SAFEGUARDS IN AGREEMENTS TO LIBERALIZE TRADE IN SERVICES: ISSUES FOR CONSIDERATION OF CARICOM MEMBER STATES IN THE WTO, THE FTAA AND IN APPLICATION OF ARTICLE 47 OF THE REVISED TREATY OF CHAGUARAMAS.

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SAFEGUARDS IN AGREEMENTS TO LIBERALIZE TRADE IN SERVICES: ISSUES FOR CONSIDERATION OF CARICOM MEMBER STATES IN THE WTO, THE FTAA AND IN APPLICATION OF ARTICLE 47 OF THE REVISED TREATY OF CHAGUARAMAS.

INTRODUCTION

In its broadest sense, the concept of a safeguard refers to provisions which permit a Member of a trade agreement to temporarily deviate from the application of its obligations under the agreement. The term "emergency safeguard measure" (EMS) is used to describe various "escape clauses" that can be invoked under different circumstances, allowing countries to impose, or increase, protection granting relief to domestic producers from the difficulties produced by increased imports resulting from bound trade liberalization. Safeguards disciplines have a long history in trade in goods, and very detailed rules and procedures for their application have been developed over time. Most trade agreements incorporate safeguard disciplines in the case of goods.[1] On the other hand, the treatment of safeguards varies significantly in the different agreements covering services.[2] In the Western Hemisphere, some agreements do not include safeguards at all.[3], other agreements only consider safeguards to remedy balance of payments difficulties[4], while other also introduced ESM.[5]. However the concrete rules for its application have not yet been developed. ESM's for trade in services is a new, and developing, rule-making area.

Currently the issue of safeguards is in the negotiating agenda of agreements to liberalize trade in services at different levels. At the multilateral level negotiations on emergency

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[1] Safeguards for trade in goods are incorporated in: GATT Article XIX and the Agreement on Safeguards. Article 5 of the Agreement on Agriculture and Article 6 of the Agreement of Textiles and Clothing. Most of existing regional or bilateral trade agreements incorporate safeguard disciplines for trade in goods. For a discussion of the evolution of safeguard disciplines over time refer to: UNCTAD; The Outcome of the Uruguay Round: An Initial Assessment, Supporting Papers to the Trade and Development Report, 1994. United Nations, New York, 1994.

[2] Note by the WTO Secretariat; Safeguards Provisions in Regional Agreements, S/WPGR/W/2, 5 October 1995.

[3] This is the case of G-3 and the MERCOSUR Agreement.

[4] NAFTA, Decision 439 of the Andean Community of Nations, and CARICOM.

[5] Emergency safeguards are considered in the Chile-MERCOSUR Agreement, and in the the Agreements between Mexico and Bolivia and Costa Rica..

safeguard measures (ESM) under Article X are underway, and Article XII provides Members with the right to adopt remedy measures when confronting balance of payments difficulties. At the hemispheric level, the issues of a special safeguards and restrictions to protect balance of payments have been proposed for inclusion in the Chapter on Services in the FTAA negotiations[6]. The Revised Treaty of Chaguaramas, in Chapter III on "Establishment, Services, Capital and Movement of Community Nationals", contemplates in Article 43 the right of CARICOM Member States to adopt, or maintain, restrictions in the event of serious balance-of-payments difficulties. Also, Article 47 recognizes the right to apply restrictions when the obligations under the Chapter "create serious difficulties in any sector of the economy of a Member State or occasions economic hardships in a region of the Community". However, specific disciplines to govern the exercise of these rights have not yet been developed by CARICOM Member States.

Negotiations on EMS in the GATS and in the FTAA are of special relevance for CARICOM because of two main considerations. As a grouping that has introduced emergency safeguards disciplines for services in its regional agreement, it is in its interest that adequate safeguard disciplines are introduced in the GATS and in the FTAA, CARICOM should seek to avoid in the future, situations in which a CARICOM Member could apply safeguard measures to services providers from another CARICOM country but not to third countries. These situations could arise when a CARICOM Member States applies a regional ESM in sectors in which it has also adopted liberalizing commitments in other agreements. The wider and deeper the specific commitments adopted by CARICOM countries in the GATS and in the FTAA, the higher the probability of this situation could occur in the future[7]. Furthermore, ESM would be of particular importance for small economies, as the Caribbean, as their size would expose them to greater damage from import surges than would be the case with larger countries. CARICOM Members should, therefore, actively participate in the negotiations to promote the inclusion of ESM in the GATS and in the FTAA Chapter on Services.

[6] FTAA Draft Agreement; FTAA.TNC/w/133/Rev.1. However ESM is not one of the issues of consensus.
[7] Abugattas, Luis;

This report is based in the analysis of recent literature and documentation of the negotiations. It reviews the current debate on safeguards in the framework of agreements to liberalize trade in services, identifying some of the critical issues for CARICOM. The objective is advancing some recommendations on the negotiating stance countries in the region might wish to consider adopting in the WTO and in the FTAA. The first section of the report briefly reviews the status of ESM negotiations in the WTO, the FTAA, and analyses the safeguard provisions incorporated in Chapter III of the Revised Treaty of Chaguaramas. An attempt is made to assess the implications of disciplines being developed in different levels, and the possible avenues for cross-fertilisation between the different processes. The second section discusses the main issues in the current debate on ESM´ s for trade in services. In that context the relevance that principles developed for trade in goods is examined discussing to what extent the nature of services trade requires the incorporation of differentiated policy instruments

SECTION I: Current Status of ESM Negotiations

1.1: ESM in the GATS Negotiations

The development of disciplines ESM within the WTO General Agreement on Trade in Services (GATS), along with rules for subsidies and government procurement, are part of the "unfinished business" of the agreement. Paragraph 1 of Article X of the GATS on Emergency Safeguard Measures provided that: "*There shall be multilateral negotiations on the question of emergency safeguard measures based on the principle of non-discrimination. The results of such negotiations shall enter into effect on a date not later than three years from the date of entry into force of the WTO Agreement.*" This mandate has been discussed, since the conclusion of the Uruguay Round, in the Working Party on GATS Rules (WPGR). Until to day, consensus has been highly elusive, and several deadlines for agreement have been missed. According to Article X negotiations should have concluded by the end of 1997. However, the deadline was

extended several times[8]. Recently, WTO Members, after a final 2-day delay on a decision on the extension of a deadline for the establishment of an emergency safeguard mechanism for the GATS, agreed on 15 March 2002 to prolong the period for negotiating such an instrument until 15 March 2004.[9]

The lack of success in bringing ESM negotiations to a satisfactory conclusion after almost seven years of efforts highlights the complexity of the issues involved in developing EMS rules and the sensitive policy areas it touches upon. Negotiations have been hampered also by the contending views of participating countries which involve some degree of tension along North-South lines. After a long period of negotiations there is no agreement even on the interpretation of the mandate provided by Article X of the GATS. The issues of the desirability and feasibility of ESM in the GATS are still under discussion. Furthermore, the institutional setting for the negotiations has not contributed to the process. During the first stage of GATS 2000 negotiations, the inclusion of the work carried out in the Council and in the Subsidiary bodies - among them the "unfinished business" being discussed in the WPGR, as an agenda item of the Special Session - brought those issues into the framework of the new round of negotiations under Article XIX.[10]. The agreed negotiating guidelines did not incorporate those issues into the agenda of the Special Session, establishing a clearer distinction between unfinished and current business and negotiations under Article XIX. The negotiating guidelines and procedures specified that "existing subsidiary bodies shall be utilized to their maximum capacity", that negotiations on ESM under

[8] This date was extended by the GATS Services Council until June 1999. WTO members later agreed to incorporate the issue in the new round of GATS negotiations launched in early 2000. When a new deadline of December 2000 was missed, WTO members agreed to push this back an additional 15 months to March 15, 2002.

[9] The extension of the EMS deadline, was proposed by the Services Council Chair, and supported, *inter alia* by the EC, Mexico, Brazil, Canada, New Zealand, Argentina, Korea, Japan and Turkey.

