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THE IMPACT OF THE GENERAL AGREEMENT ON TRADE IN SERVICES ON JAMAICA

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**A thesis submitted to the Faculty of Graduate Studies and Research in partial
fulfillment of the requirements of the degree of
Master of Laws (LL.M.)**

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ABSTRACT

This paper examines the impact of the General Agreement on Trade in Services (GATS), an agreement under the World Trade Organization (WTO) on Jamaica. In its analysis, it considers both the island's existing and former foreign trade policy, as well as the progressive trade liberalization being undertaken within the Caribbean Single Market and Economy under CARICOM and its regionally devised policy initiatives.

Having followed a fairly liberal path in its trade relations since 1991, the provisions in domestic law which accommodate or hinder liberalization are referred to. Negotiation strategies for future rounds of the GATS are another important aspect of the thesis. This closely follows the schedule of commitments made under the GATS, taking into account recent instances of autonomous liberalization, including those taken in the telecommunications industry. Finally, a critical look is taken at the dispute resolution process of the WTO to determine the extent to which the trading interests of a developing microstate such as Jamaica are protected by this system.

RÉSUMÉ

Ce document examine l'impact de L'ACCORD GENERAL SUR L'ÉCHANGE DES SERVICES (GATS). Un accord signé sous la direction de L'ORGANISATION MONDIALE DU COMMERCE concernant la Jamaïque. Dans son analyse, ce document examine la présente et l'ancienne politique commerciale extérieure de l'île aussi bien que la libéralisation progressive des échanges au niveau du MARCHÉ UNIQUE CARIBÉ EN et son ÉCONOMIE sous la direction de CARICOM et ses initiatives de politique conçues pour la région.

Après avoir emprunté une voie assez libérale au niveau de ses relations commerciales depuis 1991, les dispositions dans la loi interne qui adaptent ou gênent à la libéralisation sont mentionnées. Des stratégies de négociations pour de futures discussions sur L'ACCORD GÉNÉRAL SUR L'ÉCHANGE DES SERVICES(GATS) sont un autre aspect important de l'accord. Ceci suit de près le programme des engagements faits sous le GATS, tenant compte des exemples récents de libéralisation autonome dans les télécommunications. En fin de compte, un oeil critique est jeté sur le processus de résolution de conflits de L'ORGANISATION MONDALE DU COMMERCE (OMC) pour déterminer à quel point les intérêts commerciaux d'un micro État en voie de développement tel que la Jamaïque sont protégés par le système.

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INTRODUCTION

In the face of the World Trade Organization, Jamaica, an island nation, is seeking to find its place in the liberalized global trading arena. The matter has sparked great debate locally, with views varying from pursuing further protectionism of the agricultural sector, to the creation of niche industries, to moving away from agriculture and placing the emphasis on the services industry.

The establishment of the World Trade Organization (WTO) and its agreements, the General Agreement on Tariffs and Trade (GATT), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the Agreement on Trade-Related Investment Measures (TRIMS) and the General Agreement of Trade in Services (GATS) have led to a turning point in Jamaica's trade history, trade having always been an integral part of her economic life. Since the arrival of the Spanish in 1494, through colonization by the English, and in post-Independence times, the economic well being of Jamaica has been highly dependent on her trade with large, developed countries. After Independence in 1962, the favour of these nations has been manifested in the form of preferential arrangements such as the LOME and Caribbean Basin Initiative (CBI) arrangements, and several smaller bilateral arrangements which all have the common thread of never quite demanding from Jamaica as much as they offer her.

The effect of these arrangements has not all been good. It appears that despite the economic benefits received through these arrangements, they have engendered a sense of

complacency within the state, and the prolongation of inefficient production. This comes from the knowledge of having secure markets. The result is that innovation, diversification and ultimately, the full development of the economy has been seriously hindered.

Under the WTO, markets will no longer be secure. Goods and services will compete for market share free of legal restrictions whether they are tariffs, subsidies, or unfair licensing requirements. This thesis stems from the belief that the services industry is the sector in which Jamaica can make the strongest economic gains if its development and liberalization are planned and executed in an informed manner, taking a holistic view of the global economy.

The WTO has already made its impact on the goods trade, and pressure has been put on the state by the United States with regards to the intellectual property trade. Despite the WTO being in place since 1995, the manifestation of its power as revealed in the *EC-Regime for the Importation of Bananas* case, still caught the local banana sector unawares and indeed, unprepared. The impact of that decision extended far beyond the banana industry, in that it brought the WTO out of the rather distant and amorphous realm of international trade, and into the lives and livelihoods of local farmers, and other local producers who realized that there were no sacred cows under the WTO. The growing recognition that the state needs to become *proactive* and less *reactive* in its trade policy is one of the bases of this thesis.

The paper identifies certain negotiating strategies, and areas of the trade, which should be emphasized as negotiations progress. It also examines the producer services trade and pays particular attention to the importance of liberalizing these sectors.

The assumptions made in the writing of this thesis were:

1. That Jamaica will continue its participation in the WTO
2. That the WTO will continue its program of progressive liberalization

There were also some constraints namely:

1. The insufficient statistical data on the trade in services, particularly in supply modes 1 and 2
2. That the number of scheduled commitments are low, limiting the analysis of the impact of the GATS
3. The organizational work in the sector is minimal, thereby information was difficult to obtain or non-existent.

The paper does not deal with the issues of air transport and government procurement although these are important to Jamaica. This is due to the failure of the members of the WTO to agree that these industries should be scheduled and commitments made. As they are still not a part of the GATS, it would be improper to include them in any assessment of that agreement's impact except insofar as they remain outside its parameters and their fate will remain a matter of domestic foreign trade policy.

The paper is predicated on the idea that to understand or appreciate the impact of the GATS, the process must be followed from the genesis and theoretical basis of the WTO (thereby the GATS), through the changes in government policy, to negotiating strategies, through the negotiations process, to the implementation of the GATS in domestic law and

the efficiency of mechanisms put in place for monitoring and enforcing the system. This paper also accepts that political considerations and alliances, both domestically and internationally, play a large part in the formation of policy and the outcome of negotiations, and that despite the best intentions of the WTO system, it must operate in a context where the national interests of states will always supercede the larger global interests, and where these conflict, national interests will trump the global interests.

As the WTO system matures, it has become evident that strength comes from economic power. The recent events in Cancun, Mexico showed that developing countries can have impact on the negotiating process where they are *ad idem* on the issues. Unfortunately, the diversity of this group does not lend itself to a consistently singular position with regards to the liberalization process. There is much more cohesiveness of purpose within the developed country grouping, which in many instances has been an insurmountable obstacle to Jamaica and the developing world in negotiations, the negotiations on the movement of natural persons being the most obvious and controversial.

It is hoped that the work here assists in identifying a clear path for the liberalization of the services trade to follow. It is further hoped that it shows the efficacy of autonomous liberalization in certain instances, and the sectors for which market access should be negotiated.

CHAPTER 1

The Free Trade Fallacy

By exploiting the law of comparative advantage, liberal trade policies permit the unrestricted flow of the best goods and services at the lowest prices, thereby increasing total world wealth.¹

The tenor of this statement is positive; the meaning clear: trade liberalization is a good path to follow. Not only it is good, but that it is, in fact, an efficacious system for those who wish to achieve economic prosperity. While the statement does not go so far in its explanation of the free trade theory which it describes, the theory does presume that increases in total world wealth indicate increases in individual levels of wealth as well, which time has proven to be untrue².

Statistical data on living conditions indicate that in 1995 the wealthiest 10% of the world population had a mean per capita annual consumption expenditure which was ten times greater than that of the poorest 10% (\$102,091 versus \$10,294). On the positive side, World Bank statistics show that the percentage of the population living in poverty fell from 27.5% in 1995 to 18.7% in 2000³. Nevertheless, the problem of inequality in

¹R. Bhala and K. Kennedy, *World Trade Law* (Charlottesville:Lexis, 1998) 4

²Between 1950 and 1994 the value of world output increased by a factor of five and world trade grew at a rate of 1.6 times faster than world production, while the ratio of the income of the top 20% to that of the poorest 20% rose from 30-1 in 1960 to 84-1 in 1995. See R. Bernal, "The Caribbean in the International System: Outlook for the First Twenty Years of the Twenty-first Century", in K. Hall and D. Benn, eds. *Contending With Destiny: The Caribbean in the 21st Century* (Kingston: Ian Randle Publishers, 2000) [hereinafter *Contending With Destiny*]

³ found at <<http://worldbank.org/data>>

income distribution is still evident, as 46% of income or consumption is attributed to only 20% of the population.⁴

As occurs at the national level, increasingly larger gaps between the rich and poor are endemic to laissez faire economies. Rawls, in his Theory of Justice, posits, “justifying an institution on the grounds that the hardships of some are offset by a greater good in the aggregate ...may be expedient but it is not just that some should have less in order that others may prosper.”⁵ The inequity attributed to free trade by many developing countries has led them to try and find ways and means to circumvent the system rather than embrace it.

When the World Trade Organization (WTO) emerged in 1995 following the eight year Uruguay Round of Negotiations of the General Agreement on Tariffs and Trade (GATT), it replaced the GATT’s contractual system which it sought to legitimize through institutionalization. There were also some marked changes in the areas of decision-making and dispute resolution⁶, and the addition of substantive areas to its purview. Nine years later, the question to be asked is whether this legitimacy has been attained; is the World Trade Organization a lawful, neutral, evenhanded arbiter of the global trading system of which it has been given charge, or has it indeed taken from developing countries so that developed countries may prosper?

⁴ found at <<http://worlbank.org/poverty/data>>

⁵Quoted in M.D.A. Freeman, ed. *Lloyd’s Introduction to Jurisprudence* (London: Sweet & Maxwell, 1994) 466

⁶See Chapter 4 for more on dispute resolution in the WTO

The main tenet of free trade theory is the liberalization of trade between states, meaning a removal of trade barriers, both tariff and non-tariff. The accompanying theory of comparative advantage supposes that once an environment devoid of trade barriers is in place, the most efficient producers in all areas will emerge allowing for the production of lower priced and higher quality goods and services. According to the WTO Secretariat

Open markets are expected to encourage quality improvement and product and process innovation; reduce the scope for wasteful resource use and rent-seeking; constrain the power of individual economic operators; and ensure users continued product availability at reasonable conditions.⁷

It is also assumed by the theory of comparative advantage, that each state will produce that which it has an advantage in producing over other states, this advantage could be capital, labour, climate, geography, land or any combination of these which makes it a more efficient producer of a particular good or service. Theoretically, this would allow states to focus on producing that which they are best able to, and through trade, secure that which is cheaper to import than to produce, thus allowing these freed resources to be allocated to the most profitable production. This theory like most economic theories, is applicable only to idealized scenarios, none of which exist in the global trading arena.

The free trade theory has, by and large, been embraced by developed countries and for most of their history, rejected by developing countries and with good reason.⁸ The very division of countries into categories of developed, developing and least developed, is a telling indicator of how important levels of development are to economic prosperity, and

⁷ excerpted from "The Developmental Impact of Trade Liberalization under GATS" an Informal Note by the Secretariat of the WTO

⁸ The exception to this statement would be that group of countries referred to as the Asian Tigers which have benefited considerably from opening their economies.

it is these disparate levels of development existing among states which make the theory of comparative advantage, and hence free trade theory, fallacies when an attempt is made to apply them in a blanket fashion to the multilateral trading system.

While the WTO can boast a membership of 146 of which 82% comprises developing and transition economies⁹ which have agreed to follow the path of trade liberalization, it is still clear that free trade theory has been accepted with many reservations by many developing countries whose economies still rely heavily on protectionist policies and preferential arrangements.

Jamaica: A Look at the Economy

Traditionally, the Jamaican economy has been based on agricultural products, namely sugar, bananas, coffee and cocoa, and on the production of bauxite and alumina. As a micro-state with a population of 2.5 million, it has been difficult in recent times to be competitive in traditional agricultural production as economies of scale favour larger producers which have lower unit production costs.

The services sector is the fastest growing sector of the economy, accounting for 55% of GDP and employing up to 60% of the population¹⁰. Tourism is the largest earner, its revenues being equal to total revenue from the merchandise sector. As Table 1 shows, as the volume of services exports grow, the goods sector has been earning diminished revenues.

⁹ International Trade Centre UNCTAD/WTO, *Business Guide to the General Agreement on Trade in Services* (Geneva: Commonwealth Secretariat, 2000) 85 [hereinafter *Business Guide*]

JAMAICA: BALANCE OF PAYMENTS: 1997- 2002 (US\$M)

BALANCE OF PAYMENTS	1997	1998	1999	2000	2001	2002
IMPORTS	2832.6	2743.9	2685.6	3004.3	3031.6	2320.7
EXPORTS	1700.3	1613.4	1499.1	1562.8	1451.6	981.2
SERVICES	308.0	261.0	565.0	583.6	543.5	230
Balance on GOODS AND SERVICES	-824.5	-869.5	-621.5	-857.9	-1036.5	-1099.4

Table 1¹¹

Table 2¹²

SERVICES ACCOUNT (US\$M)

	1997	1998	1999	2000	2001
SERVICES (Net)	467.2	476.8	655.4	583.6	381.5
Inflows	1,698.9	1,770.4	1,978.4	2,025.7	1,900.9
Outflows	1,231.7	1,293.6	1,323.0	1,442.1	1,519.2
TRANSPORTATION	-273.4	-278.4	-233.6	-258.5	-258.2
Inflows	254.1	276.0	300.3	323.6	350.5
Outflows	527.5	554.4	533.9	582.1	608.7
TRAVEL	949.5	998.9	1,052.4	1,123.9	1,026.2
Inflows	1,130.8	1,196.9	1,279.6	1,332.6	1,232.2
Outflows	181.3	198.0	227.2	208.7	206.0
OTHER SERVICES	-208.9	-243.7	-163.4	-283.7	-388.5
Inflows	314.0	297.5	398.6	364.3	318.0
Construction services	0.0	1.0	---	0.0	0.0
Communication services	212.3	184.5	---	208.4	168.4
Insurance services	6.0	5.9	---	12.1	11.9
Financial services	8.6	9.2	---	12.9	15.8
Computer & Information services	33.0	37.0	---	40.4	36.6
Royalties & License fees	7.0	6.6	---	6.4	5.9
Other Business services	11.4	18.2	---	36.4	40.7
Personal Cultural & Recreational	8.6	9.6	---	9.6	9.0
Government services	27.1	27.5	---	27.5	29.7
Outflows	522.9	541.2	561.9	648.2	706.6
Construction services	5.0	6.0	7.5	10.2	10.0
Communication services	42.5	40.0	42.4	51.4	55.4
Insurance services	76.5	71.7	56.2	67.2	94.1
Financial services	2.9	3.2	3.5	16.4	29.7
Computer & Information services	4.0	5.0	5.0	7.1	13.8
Royalties & License fees	27.6	30.0	40.5	41.0	38.3
Other Business services	325.8	346.3	365.6	396.8	427.2
Personal Cultural & Recreational	3.0	3.8	3.7	4.1	4.0
Government services	35.6	35.4	36.6	32.0	34.0

⁹ International Trade Centre UNCTAD/WTO, *Business Guide to the General Agreement on Trade in Services* (Geneva: Commonwealth Secretariat, 2000) 85 [hereinafter *Business Guide*]

¹⁰ World Trade Organization, *Trade Policy Review – Jamaica 1998*, at <<http://www.wto.org>>

¹¹ found at <<http://www.pioj.gov.jm/statistics/statistics.bopt.stm>>

¹² found at <<http://boj.org.jm>>

services infrastructure in the areas of telecommunications, financial services and transport in order to facilitate the growth of all domestic industries, and for the survival of traditional sectors, as they all are dependent on these factors for efficient production. Table 2 gives some indication that Jamaica has a positive balance in the services trade, although the surplus has fallen in the last two years of the period. These figures are of course limited to those services and modes for which data is available.

Jamaica under the GATS

Jamaica has made more commitments under the GATS than any other Caribbean country. Eleven sub-sectors under the following sectors have been scheduled: Business, Communications, Education, Finance, Health, Tourism, Recreation/Culture/Sports and Transport¹³. In these sectors there are no limitations on trade with the exception of mode 3 restrictions (commercial presence) which may be comprised of certain licensing requirements. This will be further explored in Chapter 3.

Jamaica's economic policy is very liberal as a result of structural adjustment measures imposed by the IMF in the 1970s and 1980s. Prior to this, it had a mixed economy guided both by state action and the functioning of the market, under which international economic law prescribed rules for inter-state cooperation taking into account state inequalities in order to foster development.¹⁴ The ideological incompatibility of this system with the laissez faire type economy that was followed by Jamaica's closest

¹² found at <<http://boj.org.jm>>

¹³ See, WTO services database found at <<http://www.wto.org>>

inequalities in order to foster development.¹⁴ The ideological incompatibility of this system with the laissez faire type economy that was followed by Jamaica's closest trading partners is the reason which many cite for the failure of the mixed economy. Now, most sectors, even those which have not been scheduled are fairly open. For this reason one of the most important features of the GATS for Jamaica is contained in paragraph 5 of the Preamble which states:

Desiring to facilitate 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. [Emphasis added]

This desire is reflected in Article IV which promotes the increasing participation of developing countries through

- a) the strengthening of their domestic services capacity and its efficiency and competitiveness, inter alia through access to technology on a commercial basis;
- b) the improvement of their access to distribution channels and information networks; and
- c) the liberalization of market access in sectors and modes of supply of export interest to them.

Under paragraph 2, developed countries are required to establish contact points to assist developing countries with:

- a) commercial and technical aspects of the supply of services
- b) registration, recognition and obtaining of professional qualifications; and
- c) the availability of services technology

Further, paragraph 6(c) in the Annex on Telecommunications states that

members recognize that an efficient, advanced telecommunications infrastructure in countries, particularly developing countries, is essential to the expansion of their trade in services...

