Law 2007 10(2):235-265

<sup>5</sup> World Trade Organization, *Working Party on GATS Rules, communication from Brunei Darussalam, Indonesia, Malaysia, Myanmar, The Philippines and Thailand*. 24 November 2004

part of the Member invoking a safeguards measure, or even on the part of the affected private stakeholders themselves. In this context the countries proposing standalone ESMs under GATS argued that in the broad universe of situations that domestic private stakeholders may face consequent to market liberalization and undertaking of regulatory reform<sup>6</sup>, there may exist a subset of possible situations where these stakeholders may suffer from injury or the threat of serious injury, for which existence of independent safeguards provision will provide a necessary component of an overall solution<sup>7</sup>. The proponents, however, did recognize that in certain instances, the adverse consequences may nevertheless occur which may not necessarily be caused, directly or indirectly, by the commitments undertaken by a Member and, therefore, such situations cannot be intended to be addressed by any safeguards measure as the requirement of causality provided by the GATT model will be flouted, as under the GATT model ESMs are required to address emergency situations where there is an actual injury or threat of serious injury that can be attributed to binding commitments undertaken under the GATS and resulting in injurious imports.

### **5.2.2 VIEW POINT WITH A DIFFERENCE: NEGOTIATIONS**

Simultaneously another group, comprising mostly of important developed country members, questioned the appropriateness of even having the possibility of recourse to an emergency safeguard measure in the international trade in services. Members of this group of countries argue that any adverse market situations faced by some domestic stakeholders of the service importing country any way should be addressed through structural adjustments policy efforts or domestic regulatory measures rather than through the application of ESMs that will result only in the temporary withdrawal or modification of a Member's market access commitments. It was argued, that the nature of redress offered by an emergency safeguard measure developed on the GATT paradigm is temporary and applicable only for a relatively limited period of time while most of the untoward or adverse trading situations faced by domestic stakeholders often arise from inherent inefficiencies in the economy which require long term structural

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<sup>6</sup> The reforms are only relevant in WTO context if these have also been bound under the country's respective GATS' Schedule of Commitments

<sup>7</sup> World Trade Organisation, Communication from the delegation of Brunei Darussalam, Indonesia, Malaysia, Myanmar, the Philippines and Thailand to the Members of the Working Party on GATS Rules. "Further Thoughts on an Emergency Safeguard Mechanism", Document No: JOB(04)/4, 24 February 2004, p.2

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adjustments policy initiatives and such problematic situations essentially require long term policy support. These assertions were based on the premise that most of the injuries or threats thereof that confront domestic stakeholders are caused by intrinsic problems, which amongst others relate to the production, distribution or market structures of that specific service sector or any of its particular modes of supply. Therefore, the simple existence of independent emergency safeguard provisions in the services agreement will not be helpful. This view point had its own weaknesses as it appears to assume that domestic regulatory support measures are of themselves unfailingly sufficient to redress the injury or threat thereof faced by domestic stakeholders in all situations.

Most of the developed countries, during the discussions in the WPGR, expressed their doubts on the feasibility and also the desirability of standalone ESM under the GATS. For these countries the question of desirability of standalone ESM under GATS was linked to the feasibility of incorporating the specific provisions in the services Agreement and their concerns were not restricted simply to the form of any standalone emergency safeguards provisions under the GATS as was being advocated by the *demandeurs*. The developed country members were of the view that before concluding and moving towards the formulation of any ESM under the GATS the question of the 'desirability' or the 'need' of these independent safeguards provisions in the Agreement should be addressed and resolved. This group also felt that even if all or most of the technical issues being encountered in devising of emergency safeguards provisions for services are resolved even then these countries would still be reluctant to agree and accept the standalone provisions for the ESMs under the GATS since in their analysis, even if feasible, emergency safeguards in services trade are not desirable anyway<sup>8</sup>.

The rationale behind the linkage created by some members of development of ESMs with the undertaking of further liberalization commitments was not clear to countries that were not conducive to the idea of separate ESM provisions, as they felt that the link between a possible standalone provision of an ESM under GATS and further market

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<sup>8</sup> Mario Marconini, *Emergency Safeguard Measures in the GATS: Beyond Feasible and Desirable*, UNCTAD. March 2005

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access has unnecessarily being over-formalized<sup>9</sup>. These countries did not agree with the argument that existence of ESMs under GATS is a precondition for undertaking further liberalization and failed to appreciate as to how Members advocating the concept find it compelling to have ESMs in place before they decide to undertake liberalization or even offer to bind their existing market access policies, as an ESM would, at best, only allow rollback of liberalization commitments on a temporary basis. To this group, the *demandeurs*, by making existence of ESMs a precondition, were making a negative link between the development of specific ESMs and market access negotiations; whereas a more positive and concrete link could be made by identifying the commitments that they were prevented from undertaking because of the absence of an ESM, this positive linkage will also help in the construction of the ESMs.

These Members felt that though separate ESMs may be important for some countries so as to provide comfort to their domestic constituencies but these cannot be made a precondition for further market access commitments because the GATS already had other mechanisms under GATS that provided additional flexibilities<sup>10</sup> to the countries and that are expressly denied and forbidden under GATT. The *demandeurs*, however, did not find these arguments very convincing and look at the things in a different context, as to them certain commitments already made were also conditional on creation of ESM provisions in terms of provisions created in Article X of GATS and felt unsure that new binding commitments might be offered in the absence of an ESM<sup>11</sup>.

There were strong divergences of the views in the Working Party on GATS Rules (WPGR) on “various fundamental issues, including the very desirability, feasibility and also on the possible elements for an ESM”<sup>12</sup>. However, countries like Canada, EU, US, Japan and Norway during the discussions viewed and reiterated their position that the desirability of negotiating an ESM under GATS should be strongly linked to the feasibility of its application. There were two strong opinions among the members, on the one hand there were the countries which felt that ESMs in GATS are neither

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<sup>9</sup> World Trade Organization Document JOB (04)/175, Para. 18-19; S/WPGR/M/47, Para. 37 and S/WPGR/M/49, Para. 55.

<sup>10</sup> World Trade Organization Document S/WPGR/M/47, Para. 16 & 18; S/WPGR/M/50, Para. 44; S/WPGR/M/51, Para. 60;

<sup>11</sup> World Trade Organization, Secretariat document No: S/WPGR/M/47, Para. 11, 17 & 24.

<sup>12</sup> World Trade Organisation Report of Chairperson of WPGR document No: S/WPGR/9

feasible nor desirable and on the other hand there were the countries<sup>13</sup> which felt strongly about need to development of standalone ESMs under the GATS that are based on the model provided by GATT while very few countries tried to explore a possible middle ground.

The negotiators<sup>14</sup> had by mid-2006 realized that strong divergences of views exist on the issue and there is almost complete lack of any progress<sup>15</sup> on the agreement towards the feasibility or desirability of ESMs under GATS or on possible elements or structure of their constitution. With such level of divergences and no common grounds it was not possible to undertake formal discussions in the WPGR let alone conduct meaningful negotiations. The discussions on ESMs in the WPGR came to a stalemate and were, through a consensus decision, moved out of a formal structure to an informal mode and were conducted without prejudice either to the desirability of ESMs, or the form that any ESMs under the GATS, if agreed, might possibly and eventually take. The discussions in the WPGR were inconclusive and unresolved. Therefore, the members of the Working Party agreed that it will be more efficient for the present not to further discuss basic conceptual issues involved but rather focus on common principles which might need to underlie any emergency safeguard mechanism if developed under GATS.

### **5.3 SITUATIONS: HYPOTHETICAL EXAMPLES**

With no common understandings or convergence of ideas on any standalone ESMs under the GATS, the Members of the WPGR, suggested that the proposals made for possible structures and also the constituting elements of these ESMs be evaluated against some concrete real life situational examples. Such exercises are any way essentially required especially when developing disciplines in conduct of international trade with respect to creation of some ‘provisions for contingency measures’ because it is “always wise to try and imagine the possible sorts of scenarios in which the problem could arise in practice and to address them *ex ante* through a relation clause which

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<sup>13</sup> This group of countries included; India, ASEANS less Singapore and most Latin Americans

<sup>14</sup> The discussions were held till 2008 in an informal mode and there were no official positions on the issue of any country. The submissions submitted were also in the form of non-papers, room papers and informal positions therefore mostly no names of members were shown but only views.

<sup>15</sup> World Trade Organization, Working Party on GATS Rules, *Report of the Meeting of 10 February*, WTO document NO: S/WPGR/M/54 dated 22 February 2006

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governs that relationship *a priori*?”<sup>16</sup> The findings were expected to help assess the treaty needs within the framework of the GATS to address *ex-ante* the adverse market situations resulting from liberalization commitments and resultant unforeseen import that are causing or threatening serious injury to domestic producers of like or directly competitive products. In the ultimate analysis the findings were expected to establish the feasibility and desirability or otherwise of the standalone emergency safeguards under the Agreement and, if found feasible, define its contours.

The exercise could only draw examples from two possible sources; through real life experiences of jurisdictions seeking ESMs or, in the absence of these, by way of hypothetical examples. These analyses, however, had to be worked out against the backdrop of the various provisions and other possibilities that are already available under the GATS and that can be alternately be used to address and manage any adverse market situations for which any independent emergency safeguard provisions were being sought. A preference was expressed for examples from the real life situations of market disruption that individual countries faced because of the autonomous liberalization measures<sup>17</sup> undertaken by them and before these measures were bound in their respective schedules of commitments. It was useful to see whether any of the countries in their experience with liberalization had given rise to some situations that called for or were justifying an application of an ESM<sup>18</sup>.

The WPGR felt that regulators in Member countries which had faced problems with the autonomous liberalization of their service sector were ideally placed to help identify and formulate concrete examples of real life situations that required an application of an ESM, in case real life examples were not available some hypothetical examples can be then be developed to spell out scenarios that may justify application of an ESM. While some developed country Member countries suggested that provisions already exist in the Services Agreement that render the need of specific emergency safeguard measures redundant, therefore examples from real life situations may be few, but they felt that it will still be useful to consider why this was the case. To this group of countries the

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<sup>16</sup> LIM C.L. *The WTO in the Twenty-First Century* Dispute Settlement, Negotiations, and Regionalism in Asia Edited by Yasuhei Taniguchi, Alan Yanovich, And Jan Bohanes Cambridge University Press 2007

<sup>17</sup>World Trade Organisation, Working Party on GATS Rules *Negotiations under GATS Article X Compilation Of References Made By Delegations To Safeguard-Type Provisions* Note by the Secretariat, JOB(03)/20, 7 February 2003

<sup>18</sup> World Trade Organization Document S/WPGR/M/52, para. 18, 21, 27; S/WPGR/M/53, para. 32.



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answer perhaps lay in the fact that services sectors were already sufficiently protected, or that such safeguards measures simply did not make practical sense. Services sector are normally not protected through border measures but mostly through domestic regulatory mechanisms. It was hence desirable that the analysis should also explore whether internal legislation of any Member countries contain some safeguard-type provisions or not. Members were also expected to examine their own schedules of specific commitments to indicate the type of situations where liberalization had been stalled by the absence of a safeguard provision<sup>19</sup>.

The onus of presenting concrete real life examples of situations where domestic regulators felt the need of application of ESMs primarily rested with proponents of the concept under GATS. As all efforts to find and present any concrete real life examples failed, therefore to substitute the real life examples, some hypothetical examples were constructed by a group of countries that were the *demandeurs* of standalone ESMs and placed before the WPGR.

The first possible hypothetical scenarios articulated by the *demandeurs* which in their assessment potentially required an application of an ESM, was the sudden substitution of modern foreign owned departmental stores and shopping malls for more traditional small domestic corner sales outlets. The ASEAN Member Countries reinforced their proposal for standalone ESMs under GATS using this example that became to be known in the context of discussions in the WPGR as the *Shangri-La* case<sup>20</sup>. The hypothetical example was of *Shangri-La*, an imaginary developing country with a largely agrarian society and population scattered across small villages and as like in many other countries, the distribution sector is an important segment of the economy. Many workers in this country are low-skilled; receive relatively low wages, work mainly part-time, and the share of females exceeded men. The retail/distribution sector acted as an entry point into the labour market for many such workers. The dominant marketing channel was a general store in small towns, while in larger cities small conveniently located corner stores specialized in a narrow range of items with perhaps a

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<sup>19</sup> World Trade Organisation, Note by the Secretariat, JOB(03)/20, *Compilation of References Made by Delegations to Safeguard-Type Provisions Working Party on GATS Rules* 7 February 2003

<sup>20</sup> World Trade Organisation Working Party on GATS Rules, *Summary of Main Views Expressed by Members on Emergency Safeguard Measures* Note by the Secretariat 2 June 2006 JOB (06)/165 and S/WPGR/M/47, Para. 4; JOB (04)/175, Para. 2-4.

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few large departmental stores selling a much wider range of goods. The livelihood of low-wage households depended on small independent stores in villages and small towns, which were not only major employers, but also performed a vital role in providing food, basic amenities, etc. Shangri-La then liberalised its distribution sector, both wholesale and retail and granted to foreign distributors full market access and national treatment under modes 1 to 3 of delivery of services. Within months, vast numbers of foreign majority owned retail chains opened in the country and directly impacted on the small independent shops. Consumers began buying more from discount or superstores in suburban areas, forcing closure of small shops. In villages, small independent shops lost customers to 24-hour service shops and also had to close down. Only few former employees could immediately obtain jobs in modern 24-hour shops as they often required higher education, such as computer skills. As a result, shortly following the full liberalisation by the country small independent shops collapsed nationally and a large number of unskilled rural workers lost jobs as the market share of foreign owned retail businesses jumped dramatically<sup>21</sup>.

Proponents of the ESMs under GATS regarded this “Shangri-La” case in the retail sector as an appropriate example of a situation where an importing country may be justified in imposing an emergency safeguard action<sup>22</sup>. This group of countries felt that, in the Shangri-La example, the authorities might not have foreseen the pace and extent of impact of the foreigners on the domestic market. The decision makers scheduling the market access in the sector might have anticipated that, at worst, foreign suppliers will reach a maximum market share of 50% over 5 years, but could not have foreseen 60-70% market share going to foreigners over a period of three years. This rapid growth of foreign owned service supplier would have social consequences in form of loss of jobs; no doubt, some of the employment loss may be compensated by new hiring by the foreign suppliers that had caused injury<sup>23</sup> but definitely not most of the losses. The definition of injury in such a context would thus focus on the economic situation of the small domestic sales outlets, in terms of sales, turnover, profitability or employment, and, possibly, on a more widely defined public interest that takes into account regional

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<sup>21</sup> World Trade Organization document S/WPGR/M/41, 12 March 2003

<sup>22</sup> World Trade Organization document S/WPGR/M/44, *Note by the Secretariat, Report of the Meeting of 1 October 2003*; JOB (04)/175, Para. 2-4.

<sup>23</sup> World Trade Organization document S/WPGR/M/49, Para. 55; S/WPGR/M/50, Para. 42.

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or social policy implications. An ESM would therefore provide some comfort in cases where the extent or pace of committed liberalization had been misjudged<sup>24</sup>.

However, developed country Members, opposed to the desirability of ESMs in services, felt that the Shangri-La example implied basic structural problems with the economy rather than a situation soliciting application of an emergency safeguard measure and they did not regard it proper that an ESM should be used in such situations, which could be anticipated or in other words ‘foreseeable’. The *demandeurs* were not in agreement with this strand of argument and felt that not all emergency situations were structural in nature as it was often not clear from the outset whether a structural problem was affecting the domestic industry or the situation could be alleviated through temporary protection. They felt that any efforts in trying to characterize situations that are structural in nature or not could lead to endless debates and it seemed preferable to leave this to the investigating authorities of the country contemplating imposition of the measure. If the authorities subsequently realized that a real structural problem existed, they would decide whether to invoke Article XXI procedures<sup>25</sup>.

The *demandeurs* of the ESMs during discussions in the WPGR also provided with some other examples of possible situations which in their perception warranted the application of emergency safeguard measures. The second hypothetical scenarios sketched related to the optometry<sup>26</sup> profession, which has traditionally been practiced by small optical shops. The sketched scenario was something like; “with liberalization, large foreign-owned optical shops entered the market and diluted the share and profitability of local suppliers, particularly with regard to the most lucrative part of the profession, i.e., the preparation, manufacture, and sale of prescription glasses and lenses. While foreign-owned optical shops engaged local optometrists to perform refraction services in-store, these foreign shops had a limited capacity to absorb local optometrists suffering injury of loss of jobs because of the liberalization. This

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<sup>24</sup> WORLD TRADE ORGANIZATION, *WORKING PARTY ON GATS RULES, SUMMARY OF MAIN VIEWS EXPRESSED BY MEMBERS ON EMERGENCY SAFEGUARD MEASURES*, JOB (06)/1652 JUNE 2006

<sup>25</sup> World Trade Organization Document S/WPGR/M/47; Para. 4, 11 & 37; JOB (04)/175; Para. 5-6; *Non-Paper by the Secretariat, Summary of Comments Made During the Informal Meeting of 11 June 2004*, Para. 4; S/WPGR/M/49, Para. 55.

<sup>26</sup> World Trade Organization Non-Paper by the Secretariat JOB (04)/175, Para. 3-4

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phenomenon had occurred over a relatively short time span and had not been anticipated by optometrists<sup>27</sup> or the decision makers who had drafted the market access schedule of concessions in the liberalizing country.

This hypothetical example relating to optometry profession attracted interest along with a number of comments from the Members. Some members were of the view that it was difficult to distinguish between foreign and domestic suppliers when both were supplying the services from the same territory. Some others felt that a Member still could, however, impose qualification and licensing measures to regulate the persons who could perform certain activities. The issue was viewed differently by some other Members who saw classification issues in the example and they were of the opinion that in a commitment binding the 'optometry profession' the main professional services provided by optometrists, i.e. 'eye examination', were not covered and subject to any commitment and were, therefore, not affected by the influx of foreign services. On the other hand, the business of preparing and selling glasses was covered by the liberalization commitment under retail services and should have been foreseen. This example was also regarded to provide an analogy that might draw parallels with pharmacists' profession<sup>28</sup>, where the dichotomy between services of advising on the need for medicine and the more lucrative business of selling medicine often called for regulatory responses, such as ensuring that the sale of medicines was accompanied by proper expertise.

There was also a public interest dimension to the arguments with respect to the hypothetical examples that were developed, as to some Member countries, not comfortable with specific ESMs, consumer interests were also highly important and appeared to have been ignored when developing these hypothetical examples; since liberalization had also led to lower prices. It was argued that the suggested scenario in the 'optometry' example did not make a compelling case that a domestic industry had been injured or that this was due to trade. From the scenario presented one could infer that a group of opticians had experienced a decline in profitability due to competition

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<sup>27</sup> World Trade Organization Document JOB (04)/175, Para 3-4; *Non-Paper by the Secretariat*, Para. 3.

<sup>28</sup> World Trade Organisation Working Party on GATS Rules, *Summary of Main Views Expressed by Members on Emergency Safeguard Measures* Note by the Secretariat 2 June 2006 JOB (06)/165

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from more efficient suppliers. In the process employment, wages and sales volumes could have increased for the sector as a whole instead of decreasing.

The proponents of the concept of ESM in addition to the market access situation also presented another hypothetical example to the WPGR of a type of regulatory reform that related to telecommunications sector that might be suspended by way of a safeguard measure. The example presented a scenario where a Member might have undertaken a commitment under Article XVIII of the GATS to use a particular criterion for regulating the interconnection rate charged. If the criteria deviated substantially from the previous criteria in place, an increase in cross-border supply of certain telecommunication services could occur, without the commensurate increase in revenues from interconnection anticipated by domestic service suppliers. If such expected increase in revenues was intended to assist domestic suppliers in providing universal service, the additional commitment might make them unable to viably comply with such obligation.

Simultaneously there was another view that in a manner balanced this view point, which suggested that more competition, not less, was the most effective means to achieve universal service objectives<sup>29</sup>. If such a scenario occurred, the appropriate regulatory action would be to adapt the mechanism providing for universal service, and not to limit the cross-border supply of services. Ensuring the viability of such programmes was certainly laudable, but not if done in a discriminatory manner or in a way that only served to protect a revenue stream for incumbent operators. A proponent said that, in this example, a safeguard measure was not intended to restrict competition, but to temporarily modify the interconnection regulations bound so as to ensure the provision of universal service that a government might want to achieve. In such cases, governments had to intervene<sup>30</sup>. The ASEAN paper<sup>31</sup>, however, indicated that competition from foreign suppliers will somehow undercut the ability of domestic suppliers to fulfil their universal service obligation.

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<sup>29</sup> World Trade Organisation Working Party on GATS Rules, *Summary of Main Views Expressed by Members on Emergency Safeguard Measures* Note by Secretariat 2 June 2006 JOB (06)/165, Para 11

<sup>30</sup> World Trade Organization Document JOB (04)/175, para. 7; S/WPGR/M/50, para. 35, 42, 45 & 50; S/WPGR/M/51, para 58.

<sup>31</sup> World Trade Organization Document , JOB(04)/175

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The developed country members were not convinced and prepared to regard the situations put forward by the proponents in the three hypothetical examples to be convincing enough to justify an application of an ESM especially considering the immense flexibilities already provided in the services Agreement. This group believed that the proponents when developing the examples had not appropriately evaluated the alternative measures already existing in GATS and other WTO Agreements to address the kind of situations that they had identified and that the examples had not even clarified the fundamental issues like as to why an application of ESM was called for, what were the circumstances justifying an application of emergency safeguard and the linked prerequisites like who was going to be protected, and against what exactly would the protection be provided by the measures. It was felt that the examples cited did not refer to any need for development of horizontal ESMs concept, but rather these examples, at best, reinforced the case for scheduled sectoral safeguards<sup>32</sup>. Interestingly all hypothetical examples presented related to mode 3 of delivery of services and the question remained unanswered whether the proponents had thought of any example of situations demanding application of emergency safeguard the measures envisioned<sup>33</sup> for any of the other modes of the cross border delivery of services. These members felt that *demandeurs* of the ESMs have not succeeded in articulating any convincing examples. To this group of countries, the examples depicted situations where some Members might want to use an ESM, but not where the use of an ESM would be justified and that none of the examples provided by the proponents justified an application of a safeguard measure but such situations could comfortably be dealt with through domestic regulations or could have been foreseen when undertaking the market access commitment and dealt through the use of available scheduling flexibilities and the option of withdrawing a commitment through Article XXI of GATS any way always remained<sup>34</sup>.

Though technical it is advisable that in case of developing ‘contingency measures’ the negotiators should “try and imagine the possible sorts of scenarios in which the problem

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<sup>32</sup> World Trade Organization Document JOB(02)/2

<sup>33</sup> World Trade Organization Document S/WPGR/M/47, para. 11, 15, 23, 24 & 31; S/WPGR/M/49, para. 44, 47 & 49; S/WPGR/M/50, para. 38 & 41; S/WPGR/M/51, para. 64 & 66.

<sup>34</sup> World Trade Organization, document S/WPGR/M/47, para 11, 15, 23, 24 & 31.

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could arise in practice and to address them *ex ante* through a relation clause which governs that relationship *a priori*<sup>35</sup>” but this exercise was futile when the contingency protection measure that is being contemplated is the possible development of Emergency Safeguards under the model provided by the GATT. The model has limitations as under it the application of ESMs by definition requires ‘unforeseen developments’ that cannot be predicted and for which any convincing examples by definition should not be able to be provided. However, the development of hypothetical examples was useful in their accord. Firstly, all the examples related to only one mode of supply; mode 3. Which showed that proponents quest for independent ESMs was rooted essentially in retaining the possibility of defending domestically owned companies against an influx of foreign competitors and as distinguished from the need of undertaking structural reforms. Secondly, these examples also brought out more glaring the existing scheduling flexibilities available under GATS, the rights that must accrue to the service supplier after crossing borders under mode 3 of supply, also called as acquired rights. The discussions on the examples were limited and practically ignored the changing dynamics and new realities of the global economic relations. Important amongst those that were overlooked included Regional Economic Integration Agreements and the emerging investment relating regimes in for of BITs and Regional Arrangements covering services and investments.

The deliberations in the Working Party to GATS Rules (WPGR) were very vague and fairly superficial. However, despite the limitations of quality some possible issues that could have a bearing on the development of ESMs for services sectors were discussed but some very important emerging realities in the international trading relations were also ignored. The issues were unique to services sector and fairly diverse. These issues cannot be looked into purely under the paradigm provided by the GATT for the ESMs. These included; i) the concept of limited window for application of ESMs; ii) desirability of standalone or independent ESMs despite the existence of enormous scheduling flexibilities already provided in the Agreement; iii) Economic needs test as a substitute for ESMs; iv) protection of “acquired rights” of established suppliers and its fall out; v) the proliferation of International Investment Agreements and their impact on

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<sup>35</sup> LIM C.L. *The WTO in the Twenty-First Century* Dispute Settlement, Negotiations, and Regionalism in Asia Edited by Yasuhei Taniguchi, Alan Yanovich, And Jan Bohanes Cambridge University Press 2007

development of ESMs under the GATS especially with reference to Mode 3 of delivery of service and; vi) interface between Regional trading Arrangements and services and obligations of members within circumscribed context of ESMs under GATS.

### 5.3.1 THE CONCEPT OF LIMITED WINDOW

A proposal by the ASEAN member states (2004) excluding Singapore introduced a concept of a “Limited Window” for ESMs under the GATS. This was novel idea with respect to any contingency protection measure that may be developed under the paradigm provided by the GATT. It was proposed that a ‘limited window’ of time period for application of ESMs may be created for countries undertaking market access commitments. The concept simply envisages a certain period, say, ten years during which a safeguard like mechanism could be used to protect domestic services suppliers. The proposed duration of the limited window could be seen as addressing the concerns expressed by some member countries in relation to the sanctity of the agreement and the need to preserve the legal certainty<sup>36</sup> of market access commitments undertaken by a country especially during the period of limited window that during the negotiations was proposed to be ten years.

The rationale behind their proposal, was that adopting a multilaterally agreed limited time period (named as ‘limited window’) may help restrict abuse or mis-use of the provisions, since to all probability adverse circumstances for a domestic industry to the extent of causing injury or a threat thereof would occur when the industry is in process of adjusting to the realities of new liberalized market conditions created by virtue of undertaking of market access commitments. the proponents of the concept viewed that any injury beyond this ‘limited period’ of adjustment would be less likely to have been caused by an import surge resulting from the liberalisation measures undertaken in terms of newly assumed market access commitments. This line of argument suggests that any injury or, threat thereof arising as a result of market liberalization would presumably manifest itself within a concrete period of time and that injury occurring later would probably not be attributable to the market liberalization measures

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<sup>36</sup> World Trade Organization, Working Party on GATS Rules, *Report of the Meeting of 10 February*, WTO document NO: S/WPGR/M/54 dated 22 February 2006



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undertaken because of commitments. To alleviate the concerns associated with liberalization especially in the early periods, immediately following undertaking of commitments, the group, spearheaded by the ASEANs, proposed that the WPGR should consider providing a limited window of time that should be available to a Member country after undertaking liberalization commitments during which an ESM could be invoked. The proponents of this proposal thought that this was a reasonable compromise that could address concerns regarding the need to preserve the legal certainty of the commitments that have been undertaken while simultaneously provide necessary comfort to decision makers to undertake new liberalization obligations.

This proposal, like most others, had their share of problems as to some other delegations the occurrence of injury outside such a limited window could not be ruled out and some other very pertinent questions were raised<sup>37</sup>; like whether the provision for the limited window for application of an ESM will apply to all commitments, including those commitments that are below or at the existing levels of market access prevailing in the service importing country, in which case practically no actual liberalization would have taken place but a window of time period created to distort the traditional trade flows. A corollary of the question created a related concern that was whether the limited window would only be applied to commitments made in the future and not to existing commitments. The market access commitments of a country, therefore, would need to be analyzed and bifurcated between those that are made above the levels of prevailing market access and those commitments that actually deliver liberalization and opportunities for enhanced trade flows.

Moreover, if the role of ESMs is seen to provide temporary relieve from a surge in imports resulting from trade reforms, this would require actual and tangible liberalisation, as distinguished from just commitments. The *demandeurs* had consistently asserted that independent ESMs under GATS will provide the comfort levels to reform and undertake liberalization of their service sector. Any mechanism that will not promote any actual liberalisation will always associate valid concern. Similarly establishment of a causality link that any adverse market situations are consequential to the import surge that was directly caused because of the recently

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<sup>37</sup> World Trade Organization, Working Party on GATS Rules *Negotiations pursuant to Article X of the GATS Note from the Chairperson Compilation of Questions* JOB (04)/4930 April 2004

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undertaken market liberalisation commitments<sup>38</sup>. There are obvious contradictions on this negotiating stance taken by some countries, as applying the limited window to existing commitments seems to run counter to the rationale put forward for having the mechanism in the first place, namely to induce more liberal commitments and checking the market behavior in the initial period, therefore, would be unjustified in case of past commitments since previous negotiations for trade liberalization were conducted on the basis non-existence of any emergency safeguards provisions<sup>39</sup>.

The concept of ‘limited window’ has never been used in the GATT context. However, a parallel concept of a ‘limited window’ already existed in the context of certain economic integration agreements including the EC. The EC Agreements with new countries acceding to the EU do provide for a limited space to the acceding country to apply some emergency safeguard measures on their imports of services but these Agreements essentially use a positive list approach for providing a limited window for invoking such provisions. The EC agreement, for example with Slovenia (1February1999), allowed Slovenia to derogate from commitments regarding establishment of EC companies in specified sectors during a predefined transitional period of six years. Interestingly, in two of the Bilateral Investment Treaties (BITs) signed by the United States with its “BIT partners - Georgia and Bahrain – the partners countries have reserved the right to exclude certain services from national treatment during an implementation period. While Georgia remained entitled for three years from the date of entry into force of the treaty to deny US investors national treatment in financial services, Bahrain excluded the purchase of shares on its stock exchange from national and MFN treatment until January 2005”<sup>40</sup>.

