
The *emergence of Trade in Services* as an emerging,
international trading commodity from a South African
perspective.

ABDUL KARRIEM JACOBS

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The logo of the University of the Western Cape, featuring a classical building with a pediment and columns, with the text 'UNIVERSITY of the WESTERN CAPE' below it.

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International Law, trade, service, cross-border, importation, general agreement, commercial, movement, liberalize, conditional, specific, multilateral, developing, developed



DECLARATION

I declare that, **The *emergence of Trade in Services as a new emerging trading commodity from a South African perspective* is** my own work, that it has not been submitted before for any degree or examination in any other university, and that all sources I have used or quoted have been indicated and acknowledge as complete references.

Abdul Karriem Jacobs

Signed.....

November 2005



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ACRONYMS

WTO	World Trade Organization
GATT	General Agreement on Trade and Tariffs
MFN	Most Favoured Nation Treatment
OECD	Organization for Economic Co-Operation and Development
SADC	Southern Africa Development Community
TRALAC	Trade Law Centre on Trade and Development
FDI	Foreign Direct Investment
GATS	General Agreement on Trade in Services
LDCS	Least Developing Countries
UR	Uruguay Round
TNC	Transnational Corporations



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CHAPTER ONE

INTRODUCTION

1.1 INTRODUCTION AND STATEMENT OF THE PROBLEM

The World Trade Organization (WTO) agreements provide a legal framework for International commerce and trade policy. These agreements include the General Agreement on Trade and Tariffs (GATT) and the General Agreement on Trade and Services (GATS) which entails a complex and exotic mixture of legal and policy issues which seriously impact upon domestic, foreign and multinational spheres of International Trade. The Governments have negotiated these agreements and it sets the framework within which companies and individuals can operate.¹ The aim therefore is to increasingly liberalize trade in services among WTO members²

Trade in services is a rapidly growing phenomenon and currently accounts for over 20% of all international trade. During the Uruguay Round, GATS was negotiated and the basic rules applicable to trade in goods as encompassed in GATT were applied to trade in services. Services have characteristics that differentiate them from manufacturing products in international trade. These characteristics include the following:

- **Intangibility**- services are difficult to touch.
- **Nonstorability**- it is impossible to store services in an inventory implying that it is not only difficult to trade services across space but also difficult to trade across time.
- **Heterogeneity**- services are often non - standardized and tailored to customer needs thus the extent of product differentiation is very great.
- **Joint production** – services are produced and consumed at the same time, with customers participating in the production process.

¹ GATS: Fact and Fiction : 1-2 Available at
<http://www.wto.org/english/tratop_e/serv_e/gats_factfiction4_e.htm>

² Choike-GATS-TRADE IN SERVICES :1-3
<http://www.choike.org.nuevo_eng/informes/1169.html>

Services were vividly highlighted in a United Nations Publication³ asserting that “anything sold in trade that could not be dropped on foot” is a service.⁴ Services include activities such as transport of goods and people, financial mediation, communications, distribution, services provided in hotels and restaurants, education, health care, construction and accounting services are vital to the functioning of any economy.⁵

A further major distinction between service and goods is the means of protection granted by governments to domestic industries. Industries producing goods are generally protected by the imposition of tariffs or other border measures such as quantitative restrictions. Service industries are protected mainly by national domestic regulations on foreign direct investment and participation of foreign service suppliers in domestic industries.

The reason for highlighting the difference between GATT and GATS is to focus on the impact of these agreements on the developing countries and in particular the latter will be the main focus of this paper. The economies and governments of the developing states are struggling to generate sustainable capital growth and maintain financial stability to enhance economic growth. This is due to dictators who rule in such a manner to maintain power irrespective of the future economic viability of their state. Thus the environment for sustainable economic growth is fraught with political instability, lack of proper financial control and eagerness to attract foreign investment and allowing market access to developed states.

These tendencies have the effect that there is a lack of continuity and any viable projects or initiative by the government are either derailed due to internal conflict between various population and governmental groups. This creates a lacuna, which developed states exploit to their advantage. It had the effect of manipulation and abuse by developed states to offer foreign direct investment and also setting the agenda for agreements to suit their needs. The effect hereof is that there is a great need for economic growth, foreign direct investments and market access, which can be easily negotiated by developed states due to vulnerability and desperate outcry of developing states, for much needed financial injections.

The GATS regulations may be applied on a discriminatory basis, thus prohibiting foreign suppliers from investing or establishing a branch necessary to supply services, or natural persons to provide the services, thus treating them differently or less favourably than domestic producers. The question arises to what extent the developing states really invoke these regulations to their advantage.

³ The Business Guide to the World Trading System (1991) 2ND Edition Geneva ITC/CS, 191

⁴ WTO Business Guide ibid

⁵ Hoekman B, Kostecki M, The Political of the World Trading System, 2ed (2001) 237

Put differently, do they have the capacity to enforce these provisions against developed states, and limit the expansions of their markets at the cost of the minimal benefit to the developing states?

It is clear that this growing sector needs protection to enhance and advance the liberalization of international trade amongst all sectors of trade globally. Thus it is paramount to question the efficacy of GATS to regulate international trade in services on a fair and equal basis. In order to restore the necessary confidence in developing states to invoke these measures to protect their economies against the constant defiance of the multilateral agreements between developed and developing states.

This essay therefore aims to investigate the protection measures of international trade in services and in particular the impact of developed countries' exploitative and manipulative measures against developing states to increase their market access to benefit their own economies. A further aim is to investigate the extent of preventative measures encompassed within GATS with specific reference to market access provisions and whether these measures provide any protection for developing states to inhibit the exploitation and manipulation of the industrialized states. These states offer the much needed direct capital investment, but utilize it as a tool to lure developing countries to allow developed countries market access in services; to establish new markets to their benefit and to the long term detriment of the struggling economies of developing states.

The objective of the study is to identify measures available by way of GATS, to eliminate or reduce the exploitation and manipulation of developing countries. The developed states induce developing countries to allow them market access to further expand their markets, which have the effect of enriching the developed states. It is common knowledge the developing states are in need of this much-needed capital injection, it is for this reason that developing states should be cautious and not overeager to accept agreements, which could be more harmful as oppose to any benefit that they may offer to these developing states.

Based on this premise this essay will investigate the need for economic growth and the rules relating to market access in relation to trade in services as well as the impact of the manipulation tactics of developed countries on the developing states. Specific focus will be placed on the rules set out within GATS relating to measures for market access.

Reference will be made to the commitments of members to this agreement along with the modes of trade in order to highlight the importance of all modes and how GATS ultimately impact upon these modes of trade in services.

This paper will also particularly focus on the imbalances between the developing countries and developed states and to what extent the latter is taking the initiative in relation to Trade in Services to benefit their Transnational Corporations (TNC's), and to visit the impact and influence these corporations assert on their government delegates when negotiating trade agreements relating to GATS.

1.2 AIMS OF THE RESEARCH PAPER:

This paper seeks to: -

- Study to what extent the World Trade Organization (WTO) provides for rules applicable to Trade in Services.
- Investigate what Trade in Service is referred to and how it is conceptualised internationally with specific reference to the market access.
- Evaluate the extent of how Trade in Service rules are being used by developed countries within the global trade market to dominate and manipulate trade in the service sector as a bargaining tool to explore new markets for service providers in developing countries.
- Focus on GATS and the extent of protection the rules relating to market access can benefit developing states in particular the African states.
- Provide some insight of the Transnational Corporations influence and lobbying of government delegates to negotiated agreements to benefit their business irrespective of the negative impact to the host developing states.
- Give recommendations on what developing countries should do to improve their trade negotiations in services with particular reference to market access to benefit maximally from this fast growing service sector.