¹⁴H.E.C. Lafer "The Role of the WTO in International Trade Regulation" in P. Rutledge, I. Macvay & C. George, eds., *The WTO and International Trade Regulation* (London: Cameron May, 1998) 34 [hereinafter "The Role of the WTO"]

Having efficient producer services is important for economic development as they can potentially improve the efficiency of all sectors of the economy. Conversely, inefficiency in these sectors can be “critical development bottlenecks”¹⁵. Producer services include telecommunications, transportation, financial and professional services.

In a highly politicized environment like Jamaica, the government may be unwilling to legislate allowing for the introduction of foreign competition in these sectors due to public opposition. Despite the potential benefit to the economy as a whole (by increasing efficiency and thus lowering production costs), the effect on the domestic providers in these sectors may be adverse in that they may not be able to maintain viability in the face of foreign competition. The GATS provides the means by which the government can make necessary but unpopular decisions by shifting responsibility to the WTO.

The other side of the coin of course, is that the government may find themselves eventually forced by their WTO commitments to take actions in sectors, which for non-economic reasons they would rather not have. This brings to mind issues of sovereignty which are a concern to smaller states which oftentimes have a lack of choice in real terms in the context of international agreements. This means that they may not have as high a degree of participation in establishing and creating these agreements as larger more powerful states. As a counterbalance to these concerns, Article XIV of the GATS allows general exceptions for measures to be taken in the public interest or to protect life.

It is indeed easy to lose sight of non-economic goals in the midst of an all-out race towards free trade readiness; Felipe Noguera looking at the 21st century notes that

if civilization and development are the goals of the next generation, then both fostering and balancing scientific and technological progress on the one hand, and indigenous cultural preservation and promotion on the other, must be the focus of our attention.¹⁵

Jamaica's capacity for efficient production is constrained by several factors: small size, small population, small markets and limited range of resources, which together result in high production costs. Recognition of this, *inter alia*, led four Caribbean states¹⁷ to sign the Treaty of Chaguaramas in 1973 establishing the Caribbean Community (CARICOM) regional trade arrangement (RTA)¹⁸. The arrangement now has a membership of fourteen, all are English speaking with the exception of Suriname which is primarily Dutch speaking.

The advent of the WTO and NAFTA has revitalized the flagging CARICOM as the twin realities of a liberalized global economy and loss of preferential market access loom on the horizon (in some cases it has already arrived). Due to the proliferation of RTA's, and their dynamism in the developed world, there is no likelihood that their existence would have been precluded by the GATS, which mandated the inclusion of Articles V and V *bis*. While Article V looks suspiciously like an accommodation for the European Union,

¹⁵UNCTAD and The World Bank, *Liberalizing International Transactions in Services: A Handbook* (New York and Geneva: United Nations, 1994) 8 [hereinafter *Liberalizing International Transactions*]

¹⁶F. Noguera, "Economic Policy Options of the Caribbean in the Twenty-first Century: Priority Challenges" in *Contending With Destiny* 114

¹⁷Founding members were Jamaica, Barbados, Guyana and Trinidad and Tobago

¹⁸ The text of the treaty can be found at <<http://www.caricom.org>> or <<http://www.sice.oas.org/trade>>

it serves Jamaica's purposes, *vis a vis* CARICOM, well. Regional integration within the Caribbean is an important avenue for

- a) building markets through small scale liberalization,
- b) negotiating international and bilateral agreements at the regional level which is a stronger position than negotiating from the national level,
- c) strengthening the smaller economies through technical and technological assistance,
- d) facilitating freedom of labour and capital within the region which is an important move towards attracting foreign direct investment (FDI), by offering larger, more accessible markets
- e) reducing competition among these states by fostering a spirit of cooperation and encouraging specialization.

While there is some trepidation concerning the effect on the domestic industry in both goods and services once the markets are completely opened, intra-regional trade is seen as a means of preparation for this.

Jamaica's new trade policy introduced in Parliament in October 2001¹⁹, stresses the importance of regional cooperation in formulating a regional trade policy. According to the then Minister of Foreign Trade, Anthony Hylton, "Jamaica will no longer focus on preserving the preferential trading arrangements from which it has benefited for decades"²⁰. This also appears to be the new dynamic of CARICOM, which is developing a negotiating strategy for the GATS, although in practice, several preferential agreements

¹⁹ L. Simpson, "Preferential Trading Arrangements to Go – Hylton", Nov. 1, 2001, The Gleaner, A11 [hereinafter "Preferential Trading Arrangements to Go"]

are still being pursued. The region signed the Cotonou Agreement in 2001 which extends the preferences of Lome IV to 2009.

The General Agreement on Trade in Services (GATS)

The GATS stands on three pillars, Most Favoured Nation treatment, National Treatment and Transparency. It is a framework agreement, which gives the appearance of being “long on rules and short on liberalization”²¹ because substantively, it requires very little from the Members in terms of specific commitments to liberalization. The agreement is divided into six parts and has seven annexes dealing with particular service sectors. While the agreement fails to define the word “service”²², it does give definition to the term “trade in services”. This is a critically important inclusion as it gives shape to what was previously regarded as an intangible area. Article I of the agreement defines the trade in services as:

The supply of services

- (a) from the territory of one member into the territory of any other member;
- (b) in the territory of one member to the service consumer of any other member;
- (c) by a service supplier of one member, through commercial presence in the territory of any other member;
- (d) by the service supplier of one member through the presence of natural persons of a member in the territory of any other member,

In short form, they are referred to cross-border, consumption abroad, commercial presence and the movement of natural persons modes of supply, modes 1 through 4 respectively.

²⁰ *Ibid.*

²¹ J. Schott quoted in R. C. Grey, *The Services Agenda: Essays in International Economics* (Halifax: The Institute for Research on Public Policy, 1990) 141

The GATS operates as a very tentative agreement which gives countries the opportunity to 'test the waters' before jumping in. There is nothing inherently wrong in this, but it must be remembered that the agreement is aimed at the progressive liberalization of services and as such countries are required to make more and more commitments as time goes by. Under Article XX:

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

- a) terms, limitations and conditions on market access;
- b) conditions and qualifications on national treatment;
- c) undertakings relating to additional commitments;
- d) where appropriate the time-frame for implementation of such commitments; and
- e) the date of entry into force of such commitments.

Article XIX

1. In pursuance of the objectives of this Agreement, Members shall enter into successive rounds of negotiations, beginning not later than five years from the date of entry into force of the WTO Agreement and periodically thereafter, with a view to achieving a progressively higher level of liberalization. Such negotiations shall be directed to the reduction or elimination of the adverse effects on trade in services of measures as a means of providing effective market access. This process shall take place with a view to promoting the interests of all participants on a mutually advantageous basis and to securing an overall balance of rights and obligations.

2. The process of liberalization shall take place with due respect for national policy objectives and the level of development of individual Members, both overall and in individual sectors. There shall be appropriate flexibility for individual developing country Members for opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access in line with their development situation and, when making access to their markets available to foreign service suppliers, attaching to such access conditions aimed at achieving the objectives referred to in Article IV.

²²It simply states that it covers all commercially traded services in any services sector except those supplied in the exercise of governmental authority. See *Business Guide* at 17

The positive list approach that the GATS takes to scheduling commitments gives countries a lot of flexibility in deciding which sectors they wish to make commitments in.

Most Favoured Nation Treatment (MFN)

Article II

(1)...each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.

Under the GATS, MFN is applicable to all sectors of the services trade except where exemptions have been taken under Article II:2, Annex on Art II exemptions (MFN exemptions). Exemptions are granted for a maximum of ten years²³ and are to be reviewed by the WTO periodically, the first prescribed review period should have been five years after the agreement came into force,²⁴ but is yet to take place as there is a lack of statistical data on the services trade.

The MFN principle is the antithesis of protectionism and preferential trade agreements, both of which characterise the Jamaican economy. Protectionism in the Jamaican context is a holdover from colonialism²⁵, and its most notorious manifestation is in the Lome Conventions I through IV, the first of which was signed in 1975²⁶. This agreement has provided preferential market access for bananas originating in the African, Caribbean and

²³ Annex on Article II Exemptions, para. 6

²⁴ *Ibid.*, para. 3

²⁵ Jamaica is a former British colony having gained independence in 1962

²⁶ Lome II was signed in 1980, Lome III in 1985 and Lome IV in 1989. The rationale behind Lome, was not to protect former colonial exports indefinitely, but, rather was a recognition of the developmental problems faced by the then new economies and the sense of duty it was felt Britain owed to her former colonies to allow them the opportunity to become efficient without the pressure of having to compete with more efficient producers. Suffice it to say, 2001 and the EC-Bananas case has revealed an instance of opportunity wasted for Jamaica as it has failed to use the time to adjust, but has rather used it as a crutch for inefficient production.

Pacific Group (ACP). The decision in the *EC-Regime for the Importation of Bananas II*²⁷ case held the arrangement to be inconsistent with the MFN clause in the GATT and mandated that the preferential import regime be adjusted to adhere thereto.

CARICOM, though in the process of refocusing as mentioned above, is still in the process of negotiating preferential arrangements and non reciprocal agreements. Among these are the Caribbean Basin Trade Partnership Act (CBTPA)²⁸, and non- or limited reciprocity agreements with Venezuela, Canada and Colombia²⁹. The arrangements are sought as a means of reducing the imbalances between the small size of the CARICOM nations, (the largest of which is Jamaica with a population of 2.5 million), and its larger more developed North American and South American neighbours which offer large markets not available within the RTA. The recent creation of the Caribbean Regional Negotiating Machinery (CRNM) has already produced significant work in the area of developing negotiating strategies. The CRNM will be discussed in detail in Chapter 2.

The arrangements mentioned above are indicative of an economic culture of dependency. In order for Jamaica to prepare for the challenges of competing in a liberalized situation under a fulfilled GATS regime, foreign relations will have to move away from the policies of market protection through preferential arrangements followed hitherto. A

²⁷ *EC- Regime for the Importation of Bananas Case II*, (1997) World Trade Organization, Appellate Body, WT/DS27/AB/R, Sept. 9, 1997. This case will be discussed in more detail in Chapter 4

²⁸ This Act extends the preferential access to the U.S. market that Caribbean Basin produced apparel under the Caribbean Basin Initiative (CBI), under NAFTA through a parity arrangement.

²⁹ With regard to Venezuela and Colombia, there are agreements signed through CARICOM aimed at the reduction and elimination of certain tariffs. See P. Esquivel, "Beyond NAFTA: The Caribbean" (1995) 1 NAFTA: L. & Bus. Rev. Am. 137 at 40, with regard to Canada, the CARIBCAN agreement is in place.

major challenge here is not to have the services trade fall prey to the same sort of complacency which has characterized the trade in agriculture³⁰ for many years.

The opportunity is therefore offered for Jamaica to postpone liberalization of sensitive sectors while it seeks to implement measures geared towards making domestic industries more competitive. The danger with the GATS is that the loose framework and flexibility with regards to making commitments may cause many to ignore the fact that there is a time constraint. There may be thought that the time for compliance can be indefinitely extended by pleading hardship under the various mechanisms offered by the GATS.³¹

Transparency

GATS, Article III:1

Each Member shall publish promptly ... all relevant measures of general application which pertain to or affect the operation of this Agreement. International agreements pertaining to or affecting trade in services to which a Member is a signatory shall also be published

This is the most readily achievable goal of the GATS. Transparency will work to the benefit of all members in facilitating an efficient trading system by engendering predictability and providing information on domestic regulatory environments. It will also aid the Council of Trade in Services (CTS) in its mandated assessments of the system.

Through rules of transparency, the WTO aims precisely at restraining the unilateralism of discretionary Hobbesian power politics in international economic matters... There is conflict but there is also cooperation, based

³⁰There are certain niche products which do not fall into this categorization such as coffee and exotic produce.

³¹ See in particular GATS Articles II:2, IV:3, X, XII, XIV and XIX.

on a comprehensive process which stems from the rationality and functionality of the reciprocity of interests [which] can only be perceived and judged adequately if public disclosure makes them visible³²

This clause ensures not only that potential service traders are made aware of all relevant laws, regulations and requirements, but allows for easy determination of whether a state is presenting a facade of a liberalized economy while employing the use of hidden barriers to trade such as licensing requirements pegged to residency, or use of unfair standards or other requirements.

Jamaica is perhaps a step ahead of many developing countries in that it has already committed to transparency within the framework of CARICOM under the auspices of the CARICOM Single Market and Economy (CSME). A treaty for the Harmonization of Fiscal Incentives has been signed, and the proposed Harmonized Corporate Taxation Legislation is under review by Member states.

National Treatment

National treatment is provided for by Article XVII. Under the GATS, by virtue of Article II exemptions, a state can determine who is allowed to enter its borders and provide services, however, once they enter the market, they must be treated in the same manner as every other services provider there, this is a right protected and assured by the transparency clause³³. Any domestic regulations, standards or licensing requirements which are unfair barriers to trade must be removed.

³² "The Role of the WTO" at 38

³³ Subject to Article V exceptions

The problem there is that although the GATT contains express accommodations for special and differential treatment for developing countries, the GATS does not. A state therefore may be more reluctant to open its borders where there is a fledgling or weak domestic industry which it wishes to protect. The only way to do this is to refrain from scheduling commitments in the particular sector which may hinder the liberalization process. In this way a state may limit the industries in which it accords national treatment.

Market Access

Article XVI sets out limitations and specifications of market access. The market access limitations allowed are: the number of service suppliers allowed, total value of services transactions or assets allowed, total quantity of service output allowed, number of persons employed, specific type of legal entities allowed and percentage of foreign ownership.

Developing Countries under the GATS

The architecture of the WTO and its various agreements, such as the GATS, repeats throughout the texts the importance of keeping the needs of developing countries in mind while proceeding with the progressive liberalization it advocates. The *second* paragraph of the Preamble to the GATS states:

Wishing to establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting the economic growth of all trading partners and the development of developing countries. [emphasis added]

Additionally Articles IV and V also speak to the way developing countries are to be regarded during negotiations. These will be discussed in further detail below. The GATS, as mentioned earlier, is potentially a very powerful agreement in terms of the impact it could have on smaller economies. Martin Khor observed that a small state “may have a marginal role in world trade, but world trade has a major effect on it, perhaps a far larger effect than it has on some of the developed economies”³⁴. Shifts in the trading environment can reverberate through the Jamaican economy due to its openness and high level of trade dependency.

Developed economies are less susceptible to ill effects of this agreement as they are responsible for almost three-quarters of the world’s services trade³⁵, making any impact from developing countries with their relatively small share of the business, easily absorbed.

On the other hand, Jamaica being a heavily services based economy could be dramatically affected by the GATS, for better or for worse depending on how commitments are negotiated and how the agreement is implemented. Liberalization means open markets, which means domestic industries will be competing with transnational corporations and other strong well-developed producers.

³⁴ M. Khor , South Summit, April 10-14, 2000, held in Havana, Cuba, UNCTAD/OSG/DP/147 at 3

³⁵ WTO CTS, Spec. Sess, Communication from Argentina, Assessment of Trade in Services: the Participation of Developing Countries S/CSS/W/44 (2001)

Services Negotiations in the WTO

“[I]t is obvious that each country ...attempts to negotiate the best deal for itself” states scholar Fred Lazar, “[t]hus to claim that a country approaches such negotiations from a selfish perspective is to claim the obvious.”³⁶ Consequently, Deepak Nayyar’s observation that the 1988 proposal made by the U.S. Trade Representative (USTR) concentrated on the capital-related services in which it had an “overwhelming” comparative advantage, and ignored labour-related services which would be of interest to developing countries³⁷ is unsurprising and even understandable. What is somewhat disconcerting is the fact that the text as well as the substantive commitments of the GATS produced after years of negotiations on the services trade were more reflective of the original U.S. proposal than anything else, despite the hindrances it generated for developing economies,³⁸ this, even while it states in Article IV:1(c) that the liberalization of market access in sectors and modes of supply of export interest to developing countries should be facilitated through negotiated specific commitments.

³⁶F. Lazar, “Services and the GATT: US Motives and a Blueprint for Negotiations” (1990) 24 n.1 J. World T. 135 at 137

³⁷D. Nayyar, “Some Reflections of the Uruguay Round and Trade in Services” (1988) 22 J. World T. 35

³⁸The developing countries dissatisfaction with the refusal of developed countries to liberalize under Mode IV is an issue constantly discussed at negotiations and meetings of the Council for Trade in Services. At a special session of the Council July 13-14, 2000:

The representative of Pakistan stressed the importance of the assessment of trade, as the successful integration of developing countries in the multilateral trading system depended on the treatment they had and would receive, on their ability to develop export capacity and on liberalization in sectors of interest to them. He indicated that the papers which had been produced by the WTO and UNCTAD Secretariats pointed to significant trade barriers faced by developing countries. With respect to mode 4, there was a lack of meaningful commitments, and frequent barriers were economic needs tests, visa problems, licensing requirements, lack of mutual recognition of qualifications, nationality and residency requirements and prohibitions and limitations to movement

Barbados, India, Morocco and Uruguay concurred with this statement, and the Philippines on behalf of ASEAN made similar comments.

It is commonly held that the real driving force behind placing services on the GATT agenda at Punta del Este was transnational corporations which recognized the potential gain which lay in access to foreign markets for both trade and investment in services.³⁹ The first major move at the state level was made by the USTR in 1988 at the Montreal Meeting of the Trade Negotiations Committee at the Ministerial level⁴⁰ and they have continued to drive the process since that fateful 1988 proposal through to the recent Ministerial Conference in Doha.