The underlying rationale for incorporation of these ‘limited window’ provisions in the EC Agreements and the US-BITs may appear to be same as that were put forward by the ASEANs for the services agreement but the context is totally different. The concept as used in the EC Agreements and the two US BITs comes closer to using the scheduling flexibilities to create a sector specific ‘limited window’ in which binding

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<sup>38</sup> World Trade Organisation Working Party on GATS Rules, *Summary of Main Views Expressed by Members on Emergency Safeguard Measures* Note by the Secretariat 2 June 2006 JOB (06)/165

<sup>39</sup> Bosworth Mr Malcolm and Mr Dionisius A. Narjoko, *Desirability, Feasibility and Options for Establishing ESM within the AFAS*. REPSF Project No. 05/007 Final Report 2006, P 14

<sup>40</sup> World Trade Organization, *Bilateralism in Services Trade: Is there Fire Behind the (BIT) Smoke?* Staff Working Paper ERSD-2008-01 16 January 2008

market access commitments have been made. The ASEAN proposal was strange and unique in a manner as the concept of ‘limited window’ had never been introduced before in the context of GATT/WTO<sup>41</sup> system. There is no legal basis in the existing GATT/WTO system to underpin a conditional and/or sector-specific approach to safeguards. The proposal was, therefore, not in harmony with the basic assertion made by the ASEANs that, if agreed, any ESMs under GATS should be developed on the paradigm provided by the GATT.

### 5.3.2 SCHEDULING FLEXIBILITY

Market access commitments in the area of merchandise trade that are bound by the respective WTO Members in their respective schedules under GATT refer only to one type of transaction (cross-border imports) and also largely with respect to one legitimate, preferred and predominantly used instrument of protection (tariffs). The scheduled market access commitments mostly have mostly a single dimension of the tariff except in the case of the agricultural sector. The other GATT obligations like grant of MFN status and National Treatment is obligatorily and automatically implemented. The conduct of international trade in goods is simple and straight forward and there are clear distinctions between border measures and internal measures<sup>42</sup>. There is no possibility under GATT for Members to incorporate in their commitments some form of any other market access limitations, for example, those that relate to prohibition on buying goods abroad or creating linkages or barriers to market access for products of any locally established foreign owned company.

However, barriers to international trade in services are structured in a totally different manner and are characteristically imposed behind the borders of a country and fundamentally have a regulatory nature. These barriers to cross border flow of services, however, have the same ultimate effect as those of border measures for trade in goods as these also lead to increase in the cost of services in the domestic market and reduce competition. There are, however, no ‘import duties’ in the services sector and GATS,

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<sup>41</sup> Bosworth Mr Malcolm and Mr Dionisius A. Narjoko, *Desirability, Feasibility and Options for Establishing ESM within the AFAS*. REPSF Project No. 05/007 Final Report 2006, P 14

<sup>42</sup> The interpretative note to GATT Article III clarifies that any internal tax, law or regulation which applies to an imported product *and* to the like domestic product is to be regarded as "internal" even if it is collected or enforced at the time or point of importation.

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unlike its counterpart agreement for trade in goods. The services agreement has a much broader scope of application and almost all national regulations (regulatory measures) that may be regarded as appropriate to be promulgated with respect to the entire services sector or to some of its categories by any Member country government in pursuance of any of its policy objectives can possibly be covered by the Agreement.

Article XX: 1 of the GATS<sup>43</sup>; titled as ‘Schedules of Specific Commitments’, contains the only basic obligation that governs the assumption of specific market access commitments in the services sector by a Member country. This requires each Member country to submit a specific schedule of commitments that is annexed to the GATS. The Article XX goes on to clarify and lists the elements that the schedule of commitments may specify. The Article is not concerned with other factors like the number of commitments, their scope, modal coverage, levels of access, or use of particular restrictions, irrespective of the fact whether these are quantitative limitations, or price-based or regulatory discriminations. Schedules of concessions submitted by the member countries, because of the vast scope provided by the available flexibilities in bindings, vary widely both in coverage and also amongst individual groups of Members. While in the WPGR it was also argued by some members that GATS market access obligations target traditional instruments of national regulations, but the possible adverse impact of any market liberalization can comfortably be limited through careful scheduling of the market access commitments and if specific provisions for application of ESMs are created under GATS, some countries may not make full utilization of the flexibilities already available under the GATS framework and instead apply easy to use the trade distorting instrument of ESM.

The market access commitments made under the GATS cover a broad variety of cross border service transactions and almost an infinite range of permissible trade barriers including unlimited range of conceivable departures from national treatment excluding only the six types<sup>44</sup> of market access restrictions which have specifically been indicated in the Article XVI.2 of the GATS. To put it more simply, GATS provides Member countries immense flexibilities to “schedule limitations on number of service suppliers, value of service transactions or assets, number of service operations, quantity of

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<sup>43</sup> Article XX: 1 of GATS.

<sup>44</sup> Article XVI. 2 of GATS

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services output, number of natural persons, and even participation of foreign equity”<sup>45</sup>. Each one of these possibility of limiting the market access can be regarded as quantitative restrictions on its own that can, however, even be scheduled in a manner so as to be gradually relaxed either independently or in combination which practically implies progressive liberalisation timetables or even to minimize any market liberalization that may trigger shocks and create import surges that are injurious to domestic producers of directly competing services. The widespread flexibilities available to the members also include scheduling of safeguard-type measures, which in term of Article XVI. 2 of GATS provides that; “the Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule”. The positive list of scheduled services with possibility to include associated limitations to market access and national treatment by each mode of supply is central to this flexibility. Governments thus not only have the discretion to choose which sectors to include in schedule of commitments, but also to determine which mode or modes of supply to liberalise along with the flexibility to predetermine the extent and pace of any market liberalisation by listing limitations to market access or national treatment, and on the top of all these the governments can even provide specific phase-in time tables for certain liberalising measures.

This sector specific and flexible scheduling of safeguards entails domestic regulatory institutions to predict precisely as to what these circumstances will look like and also the architecture of specific safeguard provisions that will help mitigate any possible adverse market circumstances that may occur. This possibility to qualify the scheduling of market access commitments demands skills on behalf of the public officials committing market liberalization to take into account the entire regulatory structure for a given service sector and scheduling of horizontal limitations requires conceptual clarity on the restrictiveness of these regulations. It was argued by some countries that the possibility of qualifying market access commitments in the services sector by way of limitations in the Member’s schedule of concessions precludes the desirability of a separate and independent provision for application of emergency safeguards measures under the Agreement. For the countries that are not convinced with the desirability of specific ESMs under GATS this scheduling flexibility under which governments can

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<sup>45</sup> Mattoo Aaditya, *Developing Countries in the New Round of GATS Negotiations: From a Defensive to a Pro-Active Role*. The WTO/World Bank Conference, Geneva, September 1999

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virtually negotiate de facto emergency safeguards measures in their market access schedules is enough and this possibility dispenses with the need for separate or specific provision for ESMs under GATS, because there are already adequate provisions in the Agreement to deal with services trade flow situations that may solicit imposition of emergency safeguards measure as understood under the GATT paradigm.

In other words, the scheduling flexibilities that exists in the GATS provide an expansive latitude to the member countries for ex-ante scheduling of their market access limitations, thus, eliminating the need or scope for ex post emergency safeguard measure or action. However, the use of a sector-specific concept of scheduled safeguards presupposes the existence of some advance information on the nature and scope of all possible future emergency situations which will require imposition of the safeguards measure. There were obvious problems associated with these presumptions that the public officers have the capacity to foresee all the possible scenarios that may create adverse market situations calling for application of an ESM. The country that is using scheduling flexibilities to qualify its market access commitments would also require to have the ability to gauge the impact of scheduling of the commitments and will also be expected to identify in advance the nature of emergency safeguards that may be required to be applied to mitigate the adverse market situations created by the predicted situations.

This proposal, based on the scheduling flexibilities available under the GATS was fairly demanding as this required that the enabling rules for application of measures also be developed for Members who include such safeguard-type provisions in their schedules. A conceptual distinction was also required to be understood and maintain in this context between the 'sector-specific safeguards', which will have to be negotiated on case-by-case basis for inclusion in schedules of commitments and other safeguards provisions which would be made available generally. The negotiations with regards to inclusion in the country's schedules of concessions in turn will require to be based on some commonly agreed principles.

In the discussions on the pros and cons of horizontal sector-specific safeguards versus general safeguards it was considered in the WPGR that a 'horizontal mechanism', based on generally applicable criteria would be available to all Members whenever the

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emergency market situation arises in a given sector, and wherever possibly, the mode of supply meets the relevant criteria. The members favouring a sector-specific mechanism recognized the need or usefulness of some commonly accepted principles. Member countries that endorsed a horizontal, generally available mechanism had doubts about the need for sectoral variants without, however, totally precluding such a possibility. If the existence of a horizontal safeguards mechanism are presumed, Members might be free to forgo its use in individual areas by way of an Additional Commitment under Article XVIII of GATS, and that it might be possible to link the availability of such a mechanism to the quality of commitments scheduled under Articles XVI and XVII; as the dividing line between the two concepts is not very sharp.

To create a balance between liberalisation and the possible need of any country for space to undertake structural adjustment reforms, it was proposed by some members that the enabling rules, whether these are general and cut across all sectors, or are sector-specific, or even mode-specific, could include the requirement that a Member that is including a safeguards-type provision in its schedule of commitments in a given sector must also combine this measure with a proportionate commitment to liberalize in that particular sector. It was argued that it is the extent of liberalization that would only justify inclusion of a safeguard provision in the schedule and that these scheduled safeguards will have to be determined through negotiations alongside the negotiations on the schedule of market access commitments. This proposal, for the proponents of the first option, of linking ESMs with level of commitments was also an explicit departure from the model for the development of the ESMs provided by the GATT where no such linkages exist or were ever contemplated.

The argument put forward, in the context of scheduling flexibilities by the countries desiring specific ESMs under GATS, had its own merits. These countries argued that a specific safeguards mechanism is needed precisely to induce countries to abandon the many ex ante restrictions that they currently maintain or are being convinced to make through use of flexibilities. The development of ESMs will make the disciplines under GATS uniform and predictable and will also simultaneously shield the regime created by GATS from possible fragmentation. Moreover, these countries were also of the view that the scheduling flexibilities may only be helpful to more advanced of the developing countries and the developed countries in mitigating the needs for existence

of specific provisions for application of separate ESMs as for the national trade administrations of small, resource-strapped and low capacity countries it is not possible to meaningfully anticipate at the time of scheduling of commitments and make provisions for all conceivable emergencies that might arise in the future that call for application of an ESM. A classic example of this lack of analytical capacity is reflected in the fact that “in the previous negotiations, Gambia and Guyana were among those who had committed to allow unrestricted cross-border trade in financial services and the required mobility of capital, but the United States and the European Union did not<sup>46</sup>”. For the *demandeurs* countries the available flexibilities do not foreclose the case for emergency safeguards under GATS.

The rulings of the WTO Panel and Appellate Body on the *US – Gambling* dispute between the United States and Antigua and Barbuda brought out the potential overreach problem of market access commitments under GATS. Even though the Appellate Body substantially reversed the Panel ruling but both bodies agreed that the US prohibition of internet gambling was inconsistent with the specific commitments the US had made on market access. The US prohibition, in principle, applied equally to foreigners and US providers, but the inconsistency arose because specific commitments on market access preclude even non-discriminatory prohibitions. In this specific dispute, the Appellate Body found that most of the non-discriminatory measures could be justified under the GATS exceptions provision (Article XIV) but the more general issue remains that; a Member that has made full market access commitments is not free to impose certain non-discriminatory measures, such as prohibitions, unless these measures can be justified under the exceptions provision. This vagueness complicates the matter further with respect to the identification of market access commitments and application of ESMs.

### **5.3.3 ECONOMIC NEEDS TEST (ENT)**

Linked to the possibilities of scheduling flexibilities within the GATS was the possibilities created by its Article XIV, Article XII 2(d) and Article VI: 4 for the different standards and conditions that a member country may incorporate as the

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<sup>46</sup>Mattoo Aaditya, *Services in a Development Round: Three Goals and Three Proposals*, World Bank Policy Research Working Paper 3718, September 2005



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requirements that are necessarily to be met by a foreign service provider to qualify for the eligibility of the market access. These provisions are in the context of ‘necessity tests’ that are provided under the Agreement to the members primarily reflect the balance in the WTO agreements between two, at times conflicting but nevertheless very important goals; i) preserving the freedom of Members to set and achieve regulatory objectives through measures of their own choosing, and simultaneously also; ii) discouraging Members from adopting or maintaining measures that unduly restrict trade. Necessity tests typically achieve this balance by requiring that measures, which restrict trade in some way (including by violating obligations of an agreement) are permissible only if they are “necessary” to achieve the Member's policy objective. In so doing, the necessity tests confirm the right of Members to regulate and to pursue their domestic policy objectives. Though there are similarities between the wordings of necessity tests in under different WTO agreements, however, an interpretation that is developed in the context of one case cannot be automatically transposed for interpretation as each provision has to be interpreted in the light of the object and purpose of the Agreement of which it is part<sup>47</sup>.

The context of Article XVI shows that the necessity provisions thereunder serve to define what a full market access commitment of a Member really is by specifying the types of measures which the Member shall not adopt or maintain in sectors in which it has undertaken the commitments<sup>48</sup>. Those are the measures specified in subparagraphs (a) to (f) of the Article XVI which stipulates, however, that a Member may maintain any of those measures provided the measure is “specified in its Schedule”<sup>49</sup> of commitments. The Article XVI.2 also lists six types of measures that WTO Members have agreed not to maintain, or adopt in the services sector where full market access commitments have been undertaken, unless these measures have been specified in the country's GATS schedule of commitments. The measures that are otherwise forbidden under the Agreement unless these are specifically mentioned in the market access commitments are; (i) limitations on number of service suppliers; (ii) total value of service transactions (including any form of ‘economic needs test’) or assets; (iii)

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<sup>47</sup> World Trade Organization, Working Party on Domestic Regulation, "*Necessity Tests*" In the WTO, Note by the Secretariat S/WPDR/W/27, 2 December 2003

<sup>48</sup> World Trade Organization Note by the Secretariat *Economic Needs Tests* Council for Trade in Services S/CSS/W/11830, November 2001

<sup>49</sup> GATS Article XVI: 2.

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operations or total quantity of service output; (iv) value of transaction; (v) type of legal entity; or (vi) foreign capital<sup>50</sup>, these otherwise forbidden measures came also to be known as ENTs. Therefore, in order to clarify the meaning and application of ENTs for GATS purposes, it is particularly relevant to consider the context of Article XVI, taking into account the object and purpose of the agreement. The term "economic needs test" is not defined in the GATS. Nor does the term have a well-defined meaning in standard dictionaries or in the economic literature.

The application of ENTs differs amongst Members, in some cases, the schedule reveals that the test is to be conducted on a case-by-case basis, as each application for licence or a permit is submitted, whereas other entries seem to indicate that tests are periodically conducted. In one instance, the applicant is required to submit a "feasibility study justifying the economic need for the establishment". Most ENTs that have been included in the schedule of concessions do not clearly indicate the criteria that will guide their application, which has made it difficult to assess whether such criteria were similar to the factors governing the use of an ESM. Some of the forms taken by the ENTs are detached from the very concept of 'economic needs test' but in effect these tantamount to and result in almost prohibition while few others countries have tried to pre-empt some trading partners from benefiting from the market access commitments. ENTs indicated in the Members schedule of commitments lack transparency and the criteria used by the countries for their application in most cases will probably be totally different from what might be relevant for an ESM<sup>51</sup>.

Viewed with respect to the exchange of binding commitments under Article XVI of GATS, the criteria to be used in ENTs would need to be specified in a Member's schedule of commitments. Since Article XVI creates binding commitments for each Member based on the wording of the Member's market access schedule, the entries in the schedules would require to be inscribed with sufficient precision to allow the verification of the Member's compliance with its commitments<sup>52</sup>. For ENTs in

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<sup>50</sup> Footer Mary E, *The General Agreement on Trade in Services: Taking Stock and Moving Forward*, Legal Issues of Economic Integration 29(1): p 11, 2002

<sup>51</sup>World Trade Organization, document No S/WPGR/M/55, Para. 14; Communication from Brunei Darussalam, Indonesia, Malaysia, Myanmar, the Philippines, and Thailand and Room Document, 10 February 2006.

<sup>52</sup> World Trade Organization *The Guidelines for the Scheduling of Specific Commitments under the GATS*, adopted by the Council for Trade in Services on 23 March 2001, states that *all* scheduled market

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particular, the Scheduling Guidelines confirm that they “should indicate the main criteria on which the test is based, e.g. if the authority to establish a facility is based on a population criterion, the criterion should be described concisely.” A Member scheduling, a limitation on the number of service suppliers, would need to specify the exact number of suppliers, and not merely state that a numerical limitation exists. Otherwise, the legal certainty and predictability necessary for Members to exchange scheduled commitments and secure their rights and obligations, which is the purpose of Article XVI, would be undermined. However, as general practice, the references to ENTs in the schedules point to a ‘real test’ involving the determination of whether there are economic needs in the domestic market that would justify, for example, recourse to services or to services suppliers from abroad or of foreign origin.

In practical terms the incorporation of such an ENT in fact constitutes application of an emergency safeguard measure that is without any discipline as to its application. It would be difficult to argue that an ENT that lays down a limit above which there will be a cut in the permitted flow of services or service suppliers is very different from application of an emergency safeguard measure and can be seen as an import quota. For example in the case of mode 4, the main objective of the scheduled ENTs, are in the context of provision of protection to the local workforce through quantitative limitations. The inscription of an ENT provision in the market access schedule will constitute almost a blank cheque for the competent authorities to decide whenever they please, and that too, without having to comply with a bare minimum of indicators being present, criteria or tests of a broader ranging nature, on the plain subjective interruption of any flow of services or services suppliers. In that sense an ENT is not a trade remedy safeguard measure, but it is a market access limitation and delivers a subjective discretion for the domestic authorities to allow trade.

Member countries, which were not agreeable to the need of providing specific ESMs under GATS, were of the view that although serving different policy objectives and purposes Economic Needs Test (ENT) could elaborate and suggest some sort of clues so as to develop answer to the question of feasibility or otherwise of building standalone

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access limitations "should describe each measure concisely indicating the elements which make it inconsistent with Article XVI".

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and specific ESMs under GATS. To this group of countries ENTs in essence entailed almost the same type of measures as an ESM because most of the issues pertaining to the application of an ENT could be very similar to those market situations that also warrant the application of an ESM. In all probability the factors that are relevant to the determination of injury or threat thereof in the context of an application of an ESM would invariably also arise in the determination or threat of economic harm in the context of identifying an ENT. In short, the concepts of ENTs and ESM were regarded by this group of countries, to be similar to the extent of being mutually substitutable concepts.

The overwhelming use of this flexibility and legally permitted subjectivity associated with the concept is reflected in the fact that some 50% of WTO members had scheduled ENTs in at least one mode of supply and/or sector, usually without supplying information on the type of test, how it is applied or the criteria used. The forms taken by the ENTs are varied and most of these appear to have to do more with industry protection than assessment of economic needs as such. Economic Need Tests (ENTs), for example, scheduled especially for modes 3 (commercial presence) and 4 (temporary movement of people) serve as ESM-type measures. Under mode 4 the main objective of any possible ESM can be to protect the local workforce through quantitative limits, therefore, there is an “equivalent effect” between an ENT and a generic ESM. It can, however, be argued that an ENT constitutes an emergency safeguard without any disciplines on use, and that a generic ESM would be therefore be a lesser problematic, more predictable and less trade distorting and thus a better option because, if agreed, it would be subject to clearer rules and disciplines.

Member countries demanding specific ESMs in the GATS, however, disagreed with analogies drawn or similarities identified between ENTs and ESM. This group of countries emphasized that ENTs are absolutely different from ESMs and doubted whether comparisons could usefully be made as ESMs unlike ENTs are to be applied neither on a discriminatory basis nor in response to an emergency and that the development of specific emergency safeguards provisions would reduce the need for ENTs. The group also had objections to points made in relation to existing

commitments and felt that shifting the debate to such issues will not provide answers to the technical questions raised<sup>53</sup> with respect to an ESM.

To the *demandeurs* development and incorporation of specific ESMs in GATS were positively preferable because these would be multilaterally agreed upon, with clear and transparent criterion and they argued that existence of an ESM will strengthen arguments for keeping ENTs in the schedule of concessions to the minimum. With respect to points made in relation to safeguard-type entries in schedules, some members felt that such questions were not relevant for the Working Party's discussions on ESMs. ENTs contemplated under Article XVI of GATS, highlight the flexibility of the GATS rather than militating for an ESM<sup>54</sup>.

### 5.3.4 ACQUIRED RIGHTS

The disciplines governing international trade in goods under the GATT has no conceivable parallel to the Mode 3 of cross border delivery of service that is covered under the GATS. Mode 3 of delivery of service relates to the commercial presence of the service provider in the importing country. With no parallel under GATT, there is, however, a definite "overlap between 'mode-3' services supply (that is, supply through the establishment of a commercial presence) and investment disciplines. More specifically, "for instance, the definitions of 'commercial presence' and 'service supplier' in the GATS resemble the definitions of 'investment'<sup>55</sup> and 'investor' under the NAFTA"<sup>56</sup>. Under the mode 3 of delivery, a service is inherently accompanied by some form of capital investment; and dealing of investments under the WTO has been an extremely contentious issue (discussed latter in the Chapter); therefore treatment of commercial presence (mode 3 of service delivery) was one of the most complex and divisive areas for negotiations under the UR of the MTNs. The acceptance of disciplines with respect to Mode 3 of delivery in practical terms meant accepting multilateral disciplines for cross border investments.

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<sup>53</sup> World Trade Organization, Working Party on GATS Rules *Negotiations pursuant to Article X of the GATS Note from the Chairperson Compilation of Questions* JOB (04)/4930 April 2004

<sup>54</sup> World Trade Organization, document No S/WPGR/M/47, Para 35; S/WPGR/M/50, Para 49 & 53.

<sup>55</sup> The definition under NAFTA virtually includes all investments. The concept covers one which seeks to make, is making, or has made an investment and implicitly implies risk and commitment by an investor.

<sup>56</sup> LIM C.L. *The WTO in the Twenty-First Century Dispute Settlement, Negotiations, and Regionalism in Asia* Edited by Yasuhei Taniguchi, Alan Yanovich, and Jan Bohanes Cambridge University Press 2007

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Conceptualising application of an emergency safeguards measure for any specific service sector and the measure to also target mode 3 of supply of services raised pertinent concerns. Working within the GATT paradigm an application of an ESM by an importing country will imply that the foreign owned service suppliers physically located in the host country will be required to reduce their supply of service that is being provided by them domestically. In such a situation the service providers will in fact be forced to disinvest and any 'rights' that had been 'acquired' by the service provider by virtue of investments and physical presence in the country applying the measure will be either be diluted or nullified. Employing a nationality definition for application of ESMs had its problems as this practice would exclude established foreign owned firms from the definition of the domestic industry and these can then be targeted for application of any ESMs. A dichotomy is created here, as excluding established foreign firms from the definition of domestic industry will imply that they are also excluded from any 'acquired' rights for application of an ESM concurrently the investments already made by these firms will be protected by application of any ESM.

The ASEAN submissions touched this conundrum of the 'acquired rights' and application of ESMs. The paper, working on the GATT paradigm, suggested that when dealing with the issue of acquired rights a nationality definition of domestic industry will be required to be developed, agreed and used, it will have to be decided whether or not the resident but foreign owned service suppliers are included and treated as part of the domestic industry. However, if any agreed ESMs are applied under a practice that uses residency definition of the domestic industry than in practical terms it amounts to excluding foreign owned but domestically located service suppliers from the mode 3, this will make the whole exercise of the application of ESMs redundant; as even the 'expansionary rights' of such firms will remain intact. Establishing of causality would also be impossible given that any injury to domestically owned industry can only be caused by already established resident foreign suppliers that are benefiting from the full protection of acquired rights. .

There were conflicting concerns in the WPGR with respect to the protection of the rights of pre-established foreign owned service suppliers in the domestic market of the country contemplating imposition of an ESM. For some of the proponents of specific ESMs, it was acceptable that the acquired rights existing at the time of application of an

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emergency safeguard measure may be protected but, for them, all expansionary activities of a foreign owned service suppliers would not fall within the ambit of acquired rights and should, therefore, be able to be subjected to safeguards measure. The ASEAN<sup>57</sup> provided a listing of examples of such expansionary activities that may be restricted and included; i) establishment of branches or subsidiaries; ii) acquisitions; iii) merger or consolidation; iv) infusion of additional capital and; vi) acquisition of entities. ASEANs and some other developing countries viewed that the listed expansionary activities would not qualify as an ‘acquired right’ but simultaneously the listings were also not sacrosanct and that these countries were open to negotiations<sup>58</sup> on this listing. While another group of member countries had their own exclusive views that the foreign owned suppliers already established in a country should neither be affected by application of an emergency safeguard measure by a country (i.e. vested rights should be protected) nor on balance should these foreign owned supplier of the service be eligible to file an application for any reprieve through an emergency safeguard measure<sup>59</sup>.

The relevance of the concept of ‘acquired rights’ with respect to the other three Modes of cross border supply of services (other than mode 3) were also discussed. Regarding supply of services under Modes 1 and 2, proponents of the ESMs viewed that some of the existing levels of services supplied should at least be respected in the event an emergency safeguard measure was contemplated to be imposed on the analogy of the existing concept of protecting current trade flows under GATT. ‘Acquired rights’ for these modes of supply were considered very relevant in the light of investments made in developing countries for the purpose of servicing business process outsourcing requirements<sup>60</sup>. Proponents of the proposal felt that the concept of ‘acquired rights’ could also be used for ‘Mode 4’ (movement of natural persons) as it can possibly also be undertaken for other modes, however accepted the fact that the proposals need to be refined which can be done through the negotiations. They explained in the WPGR that any form of a quantitative restriction placed on supply of services under Mode 4 should be so structured so as not to curtail the number of Mode 4 suppliers to a level below the

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<sup>57</sup>World Trade Organization, document ASEAN draft text, Job 6830, 2000

<sup>58</sup>World Trade Organization, document S/WPGR/M/47, Para. 6; this primarily reflects the dynamics of negotiations in the WPGR where half-baked ideas were floated.

<sup>59</sup>World Trade Organization, document S/WPGR/M/55, Para. 11 & 15.

<sup>60</sup>World Trade Organization, document Non-Paper by the Secretariat, Para 17

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average number providing that service for a representative period prior to the measure being imposed.

This proposal was based on the paradigm provided by the GATT and was a broad extension of the concept of acquired rights to the Mode 4 of cross border supply of services. Some other Members had serious concerns about the proposal that the concept of ‘acquired rights’ as defined for Mode 3 can even be extended to Mode 4. To these countries Mode 3 and Mode 4 of delivery of services had totally different and opposing dynamics. For mode 3, stability and predictability were essential and important as this Mode of supply also requires making long-term investment decisions. While Mode 4 implied temporary movement of natural persons, therefore, the concept of Emergency Safeguards Measures and ‘acquired rights’ cannot carry the same implications, as by definition foreign natural persons were not permanent part of the host country’s labour market<sup>61</sup>.

The ASEANs were the initiators of the concept of acquired rights and the study undertaken within the ASEAN Framework Agreement on Services” drew the conclusion that “distinguishing between ‘acquired’ and ‘expansionary’ rights is somewhat arbitrary and superficial. The ‘expansionary’ rights are very closely associated to both the ‘post-establishment’ rights and the need to protect ‘acquired’ resident rights and in practice these should also be linked to both. Foreign investors considering establishment of a commercial presence are likely to be put off knowing that if they become successful they could be targeted by ESMs that would restrict their possibilities to and expand, this factor will all the more be really discouraging in the case when the initial investment was considered risky with uncertain profitability and chances of success. Similarly limiting a resident foreign owned firm’s capacity to undertake activities of merger or acquisitions through imposition of an emergency safeguards measure, for example, may prevent rationalization, and as result, could lead to reduced profits or continued losses and potential closure. The developed country members were of the view that the establishment of new branches or acquisition of companies and mergers are integral to the business activities for any company that is investing in a foreign country and that such activities were essential not only to recoup the initial cost of investments but also to maximize returns on investments and create

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<sup>61</sup> World Trade Organization, document S/WPGR/M/47, Para 14 & 22.



efficiencies. ESMs that ignore the ‘acquired rights’ of expansion will, therefore, be of disadvantage to domestic consumers and even other suppliers, including those that are locally owned. Restricting ‘expansionary’ rights could thus, in short, severely curb economic activity, be anticompetitive and create investor uncertainty.

Restricting ‘expansionary rights’ also contravenes Article IX of GATS that requires WTO Members to enter in to consultations with a view to eliminating business practices restraining competition and that restrict services trade. Such an approach also implicitly assumes a nationality and not a residency definition of the domestic industry. This is because under the latter resident foreign firms would be included in the domestic industry, and hence would be treated the same as locally-owned firms. There would be no legal basis for curtailing any post-establishment rights, including ‘expansionary’ rights<sup>62</sup>. The possible anti-competitive effects resulting from the application of an emergency safeguard by the importing country in such a context was repeatedly discussed in the WPGR. The link between ‘acquired right’ and other GATS specific concepts like ‘Economic Needs Tests (ENTs)’ also required clarification and were discussed by way of elaboration through an example. The example given in this regard was from the distribution services; where a supplier that was granted a license to establish a supermarket in an importing country under a market access commitment that was scheduled as subject to an ENT, would like to expand its activities to other parts of the territory in the country; the question that arose here was that should this expansion be considered as permissible by virtue of being the ‘acquired right’, or should this proposed expansion be subjected to the economic need tests. The ‘acquired rights’ as a concept may appear to be fairly straight forward but are not easy to demarcate and evaluate in practical terms. The answers to such important questions were difficult<sup>63</sup> and left open and no conclusions could be drawn<sup>64</sup>. However “the concept of ‘acquired rights’ despite prolonged debates in WPGR remained vague”<sup>65</sup>.