[10] The different items being addressed regarding the GATS, the built-in agenda being addressed by the WPGR, the reviews being undertaken by the Council, and the work being developed in the WPDR and in the Committee of Specific Commitments, are an integrated package, and as such were incorporated in the work of the Special Session by virtue of paragraphs © and (d) of the road-map. However, the road-map did not provided for any direction with regards to sequencing of the different issues to be considered by the Special Session. It only stated that that current work in the WPGR should be completed prior to the conclusion of the negotiations, and set December 15 as the date to complete work on safeguards. A best endeavor deadline, of March 2001, was introduced to complete the work under way in the Committee on Specific Commitments.

Article X shall be completed by 15 March 2002, and that Members shall aim to complete negotiations under Articles VI:4, XIII and XV prior to the conclusion of negotiations on specific commitments. A parallel track has been established without clear obligations, or a specified time frame, to complete negotiations in some highly sensitive issues. Following the decision of the Trade Negotiations Committee (TNC) to hold the services negotiations in a Special Session of the CTS, work in the subsidiary bodies has been limited due to an overlap with CTS activities.

WTO Members are currently in a phase of determining what the future role of the subsidiary bodies to the CTS will be. CARICOM countries should carefully evaluate the best setting for EMS negotiations. CARICOM should take into consideration the resource constraints, whether the reallocation of the work being done in the WPGR to the Council in Special Session would improve the pace of negotiations, and in what institutional setting the possibilities for advancing its positions will be enhanced. Negotiations in the Committee's Special Session should be assessed in the light of developments in the Council and in the Subsidiary bodies due to the intimate relationship between the different issues under discussion.

Particular attention should be given to the timing of negotiations of specific commitments and the progress in adopting ESM disciplines. It has been argued in the literature, and in the debates in the WPGR, as it will be discussed *infra*, that the depth of possible specific commitments would depend on the nature and scope of a EMS regime in the GATS. According to the new deadline agreed for completing EMS negotiations, WTO Members might be well advanced in the negotiations of specific commitments prior to any agreement regarding Article X. The uncertainty surrounding the final outcome of EMS negotiations could have a strong impact on the specific commitments that WTO developing country's Members will be willing to adopt.

A basic issue underlying the negotiating process in the WPGR has been the different interpretation of the mandate of Article X. According to some WTO members, and also to some analysts, Article X of the GATS does not mandate that there *must* be a

provision on ESM.[11] It is stated that the Article simply requires that negotiations on the issue must take place and that the principle of non-discrimination must abide. According to this interpretation, "it would appear that WTO Members are free to engage solely in discussion regarding the feasibility or desirability of an ESM, without necessarily having to develop actual disciplines"[12]. Based on this interpretation some develop countries have exerted strong pressure to focus discussions basically on the issue of desirability of a ESM regime in the GATS.[13] Differing views have been expressed by other develop country members regarding the desirability of an ESM mechanism in services.[14] Members agreed in the WPGR to leave this question aside and concentrated the work on feasibility issues. However, this is a pending issue on which the final outcome of the negotiations of a ESM mechanism depends.

The need for an ESM mechanism has also been questioned on the basis that the GATS already incorporates sufficient "safe valves" to accommodate the different situations that could emerge. The scheduling procedure to inscribe specific commitment has been identified as a type of built-in safeguard in the GATS. It has been argued that it provides Members with sufficient flexibility so that they can adopt specific commitments on those sectors or modes of supply in which they are confident that domestic services producers would not be affected by foreign competition. Also, incorporating the necessary limitations, conditions and restrictions in the specific commitments can adequately protect domestic service providers. The more sensitive sectors may be omitted altogether from scheduling commitments diminishing the risk of adverse effects of services trade liberalization. The fact that WTO Members have adopted specific commitments under the GATS in the absence of a ESM is highlighted as evidence that such a mechanism is not necessarily needed. Those who question the desirability of ESM have proposed, that in the event that finally such a mechanism is

[11] Japan's non-paper Job (01)/105 urges that there should be discussion on the interpretation of GATS Article X and the phrase "the results of these negotiations" to determine the context in which the article was written and the intended result the drafters of this phrase were seeking.

[12] Sherry Stephenson, Safeguard Measures for Services, mimeo April 2002.

[13] Communication from the United States; Desirability of a Safeguard Mechanism for Services: Promoting Liberalization of Trade in Services. S/WPGR/W/37, 2 October 2001.

[14] The EU have adopted a pragmatic approach supporting ESM as a vehicle to achieve further trade liberalization

put in place, safeguards should, at least, not apply to existing commitments, only to new commitments that entail effective liberalization.[15]

It has been pointed out also that any error or miscalculation of the effects of a specific commitment can be remedied through the provisions of Article XXI which allows, three years after scheduling a commitment, its modification or withdrawal, after fulfilling certain requirements. Finally, it is argued that the most critical situation, that of macroeconomic imbalances, is adequately covered by Article XII which allows for the imposition of safeguard measures in the event of "balance of payment problems and external financial difficulties or a threat thereof." Those that question the desirability of an ESM mechanism in the GATS consider that the scheduling procedure and the provisions of the GATS discussed *supra* are sufficient to avoid, or to address, any problem that could be generated by the liberalization of trade, making a ESM mechanism unnecessary, and even undesirable, because it would run counter to the over-arching objective of the GATS, which is the liberalization of trade in services[16].

The nature of the mandate of Article X, and the issue of the desirability of an ESM mechanism in the GATS, should be carefully evaluated by CARICOM Member States. According to the WTO Secretariat, "the negotiating history of Article X suggests that the use of the phrase *"negotiations on the question of emergency safeguard measures"* (Article X.1) implies that prior to elaborating specific provisions, Members may wish to consider the broader question of whether or not it would be desirable to develop an emergency safeguard instrument in the field of trade in services"[17]. However, Article X appears to be clear enough, calling for the incorporation of a ESM mechanism in the GATS. It establishes that "the results of such negotiations shall enter into effect on", leaving no room for not achieving a kind of result that can be put into effect. Therefore,

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[15] This issue has been raised in the submissions to the WPGR, and in papers by the Secretariat. Refer to Hong Kong China, (S/WPGR/W/18), USA (S/WPGR/W/37) WTO Secretariat (S/WPGR/W/1), (S/WPGR/W/15).

[16] Some also consider that Article XIV on General Exceptions provides for adequate coverage of certain situations allowing to impose measures restricting trade in services to protect human, animal and plant life and to prevent an affront to public morals or public order. Members may also impose measures inconsistent with Article XVII on *National Treatment* that are necessary for the imposition or collection of direct taxes and with Article II on *Most Favoured Nation Treatment* for purposes of avoiding double taxation.

[17] WTO SECRETARIAT; S/WPGR/W/1, 6 July 1995.

the mandate of the WPGR is not to decide whether or not an ESM provision should be incorporated into the GATS and, if so, to elaborate disciplines providing for such a mechanism. The mandate is just to provide for such a mechanism. This is crucial for the issue of "desirability". If our understanding of Article X is correct, then the desirability of an ESM mechanism was already decided by WTO Members during the Uruguay Round negotiations. The desirability of an ESM mechanism is expressed in Article X of the GATS.

The argument that an ESM mechanism is unnecessary because the GATS already contains sufficient provisions to address any situation that could emerge is strongly misleading. As some authors have pointed out, the other types of measures that can be associated with the notion of a safeguard – general exceptions; renegotiation of commitments; measures necessary to protect the balance of payments; measures taken on prudential grounds - while relevant from an overall policy standpoint, are arguably not suited to dealing with the same sort of circumstances. The only objective of an ESM for services, as is the case for trade in goods, would be the protection of domestic providers, on a temporary basis, from the adverse effects resulting from an increase in imports. It should closely resemble the basic safeguard objective specified in Article 2(1) of the Agreement on Safeguards. The other GATS provisions have their own objectives, and are there for specific purposes with their own procedures and cannot and should be not be used for emergency safeguard action[18].