Developing countries were initially unwilling to introduce services into the GATT forum for fear this was a means by which developed countries could legalize their retaliatory capacity (in terms of countervailing measures) by linking goods and services.⁴¹ However, the fear that developed countries were free to institute unilateral or bilateral measures to their detriment made a globally negotiated agreement infinitely more attractive, as it at least had the appearance of representing their interests and offered some parameter within which trade should operate. In hindsight, the comfort taken in that regard was apparently ill advised, as the issues of restrictive business practices by trans-nationals and liberalization of labour services remain untouched.⁴² Clearly, for developing countries in particular, the GATS has not lived up to its promise.

See WTO CTS, Spec. Sess, 13-14 July 2000, RESTRICTED S/CSS/M/4 (2000), also WTO CTS, Spec. Sess., 19 Jan 2001, "Communication From Barbados on Behalf of the Members of the Caribbean Community (CARICOM): WTO Negotiations on Services" RESTRICTED S/CSS/W/43, para 15

³⁹M. Gibbs & M. Mashayekhi, "Services: Cooperation for Development" (1988) 22 J. World T. 81

⁴⁰See Nayyar

⁴¹See Gibbs at 90

⁴²The U.S. maintains that labour services is an immigration not a trade issue, while developing countries consider it a factor of production similar to capital, and should therefore be treated similarly.

The “Level Playing Field” Conundrum

All animals are equal, but some animals are more equal than others⁴³

The proponents of ‘free’ trade have always equated it with ‘fair’ trade. Whether this is true or simply the result of receiving good press from some very strong players in the global trading arena, will be determined over time. At present, even its strongest advocates would be hard pressed to show where new or enhanced export opportunities, whether for goods or services, for developing countries have been created⁴⁴.

The facts of the matter are that developed countries have many more resources than developing countries. Part of the problem stems from the existence of transitional economies. While they are commonly referred to in the literature, they are not a WTO category. The only categories recognized in the GATS are developed, developing and least-developed.

With regard to services, where developed countries consider themselves on level ground with developing countries with regard to services such as communication, business and financial services, the point of reference is the transitional economies such as Hong Kong, Singapore and China, and *not* developing countries like Jamaica, Antigua and Guyana. To avoid giving what they would regard as an unfair advantage through special and differential treatment to these ‘transitional economies’, they look to the highest

⁴³G. Orwell *Animal Farm* (Essex: Longman House, 1983) 83

⁴⁴C. Rhagavan, “Clear North-South Divide on Services Negotiations” at <http://www.twinside.org.sg/title/clear.htm>

denominator in the category 'developing' to define it rather than the lowest denominator or even the average. As far as Jamaica is concerned, the playing field remains unlevel and the benefits of the agreement remain skewed towards the most developed states.

Prior to the globalization of free trade doctrine, the developing world attempted to forge its own path to trade and development through its response to the GATT in UNCTAD and the New International Economic Order (NIEO)⁴⁵. This movement was based on the idea that developing countries were in a naturally disadvantageous position in the global economy. While the GATS attempts to address the issue in a way which does admit to the inherent inequalities of its members, in the final analysis, pure free trade theory makes no real place for such considerations.

Under the GATS, unlike the GATT, the concept of special and differential treatment is not specifically incorporated. The spirit of the concept is nevertheless reflected in the Preamble and Articles IV⁴⁶ and XXV⁴⁷ which specifically deal with developing countries. The exclusion of such a clause resulted from the feeling held by developed countries that developing countries were not at a level of disadvantage in the services trade to warrant its inclusion. In other words, they feel that the playing field is level, or level enough so as not to incur legislative concern. As such, though developing country interests are considerations to be borne in mind during negotiations and in relation to transfer of

⁴⁵ "The NIEO was a movement among developed countries within the UN to force a shift in international economic relations away from structurally disadvantageous policies towards a more equitable relationship between developed and developing countries". F. Garcia, "The Integration of Smaller Economies into the FTAA" (1999) 5 NAFTA: L & Bus. Rev. Am. 221 at 239; also see B. Brown, "Developing Countries in the International Trade Order" (1994) 14 N. Ill. U. L. Rev. 347

⁴⁶This deals with the increasing participation of developing countries

⁴⁷This deals with technical cooperation

technology issues, these recommendatory provisions are essentially toothless by virtue of their vagueness and width. The formulation of the provisions discussed above aid and abet this behaviour by being easily sidestepped.

This lack of protection of developing country interests has made countries like Jamaica even more ambivalent about liberalizing certain sensitive industries. The focus of developed countries is market access, while that of developing countries is the strengthening of domestic industries first, with securing market access a close second.

The nature of law is to prescribe rules to govern behaviour in an objective manner. However all laws exist within a context, and the challenge of international trade law is that unlike national legal systems, it is not supreme and a nation's sovereignty remains the essence of its being. In reality the global "good" will always be subservient to national interests. The GATS exists not in *a* context but in *several* different contexts varying from state to state each with its peculiar social, cultural and political considerations, resources and leverage.

Frequently these considerations cause conflicts as states seek to protect national interests. It must be remembered that the responsibility of government is first and foremost to the state which it serves, and not supra national organizations or the 'global society'. This is a fact which while recognized in international political theory, is not given much weight in trade theory, to the detriment of its validity.

The fact is that Jamaica like any other country, needs to liberalize its services industry for its own economic growth, however, the problem is in negotiating commitments in the sectors it most desires liberalization for, as opposed to those on the agenda of the developed states. Needless to say, the two interests diverge more often than they converge.

Jamaica's task is two tiered: negotiation and implementation. The concern at this point is the negotiating strategy to be employed. The choices are negotiating at the national level, the regional level, or through strategic alliances with other states determined by particular sector negotiations. The strategy being employed is to negotiate at the regional level through the medium of the CRNM an arm of CARICOM. This body has undertaken several trade related studies and has pooled resources from the CARICOM membership with the goal of formulating a comprehensive Caribbean trade policy.

An integral part of the new trade policy is the creation of the Jamaica Trade and Adjustment Team (JTAT) which seeks to formulate trade policy based on input from the private and public sectors as well as civil and academic society. The method by which this is to be achieved is primarily through sector discussions and data collection using the data to construct industry specific competitiveness indicators.

This project came out of the understanding that industry personnel are more aware of industry needs than are government officials, and that the information resources will be more specific and more accurate in indicating sectoral needs and undesirables. The JTAT

is separated into the following groups: public sector, private sector, civil and academic society, services and data collection. There is also a public education component to the project which seeks to disseminate information on the trade policy both at the national and regional levels. In order to ensure the highest quality input from the various sectors, trade related seminars and documents are part of the programme of providing the various sub-groups with the information they will need to participate constructively in the project.

CHAPTER 2

The Rough Road to Economic Growth

The key to Jamaica's economic growth under the GATS regime lies in committing to liberalizing sectors which engender economic growth through the introduction of competition while stimulating growth in domestic industry and securing access to, and penetrating overseas markets.

There are however some formidable obstacles between this realization and its fulfillment, the biggest being a lack of resources, both human and institutional. A major hindrance in this regard is the paucity of human resources in the field of international trade law. Locally trained attorneys-at-law are only marginally trained in international trade law (and then, only at their option) and post-graduate work in the field must be undertaken outside the region. There is very limited funding available for such studies with the result that the number of trained trade attorneys per capita is low in comparison with developed countries. There are presently no Jamaican government sponsored scholarships for this course of study. The recognition of the need for such expertise appears to be low if the small number of state employed trade attorneys (two) is used as an indicator. On the positive side, however, the CRNM has instituted a programme under which it sponsors several internships in that organization with a view to enlarging our negotiating capacity.

While international economic and political theory are taught at the University of the West Indies, the premier tertiary educational institution in the region, it is only recently that economic theory and institutional theory have caught up with political theory and has been developed out of the context within which its application will take place. Bernal noted that

...too many academics and policy-makers are caught in a time warp using old paradigms and traditional policies to deal with difficult new problems in a changed reality. This attempt to put new wine into old bottles is doomed to fail, and the theology of orthodoxy must be challenged ...new situations require new solutions, which can only be derived from new ideas.⁴⁸

This inertia also characterizes the indigenous development of science and technology. There were no bodies of research scientists, engineers and technologists focused on developing the intellectual aspects of these fields until very recently.⁴⁹

The lack of technical expertise is therefore not only exemplified by the physical lack of experts, but also by the lack of development of theory or even the dearth of academic work devised from Jamaica's peculiar situation as a developing microstate. The attempts to address the problems attached to the GATS by application of traditional or "first world" trade theory to the Jamaican trade situation is very much akin to putting the proverbial square peg into a round hole.

To illustrate, liberalization or laissez faire economic theory propounds the idea that given certain assumptions, free trade will have the result of high quality, low cost production

⁴⁸ See Bernal in *Contending with Destiny* at 312

resulting from the emergence of the most efficient producers from the working of the market place⁵⁰. This is a system in which developing microstates must fight an uphill battle in order to succeed as this theory of success is engendered by certain dynamics and features which are not generally present in a developing microstate, but which are characteristic of developed states, particularly large states which feature multinational industries. These would be:

- market driven industry
- highly developed, modern infrastructure
- economic stability which encourages long term investment
- low interest rates which facilitate local investment
- state of the art technology and technical support
- highly skilled labour force
- large, relatively well off local market, and
- Good communication system.

Government trade policy in Jamaica has generally been geared towards extending the time for implementation of the covered agreements of the WTO, and the maintenance of preferential trade schemes for as long a period as possible. As so much of the economy is tied to the sugar and banana industries, although they are inefficient producers in comparison to large-scale producers in Central America and Europe, it is not a simple

⁴⁹ H. Watson, "Global Neo-liberalism, The Third Technological Revolution, and the Global 2000" in *Contending with Destiny* at 407

⁵⁰ According to Samuelson, free trade theory does not imply that free trade is the optimum system for any country, while it does postulate that free trade is better than no trade. However it is not necessarily true that free trade is the best trading policy and better than all other kinds of trade. See P. Samuelson, "Welfare Economies and International Trade", [1938] *American Economic Review* 261, referred to in M.

matter to switch from these industries to the much more viable services sector or other industries.

Firstly, the skills of each are dissimilar, especially in terms of the high levels of unskilled labour involved in the agricultural sector as against the more skilled labour of services industries. Secondly, the economy is already services heavy and it would be difficult for it to absorb the displaced labour force and to replace the lost income. While labour is an economic cost, it is also a social benefit in that it equates employment, and high unemployment has had severe negative social consequences⁵¹ for the island even without the removal of protectionist policies, which will itself undoubtedly increase unemployment.

The Jamaican economy is still highly reliant on traditional exports traded under the aforesaid protectionist policies. Even newer industries such as the textile industry have evolved under protectionist schemes.⁵² Despite the switch to an open economy in relatively recent times, circa 1991, there has been no transformation into a market driven economy. What did result was substantial devaluation of the Jamaican dollar and consequently rapid inflation.

More recent crises in the financial sector and social instability have rendered economic stability elusive for the state. The results have been the withdrawal of several large

Shafaeddin, "Free Trade or Fair Trade? An Enquiry into the Causes of Failure in Recent Trade Negotiations" (UNCTAD: Dec 2000), UNCTAD/OSG/DP/153 at 6

⁵¹ Namely high and constantly increasing crime rates, increasing gap between rich and poor.

multinationals⁵³ from the island and the continuous slide of the Jamaican dollar. This has naturally led to high interest rates, low investment, and increased unemployment.

Free trade theory only holds true in an environment of uniform global economic development. Globalization and its predication on free trade theory therefore fail to address the economic woes of the global community and take into account different levels of development, which have a direct effect on type of industry and production levels, and therefore trade. The likely result it seems, is that those economically strong states will increase their wealth and economic power, and those poorer states that are frequently plagued by problems of debt, technical, educational and capital insufficiency, will be further disadvantaged. While certainly not one of the least developed, Jamaica nevertheless suffers these problems and inadequacies. The unchanging variable in the Jamaican economy is small market size, therefore any substantial domestic industry must penetrate overseas markets. Further, the external debt service ratio stood at 17.32 in 1999⁵⁴, and the balance of trade is operating in deficit, which increases each year.

Free trade, which is market driven, cannot engender development in underdeveloped states. As developed states have the technology and infrastructure to make them the more efficient, the less developed and less efficient experience the marginalization of their production or the low value of it, which further hampers development.

⁵² Namely the Caribbean Basin Free Trade Agreement (CBFTA) whereby textiles are exported into the United States with reduced tariffs.

⁵³ Goodyear, Hanes, Colgate Pamolive and Coca-Cola

⁵⁴ See Bank of Jamaica website at <<http://www.boj.org.jm/debtanddebt.asp>>

Institutionally, the Ministry of Foreign Affairs and Foreign Trade is the agency responsible for formulating trade policy. The other government ministries concerned particularly with the trade in services are Industry, Commerce and Technology; Finance and Planning; and Mining and Energy. The Attorney-General's Chambers, the Planning Institute of Jamaica (PIOJ), Bank of Jamaica (BOJ) and the Statistical Institute of Jamaica (STATIN) are also integrally involved in the process. Traditionally all opinions on matters of international law (including international trade law) proceeded from the Attorney-General's Department which is responsible for issuing all legal opinions for the government service. This meant that all ministries had to await the issuance of the Attorney-General's opinion before proceeding in certain matters. This naturally has had some effect on efficiency. This policy is being revised, and the Ministry of Foreign Affairs and Foreign Trade should have begun delivering its own opinions on trade matters sometime in 2002.

The PIOJ as the name suggests is responsible for economic planning and monitoring and is the GATS designated trade point in Jamaica. STATIN and the BOJ compile trade statistics and data and publish quarterly and annual reports. The anomalous nature of the trade in services has made it difficult for most countries to compile accurate data on the sector and Jamaica is no exception. While statistics are available on tourism and air transport, there is no accurate compilation on the other services traded via all four modes available at these offices. By its nature, the cross-border or mode 2 trade in services is particularly difficult to reduce statistically as the reporting and monitoring mechanisms

are simply inadequate. Those transactions include transborder data flows, internet services, electronic commerce, and all professional services transmitted in this way.

The New Trade Policy

In 1998 Rodrik recommended that low income countries adopt a trade policy to

de-monopolize trade, streamline the import regime, reduce red tape and implement transparent customs procedures; replace quantitative restrictions with tariffs; avoid extreme variation in tariff rates and excessively high rates of effective protection, allow exporters duty-free access to imported inputs, refrain from large dose of anti-export bias; ...not tax exports too highly⁵⁵

This is clearly an idealized and long-term objective for any developing country which faces problems of high dependency on tax revenue and weak domestic industries. Such a policy would still offer some revenue gains from tariffs, while keeping them low enough to minimize price distortions caused by high tariffs and other protective measures. While such a policy directly affects the goods trade, it is clear that several service industries do depend on capital inputs, and restrictions on goods importation will affect the cost of providing these services and thereby their prices.⁵⁶ In the short term, such a policy would undoubtedly result in a severe balance of trade deficit and high unemployment in a country such as Jamaica. The new trade policy needs to address areas of deficiencies in production capacity and strengthening and diversification of the local economy before certain protective measures are removed in stages.

⁵⁵ D. Rodrik, "Why is Trade Reform so Difficult in Africa?" (1998) 7 J. African Economies, Supplement 1, 1 at 12

⁵⁶ for example, construction, tourism, health, air transport are some of the more capital intensive services.

In order to participate effectively in negotiations of the GATS or any international agreement for that matter, the objectives set, must come from informed discourse at the local level. T. Ademola Oyedjide has pointed to smallness and low income as hindrances to developing countries' development of those human and institutional resources necessary to effectively participate in, and secure optimal benefits from international negotiations.⁵⁷ As he notes, several smaller countries have started down the path of regional integration as a means of pooling resources and developing a regional trade policy. For Jamaica, the avenue for this has been CARICOM. CARICOM was established by the Treaty of Chaguaramas⁵⁸ with the intention of creating an economic union through a single market economy and harmonization of the tax system. The original signatories were Jamaica, Trinidad and Tobago, Guyana and Barbados, but has since expanded to a membership of fourteen⁵⁹ and has seen a resurgence in activity, after lying dormant for a number of years.

Table 3 shows the value of trade between Jamaica and her major trading partners. As the figures show, Jamaica's imports from CARICOM countries have increased considerably in proportion to her other major trading partners, surpassing that of all others with the exception of the United States, which remains her major trading partner. However, exports to CARICOM countries have remained fairly constant through the period accounting for less than five percent of exports. The disparity is mostly attributable to

⁵⁷ T.A. Oyejide, "Interests and Options of Developing and Least-developed Countries in a New Round of Multilateral Trade Negotiations", 2 May 2000, UN/CIDHU, 6

⁵⁸ See text of treaty at <<http://www.caricom.org> or <http://www.sice.oas.org/trade>>

⁵⁹ Also includes Antigua, St Lucia, Suriname, Grenada, Dominica, Montserrat, Bahamas, St Kitts & Nevis, and St Vincent and the Grenadines

terms of trade with Trinidad and Tobago, which alone accounted for \$357,954,000 of Jamaica's imports in 2001.⁶⁰ This relates to mainly petroleum and manufactured goods.

