

The Obligation of Non-Discrimination under the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS): A Developmental Perspective.

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DECLARATION

I, Simphiwe Sincere Bidie, do hereby declare that, except for references specifically indicated in the text, and any other help I have acknowledged, this dissertation is wholly a product of my own academic research and analysis. It is hereby further certified that this dissertation has not previously been submitted to another University for purposes of fulfilment of the requirements of a degree.

.....

Alice

DEDICATION

To the Bidie family

ACKNOWLEDGEMENTS

This study is in fulfilment of a dream that has been close to my heart and which I have always hoped to achieve. Its achievement would not have been possible without the Lord, God. I feel very privileged to have had this opportunity. In this regard my heartfelt **THANK YOU** is directed to one very close and dear friend (Dlangamandla). I will always Love you my dear, and you will always be part of me. My gratitude is also expressed to my beautiful family for always keeping me in their prayers. My expression of gratitude is also directed to my relatives, friends and colleagues who are all a blessing to me.

Specific mention is directed to:

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- May GOD bless you all.

LIST OF ABBREVIATIONS

ACE	Advisory Committee on Enforcement (World Intellectual Property Organisation)
ARIPO	African Regional Industrial Property Organisation
AU	African Union
CTS	Council for Trade in Services
CTT	Council for TRIPS
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EC	European Communities
EPA	Economic Partnership Agreement
EU	European Union
FDI	Foreign Direct Investment
FTA	Free Trade Area
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GSP	Generalised System of Preferences
IMF	International Monetary Fund
IPR	Intellectual Property Rights
ITO	International Trade Organisation
LR/ACT	Lyon-Roma Anti-Crime and Terrorism Group

MERCOSUR	Common Market of the South
MFN	Most-favoured-nation
NAFTA	North American Free Trade Agreement
NT	National Treatment
OECD	Organisation for Economic Co-operation and Development
SACU	Southern African Customs Union
SADC	Southern African Development Community
SADCC	Southern African Development Coordination Conference
SAIIA	South African Institute of International Affairs
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UPOV	International Convention for the Protection of New Varieties of Plants
US	United States of America
USTR	United States Trade Representative
WCO	World Customs Organisation
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organisation
WPPT	WIPO Performances and Phonograms Treaty
WTO	World Trade Organisation

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SUMMARY

The non-discrimination obligation has existed since the twelfth century. It has been practiced since then, changing from a conditional to unconditional form with the passage of time. It became firmly applied unconditionally at the multilateral level in 1947 after the formation of the GATT trading system upon which several countries based their trading relations. In 1995 when the WTO was formed, the underlying principles of the GATT 1947 became part of the WTO trading system, including the non-discrimination obligation. When countries join the WTO they automatically become subject to the non-discrimination obligation.

The ever increasing value of services and trade in the value of intellectual property has necessitated a look at the fundamental principles of world trade that countries have to adhere to in their trade relations. Incidentally, countries are not at the same level economically, hence one of the purposes of the WTO is to facilitate development in developing countries. Accordingly, this requires different application and/or interpretation of these fundamental principles in different situations, depending on the development level of each Member country. Amongst the five principles that underlie the international trading system, the non-discrimination principle is the focus of this study. The sustainability of the entire economic relations between WTO Member countries is dependent upon their fair compliance with this obligation. The obligation is found in Articles II and XVII of the GATS and Articles 3 and 4 of the TRIPS. The Membership of the WTO is made up of developed and developing countries. As a result of the fundamental nature of the obligation it is imperative that the scope and interpretation of this obligation, as developed by WTO adjudicating bodies, be analysed to determine if the obligation's application and/or interpretation satisfies the above fundamental object and purpose of the multilateral system of trade. The intention here is at all times to show the importance that the non-discrimination obligation carries in international economic and legal interactions and how non-observance of this obligation would negatively affect relations between Member countries of the WTO.

Keywords trade in services; intellectual property rights; non-discrimination; GATS; TRIPS; WTO; trade liberalisation; developing and developed countries

CHAPTER 1

1 INTRODUCTION

Trade liberalisation is a policy that seeks to ensure that trade between countries is consistently expanded.¹ In the General Agreement on Trade in Services (GATS) context, it is aimed at ensuring that other World Trade Organisation (WTO) Member countries' service suppliers are allowed to enter into the market of another Member State without regulatory impediments that seek to favour, for example, domestic service suppliers by discriminating against the foreign service suppliers, where market access has been granted.² In the Trade-Related Aspects of Intellectual Property Rights' (TRIPS) context, trade liberalisation seeks to ensure protection of intellectual property rights through promotion of technological innovation and transfer as well as the balance of rights to the mutual advantage of producers and users of technological knowledge.³ The WTO Preamble states that the Marrakesh agreement seeks to ensure that the rules by which trade liberalisation is promoted are free of discriminatory application. This is intended to help create a conducive environment for trade between Member nations.⁴

Trade liberalisation has over the years been seen as a necessary and an important tool for achieving openness in international trade.⁵ It is argued that trade liberalisation tends to increase average incomes, providing more resources with which to tackle poverty.⁶ It is proposed as the means: (i) by which policy efficiency can be promoted; and (ii) to provide service suppliers with opportunities to exploit new service markets so as to create progressive and sustainable development.⁷ Restraint to market access in services trade, for example through regulatory constraints, is seen as a barrier to trade liberalisation; hence regulatory reform that favours trade liberalisation is proffered through the GATS and the TRIPS

¹ Brown *et al* "How we got here: the road to GATS: Progress in Development Studies" 2008 *Sage Journals Online* 7 <http://pdj.sagepub.com/cgi/content/abstract/8/1/7> (accessed 06-03-2009).

² Brown *et al* 2008 *Sage Journals Online* 9.

³ World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 4.

⁴ *Ibid.*

⁵ McCulloch *et al* "Policies for the Poor" http://www.cepr.org/pubs/eep/EEP29/policies_for_the_poor.htm (accessed 24-03-2009).

⁶ *Ibid.*

⁷ Brown *et al* 2008 *Sage Journals Online* 16.

Agreements. It is in this context that the GATS and the TRIPS should be examined, to establish whether their regulatory framework, interpretation and/or application promotes development in accordance with the interests of the developing as well as the least-developed countries (herein after referred to as developing countries unless otherwise stated). The potential problem here is that the regulatory framework that these agreements establish may have gaps/loopholes through which interpretations that favour development⁸ and promote the interests of developing countries are subverted. This therefore requires:

- An examination of these agreements to determine and identify their non-discrimination regulatory framework and the gaps/loopholes that may exist; and
- Point out the deficiencies encountered in their interpretation and/or application and the consequences thereof.

The other problem is that, especially for example with the TRIPS Agreement which requires that Member countries enact substantive laws or regulations and incorporate these into national laws that govern the protection of goods and services or intellectual property rights embodied in those products or laws that are stand alone,⁹ the establishment of minimum enforcement standards means therefore that claims alleging the maintenance of inadequate enforcement or protection may be brought before the WTO Dispute Settlement Body (DSB).¹⁰ However, the TRIPS Agreement, like the GATS, is silent on the manner in which these claims may be proven.¹¹

⁸ In this context the term “development” is associated with opportunities that will afford developing countries with capacity and opportunities to produce and export so as to compete in global markets, balance in the playing field, provision of market access to products of developing countries, fair and equal participation in the international trading system through strengthening of trading rules and interpretation thereof so as to ensure existence of flexibility that will ultimately result in sustained economic growth, expansion of employment opportunities, sustained livelihoods and poverty reduction. See also Ismail *Mainstreaming Development in the WTO: Developing Countries in the Doha Round* (2007) 3 <http://library.fes.de/pdf-files/bueros/genf/04888.pdf> (accessed 25-01-2010).

⁹ Abbott agrees with this statement as he asserts that the TRIPS Agreement relies for many of its rules on cross-reference to an existing body of multilateral conventions administered outside the WTO. See Abbott *WTO Dispute Settlement and the Agreement on Trade-Related Aspects of Intellectual Property Right* in: Petersmann *International Trade Law and the GATT/WTO Dispute Settlement System* (1997) 415.

¹⁰ Ibid.

¹¹ Ibid.

Basically the agreement does not spell out the threshold of inadequate enforcement and protection.¹²

1.1 Adoption of the GATS and the TRIPS Agreements

The GATS and the TRIPS owe their adoption to proponents of trade liberalisation in services and intellectual property rights in the same manner that trade liberalisation was proposed under the General Agreement on Tariffs and Trade (GATT). These international regulatory norms for trade in services and intellectual property rules were made formal as a result of the Uruguay Round of negotiations which started in the mid 1980s and, eventually established the WTO in January 1995.¹³ The popular view is that the GATS and TRIPS are generally recognised as the largest achievements of the Uruguay Round, as they extended international trade rules to services¹⁴ and intellectual property rights¹⁵ for the first time. These agreements were set up as a result of a need for rules that would provide transparency, predictability and non-discrimination in international trade involving services¹⁶ (its key aim being the achievement of progressively higher levels of liberalisation of trade in services through successive rounds of multilateral negotiations)¹⁷ and intellectual property rights (its key objective being to change over to a strong patent protection regime that also reflects enforcement rather than rights protection only).¹⁸

¹² Abbott *WTO Dispute Settlement and the Agreement on Trade-Related Aspects of Intellectual Property Right* in: Petersmann *International Trade Law and the GATT/WTO Dispute Settlement System* (1997) 416.

¹³ De Vylder *The Least Developed Countries and World Trade* (2007) 148. See also Hoekman and Mattoo *International Trade: Trade in Services* in: Guzman and Sykes *Research Handbook in International Economic Law* (2007) 113.

¹⁴ Hoekman and Mattoo *International Trade: Trade in Services* in: Guzman and Sykes *Research Handbook in International Economic Law* (2007) 113. See also British Screen Advisory Council “Essential Background to Understanding the Current GATS Negotiations” <http://www.bsac.uk.com/reports/gatsbackground.pdf> (accessed 10-03-2009). See also Morrison *WTO Dispute Settlement in Services: Procedural and Substantive Aspects* in: Petersmann *International Trade Law and the GATT/WTO Dispute Settlement System* (1997) 377.

¹⁵ Abbott *WTO Dispute Settlement and the Agreement on Trade-Related Aspects of Intellectual Property Right* in: Petersmann *International Trade Law and the GATT/WTO Dispute Settlement System* (1997) 415.

¹⁶ De Vylder *The Least Developed Countries and World Trade* (2007) 148.

¹⁷ See Article XIX of the GATS. World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 300 – 301.

¹⁸ Abbott *WTO Dispute Settlement and the Agreement on Trade-Related Aspects of Intellectual Property Right* in: Petersmann *International Trade Law and the GATT/WTO Dispute Settlement System* (1997) 415.

1.2 The basic purpose of the WTO

The negotiations establishing the WTO were concluded in April 1994 and the WTO came into being on 1 January 1995.¹⁹ The basic purpose of the WTO is that it serves as a forum where Member trading nations are able to engage each other regarding matters of trade in services and trade-related aspects of intellectual property rights amongst others. The rules by which these nations are to abide are contained in Annexes 1B and 1C of the WTO Agreement.²⁰ These rules set out the principles by which the trading nations are to manage their trade relationship. They serve as the parameter within which trade in services and intellectual property rights are to be conducted by each Member country. The Mercantilism theory that people of the world must compete for the world's limited wealth was an invite to the outbreak of wars between nations.²¹ It is submitted that the multilateral negotiation system seems to create a wider scope to negotiate, and consequently, creates greater prospects of acceptance of one's offer in comparison to a bilateral negotiation which could result in conflict where another's terms of trade are not acceptable to the other. In addition to the multilateral negotiation system, it is further submitted that regional negotiated trading schemes seem to be a necessary supplementary system which not only would enhance developing countries bargaining position,²² but also ensures that such countries' regulatory framework is influenced by a regional perspective.²³

¹⁹ Petersmann *International Trade Law and the GATT/WTO Dispute Settlement System: An Introduction* in: Petersmann (ed) *International Trade Law and the GATT/WTO Dispute Settlement System* (1997) 11.

²⁰ See World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 284 and 321 respectively.

²¹ Mercantilism is seen as a zero-sum competition among States, where the aim is to generate a trade surplus. Its roots are traced back to the 1600s. See Hocking and McGuire (eds) *Trade Politics* (2004) 2 – 6.

²² As confirmed by Osakwe "Emerging Issues and Concerns of African Countries in the WTO Negotiations on Agriculture and the Doha Round" http://mpira.ub.uni-muenchen.de/1850/1/MPRA_paper_1850.pdf (accessed 03-12-2009).

²³ Hocking and McGuire (eds) *Trade Politics* (2004) 2 - 6. For another view see Alvis *et al* "Africa's Challenges in International Trade and Regional Integration: What Role for Europe?" http://www.saiia.org.za/images/stories/pubs/occasional_papers/saia_sop_32_alves_20090501_en.pdf (accessed 20-11-2009).

1 3 The basic definitional elements of services and intellectual property

A service is defined as a product of human activity, basically an act, aimed at satisfying a human need, which does not constitute a tangible commodity.²⁴ The term “services” covers a wide range of intangible and heterogeneous products and activities such as transport, telecommunication and computer services, construction, financial services, etc.²⁵ Trade in services refers to the sale and delivery of that intangible product, being a transaction, between a producer of that product and a consumer.²⁶ Also, the parties must be from different countries.²⁷ Intellectual property rights on the other hand are defined as intangible in their composite;²⁸ they represent an underlying factor in the provision of services in the marketplace.²⁹ These are trademarks, copyrights, patents and other intellectual property rights.³⁰ They are meant to facilitate exclusive rights to individuals or companies who develop new products and technologies for financial benefit from their investment and development costs.³¹ Other services, such as those associated with the public, for example, postal services, education and health were not included in international trade agreements. This was because these services fell to be under government control which exercised ownership over them.³²

²⁴ Morrison *WTO Dispute Settlement in Services: Procedural and Substantive Aspects* in: Petersmann *International Trade Law and the GATT/WTO Dispute Settlement System* (1997) 384. Brown *et al* 2008 *Sage Journals Online* 13.

²⁵ World Trade Organisation “Measuring Trade in Services, a training module for the World Bank” http://www.wto.org/english/res_e/statis_e/services_training_module_e.pdf (accessed 15-03-2009). See also Hibbert “The new framework for global trade in services – all about GATS” 2003 *The Service Industries Journal* 67 <http://www.informaworld.com/smpp/content~db=all?content=10.1080/02642060412331300892> (accessed 26-06-2009).

²⁶ Trade in services also represent a range of international economic transactions including movement of companies and people. See Lamy “Trade in Services and Economic Recovery: Tuning the instruments of growth” http://www.wto.org/english/news_e/sppl_e/sppl171_e.htm (accessed 28-09-2010).

²⁷ Hibbert “The new framework for global trade in services – all about GATS” 2003 *The Service Industries Journal* 67 78 <http://www.informaworld.com/smpp/content~db=all?content=10.1080/02642060412331300892> (accessed 26-06-2009).

²⁸ Abbott *Intellectual Property Rights in World Trade* in: Guzman and Sykes (eds) *Research Handbook in International Economic Law* (2007) 444.

²⁹ Biadgleng and Tellez “The Changing Structure and Governance of Intellectual Property Enforcement” http://www.southcentre.org/index.php?option=com_content&task=view&id=952&Itemid=67 (accessed 10-03-2009).

³⁰ World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 325 – 338.

³¹ De Vylder *The Least Developed Countries and World Trade* (2007) 156.

³² World Trade Organisation “Measuring Trade in Services, a training module for the World Bank” See Lamy “Trade in Services and Economic Recovery: Tuning the instruments of growth”.

These particular services were therefore, off limits to the private sector for profit making purposes. However, some of these services are now open to private sector commercial trade.³³

1 4 The economic value of services and intellectual property

World trade in services has the potential to be beneficial for all nations.³⁴ Maurer and Chauvet observe that the economies of low and middle income countries increased their services production between 1980 – 2000 by 25%³⁵ and that the share of services in economic activity in 2002 ranged from 72% of GDP in industrialised nations and 49% of GDP in developing countries; they contribute to employment; they contribute to infrastructure building; competitiveness and trade facilitation; they are vital contributors to other goods and services; and the potential gains from more open services trade are greater than those from liberalising goods.³⁶ In this light, trade in services is considered to be of much importance. Hence the overall goal of GATS and TRIPS is to remove barriers to trade in services and promote product protection.³⁷ With regard to employment, services trade accounts for 70 per cent in high-income countries, and 30 per cent in low-income countries.³⁸ In comparison with trade in goods which grow by 5 per cent, services trade has grown by 7 per cent on a year-on-year basis.³⁹ In 1998 the world market for trade in services was valued at \$ 3 trillion.⁴⁰ In 2008 services trade rose by 11 per

³³ Ibid. For example, banking, information technology, distance learning, etc.

³⁴ Brown *et al* 2008 *Sage Journals Online* 9 and 16. See also Kruger “Importance of trade in services” http://www.tralac.org/cgi-bin/giga.cgi?cmd=cause_dir_news_item&cause_id=1694&news_id=42479&catid=1107 (accessed 15-03-2009).

³⁵ Maurer and Chauvet *The Magnitude of Flows of Global Trade in Services* in: Hoekman *et al Development, Trade, and the WTO – A Hand Book* (2002) 235.

³⁶ The United Nations Conference on Trade and Development “The draft SADC Annex on Trade in Services: Sub-regional Conference on Improving Industrial Performance and Promoting Employment in SADC” http://www.unctad.org-60523_SADCAPCI_Services (accessed 15-03-2009). See also Lamy “Trade in Services and Economic Recovery: Tuning the instruments of growth” http://www.wto.org/english/news_e/sppl_e/sppl171_e.htm (accessed 28-09-2010).

³⁷ Maurer and Chauvet *The Magnitude of Flows of Global Trade in Services* in: Hoekman *et al Development, Trade, and the WTO – A Hand Book* (2002) 235.

³⁸ Braga and Brokhaug “Services and the Doha Development Agenda” http://siteresources.worldbank.org/EXTPARLIAMENTARIANS/Resources/Services_brief_for_PNoWB-final.pdf (accessed 14-04-2009).

³⁹ Braga and Brokhaug “Services and the Doha Development Agenda”.

⁴⁰ Hibbert 2003 *The Service Industries Journal* 70.

cent to \$3.7 trillion with an increase of between 8.5 and 15 per cent achieved by developed and developing countries respectively.⁴¹

Trade in services does not concern itself about tariffs and quotas, but about issues that are more sensitive, for example, the rights of foreign service companies in the host WTO Member country. This would include the right to a level playing field in public sector tender processes for the provision of services.⁴² Article 1:2 of GATS provides four modes by which a service in a particular sector may be supplied by a service supplier.⁴³ Members are however, entitled to choose which sectors are to be progressively liberalised and to what extent liberalisation will be entertained over a period of time.⁴⁴ Commitments are not supposed to be wound back once entered into.⁴⁵ Article XXI however, does allow withdrawal of such commitments by members.⁴⁶

Likewise, the introduction of technology has enhanced the importance and contributed significantly to the improved tradeability of services.⁴⁷ It is estimated that trade in services will reach 50% of world trade by the year 2020.⁴⁸ This estimate is informed by the significant commercial value that trade in services has presented for several countries so far. The GATS and TRIPS non-discrimination regulatory framework is the cornerstone by which this economic benefit in services trade and intellectual property rights is sought to be regulated by the WTO multilateral trading system. It is this economic significance and growth potential, especially for

⁴¹ UNCTAD Secretariat "Global Economic Crisis: Implications for Trade and Development" (2009) <http://www.indiaenvironmentportal.org.in/category/thesaurus/climatechange/naturaldisasters/conomy/services> (accessed 20-05-2009).

⁴² De Vylder *The Least Developed Countries and World Trade* (2007) 150. See Lamy "More holistic view in helping developing countries" http://www.wto.org/english/news_e/sppl_e/sppl167_e.htm (accessed 16-09-2010).

⁴³ World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 286.

⁴⁴ De Vylder *The Least Developed Countries and World Trade* (2007) 151.

⁴⁵ International Trade Strategies Pty Ltd "Submission on the General Agreement on Trade in Services (GATS)" <http://www.tradestrategies.com.au> (accessed 15-03-2009).

⁴⁶ See World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 301.

⁴⁷ Maurer and Chauvet *The Magnitude of Flows of Global Trade in Services* in: Hoekman *et al Development, Trade, and the WTO – A Hand Book* (2002) 235.

⁴⁸ Hibbert 2003 *The Service Industries Journal* 70.

developing countries, that services trade presents for all WTO Member States which informs this study's research problem.

It is submitted that greater competition in the provision of services indeed would increase competitiveness in the economy and, ultimately, improve the quality of services provided. The same principle applies with regard to intellectual property protection as this promotes innovation which contributes to a country's economic progress.⁴⁹ Based on this, competition is needed in order to promote the needs of the consumer and inventor or right holder, for without such competition, the consumer or the inventor or right holder suffers. The importance of trade in services is, again from this perspective, obvious.

However, it is not the existence or provision of such services or rights protection that is of most critical importance, but the vehicle by which such protection and services are sought to be driven, that is, the regulatory framework and its interpretation and/or application. The request-offer approach that the GATS agreement follows, for example in contrast to the GATT formula approach, makes the sector flexible, but also, more sensitive; determining the effect of such trade liberalisation in each field of services is much more difficult and crucial than anticipating liberalisation of trade in goods.⁵⁰ The people who suffer the most or who are unable to absorb the adjustment costs of trade reform are the indigent, since when hard times such as the present arise, they are the least able to protect themselves as a result of the effects of trade liberalisation. The services sector comprises 72% of output in Australia and 80% in the United States of America (US); it accounts for 50% of output in the low-income developing economies,

⁴⁹ The rationale/advantage of intellectual property is that it contributes towards innovations by facilitating the mastering of natural resources or raw materials from their extraction to their transformation into finished products. Intellectual property leads to self-emancipation of a country or region as it helps to solve existential problems or to satisfy the basic needs of the population since it is also regarded as including rights in know-how. See Botoy "Potential and Substantial Benefits of the TRIPS Agreement to the Member Countries of the African Intellectual Property Organisation in the Patent Field: An African's Perspective" 2005 *The Journal of World Intellectual Property* 91 <http://onlinelibrary.wiley.com/doi/10.1111/j.1747-1796.2001.tb00165.x/pdf> (accessed 11-10-2010).

⁵⁰ This has proven to be the case in the *Mexico – Telecoms* dispute. See Panel Report in *Mexico – Measures Affecting Telecommunications Services ("Mexico – Telecoms")* WT/DS204/R, 2 April 2004. The ability to regulate depends on governments knowing how, and when to make exceptions and impose limitations when they commit sectors to liberalisation. This, to developing countries requires an unrealistic level of foresight and capacity. See Brown *et al* 2008 *Sage Journals Online* 17.

for example, in Africa.⁵¹ In this regard the effect of regulatory interpretation and/or application and its reform in the developing countries is of great importance. As much as open trade will bring in much needed investment, this reform should not supersede the provision of a cushion for protection of the consumer generally, especially the indigent among the citizens.⁵²

The importance of trade in services is also seen from the stance taken by the Southern African Development Community (SADC) States. The SADC sees trade in services as of potential benefit/importance in five ways: firstly, it sees such trade as a tool for enhancing economic growth and increasing living standards in the region; secondly such trade in services will contribute to the development of domestic services delivery capacities; thirdly it is a vehicle to achieve the millennium development goals by contributing to social development (education and health) and poverty reduction; fourthly it will help in making merchandise exports more competitive; and in the fifth place services trade will help to promote structural change in regional economies.⁵³

Nkululeko Khumalo⁵⁴ is of the view that the SADC States are in favour of free trade which seeks to liberalise trade between them, based upon the GATS framework. For example, Article 23 of the SADC Trade Protocol states the importance that the countries attach to trade in services for the development of the regional economy and, that it requires the States to adopt policies and implement measures in accordance with their obligations in terms of the GATS agreement, with a view to liberalise trade in services within the SADC.⁵⁵ The trade services talks between the

⁵¹ The United Nations Conference on Trade and Development "The draft SADC Annex on Trade in Services: Sub-regional Conference on Improving Industrial Performance and Promoting Employment in SADC".

