A CRITICAL LEGAL AND ECONOMIC ANALYSIS OF THE POTENTIAL THREATS AND OPPORTUNITIES ASSOCIATED WITH THE OUTSOURCING OF E-COMMERCE SERVICES IN DEVELOPING COUNTRIES WITH SPECIFIC EMPHASIS ON INDIA AND SELECTIVE SADC COUNTRIES

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A mini-thesis submitted in partial fulfillment of the LLM degree at the University of the Western Cape.

TITLE

A CRITICAL LEGAL AND ECONOMIC ANALYSIS OF THE POTENTIAL THREATS AND OPPORTUNITIES ASSOCIATED WITH THE OUTSOURCING OF E-COMMERCE SERVICES IN INDIA AND SELECTED SADC COUNTRIES.

KEYWORDS:

E-COMMERCE, OUTSOURCING, SADC, DEVELOPING COUNTRIES, DOHA DEVELOPMENT AGENDA, PROTECTIONISM, GATS, MILLENNIUM DEVELOPMENT GOALS, COMPETITIVE ADVANTAGE, TRASA, EMPLOYMENT OPPORTUNITIES

DISCRIPTION OF KEYWORDS:

1. E-commerce:

Production, distribution, marketing, sale or delivery of goods and services by electronic means.

2. SADC

Southern African Development Community with the primary objective to achieve economic development, alleviate poverty and to achieve enhanced standard of living and quality of life of the people of the region. (Refer to Art 5 of the SADC Treaty).

2. Developing countries:

All countries that are not regarded as high income countries, thus those countries with Gross National Product, less than US$ 5120 per annum. All countries under review for purposes of this paper fall into this category, i.e. Mauritius (US$3560 per annum), South Africa (US$ 2500 per annum) and India (US$ 470 per annum), based on 2002 definitions of the World Bank, available at www.worldbank.org.

3. Doha Development Agenda:

The Doha Development Agenda was adopted by the WTO Ministerial Meeting in Doha in November 2001 with the prime objective to ensure that developing countries and particularly Least Developed Countries (LDCs) share in world trade commensurate with the needs of their economic development.

4. GATS

General Agreement on Trade in Services

5. Millennium Development Goals (MDGs) :

The Millennium Development Goals were adopted by 189 members of the United Nations General Assembly in September 2000 and expresses the collective commitment to overcome poverty still gripping most of the world's people. The MDGs contain targets with clearly defined deadlines.

6. Protectionism:

A policy to shield the local economy from outside competition through high tariffs, subsidies or trade restrictions. (See www.icons.umd.edu).

7. TRASA:

The Telecommunications Regulators Association of Southern Africa.

8. Competitive advantage:

When a firm sustains profits that exceed the average for its industry, the firm is said to possess a competitive advantage over its rivals. Michael Porter identifies two types of competitive advantage, namely cost advantage and differentiation advantage. Cost advantage is achieved when similar benefits are delivered but at lower cost and differentiation advantage when benefits are delivered which exceed the benefits of competing products.

9. Employment opportunities:

The opportunity to provide any type of work or service in exchange for money, fees or any other benefit.

10. ITC Outsourcing:

Contracting of a service provider to completely manage, deliver one or more ITC function such as data centers, networks or software applications.

DECLARATION

I declare that " **A critical legal and economic analysis of the potential threats and opportunities associated with the outsourcing of e-commerce services in developing countries with specific emphasis on India and selective SADC countries**" is my own work, that it has not been submitted before for any degree or examination in any other university and that all the sources I have used, or quoted have been indicated and acknowledged as complete references.

ACKNOWLEDGEMENT:

In addition to the lecturers at the University of the Western Cape who were a great source of inspiration and support throughout the course work of the LLM Programme in Trade and Investment Law, I wish to extent a special word of appreciation to my supervisor for her constant support and encouragement during the finalisation of this mini-thesis. I would also wish to extend my appreciation to Professor Loretta Feris and the staff of the Law Library at the University of Pretoria for their assistance.

ACRONYMS:

AFL-CIO:	American Federation of Labor Congress of Industrial Organizations
ASP	Application Service Provider
BPM:	Business Process Methods
BPO:	Business Process Outsourcing
EU:	European Union
FDI:	Foreign Direct Investment
FOSS:	Free Open Source Software
GDP:	Gross Domestic Product
GPL:	General Public License
GATS:	General Agreement on Trade in Services
GATT:	General Agreement on Tariffs and Trade
ICT:	Information Communication Technologies
IPR:	Intellectual Property Rights
ITAA:	Information Technology Association of America
ITU:	International Telecommunication Union
MDG:	Millennium Development Goals
NASSCOM:	National Association of Software and Service Companies
NEPAD:	New Partnership for Africa's Development
OECD:	Organisation for Economic Co-ordination and Development
R&D:	Research and Development
SADC:	Southern Africa Development Community
SME:	Small and Medium Size Enterprises
TORAW:	The Organization for the Rights of the American Worker
TRASA:	Telecommunications Regulators Association of Southern Africa
TUPE:	Transfer of Undertakings and Protection of Employees
UNCTAD:	United Nations Conference on Trade and Development
USA:	United States of America
Wi Fi:	Wireless Fidelity
WIPO:	World Intellectual Property Organization
WSIS:	World Summit of Information Societies
WTO:	World Trade Organisation

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CHAPTER ONE: INTRODUCTION

1.1 Introduction and statement of the problem

As the cross-border trade in services increases it is to be anticipated that it could become an important source of economic growth and employment to many countries in the developing world.[1] Within context of the international trade in services, it is particularly the *outsourcing* of e-commerce services that could present attractive developmental advantages to developing countries. In addition to the obvious advantage of creating employment opportunities the educational, social and associated benefits cannot be disputed.[2]

A useful illustration in this regard is the significant effect that outsourcing in e-commerce has had on the economy of India. India has managed to leverage its comparative advantage in the supply of low-cost and high-skilled labour in the ICT sector to provide cost-effective outsourcing opportunities to companies in the developed world, especially to the USA. [3]

Outsourcing is attractive to various international multinationals, against the background of a competitive international economic and business environment and relatively inflexible domestic labour policies associated with high salaries and comprehensive social benefits, especially within the European Union. The volatile labour debate, and structural economic pressures currently witnessed in Germany as a result of the introduction of the controversial Harz reform measures (which among other propagates a reduction of unemployment benefits) is indicative of the pressures that large companies in certain OECD countries have to contend with to ensure greater international competitiveness.[4] This drive towards outsourcing is further enhanced by the fact that large organizations in the developed world are refocusing their efforts on their so-called core business where their competitive advantage lies. This trend encourages outsourcing of non-core activities to outside concerns. Should the e-commerce revolution indeed lead to significant employment and economic growth in the developing world, it is not unlikely that such a success would inevitably lead to a protectionist backlash in the developed world, particularly in the USA and the European Union. Protectionist measures could also rely on enthusiastic support from trade unions in the USA and the EU.[5]

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1 Wunsch p2
2p Okediji, p 18
3 Panagariya p1-2. Overinvestment in education has contributed to a large pool of skilled workers.
4 www.anwsers.com-harz-concept
5 UNCTAD, p135., also Schneider at p2

In this sense the debate in respect of outsourcing is not entirely dissimilar from that waged in respect of other equally contentious trade-related issues, such as the issue of adequate labour and human rights standards in the developing world, which resulted in volatile divisions at the WTO Ministerial Meeting in Seattle in 1999. **6)**

The first ominous signs of direct protectionist measures have already appeared on the international trade horizon, especially from the federal and state level in the USA.**7)**

Fears of possible indirect measures of protectionism in the international outsourcing market are also a source of concern. These fears have arisen, in respect of the protection of intellectual property rights and the protection of personal data in the process of the international outsourcing of e-commerce services.**8)**

In view of the above concerns, it is therefore opportune to investigate to what extent the above threats are realistically threatening the growth of the outsourcing markets in developing countries and specifically the potential economic and developmental benefits that may accrue to developing countries.

Specific attention will be paid to the extent in which the international, regional and national legal frameworks are equipped to deal with this possible threat. The paper will investigate this in respect to the question whether the existing provisions in the General Agreement on Trade in Services (GATS) are equipped to deal with the e-commerce challenge, and if not, which alternative mechanisms can be proposed.

Although India and South Asia have received the bulk of international e-commerce outsourcing contracts, it is not unlikely that other developing countries could follow this positive trend. Southern Africa is no exception, and this paper would critically investigate the preparedness of South Africa and Mauritius, that can be regarded as best placed to take advantage of this trend, within the Southern Africa Development Community (SADC).**9)**

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6 Odell, p403. The EU played an active role in lobbying on environmental, labour and competition policy issues
7Schneider, "Änxious about outsourcing"", Drezner: "The outsourcing bogeyman",p1
8Blane p1
9IDRC, "Problems encountered with e-commerce initiatives in Southern Afrtica,p3.

The Republic of South Africa and Mauritius have both adopted national e-commerce legislation, to increase their e-preparedness.[10] The effectiveness of the relevant legislation in both countries will be investigated, in addition to the attempts at fostering closer regional co-operation within the larger sub-region.

1.2 Objectives of the mini-thesis

This paper has the following main objectives:

a. Describing the nature and scope of the international outsourcing of e-commerce services

b. Anilysing whether the potential economic and developmental benefits associated with the outsourcing of e-commerce services in developing countries are realistic and not merely a passing trend? Within this context evaluating the role of relevant international institutions such as UNCTAD, the ITU and the WSIS. Also critically evaluating the role of the WTO with emphasis on the possibility that the Doha Development Round could be used to support the development of e-commerce to the advantage of so-called vulnerable economies.

c. Critically considering the existing threat that protectionism poses, particularly as it has manifested itself in the USA and determining whether the protectionist threat is justifiable on economic grounds and whether it is bound to have a negative impact on the growth in e-outsourcing contracts in developing countries?

d. Investigating the so-called indirect forms of protectionism, namely the effect that the protection of intellectual property rights and personal data may have on the international outsourcing market? Specific attention will be paid to the position in the USA and European Union, which can be regarded as key markets for the growth of outsourcing contracts in the developing world.

e. Evaluating whether the existing international legal framework can be regarded as an adequate vehicle for the promotion of the international trade in e-commerce services?

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10 The Information and Communication Technologies Bill 38/2001 (Mauritius)
Electronic Communication and Transactions Bill, 2000 (South Africa)

Relevant aspects of the GATS such as the appropriateness of the modes of supply and country scheduling commitments will be considered for this purpose, as well as alternative approaches which could possibly streamline the GATS to the advantage of the international e-commerce outsourcing trade.

f. An analysis of national e-commerce legislation in Mauritius and South Africa will be conducted to determine the level of preparedness of both countries to meet the opportunities which e-commerce can offer. To what extent can the experiences in South Africa and Mauritius benefit the SADC region and serve as a possible template for the development of the African continent as a whole? This issue is pertinent given the importance attached to the bridging of the digital divide and economic and social renaissance of the continent as a whole.**11)**

1.3 Significance of the study

The economic and social development benefits inherent in the outsourcing of e-commerce services to countries in the developing world should be apparent. In addition to the narrowing of the so-called "digital divide" as contained the UN Millennium Development Goals, a number of direct and indirect benefits can be identified.**12)**

It is clear that the outsourcing of e-commerce services could play an important role in economic and job growth in the developing world and also assist in the much-needed diversification of the relevant economies. This is of great relevance to the developing world where over-reliance on the export of primary goods, particularly agricultural good and minerals have contributed to the structural vulnerability of their economies.**13)**

It is also arguable that increasing employment opportunities in the ICT sector of poor countries could assist in the fast tracking of a number of developmental goals, ranging from scientific agricultural production to the improved and more effective rendering of key social services such as education and health. Initial trends in a developing country such as India point to the proliferation of Small and Medium Size Enterprises (SME) benefiting from the employment opportunities created by the outsourcing of e-commerce services.**14)**

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11 UNDP, see xxii-xxiii
12 NEPAD, "Bridging the digital divide", para 105.
13 UNCTAD E-commerce and Development Report, p 41-42.
14 Rai,: Software success has India worried" p1, The Economist, 23-29 April 05', p67-69

In Southern Africa and in particular in South Africa the growth of the outsourcing sector has received prominent media attention with the proliferation of call centers, established as a result of large interest, particularly from the European Union based investors.[15] In view of the importance of international e-commerce, the establishment of an effective international, regional and national legal regulatory framework, has new meaning as a means to pre-empt potential arbitrary interference from protectionist interests in the developed world .[16]

In answering this question it would be important to strike an appropriate balance between the legitimate regulatory interests of national legal jurisdictions and the international push by organizations such as the WTO to move relentlessly towards the liberalization of trade.

The importance of the above debate should also be placed against the background of the more favourable international climate associated with the launch of the Doha Development Agenda in 2001. The possibility of developing countries obtaining trade concessions from the developed world in the present political climate appears to be more promising.[17].

1.4 Methodology and overview of the chapters

1.4.1 Methodology

In addition to extensive Internet research, academic journals, legal text books, contemporary magazines relevant international agreements and national legislation were used as research sources for purposes of finalising this paper.

1.4.2 Overview of chapters

At the outset this paper would attempt to provide greater definitional clarity regarding the terms *e-commerce* and *outsourcing*.

The following section will concentrate on contextualising the importance of the debate on the international outsourcing of e-commerce services from an economic and developmental perspective given the importance devoted to the harnessing of ICT for developmental purposes by the NEPAD and the UN Millennium Development Goals (MDGs).

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15 Business Day: 29 Nov, 2004, "SA servicing call centers overseas" and "SA alive with possibility", "Dial SA for service"

16 Wunsch, p4-9

17 WTO: Doha Ministerial adopted at Doha art 2 on promotion of economic development

The question then arises as to the direct and indirect protectionist threats that could hamper the realization of the potential of the outsourcing of e-commerce services as an important development and employment source.

In view of the above concerns the paper will then critically analyse the appropriateness of the existing international, regional and selective national frameworks regulating the trade in services, with emphasis on e-commerce.

The analysis will be followed by specific recommendations, a conclusion and bibliography of all sources that were consulted in the course of this study.

CHAPTER TWO:

2.1 *E-COMMERCE, OUTSOURCING:* BACKGROUND AND DEFINITIONS

2.1.1 Background

From the outset it is important to determine the background on the use of the key terms *e-commerce* and *outsourcing,* which represent the core of this paper and will be referred to repeatedly.

