EXECUTIVE SUMMARY

Introductory Remarks

Trade remedial measures have been a highlight of political economy surrounding international trading regime in goods. Although the science and law around applying these is evolving, the invention is very much backdated and is rooted in political debates aimed at providing economic level playing field to industries based on domestic soil, against perceived or material injuries resulting from imports of same, similar or like goods[1].

The thought of constructing and applying trade remedial measures in the context of services has indeed arisen out of a natural political and economic instinct, which was also responsible for construction and application of similar measures in the area of goods. In fact debates surrounding this issue during the Uruguay Round of Trade Negotiations reflect this quite clearly. Moreover, the growing pace of trade in services in comparison to trade in goods coupled with an intensifying push for free and fair trade demanded that practices employed by various parties to facilitate this growth needed examination in terms of their freeness and fairness and remedies needed to be in place to safeguard, interests of industry based on domestic soil against unforeseen situations that could result due to sudden import surge. *(Chapter one)*.

Hence after immense persuasion and effort, an Article X reflecting these concerns was inserted into the GATS. It is important to note that Members actually agreed to include Article X aimed at initiating negotiations on emergency safeguards covering trade in services in spite of the presence of Article XII ("Restrictions to Safeguard the Balance of Payments") and Article XIV ("General Exceptions") in the GATS. This conveys three important strands of thinking within the GATT/proposed WTO, Membership on this issue:

- They more or less believed that emergencies could crop up in the services sector;
- These emergencies could not be tackled while scheduling commitments; and

[1] Bhala, R. and Kennedy K. (1998); World Trade Law; LEXIS Law Publishing

- These emergencies could be tackled within the GATS framework and not under any other part of the GATT/WTO texts.

One would have expected that negotiations around having a safeguard measure covering trade in services should have proceeded smoothly. But, the saga of negotiations vis-à-vis an ESM covering trade in services once again exposes the *real politick* of international trade negotiations, viz. what appears to be a simple extension of construction and application of thought gets translated into an equally strong negotiated text iff it suits the political agendae of big players in the game.

This study offers an incisive insight on this *real politick* of negotiations on emergency safeguard measures applicable to services being discussed at the level of a Working Party on GATS Rules. Juxtaposing this real politick with the political, social and economic realities associated with liberalization of services in the Indian context, this analysis provides two deliverables:

Deliverable one: "A report on the utility or other wise of the mechanism of the ESM in respect of India's Trade in Services. According to assessment, a draft discipline on ESM for application in the Indian context - will be submitted."[2]

Deliverable two: "A report on how the interpretation of ESM by WTO Members would impact Indian service providers. It would also suggest the strategies that could be utilized to challenge ESM taken by these countries in sectors under consideration."[3]

Assumptions underlying this study

(1) The analysis has been carried out in the context of two time zones, one pre-1998 and the other post-1998. The natural question is why was this assumption made? As discussed in Section three of Chapter one, the East Asian crisis did have an intensive impact on the basic tenets of financial services and some others too. There are no two thoughts that political ramifications of the East Asian crisis and its contagion effect have been reflected in the approach of concerned WTO-Members with respect to the negotiations on safeguards. This strategic or tactical change in political positioning is critical to capture. Besides this, the beginning of 1998 also marked the demise of the

[2] Letter No. 14/86/95-ESM/TPD
[3] *Op cit.* ii

MAI and importantly also saw launching of processes that gave birth to the launching a proposal demanding a "comprehensive round" by the EU.

(2) As awareness on issues relevant to emergency safeguard measures is very low in services sector[4], the draft ESM-instrument (deliverable two) and strategies to challenge any ESM (deliverable one) would be based on political analysis carried out by the core research team.

(3) We have assumed that software and related services, medical and dental services, maritime transport and accountancy services are the services in which concerned Indian players to attain effective market access.

(4) Although public services may not be in the domain of GATS, the leaked requests of the EU to India coupled with the data on consumer expenditure on services in the 55th NSS survey *(see Table-4 of Chapter two)* prompted us to assume that international players would be interested in accessing markets vis-à-vis education and related services, medical and related services (institutional and non-institutional), environmental services (sewage services, sanitation and similar services), postal and courier services, telecom services, insurance and insurance related services, banking and other financial services, transport services, other business related services (especially management consulting, oil and gas services and mining services) and biodiversity related services.

(5) Consistent and reliable statistical data on domestic production, export, import, consumption and foreign competition vis-à-vis the most important services including public services is disparate and at times does not exist[5]. Hence, efforts were made to carry out the analysis by constructing relevant dummy indicators wherever necessary.

[4] After going through a large amount of secondary documentation, one found that there was hardly any literature available from Chambers of Commerce or representative outfits of various service sectors on emergency safeguards. Interviews with some important Members of the services fraternity suggests that the phrase "emergency safeguards" is absolutely new to them and has not been discussed in meetings organized by their respective Chambers of Commerce or representative bodies.

[5] "RBI wants more disclosure of data on 'trade in services'"; The Economic Times, October 25, 2002

Methodology

Step-1

In order to unravel the political positioning of WTO-Members in the changing context of time, the official and unofficial submissions of the Members were compiled in a strategic manner. The compilation was done in a manner to reflect the debate in its entirety. But at the same time the effort was to shed light on the process issues as well as the positions being taken by Members on different aspects of the debate. It is in this context that the compilation has been segregated into the following parts as below. Except part three, the remaining compilations have been annexed to this study. Given that part three discusses an ESM based on a framework of a safeguards arrangement applicable to goods, it has been included in the analysis as a chapter *(Chapter Four)*.

Part one:

(1) Do Members accept that negotiating rules on ESM is desirable or are existing safeguard mechanisms in GATS, notably those contained in Article XII and Article XIV, sufficient to address any difficulties governments might encounter while fulfilling their GATS commitments?

(2) Similarly does Article XXI of GATS provide adequate space for reversing or modifying scheduled commitments in the event of unanticipated difficulties?

(3) How would the "special and differential treatment" component be intrinsic to the entire discussions on ESM?

(4) Does the language on "progressive liberalisation" provide enough leeway for the special and differential concerns of developing and poor countries? Will issues in the realm of statistics become crucial while actually using the ESM instrument?

Part two:

What are the:

(1) Objectives of ESM: Would emergency safeguards be intended to deal with kind of situation foreseen in Article XIX of GATT, i.e. temporary threat to a domestic "industry" arising from increased imports or would it have any other objective? Is construction of ESM aimed to protect production, investors and/or employment? Would it protect all domestic production or only that part of production attributable to "national suppliers"?

(2) Definitions and Conceptualizations of ESM: Would construction of an ESM allow departures from national treatment especially in the case of Mode 3 and Mode 4? Would ESM resolve the debate that the

GATS does not allow pre-establishment rights under Mode 3 and that it allows only post-establishment rights under Mode 3?

Part three:

Can GATT Safeguards be the basis for EMS in GATS? If GATT Safeguards is the basis then it would be important to answer questions pertaining to and then probably define:

(1) "Increased imports": What in terms of GATS is the equivalent of increased imports under Article XIX of GATT? In Mode 1, the cross-border flow of services may be similar to the import of goods, but the situation is quite different under other modes.

(2) "Serious Injury" or "threat thereof": How should serious injury be determined?

(3) "Like" or "Competitive" Product: What constitutes a "like" or "competitive" product?

(4) Digressive provisions: Would safeguard measures be made digressive (progressively liberalized) during the period of their application?

(5) "Critical Circumstances": How quickly would it be possible for a Member to take a safeguard measure? How does one define "critical circumstances" as done in the Agreement on Safeguards?

(6) "National Industry" under GATS: How would national industry be defined for the purpose of determining injury?

(7) "Causal Link" between "increased imports and "injury": How can one establish causal link between increased imports and injury? How would one separate the impact of macroeconomic adjustments from trade related impacts while establishing such causal linkage?

(8) Form/institutionalization/initiation/duration of safeguard actions: If increased foreign competition and serious injury to domestic services or service suppliers have occurred, and the causality between the two have been established, what could be the characteristics of the safeguard measures that might be applied? What type of measures should be applied? Would taxes, foreign exchange restrictions, other quantitative limitations or regulatory constraints be suitable as safeguard actions? What should be the duration of the safeguard action?

(9) Compensation: Would Parties against whom the action is taken need to be compensated? If yes, then how would the process of compensation unfold?

(10) Adjustment measures: Would a Member taking a safeguard action be required also to adopt adjustment measures? If yes, then what could be these measures? How would these adjustment measures have some elements of special and differential treatment incorporated that is not "best endeavour" language?

(11) Special and Differential treatment: Would special and differential treatment be granted to developing and least developed countries with respect to initiation of ESMs? If yes, how can one visualize some measures in this respect?

Part four:

(1) Would application of ESM on one mode of service supply impact other modes of service provision in case of the same service?

(2) Would there be circumstances in which the application of a safeguard measure in respect of one mode of supply would provoke a demand for comparable measures in relation to other modes at the same time?

(3) Would application of ESM across modes of service provision differ? Should "scheduling of sectors" as a process under GATS be used to also incorporate ESM or ESM related concerns? Would such a process imply that Members are anticipating concerns, whereas ESM are actually for "unforeseen" circumstances?

Part five:

Are Members suggesting any alternative methods with respect to initiating and instituting safeguards other than the one enshrined in Article XIX of GATT? If yes, why?

Part six:

Are there any existing domestic legislations that allow Members to initiate safeguard actions applicable to the area of services? Do Members maintain any emergency safeguard measures in national legislation? If so, what are these measures and how are they implemented?

Part seven

Is absence of credible statistics in trade of services becoming a critical issue for WTO Membership with respect to moving ahead with negotiations vis-à-vis ESMs?

Part eight

Have WTO Members made any concrete proposals with respect to an ESM?

Part nine

What have been some critical issues that have arisen in the area of processes? How are process issues being tackled by the WTO-Membership?

Step-2

After compiling this information in a chronological order, the following four questions would be answered for information compiled, except for that in Part seven, Part eight and Part nine:

(a) What are the major issues on which differences exist between Members in each of the parts? What could be the possible reasons for these differences?

(b) What are the important issues in each part where there is more or less a consensus?

(c) Are major players taking positions for strategic reasons or for tactical purposes?

(d) What is the nature of alliances emerging on critical issues discussed in some of the parts mentioned above?

Carrying out this level of interrogation helped us understand the nature of interest that exists within the WTO Membership with respect to negotiating an ESM.

Step-3

We then embarked on understanding the impact that liberalization of services has had after some of the critical services sectors have been opened up in the Indian context. We understand that the Ministry of Commerce had already requested ICRIER to carry out similar analyses. Hence to avoid duplication, this report only looks at sectors that have not been touched by the ICRIER report (e.g. environmental services) or at sectors in which we have some different opinions than those of ICRIER (education and health services).

Step-4

The analysis carried out in Step-2 and Step-3 coupled with lessons drawn from analyses in Part seven and eight of Step-1, would provided us with:

(a) A perspective on whether ESM needs to be seen from a strategic angle or a tactical angle.

(b) Crucial inputs to analyse the possible ramifications of the Indian approach/positions on ESM issues at the WTO on domestic legislation and legislative capacity at the national, state and local level. This would then help us suggest a structure for implementing the Emergency Measure within the Indian framework, if one reaches a prior conclusion that a different framework is required.

Key Observations/Findings from various Chapters

The tone and tense of discussions in the submissions of Delegations, the notes prepared by the Secretariat and the Chair suggest that the debate surrounding ESM in a GATS framework has been revolving around two distinct poles. The first pole ties up discussions around the issue of desirability and the distinctive features of any ESM that would emerge from the negotiations on Article X. The discussions around the second pole, which although have been going on parallely to the discussions around the first one, critically focuses around an ESM that is more or less being designed keeping in view the features of the Safeguard Agreement applicable to goods.

The Third Chapter with its two sections sheds some light on the discussions that have centered on the first pole.

The first section of the Third Chapter investigates whether there exists a critical mass within the WTO that is actually keen to push forward the negotiation of an ESM and also investigates the possible reasons behind their postures. Furthermore, it has also mapped positions being taken by various WTO Members on the perspective of integrating the principle of special and differential treatment in an ESM from the initial stages of negotiations. The second section of this Chapter has delved into the mapping of positions around issues that could be an integral part of negotiations around any ESM and also provides political analysis of the situation. The concluding section (third section) on the basis of the analysis carried out in the first two sections provides the list of sites where there are major differences amongst Members and also those around which Members seem to be coming together.

The analysis culls out messages emerging from these positions, identifies players in the context of their political positioning on the issue and also makes an effort to link the thinking of these players vis-à-vis their positions to other debates at the WTO.

One would like to mention at the outset that not more than 25 WTO entities/Members (EU and ASEAN countries are being considered as a single entity each in this case) of 145 have found it important to keep on consistently opining on the issue of ESM. The prominent amongst these twenty five being: the EU, USA, Japan, Australia, Hong Kong, China, India, Singapore, Thailand (independently and at times for the ASEAN), Egypt, Cuba, Switzerland, Peru, Honduras, Venezuela, New Zealand, Poland, Uruguay and Republic of Korea.

Desirability of an ESM

The desirability of ESMs should not have been an issue, given the construct of the language in Article X of GATS, but one would have to admit that countries not interested in initiating negotiations on an ESM through shear political size have converted this issue into one that would decide the future of any negotiation on ESM.

The EU and US[6] have minced no words in jointly questioning the desirability and feasibility of negotiating a safeguard measure in the GATS framework. Japan has always questioned the desirability and feasibility of negotiating an ESM and *ex post* 1998 has even gone forward to interpret the Article X in order to show that it actually provides the option for Members to decide upon whether or not to negotiate for an ESM and that entering into negotiating an ESM is not binding. (Job (01)/105 dated July 02, 01). Singapore, Switzerland[7] and Mexico have decided to toe the line of the EU after 1998.