The notion of the scheduling of specific commitments as a sufficient built-in safeguard does not stand close scrutiny. The level of specific commitments adopted during the Uruguay Round, which for the most did not entail any real liberalization, cannot be taken as the norm. During the Uruguay Round, initial commitments were negotiated at the same time as the Agreement. Consequently, there seems to have been a tendency to build self-contained safeguards into the initial lists. WTO Members will make further liberalizing commitments in the different negotiating rounds under Article XIX under different circumstances and pressures than during the Uruguay Round. Possible adverse

[18] Already there seems to be consensus in the WPGR that those provisions are no substitute for a ESM

effects on domestic services providers of future commitments cannot be ruled out a priori. The main concern in drawing up an ESM should be to avoid incorporating "defensive limitations" in the national schedules through article XIX negotiations.

From the economic point of view, the rationale behind ESMs for trade in services is the same that justifies these types of measures in the case of trade in goods. Different developments in the international market can produce import surges of "fair" imports, in such quantities and conditions, that may result in market disruption in the importing country, or injury to domestic producers of similar services. ESMs provide countries with the necessary flexibility for Member Countries to adopt temporary measures to grant relief from injury to domestic services providers, facilitating their adjustment to the new market competitive realities. Therefore there is no compelling reason why there should not be an ESM mechanism in the GATS. In the debate surrounding ESM in the GATS, the economic costs associated with protection have been highlighted as an argument against the incorporation of such a mechanism. Measures could tend to increase prices, or reduce quality of basic services, imposing additional costs to consumers that could outweigh the benefits to domestic producers, resulting in net welfare losses. It has also been argued that at the microeconomic level, there is little empirical evidence suggesting that domestic industry actually does take the appropriate steps to adjust to conditions of competition when given the opportunity during the application of a safeguard measure. However, it should be borne in mind that the decision to impose ESM rests on the importing country, and that a cost- benefit analysis should be undertaken on a case by case basis. Each country on the basis of its national interest will adopt the final decision. As in the case of goods, the ESM mechanism should not guarantee the "right to protection" to domestic services providers, leaving the decision to apply or not to apply measures to the national authorities. To address to the issue of adjustment the ESM mechanism could incorporate, as in the case of the Agreement on Safeguards, the requirement that domestic industry presents an adjustment program as a pre-condition for granting relief.

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mechanism. For a discussion of this issue, refer among others to EU, S/WPGR/W/15/Add.4, 20 May 1997.

In the case of goods the reason behind increased imports does not play any role in the determination of emergency safeguards. The testing conditions are: that imports have increased and that such imports are causing, or likely to cause, injury to domestic industry. The Agreement on Safeguards, as stated in Article 4.2(b) further establishes that "when factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports". The same type of provision would apply for trade in services, to address to the problem of establishing the casual link between injury and increased imports.

In the current debate on ESM for trade in services, some WTO Members are pretending to subtly introduce the reasons behind increased imports as a determining element that should be taken into consideration for safeguard action. For this purpose a precondition for taking safeguard measures contained in Article XIX of the GATT (1994) has been revived. The European Communities, for example, have proposed that the requirement of "unforeseen developments" of GATT Article XIX should be included in the GATS safeguard definition[19]. Article XIX establishes that in order to apply a safeguard measure "the increased imports should be the result of unforeseen developments". In the area of goods this has been interpreted to mean "developments after the negotiation of a tariff concession which it could not be reasonable to expect that the negotiators of the country making the concession could and should have foreseen at the time when the concession was negotiated".[20] Introducing this condition in the ESM mechanism in the GATS will be going beyond what is currently required for trade in goods, and introducing a highly disturbing element in any investigation for the determination of safeguard action. The requirement of unforeseen developments was not included in Article 2 of the Agreement on Safeguards and therefore is not a pre-condition for safeguard action in the case of goods.[21] The GATS ESM mechanism should not

[19] S/WPGR/W/15/add.4

[20] S/WPRG/W/24, Note by the Secretariat, Examples of Situations in Which Emergency Safeguard Action May be Taken, 3 September 1997.

[21] There is an apparent conflict between Article XIX of GATT 1994 and the Agreement on Safeguards. However according to the interpretative note to Annex 1A of the WTO Agreement in the event of conflict between a provision of GATT 1994 and a provision of other Agreement in Annex 1A, the provision of the other agreement will prevail to the extent of the conflict. Therefore the conditions given in Article 2 of the Agreement on Safeguards should prevail.

incorporate any evaluation of the reasons behind increased imports, as is the case for safeguards in trade in goods.

Besides the economic rationale behind an ESM mechanism, political economy considerations provide compelling arguments in its favour. Developing countries have stressed that an ESM mechanism in the multilateral framework would enable them to adopt deeper specific commitments under the GATS, as they could take action in the future if confronted with adverse effects resulting from services trade liberalization[22]. Similarly, the WTO Secretariat has argued that the need to facilitate the acceptance of various WTO Members of higher levels of commitments under the GATS may well be the principal rationale for developing some kind of ESM mechanism. Also, the EU Commission noted that "a safeguard clause is probably the more attractive safety valve. Indeed the mere possibility of having such provision may contribute to further market opening and induce liberalization".[23] This argument in favour of an ESM mechanism is being used by some WTO Members in attempting to link the development of ESM mechanism to the depth of the specific commitments adopted by developing countries. It has been proposed, for example, that in order for a Member to schedule access to a safeguard, that Member should demonstrate that access to a safeguard would enable it to schedule more significant liberalization commitments than would be possible in the absence of a safeguard. [24]

Any link between ESM and specific commitments should be strongly opposed, as it will run counter to the objective of progressive liberalization established in Article XIX and the provisions of Article IV. Also, it would imply going far beyond, in the case of services, that which is in effect for the case of trade in goods. In the case of goods there is no linkage, whatsoever, between the level of bound tariffs and the recourse to safeguard action. It will mean introducing in the GATS ESM mechanism, a provision

[22] It has been argued also that the existence of an ESM might help persuade domestic constituencies to accept greater liberalization.
[23] Note of the EU commission to Member States, (D61), 4/10/1995.
[24] USA,S/WPGR/W/37, 2 October 2001. Refer also to LOTIS Committee, GATS and Emergency Safeguard Measures, mimeo June 2000. This reports states that "it would not be acceptable for WTO Members to have recourse to safeguard measures without at the same time undertaking high level market access commitments."

similar to the one contained in Article XIX of GATT 1994, that states that "the increased imports should be the effect of the obligations of the Member in GATT". This provision of Article XIX of GATT was not transferred to the Agreement on Safeguards, and is therefore no longer valid for the determination of safeguard actions in the case of trade in goods[25]. Negotiations of the ESM mechanism should be independent of Article XIX negotiations. ESM should be a general right established in the GATS, as it is in the GATT 1994, independent of the level of specific commitments adopted by Members.

Negotiations in the WPGR, without solving the issues of the desirability and of the need of an ESM mechanism in the GATS, discussed *supra*, have centred on the feasibility of an ESM mechanism for trade in services. The debate has been structured around an illustrative list of themes that includes, *inter alia*: the definition of domestic industry, the concept of like service, situations justifying safeguard action, indicators and criteria for determining injury and causality, possible forms of a safeguard measure, modal application of the mechanism, compensation, acquired rights, special and differential treatment, and procedural matters[26]. The main focus of analysis has been the applicability of concepts applied in the WTO Agreements, in particular Article XIX of GATT (1994) and the Agreement on Safeguards, to trade in services. These issues will be analysed in the second section of the report.

Some issues should be stressed regarding current negotiations in the WPGR. First, Article XII allows Members to "adopt or maintain restrictions on trade in services on which it has undertaken specific commitments, including on payments or transfers for transactions related to such commitments" when confronting balance-of-payments difficulties. That means that Members are authorized, under these circumstances, to impose restrictions to market access and limitations to national treatment. The application of Article XII by Members requires clarity with respect to the type of measure that would be legitimate in confronting balance-of- payments difficulties. Therefore, independently of Article X, some basic issues concerning safeguards for services have to be addressed by WTO Members, as is also the case of all agreements to

[25] Refer to footnote Nº 23

liberalize trade in services that have incorporated balance-of-payments safeguards. Article XII already introduces some conditions that are highly relevant for the current debate on ESM. Measures to address balance-of-payments difficulties, according to Article XII (2), shall not discriminate among Members, avoid unnecessary damage to the commercial, economic and financial interests of other Members, shall not exceed those necessary to deal with the situation, and shall be temporary and phased out progressively as the situation improves. Also, it requires notification and consultation when applying measures. There seems to be consensus in the WPGR that any EMS mechanism will incorporate similar provisions.