These terms are often used loosely and may differ in meaning, depending on the context in which they are employed. Finding an accurate definition is likely to be an imperfect exercise as a result of the dynamic nature of international e-commerce. In view of rapid technological developments, international e-commerce is constantly encroaching on new areas of international trade.[18] This trend is also noticeable in the evolution of the international outsourcing of e-commerce services from routine, simple functions to increasingly complex processes. Business Process Operations (BPO), a sub-category of outsourcing may for instance include basic data entry services or alternatively refer to complex operations responsible for an entire business process.[19]

Wunsch corroborates this view, stating that there is strong evidence that the comparative advantage of developing countries would not be limited to the provision of mere basic services, such as standard back office services, but there are already indications that the supply of lower-end outsourcing services have evolved to so-called more integrated, expert-based services. [20]

Various companies have commenced proceeding along the value chain by focusing on innovation, consulting, branding and increasingly integrated services. With the anticipated exponential development in ICT technology this trend is expected to continue, providing for ever-increasing complexity in the outsourcing tasks to be performed.[21]

2.1.2. E-commerce

According to the WTO definition, e-commerce can be defined as follows: *Production, distribution, marketing, sale or delivery of goods and services by electronic means.*

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18 UNCTAD 137
19 Ibid
20 Wunsch: 8
21 Ibid

WIPO differentiates between electronic and commerce. According to this definition *electronic* is defined as *global infrastructure of computer and telecommunication technologies and networks upon which the processing and transmission of digitized data takes place. Commerce is defined as the expanding array of activities taking place on the open networks- buying, selling, trading, advertising and activities of all kind that leads to an exchange of value between two parties*. **22)**

It is clear that both definitions accommodate a wide range of potential activities and it is clear that the above definitions do not exclude other modes of conducting e-commerce services, including the telephone and facsimile.**23)**

The emphasis in this paper will however be placed on the impact that electronic communication in the form of the Internet and the world wide web will have on developing countries from an economic, developmental and legal perspective.

2.1.3. Outsourcing

Various definitions are attributed to outsourcing, depending on the context in which it they are used. Outsourcing is not a novel concept and has existed for decades, especially in the manufacturing sector as a means to reduce costs. With the advances in Internet network technology, high-speed data networks and increased bandwidth capacity, outsourcing has expanded to include a wide range of management services.**24)** (UNCTAD xxii)

Outsourcing can be described as *the practice of turning-over responsibility of some to all an organization's information, systems* applications *and operations to an outside firm.***25)** According to the UNCTAD definition, IT outsourcing is the *Contracting of a service provider to completely manage, deliver, one or more IT functions such as data centers, networks or software applications.***26)**.

Outsourcing of services within the cyber age refers to a wide range of services. Two broad areas of services that are relevant to the present debate can be identified. These include so-called information technology services and business process outsourcing.**27)** The former includes services such as software development, data processing and database services, and electronic procurement of services.**28)**

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22 Steenkamp, p3-4
23 Ibid
24 UNCTAD, 135-138
25 See: www.cbu.edu
26 UNCTAD, P135-138
27 Wunsch, 5
28 Ibid

Business Process outsourcing represents the second category of outsourcing of e-commerce services and refers to three sub-categories of activities, which include:

a. *Customer interaction services* such as reservations, customer services helplines and markets research services.

b. *Back-Office Operations* (BPO), which includes: data entry and handling, data processing, human resource and payroll processing, insurance, marketing, asset management, finance, banking and related services.

c. *Independent Professional or business services* such as human resource, financial, marketing, product design and accounting services. **29)**

The above definition and associated list of activities, although not exhaustive, provides and indication of the wide array of activities covered by e-commerce outsourcing as well as the significant impact that these activities could have on the international trade in services.**30)**

Despite these potential advantages, e-commerce services traditionally represented an area in which the developed first world has enjoyed a comparative advantage. However, with the advent of globalisation and the improved levels of international interconnectivity (through the world wide web) as well as the increased ICT skills level in the developing world this situation of relative imbalance can hopefully not be expected to prevail indefinitely.**31)**

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29 Wunsch 5
30 Ibid
31 Steenkamp, p5

CHAPTER THREE

3.1 CAN THE OUTSOURCING OF E-COMMERCE SERVICES BENEFIT THE DEVELOPING WORLD?

3.1.1 Introduction

In this study emphasis has been placed on developments in India, which has dominated the ICT outsourcing market and has set the benchmark for other developing countries hoping to emulate its success.

In addition to India, much focus has turned to development initiatives on the African continent with in the context of NEPAD and the implementation of the Millennium Development Goals. In this regard it is not co-incidental that the Millennium Development Goals provide for the "development of a global partnership for development" and for private sector co-operation aimed at making available the benefits of new technologies, especially information and communication technologies. For this reason promising ICT developments in relevant Southern African countries will be investigated in greater detail below.**32)**

3.1.2 India

It is anticipated that the global outsourcing could increase from US$ 172 billion (2003) to US$ 306 billion by 2007. Whereas India is expected to receive the majority of the outsourcing-related employment opportunities, increased opposition from key emerging markets such as the Russian Federation, South Africa, the People's Republic of China and Malaysia are expected. India has captured approximately 80% of the international ICT outsourcing market.**33)**

Outsourcing of ICT services to developing countries commenced in the early 1990s when US corporations began outsourcing services to India. US companies found that programmers in India could perform the work with the necessary skill, and the process was far less expensive than in the USA.
Low labour costs, a large English speaking, skilled population, an appropriate ICT environment, and a time zone difference, convenient to developed countries have benefited the outsourcing industry in India. **34)**
Outsourcing has also benefited India from a developmental perspective. The ICT sector is regarded as one of the most competitive sectors in India. Indian software revenue exports increased by approximately 30% between 2003-2003, as opposed to the global market, which only grew by about 5-10% during the equivalent period.**35)**

32UNDP: " Achieving the Millennium Development Goals, see xxiii
33 UNCTAD, 137-138
34 The Economist: " The Bangalore paradox", p67-69
35 ibid

In addition software exports represented around 20% of India's total exports during 2002-2003 period. Signs of the dramatic impact that the outsourcing industry has had in India can clearly be observed in the southern city of Bangalore- the hub of the Indian IT outsourcing industry. NASSCOM (National Association of Software and Service Companies), the umbrella body promoting the ICT industry in India, anticipates that Indian ICT services to grow by 25-28% annually and BPO between 35%-40%.**36)**

Optimism is still growing as a result of the wide range of activities now encompassed by the ICT and BPO industries as well as the potential for further expansion, partly also as the world's dependency on ICT increases.**37)**
In terms of employment NASSCOM projects that ICT industry in India would employ more than 4 million people by 2008 and the industry should account for 7% of the Gross Domestic Product of India **38)**

India has also succeeded in developing its ability to provide outsourcing skills that require increasing technological expertise. This trend is associated with improved remuneration levels, which could assist in narrowing the income gap between developed and developing world.

India may however represent an a-typical case study for the factors referred to above and for other developing countries to successfully emulate the Indian example, national strategies aimed at assessing infrastructure and skills requirements, the encouragement of competitiveness, intimate public/private partnerships and national Government support at the highest level may be essential. **39)**

3.1.3 South Africa

Despite the fact that South Africa's economic market is much smaller than that of India and the country does not posses the same quantity and quality of ICT-skilled workers that can benefit from the international outsourcing markets, promising signs have emerged.

Of particular interest is the mushrooming of the number of call centers operating out of South Africa as a result of investment, particularly from the European Union. Given South Africa's relative proximity to Europe, the fact that English is the international business lingua franca and cultural and other advantages has assisted South Africa in establishing itself as a viable competitor in the lucrative business of offshore call centers.**40)**

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36 The Economist: 67.
37 Ibid
38 The Economist, p 69
39 UNCTAD, 146
40 Business Day, "SA servicing overseas centers"

Call centers have contributed approximately 0,83% of the South African GDP by mid 2002 and is expected to reach 2,3% of total GDP by 2007, prompting reference to the Western Cape as the "Cape of Calls". The importance of call centers as one sub-category of the total outsourcing industry can therefore not be disputed. This encouraging trend has also drawn the attention of higher office, when President Mbeki, in his 2003 State of the Nation address specifically mentioned call centers and business process outsourcing growth sectors that would receive special attention from Government. The Department of Trade and Industry is expected to play an important role in this regard by ensuring that South Africa becomes and increasingly important player.**41)**

Recent initiatives aimed at deregulating the national telecommunication sector, although long in coming, will serve as an additional incentive for the establishment of additional call centers. The deregulation measures in respect of the South African telecommunication sector took effect on 1 February 2005.**42)** This initiative should be viewed as a positive step aimed at enhancing competition in the telecommunication sector. Provision is made for operators of call centers to exercise the legal right to use Voice Over Internet Protocol"(VOIP); thus circumventing the previous requirement that all calls had to be routed over the Telkom network.**43)**

VOIP permits the making of national and international calls via the Internet, which should contribute to a drop in the cost of calls, effectively breaking the monopoly that "Telkom", South Africa's sole telecommunication's provider enjoyed thusfar.**44)** In effect, Internet users are able to make international telephone calls at the cost of a local call. In view of this development it is anticipated that companies could save between 50-60% on international calls. This is positive for South African ICT companies, which are now in a position to legally offshore calls at a fraction of the previous costs.**45)** Vigilance will however be required in the face of increased international competition.**46)**

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41 Business Day: "SA Alive with Possibility"", Business Day: "SA servicing overseas call centres", 29 Nov 2004
42 Business Day: " Call centres can now say hello to the world", 10 February 2005
43. Ibid
44 Ibid
45 Saturday Star, 30 April 2005, p8.
46 UNCTAD: Market research in the USA and EU point to the fact that call centre investors prefer to outsource services closer to home i.e. the Caribbean and East Europe respectively, in addition to the obvious cost saving advantages
With the enlargement of the EU particularly in East Europe greater competition could be anticipated by outsourcing enterprises in South Africa and the rest of the SADC region. The US Corporation General Electric has established itself as one of the largest investors in Hungary over the last 12 years with the intention of servicing General Electric's market in Western Europe.

An additional obstacle is the concern that ICT software development in South Africa has not yet reached the quality levels achieved in competing markets, particularly China, India and the Russian Federation. The need for closer co-operation between Government, business and academia has been identified to build the required skills. **47)**

3.1.4 Mauritius

In addition to South Africa, Mauritius is perhaps the only other SADC country to adopt significant measures to benefit from ICT outsourcing **48)**. Mauritius is perhaps even keener to develop the island state as an e-commerce hub and tax haven, given its geographical isolation, and the absence of a significantly diversified economy. Cultural ties with India and the successes that have been achieved in that country is also bound to have stimulated the approach adopted by the Mauritius authorities. Signs of increasing Indian investments in the Mauritius ICT sector have already been observed.**49)**

The Government of Mauritius has adopted a number of positive measures in support of the above strategy. Measures include a 5-year tax holiday to domestic and foreign businesses operating in Mauritius, the offering of technological facilities to meet the needs of ICT businesses and a "green visa concept" with India, encouraging nationals from that country to set up join venture projects with Mauritian entities.**50)**

Furthermore an ""Infocom Development Authority" has been set up by the Government in January 2001, with the aim of promoting ICT investment and regulating the ICT sector. This initiative has been followed by the construction of a "cyber city" in Mauritius during 2004, with the aim to promote investments in ICT as well as to ensure appropriate regulation of the e-commerce sector. The Government has also announced plans to create an ICT free-trade zone and to become a regional electronic hub for businesses and government entities.**51)**

Mauritius has also adopted important measures at liberalising the telecommunications sector on the island through the adoption of the Telecommunications Act (1998) that sets out the intention of Government to progressively divest itself from its equity in the monopoly service provider "Mauritius Telecom", with the ultimate aim of achieving open competition in the telecommunications sector.**52)**

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47 Business Day: "Call centers say hello to the world"
48 IDRC: "Problems encountered in e-commerce initiatives in Southern Africa", p3
49 "Mauritius e-commerce", www.taxnews.com
50 "Mauritius e-commerce", www.taxnews,com,
51 OECD: "Offshore E-commerce:" Ready for Action?, p9-13
52 Ibid
52 Ibid

3.1.5 Summary

From the above it is clear that both Mauritius and South Africa are well placed to benefit from the outsourcing of e-commerce services. It is premature to determine whether this promise will be realized in practice.

Although the level of BPO services and related outsourcing services provided by developing countries such as South Africa and Mauritius are still low, competitive advantages and economic pressures in the developed world will continue to encourage corporations in the developed world to seek profitable partnerships in the developing world. [53] Importantly, e-commerce overrides the limitations inherent to other business modes in the sense that the cross-border provision of e-commerce services is not inhibited by logistical and geographical constraints, allowing the providers of e-commerce services with much larger degrees of mobility.[54] These advantages should be exploited by developing countries, following the benchmark which has already been set by India.

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53 UNCTAD 146
54 Ibid

CHAPTER FOUR

4.1 THE ROLE OF INTERNATIONAL ORGANISATIONS IN PROMOTING THE INTERNATIONAL TRADE IN E-COMMERCE

4.1.1 Introduction

Various international organizations have taken the lead in highlighting the invaluable role that e-commerce can play in promoting economic growth and more effective wealth distribution, internationally.

The capacity of developing countries to fully take advantage of the outsourcing of e-commerce services will be critically important in assisting the achievement of developmental goals such as the eradication of poverty, sound health and education indicators, gender equality, to name a few.

4.1.2 The UN Conference on Trade and Development (UNCTAD)

UNCTAD has played a prominent role in accentuating the significant developmental advantages that can result from the international trade in e-commerce.

The 2004-year report of UNCTAD found that there was increasing evidence that ICT was increasingly prioritized as a developmental tool by developing countries. A number of distinct advantages were identified in the report. These included: **55)**

a. Evidence that small and medium sized enterprises gained substantially through the use of e-commerce. Productivity growth in industrialized countries has largely been attributed to the widespread application of ICT-job creation and savings. ICT-related outsourcing of cross-border e-commerce services represents a clear example of the benefits to be gained in this regard, and is specifically identified in the UNCTAD report as an important potential source of income to developing countries.

b. ICT and Business Process Outsourcing (BPO) service providers in developing countries could benefit from expanded offshore operations by multinational corporations registered in developed countries.

c. Time-zone differences, between countries such as India and the USA provide the opportunity to service providers in India to provide an on-line real time e-commerce service, after-hours during US standard time.

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55 UNCTAD, Chapter 5.

d. Job creation in the outsourcing sector provides various developing economies with the opportunity to diversify local economies and reduce dependency on primary good exports and associated volatility in price levels.**56)**

e. The enhanced skills associated with the outsourcing provide significant advantages.

f. The diffusion of ICT has been directly associated with macroeconomic benefits such as increased economic growth rates, lower inflation and higher demand for ICT skilled labour and productivity gains.

g. The use of broadband and new ICT technology could advance development. **57)**

However, the report noted that Public and Government ownership was essential to ensure that sub-optimal investments options from a purely private sectoral perspective are overcome. The difficulty experienced by Small and Medium Sized Enterprises (SMEs) in investing in innovation is an example of this problem, underlining the need for Governments to invest in Research and Development.**58)**

The absence of sufficient Government involvement in guiding national e-commerce policies could be viewed as a significant impediment in many developing countries.