VALUE OF IMPORTS FROM PRINCIPAL TRADING PARTNERS – US\$000

End of Period	United Kingdom	United States	Canada	E.E.C./E.U. Countries	CARICOM	Latin America	All Others	Total
1986	65,835	487,471	51,428	53,117	32,086	136,523	142,652	969,112
1987	84,710	588,015	69,216	68,041	58,964	146,332	218,995	1,234,273
1988	99,276	696,031	105,481	120,948	55,927	150,427	221,360	1,449,450
1989	115,402	913,484	106,213	114,750	90,617	195,212	337,404	1,873,282
1990	102,574	948,844	120,855	95,731	87,720	280,531	306,137	1,942,392
1991	102,034	934,240	76,001	144,096	67,581	180,535	324,089	1,828,576
1992	84,298	832,686	69,696	164,450	65,906	212,057	346,303	1,775,396
1993	84,727	1,093,122	89,143	190,881	115,414	205,014	400,942	2,189,243
1994	96,189	1,145,122	82,940	100,881	149,121	186,115	472,862	2,233,199
1995	115,066	1,429,297	99,778	189,015	254,761	199,907	543,936	2,831,778
1996	114,304	1,531,268	88,094	208,999	293,811	207,912	489,269	2,933,657
1997	116,512	1,504,359	94,390	282,699	318,084	207,489	604,269	3,127,891
1998	115,353	1,523,265	95,287	172,593	310,332	179,033	595,815	2,991,678
1999	96,042	1,436,775	96,709	137,014	366,755	211,523	614,715	2,959,583
2000	98,186	1,541,535	98,340	168,064	402,278	363,698	635,109	3,307,210
2001	102,485	1,525,773	97,641	214,349	433,019	356,434	672,886	3,402,587

Table 3⁶¹

VALUE OF EXPORTS TO PRINCIPAL TRADING PARTNERS – US\$000

End of Period	United Kingdom	United States	Canada	E.E.C./E.U. Countries	CARICOM	Latin America	All Others	Total
1986	111,846	200,236	95,378	46,991	42,291	2,927	74,200	590,838
1987	14,278	261,983	96,983	85,360	45,613	6,799	87,549	710,010
1988	162,292	317,393	135,448	93,663	59,136	4,450	101,969	883,046
1989	154,874	259,758	135,477	145,088	67,501	15,791	176,541	1,000,411
1990	174,054	339,126	129,202	166,837	71,012	19,859	126,272	1,157,491
1991	186,080	341,991	119,319	173,389	63,084	19,668	164,497	1,159,729
1992	180,160	336,280	119,758	65,644	60,022	8,942	169,100	1,053,603
1993	147,872	418,968	107,349	126,047	59,850	12,163	105,936	1,075,376
1994	164,447	439,720	147,723	122,058	58,053	35,772	149,902	1,219,626
1995	189,719	520,825	167,343	219,897	60,374	23,320	142,224	1,456,754
1996	183,660	510,793	163,671	242,882	55,655	10,143	129,762	1,387,248
1997	186,481	462,907	195,315	215,735	47,726	13,716	185,173	1,387,323
1998	158,866	521,275	154,282	217,114	43,565	8,484	144,126	1,316,303

⁶⁰ found at <<http://boj.org.jm/table35.asp>>

⁶¹ found at <http://boj.org.jm/import_pri_trad_prtners.asp>

1999	153,719	460,790	129,250	234,586	41,981	9,369	199,306	1,245,871
2000	160,361	494,285	123,235	250,167	49,019	11,850	98,306	1,301,018
2001	157,059	380,220	191,117	202,680	50,682	11,239	189,716	1,223,128

Table 4⁶²

The lukewarmness of the Uruguay Round and low level of specific commitments have been superceded by a much more whole-hearted move towards services liberalization through regionalism. The new move has been towards making the GATS work for the state rather than keeping its impact to a minimum by seemingly ignoring it by making minimal commitments. This is not merely a recognition of the importance of services liberalization, but also stems from the deadline of 2008 set for the removal of preferences under the Cotonou Agreement, as well as the requirement for showing a commitment to undertake WTO obligations on which the perpetuation of the CBTFA has been hinged.⁶³

UNCTAD has cited the GATS articles on increasing participation, domestic regulation, monopolies, business practices and measures to safeguard the balance of payments as being the most important for developing countries⁶⁴. The main concerns of Jamaica continue to be market access and movement of natural persons. Under CARICOM these have been largely secured at the regional level through the removal of tariff barriers and work permits (in certain categories of skilled workers), however the more developed markets offer larger earning potential because of the value of their currencies and their market size. Additionally, the value of technology transfers is greater from developed countries, being more technologically advanced than their Caribbean counterparts.

⁶² found at <http://boj.org.jm/export_pri_trad_prttrs.asp>

⁶³ See the factsheet of the USTR found at
<<http://www.ustr.gov/regions/whemisphere/camerica/factsheet/html>>

Before a regional policy can be formulated, a national trade policy has to be advanced. Jamaica's new trade policy of 2001 details the means by which the country hopes to achieve economic growth. The then Minister of Foreign Trade, Anthony Hylton emphasised that its "central principle ...is that Government must facilitate the development of the capacity and tendency of our private sector to produce goods and services that make intensive use of domestic capital"⁶⁵.

Prior, in 1992 the Trade Co-ordination and Policy Committee (TCPC) was formed to "study, analyze and develop Jamaica's positions on various subjects in regional economic and trade initiatives that were being negotiated."⁶⁶ Out of this came the National Industrial Policy (NIP) in 1996. The policy has been further developed and now anchored in the idea of nationwide participation through the medium of the Jamaica Trade and Adjustment Team (JTAT). As mentioned in the previous chapter, members of the private and public sectors as well as civil and academic society are invited to give their input to the process of policy formation. This is done through data collection at the industry level as well as discussions and dissemination of updated information on the relevant trade agreements and legislation. This should then indicate the sectors in which the state should seek liberalization immediately, in the middle term, and in the long term, and to what extent these sectors should be liberalized. It is the market and producers which will effectively determine the policy.

⁶⁴ *Liberalizing International Transactions* at 142

⁶⁵ quoted in "Preferential trading arrangements to go" at A11

⁶⁶ Ministry of Foreign Trade, Discussion Paper, 2001, "Adjusting Trade Policy to Meet the Challenges of the New World Order", at 5. [Hereinafter "Adjusting Trade Policy"]

If the GATS is negotiated to liberalize producer services as well as educational services, the immediate effect of the resulting increase in quality of these services (at least of the former) would be an increase in foreign direct investment. Foreign direct investment (FDI), as an engine of growth, is reflected in the economy of a state quickly, as the effects of capital expenditure and increase in employment are quickly multiplied throughout the economy. In the longer term, the technology transfers consequent on FDI will hopefully have a positive effect not only on the particular sector, but will also filter throughout the economy, thereby being quite far reaching in its benefits.

While there is some hesitation in some factions in developing countries concerning the negative effects of FDI, namely, failure to transfer technology, not hiring local skilled labour, and granting of state incentives which place local industry at a disadvantage, Jamaica cannot afford to adopt that position as economic growth stood at only 0.1% between 1991 and 2001⁶⁷. Further, the accession of Mexico to NAFTA has resulted in the diversion of North American FDI from the CARICOM states to Mexico, which by being under a harmonized trading regime has become a more attractive location.

One of the other major issues with FDI, has been the “race to the bottom” whereby countries competing for FDI seek to offer the best set of incentives to potential investors in an attempt to attract the limited investment available. This has oftentimes resulted in the granting of huge concessions in the form of tax holidays, no technology transfers, and generally denying that economy access to the long term benefits of FDI. In the

⁶⁷ D. Bloom et al, “Globalization, Liberalization and Sustainable Human Development: Progress and Challenges in Jamaica” Occasional Paper, UNCTAD/EDM/MISC176, 20 Feb 2001 at 1

Caribbean, the Treaty on Harmonization of Fiscal Incentives⁶⁸ under CARICOM should ensure some consistency in the regime governing FDI, and investors will not have the latitude to bargain down the “price” of investment in the member states. Further, liberalization should ensure that the investment incentives offered to foreign investors are available to domestic investors, and that there not be barriers created to domestic investment. This should enure to the benefit of the region in the long term, and reflects the type of farsighted negotiation strategies which need to be employed at the level of the GATS, rather than looking to the short term benefits at the expense of real economic growth.

Small State Invisibility

Hegemonic Harmonization is the default option for many small nations that are heavily dependent on a large trading partner such as the US, the EU or Japan.⁶⁹

The reality of globalization is that small states simply by virtue of their size do not have much influence on the trading behaviour of large states. In this way, one of the WTO's greatest inadequacies is its lack of recognition of the differences between states. While it does recognize three categories – developed, developing, and least developed – there are several sub-categories within each category which do affect capacity to negotiate and trade. Jamaica as a small island state should, logically, be regarded differently from other larger developing states such as India and Argentina, whose production and market size are or can be large enough to provide some bargaining power at the negotiating table. As mentioned before, one of the solutions to this for Jamaica is through the route of regional

⁶⁸ See text at <<http://www.sice.oas.org/trade>>

economic blocs. As it stands however, CARICOM, the only option bearing fruit at this time, comprises a total population of six million, not much for negotiating strength from the standpoint of the market or the producers.

This 'invisibility' is a characteristic, which has benefitted the island in bilateral or trilateral negotiations with larger entities under which it sought non-reciprocal trade advantages such as market access and national treatment (for example, under the CBTFA). In these and similar cases, being small is advantageous in the assurance that any benefits accrued under these agreements will be substantial for Jamaica while being proportionately of little impact on or disadvantage to the larger trader, therefore considerations which characterize negotiations under the GATS as a multilateral agreement such as injury to domestic industry were not huge considerations where the import contemplated is but a small fraction of the market share.

The solution for Jamaica, must lie in sectors which do not base success on economies of scale and low cost production. Fortunately for Jamaica, the services sector is one in which it is possible to thrive as these intangibles are not usually affected by economies of scale.⁶⁹ UNCTAD has stated that the sophistication of professional and business services is a key differentiator between developed and developing countries, and an important consideration for potential investors. One of the main benefits of the GATS to Jamaica will likely be in foreign services imports, particularly producer services which will serve to enhance domestic productivity of both goods and services.

⁶⁹ Oyejide at 18

⁷⁰ *Liberalizing International Transactions* at 147

These services include telecommunications, transportation, financial, business and professional services. The telecommunications sector is scheduled for full liberalization in 2013. Prior to 2000 there was monopoly control of this industry. The sector was liberalised in the first instance in the internet, secondly in the mobile communications sub sectors. The latter was done through the offer of limited licensing to two companies, other than the existing monopoly company, the licensees having large overseas interests. This has raised not only the standard of quality of internet and mobile communications, but the competition has considerably reduced the cost of these services to the consumers.

While fixed lines had remained monopoly controlled due to a twenty-five year contract between Cable & Wireless Jamaica Limited and the Government of Jamaica, this contract was renegotiated, and in March 2003 the sector was fully liberalized. Even prior to March 2003, in aspects such as international calls, the monopoly company was forced to lower prices due to the competition in this area from the mobile telephone companies. It is now one of the most vibrant, competitive and quickly expanding sectors of the economy and has generated technology transfers which have put Jamaica in line with the developed world in this area. This sector facilitates internet services thereby electronic commerce and the dissemination of knowledge and is therefore crucial to the cross border trade in services.

The scope of trade policy prior to the advent of the WTO was comprised of beggar-thy-neighbour policies and the trade arrangements made were, and to a large extent still are,

characterized by protectionism, non-reciprocal market access and other forms of special and differential treatment. These policies were pursued on the basis of the state's underdevelopment and the need to foster the growth of domestic industry while protecting it from the threat of more sophisticated imports. It may be argued that the concessions were granted, not based on market forces as demanded by liberalist thought but at a political level where the leverage gained greatly outweighed any economic disadvantage to the larger trader. This basic unilateralist approach to negotiations has hindered the growth of CARICOM as an institution for developing and executing trade policy.

Negotiations and Regionalism

Historically, the Caribbean has made several failed attempts at administrative, political and economic integration. In earlier times geographical separateness adversely affected communication and administration. There was also lack of trade among them as well as apprehension of diversion of one island's resources to support the economy of another. According to Dookham, "the past development of the islands ... in political isolation from each other encouraged the spirit of particularism caused by lack of contact".⁷¹

As early as the 1930s the British Caribbean began to recognize the value of integration or 'federation' as it was called at the time. They realized it could further regional economic development and strengthen bargaining power in international trade negotiations.⁷² It would also assist in the fight for independence, an important goal for these states which

⁷¹ I. Dookham, *A Post Emancipation History of the West Indies* (Essex :Collins, 1978) 145

were still under British colonial rule. Ironically, it was economic considerations which broke up the West Indies Federation established in 1958. The likely loss of revenue through customs unions, and the taxation to support administration being borne by the three largest islands of the Federation quickly caused Jamaica and Trinidad to withdraw their support. The Federation came to an end in 1961 after their withdrawal.

The development of CARICOM as an institutional mechanism for the consolidation and rationalization of the region's individual trade policies and to some extent domestic law (harmonization of customs laws etc.) was a necessary follow on to the regionalization of the world. More poignant than that has been the realization that the principle of most favoured nation treatment enshrined in Article II of the GATS has promised to eventually eliminate these non-reciprocal trade arrangements enjoyed by CARICOM states. This, if nothing else, affirms collective bargaining as a strength, and unilateralism as the weakest point from which a small state can negotiate as the outcome of every negotiation will apply to all parties to the GATS. In other words, concessions to these small states can no longer be justified on the basis that the impact on trade will be so minimal as to be considered negligible, as these concessions must now be extended to all parties.

Small state invisibility has increasingly become a liability in the new regime which equates size with strength, and under which strength is the only real assurance of success at the negotiating table.

⁷² *Ibid.*, at 146

Negotiations Under the GATS

It is obvious that each country which participates in trade negotiations attempts to negotiate the best deal for itself, taking into account the political realities of performing a delicate balancing act among increased competition for domestic suppliers and the concomitant benefits for consumers; new market opportunities for domestic enterprises; and regional and labour market disruptions caused by resulting industrial restructurings. Thus to claim that a country approaches such negotiations from a selfish perspective is to claim the obvious.⁷³

Negotiations are aimed at achieving further progressive liberalization of the trade in services. There have been several modalities suggested for negotiations under the GATS, and several suggested guidelines along which the negotiations should proceed.

CARICOM *et al* have proposed:

- i. Greater flexibility and special treatment in the formulation of guidelines and procedures for the negotiations. (for example, opening fewer sectors and modes of supply giving regard to states' stages of development)
- ii. That special attention be paid to the market access needs of developing countries, and
- iii. Giving practical orientation to Articles IV and XIX of the GATS⁷⁴

The argument has been put forward that negotiations in developing countries should proceed along the lines of the Uruguay Round's built in agenda on emergency safeguards, subsidies and government procurement. The justification given is that the developing countries' lack of negotiating capacity inhibits them in an extended round of

⁷³ F. Lazar, "Services and the GATT: US Motives and a Blueprint for Negotiations" [1990] 24 J. World T. 137

⁷⁴ Caribbean Regional Negotiating Machinery, *CARICOM Negotiating Strategies for the GATS and the FTAA*, (unpublished)

negotiations.⁷⁵ It is submitted that the preferred approach is the alternate view that a broad agenda would cover interests more fully, and lead to more broad based liberalization by addressing both market access and production capacity development issues,⁷⁶ both of which are crucial to developing countries, including Jamaica.

The negotiations will be directed at reducing the imbalance in specific commitments of commercial significance for developing countries. They are two tiered: rule making and market access. The method employed in GATS negotiations is the request-offer approach. Under the request-offer approach, the request is essentially made on behalf of the group as it will benefit all members (under MFN and NT principles), but the offer is only made by, and is binding on the offeror. This is pursuant to the provisions on specific commitments and the positive list approach, by which only those commitments specifically undertaken are binding; and even for those, reservations can be taken to limit the extent of the commitment. Collective bargaining attempts to return some balance to the scales. Through this medium, small states can cooperate in negotiations and make their offers more attractive 'bargaining chips'.

While the positive list approach is quite facilitative of the request-offer method of negotiating, there are certain institutional shortcomings in the WTO negotiating machinery that have been identified by the developing countries. These have been addressed through various fora. One of the major hindrances is the so-called "green-

⁷⁵ A. Panagariya, "The Millenium Round and Developing Countries: Negotiating Strategies and Areas of Benefits" G-24 Discussion Paper Series, UNCTAD, No. 1 March 2000 at 2

⁷⁶ See Oyejide for a fuller discussion of the general issues concerning developing countries in services negotiations.

room” negotiations which are informal negotiations which take place among a select group of developed countries. The effect is that the real negotiations take place within a framework constructed outside official channels, thereby completely undermining the rights of states not privy to this prior process to meaningfully impact and participate in the negotiations.

The Immovable Movement of Natural Persons Issue

Such activities have the unfortunate result of effectively excluding certain developing country interests from negotiations, a particularly poignant example being the movement of natural persons. This sector is recognized as one in which developing countries see their biggest potential for gain under the GATS, while developed countries see it as a threat to their domestic professional and other labour intensive services⁷⁷. Consequently, this sector has remained largely restricted.

The operation of the theory of comparative advantage would allow developing countries to provide services at a much cheaper cost than developed countries can provide them for themselves. This is a concept not only envisioned, but propounded by the liberal trade theory on which the GATS is predicated. Mashayekhi lists the barriers to market access for these services as: strict and discretionary visa and licensing requirements, non

⁷⁷ The importance of the movement of natural persons to developing countries has been the focus of several sectoral and discussion papers produced by UNCTAD, including those mentioned in this chapter by Panagariya and Oyejide. Also see M. Mashayekhi, “GATS 2000: Progressive Liberalization” in UNCTAD, *A Positive Agenda for Developing Countries: Issues for Future Trade Negotiations* (New York and Geneva: United Nations, 2000)

recognition of qualifications, economic needs tests and difficulty in transferring intra corporate personnel⁷⁸.