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<sup>62</sup> Bosworth Mr Malcolm and Mr Dionisius A. Narjoko, *Desirability, Feasibility and Options for Establishing ESM within the AFAS*. REPSF Project No. 05/007 Final Report 2006, P 27-28

<sup>63</sup> World Trade Organization, Communication From The European Communities, *Modal Application of An Emergency Safeguard Measure*, S/WPGR/W/38 21 January 2002

<sup>64</sup> World Trade Organization, Working Party on GATS Rules *Negotiations pursuant to Article X of the GATS Note from the Chairperson Compilation of Questions* JOB (04)/4930 April 2004

<sup>65</sup> Adlung Rudolf *Negotiations on Safeguards and Subsidies in Services: a Never-ending Story?* Journal of International Economic Law 2007 10(2):235-265

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A number of member countries had serious concerns with respect to the practical implications of the views with respect to the ‘acquired rights’ and explanations put forward by the *demandeurs* of standalone ESMs under GATS. The concerns expressed included elements like; i) not protecting acquired rights, and their impact on long term investment decisions; ii) unpredictable investments and business environment and; iii) negative effect on employment and the overall economic growth. This proposal had major difficulties and, if agreed, was likely to rebound badly on the economy of the country and its attractiveness for FDI and BITs for which developing countries especially the proponents of the concept of independent ESMs under the GATS are so desperately looking for. Moreover, if the GATS definition is used and established foreign firms with minority domestic ownership (up to 49%) are to be subjected to ESM, then domestic interests are likely to be adversely affected almost as much as foreign interests.

The ASEAN proposal had inconsistencies; the paper acknowledged that any safeguards provisions developed need to protect acquired post-establishment rights of resident foreign owned firms, the paper simultaneously also proposed applying ESMs to restrict the ‘expansionary’ rights of these foreign firms consequent to an application of an emergency safeguards measure by the host country. However, the idea of separating the expansionary rights from other ‘acquired post-establishment rights’ in order to target resident foreign owned firms with application of a safeguards measure raises a series of complications on its own, including consistency of the applied measures with Bilateral Investment Treaties (BITs) that generally protect post-establishment, including ‘acquired’ and ‘expansionary’, rights of resident foreign firms. Application of ESMs will limit the ‘expansionary’ rights of resident foreign firms and would therefore be a violation of BITs and expose the country applying ESM to potential compensation claims. Protecting ‘acquired’ rights of established foreign suppliers while prohibiting new foreign entrants also raises MFN (discriminatory) concerns<sup>66</sup>.

Following the GATT paradigm and accepted standards for BITS, once established the foreign provider of services acquire certain rights and deserve to be accorded full ‘national treatment’ in terms of Article XVII of GATS read with its explanatory

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<sup>66</sup> Bosworth Mr Malcolm and Mr Dionisius A Narjoko, *Desirability, Feasibility and Options for Establishing ESM within the AFAS*. REPSF Project No. 05/007 Final Report 2006,

footnote. However, this national treatment is limited in the context of GATS to the scheduled market access commitments of the country but in the context of BITS it is slightly more broader and in most cases open ended and invariably mandatory with respect to the National Treatment provisions. National treatment under mode 3 implies that foreign established suppliers are entitled to the same benefits, including financial incentives like subsidies, as their domestically owned counterparts. The situation is somewhat different under modes 1 and 2, where the foreigners compete with domestic producers from a different geographical jurisdiction.

### **5.4 BILATERAL INVESTMENT TREATIES (BITS)**

There are currently no all-encompassing multilaterally agreed treaty disciplines or rules concerning foreign direct investments (FDI). Several attempts were made in this regards in last couple of decades to draft an international agreement on investment<sup>67</sup> but all of these failed. The recent past has, however, experienced a proliferation of international investment agreements (IIAs) which comprise of a universe that is multilayered, i.e. composed of various treaties that, at times also overlap, are at different levels; bilateral, sub-regional, regional, interregional, sectoral and even plurilateral. Though the universe of investment agreements is increasingly becoming complex and diverse but these can still generally be bifurcated and made to fall into two groups. The first group consists of Bilateral Investment Treaties (BITs) that are negotiated bilaterally between two countries to protect and promote investment of investors of one party in the territory of the other party. The second group of Investment Agreements consists of expansive economic integration agreements (EIAs), which are broad agreements, intended to facilitate the cross border movement of goods, services, capital, people or information<sup>68</sup>.

Core elements found in most BITs include provisions on the scope of application, entry and establishment of investment, fair and equitable treatment, national treatment and

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<sup>67</sup> Negotiations to draft a Multilateral Agreement on Investment took place between 1995 and 1998 under the auspices of the OECD. All available documentation can be found on the OECD website: [www.oecd.org/daf/investment](http://www.oecd.org/daf/investment).

<sup>68</sup> UNCTAD *International Investment Arrangements: Trends and Emerging Issues* Series on International Investment Policies for Development, Geneva, 2006 The legal protection of foreign owned assets has a fairly long history and there exist norms of Customary International Law protecting foreigners, including investors; these include some minimum standard of treatment and compensation requirements.

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MFN treatment, expropriation and compensation<sup>69</sup>. Only a few of the agreements that contain investment promotion provisions go one step further, for instance, by specifically seeking to promote the transfer of technology, to provide for training and capacity building, to improve conditions. Investment Agreements like BITs have been largely irrelevant to trade law emerging out of the historical pre-Uruguay Round GATT system. Even today the BITs technically exist outside the realm of the World Trade Organization (WTO)<sup>70</sup>. Most countries, interestingly, that have entered into BITs are also WTO members. However, within the World Trade Organization some unsuccessful efforts were made to initiate a process of bringing ‘investments’ under multilateral disciplines. Singapore Ministerial Meeting decided<sup>71</sup> in 1996 to set up working groups on; trade and investment and on competition policy,. The negotiations were mandate to start after the 2003 but there were massive disagreements and ultimately the members agreed on 1 August 2004 to drop the Singapore issues (except trade facilitation) from the Doha agenda<sup>72</sup>.

The GATS is the first multilaterally agreed treaty that cuts borders into international investment law as it contains obligations on the treatment of foreign investors. The Agreement does not cover investment policies per se but it does to the extent that they relate to the cross border supply of services including under mode 3 of delivery of service (physical presence<sup>73</sup>). The disciplines of BITs in certain areas, therefore, overlap with some GATS provisions insofar as both apply to “measures by Members affecting trade in services” within the meaning of Article I: 1 of the GATS. “The relevance of BITs in governing international trade in services, as captured by mode 3, is

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<sup>69</sup> UNCTAD, *Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking*, United Nations New York and Geneva, 2007 By the end of 2009, there were nearly 2,750 (BITs) and 295 other international economic agreements with investment provisions .

<sup>70</sup> Samuelson Emily Sweeney & Solomon Ebere, *Working Paper On GATS Negotiations On Domestic Regulation: Could A Foreign Investor Use GATS Disciplines in A BIT Claim?* Harrison Institute for Public Law Georgetown Law Discussion Draft of May 19, 2010

<sup>71</sup> World Trade Organisation, Singapore Ministerial Declaration, WT/MIN(96)/DEC, Adopted on 13 December 1996

<sup>72</sup> Aaken Anne van; *International Investment Law and Rationalist Contract Theory*, Working Paper, NYU, 22 January 2009

<sup>73</sup> Commercial presence: where the service-supplier crosses the border to have a “commercial presence” abroad through which the service is provided.

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obvious, given that more than 60 per cent [sic] of world FDI [foreign direct investment] stocks (2004) pertain to service-related investments<sup>74</sup>”.

Mode 3 of delivery of service is the most important cross border mode of delivery with regards to trade in services and the trade under this mode exceeds all the remaining modes of service delivery put together<sup>75</sup>. Since “the coverage of investment treaties tends to be broader in many aspects, it might be difficult to find scenarios falling under mode 3 (commercial presence) of the GATS that are not captured by such treaties<sup>76</sup>”. It is estimated by the WTO Secretariat that on a global basis, and putting measurement problems for the moment aside; most of the service trade occurs through Mode 3, and forms almost 55 per cent of global services trade; while cross-border supply (Mode 1) is estimated to account for 35 per cent; consumption abroad (Mode 2) around 10–15 per cent; and presence of natural persons (Mode 4) a maximum of 1–2 per cent of service trade<sup>77</sup>.

The rapid spread of BITs is driven by international competition among potential host countries – typically developing countries – for foreign direct investment<sup>78</sup>. Invariably BITs typically provide various non-discrimination commitments, and expressly embrace the old customary law standard of payment of a ‘prompt, adequate and effective compensation’ for expropriation. They provide investors with the right to take investment disputes to neutral international arbitration, and commit each party to enforce arbitral awards (including an award of damages) and adhere to 1958 - Convention on the Recognition and Enforcement of Foreign Arbitral Awards – the ‘New York’ Convention.

The developed countries were of the view that relevance and importance of mode 3 of service delivery with respect to foreign direct investment (FDI) in services and

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<sup>74</sup>Rudolf Adlung & Martin Molinuevo, *Bilateralism in Services Trade: Is There Fire Behind the (BIT-) Smoke?* WTO. Economic Research and Statistics Division, Staff Working Paper ERSD-2008.

<sup>75</sup> Centre for International Economics, *Quantifying the benefits of services trade liberalisation*, Canberra, Australia, June 2010

<sup>76</sup> World Trade Organization, *Bilateralism in Services Trade: Is there Fire Behind the (Bit-) Smoke?* Staff Working Paper ERSD-2008-01 16 January 2008

<sup>77</sup> World Trade Organization, *Symposium of Cross-Border Supply of Services*, 28–29 April 2005, WTO Economic Research and Statistics Division, Geneva.

<sup>78</sup>Elkins Zachary, Guzman, Andrew T, Simmons, Beth, *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000*

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development of the economy has not been sufficiently highlighted in the discussions held in WPGR. FDI in services not only brings external capital, but also new skills and technology and are helpful in linking countries to the global value chain. Certain services are also built in to the manufactured products or serve as inputs and create enabling environment for other sectors to develop. FDI in services has grown rapidly over the recent past and now accounts for the largest part of global FDI. In that context, it was pointed out by the countries seeking broader liberalization that better commitments on mode 3 by a country will improve the investment climate for that country by providing legal certainty and stability to the investors. The positive relationship between the liberalization of mode 3 and growth of trade under other modes, especially modes 1 and 4, was repeatedly emphasized<sup>79</sup>.

An associated and equally important recent development is the surge in Economic Integration Agreements or other treaties on economic cooperation with strong investment provisions that either complement or override traditional bilateral investment treaties. These Agreements now deal with a broad range of related matters such as trade in goods, services, investments, competition policy, intellectual property rights and industrial policy. A number of Members especially those developing countries which are demanding standalone ESMs under GATS, like ASEANs, have in parallel to the negotiations in the WPGR undertaken broad and binding market access commitments under bilateral, regional or inter-regional trade and investment agreements. The commitments made by these countries under BITs, mostly entered into with developed countries, or under the framework of some Regional Economic Integration treaty covering investments, are far in excess of the commitments undertaken by these countries multilaterally under the WTO. Interestingly these commitments are more pronounced under Mode 3 of delivery of service which pertains to physical presence of the service suppliers or simply put, cross border investments in the services sector.

The negotiating mandate detailed in Article X.1 of GATS provides for “multilateral negotiations on the question of emergency safeguard measures based on the principle of

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<sup>79</sup> World Trade Organization, Council for Trade in Services, Special Session, Information Note by the Secretariat Mode 3, JOB(05)/195, 19 September 2005, p.1

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non-discrimination<sup>80</sup>, the mandate narrows down the scope of negotiations; which put simply means that if the answer to the question of ESMs is agreed to be in affirmative and if ESMs are found desirable and feasible and developed under GATS then these would necessarily need to be non-discriminatory and their application will be on a MFN basis which in turn implies that the safeguards measures taken cannot be source specific or discriminatory in any aspect. Therefore, a Member contemplating to invoke any emergency safeguard measure under GATS in the context of mode 3 will have to do it on a nondiscriminatory basis; doing so would then be derogation by that member from the obligations under the BIT which invariable do not incorporate trade remedial measures. In such a scenario the Member would have to decide whether to comply with the MFN obligation under the GATS and risk legal challenge under the BIT or, alternatively, to exempt the counter party to the BIT from the application of the safeguard measure and risk legal challenge under GATS. The Member would have to make a judgment as to what legal challenge it would want to risk facing: one under the WTO for violation of the MFN obligation or one under a BIT. The violation of WTO provisions is not an available option and will not be possible as it has already been decided under Article X.1 that any ESM which is developed under GATS would have to be applied on a non-discriminatory basis. The practical application of an ESM by a WTO Member country, which is also a party to a BIT, therefore, will create a direct conflict between the country's obligations under the Bilateral Investment Treaty (BIT) and its obligations under the WTO.

Most of these BITs have almost standard formats that guarantee full national treatment, post-establishment, to foreign investors in foreign majority-owned or controlled companies in other words all 'acquired rights' are fully protected. Even if a BIT's national treatment guarantee is confined only to established suppliers, the concept seems difficult to reconcile with the basic rationale of a GATT-type safeguards mechanism. The authorities would need to exempt precisely those companies from safeguards that had caused the injury and triggered the action<sup>81</sup>. It will not be possible to justify the guarantee of continued national treatment to one group of foreign investors that includes those companies that have caused the injury. These companies will be the

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<sup>80</sup> Article X:1 of GATS

<sup>81</sup> Adlung Rudolf, *Negotiations on Safeguards and Subsidies in Services: a Never-ending Story?* Journal of International Economic Law 2007 10(2):235-265

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ultimate beneficiaries of the safeguards measures that are imposed on new entrants<sup>82</sup>. A large number of Members have, therefore, already and practically relinquished their right to impose ESMs, under the GATS, because of the BITs entered into by them that forbid discriminating against the foreign established suppliers.

The imposition of a possible non-discriminatory emergency safeguard measure under the WTO on mode 3 would affect treatment that has been accorded by the ESM applying Member to the country with which it has signed a BIT. The ASEAN group of countries in their informal paper had also conceded that the application of an ESM could conflict with the provisions of BITs. The invoking Member has limited options and would have to either exempt that Member with which it has entered into a BIT from the safeguard measure or subject the Member to the safeguard measure or assume the risk of a legal challenge under the BIT. The field of international investments has its own dispute settlement structures including under the International Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID or the Washington Convention). Most BITs also incorporate specific provisions along with very elaborate dispute settlement systems that include full compensation provisions. These provisions are unlike the WTO dispute settlement procedures which provide possibilities limited only for retaliation through withdrawal of concessions. This option of retaliation under WTO, anyway, has not much relevance for the small developing countries that have little capacity to retaliate through withdrawal of market access concessions.

Interestingly it is the same developing countries that are demanding ESMs under GATS; that are simultaneously extremely eager to enter into broad ranging and deep BITs with the developed countries. These standalone ESM demanding countries under GATS prefer to enter into BITs and other deeper Economic Integration Agreements on bilateral or regional levels than under WTO. These countries have shown a preference for regional cooperation over market liberalization under the multilaterally agreed treaties<sup>83</sup> under which benefits if any will accrue, on an MFN basis. This approach reflects of a definite bias towards bilateralism and regionalism over multilateralism

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<sup>82</sup> Adlung Rudolf, *Negotiations on Safeguards and Subsidies in Services: a Never-ending Story?* Journal of International Economic Law 2007 10(2), P 253

<sup>83</sup> The efforts to negotiate the Multilateral Agreement on Investment miserably failed in 1998 and negotiations under WTO on services liberalization practically stalled.



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when it comes to extension of tangible benefits. In short a preference is for carving out of markets and discrimination over global trade liberalization and non-discrimination.

GATS provisions, in particular the MFN requirement pursuant to its Article II that provides that a member must “accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like service suppliers of any other country”, for the Member countries that have not listed relevant exemptions in their schedules, the Article provides that any BIT disciplines that exceed the parties' GATS obligations are to be extended on a multilateral basis. However, BITs that have been concluded in the context of broader PTA negotiations; these may fall under Article V of the GATS under economic integration initiatives. The *demandeurs* of the specific of ESMs under GATS during all the formal and informal meetings of the WPGR were not able to clarify the relationship between the proposed approach for acquired rights, i.e., the possibility to impose discriminatory measures on expansionary activities of established suppliers, and the obligations (e.g., national treatment) under Bilateral Investment Treaties (BITs) or other obligations not falling under Article V of the GATS<sup>84</sup>.

Continued and rapid proliferation of Bilateral Investment Treaties (BITs) has now added new dimensions to the deliberations held in the WPGR relating to the compatibility of restrictions imposed through any ESM type measures that may be developed under the GATS with the BITs entered into by the country that is intending to apply an emergency safeguards ‘measure’. The term ‘measure’ has a fairly broad coverage or connotation under GATS as the Appellate Body, in *EC - Bananas III*, with respect to ‘measures [...] affecting trade in services’, as provided by Article I:1 of the GATS, viewed that these are not necessarily measures ‘regulating’ or ‘governing’ trade in services, nor measures taken ‘in respect of’ trade in services’, rather, ‘any measure bearing upon conditions of competition in supply of a service, regardless of whether the measure directly governs or indirectly affects the supply of the service’ falls under the scope of the Agreement. From this perspective, although most disciplines created by the BITs may not be directly aimed at governing services trade, but they may fall within the purview of the GATS to the extent that they affect trade (and investment) in services.

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<sup>84</sup> World Trade Organization, document No S/WPGR/M/47, Para. 14 & 26.

The MFN obligation pursuant to Article II is no different in scope, since the Article applies to ‘any measure’ covered by the GATS. Accordingly, any preferential treatment effectively granted to investors from one BIT partner would need to be extended not only to other, less privileged BIT partners, if any, but to all WTO Members as well<sup>85</sup>.

### 5.5 ESMS IN SERVICES SECTOR: RTAS

Regional and Bilateral Trading/Integration Arrangements (RTAs) on the international economic scene have proliferated rapidly in the recent past. During the early years of WTO (1994-2001) all RTAs that were notified to the WTO related only to trade in goods and there was not a single RTA that either had a chapter or independent provisions on trade in services. However, the trends have changed and now the “attempts to incorporate a services chapter in the RTAs have now found a new fervour<sup>86</sup>”. Though regional trade agreements in services are a relatively recent, but these are a rapidly expanding phenomenon<sup>87</sup>, however, “unlike trade in goods, RTAs that are specific for the services sector and exclusively cover trade in services are still rare<sup>88</sup>”. Between 2001 and 2008 around forty RTAs that were notified to the WTO under GATS Article V<sup>89</sup> had separate chapters or provisions relating to trade in services. These RTAs mostly cover cross border trade in services as a component of a broader and comprehensive package of economic relations covering wide range of areas including trade in goods, services, investments and Intellectual Property Rights.

The conduct of international trade in last couple of decades has become more complex; that now demands more intricate international trade rules. World Trade Organisation has failed to provide any new up-dated or substantive rules in last twenty years which are relevant to contemporary international economic relations. This inaction has created a vacuum and governance gap, which is being bridged by the collection of

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<sup>85</sup> World Trade Organization, *Bilateralism in Services Trade: Is there Fire Behind the (Bit-) Smoke?* Staff Working Paper ERSD-2008-01 16 January 2008

<sup>86</sup> Chanda Rupa, *Trade in Services & India, Prospects and Strategies*, CENTAD, New Delhi, 2006 p 360

<sup>87</sup> Adlung Rudolf and Peter Morrison *Less Than The GATS: ‘Negative Preferences’ In Regional Services Agreements* Journal of International Economic Law 13(4), 1103–1143

<sup>88</sup> Roy Martin, Juan Marchetti and Hoe Lim, *Services Liberalization in the New Generation of Preferential Trade Agreements (PTAs): How Much Further Than the GATS?* World Trade Review Cambridge University Press (2007), 6: 162

<sup>89</sup> RTAs with chapter on services are required to be notified under Article V of GATS as these provide departure from MFN treatment in case of RTAs.

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uncoordinated and in certain cases unconnected developments outside the WTO through the evolution of new regionalism. Using their new dataset, WTO concludes that RTAs have been getting increasingly ‘deep’<sup>90</sup> with most of the provision being legally enforceable. The WTO acknowledges that the; “pattern observed suggests that deepening commitments in these areas, i.e., going beyond commitments in the WTO, continue to be a major driving force for recent RTAs<sup>91</sup>”. The World Trade Report 2011, also had to recognize that RTAs in the 21st century cover more areas outside the WTO (referred to as WTO-X) than earlier RTAs. The main policy areas covered are competition policy, intellectual property rights, investment and movement of capital. As these WTO-X provisions are largely regulatory in nature, their growth is “testimony to the growing importance of behind-the-border measures in RTAs<sup>92</sup>”.

Trade in services is now featuring prominently in the RTAs especially in those that were concluded during the last decade. It was of immense value to analyse any provisions that may have been created under these RTAs for trade remedy measures in general or specifically with respect to emergency safeguards measures in area of services. The structures of ESM in the service RTAs could be possibly helpful in answering the question raised in Article X: 1 of the GATS. This structuring of ESMs for services sector would not only had resolved the debate about the feasibility and desirability of the ESMs but also provided cues to challenges being faced by the negotiators on the multilateral front. The provisions for application of ESMs in RTAs potentially could also be transposed partly or entirely to the GATS. It was, therefore, worthwhile to explore the possibility that whether some inspirations for developing GATS specific ESMs can also be drawn from the plethora of RTAs so as to find a coherent and acceptable answer to the question of ESMs under GATS as raised in its Article X.

The RTAs in defining the conduct of interstate economic relations primarily employ the same concepts as these are embodied in different Agreements under the WTO. With

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<sup>90</sup> The concept of depth reflects ‘the extent to which an Agreement requires states to depart from what they would have done in its absence’. The notion of depth varies from country to country as it may demand large changes in some states and virtually no changes in others.

<sup>91</sup> World Trade Organization, *The World Trade Report*, WTO Secretariat, 2011

<sup>92</sup> World Trade Organization *21<sup>st</sup> Century Regionalism: filling the gap between 21<sup>st</sup> century trade and 20<sup>th</sup> Century trade Rules*, Staff Working Paper, Geneva, 23 May 2011

regard to the application of ESMs on merchandise trade the RTAs do not purely replicate the model provided by GATT but some do contain clauses titled ‘Emergency Safeguard Measures’ but the provisions for application of any emergency safeguards measures are not prescribed or elaborated and the relevant provisions simply provide for exploratory mechanism on case by case basis like “request consultations with the other Party for the purposes of taking appropriate measures to address such adverse impact. The Parties shall take into account the circumstances of the particular case in such consultations<sup>93</sup>”. Many RTAs in case of merchandise trade provide only for consultations in a trade flow situation that will solicit a possible application of ESMs under the GATT model, while these RTAs in the context of trade flow of cross border trade in services under the Preferential Trade Agreement in some cases simply create a linkage with the negotiations under the WTO and “take note of the multilateral negotiations on the question of emergency safeguard measures ... pursuant to Article X of the GATS. Upon the conclusion of such multilateral negotiations, the Parties shall conduct a review for the purpose of discussing appropriate amendments to this Agreement based on the results of such multilateral negotiations”<sup>94</sup>. This reference to negotiating mandate contained in GATS suggests that in developing any disciplines on ESMs in the area of services under RTAs the governments confront the same conceptual challenges, data limitations and implementation impossibilities at the regional level as they do on the multilateral front under the WTO. Another reason for this cross reference is deliberate choice of not creating a model for GATS or lack of capacity to create a model.

The ASEAN Member countries discussed the possible application of ESMs in the services sector in their trade liberalisation agenda in March 2005 held under the auspices of ASEAN Framework Agreement on Services (AFAS)<sup>95</sup>. The ASEAN countries, despite being strong advocates of standalone ESMs under GATS, themselves

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<sup>93</sup> Agreement between Japan and the Republic of Indonesia for an Economic Partnership (1 July 2008); Article 89

<sup>94</sup> Agreement on Trade in Services of The Framework Agreement on Comprehensive Economic Co-Operation Between The People's Republic of China and the Association of Southeast Asian Nations (1 July 2007) Article 9; China-Singapore Free Trade Agreement (1 January 2009) Article 71; Agreement between Japan and the Republic of Indonesia for an Economic Partnership (1 July 2008) Article 89

<sup>95</sup> ASEAN Framework Agreement on Services (AFAS) governs progressive liberalisation of trade in services in ASEAN; signed on December 15, 1995

failed when it came to articulating, refining and adopting some acceptable specific emergency safeguards provisions under the AFAS. There were other explanations floated for this lack of agreement on ESMs, as to some ASEAN Members this exercise seemed premature as any regional application of ESM under AFAS would have had prejudiced the outcome under on ESMs under the WTO. Another explanation seems to suggest that practically the application of ESMs will hinge critically on the adoption of agreement on ESMs in the WPGR under the WTO. As all ASEAN Member Countries also belong to the WTO, therefore, the regional application of an ESM without WTO consistency would not only be at odds with their multilateral commitments, but would also mean that application of any ESMs will practically impact discriminate against ASEAN Member Countries and thus restrict intra-ASEAN trade<sup>96</sup>. In the ultimate output the AFAS also, like many other RTAs, simply recognizes that ‘the GATS permit economic integration agreements and for the application of ESMs provides that Article X of the GATS will apply’<sup>97</sup>. Interestingly, “the India–Singapore Economic Cooperation Agreement (ECA) expressly forbids the initiation of safeguards investigations and the imposition of safeguards measures<sup>98</sup>”.

FTAs signed by ASEAN Member countries with countries outside the trading block or by other Asian countries who were the main advocates for the establishment of ESMs also do not provide for any ESMs in the services sectors. Some of these agreements do not even contain a reference to emergency safeguard provisions for services. Such Agreements include the; Japanese-Philippines Economic Partnership Agreement (JPEPA) signed in September 2006 and the Thailand-Australia Free Trade Agreement (TAFTA) signed in July 2004. India-Singapore Comprehensive Economic Cooperation Agreement (CECA) has some interesting features with respect to trade in services; CECA retains the current state of GATS disciplines in almost all areas of rules, including Emergency Safeguards; while, simultaneously, both countries are also disallowed to take ESMs in the services sector though scope to revisit the provisions on the ESMs exists but these too are based on developments in the stalemated negotiations

<sup>96</sup> Bosworth Mr Malcolm and Mr Dionisius A. Narjoko, *Desirability, Feasibility and Options for Establishing ESM within the AFAS*. REPSF Project No. 05/007 Final Report 2006, P 4

<sup>97</sup> Annamalai Nagavalli, *ASEAN Framework Agreements on Services - and GATS - A Textual Analysis*. Int. T.L.R. 1998, 4(2), 61-67

<sup>98</sup> Carsten Fink and Martín Molinuevo, *East Asian Free Trade Agreements in Services: Key Architectural Elements* Journal of International Economic Law 11(2), 263–311

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under the GATS on the subject. The same situation exists in China-Singapore Free Trade Agreement (1 January 2009) Article 71; Agreement between Japan and the Republic of Indonesia for an Economic Partnership (1 July 2008) Article 89; and Agreement on Trade in Services of The Framework Agreement on Comprehensive Economic Co-Operation between the People's Republic of China and the Association of Southeast Asian Nations (1 July 2007) Article 9. All these provisions are almost identical and read as: “The Parties take note of the multilateral negotiations on the question of emergency safeguard measures based on the principle of non-discrimination pursuant to Article X of the GATS. Upon the conclusion of such multilateral negotiations, the Parties shall conduct a review for the purpose of discussing appropriate amendments to this Agreement based on the results of such multilateral negotiations<sup>99</sup>”.

ASEAN as a group do not have an agreed single policy approach to the issue of ESMs in RTAs. Some of the RTAs concluded by the member countries like Thailand-New Zealand (2004) and Philippines-Japan (2006) do not contain or even refer to international developments with respect to ESMs in services while some other RTAs concluded with other countries do refer to developments under the GATS. Only one agreement—the Japan–Malaysia EPA—foresees the development of guidelines and procedures for the application of ESMs within 5 years of the entry into force of the agreement. FTAs concluded by the Singapore with developed countries generally make no mention of emergency safeguard provisions for cross border trade in services, and just oscillate between a positive list and negative list approach, while a few, especially the US and Singapore FTA (USSFTA), adopt both approaches. The agreement with Australia (Singapore Australia FTA) specifically states there are to be no emergency safeguards provisions, despite being based on a negative list, similarly FTAs with South Korea (2005), New Zealand (2000), EFTA (2002) and Japan (2002) have no provisions for emergency safeguards or even reference to international developments under GATS or elsewhere on the issue.

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<sup>99</sup> World Trade Organization Working Party on GATS Rules *Safeguard-type Provisions in Economic Integration Agreements*, S/WPGR/W/4/Add.2, 25 March 2009

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The cursory analysis suggests that the “RTAs have in general, made little progress in tackling the rule-making interface between domestic regulations and creating disciplines on international trade in services. RTAs have also made little headway in tackling the key “unfinished” rule-making items on the GATS agenda. This is most notably the case of disciplines on emergency safeguards and subsidies for services, where governments confront the same technical challenges or political sensitivities at the regional level as they do on the multilateral front”<sup>100</sup>. Overall, RTAs appear to “offer limited value added over GATS disciplines with respect to the rules areas, e.g. safeguard mechanism, disciplines on subsidies or domestic regulation<sup>101</sup>”. Despite a proliferation of RTAs there appears to be little progress in the area of rulemaking in the services sector and in case of some of the RTA’s. However, the Australia–United States Free Trade Agreement (AUSFTA) contains a variety of features that reach beyond the parties’ GATS commitments, including sectoral coverage and levels of liberalization. Also, concerning subsidies, AUSFTA provides more definitional precision than the parties’ GATS schedules or the GATS itself insofar as the term ‘subsidy’ is delimited to include government supported loans, guarantees, and insurance. Although the wording of relevant AUSFTA obligations differs conspicuously from their counterpart GATS provisions, it might be argued that for most practical purposes, the differences do not matter strongly.

It will be worthwhile to study the approach towards the issue of emergency safeguards measure for the services sector has been adopted in the regional context by the two largest economic players in the world; the EU and the NAFTA. The ‘NAFTA is a significantly different model of regional integration than the EU. “NAFTA follows a free trade area structure and lower level of political accommodation than the EU customs union model; however, the NAFTA and EU are substantially similar regarding the general basis of services, investments and capital movement. The EU provides for

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<sup>100</sup> Pierre Sauvé and Aaditya Mattoo *Regionalism In Services Trade A Teaching Module Prepared For The World Bank Institute Paris And Washington, D.C.* First Revision, April 2004

<sup>101</sup> Roy Martin, Juan Marchetti and Hoe Lim *Services Liberalization in the New Generation of Preferential Trade Agreements (PTAs): How Much Further Than the GATS?* World Trade Review Cambridge University Press (2007), 6: 155-192

free movement of workers, while NAFTA provides for limited free movement for professional and managerial personnel”<sup>102</sup>.