Although developing countries have traditionally been reluctant to invest in Research and Development, novel means of addressing this problem as recently shown by the International Bank on Reconstruction and Development may pave the way in this regard. **59)**

4.1.3 The use of Technology as a developmental tool

The use of advanced information telecommunication technology in the advancement of development has been at the forefront of the agenda of the International Telecommunication Union.

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56 Business Day: " E-bill offers exiting opportunities", as accessed on 13 May 2005.
57UNCTAD, Chapter 2. Broadband refers to a type of data transmission in which a single medium or wire can carry several channels at once, see www.webopedia.com.
58 UNCTAD, p41
59 Ibid

During the December 2004 Global Symposium of National Telecommunication Regulators (GSR), the issue of broadband technology and Internet connectivity was placed under the international spotlight.**60)** Specific emphasis was placed on putting forward specific guidelines aimed at the promotion of low-cost broadband technology and the expansion of Internet connectivity in the developing world.**61)**

Participants arrived at the conclusion that the advent of wireless Internet technologies could revolutionise and help narrow and close the broadband gap existing among countries.

Concrete proposals to achieve this objective included the creation of appropriate national regulatory environments. In this regard concern was expressed that telecommunication regulators in developing countries should avoid imposing artificial barriers and disincentives to investments in the ICT sector. Flexible regulatory frameworks were required, which provided for increased competition among multiple private sector service providers. **62)**

Fixed line access makes up the vast majority of broadband access today. Many countries primarily in the developing world encounter low fixed-line penetration rates, and therefore low broadband access. However with the exponential growth in wireless broadband technology, Internet access has promising application possibilities in isolated locations in the developing world.**63)** In addition to its use as a tool of commerce, such technology could also be linked to schools, clinics and other public facilities in the developing word, resulting in obvious development advantages, as envisaged by the adoption of the Millennium Development Goals.**64)**

Wireless technology could best be illustrated with reference to the use of so-called Wireless fidelity or Wi Fi hotspots. Internet access could be expanded to underdeveloped areas, without having to resort to high-cost and capital-intensive infrastructural products, required for established fixed-line Internet connections.**65)**

Through the use of existing advanced technology, technological backlogs in the developing world, the possibility of leap-frogging existing technology serves as an added advantage. "Wi-Fi or "wireless fidelity" is a technology that utilizes radio frequencies to provide high speed Internet connections for devices such as laptop computers. For developing countries the deployment of Wi-Fi hotspots is relatively easy to implement, especially in urban areas.**66)**

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60 ITU: "Broadband and Internet connectivity", p1-7
61 Ibid
62 Ibid
63.Ibid
64 UNDP, Millennium Project, xxiii
65 UNCTAD, 26
66 Ibid

Wi-Fi hotspots could for instance be located in publicly subsidized community access centers, that could also be business-orientated, contributing to self-sustainability over the long-term.[67]

The International Telecommunication Union (ITU) deliberations found that the expansion of international mobile phone subscriptions had exceeded that of Internet connections by a ratio of approximately 2,5:1. [68] With the advent of new technology, mobile phones could be used to access the Internet, providing a number of application options in developing countries. This new trend also referred to as *convergence* provides the technological possibility for separated markets in the area of electronic communication to converge, with the advantage of creating greater competition among a larger pool of potential service suppliers. This could potentially be to the advantage of the consumers as a result of a decrease in price levels.[69]

The question however begs whether this could be achievable in many developing country markets, in the absence of a critical mass of suppliers such as in most OECD and larger developing countries? This concern could support the argument in favour of increased liberalization, despite initial concerns regarding sovereignty, in a sensitive sector such as telecommunications. Through the opening up of domestic markets to foreign service providers access to individuals and businesses could be provided at affordable prices, which should benefit development and economic growth.[70]

Despite the availability of the above-mentioned technology, it is unlikely that developing countries will benefit from the full benefits that these technologies may offer in the absence of appropriate national regulatory frameworks. The liberalization of national markets become a primary objective in this regard, especially measures such as licensing requirements that restrict markets access to would-be service providers.[71] The need for closer regional co-operation is significant as the many smaller countries on the African continent could benefit from the economies of scale that a larger pool of service providers that operate cross-regionally could provide.

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67 UNCTAD, p70
68 ITU, p1-7
69 NEPAD
70 ITU, P1-7. The "infant industry argument is not that relevant with regard to the e-commerce sector in most developing countries, as with notable exceptions such as India, South Africa and Malaysia, the state of the industry in most developing countries would not be significantly threatened by outside competition.
71 Ibid

4.1.4 World Summit of Information Societies (WSIS)

The Declaration adopted by Member States to the World Summit of Information Societies (WSIS) underlined the importance of information and communication technology to promote the UN Millennium Development Goals.[72]

Participants recognized that ICT could have an immense impact on virtually all aspects of human life and that rapid progress opens opportunities to improve levels of development. The Declaration also underlines the role of ICT in reducing traditional obstacles such as those relating to time and space, which inhibited traditional forms in the past.[73]

The WSIS will again convene in Tunis during November 2005, and it would be interesting to note to what extent participants at the Tunis meeting would draw links to the present debate within the Doha Round to expedite the role that the international trade aspects of e-commerce and the provision of practical implementation modalities could play in advancing the development agenda as set forth by the member states of the WSIS.[74]

4.1.5 The role of the WTO: Does the Doha Development Round provide reason for hope?

As the premier international organization tasked with international trade promotion, it is natural to enquire what role the WTO is and should play in ensuring that appropriate recognition is given to e-commerce as a significant employment and developmental tool?

In the Doha Development Agenda, adopted on 14 November 2001, members acknowledged that *electronic commerce creates new challenges and opportunities for trade for all members at all stages of development.* The declaration continues by emphasizing the need to *create and maintain an environment which is favourable to the future development of e-commerce* and finally but significantly that the objective of the work on e-commerce is to *frame responses to trade-related issues identified for the fuller integration of small, vulnerable economies into the multilateral trading system.*[75]

The resolution adopted at the Doha Development Round follows on an earlier decision adopted at the Second WTO Ministerial Conference in Geneva which called for a work programme to examine all trade related issues relating to global commerce, taking the economic, financial and developmental needs of developing countries into account.[76]

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72 WSIS, "Declaration of Principles" p1-3
73ibid
74ibid
75WTO, Doha Ministerial Declaration, 2001
76 WTO, Geneva Ministerial Declaration, 1998

In view of the cross-cutting nature of e-commerce, affecting trade in services, intellectual property, etc, the WTO called on the Councils on the Trade in Goods, the Council on the Trade in Services, the Council on Trade-Related Intellectual Property and the Committee on Trade and Development to investigate the effect of e-commerce on global trade. **77)**

In short given its potential to create economic growth and development in the developing world, the outsourcing of cross-border e-commerce services could serve as important tool in addressing persistent inequality in trade benefits and assist in restoring the faith of many developing countries in the WTO.

Various e-commerce outsourcing activities, but particularly those linked to the financial services could benefit, as trade in financial services represents a major item on the agenda of the Doha Development Round. In view of the effects of the 1997 Asian currency, the outsourcing of support services to the financial services industry in OECD countries could be regarded as a safer option than traditional cross-border supply of banking services, where concerns surrounding sovereignty issues will invariably arise. **78)**

Mulhotra cautions that the Doha Development Round does not accurately reflect the needs and aspirations of developing countries. According to him the aspiration set out in the Doha Round should not be viewed as necessarily being consistent with the developing needs of poorer nations.**79)**

Reference is also made to existing practices within the WTO, specifically the practice of "friends of the chair", the presentation of "negotiated" texts to developing country delegations and the treatment of e-commerce also appear to be at the behest of more powerful lobby groups, particularly the USA. For instance, the USA stands to benefit greatly from the expansion of the international trade in e-commerce given its dominant ICT and related industries. These interests appear to play a major role in informing the US approach in the WTO not to lift the existing moratorium on the taxation of international e-commerce services. Various business concerns in the USA as well as developing country interests, who are not involved in e-commerce trade, may view the moratorium on the taxation of e-commerce as a form of discrimination against traditional forms of trade and it would be a useful issue to explore by the WTO General Council.**80)**

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77 Berkey, p1
78 Cornfield, p1-5
79Mulhotra,p7
80 Hoekman, 461-462

It would also be fair to argue that e-commerce, despite its immense potential as a means to increase world trade and provide much-needed employment in the developing world, cannot be regarded as an central issue in the Doha Round at present, since the WTO members voted to provide the Working Group on e-commerce more time to explore the effect of e-commerce on a range of cross-cutting trade issues.**81)**

The debate could also prove reasonably explosive given the vested interests of developing countries such as India, which played a significant role along with Brazil in leading the Group of 20 developing countries during their explosive negotiations with the EU and USA negotiating teams at the WTO Summit in Cancun.**82)** It seams clear that the WTO e-commerce work programme will demand increasing attention given the potential impact that legal uncertainty may have on e-commerce as an increasingly important component of international trade.

Within the WTO Working Group on E-commerce the correct approach would be to strike a compromise between the commercial interests in promoting of e-commerce as viewed from the perspective of OECD corporations on the one hand and the sovereignty and developmental concerns of Governments in the developing world on the other hand.

81 Raghavan, p1
82 Ibid

CHAPTER FIVE

5.1 DIRECT AND INDIRECT THREATS TO THE REALISATION OF THE FULL BENEFITS OF THE OUTSOURCING OF E-COMMERCE SERVICES TO DEVELOPING COUNTRIES. WHAT FORM DOES THE PROTECTIONIST THREAT TAKE?

5.1.1 Introduction

It is clear that despite various obstacles the outsourcing of e-commerce services could hold untold benefits to the economic growth of developing countries.

The establishment of a viable outsourcing sector can provide various indirect benefits to the country concerned. Although benefits have been largely concentrated in a number of developing countries such as India, nothing should prevent other developing countries from adopting the appropriate national policies to benefit from e-commerce.

It would however be naïve to assume that the undisputed advantages to developing countries, provided by the trade in e-commerce services, as argued above, will remain unchallenged.

5.2 Direct protectionist threats

One of the principal threats to developing countries benefiting from this trend is the risk of direct protectionist measures in the developed world. Much publicity has surrounded protectionist threats emanating from the United States of America, but there are growing signs that the European Union may be following suit.**83)**

In addition to investigating the ways in which this threat has manifested itself, the paper will also attempt to critically evaluate whether the rationale for such protectionist measures is in fact justifiable, principally from an economic perspective. Emphasis will be placed on developments in the USA and the EU, as it is save to assume that they represent the principle global markets, responsible for the creation of outsourcing-related employment. In respect to the United States of America, protectionist alarm bells have already sounded. The signing of the General Spending Bill by President Bush on 23 January 2004 raised fears that this measure may result in states enacting laws aimed at preventing ICT skill jobs in the USA from being sacrificed to more inexpensive locations offshore.

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83 Schneider, p1, Ria p1

Concerns have been raised that despite the limited and temporary effect of the General Spending Bill it may set an unfortunate precedent.**84)**

The measure in the Act only relates to contracts that involve competition between a federal agency and a private contractor, prohibiting the winning contractor from performing the work outside the USA. **85)** In terms of the above Act, the Federal US Government is prohibited from awarding certain contracts to companies that would perform work overseas. (The "interventionist" nature of this legislation is not entirely dissimilar to the effect of the much-discussed BEE clauses in South African public contracts). The USA Senate also passed an omnibus Appropriation Bill, which restricts US Government, contracts in the Departments of Transportation and the Treasury from outsourcing work offshore.**86)**

The issue has contributed to an intensive debate in the USA. The US-based Forrester Institute estimated that 3,3 million US service-sector jobs will be lost to foreign countries over a 15-year period. **87)**

The situation has seemingly been exacerbated by the enactment of legislation in eight US states, aimed at preventing the loss of jobs to foreign countries. The political sentiment surrounding these measures can aptly be illustrated by the following comment by the US Senates Chairman on Small Business during a US Senate Hearing on 18 June 2003:

US manufacturers contract with engineers from India, who send their drawings to workers in Poland who in turn ship their finished products back to the USA for incorporation as American products. Computer technicians in Ghana process New York City parking tickets…The US economy is growing and creating jobs, but Americans are not filling them. **88)**

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84 Drezner, Foreign Affairs p1-2
85 Schneider, 1-3
86 Mann
87 Kirkegaard 1-2
88 Ibid

In addition, US trade unions such as the AFL-CIO (The American Federation of Labor Congress of Industrial Organizations) have played an active role in mobilizing support for the adoption of protectionist legislation. The AFL-CIO position has received support from labour initiatives such as TORAW (The Organization for the Rights of the American Worker), which strives to ensure that US citizens and immigrants to the US with permanent green card status are not disadvantaged in favour of foreign workers. These organizations have predicted that more than 10% of USA ICT vendors will be moving offshore and that outsourcing is a major consideration for more than 80% of US-based companies.**89)** The debate has been fueled by heightened media reaction and coverage in the US-media **90)**

States that have already passed relevant legislation include, New Jersey, Maryland, New Mexico and Indiana. The forms of protectionism vary from the prevention of the outsourcing of public work, to the withdrawal of work from US subsidiaries of foreign registered firms. The New Jersey action was precipitated by a contractual arrangement in which a US corporation moved its customer-service operations to Mumbai in India, which led to the introduction of a bill by a New Jersey senator in an attempt to halt the transaction. **91)**

Although these measures almost exclusively deal with US Government procurement contracts, which are presently beyond the scope of GATS and thus allows countries freedom to regulate, as they seem fit, it is nevertheless argued that a dangerous precedent is created through the publicity and emotions that are associated with such high profile public campaigns.**92)**

During the WTO Ministerial Meeting in Doha, the US Chief negotiater, Mr. Robert Zoellick restated the US position supported by the EU and other OECD countries that India had to adopt a more accommodating approach in respect to the lowering of its agricultural import barriers and the opening of its service sectors, specifically in the areas of telecommunications and financial services.**93)** This seams to imply that the protectionist threats cannot be regarded as being entirely hollow, and that US and possibly EU trade negotiators may be expected to adopt a hard-lined approach to trade negotiations in future. They may also insist on trade-offs from certain developing countries benefiting from the e-commerce trade. In anticipation of this "onslaught", NASCOM, the umbrella organization representing the ICT sector in India has embarked on an aggressive campaign to market the mutual benefits derived from the outsourcing industry.**94)**

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89 Pastorale, p1-2
90 Kirkegaard
91 Financial Times, 17 Feb, 2005
92 Wunsch, p10
93Financial Times, 17 Feb 2005
94 Marcello and Ria, p1-2

Concerns in respect of the developments in the USA have also surfaced in the European Union, especially in the financial and telecommunication services sectors. In addition legal norms, namely the TUPE (Transfer of Undertakings and Protection of Employees) may have an inhibiting effect on trade. The TUPE provides for the safeguarding of employee rights in the event of businesses changing hands. **95)**

In contrast to the legislative vigour raised above, a number of critical voices have arisen in the USA. The ITAA (Information Technology Association of America) indicated that the issue was exaggerated, stressing that of the approximately 10 million jobs performed in the ICT sector in the US, less than 2 percent are performed abroad. **96)**

The ITAA has lobbied against legislation aimed at preventing ICT sector jobs from flowing offshore. The argument has been put forward that ICT represents one of the few business sectors in which the US runs a trade surplus and protectionist measures may be against the long-term interest of the US by provoking a possible international backlash in response to US actions.**97)**

5.1.3 The Economic argument

The concerns raised by critics to legislation aimed at preventing the outflow of US and EU-based ICT jobs, has received some welcome resonance among influential economists from the influential Washington based Institute for International Economics **98)**

Kirkegaard argues that the economic impact on the EU from the outsourcing of e-commerce services is far less than initially feared and estimates that it did not exceed more than 0,14% of the total services sector of the 15 EU members by 2005 and is predicted not to exceed 2% of the EU services sector by 2015. Furthermore, many EU economies showed healthy trade surpluses, despite the fears surrounding the outsourcing of ICT services.**99)**

Studies such as those conducted by Price Waterhouse Coopers Management have indicated that a sizeable number of European registered companies have managed large savings as a result of their involvement in outsourcing ventures. Savings in a range between 30%- 60% have been achieved. Indirect gains, primarily through the creation of a pool of highly skilled workers also ought not be discounted.**100)**

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95 Wunsch, p11 and also see www.dti.uk.gov
96 Schneider, 2
97 Ibid
98 Kirkegaard JF: Outsourcing and offshoring", Pushing the European model over the hill, p4-7
99 Ibid
100 Ibid

Innovation associated with ICT outsourcing provided an appropriate environment to create new products and services enhancing the competitive edge of many companies. It was therefore important to view outsourcing not as a goal in itself, but a process that provided a range of indirect benefits, which contributed to the increased productivity, and profitability of investor corporations. In line with this argumentation it is suggested that companies in the European Union in fact greatly benefit from such outsourcing **101)**.