Autonomous Liberalization

States have been given the flexibility of the specific commitment system as a means of implementing progressive liberalization, however it is obvious that commitments which do not represent domestic interests will not be quickly made. If otherwise is to be done on the request-offer approach, a country had better have something good to offer. Many countries have chosen not to unilaterally liberalize services sectors as this reduces negotiating leverage. However in certain instances, where it is recognized that the liberalization of certain sectors will positively impact local industry, Jamaica has taken the initiative of doing so. One example of this is the telecommunications industry which was not scheduled for liberalization until 2013.⁷⁹ The government's decision to enter into an agreement with the monopoly company to liberalize the industry in phases over a three year period was a response to the demand of the local market for more competitive provision of these services, and the clear availability of competitive providers. Jamaica is not alone in this move to unilaterally liberalize telecommunications; Hong Kong, Korea, Japan, Singapore and India⁸⁰ have also done the same to gain the benefits of the GATS Basic Telecommunications agreement of 1997.

⁷⁸ Mashayekhi at 173

⁷⁹ See Chapter 3 below for further details.

⁸⁰ S. Esserman, "Approaching the New Round: American Goals in Services Trade", Statement to the Senate Finance Subcommittee on Trade, October 21, 1999 at 4 found at <<http://www.ustr.gov/html/setestimony/html>>

Negotiations or Economic Imperialism?

The WTO should reduce the degree of intrusion of its rule-making mandate to the bare minimum which is necessary to provide a viable framework for open cross-border competition and trade flows. Since multilateral trade rules are basically designed to ensure market access rather than to directly promote economic efficiency and social welfare, these rules should be limited to general principles and procedures that ensure the non-discriminatory design and application of national policies and domestic regulatory standards whose primary aim would be to enhance economic efficiency and promote social welfare.⁸¹

By including “commercial presence” as one of the four modes of supply of services, the GATS offers an opportunity to increase FDI in services, arguably where it matters most.⁸² It is important that Jamaica ensures that it has a domestic regime in place to regulate FDI in order to gain the full advantages of services liberalization, and to recognize that liberalizing these sectors related to the development of infrastructure make them more efficient and make investment more viable. In fact, it is contended that FDI has been driving the internationalization of services since the 1980s.⁸³

There are three dimensions to the GATS implementation process: firstly – designing rules, secondly – the ‘give and take’ of negotiations, and thirdly - the effective use of rules to ensure compliance. The final dimension is discussed in the subsequent chapter, the previous two are the subject matter here.

⁸¹ *Ibid* at 18

⁸² Oyejide at 20

The CRNM has recently produced a useful document proposing negotiating strategies to be employed by CARICOM countries during services trade negotiations in the FTAA and WTO⁸⁴. It suggests that the starting point should be the schedules of specific commitments of the participating states. It also suggests:

- Evaluating effect in achieving Article IV objectives increasing participation of developing countries
- Clarifying Article V, paragraph 3(a) regarding integration agreements and ensuring CARICOM's compatibility with it,
- That sector specific, pro-competitive disciplines be elaborated following the example of the liberalization of telecommunications throughout the region, and that a reference paper on telecommunications be prepared as a matter of importance.

Negotiations should proceed in the special session. Jamaica and other developing countries have limited delegations and are unable to fully participate if too many working or negotiating groups are formed. The CRNM too joins in the cry that 'green room' and other informal negotiating groups should be discouraged as they are essentially exclusionary.

The emphasis of Jamaica in negotiations must be on looking inward to production, before looking outward to market access. In this way it can increase the competitiveness of its products before proceeding to market penetration, failure to do so will render market

⁸³ *Liberalizing International Transactions* at 9

⁸⁴ See *supra* note 74

access meaningless. The impact of liberalizing the trade in producer services such as construction, transportation, business, professional, telecommunications will have a multiplier effect throughout the economy, reaching far beyond the effects of gaining access to foreign services markets, at least in the short run.

It is important to note however, that a corresponding liberalization of the goods trade is imperative for the positive effects of liberalizing services to be felt. In October 2003, the tariff on imported cement was raised from 15% to 50%, in order to facilitate the development of the local cement industry. If the construction services trade is liberalized, this should reduce overall costs in that industry, but the ultimate consumer will not have benefited fully because of the restrictions on cement imports. This could impact FDI, and have social implications on housing, health and education facilities, as well as tourism.

The question is how far should the state go in protecting local industry, what are the considerations which play in this decision making process, and how will this reflect in the negotiations? It is submitted that the overall strategy for negotiations should focus on offering access in the producer services market in the commercial presence and movement of natural persons modes, while requesting access in modes 1 and 4 where our export strength presently lies. Subsequent negotiations will be predicated on the successes of the present round and the impact of commitments made by the member states on Jamaica's economy.

The process cannot be set in stone at the beginning; it must in some sense be long term and consistent, but must also be reactionary to the extent that it considers the present state of the economy. STATIN and PIOJ must be given the mandate to coordinate the monitoring of the effects of liberalization holistically at the macro level. There must therefore be adequate support services in place for this mission, or negotiations will be based on genericisms rather than specific needs and requirements of the economy.

The JTAT is the body which will liaise with the Caribbean Trade and Adjustment Team (CTAT) of the CRNM. This body is focused on trade policy formation through information sharing and consultations among public and private sectors and civil and academic society. It follows from what the NIP refers to as “the need to review the mechanism for trade policy formulation so as to define Jamaica’s strategic interests and to strengthen the process of strategic bargaining to defend those interests.”⁸⁵ The impact/benefits of the GATS will be dependent on the commitments negotiated and the rate at which liberalization takes place – participation must be pointed and effective. Any commitments made must have the necessary institutional and legal support in place to ensure their efficacy.

Greater efforts must be made to diversify the economy and encourage more non-traditional and more profitable industries. These include brand name, niche industries under the ‘Jamaica’ brand, information technology services, health tourism, telemedicine and educational services, *inter alia*, in addition to the very profitable tourism sector. There are also ambitions of strengthening existing facilities and fostering development of

⁸⁵ “Adjusting Trade Policy” at 9

new regional centers for research and development (R&D) with the aim of commercializing cultural science and technological breakthroughs, which has been a burgeoning and promising industry in recent years.

JTAT and other policy makers need to expand their focus beyond market access to market penetration for new and traditional services. The basis for market penetration in a liberalized trade environment is, of course, competitiveness which supports granting domestic access for producer services to facilitate development of competitive industries through domestic capital formation, both technical and human. Overseas market research should also inform the JTAT process and therefore the negotiating process. This research should be based on competitiveness indicators for local goods and services. The completion of this research should give a fairly accurate indication of where trade policy should attempt to liberalize and which sectors should stand still or be more slowly liberalized. It is nevertheless certain that domestic capital formation is necessary to ensure that liberalization benefits the local economy, and not *other economies at the expense* of the local economy. The view that the premature liberalization of capital flows, particularly during a period of macroeconomic instability, which characterizes Jamaica at this time, may compound exchange volatility and engender capital flight, is well taken, having already occurred during the liberalization of 1991. The trade policy therefore needs to be developed in tandem with proper fiscal policies and social policies which remedy the instabilities characteristic of the economy at present.

The JTAT aims at removing preferences by 2008, in line with the proposed FTAA accession date. It hopes to achieve this firstly through creating a closer relationship between the private sector in the region and their respective ministers of trade, again a public-private sector synergy. Secondly, it is hoped that building capacity in the public sector will create a core team of professionals which will be able to process the research and information coming out of the various JTAT and other institutional initiatives, which will then engender development of a fully informed negotiating strategy, and ultimately skillfully undertaken negotiations.

CARICOM and the Free Trade Area of the Americas (FTAA)

The resurgence of interest in CARICOM became apparent in 1989 at the Grenada summit where national leaders voiced their concern about the emergence of trading blocs in the region. At this point things seemed to be going well for the region, trade had increased by 20% according to the Secretary-General, and plans were being laid to remove all the trade barriers within it. It was even referred to as "the most successful regional arrangement of the promotion of economic integration outside the European Union"⁸⁶, albeit before the creation of NAFTA and MERCOSUR.

NAFTA is an outgrowth of the Canada – United States of America (U.S.) Free Trade Agreement (CUSFTA). It came into effect in 1994 as the largest regional arrangement in the world with a population of 390 million and an economic output of \$8 trillion.⁸⁷ It has as its objectives, the elimination of barriers to trade in facilitation of cross-border

movement of goods and services between the territories of the parties; promotion of conditions for fair competition in the free trade area; substantial increase in investment in opportunities in their territories; provision of adequate and effective protection and enforcement of intellectual property rights in each party's territory; creation of effective dispute resolution procedures and the establishment of a framework for further trilateral, regional and multilateral cooperation to expand and enhance the benefits of this agreement.⁸⁸

CARICOM's initial interest in joining NAFTA, was tempered by the outcome of summit meetings which determined that the membership was not economically ready to join NAFTA. In fact, the United States were only willing to negotiate with Trinidad and Jamaica with regard to accession, which idea was eventually shelved. CARICOM, as a united entity, instead decided to sign the FTAA agreement, which will integrate the Americas and the Caribbean in the largest regional trade arrangement in the world.

The WTO and CARICOM can both prepare Jamaica for the FTAA in different ways. The formulation of the FTAA services agreement is still in its preliminary stages. While CARICOM has made some preliminary submissions on the development of the text, there is nothing definitive yet. As mentioned *supra* the GATS is based on a positive list, bottom-up approach. The participants must determine what pace of liberalization is desired for the FTAA. What is clear is that the FTAA must keep apace or ahead of the GATS for it to make any sense as a regional free trade area.

⁸⁷ Bhala & Kennedy at 371

The experience of CARICOM, again as with the GATS, serves as a microcosmic experience of liberalized trade, which can prepare the state for the consequences of the FTAA. It also creates a much stronger negotiating unit than the single nation-state approach. There is some question as to whether the FTAA is to include the commercial presence mode of delivery in its services agreement, or in its investment agreement. Failure to include it in the services agreement would limit CARICOM's bargaining power as an offer in mode 3 is one of the more attractive commitments the membership has to make.

Negotiations are only successful to the extent the results are legally implemented. Institutionalization creates certainty and transparency, which are essential economic planning tools. Unlike more developed countries which need only preserve market share, Jamaica needs to create new markets and increase productivity to counteract its increasing foreign debt and create real economic growth.

The impact of the GATS on Jamaica can only be assessed or more likely predicted, by examining the effect of specific commitments on trade in services and on investment flows, and on the overall economic welfare of the state. In light of the growing importance of CARICOM as a regional trading arrangement and negotiating body, Jamaica's commitments will definitely impact inter regional trading arrangements, particularly if the group intends to harmonize their GATS commitments as well.

⁸⁸ A. Bryan, ed. *The Caribbean: New Dynamics in Trade and Political Economy* (Boulder: Lynne Rienner, 1995) 29

CHAPTER 3

General Agreement on Trade in Services, Article VI – Domestic Regulation

1. In sectors where specific commitments are undertaken, each Member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner.

This portion of the paper will look at the implementation of the GATS in domestic law in Jamaica thus far. This includes the regulatory accommodations and any obstacles that remain. There is the recognition that the emphasis in the area of international trade is being placed on the FTAA with its 2005⁸⁹ deadline, rather than the GATS to which exceptions have been taken up to 2013. Nevertheless, liberalization, regardless of the agreement or instrument which facilitates it, will have the same effect on the economy.

As important as the schedule of commitments under the GATS, is the implementation of these commitments in the domestic law and regulations of the country. Certainly, no international agreement has the force of law over the citizens of a nation in and of itself. This can only be achieved through its manifestation in the national law. In Jamaica so far, the most visible manifestation of liberalization of the services trade *pursuant* to the GATS has taken place in the telecommunications industry, which is discussed below.

⁸⁹ Esquivel at 142

GATS Implementation in Domestic Law

Commitments made during negotiations at the international level arise out of decisions made at the local level, and the considerations of local consumers and producers. The means by which this is done, JTAT, was discussed in Chapter 2. The process of changing the law to make these commitments manifest and themselves law is under the Jamaican system of parliamentary democracy, no *fait accompli*. There are several stages in the process.

Firstly, a submission must be made to Cabinet (which is the Council of Ministers of Government) detailing the bill, amendment bill or regulations as the case may be. If in agreement with the submission, the Cabinet gives its approval to refer the matter to the Chief Parliamentary Counsel, the government legislative drafter. The proposed legislation is drafted and then sent to the Legislative Committee of the Cabinet, which will give approval for the matter to be sent to Parliament for discussion. In Parliament, the legislation is debated by the Senate (Upper House) and the House of Representatives (Lower House). If accepted by Parliament, the bill will require the assent of the Governor General, the Head of State, as a formality, before it passes into law. If regulations are being passed, these will have to be 'gazetted', that is published in the *Jamaica Gazette*, the public newspaper published by the government, before it is given the force of law.

While implementation of the TRIPS agreement in Jamaican law has been extensive and apparent, the GATS has not fared as well. Due to the method employed of scheduling

obligations, the WTO Members have proved unwilling to bind themselves to any liberalizing measures without securing matching obligations from the other Members. Many have in fact bound themselves to levels of liberalization lower than those actually existing in their countries, simply to ensure that they have a certain amount of leeway for changing regulatory measures should they so desire, and to retain some bargaining power. This was hardly the aim of the GATS and scheduling undertaken in this way becomes practically meaningless in the overall agenda of liberalization.

As we have stated, the most important features of the GATS in its bid to liberalize the services trade are, most favoured nation treatment, national treatment and transparency. There are some caveats on the implementation of these aspects, the most important one being the Caribbean Single Market and Economy (CSME), which is the regional economic arrangement under CARICOM. While the principle of most favoured nation and national treatment operate within the CSME, this has not been extended to all nations as mandated by the GATS. The CSME is still consistent with the GATS, being an exception permitted under Article V.

By virtue of the CARICOM (Free Movement of Skilled Persons) Act of 1997, the movement of natural persons has been implemented regionally, albeit in a limited capacity, a feat which until now has been blocked at the level of the GATS. The success or failure of this activity will be an important guide to future negotiations hopefully being able to supply substantial data on the sector.

Admittedly, at the international level, the disparity in development of member states has caused the more developed states to be wary of an influx of 'cheap labour' and resulting increases in unemployment. The disparity in the levels of development of the CARICOM member states allows the region to view the CSME as a kind of experimental microcosm of the global trading system, which could give some indication as to the impact of implementation at the hemispheric level in the FTAA, and eventually globally under the GATS.

Schedule of Commitments under the GATS

Jamaica has scheduled commitments in eight sectors. These are:

1. Business services:-

- (A) Professional services:-legal services - local certification required, Attorneys from other jurisdictions cannot practice in Jamaica without acceptance by Jamaica Bar Association; accounting, auditing and bookkeeping services, taxation services - licensing required; architectural services, engineering services - joint ventures preferred, board examinations and licensing required; urban planning and landscape services, medical services - registration, board examinations and licensing required; services provided by nurses - registration and licensing required;
- (B) Computer related services:- software implementation services, data processing services, database services - registration and licensing required;

(C) Research and Development services (R&D):- R&D services on social sciences and humanities, R&D services on natural sciences, interdisciplinary R&D services – registration and licensing required;

(D) Real Estate services (involving owned or leased property, on a fee or contract basis) – joint ventures preferred, registration and licensing required;

(E) Other Business services:- advertising services, market research and public opinion polling services – registration and licensing required; management consultancy services – local certification required;

2. **Communication services:** – telecommunication services – voice telephone, facsimile, telex, and teleprinter services may not be supplied over cable TV network facilities:-voice telephone services, facsimile services – until 2013 bypass of exclusive private operator not permitted, callback services not permitted under modes 1 and 2, under mode 3 exclusive supply is reserved until 2013, though there is no limitation on foreign equity in the exclusive private operator; packet switched data transmission services, circuit switched data transmission services, electronic mail, voice mail, on-line information and data retrieval, electronic data interchange, code and protocol conversion, on-line information and/or data processing – no limitations; internet and internet access – voice telephony over internet excluded until 2013; digital mobile services (terrestrial) – commercial presence required, five to ten year license to be issued to exclusive private operator; mobile telephone services (satellite based) – five to ten year licence to be issued to exclusive private operator; video transmission services –

voice telephony excluded until 2013; trunked radio system services, international voice, data and video transmission services supplied to firms involved in information processing located within freezones – interconnection with local public switched network not permitted; teleconferencing services – only on network facilities supplied by exclusive private operator until 2013; , telecommunications equipment sales, rental, maintenance, connection, repair and consulting services;

3. **Educational services:** – primary education services, secondary education services – registration and local certification required; higher education services – registration, local certification and licensing required;
4. **Financial services:** – all insurance and insurance related services (life, accident and health insurance services, non-life insurance services, reinsurance and retrocession, services auxiliary to insurance (including broking and agency services) – entities should be at least 51.1% Jamaican. This is being reviewed with the objective of removing this stipulation. Permission may be granted by the Minister to waive this requirement. Must show that adequate fund will be deposited to cover the domestic liabilities of these companies;
5. **Health Related and Social services:** – hospital services – registration, licensing and local certification required;
6. **Tourism and Travel Related services:** – hotels and restaurants, travel agencies and tour operators – registration and licensing required;
7. **Recreation, Cultural and Sporting services:** – entertainment services – registration and licensing required;

8. **Transport services:** – maritime transport services, freight transportation, road transport services (passenger transportation.) – registration and licensing required.⁹⁰

In all these sectors except telecommunications, there are no limitations on either market access or national treatment in modes 1 (cross-border supply) and 2 (consumption abroad). For all the scheduled business, educational, health related and social, tourism and travel related, recreation, cultural and sporting services, local licensing or certification is required before supply by means of mode 3 (commercial presence) can be undertaken. This is usual as laws differ from state to state, and licensing certifies that the provider has attained a particular standard, and provides some proof of knowledge of the relevant laws of the territory, or adequate expertise in the service in question.