1.3 SIGNIFICANCE OF THIS STUDY

Trade in services is an ever-increasing sector of trade, which particularly affects various aspects of trade internationally. Areas of trade for example tourism, consulting agencies, insurance, telecommunication, financial intermediation, education, health and construction are vital to the functioning of any economy.

The significance of this study is based on the assessment of GATS as important rules based protective measure for developing countries against exploitation of developed countries, who seek new markets at the expense of over eager developing countries. The developing countries are eager to accept much needed foreign direct investment (FDI) to speed up their economic growth.

The technological advancement achieved in the field of telecommunications, an important services commodity, has been phenomenal, especially within the fast growing information technology domain i.e. internet and the impact of computerized technology in almost all sectors of our lives.

Telecommunications have become an important commodity which links the developing countries with contemporary technological developments within the economically strong developed countries. It is important for policy makers to understand that Trade in Services is a viable means to attract new and continuous business ventures within their countries but they must be weary of the real intentions of these multinational enterprises.

1.4 THE METHODOLOGY AND CHAPTERS OVERVIEW

This study shall be literature based with emphasis being given to the analysis of the relevant available literature on the subject matter. The study shall rely on both primary and secondary sources of literature. On primary sources regard will be given to the International Instruments, general documents, international organizations, and domestic legislation of selected countries. On secondary sources reference will be taken from backgrounds papers, books, scholarly and academic articles, various Internet sites will be consulted for relevant up-to-date data and information.

This paper will comprise of four chapters. The first gives an introduction and general statement of the problem; the second chapter covers the evolution, importance, benefits, historical overview as well as the aims, purpose and scope of the rules applicable as setout in GATS, with specific reference to market access. The third chapter deals with the implementation and effects of GATS by developed countries to benefit their economies at the expense of developing states, followed by a conclusion and recommendation for developing states to improve their trade negotiations with reference to market access for developed states in chapter four.

CHAPTER TWO

THE GENERAL AGREEMENTS ON TRADE AND SERVICES WITH REFERENCE TO MARKET ACCESS

2.1 INTRODUCTION

The General Agreement on Trade in Services (GATS) is an annex to the WTO Agreement and governs and regulates international trade in services. This is a first attempt to regulate services in the international trade arena. GATS apply the basic rules for trade in goods to trade in services but these rules have been suitably modified to take into account the differences between goods and services.⁶ This rules based system is of particular importance to developing countries as a means to prescribe to develop countries which services they wish to guarantee access to foreign suppliers. It is on this basis that the developing countries have complete freedom to choose which services to commit. This chapter attempts to provide a historical overview of GATS and in particular, benefits, aims, purpose and scope of rules as agreed to in the General Agreement on Trade in Services.

2.2 HISTORICAL DEVELOPMENT

The building of the multilateral trading system over the past 50 years has been one of the most remarkable achievements of international cooperation in history. The system is certainly not perfect that is one of the reasons why periodic negotiations are necessary.⁷

The World Trade Organization was created on 1 January 1995 and firmly based on the principles of the General Agreement on Trade and Tariffs (GATT). These multilateral agreements have predominantly focused on the trading of goods and levy of fair tariffs for goods, which enter and exit states. Trade in services was recognized during the 80's with increased interest due the rapid and continuous growth of technology during the years that followed.⁸ The United States perceived it had a comparative advantage in services, and sought to link further liberalization of trade.⁹

However the US was not successful to persuade the 1982 ministerial meeting to include services as an agenda point. Due to diligent advocacy of the importance of trade in service in the following years and in particular at the Uruguay rounds, December 1, 1994, led to the creation of General Agreement on Trade in Services

⁶ Business Guide *loc cit* 191

⁷ Gats facts and fiction *loc cit*

⁸ Hoekman & Kostecki *op cit* 237

⁹ *ibid*

(GATS) and in 1994 was part of the formation of the WTO.¹⁰ Prior to the Uruguay round trade in service was not subject to any discipline at international level. The GATS was negotiated during this round, which had the effect that for the first time trade in services will be regulated at an international level. The resolution adopted at the Doha Development Round was to frame responses to trade related issues identify for fuller integration of small, vulnerable economies into the multilateral trading system.¹¹ This resolution followed an earlier decision adopted at the Second WTO Ministerial Conference in Geneva which called for a work programme to examine all trade issues relating to global commerce, taking the economic, financial and developmental needs of developing countries into account.¹²

The General Agreement on Trade in Services (GATS) is among the World Trade Organization's (WTO) most important agreements. The Governments have negotiated it and it sets the framework within which firms and individuals can operate.¹³ The WTO began mandated negotiations in 2000 to expand the reach of the services agreement. According to GATS Article XXIX¹⁴, member countries are required to "progressively liberalize" their sector services in these negotiations.¹⁵ This had the effect that member states will be obliged to increase market access of signatory states and in particular the developed states who poses the capacity to invest and establish the necessary infrastructure to develop trade in services within the new state to enhance their economic advancement.

In recognition of the growing importance of services in the world economy, trade ministers negotiated GATS rules in 2000 with vigor and in particular those ministers of the develop states, realizing the immediate and future benefit it could hold for their economies and capitalistically geared multinational companies.

In a further attempt to draw international trade in services into the multilateral framework of rules and market access guidelines,¹⁶ as an important agenda point at the ministerial meetings, the other developed states have latched onto the USA's vision to have these negotiations of GATS included in their ministerial meetings. Due to the rapid technological advancement the developed states are the current forerunners to develop rules to suit their needs, which will be applicable to all the member states.

¹⁰ Under the terms of GATS member countries were obligated to continue further liberalization of services and to begin negotiations in 2000 to achieve that goal

¹¹ WTO, Doha Ministerial Declaration, 2001

¹² WTO, Geneva Ministerial Declaration, 1998

¹³ GATS: Fact and Fiction *op cit* 1-2

¹⁴ Article XXIX set out the annexes of states and is an integral part of GATS. When the Uruguay round was concluded, it was thought that it might not be possible to complete the negotiations on trade liberalization in a number of sectors. It was therefore decided to complement the framework text with annexes, which lay down additional rules on sectoral specifications and provide guidelines for the continuation of negotiations on further liberalization.

¹⁵ Article XIX, GATS

¹⁶ Globe Trade Negotiations : 1

The question arises, whether the developing states fully participate in formulating these rules and the obvious answer is, yes they do.¹⁷ However their self made rules come back to haunt them because of their incapacity to compete against these well oiled developed states economic machinery and technical capacity to provide the current services that the world needs.

This however gives the developed states the edge over the developing states because of the latter's continuous need to compete for foreign direct investment to stimulate economic growth within their states. This incapacity to enhance their own economies due to financial constraints lends an avenue to the developed states to legally negotiate measures with developing states to increase their market access by way of manipulative and exploitive measures acceptable or unacceptable to the developing states.

Thus the question this essay intends to investigate, is to what extent do the rules on market access, as envisaged in Article XVI,¹⁸ protect the developing states and to what extent are the developed states inhibited, if at all, to unilaterally deploy their financial strength to achieve their goals to increase their economic strength. It is clear as earlier mentioned, that the developed states are persistent and adamant to have these rules accepted by all states due to their self interest and beneficial value to their financial economic growth.

At the Doha Ministerial¹⁹ meeting, held in December 2001, a time frame was adopted whereby countries were expected to present their negotiating requests to other countries, and to respond with their negotiating offers to other countries with a conclusion date set for 1 January 2005. In order to achieve this timeline, countries were expected to present their negotiating requests to other countries by June 2002 and respond to their negotiating offers by March 2003.