⁵² Therefore, when promoting trade liberalisation the WTO should not ignore the fundamental historical realities of global trade. See Brown *et al* 2008 *Sage Journals Online* 10.

⁵³ The United Nations Conference on Trade and Development "The draft SADC Annex on Trade in Services: Sub-regional Conference on Improving Industrial Performance and Promoting Employment in SADC".

⁵⁴ Khumalo "From Controlling to Managing the Movement of Persons in SADC" http://saiaa.org.za/images/upload/trade_report_no16.pdf (accessed 20-03-2009). Khumalo further opines that SADC treaty mandates its signatories to progressively eliminate obstacles to the free movement of capital and labour, goods and services and of people in the region generally among Member States. The trade services talks will aim to cover substantially all sectors and all modes of supply. So far, six service sectors have been identified for the initial liberalisation phase. These are: Construction; Communication; Transport; Energy; Tourism; and Financial matters.

⁵⁵ See Southern African Development Community (SADC) "Protocol on Trade" <http://www.sadcstan.co.za/Secure/downloads/protocol.pdf> (accessed 20-03-2009).

regional body's Members will aim to cover substantially all sectors and all modes of supply. So far, six service sectors have been identified for the initial liberalisation phase. These are: Construction; Communication; Transport; Energy; Tourism; and Financial matters. For example the Finance and Investment Protocol has already been approved by the SADC Summit held in Maseru, Lesotho on 18 August 2006.⁵⁶ In the same vein Article 24 of the Protocol calls upon Member States to adopt policies and implement measures within the Community for the protection of intellectual property rights in accordance with the TRIPS Agreement.⁵⁷ An initial draft Annex on Services has already been initiated, and if approved by all SADC States, will serve as a base for services trade negotiations between the Member States. The aim of the draft Annex is to ensure that Member States treat services from other Member countries and like service suppliers the same way as their own service suppliers and the services that they supply.⁵⁸ The same aim and objective is intended to be pursued by the SADC Member States in the TRIPS context.

It is submitted that, as a result of WTO Agreements being applicable even at the local sphere within a Member State's regulatory framework, trade liberalisation should be carefully planned and executed.⁵⁹ Foundations must be laid and a strategy devised to sequence and time the implementation and, consequently, effective management becomes critical.⁶⁰ It is submitted further that services generally, including those embodying intellectual property, also play a strategic role in development through the provision of basic infrastructure which would directly contribute to poverty alleviation.⁶¹ From that perspective the role played by governments thus

⁵⁶ The Protocol deals with finance, investment and macroeconomic policy issues in the context of overall regional economic integration and complements measures to promote intra-regional trade. The Protocol seeks to accelerate economic growth, sustainable development and poverty eradication in the SADC region. See Murangi "Finance and Investment Protocol Information Brochure" <http://www.sadc.int/cms/uploads/SADC%20Finance%20and%20Investment%20Protocol%20Brochure%20-%20English.pdf> (accessed 10-03-2011).

⁵⁷ Ibid.

⁵⁸ Khumalo "From Controlling to Managing the Movement of Persons in SADC".

⁵⁹ See Article XXVIII of the GATS Agreement. World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 305.

⁶⁰ In fact many developing countries, contrary to their developed counterparts, face extensive limitations, not only in their lack of capacity to grasp the implications of trade liberalisation, but also in their abilities to fund and train a negotiating team. See Brown *et al* 2008 *Sage Journals Online* 17.

⁶¹ For example the infrastructure developed by the telephone and cell phone companies. See Lamy "Trade in Services and Economic Recovery: Tuning the instruments of growth".

becomes of critical importance by being the major facilitators of access to services and the protection of intellectual property rights through prudent regulatory reform in each developing country.⁶²

2 RESEARCH PROBLEM

The research problem that will be pursued in this study can be broken down and articulated as follows:

- What is the nature and content of the WTO Member States' obligation to provide the most-favoured-nation (MFN) and national treatment in terms of the GATS and the TRIPS Agreements balanced against protectionist tendencies in the context of international trade regulation;
- What are the gaps/loopholes in the relevant WTO provisions;
- How consistent are these obligations or their interpretation and/or application with the developmental needs and aspirations of developing Member countries; and
- How has the recent jurisprudence of the WTO contributed to providing clarity and certainty with regard to the non-discrimination obligation?

The liberalisation of international trade in services and intellectual property rights is meant to foster competition and innovation as well as prevent trade barriers, but in the process it must also ensure prosperity for the Member countries of the WTO. In particular, it must uplift the developing countries' domestic economies and the lives of their indigent peoples. The GATS and the TRIPS regulatory framework should provide effective means by which such trade liberalisation will be achieved. A key question therefore is: can it be said that the MFN and the national treatment obligations as espoused in the GATS and TRIPS Agreements are such means?

⁶² See more discussion on services in Lamy "Trade in Services and Economic Recovery: Tuning the instruments of growth". See also Van der Merwe "Inclusive Approach key to SADC Integration" <http://www.polity.org.za/article/inclusive-approach-key-to-sadc-regional-integration-2010-11-25-1> (accessed 06-01-2011).

3 AIMS AND OBJECTIVES OF THE STUDY

It is therefore, the objective of this study to identify, amongst others, what the nature, effects and content of the GATS and TRIPS' non-discrimination regulatory framework entails, and to establish the obligations Member States assumed under these agreements' regulatory framework as well as the challenges that the developing countries encounter and ascertain whether there are any progressive development advantages that the developing countries gain in implementing these agreements. This, it is envisaged, will contribute to international trade in services regulation and intellectual property rights protection jurisprudence. Furthermore, the study's aims are:

- To identify the content and nature of Member State obligations under the obligation of non-discrimination under the GATS and TRIPS with a view for further analysis;
- To identify gaps/loopholes within the GATS and TRIPS Agreements' non-discrimination provisions and follow the process of interpretation and implementation of those provisions, particularly with an aim to establish how they might undermine the interests of developing countries;
- To provide a critical analysis of WTO case law which has interpreted the non-discrimination obligation as it applies to Member countries.

4 IMPORTANCE OF THE STUDY

Discrimination is considered to have been an important characteristic of protectionist tendencies pursued by countries during the 1930's.⁶³ This is regarded as the greatest contributor to the economic and political crises that resulted in the Second World War.⁶⁴ Resentment amongst manufacturers, countries and traders discriminated against poisons international relations, ultimately resulting in economic and political confrontations which might lead to conflict.⁶⁵ The Preamble of the WTO Agreement seeks to eliminate these discriminatory tendencies applied by trading countries, even in the services and intellectual

⁶³ Van den Bossche *The law and Policy of the World Trade Organisation: Text, Cases and Materials* (2008) 321.

⁶⁴ Ibid.

⁶⁵ Ibid.

property context where intellectual property rights are sought to be protected.⁶⁶ This is an important international relations duty upon which the WTO's objectives are founded.⁶⁷ Without the non-discrimination rule the multilateral trading system would almost certainly not exist.⁶⁸

International trade in services and intellectual property rights bring about competition and innovation, and in the process contribute to greater economic growth, including increased consumer protection and satisfaction. The advantages that developing countries receive through their participation in the multilateral trading system should supersede the disadvantages thereof. There can be no doubt that the current and potential benefits of international trade in services can only be sustained/maximised by the design and implementation of a multilateral regulatory framework that is, as much as possible, devoid of gaps/loopholes which can be exploited by member states for the pursuit of national trade protectionist goals or other unjustifiable discriminatory policies. In choosing to critically focus on the content and application of the non-discrimination provisions of the GATS and TRIPS, this study should make a modest contribution to that endeavour.

5 DELIMITATION OF THE PROBLEM

This study will focus on the obligations that the GATS and the TRIPS regulatory framework entails based upon the non-discrimination principle.

The historical background to international trade in Services and international intellectual property rights protection will be traced so as to provide a thorough understanding and to help highlight the key areas and priorities as well as challenges and concerns that the developing countries face within the agreements' regulatory framework. The objective here is to analyse the interpretation of the relevant provisions; the regulatory gaps/loopholes and explore these with the intention to highlight their effects on the interests of all WTO Member countries, especially developing countries.

⁶⁶ World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 4 and Article II:2. See also Van den Bossche *The law and Policy of the World Trade Organisation: Text, Cases and Materials* (2008) 321, note also fn 1.

⁶⁷ Van den Bossche *The law and Policy of the World Trade Organisation: Text, Cases and Materials* (2008) 321.

⁶⁸ Van den Bossche *The law and Policy of the World Trade Organisation: Text, Cases and Materials* (2008) 38.

6 RESEARCH METHODOLOGY

Research for this study will be done, primarily, through literature study. Electronic media and the library will provide most of the relevant information.

The WTO legal texts will be the primary source of regulatory information. Books and research papers together with journals will be the secondary sources from which further references and arguments will be constructed.

The non-discrimination obligation in the GATS and the TRIPS must be looked at in context and as such, research papers that explore specific regulatory and policy issues or suggestions as a means to find solutions in the interpretation and/or application of this obligation will be examined. Views contrary to the GATS and TRIPS objectives will also be utilised, with the intention to enrich the regulatory analysis in this study. International regulation of trade in services and the multilateral protection of intellectual property rights are fairly new concepts and this study, in seeking to interpret the GATS and the TRIPS non-discrimination obligations, will use case law as another source of primary authority where such is available.

7 REFERENCING STYLE

The style of referencing used in this study is that of *Speculum Juris*, an accredited journal published jointly by the Nelson R Mandela School of Law, University of Fort Hare and the Faculty of Law, Rhodes University.

CHAPTER 2

THE GATS AND TRIPS: A HISTORICAL AND SOCIO – ECONOMIC BACKGROUND

1 INTRODUCTION

The GATS is an intergovernmental agreement that establishes a multilateral framework of principles and rules with a view to expand services trade under conditions of transparency and progressive development, and as a means for promoting the economic growth of all trading partners and the development of developing countries.¹ The articles in the GATS are a means by which governments commit themselves not to interfere in services sector markets in a discriminatory manner.² On the other hand the TRIPS agreement assumes the same status as the GATS.³ The TRIPS agreement contains various substantive obligations that cover various intellectual property rights, including obligations in respect of national measures and procedures for the protection and enforcement of intellectual property rights.⁴ The two agreements are framework agreements or a catalogue of rules and disciplines for regulating international trade in services, in the GATS context⁵ and setting minimum standards for protection of intellectual property at the national level, in the TRIPS context.⁶

In order for a country to be a GATS or TRIPS party, such country must accede to all WTO multilateral agreements and abide by the provisions contained therein.⁷ The Council for Trade

¹ See the GATS Preamble in World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 286. See also Bonapace “Main Trade and Regulatory Principles in the GATS/WTO” <http://www.itu.int/ITU-D/treg/Events/Seminars/2002/china/pdf/07-doc3-2Bonapace.pdf> (accessed 24-03-2009) and Hibbert “The new framework for global trade in services – all about GATS” 2003 *The Service Industries Journal* 67 <http://www.informaworld.com/smpp/content~db=all?content=10.1080/02642060412331300892> (accessed 26-06-2009).

² Hibbert 2003 *The Services Industries Journal* 67. See also Brown *et al* 2008 *Sage Journals Online* 14.

³ See the TRIPS Preamble in World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 321.

⁴ See World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 325 - 347. See also Biadgleng and Tellez “The Changing Structure and Governance of Intellectual Property Enforcement”.

⁵ Egger and Lanz “The Determinants of GATS Commitment Coverage” <http://www3.interscience.wiley.com/cgi-bin/fulltext/121543797/PDFSTART> (accessed 22-02-2010).

⁶ Biadgleng and Tellez “The Changing Structure and Governance of Intellectual Property Enforcement”.

⁷ Chanda “GATS and its implications for developing countries: Key issues and concerns” <http://www.un.org/esa/desa/papers/2002/esa02dp25.pdf> (accessed 10-04-2009).

in Services, which consists of all WTO members, is responsible for overseeing the regulatory functioning of the GATS,⁸ as is the Council for TRIPS in terms of Article 68 in the TRIPS context.⁹

The GATS was negotiated during a period of much unilateral reforms of service sector policies, as arguments for State-control of major service industries were eroded and large scale privatisation programmes were pursued in many parts of the world. The TRIPS on the other hand is submitted to be the driving force behind the protection of intellectual property rights which resulted from technological developments¹⁰ informed by the recognition of the fact that the cost and quality of services was important for the growth performance of any economy. As a consequence the emergence of the internet has brought about an immense international services participation in global trade which has removed distance-related barriers to trade that had disadvantaged consumers and suppliers alike.¹¹ The technological developments have contributed equally to create internationally tradeable products, for example, e-banking, tele-health and distance learning.¹² It is submitted that in this regard it is also notable that people today are even able to listen to internet-radio from anywhere in the world. It is in this context that services and intellectual property can be positively used for the development, for example of the SADC region, where there is even deteriorating quality of health and education services as these sectors could be beneficial and can help reduce poverty and uplift the regional economy.¹³

⁸ Article XXIV of the GATS. World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 302 - 303.

⁹ World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 350. See also Commission on Intellectual Property Rights "Integrating Intellectual Property Rights and Development Policy" http://www.iprcommission.org/papers/pdfs/final_report/CIPR_Exec_Sumfinal.pdf (accessed 25-01-2010).

¹⁰ Hoekman "The General Agreement on Trade in Services: Doomed to Fail? Does it Matter?" 2008 *Journal of Industry, Competition and Trade* 295 <http://www.springerlink.com/content/k228675144p5343x/fulltext.pdf> (accessed 12-12-2009). See also Zebaze "Effect of Services Trade Liberalisation in Africa" http://hal.archives-ouvertes.fr/docs/00/30/68/28/PDF/These_C._DJIOFACK.pdf (accessed 24-07-2009).

¹¹ The World Trade Organisation "Basic Purpose and Concepts" http://www.wto.org/english/tratop_e/serv_e/cbt_course_e/c1s1p1_e.htm (accessed 07-04-2009).

¹² Matthews *Globalising Intellectual Property Rights: The TRIPS Agreement* (2002) 8. See also The World Trade Organisation "Basic Purpose and Concepts".

¹³ Ndulo *et al* "State of Trade in Services and Service Trade Reform in Southern Africa". <http://www.nepru.org.na/index.php?id=126> (accessed 07-04-2009).

Trade in services facilitates foreign direct investment (FDI) as does the protection of intellectual property rights. As a result services trade has the potential to create and sustain employment for the host WTO Member country.¹⁴ Foreign direct investment that is associated with services trade was estimated at \$500 billion in 2001 – 2002.¹⁵ Also, services trade is now estimated to account for 60 per cent of World trade.¹⁶ The UNCTAD report estimates that global FDI inflows to developing countries is expected to grow by 7 per cent in 2008 due to the global recession and that a decline is expected for the year 2009.¹⁷

Intellectual property in the TRIPS' context and with regards to its socio-economic influence facilitates trade.¹⁸ As in GATS, trade in intellectual property plays an important role because it enables a country or region to increase its gross domestic and national product, which contributes towards the creation of jobs and raising of standards of living and the expansion of growth.¹⁹ One of the rationales/advantages behind granting intellectual property rights is the encouragement of artistic creation and innovation. It is the benefit that this innovation brings for the community at large since such a community will have a foundation to develop a larger economic base, for example through copyright which helps to contribute towards the progress of science and art.²⁰ Fair use balances the rights of innovators and those of the society by ensuring that there is dissemination of knowledge, and nations are permitted to utilise

¹⁴ See further discussion in Hoekman and Mattoo *International Trade: Trade in Services* in Guzman and Sykes *Research Handbook in International Economic Law* (2007) 114.

¹⁵ De Vylder *The Least Developed Countries and World Trade* (2007) 146.

¹⁶ Meester *A Legal and Institutional Analysis* (2007) 104, fn 430.

¹⁷ UNCTAD Secretariat "Global Economic Crisis: Implications for Trade and Development" May 2009 http://www.unctad.org/en/docs/cicrp1_en.pdf (accessed 10-03-2011).

¹⁸ Botoy "Potential and Substantial Benefits of the TRIPS Agreement to the Member Countries of the African Intellectual Property Organisation in the Patent Field: An African's Perspective" 2005 *The Journal of World Intellectual Property* 91 <http://onlinelibrary.wiley.com/doi/10.1111/j.1747-1796.2001.tb00165.x/pdf> (accessed 11-10-2010).

¹⁹ Botoy 2005 *The Journal of World Intellectual Property* 91 – 92.

²⁰ Palmer "Balancing Intellectual Property Rights with Public Obligations in Developing Nations: Lessons from Africa" 2006 *Critical Arts: A Journal of South-North Cultural and Media Studies* 62 http://pdfserve.informaworld.com/348298_751313789_790471586.pdf (accessed 25-03-2010).

intellectual property, to the extent justified by the purpose, in accordance with fair practice.²¹ This contributes towards the flow of information and development.²²

Intellectual property rights' main source of income stems from license fees for patents and royalties. Income from these sources has increased faster than global trade in general in recent years and in 1995 – 2004 these payments accounted for 5 to 6% of the value of world commercial services.²³ In the United Kingdom copyrights alone in 1990 were estimated to have accounted for more than £4 billion worth of exports and 2.6 per cent of GDP.²⁴ Expenditure on research and development in the United States of America (US) in 1987 is estimated to have been \$125 billion and in 1997 the figure had doubled in Germany and tripled in Japan.²⁵ In a recent study by the International Chamber of Commerce (ICC) it is estimated that copy-right based industries and interdependent sectors account for approximately 4 – 11 per cent of various countries GDP. For example this contribution is 3.4 per cent in Japan, 4.7 per cent in Canada, 6.6 per cent in Russia, 6.9 per cent in the EU and 11.09 per cent in the US. These sectors also increase job opportunities at the rate of 3 – 8 per cent within these countries.²⁶ This is true as well for the patent dependent sectors.²⁷ Given this growth and the prospects for its future positive socio-economic impact, but also given the high susceptibility of these technological innovations and the commodities made possible by them to misappropriation through piracy,²⁸ WTO Member countries felt the need for international rules upon which such trade in services and intellectual property would be conducted.²⁹ In fact the low or non-existent

²¹ Ibid.

²² Ibid. However, there are contrary arguments to the proposition that protection encourages innovation and would in the process contribute towards development. See further arguments in Correa "Review of the TRIPS Agreement: Fostering the Transfer of Technology to Developing Countries" <http://www.twinside.org.sg/title/foster.htm> (accessed 11-10-2010).

²³ De Vylder *The Least Developed Countries and World Trade* (2007) 157.

²⁴ Groves *Intellectual Property Rights and their Valuation A Handbook for Bankers, Companies and their Advisers* (1997) 127.

²⁵ Groves *Intellectual Property Rights and their Valuation A Handbook for Bankers, Companies and their Advisers* (1997) 128.

²⁶ Dixon "Intellectual Property: Powerhouse for Innovation and Economic Growth" [http://www.iccwbo.org/uploadedFiles/BASCAP/Pages/IP_Powerhouse%20for%20Innovation%20and%20Economic%20Growth%20\(2\).pdf](http://www.iccwbo.org/uploadedFiles/BASCAP/Pages/IP_Powerhouse%20for%20Innovation%20and%20Economic%20Growth%20(2).pdf) (accessed 10-03-2011).

²⁷ See Dixon "Intellectual Property: Powerhouse for Innovation and Economic Growth".

²⁸ Matthews *Globalising Intellectual Property Rights: The TRIPS Agreement* (2002) 8.

²⁹ For more argument on trade rules see Brown *et al* 2008 *Sage Journals Online* 10.

levels of protection of intellectual property rights are regarded as barriers to exports since exports are being displaced by local piracy production.³⁰ The fact that inventors cannot recoup their expenses if their intellectual property products are immediately pirated or counterfeited contributes towards disadvantaging the inventor, since he/she contributed by physical and financial efforts to the invention, hence this would result in less investment.³¹

It is submitted that the fundamental challenge for developing countries was, and still is, that the inclusion of the TRIPS provisions in the WTO Agreement meant that when the agreement entered into force, the respective Member countries must have had in place the legal procedures and the administrative and legal infrastructure necessary to enforce the conferred rights, especially after the transitional period.³² As a result any deviation from the minimum requirements set by the TRIPS could lead to the activation of dispute settlement procedures within the WTO in accordance with the Dispute Settlement Understanding (DSU).³³ If a Member country is found to have violated the TRIPS rules, the affected Member country can apply trade retaliation against the non-complying country, in any area covered by the WTO Agreements.³⁴ This in essence would call for developing countries to put much effort and resources into developing a significant body of legislation, consisting of both substantive and procedural rules, or effect a significant change in their existing laws.³⁵ The inclusion of the protection of intellectual property in the TRIPS agreement may be attributed to the broader integration of the protection of intellectual property rights into the legal framework for international trade.³⁶

This Chapter is divided into four sections. Section 2 deals with services trade. Subsequent to that the TRIPS will be dealt with in Section 3. In each section the definition, a historical

³⁰ Botoy 2005 *The Journal of World Intellectual Property* 92.

³¹ Botoy 2005 *The Journal of World Intellectual Property* 92 – 93.

³² See arguments in this regard in Correa “Review of the TRIPS Agreement: Fostering the Transfer of Technology to Developing Countries” <http://www.twinside.org.sg/title/foster.htm> (accessed 11-10-2010).

³³ Correa *Intellectual Property Rights, the WTO and the Developing Countries: The TRIPS Agreement and Policy Options* (2002) 2.

³⁴ Ibid.

³⁵ In fact developing countries have voiced the difficulties they have faced in putting the legislative changes in place as required by the TRIPS Agreement and the lack of support thereof from developed countries. See discussion in Correa “Review of the TRIPS Agreement: Fostering the Transfer of Technology to Developing Countries” <http://www.twinside.org.sg/title/foster.htm> (accessed 11-10-2010).

³⁶ Yusuf *TRIPS: Background, Principles and General Provisions* in: Correa and Yusuf *Intellectual Property and International Trade: The TRIPS Agreement* (2008) 18.

background, scope of application and objectives and purpose of the GATS and TRIPS as well as the importance of both fields (services and intellectual property) is explored from a general perspective. Thereafter, the Chapter will conclude.

2 GENERAL AGREEMENT ON TRADE IN SERVICES (GATS)

2.1 Definition of Services

The GATS defines services according to four modes of supply.³⁷ The four modes in Article I:2 are:

- cross border supply [Mode 1]: This concerns a service delivered within the territory of the Member, to the territory of another Member;
- consumption abroad [Mode 2]: This concerns a service delivered outside the territory of the Member, into the territory of another Member, to a service consumer;
- commercial presence [Mode 3]: This concerns a service delivered within the territory of the Member, through the commercial presence of the supplier; and
- presence of a natural person [Mode 4]: This entails service delivery within the territory of the Member, with the supplier present as a natural person.³⁸

The regulatory framework under which these services must be supplied is based upon five principles: non-discrimination, reciprocity, market access, fair competition and transparency.³⁹ These combined create a range of obligations for each Member country.

³⁷ Lehloenya "Trade in services: examples for SADC" 2003 *Journal for Juridical Science* 86 <http://ajol.info/index.php/jjs/article/view/27151> (accessed 30-06-2009). See also Francois and Wooton "Market structure, trade liberalisation and the GATS" 2001 *European Journal of Political Economy* 389 http://www.sciencedirect.com/science?_ob=MIimg&_imagekey=B6V97-43BXPPC-8-W&_cdi=5891&_user=2093731&_pii=S0176268001000337&_orig=search&_coverDate=06%2F30%2F2001&_sk=999829997&view=c&wchp=dGLbVzW-zSkWA&md5=5cc79de8e56ec8876120ae1592a4f925&ie=/sdarticle.pdf (accessed 01-06-2009). See further Brown *et al* 2008 *Sage Journals Online* 13.

³⁸ World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 286. Trade in services is further simply defined as an economic exchange between residents and non-residents, juristic or natural. See Hibbert "The new framework for global trade in services – all about GATS" 2003 *The Services Industries Journal* 67. The most distinguishing characteristic of services transactions is that their production and consumption occur simultaneously, often requiring direct contact between consumers and producers. See Stern *Quantifying Barriers to Trade in Services* in: Hoekman *et al* (eds) *Development, Trade, and the WTO - A Hand Book* (2002) 247. See also The United Nations "Manual on Statistics of international trade in Services" <http://www.oecd.org/dataoecd/32/45/2404428.pdf> (accessed 29-04-2010).