While this may have the appearance of a restriction on market access, and does in several instances constitute just that, in most instances licensing is necessary to protect the consumers and to ensure that these services being provided meet certain objective standards as is the case with goods production. Unlike the case with the United States and Canada, Jamaica's largest markets, residency and nationality restrictions are rare in the legislation.

Professional Services

There are residency restrictions for attorneys-at-law, architects and engineers. However, architects and engineers may be specially or temporarily registered if they are not

⁹⁰ found at <<http://www.wto.org>>

Jamaican residents, by virtue of Sections 9 and 10 of both the *Architects Registration and Professional Engineers Acts* which are similar legislation. While there may be no insurmountable restrictions, non-CARICOM nationals are required to obtain a work permit before trading their services in Jamaica by virtue of the *Foreign Nationals and Commonwealth Citizens Employment Act*.

Banking Services

The banking sector is already very open; there are nevertheless still some discriminatory provisions within it relating to foreign companies. Section 6 of the *Banking Act*, under the heading “Capital Requirements”, states:

- (a) In the case of a local bank, capital to an amount not less than eighty million dollars has been subscribed; and
- (b) In the case of a foreign bank, not less than two hundred and fifty million dollars of the subscribed capital has been paid up in cash at the time of the application for the license.

There are no indications that the section is to be amended, however, there are plans to amalgamate the Banking Act, Financial Institutions Act and the Building Societies Act. Jamaica has not scheduled any commitments in this area, which is a cautious position being adhered to consequent on the recent financial crisis of 2000.

In another vein, the Bank of Jamaica is investigating the development of electronic money schemes (pre-paid, credit card etc.) through consultation with other financial institutions. The outcome of that research will be integral to the development of e-commerce in the island.

Telecommunications Services

Without a doubt the most complicated commitments have been undertaken in the communications sector in the telecommunications sub-sector. It is not an overstatement to say that this sector is the most definitive producer service in terms of the impact it has on the enlargement and facilitation of the services trade at this time.

Whereas the government had signed a twenty-five year agreement with Cable and Wireless Jamaica Limited, a subsidiary of the London based company of the same name, granting them a monopoly on the provision of telecommunications services in Jamaica, the government scheduled a date of 2013 for the liberalization of this industry, the expiry date of the agreement.

Telecommunications of Jamaica Limited had previously provided these services to the island. They included voice telephone services, most internet and internet access services, international mobile telephone services (satellite based), most video transmission services, trucked radio system services, and international voice, and data and video transmission services supplied to firms involved in information processing located within free zones. The agreement did limit market access, however, as it was a monopoly arrangement, the issue of national treatment did not arise. Subsequently, the government rethought and renegotiated the arrangement with Cable and Wireless and has proceeded to liberalize the telecommunications industry in phases.

The government policy document of September 2002 on the issue, contained the following schedule of liberalization activities:

Phase I of the liberalization process, which took effect on March 1, 2000:-

- Opened the market to competition in wireless cellular services.
- Opened the market for the provision of customer equipment.
- Allowed companies with Single Entity Free Zone status to provide their own telecommunications services.
- Opened the market to the resale of data, international voice and Internet access.

Phase II commenced on September 1, 2001 and covered:-

- Competition in domestic facilities and services.
- Cable TV providers (STVOs) being allowed to become Internet Service Providers (ISPs).

Phase III will see on March 1, 2003:-

- All telecommunications facilities open to competition, including international voice and data services.⁹¹

At time of writing, all these phases have been successfully implemented.

The Basic Agreement on Telecommunications under the GATS, was implemented in the new, though transitional *Telecommunications Act* (which repealed the *Telephone Act*) passed in 2000. Section 3 of that Act states the objectives of it to be

(a) to promote the interests of the public by

- (i) promoting fair and open competition in the provision of specified services and telecommunications equipment.
- (ii) promoting access to specified services ...
- (iv) providing for the protection of customers;

⁹¹ Ministry of Industry Commerce and Technology, *Government of Jamaica Telecommunications Policy*, (September 17, 2002), at 2 [hereinafter *Telecom Policy*]

- (c) to facilitate the achievement of the objects referred to in paragraphs (a) and (b) in a manner consistent with Jamaica's international commitments in relation to the liberalization of communications; and
- (d) to promote the telecommunications industry in Jamaica by encouraging economically efficient investment in, and use of, infrastructure to provide specified services in Jamaica.

The Jamaica Telecommunications Advisory Council (JTAC) was established by this Act (section 58) and mandated to recommend reform of the telecommunications policy of the government. Most of the recommendations were accepted by the Ministry of Industry, Commerce and Technology and promulgated in its policy document on telecommunications. However, there were several important recommendations which were omitted, such as the repeal of the *Telecommunications Act, 2000* "and its replacement by new legislation incorporating elements from the existing Act, as well as from the Broadcasting and Radio Rediffusion Act and the Radio and Telegraph Control Act."⁹²

They also recommended the renegotiation of the 1999 contract with Cable and Wireless Jamaica Limited with a view to removing "possible limitations to the policy reform process through to 2006."⁹³ The government has not included these recommendations in its policy, perhaps in the belief that these activities are too extreme or specific to be incorporated in policy, which is usually a general document outlining goals and process.

⁹² Jamaica Telecommunications Advisory Council, *Telecommunications Policy Reform in Jamaica: Recommendations from the Jamaica Telecommunications Advisory Council to the Ministry of Industry Commerce and Technology*, (July 2002) at 2

One of the goals of the JTAC is to now share focus between the local and regional industry by driving the creation of a regional telecommunications network under the auspices of CARICOM. At the international level, it is submitted that a regional approach to the issue is a stronger point from which to pursue negotiations than the national level, and that this should be vigorously pursued. As is the pervasive and persistent problem of developing countries, there needs to be significant capacity building in this field, although Jamaica is well ahead of the region in the sector.

Nevertheless, pursuant to signing the Basic Agreement on Trade in Telecommunication Services under the GATS, the features of that agreement have been incorporated in the government policy on telecommunications issued in September of 2002 (pursuant to the recommendations of the JTAC). The fundamental principles the policy reflects are competition, universal access, and neutrality on technology. It states that

[t]he effective management of a liberalized telecommunications environment is likely to require regulatory capability that can increasingly provide a transparent and clear justification for interconnection rates, that are founded on high quality domestic cost information, that can stand up to third party examination and/or judicial review.”⁹⁴

It promises to explore other areas indicated in the basic agreement such as number utilization, number portability, rate rebalancing, interconnection, and minimum service level standards.

⁹³ *Ibid.* at 1

⁹⁴ *Telecom Policy* at 17

The government has undertaken to fulfill its GATS mandate to ensure transparency and non-discrimination in relation to universal access to telecommunications services, which it will administer in a "competitively neutral manner"⁹⁵. Also in accordance with the basic agreement, the government policy aims to provide interconnection⁹⁶ on a fair and non-discriminatory basis. The policy also aims to implement effective spectrum and numbering management principles as prescribed by the basic agreement.

The Office of Utilities Regulation (OUR) is the facility which regulates the industry as well as handles dispute settlement. The JTAC has pointed to the apparent overlap in jurisdiction between the OUR and the Fair Trading Commission (FTC) established under the *Fair Competition Act* and which is the main arbiter of disputes with relation to complaints and issues relating to unfair trading practices.

The JTAC has recommended that the OUR remit its responsibility in this regard to the FTC, as the central body with such jurisdiction. This recommendation has not been incorporated in the government policy, and it is recognized that this shift would have implications for capacity building within the FTC. A perusal of the *Telecommunications Act* reveals that section 5 thereof requires that the OUR consult with the FTC on matters which may fall within the jurisdiction of the FTC, and if it is determined that it falls within the purview of the FTC, the OUR should refer the matter to that office. The

⁹⁵ *Ibid.* at 22

⁹⁶ This refers "to the linking of suppliers providing public telecommunications transport networks or services in order to allow the users of one supplier to communicate with users of another supplier and to access services provided by another supplier, where specific commitments are undertaken" found in the Reference Paper of the Negotiating Group on Basic Telecommunications, April 1996 para 2.1

findings are that the overlap does not seem detrimental to the dispute settlement issue, although the JTAC would prefer that the first line of contact on this issue be the FTC.

There were a number of recommendations for legislative changes coming out of the policy document. According to the JTAC:

The law's main purpose would be to give legal effect to the Government of Jamaica's policy to introduce and promote competition in the provision of telecommunication services. This pro-competition legislation will set out:

- how local telephone carriers, including STVOs, can enter and compete in the market;
- how, and under what circumstances, carriers will be allowed to provide long distance services;
- how the industry will be regulated (including provisions relating specifically to the composition and work of a single Regulator);
- how the rights of consumers will be protected as the liberalization process unfolds;
- how the interests of the operating companies will be safeguarded;
- how Universal Access will be applied in the build-out of networks and the roll-out of new services; and
- how the rules will be applied in this new era of competition.⁹⁷

The present Act is divided into parts relating to administration, licensing of telecommunications services, spectrum management, interconnection (provision of voice services), universal service, consumer protection, international services, certification standards, enforcement and offences, *inter alia*. As the Act is quite comprehensive, there should be no need for the recommended repeal, only perhaps for amendments to enlarge the section on interconnections, which presently only relates to provision of voice services. Sections 71 and 72 give authority to the OUR and the Minister of Commerce,

⁹⁷ *Telecom Policy* at 27

Science and Technology (formerly the Minister of Industry, Commerce and Technology) to make rules and regulations under the Act.

Electronic Commerce

There is a new and burgeoning sector, that of electronic commerce or e-commerce for which there is no legislation in place. It is not a sector of the services trade, but rather falls within the modes 1 and 2 means of trading services. E-commerce may simply be defined as the production, distribution, marketing, sale or delivery of goods and services by electronic means.⁹⁸ Its means of operation through the internet makes it both difficult to gather statistics on the quantity of services traded in this way, as well as to regulate and monitor trade as there is no mechanism at any level which has been developed to comprehensively track the activities on the internet.

One major issue is whether Jamaica would seek to restrict the electronically traded services, or to liberalize the traditionally traded services to ensure that services traded by both methods are treated equally, and to ensure the consistent application of the law and therefore the GATS.

The paradigm shift from the physical to a digital economy has changed the way services are traded. This is an area in which developing countries can access markets and trade in sectors, which they would previously have been unable to due to costs of establishment and modes 3 and 4 restrictions on trade. The growth of e-commerce has effectively

reduced the size of the world to a computer, while exponentially increasing the size of potential markets. Nowhere is inaccessible; distance is no longer of great significance in the provision of certain services (for example, professional, educational, financial), every potential consumer is but a phone call, e-mail or click of the mouse away.

E-commerce has great potential because it allows access to the mass market without incurring the traditional overhead costs, reduces physical barriers between consumer and supplier, reduces time and costs of doing business globally, reduces the administrative cost of doing business, and provides opportunities for outsourcing arrangements with the United States or other firms in areas such as data processing and programming.⁹⁹ Almost any business that seeks to extend its reach beyond its national borders seeks to transmit information digitally via the internet.

The Jamaican government, through the Ministry of Commerce, Science and Technology has sought to encourage e-commerce through a number of recent initiatives. Although there is still no regulatory legislation in place, the *Electronic Transactions Bill*¹⁰⁰ is currently before Parliament, with the hope that this will soon be passed into law. Important facilities such as the recognition of electronic signatures and the use of local credit cards on-line and other e-payment methods need to be introduced before trade can properly be established locally. The repudiation of cyber contracts is also an important legal issue which will hopefully be addressed in the Act. As mentioned above, the Bank

⁹⁸ R. Chaitoo, "E-commerce and Caribbean Economies: Strategic Considerations for Governments, Caribbean Regional Negotiating Machinery" (Bridgetown: Caribbean Regional Negotiating Machinery, October 2000) at 7

⁹⁹ *Ibid.* at 14

of Jamaica is investigating this issue. Regulation is also necessary to safeguard public interests, and to ensure that services offered are legitimate and properly licensed.

Other Services

The other scheduled services have received little attention from local regulators as the existing regulations already meet the level of commitments scheduled. With regard to overseas market access for local services, significant trade has only occurred in the educational, tourism, communications (technical personnel), and professional (nurses) sectors and sub-sectors. The general prohibition of the delivery of services through the movement of natural persons through residency and licensing restrictions has been the cause.¹⁰¹ These restrictions would also affect the mode 1 delivery of professional services, which are those services most affected by them.

The state has made no commitments with regard to Government procurement under the GATS, which is consistent with Article XIII thereof. Both public and private interests are unwilling to commit to liberalizing this sector. There continues to be no commitments in the air transport industry.

Monitoring the System

Jamaica has scheduled the most commitments in the Caribbean region. With the exception of telecommunications, these commitments bind existing levels of liberalization, and therefore amendments to existing laws, or the passing of new laws

¹⁰⁰ After being passed by Parliament, the Bill will become the *Electronic Transactions Act*.

have not largely been necessary. The focus for the regulators is therefore not on legislation to implement commitments, but rather on the legislative and organizational 'infrastructure' to monitor, enforce and report. Article III on Transparency requires that an enquiry point be established to provide information to member states. The PIOJ has been designated as Jamaica's enquiry point, and does provide the information required of it.

To accompany the regime put in place to ensure the proper monitoring of the system, there should also be an efficient system for the compilation of data on the four modes of delivery of the services trade to enable a proper evaluation and analysis of the impact of the GATS, and to indicate areas in which reform may be needed. It would allow a depth of analysis of the services trade, which is presently impossible to achieve due to the dearth of data, particularly in modes 1 and 2. This of course, poses its own problems in terms of the method of data retrieval on modes 1 and 2. The problem is endemic to these modes and is international in its reach.

The PIOJ and STATIN are the agencies responsible for the compilation and publication of trade data. The Jamaica Bureau of Standards is in charge of developing and controlling standards, which is important in a trade environment where services sourced from various providers are being offered. It also assesses the conformity of applied standards with ISO standards, as well as WTO conformity. Jamaica has about 500 local standards including 100 technical regulations.

¹⁰¹ CARICOM being the exception having liberalized the movement of certain categories of workers.

Unfair Business Practices

It is important that the trade environment is one in which the interests of the domestic suppliers are protected against unfair business practices as indicated in Article IX. It must however be noted that Article IX is a very vague and weak provision. It states:

1. Members recognize that certain business practices of service suppliers, other than those falling under Article VII, may restrain competition and thereby restrict trade in services.

The use of the words 'may' and 'recognize' are more fitting for the preamble rather than the articles, which should be definitive and prescriptive. The use of 'shall' in paragraph 2 of the article, is prescriptive, but only prescribes entering into consultations and giving sympathetic consideration to requests. It is suggested that this article be strengthened by stating what these offensive business practices are, and if necessary, list exceptional circumstances in the proceeding paragraph.

Subsidies

Article XV – Subsidies

1. Members recognize that, in certain circumstances, subsidies may have distortive effects on trade in services. Members shall enter into negotiations with a view to developing the necessary multilateral disciplines to avoid such trade-distortive effects. The negotiations shall also address the appropriateness of countervailing procedures. Such negotiations shall recognize the role of subsidies in relation to the development programmes of developing countries and take into account the needs of Members, particularly developing country Members, for flexibility in this area. For the purpose of such negotiations, Members shall exchange information concerning all subsidies related to trade in services that they provide to their domestic service suppliers.

The flip side of dumping is subsidies, both of which can constitute trade distorting business practices in that they disguise the real prices of services. No real progress has been made in determining how subsidies are to be evaluated, that is, to determine whether they are trade distorting or not. Jamaica at present subsidizes the cinema, maritime transport, and tourism industries and offers location incentives.¹⁰² The issue is whether tax incentives should be considered subsidies, which are mostly focused on mode 3 delivery (commercial presence). The article on subsidies speaks to further negotiations being undertaken to develop disciplines governing this issue, taking into consideration the developmental needs of developing countries. This has not yet been achieved, and as such the subsidies issue is somewhat in abeyance.

While Jamaica has not established its coalition of services industries formally, there is a services grouping which operates within the JTAT that addresses trade issues of concern to this group. This will most probably become the basis for the coalition. Meanwhile, the Barbados Coalition of Services Industries has expressed certain concerns about the liberalization of the services trade, namely, saturation of local market with foreign service providers; unqualified persons being allowed to practice locally, and unfair competition from foreign professionals¹⁰³ which mirror the concerns of the Jamaican services providers as expressed in JTAT and industry discussions.

¹⁰² L. Abugattas Majluf, "Towards Disciplines on Subsidies on Agreements to Liberalize Trade in Services" found at <<http://www.crnw.org/documents/studies>> Caribbean Regional Negotiating Machinery/IDB, August 2002) 9

¹⁰³ N. Watson, "Study on Market Access Issues Re the Export of CARICOM Services to Canada and the USA"(Caribbean Regional Negotiating Machinery, April 2003) 29.

CHAPTER 4

*We turn now to the most obvious problematic of distributive justice: the income disparity between rich and poor nations, and all its social, political and cultural consequences*¹⁰⁴

Justice Theory of the WTO

The effectiveness of the dispute resolution mechanism is integral to an assessment of the working of any multi-lateral agreement. The effectiveness of that mechanism is in turn, dependent upon the existence of rules which state decisively whether or not a violation of the agreement has occurred. Consequent upon the years following the 1947 installation of the GATT, the WTO has taken the system of dispute resolution which evolved under the auspices of the GATT, and remedied defects such as the power of any one member, including the losing party, to stop the adoption of a report on the dispute. This process which has been aptly described as a “thickening of legality”¹⁰⁵ has created a system more akin to a municipal legal system than its predecessor in an attempt, *inter alia*, to ‘depoliticize’ the process.