The purpose of these requests is to negotiate agreements to establish a multilateral framework of principles and rules for trade in services. An important aim of these agreements is to seek progressively high levels of liberalization of trade in services via successive rounds of talks as set out in Article xix.²⁰ Mulhtra cautions that the Doha Development Round does not accurately reflect the needs and aspirations of developing countries. According to him the aspirations set out in the Doha Round should not be viewed as being necessarily being consistent with the developing needs of poorer nations.²¹

¹⁷ "when we negotiated the ground-breaking agreement on telecommunications in the WTO in 1997 we were surprised and pleased by the enthusiastic participation of developing countries, including many very small ones." WTO/speech-DG MIKE MOORE-"The future of international trade in services"(1999)

¹⁸ General Agreement on Trade In Services

¹⁹ Doha 4th Ministerial- Ministerial Declaration 2001

²⁰ ibid GATS

²¹ Mulhtra,p7

An important standard is required that member countries ensure transparency during the application of regulations to service industries and activities. In order to ensure increased participation of developing countries in the trade in services and to increasingly liberalize trade in services among WTO members.²²

The ultimate aim of Governments is to promote human welfare in the broadest sense, and trade policy is only one of many instruments governments use in pursuing this goal. It is evident trade has become an important measure for global populations to enhance a better live and make them less dependant on Governments handouts.

The Governments has an added responsibility to ensure fair trade not only domestically but also internationally amongst all nations. Trade policy is nevertheless very important, both in promoting growth and in preventing conflict nationally as well as internationally.²³

2.3 SCOPE OF GATS

This Agreement applies to measures by Members affecting trade in services.²⁴ For the purpose of this Agreement trade in services is defined as the supply of services, from the territory of one member into the territory of any other member; in the territory of one member to the service consumer of any other member; by a service supplier of one member, through commercial presence in the territory of any other Member; by a service supplier of one member, through presence of natural persons of a member in the territory of any other member.²⁵

GATS apply to government measures affecting services provided on commercial basis. It thus covers both private sector enterprises and companies owned (or) controlled by governments if they supply services on a commercial basis. Services obtained by government departments and agencies for their own use are excluded from the purview of the Agreement.²⁶ It is clear that the measure that exist within the state who accept these services will be compelled to comply to GATS and particularly to the rules relating to market access. However due to the struggling economies of most developing states, they do not have rules or legislation that is well enough developed to accommodate the upsurge of trade within the service sphere.

²² Choike- GATS- TRADE IN SERVICES
<http://www.wto.choike.org.nuevo_eng/informes?1169.html>
2002:1

²³ Gats facts and fiction *loc cit*

²⁴ Article 1:Annex 1B: General Agreement on Trade in Services

²⁵ *ibid* Article 1(3): sets out the purpose of Gats in that in fulfilling its obligations and commitments under this Agreement, each Member shall take such reasonable measures as may be available to it to ensure their observance by regional and local governments and authorities and non-governmental bodies within its territory

²⁶ *Ibid* Business Guide 1999: 194

2.4 STRUCTURE OF GATS

GATS consist of:²⁷

- A framework of general rules and disciplines that apply to all measures affecting trade in services;
- National Schedules which list individual countries' specific commitments that apply only to service sectors and sub sectors listed in a members schedule on access to their domestic markets by foreign suppliers.
- Attachments, protocols and annexes addressing special conditions relating to individual sectors and Ministerial Decisions that relate to the implementation of the agreement.
- Liberalization commitments specific to the service sectors and sub sectors listed in each countries' schedules

Each WTO Member lists in its national schedule those services for which it wishes to guarantee access to foreign suppliers. All commitments apply on a non-discriminatory basis to all other Members. In addition to the services committed, the schedules limit the degree to which foreign services providers can operate in the market²⁸.

2.4.1 OBJECTIVES

The objectives of GATS are aimed at promoting the economic growth of all trading partners and development of developing countries through the expansions of trade in services. It seeks to achieve this by applying to the service trade the rules of (GATT), with the modifications necessary to take into account its special features.²⁹

2.5 OVERVIEW OF THE GATS LEGAL FRAMEWORK

GATS have been heralded as the contemporary code of principles to enhance the liberalization of trade in services globally. This body of rules encompasses a number of legal rules ascribed to by most governments. Paramount to this acceptance was the idea of the drafters and signatories to construct a body of rules based on neutrality, fairness and equity.

GATS define services broadly and apply to all measures that affect services. Services include all service with the exception of services that are supplied in the government service industry. The WTO has divided services in 12 different groups which cover all aspects of a countries economy and range from business, communication services, construction and engineering, education, environment, health financial tourism, recreational, transport and other related services.

²⁷ Hoekman *loc cit* 250

²⁸ Gats facts and fiction *loc cit* 3

²⁹ General Agreement on Trade In Services Preamble

This chapter will give an overview of GATS and explore the rules applicable to market access.³⁰ In order to evaluate to what extent these rule are ignored by developed states, to manipulate developing states in allowing them access and expanding their market to benefit particularly their service providers. Also to asses the extent to which developing states invoked provisions negotiated in GATS to oppose the developed states and without fearing the loss of much needed economic investment offered by developed states.

2.5.1 MODES OF INTERNATIONAL SERVICE TRANSACTIONS

The method of trading in services was not always understood by many and was until recently still a point of contention amongst all states. The 1994 GATS framework sets out the methods of delivering services according to the following “modes of supply”³¹

- Providing a service across country borders, for example by telephone or in the form of cross-border transport (mode1)
- Providing a service within one’s own country to a citizen of another country (mode 2)
- Providing a service within a foreign country by establishing a “commercial presence “ there a facility or branch (mode3)
- Providing a service through the presence of staff or employees, but not a “commercial presence,” in another country (mode 4)

2.5.2 GENERAL AGREEMENT ON TRADE IN SERVICES - LEGAL RULES

The General Agreements on Trade in Services³² are concluded in six parts. Part one sets out the scope and definition of the agreements, part two the general obligations and disciplines member states agree to. Part three sets out the specific commitments, four progressive liberalization, five institutional provisions and six the final provisions. This paper will briefly discuss the general obligations and focus on the specific commitments with special reference to market access and the impact on developing countries.

2.5.3 GENERAL OBLIGATIONS

The General Obligations outline the rules applicable to all member states. Adherence thereto is of utmost importance to achieve the objective and ensure stability within this fast growing sector. This essay will only refer to those rules applicable to the issues addressed within this essay.

Among the most important general obligations imposed by the legal framework are those relating to Most Favoured Nation Treatment³³(MNF) principles, with respect to any measure covered by this agreement.

³⁰ Gats: Part iii - Specific Commitments Article XVI, Market Access

³¹ Friends of the Earth :2

³² Negotiated in the Uruguay Round and

³³ GATS Article II

Each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to similar services and service suppliers of any other country.³⁴

Other important aspects of the general obligations relates to the following, transparency of regulations within the foreign countries,³⁵ rules governing monopolies and exclusive service suppliers, and other business practices to restrain competition, led to need to take measures to liberalize trade, including those securing the greater participation of developing countries.³⁶

2.5.4 EXCEPTIONS TO THE GENERAL OBLIGATIONS

A state may adopt measures necessary to protect morals, human, animal or plant life or health and maintain public order to secure compliance with laws consistent with GATS.³⁷ Exceptions to the national treatment principle are allowed if the difference in treatment is aimed at ensuring the effective levying of direct taxes in respect of services or service suppliers of other states. Whenever a state deviate from the MFN principle if it is necessary to give effect to an agreement on the avoidance of double taxation.³⁸ These rules also inhibit the much needed financial injection developed states need and is constantly used to advance the agenda of the develop states, too increase market access and expansion of their own markets to benefit their own economies.

GATS does not contain a requirement that other states or the Council for Trade in Services must be notified of these general exceptions. It seems that there is no general duty on states to designate measures as general exceptions. All that is required is the adoption or enforcement of a measure falling within the wording of the exception.

These however seems to be unnecessary rules at this point but need be included should a situation arise where developed states transgress or overstep their limitations. In the event of transgression or abuse of these exceptions by the developed states the developing states has measure to inhibit these developed states to comply with the required rules and thus ensure that they are not exploited to benefit these developing states service providers.