### 5.5.1 EC’S APPROACH: ESM IN SERVICES

The European Community and all of its Member States simultaneously are also the Members of the WTO. The WTO Agreements under the EC law for the individual States are ‘mixed agreements’ which are concluded both by the EU and by all of its member States being on one side, and by the third country or body, on the other side. This in practical terms means that “the subject-matter of an agreement or contract falls in part within the competence of the Community and in part with that of the Member States”<sup>103</sup>. Due to the shared competence, there are two issues of the direct applicability of the WTO Agreements in the EC: first, agreements relating to trade in goods (the 1994 GATT) which are implemented by the Community at the EC level. In the Opinion<sup>104</sup> 1/94, the ECJ held that the European Community has the exclusive competence relating to trade in goods, but shares the competence with Member States relating to Agreements pertaining to trade in services (GATS) and trade-related intellectual property rights (TRIPs) implying that the two Agreements under the WTO are jointly implemented by the Community at the EC level and the Member States at national level. The EC approach to the regulation of trade in services is, however, somewhat different to that of the GATS and NAFTA. In the EC the market in services is based on the fundamental principle of ‘free movement of services’ dealt within Title III of the treaty of Rome as amended, alongside ‘free movement of persons’ and ‘free movement of capital’.

The European Commission (EC) in the deliberations held in the WPGRs was not favourably inclined towards development of standalone and specific ESMs under the GATS. The EC, like most of the other developed countries, felt that the latitude provided by the scheduling flexibility is sufficient to dispense with the need for

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<sup>102</sup> Snyder Francis (ed) *Regional and Global Regulation of International Trade*, Hart Publishing 2002, p. 95

<sup>103</sup> Gucht Karel De; European Commissioner for Trade, *The implications of the Lisbon Treaty for EU Trade policy* S&D seminar on EU Trade Policy, Oporto, 8 October 2010

<sup>104</sup> Opinion 1/94 (Competence of the Community to conclude international agreements concerning services and the protection of intellectual property), November 15, 1994, [1994] E.C.R. I-5276.



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standalone ESMs. During the discussions undertaken in the meetings of WPGR the EC always maintained that there is no history of existence or application of any Emergency Safeguards Mechanisms or Measures in the area of cross border trade in the services sector and that the international community has no experience in devising or applying such a measure. This assertion<sup>105</sup> made by the EC was, however, questioned by some developing country Members of the Working Party and they quoted instances where the EC had included Emergency Safeguard type provisions in its trade and economic integration agreements or those covering specific sectors of services. To this group of countries, that challenged the EC's assertion about the lack of any history of existence of ESMs in the International Agreements, the EC treaty itself and some other economic integration agreements concluded between the EC with certain third countries contained examples of the enabling provisions that related to application of some form of 'emergency safeguards measures'. These enabling provisions either specifically covered application of safeguards measures in some specific services sector or its mode of delivery. These provisions were mostly general in character and were not necessarily specific to services sector but these were so structured that these could equally be applicable to the services sector as well as to the merchandise trade. To this group of developing countries these provisions in the EC's trade and economic agreements tantamount to be the manifestations of the concrete examples of the ESMs for the services sector. To this group of countries the existence of these examples of ESMs also confirmed the feasibility of developing independent provisions for application of emergency safeguards and also the desirability of incorporating these provisions for application of emergency safeguards measures as independent clauses under the GATS.

With respect to lack of experience and provisions about the emergency safeguard provisions the specific examples cited in the WPGR by the proponents of the concept ESMs under GATS was the EC's directives on 'gas and electricity'<sup>106</sup>, which was a sector specific provision. The directive provides the space for the EC Members to take the necessary safeguard measures in case of an emergency. Though the provisions under the directive have never been used but the mere existence of such provisions was interpreted as an example of ESMs for services sector. This directive was interpreted to

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<sup>105</sup> World Trade Organization Document S/WPGR/W/38

<sup>106</sup> European Council Directive 90/377/EEC of 29 June 1990

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mean that some form of provisions for application of ESMs are required especially considering the sensitivities which are specific to any particular sector or for the services sector<sup>107</sup> as a whole.

The Member countries that were demanding specific ESMs under GATS argued that the provisions in the EC directive on 'gas and electricity' were in practical terms emergency safeguard measures, the provisions have all the relevant attributes of the GATT type emergency safeguards provisions and it had also been notified as such. The *demandeurs* argued that the fact that these rules had not been invoked by the EC did not mean that these provisions were not useful and relevant, but it needed to be examined as to why the EC had introduced these in the first instance anyway as it is very normal for a legal provision for applying a specific measure may exist although the measure may not have been applied as yet. For the *Demandeurs* the existence of emergency safeguard type provisions in the directive partly answered the question posed in Article X of the GATS and established both the feasibility and desirability of specific standalone provisions for ESMs for services sector as a whole.

The EC, however, did not share the perception of the *demandeurs* of the ESM with respect to the 'gas and electricity' directive. To the EC the provisions in the directive were a totally different concept of "safeguards" than those which are perceived as such under the concept of the emergency safeguards measures as understood in the context of the provisions already existing in the GATT, the AOS and those being contemplated under GATS. The provisions in the EU internal directive on 'gas and electricity' takes into consideration two important elements of the energy sector which relate to the facts that the; i) transmission of energy was a natural monopoly; ii) the risk to a national economy and this allowed Member States to impose public service obligations to ensure the security of supply along with consumer and environmental protection, which in the view of EC member countries, free competition without intervention cannot necessarily guarantee. The EC was also of the view that in its more than fifty years of existence the Community has undertaken very intense liberalization of trade in services both in the context of deepening of economic integration amongst the EU countries and also within the framework of free trade or economic association agreements with outside

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<sup>107</sup> World Trade Organization Document JOB(02)/72

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trading partners. The EC despite massive liberalization has never applied any emergency safeguard measure to trade in services, with the sole and notable exception of the application of ESMs by one member on the movement of natural persons (mode 4).

Member countries advocating development of specific safeguards also raised questions in the WPGR regarding the criteria for applying the safeguard measure and the form of the measures that were contemplated to be applied under the provisions of Article 59<sup>108</sup> of the treaty establishing the European Community. The EC representative in his response tried to explain that "...[t]he interpretation of the criteria would be, in the final analysis, a political question decided on the basis of the circumstances in the particular sector of the economy concerned at the time the problem arose<sup>109</sup>". The explanation given by the EC regarding Article 59 of the Treaty of the EU was not convincing enough for the countries demanding ESMs but rather it strengthened their assertion that this provision was for all intents and purposes an emergency safeguard, which was considered to be feasible and desirable, may be for at least for six months and in practical terms provided a 'limited window' for application.

Though there is no history of application of ESMs in international trade in services but the European Communities has, in the context of emergency safeguards, historically recognized that a country might introduce safeguard measures<sup>110</sup>. Paragraph 7 of the three notifications containing the EC's bilateral Agreements with the then partner countries namely Hungary, Poland and Slovakia which were submitted by the European Communities to the WTO's Committee on Regional Trade Agreements<sup>111</sup> in late 1990s contained provisions on safeguards that read as:

"7 Safeguards; The provisions in the Agreement concerning the application of safeguard mechanisms do not provide for the exclusion of one or other Party from safeguard measures applied to third parties. Under specified and restricted

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<sup>108</sup> Article 59 of the EEC Treaty Establishing the EC

<sup>109</sup> World Trade Organization Document WT/REG50/2/Add.1

<sup>110</sup> World Trade Organization *Negotiations under GATS Article X*, Note by the Secretariat Working Party on GATS Rules JOB(02)/216, 16 December 2002, p.2

<sup>111</sup> The three Agreements were (i) The European Communities–Hungary Europe Agreement, Committee on Regional Trade Agreements. Document WT/REG50/1 of 15 January 1998; (ii) The European Communities–Poland Agreement, Services Document WT/REG51/1 of 15 January 1998; (iii) The European Communities–Slovak Agreement, Document WT/REG52/1 of 15 January 1998.

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circumstances, the implementation of the provisions on establishment in certain sectors may be delayed as provided for in Article 50. This safeguard clause has no effect on service suppliers from third countries.”

As explained by the EC to the WPGR the provisions were included in these Agreements to ensure that the implementation of the ‘Partnership Agreements’ do not give rise to social problems or create untoward hardship and cause long-term damage to the partner economies caused by rapid progress and liberalization. However, the very presence of the clause nevertheless raised questions regarding the conditions which were contemplated by the EC for the application of measures.

The European Communities in its Agreements with countries like Czech Republic, Lithuania, Latvia and Estonia<sup>112</sup> had also provided for similar clauses and its Agreement with Latvia read as “During the transitional period referred to in Article 3, Latvia may introduce measures which derogate from the provisions of this Chapter as regards the establishment of Community companies and nationals if certain industries

- are undergoing restructuring; or
- are facing serious difficulties, particularly where these entail serious social problems; or
- face the elimination or a drastic reduction of the total market share held by domestic companies or nationals in a given sector; or
- are newly emerging industries in the country concerned<sup>113</sup>.”

The EC’s bilateral Agreements had contemplated provisions for application of emergency safeguards measures of some sort that were specific for the services sector. The EC’s bilateral Agreement with Latvia as seen above, contained provisions relating to trade in services along with safeguards provisions for balance-of-payments difficulties in the Community or in Latvia (Article 65:2). The Agreement with Latvia provided for limited derogations (or escape) from the provisions of the Agreement in special cases which included factors as diverse as Latvian industries undergoing

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<sup>112</sup> European Communities – Estonia Europe Agreement (1 February 1998) Article 50

<sup>113</sup> World Trade Organization Working Party on GATS Rules *Safeguard-type Provisions in Economic Integration Agreements*, S/WPGR/W/4/Add.2, 25 March 2009

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restructuring, facing serious difficulties or elimination/drastring reduction of the total market share, or for newly emerging industries in Latvia (Article 51)<sup>114</sup>. Almost exactly similar provisions were likewise included in some other agreements that were notified to the WTO by the EC, like; (i) Agreement between the European Communities and Estonia –February 2002; (ii) the European Communities and Lithuania 2002; (iii) the European Communities and Slovenia– 11 February 2002<sup>115</sup>. The European Economic Area (EEA) Agreement concluded with Norway, Iceland and Liechtenstein (1 January 1994) also included a provision on safeguards that also covered services sector <sup>116</sup>. However, Liechtenstein is the only country which has also once used the safeguards provisions applied on mode 4 of delivery of services. Liechtenstein had imposed quantitative restrictions through restricting the right of foreigners to take up residence in the country and the safeguards were applied pursuant to provisions of Article 112 EEA and Protocol 15 to the EEA; the protocol provided for certain quantitative restrictions on free movement of natural persons, till the end of the transitional period.

These Emergency Safeguards type provisions or criterion for application were generic in character, therefore these were equally applicable to trade in goods and services trade. According to the explanations given by the representative of the EC during the meetings of the WPGR these clauses were basically designed to reflect the realities of considerable structural and economic changes underway in the partner countries. These provisions were also to ensure that the implementation of the integration agreement does not give rise to social problems, unpleasant hardship or long-term damage to the partner economies caused by too rapid progress. The EC also explained that interpretation of the criteria would be, in the final analysis, “a political question decided on the basis of the circumstances in the particular sector of the economy concerned at the time the problem arose”<sup>117</sup> and that ultimately the Commission and not the member state has to decide the specific conditions and modalities under which the emergency provisions are put in place.

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<sup>114</sup> A concept that is somewhat similar to the concept of ‘infant industry’ embodied in Article XVIII of GATT

<sup>115</sup> World Trade Organization Note by the Secretariat, JOB(03)/20, *Compilation of References Made by Delegations to Safeguard-Type Provisions* Working Party on GATS Rules 7 February 2003 P 13

<sup>116</sup> The Agreement on the European Economic Area (1 January 1994) Article 112,113 & 114

<sup>117</sup> World Trade Organization WT/REG50/2/Add.1, WT/REG51/2/Add.1, WT/REG52/2/Add.1.

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Article 56 of the EC Treaty provides that all restrictions on the movement of capital between Member States, and also between Members States and third countries were prohibited. Such an obligation put the EU in an extraordinary situation with respect to its unilateral commitment to free capital movements with the third countries. Moreover, this obligation could not be changed, including in emergency situations. In this context, Article 59 provided for safeguard measures for a period of up to six months only with regard to third countries in exceptional circumstances where movements of capital caused, or threatened to cause, serious difficulties for the operation of European Monetary Union. This provision had to be assessed in the unique context of the creation of the Euro and no measures had ever been taken under this Article of the treaty since its entry into force on 1 January 1994.

The EC during the negotiations clarified that these Agreements were simply and essentially horizontal by nature, in the sense that all disciplines applied equally to goods and services. The bilateral Agreements were based on a top down approach and did not entail any possibility to withdraw commitments and the safeguard provisions in the Agreements primarily attempted to accommodate concerns relating to Balance of Payment and the infant-industry. The EC also explained that the provisions in the Agreements were time bound with sunset periods ranging from one to six years following the date of entry into force of the Agreement<sup>118</sup> and the provisions have never been used and are not of the same nature as the model of emergency safeguards provided under the GATT. EC delegation further explained that Article 73 of the EC Treaty provides for the free movement of capital, which went far beyond the GATS, and the safeguard provision in the ‘Commercial Policy’ chapter of the Treaty had been used only for trade in goods and the fact that it was applicable to services was a different matter<sup>119</sup>.

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<sup>118</sup> The Europe Agreements were terminated on 1 May 2004 (for Czech Republic, Estonia, Latvia, Lithuania, Hungary, Poland, Slovenia and the Slovak Republic) and 1 January 2007 (for Bulgaria and Romania), following enlargement of the European Union. WTO document WT/REG/GEN/N/3 and WT/REG/GEN/N/4.

<sup>119</sup> World Trade Organization, Note by the Secretariat, JOB(03)/20, Compilation of references made by delegations to safeguard type provisions Working Party on GATS Rules 7 February 2003

**5.5.2 NAFTA APPROACH: ESMS IN SERVICES**

The North American Free Trade Agreement (NAFTA) is fairly similar to the GATS. Building on the experience of the earlier Canada-United States Free Trade Agreement (CUSFTA) which it largely superseded, NAFTA contains general provisions with respect to (cross-border) trade in services, i.e. “measures respecting... the production, distribution marketing sale and delivery of a service; ... the purchase, or use of, or payment for a service” and “the presence in its territory of a service provider of another Party”. As it is in the case of the GATS, Chapter Twelve of the NAFTA sets out the basic principles that governs trade in the services, together with a number of sector-specific annexes, which contain extensive reservations, including reservations relating to professional services (especially the legal and engineering professions) and transportation (especially land transportations). There are also some service sectors or other substantive issues that are excluded entirely from coverage under the NAFTA, namely air services, public procurement and subsidies. Just as in the case of the GATS and the EC Treaty, two specific service sectors are treated separately in the NAFTA due to the recognized sensitivity of the sectors and their pivotal role in the economy and these are covered under sector-specific chapters. These two services have been dealt independently in Chapter Thirteen of NAFTA covers the telecommunication sector, while Chapter Fourteen of NAFTA deals with financial services.

The NAFTA adopts a ‘negative list’ approach to the listing of obligations under the Agreement, i.e. reservations are noted only in respect of those services sectors, and for those measures within certain sectors, to which one of the parties does not want that certain obligations should apply. This is, *prima facie*, the reverse of the ‘positive listing’ approach taken in the GATS, in which Members undertake no obligations to liberalize a particular sector unless it has been specifically itemized in the member’s schedule of market access. In fact, the GATS approach is “hybrid” of the two, for once a positive sectoral commitment is made, and it is considered to be a full commitment, which is to permit unqualified delivery of services through each of the four modes of delivery; unless limitations are further specifically itemized. While the ‘negative’ listing approach can at times facilitate ‘carve-outs’, but this approach is generally considered most conducive to liberalization because all items that are not specifically identified are

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automatically liberalized. This approach also corresponds to that used most widely in relation to foreign direct investment, and is thus one with which government officials are familiar.

The NAFTA, however, differs from the rules under the EC Treaty with respect to the “right of establishment” (Article 43 of the EC Treaty) in not requiring that a service supplier from another NAFTA partner maintain a residence or office in its territory as a condition for supplying a service (Article 1205). However, the NAFTA provides for avoidance of use of measures such as professional listing or certification procedures as a barrier to entry in their respective services market (Article 1210), thereby applying the principle of non-discrimination as in EC law. Even so, parties to the Agreement are entitled to maintain certain existing discriminatory measures, subject to liberalization commitments, as set out in Annex I to NAFTA, as well as to adopt and maintain certain other discriminatory measures, which are not subject to future liberalization, in accordance with Annex II to the NAFTA<sup>120</sup>.

Another aspect of the NAFTA, which is not reflected in either the EC or the GATS, is a “federal clause” in Article 1206. In particular, this allows the United States and Canada, where state and provincial governments respectively may be extensively involved in the regulation of services (for example professional services), to list reservations in as Annex that reflect the regulatory competence of a state or provision in the matter. By contrast under GATS, where individual states and/or provinces in the territory of a WTO Member retain a degree of regulatory competence, the Member in question cannot make such a reservation but must list the geographical scope of the measure (and related restrictions for the territory) as a limitation on the national treatment under one of the modes of supply (often mode 3---commercial presence).

In the case of both the GATS and NAFTA, measures relating to trade in services are determined in accordance with the means (or mode) by which they are supplied<sup>121</sup>. Trade in services under the EC Treaty is allocated discrete coverage under Articles 49

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<sup>120</sup> Macrory Patrick F J, Arthur E Appleton, Michel G Plummer (Ed), *The World Trade Organization, Legal, Economic and Political Analysis, Volume I & II*, International Law Institute, Springer, USA 2005

<sup>121</sup> Macrory Patrick F J, Arthur E Appleton, Michel G Plummer (Ed), *The World Trade Organization, Legal, Economic and Political Analysis, Volume I & II*, International Law Institute, Springer, USA 2005



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and 50 but the subject matter has always been considered subsidiary, even residual in character to the free movement of goods, free movement of capital and the right of establishment, in contrast to the NAFTA<sup>122</sup> and the GATS. However, a similarity between the three regimes is that each recognizes that there may be a need to provide for more specific rules in certain sectors, which have been in existence for some time or are particularly sensitive or constitute key infrastructural sectors. In the case of both GATS and NAFTA telecommunications, transportation and financial services are accorded separate treatment with more detailed rules in separate chapters or annexes respectively. In the case of the EC Treaty transport is the only service sector that is covered separately (Title V).

Provisions to apply Emergency Safeguards Measures exist in North Atlantic Free Trade Agreement (NAFTA) but these are primarily with regards to trade in goods (already discussed in some detail in previous chapters) and the application has not been specified for the services sector. Though a reference has explicitly been made in NAFTA to the ESMs but these are fairly different from the paradigm provided by the GATT. The NAFTA concept includes a system of ‘scheduled safeguards’ in financial services that could be applied to stop capitalization of foreign-owned banks at a certain level; the measure could only prevent capital participation from further increasing, but could not reduce that level<sup>123</sup>. The emergency safeguard provisions in “Annex 1413.6 – Section B - Payments System Protection of NAFTA” were limited to financial services and those too primarily because of precarious financial position of one member country, namely Mexico in the 1990s. The provisions cannot anyway be regarded as blanket scheduled emergency safeguards as these were country, product and even measure specific. The provisions provide for consultation and if no consensus is reached, any Party may request the establishment of an arbitral panel under Article 1414 or Article 2008<sup>124</sup>. The entire architecture of ESMs under NAFTA is totally different from the ESMs as understood under the model provided by GATT. The GATT structure does not provide possibilities for any third party intervention in that form.

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<sup>122</sup> Comprising of the US, Canada and Mexico entered in to force on Jan 1, 1994

<sup>123</sup> World Trade Organization, JOB (03)/207, February 2003 Note by the Secretariat, Working Party on GATS Rules, Compilation of references made by delegations to safeguard-type provisions.

<sup>124</sup> World trade Organization *Working Party on GATS Rules Safeguard-type Provisions in Economic Integration Agreements*, S/WPGR/W/4/Add.2, 25 March 2009.

## 5.6. MODELS FOR ESMS UNDER GATS.

The discussions held in the WPGR, though had a deficit in commitment but yet these were interesting and reflected the genius of the negotiators to improvise articulation and lack of convincing arguments. Member countries<sup>125</sup> made several individual or collective submissions in the Working Party's meetings that articulated their perspectives on the possible approaches that can be adopted towards development or otherwise of standalone or the specific provisions for application of ESMS under GATS. The country's representative expressed their views either verbally in the different meetings of the Working Party, or these were presented in some form of written submissions like 'formal', 'informal', 'non' or 'room' papers. These submissions combined with long and protracted discussions in the WPGR and compilations created by the WTO secretariat suggested different possible alternative models or their variations for a possible standalone safeguard mechanism under the GATS. The discussions in the WPGR were marred by the enormous differences. However, there were some parallel strands of thoughts in the views that were common to some particular groups of countries<sup>126</sup> that suggested of definite formation of negotiating coalitions amongst the members. These coalitions advocated their own preferred possible approach or options to the resolution of question posed under Article X of GATS.

The view of the member countries that were demanding specific provisions for application of ESMS under GATS, and can be regarded as their primary option was, that any emergency safeguards provisions under GATS should necessarily and strictly be modelled on the concept and framework provided by the Emergency Safeguards Mechanism that is already available for international trade in the goods under Article XIX of the General Agreement and the AoS. During the discussions this position was maintained and repeatedly advocated by the proponents that the safeguards mechanism that is developed should follow the model provided by GATT. The provisions creates

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<sup>125</sup> These, among others members, include the US, the EC, ASEANs, Argentina, India, Japan, Hong Kong, Australia, Cuba, Guatemala, Honduras, Chile, Costa Rica and Switzerland and Nicaragua,

<sup>126</sup> Multilateral negotiations are necessarily characterized by coalitions as the formations of these coalitions are essentially required to make, "the multilateral negotiations less complicated" and has always been a major approach to analysing multilateral negotiations both with respect to multiple parties involved and to multiplicity of issues.

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should not only follow the GATT paradigm but also necessarily should contain most of the constituting elements of Article XIX and also of the AoS along with conditions that are identical to those that are applicable in case of imposition of the safeguards measures for the trade in goods. This model and possible transpositions of its individual building blocks to the GATS has been discussed in detail under the Chapter 3. The crux was that cross border trade in services and trade in goods are not comparable in most of their dynamics. Similarly the two Agreements, GATT and GATS, are also different and transposition of GATT concepts to GATS was not straight forward, simple or even possible in most areas. The discussions in the WPGR failed even to clarify the issues involved and that may lead to some sort of agreeable outcomes, rather this created unresolvable confusion because of the efforts to treat two dissimilar products and Agreements in a similar dimension.

A second view put forward by some member countries recognized that it may not be feasible to develop an independent safeguards provisions under GATS that is generic and cuts across all the service sectors and thus applicable to all the services as well as to all modes of service delivery. It was suggested that some mutually negotiated and agreed emergency safeguard type provisions may be included with respect to specific service sectors or its mode of delivery in a Member's schedule of market specific access commitments. This approach was favoured by the US<sup>127</sup> and also by some other developed countries that tried to explore the possibility of inclusion of sector specific safeguards in their schedules of commitments. This option was also referred to as the scheduling flexibilities. This alternative of scheduling as already been discussed in some detail earlier in the Chapter.. The 'rights' under this model, to resort to an emergency safeguards measure were to depend on the negotiated and scheduled safeguards alongside negotiations on market access and thus these were to vary from Member to Member. This variation in ESMs provided for one service sector in the schedules of different countries will in turn depend on the specific interests of pressure groups or domestic lobbies involved along with the bargaining power of the individual Member to schedule an emergency safeguards provision in that particular sector. This proposal also implied that the onus of defining an emergency safeguard either generically for the entire service

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<sup>127</sup> World Trade Organization Communication from the United States to the WPGR, S/WPGR/W/17

sector or in some sort of a mode specific context depended on the Member country; thus leading to subjectivity in definition.

In terms of this model it will be a tedious to balance the multilaterally agreed safeguard measures, if developed, simultaneously with the scheduled safeguard measures that may be incorporated by some members in their commitments. Moreover, in the event of a situation where scheduling is agreed a common understanding on the language of the emergency safeguards would still inevitably be essential that does not exist at present, therefore, will be required to be negotiated amongst Member countries; or “else multiple approaches with multiple understandings will further enhance the ambiguity with respect to the application and interpretation of the emergency measures<sup>128</sup>”. Simultaneously it is conceptually and politically impossible for the economic managers of a member country either to identify sectors where “unforeseen circumstances” are likely to occur or otherwise and earmark potential areas for application of emergency safeguard measures and then also offer these sectors for market liberalization.

A third model of ESMs that already existed in the universe of the WTO agreements and that was mentioned to be explored for providing the possible paradigm for development of the independent ESMs under GATS was the Article 5 of the WTO Agreement on Agriculture (AoA). The model provided by the Agreement on Agriculture does not require either the establishment of any causality between any injury and surge in imports or even a demonstration of injury to the domestic industry as a basis for application safeguard measure. The application of safeguards measures under this model are triggered or allowed to be imposed simply because of increases in import volumes or import price reductions, and this factor alone permits the imposition of additional import duties up to specified limits that provides sufficient protection to the domestic producers. The volume trigger, which leads to the non-discriminatory application of additional duties, is sensitive to the degree of import penetration, while the price trigger, which may result in additional duties on a consignment-by-consignment basis, is related to certain base year prices of the products.

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<sup>128</sup> Mario Marconini, *Emergency Safeguard Measures in the GATS: Beyond Feasible and Desirable*, UNCTAD. March 2005.

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The model provided by the Agreement on Agriculture (AoA) is already overly complex and the complications associated with it are further compounded by the fact that the market access barriers in the services sector are not transparent or easily observable. In case of AoA only very rough tariff equivalents can be worked out using complex calculations and high quality and up to-date statistical information. There are serious and valid doubts, however, whether such non-predictable approach to supplies and also intense data requirements could be met in the context of cross border trade in services. There are no injury requirements under AoA and invocation of its Article 5 relies primarily on a considerable amount of regularly updated empirical information that is mostly lacking in the case of services or there are also immense time lags between the imports and availability of trade flow statistics. There were valid strong reservations and doubts about applicability of Article 5 of the Agreement on Agriculture to international trade in services as the policy backgrounds and structures of international trade are very different in the agriculture sector from that for the services.

A possible fourth alternative was to develop ESMs under GATS on model that was in first place itself derogation from GATT and never accepted by the developing countries. The model was discriminatory in character and allowed application of source specific ESMs. This was provided by Article 6 of now defunct Agreement on Textiles and Clothing (ATC). Under the ATC special treatment was envisaged when applying safeguards against small exporters, least-developed countries, wool producers, outward-processing trade and cottage industries. Members contemplating application of the special safeguards measure in textile sector needed to demonstrate that a particular product is being imported from the country in question in such increased quantities as to cause serious damage, or threat thereof, to the domestic industry producing like and/or directly competitive products. The safeguard measures applied, could only be in form of quantitative restrictions on imports. The safeguards in form of import quotas, under the ATC, were essentially to be applied following a stringent exercise which had significant data requirements<sup>129</sup>. The measure was, however, applied selectively to exports of a particular exporting country. This possibility of source specific application of the ESMs contravened the non-discrimination or MFN principle of GATT. The model also went against the objective laid down in the preamble to GATT 1947 and

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<sup>129</sup> In the textile sector application of a Safeguards measure, detailed trade and production data was required for the “first 12 months of the last 14 months” and beyond for justifying any embargoes.

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also to the Marrakesh Agreement Establishing the World Trade Organization (WTO), both provide for “elimination of discriminatory treatment in international trade relations”. The discriminatory approach of the model also contradicted the basic stipulation in Article X: 1 of GATS that aimed at negotiations towards development of “Emergency Safeguard Measures based on the principle of non-discrimination”.

A fifth option suggested during the discussions in the WPGR was to have mixed or hybrid emergency safeguard mechanism that is developed by combining elements that are contained in Article XIX of GATT 1994, Article 5 of the Agreement on Agriculture and Article 6 of the defunct Agreement on Textiles and Clothing<sup>130</sup>. This hybrid model was a non-starter. The WPGR never discussed the proposition seriously. The constituting elements of this possible fragmented structure that was to use pieces from different Agreements each having its own fundamentals and dynamics were never debated.

Another possibility was to make Article X:2 GATS permanent which was originally conceived to compensate for absence of any multilaterally agreed ESMs and allowed Members to modify their schedule of concessions, if need be, even after one year in terms of Article X: 2 of the GATS that provides that “...any Member may, notwithstanding the provisions of paragraph 1 of Article XXI, notify the Council on Trade in Services of its intention to modify or withdraw a specific commitment after a period of one year from the date on which the commitment enters into force;...<sup>131</sup>”. The reduced time frame from three to one year was to compensate for lack of existence of ESMs under the Agreement is also fraught with concerns, as but for the shortened time span of one year, the entire requirements as laid down in Article XXI of GATS and those adopted by the Council for Trade in Services in 1999 will require to be followed<sup>132</sup>. Under the GATT paradigm Article XXVIII and XIX of the General Agreement have always co-existed with their own objectives and functions; and their objectives are different.

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<sup>130</sup>World Trade Organization, Document No S/WPGR/M/19 (statement of the Egyptian delegation)

<sup>131</sup> Article X (2) of the GATS.

<sup>132</sup> World Trade Organization *Procedures for the Implementation of Article XXI of the General Agreement on Trade in Services (GATS) (Modification of Schedules)* Adopted by the Council for Trade in Services on 19 July 1999 S/L/80 29 October 1999.

Similarly if it is agreed to retain the provisions of Article X: 2 of the GATS<sup>133</sup> as a permanent fixture of the Agreement and accept the renegotiation of the schedule of market access commitments as a substitute for standalone ESMs under the GATS, in such a situation in addition to the concerns already discussed in the context of agreed Procedures for the Modification of Schedules of concessions in terms of Article XXI<sup>134</sup> of GATS. In terms of Article XXI procedures there will be no scope for emergency measures and the lengthy modification process may convert the ‘threat of injury’ to ‘permanent injury’ to the domestic producers.