Secondly, the emphasis on the analysis of the applicability of concepts and procedures of Article XIX of GATTS, and of the Agreement on Safeguards, to trade in services, and the attempts to "leap-frog" in developing rules and disciplines for safeguards under the GATS, might have not contributed to achieving results. Disciplines for safeguards in goods have evolved over a long period of time since the first proposal to include such a provision in the GATT was made by the USA in London in 1946. The experience over time in the GATT, and in other agreements, finally led to the Agreement on Safeguards on the WTO, almost fifty years afterwards. The attempt being made to establish, since the beginning, a comprehensive mechanism of ESM in the GATS without any prior experience with such types of measures, and basically borrowing from the disciplines for trade in goods which may not be completely appropriate for services, can explain in part the difficulties being confronted. An incremental approach would be better. Some basic disciplines should be incorporated in the GATS through the work of the WPGR, mandating built-in periodical reviews, through which the experience developed in the application of measures could be progressively incorporated in the ESM mechanism.

Finally, the outcome of the negotiations in the framework of the GATS, and the disciplines adopted, will without doubt influence the development of EMS in the FTAA services negotiations, and in other agreements. In fact some countries are proposing that

[26] Job No. 1979/Rev.1

the FTAA negotiations wait for the results in the GATS concerning ESM[27]. Furthermore, GATS disciplines can provide important inputs for developing rules and disciplines for the application of Articles 43 and 47 of the Revised Treaty of Chaguaramas.

1.2: ESM in the Services Chapter of the FTAA

The issue of ESM has not been widely debated in the Negotiating Group on Services (NGSV), which has been mostly concern with the so called "consensus items", around which consensus is still, until today, elusive as demonstrated by the results of the last May TNC meeting. However, under the "other issues for consideration" some Members have proposed that an ESM mechanism be included in the Chapter on services of the final FTAA Agreement. Other Members consider that ESM are not desirable or feasible. To a certain extent the same discussion ongoing in the WPGR of the GATS is being reproduced at the FTAA level. Some Members, who support the inclusion of ESM in the Agreement, have proposed that this issue should wait for the results of the negotiations at the multilateral level[28]. Most certainly the debate around ESM, that has not really started in the NGSV, will be undertaken once there is agreement on the overall architecture of the Chapter on Services.

The current Draft of the agreement incorporates proposals for restrictions to protect the balance of payments, and for special safeguards. In the first case, the proposal mirrors what has already been incorporated in the GATS. With respect to special safeguards, the proposal included in the Draft is as follows:

1. *For the purpose of addressing problematic market conditions in particular service sectors, linked to the creation of new sectors, the correction of structural problems within the market or the threat of the disappearance of services sectors, a Party may adopt safeguard measures in a non-discriminatory manner with the proviso that they will be eliminated gradually as the reason for their*

[27] Honduras y El Salvador

adoption disappears. For this purpose, the Party shall notify it to the Committee for Trade in Services and offer evidentiary proof justifying the adoption of such measures.

2. *The Committee on Services shall determine, inter alia, the procedures for the implementation of necessary measures in relation to....urgent safeguard measures.*

This proposal departs significantly from what is being discussed in the WPGR and from the traditional understanding of an ESM. The concept of "problematic market conditions" goes far beyond that of injury or threat of injury to domestic industry which is usually the trigger for safeguard action; and the "correction of structural problems" should not be a goal of an ESM. This type of proposal cannot be the basis for a serious discussion of ESM's. This issue requires much further development in the FTAA services negotiations. Participating countries should make concrete proposals to advance negotiations on this issue.

To the extent that the FTAA agreement on services incorporates the four modes of delivery and positive listing, the progress in determining rules and disciplines of ESM in the GATS could constitute a sound base for the incorporation of such a mechanism in the services Chapter of the FTAA Agreement. If Mode 3 is incorporated in the Chapter on Investment, and negative listing is adopted, then whatever norms are developed for the GATS should be adapted to fit these changes. However, in principle, the type of listing should not demand major adjustments to any ESM mechanism, as it will allow countries to impose market access restrictions and limitations to national treatment, above those bound either in the national schedule (positive listing), or in the Annex of reservations (negative listing). The major difference would be with respect to the norms that are developed for ESM on Mode 3 of delivery in the GATS, the more controversial issue in the WPGR. This would not be required if establishment is considered solely in the investment Chapter, limiting the Chapter on Services to cross the border trade.

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[28] Matrix for the FTAA Negotiating Group on services, FTAA.ngsv/w/06/Rev.4, 31 August 1999.

1.3: Article 47 of the Revised Treaty of Chaguaramas

The treaty of Chaguaramas, in Article 47, introduces a general ESM clause, allowing CARICOM Member States to apply restrictions to establishment, to the provision of services, and to the movement of capital and community nationals, where the exercise of those rights creates serious difficulties in any sector of the economy or occasions economic hardships in a region of the Community. It is the most comprehensive ESM clause of all the agreements covering services in the hemisphere.

According to Article 47, restrictions shall be confined to those necessary to resolve difficulties, or to alleviate economic hardship. In applying restrictions Members shall minimize damage to the economic interests of any other Member State, and prevent the unreasonable exercise of rights granted, the exclusion of which could impair the development of the CSME. Measures shall not discriminate, and may be maintained only to the extent that conditions justify their application. Moreover, they shall be progressively relaxed as relevant conditions improve. Member States intending to apply restrictions should notify to the competent Organ the intention and the nature of the measures, prior or after the application of the measure. The competent Organs, the COTED or COFAP as the case may require, have to make a determination of the appropriateness of the measure, the adequacy of the program to resolve the difficulties or to alleviate the hardships, and the period for which the restrictions should continue. The Organs have the right to impose conditions, as they consider necessary, and can also recommend alternative arrangements to address the problem.

The adequate application of Article 47, for trade in services, could benefit from further development of some its provisions. In particular, the following issues should be analysed by CARICOM Member States:

i. *Situation in which ESM can be applied*: The concepts of "serious difficulties" and "economic hardships" have to be defined and

operationalized through clear and quantifiable indicators. It should allow the determination of the appropriateness of the measure, and the overall review to be undertaken by the competent Organs of the Community with respect to the conditions established in paragraphs 5, 6, and 7 of Article 47. The concept of "serious difficulties" could be approximated to that of "serious injury" to maintain coherence with the developments in other agreements. For the case of services the increase in imports, resulting from the exercise of rights granted under Chapter III, could be incorporated as a test condition for safeguard action.

ii. *Appropriate type of restrictions*: It would be convenient to clarify the type of restrictions that would be legitimate under Article 47. This is particularly important with respect to the right of establishment, and the treatment to be granted, when applying a measure, to service providers already established in a Member State. As it will be discussed infra, this is the most sensitive issue in the debate of ESM for trade in services in the WPGR.

iii. *Ex-post notification*: Article 47 is silent with respect to the conditions that would enable a Member State to apply restrictions without prior notification. It states only "Where a Member State is unable to comply with sub-paragraph (a)". Due to the nature of measures restricting market access or limiting national treatment, ex-post notification can render useless the recommendations or the conditions imposed by the competent Organs of the Community. At least the notion of "irreparable damage" would have to be demonstrated, if delay in the application of measures should be considered by CARICOM Member States to justify ex-post notification.

iv. *Non-discrimination*: Paragraph 7 establishes that Member States shall not discriminate when applying a measure. It is not clear if this obligation is limited to CARICOM Member States, or includes also third countries. As it will be discussed in the second section of this report, the issue of non-

discrimination and its relation to Article V of the GATS is another crucial issue that has to be solved in the WPGR negotiations.

Article 47, with the necessary adaptation, and incorporating the issues discussed *supra*, could provide a sound basis for a CARICOM submission on ESM both in the WPGR and in the FTAA negotiations.