The developing countries that have been pressing for initiating negotiations on an ESM prior to 1997 are Thailand and India. The demands of these countries, prior to 1998, have been supported by Egypt,[8] Poland[9], and Peru[10]. Thailand and India have maintained their position after 1998 and have not left any stone unturned to prove the frivolity associated with the claims of Japan, EU and the US vis-à-vis non-desirability of initiation of negotiations on ESM. They have been joined by Cuba after 1998. Venezuela, Honduras, Dominican Republic, ASEAN, Argentina, Uruguay[11] and Australia became vociferous on their demand to negotiate a safeguard measure and started contributing actively to the debate after 1998.

Even by mid 2003, the debate on desirability continues. Brazil, in its intervention during the Meeting of the Working Party of GATS held during May 13-14, 2003 for the first time in the history of negotiations on this issue mentioned that initiation of negotiations on an ESM within the ambit of GATS now rests on the political will of Members and was no more hinged to technical details.[12] US and the EU have taken strong objections to the language of political will raised by Brazil and also in the Report submitted by H.E. Chan, the Chair of the Working Party on GATS till May 2003.[13]

EU further mentioned that three different outcomes were possible in this negotiation: (i) should the WPGR be able to identify situations justifying an ESM and demonstrate the

[6] S/WPGR/M/20 dated March 17, 1999
[7] S/WPGR/M/23 dated July 06, 1999
[8] S/WPGR/W/15/Add.5 dated May 20, 1997
[9] S/WPGR/W/15/Add. 3 dated May 02, 1997
[10] S/WPGR/W/23 dated August 21, 1997
[11] S/WPGR/M/23 dated June 21, 1999
[12] S/WPGR/M/42 dated 19th June 2003
[13] S/WPGR/9 dated 14th March 2003

feasibility and desirability of an ESM to deal with them, the result could be an ESM agreement; (ii) should the WPGR have identified such situations, but failed to prove feasibility and desirability of an ESM, the result could be making Article X:2 permanent; and, (iii) should the WPGR be unable to identify such situations, this would suggest that there was no need for an ESM. Political will was needed to reach any of these three outcomes, not only to agree to establish an ESM.

Canada during its presentation at this meeting once again reiterated its position that the desirability of negotiating an ESM was strongly linked to the feasibility of its application. Not surprisingly, EU, US, Japan and Norway supported the logic of Canada.

Chile has asked for a clarification on the validity of continuing negotiations on an ESM, if one could not reach any conclusion by the end of March 15, 2004 – the date mandated by the WPGR to wrap up negotiations on an ESM in services. This is quite a clever interpretation and needs to be adequately utilized by us in the context of Singapore issues if it gets employed in the context of ESM.

From the discussion above, one remains far from being confident even about initiation of negotiations on an ESM, especially in the context of the positions taken by the EU, US and Japan. Although, a number of developing Members have been taking proactive positions on negotiating an ESM and have suggested a range of views on how various elements of an ESM should be, quite a few of them might be using their position on an ESM as a bargaining chip to get something substantial in other sectors (e.g. agriculture, industrial tariffs etc.) and/or as a input to their basket of tactical strategies given the possibility of negotiations beginning on investment at the WTO.

Incorporation of the Special and Differential Treatment as a perspective

India and Cuba are the only countries that have been making a consistent demand for incorporation of special and differential treatment as a perspective while negotiating on any ESM. *Ex post* 1998, as the debate on ESM started revolving around an approach similar to that of discussions in Agreement on Safeguards, and the social and economic impacts of the South East Asian crisis started becoming more evident, even Thailand (on behalf of ASEAN) joined hands of India. ASEAN has noted that special and

differential treatment for developing countries is consistent with the objectives of the GATS (Article 9 of the Agreement on Safeguards would be of relevance).[14]

During 2001, in one of their non-public submissions to the Working Party, even Dominican Republic, Guatemala, Honduras and Nicaragua (Job (01)/166 dated December 04, 01) have requested for a special and differential treatment to be granted to developing and poor countries irrespective of the kind of ESM that would be negotiated.

Many delegations have noted that S&D is a well-established principle in all WTO agreements and, therefore, S&D provisions should be included in services ESM. Several delegations suggest that Article 9 of the Agreement on Safeguards could be used as a starting-point. Other delegations doubt whether this provision can be transferred to the services context. Some delegations are of the view that it might be easier to define the content of S&D provisions once the general disciplines and rules of an ESM are known. Others remain to be convinced of the need to introduce S&D provisions in services ESM.[15]

EU has not been keen on granting any special and differential treatment to developing countries with respect to negotiation and application of an ESM[16] and has maintained this position even after the debate on ESM has moved forward from a generic-ESM debate to a more structured one. Even though US has not come out very firmly on this issue, their stand would not be very different from the EU.

Incorporation of special and differential treatment at the stage of negotiations on ESM is indeed critically important from the point of view of safeguarding interests of developing countries. Even though there exists a small but a vociferous group of developing and middle income countries, which is keen to get special and differential treatment integrated into application of an ESM, the approaches towards integrating the same would have to depend upon how the ESM is visualized. One would therefore require a good political strategy to actually not allow this coalition to break and to come out with a prudent approach in order to get the perspective on special and differential treatment integrally built in ESM negotiations.

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[14] S/WPGR/M/21 dated 7th May 1999 – Report of the Meeting of 16th April 1999

[15] Job No. 3449/Add.1, paras. 9-13; Job No. 3449/Add.2, paras. 14-19; Job No. 6943, paras. 31-34; Job (01)/74, paras. 3-7; Job (01)/108, paras. 37-39. See also Note by the Secretariat on *Special and Differential Treatment in the Context of Emergency Safeguard Measures*, Job No. 5539 (15 September 2000).

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

Conceptualization of an ESM not based around Agreement on Safeguards applicable to goods

The important issues that have arisen in this context are:

(a) Whether ESM needs to be associated with only "unforeseen" situations?

(b) Whether a safeguard should be temporary?

(c) Whether safeguards can be applied to sectors where Members have committed liberalization or whether safeguards can be applied to sectors where Members are yet to commit or both?

(d) Whether "suspension" or "modification" or "withdrawal" of existing language would be included as a part of implementing the safeguard, especially in the context of national treatment and MFN?

(e) Whether all modes of supply should attract an ESM? How would one broadly conceive applying an ESM to various modes of supplying services?

(f) Whether the ESM should be of a horizontal nature or a scheduled approach should be followed?

(g) Who should apply ESM and to whom should ESM be applied?

(h) What could be the possible constituents of a generic ESM not based on Agreement on Safeguards applicable to goods?

"Unforeseeness" and "Emergencies"

Thailand [17] and the EU [18] in their respective positions have included "unforeseen circumstances" as a part of "emergencies". But when US and Poland[19] actually pointed out that it would be necessary to spell out the difference between "foreseen" and "unforeseen" in 1999, the debate around the terms of the subject mentioned above took a different dimension. Countering the efforts of the US to actually scuttle discussions on the basis of this issue, Thailand and India[20] kept on pushing the notion that the

[17] S/WPGR/W/15/Add.1 dated March 11, 1997
[18] S/WPGR/W/15/Add.4 dated May 20, 1997
[19] S/WPGR/M/21 dated May 07, 1999
[20] *Op cit.* 14

safeguard mechanism should address unforeseen emergency situations not anticipated by Members at the time of scheduling commitments under GATS, but in the same breathe India also mentions that the application of the emergency safeguard should not be hinged to "unforeseen developments". At this point of time in mid 1999, Australia[21], Japan and the EU pitched in the concept of "unforeseen developments" to replace "unforeseen circumstances" to which the US still has objection as it feels that the term still assumes a subjective orientation. New Zealand[22], supporting the Thai and the Indian position is of the opinion that the terms "unforeseen circumstances" and "emergencies" are complementary in nature.

The note from the Chair Job (01)/122 dated August 07, 2001 makes a good effort to put forward a composite and complementary notion of "emergencies:" and "unforeseen developments" which is as follows:

> "An emergency safeguard measure "may be applied … only if the applying Member has determined … that … there is an emergency where there is an increase in supply of the services concerned … which is causing or threatening to cause serious injury to the domestic industry …".[23]
>
> A safeguard measure should be an extraordinary remedy to be used in emergency situations. Although the term "emergency" clearly encompasses the notion of "unforeseen developments", the causality of the emergency should be stressed. Hence, "an emergency safeguard measure could be applied if it has been determined that there exists an emergency derived from unforeseen problems caused by liberalization commitments that provokes an increase in supply of a service"

In spite of this Chair's statement it would be difficult to say that Members actually have come to a common understanding on the issue of defining "emergencies" even at a broader level.

An interesting feature of the process that needs to be mentioned upfront is that developing countries could take the discussion forward in spite of strong efforts made by the US delegation to

[21] *Op cit* 14
[22] Job (01)/146 dated September 27, 2001
[23] Job No. 6830 (31 October 2000), Article II: 1.

nip the root of the ESM discussions in the bud. Of course this does not mean that an ESM is per se desirable. Another feature that is worth noting is the keen interest that Thailand has taken with respect to setting the contours of the term "emergencies". This intensive role of Thailand has to be seen in the light of the financial crisis that it faced, which in fact became a good example for it to show the complementarity between "emergencies" and "unforeseen circumstances".

Temporariness of ESM

Since the beginning of the discussion on Article X, Members actively participating in the discussions seem to have agreed to the fact that the ESM, if it is negotiated, in whatsoever form has to be temporary.

As discussions on ESM have progressed, Venezuelan, Nicaraguan, Cuban, Dominican Republican delegations and the Delegation of Honduras have made some recommendations on this issue which get summarized in the Secretariat note Job (01)/168.

By the beginning of 2002[24], as the discussions on the ESM started getting constructed in the framework of an Agreement on Safeguards applicable to goods, countries like Thailand and Venezuela pushed forward proposals in support of a temporary safeguard having the potential of addressing an emergency.

According to these proposals safeguards shall be applied provisionally and shall have a specified maximum period of duration not exceeding 18/24 months. At the expiration of this period, the Member concerned must withdraw the safeguard or proceed to modify its schedule of commitments pursuant to GATS Article XXI. These presentations convey that in principle, a safeguard may not be invoked for a specific sector during a period of 18/24 months following the termination of a safeguard for that same sector.

Whether safeguards can be applied to sectors where Members have committed liberalization or whether safeguards can be applied to sectors where Members are yet to commit or both?

According to the EU[25] one needs to explore further before arriving at a decision on applicability of safeguards on sectors where Members have not made commitments. For

[24] Job (01)/164, para. 2. Job (01)/168, paras. 9-10.
[25] S/WPGR/W/15/Add.4 dated May 20, 1997

the US[26], the application of safeguard measures to existing commitments would go against the goals of GATS and would be a regressive rather than a progressive measure. In the same breathe, the US clearly articulates, "any potential safeguard should only apply to new commitments made by Members after the safeguards mechanism takes effect…" The representative of the United States till mid 1999 kept on saying that his delegation was still considering the possibility of suspending Article XVIII commitments.[27]

This position from the EU and the US is very much expected given the pressure that the USTR and the EC are under from their respective services lobby. In fact the history of financial services negotiations clearly points out that, that US came to the negotiating table only when it was convinced that other Members had agreed to grant its financial service firms irreversible market access commitments.[28]

The representative of Thailand, speaking on behalf of ASEAN, said that suspension of additional commitments under Article XVIII should be possible. However, some issues, such as regulatory disciplines, might need special consideration.[29]

India in a meeting in 2001, mentions that the ESM should be applied to scheduled measures only but has not said anything with respect to the extension or non-extension of the applicability of ESMs to non-scheduled or future commitments.[30]

Interestingly, the Chair in his note to the Members in 2001 notes, "…Article XVIII additional commitments should be *de facto* excluded from the scope of an ESM.[31]" This particular observation from the Chair is actually unrepresentative of the broader discussions that had been taking place on future commitments under Article XVIII, some of which have also been discussed above.

Developing countries have internal differences on the issue of applicability of ESM to already scheduled commitments as well as with respect to applicability of ESMs to future scheduled commitments. This particular confusion at the level of developing countries (including India)

[26] S/WPGR/W/37 dated October 02, 2001
[27] S/WPGR/M/24 dated 8th September 1999 – Report of the Meeting of 27th July 1999
[28] For more on this read Chakravarthi Raghavan
[29] S/WPGR/M/24 dated 8th September 1999 – Report of the Meeting of 27th July 1999
[30] S/WPGR/M/35 dated 7th December 2001 – Report of the Meeting of 28th November 2001
[31] Job (01)/81, p. 3.

results, as they are aware that in the context of changing service supply scenario, an ESM could very much be go against their service suppliers.

The developing countries should realize that this issue is critical and in fact US has been keen that discussions around this issue should not conclude till the market access negotiations under the 'request-offer' framework get concluded during the current round of GATS-negotiations that have begun in 2000. If negotiations on an ESM ever begin, then we need to ensure that they go side-by-side with liberalization of services under the ambit of GATS. Only then would Members have any right to address emergencies associated with scheduled commitments, which would be spanning almost all the important services concerning them.

Whether "suspension" or "modification" or "withdrawal" of existing language would be included as a part of implementing the safeguard?

Given the starkly different consequences associated with the legal interpretation of these words in the area of market access, this particular subject has been heavily debated upon, but by a few Members again.

Since the debate on ESM has begun, Switzerland[32], the EU and the US have been vociferously advocating that if an ESM gets actually negotiated then its application at the most would involve a temporary "modification of/derogation from" domestic legislation. The Indian position however has been that it might prove necessary for developing countries to temporarily suspend national treatment obligations especially in the context of services being provided by companies having their commercial presence on Indian soil. [33]

The Chair seems to be trying to push the argument that the political meaning enshrined in these two concepts, viz. "temporary suspension" and "temporary withdrawal" is the same, which needs to be questioned.