2.2 Historical Background

According to Brown *et al* the road to GATS started in 1927 when the first real attempt to deal with matters relating to international trade in a co-ordinated way was made through the negotiation of the Geneva Convention on Import and Export restrictions.⁴⁰ The agreement however, failed to get sufficient signatories and was eventually abandoned.⁴¹

The International Trade Organisation (ITO) discussion followed at the end of the Bretton Woods negotiations that resulted in the formation of the World Bank and the International Monetary Fund (IMF), and once again broad agreement on the new institution failed to reach final ratification.⁴² As a result of that failure, the General Agreement on Tariffs and Trade (GATT), despite its temporary status, came to form the basis for international negotiations on trade affairs until the formation of the WTO on 1 January 1995.⁴³ After the GATT was adopted the process of integration of international trade became primarily multilateral and was separated from the process of investment. The separation was informed by the fact that an international investment regime is more intrusive than an international trade regime as it also touched on traditional domestic economic processes, making negotiations technically and politically more difficult.⁴⁴

Services were not covered in trade negotiations between States from 1947 until the Uruguay Round⁴⁵ despite the fact that trade in services, for example, in transportation, travel and finance, have been an important part of the international trading system for a long time.⁴⁶ The basic objective of the GATT was to facilitate further negotiations between Member States, to

³⁹ World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 286 – 319.

⁴⁰ Brown *et al* 2008 *Sage Journals Online* 8.

⁴¹ Ibid.

⁴² Ismail *Mainstreaming Development in the WTO: Developing Countries in the Doha Round* (2007) 3 <http://library.fes.de/pdf-files/bueros/genf/04888.pdf> (accessed 25-01-2010).

⁴³ Brown *et al* 2008 *Sage Journals Online* 8. See also The United Nations Conference on Trade and Development (UNCTAD) “Investment Provisions in Economic Integration Agreements” http://www.unctad.org/en/docs/iteit200510_en.pdf (accessed 12-11-2009).

⁴⁴ The United Nations Conference on Trade and Development (UNCTAD) “Investment Provisions in Economic Integration Agreements” http://www.unctad.org/en/docs/iteit200510_en.pdf (accessed 12-11-2009).

⁴⁵ Francois and Wooton “Market structure, trade liberalisation and the GATS” 2001 *European Journal of Political Economy* 389.

⁴⁶ Hibbert 2003 *The Services Industries Journal* 69.

lower tariffs and duties imposed upon Members across all economic sectors by setting the ground rules by which Member countries were to engage in the international trading system and provide a forum for continuing trade negotiations.⁴⁷

The 1980s brought a new ideology committed to trade liberalisation.⁴⁸ Consequently, the international financial institutions and major economic powers came increasingly under the influence of ideas that aggressively promoted the superiority of market forces.⁴⁹ Thus the Uruguay Round of multilateral trade negotiations held between the early 1980s and 1994 was much bolder in its pursuit of trade liberalisation and broader in the range of sectors it sought to tackle.⁵⁰ This led to the inclusion for the first time of trade sectors such as services, intellectual property, investment and agriculture in the negotiations.⁵¹ The most significant outcome of these negotiations was the creation of a new Organisation, the WTO. The WTO is a major permanent institution that has its own secretariat. It oversees international trade and is endowed with much broader powers to pursue the trade liberalisation agenda.⁵² With this in mind, it is only in recent decades that services have become an important and dynamic part of economic activity.⁵³ Trade in services is now the dominant employer and producer of income in all developed and developing countries.⁵⁴ Governments have dominated ownership and control over segments considered to be significant for infrastructural development, social and regional cohesion.⁵⁵ These were monopolised and invited tight regulation to shield them from the market's rough tumbles.⁵⁶

The organisational structure of the WTO consists in a Ministerial Conference which is the highest decision-making body of the organisation and, its day-to-day business is run by the

⁴⁷ Brown *et al* 2008 *Sage Journals Online* 8.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Ibid.

⁵³ Lehloenyana 2003 *Journal for juridical Science* 87.

⁵⁴ Ibid.

⁵⁵ Bonapace "Main Trade and Regulatory Principles in the GATS/WTO". These included education, health, and basic insurance.

⁵⁶ The World Trade Organisation "Basic Purpose and Concepts" http://www.wto.org/english/tratop_e/serv_e/cbt_course_e/c1s1p1_e.htm (accessed 07-04-2009).

General Council. It also has a Dispute Settlement Body and a Trade Policy Review Body.⁵⁷ All Member countries are formally represented on these bodies,⁵⁸ even though a lot of serious business is conducted behind closed doors, at the so called “green rooms” meetings between the most powerful economic players.⁵⁹ Ismail argues that the deprivation of the opportunity to participate in crucial decisions regarding public affairs is to deny people the right to develop.⁶⁰ The underlying philosophy of the WTO is that open markets, non-discrimination and global competition in international trade are conducive to the national welfare of all States.⁶¹ It is submitted that the conduct of business in green rooms and the resulting denial of the right to development is contrary to the WTO philosophy as this constitutes discrimination against other Member countries.

Currently, services and intellectual property protection are part of the Doha Development Round negotiations started in 2000 under the auspices of the WTO. These negotiations were scheduled to have been concluded by January 2005. These negotiations are informed by Article XIX of GATS which envisages progressive liberalisation of trade in services through negotiations between Member countries.⁶² As a result, the Fourth Ministerial Conference Negotiations in Doha, Qatar in 2001 sought to facilitate this mandate for negotiations on a range of subjects.⁶³ The negotiations in services trade are conducted under the Council for Trade in Services and the first phase ended in March 2001 after the negotiating guidelines and procedures were agreed upon.⁶⁴ The principle of “single-undertaking”⁶⁵ is the foundation upon which the

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Osakwe “Emerging Issues and Concerns of African Countries in the WTO Negotiations on Agriculture and the Doha Round” http://mpr.ub.uni-muenchen.de/1850/1/MPRA_paper_1850.pdf (accessed 03-12-2009).

⁶⁰ Ismail *Mainstreaming Development in the WTO: Developing Countries in the Doha Round* (2007) 3.

⁶¹ Hoekman and Kostecki *The Political Economy of the World Trading System The WTO and Beyond* (2001) 1.

⁶² The WTO “Doha WTO Ministerial 2001: Ministerial Declaration” http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm#services (accessed 12-04-2009).

⁶³ The World Trade Organisation “The Doha Declaration Explained” http://www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm (accessed 12-04-2009). See also at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm#organization (accessed 12-04-2009).

⁶⁴ The World Trade Organisation: The Agreements “Services: rules for growth and investment” http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm6_e.htm (accessed 12-04-2009). The Member countries also agreed upon the right of each Member to regulate and to introduce new regulations on the supply of services in pursuit of national policy objectives.

⁶⁵ Some other commentators use the expression “Nothing is agreed upon, until all is agreed” http://www.wto.org/english/thewto_e/whatis_e/tif_e/doha1_e.htm (accessed 12-04-2009).

negotiations are to be concluded.⁶⁶ A Doha Declaration was unanimously adopted which emphasised special importance of the Doha Development Agenda (DDA).⁶⁷ According to guidelines and procedures for the negotiations on trade in services⁶⁸ the scope of the negotiations in terms of paragraph 5 will not *a priori* exclude any service sector or mode of supply and special attention will be accorded to sectors and modes of supply of export interests to developing countries.⁶⁹

One of the goals of the Doha Round is to pay attention to correcting past mistakes, and target reform of the multilateral trading system on development problems.⁷⁰ The empowerment of developing countries so that they could be able to implement the WTO agreements is an important part of the DDA.⁷¹ The Doha Round negotiations are experiencing challenges as a result of a lack of a common understanding of what development means and the inability to translate agreed sentiments about development into concrete positions in the detailed negotiations.⁷²

⁶⁶ The World Trade Organisation "Understanding the WTO: The Doha Agenda" http://www.wto.org/english/thewto_e/whatis_e/tif_e/doha1_e.htm (accessed 12-04-2009). The principle states that every item of the negotiation is part of a whole and indivisible package and cannot be agreed separately. See The World Trade Organisation "How the negotiations are organised" http://www.wto.org/english/tratop_e/dda_e/work_organ_e.htm (accessed 12-04-2009).

⁶⁷ De Vylder *The Least Developed Countries and World Trade* (2007) 194.

⁶⁸ Adopted by Special Session of the Council for Trade in Services on 28 March 2001, See http://www.wto.org/english/tratop_e/serv_e/s_negs_e.htm (accessed 12-04-2009).

⁶⁹ The WTO "Services: Negotiations - Current negotiations" http://www.wto.org/english/tratop_e/serv_e/s_negs_e.htm (accessed 12-04-2009). It has been submitted that developing countries' development interests lie in: enhanced market access and entry opportunities in manufacturing and services; transparent and simple rules of origin; more discipline on trade-distorting technical barriers to trade; adequate policy autonomy and space for economic governance, including through effective and operational, special and differential treatment and less-than full reciprocity; and international solidarity measures to build competitive supply capacity including services and trade-related infrastructure in developing countries, particularly through the Aid for Trade initiative. See United Nations Conference on Trade and Development (UNCTAD) "Trade and Development Board Reviews Status, Issues of Doha Trade Negotiations" <http://www.unctad.org/Templates/Webflyer.asp?docID=9177&intItemID=1584&lang=1> (accessed 07-04-2009).

⁷⁰ Jensen and Gibbon "Africa and the WTO Doha Round: An Overview" <http://www3.interscience.wiley.com/cgi-bin/fulltext/117999583/PDFSTART> (accessed 13-04-2009).

⁷¹ De Vylder *The Least Developed Countries and World Trade* (2007) 199. See also The WTO "Implementation-Related Issues and Concerns" <http://www.worldtradelaw.net/doha/impdecis.pdf> (accessed 12-11-2009).

⁷² Davis "The Doha Round" http://www.igd.org.za/index.php?option=com_remository&Itemid=69&func=selectcat&cat=4 (accessed 09-09-2010)

In terms of Article IV:5 of the WTO Agreement the TRIPS Council is to oversee the implementation of the TRIPS Agreement. In its responsibilities the Council has to review laws of Members in terms of Article 71.1 of the TRIPS Agreement. It also has to periodically review operations of the TRIPS Agreement and as well to undertake further negotiations or review specific subject matter areas.⁷³ The TRIPS Council acts by consensus in terms of its rules of procedure.⁷⁴ The Ministerial Declaration⁷⁵ in its work programme puts emphasis on the negotiations on TRIPS to be guided by the principles set out in Articles 7 and 8 of the TRIPS Agreement which should fully take account of the development dimension.

The TRIPS Council met in March 2002 to start work on a list of issues that Ministers assigned to it in Doha. The issues included specific aspects of TRIPS and Public Health, geographical indications, the patentability of plants and animals, biodiversity, transnational knowledge, a general review of the TRIPS Agreement, and technology transfer.⁷⁶ Other substantive issues discussed include compulsory licensing of drug manufacturing where a country in need of certain drugs has no domestic production capacities and the possible application of geographical indications to products other than wine and spirits. Discussions are still ongoing.⁷⁷ So far the TRIPS negotiations positions have remained largely unchanged, but new

⁷³ World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 352.

⁷⁴ Rules of Procedure for Meetings of the Council for TRIPS, IP/C/1, 28 September 1995, Rule 33. In terms of Article 68 of the TRIPS the Council is also to coordinate matters between the WTO and WIPO.

⁷⁵ The WTO "Doha WTO Ministerial 2001: Ministerial Declaration" adopted 14 November 2001, WT/MIN(01)/DEC/1 http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm#services (accessed 12-04-2009). See para. 19.

⁷⁶ The United Nations Trade on Development (UNCTAD) "Developments and Issues in the Post-Doha Work Programme of Particular Concern to Developing Countries" http://www.unctad.org/en/docs/tb49d11_en.pdf (accessed 25-02-2010).

⁷⁷ The United Nations Trade on Development (UNCTAD) "Developments and Issues in the Post-Doha Work Programme of Particular Concern to Developing Countries". Frederick Abbott has it that there are disagreements on TRIPS issues in the Doha Round. See Abbott "Post-mortem for the Geneva Mini-Ministerial: Where does TRIPS go from here?" http://www.unctad.org/en/docs/iprs_in20091_en.pdf (accessed 15-09-2010). It is pleasing to note that in order to facilitate easier access for developing countries to cheap medicines WTO Member countries agreed to the import of cheaper generics made under compulsory licensing if these countries are unable to manufacture such medicines themselves. This is in recognition of poorer countries to make full use of the flexibilities provided by the TRIPS Agreement. See The WTO "Decision removes final patent obstacle to cheap drug imports" http://www.wto.org/english/news_e/pres03_e/pr350_e.htm (12-08-2009).

developments include the adoption of the Nagoya Protocol⁷⁸ by the Conference of the Parties to the UN Convention on Biological Diversity (CBD) at its 10th meeting on 29 October 2010 in Nagoya, Japan.⁷⁹ The Protocol deals with access and benefit sharing with countries or local communities when inventors use genetic materials and any associated traditional knowledge.⁸⁰

2 3 Scope of Application

Firstly the GATS espouses that Member countries observe certain obligations. These can be categorised into three: (i) the General obligations, which apply to all WTO Member countries across all sectors, for example the most-favoured-nation (MFN) principle and the principle of transparency; (ii) sectoral rules; and (iii) specific commitments, which require members to afford market access to others and be subject to the national treatment commitments.⁸¹ These obligations must be observed in relation to two types of rules:

2 3 1 The Top-Down rules

These apply to all 160 service sectors and are measures that apply automatically as soon as a country joins the WTO.⁸² There are two basic elements to these rules:

- Each country must treat all other countries equally as most-favoured-nations. Exceptions to this treatment can be listed but they will only apply for 10 years, although

⁷⁸ The Nagoya Protocol is an international agreement which aims at sharing benefits arising from the utilisation of genetic resources in a fair and equitable manner. This includes sharing by appropriate access to genetic resources and by appropriate transfer of relevant technologies, and by appropriate funding which would result in the conservation of biological diversity and the sustainable use of its components. See Convention on Biological Diversity website at <http://www.cbd.int/abs/> (accessed 07-03-2011).

⁷⁹ The World Trade Organisation “Nagoya gives new context to old views in Intellectual Property Council” http://www.wto.org/english/news_e/news11_e/trip_01mar11_e.htm (accessed 04-03-2011).

⁸⁰ The next TRIPS Council meeting is scheduled for 7-8 June 2011 and 25-26 October 2011 and the TRIPS negotiation meeting was scheduled for 3 March 2011.

⁸¹ Chanda “GATS and its implications for developing countries: Key issues and concerns”. See also the Organisation for Economic Co-operation and Development “GATS: The Case for Open Services Markets” (2002) 58. Hoekman and Kostecki mention four elements that the GATS consists of, the fourth one being an understanding that periodic negotiations will be undertaken to progressively liberalise trade in services. See Hoekman and Kostecki *The Political Economy of the World Trading System The WTO and Beyond* (2001) 250.

⁸² Brown *et al* 2008 *Sage Journals Online* 14.

all services that are supplied in the exercise of government authority are exempt if there are no commercial elements;⁸³ and

- All countries must ensure transparency of their national systems through publishing annually those laws and regulations affecting the regulation of the service sectors.⁸⁴

2.3.2 *Bottom-up rules*

These apply if a government decides to apply them in particular service sectors. It is these rules that form part of the Doha Round negotiations where each government is expected to make 'offers' for liberalisation of specific sectors and make requests for liberalisation of those of other nations.⁸⁵ The basic commitments envisaged through these rules relates to the requirement of national treatment and market access principles.⁸⁶ All WTO Members have to respect the general obligations as set out regardless of specific commitments that have been entered into.⁸⁷

The GATS regulatory framework, in terms of Article I:3(b)-(c),⁸⁸ covers all activities that are associated with trade in services, with the exception of two sectors as listed in the top-down rules.⁸⁹ Examples of sectors to which services rules do not apply include the police, fire protection, monetary policy operations, mandatory social security, and tax and customs administration. Also excluded are services affecting air traffic rights as well as those directly related to the exercise of such rights.⁹⁰

The GATS covers measures affecting both the service and the service supplier, whilst the GATT does not.⁹¹ Article XXVIII of GATS states that the agreement applies to all measures by Members affecting trade in services; and that these measures may be taken at central, regional

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ Brown *et al* 2008 *Sage Journals Online* 14 – 15.

⁸⁶ The World Trade Organisation *A Hand Book on the GATS Agreement* (2005) 4.

⁸⁷ World Trade Organisation "Services – CBT – Basic Purpose and Concepts" http://www.wto.org/english/tratop_e/serv_e/cbt_course_e/c1s4p1_e.htm (accessed 08-04-2009).

⁸⁸ World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 287.

⁸⁹ The World Trade Organisation *A Hand Book on the GATS Agreement* (2005) 4. See also Wouters and De Meester *A Legal and Institutional Analysis* (2007) 27.

⁹⁰ Chanda "GATS and its implications for developing countries: Key issues and concerns".

⁹¹ The World Trade Organisation "A Hand Book on the GATS Agreement" (2005) 4.

or local government spheres or exercised by non-governmental bodies in exercise of delegated powers. These may be in the form of: law, regulation, rule, procedure, decision, administrative action, or any other form, in respect of: the purchase, payment or use of a service; the access to and use of, or in connection with the supply of a service, services which are required by those Members to be offered to the public generally; and the presence, including commercial presence, of persons from a Member for the supply of a service in the territory of another Member.⁹²

The GATS Services sectoral classification list⁹³ sets out 12 types of services that GATS provides for: These include: Business; Communication; Construction and related engineering services; Distribution; Education; Environmental; Financial; Health and related social services; Tourism and travel related; Recreational, Cultural and Sporting; Transport; and Other services not included elsewhere. Angela de Siqueira⁹⁴ has opined that the last item would include any services not listed or that may come into existence in future. These sectors are further subdivided into 160 sub-sectors and as such, under this classification a Member may include any service sector into a schedule of commitments with specific market access and national treatment obligations.⁹⁵

2.4 Objectives and Purpose

The GATS agreement's objectives and purpose, as stated in its Preamble, consist of:

- creating a credible and reliable system of international trade rules by ensuring fair and equitable treatment of all participants (principle of non-discrimination);
- stimulating economic activity through guaranteed policy bindings; and

⁹² World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 305.

⁹³ GATS Services sectoral classification list <http://www.smeda.org/downloads/AppendixV-TradeinService.pdf> (accessed 07-04-2009).

⁹⁴ De Siqueira "The Regulation of education through the WTO/GATS" *Journal for Critical Education Policy Studies* <http://www.jceps.com/index.php?pageID=articleID=41> (accessed 06-03-2009).

⁹⁵ World Trade Organisation "Services – CBT – Basic Purpose and Concepts". See also United Nations "Manual on Statistics of international trade in Services" <http://www.oecd.org/dataoecd/32/45/2404428.pdf> (accessed 29-04-2010).

- the realisation of growth and development of the world economy due to its importance, the establishment of a multilateral framework of principles and rules of trade in services with a view to expand trade in services under conditions of transparency and progressive liberalisation and as a means of promoting the economic growth of all trading partners and the development of developing countries;
- the quest for progressively higher levels of liberalisation of services trade through successive rounds of multilateral negotiations, with the purpose of promoting the interests of all participants on mutually advantageous grounds and securing the balance of rights and obligations, while at the same time giving respect to national policy objectives;
- seeking to achieve these objectives through affording respect to Member countries' right to regulate and the facilitation of increased participation of developing countries in trade in services as well as expansion of their services exports through, among others, the strengthening of their domestic capacity, efficiency and competitiveness; and
- having this done with particular consideration of the least-developed countries' economic situation and their development and financial needs.⁹⁶

From the above it is submitted that the GATS expressly recognises the right of Members to regulate the supply of services in pursuit of national policies, but the GATS however, plays an influential role in the definition of a nation's objectives since it does not allow Members to regulate where the rules would not be seen as reasonable, objective and impartial in terms of Article VI:1.⁹⁷ The WTO however states that this is not what the GATS seeks to do, but rather the GATS establishes a framework of rules to ensure that services regulations are administered in a reasonable, objective and impartial manner and, that they do not constitute unnecessary barriers to trade.⁹⁸ If the WTO through the GATS did not seek to influence a nation's objectives,

⁹⁶ World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 286. See also The World Trade Organisation *A Hand Book on the GATS Agreement* (2005) 3.

⁹⁷ World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 291.

⁹⁸ The General Agreement on Trade in Services (GATS) "Objectives, coverage and disciplines" http://www.wto.org/english/tratop_e/gatsqa_e.htm (accessed 08-03-2009). See also Francois and Wooton "Market structure, trade liberalisation and the GATS" 2001 *European Journal of Political Economy* 389.

it seems it would have been prudent for it to clarify the scope of the test to be met and not leave such scope to Member countries or the DSB to determine.⁹⁹

2.5 Importance of Services

The importance of services as an international trading commodity is best reflected in the fact that provisions regulating trade in services have come to be included in many regional trade agreements, e.g. the European Union (EU), the North American Free Trade Agreement (NAFTA), the Common Market of the South (MERCOSUR)¹⁰⁰ and the SADC. This makes the rules by which such trade is conducted much more important as they are used as measures underlying the playing field for services trade. The importance of services trade can be viewed also from the perspective that it also requires reduction of regulatory barriers to market access and discriminatory national treatment across all four GATS modes of supply.¹⁰¹ Trade in services is made even more important by the fact that such liberalisation should be consistent with the country's commitment towards consumer protection, prudential management of the economy, control of natural monopolies or the achievement of social goals.¹⁰²

In the past two decades advances in technology, for example in the telecommunications and financial sectors,¹⁰³ have contributed greatly to the recent rapid growth in trade in services which offers important trade opportunities for developing countries and can contribute immensely towards domestic economic growth. This is so because over half of all FDI is as a result of or linked to services trade.¹⁰⁴ Services trade is important because it underpins every activity needed in the production and distribution of other goods and services.¹⁰⁵ It is submitted

⁹⁹ See also discussion in Chanda "GATS and its implications for developing countries: Key issues and concerns".

¹⁰⁰ Hodge *liberalization of Trade in Services in Developing Countries* in: Bernard Hoekman *et al* (eds) *Development, Trade, and the WTO - A Hand Book* (2002) 221.

¹⁰¹ Hodge *liberalization of Trade in Services in Developing Countries* in: Bernard Hoekman *et al* (eds) *Development, Trade, and the WTO - A Hand Book* (2002) 222.

¹⁰² *Ibid.*

¹⁰³ SADC Trade "Services Sector Liberalisation: Literature Review" <http://www.sadctrade.org/files/Service%20Sector%20Liberalisation%20Literature%20Review.pdf> (accessed 08-04-2009).

¹⁰⁴ SADC Trade "Services Sector Liberalisation: Literature Review".

¹⁰⁵ World Trade Organisation "Opening Markets for Trade in Services: Countries and Sectors in Bilateral and WTO Negotiations" http://www.wto.org/english/res_e/booksp_e/open_markets_e.pdf (accessed 08-04-2009). See also

that services trade becomes more important for the developing countries, since through such FDI economic development is almost assured. Incidentally, developing countries engaged in trade in services have been more successful than they have been in trade in merchandise. In fact, nine of the top twenty five services trading nations are developing countries.¹⁰⁶ Hence, a country with effective services sector inputs to many production processes experiences more gains from goods and services trade liberalisation.¹⁰⁷ The importance of services trade is two dimensional: Firstly, it contributes as a direct input or has a direct effect on the sector itself. Secondly, it has an indirect effect on all other sectors in the economy that make use of a service and for this reason, services trade has a potential for higher gains than trade in final goods.¹⁰⁸ For example, in Hong Kong services trade contributes by 132 per cent to domestic merchandise exports; 55 per cent in Austria, and 66 per cent in Turkey.¹⁰⁹ Governments therefore, should quickly understand the complexities involved and make changes to enhance their services industries through creating a sustainable environment for their companies and individuals to flourish.¹¹⁰

2 5 1 *Value of World Services Trade*

In 1996 the services industry exports were valued at \$1, 260 billion, an increase of 5 per cent over the same period the previous year and imports of commercial services, over the same

Lamy "Trade in Services and Economic Recovery - Tuning the instruments of growth" http://www.wto.org/english/news_e/sppl_e/sppl171_e.htm (accessed 28-09-2010).