2.5.5 CONDITIONAL OBLIGATIONS³⁹

³⁴ GATS Article II

³⁵ GATS: Article III

³⁶: GATS Article IV

³⁷ GATS Article XIV

³⁸ GATS Article XIV(e)

³⁹ GATS Article VI

The conditional obligations are additional to the General Obligations, and are aimed at ensuring fuller implementation of commitments assumed by countries.

Particularly in terms of sectors where countries have undertaken specific commitments which include the following:

- to ensure that all domestic regulations of general applications affecting trade in services are administered in a reasonable and objective way;
- to maintain or institute tribunals or procedures providing for the review of decisions affecting trade in services;
- to issue to foreign suppliers the authorization required for the provision of services within reasonable period ;
- to refrain from applying restrictions on international transfers and payments, except when the country is in serious balance -of – payment difficulties.

Thus the conditional obligations are a mere measure to ensure the implementation and proper administration of the agreed general obligations. These measures are favourable due to the practical implementation constrains as well as the monitoring thereof. It is a proven fact that much are been said and agreed upon at these international summits but the implementation and enforcement have created major gaps which always have detrimental effects on the developing states.

2.6 SPECIFIC COMMITMENTS⁴⁰

GATS oblige states to agree on specific commitments and outlined in their schedules.⁴¹ GATS is a combination of a so called *top down* agreement which requires countries to abide by certain disciplines across all sectors and *bottom up* agreement which permits countries to decide in which sectors they will make “specific commitments” to market access and national treatment restrictions. These specific commitments are negotiated on a bilateral basis between individual countries, but once a country adopts a commitment, that commitment must be applied to all other WTO members under the most-favoured nation rules. It should be noted that these negotiations of bottom up access commitments are very similar to negotiations of tariff rates, part of the traditional regime in the WTO.

This principle could have adverse effects on the specific developing state whom at a particular time or at time of entering in to the bilateral agreement with a specific state may have had the capacity to undertake the commitment but not to expand it to all its member states. It will have the effect that these states will be obliged to extend the treatment to all member states irrespective of its capacity to do so or not.

⁴⁰ GATS Article XX

⁴¹ GATS Article XX

Failure by the developing state, means they will have to face the consequences of the might of the developed states and particularly its Trans National Corporations in who interest these develop states act.

This is a major problem because it creates the avenue whereby the developed states can manipulate the set the tone of future agreements and negotiations to benefit their Trans National Corporations.

The negotiations aim to expand the specific commitments made by countries in particular sectors and to elaborate the “general obligations of the agreement throughout the broad sectors, while countries can make new commitments in other sectors. These substantial extensions of GATS rules will increase the market access of multinational service providers and thus the need to strengthen the general obligations to strengthen GATS has been reiterated by most major countries⁴² .

Specific commitments are made in terms of both market access, which requires countries to provide unlimited quantitative access⁴³ to their markets, and national treatment⁴⁴, which requires countries to provide the same or better regulatory treatment to Foreign Service operators as that provided for domestic operators. Hence it is evident that Article xvii provide for unlimited market access within the specific developing states.

Even though the proviso exist that states can limit their commitments by means of specified schedules, this will enhance the manipulative strategy of developed states because their Trans National Corporations will not invest in a country, which rules are not favourable to their financial advancement or enrichment? Thus your developing states will be at a constant loss because of the incapacity and lack of human capitol to negotiate better agreements, but also to attract economic invest to create opportunities for their citizenry.

When countries make specific commitments in a particular sector, they may choose which modes supply is covered by the rules that apply to those commitments. Countries are, for all intends and purposes, locked into these specific commitments once they have been made. When countries make commitments, GATS provides countries with a right to specify the qualifications under which they will provide market access and national treatment for foreign services and service suppliers.⁴⁵ Once it is adopted, however, a sectoral commitment and its qualifications are difficult to change.

The extent of these commitments is in the discretion of the individual states. Each state’s specific commitments are set out in its schedules. Each schedule is divided in two parts: horizontal which applies to all sectors across the board and sectoral those applicable to specified sectors e.g. legal services, computer services, advertising, telecommunications, construction, education

⁴² Friends of the Earth *loc cit*

⁴³ GATS Part iii Article XVI 2 (a-f)

⁴⁴ GATS Article XVII (1)

⁴⁵ Friends of the Earth *loc cit*

and financial services. Entries in the schedules illustrate the extent of the commitments, which each country has agreed to and are listed separately for each mode in which international trade takes place.

Schedules of specific commitments are annexed to GATS and form an integral part of the agreement.⁴⁶ While negotiating specific commitments, special consideration has to be given to certain objectives relating to developing countries. Developed countries have to establish contact points to facilitate access of developing country service suppliers to information in relation to:

- the commercial and technical aspects of the supply of services in their respective countries;
- the availability of services technology in their respective countries .

Special priority must be given to least developed countries in respect of above provisions.⁴⁷ Developed states should engage in training and development programmes within these states to educate and develop the citizenry in order for them to be able to maintain and sustain programmes implemented to the advancement states. Due to the developing states lack of proper technological infrastructure, economic stability, insufficient human and financial resources it is common knowledge that these states becomes breeding grounds wherein the developed states expand their exploitative and manipulative tactics to benefit their own Trans National Companies interest.

2.7 ADDITIONAL COMMITMENTS

Article XVII⁴⁸ provides for negotiations of commitments additional to those provided for in Articles XVI⁴⁹ and XVII⁵⁰. States may negotiate commitments other than that in respect of market access or national treatment e.g. commitments in respect of recognition of qualifications, standards, or licenses. These may also be included in the schedules, which will have a legal binding effect on that particular state.

Specific commitments are binding international obligations and cannot be amended unilaterally. These commitments bind the developing states and is detrimental to the progress off their own economies should the particular services commitments not be beneficial to their economic progress. But rather provide a profitable and lucrative outlet to the service provider whom has the ultimate decision to accept the outcry of the affected state or insist on retribution in a manner acceptable to them

⁴⁶ GATS Article XX (3)

⁴⁷ Lal Das (1999): 347

⁴⁸ General Agreement on Trade in Services

⁴⁹ Adoption of certain types of quantitative restrictions on market access by foreign suppliers

⁵⁰ National Treatment – members undertake to accord “treatment no less favorable than it accords to its own like services and service suppliers

However in terms of Article XXI(1)(a) a state may modify or withdraw a commitment three years after that particular commitment entered into force. The modifying state needs to negotiate with affected states due to the modification to reach consensus on any compensatory adjustment that the other states may encounter or had encountered.⁵¹

The member modifying its schedule of specific commitments or wishing to eliminate any commitment in its schedule has to give notice of its intention to the Council of Trade in Services at least three months prior to date when it wants the modification or elimination to take place.

The members will consider this request and enter into negotiations to decide after assessing the implications and effect to their economies. As well as the new offer that is presented.⁵² It is evident that Article XX(1)(a) provide for developing states to terminate their commitments but allow more relief to the service provider and protection for interest because peremptory time limits as set out before these state can modify their commitments.

These already ailing economies also subject to the discretion of the provider and acceptance base this on an alternative commitment. Thus it is my opinion that this stringent article further strengthens the stronghold of the developed states.

The provisions of GATS are based on the supposition that the modification of specific commitments is a violation of an international law obligation. Compensatory adjustments include the adoption by the amending state of new specific commitments no less favourable to international trade than the commitments that need be amended.⁵³ If an injury cannot be avoided by the adoption of other no less favourable specific commitment, the amending state should pay compensation for the injury caused by the amendment of the specific commitments. This has the effect that the developing states are constantly in a spiral of continuous poverty and trapped in a sphere of economic subservience to developed states and left to their own peril at the cost of economic advancement of the service providers.