Modes of Supply and ESM

India has been of the opinion [34] that ESM should be related to the scope of the commitment and all the modes of supply involved. No mode of supply should be

[32] S/WPGR/W/14 – Communication from Switzerland dated 10th October 1996
[33] S/WPGR/M/21 dated 7th May 1999 – Report of the Meeting of 16th April 1999
[34] S/WPGR/W/15/Add. 2 - Communication from India – 29th April 1997

excluded but decisions need to be made on a case-by-case basis. There could be different mechanisms for the different modes of supply.[35] According to Cuba, quantitative restrictions, generally speaking, would consist in restrictions on the volume of services, on the number of service suppliers, on the total number of natural persons that can be employed in a given service sector or that a service supplier may employ, and on foreign equity participation.[36] Furthermore Cuba opines that there may be circumstances in which the application of a safeguard measure in respect of one mode of supply would provoke a demand for comparable measures in relation to other modes at the same time.

According to Mexico,[37] given the characteristics of each mode of supply, it would be difficult to adopt a measure that could be applied uniformly to all of them.

The note from the Secretariat in 1999 mentions that with respect to application of ESM to different modes of service delivery, Members have argued that safeguard actions be taken with respect to all modes of supply or that it would be for the invoking Member to decide on the modal coverage based on the policy objectives involved**.** The argument has been advanced that mode-specific safeguard action could create economic distortions, and that such action may not be effective since it could be circumvented by foreign suppliers switching to unrestricted modes. The note further comments that this possibility of switching over should not be overestimated as switching between modes may imply significant *costs.* The other view is that action can only be taken with respect to certain modes. The argument is that it may be counterproductive to target all modes; for instance, if the purpose of safeguard action is to prevent unemployment, it may not make sense to restrict new investment or to take action against locally established foreign firms.[38]

Voicing the sentiment of a number of Members, the Chairman's statement of August 2001, mentioned that a safeguard measure shall be applied to a service irrespective of its source and mode of supply.

[35] S/WPGR/M/35 dated 7th December 2001 – Report of the Meeting of 28th November 2001
[36] S/WPGR/W/15/Add. 4- Communication from Cuba – 27th May 1997
[37] S/WPGR/W/15/Add. 6 - Communication from Mexico- 22nd May 1997
[38] S/WPGR/W/27/Rev.1 – Note by the Secretariat dated 7th May 1999

Taking the debate forward the EU in its presentation in 2002 showed the intricacies associated with the relationship between ESM and various modes of service provision. According to the EU[39], it is difficult to separate completely a safeguard under mode 1 from mode 2. Applying a safeguard to one mode only does not take into account reality of cross-mode competition and would create trade distortion.

The maximum number of submissions have been made on the interface between ESM and Mode 3. For the services sector lobby of the EU and the US, this particular mode of service delivery is very crucial for market access and the submissions from the EU clearly resonate the positions of the European Services Forum. The submission made by the EU show how rights of investors negotiated at the bilateral level if not the multilateral level could get compromised with the applications of ESMs.

Developing and developed Members are unanimous about protecting the "acquired rights" of established foreign players in their respective economies. India remains the only player to have categorically mentioned about the possible alteration that might take place vis-à-vis acquired rights if an ESM is applied. This might lead to reopening of the GATS, especially in the area of "national treatment".

On the debate around interface between ESMs and Mode 4, India has articulated very clearly its demand for protection of "acquired rights" of natural and juridical persons. But it does not seem to be getting direct support from the Delegations of other countries on this issue. The EU has raised a number of interesting questions on the complex issue of protection of "acquired rights" of natural and juridical persons. But while doing so it strategically conveys that protection of rights of professionals delivering services using Mode 4 are very much dependent on protection of "acquired rights" of entities delivering services using Mode 3.

We need to realize that Mode 4 is statistically the easiest and politically the most likely candidate for application of ESMs amongst the four modes of service supply. The qualitative and quantitative data on the number of juridical and/or natural persons crossing borders is easily available and can be easily monitored. Availability of such data resolves the statistical hurdle that

[39] S/WPGR/W/38 - Communication from European Communities and Member States dated 21st January 2002

could come in the way of initiating an ESM. This would clearly go against the interest of India, which is keen that countries open their markets to Indian professionals.

Furthermore, showcasing domestic political support for an ESM related to Mode 4 becomes very easy for developed countries, especially the European ones, given the consistently high levels of unemployment in these economies for the past few years.

Who should apply an ESM?

In the context of the first part of this question mentioned above, the debate has been as to whether Central Government should be the only entity that should be endowed with the right of applying an ESM of whatsoever form.

The Indian delegation opines that it would be preferable if safeguard measures were taken only by governments, and not by agencies with delegated powers.[40]

The WTO Secretariat in its note[41] for the Members shows that Members are divided on whether central government or a designated authority of the Central Government or sub-national and other entities should apply an ESM. These differences are based on the perceptions of Delegations vis-à-vis the term 'Member'.

This debate is all the more important to understand in the Indian context. This is so because although the Centre can negotiate on behalf of States as enshrined in the Constitution, the States and the respective Municipal Corporations and Panchayat Systems still maintain a legitimate autonomy with respect how to implement legislative decisions. Given that regulatory decisionmaking on number of services especially in the area of health, education, environmental services are a legitimate right of the respective state governments, their perceptions of emergencies in these services is going to differ and also their approach to tackle the same.

To whom should an ESM be applied?

In the context of the debate surfacing vis-à-vis, "as to whom should ESM be applied?", the tricky part arises with respect to how the element of national treatment might get integrated with respect to the application of an ESM. This in turn depends upon on whose interest is to be protected under which mode of service delivery on application of an ESM. If the interest of the service industry (the one under consideration) or the public

[40] S/WPGR/M/21 dated 7th May 1999 – Report of the Meeting of 16th April 1999
[41] S/WPGR/W/27/Rev.1 – Note by the Secretariat dated 7th May 1999

interest is to be protected then even the domestic producers, if they are causing damage to the particular service sector/public interest would have to bear the brunt of an ESM along with their foreign counterparts.

In fact, Hong Kong has indirectly hinted towards this issue in its submission in 1997[42]. The submission mentions, "Emergency safeguard measures should always be applied on a non-discriminatory basis to "producers" of services that cause a temporary threat to the domestic industry in question. Emergency safeguard measures are designed to be applied to all service suppliers that cause a temporary threat to the domestic services industry."

The Indian submission[43] around this issue mentions that Safeguards should protect the national industry, including natural and juridical persons, of the Member taking the measure. While doing so, India has not actually defined by what it means by "national industry".

The note from the WTO also provides an overview of the various contours of the positions being expounded by Members on this issue. This note shows that in the Working Party there exists a view that the goods precedent should be followed, viz. safeguard action is taken on behalf of a domestic industry - defined to mean the producers as a whole of the like or directly competitive products operating within the territory of a Member, or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products. Members supporting such a view feel that all domestically established suppliers of like or directly competitive services, regardless of ownership and control would be protected by these safeguard actions. According to this view, it would not be desirable to use, for the purpose of safeguard action, the relevant definition in GATS Article XXVIII to determine what constitutes national industry.

Another view has been that safeguard action should be available to protect the national industry, which is understood to mean all natural and juridical persons of the Member taking the measure who supply like or directly competitive services. According to this

[42] S/WPGR/W/18 - Communication from Hong Kong - 16th May 1997
[43] S/WPGR/M/21 dated 7th May 1999 – Report of the Meeting of 16th April 1999

view, the distinction between national and foreign entities should be based on the relevant definition in GATS Article XXVIII. While it has been argued that some Members' domestic legislation would not allow for such a distinction to be made, it has also been noted that there would be no obligation to introduce it.

Importantly, quite a few Members who wish to make a distinction within the class of domestically established suppliers on the basis of nationality have stated that "acquired rights" of foreign suppliers should be respected, and measures which force disinvestment must not be taken. (It would be necessary to examine closely what is meant by the protection of acquired rights and whether this would be consistent with MFN.)

Second, given the Article X requirement that any emergency safeguard measures be "based on the principle of non-discrimination", it is clear that safeguard action cannot be selective, but must be applied on an MFN basis to all foreign services and service suppliers.

Possible constituents of a generic ESM not based on Agreement on Safeguards applicable to goods

This section discusses opinions expressed by countries on the forms of an ESM. These views are important to analyse and to take note of, as thoughts expressed under the rubric of this discussion will shed light on how Members have actually envisaged a generic ESM in spite of the discussions on ESM moving into a typical construct based on the Agreement on Safeguards applicable to goods. Although there are proposals that have also cited certain clauses in the Agreement on Agriculture as a model way to move forward, this particular debate is not being considered, as there seems to be very little support from the Membership for this approach.

While commenting on this issue in 1997[44], the EU had mentioned that foreign exchange restrictions and limitations to movement of capital might be an operational manner to monitor the import of services together with a quantitative limitation, which could include a zero quota for a limited period of time. However, they expressed that the

[44] S/WPGR/W/15/Add. 4 - Communication from European Communities and Member States- 20th May 1997

application of ESMs of such form should be compliant with the IMF jurisdiction on foreign exchange restrictions. They also expressed that regulations built around the supply of services can be used as an instrument to safeguard the desired interests during emergencies, e.g. only a partial licence could be granted, allowing to exercise some activities of the whole range of services activities of the sector.

According to Mexico[45], for trade in services, the safeguards could basically be in the form of quantitative restrictions. They opined that foreign-exchange restrictions would not be advisable as safeguard measures to protect a specific services sector because their use could have adverse effects on other activities, as they have a general impact on the economy as a whole. For Cuba[46], while the measures to be applied would generally be quantitative, qualitative measures would also be possible. Quantitative restrictions, according to Cuba could consist in restrictions on the volume of services, on the number of service suppliers, on the total number of natural persons that can be employed in a given service sector or that a service supplier may employ, and on foreign equity participation. With respect to actually addressing an emergency the Cuban Delegation feels that foreign exchange restrictions and other quantitative tools could be better options.

According to Singapore[47], a temporary ESM could be effected by regulating the foreign service supplier's market share and scale of activities/operations through suspension of scheduled market access and national treatment obligations. However, the ESM should adhere to specific rules and be subject to approval by the Council for Trade in Services (CTS) or a Safeguards Committee.

Peru[48] has also provided a very interesting perspective to this debate. According to the Peruvian Delegation, an ESM should not simply extrapolate situations that are similar to the ones described in Article XII and Article XIV of GATS. They envisage that an ESM in the area of services should be broader and should not be restricted to covering the case of "injury or threat of injury due to an unforeseen increase in imports", because in the case of services this could only theoretically apply to mode 1.

[45] S/WPGR/W/15/Add. 6 - Communication from Mexico- 22nd May 1997
[46] S/WPGR/W/15/Add. 7 - Communication from Cuba - 27th May 1997
[47] S/WPGR/W/19 - Communication from Singapore - 25th June 1997
[48] S/WPGR/W/23 - Communication from Peru – 21st August 1997

The representative of Thailand, speaking on behalf of ASEAN has opined that that the main safeguard measures envisaged would be restrictions on market access and suspensions of national treatment.[49] This particular position of ASEAN countries should be seen in the light of the East Asian crisis and its aftermath that rocked the socioeconomic and political systems in these countries in 1997 and 1998. Instead of simply pushing the safeguard button that would have allowed them to restrict outflows of foreign exchange during emergencies, the ASEAN has taken a more strategic position on the issue of an ESM that would allow them to use liberalization measures under GATS to suit their national service sector demands and more so also guide their position on investment at the Working Group on Trade and Investment at the WTO.

The representative of the Republic of Korea has observed[50] that even though price-based measures were in principle preferable to quantitative restrictions, given that the main purpose was to remedy injury (or threat thereof) caused by increased imports, it would be important to institute measures that would produce immediate results. Once again it is interesting to understand this position in the context of the socioeconomic crisis that Republic of Korea faced during and after the economic crisis. This particular position in which it wants to prioritize remedies that would stabilize its domestic services sector could be a result of the experiences during 1998 when its efforts to resuscitate its domestic sectors in an accelerated fashion were not allowed due to the political and economic demands tied to the loans provided by the IMF and the World Bank.

Interestingly, the Chair while concluding the meeting held on 27th July 1999, notes[51] that while some Members considered price-related measures to be more transparent, less distortive and disruptive, the others have also noted that quota-type restrictions offered more immediate remedies.

The Indian representative during a meeting in November 2001 has noted[52] that the safeguard measure should take the form of a temporary suspension of specific commitments and should not be more trade-restrictive than necessary.

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[49] S/WPGR/M/24 dated 8th September 1999 – Report of the Meeting of 27th July 1999
[50] S/WPGR/M/24 dated 8th September 1999 – Report of the Meeting of 27th July 1999
[51] S/WPGR/M/24 dated 8th September 1999 – Report of the Meeting of 27th July 1999
[52] S/WPGR/M/35 dated 7th December 2001 – Report of the Meeting of 28th November 2001

Some delegations (Hong Kong, the US, the EU directly or indirectly) support the introduction of a "necessity test" to ensure that a safeguard measure is applied only to the extent necessary to remedy the injury and permit adjustment. Diverging views exist as to whether a set of criteria should be established to specify this concept. It has been suggested that strong implementation disciplines may be a better option.

There is also a growing feeling that among the options available, which allow reaching the same objective, preference should be given to the measure, which could most easily be undone. This might include quantitative restrictions, subsidies, etc. Given the temporary nature of emergency safeguard measures, remedies with lasting effects should be avoided.[53]

Some delegations (the EU, Poland, Hong Kong, Singapore) are in favour of a requirement not to decrease the level of supply below the average of a representative period[54] and, in this context, some delegations feel that this principle should be extended to measures other than quantitative restrictions. It has been noted, however, that identifying the volume of services trade concerned might not be feasible in many instances.