¹⁰⁶ SADC Trade "Services Sector Liberalisation: Literature Review". According to the latest yearly report by the World Investment Survey 2010 – 2012 compiled by the UNCTAD, South Africa is ranked 19th in a league table of "top priority host economies" for FDI. For further figures on FDI prospects see Creamer "SA a top priority global investment destination – UNCTAD Survey" http://www.tralac.org/cgi-bin/giga.cgi?cmd=cause_dir_news_item&cause_id=1694&news_id=92488&cat_id=1026 (accessed 10-09-2010).

¹⁰⁷ SADC Trade "Services Sector Liberalisation: Literature Review". See also Arnold *et al* "The Productivity Effects of Services Liberalisation, Evidence from the Czech Republic" http://www.internationalpolicy.umich.edu/edts/pdfs/czech_services_april25.pdf (accessed 09-04-2009).

¹⁰⁸ Hodge *liberalization of Trade in Services in Developing Countries* in: Hoekman *et al* (eds) *Development, Trade, and the WTO - A Hand Book* (2002) 222. Hoekman confirms the diversity that the services sector presents and that it masks a fundamental function of many services. See in Hoekman 2008 *Journal of Industry, Competition and Trade* 295.

¹⁰⁹ Prieto and Stephenson *Multilateral and Regional Liberalisation of Trade in Services* in: Rodriguez *et al* (eds) *Trade rules in the making* (1999) 238.

¹¹⁰ Kruger "The brave new World" http://www.tralac.org/cgi-bin/giga.cgi?cmd=cause_dir_news_item&cause_id=1694&news_id=61942&cat_id=1030 (accessed 24-07-2009).

period overall were \$1, 265 billion.¹¹¹ Nine years later exports in commercial services trade amounted to \$2, 415 billion.¹¹² According to the *WTO Trade Report 2009*, world exports in commercial services rose by 11 per cent in 2008 to \$3.7 trillion.¹¹³ The regions that benefit mostly from trade in services are the EU which accounts for 40 per cent of world services trade; followed by the Western Hemisphere (Canada, United States of America, Latin America and the Caribbean) which accounts for 24 per cent of such world trade.¹¹⁴ The Commonwealth and Independent States increased by 26 per cent in exports to \$ 83 billion while imports rose 25 per cent to \$ 114 billion.¹¹⁵ The Middle East's commercial services' exports reached \$94 billion, increasing by 17 per cent in 2008 while imports were 13 per cent up to \$158 billion. By the same token, Asia's commercial services exports also benefited in 2008 by rising 12 per cent to \$ 837 billion while imports also increased by the same percentage margin to \$858 billion.¹¹⁶ This reflects the importance of services trade in the economies of these countries.¹¹⁷ Africa's commercial services' exports grew by 13 per cent in the same year to \$88 billion while imports also increased by 15 per cent to \$121 billion.¹¹⁸ Inevitably, the developed countries (North America and Western Europe) make up the bulk of world commercial services trade, constituting 75 per cent of world trade.¹¹⁹

This growth has helped to facilitate trade between developing countries like India, China and Thailand on the same footing *vis-à-vis* developed countries.¹²⁰ However, it is submitted that growth in services trade has also facilitated discrimination in terms of which mode of supply should be used to supply a particular service. This discrimination is especially visible in modes

¹¹¹ Mattoo *et al* "GATS, The Modes of Supply and Statistics on Trade in Services" <http://diplomaticwebsites.ch/ISTIA/wtopapers/statisticspaper.pdf> (accessed 23-07-2009).

¹¹² De Vylder *The Least Developed Countries and World Trade* (2007) 147.

¹¹³ World Trade Organisation "World Trade Report 2009" http://us-cdn.creamermedia.co.za/assets/articles/attachments/22406_world_trade_report09_e.pdf (accessed 24-07-2009).

¹¹⁴ Prieto and Stephenson *Multilateral and Regional Liberalisation of Trade in Services* in: Rodriguez *et al* (eds) *Trade rules in the making* (1999) 238.

¹¹⁵ World Trade Organisation "World Trade Report 2009".

¹¹⁶ *Ibid.*

¹¹⁷ Zebaze "Effect of Services Trade Liberalisation in Africa" http://hal.archives-ouvertes.fr/docs/00/30/68/28/PDF/These_C._DJIOFACK.pdf (accessed 24-07-2009).

¹¹⁸ World Trade Organisation "World Trade Report 2009".

¹¹⁹ *Ibid.*

¹²⁰ De Vylder *The Least Developed Countries and World Trade* (2007) 148.

that are closely associated with the economic welfare/interests of developing countries, whilst it is used by the developed countries to their benefit. This again negates the overall purpose of multilateralism. De Vylder¹²¹ shows this in terms of the value of each mode of supply. According to his study, mode 1 constitutes 35 per cent of the share; mode 2 constitutes 10 – 15 per cent; whilst the most important, being mode 3 constitutes 50 per cent; and the lowest being mode 4 consists of only 1 – 2 per cent.¹²² Mode 4 is the mode most associated with developing countries' interests. Regulation also, as much as it is of importance, generates barriers to services trade.¹²³ These regulations could sometimes be of a discriminatory nature and as such constrain the inflow of FDI by raising the costs of entry for foreign service suppliers.¹²⁴ The principle of non-discrimination in the GATS regulatory framework seeks to ensure that such restrictions to trade in terms of regulation or modes of supply are prohibited and/or do not operate in a manner that is unfair and that such regulations/restrictions do not act as barriers to trade unnecessarily, favouring/preferring one party to the other.¹²⁵

It is submitted that the importance that services trade liberalisation plays in an economy requires governments, especially in developing countries, to first lay the foundation before liberalisation is undertaken so as to maximise the gains while minimising adjustment costs.¹²⁶ This should also ensure that discrimination is minimised, and that competition is promoted so as to limit the chances of being successfully challenged before the DSB of the WTO. This will help keep the political consequences of reform, through deregulation, manageable.¹²⁷

¹²¹ This he does by quoting from the WTO (*World International Trade Statistics*, 2005).

¹²² De Vylder *The Least Developed Countries and World Trade* (2007) 150. See also Maurer *et al* "International Trade in Services – GATS, statistical concepts and future challenges" <http://www.iaos2006conf.ca/pdf/Andreas%20Maurer.pdf> (accessed 01-10-2009).

¹²³ SADC Trade "Services Sector Liberalisation: Literature Review". See also Hodge *liberalization of Trade in Services in Developing Countries* in: Hoekman *et al* (eds) *Development, Trade, and the WTO - A Hand Book* (2002) 221.

¹²⁴ SADC Trade "Services Sector Liberalisation: Literature Review".

¹²⁵ *Ibid.*

¹²⁶ See similar opinion from Van der Merwe "Inclusive Approach key to SADC Integration" <http://www.polity.org.za/article/inclusive-approach-key-to-sadc-regional-integration-2010-11-25-1> (accessed 02-01-2011).

¹²⁷ Hodge *liberalization of Trade in Services in Developing Countries* in: Hoekman *et al* (eds) *Development, Trade, and the WTO - A Hand Book* (2002) 330.

2.5.2 Developing Countries' World Services Share

The main services trade conducted at the international level are transport, travel, and “other services”, for example, telecommunications and finance.¹²⁸ Since 1990 the services share of growth in developing countries has increased from 45 to 52 per cent.¹²⁹ Developing countries' exports of services have grown by 8 per cent compared to 6 per cent for the developed countries.¹³⁰

Services trade is making a valuable contribution to the economies of many developing countries. Nazeer and Pracha¹³¹ reflect on the fact that services trade is the fastest growing sector in Pakistan; that it accounts for 50% of that country's GDP; and that it employs approximately 40% of their labour force. Further, they opine that such potential for growth can no longer be ignored. Countries engaged in services trade should also specialise so as to redirect their resources to the most productive usage.¹³² This expands outputs in the sector based on comparative advantage whilst lowering the cost of both domestically produced and imported goods.¹³³ Developing countries¹³⁴ like Egypt, the Philippines, and Poland that are not on the list of the thirty leading exporters of goods are in the top thirty for the export of services trade; this confirms the value that is attached to trading in services.¹³⁵ The overall share of world services exports in the developing countries rose from 18 to 24 per cent between 1990 and 2005. But the export of services in the developing countries in Africa, the Caribbean and Latin America have remained stagnant as it is only Asia that has seen growth.¹³⁶ The top 15

¹²⁸ Zebaze “Effect of Services Trade Liberalisation in Africa” http://hal.archives-ouvertes.fr/docs/00/30/68/28/PDF/These_C._DJIOFACK.pdf (accessed 24-07-2009).

¹²⁹ Puri “Trade in Services and Development Implications” http://www.unctad.org/sections/ditc_dir/docs/statement_0112_20-03-07_en.pdf (accessed 24-07-2009).

¹³⁰ Puri “Trade in Services and Development Implications”.

¹³¹ Nazeer and Pracha “Domestic Preparedness under GATS Related Services Trade Liberalisation” http://www.sdpi.org/10thsdca/abstracts_globalization_panel3.html (accessed 09-04-2009).

¹³² Nazeer and Pracha “Domestic Preparedness under GATS Related Services Trade Liberalisation”.

¹³³ Hodge *liberalization of Trade in Services in Developing Countries* in: Hoekman *et al* (eds) *Development, Trade, and the WTO - A Hand Book* (2002) 224.

¹³⁴ 2009 List of Developing Countries http://www.aoac.org/meetings1/123rd_annual_mtg/2009_LIST_OF_DEVELOPING_COUNTRIES%5B1%5D.pdf (accessed 27-07-2009).

¹³⁵ Prieto and Stephenson *Multilateral and Regional Liberalisation of Trade in Services* in: Rodriguez *et al* (eds) *Trade rules in the making* (1999) 238.

¹³⁶ Puri “Trade in Services and Development Implications”.

developing countries account for over 80 per cent of the total services trade from developing countries, but the fact that over half of services exports from developing countries comes only from 6 countries¹³⁷ does not help developing countries at all.¹³⁸

In 2007 Africa's services growth value stood at 6 per cent¹³⁹ and its contribution to world services trade stood at 2.5 per cent on average. It is further reported that services trade drives value-added growth and is the largest sector contributor to growth in Southern Africa.¹⁴⁰ This contribution is projected to be between 35 – 70 per cent. The implication here is that African countries are less productive in the world services trade marketplace.¹⁴¹ In fact Asia accounts for the largest number of developing countries¹⁴² which are included in the top thirty leading exporters of commercial services in the world.¹⁴³ However, while Africa's contribution to the world's services trade market is relatively small, the contribution of the sector however, at domestic level is quite large. Ndulo, Hansohm and Hodge are of the view that, despite the negatives, the services sector is a major contributor to the region's Gross Domestic Product (GDP), employment and trade.¹⁴⁴

¹³⁷ That is, China, Hong Kong, India, Singapore, Republic of Korea and Turkey.

¹³⁸ Puri "Trade in Services and Development Implications". See also Zebaze "Effect of Services Trade Liberalisation in Africa".

¹³⁹ Economic Report on Africa 2009 "Developing African Agriculture Through Regional Value Chains" <http://www.uneca.org/era2009/> (accessed 28-07-2009). See also Zebaze "Effect of Services Trade Liberalisation in Africa" and Alves *et al* "Africa's Challenges in International Trade and Regional Integration: What Role for Europe?" http://www.saiia.org.za/images/stories/pubs/occasional_papers/saia_sop_32_alves_20090501_en.pdf (accessed 20-11-2009)

¹⁴⁰ Economic Report on Africa 2009 "Developing African Agriculture Through Regional Value Chains".

¹⁴¹ Zebaze "Effect of Services Trade Liberalisation in Africa".

¹⁴² Being Hong Kong, Singapore, the Republic of Korea, the People's Republic of China, Taiwan, Thailand, and the Philippines.

¹⁴³ Prieto and Stephenson *Multilateral and Regional Liberalisation of Services in Trade* in: Rodriguez *et al* (eds) *Trade rules in the making* (1999) 238.

¹⁴⁴ For example, services trade is estimated to have contributed about 48.6 per cent of SADC's regional GDP in 1999. The services sector's contribution to employment creation has been growing steadily, and since 1980 – 1990 this growth in the SADC region has been between 22.5 and 26 per cent. South Africa, Mauritius, Seychelles and Zimbabwe are said to have had services contributions of more than 60 per cent to their GDP's up to the year 1999. In fact Angola had the lowest contribution from the services sector at 16 per cent as compared to other least-developed countries that benefited from the services sector, for example Tanzania, Mozambique, and Malawi. See Ndulo *et al* "State of Trade in Services and Service Trade Reform in Southern Africa".

The regional services GDP from 1990 to 1999 is estimated to have been growing at an annual rate of 2.6 per cent.¹⁴⁵ Ndulo *et al* report that there is consensus that the services sector is a major contributor to employment opportunities in the region more than the primary or manufacturing sectors even though statistics are scarce. The growth of this sector is then considered to be valuable from the perspective of contributing to sustainable development through employment creation in the region. The IMF has forecast overall growth in the SADC region of 4.75% in 2010.¹⁴⁶ There has also been an increase in the number of workers, for example, in the formal services sectors. Zambia's employment as a result of services trade is said to be about 60 per cent. In South Africa the services sector constitutes about 67 per cent of the economy and contributes about 70 per cent of employment.¹⁴⁷ In the informal sector 83.6 per cent is estimated to be derived from the services sector, for example in the transport and tourism sectors.¹⁴⁸ In Namibia the services sector is said to employ about 40 per cent of their labour force. In Mauritius between 43 and 51 per cent of employment has been provided by the services sector between the periods 1970 and 1998. In 1997 the total merchandise trade was \$94, 147.1 million. Services trade was \$34, 806.9 million. This constituted 23.6 per cent of total SADC merchandise and services trade and 37.9 per cent of GDP. In Uganda, for example, services trade contributes about 40 per cent in GDP, whilst such contribution is at 50 per cent in Zambia.¹⁴⁹ In South Africa, services trade's value is estimated to contribute by 70 per cent to the country's GDP.¹⁵⁰ In North Africa growth was recorded at 7.6 per cent whilst it was 4.8 per cent in West Africa in 2007.¹⁵¹ The SADC countries have in fact from 2002 – 2009 attracted \$192.9 billion (R1.4 trillion) in FDI.¹⁵²

¹⁴⁵ Ndulo *et al* "State of Trade in Services and Service Trade Reform in Southern Africa".

¹⁴⁶ Hazelhurst "Sub-Saharan policies praised" Business Report, 26 April 2010. http://www.busrep.co.za/index.php?from=rss_&fArticleId=5444575 (accessed 29-04-2010).

¹⁴⁷ Disenyana "SA: Services and Development [Opinion]" http://www.tralac.org/cgi-bin/giga.cgi?cmd=cause_dir_news_item&news_id=52219&cause_id=1694 (accessed 08-10-2009).

¹⁴⁸ Ndulo *et al* "State of Trade in Services and Service Trade Reform in Southern Africa".

¹⁴⁹ Mutume "Trading services: an opening or a noose" <http://www.un.org/ecosocdev/geninfo/afrec/vol16no1/161trade.htm> (accessed 24-07-2009).

¹⁵⁰ SADC Trade "Services Sector Liberalisation: Literature Review".

¹⁵¹ Economic Report on Africa 2009 "Developing African Agriculture Through Regional Value Chains".

¹⁵² Hazelhurst "Sub-Saharan policies praised".

3 TRADE RELATED-ASPECTS OF INTELLECTUAL PROPERTY RIGHTS (TRIPS)

3.1 Definition of Intellectual Property

Article 1:2 of TRIPS define intellectual property as referring to all categories of intellectual property that are the subject of Sections 1 through 7 of Part II of the Agreement.¹⁵³ Part II of the agreement consists of seven sections in which each intellectual property category that must be protected is contained.¹⁵⁴

Intellectual property can also be defined as information that has economic value when put into use in the marketplace.¹⁵⁵ The Universal Declaration of Human Rights (UDHR) recognises in Article 27 the right of everyone to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits as well as everyone's right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.¹⁵⁶

¹⁵³ World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 322.

¹⁵⁴ These are Copyrights and Related Rights, Trademarks, Geographical Indications, Industrial Designs, Patents, Layout Designs (Topographies) of Industrial Circuits, and Protection of Undisclosed Information. See World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 325 – 338. The WTO Appellate Body (AB) in the *US – Section 211 Omnibus Appropriations Act of 1998* dispute disagreed with the Panel's interpretation of what intellectual property meant. The AB was of the view that intellectual property deals not only with the categories as they appear in the titles of the sections, but with other subjects as contained in the provisions as well. See Appellate Body Report in *US – Section 211 Omnibus Appropriations Act of 1998* ("US - Havana Club"), WT/DS176/AB/R, para 335. However, Correa has opined that TRIPS excludes breeders' rights and utility models (or "petty patents"). See Correa *Intellectual Property Rights, the WTO and the Developing Countries: The TRIPS Agreement and Policy Options* (2002) 1.

¹⁵⁵ Hoekman and Kostecki *The Political Economy of the World Trading System* (2001) 274. Intellectual property accords ownership rights to intellectual assets that span those ideas, inventions and creative expression on which there is a public willingness to bestow the status of property. See Matthews *Globalising Intellectual Property Rights: The TRIPS Agreement* (2002) 8. See Hoekman and Kostecki *The Political Economy of the World Trading System* (2001) 274. See also Nicholson "Intellectual Property: benefit or burden for Africa" 2006 *IFLA Journal* 310 <http://0-ifl.sagepub.com.wam.seals.ac.za/cgi/reprint/32/4/310> (accessed 11-07-2009). See also Abbott *Intellectual Property Rights in World Trade* in: Guzman and Sykes (eds) *Research Handbook in International Economic Law* (2007) 444.

¹⁵⁶ United Nations (1948) "Universal Declaration of Human Rights" <http://www.un.org/en/documents/udhr/index.shtml> (accessed 25-03-2010).

3.2 Historical Background

Previously intellectual property rights were principally negotiated through the Berne and Paris Conventions¹⁵⁷ and the Rome Convention (on sound recordings and music) which were administered by the World Intellectual Property Organisation (WIPO) a Geneva-based UN body.¹⁵⁸ The Paris and Berne Conventions were first negotiated over a century ago¹⁵⁹ and have been periodically updated and expanded as the need for intellectual property co-operation grew.¹⁶⁰ The intellectual property landscape prior to the establishment of TRIPS had characteristics of flexibility as countries would implement intellectual property rights provisions when it was in their national interests. For example, prior to the TRIPS, Hong Kong, Singapore, South Korea and Taiwan had enforced soft intellectual property rights, enabling themselves to adopt, adapt and assimilate technologies from developed countries.¹⁶¹ This view is also confirmed by De Vylder when he asserts that before the introduction of TRIPS, every one copied foreign technology as a matter of course; it was not until the industrialised countries started developing their own technology that intellectual property rights were introduced multilaterally.¹⁶² Some other countries were inclined to copy the intellectual property rights of their colonial masters. These would include, amongst others, South Africa, Kenya, Zambia, Namibia, Swaziland, and Morocco.¹⁶³ These countries, therefore, had a few TRIPS-compliant legislation before the WTO agreement came into being.¹⁶⁴

Lack of political will and resources contributed to the weak enforcement of the intellectual property rights legislation. As a consequence, there was a noticeable and significant relationship between the extent of intellectual property rights protection and levels of economic development, whereby higher income countries provided more intellectual property

¹⁵⁷ De Vylder *The Least Developed Countries and World Trade* (2007) 157. See also Palmer 2006 *Critical Arts: A Journal of South-North Cultural and Media Studies* 62.

¹⁵⁸ Hoekman and Kostecki *The Political Economy of the World Trading System* second edition (2001) 280.

¹⁵⁹ Biadgleng and Tellez "The Changing Structure and Governance of Intellectual Property Enforcement".

¹⁶⁰ Hoekman and Kostecki *The Political Economy of the World Trading System* (2001) 280.

¹⁶¹ Livramento "How compliant are developing countries with their TRIPS obligations?" <http://cdm.epfl.ch/repec/cmi-wpaper/cemi-workingpaper-2009-001.pdf> (accessed 28-09-2009).

¹⁶² De Vylder *The Least Developed Countries and World Trade* (2007) 157.

¹⁶³ Livramento "How compliant are developing countries with their TRIPS obligations?".

¹⁶⁴ Ibid.

rights protection than lower income, developing.¹⁶⁵ This, as Livramento opines, was confirmed by the 2001 World Bank report which also added that such protection of intellectual property rights tended to be higher where a country had high innovation capabilities.¹⁶⁶ To facilitate further enforcement of intellectual property rights it is reported that during the Tokyo Round, the EC and the US had tabled a draft agreement on trade and counterfeit goods.¹⁶⁷ The two countries further pursued unilateral trade policies to offset perceived inadequate intellectual property protection by trading partners. This contributed to the agreement to include intellectual property in the GATT negotiations.¹⁶⁸ Also many countries had come to accept that affording protection to intellectual property would not necessarily be against their interests.¹⁶⁹ The forum at which the already existing intellectual property rights were negotiated was the WIPO. However the fact that the organisation had a lack of universality and an inadequate enforcement mechanism was problematic. On the other hand developing countries demanded more flexible rules for exports to developed country markets for their agricultural and textile products.¹⁷⁰

The main elements of the EC and US draft TRIPS agreement were that: firstly the basic GATT principles of national treatment and the most-favoured-nation (MFN) treatment were to apply; secondly, signatories agreed to substantive obligations regarding the protection of six types of intellectual property rights, that is, copyrights, trademarks and service marks, geographical indications, industrial designs, patents, and layout designs of integrated circuits; and thirdly, governments were to provide procedures and remedies under domestic law in instances where

¹⁶⁵ Ibid.

¹⁶⁶ Ibid.

¹⁶⁷ Hoekman "New Issues in the Uruguay Round and Beyond" 1993 *The Economic Journal* 1528 <http://www.jstor.org/stable/pdfplus/2234482.pdf> (accessed 01-12-2009).

¹⁶⁸ Hoekman 1993 *The Economic Journal* 1531.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid. These countries had misapprehensions about the TRIPS Agreement since they were of the view that it was a means to increase rent payments to the developed countries for technology. They were not of the belief that intellectual property would provide them with dynamic innovation benefits that would offset such rent outflows. See also Abbott *Intellectual Property Rights in World Trade* in: Guzman and Sykes (eds) *Research Handbook in International Economic Law* (2007) 452. See further TRIPS background arguments in Correa "Review of the TRIPS Agreement: Fostering the Transfer of Technology to Developing Countries" <http://www.twinside.org.sg/title/foster.htm> (accessed 11-10-2010).

intellectual property rights are alleged to have been violated.¹⁷¹ In respect of copyright and patents, parties were expected to comply with the Paris and Berne Conventions. The TRIPS, however, goes beyond the Berne Convention by providing for rental rights and protection against unauthorised recording of live performances.¹⁷² All signatories were to provide for patent protection lasting at least 20 years for almost all inventions.¹⁷³ This however came to be criticised as a way of creating patent monopolies. The TRIPS agreement has also broadened the scope of protection conferred on patented inventions by: protecting process and products; applying this to all technological fields; and setting a minimum duration for patent protection.¹⁷⁴

3 3 Scope of Application

The structure of the TRIPS agreement is made up of seven intellectual property rights categories and these consist of: Copyrights and Related Rights (Articles 9 – 14); Trademarks (Articles 15 – 21); Geographical Indications (Articles 22 – 24); Industrial Designs (Articles 25 – 26); Patents (Articles 27 – 34); Lay-out Designs (Topographies) of Industrial Circuits (Articles 35 – 38); and Protection of Undisclosed Information (Article 39).¹⁷⁵ These Articles set out the minimum requirements that each Member country must adhere to in relation to the protection of the various categories of intellectual property rights. These intellectual property rights are granted by governments and operate within the territory where they are granted.¹⁷⁶ The bilateral and multilateral treaties that governments have signed allow national intellectual property right-holders to gain protection in other jurisdictions as well.¹⁷⁷

One of the features of these bilateral and multilateral treaties is that they adhere to the fundamental principles of non-discrimination which afford protection to foreign nationals by

¹⁷¹ Ibid.

¹⁷² Hoekman 1993 *The Economic Journal* 1531.