The reality of close to 2,5 billion people that have joined the globalised economy as represented by the populations of the Russian Federation, China and India could not simply be swept away and contributed to fundamentally to changing the international investment environment. Furthermore, the over-regulated and generally inflexible nature of the European labour market was often a major contributor to the job losses suffered within the EU and not outsourcing contracts. **102)**.

In order to remedy this state of affairs it is incumbent on European countries to reduce their traditional dependencies on fixed social benefits and high re-employment conditions. **103)**

High labour standards associated with the above-mentioned inflexible labour policies also affected economically depressed areas of Europe, which are increasingly battling to ensure their competitiveness as they cannot provide labour inputs at lower, more realistic levels.**104)**

The position regarding the United States is not dissimilar:

a. Most job-losses between 2000-2002 were driven by economic fundamentals and factors unrelated to the outsourcing of jobs, i.e. the effects of the so-called ICT bubble;

b. In the USA in particular many jobs were "lost" as a result of the flexibility of the domestic labour market, i.e. by the movement of jobs between states, instead of outside the USA;

c. Quantatively most of the jobs that left the US were in the lower wage category, resulting in a lesser negative aggregate affect on the US economy;

d. The US economy has been relatively successful in managing to re-employ workers who had lost their jobs as a result of outsourcing;

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101 Kirkegaard JF: "Öutsourcing and Offshoring"" p4-7
102 Ibid
103 Ibid
104 Ibid

e. Globalisation of ICT and software services should contribute to more jobs being creating in emerging markets, but this will also lead to new opportunities in the economies that have lost jobs, such as skills improvement and productivity growth for the mother company, which in turn contributes to greater wealth creation.

f. The USA has consistently showed greater quarterly gains in job creation than the amount of jobs purported to have been lost as a result of outsourcing to emerging markets;

g. ICT-related job losses appears to result from unique local market conditions;

h. Between 1995-2002, the net export of services from the US has increased by approximately US$7billion. Many job losses have also resulted from factors such as the automation of ICT services that require low skill levels;

i. Job losses could be compensated for by providing domestic incentives such as tax concessions by redirecting ICT skills training in areas where market demand exists, instead of adopting direct measure that may distort trade; **105)**

It is clear from the above debate about the concern about job losses in the EU and the US may not always be based on sound economic argument. Labour-related trade issues are often uniquely emotive issues as illustrated in the dramatic break-down of the WTO Ministerial Meeting in Seattle and it is unlikely that the issue would be settled on the ground of rational economical discourse alone.**106)**

Short-term job losses are bound to have political repercussions, which invariably contribute to protectionist pressures. For this reason constant vigilance by vulnerable developing economies, may be called for. **107)**

The Economists corroborates the view that political moves to implement protectionist measures may be largely dependent on the prevailing business cycle in the economy.**108)** This is particular relevant in various European countries, where negative or very low growth rates in countries such as the Netherlands, France and Italy has contributed to negative response to the new European Constitutional Treaty. **109)**

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105 Kirkegaard JF: "Stains on the white collar"…, p 14-17
106 Mann C: 1, 10.
107 Ibid
108 Ibid
109 Financial Times, 21/22 May 2005. French voters dramatically rejected the EU Constitution in a national referendum on 29 May 2005.

On the basis of this it is predicted that less protectionist pressure would arise during 2005. Caution is however expressed that the prevailing situation could experience a rapid turn-around should the international economic experience a slowdown.**110)**

Drezner argues that a certain level of hype may surround protectionism, especially during election years in the USA, when the rights of workers feature prominently on the election platform, especially when presidential elections coincide with economic uncertainties. The 2004 USA presidential campaign was no exception sparking recriminations between Republicans and Democrats.**111)**.

Empirically its is also difficult to establish a direct loss of jobs in the USA to the outsourcing drive as many losses may be attributable to technological innovation in general and the tendency to draw comparison to the pinnacle of ICT employment at the turn of the 21st century, before the spectacular dot-com crashes. **112)**.

The argument can also be posed that by resisting interference, Governments in the developed world should concentrate on furthering their competitive advantages, such as technological development, and in so doing recognize the comparative advantages of others, such as relatively low labour costs and flexible markets. **113)**

This is in line with the doctrine devised by the esteemed British economist, David Ricardo and represents an important premise on which the philosophy of free trade is based upon. Ricardo proceeded from the position that the rate of profit depended on the cost of labour of producing a specific good. If country X produced a specific good at a lower cost than country Y as a result of lower labour costs then X enjoyed a comparative price advantage and so the theory provides the basic premise for international trade.**113)**

This key Ricardian premise is supported by the economic arguments posed above, i.e. that Government interventions in the international trade market, inspired by protectionist vigor and political opportunism do not further the interest of international trade and in fact undermine the long-term interests of countries that propagate such measures over the short-term.**114)**

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110 The Economist, 23 April 2005
111 Drezner, p 4
112 Drezner p12
113 Rima, p167-168
114 Ibid

The absence of economic justification of protectionist measures, still does not reduce the risk of such a threat, specifically if one accepts that decision-making at national level is often dictated by emotional; even irrational short term considerations and is not necessarily based on considerations of equity and long term benefits. This has clearly been borne in practice, as confirmed by protectionist measures that have already been adopted and this trend is unlikely to disappear. If it assumed that the cyclical economic movements are here to remain it appears fair to assume that protectionist pressures will continue.**115)**

5.1.4 Possible indirect protectionist measures

5.1.4.1 Introduction

In contrast to direct protectionist actions as described above, a number of indirect or less explicit factors could directly impact on the viability of the outsourcing industry in the developing world. In addition to political stability and suitable economic factors, the role of IPR and data security looms large within the e-commerce trade context. The impact of the September 2001 attacks on the USA has increased the specter of a further bureaucratic clampdown as far as the protection of private data is concern. Various European countries have also adopted a fairly dogmatic approach on the protection of private data. **116)**

5.1.4.2. The impact of Intellectual Property Rights on the trade in e-commerce

Intellectual Property can broadly be described as ideas, inventions, music, etc created by the human intellect. Within the context of electronic commerce this would include databases and computer software to name a few.**117)**

The strong emphasis on the protection of Intellectual Property Rights within developed country jurisdictions could have a negative effect on e-commerce trade and development growth in general. This is particularly true as far as proprietary information on the Internet is concerned. In addition to representing an invaluable source of information, access to IPR may also be essential to assist ICT services providers in developing countries to provide outsourcing services to clients in the developed world, particularly in view of the still existing knowledge between the developing and developed world.**118)**

Various potential practical problems can arise in practice in respect to the legal constraints that may potentially confront an outsourcing provider in the developing world and will be referred to below.

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115 Drezner , p1
116 Oppenheim, 116-118
117 Oppenheim, p5
118 Blane, p1

It is not inconceivable that in the execution of an outsourcing contract, a service provider in a developing country may deliberately or inadvertently contravene IPR such as a software patent, as most intellectual property remains registered in the developed world.**119)**

The risk of such legal sanction may potentially inhibit potential service providers from entering into contractual arrangements and thus retard the growth in e-commerce related trade. This is a concern, in addition to the much-debated issue that the level of protection granted to IPR is a significant force that inhibits developmental growth in the developing world.**120)**

The question thus arises how a service provider in the developing world could pre-empt such possible eventuality?

The integration of an IPR strategy is important when entering into international outsourcing contracts as domestic laws in respect of IPR can differ significantly. Contractual precision is an essential pre-condition by stating specifically what is being provided to the supplier and the conditions of use.**121)** This is a critical issue as the purchaser of a service does not automatically own the IPR created during the course of the contractual relationship. Such rights have to be specifically negotiated.**122)** This is particularly important in the international outsourcing environment as many intellectual property rights may be created on an ongoing basis, during the duration of a long-standing contractual arrangement, for instance.**123)**

Service providers in developing countries may be provided further protection, through the availability of so-called *qualified monopolies*. A *qualified monopoly* enables a software developer to exploit an existing development and build on an idea, which has already been created. **124)**

Confidentiality agreements may however be required, especially in respect of the creation of so-called "cutting-edge" technology. The importance of these issues have to be emphasised from a developing country context in view of the generally poor level of IPR protection compared to that in OECD countries.**125)**

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119 Blane, p1 also see WIPO at http://www.wipo.int.
120 Okeiji,p5-7
121 Blane, p1
122 Singleton, p21
123 Ibid
124 Oppenheim, p8
125 WIPO, see www.wipo.org

Ensuring that the purchaser or customer of an outsourcing service is the importer of the service into a third country and that the service provider is not exporting such service across a border should minimize potential risk **126)**

Copyright infringement could arise, if a service is provided without the prior authority of the owner, irrespective of the media in which the copyrights occurs, physically or via electronic communication. In principle many violations may occur as result of the ease of violating copyright by using the Internet. However, it still remains very difficult to police such illicit actions. The question however begs for how long? **127)** .

Concerns about legal responsibility of an e-commerce outsourcing provider establishing computer links to information subject to IPR, in the process of website design and computer software development has also been raised. The high profile *Napster* case, in the USA in which a specific software programme was designed, enabling members of the public to download music is a case in point. The software in question was judged to be in violation to the holders of the affected music rights, despite the fact that Napster itself did not make copies of the music files in question.**128)** A similar case arose in Japan with respect to access to pornographic material.**129)**

This rather wide interpretation of the responsibilities of software provider could potentially place software providers in the developing world in an invidious position and it is suggested that a more reasonable compromise should be sought, not questioning the rationale behind the *Napster* decision in view of the need to protect the rights of music rights owners.

It may be useful to absolve the providers of outsourcing services from responsibility for third party content, unless they had knowledge of such content and had the technical ability to prevent access to such content. It would appear that such approach would result in a fair outcome, and could be viewed as a just outcome for the result in the Napster decision.**130)** The question can also arise against the background of the liability of Internet Service Providers for third party content. German and US legislators appear to have adopted a liberal accommodating approach towards the interest of such service providers. **131)** This approach should be welcomed as the burden on Internet service providers could otherwise become very onerous indeed.

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126 York, p161
127 York, p185-186, points to various jurisdictional restraints in enforcing such rights
128 MacQueen,187
129 Singleton, p 48
130 MacQueen, 187
131 Ibid

The position of the ICT contractor in the developing world could be further complicated by the diverse approached to IPR interpretation among countries in the OECD. This refers to the diverse approaches adopted within the European Union (excluding the UK and the Republic of Ireland) and the USA in respect to IPR in the form of copyright protection. Whereas the Civil law tradition on the continent has viewed copyright protection as the rights of the individual creator or author of the subject matter, the Anglo-American or Common Law tradition has favoured the economic role of the copyright or the role of the entrepreneur. This interpretational distinction has implications in so far as the US interpretation would lead to a situation where the public interest in the dissemination of information outweighs the more individualistic rights of the author, as is the position generally favoured on the Continent. **132)** The latter approach would obviously present fewer obstacles to the ICT outsource provider in the developing world.

With the adoption of the additions to WIPO Berne Convention, concern has been voiced that the rights of copyrights owners have been unduly favoured, as opposed to the users of copyright. The WIPO Copyright Treaty (1996), provides for the protection of computer programmes and databases as well as for protection against the "circumvention of effective technological measures" so as to ensure that the author of electronic information can exercise her rights in terms of the Berne Convention or the WIPO Copyrights Treaty.**133)**

The WIPO Copyright Treaty eliminates the need for a physical copy to exist, as pre-condition for a right holder to control distribution of a work. User rights appear to be further restricted by "confining" reproduction of copyrighted work. Some jurisdictions, particularly the USA have even moved a step further by adopting more progressive standards regarding Internet copyright protection, through the adoption of the *Digital Minimum Copyright Act.***134)**

The scope of copyright protection has also been extended by according protection so-called "Business Method Patents" (BMP) or a computer-aided design to aimed at enhancing production.**135)** The patenting of such business methods could negatively impact on economic growth and the development stimulation.