SECTION II: Themes in the Negotiation of an ESM Mechanism for Trade in Services

This section of the report analyses the main issues that have emerged in the negotiations in the WPGR. The issues under discussion are equally relevant for any possible ESM in the FTAA Chapter on Services, and its analysis could provide for some insights for further development of Article 47, as discussed *supra*. It does not pretend to be a comprehensive discussion of all the issues that have emerged in the debates in the WPGR. Using the existing framework of trade in goods as a model, it examines whether and how relevant GATT principles might be applicable in the context of services trade, and how the nature of services trade might suggest the adoption of differentiated approach. Some of the general issues have been analyzed in Section I of the report. The main objective of the analysis is to provide some input for the adoption of a position of CARICOM Member States in the different negotiating processes.

2.1 ESM Model for the GATS

Different alternatives of an ESM mechanism have been proposed in the literature, and by WTO Members in the WPGR. Discussion has focused on the pros and cons of the different alternatives. At least three different general approaches, or models, can be identified:

2.1.1 Horizontal ESM Mechanism

This approach proposes the incorporation in the GATS of a general ESM regime mirroring the Agreement on Safeguards. The regime should incorporate all the required

provisions, definitions, basic principles, quantitative criteria and procedural restraints. It would be applied, in general, in those situations in which service suppliers of a Member country are suffering injury or threat of injury as a result of increased supply of services by service suppliers of other Members. This approach is the one favoured by most developing countries in the WPGR, and some comprehensive proposals have been presented for consideration by WTO Members.[29] This would be similar to the approach taken in Article 47 of the Chaguaramas Treaty.

With respect to this approach, questions have been raised regarding the effectiveness of a broad-based mechanism. There is doubt that general disciplines could account for the variety of situations that could emerge due to the heterogeneity of services, the different modes of delivery in trade in services, and the different regulatory regimes between sectors, and between countries. However, discussion in the WPGR has centred on this approach as a consequence of the analysis of the applicability of concepts and disciplines of the Agreement on Safeguards. This approach probably will be the one that will finally be incorporated in the GATS. Certainly, it does seems that it would be possible to develop a full-blown regime that solves all the possible questions at the very start. As was the case with the Agreement on Safeguards, it could be progressively improved overtime through cumulative experience. Moreover, at this time it seems the most feasible alternative that would respond to the principal concerns of developing countries.

2.1.2: National Schedule-Built- in-Safeguards

An alternative that has been proposed would not require a comprehensive ESM regime in the GATS. Instead, ESM would be inscribed in the national schedules of Members for individual sectors, and some general criteria could be agreed for the application of measures.[30] Under this alternative there are two possible options:

[29] ASEAN, S/WPGR/W30.

[30] For example Gauthier, et al, 2000, proposes this approach with the following general criteria: only temporarily delay liberalisation,, no permanent back-tracking would be possible; be a one time measure only, of limited duration, and perhaps include progressive liberalisation; be triggered only by non-discretionary, objective events, based on statistical results; require appropriate notification and reporting obligations; be

- The incorporation of an ESM in the national schedules could be negotiable or left to Members to decide. There are some possible variants of this approach. One is borrowed from Article 5 of the Agreement on Agriculture, in which an ESM would only be available to sector and modes of supply designated in the Members schedule and on which liberalizing commitments have been undertaken. This ESM would be triggered by specific quantifiable events, and recourse to an ESM would be time-bound. That is it would not be a permanent right.[31]

- Another alternative of built-in-safeguards is tailored after the provisions incorporated for financial services in the NAFTA Agreement in favour of Mexico. If the sum of the authorized capital of foreign commercial bank affiliates (as defined in the Schedule of Mexico to Annex VII), measured as a percentage of the aggregate capital of all commercial banks in Mexico, reaches 25%, Mexico may request consultations with the other parties on the potential adverse effects arising from the presence of commercial banks of the other Parties in the Mexican market. It should be understood that consultation is for determining certain action on the part of Mexico.[32] It has been proposed that this approach could be limited to more sensitive service sectors. The financial sector has been identified as a possible candidate fit for this approach. Under this alternative, each Member would have to inscribe the nature of the ESM, and/or the conditions that would trigger its application, in those chosen sectors.

Some complexities would arise from the application of a national schedule-built-in-safeguard approach. The first alternative links ESM with level of commitments running

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applied on an MFN basis; require specificity in terms of sectors and modes of supply; for mode 3, there should be no right to seek divestiture. Also the issue of compensation should be included.

[31] U.S.A S/WPGR/W/17.

[32] According to the provision of the Agreement, in considering the potential adverse effects, the Parties shall take into account: a) the risk of undue control of the Mexican payments system by non-Mexican persons; b) the effect foreign commercial banks established in Mexico may have on Mexico's ability to conduct monetary and exchange-rate policy; c) the adequacy of the agreement in protecting the Mexican payments system. Regarding procedures, it is established that: (a) A request for consultations to be completed expeditiously to the parties concerned; (bi) If the consultations fail to achieve a consensus, any party may request the establishment of an arbitral panel which would present its determination within 60 days.

counter to what is established in Article XIX of the GATS, as discussed earlier, and the issue of what should be the appropriate level of commitments would be difficult to settle. The definition of trigger criteria is almost an impossible task considering the variety of services and possible circumstances. It could promote over use of the regime as a pre-emptive mechanism. Countries more probably would tend to inscribe ESM in almost every sector in which specific commitments are made, just to protect themselves from any eventuality. It could bring a built-in asymmetry in the GATS because the recourse to ESM could be possible for some Members and not for others. Furthermore, the second alternative would require the definition of sensitive sectors which are not the same for all Members, and the determination of the ESM trigger conditions and type of measure, be it the case, would involve enormous effort and complexity.

2.1.3: Sector or Mode Specific ESM

Another possibility for an ESM mechanism in the GATS would be to develop specific rules and disciplines for different service sectors[33], or a specific mechanism for each of the four modes of delivery[34]. An ESM regime could be developed for those services in which it is perceived that there could be disruptive effects as a result of liberalization, or a basic set of rules and procedures developed for applying ESM in each mode of delivery that should be utilized for all service sectors. Conceptually, considering all the complexities involved in determining the optimum ESM regime for trade in services, this might be the better approach. However, this would require a progressive approach, dealing with sector by sector or mode by mode, and would require a great amount of effort, expertise and time that countries currently cannot afford. This could be an objective attainable through the accumulated experience with the application of ESM in trade in services overtime. Some authors have proposed an alternative route: starting by setting norms and disciplines for a sector, and based onth experimentation, extending the experience to other sectors, or developing a general framework on that basis.

[33] The Latin American countries have suggested that a safeguard be useful in the tourism sector. Communication from Latin American countries, S/CSS/W/107, 26 September 2001.
[34] India has suggested his approach, refer to S/WPGR/W/15/Add.2. 29 April 1997.

2.2: Conditions for Application of a ESM

The Agreement on Safeguards clearly establishes the conditions that permit the application of a safeguard:

(i) the imports of the product should have increased, either an absolute increase, or an increase relative to domestic production;

(ii) imports should be in such quantities and under such conditions as to cause serious injury or threaten to cause serious injury to domestic producers of like or directly competitive products.

The conditions of "unforeseen developments, and "that increased imports should be the effect of obligations" originally contemplated in Article XIX not longer apply, as was discussed *supra*. The same type of condition could be applied for an ESM in the GATS. However, in the case of services, the concept of imports is not straightforward, as the GATS definition of trade in services includes cross-border trade, and domestic sales of foreign providers established, permanently or temporarily, in a Member territory[35]. Mode 1 comes very close to an import situation similar to trade in goods. Mode 3 involves domestic sales exclusively. Even though Modes 2 and 4 involve cross-border movement of natural persons, the relevant economic transactions are done inside the Member territory, and therefore are domestic. For example, regarding Mode 4, the relevant data to evaluate the effect on domestic services providers, will not be the number of natural persons service providers entering the country, but the volume of business they are doing.