¹⁷³ Ibid.

¹⁷⁴ Livramento “How compliant are developing countries with their TRIPS obligations?”.

¹⁷⁵ World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 325 – 338. See also Matambalya “Profile of Small and Medium Scale Enterprises (SME’s) in the SADC Economies” http://www.wipo.int/about-ip/en/studies/pdf/study_f_matambalya.pdf (accessed 04-04-2010).

¹⁷⁶ Hoekman and Kostecki *The Political Economy of the World Trading System* (2001) 280.

¹⁷⁷ Biadgleng and Tellez “The Changing Structure and Governance of Intellectual Property Enforcement”.

requiring their treatment in the same way as the nationals of the particular State.¹⁷⁸ The TRIPS allows countries the autonomy to develop and enforce their own laws, while at the same time meeting the demands for international protection.¹⁷⁹ This autonomy is advanced as being of importance and essential in as far as the effective functioning of a national intellectual property system is concerned.¹⁸⁰

3 4 Objectives and Purpose

The TRIPS Preamble sets out its objectives by stating amongst others that the agreement seeks to reduce distortions and impediments to international trade, and, taking into account the need to promote effective and adequate protection of intellectual property rights, to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade.¹⁸¹ Article 7 further states that the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.¹⁸²

Yusuf asserts that these objectives were included in the TRIPS as a result of developing countries' insistence on the link between the protection of intellectual property rights and the promotion of social, economic and technological development.¹⁸³ In fact some of the Preamble's paragraphs are based upon proposals submitted by the Group of 14 developing

¹⁷⁸ Ibid. See also Matambalya "Profile of Small and Medium Scale Enterprises (SME's) in the SADC Economies". See further Abbott *Intellectual Property Rights in World Trade* in: Guzman and Sykes (eds) *Research Handbook in International Economic Law* (2007) 454. This is unlike the principle of reciprocity which was then used for extending intellectual property rights protection to foreigners. See Livramento "How compliant are developing countries with their TRIPS obligations?"

¹⁷⁹ Abbott *Intellectual Property Rights in World Trade* in: Guzman and Sykes (eds) *Research Handbook in International Economic Law* (2007) 456 – 457. See also Biadgleng and Tellez "The Changing Structure and Governance of Intellectual Property Enforcement". See further Matambalya "Profile of Small and Medium Scale Enterprises (SME's) in the SADC Economies".

¹⁸⁰ Ibid. See also Matambalya "Profile of Small and Medium Scale Enterprises (SME's) in the SADC Economies".

¹⁸¹ World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 321.

¹⁸² Ibid, at 324.

¹⁸³ Yusuf *TRIPS: Background, Principles, and General Provisions*: Correa and Yusuf (eds) *Intellectual Property and International Trade* (2008) 13.

countries in May 1990.¹⁸⁴ The Group of 14¹⁸⁵ developing countries submitted detailed proposals on TRIPS that included standards and procedures concerning the availability, scope and use of intellectual property rights, in addition to draft rules on counterfeit goods and border measures.¹⁸⁶ This submission is considered to have made a major breakthrough in the TRIPS negotiations. The submissions consisted of two parts: Part I was entitled “Intellectual Property and International Trade” and dealt with norms and disciplines to be applied to trade in counterfeit and pirated goods. Part II entitled “Standards and Principles Concerning the Availability, Scope and Use of Intellectual Property Rights” dealt with objectives and principles underlying an agreement on such standards and specified the basic standards relating to different categories of intellectual property rights.¹⁸⁷ In fact developing countries are said to have been in favour of the operationalisation of Articles 7 and 8 of the TRIPS Agreement.¹⁸⁸

3 5 Importance of Intellectual Property

It is submitted that the importance of intellectual property rights is apparent from the inclusion of these rights in a multilateral treaty.¹⁸⁹ The SADC, as seen from its development policy, in order to be integrated into the world economy has infrastructure development and technological advancement at its fore front. This, it is submitted, will require affording protection to intellectual property in order to earn confidence from potential investors. In order to guarantee a proper balance in the intellectual property rights system, the policy of intellectual property enforcement should be supported by substantive laws that would safeguard the legitimate interests of third parties and the public at large; provide adequate limitations on and exceptions to the rights conferred; and regulate anti-competitive

¹⁸⁴ Biadgleng and Tellez “The Changing Structure and Governance of Intellectual Property Enforcement”.

¹⁸⁵ See the list containing Groups of Member countries in the WTO, undated on 14 December 2010, at http://www.wto.org/english/tratop_e/dda_e/negotiating_groups_e.pdf (03-01-2011)

¹⁸⁶ Biadgleng and Tellez “The Changing Structure and Governance of Intellectual Property Enforcement”.

¹⁸⁷ Ibid. See further arguments on developing countries in Correa “Review of the TRIPS Agreement: Fostering the Transfer of Technology to Developing Countries” <http://www.twinside.org.sg/title/foster.htm> (accessed 11-10-2010).

¹⁸⁸ Correa “Review of the TRIPS Agreement: Fostering the Transfer of Technology to Developing Countries”.

¹⁸⁹ See other treaties that contain provisions on intellectual property rights, in Commission on Intellectual Property Rights “Integrating Intellectual Property Rights and Development Policy” http://www.iprcommission.org/papers/pdfs/final_report/CIPR_Exec_Sumfinal.pdf (accessed 25-01-2010).

practices.¹⁹⁰ Article 41 of TRIPS states that these would also need to provide procedural rules that are equitable and fair to all parties.¹⁹¹

Biadgleng and Tellez opine that the various intellectual property rights have a common characteristic which is to establish property rights over an intangible subject matter. These would include inventions capable of industrial application, the form in which an idea or information is expressed, and signs distinguishing goods and services.¹⁹² This implies that the term “intellectual property right” refers to the specific legal right which an author, inventor, and other right-holders may hold and exercise in relation to an intellectual property subject matter.¹⁹³ Rights related to copyrights include those of performing artists in their performances; those of producers of phonograms in their recordings; and those of broadcasters in their radio and television programs.¹⁹⁴

It is submitted that the preceding submission by Biadgleng and Tellez underlies the importance of intellectual property rights protection and enforcement which can also be seen from the developed countries’ concerted effort to increase enforcement of intellectual property rights globally, through a combination of efforts at the multilateral, regional and bilateral levels.¹⁹⁵ These efforts include for example: setting enforcement of intellectual property rights as a priority in the common agenda of the G8 countries and proposing negotiations on a new international treaty on anti-counterfeiting; increasing the role of the World Customs Organisation (WCO) and Interpol in such rights enforcement, particularly through border measure controls and the use of criminal law; introducing detailed TRIPS-Plus obligations in the enforcement of these rights in bilateral FTAs and economic partnership agreements (EPAs) negotiated by the US and EU with developing countries; demanding that the WTO make enforcement part of the permanent agenda of the TRIPS Council; and exerting pressure on

¹⁹⁰ Biadgleng and Tellez “The Changing Structure and Governance of Intellectual Property Enforcement”.

¹⁹¹ World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 339.

¹⁹² Biadgleng and Tellez “The Changing Structure and Governance of Intellectual Property Enforcement”.

¹⁹³ Ibid.

¹⁹⁴ See also Matambalya “Profile of Small and Medium Scale Enterprises (SME’s) in the SADC Economies” http://www.wipo.int/about-ip/en/studies/pdf/study_f_matambalya.pdf (accessed 04-04-2010).

¹⁹⁵ Commission on Intellectual Property Rights “Integrating Intellectual Property Rights and Development Policy” http://www.iprcommission.org/papers/pdfs/final_report/CIPR_Exec_Sumfinal.pdf (accessed 25-01-2010).

WIPO to strengthen the mandate of the WIPO Advisory Committee on Enforcement (ACE) to include soft law norm-setting, such as developing best practices and guidelines on enforcement.¹⁹⁶

3.6 Enforcement Mechanisms

Intellectual property forms the foundation upon which the globe's economy is based as it is increasingly being recognised as an asset, the possession of which confers major economic benefits.¹⁹⁷ From a developed countries' perspective, right-holders should be allowed to recoup the investment they have made in terms of research and development endeavours and/or intellectual creativity. On the other hand, the developing countries assert that intellectual property is a common heritage of society. They for example, state that human-kind should have equal access to life saving medicines. This brings to the fore the need for a balancing of interests, those of the developed and developing countries, within the scope of intellectual property rights protection¹⁹⁸ and the provisions for observance of the non-discrimination obligation. In fact developing countries have always held the view that intellectual property rights were simply a means of reinforcing the economic power of the developed nations; in this way they would transfer wealth from the developing countries.¹⁹⁹

Currently, it is estimated that the US and EU companies in the pharmaceutical sector invest about 20 per cent of their sales income in research and development.²⁰⁰ Consequently, the innovation and the creativity that is involved, for example in the research and development of integrated circuits, reflects the importance of intellectual property law as the creator should know how to protect him/herself.²⁰¹ Intellectual property has come to constitute a valuable economic asset that accounts for an ever greater value added in high technology areas such as

¹⁹⁶ Biadgleng and Tellez "The Changing Structure and Governance of Intellectual Property Enforcement".

¹⁹⁷ Groves *Intellectual Property Rights and their Valuation* A handbook for bankers, companies and their advisers (1997) 127.

¹⁹⁸ See also discussion in Yusuf *TRIPS: Background, Principles, and General Provisions*: Correa and Yusuf (eds) *Intellectual Property and International Trade* (2008) 13.

¹⁹⁹ Matthews *Globalising Intellectual Property Rights: The TRIPS Agreement* (2002) 8.

²⁰⁰ Ibid.

²⁰¹ Yeo *et al Intellectual Property for Integrated Circuits* (2010) 21.

the pharmaceutical and information technology industries, and in audiovisual entertainment areas such as the music and cinema industries.²⁰²

In 2006 the G8 Leaders Summit in St Petersburg announced a comprehensive intellectual property rights enforcement strategy that delivered upon the strategy adopted in 2005. The G8 Statement on Combating Intellectual Property Rights Piracy and Counterfeiting mentions several obligations: to keep the spotlight on trade in counterfeit and pirated goods and secure agreements on projects that promote greater co-operation among national law enforcement and customs officials; to link victims of intellectual property rights infringement to national enforcement authorities; to build capacity in developing countries to combat trade in counterfeit and pirated goods; to conduct further research into the economic impact of piracy and counterfeiting on national economies, brands, rights-holders and public health/safety; and to refer relevant law enforcement work (including online piracy) to the Lyon-Roma Anti-Crime and Terrorism Group (LR/ACT).²⁰³ It is further reported that specific initiatives were endorsed by the G8 in June 2007 aimed at improving and deepening co-operation among G8 Members and deliver real enforcement results. These included guidelines for customs and border enforcement co-operation designed to strengthen co-operation and co-ordination among G8 nations' customs and law enforcement administrators; guidelines for technical assistance on intellectual property rights protection to developing countries, and a mechanism to better co-ordinate and leverage existing G8 assistance to such countries to build capacity to combat trade in counterfeited and pirated goods and to strengthen intellectual property enforcement; and recommendations aimed at improving G8 countries' co-operative actions to combat serious and organised intellectual property rights violations, and further work on this basis to facilitate structured international co-operation in the investigation and prosecution of those crimes.²⁰⁴ Progress on implementation of the pilot plans were to be reviewed by the G8 in 2008. The Group also established an intellectual property rights Taskforce focusing on anti-counterfeiting and piracy to look at how best to improve international intellectual property rights protection

²⁰² Matthews *Globalising Intellectual Property Rights: the TRIPS Agreement* (2002) 8.

²⁰³ Biadgleng and Tellez "The Changing Structure and Governance of Intellectual Property Enforcement".

²⁰⁴ Ibid.

and enforcement and to produce recommendations for action which would be presented for discussion as part of the Heiligendamm process.²⁰⁵

The Heiligendamm process is a new two-year high level dialogue between the G8 countries and emerging market countries such as Brazil, China, India, Mexico and South Africa. The platform for dialogue will be the Organisation for Economic Co-operation and Development (OECD). It is argued that whilst it is praise worthy to participate in a dialogue and a significant step towards better co-ordination among the G8 and the larger developing countries, such participation must not come at a price.²⁰⁶ The developed countries have been steadfast in using the Heiligendamm platform to enforce intellectual property rights even though it is not part of its mandate. The Heiligendamm platform has issued a statement which emphasises the need to have a more balanced approach to the dialogue in the exchange of views on intellectual property rights in conjunction with the common good of human kind for purposes of protecting the environment and supporting health.²⁰⁷ The push by developed countries is in fact contrary to the objectives of the Heiligendamm initiative and basically risks negatively affecting the Heiligendamm dialogue.²⁰⁸

The US has used Section 301 and the Omnibus Trade and Tariffs Act 1988 to empower the United States Trade Representative (USTR) to enforce intellectual property rights which were considered to be unjustifiable and unreasonable against the trading partners of the US, especially those from the developing countries.²⁰⁹ Similarly, the same instruments have been used to argue that these countries had to ensure intellectual property protection as a criterion for the elimination of tariff privileges for imports into the US from designated developing countries under the Generalised System of Preferences (GSP).²¹⁰ The US has also adopted the

²⁰⁵ Ibid.

²⁰⁶ Ibid.

²⁰⁷ Ibid.

²⁰⁸ Ibid.

²⁰⁹ Matthews *Globalising Intellectual Property Rights: The TRIPS Agreement* (2002) 8.

²¹⁰ Ibid.

Trade Act of 2002 which states the US's principal negotiating objectives with regard to intellectual property.²¹¹

Japan and the European Commission are also content with increasing the enforcement of intellectual property rights as they announced on 23 October 2007.²¹² The internet treaties are also used to ensure further enforcements of intellectual property rights.²¹³ The WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) are jointly called the Internet Treaties and were signed in 1996. The Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore deals with matters falling under the said treaties.²¹⁴ They seek to prohibit the circumvention of effective technological measures (such as encryption) used by right-holders to protect their rights against the deliberate alteration or deletion of electronic rights management information.²¹⁵ The International Convention for the Protection of New Varieties of Plants (UPOV) of 1991 defines the scope of the rights of plant breeders with respect to plant varieties. The Convention does not provide for detailed procedures on the enforcement of plant breeder's rights. Article 30 of the Convention requires countries to adopt measures appropriate for the implementation of the Convention.²¹⁶

In addition to such treaties, the WIPO established a permanent committee, the WIPO Advisory Committee on Enforcement (ACE) in 2002 for Members to discuss and share national experiences on intellectual property enforcement.²¹⁷ This Committee is a merger between the Advisory Committee on Enforcement of Industrial Property Rights and the Advisory Committee on Management and Enforcement of Copyright and Related Rights in Global Information

²¹¹ See footnote 19 in Commission on Intellectual Property Rights "Integrating Intellectual Property Rights and Development Policy" (accessed 25-01-2010).

²¹² Biadgleng and Tellez "The Changing Structure and Governance of Intellectual Property Enforcement".

²¹³ Ibid.

²¹⁴ Commission on Intellectual Property Rights "Integrating Intellectual Property Rights and Development Policy" (accessed 25-01-2010).

²¹⁵ Article 19 of the WIPO Performances and Phonograms Treaty 1996.

²¹⁶ International Convention for the Protection of New Varieties of Plants, ACT of 1991 <http://www.upov.int/en/publications/conventions/1991/pdf/act1991.pdf> (accessed 20-08-2010).

²¹⁷ Biadgleng and Tellez "The Changing Structure and Governance of Intellectual Property Enforcement".

Networks.²¹⁸ For example at the WIPO Assemblies in September 2007, Italy proposed that the ACE be entrusted with a broader mandate to include the establishment of guidelines and best practices on enforcement of intellectual property rights.²¹⁹ The General Assembly approved in September 2007 the implementation of the Development Agenda which requires the ACE to examine the development dimension of intellectual property enforcement and technical assistance and consider such issues as competition and transfer of technology in relation to enforcement.²²⁰ The TRIPS Council reviews on a continuous basis the implementation of the TRIPS agreement and commitments by developing countries under the accession Protocols.²²¹

3 7 Developing Countries' World Intellectual Property Share

With regard to its socio-economic influence, intellectual property rights' main source of income stems from license fees for patents and royalties. Income from these sources has increased faster than global trade in general in recent years and in 1995 – 2004 these payments accounted for 5 to 6% of the value of world commercial services.²²² Among the developing countries, Singapore, China and South Korea have increased their payments for, and income from, such license and royalty fees. Only 4% of global payment of such fees and royalties was paid to developing countries outside of East Asia in 2004.²²³ In 1999/2000, India is said to have received \$2.5 million and Kenya received \$629 000.²²⁴

Protection of intellectual property is said to be of potential benefit for investment purposes, for example in the seed industry.²²⁵ In this industry a seed breeding farmer as a result of such breeding becomes the major beneficiary. In 1994, as a result of South Africa's increase in maize yields per hectare, a seed breeding farmer was the major beneficiary, and the value of such

²¹⁸ Ibid.

²¹⁹ Ibid.

²²⁰ Ibid.

²²¹ See further discussion on intellectual property in Correa *Intellectual Property Rights, the WTO and the Developing Countries: The TRIPS Agreement and Policy Options* (2002) 1 – 4.

²²² De Vylder *The Least Developed Countries and World Trade* (2007) 157.

²²³ Ibid.

²²⁴ Commission on Intellectual Property Rights "Integrating Intellectual Property Rights and Development Policy" (accessed 25-01-2010).

²²⁵ Van der Walt "Fanrpan Economic Policy Research Study of Plant Variety Protection in the SADC Region" http://www.fanrpan.org/documents/d00242/FANRPAN_EPRS_Nov2005.pdf (accessed 04-04-2010).

benefit stood at \$200 million per year.²²⁶ In fact the export earnings from such seeds can be enormous. Zambia is said to have exported thousands of tons of seed in 2004, and Zimbabwe is also reported to be a major exporter of seed. South Africa exported 21 000 tons worth \$80 million in 2004. This proves the value that is attached to the protection of intellectual property as companies will not sell new varieties, or have seed produced, in countries that pose a danger of alienation of proprietary varieties.²²⁷ It is submitted that this implies that promoting the enactment of intellectual property laws so as to afford protection to intellectual property rights within all regions, especially those mostly consists in developing countries, could be beneficial for regional countries and for development purposes, and affording the same protection to the intellectual property rights of foreign service suppliers in a non-discriminatory manner would promote FDI, which will contribute to further economic development. Tanzania in the 1999/2000 financial year is reported to have received \$214 000 from intellectual property revenue.²²⁸ However, it is submitted that, this must be balanced against the expenditure that each country has incurred in the establishment of an intellectual property system, its protection, implementation, enforcement and monitoring.²²⁹

It is widely accepted that knowledge is a prerequisite for development to take place in the current knowledge economy, which knowledge must be acquired, absorbed and diffused.²³⁰ From a developing country perspective accepting that knowledge is a prerequisite for development, these countries should by international standards be working towards being intellectual property creators rather than only being users.²³¹ This would be consistent with the pursuit of development of their economies.²³² For example the SADC countries acknowledge/express their commitment to be compliant with the relevant international

²²⁶ Ibid.

²²⁷ Ibid.

²²⁸ Commission on Intellectual Property Rights "Integrating Intellectual Property Rights and Development Policy" (accessed 25-01-2010).

²²⁹ See further Correa "Review of the TRIPS Agreement: Fostering the Transfer of Technology to Developing Countries" <http://www.twinside.org.sg/title/foster.htm> (accessed 11-10-2010).

²³⁰ Wolson "Intellectual Property Tools, Innovation and Commercialisation of R&D: Options to Assist Developing Countries in Positioning Themselves to Reap the Benefits of a Stronger Intellectual Property Regime, With Special Reference to the Role of Intellectual Property Management in Research Organisations" http://ictsd.net/downloads/2008/03/2004-06-29_wolson.pdf (accessed 25-03-2010).

²³¹ Matambalya "Profile of Small and Medium Scale Enterprises (SME's) in the SADC Economies".

²³² Ibid.

treaties through Article 24 of the Trade Protocol.²³³ One point that negates this expression of collective will however is the fact that some developing countries have no regional policy framework on intellectual property nor are there any efforts to harmonise copyright laws.²³⁴ For example the SADC countries have not even included intellectual property rights in their Economic Partnership Agreement negotiations with the European Union.²³⁵ But some of these countries have no policy framework because they still have concerns regarding the protection of intellectual property rights. In fact serious development-related consequences inform the concerns that these countries have as relates to the impact that the various intellectual property rights categories might have on the development of various sectors.²³⁶ Palmer is of the view that without effective protection of intellectual property, recipients of useful technology will often be crippled in their efforts to use and advance the technology.²³⁷

4 CONCLUSION

It is submitted that the importance of trade in services and protection of intellectual property and the need for multilateral and domestic rules designed to facilitate these are obvious. This chapter's purpose was to present a broad view of services and intellectual property. The intention was to show the fundamental value and the weight of economic importance that the non-discrimination obligation carries in relation to trade relations between WTO Member countries. Lamy agrees as he opines for example, that services underpin every part of the

²³³ That Article calls upon Member States to adopt policies and implement measures within the Community for the protection of intellectual property rights in accordance with the TRIPS Agreement. See Southern African Development Community (SADC) "Protocol on Trade" <http://www.sadcstan.co.za/Secure/downloads/protocol.pdf> (accessed 23-05-2009).

²³⁴ Palmer 2006 *Critical Arts: A Journal of South-North Cultural and Media Studies* 62. See also Matambalya "Profile of Small and Medium Scale Enterprises (SME's) in the SADC Economies".

²³⁵ Phiri "Economic Partnership Agreements and Intellectual Property Rights Protection: challenges for the Southern African Development Community (SADC) region" http://www.saiia.org.za/index.php?option=com_content&view=article&id=861:economic-partnership-agreements-and-intellectual-property-rights-protection-challenges-for-the-southern-african-development-community-sadc-region&catid=78:diplomatic-pouch&Itemid=230 (accessed 20-10-2009).

²³⁶ For example these countries worry about the administrative as well as the financial challenges that they may encounter as a result of intellectual property enforcement. See Phiri "Economic Partnership Agreements and Intellectual Property Rights Protection: challenges for the Southern African Development Community (SADC) region".

²³⁷ So, in this sense developing countries need to determine whether their intellectual property policies do advance development and reduce poverty, or whether the insufficiency of policy and law is stagnating technological and digital development. See Palmer 2006 *Critical Arts: A Journal of South-North Cultural and Media Studies* 62.

production process, from research and development, design, engineering, financing, transportation, distribution and marketing.²³⁸ From this perspective one may argue with certainty that those services are in every respect underlined by intellectual property whose right-holders would require protection.

It is further submitted that it is imperative that the development of rules take into account the level of development of each Member country if multilateralism is to remain credible and ease apprehensions. The GATS and the TRIPS Preambles recognise this. The non-discrimination obligation in this regard will play an important role. Its overall purpose is to guard against discrimination and foster market access, while ensuring that regulatory guidance does not lead to economic stagnation for some Member countries and economic gains for others. This is very important since the ultimate purpose is to ensure existence of balance thereby ensuring mutual benefit for all Member countries in their trade relations. Rules regulating international trade should ensure progression that is sustainable regarding the economic interactions between Member countries. The negative side of economic stagnation is the danger of Member countries reverting to protectionist tendencies. The exceptions to the application of the non-discrimination obligation to a Member countries' commitments may be justified on these grounds, hence their tolerance.

The non-discrimination principle serves to keep countries in check so that they do not go overboard in the exercise of their discretion when concluding a regional agreement or implementing, for example, a particular safeguard or other measure in the name of prudential services trade when in fact the particular measure would have a discriminatory effect. But, at the same time its purpose is not to curtail the introduction of measures at all costs even if they are not for protectionist reasons.²³⁹ It is submitted that it is the response to this delicate fine line that an answer must be sought to ensure that the multilateral purpose is paramount in all international trade interactions. It is further submitted that it is therefore the prudential

²³⁸ Lamy "Trade in Services and Economic Recovery - Tuning the instruments of growth" http://www.wto.org/english/news_e/sppl_e/sppl171_e.htm (accessed 28-09-2010).