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132 MacQueen, p183 also see WIPO Copyright Treaty (1996)
133 Ibid and WIPO, p45-47 and Okediji, p29
134 WIPO, art8
135 Okediji, p26-28

The situation appears to be exacerbated by the European Patent Office's adoption of seemingly conflicting positions as to the granting of IPR protection to these business methods, depending on whether such methods satisfy the requirement of a *technical contribution to art.* A similar obstacle could arise in respect to the IPR protection of what is described as *critical databases,* which has already faced opposition from developing country quarters.**136)**

The balancing of the rights of IPR owners whilst ensuring that the trade and associated development benefits are not unduly jeopardized remains paramount. In this regard a potential threat may be converted into a valuable asset by using the creative bent of e-commerce outsourcing providers in the developed world to ensure that the products of their creations are subjected to IPR protection. This is particularly relevant to software applications that can be adapted to the needs of developing countries.**137)** It should also be borne in mind that IPR owners could worldwide web as a marketing tool.**138)**

It is recommended that developing countries ensure that any additions to the WIPO Copy Rights Treaty in so far as it affects e-commerce should be based on their true developmental needs. Concern has been expressed that the majority of the developing countries that have ratified the new revised WIPO Copyrights Treaty, whilst they themselves have little possibility of benefiting from such IPR protection, as the proprietary rights are almost exclusively vested within developed countries.**139)**

5.1.4.3 Free Open Source Software (FOSS) an effective counter-measure

Finally developing countries could attempt to challenge the IPR tide by utilizing the so-called FOSS (Free Open Source Software). Software development such as FOSS GNU/Linux relies on the software development through collaboration of software volunteers over the open net and uses proprietary copyright as a means to promote access to creative work.**140)** One of the major rationales behind the Free Open Source Software movement was the creation of an appropriately creative environment that would provide software developers the opportunity to advance compatibility among different computer systems for which software had to be engineered. Through the use of a General Public License (GPL), Free Open Source Software prevents the software source code from being turned into proprietary, restricted and copyrighted software product.**141)**

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136 MacQueen, 190 and Okidiji, p28-29
137 Okidji
138 Ibid
139 Ibid
140 UNCTAD, 98-100
141 Ibid

FOSS users are required to respect the intellectual property of the software authors and Governments of the relevant users are required to provide the necessary protection when required. **142)**

In contrast to products such as Microsoft, which can be described as the cornerstone of the conventional IPR regime for computer software, FOSS can be regarded as "free" in contrast to proprietary products such as Microsoft, as the software programme can be run for any purpose, and can be adapted to individual needs, i.e. for purposes of redistribution and improvements. The price is not necessarily zero as certain products established through FOSS are traded on the market like any other product. **143)**

Despite its advantages, care should still be exercise in respect to the quality of certain FOSS software. The debate also does not address the critical need of providing potential users in developing countries with increased access to Internet technology.**144)**

FOSS could provide a number of advantages to the developing world, among other, the ability of FOSS to break out of the corporate profit-driven mode which has often ignored the larger developmental needs that software developed can and should address.**145)**

FOSS could also allay fears among developing countries that their sovereignty could be seriously undermined if they contracted their software development with one almost monopolistic software supplier such as Microsoft.**146)** The flexibility that FOSS offers could allow developing countries to adopt FOSS to its own specific needs, by manipulating the software source code. The users of open source software are also not restricted to licensing requirements and related conditions associated with proprietary software.**147)**

In recognition of these advantages the Government of Brazil initiated a programme to provide affordable access to desktop computes via Government grants to take advantage of free and open source software.**148)**

In view of the above this trend could serve as a useful example for other developing countries to follow, by ensuring cost-effective accessibility to IPR, which are electronically available.

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142 UNCTAD p100-103
143 Okidji, p39
144 UNCTAD 100-103
145 Ibid
146UNCTAD, p100
147 Ibid
148 Benson, p7

5.1.4.4 Protection of private data

With the dramatic expansion in the role of the Internet, many concerns have been raised regarding the level of privacy and security that it can offer. Daily Internet communication involves the transfer of sensitive data, including credit card details, physical addresses, contact numbers, which provide significant scope for abuse.[149]

If the possible infringement of IPR rights or the lack of sufficient protection of IPR created in the developing world looms large as a potential risk, the situation in respect to the protection of private data is arguably an issue of much greater immediate concern. The perceived increased risk of international terrorism, proliferation of Internet viruses, increase in spam, and etc. are all factors that may stir the protectionist passions in OECD countries.[150]

This concern is also of relevance with reference to Art XIV (a)(ii) of the GATS which determines that subject to the fact that any exception measures are not applied in *a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries, nothing in the Agreement shall be construed to prevent the adoption or enforcement by any Member of measures aimed at the protection of the privacy of individuals in relation to the processing* and dissemination of personal data and the protection of confidentiality of individual records and accounts.[151] In a sense this provision assists in providing the necessary policy space to countries, but also leaves possible room for abuse.

In a developing country context, protection of private data would have to be implemented by individual countries and this invariably raises concerns about the capacity to oversee effective implementation of such measures. [152] To decide on how best to approach this threat from a developing country perspective is challenging as most countries have different privacy rules for private business and for Government. To a large degree the amount of privacy protection will depend on a country's general approach to privacy. In the South African context, it has been argued that it would be dangerous to regulate the technology that potentially threatens privacy. Rights in the Constitution have to be balanced against other potentially conflicting and equally legitimate rights. The right to privacy cannot be regarded as absolute and can be limited to what can be regarded as reasonable and justifiable in an open and democratic society.[153]

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149 "Buys, p365. "Privacy and the rights to information", "Cyber Law SA.
150 Ibid
151 GATS Art XIV (a) (i)
152 "Law in Cyberspace", Commonwealth Secretariat, Oct 2001, p20-21
153 Buys, 365-367

Instead it is suggested that a compromise be sought by allowing the user of the Internet the ability to control their own private information and to provide such user with the means to make an informed decision on how the relevant information may be used. This approach is also supportive of the view that control over private data should be based on self-regulation by the private sector, with limited Government interference.**154)**

5.1.4.4.1 Developments within the European Union (EU)

Concerns have specifically been raised in respect to the manner in which private data is protected in the European Union. This is of particular relevance to countries in the SADC region where the EU represents the most significant export market and most ICT outsourcing arrangements are likely to be entered into with EU countries.**155)**

The particular legal instrument in the EU governing the privacy of data is the *EC Data Protection Directive.* (A directive unlike a regulation does not have immediate affect in the member states). The Directive was approved in July 1995 and is now enforced throughout the European Union.**156)** The directive proved difficult to negotiate given the divergent approaches to the issue of the protection of private data. Many EU countries viewed privacy issues as having significant human rights elements, whereas others followed a more pragmatic approach aimed at ensuring that the free flow of international trade was left unhindered.**157)** With the eventual adoption of the EU Data Protection Directive, elements of several of the national data privacy regimes were integrated with the expressed aim to harmonise the level of protection provided to personal data by different EU Member states.**158)**

Of specific concern to developing countries is the conditions set within the EU Data Protection Directive for the transfer of personal data to third party countries. Provision is made for the prohibition of the transfer of data when non-Members fail to ensure an adequate level of protection of personal data **159)** The principle exception that would not restrict a developing country provider of an outsourced ICT service, would be in a situation where the personal data concerned was either viewed as essential for the performance of a contract between the data subject (person who's data is involved) and the data controller or where the data subject was fully informed that a country receiving the exported data, does not provide adequate levels of protection.**160)**

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154 Buys, 365-367
155 Charles worth, p84-90 and 107
156 Oppenheim, p116-120
157 Ibid
158 Ibid
159 Dickie J, p45
160 Oppenheim, p120

It should be evident from the above that the exception provided would provide developing countries little opportunity to take advantage of contracts of this nature. In addition, the determination of the definition of what an *adequate level of protection is,* also appears to be subjective and open to possible manipulation.

The EU regulators saw the need for the Directive given the previous national laws was viewed as causing distortions within the EU economy. In terms of Art 25 (2) of the Directive the critical question of determining *adequacy* shall be assessed in the light of the circumstances surrounding a specific data transfer operation. Consideration shall be given to the nature of the data, purpose and duration of the proposed processing operation, the country of origin and security measures pertaining that specific jurisdiction.**161)**

Although this appears to be a laudable attempt to create a semblance of objectivity, by setting out the abovementioned criteria to determine *adequacy*, various question marks remain. The question as to determining the *adequacy* of data protection still appears to be open to possible manipulation, which may be divorced from the true, objective circumstances prevailing within a particular jurisdiction under review.

The test to determine whether the data is adequately protected, relies on the following criteria:

The first relates to substantive rules that would be applied to the data concerned. This refers to an evaluation of the national legislation to which the relevant data is intended to be transferred to, codes of conduct at the relevant industry or sectoral level and specific contractual provisions that exist between the EU and country concerned. A high test for compliance with the Directive envisaging the same degree of protection in the in the non-EU jurisdiction as compared to the EU, appears to be quite unrealistic. **162)**

The concern about the EU directive is also important given its implications for existing on-line data transfers and in view of the ever-expanding nature of outsourcing services, which potentially could contain a large degree of privileged information within the interpretation of the EU directive.**163)** The personalization of e-commerce sites may for instance provide a definite obstacle in this regard.

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161 Dickie J, p45 and Oppenheim, p125
162 Oppenheim ibid
163 Ibid

The EU Directive was adopted in October 1995 and Member States were granted a twelve-year period to phase in the requirements.[164] It is unclear how the directive impacts on the Member States who joined the EU on 1 May 2004, although it will more than likely form part of their respective accession requirements. The divergent rate of phasing in the Directive could however further complicate and create uncertainty as far as the position of developing country contractors are concerned.

5.1.4.4.2 Developments within the United States of America

In contrast to the EU it is safe to assume that the USA poses far less of a risk to the developing world contractor, as the USA lacks meaningful personal data laws, given the generally liberal approach to freedom of expression and despite the fact that the concept of privacy has long been accepted in the US legal system as a constitutional right (Whalen v Roe).[165]

Despite the fact that the US Fourth Amendment provides for the *right of individuals against unreasonable searches and seizure,* the sphere of privacy protection does not appear to extend very far.[166]

With the advent of the dramatic events of September 2001, it is to be anticipated that this protection of personal data, at least as insofar as it affects the US domestic security, may be further eroded. The full effect of concerns regarding the flow of personal data to foreign jurisdictions would still have to be determined.

The EU and US has entered into a so-called *Safe Harbour Agreement* in an attempt to pre-empt the negative effects that the EU Directive on the Protection of Personal Data may have on e-trade between those these two gigantic economic blocks.[167]

The Safe Harbour Agreement was necessitated, as the USA was not regarded as providing adequate protection of personal data within the context of the EU Directive. Negotiations on the agreement were protracted and various negotiation attempts between the USA and EU were conducted before the final agreement was adopted. [168]

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164 Buys, p374
165 Charlesworth, p90-91
166 Charlesworth, p91-93
167 Clubukonline, p1
168 Ibid and Charlesworth, p108-109

In order to qualify, a USA organization in question has to adhere to a set of principles, state so publicly and self-certify compliance with the USA Department of Communication.[169] Various practical problems are experienced with these

provisions, raising questions regarding the efficacy of the Agreement and the relatively high standards that the EU regulators appear to require. Obstacles have arisen in respect to the essentially self-regulatory function adopted by the USA private sector.[170] Charlesworth notes that the US Federal Trade Commission Chairman (FCT) has cited the failure of the business community in the USA to implement a system of self-regulation for online privacy. [171]

5.1.4.4.3 Summary

Whilst not questioning the rational and legitimate concerns behind the US and particularly EU policy on the protection of private data, the question remains whether the present state of affairs are proportionate to the need to protect. If not, the measure could easily be construed as contributing to de facto protectionism, given the potential inhibiting effect of such measures on e-commerce trade, especially in developing country markets. This argument is all the more pervasive if the Safe Harbour Agreement provides little comfort for effective control. Why should developing countries be treated on the basis of a different standard-suspicions on indirect barriers to trade will invariably be raised!

In view of the fundamental role that the EU and USA companies play in the provision of e-commerce outsourcing contracts, and the confusion caused by their divergent approaches to the protection of personal data, it may be useful to consider the drafting of a framework agreement that would provide for the interaction between various national laws regulating e-commerce.

5.1.5 The WTO Panel decision: Antigua & Barbuda an encouraging trend?

Despite the concerns regarding the extra-territorial effect of privacy or security regulations in the EU and the US, some hope has recently been created as a result of a decision by the WTO Panel in the "David vs. Goliath" case when Antigua and Barbuda successfully took the USA to task in respect of restrictions imposed by the USA on the provision of cross-border electronic gambling services by service providers in Antigua & Barbuda.[172]

The small island state had estimated to have lost more that US$ 90 million as a result of the ban and argued that the US action was in violation of international trade rules, including GATS requirements in respect of most favoured nations treatment, domestic regulation, markets access and national treatment, to name a few. [173]

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169 Charlesworth, p106
170 Ibid
171 Ibid
172 Thayer: 1-3 and Pruzin, p1-3
173 Pruzin, 1-3

In its defence the USA argued that online gambling could provide a haven for money launderers; a concern which is obviously been exacerbated by the post 9/11 developments. The USA also put forward strong moral arguments that the ban on Internet gambling in terms of the *Wire Communications Act (1961)* is aimed at protecting citizens and especially children from the harmful effects of Internet gambling. In addition to the aforementioned Act certain forms of online gambling had also been outlawed by US federal and state laws.**174)**

In March 2004 the WTO Panel upheld the Antigua & Barbuda complaint that the USA approach was a violation of international trade rules by not providing market access and/or national treatment to Internet gambling services provided by Antigua & Barbuda and that the USA in fact violated its scheduled commitments under the GATS.**175)**

The WTO Panel had to apply its mind specifically to the question whether the USA had intended gambling services to fall under it GATS schedule covering "other recreational services". Antigua & Barbuda arguing that this corresponded with the United Nations Central Product Classification code 96492, which specifically mentioned gambling and betting services. The USA retorted that it was not its intention to use the Central Product Classification (CPC) as the basis for its GATS schedule. **176)**

This line of argument is interesting as it can provide the opportunity to other WTO members to argue in favour of the opening of other service sectors, which are not specifically mentioned in the schedule of a particular Member. This would also be a trade-free interpretation by avoiding a narrow dogmatic interpretation of country schedule commitments.

On 7 April 2005, the WTO Panel agreed with most of the claims put forward by Antigua & Barbuda, namely that the US position is inconsistent and discriminatory against foreign operators, whilst permitted the US exception on "moral grounds", if the USA cleared inconsistencies in respect of its legislation **.177)**

The question arises as to whether the above ruling creates a useful precedent for developing countries in general. This appears unlikely as smaller countries may be intimidated to enforce sanction measures against a big power such as the USA.**178)** A similar argument could be pursued if the imbalance in relationship between African countries, including South Africa and the EU.

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174 Pruzin, 1-3, "International Trade Reporter"
175 Ibid
176 Ibid
177 The Economist, 16 April 2005 , p61
178 Thayer, p1-5 Kori V and Lapierre J, "Gambling dispute settlement, p1-10

The adoption of a central international registry of online security breaches, online security concerns in OECD jurisdictions could be balanced against the legitimate income needs of ICT service providers in the developing world, which could otherwise be forfeited.