The establishment of this rules-based system, which operates exclusively within the four corners of the WTO treaty, begs the question of whether the Law i.e. the treaty itself, is just. Now, while there are many definitions of justice, it is fair to say the root of the

¹⁰⁴ T. Franck, “Fairness in International Law and Institutions”(New York: Oxford University Press, 1995) 413

¹⁰⁵ C. Lafer, *The World Trade Organization Dispute Settlement System* (Geneva: United Nations, 1996) 18

determination will be the validity of the law, in how it was developed and arrived at, and how fair the law is to those subject to it, especially those whom Rawls refers to as the “least advantaged” members. Most theories of justice were developed for municipal legal systems as in times past, many of the societal features necessary for this process were thought not to be present in the international system as there was no cohesiveness among its subjects, or any universal point of reference from which such a system could spring.

What Kelsen refers to as the *grundnorm*¹⁰⁶ and Hart calls the rule of recognition¹⁰⁷ can be applied to an analysis of the WTO to a certain extent. Both phrases refer to the basic rule which underlies all other rules in a society; the unchangeable normative fact accepted by all, and in which all other rules are rooted and justified. The acceptance of such a rule or norm is necessary in the absence of universal agreement, otherwise any agreement would simply be a contractual relationship rather than law properly so-called. In the case of the WTO, it is submitted that the agreement remains contractual, as free trade theory, while generally accepted by the ‘society of nations’, can not be truly described as the only normative basis of international trade relations, as there are several other bases still in legitimate operation.¹⁰⁸

Prior to the WTO, one major criticism was

¹⁰⁶ See Freeman, M.D.A. ed, *Lloyd's Introduction to Jurisprudence*, at.273 for Kelsen's Pure Theory of Law and a discussion of his basic norm or *grundnorm*.

¹⁰⁷ *Ibid.* at 351 for a fuller discussion of Hart's rule of recognition.

¹⁰⁸ For example, preferential arrangements, tariff barriers, subsidies, restrictions on movement of peoples, and regional arrangements.

that international law not only lacks the secondary rules of change and adjudication which provide for legislature and courts, but also a unifying rule of recognition specifying 'sources' of law and providing for general criteria for the identification of its rules.¹⁰⁹

Some have cited the text of the WTO agreement as this 'rule of recognition' or norm¹¹⁰, in the international trade arena. The difference between the WTO and municipal law is that nations are not automatically subject to the WTO agreement, they opt to be, which raises the query: why would countries choose to join a system they decry as unjust, if it was not in their interests to do so?

This is where the rule of recognition meets with considerations outside its usual municipal law application, which renders it untenable in an analysis of the WTO. The universal acceptance of free trade theory is *sine qua non* to regarding the WTO as the rule of recognition. It is submitted that free trade theory is not in fact universally accepted, and a review of the history of the GATT reveals that the developing nations of the world became unwilling partners in the GATT *after* their attempts to develop another trading system which they believed to be more beneficial to their interests, failed.¹¹¹

One persuasive argument against the position of those who choose to justify free trade through Hart-based analysis, is rooted in Rawls' Theory of Justice. Under this theory, and equating justice with fairness, it is submitted states could not rationally believe free trade to be a just system. If they were placed behind Rawls' hypothetical 'veil of

¹⁰⁹ Hart, quoted in D. Palmeter "The WTO as a Legal System" (2000) 24 Fordham Int'l LJ, 444 at 453

¹¹⁰ Palmeter at 467

¹¹¹ referring here to UNCTAD and the New Economic Order

ignorance'¹¹² they would choose a system which would benefit the least advantaged in society having not been privy to what their status would be once the veil was lifted.

It is submitted that this fiction offers as objective an analysis of the justice of the free trade system as is possible. The obvious follow on is therefore, firstly, can a just system of adjudication be predicated on an unjust law? Secondly, does acceptance of the law make it valid? In the words of Pascal, "justice without strength is helpless, strength without justice is tyrannical ...Unable to make what is just strong we have made what is strong just."¹¹³ In municipal contract law persons can claim duress, misrepresentation, incapacity among many other defences to invalidate acquiescence. These defences do not exist under the WTO; a state cannot claim duress when it is obliged to fulfill its treaty obligations. The answer is therefore, that while justice cannot rationally be produced by and unjust system; neither can a state part of this system cry foul without subjecting itself to extreme hardship. It is submitted, therefore that the system is not a just one.

The heavy dependence of small island economies on external trade has been mentioned before. While there is a choice to participate in the WTO or not, the latter choice is not economically feasible, because although the WTO system is not of optimum advantage to small economies like Jamaica, it is better than the alternative of being effectively excluded from the global market. Such states therefore become caught between the proverbial "devil and the deep blue sea".

¹¹² Behind this veil, no state would know its economic situation in the world; this is an adaptation of the theory which Rawls originally related to individuals in a society.

The system of free trade which is predicated on ideas such as comparative advantage does not address the issues of the poorest states which are burdened by increasing debt and which are oftentimes not competitive enough in any one area to cultivate a healthy economy in such a system.

Deficiencies of the Dispute Settlement Body

Under the auspices of the WTO, the Dispute Settlement Body (DSB) was established by the Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes. By this understanding, adjudication in matters arising from the GATS or any other agreement under the WTO falls as a first recourse under the compulsory jurisdiction of the DSB. The body is composed of “well-qualified governmental and/or non-governmental individuals”¹¹⁴ and the panel which hears and adjudicates the matter should be “selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience.”¹¹⁵ The panel is composed of three members unless the parties agree to a five-member panel within ten days of the panel’s establishment.¹¹⁶

There are certain provisions within the DSU which were specifically included to accommodate the interests of developing countries. These are Articles 3(12), 4(10), 8(10), 12(10), 21(2), 21(7), and 21(8). Several of them are merely suggestive rather than

¹¹³ B. Pascal, *Pensées* found at <<http://www.ccel.org/p/pascal/pensees/pensees.htm>>, (1660)

¹¹⁴ WTO Understanding on Rules and Procedures Governing the Settlement of Disputes, Article 8 (1)

¹¹⁵ Ibid, Article 8(2)

¹¹⁶ Ibid, Article 8(5)

prescriptive of any actions to be taken during proceedings involving developing countries. Specifically, Article 4(10) states:

During consultations Members should give *special considerations* to the *particular problems and interests* of developing country members"[emphasis added];

Article 21(2) states:

Particular attention should be paid to *matters affecting the interests* of developing country Members with respect to measures which have been subject to dispute settlement"[emphasis added].

and Article 21(7) states,

(7) If the matter is one which has been raised by a developing country Member, the DSB shall consider what *further action* it might take which would be *appropriate* to the circumstances.

(8) If the case is one brought by a developing country Member, in considering what appropriate action might be taken, the DSB shall take into account not only the trade coverage of measures complained of, but also their impact on the economy of developing country Members concerned. [emphasis added]

While at first blush the inclusion of these provisions shows promise, any actual discretion to give meaningful consideration or attention to developing countries' specific interests and problems seems minimal in light of Article 3(2).¹¹⁷ That article disallows *adding* to or *diminishing* the rights and obligations provided in the covered agreements through the recommendations and rulings of the DSB. Therefore, any consideration given to the

¹¹⁷ Article 3(2) states:

The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of

interests and special problems of the developing world is subservient to the rights of any party claiming under the WTO agreements, as the former is not a binding obligation.

Further, panel decisions must be based on what is prescribed in the relevant agreement. The end result is that the 'special consideration' and 'particular attention' referred to above is limited to the considerations granted by the subject agreement itself, unless the opposing party acquiesces to any further considerations being extended. A defendant state may therefore be better served by a negotiated settlement than a panel decision. This system may serve a complainant well, but a respondent can hardly throw itself on the mercy of the Panel.

The process has been acclaimed as a great improvement over the previous system that existed under the GATT regime. The old system has been described as 'negotiation based' or more cynically as 'power based' while the new system is described as being 'rules based'. Under the previous system consensus among all the member states was necessary for decision making, while under the new system, the panel makes the decision bound by the rules of the agreement. The outcome is based on the application of the terms of the agreement, without more, and one member cannot block adoption of a report as this requires the consensus of the members. Analysis of the two systems has produced the strong, almost singular line of thought that developing countries would have been the great beneficiaries of the change.

interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

The thought behind this is that developing countries operate from a position of inferiority and developed countries from one of superiority when it comes to economic and political strength, both of which guide bargaining in the trade arena. As such, the certainty fixed into the new system is expected to create balance through its objectivity. Deliberations would be more objective, and ultimately so would decision making in the resolution of trade disputes.

However this move from the political approach to a legalistic approach in dispute resolution, one could argue, remains theoretical, and in the practical sense, not much has changed. Hudec states that

the impressive new WTO procedure is not a new departure, in the last fifteen years of its existence, the GATT dispute settlement system had become an adjudication procedure built solidly on the authority of legally binding obligations. Much of the new procedure laid down in the WTO's Dispute Settlement Understanding is merely a repetition of operating practices already established less formally by the GATT procedures... many things, perhaps, most, are being done the way they were done before.¹¹⁸

He in fact credits the impetus for change from the old to the new to an apprehension of United States' threats to use unilateral trade sanctions for GATT violations. Jamaica, as a developing country would hope that the promise of the DSB to remove 'real politik' from the dispute resolution process holds true. This sentiment places no finger on what in the new system will build confidence in small developing countries to believe that they will be operating on the 'level playing field' which has so far proven to be elusive. What will allay the reluctance these states had under the old system to bring complaints to the

¹¹⁸ R.E. Hudec, "The New WTO Dispute Settlement Procedure: An Overview of the First Three Years (1999) 8 Minn J. Global Trade 1, at 10-11

GATT when it was thought “that weak procedures... allow larger countries to apply ‘muscle’ in response to unwelcome complaints”¹¹⁹?

The stock answer is objectivity and effective enforcement of decisions. However, it is submitted that the DSB is essentially a legal structure existing in a highly politicized environment in which the ‘law’ is desired less for its certainty and regulatory functions, and more as a tool used unconscionably by some developed countries to achieve national economic goals.

The assertion of Hudec and others that the DSB as it exists today reflects a strong United States influence is doubtlessly true. It is equally true that the present system is a much more objective one in terms of the bases on which decisions are made. The downside to this is that the DSB is predicated on strict adherence to the letter of the WTO Agreements and there is no real equivalent to the old common law principle of equity to temper its rigidity.

Adjudication and the GATS

Jurisdiction

A critical look at the *EC Bananas II*¹²⁰ case, one of the only two matters decided under the GATS¹²¹ so far, shows how an unjust process and result can ensue under the WTO

¹¹⁹ *Ibid*, at 21

¹²⁰ Appellate Body Report, *European Communities –Regime for the Importation, Sale and Distribution of Bananas II*, WT/DS27/AB/R, Sept. 9, 1997 (hereinafter referred to as “EC-Bananas II”)

through strict adherence to the letter of the law, even in the face of a manifestly unjust result. The question of the justice of the outcome depends of the definition of justice and many other factors certainly; the facts however, are evident.

The matter was brought by the United States, Honduras, Mexico, Guatemala and Ecuador against the European Communities (EC) regarding their preferential scheme for the importation of bananas from the African Caribbean and Pacific group (ACP) countries, of which Jamaica is a member, provided for under the Lomé Convention. It was brought under both the GATT and the GATS. Essentially, the complainants alleged that the system of tariff quotas and licensing which favoured ACP countries was inconsistent with the WTO and denied them equal access to the EC bananas markets.

This matter exemplifies the impact a single decision of the DSB can have on the economic welfare of a small developing state. It demonstrates how the interests of multi-lateral corporations can be pursued under the auspices of the WTO, to the detriment of small mono-agricultural economies¹²². The incongruity within the WTO which allows “the small countries of the African, Caribbean and Pacific [to] feel they are being sent to a guillotine operated by Dole, Chiquita and Del Monte” by permitting the United States standing to bring a complaint regarding inaccessibility to markets for goods in which it

¹²¹ See also *Canada- Certain Measures affecting the Automotive Industry*, WT/DS 139/12, WT/DS 142/124 October 2000 (AB-2000-2). Decided on Article II and XVII as they affected the wholesale trade of motor vehicles.

¹²² In free trade theory, these economies would be regarded as inefficient producers, and should diversify their economy into more viable areas. Of course, in reality, states are made up of individuals whose welfare, both social and economic is the responsibility of the state. It is difficult in these circumstances to change the emphasis of the economy without affecting a large portion of the population adversely for whatever extended period of readjustment is necessary.

does not trade¹²³ while relegating the parties which are the actual affected traders to third party status with the limited participation that brings, surely cannot be described as a just outcome.

It was held by the Panel that the EC had violated the GATS by the use of operator category rules, activity function rules and hurricane licences under its import licensing system, which afforded unfair protection to EC and ACP distributors. The appeal case highlighted some of the difficulties inherent in the implementation of the GATS. The major ambiguity was whether services consequent on goods production should fall within the GATS. This was an important issue to the EC¹²⁴, and for the purposes of this paper, as it goes directly to the notion of certainty in the WTO law.

There is legitimate concern about overlap between the GATT and GATS and which one is supercedent in instances of conflict. It is submitted that the EC's argument that the simultaneous application of the GATT and the GATS to the same services-related measure could result in a conflict of rights between members is sound. In fact, despite the DSB's repeated insistence that there is no conflict between the GATT and the GATS, they admitted that "[w]hether a certain measure affecting the supply of a service related to a particular good is scrutinized under the GATT 1994 or the GATS, or both, is a matter that

¹²³ Which necessarily negates the requirement of trade detriment in bringing a matter before the DSB

¹²⁴ See, *EC-Bananas II* para. 56, where the EC contended that "[t]he licensing regime is an import licensing system and, therefore, does not touch the service providers of the Complaining Parties in their wholesale service activities, but only in their import activities, that is, in their activities in the goods sector. The European Communities maintains that, with respect to the allegedly discriminatory effect of operator categories, the Panel failed to demonstrate that there are unequal conditions of competition between service suppliers, and not between importers, who, although they may be also service suppliers, are not, in the latter capacity, affected by the licensing system. The European Communities submits further that the Panel erred in

can only be determined on a case-by-case basis”¹²⁵. It seems that the DSB itself is not really definitive on the issue.

The Complaining Parties maintained that if the framers of the GATS meant to exclude goods related services, they would not have included distribution and freight transportation services within its purview. The Appellate body agreed with the Panel where it stated that

the scope of the GATS encompasses any measure of a member to the extent it affects the supply of a service regardless of whether such measure directly governs the supply of a service or whether it regulates other matters but nevertheless affects trade in services¹²⁶

Therefore the Panel rejected the EC’s argument that the application of the GATS to the goods trade undermines the GATT. The services need not be independent services, included are any and all services related to the production and distribution of goods. The problem with this is, not only does it not resolve the issue of which agreement covers which measures, it also raises the query of whether the application of the GATS can render concessions extended towards the importation of goods under the GATT

law by determining that integrated companies are service suppliers under the GATS, because normally only their products, and not their services, appear on the market, and thus the GATS does not apply.”

¹²⁵ Ibid, the full section reads:

There is [a] ... category of measures that could be found to fall within the scope of both the GATT 1994 and the GATS. These are measures that involve a service relating to a particular good or a service supplied in conjunction with a particular good. In all such cases ..., the measure in question could be scrutinized under both the GATT 1994 and the GATS. However, while the same measure could be scrutinized under both agreements, the specific aspects of that measure examined under each agreement could be different. Under the GATT 1994, the focus is on how the measure affects the goods involved. Under the GATS, the focus is on how the measure affects the supply of the service or the service suppliers involved. Whether a certain measure affecting the supply of a service related to a particular good is scrutinized under the GATT 1994 or the GATS, or both, is a matter that can only be determined on a case-by-case basis.

¹²⁶ *EC Bananas II*, para 217

meaningless. The instant case is of course one which brings this into focus, as the services necessarily accompanying the concessions, are subject to another WTO agreement under which no concessions were given, making the arrangement inconsistent with the WTO.

Locus Standi

Another important point arising from this matter is in respect of *locus standi*. The failure of the United States to show any actual impairment of trade as it has no banana export industry did not nullify its claim. It was decided that *potential* interest was enough to ground a claim. It was solidly argued by the EC that the basis for bringing such proceedings is a claim for impairment of trade in the particular good or service in issue as an exporter or domestic producer, which the United States *prima facie* did not have, and was not asked to prove. It is submitted that the Panel and Appellate Body erred in ignoring this, particularly in consideration of the strong third party interests which stood to suffer severe impairment of trade in the event of a ruling in favour of the United States.

The *locus standi* issue has been so strictly adhered to even in the instant matter, that state parties with legitimate trade interests in a matter are only allowed limited participation in the proceedings if they are not the claimant or respondent. It is submitted that the application of a "legal interest test" at the inception of the matter, perhaps the pro-active flip-side of the nullification test, would be a useful device in determining which members have the right to be parties to the proceedings.

Equitable Jurisdiction

On appeal, the EC made the argument that the infractious measures taken were justified as they aimed to make the less developed banana producers more competitive with multi-nationals by employment of the measures in question, which basically made their bananas cheaper on the EC market. This argument was rejected on the basis that this was not a justification or exemption under the GATS. While the GATS seeks to liberalize the services sector, the DSU must seek to ensure that this is done equitably, without inflicting disproportionate hardship on its less developed members, which can ill afford it.

The GATS is based on a system of specific commitments which removes to some extent the need for special and differential treatment to be included in it, in cases such as the *EC Bananas II* case, however, where the third party states are the recipient of a trade benefit put in place by another state, there is no room for their concerns to be accommodated under the GATS.

The move towards the institution of an objective dispute resolution process appears to have depoliticized it to some extent. However, it has had some unfortunate consequences for Jamaica and other developing states. While an unfortunate outcome for the ACP states, the *EC Bananas II* case has opened eyes to the real economic consequences of the new system; a system under which decisions are now binding. It also shows how malleable and interchangeable the covered agreements can be where issues are not distinctly single faceted.