Taking into consideration the above mentioned issues, a more relevant approach for establishing the conditions that justify safeguard action in the case of services could be: *an absolute, or relative, increase in the value or volume of services rendered by service suppliers of other Members in the Members territory*[36]. This approach will take into account in a clear way Modes 1, 3, and 4, as it would cover both cross-border transactions and domestic sales.

[35] Based on this fact some have proposed that ESM should be limited to cross-border trade only.

[36] This is in line with the proposal presented by ASEAN to the WPGR ;S/WPGR/W/30, 14 March 2000 and Job 6830 31 October 2000.

The case of Mode 2 is different. The only situation in which increasing trade under this mode could affect national service providers is if the consumption of services abroad by residents of a Member grows in such a manner that it causes injury to domestic industry. This will be a case of "run-away business". This situation can be classified also as a condition justifying an ESM. With these adaptations, the other conditions of Article 2 of the Agreement on Safeguards justifying the application of an ESM: injury or threat of injury and the link with increased participation of foreign providers, would hold for services.

It has been argued that the lack of adequate statistical data would render it very difficult to make a case for the application of ESM in services. While in the case of Mode 1, there is certainly a data problem, this is not necessarily the case in all service sectors for the other modes of delivery. The application of ESM would require data on the participation of foreign providers in the market, and data on the situation of domestic industry, such as sales, employment, profitability, and market share, among other indicators. Both can be collected, particularly in the more modern and dynamic services in which foreign services suppliers would be expected to participate[37]. In any case it would be the responsibility of the country invoking the application of an ESM to convincingly present its case. If the case cannot be appropriately constructed, then it will not be possible to take safeguard action. Nevertheless, the improvement of statistical data concerning services activities is imperative in order to assess adequately the effects of trade liberalization. Relevant data requirements should be identify for each service sector.

2.3: Serious injury

The Agreement on Safeguards, Article 4:1, defines serious injury as "a significant overall impairment" in the position of the domestic industry. The determination of the existence of serious injury has to be done on a case-by-case basis. Some guidelines have, however, been provided. The following elements have to be evaluated for the determination of injury:

[37] Most countries have quite adequate data regarding financial and insurance services, telecommunications,

1. the rate and amount of the increase in imports of the product in absolute terms or relative to domestic production;
2. the share of the domestic market taken by increased imports; and
3. changes in the levels of sales, production, productivity, capacity utilisation, profits and losses, and employment.

No specific criteria have been laid down in the Agreement or in GATT 1994 to determine the existence of threat of serious injury. The threat of serious injury means serious injury being "clearly imminent". The existence of imminence is to be decided on the basis of facts and not merely on allegation, conjecture or remote possibility.

The introduction of a similar approach in an ESM mechanism in GATS appears to be acceptable to most, developed and developing WTO Members. A major concern has been raised with respect to the availability of data to determine serious injury in the process of an investigation for safeguard action.

2.4: Domestic Industry and Like Services

Two main concepts, that have been at the centre of the debate on ESM, derive from the pre-conditions required for safeguard action: "domestic industry" and "like or directly competitive" service. According to the Agreement on Safeguards, Article 4:1©, domestic industry means all the producers of the like or directly competitive product, or at least those whose collective production constitutes a major proportion of the total domestic production of those products. The notion of domestic production is straightforward in the case of goods. However, it is not so in the case of services. The definition contained in the Agreement on Safeguards can be applied without modification to Mode 1, and Mode 4. In the case of Mode 1 foreign providers are outside the Member's territory, therefore domestic producers are all those providing the like service inside the Member's territory. As Mode 4 in the GATS refers exclusively to temporary movement of natural persons who will enter the Member's territory under specific immigration regulations, domestic industry would refer to all the other service providers of the like service who are permanent residents, be

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construction, retail, auditing, accounting, health services among others.

they national or foreign, in the Member territory.[38] In the case of Mode 2, domestic industry, would include those service suppliers in the Member territory of the like service that residents in the Member territory are purchasing in other Member's territory.

Under Mode 3 the definition of domestic industry is much more complicated. We agree with the WTO Secretariat and other analysts, in the sense that for this mode of delivery the concept of domestic industry could have two different meanings. It could refer to national and foreign companies supplying the like service in the Member's territory, or only to national companies. In the first case subsidiaries, branches and representative offices of foreign firms would all be regarded as part of the domestic industry. The different meaning of "domestic industry" would have strong implications for the ESM mechanism. In one case safeguard action would be taken to protect both national and foreign services suppliers established in the Member's territory from new market entrants. In the other case it would be to protect only national suppliers, even also from the competition of foreign suppliers already established in the Member's territory. This second possibility is one of the more sensitive, and conflicting, issues in the current debate about an ESM mechanism in the GATS, and would have strong implications for the type of safeguard measures that could be foreseen.

The definition of domestic industry in the case of Mode 3 is a crucial aspect of any future ESM mechanism in the GATS. From this definition the question arises as to whether an ESM could be applied to both pre and post-establishment phases, or only to pre-establishment. Application of an ESM in a post-establishment phase may involve the reversal or suspension of national treatment and market access to companies already doing business in the Member's territory. Some countries, and analysts, strongly oppose the possibility that established companies could be subjected to ESM, as it will impair "acquired rights" and would have strong negative repercussions on the imposing Member's economy. Other countries consider that there could be cases in which the application of an

[38] Our position is different from the one expressed by the WTO' s Secretariat that considers that that under Mode 4 domestic production refers either to national and foreign suppliers, or only to national suppliers. The relevant concept in this case is that of residency and not that of nationality. For the position of the Secretariat refer to: S/WPGR/W/8, March 6 1996.

ESM to established companies would be more than justified.[39] A relevant issue in this regard is the definition of natural and juridical persons of other Members contained in Article XXVIII (k), (l), (m), (n) of the GATS. According to this domestic industry should include natural or juridical persons of the Member intending to apply an emergency measure, excluding natural and juridical persons of other Members. If this approach is followed, it would allow for the application, in the case of commercial presence, of ESM in the pre and post establishment phases. The nature of post-establishment safeguard measures is an issue that should be analysed in the context of determining the type of ESM that would be considered legitimate under the agreement, and not in the context of defining domestic industry.

The Agreement on Safeguards does not specifically define "like" or "directly competitive products". It is determined on case-by-case basis[40]. The GATS also does not define these concepts. The very nature of services trade makes the determination of likeness more complex. As Mattoo states, " It will be necessary to deviate in the GATS from the more literal GATT interpretation of "likeness" to arrive at an economically meaningful interpretation which would necessarily incorporate the notion of substitutability"[41] The GATS provides for a first approximation to the issue of likeness, through the scheduling procedure of specific commitments. Specific commitments are scheduled by sector, sub-sector and by mode of delivery. Therefore, in practice, likeness should primarily be a function of the modes of delivery, being defined within each mode individually. This approach provides guidance with respect to the notion of likeness in relation to the scope of specific commitments on national treatment, and of the general obligation of MFN contained in Article II of the GATS.[42]

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[39] Communication from ASEAN, S/WPGR/W/30, 14 March 2000; Argentina statement at the WPGR Meeting of May 10, 2001; among others.

[40] The application of Article III and XIX of GATT 1994 has provided some guidelines in this respect. The Agreement on Subsidies and Countervailing Measures and the Anti-Dumping Agreement introduce greater clarity to the concept of like products.

[41] Mattoo, Aaditya, National Treatment in the GATS, 1997

[42] There is an ongoing discussion in the FTAA negotiations regarding the concept of like service in relation to the NT commitments and MFN obligation. The issue is basically if these commitments will apply across mode of delivery or should be limited to the each mode of delivery.

From the standpoint of an ESM, which implies the reversal of a bound specific commitment undertaken by mode of delivery and by sector, the mode of delivery criteria for likeness makes sense in relation to the kind of safeguard action that could be undertaken. An ESM could only be imposed in the mode of delivery in which national treatment or market access commitments have been undertaken. However, given the high level of aggregation of the services classification list, the fact that specific commitments might be scheduled in even more desegregated sub-division, not necessarily homogeneous among Members; and particularly because the notion of mode of delivery does not necessarily apply to domestic market transactions, this criteria alone will not be enough to address the issue of likeness in the context of the ESM mechanism in the GATS. The criteria of mode of delivery should be complemented with the notion of "end use".[43] Therefore, a like service would be one in the same sector, that has the same end use by consumers, and must be supplied through the mode of delivery where commitments have been undertaken. If specific commitments have been made for the same service in different modes of delivery, then the notion of "directly competitive services" would be relevant, and the dominant criteria should be "end use". The substitutability of services, and the need to apply ESM to different modes of delivery, would have to be demonstrated through the injury and casual link test.