These submissions show that Members are keen to address the impasse of being caught between the rock and the hard stone. On one hand they are very much interested to address emergencies that could arise in a transparent manner, but on the other they do not want a structure in place that could actually become a barrier to their service exporters.

Whether the ESM should be of a horizontal nature or a scheduled approach should be followed?

USA has been keen to include safeguard-type provisions for specific sectors in a Member's schedule of specific commitments (this view has been expressed in a Communication from the United States, S/WPGR/W/17). Rules may still need to be developed to be followed by Members who include such safeguard-type provisions in their schedules. It has been suggested that such rules - general, sector-specific or mode-specific - could include the requirement that a Member including a safeguards-type

[53] Job (01)/122 – Note from the Chairman – 7th August 2001
[54] See for instance Job No. 6830, Article IV: 3.

provision in its schedule in a given sector must combine it with a commitment to liberalisation in that sector.

The representative of Brazil has favoured a horizontal approach, commensurate with the notion of unforeseen developments. The representative of Thailand said that data problems were not a strong argument against a horizontal mechanism since sector-specific rules would suffer from similar problems. Moreover, it would be difficult to identify sectors, which on a longer-term basis were more prone to safeguard-type situations than others. He requested clarification as to the legal basis of a sector-specific approach. The representative of Australia said it might not be practical to develop separate disciplines for different sectors, given the statistical problems involved. The representative of New Zealand, echoing these concerns, favoured the development of horizontal rules.[55]

Expressing support for a horizontal mechanism, the representative of Mexico has opined that a sector-specific approach could fragment the system and jeopardize its predictability and stability and has expressed serious doubts about its legal validity. The representative of India, noting various problems has expressed strong opposition to a sector-specific approach.

But at the same time the Indian delegation has added that it might be necessary to develop separate rules for the four modes of supply in view of their particular characteristics. The representative of Brazil, also favouring a horizontal approach, acknowledged the possible need for flexibility in some sectors. The representatives of Pakistan associated himself with the comments made by Egypt and India. The representatives of New Zealand and Poland, while arguing for a horizontal mechanism, did not exclude the possibility of developing sector-specific rules.

The representative of Japan has distinguished three options for a safeguard mechanism: scheduled safeguards; safeguards specific to certain sectors; and a horizontal mechanism. In his view, the first option would introduce instability in scheduled commitments. The second option would be available to all Members in a certain sector, unrelated to the schedules.

[55] S/WPGR/M/20 dated 17th March 1999 – Report of the Meeting of 19th February 1999

The reports of the various meetings of the Working Party that were held after the Japanese communication mentioned above, show that Thailand, the US and the EU started exerting indirect support to the so-called "hybrid" approach being echoed by the Japanese proposal. But at the same time Thailand on behalf of ASEAN made it clear that no link should be established between an emergency safeguard mechanism and the process of scheduling.

Hence one finds that discussions have focused on the pros and cons of horizontal sector-specific versus safeguards. A conceptual distinction has been made in this context between those sector-specific safeguards, which would be negotiated case-by-case for inclusion in schedules (possibly based on some commonly agreed principles), and others, which would be made generally available. In addition, it has been noted that the parallel existence of sectoral safeguard variants could lead to fragmentation of the system and affect transparency. More fundamentally, a point has also been made that the use of a sector-specific concept would presuppose the existence of some advance information on the nature and scope of future emergency situations; however, Article X envisaged an ex-post mechanism to cope with unforeseen circumstances which might arise over time.

A horizontal mechanism, based on generally applicable criteria, is found by some Members to be available to all Members whenever the situation in a given sector and, possibly, mode of supply meets the relevant criteria. However, apart from questions concerning desirability, the EU has expressed doubt on whether such a broad-based mechanism could be made subject to effective disciplines.

The idea has also been discussed that a safeguards mechanism conceived for general application might be made available only in sectors considered prone to crises situations. The selection of such sectors, however, might prove difficult and could unduly affect trade and investment decisions.

It appears that Delegations favouring a sector-specific mechanism also recognize the need or usefulness of some commonly accepted principles ("hybrid approach"), while delegations endorsing a horizontal, generally available mechanism have expressed

doubts about the need for sectoral variants without, however, precluding such a possibility at present.

Several delegations by the end of 1999 actually expressed that it might be more efficient for the time being not to further discuss basic conceptual issues but, rather, focus on common principles, which might need to underlie any safeguard mechanism, whether horizontal or sector-specific in nature. Examples of such common principles – MFN-basis, advance notice, temporary application, degressivity, clear specification of measures envisaged, protection of "acquired rights" of established suppliers, etc. - can be found in written submissions from Hong Kong, China (S/WPGR/W/26, 10 February 1998) and the United States (S/WPGR/W/17, 13 March 1997).

The Chair in his comments at the end of 2001 mentions very categorically about the growing resistance to the scheduled approach but maintains silence about the existing level of support to the horizontal or the "hybrid" approach.

Sites of Common Understanding and Differences

Before we actually embark on elaborating these, it is critical to note that these sites of common understanding and differences have been isolated in the context of a larger picture and not on the basis of the specific presentations that Members have been making or the responses that are being voiced to discussions taking place on an ESM that is being more o less modeled keeping in view the language and requirements in Agreement on Safeguards applicable to goods.

The following are sites, which would receive support from a cross-section of WTO Membership if negotiations begin on an ESM:

- The objective of an emergency safeguard action would be to protect the domestic service providers including those who have 'acquired rights' on the soil of the host country.
- More or less there is an agreement that if an ESM actually gets formulated within the GATS framework then 'temporariness of application' would be one of its cornerstones.
- ESM should be transparent
- ESM should be applicable to all modes of services.
- MFN should be integral to an ESM.

The following are the sites where there exist major differences amongst the WTO Membership:

- Desirability of an ESM: USA and the EU with the tacit support of Japan and Hong Kong are raising questions about the need to initiate negotiations on an ESM. India, Thailand (representing ASEAN), Mexico, Republic of Korea, Venezuela, Cuba and Egypt are the major countries are interested to retain their right to negotiate an ESM. Interestingly, India has been maintaining a low profile in these discussions. This is very much expected given the changing nature of our service sector potential to contribute to our export income. Furthermore, it would be important to note that none of the least developed countries have found it useful to make strategic interventions on the debate on ESM as many of them have already privatized their service sectors under structural adjustment programmes or do not have domestic supply side capacities to create services. Hence how much they would actually ally with developing countries opposing the US, especially in the context of their macroeconomic realities remains a question.
- Whether ESM should be associated with "emergencies" and not with "unforeseen developments" only.
- Whether ESM should protect domestic service producers, the service sector or public interest
- Whether an ESM should be horizontal or to be negotiated in a scheduled fashion.
- Whether special and differential treatment should be enshrined in a ESM to be negotiated
- How ESM would be applied to all the modes of service delivery remains a debatable issue.
- Whether provisional safeguards should be built up within an ESM that would allow immediate relief to domestic producers.

Inputs from Members on an ESM based on Agreement on Safeguards applicable to goods under GATT/WTO

Taking cue from the Chairman's Report (S/WPGR/9 dated March 14, 2003), the analysis carried out in Chapter Four is presented below for the following heads:

Situations justifying emergency safeguard mechanisms

Given the different economic and social climates existing in each Member's territories, coming out with a congruent understanding on situations that would trigger application of ESM has been very difficult. Setting the tone of the discussions, the Secretariat [56] in its

[56] S/WPGR/W/8 - Note from the Secretariat dated 6th March 1996

note mentioned that it would be critical to think on the relationship that modes of service delivery in the same sector would have to "critical circumstances" which could trigger an ESM.

Hong Kong[57] while opining on this issue mentions, that under Modes 1, 2 and 3 one could envisage emergencies where the share of domestic service suppliers, whether defined as all established or only national, could suffer serious decline in total market share. One can equally see that under Mode 4 social unrest or unemployment could arise from a multilateral commitment. And one could conceive of situations where an influx of foreign nationals could lead to serious unemployment in a specific sector of nationals.

Thus Hong Kong suggests that possible emergency situations are limited but could include:

- serious environmental or societal problems, such as pollution (due to a specific commitment on transport?), mounting and high unemployment in a particular sector or social/racial problems
- drastic reduction in or elimination of total market share held by national service providers
- national service providers undergoing (temporary) restructuring or which are newly emerging

According to ASEAN[58], the ESMs would apply to all modes of supply, including both pre-establishment and post-establishment of commercial presence, in the case whereby, as a result of unforeseen development and of the effect of the obligations incurred by a Member under the GATS, there is a dramatic increase in consumption of foreign services, in absolute or relative terms, to such an extent that it causes or threaten to cause disruption of the national industry producing like or directly competitive services of the Member taking the measures.

The dramatic increase in consumption of foreign services could be assigned to a fixed percentage of the average level of supply of foreign services concerned as a whole of the

[57] S/WPGR/W/18 – Communication from Hong Kong dated 16th May 1997
[58] S/WPGR/W/22 - Communication from ASEAN - 23rd July 1997

previous representative years, such as 100, 150 or 200 %, the threshold of which is subject to negotiation.

As the debate has proceeded on this critical issue, some interesting questions have come the forefront, viz. how could you say that a particular critical circumstance resulted from actions of a foreign supplier? How could one provide a figure that would differentiate between the impacts caused due a foreign supplier in comparison to his/her domestic counterpart in the context of the critical circumstance generated? These questions are critical to answer before we embark on negotiating an ESM. As one would note from the responses below, these questions remain completely unresolved.

The Secretariat's note[59] that was prepared on the insistence of the EU outlines how some positive impacts of liberalized trading system could result in emergencies in domestic markets of some countries. The question then is whether the larger global welfare needs to be sacrificed to serve the interests of a few suppliers in limited sets of countries? Or, would sacrificing these interests would have long run impacts on competition in the world market reducing welfare?

Questions have also been raised during discussions as to who would be responsible for the unforeseen circumstances, i.e. would the poor foresight of the domestic producer be responsible for the critical circumstances or would it be the irrational aggressiveness of external industries?

Dimensions of serious injury and causality

Serious injury and the threat of serious injury are both defined in Article 4:1 of the Safeguards Agreement. Serious injury means "significant overall impairment in the position of a domestic industry." The threat of serious injury means "serious injury that is clearly imminent ... [A] determination of the existence of a threat of serious injury shall be based on facts and not merely on allegation, conjecture or remote possibility." Article 4:2(a) goes on to stipulate that an injury investigation must "evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation ... in particular the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of domestic market taken by increased imports,

[59] S/WPGR/W/24 - Note by the Secretariat - 3rd September 1997

changes in the level of sales, production, productivity, capacity utilization, profits and losses and employment."

A number of delegations (Peru, ASEAN, and Mexico) are keen to use the Article 4.1 and Article 4.2 of the Safeguards Agreement to create variables that would help us indicate serious injury.[60] This is also confirmed in the note published by the Secretariat in 1999.[61]

Although a number of delegations have provided a number of variables they could utilize to measure serious injury, the debate on what are subjective and what are objective factors remains a major hurdle. Similarly the question of dealing with modes of services supply susceptible to technological changes in the context of determining injury also becomes critical for a few delegations.[62] This is because of completely different social and economic circumstances in which same services are provided using different modes. Interestingly, there is hardly any delegation that has used a very concrete example to prove its point with respect to establishing its concerns in this area.

Hence, while the EU[63] asserts that serious injury should be assessed on the basis of all relevant factors of an objective and quantifiable nature having a bearing on the situation of the industry, such as market share, employment, consumers' interest and profitability; and, that the assessment should also demonstrate the existence of a causal link between the increase in value of services and the serious injury to domestic service suppliers, it does not find it relevant to furnish an example to prove its point under variable situations.

For the Thais,[64] serious injury should be determined by a variety of factors of an objective nature having a bearing on domestic services suppliers sustaining unanticipated difficulties, such as the rate and amount of the increase in imports of services in absolute or relative terms, the share of domestic market by foreign imports; the rate and amount of increase of foreign services suppliers; the rate and amount of

[60] S/WPGR/W/22 – Communication from ASEAN – 23rd July 1997 and S/WPGR/W/23 - Communication from Peru – 21st August 1997
[61] S/WPGR/W/27/Rev.1 - Note by the Secretariat – 7th May 1999
[62] S/WPGR/W/15/Add. 5 - Communication from Egypt- 20th May 1997
[63] S/WPGR/W/15/Add. 4 - Communication from European Communities - 20th May 1997
[64] S/WPGR/W/15/Add. 1 - Communication from Thailand - 11th March 1997

changes in the level of sales, profits, production, capacity utilization, and employment of domestic service suppliers.

For Cubans, serious injury vis-à-vis domestic suppliers will be considered to have taken place if there is a considerable drop in demand for the service they supply, reflected in a considerable decrease in earnings resulting from the supply of such service, or if there has been a significant diversion of domestic consumption of the service towards a foreign supplier. For domestic service suppliers, In the case of modes 3 and 4, the injury is also reflected in the balance of payments of the country in which the service is consumed, provided the net effect for its economy is negative, through a significant increase in remittances of profits to the country of origin of the foreign suppliers established in the country where the service is consumed.[65]

Some delegations like Hong Kong have raised questions with respect to various targets of any safeguard action. According to them, due to existence of four modes of supply, there are at least three possible targets:

- service suppliers (including individuals) established in the territory irrespective of ownership/management
- national domestic owned/managed service suppliers
- own nationals

The answer would seem to depend on the emergency situation, the sector in which the Member has made a commitment and the mode of supply that is causing the injury.[66]

Summing up the debate till mid 1999, the Secretariat note mentions, "No detailed views have been expressed, but it seems obvious that an investigation would be required. Article 3 of the Agreement on Safeguards dealing with investigation has been suggested as a starting point. This provision stipulates that a safeguard measure may only be applied following an investigation, and prescribes the procedures that must be followed. For the determination of injury, the concepts contained in Article 4.2(a) of the AS have been proposed as relevant. The causality requirement in the area of goods, i.e.