The analysis of structures of ESMs in the service RTAs that could have been helpful in answering the question raised in Article X: 1 of the GATS was not productive. The study of bilateral and regional trading arrangements was not much of a contribution to the debate about the feasibility and desirability of the ESMs or provided any cues to help resolve challenges being faced by the negotiators on the multilateral front. There were no provisions for application of ESMs in RTAs that could possibly be transposed partly or entirely to the GATS.

However, the brief analysis of evolving disciplines on cross border investments within the context of BITs or broader Economic Integration Agreements has brought out some interesting facts. The countries that were treating the existence of standalone emergency safeguards as prerequisite for making any binding commitments of their existing market access regime had made really deep and unconditional commitments under the BITs and/or RTAs. The BITs regime in certain ways is more demanding than WTO system because of the differentiated dispute settlement and compensation structures.

The *demandeurs* of ESMs, however, regarded that certain other provisions that have been incorporated in the schedules of market access commitments by a few Member countries can also be regarded as concrete examples of emergency safeguard measures in the international agreements that are specifically for the services sectors. To support

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<sup>133</sup> Article X:2 of GATS reads as: “In the period before the entry into effect of the results of the negotiations referred to in paragraph 1, any Member may, notwithstanding the provisions of paragraph 1 of Article XXI, notify the Council on Trade in Services of its intention to modify or withdraw a specific commitment after a period of one year from the date on which the commitment enters into force; provided that the Member shows cause to the Council that the modification or withdrawal cannot await the lapse of the three-year period provided for in paragraph 1 of Article XXI”.

<sup>134</sup> World Trade Organization *Procedures for the Implementation of Article XXI of The General Agreement On Trade In Services (GATS) (Modification Of Schedules)* Adopted by the Council for Trade in Services on 19 July 1999 S/L/80 29 October 1999

and to substantiate their argument the examples cited were; i) the Schedule of Specific Commitments of Japan<sup>135</sup> that contained in its section 11.F, a restriction titled “emergency safeguard measures” for mode 3; ii) the report of the WTO’s Working Party on the Accession of Bulgaria mentions that Bulgaria was allowed, under certain conditions, to suspend certain of its specific commitments<sup>136</sup>; and iii) NAFTA Chapter relating to the Financial Services. All these contained some sort of a mechanism that has the basic characteristics of an ESM as understood and available under GATT model. Some accession protocols of new acceding countries to the EU and regional trading arrangements that were notified to the Committee on the RTAs also contain stipulations which can be regarded as emergency safeguards.

## **5.7. WRAPPING the DISCUSSIONS**

The General Agreement on Trade in Services (GATS) is fairly ambiguous and unpredictable and in addition to that it is also structured to be fairly flexible. It provides the member countries with a substantive and broad regulatory space to incorporate, desired flexibilities by way of limitations; in their schedule of market access commitments. The flexibility in scheduling of the emergency safeguards, have practically dispensed with the need for development of an ex-post facto mechanism of ESMs under GATS, on the pattern of GATT, to cope with unforeseen adverse circumstances which might arise over time because of the commitments undertaken. However, the possibility of pre-empting the need to impose an ESM through effective use of the scheduling flexibilities, as already discussed, have their own practical problems as the Scheduling Guidelines<sup>137</sup> only refer to the treatment of a foreign-based service supplier and not to the treatment of the service, once it has entered a country's jurisdiction (mode 1) or is consumed abroad under mode 2 of delivery. Scheduling flexibilities have limited practical utility as “states simply cannot anticipate every circumstance and cannot identify all possible behaviours by another Member country that it may undertake in future and which they would like to prevent. Thus, for

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<sup>135</sup> World Trade Organization Document GATS/SC/46

<sup>136</sup> World Trade Organization Document WT/ACC/BGR/5, paragraph 88

<sup>137</sup> World Trade Organization *Guidelines for the Scheduling of Specific Commitments Under the General Agreement On Trade In Services (GATS)* S/L/92 Adopted by the Council for Trade in Services on 23 March 2001



example, the parties to a trade agreement might wish to permit the use of safeguard measures when domestic industries are threatened, but it may be impossible to verify when that is the case<sup>138</sup>.

The Hypothetical examples developed to identify the circumstances that may require application of ESMs in case market liberalization in the services sector. These hypothetical examples in practical terms created more questions than it provided the answers. The examples highlighted the associated issues that will shoot out in case of application of an ESM. These issues will include the determination of the nationality of the industry and the linked concerns about its ‘acquired rights’. All the examples were developed in the context of mode 3 of service delivery, reflecting paranoia of the *demanders* of the concept of ESMs with the investments. However, the contradictions have arisen between the obligations assumed by the countries under the BITs and deeper Economic Integration Agreements and obligations under the WTO. All the models that could have possibly been looked at from within the broader paradigm of the WTO were deficient and not able to provide the foundation on which structure of standalone ESMs under the GATS could possibly be built.

The EU and NAFTA have very intelligently managed the issue and the two agreements do not provide any clues or leads for developing ESMs under GATS, rather the two Agreements suggest of a scheduling flexibility if necessarily required and implementation of Agreement in ‘good faith’. However, interestingly despite the strong stands taken by some countries for provision of specific emergency safeguards provisions under GATS as a pre-requisite for them to make market liberalizing commitments, these countries have joined the negotiations towards possible future liberalization.

### **5.8 NEGOTIATIONS CONTINUE: DESPITE**

International commerce is fast becoming more complex in the contemporary world – in particular with reference to rapid development of the trade-investment-services nexus. The exporters of foreign direct investments have signed BITs with countries seeking foreign investments. There may well have been a sort of domino or “race to the bottom”

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<sup>138</sup> Djordjevic Margareta *Domestic Regulation and Free Trade in Services – A Balancing Act*, Legal Issues of Economic Integration 29(3): 305–322, 2002.

element in the BIT proliferation, as FDI seekers felt they had to sign BITs to guard their locational competitiveness against rivals who had already signed BITs with the major source-nations of FDI<sup>139</sup>. In today's world, it is really difficult to establish a company's nationality and it is more difficult to create any provisions that may only apply to companies of any particular nation, this problem has frequently led RTAs to define the affected firms simply by the place where these are incorporated. This determination of origin and application of any discriminatory punitive measure can comfortably be circumvented as it allows firms from third nations to free ride on bilateral opening by incorporating affiliates in one of the nations<sup>140</sup> that is party to a bilateral or regional trading arrangement.

Continued negotiations on the market liberalization under GATS, emergence of BITs and rapidly developing phenomenon nexus amongst trade-investments-services apart there is also simultaneously a linked and equally fast moving but fairly deep process of developing countries entering into Regional/Preferential Trading Arrangements (RTAs) with developed countries and also other developing countries. A recent OECD "report examines services schedules of commitments in 56 regional trade agreements (RTAs) where an OECD country is a party. The preferential content of RTAs is assessed through an analysis of market access and national treatment commitments at the level of the 155 sub-sectors of the General Agreement on Trade in Services (GATS) Sectoral Classification List. Partial commitments are broken down according to nine categories of non-conforming measures. The report confirms that on average RTAs in services go beyond GATS with commitments in about 72% of sub-sectors, among which 42% correspond to preferential bindings (GATS-plus commitments)<sup>141</sup>". The development of interface of GATS with the emerging RTAs especially those that contain some form of market access commitments or preferably some trade remedial measure with respect to international trade in services has been discussed in some detail in the latter half of this Chapter.

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<sup>139</sup> World Trade Organization *21<sup>st</sup> Century Regionalism: filling the gap between 21<sup>st</sup> century trade and 20<sup>th</sup> Century trade Rules*, Staff Working Paper, Geneva, 23 May 2011

<sup>140</sup> World Trade Organization *21<sup>st</sup> Century Regionalism: filling the gap between 21<sup>st</sup> century trade and 20<sup>th</sup> Century trade Rules*, Staff Working Paper, Geneva, 23 May 2011

<sup>141</sup> Miroudot, S., J. Sauvage and M. Sudreau (2010), "Multilateralising Regionalism: How Preferential are Services Commitments in Regional Trade Agreements?" OECD Trade Policy Working Papers, No. 106, OECD Publishing. <http://dx.doi.org/10.1787/5km362n24t8n-en>

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Interestingly and despite developing a strong and causal linkage between development of ESMs and market access, members in accordance with Article XIX of GATS have also entered into consultations for progressive liberalization of the markets and the process has not only been moving forward but the Members have agreed to adopt specific instruments to guide these market liberalization negotiations. The instruments adopted in this regard include the 'Guidelines and Procedures for the Negotiations on Trade in Services', which, recalls the provisions of Article XIX of GATS and its objectives to progressively achieve higher levels of liberalization. Members also held a Services Signalling Conference in July, 2008 that was followed by the Services Cluster meetings in March/April, 2009 to take account of the progress in the Services negotiations. During the signalling conference Members, including many developing countries, that were staunch proponents of the ESMs under GATS, have signalled not only the improvement in their existing offers of market liberalization commitments but have also indicated the possibility of bindings some new services sector<sup>142</sup>. Though the Conference only required signals from the individual members for the possible liberalization but the process did establish the fact that developing countries including the *demandeurs* of the ESM in practical terms do not necessarily want to hold the liberalization process hostage to the development of the specific emergency safeguards provisions under GATS<sup>143</sup>.

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<sup>142</sup> Mattoo Aaditya, *Services in a Development Round: Three Goals and Three Proposals*, World Bank Policy Research Working Paper 3718, September 2005

<sup>143</sup> The Negotiating Guidelines established the request-and-offer approach as the main negotiating method and more than 70 Members (counting the EC as one) had submitted offers, including 30 revised offers by 2007 within the Doha Round framework.

## **6. ESMs UNDER GATS: CONCLUSIONS**

### **6.1. THE CHAPTER INTRODUCED & BACKGROUND**

To put the conclusions drawn in the thesis in right perspectives, the Chapter briefly recalls the background, the negotiating process and different issues involved in development of Emergency Safeguards Measures (ESMs) under General Agreement on Trade in Services (GATS). The Chapter then tries to explore and find solutions to the question of emergency safeguard measures posed in Article X through some other domestic trade policy instruments, not brought under discussions before, that can possibly have nexus with the conduct of cross border trade in services, particularly with respect to mode 3 of delivery. The two areas explored in this context were the Subsidies and Competition policies because these, though, not part of the GATT model but these do belong to the box of contemporary domestic economic policy instruments.

The Chapter goes on to draw its own reasons and tries to briefly analyse as to why the negotiations in the WPGR went the way they did. The Chapter first tries to look at the structural problems that are inherently present in the GATS and then goes on to briefly gauge the problems with the WTO system as a whole that may have impacted the development of ESMs under GATS. The phenomenon of shift towards the regionalism or other forms of economic integration agreements are also looked at but solely in the context of development of ESMs under GATS. Brief efforts have also been made to look at the evolution and importance of ‘collective preference’ concerns, lack of capacity and willingness in WTO system to address these concerns, which in turn have created the image and relevancy problems for the WTO. The chapter concludes by analysing that whether the negotiations on development of standalone ESMs under GATS stalled for simple straight forward reasons of limitation of the model, or structural issues with the Services Agreement or simple preference for regionalism despite good faith efforts, or, were there external or unconnected considerations that led the negotiations to failure because of a deliberate policy choice by some important players. Any “solution to the

stalled negotiations on emergency safeguards under GATS will need to transcend the dichotomy created between the feasibility and the desirability<sup>1</sup>". One way to achieve this was to carefully examine – and ultimately rectify – those arguments that have been put forward by the members as part of their overall negotiating strategy and in some way detached from the good faith.

### **6.1.1 GATT/WTO NEGOTIATIONS: DIFFERENT PROSPECTIVE**

There are, different theoretical lenses through which different negotiating processes can be viewed, and it is important to appreciate that “qualitatively different negotiations need to be analysed within different theoretical frameworks”<sup>2</sup>. However, as a general principle, the participants to the international negotiations need to have some common understandings of the issues involved and that the negotiations of most sorts are stringently demarcated and controlled by the agenda set for them; agenda setting process itself is, therefore, an important and integral component of any negotiations, be these bilateral, plurilateral or multilateral.

The Multilateral Trade Negotiations (MTNs) held under the auspices of GATT/WTO, are no different in their dynamics including with respect to their agenda setting. Agreements on the specific Agenda and structuring of the negotiations have traditionally been divisive<sup>3</sup> as “one of the most severe recurring problems facing the GATT/WTO throughout its history has been the manner in which decisions are made on the content and form of the negotiating agenda”<sup>4</sup>. The issues with agenda setting have been especially relevant in the last two rounds of MTNs held under the auspices of GATT where fairly deep Agreements were negotiated as compared to the earlier rounds of negotiations primarily had limited

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<sup>1</sup> Mario Marconini, *Emergency Safeguard Measures in the GATS: Beyond Feasible and Desirable*, UNCTAD, March 2005. p 20

<sup>2</sup> Hopmann P Terrence *Negotiating Data: Reflections on the Qualitative and Quantitative Analysis of Negotiation Processes* Watson Institute for International Studies, International Negotiation 7: Kluwer Academic Publishers, Netherlands, 67–85, 2002.

<sup>3</sup> It took almost three years of intensive negotiations at Geneva to formally agree to the agenda for the UR of MTNs.

<sup>4</sup> World Trade Organization Low Patrick, *WTO Decision-Making for the Future* Staff Working Paper, Geneva, May 2011

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ambitions of only tariff reductions and market access at borders<sup>5</sup>. In the initial years of GATT many of the differences over the reach and content of GATT rules were resolved not necessarily to the satisfaction of all parties involved or through simple negotiating process and articulation of arguments, but “in certain instances may have been disposed of with a certain degree of coercive persuasion<sup>6</sup>” of major players in the world economy like the European Union (EU) and the United States (US). In the goods sector most of the ESMS related bilateral trade concerns between exporting and importing countries for the first quarter of the century of existence of the General Agreement were not settled through compensation under Article XIX but were dealt with in the context of six rounds<sup>7</sup> of trade liberalization MTNs held from 1947 to 1967 within the context of on-going renegotiations of schedule of concessions under Article XXVIII of the GATT and gradual liberalization processes.

The global trade flows have dramatically changed in last couple of decades and new and important economic players have emerged on the international trade scene. The new found importance of these major developing countries has now bestowed on them the right to be heard especially when it comes to rule making for conduct of international trade. The change in realities of the global trade flows has proportionately challenged the capacity of the major traditional developed economic powers (the US and the EU) to bilaterally determine the governing rules for international trade. The GATT/WTO negotiating structures in last couple of decades has rapidly moved away from a hegemonic monopoly of the developed countries to more of multi-polarity. The market liberalization and rule making negotiations for the multilateral trading system, however, is still dominated<sup>8</sup> by the

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<sup>5</sup> The seventh round of MTNs (Tokyo Round) held under the GATT has already been discussed earlier.

<sup>6</sup> World Trade Organization Low Patrick, *WTO Decision-Making for the Future* Staff Working Paper, Staff Working Paper ERSD, Geneva, May 2011

<sup>7</sup> The First six Rounds of MTNs were: First Round (1947), Annecy Round (1949), Torquay Round (1951), Geneva Round (1956), Dillon Round (1962) and Kennedy Round (1967)

<sup>8</sup> Some of the other main multilateral treaty bodies: Food and Agriculture Organization of the United Nations (FAO); Hague Conference on Private International Law; International Civil Aviation Organization (ICAO); Intergovernmental Organisation for the International Carriage by Rail; International Institute for the Unification of Private Law (UNIDROIT); International Maritime Organization (IMO); International Narcotic Control Board (INCB); International road transport Union; International Telecommunication Union (ITU); International Tropical Timber Organization (ITTO); International Union for the Protection of New Varieties of Plants (UPOV); United Nations Secretariat; United Nations Commission on International Trade Law (UNCITRAL); United Nations Environment Programme (UNEP); United Nations Office on drugs and Crime; United Nations Educational Scientific and Cultural Organization (UNESCO); World Bank; World

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GATT/WTO system which now has to accommodate multiple, diverse and at times contradictory interests. These developments have not only affected the agenda of rulemaking for the GATT/WTO system but have also reduced the system's ability to take decisions. The changing international trade equation has added further complications to the decision-making process which was already under pressure from the combination of rapidly increasing numbers of developing countries membership of the organisation most of which had recently attained independence and had very rudimentary management structures of different components of their economy.

The dynamics of Uruguay Round of MTNs was influenced by a combination of different factors, like the negotiating experiences gained by the developing countries from previous round of MTNs, and more importantly in the context of this paper, the experiences gained in the past from the practical application of the provisions of Article XIX of the General Agreement relating to ESMs under the GATT System<sup>9</sup>. The developing countries in their conduct of MTNs during the UR also had some external support that was created through parallel analytical and consultative processes that became available under the institutions like United Nations Conference on Trade and Development (UNCTAD), South Secretariat and different Non-Governmental Organisations. The defining and creation of understanding about the issues that were subjected to multilateral trade negotiations, an activity which was previously solely a preserve and dependent on the technical support and other inputs to be provided by GATT Secretariat, changed radically. In the context of negotiations on for ESMs under the UR of the MTNs both in the goods and the services sector the support received from the outside sources essentially suggested non-discrimination. The possible benefits to small suppliers of source specific application of the ESMs for trade in goods, that were to restrain imports from major suppliers, was never discussed or even mentioned. This approach reflected the power or the influence that major exporting developing countries had attained. The practical realities had further evolved by early 1990s and it was no more possible for the analysts of GATT to make any suggestions as were earlier made by the

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Customs Organization (WCO); World Intellectual Property Organization (WIPO); World Trade Organization (WTO). Source <http://www.intracen.org/policy/trade-treaties-map/> (.legacarta),

<sup>9</sup> The exporting developing countries had been subjected to source specific export restraints through various mechanisms developed as different 'Grey Area' measures

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Executive Secretary of the GATT in one of his informal notes in mid-sixties recommending study on source specific application of the ESMs.<sup>10</sup>

The developing countries as a group not only showed successful coalition behaviour in the UR negotiations of MTNs but more advanced amongst them<sup>11</sup> were also successful in bundling together the negotiating position of the developing countries across different set of issues. The negotiating positions created by the coalition of developing countries were generally of uneven interests to different developing member countries but these issues were of particular interest to the advanced developing countries<sup>12</sup> that were leading the coalitions. These advanced developing countries were not only able to forge but were also able to lead the coalitions that adhered better than ever before in the Multilateral Trade Negotiations; despite the fact that the stance taken so successfully by these coalitions were in certain instances in essence against the immediate economic interests of some of the less knowledgeable and weaker coalition partners<sup>13</sup>. The negotiating stances taken by developing county coalitions on the issues that had conflicting underlying interests included the negotiations on Emergency Safeguards provisions, Services, TRIMs and IPRs.

The negotiating positions of developing country coalitions were in general wrapped in the rhetoric and terminology used by these very countries in the other UN forums like the Group of 77 or outside the UN on the non-aligned countries platform<sup>14</sup>. A classic example of this split interest positions was the discussions surrounding the source specific and discriminatory application of ESMs in the cross border merchandise and services trade. The developed amongst the developing countries were the real beneficiaries of the stance taken by the developing countries collectively on the issue of non-discrimination and any

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<sup>10</sup>General Agreement on Tariff and Trade, Informal note of the Executive Secretary of GATT “*Rationale for Dealing with Market Disruption through the Application of Article XIX*”, 26 May 1964.

<sup>11</sup> The most vocal developing countries that lead the regional or issue related coalitions included; India; Brazil; ASEANs and Egypt.

<sup>12</sup> The formations of coalitions lead by major developing countries prominently figure out in the negotiations on Agriculture, Textiles, Services, Investments and IPRs. These coalitions were led by Brazil and India followed by countries like Egypt and ASEANs.

<sup>13</sup> Discriminatory or source specific application of an ESM was in a way helpful to the less efficient and/or small exporters as it reduced the competition for them in the economy applying the emergency safeguards measure. With fast growing suppliers restrained these small producers had more opportunities to increase their exports. Similarly the subsidized exports of the agricultural produce were in interest of some food importing countries.

<sup>14</sup> UNCTAD and GATT are physically located at ten minutes’ walk from each other and in most cases the diplomats servicing meetings in the two institutions were the same.



proposal implying source specific application of ESMs was regarded as move to divide the developing countries. The UR in the course of MTNs created a paradigm shift in the negotiating processes under the GATT/WTO system and institutionalized the participation of coalitions in the negotiating process<sup>15</sup> a reality which became glaringly more evident in the post UR negotiations held in the context of built-in Agenda emerging out of the UR Agreements (including Article X of the GATS) or the new Doha Round of MTNs.

This movement in the approach, increased numbers of developing countries and the altered negotiating dynamics was probably the beginning of the UNisation or the ‘UNCTADisation’<sup>16</sup> of the GATT system and also probably the end of an era of all-encompassing meaningful negotiations under the auspices of the WTO. The GATT, had till mid 80s successfully avoided the pitfalls that had led to the failures of other international organisations, particularly of those that were within the UN system like the UNCTAD or ECOSOC<sup>17</sup>, because GATT had a reasonably clear purpose, a dynamic and contemporary negotiating agenda with a small number of key players. The GATT/WTO system, as is reflected in the negotiations on question of Emergency Safeguards Measures (ESMs) under the GATS, instead of keeping itself relevant to the evolving interdependent economic relations amongst the countries, started to follow the UN-style rigid negotiating practices. This trend was glaringly noticeably visible in the discussions and submissions in the Working Party on GATS Rules (WPGR). The WTO’s capacity to function as an effective multilateral forum for result oriented conduct of international trade rule making negotiations started to decline.

### **6.1.2 NEGOTIATIONS: ESMs**

The existence of escape clause provisions in an international trade agreement has always been criticised for the fact that its existence erodes the legal certainty and predictability of economic reform commitments undertaken by the Members in terms of the Agreement.

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<sup>15</sup> In early years of GATT and also the MTNs the negotiations were not held as a ‘North South’ dialogue but based on issues and even concessions were exchanged on ‘request’ ‘offer’ basis. In the UR the coalition formations changed the dynamics in to more or less a north-south dialogue.

<sup>16</sup> Sally Razeen, *The WTO In 2003: Structural Shifts, State-Of-Play And Prospects For The Doha Round*, Institute of Defence and Strategic Studies, Singapore, March 2003

<sup>17</sup> ECOSOC; Economic and Social Council is a permanent standing body of the General Assembly of the UN

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The political economy argument used in the WPGR was based on the view that the existence of ESMs help induce market liberalization in the services sector by providing insurance against situations of market disruption and thus reassurances to political decision makers that the government retains the freedom to respond to emergence of any unforeseen injurious situations. The value of political economy role for existence of ESMs, as already discussed is controversial and the experience shows that contrary to the claim of ESMs facilitating liberalization; the domestic protectionist or vested interests tend to pressurize the governments for application of the ESMs as a means of extending ‘temporary’ protection from competition<sup>18</sup>. The space for domestic producers or supplier of product to pressurize the public officials and thus create a protection for the industry is already built into the mechanics of application of the ESMs under the GATT model. The experience with model provided by GATT shows that even the initiation of investigations for application of any possible ESMs on trade in goods have been found to have a trade dampening effect.

The value of the role the escape clause plays is controversial and is difficult to prove or disprove. However, based on the understandings gained by the international trading community under the framework of the GATT, it can comfortably be stated that the role of escape clause provisions in a trade Agreement is surely not guaranteed. In the political context effectively selling of the benefits of the market liberalisation domestically requires much more than having access to ESMs, the entire trade policy regime essentially requires having domestic transparency with respect to the economic costs of different policy instruments that are employed to provide protection to domestic producers.

### **6.1.3 ESMs: SERVICES and the WPGR**

The Working Party on GATS Rules (WPGR) was established to address the rule making issues left unresolved under the GATS in the UR of MTNs. In the context of developing emergency safeguards under GATS the Working Group had before it the negotiating mandate provided in the built-in agenda under Article X:1 of GATS which provided that; “there shall be multilateral negotiations on the *question of* emergency safeguard measures

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<sup>18</sup> Bosworth Mr Malcolm and Mr Dionisius A. Narjoko, *Desirability, Feasibility and Options for Establishing ESM within the AFAS*. REPSF Project No. 05/007 Final Report 2006, P xiv

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*based on the principle of non-discrimination*” (emphasis added). This mandate for negotiations was narrowly interpreted to mean as obliging the conduct of multilateral negotiations with regards to evaluating the very feasibility of specific standalone mechanism for application of ESMs under the GATS. If found to be feasible, then the agreement was required on the need or desirability of these provisions. The second part of the sentence in Article X: 1 circumscribes the ‘command’ or ‘mandate’ given in the first part, to the effect that any possible answer that may be developed in response to the mandated question raised in the first part of the clause has necessarily to be based on the ‘principle of non-discrimination’.

Some of the developed countries felt that it is not fair and equitable to restrain exports of the countries that are not contributing or have minimal contribution to the creation of adverse market circumstances, however, the concept of discrimination or source specific application of any ESM was vehemently resented by the major developing countries that were industrializing fast and their share in the world exports was growing rapidly<sup>19</sup>. These advanced developing countries, being the real beneficiaries of the notion of ‘non-discriminatory’ application of ESMs, therefore, were always very apprehensive and on constant guard to ensure that no provisions that permit any form of source specific application or any discrimination amongst developing countries and that dilute the concept of non-discriminatory application of an ESM existing under the GATT paradigm should creep in to any Agreement. It was in the interest of these countries to make the application of any possible ESM developed under the GATS exacting and also to ensure that these are so structured that an importing country is not in a position to specifically target the exporting country which is creating the unforeseen adverse market conditions that warrant application of an ESM.

The major developing countries successfully negotiated the text of the built-in agenda for the continued negotiations on development of ESMs under the GATS contained in its Article X. Though the preamble of the Marrakesh Agreement Establishing the World Trade Organization laying down the objectives of the Agreement provides

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<sup>19</sup> Application of measures known as the VERs and Grey Areas has been discussed in some detail under Chapter 2.

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for“...substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations” yet the advanced developing countries ensured that the principle of non-discrimination stays integral to the *question* of any possible emergency safeguards provisions under the GATS and that no answer that is developed should transcend that boundary of *non-discrimination*. These countries, in other words doubly safeguarded their interests that all negotiations that are held in terms of Article X are circumscribed by the concept of non-discrimination implying that irrespective of the process, whatever the answer, that is developed to the ‘question of the ESM’ in the negotiations; the answer nevertheless has to be based on the principle of non-discrimination

The discussions held in the WPGR were extremely restricted and merely revolved around the conceptual clarifications and primarily positioned around only an illustrative list of themes that were derived primarily from the model provided by the GATT. The discussions were also an exercise in identifying any relevance of the existing concept or constituting elements of the GATT paradigm to the development of possible ESMs under the GATS and their possible application to cross border trade in services. The quality of submissions made to the WPGR by the member countries reflects lack of commitment as these submissions were not even well thought out and deliberated upon before being presented to Working Party (WP) by the respective sponsoring Members. The lack of commitment is well reflected in the fact that most discussions in the WPGR were, essentially, held without prejudice to the respective Member’s official position on the issues and also to that country’s position on the possible future emergence on any rights and obligations in any services sector under the WTO<sup>20</sup>. The situation particularly places countries that were demanding standalone ESMs under GATS in wrong light because of their lack of political commitment and the intellectual application to a cause which they so vehemently pleaded. The quality of discussions, submission of semi or unrefined proposals and even the level<sup>21</sup> of participating countries representations in the meetings of the WPGR

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<sup>20</sup> World Trade Organization, *Annual Report Of The Working Party On GATSs Rules To The Council for Trade in Services* (2006), S/WPGR/16, 23 November 2006

<sup>21</sup> World Trade Organization *Report of The Meeting of 21 September 2005 and 23 June 2004*, Working Party on GATS Rules, document S/WPGR/M/5330 September 2005 and S/WPGR/M/48 20 July 2004 Ms Clare Kelly, New Zealand, a diplomat of the level of First Secretary presided over these meeting which reflects of the significance attached to the Working Group by the member countries. The Working Groups or committees where serious work is desired to be accomplished are normally chaired at the ambassadorial level.

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suggest that vocal amongst the negotiating countries primarily not interested in answering the question raised in Article X of the GATS. It appears that the Member countries simply wanted to keep the discussions on the subject as a work under progress and keep the mandate alive as “during the negotiating process in the WPGR many developing countries had argued that development of ESM must stay on the WTO agenda partly because this requirement was established by the GATS”<sup>22</sup>. A non-substantial argument of low weightage used was that ‘as General Agreement on Trade in Services has been created in the shadow of GATT and that because the ESMs exist for trade in goods the same generic rules should, therefore, also apply to services’. The Punta Del Este ministerial declaration with respect to services also provides that the GATT procedures and practices shall apply to these (services) negotiations.

The claim of equivalence by the proponents of the ESMs between the two Agreements, GATT and GATS, may appear to be attractive but in reality this assertion is fairly artificial. The two Agreements cover two fundamentally distinct areas of cross border trade and deal with products that are neither mutually substitutable nor comparable and also have their own strong specificities. In the GATT framework, there is a long list of border measures that an importing country can adopt to provide protection to its manufacturers along with the provisions to take additional contingency protection measures like Antidumping, countervailing and emergency safeguards to provide protection to the domestic industry. While, on the other hand, the domestic services industries have their own specificities and four modes of delivery and, which cannot be protected simply through measures at the border. The General Agreement on Trade in Services (GATS), though created in the shadow of GATT, has a slightly dissimilar structure<sup>23</sup> and there also exist differences in the substantive provisions of the two Agreements. The GATS, unlike GATT, does not make National Treatment (NT) and Most Favoured Nation (MFN) as general commitments, and instead adopts a positive list whereby commitments to liberalize market access and national treatment apply only to scheduled services and modes of supply, and these too only to the extent that limitations are not listed in the schedule of concessions that preserve the right of

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<sup>22</sup> Bosworth Mr Malcolm and Mr Dionisius A. Narjoko, *Desirability, Feasibility and Options for Establishing ESM within the AFAS*. REPSF Project No. 05/007 Final Report 2006, P xiv

<sup>23</sup>The GATS has only 29 Articles (32, if three *bis* Articles are counted separately) and amount to almost half the length of the GATT’s 38 Articles.

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the country to apply measures that are inconsistent with the Agreement. While GATT primarily refers to the border measures whereas issues like National Treatment and MFN are dealt with and taken care of automatically.