The adoption of such a objective and transparent mechanism could assist in restoring the "good faith" of legislators in developed countries.**179)**

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179) Kori V, J Lapiere, L Louie, J Lu: "Gambling Dispute settlement (285)

CHAPTER SIX

6.1 THE STATUS OF MULTILATERAL REGULATION OF E-COMMERCE

6.1.1 Introduction

It should be apparent from the above that the benefits and threats posed by e-commerce represent a complex range of issues and should be viewed from a holistic perspective. Despite the importance of a national ICT strategy, the creation of public awareness around the importance and potential of e-commerce, the establishment of an appropriate telecommunications infrastructure, e-access and human resource development, will all be doomed to failure, in the absence of an appropriate international and national legal frameworks aimed at effectively regulating cross-border e-commerce trade activities.

6.1.2 The regulation of the international trade in electronic commerce

During the Second Ministerial Meeting of the WTO in Geneva, the Ministerial Conference of the WTO urged the WTO General Council to "establish a comprehensive work programme to examine all trade-related issues arising from global electronic commerce.[180] A plan for this work programme was subsequently adopted by the General Council on 25 September 1998, underlining discussions on the issue of electronic commerce on trade by Goods, Services and TRIPS and the interests of small and vulnerable economies[181]

The premier international legal instruments regulating international trade consists of the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS). In the case of electronic commerce services the first question to be answered is to whether products supplied via electronic means should be classified as goods and services. The question is of relevance, as the answer would determine whether the GATT or GATS would apply.[182] In the absence of clear answers on the question, the legal uncertainty characherising the electronic commerce will persist and also provide fertile ground to unscrupulous operators, wishing to profit from this hiatus.

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180 WTO, 2ND ministerial meeting
181 Ibid
182 WTO General Agreement on Trade in Services and General Agreement on Tariff in Trade

6.1.3 GATS or GATT?

As strong consensus exists that the role of cross-border trade in e-commerce more fundamentally impacts on the international trade in services.**183)** Should such consensus however lead to the automatic conclusion that the GATS should regulate the international trade in electronic services? When goods are ordered over the Internet, such as the downloading of a book, which WTO agreement would regulate such a transaction?

The distinction is not trivial as national treatment and markets access rules between GATT and GATS differ. As an example, under the GATS discrimination against foreign suppliers is generally allowed, but prohibited under the GATT.**184)** The issue should also be viewed from the perspective that no barriers presently exist to trade conducted via e-commerce over the Internet, largely as a result of technological constraints of enforcing such measures.**185)** The existing moratorium placed on customs duties in respect of global e-commerce serves as additional example of the advantages that electronic traders presently enjoy over the traditional means of supplying goods.**186)**

Decisions on whether a specific transaction should be classified as good or a service could significantly impact on the present incentives in respect of using electronic trade in contrast to traditional physical delivery of goods.**187)** In view of the WTO stance on progress in the liberalization of international trade, it would be difficult to foresee whether stringent measures on e-commerce transactions will be introduced; this despite the fact that conventional traders may complain about the competitive advantage that electronic-trade enjoys.**188)** Signs of opposition to the moratorium have already surfaced among lobby groups in the US in response to the ascendancy of the so-called dot.com companies. **189)**

In order to avoid confusion it would appear to make more sense if *all* electronic transactions were described as services. An Internet transaction crosses international borders without having any physical counterpart at the time of transmission. The fact that the action may subsequently followed by the delivery of a physical good does not fundamentally alter this concept. It is suggested that Governments could address such a scenario by either eliminating tariffs on the physical delivery of goods (which appears extremely unlikely given the currents status of the WTO liberalization debate) or by imposing a domestic tax on goods imported via the Internet. **190)**

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183 "Center for International Development, Harvard University, p1.
184 OECD Observer, p4-5
185 Center for International Development, p1
186 Ibid
187 Ibid
188 Ibid
189 Panyagaria,p1
190 Ibid

Panyagarira emphasises the potential of creating disputes as a result of the uncertainty as to whether GATS or GATT will apply. The classification of all electronic transactions as services, is a practical solution, if not an entirely elegant one in resolving the matter[191]

It would appear that developing countries such as India and China Malaysia, etc which posses strong e-commerce sectors would also favour the classification of e-commerce as trade in services in terms of the GATS, which will enable them to target industries that enjoy a competitive advantage, without having to liberalise too soon.[192] The USA and EU in contrast would appear to prefer to fast-track the liberalization of e-commerce trade and would prefer to do so under the GATT. [193]

Attempts to clarify the situation is important as products which are identical, could be treated quite differently if imported into a certain jurisdiction, either under the GATT or the GATS. A lack of clarity in this regard could lead to inconsistencies and also create unnecessary loopholes, which would not work to the benefit of international trade.[194]

6.1.4 Summary

In summary it would be in the interest of the international trade in electronic commerce to bring finality to this debate as soon as is possible. Panyagarira's approach appears acceptable on practical grounds and on the basis of logic as the electronic medium lends it self in most cases to delivery via services. This is particularly true of the outsourcing market, characterised by software development, call centres, back office operations, which with few exceptions do not require the transfer of physical goods.[195] It is therefore recommended that GATS should apply to all such transactions, primary as a means to ensure greater legal certainty and consumer confidence in the use of electronic communications.

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191 Panayagarya, p1-2
192 Ibid
193 Global Trade Network, Univ of Harvard, p1
194 Mujahid, p18
195 Panayagira

6.2. Can the General Agreement on Trade in Services be regarded as an effective measure to regulate the trade in e-commerce services?

6.2.1 Introduction

If one accepts the position that the supply of outsourcing services via electronic means should be governed by the GATS, it should at the outset be emphasized that the agreement does not discriminate against the provision of a service by electronic means as the means of delivery be it physical or electronic is regarded as immaterial.[196] Thus the agreement adopts the position of "technological neutrality". In this regard it can be argued that the GATS similar to that of the other international trade agreements such as the General Agreement on the International Sale of Goods, strives to accommodate best commercial practice as closely as possible and thus attempts to avoid undue encumbrances on international trade in line with the WTO philosophy of trade liberalization and the quest for global wealth creation.[197]

The question to be asked is to what extent the GATS could impact on the trade in e-commerce services and how adjustments to present text could be made to accommodate the particular needs of e-commerce? An exhaustive analysis of all aspects is not possible within the scope of this paper, with the exception of some of the most salient aspects.

A key issue for consideration, is the effectiveness of the present system of the entering country commitments on GATS schedules, as the most effective means of liberalising trade in e-commerce. Are more creative approaches not required to stimulate the trade in e-commerce services?

6.2.2 Commitments in respect of modes of supply of services in terms of the General Agreement on Trade in Services (GATS).

At the outset it is recommended that the ""positive list approach" currently used in respect of scheduling country commitments be replaced by a so-called "negative list approach", providing that only those services which are explicitly excluded should be covered and the remainder be regarded as being liberalised .[198] This is similar to the approached adopted in the North American Free Trade Agreement (NAFTA).[199] In addition a "formula approach" may be considered in contrast to the disadvantages associated with the "request and offer approach", mentioned above, which could lead to the exploitation of weaker WTO Member States.[200]

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196 Trebilcock
197 Ibid
198 Ibid
199 Ibid
200 Ibid

A second priority would be the adoption of a different approach to the present classification scheme respect of services. This issue will be discussed with specific reference to the mode of supply commitments in force in respect of the GATS.**201)**

Determining the particular applicable mode of supply is not of mere academic importance. Each WTO Member is required to have a Schedule of Specific Commitments, which identifies the services in terms of which the Member guarantees market access and national treatment and any limitations that may wish to attach. Commitments are undertaken in respect to four different modes of delivery and are based on the United Nations Central Product Classification (CPC), developed by the GATT Secretariat.**202)** A distinction should also be drawn between horizontal commitments that apply across all sectors listed in a particular sector and specific commitments that apply only to a specific sector.**203)**

If no commitment is entered into by a WTO Member, that Member remains free to restrict that service, in terms of the "positive listing" approach.**204)**). According to this approach services that are not specifically listed remain restricted. An obvious problem with this approach, as outline above, which is particularly relevant to e-commerce is the question that technology does not await upon the law-makers and that the range of services in the dynamic electronic commerce environment are constantly expanding.**205)**

New services that are provided are therefore not necessarily covered by the existing categories in the GATS schedules leading to the inevitable conclusion that states could still entertain restrictive practices and thus effectively stymie international e-commerce trade. Even if these new services could be inferred from generic categories, as they exist in the present classification system, no consistent interpretation in respect of under category of services such a new service should resort under can be guaranteed; potentially further exacerbated uncertainty in e-commerce trade.**206)**

This approach is further complicated as most WTO negotiations in respect of country commitments are conducted on a strictly bilateral basis, by adopting the so-called "request and offer approach". Various disadvantages are also associated with this bilateral approach, such as the high costs involved and the unequal bargaining power of the negotiators, particularly relevant of developing countries.**207)**

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201 Wunsch, p 16-18
202 Ibid
203 Trebilcock, p277
204 Ibid
205 Wunsch,, p16-18
206 Ibid
207 Ibid

Therefore a critical issue to determine is whether the present electronic services classification in GATS represents a proper classification. GATS rules are listed on schedules that contain eleven service sectors and four different modes of delivery. Each WTO Member lists its market access and national treatment commitments provided to foreign service suppliers on a service sector and a mode of supply basis.**221)**

This dilemma can be illustrated with regard to the fact that the services classification system had to be updated twice since the Uruguay Round alone. In respect to "call centers" they are not covered specifically and if they were to be covered it would possibly be through a broad interpretation of the category "telephone answering services" in terms of the existing GATS classification system. The problem is exacerbated due to the fact that certain services represent a combination of various sub-categories on computer and related services, making it often difficult to determine with any level of exactness in terms of which services commitments have been entered into.**222)**

However, assuming that this first hurdle could be overcome an indication as to which mode of delivery applies to a specific transaction would still have to be made.**223)**

The GATS defines four modes of delivery in respect of the rendering of services, unlike the General Agreement on Tariffs and Trade, which deals with goods exclusively delivered on cross-border basis.**224)**

The modes of supply are the following:

a. From one Member into the territory of any other Member or the cross-border supply of services;

b. In the territory of one Member to the service consumer of any other Member or consumption abroad;

c. By a service supplier of one Member, through commercial presence in the territory of any other Member, i.e. FDI.

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221 WTO: Services Database, p4-5
222 Wunsch, p18
223 Ibid
224 GATS, Art1

d. By a service supplier of one Member, through the presence of natural persons of a Member in the territory of any other Member or the movement of natural persons.[225]

The reason behind the provision of three different modes of supply in addition to cross-border supply is the fact that services could often only be supplied meaningfully if the producer of the service and the consumer of that service where present at the same time. Therefore to ensure meaningful liberalization of the electronic trade in services, liberalization commitments must extend to cross-border commitments of the consumer and his property, the establishment of a commercial presence in a market or the temporary movement of the service provider himself. [226]

As Steenkamp correctly argues, the advent of e-commerce has posed some unique challenges to the traditional concept of the supply of services.[227] Important issues raised in this context are the determination of which of the above modes of supply applies to specific transactions. The determination of this question is important in view of the level of commitments countries have entered into in respect to specific modes of supply may differ considerably.[228]

If a software developer in India provided a programme to a multinational in the USA, the question arises whether the service provided has crossed the border from India into the USA, therefore satisfied the criteria in mode 1, or whether in fact the consumer of the services had in fact *traveled* to Bangalore to *consume the service?* In the latter case mode 2 would apply.[229] If the level of commitments of the USA and India differ in respect to the modes 1 and 2, the importance in determining in terms of which of the above modes the specific transaction should be classified, is highlighted.

The importance of distinguishing between the correct mode of supply however has wider ramification, specifically in terms of balancing the interests between developed and developing countries. This can be illustrated by the following example:

In respect to the USA the importance of distinguishing between modes of supply can be illustrated by the liberalization of commitments made by the USA during the Uruguay Round of negotiations. The USA emphasized liberalization in respect of technology-intensive services in which the USA enjoys a comparative advantage, but distanced itself from labour intensive services in which many developing countries have had an advantage. [230].

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225 GATS, Art 1(2) a-d
226 Steenkamp, p10
227 Ibid
228 Ibid
229 Ibid
230 Treblcock p272

Mattoo supports the view that coverage of commitments remain low and appear to protect entrenched interests.[231] In the context of the outsourcing of ICT services this is also of great relevance as certain forms of ICT outsourcing such as call centers and back office operations require fairly labour intensive operations, which could lead to disadvantages in the developing world.[232]

In the interest of trade liberalization in e-commerce it would therefore be incumbent on WTO member countries to establish an equal playing field so that larger players such as the USA and the EU could not ignore liberalization of services areas where developing countries enjoy a comparative advantage. The situation becomes more complicated if it is considered that the regulatory regimes between India and the EU may differ, specifically in respect to whether they could exercise jurisdiction over a particular transaction?[233] Could the EU for instance exercise extra-judicial jurisdiction over a service provider in India, if mode 1 was at stake? This situation could conceivably lead to jurisdictional disputes and would not be in the interest of the liberalisation of trade in general and the trade in e-commerce services specifically. The WTO has recognized the difficulty in distinguishing between modes 1 and 2, as GATS itself provides not textual solution to the problem.[234] The situation will only be exacerbated as the trade in e-commerce-related services grows exponentially.

6.2.3 Possible solution

It is recommended that greater clarity could be obtained if Article I of the GATS is amended to provide that mode 2 would only apply when a EU multinational, which is purchasing software from and Indian developer was physically present in India to consume the service.[235]

It has been suggested that as a practical means to resolve the issue, the preferred method for classifying e-services would be to regard all such services as falling with in the ambit of mode 1 and mode 1 should apply to all services provided via the Internet.[236] A clear advantage in adopting this approach would be that it would establish much greater transparency and predictability. The present divergence experienced in the nature and extent of the of scheduling of country commitments in respect of the GATS provides ample opportunity for countries to exploit their respective comparative advantage at the expense of allowing a unhindered flow of international trade in e-services. Greater certainty and predictability should assist the international trade in e-services to develop further, including the various indirect benefits to developing countries as argued above.

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231 Mattoo, p4-5
232 Ibid
233 Trebilcock & Howse, p272
234 Steenkamp p8-10
235 Mattoo p4-5
236 Berkey, p2

An additional method to address the inconsistencies in the GATS scheduling mechanisms is by devising a framework agreement parallel to the GATS, which could assist in interpreting the GATS, whilst ensuring that artificial disruption to international trade in e-commerce is limited as far as possible. Emphasis on such a framework agreement would be that any recommended regulations, contained in such a framework agreement should avoid inhibiting the electronic-commerce trade by conflicting with the GATS.**237)**

Key principles identified to be included in such a framework agreement would include:

a. Preventing discrimination against particular electronic-service suppliers,
b. Avoiding restrictions on the development of new electronic-services,
c. To ensure that the transfer of information essential to the supply of electronic services is not inhibited,
d. Freedom of choice to consumers to purchase electronic services and
e. Encouraging of transparency in legal regimes governing e-commerce.