²³⁹ Hence Lamy acknowledges the fact that the GATS recognises the importance of regulation, and from that perspective the strengthening of the GATS foundation becomes important. See Lamy "Trade in Services and Economic Recovery - Tuning the instruments of growth".

engagement with the interpretative duty to define that fine line that may be disturbed by the introduction of those measures and find solutions thereto that will be favourable to all parties involved. This is a challenge for all WTO Members and for almost all trade in services, and by implication TRIPS, commentators alike.²⁴⁰

²⁴⁰ See Cottier and Mavroidis (eds) *Regulatory barriers and the Principle of Non-Discrimination in World Trade Law* (2002) 5-10.

CHAPTER 3

NON-DISCRIMINATION UNDER THE GATS AND TRIPS I: THE MFN OBLIGATION

1 INTRODUCTION

Globalisation consists in the closer integration of countries and peoples of the world resulting from the enormous reduction of costs of transportation and communication, and the breaking down of artificial barriers to the flow of goods, services, capital, knowledge, and people across borders.¹ This process of globalisation is now being challenged for not having lived up to the expectations promised by its advocates.²

The MFN obligation, as one of the two core principles of the non-discrimination obligation in the WTO system, is one measure through which globalisation is being facilitated.³ It is an economic obligation that legally binds treaty Members seeking to maintain economic equilibrium between two or more trading nations so as to facilitate equal trade opportunities between and amongst themselves. Its ambit of application is extended to WTO trading partners on the understanding that no favouritism will ensue in favour of any one party, and if such favouritism does ensue, the favour will be accorded to other WTO trading partners.⁴ In essence, this obligation also implies that importing countries should not exercise protectionism or discriminate against imported goods and services or foreign persons based on the origin of such imports or persons, either by not offering intellectual property protection or by allowing lower tariffs or any other form of relaxation of import regulations for goods or services imported from one country *vis-à-vis* another WTO Member, unless they are Members of a regional trade

¹ Stiglitz *Globalisation and its discontents* (2002) 9.

² Stiglitz *Globalisation and its discontents* (2002) 20. See also Lundahl *Africa in Global Context* in: Lundahl (ed) *Globalisation and the Southern African Economies* (2004) 9 - 11.

³ Kostecki *International Trade in Services* in: Hocking and McGuire (eds) *Trade Politics: International, Domestic, and Regional Perspectives* (1999) 68.

⁴ See article II of GATS and Article 4 of the TRIPS Agreements in World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 287 and 323 – 324.

agreement (RTA).⁵ In other words the MFN obligation facilitates/envisages equal treatment between States.

The means by which this equal treatment has been determined by WTO Panels and the Appellate Body (AB), established in terms of the Dispute Settlement Understanding (DSU),⁶ is by giving clarity to the legal interpretation of this obligation. Consequently, the interpretation and/or the application of the MFN obligation has given rise to concerns from developing countries as to whether the obligation is developmental in nature or whether it is a policy instrument that is only used in favour of developed countries to further their interests. From this it is submitted that there are two primary objectives that are sought to be achieved through the MFN obligation: to ensure economic stability between the nations of the world in their trade interactions; and to ensure that in such trade interaction no one Member country is discriminated against irrespective of its economic prowess *vis-à-vis* others.⁷

This chapter is in five Parts. After this introduction, Part 2 will discuss the advantages and/or rationales of the MFN obligation. Part 3 will discuss the background to this obligation and Part 4 will discuss the general nature and the content of this obligation which will also involve its interpretation from the GATS and TRIPS perspectives. In part 5 the chapter will conclude.

2 ADVANTAGES, RATIONALES AND DISADVANTAGES OF THE MFN OBLIGATION⁸

2 1 Advantages and Rationales

The policy rationale for the unconditional MFN obligation is based on the belief that the obligation promotes better international relations since it avoids the bitterness and tensions

⁵ World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 289.

⁶ The DSU is a dispute settlement understanding signed by WTO Members, administered by the WTO as part of the Marrakesh Agreement, which has the authority to establish Panels and adopt Panel and Appellate Body Reports and maintain the surveillance of implementation of rulings and recommendations, and authorise suspension of concessions and other obligations under the covered agreements. See World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 354 - 355.

⁷ For more discussion on the goals of the WTO, see Sampson and Chambers (eds) *Developing Countries and the WTO: Policy Approaches* http://www.unu.edu/unupress/sample_chapters/developing_countries_and_the_WTO_web.pdf (accessed 25-08-2010).

⁸ See Trebilcock and Howse *The Regulation of International Trade* (2005) 51 – 53.

that may result from discriminatory policies.⁹ Its overall rationale proceeds on the presumption that discrimination is inherently undesirable from an economic point of view.¹⁰ This is so because the obligation prohibits governmental decisions to rely on short-term *ad hoc* policies based on political considerations which could increase tensions among nations.¹¹ Its principal purpose is to ensure equality of opportunities to import from, or to export to, all WTO Members.¹² The obligation prevents discrimination by generalising concessions (described as the multiplier effect of the MFN clause) made to a specific trading partner hence the obligation is generally referred to as the cornerstone of the Multilateral trading system.¹³ In this respect the MFN can have a salutary effect of minimising distortions of the market principles that motivate many arguments in favour of free trade.¹⁴

According to Trebilcock and Howse the unconditional MFN obligation has a number of strengths. Firstly, it helps to lower transaction costs which are the costs of concluding trade agreements as there are many State actors in the multilateral trading system. This, therefore, helps to extend the results of negotiations with one country to all WTO Members. Secondly, the MFN is an essential instrument in making the principle of comparative advantage work in a free market. If all producers have equal access to a certain market, importers and consumers in this market will be able to choose to buy from the producer with the lowest price. It would therefore, be possible to compare prices because national import rules and duties affect them all in the same way. Thus equality of competitive opportunities is established through the MFN principle. However, it is submitted, the MFN does not seem to envisage the protection of small

⁹ Trebilcock and Howse *The Regulation of International Trade* (2005) 51.

¹⁰ Horn and Mavroidis "Economic and legal aspects of the Most-Favored-Nation clause" 2000 *European Journal of Political Economy* 233.

¹¹ Trebilcock and Howse *The Regulation of International Trade* (2005) 51.

¹² Van den Bossche *The Law and Policy of the World Trade Organisation: Text, Cases and Materials* (2008) 324.

¹³ Trebilcock and Robert Howse *The Regulation of International Trade* (2005) 49. In fact in the Appellate Body Report in *European Communities – Regime for the Importation, Sale and Distribution of Bananas ("EC – Bananas III")*, para 190, WT/DS27/AB/R, the Appellate body ruled that "the essence of the non-discrimination obligation is that like products should be treated equally, irrespective of their origin. As no participant disputes that all bananas are like products, the non-discrimination provisions apply to all imports of bananas, irrespective of whether and how a Member categorises or sub-divides these imports for administrative or other reasons". The Appellate Body also made reference to the non-discrimination obligations set out in Articles X:3 (a) and XIII of GATT 1994 and Article I.3 of the Import Licensing Agreement. See also Horn and Mavroidis "Economic and legal aspects of the Most-Favored-Nation clause" 2000 *European Journal of Political Economy* 234.

¹⁴ Trebilcock and Robert Howse *The Regulation of International Trade* (2005) 52.

industries within a country, in that there is no provision that such industries be developed within the application of the obligation. In other words the obligation does not uplift smaller economies by for example, providing that its application is dependent upon the size of that particular Member's economy in that particular sector/sub-sector. Hence, Member countries that are well developed in the particular sector/sub-sector will be at an advantage driving out any internal traders in that sector/sub-sector. It only envisages that the smaller/emerging traders trade parallel to the developed traders, in which case they could simply be driven out of the market.¹⁵

Lastly, the MFN discourages special interest groups' impact on the executive (negotiating) branch in order to obtain special trade preferences. This is promoted by the obligation to grant benefits on a multilateral basis.¹⁶ The MFN principle serves as a constraint on the ability of special interests to obtain discriminatory trade measures.¹⁷ It makes trade agreements more credible, since the increased cost of giving concessions makes it less attractive for a party to undermine an agreement through concession diversion, that is, by subsequently offering better terms of market access to a third party. Through the MFN, peace and stability in international relations is achieved.¹⁸

¹⁵ Hence it is often said that the MFN tends to favour the developed countries. See Trebilcock and Robert Howse *The Regulation of International Trade* (2005) 52.

¹⁶ The MFN obligation contributes to transparency and predictability in international trade interactions, resulting in advantages to traders, but also for the negotiating Members as well. Merely making use of bilateral deals can lead to uncertainty about the envisaged benefits accruing from the deal between countries A and B, but erodes benefits for country C, resulting from a bilateral deal between A and C. See Wouters and De Meester *A Legal and Institutional Analysis* (2007) 25 – 26.

¹⁷ Davey and Pauwelyn *MFN Unconditionality: A Legal Analysis of the Concept in View of its Evolution in the GATT/WTO Jurisprudence with Particular Reference to the Issue of "Like Product"* in: Cottier et al (eds) *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law* vol. 2. (2002) 14 – 15.

¹⁸ The MFN obligation even makes it attractive for outsiders to enter into an existing agreement, since they get access to a package of low tariffs. Furthermore, since entrants must grant MFN treatment, insiders get access to many foreign markets through the incentives for entry. See Horn and Mavroidis "Economic and legal aspects of the Most-Favored-Nation clause" 2000 *European Journal of Political Economy* 251.

2.2 Disadvantages

The main disadvantages resulting from the MFN obligation relate to free-riding by Member countries on the efforts of others to obtain certain advantages.¹⁹ As a result of the reciprocal nature of the negotiations at the multilateral level, Members are required to part with some advantage to a trading partner in order to gain another where such a Member's trade interests lie.²⁰ Countries that enjoy a benefit without submitting themselves to a discipline, such as a restraint from using certain trade barriers, are therefore free-riders.²¹

Wouters and De Meester submit that in order to avoid such free-rider consequence, countries tend to revert to a conditional MFN. This would imply that a country willing to benefit, on the basis of MFN, from a privilege given by another country to a third party, only receives the advantage if the country grants the privilege itself.²² The MFN obligation is sometimes doubted as to whether it is always in the interest of most countries, as is normally stated. However, in spite of all the negatives, the MFN obligation is agreed to be necessary overall and as the most appropriate policy for the world as a whole given that the negatives do not outweigh the advantages of the unconditional MFN.²³ In this respect it is submitted that, in conformity to these principles, the Panels and the AB's interpretative duties bear fundamental significance.

¹⁹ Wouters and De Meester *A Legal and Institutional Analysis* (2007) 27. See also Trebilcock and Robert Howse *The regulation of international trade* (2005) 52. Some other Members receive a benefit without even parting with a concession themselves.

²⁰ Wouters and De Meester *A Legal and Institutional Analysis* (2007) 27.

²¹ Ibid.

²² Ibid. In the WTO agreements, the MFN obligation applies unconditionally. This is what may cause the major trading nations, for example, to agree to less liberalisation than they would if reciprocity were required. Davey and Pauwelyn *MFN Unconditionality: A Legal Analysis of the Concept in View of its Evolution in the GATT/WTO Jurisprudence with Particular Reference to the Issue of "Like Product"* in: Thomas Cottier et al (eds) *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law* (2002) 15.

²³ Davey and Pauwelyn *MFN Unconditionality: A Legal Analysis of the Concept in View of its Evolution in the GATT/WTO Jurisprudence with Particular Reference to the Issue of "Like Product"* in: Thomas Cottier et al (eds) *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law* (2002) 15. Horn and Mavroidis have identified more negative effects that the MFN principle generates and its impact on reciprocal trade liberalisation and negotiations. They assert that the MFN increases the costs of giving concessions, since each concession must be given to all countries with which a country has MFN agreements. Furthermore, they argue that the MFN makes developed countries unwilling to make concessions to developing countries, since in return for peanuts such developed countries must extend their concessions to a large volume of trade. They also contend that the MFN reduces the benefits from a given concession since they must be shared with other countries. Still further, in their view the MFN prevents countries from punishing free riding. Lastly, they contend that the MFN

3 BACKGROUND TO THE MFN OBLIGATION²⁴

The MFN principle is said to have its origins in the feudal system of the eleventh to the thirteenth centuries, as Lords granted equivalent concessions to merchants of different foreign cities.²⁵ The privileges were unilaterally granted by a Lord to the citizens outside of his territory, and the favours to be granted were limited to those privileges already granted to others.²⁶

After the fifteenth century, the MFN principle developed together with sovereign States driven by ideas of equality advocated at the time as countries could not afford to fall into a position of disadvantage in the markets of their neighbours.²⁷ The term “most-favoured-nation” first appeared at the end of the seventeenth century.²⁸ As the scope of commerce increased among European nations, the use of the MFN principle in bilateral commercial treaties also increased.²⁹ The MFN principle became widespread throughout Europe from the seventeenth century to the early eighteenth century.³⁰ Each sovereign would conclude preferential treaties with foreign nations to gain market access with more favourable conditions than others. It therefore came to be standard practice to stipulate this preferential treatment as a conventional obligation. However, future discriminatory actions by States started to concern sovereigns.³¹

The development of the tariff system as a result of tariff wars also contributed to the development of the MFN principle.³² These were as a result of retaliation to tariff increases

prevents subsets of countries from going further in liberalisation than is desired by the rest of the world. See Horn and Mavroidis “Economic and legal aspects of the Most-Favored-Nation clause” 2000 *European Journal of Political Economy* 251.

²⁴ Trebilcock and Howse *The Regulation of International Trade* (2005). See also Yanai “The Function of the MFN clause in the Global Trading System” <http://202.244.105.129/English/Publish/Download/Apec/1863ra0000006alg-att/1863ra0000006cgb.pdf> (accessed 21-07-2009). See further Ustor “Most-Favoured-Nation Clause in the law of treaties: working paper” http://untreaty.un.org/ilc/documentation/english/a_cn4_l127.pdf (accessed 18-07-2009).

²⁵ Yanai “The Function of the MFN Clause in the Global Trading System”.

²⁶ Ibid.

²⁷ Trebilcock and Howse *The Regulation of International Trade* (2005) 49.

²⁸ Davey and Pauwelyn *MFN Unconditionality: A Legal Analysis of the Concept in View of its Evolution in the GATT/WTO Jurisprudence with Particular Reference to the Issue of “Like Product”* in: Cottier, Mavroidis, and Blatter (eds) *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law* (2002) 14.

²⁹ Yanai “The Function of the MFN Clause in the Global Trading System”.

³⁰ Ibid.

³¹ Ibid.

³² Ibid.

during the Middle Ages. Tariffs therefore came to be regulated through bilateral agreements which made it impossible to change rates unilaterally.³³ A conventional tariffs system was therefore created which meant that, when one country revised its rates for a certain agreement it had to modify all other agreements with tariff rates.³⁴ The fear by States of overlooking concessions was also evident, hence alternative MFN clauses were devised that could avoid such repetitions and assure partner States that the benefits of previous or subsequent concessions made to third parties would also be provided to them.³⁵ At the time, MFN concessions functioned to generalise concessions. However, because MFN clauses were not offered on a multilateral basis, but to specific parties, it was not possible to secure non-discrimination in the same manner that it operates in the present multilateral trading system. This implied that the MFN clauses would discriminate against nations that had not concluded commercial treaties.³⁶

One other factor that motivated the MFN principle is that the principle was born from the reciprocity principle which is a “tit for tat” kind of a concept.³⁷ Reciprocity is divided into two types: diffuse and specific reciprocity.³⁸ Diffuse reciprocity would be the equivalence of the GATT doctrine of multilateral and non-discriminatory liberalisation which is meant to be realised through the exchange of unconditional MFN treatment among Member States.³⁹ Specific reciprocity on the other hand required simultaneous exchange of strictly equivalent benefits or obligations which would support the conditional MFN clause.⁴⁰

In time, the MFN clause was divided into two: the conditional and unconditional MFN.⁴¹ The conditional clause is where countries A, B and C sign several bilateral MFN treaties between themselves; concessions made by country A to country B will be extended to C only if country C gives A concessions equivalent to those made by B to A at the time of the granting of those

³³ Ibid.

³⁴ Ibid.

³⁵ Yanai “The Function of the MFN Clause in the Global Trading System”.

³⁶ Ibid.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Ibid.

concessions.⁴² The US was the propagator of this clause as it was its view that granting the same privileges to a nation which had not paid any compensation would destroy the quality of market privileges which the MFN clause was intended to secure.⁴³ Great Britain had also signed the Reciprocity of Duties Act in 1823, under which it entered into bilateral treaties to provide conditional MFN treatment to exports. The conditional MFN became prevalent in the years between 1825 and 1860 and as such superseded the unconditional MFN treatment as the conditional treatment helped to protect national interests. However, with time the general function of the conditional MFN changed.⁴⁴ The unconditional MFN is illustrated by a scenario where countries A and B agree upon an exchange of concessions based on unconditional MFN treatment, and country A makes new concessions to country C, country A should also automatically apply these concessions in its dealings with country B.⁴⁵

The unconditional form of the MFN obligation was used exclusively until the late eighteenth century when in 1778 the US entered into a treaty with France in which the MFN was made conditional on receiving the same compensation as had been provided by the third party that obtained the advantage.⁴⁶ Subsequently the conditional MFN became widespread. However, the unconditional MFN regained its use in the second half of the nineteenth century as Great Britain and France started shifting from the protectionism of conditional MFN to the more liberal unconditional MFN through the conclusion of the Cobden-Chevalier Treaty of 1860 which substantially reduced tariffs on some goods and removed prohibitions on exports and imports between the two countries.⁴⁷ In Article XIX of that treaty, the two countries secured an unconditional MFN treatment.⁴⁸ From that point on the unconditional MFN treatment became the preferred trading policy method amongst European nations, save for certain periods

⁴² Trebilcock and Howse *The Regulation of International Trade* (2005) 50.

⁴³ Ibid.

⁴⁴ Yanai "The Function of the MFN Clause in the Global Trading System".

⁴⁵ Ibid.

⁴⁶ Davey and Pauwelyn *MFN Unconditionality: A Legal Analysis of the Concept in View of its Evolution in the GATT/WTO Jurisprudence with Particular Reference to the Issue of "Like Product"* in: Cottier, Mavroidis, and Blatter (eds) *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law* (2002) 14.

⁴⁷ Yanai "The Function of the MFN Clause in the Global Trading System".

⁴⁸ Ibid.

featuring economic depression.⁴⁹ But, the US began to make use of the unconditional MFN clause only during a change of policy in 1925 when a commercial treaty between the US and Germany was ratified which contained the unconditional MFN clause.⁵⁰ From 1929 to the Second World War the unconditional MFN clause fell into disuse as a result of the Smoot-Hawley Tariff Act enacted by the US, which raised tariffs to their highest rates in the twentieth century.⁵¹ As a result of that Act, discriminatory protectionism and retaliatory actions surfaced which resulted in such disuse.⁵² As a consequence various trade measures⁵³ superseded tariffs as the most important methods of trade restrictions/protectionism and created effective conditions of commercial discrimination.⁵⁴ Movement towards discrimination was also manifested in the movement to extend regional and imperial preferences.⁵⁵ The unconditional MFN principle recovered its importance during the period of the Second World War.⁵⁶ The protectionist policies and pre-war economic nationalism were widely agreed to have contributed to the outbreak of the war. As a result of this, the Allied Nations sought to establish international institutions that would liberalise international trade and limit restrictive practices.⁵⁷

One wonders whether the historical background of the unconditional MFN principle does not justify its consideration as a *jus cogen*, that is, a peremptory norm of international law or its treatment as creating an obligation *erga omnes*, that is, an obligation which a State owes to the international community as a whole and in the enforcement of which all States have an interest.⁵⁸

⁴⁹ Ibid.

⁵⁰ Trebilcock and Howse *The Regulation of International Trade* (2005) 50.

⁵¹ Trebilcock and Howse *The Regulation of International Trade* (2005) 51.

⁵² Ibid.

⁵³ For example, the exchange controls, clearing agreements, import quotas and monopoly purchases.

⁵⁴ Trebilcock and Howse *The Regulation of International Trade* (2005) 51.

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Dugard *International Law: A South African Perspective* (2001) 40. The importance of the MFN obligation is also discussed in Evans *Lawmaking under the Trade Constitution: A Study in Legislating by the World Trade Organisation* (2000) 65 - 87.

In trying to clarify the nature of the MFN obligation, Evans avers that the MFN is not simply an obligation which underwrites the liberalisation process of trade, but it is also an obligation that shapes the law making process within the WTO; that it is an obligation that not only informs the out-comes of the negotiating process, but also shapes the negotiating process.⁵⁹

4 NATURE AND CONTENT OF THE MFN OBLIGATION

4 1 Introduction

In the GATS the MFN principle is found in Article II:1. The principle is also contained in Articles V:2 and 3 regarding economic integration; Articles VI:1 and 4 regarding domestic regulations; Article VII:3 regarding recognition; Article VIII:1 regarding monopolies and exclusive service suppliers; Article IX:1 regarding business practices; Article X regarding safeguards; Articles XII:1 and 3 regarding restrictions to safeguard the balance of payments; Article XIII:1 regarding government procurement; Articles XIV(d) and (e) regarding general exceptions; Article XV regarding subsidies; Article XVI regarding market access; Article XVII regarding national treatment; Article XIX:2 regarding negotiations of specific commitments; and Article XXI:2(b) regarding modification of schedules.

In the TRIPS⁶⁰ the MFN obligation is found in Article 4, being the MFN provision. Article 66:1 of TRIPS requires observance of Articles 3, 4 and 5 by least-developed countries. Article 27:1 requires patents to be available and enjoyable without discrimination as to their place of invention, the field of technology and whether products are imported or locally produced. Article 25 requires Members to ensure absence of unreasonable impairment of an opportunity to see and obtain protection of independently created industrial designs that are new or original. Article 41:2 requires procedures concerning intellectual property to be fair and equitable; that they should not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays. It seems that this Article should be read with Article 42 which also makes reference to the observance of fair and equitable procedures. Article 65:2

⁵⁹ Evans *Lawmaking under the Trade Constitution: A Study in Legislating by the World Trade Organisation* (2000) 80.

⁶⁰ World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 323 – 350.

prohibits delay in the implementation of Articles 3, 4 and 5. Article 6 also requires the observance of Articles 3 and 4. The requirement to observe these provisions suggests that the TRIPS Agreement seeks to ensure that there is no protectionism or discrimination in the manner in which the substantive rules or procedures are enforced between foreign investors.

The General Agreement on Tariffs and Trade (GATT) 1994 contains a number of provisions requiring MFN treatment. For example: Article I being the MFN provision; Article III:7 regarding internal quantitative regulations; Article V regarding freedom of transit; Article IX:1 regarding marketing requirements; Article X:3(a) which requires laws, regulations, judicial decisions and administrative rulings of general application pertaining to trade to be administered in a uniform, impartial and reasonable manner; Article XIII regarding the non-discriminatory administration of quantitative restrictions; and Article XVII regarding State trading enterprises.⁶¹ Article XX of GATT 1994, which contains the general exceptions, also contains an MFN-like provision.⁶² The existence of these clauses shows the pervasive character of the MFN principle.⁶³ This confirms the saying that the MFN principle is a corner-stone of the GATT and one of the pillars of the WTO trading system.⁶⁴ Further, the Appellate Body in the *US – Section 211 Appropriations Act* case stated that, “for fifty years, the obligation to provide most-favoured-nation treatment in Article I of the GATT 1994 has been both central and essential to assuring the success of a global rules-based system for trade in goods”.⁶⁵ From the above the importance and significance of the obligation is therefore obvious.

⁶¹ World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 424 – 447.

⁶² World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 455 – 456.

⁶³ Van den Bossche *The Law and Policy of the World Trade Organisation: Text, Cases and Materials* (2008) 323.

⁶⁴ Appellate Body Report in *EC – Tariff Preferences*, para 101.

⁶⁵ Appellate Body Report in *US – Section 211 Appropriations Act*, para 297. Also Appellate Body Report in *Canada – Auto Pact*, para 69.

4 2 Scope of the MFN obligation under the GATS

Article II:1 of the GATS requires:

“with respect to any measure covered by this Agreement, each Member to 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”.⁶⁶

Equality of opportunity for services and service suppliers from all WTO Member countries is the primary purpose of this provision in GATS as it is in GATT.⁶⁷

4 2 1 Interpretation of the MFN Obligation under the GATS

Van den Bossche identifies three elements in the GATS Article II:1 definition which determines whether the MFN obligation has been violated:

- (a) whether the measure is a measure covered by the GATS or affects services;
- (b) whether the services or service suppliers concerned are like services or service suppliers; and
- (c) whether less favourable treatment is accorded to the services or services suppliers of a Member.⁶⁸

⁶⁶ World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 287.