[65] S/WPGR/W/15/Add. 1 - Communication from Cuba – 27th May 1997
[66] S/WPGR/W/18 - Communication from Hong Kong- 16th May 1997

Article 4.2(b) of the AS, should be translated into the services context, provided some key terms were modified. The Agreement on Implementation of Article VI of GATT (Antidumping Agreement) has been cited as an approach which provided for the necessary flexibility in injury determinations, allowing for action based on "best information available" and for the possibility of consultations with affected Members during an investigation.

Indicators to be used in establishing injury would include: losses experienced by domestic suppliers; decline in capacity utilisation; capacity reductions; decline in sales; declining productivity; reduction in prices or changes in the price structure; declining number of domestic suppliers; and shrinking employment. An increase in foreign supplies would be reflected in: tax declarations (e.g. for sales taxes); indicators related to financial transactions; statistics maintained by competent professional associations or regulators (including information on market shares or number of foreign professionals); capital flows; and revenue figures. For the determination of causality, data series (performance before and after market entry) could be used in the same way as in the goods area; the burden of proof would rest on the invoking party. It has been noted that any type of administrative information might be used; the standard of proof in such instances would not need to be as high as in penal cases.

While concerns have been expressed that such information, if it were available, would be subject to confidentiality constraints, it has also been noted that similar constraints have not proved a problem in antidumping or safeguards cases for goods. Article 3:2 of SA specifies the treatment of confidential information."[67]

The list of indicators contained in an informal submission by Venezuela (Job No. 2860, dated 17 May 1999) has been widely considered a useful basis for future discussion; the Secretariat was requested to use it as starting-point for a working document listing any conceivable indicators proposed by Members and the comments made in the Working Party. It has also been stressed, however, that such work needed to be complemented by the examination of hypothetical safeguard situations for all four modes of supply in order to further explore the relevance of individual concepts and indicators.

[67] S/WPGR/W/27/Rev.1 - Note by the Secretariat – 7th May 1999

The representative of Venezuela has mentioned that several indicators could be used to prove the existence of injury, including the revenue from value added tax. It had been argued that information provided for tax purposes was normally confidential. However, confidentiality was protected, for instance, in antidumping and safeguards cases for goods, where one of the elements used to evaluate injury were tax declarations. Other indicators could be offer/sales statistics, which were normally maintained by private enterprises and chambers of commerce; the number of providers in the market; changes in prices and the price structure; market share; capital flows recorded by national statistical offices for individual activities, groups of enterprises and purposes; as well as statistics on the entry of foreigners and their professional activities.

While delegations had emphasized the need for reliable proof, it was necessary to bear in mind that the standards of proof tended to be lower in economic investigations than in penal cases. The representative of the United States expressed reservations as to whether capital flows could be used to measure increased imports and ensuing injury. Capital flows were associated with a wide variety of economic activities and not necessarily related to sales of services.[68]

In the subsequent meetings held in 1999,[69] the entire discussion on serious injury issues concentrated on development of objective indicators on the basis of the existing relevant instruments applicable to goods in the GATT framework. While a number of indicators have been put on the table, there exist a range of views on the objectivity of the same. EU did raise the issue of statistics coming in the way with respect to maintaining the practical sanctity of indicators that could get created, but nobody seemed to have paid any heed to it. Countries like Thailand and ASEAN as a grouping very aggressively have been stating that strong and objective investigation processes should be constituted

[68] S/WPGR/M/20 – dated 17th March 1999 - Report of the Meeting of 19th February 1999
[69] S/WPGR/M/21 – dated 7th May 1999 - Report of the Meeting of 16th April 1999; S/WPGR/M/22 – dated 15th June 1999 - Report of the Meeting of 19th May 1999; S/WPGR/M/23 – dated 6th July 1999 - Report of the Meeting of 21st June 1999; S/WPGR/M/24 – dated 18th September 1999 - Report of the Meeting of 27th July 1999

to determine injuries and to establish causal relationships between serious injury and compensation.

National Industry or Domestic Industry

The notion of domestic production is straightforward under the Safeguards Agreement. The closely related concept of domestic industry is defined in the Agreement to mean "producers as a whole of the like or directly competitive products operating within the territory of a Member, or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products" (Article 4:1(c)). This definition could be applied without modification in GATS under Mode 1 and Mode 2.

Under Mode 3 and Mode 4, the situation is more complicated, as "domestic" production involves two different concepts -- in one circumstance, domestic production refers both to national and foreign suppliers, and in another it refers only to national suppliers. Thus, at the establishment or entry stage, domestic production would logically refer to all suppliers operating within the territory of a Member, whether national or foreign. Safeguard action would be taken to protect these suppliers against newly establishing suppliers or market entrants. By contrast, in the context of post-establishment operations, the only conceivable safeguard action would have to distinguish between national and foreign suppliers, defining domestic production in terms only of national suppliers.

For most developed country Members and Members from Middle income countries, the issue of acquired rights has been extremely significant in this debate on domestic industry. Since these countries have firms that have a multinational presence in various forms they have been concerned with respect to how the rights of these firms would be protected during investigations or during determination of serious injury and rightly so. For a number of Latin American countries the issue is a bit different. Traditionally their economies have been dependent on foreign capital for growth and therefore these countries under any circumstances are not interested in providing negative signals to foreign investors. Witness the submissions made by Switzerland, EU, United States, Hong Kong, Cuba, Mexico, Hungary, Uruguay, Brazil, Columbia Argentina and others.

Hence the EU has been suggesting that in order to determine injury, concepts used under the GATT may have to be examined such as should the national industry be defined as the providers as a whole of the like or directly competing services operating within the territory of the Member, or those whose collective supply constitutes a major proportion of the total Member supply of those services.[70]

In the globalising economy, the concept of "domestic industry" is becoming more and more diffuse. If we were to take the lead of the GATT Safeguards Agreement, all producers of like or directly competitive products operating in the territory of the Member before the ESM would count as "domestic industry" (Article 4(1) (c).

Hong Kong and Singapore[71] has questioned whether such a definition meets the needs under the GATS and also modal issues. One could conceive that an "emergency " has arisen because market opening has occurred too quickly for the national domestic service suppliers to adapt.[72] So some restrictions might need to be put on the entry of "new" (foreign) domestic suppliers: i.e. those established under Mode 3. But under the GATT Safeguard Agreement it would not be possible to take differential action against the "newcomers".

A further problem relates to Mode 4. Under this there is a clear differentiation between own and foreign nationals. So an anomalous situation could arise where a foreign company was not affected by an ESM, but foreign nationals within the company could be. The only way this can be done is for the GATS to examine the need to have separate definitions for national service suppliers and foreign service suppliers. This would reopen the whole agreement and would impact market access ambitions of our exporters.

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[70] S/WPGR/W/14 - Communication from Switzerland – 10th October 1996; S/WPGR/W15/Add.4 - Communication from European Community and Member States - 20th May 1997; S/WPGR/W/15/Add.5 - Communication from Egypt- 20th May 1997; S/WPGR/W15/Add.6 - Communication from Mexico – 22nd May 1997; S/WPGR/W15/Add.6 - Communication from Cuba – 27th May 1997; S/WPGR/M/26 dated 20th April 2000 – Report of the Meeting of 24th March 2000; S/WPGR/M/26 dated 22nd December 2000 – Report of the Meeting of 30th November 2000;

[71] S/WPGR/W/18 - Communication from Hong Kong – 16th May 1997; S/WPGR/W/189 - Communication from Singapore – 25th June 1997

[72] National domestic service suppliers are used in this paper to refer to suppliers owned, managed or controlled by nationals of the Member concerned.

For ASEAN[73], emergency safeguard measures (ESMs) would need to be taken for temporarily protectecting the national industry, which is understood to mean the totality of the natural persons and/or juristic persons supplying like or directly competitive services of the Member taking the measures according to the respective definitions provided for in Article XXVIII (Definitions) of the GATS, in order to enable them to adjust to foreign competition.

The representative of the Republic of Korea said that he would prefer safeguard measures, which focused on protecting the national, rather than the domestic industry. The Korean's want to protect acquired rights of established foreign suppliers and do not see ESM as instrument that would lead to forced disinvestments.

The representative of India has said that safeguard measures should be available to protect national suppliers vis-à-vis any foreign supplier.

The above discussion shows that there would exist problems with respect to establishing which mode is responsible for a particular critical circumstance to occur. Which implies that one would not be in a position to establish a relationship between injury, imports and mode of service supply, which would be critical to apply an ESM based on the model applicable to goods.

Moreover, application of an ESM on a particular mode of service supply would inject arbitrariness into the system and become a tool that could be effectively used against us. For example, if authorities come out with a preliminary investigation report saying that mode 4 or mode 1 of service supply are the ones that are responsible for the emergency and the final finding says that it is actually mode 3 has caused the injury, then the service providers using mode 1 and mode 4 would have to face barriers in the period between preliminary and final determination , which could impact these service providers tremendously.

Compensation

Article 8:1 of the Safeguards Agreement requires that a Member intending to apply a safeguard measure should "endeavour to maintain a substantially equivalent level of

[73] S/WPGR/W/19 - Communication from ASEAN – 23rd July 1997

concessions and other obligations to that existing under GATT 1994 between it and the exporting Members which would be affected by such a measure." This provision implies that Members taking measures must be prepared to compensate other Members for any adverse effects of safeguard actions.

The Agreement provides for consultations on such compensatory arrangements. If consultations do not lead to a satisfactory outcome within 30 days, affected Members are entitled to suspend the application of substantially equivalent measures to the trade of the Member responsible for the safeguard action, provided the Council for Trade in Goods does not disapprove of such retaliatory action. However, this right to suspend equivalent concessions cannot be exercised during the first three years that a safeguard measure in conformity with the provisions of the Agreement is in effect, as long as the measure concerned has been taken as a result of an absolute increase in imports (as opposed to a situation in which the relative share of domestic production has declined in domestic consumption of a product). What this means, in effect, is that under the above set of circumstances, Members would be unlikely to offer to provide compensation to trading partners for any adverse effects arising from a safeguard measure during the first three years of its application.

Compensatory adjustments should seek to maintain "a general level of mutually advantageous commitments not less favourable to trade than that provided for in Schedules of specific commitments" (Article XXI:2). If consultations fail to produce a satisfactory solution within the three-month period provided for such consultations, affected Members may submit the matter to arbitration. Affected Members wishing to enforce their rights must participate in arbitration. If no Member seeks arbitration, the Member intending to modify its schedule is free to act. If there is arbitration, however, schedules must be modified in accordance with the arbitrator's findings, failing which any affected Member may modify or withdraw substantially equivalent benefits in conformity with those findings.

From a procedural perspective, it is noteworthy that an arbitration provision was introduced in Article XXI. This approach has no precedent in the field of goods. Providing for arbitration reflects the realization of negotiators that the rights and obligations of Members seeking to modify their schedules and of Members affected by

such action, are more complicated to deal with in the field of services. This additional degree of difficulty arises both as a result of the kinds of measurement difficulties and information shortfalls referred to above, as well as from the fact that compensatory adjustments in services can take different forms, relating both to market access and national treatment commitments. Presumably, these same considerations would apply in the context of a safeguard mechanism in services that provided for compensatory adjustments for Members adversely affected by safeguard actions.

An issue referred to in Working Party discussions is the relationship between the existing Article XXI provisions and a possible safeguard mechanism. In addition to the broader question as to whether an Article XXI-type scenario involving the indefinite withdrawal of commitments is comparable to the temporary withdrawal of commitments that would presumably be envisioned under an emergency safeguard provision, three other points about the nature of Article XXI as it stands seem to be relevant in this context.

First, Article XXI action is only available three years after a commitment has been undertaken. Second, Article XXI action cannot be taken until three months after notification of the intention to act. Third, the obligation to provide compensation for the adverse effects of the modification of a commitment exists from the outset under Article XXI procedures. These characteristics of Article XXI would have to be taken into account in any consideration of the question whether the possibilities for modifying commitments provided under Article XXI might obviate the need for a safeguard.

The Secretariat and the EU suggests that a system similar to Article 8 of the Agreement on Safeguards could be envisaged. Mexico also suggests that some provisions of the Safeguard Agreement could be applied mutatis mutandis in a GATS context.[74]

The representative of New Zealand and Thailand, on behalf of ASEAN, noted that Members needed to carefully think about the conceptual issues contained in Article 8 of the AS, and their applicability to services. It might prove difficult to determine the level

[74] S/WPGR/W/27/Rev.1 – Note by the Secretariat dated 7th May 1999; S/WPGR/W/27/Rev.2 – Note by the Secretariat dated 16th September 1999; S/WPGR/W/15/Add. 4 - Communication from European Communities and Member States- 20th May 1997; S/WPGR/W/15/Add. 6 - Communication from Mexico- 22nd May 1997

of any compensatory measures. In addition, he proposed considering differential treatment of developing countries; Articles 8.3 and 9 of the AS were relevant in this context.[75]

With respect to the issue of compensation and possible relevance of Article 8 of the AS, the representative of India noted that the compensation should depend on the nature of the safeguard measure adopted.

By the end of 2001 the Chair summarized the debate on Compensation issues[76] saying that: "A number of Members are of the view that a compensation requirement can play an important role to prevent possible abuses of safeguard measures, and should therefore be included in an ESM. It has been suggested that Article 8 of the AS could be used as a starting-point and, if necessary, should be improved upon.

Other delegations are of the view that lessons should be drawn from the AS where the compensation requirement does not seem to be effective. Moreover, too burdensome a compensation requirement may prompt Members to resort directly to GATS Article XXI. Other options should be examined, including the non-inclusion of compensation. It has been noted in this context that the duration of the measure was relevant: a short duration could obviate the need for a compensation requirement. Another view is that strict rules on investigation and implementation could obviate the need for a compensation requirement.