Canada – Certain Measures Concerning Periodicals Case

Although the *EC Bananas II* case is the only one which has applied the GATS in its decision making, the *Canada – Certain Measures Concerning Periodicals – Report of the Appellate Body*¹²⁷ also gave strong indication that there may be some conflict arising from the overlap between the GATS and the GATT in the future. Further, that countries which had taken comfort in the moratorium that the system of scheduling obligations under the GATS offers, may have their non-scheduled services caught by the GATT, as these services are linked to the production of goods.

During the appeals phase of the *Canada Periodicals* case, Canada submitted that the panel had erred in law when it held that Part V. I of Canada's Excise Tax Act was subject to and in contravention of the GATT. Canada claimed this tax was applied to advertising services and should properly be within the jurisdiction of the GATS. As Canada had not made any commitments to advertising services in its Schedule of Specific Commitments, it submitted that these were not in any way in contravention of the WTO. In its main arguments, Canada posited the following:

1. If the GATT 1994 applied to all aspects of services measures on the basis of incidental, secondary or indirect effects on goods, the GATT 1994 would effectively be converted into a services agreement.
2. The GATT 1994 should not apply merely on the ground that a service makes use of a good as a tangible medium of communication.

¹²⁷ AB-1997-2, WT/DS31/AB/R, 30 June 1997

3. The mere fact that a service makes use of a good as a vehicle or a medium is an insufficient ground on which to base a challenge under the GATT 1994.
4. It is evident from its text that Article III:4 of the GATT 1994 governs only services measures that affect the ability of foreign goods to compete on an equal footing with domestic goods.
5. Advertising services are only subject to Article III:4 to the extent that they affect the "internal sale or offering for sale, purchase, transportation, distribution or use" of a product that is entitled to national treatment under Article III of the GATT 1994
6. Advertising is not an input or a cost in the production, distribution or use of magazines as physical products. Therefore, the taxation of magazine advertising services is not indirect taxation of magazines as goods within the meaning of Article III:2.

The United States, which had brought the case against Canada in the first instance, countered these arguments by denying that the GATT and the GATS are mutually exclusive agreements, submitting that measures can be subject to both. The Panel had held that nothing in the *Marrakesh Agreement* opposed this. The United States rationalized that exclusivity of the agreements would allow states to discriminate against imports through the imposition of taxes which affected services related to the production of these goods, thereby effectively raising the cost of the imported goods.

The United States also asserted that advertisements affect a magazine's price, cost and competitive position as much as any input used in the production of a product. In the final analysis, the Appellate Body did uphold the findings of the Panel. They stated that the tax in question was listed as a tax on split-run periodicals, which *prima facie* puts it

within the jurisdiction of the GATT. It further held that the advertising content combined with the editorial content to form the physical product of the magazine. "By its very structure and design"¹²⁸, it was deemed to be a tax on a periodical. It was also noted that it is the publisher, or in the absence of a publisher resident in Canada, the distributor, the printer or the wholesaler, who is liable to pay the tax, not the advertiser.

In *EC Bananas II*, the EC alleged that in determining whether a service fell under the jurisdiction of the GATS or the GATT, the important thing was who was subject to the infractious measure, if it was the importer, then it would be the GATT. Unfortunately, for the purposes of this paper, they did not address the possibility of overlap between the GATT and the GATS as it was not relevant to the resolution of the matter. The overriding thought however, was that neither the GATT or the GATS supercedes each other.

But what of a genuine conflict? Will the determination of jurisdiction simply lie in the strength of the link between the service and the good in question and the discretion of the DSB? This would affect the treatment of professional services, communication services, audiovisual services, construction services, transport services, distribution services, and research and development services by the WTO. All these may be legitimately regarded as inputs in the production of goods, and can therefore affect market competitiveness. The initial impact of the GATS in this regard may be the shock felt by states as they learn that certain services are subject to other covered agreements. This could conceivably apply to the TRIPS and TRIMS in the way it did to the GATT in *Canada Periodicals*.

¹²⁸ *Canada-Certain Measures Concerning Periodicals*, para IV

It is submitted that a test be used, which may be called the "primary function" test to determine jurisdiction. The test is two-part:

1. Who is being subject to the measure? Is it an importer, exporter, distributor, transporter, financier, accountant etc.

Prima facie, if the entity being subject is a trader in goods primarily, then it is governed by the GATT; if it is a trader in services primarily, then it is governed by the GATS. If this is not definitive, the second tier of the test is applied:

2. Is the entity a service provider whose services can be independently traded in sectors other than the goods sector; or are the services characterized solely as inputs for the production of goods?

In the first scenario, it is submitted that such services fall correctly within the GATS, as they should rightfully be governed by that agreement which deals with the trade in services. In the second scenario, those services do not exist independently of the production of goods, and are not being "traded" as such, and rightfully belong under the GATT.

As the DSU is a general agreement, there needs to be provisions incorporated into the *Marrakesh Agreement*, and the covered agreements not only to guide the DSB in situations of conflict, but to create that certainty in the law, which has set the WTO system apart from its counterparts.

The 'rule of law' approach has important consequences for the principles of equity in the global trading arena. Much has been said within this paper on the concept of an unequal playing field, which in real terms puts Jamaica at a disadvantage in the trading arena for all the previously mentioned reasons. As such, the dispute resolution system as it exists engenders an inequitable result in that it does not allow for the consideration of extra-WTO matters by the panel.

Under the GATT, the chapeau under Article XX ameliorated the harsher effects which sometimes results from a strict application of the agreement in that it allowed certain extrinsic considerations to be taken into account. As the DSU makes no such provision in itself, the specific covered agreement is the only document which could speak to an equitable jurisdiction.

The panel is required to adjudicate upon issues by sticking closely to the black letter of the law. The treaty provisions are to be interpreted in the manner prescribed by the Vienna Convention, and only the sources of law recognized by the International Court of Justice Statute may be considered by the panel. This approach ignores the realities of the international trade arena, where states establish trade policy for political, social, historical and economic reasons.

Article XIV of the GATS does provide limited exceptions under a chapeau similar to Article XX of the GATT. It allows for the adoption of measures which may be inconsistent with the GATS but are (a) necessary to protect public morals or to maintain

public order (b) necessary to protect human, animal or plant life or health (c) necessary for compliance with anti-fraud laws, privacy laws and safety laws (d) inconsistent with Article XVII (national treatment) where it relates to the equitable or efficient imposition or collection of taxes in respect of service or service suppliers of other members, and (e) inconsistent with Article II (most favoured nation treatment), if it is to avoid double taxation pursuant to any other international agreement binding the Member. None of these exceptions address the issue of the economic disparity between the developed and developing nations of the world.

Measures may be implemented by a state from which it expects no economic gain, but which serves some other important purpose. Institution of such a measure may well be indefensible under the GATS, even though the hardship it imposes on another state is minor, when compared with the gains it achieves for the beneficiary state(s).

Many matters brought before the DSB can determine a small, undiversified economy's ability to be self-sustaining. The genesis of these matters is not usually an attempt to stop massive human rights violations or protect matters of national security, it is much more likely to be a bid to gain greater market access. Are small developing countries like Jamaica being asked to sacrifice their very existence to liberalist ideals? Bhala rightfully poses the question:

“Can we identify any schism in the global economy of the millennium that is any wider, and growing any faster than that between the first and third Worlds? Fifty years of trade liberalization has done a lot for a handful of

countries, and very little for the bulk of them, or at least that is the perception... and in this war perception is reality.”¹²⁹

Many of the issues Jamaica has with the system surfaced in the *EC Bananas* matter, namely, lack of legal resources; unlevel playing field; lack of effective sanctions; exclusion of equitable principles and the ineffectiveness of the system to justly decide multifaceted disputes; and standing to bring a complaint. Outside of the case, the lack of effective sanctions is another major consideration.

Enforcement

In the area of enforcement, the major deficiency is the lack of effective, across the board sanctions and lack of a central administering authority for applying them. As mentioned previously these deficiencies have resulted in the emergence of a very power focused system of enforcement, whereby it is left to the individual member state to use rather mercantilist tools against non-compliant loser states.

One suggestion on improving the system is that the DSB take a collective approach to enforcement similar to that employed by the United Nations when it recommends collective sanctions be taken against an offending state¹³⁰; NATO being one other international organization which operates in this way. Such an approach would improve the effectiveness of countermeasures, and would put enforcement of decisions properly within the control and authority of the WTO. It would remove the bilateral face from

¹²⁹ R. Bhala, “Five Theoretical Themes in the WTO’s Adjudicatory System” (2000) 6 I.L.S.A. Int’l & Comp. L. 439

¹³⁰ See generally, J. Pauwelyn, “Enforcement and Countermeasures in the WTO: Rules are Rules – Toward a More Collective Approach” (2000) 94 AJIL 335

post decision activities, and dispel the idea that states are left to their own devices once the DSB makes its decision.

However, even proponents of the collective approach recognize the difficulty of garnering the political will necessary for the adoption of such an idea by the necessary majority in the WTO. Such an approach would require that materially unaffected members be willing to risk the ill effects of restricting trade from the offending state, while having in effect nothing to gain economically by that state's compliance, and nothing to lose by its non-compliance. This is a challenge, however the promise of a more neutral and central system of enforcement is attractive and could well garner the support of the membership, beyond those members that are unable to effectively employ countermeasures.

It is submitted that any collective measures taken should emanate from the DSB in the form a resolution of the Membership passed by the usual two-thirds vote, which mandates collective sanctions to be taken against the loser state. This should be a recourse particularly where the interests of small developing and least developed states are being adversely affected, and their abilities to take effective action is limited by the small size of their 'weaponary'.

The Appellate Body of the WTO itself stated,

with the increased interdependence of the global economy, members have a greater stake in enforcing WTO rules than in the past since any deviation

from the negotiated balance of rights and obligations is more likely than ever to affect them directly or indirectly.¹³¹

This reasoning is quite consistent with, and in fact supports the idea of collective enforcement. The idea of countermeasures as a means of enforcement is impracticable for Jamaica as a heavily trade dependent economy. Palmeter notes:

The effectiveness of the remedy is compromised by the fact that, from an economic viewpoint, it is the equivalent of a self-inflicted wound. To be sure, trade restrictions impose a cost on firms and workers in the exporting country, but they also impose a cost on consumers and importers in the importing country. This undeniable fact can impose a political as well as economic cost on the Member imposing the sanction.¹³²

He goes on further to state:

Inequality between units of international law is one of the things that has imparted to it a character so different from municipal law and limited the extent to which it is capable of operating as an organized coercive system.¹³³

Jamaica's major trading partners, like most small English speaking Caribbean states, are the United States, Canada, Great Britain and the Caribbean. The truth of the matter is, with regards to the first three, Jamaica needs them, more than they need Jamaica. Countermeasures would be perhaps more than a self-inflicted wound; it could be a mortal wound. Charnovitz is therefore on the mark in his analysis that "by favouring large economies, the sanctioning instrument in the WTO may further tilt the North-South power balance in favour of the North"¹³⁴.

¹³¹ *EC-Bananas II*, para. 136

¹³² Palmeter, at 472

¹³³ *Ibid*, at

¹³⁴ S. Charnovitz, "Rethinking WTO Trade Sanctions" (2001) 95 AJIL 792 at 817

One of the fundamental functions of any law is to protect the weakest members of society. If the law is simply giving individuals the 'go ahead' to seek their own justice, rather than securing justice for them, it is only serving those strong enough to do it themselves. Those members of course, never needed the law in the first place, other than to legitimize what they could have done on their own. The law should be able to enforce compliance both from those willing, and particularly those who are *unwilling* to comply.

In fact, if the aim of these sanctions or countermeasures is to rebalance trade, then it seeks to do this at the expense of engendering further liberalization of trade. By allowing states to increase tariffs or take such measures as amounts to creating new restrictions on trade, it indeed seems a strange method of promoting free trade. If it is aimed at ensuring compliance, then this has not been the result thus far; in fact it seems not to "serve any purpose well"¹³⁵. The system has even been said to "encourag[e] discrimination, deprec[at] human rights, damag[e] the economy of the sender country, facilitat[e] protectionism, and favou[r] large countries"¹³⁶

Compensation or restitution have also been suggested as enforcement measures. Where countermeasures are ineffective, mandatory compensation should have more success for countries which cannot afford to take countermeasures. The compensation would be payable to all affected members as is stated in the agreement, except that this would be compulsory and not at the discretion of the losing party. Compensation could also be 'payable' in the form of a reduction of trade barriers, which would not only eliminate the

¹³⁵ *Ibid.* at 823

¹³⁶ *Ibid.* at 817

type of disadvantage suffered by the winning state relying on countermeasures as enforcement, but would advance the cause of trade liberalization.

Other suggestions for ensuring compliance with the WTO agreement are, withdrawing benefits from offending member states such as their right to bring matters to the DSB, and/or ensuring transparency in the resolution process effectively forcing the state to comply by way of conscience.¹³⁷

The preamble of the GATS states that the members wish to promote the economic growth of all trading partners and the development of developing countries. As a part of the WTO, the DSU should reflect this ideal. The adjudication process should also ensure that it has a positive effect on the promotion of the idea of trade liberalization, and that it not employ processes which may be counter productive to its cause.

¹³⁷ *Ibid.* at 326 -330

CONCLUSION

While the research and writing of this paper proceeded labouriously due the lack of comprehensive data on the trade in services, this in itself has led to the most important conclusion gleaned from the exercise. This is, that the services trade is difficult to document through data analysis due its inherently intangible nature and the unaccountable nature of certain modes of supply. Modern means of services provision that exclude passing through any physical borders, official checkpoints or ports, precludes an accurate scientific analysis of certain sectors of the trade. This is an internationally experienced problem, by no means confined to Jamaica, and is generally restricted to services consumed abroad (mode 1) and services traded cross-border (mode 2).

Central Administration of the GATS

There is need for centralization in the administration of the GATS, and indeed the WTO at the local level, to ensure coordination of all the relevant activities, information, materials and data. It is suggested that this be done at the level of the Ministry of Foreign Affairs and Foreign Trade, which leads negotiations and foreign policy formulation, or the Planning Institute of Jamaica which collects and compiles information.

Autonomous and Negotiated Liberalization

It is submitted that the liberalization of the trade in services must proceed through a mixture of autonomous and negotiated liberalization. It is important that certain key producer service sectors such as telecommunications, transportation and construction be

liberalized autonomously to facilitate the development of local industry, both in the goods and services sectors. Competitiveness in all aspects of the economy clearly depend on the cost of inputs and efficient production. While certain local industries may experience difficulties initially, the multiplier effect of having access to the most efficient producer services will increase overall welfare and benefit them in the long term

The protection of industry through preferential arrangements and subsidies should be de-emphasised. Instead, through the forum of JTAT and its development of competitiveness indicators, programs to encourage producers to make advantageous shifts in what they produce, and how they do it should be established. This will reduce the level of dislocation and economic hardship which will inevitably result from full liberalization.

Regional Liberalization

CARICOM is clearly the organ through which Jamaica can achieve the most success under the GATS. The CSME offers an opportunity to step into the "shallow end" of liberalized trading, before being thrown into the "deep end"(or the global trading arena). Lessons learned in the CSME will be valuable in developing and honing the approach to be taken globally in negotiations, and locally in implementing liberalization. These lessons will be less expensive than learning them at a global level where the major markets are located and the stakes are much higher.

Development of Regional Trade Policy

CARICOM also facilitates the development of a regional trade policy. The discussions in Chapter 2 show that it would be ineffective for Jamaica to approach the GATS negotiations as a single state. Jamaica has no market large enough, nor holds a large enough market share of any services market to command significant bargaining power. It is submitted that Jamaica must strengthen her CARICOM arrangements, and seek to expand these links regionally with South and Central America through bilateral agreements at the CARICOM level, in order to advance her interests at the negotiating table.

APPENDIX 1

LIST OF JAMAICAN LEGISLATION GOVERNING SERVICES

1. The Architects Registration Act, 1987
2. The Bank of Jamaica Act, 1960 (Amended last 2001)
3. The Banking Act, 1992
4. The Broadcasting and Radio Rediffusion Act, 1949 (Amended 1995, 2001)
5. The Building Societies Act, 1897 (Amended last 1997)
6. The Caribbean Community and Common Market Act, 1973 (Amended 1988)
7. The CARICOM (Free Movement of Skilled Persons) Act, 1997
8. The Education Act, 1980
9. The Fair Competition Act, 1993 (Amended 2001)
10. The Financial Institutions Act, 1992 (Amended 1997)
11. The Financial Services Commission Act, 2001
12. The Foreign Nationals and Commonwealth Citizens Act, 1964
13. The Insurance Act, 2001
14. The Land Surveyors Act, 1944 (Amended 1979)
15. The Legal Profession Act, 1972 (Amended 1994)
16. The Marine Insurance Act, 1973
17. The Medical Act, 1976 (Amended 1996)
18. The Nurses and Midwives Act, 1966
19. The Planning Institute of Jamaica Act, 1984
20. The Professional Engineers Registration Act, 1987 (Amended 2001)

21. The Office of Utilities Regulation Act, 2000
22. The Radio and Telegraph Control Act, 1973
23. The Real Estate (Dealers and Developers) Act, 1988
24. The Shipping Act, 1999
25. The Standards Act, 1969 (Amended 2002)
26. The Statistics Act, 1949 (Amended 1984)
27. The Telecommunications Act, 2000
28. The Travel Agencies Registration Act, 1956 (Amended 1973)
29. The Tourist Accommodation (Licence Duties) Act, 1984
30. The Tourist Board Act, 1955 (Amended last 1999)

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