The differences apart there also are, no doubt, similarities in the two Agreements (already discussed in earlier chapters), including the fact that the GATS like GATT, allows member countries to take measures that may have the ultimate effect as similar to imposition of emergency safeguards measures under GATT, like possibility to permanently modify its schedule of market access commitments (Article XXI), and to take measures necessary to protect the balance of payments (Article XII).

The framework for the emergency safeguards provisions as enshrined in GATT paradigm and already discussed has many flaws, the concept has inbuilt inconsistencies and the passage of time has further eroded validity of this paradigm. These gaps in conceptual coherence includes factors like loss of anchor of time horizon for the ‘unforeseen developments’ which can enable these developments to be considered to be because “... the effect of the obligations incurred by a contracting party<sup>24</sup>”. The framework provided by Article XIX of GATT had been a subject of almost continuous negotiations and has been part of the General Agreement’s work in progress since its early years. The protracted negotiations did bring about an Agreement on Safeguards (AoS), which was an improvement and which elaborated and provided mechanics for the application of the provisions of Article XIX of the GATT (discussed in Chapter 2 and 3).

It was important and meaningful that any independent mechanism for application ESM if it is developed under GATS does not further add to the complexity and vagueness of the provisions of Agreement, otherwise such a provision would simply compound the problem and not help to resolve these. Any emergency safeguards instrument if developed will only be meaningful if it is administratively sound and also procedurally enforceable, creation of an ESM that does not simultaneously create right balance will be counterproductive and add further confusion to a complicated situation. For any good faith MTNs to be meaningful members countries first individually need to comprehend the subject and

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<sup>24</sup> Article XIX:1 of the GATT

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collectively also develop a shared understanding of the issues involved. Where understandings are low, honest ‘knowledge intermediaries’ can help and ‘broker’ common understandings. The question raised in Article X and negotiations on the feasibility and desirability of the standalone ESMs under GATS was a typical example of negotiations on norms without consensus on the issues contained in the agenda as Terrence had rightly concluded that it is only “a reasoned consensus on the issues rather than a compromise on the agenda enhance the capacity of negotiators to reach an Agreement which contains agreement on the norms, rules, and procedures of the treaty under consideration, as well as the monitoring and enforcement procedures”<sup>25</sup> .

The discussions and submissions in the WPGR on the ESMs under the GATS also conspicuously bring out the fact that the negotiators ignored the necessary prerequisites of understanding of the issues and capacity of the negotiators, for meaningful conduct of any negotiations. The negotiators tried simply to “leap-frog” the negotiating process into developing rules and disciplines for application of emergency safeguards under the GATS. This was done without either taking the universe of cross border trade in services fully in to account or understanding the issues involved. This approach was not only simplistic but also reflective of the lack of seriousness on the part the negotiators. The negotiators by taking a leap in the dark in the WPGR added further confusion to the complications that already surrounded the concept of ESMs under GATT and their transposition to under GATS.

The WTO Members despite lack of progress on rulemaking under GATS and trying to leap frog the negotiations, simultaneously rushed into parallel negotiations under the frame work of Doha Round. The members tried to secure further market liberalizing commitments in the services sector without taking any significant step towards clarifying the scope and implications of existing GATS provisions. This approach was adopted despite the fact that, “unlike some of the other areas of trade regulation, GATS does not really fit into the Doha trade round. Instead, it is better to regard negotiations with respect to trade in services as a work-in progress because the GATS contains a built-in agenda that

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<sup>25</sup> Hopmann P. Terrence *Negotiating Data: Reflections on the Qualitative and Quantitative Analysis of Negotiation Processes* Watson Institute for International Studies, *International Negotiation* 7: Kluwer Academic Publishers, Netherlands, 67–85, 2002.

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addresses much unfinished business left over from the Uruguay Round. Moreover, the services programme was moving along a completely different track and time frame to some of the other WTO subject matter that formed part of the Doha Round<sup>26</sup>. The scenario driven by irrational exuberance and ambitions created complications and a danger of an inequitable outcome: the less experienced and informed being induced to offering some broad sectoral bindings while the more experienced countries holding back making any substantive commitments in the sectoral negotiations, for instance; “Gambia and Guyana were among those who committed to allow unrestricted cross-border trade in financial services and the required mobility of capital, but the United States and the European Union”<sup>27</sup> along with most of other advanced developing countries did not. Similarly the major developing countries were not prepared to offer for binding their current market access practises in-force; even in the services sectors where they had already undertaken liberalization reforms and which had then also been time tested for more than two decades as to their possible or apprehended adverse implications.

The negotiations held in the WPGR in terms of the mandate provided in Article X of the GATS were handicapped and suffered from all the conceivable and classical structural weaknesses which any MTNs theoretically can encounter or suffer from. The discussants in the Working Group tried only to conceptually clarify the issues involved without addressing the basic critical matter confronting the WTO with respect to the ‘question’ mentioned in Article X:1 of the GATS. The negotiators in the WPGR unfortunately tried to use a basically defective concept as a model to follow strictly that was itself marred by incoherence and to transpose it to create ESMs under the GATS. The negotiations on the development of emergency safeguards under GATS apart from the questionable political commitments and issues with underlying concept of mode 3 of delivery also brought the contradictions of the model under consideration. The discussions in the WPGR on question of ESMs were unfortunately held in total isolation of other topics<sup>28</sup> under consideration of the Working Party (WP) and were dominated by dealing only with the question raised

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<sup>26</sup> Footer Mary E, *The General Agreement on Trade in Services: Taking Stock and Moving Forward*, Legal Issues of Economic Integration 29(1): 7–25, 2002

<sup>27</sup>Mattoo Aaditya, *Services in a Development Round: Three Goals and Three Proposals*, World Bank Policy Research Working Paper 3718, September 2005

<sup>28</sup>The three negotiating mandates the Working Party was entrusted with were: emergency safeguard measures (Article X), government procurement (Article XIII), and subsidies (Article XV).



regarding the Emergency Safeguards Measures for the services sector. This detachment of discussions from other trade remedial concepts that were also being discussed parallel under the same WP is fairly surprising. The scope of any other parallel and relevant disciplines, like subsidies, if developed in the area of services, especially considering specificities of four modes of delivery, were also to influence Members' need for, and the ability to apply, any emergency safeguard provisions.

Despite protracted discussions in the WTO since 1995 members were still unable to agree on the simple fact whether there was a need to extend generic ESMs to cross border trade in services under GATS<sup>29</sup>. Studies conducted by some institutions external to the WTO Secretariat suggested different possible approaches to developing of ESMs under GATS. An UNCTAD study on safeguards in services explored in some detail the option of mode specific ESMs and concluded that "safeguards mechanism in services may be quite unfeasible<sup>30</sup>".

## **6.2 FINDING SOLUTIONS: COMPETITION POLICY or SUBSIDIES**

Having failed to find a way forward strictly within the paradigm provided by the GATT model for the construct of ESMs under the GATS, it will be meaningful to try to find the answer to the question raised in Article X: 1 in terms of some other domestic trade policy instruments that can possibly have nexus with the conduct of cross border services trade. This identification of some alternate domestic economic policy option required analysing policies that in their practical application may provide the ultimate effect that can have the consequences of achieving the same results that are expected in case of imposition of an ESM as understood under the GATT paradigm. This analytical exercise was expected to be of interest to explore and figure out whether an out of box solution can somehow be found to the question of the ESM under GATS from within the concepts for 'contingency protection' that are already available under the GATT/WTO system.

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<sup>29</sup> Bosworth Mr Malcolm and Mr Dionisius A. Narjoko, *Desirability, Feasibility and Options for Establishing ESM within the AFAS*. REPSF Project No. 05/007 Final Report 2006, P xiii

<sup>30</sup> Mario Marconini, *Emergency Safeguard Measures in the GATS: Beyond Feasible and Desirable*, UNCTAD. March 2005.

There are almost infinite concoctions of domestic policy instruments that are employed by the public officials of a country, for a variety of and at times strange reasons, but these instruments are primarily geared to provide protection to their domestic manufacturing and service industries. This ingenuity of public officials has a wide range; starting from the basics like fixed and variable border controls to domestic price triggers, seasonal adjustment, standards, labelling, language of inscriptions on the packaging and the list goes on. Remaining within the existing universe of available, commonly practiced and acceptable domestic economic and trade policy options, two instruments; namely 'subsidy' programmes and the 'competition policy', merit exploration in some detail especially because of their direct relationship with investments (mode 3 of service delivery; a contentious issue under GATS). The competition policy has already been recognized in the UR Agreements to have some possible complementarity with the investment policy and trade related aspects of the investment measures<sup>31</sup>. The model provided by the GATT has many parallel provisions in the three Agreements dealing with the three contingency protection mechanisms; anti-dumping, countervailing, and emergency safeguards. This investigation was expected to help determine whether anyone of these or some combination of both can possibly provide a substitute for standalone ESMs under the GATS.

### **6.2.1 SUBSIDIES: ESMs**

There are 'primarily two types of subsidy schemes, irrespective whether these are producer or consumer focused, these essentially serve the same purpose, that is, the schemes strengthen the position of a domestic industry *vis-à-vis* competitors that are established abroad<sup>32</sup>. Subsidies are also fairly transparent and less trade distortive when compared with some other trade restrictive non-tariff barriers including quantitative restrictions. The compatibility of subsidies with MFN treatment can also be more easily ensured than the quantitative restrictions. Recourse to subsidies in an emergency situation has always been regarded to be slightly advantages over other possible alternatives for protection of the domestic industry. The subsidies are costly from a government's and tax payer's perspective, unlike tariff surcharges; therefore, it is comparatively easier for the public

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<sup>31</sup> Agreement on Trade Related Investment Measures, Article 9

<sup>32</sup> Adlung Rudolf, *Negotiations on Safeguards and Subsidies in Services: a Never-ending Story?* Journal of International Economic Law 2007 10(2):p 245

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officials to dispense with them through the political process using transparency to propagate their costs.

The Services Agreement, currently, unlike Agreement governing trade in goods, does not establish any special disciplines with respect to subsidies. The Services Agreement in its Article XV merely provides for a negotiating mandate to develop necessary disciplines to avoid ‘trade-distortive’ effects of subsidies. Article XV of GATS, like its Article X, is part of the unfinished agenda and provides for the development of countervailing mechanism under GATS. Though the Services Agreement does not define the term “subsidy”; however, GATS Article XV recognizes that “in *certain* circumstances, subsidies may have distorting effect on trade in services” and provides that: “Members shall enter into negotiations with a view to developing the necessary multilateral disciplines to *avoid such trade-distortive effects*”<sup>33</sup>. The Article XV does not condemn subsidies outrightly and guiding the negotiators provides that “...negotiations shall recognize the role of *subsidies in relation to the development programmes* of developing countries and take into account the needs of Members, particularly developing country Members, for *flexibility* in this area”. The negotiations envisioned were also to ‘address’ the *appropriateness of countervailing* procedures (emphasis added).

The negotiations conducted on developing disciplines on subsidies in terms of the mandate provided by the Article XV of the GATS met the fate similar to that of its Article X mandated negotiations. The negotiations with respect to subsidies ignored the peculiarities and different modes of cross border supply of services, and the negotiators resorted to the GATT definition of subsidy<sup>34</sup>. The proposals made on development of regime on subsidies

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<sup>33</sup> GATS Article XV: 1 reads as: “Members recognize that, in certain circumstances, subsidies may have distortive effects on trade in services. Members shall enter into negotiations with a view to developing the necessary multilateral disciplines to avoid such trade-distortive effects. The negotiations shall also address the appropriateness of countervailing procedures. Such negotiations shall recognize the role of subsidies in relation to the development programmes of developing countries and take into account the needs of Members, particularly developing country Members, for flexibility in this area. For the purpose of such negotiations, Members shall exchange information concerning all subsidies related to trade in services that they provide to their domestic service suppliers”.

<sup>34</sup> Korotana Shabir, *International Financial Crises, Subsidies and GATS Article XV*, Int. T.L.R. 2009, 15(6), 167-170

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under Article XV of the GATS<sup>35</sup>, were structured around the paradigm provided by the GATT. The negotiations in the WPGR under Article XV of the GATS also stalled and if had these been continued with some commitment, the outcome might have supported or, at least, clarified some of the subsidy-related questions that also affected and created problems for any possible movement in negotiations on question of ESMs in services<sup>36</sup>.

The provision of subsidies to domestic producers of goods and services, like application of ESMs, are trade distorting in their end effect as these provide protection and respite to the domestic industry from the injury caused by surge in imports, one through creation of engineered competitiveness and the other through border controls but in practical terms the ultimate effects are almost similar. In absence of any disciplines in GATS on subsidies and countervailing measure some Members, who have the capacity to do so, can easily resort to subsidization to counter the loss of competitiveness of their industry, a practice which will almost amount to a safeguard measure. The underlying rationale or factors leading to the provision of support through subsidies are, however, different from the reasons for the application of ESMs but the effect of the policy actions for the domestic market is practically the same. This proposition, however, had a bias against cash strapped developing countries who may find it difficult to mobilize enough fiscal surpluses and allocate the funds required to effectively protect a domestic industry from foreign competition.

To explore the possibility of using subsidies as a substitute for standalone ESMs under the Services Agreement; functions which a standalone emergency safeguards mechanism could perform in services trade need to be compared to possibilities available with the Members for using subsidies as a policy tool for achieving similar purposes. The role of subsidies in the goods trade, which has a simple single cross border dimension, is now fairly researched and well understood. However, in the context of trade in services which has its own specificities; it is the modal structure that appears to be an appropriate beginning point to

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<sup>35</sup> World Trade Organization *Proposal for a Provisional Definition of Subsidies in Services*, Communication from Chile; Hong Kong, China; Mexico; Peru and Switzerland Working Party on GATS Rules, Job(05)/96, 9 June 2005

<sup>36</sup> World Trade Organization, WPGR, Note from the Chairperson. “*Negotiations pursuant to Article X of the GATS*”, 30 April 2004.

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assess whether subsidies can be used as substitute for the sought after standalone ESMs under GATS.

In order to protect a domestic service industry from undue adjustment pressures created because of trade liberalization, governments may have few options in some specific sub-sectors other than to grant some form of subsidy-type support. As under GATS there exist no disciplines with respect to subsidies Members countries are entitled within the current legal framework to employ import-displacing (producer) subsidies even in the service sectors that are subject to full market access commitments. Under modes 1 and 2 of delivery the foreigners compete from an external or foreign jurisdiction therefore it is difficult to see a role for subsidies as safeguards under modes 1 and 2 (cross-border trade and consumption abroad<sup>37</sup>). Considering the dynamics of trade under modes 1 and 2 of the service delivery, the services are under these two modes are supplied from and regulated in a foreign jurisdiction that is beyond the governing jurisdiction of public official of any country that is contemplating imposition of ESM. There is, therefore, no scope for subsidies to be used to provide reprieve to the domestic service industry under these two modes.

Government subsidies, especially those subsidies that discriminate between the firms with respect to their country of origin, can be an important trade policy instrument that can possibly be used to make the domestic industry competitive and generate end results that may almost be similar to the imposition of the ESMs, especially considering the fact that the GATS in its present shape contains no substantial constraints on the use of subsidies other than in context of its MFN and national treatment obligations. In the absence of special rules, subsidies in services are subject to all obligations under the GATS—most importantly, national treatment. National treatment under mode 3 of supply implies that foreign established suppliers are entitled to the same benefits, including financial incentives (subsidies), as their domestically owned counterparts. In other words, in sectors where specific commitments are undertaken and unless national treatment limitations with respect to subsidies are inscribed, government aid offered to domestic service suppliers will

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<sup>37</sup> Services supplied from the territory of one Member into the territory of another Member e.g. international telecommunication or database services performed in country A for benefit of a user in country B

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necessarily require to be extended on a non-discriminatory basis to the foreign service suppliers. If provision of subsidies to domestic service industry (a difficult definition on its own accord) is inscribed in the schedule of commitments by a country than it becomes more a case of using scheduling flexibilities than subsidies.

In terms of the Services Agreement the national treatment must be granted only in the scheduled service sectors and that too only to the extent that no relevant limitations have been inscribed in the country's schedule of commitments. The discussions on the issue suggest that there can be an inverse relationship between the (non-)existence of subsidy disciplines and the scope for a GATT-type safeguard mechanism under the GATS. The more leeway Members retain for trade-defensive subsidization in emergency situations, whether apparent or real, the lesser the need for a mechanism that would allow for the temporary suspension of existing commitments. In the WPGR many members expressed their intention to create a mechanism that would allow them to protect nationally-owned incumbents from injury that might be caused by foreign-owned competitors both with respect to application of an emergency safeguards measure or provision of subsidies<sup>38</sup>. The schedules of commitments initially submitted by more than ten Member countries contained subsidy related limitations or complete exemptions from national treatment under mode 3 which in practical terms provide scope and cover for discriminatory support programmes that the member countries choose to maintain in favour of domestically owned companies.

However, in the case of domestic producers under mode 3 (commercial presence) the situation is fairly complex. Like the GATS, most Preferential or other Economic Integration Agreements (RTAs) covering trade in services have also not established any dedicated disciplines for subsidies. Submission from the European Communities to the Council for Trade in Services, in 2006, was clear and made no distinction, the EC considered that "[i]n accordance with Article XVII of the GATS, and with the scheduling guidelines, . . . the fact that subsidies provided to services suppliers of a Member are not extended to services suppliers located outside the territory of that Member does not require to list a National Treatment limitation under Modes 1 and 2". Consistent with this interpretation, the EC

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<sup>38</sup> Adlung Rudolf, *Negotiations on Safeguards and Subsidies in Services: a Never-ending Story?* Journal of International Economic Law 2007 10(2):p 264

further noted that other national treatment limitations under mode 2, initially inscribed by some of its new Member States in their respective GATS schedules, served an ‘explanatory purpose’ only and, thus, could be omitted from the consolidated EC schedule. Cases in point were entries by Poland, Latvia and Slovenia that exempted hospital treatment abroad from cost coverage under public health insurance programmes”<sup>39</sup>.

### 6.2.2 COMPETITION POLICY: ESMs

The basic goal of a competition policy<sup>40</sup> of any country is to promote and maintain healthy inter-firm competition in the markets where ever it is viable. This policy intervention is primarily required “in the face of increased competition and in the pursuit of larger profits, existing market players can be tempted to distort or eliminate competition in order to acquire and abuse market power. The competition policy provisions are also typically aimed at assuring companies that their market access and/or investments will not be threatened by anti-competitive practices of private or state-owned local firms in the host country. Consequently, policy interventions are necessary in order to maintain and encourage healthy competition. In recognition of this need, Governments in many countries implement a competition policy to maintain and encourage healthy competition, which includes laws and policies dealing with anticompetitive practices”<sup>41</sup>.

Though normally the competition policy has a fairly overarching reach but this paper briefly looks only at the policy’s narrow implications with respect to GATS and there too only with respect to the possibilities of using the competition policy as a substitute for the ESM type temporary relief to domestic industry in case of surge of imports in cross border trade in the services sectors that have been included by the country in its schedule of market access commitments. Prohibition of anti-competitive practices, prevention of abuse of dominant position and regulation of combinations (statutes governing mergers and acquisitions) are the tools normally available to the governments under the competition

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<sup>39</sup> World Trade Organisation, Council for Trade in Services *Communication from the European Communities and its Member States, Draft consolidated GATS Schedule* document number S/C/W/273 of 9 October 2006,

<sup>40</sup> Competition policy was one of the most contentious issues at Singapore WTO ministerial meeting and after the debacle in Seattle; it has almost been unmentionable in the WTO.

<sup>41</sup> UNCTAD secretariat *The Relationship Between Competition, Competitiveness and Development*, , Commission on Investment, Technology and Related Financial Issues, Intergovernmental Group of Experts on Competition Law and Policy Fourth session Geneva, 3–5 July 2002

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policy to ensure that foreign service providers entering through any of the three modes of service delivery do not engage in unfair competition.

It is of interest to examine that instead of creating specific and standalone emergency safeguards provision under the GATS on the paradigm provided by the GATT, some provisions that can substitute for standalone ESMs can be introduced by a Member country to provide temporary protection to its producers in the specific service sectors through the competition legislation. The examination, in short, needs to determine that whether, for instance under Mode 3 of supply of service the competition policy can be used to achieve the same results as are expected, under the GATT paradigm, from the inclusion of standalone emergency safeguards provisions.

However, the regulatory clauses, creating disciplines and controlling anti-competitive behaviour, in the competition legislations of countries are usually neutral to the nationality of the firm. Under GATS the National Treatment with respect to mode 3 implies that foreign established suppliers are entitled to the same benefits, including financial incentives, as their domestically owned counterparts. The situation is somewhat different under modes 1 and 2, where the foreigners compete from a foreign jurisdiction. The competition policy of the countries do not differentiate on the basis of origin and these invariably subject the Foreign Service suppliers to the domestic jurisdiction of the competition office independent of the service sector or its mode of delivery, if the policy is made to differentiate then the complications of classifying the suppliers with respect to origin and also of the circumvention of the measure will arise. From an economic perspective, it would be unreasonable to expect the authorities of an importing country to assess the competitive conditions in committed sectors across all other Members that may have trade interests--and then try to create balance and level the 'playing field' *vis-à-vis* each of these Members.

Competition policy is difficult to be subjected to rules of origin. There are multiple problems in conceiving competition policy as a substitute to the ESMs because it is anyway difficult to establish the nationality of modern corporations, as already discussed in earlier Chapters; another problem originates from very essence of the character of regulations of



the competition policy. The competition policy specifically targets at forbidding certain specified market behaviours (e.g. price fixing) primarily originating in dominant position of the supplier in the market and this delimiting is without regard to the nationality of the defendant or the plaintiff<sup>42</sup>. The countries seeking independent ESMs under GATS can structure their competition policy in the manner desired and include their competition policies and other consumer protection policies as horizontal limitations in their market access schedule of commitments under GATS. The safeguards type provisions have already been imported into some of the sectoral agreements in the form of provisions on anti-competitive practices or as so-called clauses on ‘competitive safeguards’<sup>43</sup>, that exist in different service sectors. These clauses will fall more under the context of scheduling flexibilities and not as ESMs in the context of GATT.

### 6.3 SPECIAL SAFEGUARDS: LAMY

The study on the political challenges of ‘collective preferences’<sup>44</sup>, presented in September 2004; by Pascal Lamy has strong relevance to the subject of the thesis, contemporary socio-economic world and also for the interstate commerce<sup>45</sup>. The study needs not only to be recognised but also merits consideration when contemplating development of any future regime for emergency safeguard measures under the GATT/WTO system. Lamy<sup>46</sup> explaining his proposal stated that; “traded goods and services are both an embodiment of and also a vehicle for the collective preferences of the countries producing them; these then

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<sup>42</sup> World Trade Organization, Baldwin Richard, *21<sup>st</sup> Century Regionalism: filling the gap between 21<sup>st</sup> century trade and 20<sup>th</sup> Century trade Rules*, Staff Working Paper, Geneva, May 2011

<sup>43</sup> Liberalization and increased competition in markets require active regulatory involvement to provide new entrants with a level playing field when attempting to compete against well-established incumbent operators. Incumbent operators usually have substantial advantages, such as a substantial customer base, and market power. New entrants require assurances that adequate regulatory protection will in place so that the incumbent operators will not be permitted to engage in anticompetitive behaviour or abuse their dominant position. Accordingly, regulators are generally given the power to establish competition policy and address anticompetitive practices in the market.

<sup>44</sup> The ‘collective preferences’ can be defined in short as “end result of choices made by human communities that apply to the community as a whole”; while the political economics define, collective preferences as the “differentiated weights that a government attributes to social groups when maximising a social utility function”. Lamy’s conception of collective preferences is rather universal but his diagnosis mainly rest on European examples.

<sup>45</sup> The presentation was made in September 2004, by the then European Trade Commissioner, Pascal Lamy organised a conference on ‘collective preferences and global governance: what future for the multilateral trading system?’

<sup>46</sup> Pascal Lamy is presently the Director General of the WTO and prior to that he was Trade Commissioner of the EU.

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become an interface with the collective preferences of the consumer country<sup>47</sup>”. However, the concept of accommodating ‘collective preferences’ as safeguards under the GATT/WTO system has problems for the international economic relations and the WTO system especially if the resulting measure that may be required to be taken because of the ‘collective preference’ violates the WTO rules and yet the measure is too popular in the regulating country for the government to withdraw it. Lamy, to address such circumstances, proposed the negotiations of a new WTO safeguard that would permit governments to retain strongly-supported measures provided that compensation is paid.

The paradigmatic example is *EC - Hormones* in which the European Commission could not comply with the ruling of the Panel because of contrary popular opinion, The “EU-US beef hormone dispute “the ban on US beef was considered an unnecessary policy to defend EU collective preferences according to the first ruling. Since the EU assessment of the policy rationale based on the sanitary risk was considered unconvincing, it means that the alleged EU preference for hormone-free beef was not considered a good reason for trade restriction. The trade retaliation imposed by the US can be interpreted as the ‘price to pay’ (for the loss of market share in the US) by the EU to maintain its policy for alleged European preferences. This indicates that countries can still defend their collective preferences in the absence of proven risk, but must suffer retaliation<sup>48</sup>.

The WTO disputes on *hormones*, *shrimp*, and *asbestos* were primarily also felt as disputes about ‘collective preferences’, and that there will be more of such disputes in future. The World Trade Organization and other global standard setting and governance institutions will have to create space for the accommodation of these concerns or else these institutions will be rejected by the public opinion that sees international trade and WTO rules as a threat to nationally-chosen collective preferences. The ‘sudden emergence’ of the reality of collective preferences demonstrates the need for governments to respond. The Panel in the *US-Gambling*, transplanted the GATT balancing test into the rules on trade in services. In

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<sup>47</sup> Lamy Pascal speech, “*Collective preferences and global governance: what future for the multilateral trading system*”, Brussels, 15 September, 2004. (he was the trade commissioner for the EU at that time)

<sup>48</sup> Tristan le cotty Tancrede voituriez *The potential role for collective preferences in determining the rules of the international trading system*, Institut du développement durable et des relations internationales Paris 2008, page 18

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the first ‘General Exceptions’ case adjudicated under GATS<sup>49</sup>, the panel held that for a measure to be ‘necessary’ under the moral exception in GATS Article XIV (a), the United States was required to negotiate with Antigua to see if a way could be found to avoid the harm associated with the remote gambling services that Antigua's private sector was offering to US residents. The fact that the United States had not entered into gambling negotiations was a decisive reason why it lost the case at the panel level. The panel went so far as to say that a US negotiation ‘with Antigua was required even if the United States considered the gambling ban indispensable’<sup>50</sup>.

Pascal Lamy’s addition of ‘collective preference’ to the existing safeguards regime will broaden the concept of emergency safeguards through introduction as new qualifying factor that can trigger a special safeguards action. Lamy was not the first one to have such a strand of thought, prior to him; “other analysts had also suggested the need to expand the availability of a safeguard for national policies. In 1996, Dani Rodrik had proposed a ‘social safeguards’ clause for labour standards; a few years later in 2001, the team of Nicholas Perdikis, William A. Kerr, and Jill E. Hobbs suggested the negotiation of a WTO Agreement on Trade Related Aspects of Consumer Concerns that would distinguish consumer-based trade restrictions from producer-based restrictions<sup>51</sup>”.

Lamy expects WTO to show greater respect for broad or intense public opinion than for policies chosen through political representation, or technocratic expertise as in contemporary societies the biggest protectionist force is not so much the injury to producers, but more importantly injury or upsetting consumers or citizens primarily with respect to the values or collective preferences that they hold. The existing contingency protection provisions under the GATT/WTO need to be changed or expanded, not with the objective to allow imposition of arbitrary restrictions to protect some subjective values, but rather to provide politicians with a window of specialized escape valve to accommodate ‘collective preferences’ of the society imposing the restrictions, under clearly defined conditions.

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<sup>49</sup> World Trade Organisation, Panel Report, *US - Gambling*, above n 98, Para 6.534 (suggesting that for the regulation to be ‘necessary’ under GATT Article XX, the United States should first pursue other appropriate measures such as diplomatic overtures or foreign assistance), Para 6.562.

<sup>50</sup> Charnovitz Steve, *An Analysis of Pascal Lamy's Proposal on Collective Preferences*, 8 J. Int'l Econ. L. June, 2005,

<sup>51</sup> Charnovitz Steve, *An analysis of Pascal Lamy's proposal on collective preferences*, J.I.E.L. 2005, 8(2), 455

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The currencies of most countries now have free floating exchange rates, the import tariffs are at historically low levels in case of merchandise trade and simultaneously there exist very low entry barriers in case of services including under its mode 3 (investments) of delivery. The slicing or the unbundling of the production has added a new dimension to application of any traditional contingency protection instruments provided under WTO system. The change and shift in consumption patterns towards items that have a social preference have changed the dynamics of trade. The collective preference is now reflected in many diverse dimensions, like in social standards (like child labour, proper working conditions, safety, medical for workers, gender equality), social responsibility standards, ethical, governance and environmental standards and the list goes on and on. The service industry has also to ensure that they measure up to the collective preferences and observe standards or face rejection of collective or social preference. The barriers to trade in the contemporary world have moved to inside the importing country and away from the traditional borders. The barriers, for reasons listed above, are created by collective of social preferences that are detached from the traditional trade remedy measures and so strong that it is not possible for the public officials to ignore them. It is difficult to follow the paradigm that was created seventy years back in the context of totally different realities both with respect to international economic relations and also the role of state, especially in the developed and democratic world.

The phenomenon addressed by any name be it social preferences or public policy consideration or ‘collective preferences’ of the society, in the ultimate effect of immense importance to the public officials especially in the democratic societies. It is presently the consumer and citizen concerns (values) that resist free trade. This changing behaviour calls for creation of treaty provisions for application of special safeguards to accommodate these preferences and the WTO’s contingency protection regime needs to be adjusted accordingly. The WTO system already recognizes and accommodates the concept of ‘public policy’ or ‘collective preference’ concerns but in a very limited and restricted dimension under GATT Article XX and Article XIV of GATS but with regards to specified ‘General Exceptions’ only. Since its inception, the GATT/WTO’s contingency protection provisions focus on providing a safety valve and the possibility to re-introduce trade

restrictions in case domestic producers are hurt by imports. This safety valve needs to be modified and expanded to be able to take into account the concept of collective preferences and policy space should be created for consumer triggered ESMs be it the supply of services or trade in goods. The WTO will have to change its way of doing things, create space for 'collective preferences' in its scheme of contingency protection instruments or risk and accept irrelevance.