It has been suggested that compensation could take the form of additional or enhanced commitments in the same or related sectors or sub-sectors. The invoking Member should nevertheless retain some flexibility in choosing areas in which it would grant compensation.

Some delegations have noted that the withdrawal of compensation, once the safeguard measure has expired, may be more complex in the services area; compensation under

[75] S/WPGR/M/23 dated 6th July 1999 – Report of the Meeting of 21st June 1999
[76] Job No. 3449/Add.1, paras. 2-8; Job No. 6943, paras. 27-30; JOB(01)/45, paras. 3-23; JOB(01)/54, paras. 30-32; JOB(01)/74, paras. 13-16; JOB(01)/108, paras. 31-36; See also Note by the Secretariat on *WTO Members' Practice relating to Article 8 of the Agreement on Safeguards*; JOB(01)/61.

mode 3, for instance, may raise particular problems. In this context, it was suggested to examine the links between compensation and "acquired rights".[77]

The notion of "substantially equivalent level" remains unclear in the services context. The language of last resort that could be used is to replace this phrae by the words "a general level of mutually advantageous commitments" (GATS Art. XXI:2(a)). But even if we get a solution to the language we still cannot overcome the problem of data that would be so critical to calculate the injury and thereafter compensation.

Investigation

Delegations[78] that have participated in discussion have generally agreed that there should be three steps in the investigation procedure: (i) demonstration of an increase in trade in services; (ii) demonstration of injury or threat thereof for the domestic industry; (iii) establishment of a causal link between (i) and (ii).

One of the main issues raised under this item relates to the availability of data, which could be used in the investigation process. A number of delegations consider that many services areas lack reliable data and statistics. Other delegations are of the view that the quality of information is improving rapidly and, thus, that the problem should be not be exaggerated. One suggestion is that data problem could be counterbalanced with strong enforcement disciplines, in particular by an effective surveillance mechanism.

Another issue is the level of obligation on the investigating authority when examining indicators and criteria. Attention has been drawn to existing GATT case-law on relevant provisions of the Agreement on Safeguards. A number of delegations are of the view that the investigating authority should have an obligation to examine all factors and justify the relevance – or irrelevance – of each one; this does not mean, however, that a positive finding of injury would be required for each factor. Another suggestion is that the investigating authority should have a pro-active duty to look at all relevant factors causing injury. Delegations generally agree that factors other than imports should not be taken into account to determine injury.

[77] Job(01)/67, p. 4.
[78] Job No. 3449, paras. 27-33; Job No. 6943, paras. 15-18; Job(01)/26, paras. 36-41; Job(01)/54, paras. 26-29; Job(01)/74, paras. 8-12; Job(01)/108, paras. 22-25.

Sites of Common Understanding and Differences based on Presentations of Members

Members agree that it would be necessary to establish that increased imports of services have resulted in injury to the domestic industry. Moreover they realize that it is not going to be easy at all to establish such a relationship across different modes of service provision, especially in the context of weak statistical systems.

Although protecting domestic suppliers interests during emergencies seem to be a primary concern pushing Members to actually initiate an emergency safeguard measure, there are some Members like Hong Kong, Australia, etc. who have also shown concern towards issues pertaining to public interest.

Developing countries seem to be in a consensus with respect to their demands around enjoying a special and differential treatment especially in the areas of adjustment and compensation. Witness the presentations of India, Cuba, Dominican Republic, Venezuela etc.

There are although differences on whether compensation should be dependent on a type of service and/or the mode of supply or independent of these two parameters.

Although there may be a number of versions emerging with respect to defining domestic industry, there is more or less a consensus that foreign entities with acquired rights in the host country should also be treated as domestic industry during the application.

The issue of how one would treat foreign entities with acquired rights in comparison to those that would acquire rights in future and actual domestic entities during an emergency is yet to be resolved.

Members also seem to agree that there should be transparency in investigations but there is still some debate on how this transparency would be safeguarded especially during the application of provisional safeguards.

Statistics… the major stumbling block

The discussions on causality, investigation and any other process based on Agreement on Safeguards and Agreement on Antidumping in the context of ESM for services can only fructify if services-trade data is available in a time series. Submissions of many countries (as cited above) adequately show that at present there exists no coherent source at various capitals from where services-trade data can be sourced. (For more on statistical issues refer Chapter Five)

The Indian Situation…

Chapter Six makes an effort to delve into discussions that provided us with valuable inputs while designing an ESM and while taking a position whether or not to use the ESM as a strategic or a tactical instrument.

In order to achieve this objective, we have studied some of the service sectors in order to understand the opportunities and threats that have arisen in the context of the liberalization in these sectors. Furthermore, analysis was carried out to understand as to how these sectors have been treated under Indian Constitution and one also tried mapping legal instruments that are relevant to these sectors. At the same time, the discussions on each sector has covered existing Indian commitments at the WTO as well as the commitments that successive Indian governments have made at an autonomous level in each sector.

We have not ventured into analyzing sectors like software, maritime transport, audiovisual services and banking on which the Department of Commerce has already sought an opinion from agencies like ICRIER and the RBI. In cases like telecom, construction and consultancy services we have hinged our analysis to the work that has been done by some of the known authors in the area.[79] This has been done in order to not reinvent the wheel and therefore in the section on telecom we have only touched those areas where general analysis has been absent.

Broadly the sectoral analysis starts by providing a general picture of the sector discusses the factors that are responsible for its growth and then proceeds to discuss the following:

(a) The discussion at the WTO on the sector and various issues concerning that sector

(b) The Indian position on the sector at GATS and the commitments that India has made with respect to liberalizing the sector at an autonomous level

(c) The Constitutional Classification of the sector and the laws governing that Sector in the Indian context

[79] In the area of construction and consultancy services we have drawn from the paper written by Dr. Vijaya Katti of Indian Institute of Foreign Trade and with respect to telecom we are annexing a paper written by Amitabh Kumar, Director (Technology) Zee networks ["Indian Telecoms: Critical Deviations in the Post WTO Era" which can be downloaded from: http://www.iimahd.ernet.in/ctps/WTO-Critical%20Dev-Amitabh.pdf]

(d) The opportunities and the threats that GATS and autonomous liberalization has resulted in for the players and consumers in each sector.

Highlights of the Case Studies

The analysis of the various sectors that are being liberalized at an autonomous level and/or as a result of GATS negotiations and analysis presented in Chapter Six, highlight the following:

(a) There are threats and opportunities to Indian domestic industry in more or less every sector, which need to be looked at more strategically. Experiences with respect to autonomous liberalization and liberalization induced due to maintain consistency with our GATS submissions are heterogeneous and quantification of impact (positive or negative) is a task that cannot be accomplished only on the basis of case studies.

(b) In spite of this hurdle, on the basis of case studies illustrated and possibilities opined, one can say that liberalization of each of these sectors, especially of basic services, has exposed consumers of these services, importantly, the poor and the subsidized consumers, to a very volatile climate. This phenomenon highlights the importance of the Government to be armed with instruments that it could use, more so during emergencies, for fulfilling its constitutional commitments and universal access of critical physical and social infrastructural services like roads, telecommunications, education, health, electricity, water supply and waste disposal.

(c) Given the nature and jurisdiction of transactions taking place in sectors like urban infrastructure, environmental services, health and education, coupled with the lack of sectoral bodies representing the interest of the players in each of these sectors, there exists very little centrally available, reliable, time series data or even sectoral time series data on important variables such as employment generated or underemployment or unemployment in these sectors, the number of domestic players that have been displaced or have wound up, the number of consumers that have stopped consuming services or consume them temporarily *et al*.

(d) Most importantly, it has been extremely difficult to source data from the Reserve Bank of India with respect to the returns on investment that some of the foreign direct investors have been channeling back to their principal entities outside India.

(e) Although data may be available on the FDI coming into each of these sectors, non-availability of a time series, reliable, disaggregated data at the State level, does not help us to infer, as to why concentration of FDI in a sector is taking place at particular centres in a State. Although, case studies in the area of health and education and telecommunications show that investors that are lining into India to generate and/or provide these services by establishing their commercial presence through joint ventures or independently, are interested to capture that particular segment of the market that can pay for the provision of these services.

(f) Multiplicity of legislations and regulations at the state and sub-state levels, coupled with the fact that panchayati raj institutions have been given the constitutional right to legislate at their level, is going to be a critical feature of any process to come to a decision to employ and implement an ESM.

Structural and Systemic issues pertaining to India

Application of a safeguard is very much dependent on availability of comparable time series data and the quality of the same. The experience in the area of goods provides us with some valuable insights in this regard, which need not be discussed at this juncture. At the same time we need to realize that the lack of availability of data is not only a systemic difficulty in the area of services but is hinged to structural issues associated with the way technology would impact mode of service supply.

A relevant example to cite in this regard would be that of services that are being offered by Indian/Foreign companies using Indian labour from Indian soil to serve consumers in internationally.

Prior to the telecommunications revolution, companies were compelled to use high-cost labour in their respective parent economies and provide these services to their clients, or otherwise they had to actually import labour from other countries (mode four) to get the

work done. With the advent of new-generation telecommunication software and progress in telecom technology, these companies are now in a position to address cliental concerns and get their own work done at very little cost by using relatively cheap labour from India and other Asian nations. Hence the same or similar services are now being supplied across border (mode one).

This change in mode of supplying similar/same service according to some of the reports has:

(a) The potential to reduce employment opportunities; and

(b) Has already started impacting employment in countries such as USA.

If we assume that "loss of employment" would be a significant component in the definition of a "critical circumstance" for an ESM in the area of services, then a situation like this would be a very politically correct situation for countries such as US to apply one.

Moreover, a check whether reliable, comparable publicly available, mode-wise, time series data is available on services of interest to India.

Mode of service supply	**Services of interest**	**Sources of reliable, comparable, publicly available, time series data**
Mode one	• Software services • Engineering Services • Architectural Services • Accounting Services • Research and Development • Medical transcription • Customer Support • Back Office Operations • E-commerce services that are exported from Indian soil to the rest of the world	The Councils that represent interests of Architects, Engineers and Accountants do have some amount of aggregate data, but one needs to verify whether it can stand tests of consistency. Individual BPOs do have data with them, which they might not be ready to share publicly.
Mode two (consumption abroad)	• Leisure Tourism • Consumption of Medical Services • Educational services that are consumed by Indians	The Ministry of External Affairs can provide us with aggregate data on the number of tourists. But there is no consistent data that would be available at the state level if any injury to environment in a particular state has to be established. Besides this a number of people that come to India to visit conferences have a business visa but do indulge into tourism. Hence details associated with visa may not be an indicator about their consumption or non-consumption of

		tourism services in India. There is no central pool that collects data on the number of foreign patients that consume medical services from Indian hospitals or medical outfits. Individual hospitals or medical centres have this data but they might not want to share the same for reasons of confidentiality. Data on consumption of educational services by Indians on foreign soil can be easily availed from consulates as students are issued a different visa for consuming these services
Mode three (commercial presence)	The following services could be delivered by wholly or partly owned subsidiaries of foreign entities or by a joint venture between a local and a foreign entity: • Physical and Social infrastructure services • Business Process Outsourcing services of various kinds	The qualitative time series data that would be available on service suppliers exporting services using this mode is the remittance data (RBI) and the data on patents they have filed (Patent Office of India), on the clearances they have obtained while establishing their commercial presence. We could also have data on how much employment they have generated.
Mode four (movement of natural persons)	• Services provided by our professionals by traveling and staying on foreign soil without establishing their commercial presence	Given that countries importing these services provide a different visa classification for exporters of such services it is very easy to track and evaluate the quality and magnitude of their service supplied.

Even if we assume that one is in a position to collect data that satisfies the qualitative requirements, establishing that import of a certain service in various modes for a certain period of time is the cause for injuring the domestic services sector, is going to be a very contentious terrain due to the following reasons:

(a) How are we going to differentiate whether the injury being investigated is due to the import of a service under a particular mode or due to macroeconomic factors? Only if the service imported is not being supplied by a domestic producer in the host country then it would be relatively easier to prove that the injury is being caused due to imports of the service.

(b) How are we going to prove that at a particular time 't' the service exporter changed its mode of service supply and that it is due to this change occurring at time 't' in the mode of service supply that the injury occurred?

(c) We need to realize that the quality of data collection is of a very high order in the US and the EU. Given that our service suppliers are increasingly establishing their commercial presence in these countries and are also aspiring to export

value added services using mode one and mode four, having a ESM might in fact go against our interest.

(d) Moreover, the domestic laws in the Indian context can be strengthened to protect the interest of the Indian consumer and of the Indian service providers.

Broad Conclusion based on Country Presentations and analysis of the Indian situation

The submissions show that the Membership is aware of the growing complexities associated with supply of services. Technological advancements are having implications on the modes of supplying the same service. For example, services that were being offered by professionals by establishing their presence on foreign soil are now being rendered across borders by using tools of information technology. Services that were being offered by using one particular mode are now being rendered using a combination of modes in order to save upon costs. It is far more difficult to understand origin of a service and this ambiguity feeds into identification of the provider responsible for "injury".

These complexities associated with supply of services have not allowed Members to even come to a conclusion on what would constitute a "critical circumstance". Members have therefore not even moved forward towards defining important terms such as "injury" and "compensation"

The reports of different Chairman during various times also show that there is no movement towards reaching a conclusion on deciding whether to negotiate an ESM within ambit of the GATS.

The analysis of country positions and of the Indian situation makes us infer that an ESM negotiated on the lines of Agreement on Safeguard applicable to goods would go against Indian interest. We feel that by doing so we would be jeopardizing the interest of our service suppliers, especially those who supply services using Mode 1 and Mode 4.