Provision should also be made for countries to determine their own pace of liberalization of GATS scheduling commitments.**238)**

Through agreements on such core guidelines aimed at ensuring a liberalized environment in which trade in electronic commerce can be conducted, WTO members can establish a healthy framework that will prevent undue and arbitrary limitations on the rendering of international e-commerce services.**239)** Mattoo supports the adoption of additional multilateral mechanisms to deal with practical obstacles such as licensing and qualification requirements, which cannot so easily act as indirect barriers to trade. He calls or for the adoption of the "necessity test" which requires any domestic measure to be necessary to achieve the relevant objective and should therefore not have a trade restrictive effect. In similar vein he supports the adoption of horizontal commitments instead of sectoral commitments.**240)**

Even if greater cohesion on the regulation of electronic commerce were achieved internationally, it would still remain the responsibility of national governments to ensure that effective national legislation is passed, which will ensure that the potential benefits from electronic commerce trade are maximised.**241)**

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237 Berkey, p3-5 and GATS Annex on Telecommunication
238 Ibid
239 Mattoo, p13
240 Ibid
241 Berkey, p5

The GATS Annex on Telecommunication is a good example to follow in this regard. It provides for WTO Member States to ensure that any telecommunication service supplier of any other Member is accorded access to and use of public telecommunications transport networks and services on reasonable and non-discriminatory terms and conditions, for the supply of a service included in its schedule. Provision is made for the liberalisation of a number of telecommunication services ranging from voice telephony, data transmission services and many more. **242)**

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242 Trebilcock,p301 also see GATS Annex on Telecommunication
Mattoo, p11

CHAPTER SEVEN

7.1 Regional initiatives in Africa

In recognition of the important role that e-commerce can play in trade growth and accelerated development of the continent, a number of promising initiatives have been launched on the African continent.[243]

During early 2003, African countries launched the Free and Open Source Software Foundation for Africa (FOSSFA) aimed at promoting Free and Open Software throughout the continent. In an Action Plan from June 2003 to June 2005 it was proposed that Governments on the continent should adopt one of three distinct approaches in formulating their own (Free and Open Source Software) policies.[244]

These approaches are:

a. Encouraging Governments on the continent to adopt a neutral approach, which supports choice, so that any possible discrimination against FOSS can be eliminated;

b. The provision of an enabling environment, in which the necessary capacity to use FOSS is established;

c. An aggressive approach, promoting the use of FOSS through both legislative and policy measures.[245]

This approach is practical given the clear differences in the developmental levels of the ICT sectors on the continent. Flexibility would therefore be an important requirement over the short and medium term. Harmonization of policies in the short term does not appear to be a realistic or effective means given existing disparities. However in devising this Action Plan countries in Africa clearly recognize the importance that e-commerce has for their development.[246] Through these and hopefully similar initiatives in future greater awareness around this important debate can be created. The continent can only ignore the pervasive effects of the international globalised economy to its own peril. It is apparent from the discussion under chapters three and four above, citing the developmental benefits of international trade in e-commerce and that the establishment of an enabling environment is critical to reaping the full benefits of e-commerce trade.

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243 UNCTAD, p116
244 UNCTAD, p119
245 UNCTAD, p117
246 IDRC, p3

In this regard it is significant that regional regulatory practices reflect recommendations contained in the UNCTAD Report, advocating that national regulators encourage competition to reduce the cost of access to relevant technology as well as enhancing the availability of quality technology.**247)** Increased access in rural areas, provision of technical assistance and regional interconnectivity has been identified as priorities. The Telecommunications Regulators Association of Southern Africa (TRASA) has adopted a number of initiatives aimed at ensuring that appropriate regulatory practices were put in place in the telecommunication sectors of Member states. **248)**

The TRASA activities are supported by specific programmes such as the SADC ICT Policy and Regulatory Support Programme (SIPRS). SIPRS aims to foster regional telecommunications policy harmonization, based on the principle of increased liberalization resulting in increased competition and resultant advantages to consumers.**249)**

An advantage of e-commerce trade is related to the overcoming of the various bureaucratic procedures, including customs procedures, corruption and exobertant import tariffs that has charachterised physical cross-border trade. In this regard e-commerce could play an invaluable role in serving democracy and good governance on the continent. As the importance of services increase as an economic factor, Governments should lend their full support and channel adequate resources to establish a viable e-commerce infrastructure. **250)**

Caution has however been expressed regarding these and related initiatives. It is argued that various telecommunication policy makers in the region approach the regulation of e-commerce from a short term position given the international "hype" surrounding the topic instead of adopting a long term view which will contain definite integrated policies.**251)**

Furthermore regional organizations will have to come to grips with the fact that the level of e-commerce development in the region is vastly different.**25 2)**

Refining the partnership between the private and public sectors and outlining their specific role and the need for increased co-ordination within countries as well as intra-regional is an additional priority. It is recommended that regional co-operation be strengthened at the continental level, preferably as part of a NEPAD initiative, geared towards the harmonization of national telecommunication policies, which can lay the platform for addressing the digital divide.

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247 UNCTAD, 115-117
248 Dot-comments, p1
249 Ibid
250 UNCTAD, p77-79
251 Okediji,p39
252 IDRC, p3-4

CHAPTER EIGHT

8.1 NATIONAL LEGISLATION OF SELECTIVE SADC COUNTRIES

8.1.1 Introduction

South Africa and Mauritius were selected given their relative advanced stage of e-commerce preparedness within the SADC region, and in the expectation that relevant legislation and practice in both countries could perhaps serve as valuable example for other SADC countries to follow.

Specific attention would be paid to whether the South African and Mauritius legislation provide a suitable platform on which e-commerce trade can flourish. The question to what extent the respective legislation could pre-empt protectionist measures from trade partners in developing countries, particularly the USA and the EU. In this regard the issue of the protection of personal data would be closely investigated. It should be mentioned at the outset that both in Mauritius and South Africa the issue of IPR protection, which could serve as an additional threat to e-commerce business in developing countries is also not addressed within the existing legislation. **253)**

8.1.2 Mauritius

Mauritius has adopted a number of key legislative measures aimed at regulating e-commerce. Key measures include the *Electronic Transactions Act (2000)* and the *Information and Communication Technologies Bill (2001)*.**254)**

The main purpose of the *Electronic Transactions Act*, is to provide the appropriate legal framework, which can serve as a platform to facilitate electronic transactions and communications. Provision is made for the legal recognition of electronic records, the regulation of the formation of electronic contracts, regulation of electronic or digital signatures, the electronic filing of documents in the public sector, to name a few.**255)**

In so far as electronic signatures are concerned, the Certification Authorities, appointed in terms of the act play a crucial role in ensuring and verifying the identities of parties to an electronic-transaction.

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253 Information and Communications Technologies Bill (Mauritius), Electronic Communications and Transactions Bill 2002 (South Africa)
254 Mauritius e-commerce, p2
255 Ibid,

In this regard the Mauritius legislators have closely followed the UNCITRAL model law, in ensuring that legal certainty and specifically confidence in e-commerce trade is ensured as far as possible. Recognition is also given to the concept of the technological *neutrality* as far as the means in which trade is conducted, irrespective if via conventional means through documentation or electronic means.**256)**

In addition to the *Electronic Transactions Act* Mauritius adopted the *Information and Communication Technologies Bill (38/2001),* providing an additional basis for the establishment of a legal framework to allow Mauritius to exploit opportunities in respect of e-commerce.**257)**

An appropriate legal framework, was also viewed as an important catalyst for the development and national acceptance of the value of e-commerce. With the adoption of the *Information and Communication Technologies Bill* (38/2001) obstacles to the establishment of a more secure environment for the public and private sectors to embrace the value of e-commerce, based on a spirit of trust, have been addressed.**258)** The authorities hope that through this initiative the foundation for establishing Mauritius as a hub for international e-commerce could be entrenched.**259)**

The interest that Mauritius has displayed in embracing the importance of e-commerce most likely derives from its status as a relatively isolated island economy, which is dependent on a few critical sectors to augment it's GDP, notably export of primary goods and tourism. **260)**

The work group, responsible for the drafting of the Mauritian legislation examined the UNCITRAL Model law legislation closely and conducted comparative studies of comparative legislation. The following were the guiding principles adopted by the Working Group:**261)**

a. The importance of an appropriate legal framework serving as a foundation to facilitate electronic communications and transactions;

b. The legal recognition of electronic records and signatures for application purposes during electronic transactions;

c. The regulation and formulation of contracts by electronic means;

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256 E-commerce, Mauritius, p3
257 Ibid
258 Ibid
259 Ibid
260 Ibid
261 Ibid

d. The appointment of a Controller of Certification Authorities, responsible for the licensing and monitoring of activities of the certification authorities Mauritius provides for a system of voluntary licensing for certification authorities by the Controller of Certification. (In 2000 the South African Certification Agency (SACA) signed its business partnership agreement in Mauritius I line with its strategic expansion into Africa).;

e. Regulation of the electronic filing of documents in the public sector, to encourage stakeholders in the public and private sectors to increasingly resort to electronic means in conducting their operations, particularly with Government;

f. Uniform rules and regulations aimed at establishing standards to combat fraud, forgery or any unlawful practice so that confidence in electronic records and dealings could be promoted. **262)**

8.1.2.1 Data protection provisions

Art 33 of the Information and Communication Technologies Bill (38/2001) provides fairly wide-ranging powers to the ICT Authority, tasked with the administering and management of the Act in terms of the Code of Practice contained in Schedule IV to the Act. The ICT authority is also empowered to direct that data may be corrected modified, up-dated or deleted in respect to any individual. Furthermore to qualify as "lawful data", such data may not been used contrary to a written personal instruction, sent directly to the data user. **263)**

The Fourth Schedule to the *Information and Communication Technologies Bill* provides extensive protection to protect private data. Provision is made that data which is fairly obtained, that the data user shall have informed the data subject of the identity of the data user, prior to obtaining the data and that the intended use of the data and the persons to whom the data would be disclosed should be revealed. **264)**

In addition data shall be deemed to have been fairly processed when the data shall not have been used contrary to any written personal instruction and sent directly to the data user, or via a lawful intermediary.**265)**

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262 E-commerce, Mauritius, p3 also see OECD Report, p14
263 Information and Communication Technologies Bill sec 33(3)
264 Ibid, Schedule IV
265 Ibid

Further extensive provision is made for data protection, including that data be used for the specific purposes for which it was collected, that data be held accurately and that it should not be kept longer than what it is necessary. Personal data should also be used on the basis that it is relevant, adequate and not excessive in relation to the purpose for which it will be held. This prevents the recording of data that may be useful in future. Data should also be accurate and that it should not be kept longer than required. **266)**

The provisions are quite extensive but it would still have to be determined to what extent they would satisfy EU regulators in Brussels. Mauritius perhaps has the added advantage, that its market does not pose any significant competitive threat. Significant growth in the local ICT is unlikely to raise to many eyebrows.

8.1.3 South Africa

The primary legislative measure aimed at the regulation of e-commerce in South Africa is the *Electronic Communications and Transactions Bill (2002)*. With the passing of this bill, which came into force on 30 August 2002, legal recognition is given to electronic transactions and communications. **267)**

In the outlining of the objectives of the Act, emphasis is placed on the broader developmental objectives, including the importance of information technology for social and economic prosperity, the promotion of universal ICT access, the encouragement of innovation, promoting the establishment of SMEs within the electronic transactions environment. In this regard the facilitation of electronic communication is viewed, not as a goal in itself but as an important means to achieve broader national developmental objectives. The importance attached to the developmental dimension is underscored through the dedication of articles 5 to 9 of the Act to provide extensive coverage of these issues.**268)**

The Act also strives to lay the necessary legal foundation so that electronic transactions conducted in terms of the Act were in fact legally binding.**269)** Some uncertainty however still remains regarding the weight of evidence provided via electronic means and contractual procedures, particularly determining the point at which a contract is formed. This problem could arise in a case when a would-be purchaser sends an offer to purchaser to a supplier via e-mail, and the act does not appear clear enough on when an offer would give effect to a binding contract 269)

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266 Information and Communication Technologies Bill, Schedule IV
267 Coetzee J:, 501
268 Electronic Communications and Transactions Bill, Art 5-9.
269 Coetzee J, 517

It would appear that these *lacunae* would have to be clarified by practice and litigation, which is bound to result from the expansion of the trade in e-commerce. **270)**

Extensive provision is made for the promotion of technological neutrality, the promotion of legal certainty and confidentiality, the promotion of a safe, secure and effective environment for the consumer, as comprehensively covered in articles 11- 21 of the Act. To what extent this would be effective in providing sufficient confidence to the market and the users of e-commerce as means to trade is difficult to determine at this stage and would have to be borne out through practice.