#### **6.4 LIMITATIONS OF WTO: Added complications; BITs and RTAs**

When the GATT was created in late 1940s, the cold war was just beginning, Western Europe was struggling with ravages of war, Japan was essentially out of the international economy order; most of Africa and major parts of Asia and Oceania was part of colonial rule. The US was the unchallenged leader of the world economy with an apparently permanent trade surplus. The US dollar stood as firm anchor of international system, tied to gold and most other currencies were linked to the dollar, had strict capital controls in place and were pegged with fixed exchange rates.

The world has moved away from that scenario which prevailed up to 1960s. The Bretton Woods has now ceased to exist and nothing has replaced it, the par value system is gone and so is the US dominance of the world economy. The EU has grown to twenty seven member countries and Japan has become a major trading nation. China is now world's "second largest trading nation and some developing countries have rapidly moved forward economically, however, the developing countries on the whole have not turned out all to belong to a single class, with some active participants in the global trading system, others are largely outside that system<sup>52</sup>."

Today most important currencies are floating and capital crosses most borders freely, which has potentially a huge impact on the actual value of tariff concessions<sup>53</sup>. Changes that have occurred in the international economic scenario include existing historically low

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<sup>52</sup> Lowenfeld Andreas F, *International Economic Law* (second edition) Oxford University Press, Oxford, 2008, p 49

<sup>53</sup> Pauwelyn Joost *New Trade Politics For The 21<sup>st</sup> Century* Journal of International Economic Law 11(3), 559-573

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tariffs, increased financial integration amongst countries, more diversification in world trade shares and proliferation of Preferential Trading Agreements and deeper Regional Economic Integration Arrangements. Another important factor though often overlooked but of no less significance, is the unbundling or slicing of production and service supplies. The fast evolving trading and manufacturing structures have induced a drastic change in the issues of concern to the contemporary interstate economic relations.

The major economies like the United States, the EU and other industrialized countries now permit their currencies to float. Simultaneously China and some other Asian governments, whose size of economy in certain cases exceeds the size of many developed countries economies, manage their exchange rates and try to maintain undervalued currencies. This phenomenon of undervalued currencies in practical terms has the effect that is similar to that of the border controls and provision of protection to domestic producers. The traditional concept that provided the rationale for application of ESMs does not hold same validity; raising barriers at borders is at times rendered ineffective by some other economic policy tool. Now currency manipulation, competition policy, IPRs and the regulation of foreign investment are the new areas of conflict in the trade policies but the GATT/WTO system is silent on these issues and does not have the agreed mandate even to address these concerns.

### **6.4.1. PROBLEMS WITH WTO**

The ethos or the doctrine of the World Trade Organization (WTO) is derived from that of the General Agreement on Tariffs and Trade (GATT). This ethos had its roots in the world dominated by the US along with a few other developed countries, while most developing countries being marginal players in the system. The traditional culture continued to prevail; which was fairly detached from the contemporary ground realities of interstate economic relationships among its members; it is this carryover culture of the WTO from past that primarily inhibits its progress. The possibilities of using the WTO as a platform for rulemaking for the world trading system do still remain but the Members to all intents and purposes appear not to be inclined to use this forum for doing so. Most of the Members are captives of their familiarity bias and still think in terms of the old GATT

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practices with which they are now familiar. The WTO system is captive of the successes of its predecessor organization GATT, which it achieved during the period when its agenda of work was relevant to the then prevailing needs of the world economy. The “problem is that the WTO is not the old GATT. The GATT/WTO membership has increased over the years, from 23 in 1948 to 153 in 2009, so too did the diversity and complexity of issues that must be dealt with in trade relations. Greater variance among WTO members in terms of interests and priorities made negotiations harder to manage and slower to complete...provoking a search for new ways of doing business in relation both to procedures and the disposition of substantive rights and obligations among Members. Bilateral and plurilateral regional arrangements may also be seen in part as an attempt to address these difficulties<sup>54</sup>.

The GATT’s ‘operating system’ since its inception has essentially been mercantilist<sup>55</sup> and the soul of the system is still embedded in post war economic nationalism. The grant of market access has traditionally been considered as some sort of an altruistic generous gesture and continues to be called a ‘concession’ which can only be granted in return of ‘concession’ received. In the context of the WTO it is only appropriate for the public officials to offer or withdraw concession if they get or give ‘something in exchange’, this approach not only hinders, but “it puts unilateral liberalization in a bad light, as if it is an act of weakness or self-surrender without getting anything in return<sup>56</sup>”. This archaic negotiating process influenced the services sector liberalization negotiations more than those for the trade in goods where the negotiating processes have moved up from request-offer approach to a formulae approach. This up-gradation to formulae approach primarily reflects of consensus on the feasibility of desirability of the tariff reduction exercise for trade in goods. However, “negotiating barrier to trade in services is difficult. These barriers are not simple and obvious like tariffs on goods; they are difficult to identify, to clarify, and to negotiate on the traditional basis of reciprocity. In many instances, the barriers to trade are domestic regulations, which may be designed to protect local monopolies, to protect

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<sup>54</sup> World Trade Organization Low Patrick, *WTO Decision-Making for the Future* Staff Working Paper, Staff Working Paper ERSD, Geneva, May 2011

<sup>55</sup> The GATT framework was negotiated in early nineteen forties during the period which immediately followed a period characterized by protectionism which Discussed in more detail in first Chapter.

<sup>56</sup> Pauwelyn Joost *New Trade Politics For The 21<sup>st</sup> Century* Journal of International Economic Law 11(3), 559–573

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consumers, or to achieve some objective of monetary or fiscal policy, but will have the effect of excluding supply of services by outsiders<sup>57</sup>”

The entire GATT/WTO system is still grounded in a deep mistrust of domestic politics and transparency of the protection instruments. The assumptions being that if political officials are left alone to themselves, protectionism will be the order of the day and rampant and that the protectionism is at times camouflaged in layers of domestic trade policy instruments. It was this underlying mistrust of policy makers and need for transparency of trade policies that the Trade Policy Review Mechanism was agreed primarily “to contribute to improved adherence by all Members to rules, disciplines and commitments made under the Multilateral Trade Agreements and, where applicable, the Plurilateral Trade Agreements, and hence to the smoother functioning of the multilateral trading system, by achieving greater transparency in, and understanding of, the trade policies and practices of Members”<sup>58</sup>. A new transparency clause, Article III, that is unique to services agreement from amongst the WTO Agreements, was provided in the GATS. This Article III obliges that each Member shall publish all relevant measures of general application pertaining to Trade in Services, and shall give notice of proposed changes to the Council on Trade in Services.

Another important change that has occurred in the international trade since the inception of GATT system is the content and mechanics used for conduct of international trade or simply put, with what is being traded and how. The bulk of trade flows presently are not between industries with one country specializing in some sectors and the other country focusing on others. Instead, most of today’s trade is intra-industry and intra-firm (components between subsidiaries), and most importantly, “rather than trade in raw materials or finished products, what we have witnessed in recent years is an unbundling or slicing up of the production chain”<sup>59</sup>. A recent OECD study in this regards “emphasises

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<sup>57</sup> Lowenfeld Andreas F, *International Economic Law* (second edition) Oxford University Press, Oxford, 2008, p 49

<sup>58</sup> World Trade Organisation, *The Legal Texts, The Results of Uruguay Round of Multilateral Trade Negotiations*, Cambridge University Press, Cambridge. 1999. Clause A (i) of Annex 3 to the Marrakesh Agreement Establishing WTO. p 380 (objectives clause)

<sup>59</sup> Lanz, R., S. Miroudot and H. K. Nordås (2011), “Trade in Tasks”, *OECD Trade Policy Working Papers*, No. 117, OECD Publishing. <http://dx.doi.org/10.1787/5kg6v2hkvmmw-en>



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that tradability is not only determined by the technical feasibility of unbundling and digitisation, but also of transaction costs and the economies of scope of keeping tasks together”<sup>60</sup>. The slicing up of the production chain has immense impact on structuring of domestic economic policy regulations of the countries as it happens in consort with the increased flows of foreign direct investment (mode 3 of supply of service). The ensuing enhanced trade flows that have followed the unbundling of productions have created the new pressures to liberalize trade and to attract investments. In other words, unbundling in itself, and quite separate from the WTO process, has led to enhanced levels of trade liberalization and also induced countries to create disciplines relating to competition. This unbundling of supplies and slicing of the production chains have created enormous issues with almost all the constituting elements which provide the basis for the application of Emergency Safeguards Measures in the area of goods under the GATT paradigm. The slicing of production has made the origination or manufacture of the product really blurry, and thus rendered the increased trade flows as not actionable under any ESMs that are modeled on the GATT. The phenomenon is more pronounced in the supply of services making application ESMs under GATS, which are developed on the GATT model, impossibility.

The WTO over the last two decades, this period in certain ways overlaps with the closing years of the UR of MTNs. During the period the institution was mostly occupied in discussing agenda that was in process of becoming irrelevant to emerging structures for the conduct of international economic relations and its governing structures. This preoccupation of the WTO in the non-productive and irrelevant activities created a gap in the governance that is fast being filled by the uncoordinated developments elsewhere – primarily in deeper than ever before Regional Trade and Economic Integration Agreements and Bilateral Investment Treaties along with autonomous structural reforms in some emerging economies. The resulting package of deeper disciplines can also be called the “21st century regionalism”<sup>61</sup>.

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<sup>60</sup> Pauwelyn Joost *New Trade Politics For The 21<sup>st</sup> Century* Journal of International Economic Law 11(3), 559–573

<sup>61</sup> World Trade Organization, Baldwin Richard, *21<sup>st</sup> Century Regionalism: filling the gap between 21<sup>st</sup> century trade and 20<sup>th</sup> Century trade Rules*, Staff Working Paper, Geneva, May 2011

The lack of progress in the Multilateral Trade Negotiations and the stalling of the decision-making and global trade rule-making machinery at the WTO are attributed to different reasons by different researchers. There is a thought that is also subscribed by some scholars that probably “the proliferation of regional trade agreements, partly in response to the impasse in the multilateral negotiations, is also diverting precious government resources and attention from the WTO toward regional negotiations”<sup>62</sup>. The exercise of choice by the individual countries to subscribe to some specific market liberalization rule making process from amongst the different available parallel ongoing negotiating processes suggests of a shifting of preference of the individual countries towards the Regionalism and/or Bilateralism. This phenomenon takes a practical manifestation in the exponential development of RTAs, Bilateral Investment Treaties (BITs) and recently towards more comprehensive economic co-operation and integration Agreements covering almost all aspects of interstate economic relationships. These include not only trade in goods and services but also agreed disciplines for investment flows and protection to IPRs.

### **6.5 PTAS/BITS: IMPACT THEREOF**

There were different models or the options that were analysed in the WPGR for drawing some possible inferences for dealing with the question of the ESMs under the GATS. These models were primarily drawn from within the existing framework or paradigms provided by the GATT and some different WTO Agreements. None of the models that were discussed provided any coherent answers to the question raised in the negotiating mandate provided in Article X of the GATS. The cursory look at the negotiating stance in the WPGR taken by some important player and also in some of the parallel negotiations in that were being simultaneously in different forums outside the WTO framework<sup>63</sup> suggests of linkages of mode 3 of delivery of services with the negotiations on the development of multilateral disciplines for international investments. The shifting focus of major economic players away from the WTO and towards deep commitments under the evolving deeper Economic Integration Regional Agreements and rapid emergence of BITs are some of the

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<sup>62</sup> Steger Debra P. *The Future of the WTO: The Case for Institutional Reform* Journal of International Economic Law 12(4), 803–833

<sup>63</sup> Negotiations on the Multilateral Investments Agreement were held under the OECD framework in late 1990s

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flanking factors that necessarily need to be explored in some detail to understand the behaviour of the negotiators in the WPGR and evaluate the conduct of negotiations in the WPGR on ESMs under the GATS.

The experience generated over the last decade shows that the multilateral trade negotiations conducted under the auspices of the WTO in this day and age of rapidly evolving economic relations amongst the countries have only a very limited scope. This reduction of the role of the WTO/GATT system has led to emergence of new structures that have provided alternate mechanisms to the countries and enabled them to circumvent the unpredictable, tedious and stretched negotiating processes under the WTO system. The development of alternate or parallel forums was the logical consequence of the role that WTO chose by restricting itself to under the GATT paradigm and suffocating its relevance to the emerging needs of economic relations. Gradually over time these regional and similar other arrangements have established their supremacy and relegated to secondary levels the traditional multilateralism as defined and embodied in the GATT/WTO system.

The efficacy of these extra-WTO or new economic integration Arrangement can easily be gauged from the fact that the issues like those that were being negotiated in the WPGR under the WTO/GATS, including the question of ESMs and where no solutions were in sight under the multilateral process have now been managed to the satisfaction of the concerned parties under these regional arrangements. These difficult to manage issues have not only been coped through simple and voluntary instruments but the outcomes have now almost been standardized under these to new limited partnership<sup>64</sup> frameworks like deeper economic integration agreements or even simple BITs. This re-orientation of the market liberalization processes and opportunities to deal with the trading partners of choice has also eliminated the necessity to tolerate the menace associated with the concept of 'free riders' that was so common under the multilateral framework. The countries can now choose their preferred and major trading partners and also free themselves from the 'unwanted' economic partners by employing selective policy instruments, unlike under the WTO, where all their policies had to be on a MFN basis.

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<sup>64</sup> Most of the current Economic Integration Agreements having binding clauses do not have any Special and Differential treatment for developing countries.

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President Vladimir Putin of Russia had recently made a very true to life statement about evolving pattern of interstate economic relations when he said that; “the new architecture of economic relations implies a principally new approach to the work of international organisations. It has become increasingly apparent of late that the existing organisations are not always up to the measure in regulating global international relations and the global market. Organisations originally designed with only a small number of active players in mind sometimes look archaic, undemocratic and unwieldy in today’s conditions. They are far from taking into consideration the balance of force that has emerged in the world today”. He also highlighted that the “rapid growth in regionalism has emerged for a reason: It is not coincidence that a parallel system of regional alliances and agreements is taking shape, essentially giving the global market a new structure. And the trade liberalisation process is now taking place more and more through these new agreements<sup>65</sup>”.

This phenomenon has produced an anomalous situation and created many complications with respect to the application of an ESM under the GATT paradigm by a country in a specific service sector or on its some particular mode of delivery where same market access commitments have been made by a country under the GATS and also under a PTA or a BIT. In such circumstances the PTA or the BIT may confer benefits to certain countries that are party to the regional arrangement, which will, however, be at the cost of other member countries of the WTO. This situation will always arise in cases where an importing country imposes an ESM that is modelled on GATT within the framework of GATS and not in the context of some other bilateral or broad regional economic integration or investment agreements to which it is a party.

This divided application of the safeguards measure will create treaty complications because of the simple fact that the “legal effect of an RTA is only to create new rights and obligations for the Members under the RTA regime, rather than changing the rights and obligations under the ‘covered agreements’ of the WTO because the WTO Agreement provides exclusive procedures to be followed in amending the obligations under the

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<sup>65</sup>President of Russia, ‘Meetings with Representatives of Various Communities’, Speech presented at the XI Saint Petersburg International Economic Forum, June 10, 2007, Saint Petersburg, Russia [http://www.kremlin.ru/eng/speeches/2007/06/10/1823\\_type84779\\_133685.shtml](http://www.kremlin.ru/eng/speeches/2007/06/10/1823_type84779_133685.shtml) (visited 14 June 2007).

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‘covered agreements’, any amendment must follow such prescribed procedures before it could change the content of the ‘covered agreements’ under the WTO<sup>66</sup>. Even though the Panel and the Appellate Body have no power to change the rights and obligations of the Members, the Members themselves can always conclude other treaties (such as RTAs) to change their rights and obligations under the WTO. To give effect to these treaties, the panel and the Appellate Body shall have the power to apply them in WTO disputes as well. Otherwise, the power of Members to conclude other treaties would be diminished. The decisions reached, if any, on the question of standalone ESMs under GATS will have influence on trade in services between the countries that are party to an RTA. The impact of the RTAs will apparently be felt in the Agreements in fairly diverse areas particularly those that relate to Investments,<sup>67</sup> and also even in cases of other binding bilateral and multilateral agreements or contracts like those on Transfer of Technology.

If the liberalization and binding market access commitments that have been made by the developing countries with respect to cross border trade in the services collectively at the Multilateral, Bilateral and Regional level are evaluated in an all-encompassing manner, then the assertions made by some analysts about the lack of progress in the overall liberalization in the services sector because of lack of presence of independent Emergency Safeguards provisions under the covering Agreement becomes seriously questionable. The overall, market access commitments offered and made under different PTAs by the WTO Members tend to go significantly beyond offers that have been tabled in terms of improved and new bindings in context of trade liberalization under the GATS. “The proportion of new/improved commitments is also generally much greater in PTAs (compared to GATS offers) than in GATS offers (when compared to existing GATS commitments). There is, however, a great diversity in the offers made by the countries. The countries that have signed a PTA with the United States, like, Bahrain, Central American countries, Chile, Colombia, Dominican Republic, Morocco, Oman, Peru, and Singapore had generally made mode 1/mode 3 bindings in their GATS market access schedules or had made offers in less

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<sup>66</sup> Gao Henry and C. L. Lim *Saving the WTO from the Risk of Irrelevance: The WTO Dispute Settlement Mechanism as a ‘Common Good’ For RTA Disputes* Journal of International Economic Law 11(4), 899–925

<sup>67</sup> Investment’ in these Treaties is normally defined to include, among others: ‘shares in and stocks of a company and any similar forms of participation in a company’. This implies a wider coverage than the scope of the GATS, which is limited to foreign majority-owned or foreign-controlled companies, thus excluding mere portfolio investments.

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than half of all services sub-sectors, however, these countries have taken giant leaps in the commitments made under the PTA in terms of sector coverage: on average, they have for both modes of supply in more than 80% of all services sub-sectors<sup>68</sup>.

Those countries that have a comparatively higher number of service sectors already bound under their GATS schedules of market access commitments, have all offered much improved level of binding under the PTAs. For example: “Singapore, under mode 3, has gone much beyond its GATS offer by improving the level of commitment in 45 sub-sectors (30%) and making new commitments in 63 sub-sectors (41%). Similarly the Dominican Republic, which had mode 1 commitments in its GATS schedule/offer in 26% of sub-sectors has increased this proportion to 89% in its PTA. Overall, while much diversity was found, the overview suggests that many PTAs go well beyond GATS offers in terms of sector coverage (i.e., commitments in new sub-sectors), but also levels of commitments, as suggested by the proportion of sub-sectors where commitments in GATS schedules/offers were improved. Many PTAs have gone a long way to correct the generally low level of sector coverage in Members' existing GATS commitments and the modest quality of offers in the Doha Round. PTAs generally have provided for significant improvements over GATS commitments, sometimes even leading to real liberalization of the market. The advances in PTAs have in general well exceeded the offers made in the context of the Doha Round<sup>69</sup>.

The member developing countries, in most cases, have already experimented with autonomous liberalization, as was done in the goods sector, prior to scheduling of the commitments; the autonomous liberalization has provided these countries with the experience of the possible impact of opening up of the service sector and may have helped them identify the limitations which may be incorporated in their respective schedules. This prior experience and assessment of liberalization theoretically should have eliminated the apprehensions with respect to making liberalizing commitments and need of ESMs

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<sup>68</sup> Roy Martin, Juan Marchetti and Hoe Lim; *Services Liberalization in the New Generation of Preferential Trade Agreements (PTAs): How Much Further Than the GATS?* World Trade Review Cambridge University Press (2007), 6: 162

<sup>69</sup> Roy Martin, Juan Marchetti and Hoe Lim; *Services Liberalization in the New Generation of Preferential Trade Agreements (PTAs): How Much Further Than the GATS?* World Trade Review Cambridge University Press (2007), 6: 162

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under the covering WTO Agreement.. The reluctance of the Members to offer bindings under the WTO suggests of profound and structural problems with the System, it is the frustrations or concerns with the WTO system and efforts to channel away from it is a fact that is reflected in the rapid growth of Bilateral, Plurilateral and Regional Free Trade and also much broader and deeper Economic Integration Agreements

However, undertaking of binding commitments by individual countries on an MFN basis under the GATS is another issue; there is not only a definite lack of interest but also some pull back. The liberalization and development of new regime governing trade in services are amply reflected in the fact that quite a number of Members have undertaken fairly sweeping market liberalization commitments even with respect to Mode 3 of delivery of services (investments) either under Regional Trade Agreements (RTAs) or strictly within the context of BITs. The same countries, however, appear not to be inclined to undertake any commitments or make any offers for binding in the MTNs that are under way in Geneva under the auspices of the WTO. The commitments in WTO were even denied in the context of even those service sectors where these countries have already yielded their sovereignty to legislate under a BIT or the PTA.

The expansive liberalization and in most cases legally enforceable commitments have voluntarily been undertaken by the developing countries in the context of the PTAs despite the fact that very few Regional Economic/Preferential Trade Agreements actually do not contain any provisions allowing for taking some sort of Emergency Safeguards Measures and, where these provisions do exist, their scope has been made time bound and confined mostly to an initial implementation or transition period. In a nutshell, “21st century regionalism is not primarily about preferential market access as was the case for 20th century regionalism; it is about disciplines that underpin the trade-investment-service nexus. This in practical terms means that 21st century regionalism is driven by a different set of political economy forces; the basic bargain is “foreign factories for domestic reforms” and not simply traditional “exchange of market access”<sup>70</sup>”.

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<sup>70</sup>World Trade Organization, Baldwin Richard, *21<sup>st</sup> Century Regionalism: filling the gap between 21<sup>st</sup> century trade and 20<sup>th</sup> Century trade Rules*, Staff Working Paper, Geneva, May 2011

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A WTO Panel is subject to a fundamental limitation: “it may only examine a claim arising from an agreement covered by the “Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)<sup>71</sup>” agreed in UR of MTNs and annexed to WTO, and not some other source such as a PTA. The DSU explicitly states that a dispute must be brought under (‘pursuant to’) the relevant provisions of a covered agreement. This requirement would clearly exclude any attempt by a PTA party to launch a WTO dispute based solely on a trade-in-services commitment in a PTA. In addition, however, a WTO Panel might be subject to other jurisdictional limitations relating to a PTA<sup>72</sup>. These could include a provision in a PTA establishing precedence for its own dispute settlement rules, or an existing decision by a PTA tribunal that had already made a ruling on the matter, through a *resjudicata* effect. Similarly, a WTO Panel might decline jurisdiction where the two parties had made a bilateral agreement neither to appeal a PTA ruling nor invoke WTO dispute proceedings. Importantly, though, there would appear to be no other overall jurisdictional bar preventing a WTO Panel from hearing a defence, based on a provision in a PTA, to a claim arising under a WTO-covered agreement<sup>73</sup> as has been the practice under the GATT in cases of application of a measure involving the issue of PTA under the interpretation of Article XXIV of GATT.

### 6.5 GATS: CONTEXT & STRUCTURAL ISSUES.

The Marrakesh Agreement establishing World Trade Organisation created an organization possessing its own international legal personality’. In order to avoid any ambiguity about it,

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<sup>71</sup> World Trade Organisation, *The Legal Texts, The Results of Uruguay Round of Multilateral Trade Negotiations*, Cambridge University Press, Cambridge. 1999. Annex 2 to the Marrakesh Agreement Establishing WTO. p 354

<sup>72</sup> Gao Henry and C. L. Lim *Saving the WTO from the Risk of Irrelevance: The WTO Dispute Settlement Mechanism as a ‘Common Good’ For RTA Disputes* *Journal of International Economic Law* 11(4), 899–925; “DSU Article 23.2.(a) means that WTO Members have no recourse but to submit to WTO dispute settlement whenever there is a question involving the violation of an obligation under a covered agreement of the WTO, the exclusivity of WTO jurisdiction may be called into question in situations involving the following:

(1) An exclusive forum selection clause, electing RTA dispute settlement: the most obvious example is where there exists an exclusive forum selection clause choosing the RTA as the exclusive forum for all disputes or a certain class of disputes.

(2) A non-exclusive forum selection clause: the RTA provides for an alternative dispute settlement system in addition to the one available under the WTO and gives the Members the choice to resort to either system even if the matter falls within the jurisdiction of the WTO. This method may be found, for example, in Article 56(2) of the EFTA–Singapore FTA”

<sup>73</sup> Adlung Rudolf and Peter Morrison *Less Than The GATS: ‘Negative Preferences’ In Regional Services Agreements* *Journal of International Economic Law* 13(4), 1103–1143



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the Agreement Establishing the WTO in its Article VIII<sup>74</sup> specifies that the Organization “shall have legal personality”. The system is no longer based solely on the principles of a certain diplomacy which often led, under the GATT, to the adoption of negotiated solutions that reflected the relative power of the states involved in the negotiating process.

All of the WTO Agreements are adjoined under a ‘single undertaking’, and legal provisions emerging out of different WTO Agreements form constituting elements of a single system that is an integrated whole. A number of provisions recall this fact, in particular Article II: 2 of the Agreement Establishing the WTO states that the multilateral trade agreements ‘are integral parts’ of the Agreement Establishing the WTO and are ‘binding on all Members’. In the *Indonesia – Autos* dispute, the Panel which ruled in the first instance recalled that there was a presumption against conflict between the different provisions of the WTO treaty since they formed part of Agreements having different scopes of application or whose application took place in different circumstances. The Dispute Settlement Body (DSB), however, reaffirmed the Panel’s findings that Members must comply with all of the WTO provisions, which must be interpreted harmoniously and applied cumulatively and simultaneously. The ‘WTO treaty is thus a ‘single agreement’, which has established an ‘organized legal order’<sup>75</sup>.

More importantly, since both the GATT and the GATS are formally annexed to the same Treaty instrument, the ‘Marrakesh Agreement Establishing the World Trade Organization’<sup>76</sup>, pursuant to Article 31.2 of the Vienna Convention on the Law of Treaties (VCLT)<sup>77</sup>, a GATT provision may, therefore, be considered as ‘context’ in interpreting a

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<sup>74</sup> Marrakesh Agreement Establishing the World Trade Organization, Article VIII 1 on the Status of the WTO, reads as; “ The WTO shall have legal personality, and shall be accorded by each of its Members such legal capacity as may be necessary for the exercise of its functions”.

<sup>75</sup> Pascal Lamy *The Place of the WTO and its Law in the International Legal Order The European Journal of International Law* Vol. 17 No. 5, 969–984

<sup>76</sup> World Trade Organisation, *The Legal Texts, The Results of Uruguay Round of Multilateral Trade Negotiations*, Cambridge University Press, Cambridge. 1999.p3

<sup>77</sup> Vienna Convention on the Law of Treaties, Article 31, General rule of interpretation:

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

- (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
- (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty

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GATS provision; as the context for the purpose of the treaty interpretation comprises any annex to the treaty<sup>78</sup>.

Structuring of GATS on the GATT model, making it part of the ‘single undertaking’ and both the Agreements being annexed to the same treaty has linked the two Agreements in more than one way. Any standalone ESMs that are developed under GATS, on the model or paradigm provide by the GATT will also be burdened with the history of the emergency safeguards provisions under GATT including different rulings of the Panels and AB decisions that have already been taken under the GATT in the area of emergency safeguards. It will be interesting to recall here that in case of trade in goods “every emergency safeguards measure that has been taken by any member country and that has been challenged under the Dispute Settlement Understanding (DSU) of the WTO has been ruled either by the Panel or by the AB to be in violation of the WTO law”<sup>79</sup> implying that any application of the safeguards measure scrutinized by the Dispute Settlement System has been found to have problems associated with basis of the application of the measure. Invariably the Panels in their rulings have not upheld the Emergency Safeguards action taken by the importing country. Therefore, even in an unlikely situation where emergency safeguard measures are developed under GATS that are modelled on the GATT there will always, in ultimate analysis, be issues associated with their imposition and it will be difficult for the country applying the measure to withstand any challenge under the WTO’s dispute settlement system.

The GATS is a framework Agreement that also provides an umbrella for conduct of negotiations on sectoral, market liberalization Agreements<sup>80</sup>. However, the Agreement does not provide adequate disciplines on most indirect forms of protectionist measures that are normally concealed in domestic regulations. The dynamics of the international

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<sup>78</sup> Adlung Rudolf and Peter Morrison *Less Than The GATS: ‘Negative Preferences’ In Regional Services Agreements* Journal of International Economic Law 13(4), 1103–1143

<sup>79</sup> Sykes Alan O., *The safeguards mess: a critique of WTO jurisprudence*, World Trade Review (2003), 2: 3, 261–295

<sup>80</sup> Punta del Este Declaration with respect to services provides “Negotiations in this area shall aim to establish a multilateral framework of principles and rules for trade in services, including elaboration of possible disciplines for individual sectors, with a view to expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting economic growth of all trading partners and the development of developing countries. Such framework shall respect the policy objectives of national laws and regulations applying to services and shall take into account the work of relevant international organizations.

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merchandise trade are totally different from those of cross border trade in services, especially considering the latter's four modes of delivery. Despite basic differences in the coverage and of the products, efforts were made to develop GATS in the shadow of the GATT and there were more than one reason for doing so.

For reasons of specificities of underlying trade in services GATS could not purely imitate GATT and the efforts to replicate were extremely ambitious and almost a misadventure. The General Agreement on Trade in Services (GATS) as it emerged out of UR of MTNs is, therefore, fairly "complicated and suffers from basic inherent incomprehensibilities<sup>81</sup>". The complexities of the provisions have made the Agreement fairly ambiguous with uncertain implications particularly with respect to the practical application of different permitted measures under its existing provisions. There exist fair amount of unpredictability's in the Agreement even including with respect to its scope and also in some important areas of the Agreement's practical application.

The Agreement is still fairly new and substantive jurisprudence has yet to develop on it. Despite its limited life, the agreement, however, has now been unfolding itself now for over a decade; through the continued negotiations on the built-in Agenda that emerged out of the UR left overs; in the context of new Round of the MTNs and; also through the dispute settlement process. These unfolding processes of the Agreement, instead of clarifying the issues, have added to the complexities and created real apprehensions amongst the domestic service sector regulators in the Member countries with respect to the reach and scope of practical implications of the Agreement. In short in its ultimate effect the Agreement's "reach (far) exceeds its grasp<sup>82</sup>", as we have already seen this in the context of aspects of unpredictability attached to it.