Foreign Service suppliers can occur serious financial lost relating to marketing or establishment of a presences in the foreign country. The individual service supplier who may be caused financial injury due to the amendment or withdrawal of a specific commitment is however without an international legal remedy. If Gats is given an exclusive inter-state operation only the national state of the service supplier has a right under the agreement. If the individual were seen to obtain rights directly from a treaty like GATS the result would have been more satisfactory to benefit the foreign supplier but question still exist what protection is afforded to the affected state?

⁵¹ GATS Article XXI (2)(a)

⁵² Lal Das (1999) 337-338

⁵³ GATS Article XXI (2)(a)

None because they need to conform to provision of GATS Article XX (1)(a)⁵⁴ which have the effect that these states will have to provide an alternative commitment f which they may not be capable to manage and maintain or has the capacity to administer the agreement.

2.8 BENEFITS FOR MEMBER STATES

The liberalization of services has certain benefits from which all member countries can benefit and the following are set forth:⁵⁵ 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.⁵⁶

Economic performance An efficient services infrastructure is a precondition for economic success. Services such as telecommunications, banking, insurance and transport supply strategically important inputs for all sectors, goods and services. Without the spur of competition they are unlikely to excel in this role – to the detriment of overall economic efficiency and growth. An increasing number of Governments thus rely on an open and transparent environment for the provision of services.

Development Access to world-class services helps exporters and producers in developing countries to capitalize on their competitive strength, whatever the goods and services they are selling. A number of developing countries have also been able, building on foreign investment and expertise, to advance in international services markets – from tourism and construction to software development and health care. Services liberalization has thus become a key element of many development strategies.

Consumer savings There is strong evidence in many services, not least telecommunications that liberalization leads to lower prices, better quality and wider choice for consumers. Such benefits, in turn, work their way through the economic system and help to improve supply conditions for many other products. Thus, even if some prices rise during liberalization, for example the cost of local calls, this tends to be outweighed by price reductions and quality gains elsewhere. Moreover, governments remain perfectly able under the GATS, even in a fully liberalized environment, to apply universal-service obligations and similar measures on social policy grounds.

Faster innovation Countries with liberalized services markets has seen greater product and process innovation. The explosive growth of the Internet in the US is in marked contrast to its slower take-off in many Continental European countries, which have been more hesitant to embrace telecom

⁵⁴ Each Member shall set out in a specific schedule the specific commitments it undertakes under Part III of this Agreement. With respect to sectors such commitments are undertaken, each Schedule shall specify

(a) terms, limitations and conditions on market access;

⁵⁵ GATS: Fact and Fiction loc cit 5

⁵⁶ Wunsch p2

reform. Similar contrasts can be drawn in financial services and information technology.

Greater transparency and predictability A country's commitments in its WTO services schedule amount to a legally binding guarantee that foreign firms will be allowed to supply their services under stable conditions. This gives everyone with a stake in the sector—producers, investors, workers and users—a clear idea of the rules of the game. They are able to plan for the future with greater certainty, which encourages long-term investment.

Technology transfer Services commitments at the WTO help to encourage foreign direct investment (FDI). Such FDI typically brings with it new skills and technologies that spill over into the wider economy in various ways. Domestic employees learn the new skills (and spread them when they leave the firm). Domestic firms adopt the new techniques. And firms in other sectors that use services-sector inputs such as telecommunications and finance benefit too. The international trade in services is therefore expected to expand rapidly and, according to some, it may overtake trade in goods within the next 10 years.⁵⁷

International trade can play a major role in the promotion of economic development and alleviation of poverty. Developed countries argue that liberalization of trade in services can only be beneficial for developing countries, particularly through foreign direct investment and access to imports of service, many developing countries are sceptical as to the benefits accruing to them both in terms of market access and strengthening of their supply capacity.⁵⁸ This statement has its positives as particularly been illustrated in the benefits set out above. The 2004-year report of UNCTAD found that there was increasing evidence that the information and communication technology was increasingly prioritised as a developmental tool by developing countries as a means to increased international involvement in relation to trade.⁵⁹

Even though the WTO recognizes the need for all peoples to benefit from the increased opportunities and welfare gains that the multilateral trading system generates, this however is not what is happening because the rules negotiated during the GATS negotiations is purely geared to benefit the developed states, particularly the trans national companies, which has increased and expanded their markets into developing states.

The majority of the members of the WTO are developing countries and the organization seek to put their needs and interest at the heart of the work program's adopted at the Ministerial meetings.⁶⁰ The debate could also prove reasonably explosive given the vested interest of developing countries such as India, which played a significant role along with Brazil in leading the

⁵⁷ *ibid*

⁵⁸ Mashayekhi, p3

⁵⁹ UNCTAD, Chapter 5

⁶⁰ Doha 4th –Ministerial – Ministerial declaration.

Group 20 developing countries during their negotiations with EU and USA negotiating teams at the WTO Summit in Cancun.⁶¹

It is evident that the negotiations at these meetings are dominated by developed states to ensure maxim benefit for their own constituencies or particularly the TNC's. This was openly displayed at the last ministerial meeting held at Cancun⁶² where the developing states demanded to have their interest and concern be taken seriously, when this meeting grinded to an standstill due to the developed states stubbornness to give into the demands of the developing states. Thus a rules based system of international trade is needed to provide a measure of certainty for both importers and exporters and hold the potential to promote fundamental socio-economic objectives such as economic growth and poverty reduction.⁶³

The nature of trade agreements that has been negotiated in the last decade marked a significant change from traditional tariff barriers to non-tariff barriers of various kinds, technical barriers which specifically refer to technical regulations of products⁶⁴ and standards which particularly relates to the quality of product or service delivery⁶⁵ and the so-called "economic needs test"(ENT) applied by the developed countries which proved to be an huge trade barrier.⁶⁶

This has become an important aspect for governments in determining which negotiated commitments would be best for business on whose behalf they negotiate. Which will not hinder or facilitate access to specific markets and offer maxim protection against manipulation and abuse in particular developing countries who are at times forced to open there markets to attract much needed financial investments. This essay will seek to investigate to what extent the abovementioned rules offers protection to developing states seeking to expand and increase economic growth.

⁶¹ Raghavan p1

⁶² Fifth Ministerial Conference held at Cancun 13 September 2003

⁶³ Hartzenberg (2004) 1-4

⁶⁴ Business Guide to the World Trading System 2nd Ed (1999) 87

⁶⁵ ibid Business Guide to World Trading System 85

⁶⁶ Raghavan (1998) 2

CHAPTER THREE

“ CRITIQUE OF PROTECTION ”

3.1 INTRODUCTION

The Uruguay Round (UR) of global trade talks was hailed by many as an outstanding achievement. The multilateral fair-trade was extended to almost every area of international commerce. Some areas, which could not be concluded during the UR, were continued as built in agenda items to be reviewed subsequently. The signing of this global trade award was considered a victory for multilateralism.⁶⁷

Watkins argues⁶⁸ that international trade has the potential to act as a powerful catalyst for poverty reduction also that this potential is not being realized. One reason for this is the world trade relations are governed by rules, policies and practices that systematically skew the benefits of trade towards the wealthy. Trade is not inherently anti-poor but it is being managed to produce anti-poor outcomes.⁶⁹ The GATS agreement is designed to help trans national services corporations constrain and over-ride democratic governance and its ultimate purpose is to commercialise every service sector in every WTO member country-including essential public services, such as education, water and health care.⁷⁰

When the developing countries, especially least developed countries (LDC), were enticed into signing the Uruguay Round Agreements they were promised heaven by developed countries. They were led to believe that conclusion of UR and subsequent formation of the World Trade Organization (WTO) would lead to increased market access for their goods and services in the territories of the developed countries.

They were also assured of agreements in relation to investment, and services which will be beneficial to them and would help their economies on a rapid and sustainable path to prosperity. Years later, since the inception of the WTO in 1995, the developing countries are finding themselves isolated and feeling tricked, misled, and stranded.⁷¹

⁶⁷ Evans , and Walsh (1995).