2.5: Non-Discrimination

The question of whether ESM should be applied on a MFN basis or whether there can be selective application against some suppliers, which was a matter of serious consideration in GATT for a long time, has not emerged in the current debate for a ESM mechanism in the GATS. Article X of the GATS established that the outcome of those negotiations should be based in the principle of non-discrimination, and there is consensus that any ESM should be applied without discrimination. Therefore, what is provided in Article 2 of the Agreement on Safeguards, that "safeguard measures shall be applied to a product being imported irrespective of its source" is transferable for an ESM mechanism for services. Nevertheless,

[43] This notion provides an economically meaningful basis for comparing services. Refer top Mattoo (1997) op.cit

ESM in goods allows for some limited selectivity in its application. This is an issue that should be analysed for the case of services, to address particular situations in which serious injury might be clearly produced by specific exporters, and in the case of allocating quotas as in goods.[44]

Another issue that should be analysed by CARICOM countries is the relationship between an ESM mechanism and Article V of the GATS. Would it be possible, for example, to exempt other Parties of an integration agreement, compatible with Article V, from the application of an ESM? This is an unresolved issue for the case of goods, and many trade agreements do not consider safeguards for intra-regional trade, while Members reserve their right to apply Article XIX safeguards. Article XXIV of the GATT 1994 does not provide with any clear guidance to this respect, and there are conflicting interpretations of the legitimacy of discriminating against third countries when applying safeguards by a member of a preferential agreement, due to the omission of Article XIX from those exemptions mentioned in Article XXIV:8(b)[45]

2.6: Type of ESM

An ESM is a time-bound modification of a bound commitment, or it could also imply the modification of a general obligation of an agreement. In the case of goods an ESM could be applied through raising tariffs above the bound level, through quantitative restrictions, or

[44] Raising of tariff as a safeguard measure has in any case to be applied to all Members. The question of selectivity arises only while applying quantitative restriction. But even such a measure has to be applied to all supplying Members following the provision of Article 2. The element of some discrimination comes up only in the matter of allocation of shares in the quota. The quota modulation provision contained in Article 5.2 (b) allows departure from the practice of taking the past performance as the basis for allocation of shares. A Member may depart from this practice, if certain conditions are fulfilled, particularly the condition of disproportionate increase in the import share of some Members. Thus there can be some modification in the normal practice of the allocation of quota; but selective targeting of only a limited number of exporting countries for the application of a safeguard measure appears to have been excluded by the Agreement of Safeguards. Hence, if quantitative restriction are to be applied, it has to be applied globally, i.e., it has to be applied to all exporting countries; buy under certain conditions, the shares of the quota may be reduced in case of some countries, and the shares may consequently be increased in case of other countries.

[45] GATT; Guide to law and Practice 1994, page 779.

through a combination of both. In the GATS specific commitments with respect to National Treatment, (Article XVII), and Market Access (Article XVI) are negotiated, and there are the general obligations in Part II of the GATS. A first issue to be determined is if the ESM mechanism will allow Members to temporarily depart only from its negotiated specific commitments, or also from some general obligations. The issue of the MFN obligation regarding the ESM mechanism has been settled by Article X of the GATS, as discussed *supra*. An issue that should be decided if the ESM mechanism would allow Member's to temporarily depart from Article XI concerning payments and transfers, as is the case of restrictions to safeguard balance-of-payments. Restrictions on payments and transfers could serve the objectives pursued by safeguard action, in particular regarding across-border trade and mode 2 of delivery. However, the feasibility of applying these types of restrictions would depend on the overall legal framework regarding foreign currency access and disposability in effect in each Member's territory[46]. It would depend also on the extent to which it can be demonstrated that this type of restriction would effectively contribute to alleviating the situation of domestic services suppliers of the service in question.

An ESM in the case of services, as in the case of goods, could be of two main types: price-based or quantity-based measures. In the first case, through different instruments, the price of services supplied by natural or juridical persons of other Members could be increased, giving therefore a competitive advantage to domestic suppliers to alleviate the injury caused by increased competition. Price-based measures would be feasible through the limitation of national treatment, allowing their imposition only on suppliers from other Members. Quantitative measures can be put into effect both through restrictions to market access and through limitations to national treatment. The specific nature of the measure to be imposed would depend mostly on the service in question and on the mode of delivery.

The case of cross-border trade, Mode 1, closely resembles the case of goods. In theory, imports can be taxed, or limited through quantitative restrictions. The main issue here is the technical feasibility to tax or to impose quantitative restrictions in services that can digitised and electronically transported across borders. A discussion of this issue goes

[46] In some countries, as Peru, access and disposability of foreign currency is even a constitutional right.

beyond the scope of the present report; however there seems to be technically feasible solutions to this problem, even though the effectiveness and economic effects of these types of measures are currently under debate.[47]

Under Mode 2 it would be feasible to tax or to impose a quantitative restriction on consumption abroad. When consumption abroad involves the physical movement of consumers they could be taxed or restricted in some way. For example in the case of tourism a tax can be imposed on nationals travelling abroad, or a limitation on the amount of foreign currency they can take out of the country. Under Mode 4 market access to foreign suppliers can be restricted through immigration entry quotas, quantitative limits in the number of licences granted to supply the service, or prices can be affected through differential taxing or license fee. There seems to be consensus among most Members in the WPGR that the major problem with an ESM mechanism in the GATS is not the feasibility or the effectiveness of possible measures in achieving their intended results. Most of the discussion has centred on the possible adverse effects, on suppliers and the Member's economy, of imposing ESM on established companies. In effect, the application of ESM under Mode 3 raises a number of relevant questions. The issue of pre and post-establishment has already been analysed. There are no major theoretical problems in determining the type of ESM that could be applied in the pre-establishment phase. In principle, a ESM could adopt any of the limitations defined in Article XVI: 2 of GATS, and limitations to national treatment, which would adopt an specific nature depending on the particular sector, and on the domestic regulation that is in effect.

In our opinion there is no compelling reason why there should not be ESM for the post-establishment phase in an ESM mechanism in the GATS, or in any other agreement on trade in services. Service suppliers, from other Members, established in the territory of a Member can cause injury to service suppliers of that Member. For example a foreign retail chain can massively displace domestic small retailers, or a hotel chain displace small domestic lodging houses. The relevant question is: what type of ESM should be appropriate to confront this type of situation? The most sensitive issue with respect to the "acquired

[47] Lucas, Aaron, Taxing Bites: A Primer on the Taxation of Electronic Commerce, Center for Trade Policy

rights" of established service suppliers derives from the possibility of applying limitations of the type identified in Article XVI (e) and (f). That is, limitations which restrict the specific type of legal entity or joint venture through which a service supplier may supply a service, and limitation on the participation of foreign capital in terms of maximum percentage limit on foreign share-holding or the total value of individual or aggregated foreign investment. Imposing limitations of this type on companies already established in the territory of a Member, under a different regulatory framework, could imply forced disinvestments, or forced association, that will run counter to basic rights recognised in all legislations, and in many cases in bilateral, or regional, investment agreements. These types of limitations should be proscribed as available ESM. However, it should be possible to apply ESM to established service suppliers, for example, limiting their expansion through the establishment of a temporary market quota, or limiting the type of service they can supply in the future. For example, a retail chain can be forbidden to open new outlets for a time –bound period, or to stop selling certain type of goods for a time. Or there can be support measures that are only made available to service suppliers of the Member, therefore limiting national treatment.