The different rulings and decisions emerging out of the WTO's dispute settlement system have underlined the fact that in the undertaking of the new market access commitments under the GATS there were always some risks that were associated with ultimate

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<sup>81</sup> Mattoo Aaditya, *Services in a Development Round: Three Goals and Three Proposals*, World Bank Policy Research Working Paper 3718, September 2005

<sup>82</sup> Sinclair Scott, *GATS; How the World Trade Organization's new "services" negotiations threaten democracy*. Canadian Centre for Policy Alternatives Ottawa 2000

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unpredictably of these commitments. This unpredictability was particularly more pronounced with respect to the scope and coverage of the commitments which even at their best were mostly incomprehensible for the regulators to their definitive impact. The Agreement contains provisions that are surrounded by the ambiguities; these ambiguous provisions are not merely with respect to peripheral requirements under the Agreement but also with respect to some central and critical constituting elements for any Agreement conceived under the GATT paradigm. These ambiguous provisions include like those relating to market access (Article XVI), national treatment (Article XVII) and even domestic regulations (Article VI). There may be a number of other provisions in GATS that may eventually turn out to be similar and be also classified as ambiguous. However, most of the apprehensions about these other provisions, as yet, still remain to be tested and clarified to their ultimate effect or with respect to their final practical implications by passing through the scrutiny of the dispute settlement process.

In areas where the constraints imposed by the GATS on policy-makers and regulators are predictable; then it is the desirability of these constraints that has raised concerns with the domestic regulators, because the structure of the Agreement is already fairly intrusive in many aspects in to the trade policy areas that were previously considered exclusively within the purview of the domestic policy concerns. The ambiguity of the provisions combined with lack of understanding and the ownership of the treaty provisions by the concerned political official's has resulted in concerns being raised about the desirability and acceptability of these constraints.

Though efforts were made by the drafters of the Agreement to delineate the scope of the domestic regulatory provisions with respect to the market access and national treatment provisions, but the dividing line is not clear and the scope of applicable provisions of the Agreement remain misty and uncertain. The existing GATS rules and commitments create two distinct types of concerns and problems for the regulators that are domestically managing the compliance requirements with the obligations undertaken by a country in terms of the Agreement. The market access and national treatment provisions overlap if these are analysed on a conceptual level, any discriminatory quotas, if levied by a Member country, will practically fall within the scope of each. Similarly in situations where

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commitments made under the two provisions differ, it is almost impossible to identify the measures that can be precluded. In short, the Agreement in its current structure raises two types of serious and at times unnerving concerns for regulators: intrusiveness and inherent incomprehensibility.

The unpredictability of the market access commitments made by individual countries under the GATS have glaringly been brought out by the dispute settlement process and are reflected in the simple fact that the three WTO Members that possessed the strongest capabilities in the form of institutional resources with respect to the research capacities, a large, experienced and knowledgeable pool of legal expertise along with a well-trained force of professional, well exposed and resourceful negotiators have each been a defendant in the three different services related cases that have been brought before the WTO Dispute Settlement System. Each of these resourceful Members; the EU (in the *bananas dispute*), Canada (in the *automotive parts dispute*), the US (in the *gambling dispute*) was found to have misunderstood their own schedule of market access commitments that were drafted and agreed by them. All the three individual Members were also not able to comprehend or predict properly the full scope and practical implications of the provisions contained in the services Agreement as these were subsequently defined and interpreted by the dispute settlement processes.

The experiences that developed with respect to the Agreement in the context of the three cases involving the three major economies, that were also the primary movers and drafters of the GATS, interestingly suggests that the Agreement contains uncertainties of which its primary promoters and architects were even unaware of, or could not comprehend at the time of drafting it. In the *US-Gambling* case the core issue was considered to be that of applicable law and it was felt that the decision required was with respect to whether the US regulation of internet gambling or Antigua regulation of internet gambling would prevail, in connection with cross-border internet-based provision of services from Antigua to the United States. However, the *US- Gambling*<sup>83</sup> eventually through dispute settlement

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<sup>83</sup> World Trade Organization *WTO Dispute Settlement: One-Page Case Summaries 1995-September 2006*, Geneva 2007: in the *US-Gambling*, “The Appellate Body upheld, based on modified reasoning, the Panel’s finding that the US GATS Schedule included specific commitments on gambling and betting services. Resorting to ‘document W/120’ and the ‘1993 Scheduling Guidelines’ as the ‘supplementary means of

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process emerged to be a case regarding market access and the United States was found to have violated Article XVI of GATS, which was read to impose restrictions in this case that are similar to those under Article XI of GATT. The general exception provisions under Article XIV of GATS, which are very similar to Article XX of GATT, also came into play, creating uncertainty as to the scope of regulatory authority<sup>84</sup>.

The issue relating to the co-application of the GATS and GATT arose for the first time in the context of the *Canada—Periodicals*<sup>85</sup> case, both the Panel and the Appellate Body rejected the Canadian argument and determined that the obligations of both the Agreements (GATT and GATS) are cumulative and co-exist, rather than the obligations of one agreement (GATS) overriding those of the other (GATT). This ruling had very important and far reaching implications. The ruling put in place the seeds for later determination that the GATT and the GATS are not mutually exclusive Agreements and that these may overlap. It was also ruled that “a measure primarily relating to trade in goods can be reviewed under, and found to be inconsistent with, the GATS”. Competition-type disciplines that related to the behaviour of a private actor contributed to forcing a Member to open up its market on telecommunications services *Mexico – Telecoms*. Similarly a measure to prohibit (*US- Gambling*) the remote supply of gambling services was scrutinized and found to be inconsistent with that Member’s market access commitments. The *US-Gambling* has, in particular, contributed to bringing the GATS to the forefront and it sparked a “debate as to what should be the right balance between trade constraints, on one hand, and the autonomy of Members’ service regulators, on the other<sup>86</sup>”. The Appellate Body has on occasions drawn on the provisions available under the GATT in order to interpret GATS requirements that have a similar wording and intended functions.

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interpretation’ under Art. 32 of the VCLT, rather than context (Art. 31), the Appellate Body concluded that the entry, “other recreational services (except sporting)”, in the US Schedule must be interpreted as including ‘gambling and betting services’ within its scope”.

<sup>84</sup> Trachtman Joel P. *Regulatory jurisdiction and the WTO* J.I.E.L. 2007, 10(3), 631-651

<sup>85</sup> World Trade Organization *WTO Dispute Settlement: One-Page Case Summaries 1995-September 2006*, Geneva 2007: the *Canada-Periodicals* case was related to GATT Arts. III, XI and XX; and the Measures at issue was : (i) Tariff Code 9958, which prohibited the importation into Canada of any periodical that was a "special edition"<sup>2</sup>; (ii) the Excise Tax Act, which imposed, in respect of each split-run edition<sup>3</sup> of a periodical, a tax equal to 80 per cent of the value of all the advertisements contained in the split-run edition; and (iii) the postal rate scheme under which different postal rates were applied to domestic and foreign periodicals.

<sup>86</sup> Leroux Eric H., *Eleven Years of GATS Case Law: What Have we Learned?* *Journal of International Economic Law* 10(4), 749–793

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The Appellate Body has used the extensive jurisprudence on general exceptions under Article XX of GATT in order to shed light on the analogous provisions in Article XIV of the GATS. In *US — Gambling*, the Appellate Body applied interpretations developed under Article XX of GATT to GATS Article XIV on the basis that both provisions have the same objective and that each uses ‘similar language’<sup>87</sup>.

If domestic regulators are to support the political officials for making binding market access commitments, they need to be reassured that these commitments have predictable implications and strike the appropriate balance between market access and regulatory autonomy<sup>88</sup> something with which the regulators are not confident at present. The focus on obtaining market-opening commitments in the post UR negotiations in the services sector has led to a relative neglect of the wider regulatory context. This avoidance of regulatory context has made the market opening goal even more difficult to attain within the GATS/WTO system. Members instead of focussing on market liberalization needed to respond to ‘three substantive concerns that were holding the market liberalization, these concerns, as we have discussed, were; i) that GATS commitments deprive regulators of the freedom to regulate and the full implications of the commitments are very difficult to predict; ii) that the service sector regulatory institutions in a many countries are too weak to cope with liberalized markets; and iii) There is no provision for the regulatory cooperation that is necessary for successful liberalization’<sup>89</sup>.

In a fast globalizing and interdependent world the solution to issues being faced in the negotiations like those under the GATS also require harmonisation of domestic legislations and regulation. However, the GATS did not sufficiently consider the issue of international cooperation and possible harmonization of international supervisory standards. The dynamics of global trade are changing fast and the boundaries between different areas of economic activities and international interactions are rapidly getting blurred. The different fields of interstate economic relations that were customarily considered as mutually

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<sup>87</sup>World Trade Organisation Appellate Body Report, *United States—Measures Affecting the Supply of Cross-Border Gambling Services*, WT/DS285/AB/R, adopted 20 April 2005, Para 291

<sup>88</sup> Mattoo Aaditya, *Services in a Development Round: Three Goals and Three Proposals*, World Bank Policy Research Working Paper 3718, September 2005

<sup>89</sup> Mattoo Aaditya, *Services in a Development Round: Three Goals and Three Proposals*, World Bank Policy Research Working Paper 3718, September 2005

detached now interact at different places and also at times overlap. The traditional modes of classifying different areas into different fields of economic relationship are becoming difficult to segregate<sup>90</sup>. Problems with conduct of smooth international economic relations are also highly interdependent in reality and cannot easily or neatly be allocated to one or the other institutional framework. For “example, the depletion of oceans cannot be effectively addressed in the framework of FAO and the Law of the Sea Convention without addressing WTO related subsidies to the fishing industry. Health issues dealt with by the World Health Organization (WHO) cannot be dealt with without taking into account WTO law, in particular intellectual property rights<sup>91</sup>”. Another example can be drawn from the concept of ‘collective preferences’ that if Emergency Safeguards having an undertone of collective preference or some other shade of social safeguards if agreed to be accommodated as additional safeguards under WTO system will cut across currently segregated institutions.

### **6.8 CONCLUSION**

The GATS as an international treaty is still fairly young and also in its early stages of development. Broad based Multilateral Framework Agreements like GATS can anyway not be concluded and finalized in a single push; such Agreements normally evolve gradually by moving one step at a time. The parties involved also appreciate and understand these facts and that each step taken by them during the evolution of the Agreement may be incomplete but this incomplete step is very important in itself as this creates a requirement for further steps to be taken in proper course of things so as to make the Agreement complete and also keep it relevant. That is exactly how the post-war simple Coal and Steel Community gradually, taking one incomplete step at a time, transformed itself into the EU as we see it today that is still in the evolution process. Similarly there was nothing extraordinary in the GATS becoming an agreed treaty while simultaneously still being a work in progress. Though there is tremendous strength in the argument to move forward and not only complete but also to expand the Agreement through successive rounds of MTNs. However, for the Agreement to remain relevant the pace of movement forward and its agenda of work

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<sup>90</sup> For example; IPRs are built into the Investment Agreements as ‘Investment’ not as IPRs

<sup>91</sup> Cottier Thomas, *Challenges Ahead In International Economic Law* Journal of International Economic Law 12(1), 3–15



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also have necessarily to match the evolving requirements of the participants and also the changes occurring in the international trading system.

All international Agreements between sovereign states involve some sort of a trade-off between flexibility, security and predictability. Provisions for possible application of ESMs in the international trade agreements in practical terms are also simply a mechanism to provide an accepted instrument for creating flexibilities in the Agreement by providing a conditional escape clause. In the specific context of developing ESMs under GATS, the challenge was to strike a balance between the cost of giving up some predictability by the members and the benefit of securing market access. The negotiating process in WPGR on the question of ESMs under GATS, which was a carryover and unfinished work from the UR of MTNs, was irrationally difficult as the Working Party was expected to deal with issues that were not only new but also little understood. The difficulties for the Members were compounded by the fact that there were no conventions or history of past practices of rulemaking in the areas under negotiations in the WPGR and also on the issues involved which the Working Party was trying to capture.

The negotiations on the question posed in Article X of GATS suffered from a combination of factors that included excessively limited scope of the model the negotiators chose to follow strictly. The negotiators, particularly the *demandeurs* of the standalone ESMs under GATS, tried to draw too many inspirations from the existing incoherent and not so efficacious mechanism of the ESMs that was already available for merchandise trade under the GATT. The negotiating mandate that read as; “multilateral negotiations on the question of emergency safeguard measures based on the principle of non-discrimination<sup>92</sup>”, therefore, after almost a decade of intensive negotiations still remains as an open issue, with little common understanding amongst the negotiators about the issues involved and even the future course of work to be adopted.

However, the analyses undertaken earlier in the course of the thesis suggests that even if an agreement is reached, amongst the participants, on the feasibility of the ESMs and these are also found to be desirable under the GATS, the eventual shape that these ESMs may take,

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<sup>92</sup> Article X:1 of the GATS

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following the incoherent model provided by the GATT will have some real associated concerns, and the mechanism developed will also have fairly broad implications attached to it. The implications of such a major outcome in the interstate economic relations will be fairly far reaching to extent that these will be not easy to grasp. The ESMs, if agreed and developed under GATS that also have a 'context' with GATT and in the contemporary scenario of interstate economic relations that are dominated by BITs and other deeper and broader economic integration agreements, will not simply and solely fall under the domain of GATS or even the WTO, at times. The application of ESMs will in all probability also simultaneously fall under the domain of either some other source of international law or under the purview of some other Regional or Bilateral trade or broader economic treaty. This overlap will not only create further complications but also contradictions.

The argument asserting that the incorporation of specific emergency safeguards provisions under GATS that will make the liberalization in the service sector possible does not appear to be irrefutably convincing. The development of independent ESMs under GATS, modelled on GATT, as a precondition for liberalization, considering the weakness of the model and dynamics of the services sector also appear to be irrelevant. Meaningful liberalization of markets is only possible through a concerted policy approach. The availability of ESMs in the regime governing trade in services is unlikely to contribute much to liberalisation and even if these are introduced as independent provisions under GATS. As ESM provisions without ownership of and commitment to the liberalization process may well become captive of protectionist interests, both within the industry and politically and the provision may be used even to simply bypass the natural structural adjustment needs associated with any market opening process. To be really meaningful the policy regime in individual Member countries governing international trade in the services requires political and intellectual ownership and policy needs to be subjected to public scrutiny with public officials enthusiastically trying to create understanding and appreciation of the merits of services liberalisation in the domestic market. This awareness has to be supported by independent public research and other reliable policy inputs on the costs and even benefits of protection.

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In terms of the mandate given in GATS for the negotiations on ESM in the WPGR it was not necessarily required to follow the paradigm provided by the GATT. The direct and unqualified association of the mandate to the objectives and the paradigm provided by the Article XIX of the GATT and also the AoS was an unnecessarily narrow and rigid interpretation. This reading combined with the interpretation of the question raised in Article X of the GATS was confusing when this interpretation was strictly observed to mean not only an affirmative answer to the question raised but also a positive tangible outcome that was tried to be created to the exclusion of discussions on other parallel issues within the WPGR. This was especially so when the negotiations also ignored the specifics of the cross border trade in services and its coverage under the GATS as differentiated from the regime provided for the trade in goods under GATT. The unreserved embedding of the negotiations in the WPGR in to the GATT paradigm limited the possible policy choices that could become available to the negotiators. If the Working Party had adopted an open approach to the negotiations the chances of creating innovative policy choices would have been comparatively much greater. This narrow and restricted approach to devising of ESMs under GATS on a flawed model was destined to suffocate, mislead and eventually derail the discussions.

Despite developing a strong linkage between the development of ESMs and market access, Members in accordance with Article XIX of GATS have also entered into consultations for progressive liberalization of the markets. They have formally adopted the 'Guidelines and Procedures for the Negotiations on Trade in Services', and also held a Services Signalling Conference in July, 2008 that was followed by the Services Cluster meetings in March/April, 2009. These concurrent activities of the members suggest that the Members have practically reconciled to the prevailing situation and decided to terminate or suspend or simply abandon the multilateral negotiations that were underway in the WPGR on the question of ESMs under GATS. However, this state of affairs still provides the room for use of scheduling flexibilities by the countries, and it appears that for all practical purposes they for present will have to be contented with sector specific solutions to the question of standalone or specific ESMs in the Services Agreement.

## 6.9 CLOSING REMARKS

Negotiations by definition are a dynamic process in which negotiating stances taken by the participants normally shift over time and are modified within the course of negotiations, especially by the principal parties, so as to enable the development of an agreement<sup>93</sup>. The irrational rigidities in the negotiating positions of a group of countries in any one area of negotiations are normally interpreted either as a tactical negotiating stance for extraction of some concessions in a remotely linked area or even in a totally detached subject but usually being negotiated under a common umbrella. This irrationality can, at times, also be interpreted to be a part of a larger grand design of some major parties to stall the negotiating process altogether by leading the process in to a blind alley with nowhere to go and even more difficult to come out of.

The approach adopted in the negotiations on ESMs under GATS by strictly restricting these solely to the GATT model by some major developing countries essentially reflected of multiple possible reasons or factors and from which different and interesting inferences can possibly be drawn. This singular focus suggests of an unchecked and irrational familiarity bias towards GATT. In addition, this conduct of discussions or negotiations in the WPGR in the area of Emergency Safeguards Measures, totally within the confines of the incoherent model provided by the GATT, despite the enormous differences in the dynamics of underlying sectors of trade in goods and services, may not simply be an innocent lack of understanding of issues involved. This rigid approach may very well have been a component of an overall premeditated strategic design; a deliberate policy choice and; a conscious decision to simply keep the negotiators entangled in a non-productive and impossible pursuit while simultaneously, for tactical reasons keep the activity of negotiations alive and an on-going process while patiently waiting for triggers when this process can eventually be led to derail itself.

The negotiations on the question of ESMs in the WPGR if analysed in the context also appear to have been guided into getting stalled. Though the 'Members had to all extent

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<sup>93</sup> Zartman, William I (ed) Processes of International Negotiations (PINS) Project, *International Multilateral Negotiations, Approaches to Management of complexity*, Josey-Bass, California, USA, 1994

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acknowledged the impossibility of conceiving GATS equivalent to relevant trade remedy GATT provisions<sup>94</sup>, but despite this acknowledgment restricting discussions for possible development of ESMs under the GATS solely to the GATT model led to the stalling of the negotiations. If seen from a different perspective this exercise can be attributed to the overall negotiating design of some member countries or coalitions to relegate the rule making issues carried forward from the Uruguay Round, ensure that these issues remain unresolved and also preserve them in the process so that these outstanding issues linger as a work in progress. Through these tactical endeavours and in a narrow perspective these countries desired, probably successfully, to eliminate any pressures on them with regards to undertaking of any new substantive market access liberalization obligations in the services sector under GATS on a multilateral basis. These countries were, particularly apprehensive and concerned with creating multilaterally agreed disciplines on and allowing investments on an MFN basis under mode 3 of the service delivery.

The advanced developing countries denied undertaking of market access commitments under the WTO without the development and incorporation of standalone ESMs under GATS and this concern stalled the negotiating process on the ESMs in the WPGR. Interestingly all this occurred concurrently and in parallel with undertaking of substantive liberalization of their services sector markets under other Arrangements by the same countries that had refused to make market access commitments without the ESM under GATS on the multilateral basis. These countries unconditionally liberalized their service sectors in the context of other Regional Trade Agreements or more comprehensive and deeper Economic Integration Arrangements that had no specific provisions for application of the ESMs and in most cases these Regional Agreements also had no other provisions that could possibly substitute for ESMs as have been identified under GATS in Chapter 5 of the thesis.

The proclaimed need of some Members of existence of ESMs in the services Agreement for undertaking market liberalization commitments appears purely to be a tactical negotiating stance. This fact is all the more clearly brought out when the market

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<sup>94</sup> Adlung Rudolf, *Services Negotiations in the Doha Round: Lost in Flexibility?* Journal of International Economic Law 9(4), 865–893 October 2006

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liberalization by the ESM demanding individual countries undertaken in context of PTAs with countries of their choice is evaluated against their market access commitments under the GATS where any extended commitments will be on an MFN basis and infected with ‘free riders’. Given Members’ scheduling flexibilities, leeway in granting trade-defensive subsidies, plus possible constraints under Preferential Trade Arrangement and Bilateral Investment Treaties (BITs), it is difficult to imagine if there is “any role left for safeguards modelled on Article XIX of the General Agreement on Tariffs and Trade (GATT)<sup>95</sup>”.

When the GATS was agreed in 1994, there was little understanding that the internet would provide such a wide avenue for the cross-border provision of services. The phenomenal development of the internet has redrawn the traditional concepts about the cross border trade in services and also of the regulatory jurisdictions. The transformation brought about by the internet has also created related issues with respect to the extent to which the MFN and national treatment obligations apply across various modes of supply of services. Contemporary trade is radically more complex than it was in 1940s, the internet revolution has led to an internationalisation of supply chains, and that has now evolved to create a fairly strong ‘trade-investment-service nexus’. This nexus is now at the heart much of present day international trade both in goods and also in services. The countries that were demanding the standalone ESMs under the GATS with the declared intention to provide them with the comfort level to offer market access commitments under the GATS were strangely also the same advanced developing countries that were opposed to the conduct of negotiations to set up working groups on ‘investments’ and ‘competition’ in terms of Singapore Ministerial Meeting decision<sup>96</sup> in 1996.

In the broader sense these advanced developing countries were, through their efforts to stall the negotiations in the WPGR, trying to avoid undertaking of new binding market access commitments under the WTO’s Services Agreement. They linking of the liberalization in the context of the WTO to formulation of the ESMs under GATS deflected any pressures to do take market access commitments especially under mode 3, primarily because of nexus

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<sup>95</sup> Adlung Rudolf, *Negotiations on Safeguards and Subsidies in Services: a Never-ending Story?* Journal of International Economic Law 2007 10(2):p 238

<sup>96</sup> World Trade Organisation, Singapore Ministerial Declaration, WT/MIN(96)/DEC, Adopted on 13 December 1996

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of mode 3 of supply of services (commercial presence) and investments. These countries by stalling the progress on GATS and thus mode 3 of supply of services (commercial presence) were simultaneously also avoiding any movement forward or conduct of negotiations in terms of the decision contained in Article 9 of the WTO's Agreement on Trade Related Investment Measure (TRIMs). The TRIMs provides for consideration, at a later date, of whether the Agreement should be "complemented with provisions on investment and competition policy more broadly"<sup>97</sup>.

It is worth noting here that the countries that were seeking ESMs as a prerequisite to making of market access commitments under GATS were also opposed to development of Multilateral Agreement on Investments<sup>98</sup>. There are currently no all-encompassing multilaterally agreed treaty disciplines or universally accepted rules concerning foreign direct investments. All efforts made in the past to negotiate a Multilateral Agreement on Investment especially between 1995 and 1998 under the auspices of the OECD failed because of opposition of almost the same group of advanced developing countries. Most of the major developing countries are not interested, and averse, to development of any multilaterally binding disciplines on cross border Investments, especially under a unified framework that has a robust Dispute Settlement System and compensation mechanism.

These advanced developing countries<sup>99</sup> as a group were also strongly opposed to the inclusion of services in the agenda for UR of MTNs for negotiating a multilateral agreement on cross border trade in services. Any comprehensive Services Agreement, in the perception of these countries, anyway was not in their interest. These countries wanted to retain the total sovereignty over their investment policies and to be in a position to provide protection to their service industries and create the opportunity to grow and eventually become competitive. Stalling of negotiations on the ESMs under GATS in the WPGR, virtually stifled the GATS, these countries in practical terms achieved in the WPGR what they could not stop at Punta Del Este.

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<sup>97</sup> TRIMS Article 9: Review by the Council for Trade in Goods reads as; "Not later than five years after the date of entry into force of the WTO Agreement, the Council ...shall consider whether the Agreement should be complemented with provisions on investment policy and competition policy.

<sup>98</sup> The prominent amongst these countries were India, Brazil and even some ASEAN countries.

<sup>99</sup> This group of developing countries included amongst others; India, Brazil, Argentina, Ecuador, Egypt and ASEANS excluding Singapore.

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The WTO system, is anyway victim of a general paralysis primarily because of the cumbersome institutional machinery, refusal of the Institution to expand its existing limited agenda. In recent years, technology has transformed global markets. Investments, IPRs, environment, competition policy and Regional Economic Integration Agreements have become critical levers of economic statecraft. For any system to remain relevant, including WTO system, it is necessary that it should have the capacity to accommodate these diverse interests, be flexible and continuously adjust and extends its agenda to the needs of its membership in a dynamic and rapidly changing world economic order. The WTO is not geared to address any of these contemporary issues of interstate economic relations, the issues have to be addressed, the institutional rule making and governance vacuum cannot exist. The WTO needs major surgery in order to respond effectively to the new political realities in the international economic system.

The WTO cannot be the old GATT and survive; members need to abandon the agenda and practices that are no longer relevant. “A ‘time out’ can be put to good use if it is used to seize the opportunity to search for a new culture and mandate for the WTO – a culture and a mandate that meets the needs of all the global players in this multi-polar and interdependent world. New models for global economic governance need to be forged<sup>100</sup>”.

Slowly over the last decade the romance for WTO as a platform for rulemaking for conduct of interstate trading and an instrument or one of the principal sites of global governance has fading fairly rapidly. The world economic relationships and trading system has moved a long way away from where it was in late 1980s or mid-1990s. The WTO, despite attached issues and the stalling and failure of the negotiations, has not lost its relevance as given the transforming state of affairs and emergence of multi-polarity in the international economic relations. It will be really difficult, if not impossible, to forge a multilaterally agreed binding international treaty with such a broad coverage and a strong Dispute Settlement System. The Dispute Settlement System of the WTO is not only robust but is also functioning. The consumers in major countries have serious concerns with lack of grasp of the system for ‘collective preference’, the WTO system has no option but to create some space to accommodate these ‘preferences’ or else we may see re-emergence of some form

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<sup>100</sup> Steger Debra P. *The Culture of the WTO: Why it Needs to Change* Journal of International Economic Law 10(3), 483–495



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of ‘grey area’ measures creeping in. Though the discussions “on the value of collective preferences in trade negotiations is still at an early stage, nevertheless, the questions raised by Pascal Lamy do relate to the existing debate on the role of the WTO in global governance ... and the challenge, in his view, was to design an open trading system that everyone accepts and that safeguards legitimate social choices<sup>101</sup>”.

The WTO is a strong and an effective organization that provides a fairly comprehensive foundation for conduct of basic rules-based trading system to the world, the rest is mostly incremental to it. If the negotiations under the aegis of WTO fail, “it will not be the end of the WTO. On the contrary, it might provide a useful ‘time out’ for the multilateral system to find its new stride. A related problem is that the mandate of the WTO is no longer clear<sup>102</sup>” and in most aspects not relevant to the contemporary interstate trading relations. Negotiations may be dead but dispute settlement under WTO is very much alive and empowered. However, the trading nations of world becoming disenchanted by the WTO’s new rule making and trade liberalizing negotiating processes primarily because of the slow pace and rigid agenda. All this does not make the WTO irrelevant.

The Daniel Altman in his article that was carried by the Newsweek Magazine in its February 2010 edition had very appropriately brought out the contemporary realities of evolving interstate economic relations. He rightly acknowledged the fad towards formation of Trading Blocks, and also that eventually these blocks will have to look outside to enlarge their reach not only with respect to the raw materials but also with respect to the consumers and knowledge. Though Altman has not said it, but his vision is reflected in the approach adopted by the current day two economic giants, namely the European Union and the NAFTA. Their evolutions in thought of the great economic powers and approach to issues are the practical or the real world manifestation of the path the countries will be adopting for their future. The two economies are now also linking up with other trading blocks and provide the role model for development for other countries. Daniel Altman’s article reads as “...the World Trade Organization has been trying to lower trade barriers ... whether the

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<sup>101</sup> Tristan le cotty Tancrede voiturier *The potential role for collective preferences in determining the rules of the international trading system*, Institut du développement durable et des relations internationales Paris 2008,

<sup>102</sup> Steger Debra P. *The Culture of the WTO: Why it Needs to Change* Journal of International Economic Law 10(3), 483–495

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WTO succeeds or not will make little difference to most people; indeed, trade negotiations would actually go much further if the WTO simply closed down its talk's altogether. The majority of nations can simply leave the obstructionists behind and move forward with regional trading partners. Eventually, most of the world's trading nations will arrange themselves into just a few big blocs... the blocs will focus on lowering trade barriers among their own members. Those that lower barriers faster will create more gains from trade, and their incomes will rise more quickly. ... As a result, blocs that lower trade barriers will see incomes converge; their members will start to look more and more like each other. When that happens, the blocs will have to look outside their borders to other countries for cheap materials and labor. They'll find those countries in the blocs where incomes didn't rise as much. All of a sudden, the big blocs will have a very strong economic motive to start talking to each other. ... This is how global trade talks will work in the future<sup>103</sup>.

In the fast changing patterns of economic relationships amongst the countries, the traditional concept of application of Emergency Safeguards Measures that strictly follows the paradigm that is provided in the GATT now has minimal utility. This lack of relevance of the concept is particular applicable to the cross border trade in services. The present-day economic and trade relations amongst countries do not work by the paradigms that were developed around early to mid of last century. The different factors including unbundling or slicing of productions, currency movements, social preferences, standards, low tariffs have all now dramatically shifted the working paradigms. The traditional contingency protection instruments will continue to be used but with a declining utility. This is more relevant for ESMs as the WTO has a predictable Dispute Settlement System and conventionally an application of the measure has not been able to withstand legal scrutiny. These protection instruments, including the GATT concept of emergency safeguards has served its purposes well when it was relevant. It is not to pronounce that they will be no application of emergency safeguards but these may have any reasons including prevalence

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<sup>103</sup> Daniel Altman, *Goodbye and Good Riddance Why the WTO could soon be obsolete*. Newsweek, Feb 20, 2011

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of some lobby<sup>104</sup> on the public officials but most probably not for the valid reasons of temporary reprieve in the circumstance specified.

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<sup>104</sup> The US Voluntary Restraints Agreements (VRAs) Voluntary Export Restraint (VERs) and Safeguards actions with respect to certain Steel products is an interesting study in this regards.

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