⁶⁸ Watkins(2002), 1-2

⁶⁹ Watkins ibid

⁷⁰ Rhaghavan(2000),1

⁷¹ Adhikari, Ratnarkar and Ghimire,Hiramani(2001), 1

This chapter will specifically deal with the impact of GATS on developing countries economies, the extent of developed countries continued appeal to invoke rules of GATS to commit developing countries to accept the rules. In doing so they would be guaranteed access to developed countries markets and much needed financial assistance to enhance their ailing economies.

On the contrary developed countries would have increased market access and advance their economies to the benefit their own citizenry and expansion of their business concerns into newly negotiated markets.

A debate has erupted as to the real intension for the creation of the WTO? Some has argued that the WTO was meant, both by design and construct, to provide the opportunity for the developed countries to 'ratchet' market access.⁷² It is prevalent across the international spectrum that there has not been much increase in market access of products and services in the markets of developing countries whilst the latter's markets is flooded by imports from the richer nations.⁷³

3.2 IMPLICATIONS OF GATS TO DEVELOPING COUNTRIES

The international trade in services is expected to expand rapidly and, according to some, it may overtake trade in goods within the next 10 years. Choike⁷⁴ defines liberalization as, among other things, the elimination of any government policies whereby national providers are favoured over foreign ones, such as, for example, preferential public subsidies. Significantly, it involves eradicating state monopolies, as well as deregulation whenever a norm is considered too onerous for foreign investors and service providers.⁷⁵

WTO leaders have denied claims that GATS would lead to privatisation of public services and support this statement, pointing to a provision that stipulates that GATS is not applicable to services rendered in the exercise of governmental "authority".⁷⁶ Choike, further notes that forced trade liberalization is having real and diverse negative impacts on the day – to - day lives of millions of people. Democracy is being eroded as Governments renounce or are made to renounce their right to regulate domestically in exchange for a chance to increase market access. The profits go to companies and their owners, rather than countries and their citizens.

A critical issue is that all the key terms of the agreement are left undefined and will only be determined by a WTO dispute resolution panels.

⁷² Chatterjee, and Narslay(1998), 1-3

⁷³ Adhikari and Ghimire :2001: 4

⁷⁴ http://www.choike.org.nuevo_eng/informes/1169.html (accessed 31/07/2004)

⁷⁵ Choike ibid

⁷⁶ Article I (3)(b) "services" in any sector includes any sector except services supplied in the exercise of governmental authority ; Article I (3)(c) stipulates "a service supplied in the exercise of governmental authority "means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.

Choike,⁷⁷ consequently professes that any claim that GATS protects public services must be met at least with some skepticism. Emmerson⁷⁸ acknowledge and commend the existence of measures designed to help developed least developed countries, such as “everything but arms”, ‘capacity building’ and technical assistance.

Mashayeki⁷⁹ argue that many markets for services, however, are dominated by relatively few large firms from developed countries and a number of small players. This tends to lead in most service sectors to a position where the larger operators face little effective competition because the size of the next tier of competitors is so small.

Developing countries service providers, most of whom are small and medium size enterprises (SMEs), face competition from large service multinationals with massive financial strength, access to the latest technology, worldwide networks and a sophisticated information technology infrastructure.

However the advantages offered by these measures as set out in GATS will be outweighed by the increased disadvantages, which will rise from the clear strategy of rich countries to gain ever-greater dominance of markets.⁸⁰ The lack of commercially meaningful commitments in sectors and mode of supply of natural persons, which is essential for the supply of a service by developing countries, has been highlighted in all the sectoral papers produced by UNCTAD and the WTO.⁸¹

This lack of access creates a major imbalance in trade. To enhance the competitiveness of developing countries, it would be essential that the developed countries improve their commitments by including specific categories of natural persons without the requirement of an economic needs test, that is some minimum access commitments, and provisions for periods of stay longer than one year. In cases where economic needs tests and other screening procedures are applied, efforts should be made to reduce the restrictive impact of such tests and ensure that they would not nullify the benefits of the GATS.⁸²

3.2.1. RULES OF THE NEW GAME

Trades in Services were not eagerly welcomed by developing during the various rounds of negotiations but was however accepted and annex to GATT during the Uruguay Round. Developing state unable to block GATS agreed on a compromise that it would be accepted as bottom-up approach as oppose to

⁷⁷ Choike –GATS_Trade in Services loc cit

⁷⁸ Emmerson: Reading Trade Justice Group (2002) 9

⁷⁹ Mashayekhi : GATS 2000 Negotiations ,Options for Developing Countries, p6

⁸⁰ ibid p23

⁸¹ ibid p24

⁸² ibid p26

across the board liberalization approach allowing each member to decide which sector to open, the pace and extent of marketing opening and the limitations to liberalizing in each sector.⁸³ Jawa(2003) further states because of this 'bottom-up' approach, the GATS has been presented by Northern governments as development-friendly.

In reality, its very inclusion in the WTO was a huge concession to the developed countries from which developing countries reaped little or no benefit, because of the tremendously unequal competitive positions of service suppliers from the North and South. Developing countries are now being put under enormous pressure to liberalize in many sectors, where they cannot compete. This could destroy existing local services industries, jeopardizing social and development objectives.⁸⁴

It is commonly known that the most current service negotiation is about domestic regulation and investment. These two issues are paramount for both developed and developing countries regarding the question of attracting capital. In the case of developed countries to increase their financial interest through increased market access and developing states to savour their struggling economies. Thus it is important that both partners should find ways to serve legitimate public objectives while introducing foreign investment, technology, and competition into both markets.⁸⁵

Article II and Article IV⁸⁶ make specific reference to equal treatment to be accorded to both states in relation to the MNF principles and the latter section set out regulations to combat monopolies but to increase participation of developing countries to ensure greater liberalization of trade globally. Developing countries also wanted an emergency safeguard mechanism (ESM)⁸⁷ to be put in place, to provide an exit strategy if liberalization had adverse effects. While this is also mandated in the GATS Agreement, there has been no political will on the part of the major powers, and the original 1998 deadline has been repeatedly rescheduled. The current timeline is that an ESM should be agreed by 15 March 2004.⁸⁸

The question whether GATS will be able to achieve a meaningful liberalization is doubtful due to the low level openness in the initial offers. Developing countries in the Cairn Group such as Brazil are not willing to make significant liberalization in services if they do not benefit from market access commitments in agriculture.⁸⁹ On the other hand, the ASEAN countries especially Indonesia, Malaysia, Thailand and Phillipines are unhappy at the negative response from developed countries to their request for establishing an EMS in

⁸³ Jawa & Kwa (2003) 31

⁸⁴ *ibid* 31

⁸⁵ Lang (2000) 3

⁸⁶ GATS

⁸⁷ GATS Article X

⁸⁸ Jawa *loc cit*

⁸⁹ Mukherjee(2005),p11

services.⁹⁰

This safeguard mechanism can be used by a country to back track from its GATS commitments when its national service enterprises are threatened.⁹¹

However this phenomenon is hardly visible because of the greater need and expectation of developed countries to expand their markets being played off against the eagerness of developing countries to attract capital investment in their much-needed economies. Article XIV provide for member states to adopt measures to protect member countries in particular developing states to maintain public order and secure compliance of developed states to act in accordance with the GATS.

The questions always arise will these marginalized states invoke these laws and risk losing the capital injection or would they rather allowed to be misused to benefit their economy and enriched the coffers of the rich states.