While we come to this conclusion, which we feel should be our front line agenda, we have still gone ahead and formulated a draft ESM Agreement so that we are armed with

language that could preserve our interests in case negotiations get initiated – a fall back agenda.

This proposed instrument is mentioned below.

Proposed Draft ESM Agreement

Members,

Recognizing the growing importance of trade in services for the growth and development of world economy;

Facilitating the increasing participation of developing countries in trade in services and the expansion of their service exports including *inter alia* through the strengthening of their domestic services capacity and its efficiency and competitiveness;[80]

Recognizing that growing trade in services using any mode of supply could result in emergencies posing serious threat or causing injury to the capacity and/or existence of service providers in importing countries;

Recognizing the right of Members to suspend existing and future commitments under GATS, during emergencies in order to safeguard the interest of domestic, service providers, consumers and services sector;

Allowing structural adjustment of domestic service provision in the territory of Members, in particular that of developing countries, with a view to enhancing competition in the area of services, and facilitating the development of the service industry of developing countries which are essential to their national socioeconomic development programmes;[81]

Hereby *agree* as follows:

Part I – Scope and Definition

Article 1: Scope and Definition

For the purposes of this agreement:

(a) "emergency" or "critical circumstance" means a situation in which the domestic services production, provision, access and consumption, suffers serious injury, or is threatened thereof, permanently or temporarily, due to, service supply and/or by other actions, of another Member;

[80] S/WPGR/W/30 dated March 14, 2000 – proposal of ASEAN
[81] S/WPGR/W/30 dated March 14, 2000 – proposal of ASEAN

(b) “emergency safeguard measure (ESM)” means actions taken by a Member on the service supply of service(s) or a like service(s) or directly competitive service(s) of another Member, irrespective of its mode of provision, with a view to temporarily suspending its GATS specific commitments in order to safeguard its domestic, production, provision, access and consumption of services, against serious injury or threat thereof;

(c) “service supply of another Member” includes the import or domestic supply of the same or like or directly competitive services provided or supplied by the service supplier or suppliers of another Member using any of the four defined modes of service delivery, as specified under Article I (2) of GATS;

(d) “domestic production of services” means actions taken by domestic services industry of the Member intending to apply emergency safeguard measure, to produce the same, like or directly competitive services;

(e) “domestic services industry” is understood to mean producers and/or suppliers, including natural and/or juridical persons[82], as a whole of the same or like or directly competitive services operating within the territory of the Member intending to apply an emergency safeguard measure, or those whose collective output of the same or like or directly competitive services constitutes a major proportion of the total domestic supply of these services;[83]

(e) “provision” means actions towards providing, the same like or directly competitively service(s), by a Member intending to apply emergency safeguard measure;

(f) “access” means actions including those enabling availability of, the same, like or directly competitive services, taken by a Member intending to apply emergency safeguard measure;

(g) “serious injury” is understood to mean a significant and overall impairment of, domestic services production, provision, access and consumption, that is determined with the criteria and indicators for the determination of serious injury referred to relevant paragraphs;

(h) “threat” or threat of serious injury” is understood to mean serious injury that is determined to be clearly imminent in accordance with the criteria and indicators for the determination of serious injury referred to in relevant paragraphs;

(i) “basic services” means all services pertaining to health, education, water storage and supply, environment and biodiversity protection, waste management, power generation, transmission and supply and any other services that are desired to be accessed by the entire population and those which the Member may deem fit to be included in future in the context of this description;

[82] “natural and juridical persons” as defined by GATS Article XXVIII (k), (l), (m) and (n)
[83] This definition is based on Article 4.1 of the Antidumping Agreement and Article 4.1 of the agreement on safeguards

(j) “like or directly competitive services” are services that are supplied to consumers for the same end-purposes;

(k) “direct consumers” are those who pay the full or subsidized price for the same or like or directly competitive service having the same end-purpose;

Part II – General Obligations and Disciplines

Article 2: Most-Favoured-Nation Treatment

With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services, service suppliers and modes of service supply of any other Member treatment no less favourable than that it accords to, same, like or competitive services, service suppliers and modes of service supply of any other country.

Article 3: National Treatment

During the application of provisional safeguards and once an ESM is applied:

(a) Members would have the right to suspend the level of national treatment granted above the GATS commitments to existing and future foreign suppliers, even those with ‘acquired rights’, till the exhaustion of the ESM, iff suspension of the same would improve the access and consumption of existing and future services.

(b) Members would have the right to temporarily suspend national treatment completely, to existing and future foreign suppliers, even those with ‘acquired rights’ involved in the provision of basic services, till the exhaustion of the ESM, iff suspension of the same would improve the access and consumption of existing and future basic services

Article 4: Transparency

(a) A Member, within two months after applying an emergency measure, would submit a report that would demonstrate its serious intention to reinstate suspended commitments at the earliest.

(b) Developed Member Country(ies), within one month after applying an emergency measure, would submit a report that would demonstrate its(their) serious intention, within a limited timeframe, to compensate Member(s) from developing and least developed group of countries, for the loss of the export market that would be experienced by developing and least developed Members due to application of emergency safeguard measure by the developed Member(s).

(c) Each Member shall promptly and at least annually inform the Committee on Emergency Safeguards in Trade in Services of the introduction of any new, or any changes to existing, laws, regulations or

administrative guidelines having relevance to the application of emergency safeguards vis-à-vis services included under GATS.

(d) Each Member shall respond promptly to all requests by any other Member for specific information on any of its measures of general application or international agreements relevant to application of emergency safeguards vis-à-vis services included under GATS. The enquiry points established by Members as per the requirement of paragraph 4 of Article III of GATS would also act as enquiry points that would provide specific information to other Members, upon request, on all such matters as well as those subject to the notification requirement in paragraph (d) above.

Article 4 *bis*: Disclosure of Confidential Information

Nothing in this Agreement shall require any Member to provide confidential information, the disclosure of which would impede law enforcement, or otherwise be contrary to the public interest, or which would prejudice legitimate commercial interest of particular suppliers of services, public or private.

Article 5: Domestic Competent Authorities in the context of ESMs

(a) Each Member shall maintain or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures which provide, at the request of an affected service supplier, for the prompt review of, and where justified, appropriate remedies for, administrative decisions relating to emergency safeguards in the area of services. Where such procedures are not independent of the agency entrusted with the administrative decision concerned, the Member shall ensure that the procedures in fact provide for an objective and impartial review.

(b) The provisions of paragraph (a) shall not be construed to require a Member to institute such tribunals or procedures where this should be inconsistent with its constitutional structure or the nature of its legal system.

Article 6: Payments and Transfers

Except under relevant "emergency(ies)" as defined in Article I (a) and under circumstances envisaged in Article XII of GATS, a Member shall not apply restrictions on international transfers and payments for current transactions relating to its specific commitments.

Part III – Specificities pertaining to an ESM

Article 7: Conditions of Application of an ESM

(a) ESM shall be applied to a service and/or service supplier of another Member, irrespective of the mode of service supply, only if the applying Member has determined, pursuant to the rules contained herein, that there is an emergency resulting from the increase in supply of such service, in absolute terms or relative to

domestic supply of such domestically supplied service, and under such conditions as to cause or threaten to cause serious injury to supply, access and consumption of like or directly competitive services being provided by domestic service providers.

(b) ESM shall be applied only to the extent and within a period of time necessary to prevent or remedy the serious injury or the threat thereof and to facilitate adjustment of the concerned domestic industry.

(c) ESMs shall be applied only where serious injury or a threat thereof has been determined pursuant to an investigation referred in Article 8

Article 8: Determination of serious injury or threat thereof

(a) The determination of injury or threat thereof shall be carried out pursuant to an investigation to be conducted by the competent authorities of the Member intending to apply an emergency safeguard, at the request of its domestic industry or direct consumers. A determination of the existence of the threat of serious injury shall be based on facts and not merely on allegations, conjecture or remote possibilities.

(b) During the investigation the competent authorities shall:

(i) examine all relevant indicators (mentioned in Annexure-1) and sources of information relating to the volume of supply of the service of another Member concerned, in order to demonstrate an increase in this supply; and

(ii) evaluate all possible relevant criteria of an objective, quantifiable nature having a bearing on the situation of the domestic industry and direct consumers concerned, in order to demonstrate the existence of a serious injury or threat of; and

(iii) demonstrate, that there is evidence of a causal link between increased supply of the service of another Member and serious injury or threat of. When factors other than increased supply of a service of another Member are causing serious injury to the domestic industry or the direct consumer at the same time, such injury shall not be attributed to increased supply of such service.

Article 9: Applicable Measures

It is understood that:

(a) Where serious injury or threat thereof has been determined pursuant to an investigation referred to in Article 8 above, the Member concerned may, with regard to a service of another Member, apply safeguard measures only to the extent necessary to prevent or remedy serious injury or threat thereof and to facilitate adjustment. The applicable measures shall respect Article 2 and Article 3 of this Agreement, apply to all modes of supply, and include any or a combination of the following:

(i) temporary suspension or modification of specific commitments undertaken pursuant to GATS Article XVI;

(ii) temporary suspension or modification of specific commitments undertaken pursuant to GATS Article XVII[84];

(iii) temporary suspension or modification of additional commitments undertaken under GATS Article XVIII[85].

Article 10: Compensation

It is understood that:

(a) A Member intending to apply the ESM shall enter into negotiations with a view to reaching agreement on any necessary compensatory adjustment. In such negotiations, the Members concerned shall endeavour to maintain substantially equivalent level of specific commitments to that existing under the GATS between it and the Members of which service suppliers would be affected by such a measure.

(b) If no agreement on compensatory adjustment is reached within two months, the Member of which service suppliers are affected shall be free to suspend the application to the Member applying the ESM of substantially equivalent level of specific commitments under the GATS, the suspension of which the Council for Trade in Services does not disapprove.

(c) The right of suspension referred to in Paragraph (b) of this Article shall not be exercised for the first three years that an ESM is in effect, provided that the ESM has been taken as a result of an absolute increase in supply of a service and that such ESM conforms to the rules contained in this paper.

Article 11: Duration[86]

It is understood that:

(a) A Member shall apply ESMs only for such period of time as may be necessary to prevent or remedy serious injury and to facilitate adjustment. The period shall not exceed 2 years, unless it is extended under Paragraph (b) of this Article.

(b) The period of application of an ESM may be extended only after a new investigation, made pursuant to a request by the domestic industry or direct consumers concerned, determine that the ESM continues to be necessary to prevent or remedy serious injury *and* that there is evidence, based on objective criteria, that the domestic industry concerned is adjusting. The total period of application of an ESM including the period of application of any provisional measure, the period of initial application and any extension thereof, shall not exceed five years.

[84] The issue of subsidies as ESM should be dealt with under this provision.
[85] The issue of special considerations for regulatory disciplines should be dealt with under this provision.
[86] This is based on Article 7 of the Agreement on Safeguards

(c) In order to facilitate adjustment in a situation where the expected duration of an ESM is over one year, the Member applying the measure shall progressively liberalize it at regular intervals during the period of application. If the duration of the measure exceeds three years, the Member applying such a measure shall review the situation not later than the mid-term of the measure and, if appropriate, withdraw it or increase the pace of liberalization. A measure extended shall not be more restrictive than it was at the end of the initial period, and should continue to be liberalized.

(d) No ESM shall be applied again to a service that has been subject to such a measure, for a period of time equal to that during which such measure had been previously applied, provided that the period of non-application is at least two years.

Article 12: Provisional Measures[87]

It is understood that:

A provisional ESM may be applied by a Member in critical circumstance where delay would cause damage, which would be difficult to repair, and pursuant to a preliminary determination of serious injury. This provisional measure shall be of a limited, non-renewable, period of application with the sole purpose of allowing the Member concerned to temporarily stabilize the situation pending the result of an investigation.

Article 13: Consultation,

It is understood that:

A Member intending to apply or extend an investigated ESM shall provide adequate opportunity for prior consultations with those Members of which service suppliers have a substantial interest in the matter, with a view to, *inter alia*, reviewing the information notified under Paragraph (b) of this Article, exchanging views on the measure and reaching an understanding on ways to achieve the objective set out in Paragraph (b) of Article 10.

(b) A Member shall immediately notify the Council for Trade in Services upon:

(i) initiating an investigation;

(ii) making a finding of serious injury or threat thereof;

(iii) taking a decision to apply a provisional ESM; and

(iv) taking a decision to apply or extend an ESM.

(c) A Member shall also immediately notify the results of consultations, reviews, as well as of compensation and proposed suspensions of commitments to the Council for Trade in Services.

[87] This is based on Article 6 of the Agreement on Safeguards

Article 14: Special and differential treatment[88]

It is understood that:

(a) ESMs, provisional or otherwise, shall not be applied against the supply of a service or a service supplier of a developing country Member if its share of the total supply of the service concerned in the territory of the Member intending to apply the measure does not exceed a certain proportion to be specified.

(b) A developing country Member shall have the right to extend the period of application of an ESM for a period of up to two years beyond the maximum period referred to in Paragraph (a) of Article 11 above. It shall also be exempt from obligations referred to in Paragraphs (a) and (b) of Article 10.

Article 15: Dispute Settlement

It is understood that:

The provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes shall apply to disputes arising under these rules.

Article 16: Review

It is understood that:

These rules shall be reviewed by the Members 10 years after its entry into force. The review shall be completed within one year or 364 days, whichever is the shortest, from the date of beginning the review.

Annexure-1 (applicable to domestic industry/natural and/or juridical persons)

The petition is required to include the following additional information, to the extent that such information is available with the governmental or other sources, or best estimates and basis therefore if such information is not available.