In applying emergency measures the basic test should be the extent to which itt contributes to solving the problem affecting domestic industry. For example, limit in the total number of foreign employees is considering a market access limitation according to Article XVI (d). However, it would be hard to make a case that restricting the number of foreign employees in service suppliers of other Members will contribute to alleviation of the injury to domestic service suppliers. The different price or quantity-based measures would have to be analysed case by case depending on the service and the mode of delivery, taking into account the specific commitments adopted by the Member invoking a ESM and domestic regulation in effect.

2.7: Provisional Measure

Studies, CATO Institute, December 17, 1999.

The Agreement on safeguards, Article 6, permits the adoption of provisional measures in "critical situations where delay would cause damage which it would be difficult to repair". There may be a situation in which a Member finds that safeguard measures must be taken urgently. In such a situation, it has to consider if delay would cause damage, which it would be difficult to repair. Such a situation may come, for example, when the domestic industry needs immediate relief because of a rapidly emerging adverse situation as a result of the increased imports. Once the Member is satisfied about the critical nature of the situation and the need for urgent action, it has to have a preliminary enquiry to determine if there is clear evidence that increased imports have caused or are threatening to cause serious injury. This enquiry, by its very nature, need not be very detailed. If the result of the determination is positive, the Member may apply provisional safeguard measures. Such measures should be in the form tariff increase. Tariffs should be promptly refunded if the final investigation determines that there is no evidence of serious injury, or its threat, or that there is no link between the imports and such injury.[48]

According to the WTO Secretariat, "conceptually there does not appear to be any reason why provisional safeguard measures cannot be applied to trade in services".[49] However, the application of a provisional measure for trade in services confronts a basic problem that casts serious doubts on feasibility, and the possibility of transferring what is in effect for trade in goods. In the case of services it would not be possible to quantify the effect of a provisional measure on service suppliers of other Members. In case of goods the revenue generated by the tariff is easily quantifiable. In the case of services the effect of measures, other than taxing or increasing fees probably, could not be determined in monetary terms, and refunded if the final investigation determines that there is no case for the application of an ESM. For example, the temporary banning of new retail outlets, or limiting the growth of a financial institution can cause damage to the service supplier, but it would be almost impossible to quantify.

[48] The provisional measure can be applied for a maximum duration of 200 days; and by then the investigation and subsequent consultation with the Members concerned must be completed.

[49] S/WPGR/W/8, 6 March, 1996.

2.8: Compensation and Retaliation

When a Member introduces a safeguard measure in trade in goods, it, in effect, reduces the level of the concessions it gives to other members and the level of obligations undertaken by it. Article 8.1 of the Agreement on Safeguards stipulates that the Member has to endeavour to maintain a substantially equivalent level of concessions and other obligations existing between it and the exporting Members. This would require giving trade compensation to the exporting Members. For this purpose, the Members have to enter into consultation with the Members having substantial interest in the export of the product. The compensation usually offered is in terms of reduction of tariff on some other products in which these Members have an export interest. The extent of the compensation has to be substantially equivalent. No criteria have been specifically laid down to determine what will be considered as substantially equivalent concession or other obligation. The Agreement on Safeguards and Article XIX of GATT 1994 provides for a situation when no agreement is reached in consultations. Article 8.2 establishes that if Members that are affected are not satisfied with the measures taken, or the compensation given, they have the option to suspend substantially equivalent concessions or other obligations under GATT 1994 in respect of the trade of the Member applying the measure[50].

In the case of safeguard measure involving a tariff increase, it may be easy to evaluate the equivalence. Usually the amount of additional tariff income is taken as a measure of the concession withdrawn or obligation reduced. This should generally be equal to the

[50] There are a number of conditions attached to the right of suspension. It cannot be exercised for the first three years of the safeguard measure, provided that: (i) the safeguard measure has been taken as a result of an absolute increase in imports (i.e. it should not be a case of the import level actually falling and yet the import being higher relative to the domestic production); (ii) the safeguard measure conforms to the provisions of the Agreement of Safeguards. In other cases, i.e., the cases in which the conditions mentioned above are not fulfilled (for example, if the measure has been taken without an investigation and thus does not conform to the provisions of the Agreement), the stipulation of deferment for three years does not apply. Before applying the suspension, a Member has to give notice to the Committee on Safeguards and the suspension may be applied upon the expiration of 30 days from the day the notice is received by the Committee on Safeguards.. In such cases suspension can be effected on the expiry of 30 days after the notice of suspension has been received by the Committee on Safeguards. A suspension can be applied if the Council for Trade in Goods does not disapprove of it. This provision is similar to a provision in Article XIX of GATT 1994. It does not mean that a Member will have to obtain prior approval of the suspension. So far only in one case a specific decision was taken not to disapprove of the action.

decrease in the tariff income by reducing tariff on other products. If, however, the safeguard measure is in the nature of quantitative restriction, the equivalence may be calculated based on an approximate estimate of the import foregone as a result of the restrictions. In trade in goods it has not been easy to arrive at a precise equivalence. Members have addressed this problem in a practical and pragmatic way.

The issue of compensation and retaliation has been brought to the WPGR. The inclusion of this type of provision for services raises a number of questions. In particular if compensation will be in the same mode of delivery and or whether compensation would be across modes of delivery. How can equivalent concessions would me measured? The major problem with incorporating similar provisions in an ESM mechanism in the GATS would be the difficulty in determining what would be considered a substantially equivalent concession. Ast has been mentioned *supra*, in the case of services it would be almost impossible to quantify the effect of an ESM, in particular those quantity-based measures affecting either national treatment or market access. The practicality of introducing the type of provisions is highly doubtful, and could become a source of permanent conflict promoting retaliation against those Members that apply an ESM[51].

2.9: Special and Differential Treatment

Special and differential treatment for developing countries has been incorporated in the Agreement on Safeguards. There is a *de minimis* provision regarding safeguard action against the products from developing countries. No safeguard action will be taken against products originating in a developing country Member as long as its share of imports of the product in the importing country concerned does not exceed 3 percent. When several developing countries' Members are exporting the product, and their individual share is less than 3 percent, safeguard measure will not be taken against the product concerned from these developing member countries. This treatment applies when the shares of those developing countries collectively account for more than 9 percent of the total imports of the

[51] Chile, Costa Rica and Switzerland, suggest that there should not be compensation and retaliation provisions if the period is really temporary. Retaliatory action should only be allowed is the measure is imposed beyond the stated time, or if it imposed counter the provisions of the Agreement, Job(01)/81, 8 June 2001.

product in the importing Member country proposing to take safeguard measure. There are also special provisions regarding developing countries in respect of the duration of safeguard action, and relating to taking repeated action.

Some developing countries have stressed the need to incorporate provisions for special and differential treatment in the GATS's ESM mechanism. However, no detailed proposals have been yet submitted to the WPGR in this regard. Notions of trade in goods as repeated actions and duration of the safeguard, could be transferred to the case of services. Due to the problems of measurement *de minimis* provisions do not seem to be feasible for trade in services. Some developed countries have challenged special and differential treatment. As the EU that has stated, "There might not be any additional justification (other than progressive liberalisation) to design a different more flexible safeguard for developing countries. The only flexibility, which could be considered, is in the application of a safeguard clause for LCD's."[52] The optimum result of the negotiations in this regard, from the point of view of developing countries, would be a provision that excludes service exports from developing to developed countries from safeguard action. Therefore, ESM would only be applied to north-north trade, north-south trade, and to south-south trade. However, is very unlikely that this type of proposal could prosper in the WPGR.

The issue of special and differential treatment regarding ESM should be carefully evaluated by developing countries, in particular by small economies such as CARICOM Member States. Competition to domestic service suppliers would not necessarily come exclusively from developed countries. Probably, the most developed of the developing countries could be an even bigger challenge, particularly at the regional level. A general S&D treatment for developing countries would have to be applied in south-south trade also, limiting the possibilities of small economies taking safeguard action when being confronted with competition from service suppliers of other more advanced developing countries. The most effective S&D treatment would derive from strict, and enforceable criteria for the determination of serious injury. It is highly unlikely that services exports from developing

[52] S/WPGR/W/15/Add.4, 20 May, 1997.

countries would be, in most cases, of such magnitude to cause serious injury to service supplier in developed countries markets.