⁶⁷ Van den Bossche *The Law and Policy of the World Trade Organisation: Text, Cases and Materials* (2008) 334.

⁶⁸ Van den Bossche *The Law and Policy of the World Trade Organisation: Text, Cases and Materials* (2008) 336. Mattoo also identifies these three elements; see Mattoo *MFN and the GATS* in: Cottier *et al* (eds) *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law* (2002) 53. In the Panel Report in *European Communities – Regime for the Importation, Sale and Distribution of Bananas (“EC – Bananas III”)*, para IV. 641 the US argued that a Member would have acted inconsistently with Article II if (i) the Member had adopted or applied a measure covered by the GATS; (ii) the Member could claim no MFN exemption as to that measure; and (iii) the measure accorded to the like services or service suppliers of any other Member treatment less favourable than that it accorded to the like services or service suppliers of any other country.

4 2 1 1 Measures covered by the Agreement

The domain of this obligation in the GATS covers the supply of service by service suppliers. The broad definition includes measures taken by central, regional or local governments as well as non-governmental bodies in the exercise of powers delegated by the government as stated in Article XXVIII of the GATS.⁶⁹ In other words the Agreement seeks to ensure that Members take such reasonable measures as may be available to them to ensure compliance by sub-central entities.⁷⁰ When interpreting whether a measure falls under the GATS, Article XXVIII of GATS provides some interpretative guidance as measures can take any legal form, including laws, regulations, rules, procedures, decisions, or administrative action.⁷¹ When interpreting measures covered by the agreement Zdouc calls for a functional interpretation based upon the legal effect of the measure in question and not on the formal term used by a government.⁷²

Article I:1 of the GATS specifically refers to measures by Members affecting trade.⁷³ These measures include measures as reflected in Article I:3 (a) of the GATS within the meaning of Article I:1.⁷⁴ Article II:1 of the GATS in this regard refers to any measures covered by this agreement. From this Article II:1 seems to be an all encompassing provision including measures covered in Article I:1 of the GATS. It is suggested that from the above the GATS seeks to have a broad spectrum of services trade coverage. The AB in the *European Communities – Regime for the Importation, Sale and Distribution of Bananas (“EC - Banana III”)*⁷⁵ dispute ruled that Article II:1 would apply even to measures having an effect on services and not only those that affect

⁶⁹ World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 305.

⁷⁰ Mattoo *MFN and the GATS* in: Cottier et al (eds) *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law* (2002) 53. See also Van den Bossche *The Law and Policy of the World Trade Organisation: Text, Cases and Materials* (2008) 321.

⁷¹ See also discussed in Zdouc *WTO Dispute Settlement Practice Relating to the General Agreement on Trade in Services* in: Ortino and Petersmann *The WTO Dispute Settlement System 1995 – 2003* (2004) 387.

⁷² Ibid.

⁷³ Mattoo *MFN and the GATS* in: Cottier et al (eds) *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law* (2002) 53. See also Van den Bossche *The law and Policy of the World Trade Organisation: Text, Cases and Materials* (2008) 321.

⁷⁴ World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 286 – 287.

⁷⁵ Appellate Body Report in *European Communities – Regime for the Importation, Sale and Distribution of Bananas (“EC - Banana III”)*, WT/DS27/AB/R, para 220. In this case the EC had argued for a narrow interpretation of the measure deemed to fall under services trade. See paras 40 – 46 Appellate Body Report in *EC - Banana III*.

services trade. This implies that the measures taken need not affect trade in services directly, but could also be measures taken in other areas with repercussions on services.⁷⁶

The GATS in its broad view takes into account not only the cross-border supply of a service, but also the supply of services through consumption abroad, commercial presence and the presence of natural persons.⁷⁷ In order for a supplier of services to be deemed to be a service supplier, he/she does not necessarily have to be present where delivery or consumption of the service takes place. The Panel in the *Mexico – Telecoms* dispute held that such a supplier could be considered as a cross-border service supplier within the definitional elements of Article I:2 (a).⁷⁸

4.2.1.2 *Like services and service suppliers*

The MFN obligation applies only in respect of like services and service suppliers and it is only in this context that discrimination within the meaning of Article II:1 of the GATS may be actionable.⁷⁹ When interpreting the concept in the GATS context, as the starting point, the AB in the *Canada – Auto Pact* dispute⁸⁰ stated that a threshold determination must first be made under Article I:1 of GATS that the measure is covered by the GATS. This determination would then require that there be a “trade in services” in one of the modes of supply, and that there

⁷⁶ Mattoo *MFN and the GATS* in: Cottier et al (eds) *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law* (2002) 53. See also the discussion in Morrison *WTO Dispute Settlement in Services: Procedural and Substantive Aspects* in: Petersmann *International Trade Law and the GATT/WTO Dispute Settlement System* (1997) 384.

⁷⁷ Mattoo *MFN and the GATS* in: Cottier et al (eds) *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law* (2002) 53. See also Van den Bossche *The Law and Policy of the World Trade Organisation: Text, Cases and Materials* (2008) 321. In the Panel Report in *Mexico – Measures Affecting Telecommunications Services* (“*Mexico – Telecoms*”), WT/DS204/R, 2 April 2004, para 7.30, the Panel was of the view that the wording of Article I:2(a) of the GATS suggests that the place where the supplier operates, or is present, is not directly relevant to the definition of cross-border services.

⁷⁸ Panel Report in *Mexico – Measures Affecting Telecommunications Services* (“*Mexico – Telecoms*”) WT/DS204/R, 2 April 2004, para 7.30.

⁷⁹ Van den Bossche *The Law and Policy of the World Trade Organisation: Text, Cases and Materials* (2008) 340.

⁸⁰ Appellate Body Report in *Canada – Certain Measures Affecting the Automotive Industry* (“*Canada – Auto Pact*”), WT/DS139/AB/R, WT/DS142/AB/R, 31 May 2000, adopted 19 June 2000, WT/DS139/AB/R, WT/DS142/AB/R, and its Panel Report, WT/DS139/R, WT/DS142/R, 11 February 2000.

also be a measure which “affects” this trade in services.⁸¹ If the determination establishes that the measure is covered by the GATS, the next step would be to undertake an appraisal of the consistency of the measure with the requirements of Article II:1. If it is established that the services and service suppliers are not “like”, then the enquiry does not proceed any further.⁸²

In the Panel Report in *Japan – Alcoholic Beverages I*,⁸³ it was decided that the term “like products” is best defined on a case-by-case basis, using three criteria: (i) the products’ end uses in a given market; (ii) consumer’s tastes and habits which change from country to country; and (iii) the product’s properties, nature and qualities. Also the classification and description of the service in the United Nations Central Product Classification (CPC) system should be considered.⁸⁴ The characteristics of the service or the service supplier; the size of the company, its assets, its technological prowess and the nature and extent of its expertise should also be taken into account.⁸⁵ To further assist with the difficulty of interpreting likeness, the AB in *Japan – Alcoholic Beverages I* stated that:

“the concept of “likeness” is a relative one that evokes the image of an accordion. The accordion of “likeness” stretches and squeezes in different places as different provisions of the WTO Agreements are applied. The width of the accordion in anyone of those places must be determined by the particular provision in which the term “like” is encountered as

⁸¹ This determination was done in the Panel Report in *Mexico – Measures Affecting Telecommunications Services* (“*Mexico – Telecoms*”) WT/DS204/R, 2 April 2004 dispute and the Panel established that Mexico’s measures in dispute were covered by GATS and that the measures affected trade in services in terms of mode 1, see para 7.45.

⁸² *Canada – Auto Pact*, paras 170 – 171.

⁸³ Panel Report in *Japan – Alcoholic Beverages* (“*Japan – Alcoholic Beverages I*”), adopted on 10 November 1987, BISD 34S/83.

⁸⁴ See also *Mexico – Telecoms*, from para 7.35 – 7.41. The Panel further said that a supplier of services under the GATS is no less a supplier solely because elements of the service are subcontracted to another firm, or are carried out with assets owned by another firm. What counts is the service that the supplier offers and has agreed to supply to a customer. See para 7.42. In this case the services contested by the US were found to be services in the context of GATS and supplied cross-border. See para 7.45.

⁸⁵ Van den Bossche *The law and Policy of the World Trade Organisation: Text, Cases and Materials* (2008) 340. See also discussed in Zdouc *WTO Dispute Settlement Practice Relating to the General Agreement on Trade in Services* in: Ortino and Petersmann *The WTO Dispute Settlement System 1995 – 2003* (2004) 394 – 403. See also Panel Report in *Indonesia – Certain Measures Affecting the Automobile Industry* (“*Indonesia – Autos*”), WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, 2 July 1998, paras 14.173 – 14.174.

well as by the context and circumstances that prevail in any given case to which that provision may apply”.⁸⁶

Thus, the concept of “like product” not only varies depending on the GATT provision in which it is mentioned, but according to the context and circumstances in which it is used and referred to. But the concept can also be interpreted differently under the same provision depending on the particular context and circumstances of the case.⁸⁷

4.2.1.3 *Treatment no less favourable*

Van den Bossche is of the view that Article II of the GATS does not provide any guidance as to the meaning of the concept “treatment no less favourable” from which an interpretation of the national treatment obligation could be inferred.⁸⁸ However, Article XVII of the GATS should cater for this gap.⁸⁹ Article XVII:3 states that “formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to the like service or service supplier of any other Member”.⁹⁰ It is submitted that the requirement here is that once Member countries sign an agreement with each other this creates an expectation that such countries will honour their obligations under that agreement. Treatment no less favourable seems to suggest the fulfilment of this obligation. Diebold is of the view that an economic standard is sought to be introduced by Article XVII:3 as a result of the use of the words “competitive conditions”.⁹¹ In the national treatment context of the GATT, as reflected in the *US – Section 337 of the Tariffs*

⁸⁶ Appellate Body Report in *Japan – Alcoholic Beverages I*, para 21.

⁸⁷ Davey and Pauwelyn *MFN Unconditionality: A Legal Analysis of the Concept in View of its Evolution in the GATT/WTO Jurisprudence with Particular Reference to the Issue of “Like Product”* in: Cottier et al (eds) *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law* (2002) 27.

⁸⁸ Van den Bossche *The Law and Policy of the World Trade Organisation: Text, Cases and Materials* (2008) 341.

⁸⁹ See also Mattoo *MFN and the GATS* in: Cottier et al (eds) *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law* (2002) 53 and Zdouc *WTO Dispute Settlement Practice Relating to the General Agreement on Trade in Services* in: Ortino and Petersmann *The WTO Dispute Settlement System 1995 – 2003* (2004) 404.

⁹⁰ World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 300.

⁹¹ Diebold “Non-Discrimination and the Pillars of International Economic Law: Comparative Analysis and Building Coherency” http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1632927 (accessed 01-09-2010).

*Act of 1930*⁹² dispute, treatment no less favourable is said to require an effective equality of opportunities for imported products as a minimum permissible standard in respect of the application of rules, regulations and requirements.⁹³ It is expected that such a measure will not disturb that equality of opportunities as the text requires, otherwise it would be deemed protectionist or discriminatory from a textual/objective interpretative approach even if a regulatory measure is not introduced for protectionist or discriminatory purposes. In that case the US argued that the Panel should consider the measure in terms of its purpose since it was meant to ensure enforcement of patent rights.⁹⁴ In the *US – Section 337* dispute⁹⁵ the Panel ruled that in order to determine whether treatment no less favourable has been accorded a decision should be based on the distinctions made by the contested measure itself and on its potential impact rather than on the actual consequences for specific imported products or actual trade effects.⁹⁶ In the *EC – Bananas III* dispute the EC had argued that Article II:1 of the GATS does not envisage the application of the notion of “modifications of competitive conditions” and as such this concept should not be applied in the MFN context.⁹⁷

With regard to *de facto* and *de jure* measures, the AB in the *EC – Bananas III*⁹⁸ case confirmed that the ordinary meaning of “treatment no less favourable” does not exclude *de facto*

⁹² Panel Report in *US – Section 337 of the Tariffs Act of 1930 (“US – Section 337”)*, adopted on 7 November 1989, BISD 36S/345. In this dispute the US was accused of failing to comply with its obligations under Article III:4 of GATT by applying procedures under section 337 of the United States Tariffs Act of 1930. See para 3.1. See also discussed in Trebilcock and Giri “The National Treatment Principle in International Trade Law”.

⁹³ *US – Section 337*, paras 5.11 – 5.14.

⁹⁴ *US – Section 337*, para 3.8.

⁹⁵ Panel Report in *US – Section 337 of the Tariffs Act of 1930 (“US – Section 337”)*, adopted on 7 November 1989, BISD 36S/345.

⁹⁶ This case approved an interpretative approach used in *United States – Taxes on Petroleum and Certain Imported Substances*. See Panel Report in *United States – Taxes on Petroleum and Certain Imported Substances*, BISD 34S/136, 138, adopted on 17 June 1987. See also the Panel Report in *EC – Banana III*, para. 7.179. See *US – Section 337*, para 5.13.

⁹⁷ Appellate Body Report in *EC – Banana III*, paras 47 – 48. If parties wanted the principle of equality of competitive conditions to apply they would have explicitly said so, para. 49. The complaining parties were of the view that the opposite was true, that foreign products are afforded no less favourable treatment than like domestic products. See para 67.

⁹⁸ Appellate Body Report in *EC – Banana III*, paras 233 – 234. What was at issue in this case was the allocation rules of import licences for bananas that were used. The complainants believed that these rules were discriminatory which on their face were origin-neutral. Diebold states the two concepts to differentiate on the basis of origin in *de jure*, and on the basis of a permitted criterion in *de facto* discrimination. A link between the two is presumed if the quantitative threshold is met. See Diebold “Non-Discrimination and the Pillars of International Economic Law: Comparative Analysis and Building Coherency”.

discrimination. Zdouc is of the view that the fact that there are references to Articles XVII: 2 and 3 of GATS in GATT Panel reports interpreting Article III:4 suggest that the framers of the GATS intended to introduce, within sectors and modes of supply covered by specific commitments, a comprehensive prohibition of all forms of direct and indirect discrimination.⁹⁹

4 2 2 *Exemptions from the MFN Obligation under the GATS*

Article II:2 of GATS states that a Member may maintain a measure inconsistent with paragraph 1 provided that such a measure is listed in, and meets the conditions of, the Annex on Article II Exemptions.¹⁰⁰

The Annex on Article II Exemptions specifies the conditions under which a Member, at the entry into force of the Agreement, is exempted from its obligations under paragraph 1 of Article II.¹⁰¹ There are about 400 exemptions listed by and granted to WTO Members.¹⁰² The exemptions are basically in respect of transport (maritime), communications (audiovisuals), financial and business services.¹⁰³ Members should list: a description of the sector or sectors in which the exemption applies; a description of the measure, indicating why it is inconsistent with Article II; the country or countries to which a measure applies; the intended duration of the exemption; and the conditions creating the need for the exemption.¹⁰⁴ The exemptions that Member countries make are based upon the twelve broad services sectors that are covered by the GATS.¹⁰⁵ Members that will not benefit from the MFN obligation need not be identified. Those

⁹⁹ Zdouc *WTO Dispute Settlement Practice Relating to the General Agreement on Trade in Services* in: Ortino and Petersmann *The WTO Dispute Settlement System 1995 – 2003* (2004) 405.

¹⁰⁰ World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 287.

¹⁰¹ World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 308.

¹⁰² Van den Bossche *The Law and Policy of the World Trade Organisation: Text, Cases and Materials* (2008) 342.

¹⁰³ Ibid.

¹⁰⁴ The WTO: Services Schedules “Guide to reading the GATS schedules of specific commitments and list of Article II (MFN) Exemptions” http://www.wto.org/english/tratop_e/serv_e/guide1_e.htm (accessed 20-05-2009). See also Van den Bossche *The Law and Policy of the World Trade Organisation: Text, Cases and Materials* (2008) 342.

¹⁰⁵ The WTO: Services Schedules “Guide to reading the GATS schedules of specific commitments and list of Article II (MFN) Exemptions”.

that will benefit from better market access than others are the only ones that must be identified.¹⁰⁶

The limited exemptions to the GATS provisions were agreed to as a means to avoid wholesale exemptions which would ultimately have led to a gap/loophole in the enactment of the MFN principle.¹⁰⁷ These exemptions however, should not exceed a period of more than ten years in terms of paragraph 6 of the Annex on Article II Exemptions, that is, until January 2005. However, the exemptions are still being applied by Member States.¹⁰⁸ In a review conducted in 2000, in terms of paragraph 4 of the Annex, to establish whether the circumstances that led to the need for exemptions were still prevailing, the Council for Services Trade did not find any exemption that was no longer justified.¹⁰⁹ In 2004 – 2005 the Services Trade Council undertook a second review conducted in the same manner as the 2000 review which produced the same result. The next review is scheduled to start no later than June 2010.¹¹⁰

4 3 Scope of the MFN Obligation under the TRIPS

Frederick Abbot has noted that prior to the TRIPS Agreement the MFN obligation did not feature in any of the international intellectual property rights agreements (that is, the Berne Convention (1886) and the Paris Convention (1883)).¹¹¹ This was so because then it did not appear likely that a country would grant to any foreigner intellectual property privileges more extensive than those it granted to its own nationals. Hence national treatment seemed an adequate standard for all treaty partners. Parties started to see the MFN as necessary in the intellectual property context at the multilateral level when in the 1990s the US started to negotiate agreements which appeared to give rights to US nationals that were not enjoyed by

¹⁰⁶ Van den Bossche *The Law and Policy of the World Trade Organisation: Text, Cases and Materials* (2008) 342.

¹⁰⁷ Mattoo *MFN and the GATS* in: Cottier et al (eds) *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law* (2002) 55.

¹⁰⁸ Van den Bossche *The Law and Policy of the World Trade Organisation: Text, Cases and Materials* (2008) 343.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ Abbot *Intellectual Property Rights in World Trade* in: Guzman and Sykes *Research Handbook in International Economic Law* (2007) 454. See also Yusuf *TRIPS: Background, Principles and General Provisions* in: Correa and Yusuf *Intellectual Property and International Trade: The TRIPS Agreement* (2008) 18.

the nationals of its treaty partners.¹¹² In fact some developed countries had preferred the conditional MFN approach during negotiations for the TRIPS Agreement, but this raised concerns of generating selective protection and the developing countries especially would not benefit from the concessions of other Members if they did not provide reciprocal concessions.¹¹³ This would have been inconsistent with the principle of “multilateral framework”, hence the principle of a single undertaking was developed.¹¹⁴ This principle is said to be expressed in Article 4 of the TRIPS.¹¹⁵

Article 4 of the TRIPS regards the provision of MFN obligation, in relation to intellectual property rights protection as any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country which shall be accorded immediately and unconditionally to the nationals of all other Members.¹¹⁶

The MFN principle in its scope is inter-disciplinary; accordingly, the principles that underlie the obligation as discussed in the above sections apply equally in the intellectual property context.¹¹⁷ As the *US – Section 211 Omnibus Appropriations Act of 1998* dispute has confirmed:

“like the national treatment obligation, the obligation to provide most-favoured-nation treatment has long been one of the cornerstones of the world trading system. For more

¹¹² Abbot *Intellectual Property Rights in World Trade* in: Guzman and Sykes *Research Handbook in International Economic law* (2007) 454. In this regard the adoption by Ministers of the Doha Declaration on the TRIPS Agreement and Public Health (Doha Declaration) on 14 November 2001 is regarded as a seminal event in the evolution of WTO law and that this will tend to have an influence in the jurisprudence under the TRIPS Agreement. Abbott 421. The Doha Declaration is said to be the only valid legal instrument in terms of which the TRIPS is to be interpreted since it contains achievements fundamental to developing countries’ interests in the interpretation of TRIPS provisions, especially in pharmaceutical and health matters.

¹¹³ Evans *Lawmaking under the Trade Constitution: A Study in Legislating by the World Trade Organisation* (2000) 81.

¹¹⁴ Evans *Lawmaking under the Trade Constitution: A Study in Legislating by the World Trade Organisation* (2000) 81. See further discussion on TRIPS Agreement in Trebilcock and Howse *The regulation of international trade* (2005) 397 – 400.

¹¹⁵ Evans *Lawmaking under the Trade Constitution: A Study in Legislating by the World Trade Organisation* (2000) 81.

¹¹⁶ World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 323 – 324.

¹¹⁷ See also Yusuf *TRIPS: Background, Principles and General Provisions* in: Correa and Yusuf *Intellectual Property and International Trade: The TRIPS Agreement* (2008) 7. See also Gad *TRIPS Dispute Settlement and Developing Country Interests* in: Correa and Yusuf *Intellectual Property and International Trade: The TRIPS Agreement* (2008) 357 – 358.

than fifty years, the obligation to provide most-favoured-nation treatment in Article I of the GATT 1994 has been both central and essential to assuring the success of a global rules-based system for trade in goods. Unlike the national treatment principle, there is no provision in the Paris Convention (1967) that establishes a most-favoured-nation obligation with respect to rights in trademarks or other industrial property. However, the framers of the TRIPS Agreement decided to extend the most-favoured-nation obligation to the protection of intellectual property rights covered by that Agreement. As a cornerstone of the world trading system, the most-favoured-nation obligation must be accorded the same significance with respect to intellectual property rights under the TRIPS Agreement that it has long been accorded with respect to trade in goods under the GATT. It is, in a word, fundamental”.¹¹⁸

Persons accorded non-discriminatory treatment should be interpreted in terms of Article 1:3 of the TRIPS as meaning natural or juristic persons who are domiciled or have a commercial presence in a customs territory.¹¹⁹

At a closer glance Article 4 of TRIPS resembles the provisions of Article I:1 of the GATT. This gives an impression that the interpretation of the obligation should not differ much in the TRIPS context from the manner in which the obligation has been interpreted under the GATT.¹²⁰ The notable difference between the two agreements is that under the TRIPS the obligation does not require that the nationals of these different countries be “like”.¹²¹ It is submitted that one would assume the obvious that all persons are alike and that Panels would take judicial notice of such a fact.

¹¹⁸ Appellate Body Report on *United States – Section 211 Omnibus Appropriations Act of 1998* (“US – Havana Club”), para 297.

¹¹⁹ World Trade Organisation *The Legal Texts: “The Results of the Uruguay Round of Multilateral Trade Negotiations”* (2002) 322, fn 1.

¹²⁰ Gad confirms the interrelatedness of the interpretative principles found in these agreements. See Gad *TRIPS Dispute Settlement and Developing Country Interests* in: Correa and Yusuf *Intellectual Property and International Trade: The TRIPS Agreement* (2008) 358.

¹²¹ Davey and Pauwelyn *MFN Unconditionality: A Legal Analysis of the Concept in View of its Evolution in the GATT/WTO Jurisprudence with Particular Reference to the Issue of “Like Product”* in: Cottier, Mavroidis, and Blatter (eds): *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law* (2002) 25, fn 65.

Matsushita opines that although it is clear from the language of the TRIPS Agreement that the non-discrimination obligation applies to intellectual property rights, it is significant that the obligation's application be confirmed by the AB.¹²² When interpreting the obligation in the TRIPS context, it is submitted that note must be taken of what was said in the *EC – Bananas III* dispute with regard to the interpretation of the MFN obligation in the GATS context. The Appellate Body in that case stated that the fact that Article II of GATS reflects more the contents of Article III of GATT instead of Article I:1 of GATT should not lead to an interpretation straying away from Article I:1 of GATT, but rather, inspiration should be drawn from GATT Article I:1 instead of GATT Article III, notwithstanding what differences there might be.¹²³ The discussion here will therefore be based on the GATT and GATS jurisprudence and the principles that are common to the MFN provisions in both agreements.