(a) Service Description

The name and description of the imported service concerned, specifying the UNCPC classification under which such service is classified and the mode of supply of the same thereof, and the name and description of the like or directly competitive domestic service/services concerned;

(b) Representativeness

(i) the names and addresses of the firms/natural and/or juridical persons represented in the petition and/or the firms/natural and/or juridical persons employing or previously employing the workers represented in the petition and the locations of their establishments from where domestic service is supplied;

[88] This is based on Article 9 of the Agreement on Safeguards

(ii) the percentage of domestic supply/consumption of the like or directly competitive services that such represented firms/ natural and/or juridical persons and/or workers account for and the basis for claiming that such firms/ natural and/or juridical persons and/or workers are representative of an industry; and the names and locations of all other producers of the domestic service known to the petitioner.

(c) Import Data

Import data for at least each of the most recent 5 full years which form the basis of the claim that the service concerned is being imported in increased quantities, either actual or relative to domestic supply.

(d) Domestic supply data

Data on total Indian supply of the domestic service for each full year for which data are provided pursuant to paragraph (c) above;

(e) Data showing injury

Quantitative data indicating the nature and extent of injury to the domestic industry concerned:

(i) with respect to serious injury, data indicating:

- A significant idling of supply in the industry, including data indicating closings of operations of firms/natural and/or juridical persons or the under-utilisation of supply capacity;
- The inability of a significant number of firms/natural and/or juridical persons to carry out domestic supply operations at a reasonable level of profit; and
- Significant unemployment or underemployment within the Industry; and / or

(ii) with respect to the threat of serious injury, data relating to:

- A decline in sales or market share, a higher and growing inventory (whether maintained by domestic suppliers, importers, wholesalers, or retailers), and a downward trend in production, profits, wages, productivity, or employment (or increasing underemployment);
- The extent to which firms in the industry are unable to generate adequate capital to finance the modernization of their domestic services supply mechanisms, or are unable to maintain existing level of expenditure for research and development;
- The extent to which the Indian market is the focal point for the diversion of exports of the service concerned by reason of restraints on exports of such article to, or in imports of such article into, third country markets; and

(iii) Changes in the level of prices, production and productivity.

(f) Cause of injury

An enumeration and description of the cause believed to be resulting in the injury, or threat thereof, described under paragraph (e) above, and a statement regarding the extent to which increased imports, either actual or relative to domestic supply, of the imported service are believed to be such a cause, supported by pertinent data;

(g) Relief sought and purpose thereof

A statement describing the import relief sought, including the type, amount and duration, and the specific purposes therefore, which may include facilitating the orderly transfer of resources to more productive pursuits, enhancing competitiveness, or other means of adjustment to new conditions of competition;

(h) Efforts to make positive adjustment

A statement on the efforts being taken, or planned to be taken, or both by firms/natural and/or juridical persons and workers in the industry to make a positive adjustment to import competition.

(i) Critical circumstances

If the petition alleges the existence of critical circumstances, a statement setting forth the basis for the belief that there is clear evidence that increased imports (either actual or relative to domestic production) of the service are a substantial cause of serious injury, or the threat thereof, to the domestic industry, and that delay in taking action would cause damage to that industry that would be difficult to repair and a statement concerning the provisional relief requested and the basis therefore.

Annexure-1 (for Consumers)

The petition is required to include the following additional information, to the extent that such information is available with the governmental or other sources, or best estimates and basis therefore if such information is not available.

(a) Service Description

The name and description of the imported service concerned, specifying the UNCPC classification under which such service is classified and the mode of supply of the same thereof, and the name and description of the like or directly competitive domestic service/services concerned;

(b) Consumers

(i) Details on consumers consuming the imported service (information on representation, location of consumers, income patterns, etc.)

(c) Import Data

Import data for at least each of the most recent 5 full years which form the basis of the claim that the service concerned is being imported in increased quantities, either actual or relative to domestic supply.

(d) Domestic supply data

Data on total Indian supply of the domestic service for each full year for which data are provided pursuant to paragraph (c) above;

(e) Data showing injury

Quantitative data indicating the nature and extent of injury to the consumers concerned:

(iv) with respect to serious injury/threat of serious injury, data indicating:

- the share of the firm in the supply of basic services for concerned consumers;
- the price charged by the firm for supplying services in comparison to prior prices and in comparison to prices of similar/like services supplied in like contexts

(f) Cause of injury

An enumeration and description of the cause believed to be resulting in the injury, or threat thereof, described under paragraph (e) above, and a statement regarding the extent to which increased imports, either actual or relative to domestic supply, of the imported service are believed to be such a cause, supported by pertinent data;

(g) Relief sought and purpose thereof

A statement describing the relief sought, including the type, amount and duration, and the specific purposes therefore, which may include facilitating the orderly transfer of resources to more productive pursuits, enhancing competitiveness, or other means of adjustment to new conditions of competition;

(h) Efforts to make positive adjustment

A statement on the efforts being taken, or planned to be taken, or both by firms/natural and/or juridical persons and workers in the industry to make a positive adjustment to import competition.

(i) Critical circumstances

If the petition alleges the existence of critical circumstances, a statement setting forth the basis for the belief that there is clear evidence that increased imports (either actual or relative to domestic production) of the service are a substantial cause of serious injury, or the threat thereof, to the domestic industry, and that delay in taking action would cause damage to that industry that would be difficult to repair and a statement concerning the provisional relief requested and the basis therefore.

What are the critical differences in our draft-ESM as compared to other proposals?

It would be critical to point out some the significant differences and commonalities of our proposed ESM in the context of the ones that have been discussed or already tabled:

(a) The draft ESM tries to balance the interests of the investors as well as public interest, which is the most important difference between the presentations made by Thailand and Republic of Korea. The Australian Model also tries to touch this issue.

(b) Hence, the draft ESM supplies the list of indicators in Annexure-1 that would be helpful while assessing whether ESM would have to be applied if domestic consumers are being affected due to emergencies.

(c) The draft ESM affirmatively answers the questions that the Thai and Australian models have been raising vis-à-vis most favoured nation status, national treatment (especially in the context of investors with acquired rights), special and differential treatment, definition of emergencies, like services, public interest *et al*.

(d) The draft-ESM does not address the concerns that have been raised in the Australian presentation with respect to Consultation Mechanism with the Council on Trade in Services before instituting an emergency safeguard. We thought that the Australian proposition was not of any use given that such a consultation process would hinge to the political power being enjoyed by a country in the Council for Trade in Services and would only end in mockery of concerns of Members, especially from the poor and developing world, desiring to apply the ESM.

(e) The draft-ESM addresses issues raised by various presentations with respect to modal application of an ESM. It explicitly mentions that once a decision has been arrived at with respect to applying an ESM, then the ESM would be applied to all modes of service provision irrespective of the sector under consideration.

(f) The history of negotiations at the GATT/WTO clearly echo the fact that drafts that are introduced in Committees or Working Groups get diluted over a period time and by the time we have an Agreement in place they hardly reflect any other interest except corporate interest, irrespective of the preambular articulations of the GATT (1994). Other consideration that is important in terms of contextualization is that future Ministerial Conferences might ring the bell of initiation of negotiations on an investment agreement. In such circumstances, it would be important to have a draft ESM that would provide necessary safety valves. It is in this context that we have presented a draft-ESM, which is guarded, as compared to other models presented till date.

What are the critical similarities of the draft ESM with respect to the others that have been presented?

(a) The major similarity, which has been retained, keeping in view the general mood of the WTO Membership is that the draft ESM has been based on the framework of Agreement on Safeguards applicable to goods.

(b) The other similarity that has been retained is, the approach towards formulating emergency safeguards, viz. having both a properly investigated emergency safeguard coupled with the facility of instituting a provisional safeguard to arrest the immediate reason of emergency.

Would this draft-ESM create an investment climate that would not support inflow of FDI in India?

Fundamentally, the ESM is supposed to be triggered only during emergencies and as shown in our draft-ESM, the triggering is not going to be an arbitrary process. More so the ESM can be also challenged before the dispute resolution system of the WTO.

Furthermore, the language on suspension on national treatment and most favoured nation status in the draft-ESM balances the rights and obligations of the investor, a philosophy that also guides the Indian presentation in the area of investment at the Working Group on Trade and Investment at the WTO[i].

The only thorny issue that could arise is: How are we going to resolve a conflict that might arise when we would reduce the national treatment from what has been granted due to autonomous liberalization to a GATS level or to zero during emergencies?

It is important to note that foreign investors in the area of goods, already have an experience of the consistency and legitimacy of the Indian legal system vis-à-vis application of safeguards in the area of goods and hence the issue of and consistency and legitimacy of legislative frameworks, institutions and their performance should not be a major issue when it comes to ESM in the area of services.

Not to forget, the Indian Government has a good track record of protecting rights of foreign investors with acquired rights. This was clearly exhibited when the Indian

Government took active steps to protect interests of the automakers like Ford, Hyundai, Daewoo and others with respect to imposing high tariff walls on second hand car imports, while it was gearing itself to embrace the tariff regime as a result of losing the case pertaining to phasing out of quantitative restrictions to the US. Hence the Indian Delegation and the Capital should not find it difficult to convince their foreign counterparts with respect to how the interests of their existing and future investors would be protected on the Indian soil.

Moreover, research by Nagesh Kumar (2002)[ii] across countries and over a time series shows that inflow of investment is independent of the FDI regime existing in countries.

Juxtaposing the discussions above with the facts that there exists a huge market for a number of services that are about to be opened up in the forthcoming GATS negotiations, and that investment negotiations are possibly on the anvil, it would be too pessimistic to expect the EU and the US taking serious opposition to our draft ESM.

What would be actually the major area of concern for investors?

According to us the major area of concern for the investor is going to be the multiplicity of regulations and legislations with respect to service sectors given that many of those being opened up come under the state or concurrent list.

Another interesting issue that would have to be urgently resolved is with respect to jurisdictions of the Centre and the State on critical issues such a judicial investigation pertaining to items on the Concurrent List of the Constitution. The following example is an indicator in this regard. In the month of January 2003, the Union Ministry of Power called upon the Maharashtra government to defer the ongoing proceedings/hearings of the Justice S. P. Kurdukar Commission into the Dabhol Power Company deal, "pending amendment to the notification on the formation of a Commission under the Commission of Inquiry Act". According to the Central Ministry, the Commission had no jurisdiction to look into the validity of the agreements, clearances and concurrences by the Centre in this issue. After seeking an opinion from the Attorney General, the Central Ministry observed that appointing a Commission was "beyond the power and competence" of the State Governments.

The Union Ministry pointed out that the Article 162 of the Constitution envisages that the executive power of the state government should be co-extensive with that of its legislative powers and the state has exclusive executive power with regard to the entries mentioned in List III of Seventh Schedule. It further pointed out that the state government cannot exercise any executive power regarding statutory clearances/orders given and passed by various agencies of the Centre such as Central Electricity Authority, Ministry of Environment and Forests and National Airports Authority.

The entry of international financial institutions like the World Bank and the Asian Development Bank (ADB) is adding a completely different dimension in the area of legislation and regulation. There are nine states (Andhra Pradesh, Kerala, Gujarat, Maharashtra, Madhya Pradesh, Chattisgarh, Uttar Pradesh, Sikkim, Assam) where international financial institutions have given or in the process of extending policy loans. One does not know the regulations and the kind of regulatory institutions that might evolve as a result of the interface between the State level political compulsions and the loan conditionalities imposed by the Bank.

Involvement of States and Local decisionmaking bodies and others in decisionmaking processes with respect to services, including those pertaining to ESM

This is going to be the most difficult task and it would be important that the Centre actually discusses this process of ESM and its nuances with State Governments and Local decisionmaking bodies in a language they would comprehend. This is critical especially given the fact that political circumstances and the Centre-State-Local political linkages are turning a new leaf in the past decade.

The Ministry could actually think of setting a Consultative Committee on Services consisting of State Nodal Points on Services and also involve active Panchayati Raj Institutions so that the process becomes more democratic and respects the constitutional principles.

The Members of the Trade Advisory Body consisting of Business and their representatives is already sufficient to guide the Ministry on its decisions vis-à-vis services from the perspective of the business. But the critical part that remains to be

touched and needs to be seen more carefully from the social point of view is how is the Ministry going to assimilate and reflect the viewpoint of those services sectors that according to the 55th NSS Sample survey are employment generators and are the social pillar of the services industry, viz. construction, restaurants and social and personal services. Hence interest groups representing the interest of the employers and employed need to be also contacted.

The Conjuncture…

The situation with respect to ESM negotiations can be best described as 'fluid'.

As Chairman Chan notes in his report to the Working Party on GATS Rules,

> "It is unclear to me how the current mode and pace of discussions would enable the negotiations to be finalized by the deadline of 15th March 2004…In particular, Members would need to consider what they intend to do during the remaining 12 months with a view to finalizing the negotiations…Ultimately, the key to enable discussion to move forward and to finalize the negotiations by the deadline of 15th March 2004 is political will from all Members."

The Decision of the General Council on negotiations vis-à-vis "relationship between trade and investment, interaction between trade and competition policy and transparency in government procurement", at the WTO in July 2004 notes that "the Council agrees that these issues, mentioned in the Doha Ministerial Declaration in paragraphs 20-22, 23-25 and 26 respectively, will not form part of the Work Programme set out in that Declaration and therefore no work towards negotiations on any of these issues will take place within the WTO during the Doha Round."

While this removes the threat of initiation of negotiations an investment agreement at the WTO for the next few years, it does not root out the possibility of initiation of negotiations on investment agreement, from the WTO system. Given this, we need to exploit the debates on ESM to extract positions that would suit our agenda on investment and government procurement.

In the meanwhile it will be critical for India to reach an *internal political decision* on an ESM that it might want to table at the Working Party discussions. In order to maintain

consistency between its agenda on investment and ESMs, the ESM-positions need to draw from the position that India would be taking on investment issues, especially on the issue of obligations that investors would have to respect in case of emergencies.