3.2.2 BALANCE OF RIGHTS AND OBLIGATIONS

In developing countries the question is constantly ask: What is the law? It is evident that Gats and the interpretation thereof pose serious problems to these states. Developing countries have laid stress on the obligations built into GATS, for measures to increase participation of third world countries in the services trade, and the removal of the glaring imbalances and lack of benefits so far in the GATS.⁹²

Renewed round of services negotiations and the progressive liberalization of services must be mutually advantageous to all WTO members in order to preserve the balance of rights and obligations.⁹³

3.2.3 REGULATION OF RIGHTS

Most trade officials and negotiators of developing countries do not seem to be fully aware of the macro-economic aspects of their negotiating trade rules, which may be used to lock them into a particular type of external relationship permanently.⁹⁴

The WTO continually claims that the right to regulate market access to services is protected by GATS. However in terms of the negotiated commitments⁹⁵ states agree to market access to specific sectors and which are normally negotiated on a bilateral basis between individual countries.

⁹⁰ *ibid*

⁹¹ *ibid*

⁹² Raghavan (1998)1

⁹³ Article IV: GATS: provide for measures to be taken to liberalize trade, including those securing greater participation of developing countries.

⁹⁴ Raghavan : 2000 : 1-3

⁹⁵ Gats Article XX

Thus meaning South Africa and USA can enter into an agreement allowing market access to a specific sector but once adopted these commitments is

available to all WTO member states in terms of the most favoured nation rule.⁹⁶ Countries are for all intents and purposes locked into these specific commitments.

This may have the effect that developed countries, which have good relations with each other negotiate a bilateral agreement with a specific state and thus thereby ensure market access of all WTO member states including hostile states towards the other state. These specific commitments are binding international obligations and cannot be amended unilaterally if states realize that their negotiators have wrongly agreed to a particular commitment.⁹⁷ Article XX(1)(a) provide for means whereby a state may modify or withdraw a commitment.⁹⁸ However this mechanism will have detrimental effects on the already ailing developing states economies. This mechanism can easily be deployed by developed states in forcing developing states to succumb to their demands.

The opening up of domestic markets to foreign service providers access to individuals and businesses could be provided at affordable prices, which should benefit the development and economic growth.⁹⁹ Despite the availability of Information and Telecommunication Technology (ITC), 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.

Limited institutional capacity to regulate means that the regulations are often copied from developed countries, which may not be appropriate for smaller and more monopolistic markets. Multi National Corporations (MNCs') market power also allows them to exert unhealthy influence on regulators - sometimes backed by pressure from their home governments. In Argentina, for example, when the foreign investor involved in railway privatisation sought changes in the regulatory framework before the end of its five-year term, its monopolistic position greatly weakened the government's bargaining power. With such power imbalances, regulatory processes may have very little effect.¹⁰⁰

The liberalisation of national markets become a primary objective in this regard especially measures such as licensing requirements, developed within their national domestic framework, to restrict market access to would be service providers due to non compliance.¹⁰¹ Some hope has been created as a result of a decision by the WTO Panel in the "David and Goliath" case when

⁹⁶ GATS Article II

⁹⁷ GATS Article XVII

⁹⁸ has suffered or encountered any loss. See also Article XVII(2)(a)

⁹⁹ ITU,p1-7

¹⁰⁰ Jawa (2003)

¹⁰¹ ITU,p1-7

Antigua and Barbuda successfully took the USA to task in respect of restrictions imposed by service providers in Antigua and Barbuda.¹⁰²

The island estimated to have lost more than 90 million US\$ as a result of a ban and argued that the US action was a violation of international trade rules, including GATS requirements, domestic regulation, market access and national treatment.¹⁰³

On 7 April 2005, the WTO panel agreed with most of the claims put forward by Antigua & Barbuda in that the US position is inconsistent and discriminatory against foreign operators.¹⁰⁴ It begs the question whether the above ruling creates a useful precedent for developing countries in general. It appears unlikely as smaller countries may be intimidated to enforce sanction measures against a big power such as the USA.¹⁰⁵

The Cancun Ministerial¹⁰⁶ was acclaimed as a success for developing countries that demanded that their concerns be pertinently addressed by developed states. Also more commitment of developed states to implement the agreements negotiated at previous ministerial to alleviate the abuse and exploitation of developing states. At paragraph 6¹⁰⁷ relating to services negotiations states reiterated to intensify their efforts to full participation of all participants via exchange of request and offers to conclude negotiations at specific dates, to provide effective market access to all members. Also refers to noting of developing and least developed states interest in particularly mode 4 and suggest that special treatment be accorded to least developed countries.

3.3 IMPACT OF TRANS NATIONAL CORPORATIONS

It is alarming how leading developed countries, particularly United States and the European Community, continuously attempt to dominate trade negotiations in services enforcing their will and particularly the interest of their Trans National Corporations (TNC's) interest of increased market access and the applicability of Most Favoured Nation Treatment Principle.¹⁰⁸ The GATS agreement sets new standards for development and is constantly negotiated behind close doors in countries to which it has specific benefits.¹⁰⁹

¹⁰² Thayer: 1-3 and Pruzin, p1-3

¹⁰³ Pruzin, p1-3

¹⁰⁴ The Economist, 16 April 2005, p61

¹⁰⁵ Thayer, p1-5 Kori V and Lapierre J, "Gambling dispute settlement", p1-10

¹⁰⁶ Fifth Ministerial Conference held at Cancun 13 September 2003

¹⁰⁷ Draft Cancun Ministerial Text 13 September 2003 Job(03)150/Rev.2

Article II: GATS : members must accord to services and service suppliers of member states unconditional and immediate treatment no less favorable than that it accords to like services and services suppliers of any other country .

¹⁰⁹ Wilkes L. (2001) 1

Its principle movers are the CEOs of the TNC's, without whose 'enormous pressure' it would not have been conceived.¹¹⁰

In essence GATS is intended to enforce the speedy liberation of public domains. In its push to broaden the definition of a service, and to get rid of burdensome governmental regulations, it has the effect of cutting down the remaining barriers between private finance and the public sector. It will further have the effect that those who cannot pay will be excluded.¹¹¹ The ultimate goal is to further liberalize service in the public domain, to justify private businesses providing public services.

GATS provisions does not only apply to already partially globalised and generally private sectors such as financial and telecommunications services but also sectors which are at present seen essentially as public services which include sectors such as power generation, water, public transport and most worrying health and education.¹¹²

The concern with GATS has been along the lines of concentrated ownership, foreign ownership by large TNC's and rules limiting or affecting the ability of national governments to hold companies providing these services sufficiently accountable.¹¹³

TNC's and their strong business lobby groups is detrimental in making the US and EU pushing hard in order for developing countries to submit to their demands at the trade negotiations.¹¹⁴ The powerful Northern based TNC's and their representatives are constantly meeting with Geneva based delegates and government officials in the capitals, and often use their own governments to further their interests. Their interest are at the heart of how the more powerful member countries shape their policies on globalisation and trade issues, at the expense of less powerful (particularly developing) countries.¹¹⁵

The EU has long been the driving force behind multilateral liberalization of services. The sheer scale of EU ambition to conquer new markets was fully revealed in April 2002, when the European Commission's draft proposal stipulate that Europe will press developing countries to lift all controls on foreign ownership in sectors such as banking and insurance, to remove limits on profit repatriation, and to privatise public services.¹¹⁶

Oxfam further states that instead of the EU focused on measures to assist developing countries to benefit from trade, the EU seek to expand the WTO liberalizing agenda to include government policies on investment, competition

¹¹⁰ *ibid*:1

¹¹¹ *ibid*.1

¹¹² *ibid* 2

¹¹³ Anup Shah (2001) 1-3

¹¹⁴ Shah *ibid*

¹¹⁵ Jawara & Kwa (2003) 54-55

¹¹⁶ Oxfam Briefing Paper 22: 1-5

and government procurement policies and the growing service sectors, which will further distort the benefits of trade towards the already rich and

powerful.¹¹⁷ EU further reiterated its position¹¹⁸ that European services are amongst the most competitive and successful in the world.