If compared to the relevant Mauritius legislation above it appears that the trend adopted in the South African Act closely follows the guidelines contained in the UNCITRAL model law. In this regard the South African and Mauritius legislation is in line with worldwide trends which could greatly facilitate the possibility of adopting e-commerce at the level of the WTO through harmonized procedures as a result of practices that have established themselves through the course of international e-commerce trade. **271)**

In terms of article three of the UNCITRAL model law specific recognition is attributed to the *international* origin of e-commerce trade and thus the need to promote uniformity. This approach is similar to that adopted by the UNCITRAL drafters responsible for the drafting of the Convention on the International Sale of Goods. An additional similarity was the adoption of the principle to respect the autonomy of the contracting parties.**272)** This issue is particularly trite as it can be argued that party and industry autonomy are particular relevant within international trade. According this argument state intervention should be limited to that which could be regarded as essential so as not to artificially inhibit the flow of trade by its practitioners, which have established appropriate practices through practical experience. **273)**

In addition the bill accentuates the importance of devising a national e-strategy as part of bridging the digital divide domestically but also on the continent by specifically providing for assistance to the New Partnership for African Development (NEPAD), specifically in respect of the bridging of the digital divide on the continent.**274)**

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270 Cliffe Dekker, p3, uncertainty as to what qualifies as a contractual offer.
271 Coetzee, p504
272 UNCITRAL Model Law on E-commerce see comments by Coetzee J Incoterms, p4
273 Ibid
274 NEPAD, p1

8.1.3.1 Protection of private data

In respect to the protection of data privacy, concern has been expressed at the ability of the newly created cyber inspectors to investigate unlawful activity on the Internet and to perform remote searches and seizures through computer networks.[275] Although the legitimate need to investigate potential criminal activities over the Internet cannot be questioned, question marks arise as to the extent that such activities could negatively impact on ensuring data privacy, especially in view of the high standards adopted in European Union, as indicated above.[276]

Concerns have also been raised by the South African audit company Price Waterhouse Coopers regarding the additional burden that recommendations regarding the "cyber inspectors" may place on e-commerce businesses and e-commerce trade in general.[277]."""Cyber inspectors" who are empowered to conduct audits on critical databases without issuing a warrant. In the absence of limits being place on their functions, privacy of individual users could arguably be adversely affected. It is clear that an appropriate balance between the states obligation to protect the public from crime and other related cyber crimes as well as to protect the sovereignty of the state should be balanced against the legitimate right of the individual and private sector to rely on privacy [278]

Criticism at the new Bill has also been directed at the new Bill from various quarters, namely that too many powers are vested within the Department of Communications in what should essentially be regarded as legislation covering the private sector. [279] Provision is also made for retail web sites to stipulate their security procedures and privacy policy in respect of payment and personal information. It is not sure how effective consumer protection remedies, provided for in the Act will be in the event of cross-border e-commerce transactions. [280]

The Act is also regarded as too ambitious in setting requirements for "cryptographic materials" and may in fact hamper trade in e-commerce.[280] The problem is of concern given the broad definition the Act attributes to "cryptography", implying virtually anyone who sells computers and provides strict requirements in respect to foreign cryptographic service providers, requiring that registration in South Africa is a prerequisite to conduct trade in these services within the Republic.[281]

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275 Business Day, "Experts say bill offers exiting opportunities"
276 Ibid
277 Ibid
278 Cliffe Dekker, p9
279 Cliffe Dekker, p4
280 Ibid
281 Coetzee J, pC506
282 Cliffe Dekker, p9

Security interventions as described above should be based on necessity necessary and motivated for the purposes that they are instituted. Provisions contained in Chapter VIII of the Act which makes provision for this would and should provide the necessary checks and balances.**283)**

Inappropriate actions could clearly run foul of policy makers in South Africa's primary international markets, such as the USA and the EU. An added concern is the fact that although the Act provides for the protection of private information obtained through electronic transactions by data controllers, subscription to these policies are voluntary. (Section 50 (2)). **284)**

Related to the above concern is the issue that the definition of "critical "data", contained in art 1 is very wide formulation as it includes any data which is *important to the economic and social well being of the citizens of the Republic*.**285)**

In line with most international jurisdictions the South African Law Commission has signaled interest in incorporating aspects of the *Electronic Communications and Transactions Bill* dealing with the protection of personnel data as part of comprehensive new legislation dedicated to data privacy in South Africa.**286)**

In view of the above it appears fair to deduce that the Act has fulfilled a useful purpose in filling the legislative void as far as the regulation of electronic communications is concerned, especially in ensuring that the relevant South Africa practice was in line with the relevant international standards. In this regard South Africa has benefited from various international e-commerce legislative attempts, including of course the UNCTAD model law on e-commerce. However, concerns surrounding the effects hat invasive measures could have on private users of e-commerce remains uncertain and raises certain legitimate concerns, especially as far as interpretation by regulators in South Africa's principle trading partner, the European Union is concerned. The issue of Intellectual Property also looms large and is not addressed in the act, similar to the position in Mauritius. **287)**

In addition to the above Act consideration should be drawn to the Open Democracy Bill, which was promulgated in 1999 **288)**.

The critical question is whether this Bill could possibly cover deficiencies within the Electronic Communications Act. The essential internationally accepted principles provided for in the Open Democracy Bill are openness, provision for individual access and correction, placing limits on the collection of data as well limits on the use of collected data and providing that data be used with the consent of the data subject as well as for the expressed purpose for which the data was obtained or complied.**289)**

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283 Electronic Communications and Transactions Bill, Chapter VIII
284 Coetzee J, p510
285 Bridges, "Commentary on The Electronic Communications Bill…., p3
286 Ibid, p5
287 Bridges, p2
288 Buys, 378-380
289 Ibid

It is clear that the above-mentioned legislative measures, although incomplete, would have to be supported by other more operational strategies to ensure that Government makes good on the intentions contained in the Act, specifically as far as the implementation of proposals are concerned. South Africa has already implemented progressive steps to explore the possible advantages that Free Open Source Software (FOSS) can provide. **290)**

The South African Government Information Officer's Council has indicated that a range of advantages could result from using FOSS. These include: reduced costs, decreased technological dependency (read Microsoft), promotion of universal ICT access, avoidance of software vendor lock-in. In this regard the South African Government could give practical content to its national e-strategy as outlined in the *Electronic Transactions and Communications Bill.* The Information Officer's Council delivered an official recommendation promoting the use of open-source applications when proprietary alternatives did not offer a compelling advantage.**291)**

FOSS has also been implemented at varies tiers of Government on an experimental basis, i.e. through deployment by various Government service agencies at the national and provincial levels. South Africa has also taken the lead in regional collaboration on the Open Source Society, including the Free and Open Source Software Foundation for Africa. **292)**

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290 UNCTAD
291 UNCTAD, p116
292 Ibid

CHAPTER NINE

9.1 CONCLUSION AND RECOMMENDATIONS:

This paper has critically investigated the nature of risk posed by regulatory authorities in OECD countries, primarily the USA and the EU in inhibiting the flourishing growth in the market for the outsourcing of e-commerce services in certain developing countries.

In order to illustrate the extent of the benefits contained in the e-commerce outsourcing trade, specific attention was paid to the dramatic trade growth experienced in India, with outsourcing contracts representing a sizeable percentage of the Gross Domestic Product of that country and with all the prospects for continued future growth.

Although India possesses distinct comparative advantages to benefit from the international outsourcing of electronic services, primarily as a result of a highly qualified ICT skills base, it is not inconceivable that other developing countries that have made substantive investments in education and training, but who continue to suffer from high unemployment and low economic growth levels, could equally benefit from this market.

In the interest of diversifying economies in the developing world, the importance of maximizing the advantages that the international e-commerce trade could provide, should be underlined. This is particularly important in the context of Southern Africa, where the reliance on primary product exports, among SADC Member States is still too high. However, encouraging signs of this region potentially benefiting from the supply of outsourced e-commerce services has already emerged in respect of developments in Mauritius and South Africa.

It should also be clear from the discussion that the wealth and job creation advantages associated with the stimulation in e-commerce trade should not be viewed as goals in themselves. Various indirect benefits, specifically linked to the developmental goals of low income countries can be facilitated through the adoption of an enabling and legal environment, conducive to the exploitation of this potentially lucrative market.

The importance of utilising technology as a developmental and democratisation tool has been prominently voiced in a wide range of international fora. Strong consensus on the importance of actively promoting e-commerce trade has emanated from a number of prominent multilateral bodies such as the WTO, UNCTAD and the ITU. The key concern remains whether developing countries

will display the necessary political will to devise and implement national and regional policies, which would directly benefit the ICT sector.

It is clear that the creation of a sufficient enabling environment will prove challenging given resource constraints in many developing countries. In this regard the growing response to innovative approaches such as the adoption of Free Open Source Software (FOSS) is heartening. FOSS, although no panacea for all the challenges facing developing countries, could nevertheless contribute significantly in addressing key developmental concerns. The emergence of (FOSS) provides additional scope to developing country e-commerce traders to avoid the threats posed by proprietary software. Various developing countries such as Brazil have planned ambitious drives to increase public accessibility to FOSS.

In the light of these benefits, this paper has argued in favour of developing countries supporting the liberalization of the trade in e-commerce services, as propagated by GATS, instead of adopting the traditional overly cautious approach, based largely on sovereignty considerations. Certain concerns, particularly those related to morality and cultural could be accommodated without inhibiting the principle advantages provided by e-commerce. To resist will increasingly be regarded as anachronistic and counter-productive. High trade barriers have not enabled developing countries to escape structural poverty and underdevelopment and the same should inform the approach to e-commerce.

In respect to e-commerce many developing countries, although not all, enjoy a number of key advantages, including relative low labour costs and a relative large pool of skilled unemployed citizens. In addition may countries still have small ICT sectors, which lessen the argument for protectionism, as there are invariably few “infant industries” in need of protection. These comparative advantages should be exploited to the benefit of the countries concerned.

In view of the strong recognition of the benefits contained in the providing of e-commerce services, the fundamental question remains whether protectionist measures from the developed world, particularly the USA and the European Union pose a real threat to realizing the ambitions of millions of potential job seekers in developing countries?

This paper has indicated that the arguments in favour of protecting jobs in developed countries, especially in the USA are generally not based on sound economic considerations. It would appear that legislative measures aimed at halting outsourcing contracts, especially public ones, are based on considerations that are not directly linked to concerns of job losses and no substantial correlation between job losses in the US labour market in particular and the increase in outsourcing contracts could be confirmed.

Despite the absence of clear economic justification for protectionist measures, the risk of such measures being adopted is not lessened. As the paper attempted to argue, a number of considerations such as political sentiment and opportunism surrounding unemployment could increase popular appeal for stricter protectionist measures. The concerns of influential trade union lobby groups in OECD are granted considerable priority on the agendas of political decision-makers; similar to influence that the farm lobbies have on EU agricultural policy.

The paper also indicated that the potential threat to the outsourcing market in developing countries is not only direct in nature and could potentially surface in a number of indirect and even insidious forms. Although it was not possible to explore all potential risks within the scope of this paper such as the effect taxation, the influence of Intellectual Property Rights and the protection of private data have been considered in view of the prominence received within academic and popular literature, largely as a result of security concerns associated with the e-commerce.

From the discussion on Intellectual Property Rights it is clear that various potential obstacles may confront the unsuspecting outsourcing service provider in the developing world. It is particularly likely that a service provider may unwittingly compromise proprietary rights. An additional burden is created by the changes to the Berne Copyrights Treaty to accommodate changes in technology, which many developing countries have ratified. It is therefore heartening to note that most of the writers quoted in this paper recommend a cautious approach in holding service providers strictly liable and rather suggest an approach based on objective criteria such the knowledge that the service provider concerned has of such data and the technical ability of a service provider to prevent access to such data.

In addition to IPR, the protection of private data is perhaps the single most important issue that could threaten the proliferation of outsourcing contracts in the developing world. A principal concern, particularly for countries in the SADC region is the adoption of an EC Data Protection Directive. One of the controversial aspects of the Directive provides for the restriction of data transfer a to third countries if *an adequate level of protection* was not provided in the country concerned. In view of its wide formulation and in the absence of objective measurable criteria to determine such adequacy, various developing country service providers could be rendered particularly vulnerable.

A potentially encouraging development was heralded by the WTO Panel and appeal judgment in Antigua& Barbuda v USA. The recognition of the trade limiting effect of the US domestic legislation is an encouraging development, although the practical advantages of the decision for developing countries are debatable, principally as a result of their lack of bargaining power. The decision of the WTO Appellate Body in recognizing that “moral considerations” be

regarded, as an exception to liberalization commitments will have to be carefully scrutinized to avoid undue erosion of the process towards trade liberalization.

From the analysis of the international regulation of e-commerce trade it is evident that such transactions best be regulated by the GATS to avoid any possible confusion with GATT.

GATS in its present form, appears ill equipped to deal with challenges posed by the international e-commerce trade. In addition to the relatively low level of commitments by WTO Member countries various potential problems, which could contribute to legal uncertainty, have been identified.

Foremost is the concern that the present classification system of services, gives room to inaccurate interpretation of services categories. This is not in the interest of international trade promotion. Legal uncertainty may result from the application of the various modes of supply in respect of the GATS and it is recommended that e-commerce be treated as a mode 1 supply in the interest of consistency as well as to avoid possible manipulation that could result from the discrepancies in country commitments in respect to the various modes of supply.

To prevent the GATS from becoming an obstacle to trade liberalization of e-commerce services, the recommendation to establish a framework agreement, based on certain core trade promotion criteria is supported. It is trusted that with such a "framework agreement" based on core principles, including the encouragement of competition between e-commerce suppliers, the granting of freedom of choice to consumers, and transparent e-commerce legal regimes, which would inspire confidence in the market, the regulation of e-trade could act as a powerful facilitator instead of an obstacle to the trade in e-commerce services. Of particular importance would be the creation of a suitable legal environment, which would be characherised by transparency and objectivity instead of opportunism. The relative flexibility of such a "framework agreement" could hopefully also assist in limiting the use of technical-legal arguments by OECD trade law experts, which strictly interpreted fall outside the spirit of the GATS.

In the review of national e-commerce legislation in South Africa and Mauritius as well as on the African continent, various positive initiatives can be noted. On a regional level and in line with the NEPAD initiative much emphasis will have to be placed on harmonization of policies, specifically the liberalization of the respective telecommunications sectors to ensure improved quality and less costly telecommunication sectors in a region where sovereignty considerations have contributed to market inefficiencies. Through increased competition and more emphasis on self-regulation of the e-commerce sector the interests of the ordinary citizens would be best served. If the region were to take its rightful place on the international e-commerce stage these policies would have to be given practical meaning. In this way increased FDI in the sector could be expected.

National legislation in South Africa and Mauritius has laid a promising, although incomplete platform for the development of the ICT sector. The respective legislation has placed legal recognition of e-commerce transactions on a firm footing and legislation in South Africa and Mauritius strongly emphasise the broader developmental importance of e-commerce, in line with the UNCITRAL model law from which both drew significant inspiration. This should directly assist in international hamonisation efforts as the UNCITRAL Model law can be viewed as setting an important international standard in regulating e-commerce.

However both Mauritius and South Africa in particular have both adopted fairly stringent data protection measures, to the extent that it may be viewed as unduly invasive. In the interest of increased liberalization of the sector it is however recommended that strong powers vested in Government to control data security be relaxed, particularly in the case of South Africa, may act as deterrent to e-commerce trade, especially where such measures may not be proportionate to a perceived risk. In view of the argumentation of this paper these measures may potentially also run foul of foreign regulators, particularly within the EU.

In conclusion it is perhaps safest to state that the international, regional and national legal frameworks are at present not sufficiently geared to meet all the challenges posed by e-commerce. However as e-commerce is playing an increasingly important role in world trade, not to mention the range of potential developmental applications, the urgency of meeting these challenges cannot be ignored.

It has hopefully been argued in the course of this paper that through the creation of creative mechanisms and liberal interpretation of relevant international agreements and national laws, the spirit of trade liberalization will be given priority. It is unlikely that any system would entirely meet the needs of the markets and technology at all times. It is however the attitude of legislators, politicians and regulators which could play a pivotal role in establishing an environment which will stimulate e-commerce trade.

In closing it is perhaps appropriate to reflect that the importance of e-commerce trade to the developing world cannot be underestimated. A concerted effort at national as well as regional and multilateral levels to provide for economic and legal co-operation is essential.

It is however also true with the exponential growth of technology, it is unlikely, indeed most likely impossible that any legislative framework will fully meet the needs of the market and society. As long as the international trading system is informed by our constant vigilance to maintain good faith in the interest of growth and the upliftment of our poorest and marginalized, the immense potential of e-commerce may be realized.

It may be opportune to close with the following statement by the revered Mahatma Gandhi:

It is pointless to dream of systems so perfect so that human beings no longer need to be good.

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