The European Community is the world's largest exporter and importer of services of services, with 26% of world trade in services. The service sector is the single most important economic activity in the EC accounting for over two thirds of Gross Domestic Product.¹¹⁹ It is indeed statements like these that illustrate an agenda of competitive self-interest, which is more focussed on cornering success than sharing it. It is evident that the developed states can boast with figures as mentioned above irrespective of the consequences or economic disadvantages it had on the host country to which the service is provided.

Given the above Kirkegaard argues, that the economic impact on the EU, particularly the outsourcing of IT technology 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 EU by 2005 and it is predicted not to exceed 2% of the EU services sector by 2015.¹²⁰

The UK share the same sentiment by pronouncing as them being the second largest exporter of services in the world and this sector contributes 70% of GDP and are thus very keen to achieve positive outcome during the WTO service negotiations. The GATS is all about allowing big business to seize a far greater market share than before, by granting it access to those parts of the economy now controlled by the state, and harmonizing regulatory standards worldwide.¹²¹

Australia views an open service trade environment important to their \$17.1 billion a year tourism industry, \$4 billion education industry and as well as smaller service sectors which is forecast to grow into multi-billion dollar export service sectors.¹²² Services account for about seventy percent of the US economy. Their fear that their industrial economy is hollowing out led to the US Congress to press for foreign market access for services, which they knew would accelerate the restructuring of the U.S. economy. The basic mandate of the U.S. negotiators at the Uruguay Round was to gain market access for service exports and establishing an international system of services agreements.¹²³

¹¹⁷ *ibid* :6

¹¹⁸ "Summary Of The EC's Initial Request To Third Countries In The GATS Negotiation's dated 1st July 2002.

¹¹⁹ Emmerson: Reading Trade Justice Group (2002) 8-9

¹²⁰ Kirkegaard JF: Outsourcing and offshoring ,Pushing the European model over the hill p4-7

¹²¹ Jawa & Kwa (2003) 33

¹²² Trade Fact Sheet: General Agreement on Trade in Services (GATS) Australia .

¹²³ Lang (2000) 1

The increased mobility of capital, coupled with the growing economic integration of national economies, has dramatically expanded the scope and intensity of competitive markets. This growth in business competitiveness has

forced governments into a competitive struggle for the world's human and physical capital base. As a consequence governments have lost much of the monopoly power that underscored their growth in earlier decades.

It is clear that these countries has a specific interest in further liberalization of services trade and has encouraged the drive to remove barriers to create a truly global market of services. It is statements as abovementioned, which illustrate an agenda of competitive self-interest that is more focused on cornering their own success than sharing it.¹²⁴ Since the GATS Agreement, many developing countries have been forced to liberalize trade in services under World Bank and IMF structural adjustment programmes and they wanted this 'autonomous liberalization' to be used as a bargaining chip in negotiations.

The major powers, clearly unwilling to move on this matter, threw several spanners in the works, asking for developing countries to 'bind' their liberalization under the GATS in order to receive this credit. It was finally agreed that binding would not be required, but that it would be taken into account in determining the extent of a country's credit. This largely defeated the purpose of the exercise, leaving developing countries dependent on bilateral negotiations.¹²⁵

The service economy is heavily dominated by the Northern Trans National Corporations who are actively engaged in corporate lobby groups that set the agenda for the big WTO players (EC, USA, Canada, Japan and Britain). These countries have made it clear that GATS is about expanding their export opportunities to benefit economies more reliant on the service sector.

During the WTO Ministerial Meeting in Doha, the US chief negotiator 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.¹²⁶ At the Sixth Ministerial Conference held in Hong Kong during December 2005 the ministers agreed to embark on a plurilateral request-offer negotiating process as a means to advance services negotiations.¹²⁷ All of the current flexibilities of GATS will continue to apply with additional flexibility to individual developing country Members, such as the ability to open fewer sectors, liberalize fewer types of transactions and progressively extend market access in line with their development situation.¹²⁸

¹²⁴ Emmerson: Reading Trade Justice Group (2002) 8-9

¹²⁵ Jawa & Kwa (2003) 35

¹²⁶ Financial Times, 17 Feb 2005

¹²⁷ WTO-Trade in Services, Sixth WTO Ministerial Conference, December 2005

¹²⁸ *ibid* p1-4

It is viewed that developing countries will benefit from this additional flexibility in the plurilateral request – offer negotiations. It is clear that the developing countries are further empowered, by this process, to dictate service negotiations to suit their development needs.

These benefits extend only to certain individual developing countries and exclude Least Developed Countries¹²⁹ which bring to mind the real intention of developed countries and subtle inclusion of individual developing countries to advance their own interest.

The impact of political realities of international trade negotiations are not acknowledged nor form an integral part of the negotiations rounds but are being overshadowed by the need of developed countries to increase their market interest to benefit their own economies.



¹²⁹ *ibid* p1

CHAPTER FOUR

4.1 RECOMMENDATIONS

The trading system needs to think of the development of the developing states, not as a question of granting uncompensated concessions, but as a partner thereby allowing countries to grow faster precisely because they willing take on commitments. In order to do this, we must realize that a new era for trade negotiations has developed that needs to be nurtured for the mutual advantage of both developed and developing countries whom are seeking different but complimentary objectives.

The developed countries are, indeed, seeking market access whilst the developing countries, however, are seeking capital, service market development, to help build a competitive infrastructure. We need to find ways to demonstrate that this trade-off actually works because, with some interesting but economically minor exceptions, developing countries are unlikely to see developed countries as markets for their services at this stage.

Developed countries should resist making uncompensated trade concessions to countries that refuse to establish the rule of law, in order to enhance the ability, to establish structured programmes and support for these states to develop and educate domestic negotiators to skilfully negotiate and interpret the international instruments to benefit their own country. The developed states should make a unilateral effort to establish the domestic rule of law in developing countries as part of their development goals for 2015.

The foundations for this effort by developed countries already exist in the GATS. Articles III and VI are virtual Administrative Procedure Act for services. Article III requires publication or some other form of public notice of any measure relevant to the operation of the GATS. Article VI requires members sectors to follow various procedures where specific commitments are concerned with particular reference to domestic regulation that needs to be followed.

Whatever the legal impact of Articles III and VI, the idea that domestic regulation has to exist and that it had to be impartial and regular is new to much of the world. We must insist that these provisions are put into place, but we must realize that the necessary skills cannot be learned in a day. But until the skills of impartial and regular law are acquired, there must be substitutes.

It is important to note that market access rules and in particular Article 1 need to be revisited or reassessed due to its stringency against non-compliance of states

commitments. Article 1 creates a burden upon the weaker state, normally the developing states, to either make new commitments or bear the effect of its legitimate decisions.

A further aspect is the market access which developed states negotiated should be link to a responsibility placed on these providers to help develop and create a sustainable infrastructure to benefit the domestic economy and citizenry at large.

4.2 CONCLUSIONS

The WTO membership has at least recognized the importance of service sector in international trade and commerce. It has developed, a cumbersome, but potentially workable framework of rules, procedures, and obligations. Although the trade in services is strongly represented by developed states for their own financial gain, detailed direction now needs to come from governments, with the key objective to increase the participation of the developing and least developed countries in the area of trade in services on equal basis or as equal partners. What is perceivable is that the regrouping of the developing countries, as per the Group 20 initiative, enabling them inhibit the developed states from advancing their own agenda and force them to take cognisance of the specific problems that they face. The implication of GATS rules need to be paced equally with the development process as it transpire within the individual developing states.

As a way to promote the infrastructure and investments these countries will need to grow, using, as appropriate, their interest in access to capital and market development. In this regard making them less dependant on developed countries and more self sustainable to develop and sustain their economies to benefit the citizenry and the world economy making it more competitive with the entry of these developing states as equal partners.

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