4.3.1 *Interpretation of the MFN obligation under the TRIPS Agreement*

In *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs* (“*EC – Trademarks and Geographical Indications*”)¹²⁴ the US and Australia each brought claims alleging that the EC's system of protecting geographical indications (GI) found in Articles 12a and 12b of the Council Regulations¹²⁵ discriminated against foreign applicants for protection and as such inconsistent with the MFN obligation and the Paris Convention.¹²⁶ The US claimed that the Regulation did not immediately and unconditionally accord the same advantages with respect to availability of protection that it

¹²² Matsushita *Appellate Body Jurisprudence on the GATS and TRIPS Agreements* in: Ortino and Petersmann *The WTO Dispute Settlement System 1995 – 2003* (2004) 471 – 472.

¹²³ This having been said in the Appellate Body Report in *EC – Bananas III*, para 231.

¹²⁴ Panel Report in *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs* (“*EC – Trademarks and Geographical Indications*”), WT/DS174/R, WT/DS290/R, 15 March 2005.

¹²⁵ Council Regulations were regulatory mechanisms which the EC was said to be using to discriminate against other WTO Members with regard to GI protection. See Panel Report in *EC – Trademarks and Geographical Indications* paras 2.1 and 7.

¹²⁶ The EC's Regulation required as a condition for granting protection that the home country of the foreign applicant maintain a system of GI protection equivalent to that of the EC. The Regulation therefore imposed conditions of reciprocity and equivalence on the availability of protection of geographical indications. This was called the “material reciprocity” requirement. Panel Report in *EC – Trademarks and Geographical Indications*, from paras 7.38 -7.40. The US cited the dispute in *Belgium – Family Allowances* in which it said entitlements to an advantage for imported goods made conditional upon the system of family allowances in the exporting Member was found to be inconsistent with the MFN treatment obligation in GATT, para 7.689.

accords to EC nationals. Nationals of WTO Members that satisfy those conditions are accorded more favourable treatment than nationals of WTO Members that do not. The conditions were placed on third party governments, but deny rights to third party nationals.¹²⁷ The EC's view was that its regulations did not apply to geographical areas located in WTO Members as such are not discriminatory. The EC further argued that the fact that its regulations were qualified by reference to international obligations assured WTO consistency.¹²⁸ This case will further be discussed in chapter 5.

The Panel opined that in order for Article 4 of the TRIPS Agreement to be satisfied two elements must be satisfied:

- (i) the measure at issue must apply with regard to the protection of intellectual property; and
- (ii) the nationals of other Members are not “immediately and unconditionally” accorded any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country.

4.3.1.1 *Protection of Intellectual Property*

With regard to the first requirement that must be met the Panel referred to footnote 3 of the TRIPS Agreement as providing an inclusive definition of the term “protection” as used in Articles 3 and 4. The footnote reads:

“for the purposes of Articles 3 and 4, “protection” shall include matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as those matters affecting the use of intellectual property rights specifically addressed in this Agreement”.¹²⁹

¹²⁷ Panel Report in *EC – Trademarks and Geographical Indications*, para 7.689.

¹²⁸ Panel Report in *EC – Trademarks and Geographical Indications*, para 7.41.

¹²⁹ World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 323. See also Panel Report in *EC – Trademarks and Geographical Indications*, para 7.126.

The Panel ruled that intellectual property is defined in Article 1.2 as referring to all categories of intellectual property that are the subject of Sections 1 through to 7 of Part II.¹³⁰ The Panel also said that the Council Regulations in issue fell to be determined in terms of the categories of intellectual property as defined in Article 1.2 of the TRIPS Agreement.¹³¹ This makes the claim in question pertinent to the protection of intellectual property within the scope of Article 4 of the TRIPS Agreement.¹³²

4.3.1.2 *Any advantage, favour, privilege or immunity*

Van den Bossche is of the view that an advantage, favour, privilege or immunity granted by a Member covers any advantage, favour, privilege or immunity granted to any country, including non-Members. Article I:1 of the GATT obliges Members to extend any such advantage to all WTO Members¹³³ as does Article 4 of TRIPS with regards to conferment on persons. In interpreting Article I:1 of the GATT the Appellate Body in the *Canada – Auto Pact* dispute¹³⁴ gave clarity to the scope of Article I:1 by stating that:

“Article I:1 requires that “any advantage, favour, privilege or immunity granted by any Member to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other Members”. The words of Article I:1 refer not to some advantages granted “with respect to” the subject that fall within the defined scope of the Article, but to “any advantage”, not to some products, but to “any product”, and not

¹³⁰ Panel Report in *EC – Trademarks and Geographical Indications*, para 7.127.

¹³¹ Panel Report in *EC – Trademarks and Geographical Indications*, para 7.128.

¹³² See Panel Report in *EC – Trademarks and Geographical Indications*, paras 7.699 – 7.701. The MFN treatment obligation also applies to the protection of intellectual property, even where measures provide a higher level of protection. MFN treatment under the TRIPS Agreement generally only has an independent application where a Member grants to the nationals of any other country a level of protection that is higher than it grants to its own nationals and higher than the minimum standards laid down in the TRIPS Agreement. See Panel Report in *EC – Trademarks and Geographical Indications*, para 7.702.

¹³³ Van den Bossche *The Law and Policy of the World Trade Organisation: Text, Cases and Materials* (2008) 327.

¹³⁴ Appellate Body Report in *Canada – Certain Measures Affecting the Automotive Industry* (“*Canada – Auto Pact*”), WT/DS139/AB/R, WT/DS142/AB/R, 31 May 2000, adopted 19 June 2000, WT/DS139/AB/R, WT/DS142/AB/R, and its Panel Report, WT/DS139/R, WT/DS142/R, 11 February 2000.

to like products from some other Members, but to like products originating in or destined for “all other” Members”.¹³⁵

This basically requires that any advantage, favour, privilege or immunity granted by a Member to any product from or destined for another country must be granted to all like products from or destined for the territories of all other Members. Davey and Pauwelyn opine that only those advantages, favours, privileges or immunities actually granted to any product are subject to the MFN obligation in Article I:1 of the GATT.¹³⁶

In the TRIPS context with regard to any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country the Panel¹³⁷ stated that the US had made a *prima facie* case that the registration procedure in Articles 12a and 12b of the Regulation in that case was not available for GI located in third countries, including WTO Members that do not satisfy the conditions in Article 12(1). The Panel therefore found that GI protection was not available under the Regulation in respect of geographical areas located in third countries which the Commission has not recognised under Article 12(3), even though the GI protection may become available if the third country in which the GI was located enters into an international agreement or satisfies the conditions in Article 12(1).¹³⁸ The Panel ruled that this constitutes an “advantage, favour, privilege or immunity” granted by the EC with regard to the protection of intellectual property. It is subject to the satisfaction of the equivalence and reciprocity conditions, or the conclusion of an international agreement, or both which tends to indicate that it is not accorded “immediately and unconditionally”.¹³⁹ The Panel further said that the

¹³⁵ Appellate Body Report in *Canada – Auto Pact*, para 79. The complaint in the case by the European Communities and Japan was with respect to a Canadian measure which provided a duty exemption for the importation of certain automobiles, buses and other specified commercial vehicles (“motor vehicles”). See paras 2.15 – 2.35 of the case.

¹³⁶ Davey and Pauwelyn *MFN Unconditionality: A Legal Analysis of the Concept in View of its Evolution in the GATT/WTO Jurisprudence with Particular Reference to the Issue of “Like Product”* in: Cottier, Mavroidis, and Blatter (eds): *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law* (2002) 22.

¹³⁷ In *EC – Trademarks and Geographical Indications*, para 7.703.

¹³⁸ Panel Report in *EC – Trademarks and Geographical Indications*, para 7.703.

¹³⁹ Panel Report in *EC – Trademarks and Geographical Indications*, para 7.704.

advantage, favour, privilege or immunity must be granted by a Member “to the nationals of any other country”.¹⁴⁰

The *United States – Section 211 Omnibus Appropriations Act of 1998 (“US – Havana Club”)*¹⁴¹ was the first case in which the MFN obligation was challenged and decided under the TRIPS.¹⁴² The EC claimed before the Panel that Sections 211 (a) (2) and section 211 (b) of the Omnibus Appropriations Act of 1998 which banned protection and recognition of trademarks and trade names in connection with Cuban business relations were inconsistent with Article 4 of the TRIPS Agreement. The Panel in its finding ruled that the sections did not deny Cuban nationals any advantage, favour or immunity that the US accords to other foreign nationals and that the US’s legislation was not therefore inconsistent with the TRIPS MFN obligation.¹⁴³ The fact that Cuban nationals were subject to the provisions of section 211 (a) (2) and 211 (b) and a non-Cuban national is not is insufficient to find that the sections violate the MFN obligation.¹⁴⁴

However, the AB disagreed with that ruling.¹⁴⁵ It ruled that the US’s sections 211 (a) (2) and 211 (b) provided formally different treatment on their face in respect of nationals from Cuba and non-Cuban foreign nationals.¹⁴⁶ According to the AB the US’s sections 211 (a) (2) and 211 (b) were *prima facie* inconsistent with the MFN obligation since the sections offered different terms of application to US nationals than they did to non-nationals, hence establishing an advantage or favour for US nationals.¹⁴⁷ This case will be discussed in detail in chapter 5.

However, advantages that have no direct or indirect repercussions on related products or persons as contemplated in the TRIPS would seem not to be subject to the MFN obligation.¹⁴⁸

¹⁴⁰ Panel Report in *EC – Trademarks and Geographical Indications*, para 7.705.

¹⁴¹ Panel Report in *United States – Section 211 Omnibus Appropriations Act of 1998 (“US – Havana Club”)*, WT/DS176/R, and its Appellate Body Report, WT/DS176/AB/R, 2 January 2002.

¹⁴² Abbott *WTO Dispute Settlement Practice Relating to the Agreement on Trade-Related Intellectual Property Rights* in: Ortino and Petersmann (eds) *The WTO Dispute Settlement System 1995 – 2003* (2004) 433.

¹⁴³ Panel Report in *US – Havana Club*, paras 8.140 and 9.1

¹⁴⁴ Appellate Body Report in *US – Havana Club*, para 307.

¹⁴⁵ Appellate Body Report in *US – Havana Club*, para 306.

¹⁴⁶ Appellate Body Report in *US – Havana Club*, paras 306 – 309.

¹⁴⁷ Appellate Body Report in *US – Havana Club*, paras 308 – 309.

¹⁴⁸ Davey and Pauwelyn *MFN Unconditionality: A Legal Analysis of the Concept in View of its Evolution in the GATT/WTO Jurisprudence with Particular Reference to the Issue of “Like Product”* in: Cottier, Mavroidis, and Blatter (eds): *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law* (2002) 22.

An example in this regard could be a situation where the MFN obligation would not apply because the intellectual property is not used for trade purposes by the user, for example, where the intellectual property is used in study or research engagements.¹⁴⁹

Any advantage, favour, privilege or immunity granted by a WTO Member to imports from any country must be granted immediately and unconditionally to imports from all other WTO Members.¹⁵⁰ If the advantage, favour, privilege or immunity is subjected to any conditions, for example reciprocity, that condition would run foul of TRIPS Article 4 just as much as it would also be contrary to GATT Article I.¹⁵¹ This interpretation accords well with what was decided in the *Canada – Auto Pact* dispute where the AB found that:

“the measures maintained by Canada accords import duty exemption to certain motor vehicles entering Canada from certain countries. These privileged motor vehicles are imported by a limited number of designated manufacturers who are required to meet certain performance conditions. In practice, this measure does not accord the same import duty exemption immediately and unconditionally to like motor vehicles of all other Members, as required under Article I:1 of GATT 1994. The advantage of the import duty exemption is accorded to some motor vehicles originating in certain countries without being accorded to like motor vehicles from all other Members”.¹⁵²

Accordingly, the AB ruled that this measure was not consistent with Canada’s obligations under Article I:1 of the GATT 1994.¹⁵³ The challenge here would be a situation where the right-holder seeks protection of intellectual property in a field in which a developing country suffers casualties as a result of non-availability of, for example, medicines/drugs because they are too expensive to acquire. The affected Member country may introduce a measure that seeks to curb such casualties by for example allowing the acquisition of the cheaper versions of the

¹⁴⁹ In South Africa this is catered for in section 12 of the Copyright Act 98 of 1978.

¹⁵⁰ Van den Bossche *The law and Policy of the World Trade Organisation: Text, Cases and Materials* (2008) 331.

¹⁵¹ Davey and Pauwelyn *MFN Unconditionality: A Legal Analysis of the Concept in View of its Evolution in the GATT/WTO Jurisprudence with Particular Reference to the Issue of “Like Product”* in: Cottier et al (eds) *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law* (2002) 20.

¹⁵² Appellate Body Report in *Canada – Auto Pact*, para 85.

¹⁵³ See also in Appellate Body Report in *US – Havana Club*, para 297.

medicines/drugs from one Member country instead of the other. If the right-holder challenges this exercise, would the interpretation of such a measure be classified as affording an advantage, favour, privileges or immunities, especially if the measure introduced contradicts the TRIPS allowed exceptions, even though it is clear that such a measure requires an interpretation according to its context and aim and the positive societal effect that it will achieve?

4.3.2 *Exceptions to the TRIPS Agreement*

The inclusion of the MFN in the TRIPS seems to have been motivated by the proliferation of bilateral agreements on intellectual property between developed and developing countries. This is so because Article 4(d) of the TRIPS exempts these bilateral agreements from the application of the MFN if they entered into force prior to the entry into force of the Uruguay Round agreements and provided they are notified to the Council for Trade-Related Aspects of Intellectual Property Rights of the WTO.¹⁵⁴ These bilateral agreements are required not to constitute an arbitrary or unjustifiable protectionism or discrimination against nationals of any other Member State.¹⁵⁵ Article 6 of the TRIPS Agreement adds another dimension to this by excluding the regulation of exhaustion of intellectual property rights in terms of the agreement. This is left to individual Member States.¹⁵⁶ It is submitted that if these countries enter into regional agreements they can reclaim their policy space and by so doing determine their economic interests through reliance on Article 6.¹⁵⁷

¹⁵⁴ World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002). See also Yusuf *TRIPS: Background, Principles and General Provisions* in: Correa and Yusuf *Intellectual Property and International Trade: The TRIPs Agreement* (2008) 18.

¹⁵⁵ These exceptions include any advantage, favour, privilege or immunity: accorded by a Member that derives from international agreements on judicial assistance or law enforcement of a general nature and not particularly confined to the protection of intellectual property; granted in accordance with the provisions of the Berne Convention (1971) or the Rome Convention authorising that the treatment accorded be a function not of national treatment but of the treatment accorded in another country; in respect of the rights of performers, producers of phonograms and broadcasting organisations not provided under this Agreement; and any advantage, favour, privilege or immunity deriving from international agreements related to the protection of intellectual property which entered into force prior to the entry into force of the WTO Agreement.

¹⁵⁶ World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 324.

¹⁵⁷ Yusuf *TRIPS: Background, Principles and General Provisions* in: Correa and Yusuf *Intellectual Property and International Trade: The TRIPs Agreement* (2008) 18.

5 THE EFFECT OF THE MFN OBLIGATION

The MFN obligation has a harmonising and levelling effect as it transcends the bilateralism of commercial relations by focusing on multilateralism.¹⁵⁸ This multilateral effect is also seen from the WTO provisions that encapsulate the MFN obligation.¹⁵⁹ The multilateral character of this principle is reflected in the fact that it prohibits all forms of discrimination. The interdisciplinary nature of the MFN principle can be seen from its link to the most diverse systems of economic policy, for example, to free trade as well as protectionism.¹⁶⁰

In international law, States have a duty to co-operate with one another in accordance with the Charter of the United Nations and adhere to the principle of non-discrimination.¹⁶¹ In fact the GATT was established in order to denounce the discriminatory treatment which had caused international trade to develop into economic blocs. As a result, the GATT emphasised the principle of non-discrimination in trade.¹⁶² However, such economic blocs are still allowed through the creation of RTA's which is in fact a reversal of what the MFN obligation was created to stand against. In this regard the main distinction between non-discrimination and reciprocity is that the non-discrimination obligation was established as a substantial principle of international law, while reciprocity, which competes with this non-discrimination principle, is a guiding principle of negotiation.¹⁶³ The non-discrimination obligation would inevitably lead to unconditional MFN treatment that does not necessarily require equivalence of benefits, whilst in contrast, in terms of reciprocity equivalence is an essential characteristic, even though the extent of such equivalence can be flexible.¹⁶⁴

¹⁵⁸ Ustor "Most-Favoured-Nation Clause in the law of treaties: working paper" http://untreaty.un.org/ilc/documentation/english/a_cn4_l127.pdf (accessed 18-07-2009).

¹⁵⁹ See also Article 5 of the International Law Commission, *Draft Articles on Most-Favoured-Nation Clauses*, (1978) (Draft Articles), available at United Nations "Draft Articles on Most-Favoured-Nation Clauses (1978)" http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/1_3_1978.pdf (accessed 20-05-2009).

¹⁶⁰ Ustor "Most-Favoured-Nation Clause in the law of treaties: working paper". See also Van den Bossche *The law and Policy of the World Trade Organisation: Text, Cases and Materials* (2008) 324.

¹⁶¹ Ustor "Most-Favoured-Nation Clause in the law of treaties: working paper".

¹⁶² Yanai "The Function of the MFN clause in the Global Trading System".

¹⁶³ Ibid.

¹⁶⁴ Ibid.

The category of rights contemplated in terms of the MFN principle are those of the same kind or order, or belonging to the same class, or those contemplated therein.¹⁶⁵ The subject matter or category of subject matter must be the same.¹⁶⁶ As much as there are exceptions to the principle, such as customs unions, frontier traffic, and the interests of the developing countries,¹⁶⁷ the grant of MFN rights relating to one subject matter or category of subject matters cannot confer a right to enjoy the treatment granted to another country in respect of a different subject matter or category of subject matters.¹⁶⁸ The scope of the obligation with regard to favours must be in respect of favours *ejusdem generis* (of the same kind).¹⁶⁹ It is the point of the preferential treatment that a country receives that necessitates the determination whether a State has been more favoured. "The determination to establish the difference in treatment must therefore be made point by point and not in *globo*".¹⁷⁰

Even though the MFN principle has been in existence for centuries, as shown in the background section above, it has not yet been accepted as part of customary international law.¹⁷¹ This is motivated by the fact that the rule is considered not to have reached the stage of adhering to the two standards that must be met to fulfil the requirements of customary international law, namely, *usus* (settled practice) and *opinio iuris sive necessitatis* (sense of obligation to accept the general practice as law).¹⁷² This however, does not erase the importance attached to the application of the MFN principle in many WTO agreements as a basic pillar.¹⁷³

The advantages/favourable treatment which each WTO Member country receives from the presence of the MFN obligation in the GATS and TRIPS should serve as motivation for Member countries. The problem, it is submitted, seems to be that the advantages tend to benefit one trading partner to the disadvantage of the other.

¹⁶⁵ Ustor "Most-Favoured-Nation Clause in the law of treaties: working paper".

¹⁶⁶ Ibid.

¹⁶⁷ Ibid.

¹⁶⁸ Ibid.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

¹⁷¹ Wouters and De Meester *A Legal and Institutional Analysis* (2007) 25.

¹⁷² Ibid. See also Dugard *International law - A South African Perspective* (2001) 27 – 28.

¹⁷³ Ibid.

6 SUMMARY AND CONCLUSION

The advantages, rationales and disadvantages of the MFN obligation reveal the pervasive character of the obligation. The background, nature and content of the obligation show the high regard for the obligation especially considered from the interpretative approach followed by the WTO jurisprudence in interpreting the elements that underlie this obligation under the GATS and TRIPS. The final result is that indeed the obligation is the fundamental pillar upon which WTO Members' relations reside even though it is marred by exceptions. However the obligation does present challenges for Members. Primary among these is the consideration of competitive conditions/relationship which help to maintain the effective equality of opportunities for imported products so as to prevent protectionist or discriminatory tendencies by Member countries as well as to ensure protection for the intellectual property rights of investors. This point will be expanded upon in chapter six.

This chapter shows that the primary determinants for the obligation to be proved are that:

- i. the services or services suppliers must be defined broadly;
- ii. there must be respect for competitive relationships;
- iii. conditions of competition must not be disturbed to the detriment of foreign investors;
- iv. the effective equality of trading opportunities must be ensured; and
- v. protection for intellectual property rights for right-holders must be provided.

CHAPTER 4

NON-DISCRIMINATION UNDER THE GATS AND TRIPS II: THE NATIONAL TREATMENT OBLIGATION

1 INTRODUCTION

The WTO Agreement espouses the principle of sustainable development based on raising standards of living, among others, upon which the pursuit of expansion of trade in goods and services,¹ including intellectual property, is founded. Implicit in that principle is the hope that developing countries will secure a share in the growth of international trade commensurate with their development needs. In the WTO Agreement's pursuit of discrimination-free treatment, this will be achieved through mutually advantageous arrangements.²

The national treatment obligation is the second principle of non-discrimination in WTO law.³ This chapter examines the content, scope and ramifications of this obligation under the GATS and the TRIPS.⁴ The following discussion is in 8 Parts. Part 2 looks at the obligations' rationales while Part 3 discusses the obligation's background. Part 4 examines its nature and content while Part 5 looks at the interpretation of the obligation in the GATS context and Part 6 looks at the scope of the obligation in the TRIPS context. Part 7 discusses the interpretative elements embodied in the obligation in the TRIPS context and Part 8 concludes.

¹ World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 4.

² *Ibid.* Some of the rationales of the WTO are: to ensure the predictability that is necessary for a smooth operation of economic activities; it serves to protect economically weaker countries from economic pressures of more powerful countries; it seeks to prevent the escalation of international tensions; and it seeks to introduce equilibrium of rights and obligations that the contracting parties have voluntarily accepted as being in their mutual interests. See the WTO Agreement's Preamble.

³ Van den Bossche *The law and Policy of the World Trade Organisation: Text, Cases and Materials* (2008) 321.

⁴ Other agreements that seek to protect the economic benefits espoused in the national treatment obligation include the Uruguay Round TRIMs (Trade Related Investment Measures). The agreement addresses domestic content issues, and states that a requirement to use or purchase products from domestic sources as a condition for privilege or when required by rule is inconsistent with paragraph 4 of Article III of the GATT. See Jackson *The World Trading System: Law and Policy of International Economic Relations* (1997) 215. See also Panel Report in *Indonesia – Certain Measures Affecting the Automobile Industry ("Indonesia – Autos")*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, 2 July 1998, para 6.23. But there are as well agreements that seek to afford developing countries policy space to introduce subsidies and countervailing measures, for example the Agreement on Subsidies and Countervailing Measures (SCM), where the need arises so as to protect their domestic industry. See also Indonesia's arguments in the Panel Report in *Indonesia – Autos*, paras 5.128 and 14.156.

2 RATIONALES AND ADVANTAGES OF THE NATIONAL TREATMENT OBLIGATION

From a public policy perspective the national treatment obligation is regarded as self-evidently advantageous.⁵ This is normally related to the assertion that the national treatment obligation seeks to ensure that other countries' products, services or services suppliers will compete fairly on foreign markets once they have crossed the border. In other words competition opportunities for foreign investors in trade-related aspects of the WTO agreements will be preserved irrespective of whether the country has a negotiated claim for market access or not.⁶

The other rationale that the WTO law recognises is the right of governments to restrict trade in specific circumstances.⁷ Article V of the GATS provides an exception for those countries who might wish to forge regional economic ties and, in the process, discriminate against those outside the region. In fact the Article even allows for a developmental purpose as espoused in the GATS Preamble in consonance with the level of development of the countries concerned.⁸ Article 3.1 of the TRIPS permits some exceptions as well.⁹ Each of the intellectual property categories of the TRIPS provide for exceptions with regard to protections that each Member is required to maintain.¹⁰ WTO Member countries may use 'safety valves' when pursuing their economic policies and protecting national interests. This may happen where foreign competition is extremely vigorous and the import of foreign products and services unexpectedly peaks so as to severely hurt national competitors.¹¹ Foreign products may be priced below the normal domestic market price in order to destroy domestic competitors. This type of pricing to gain advantage constitutes dumping which is considered to be an unfair trade

⁵ Von Moltke "Discrimination and Non-Discrimination in Foreign Direct Investment Mining Issues" <http://www.oecd.org/dataoecd/1/59/1819921.pdf> (accessed 21-09-2010).

⁶ The Organisation for Economic Co-operation and Development "The Principles and Concepts" http://ec.europa.eu/environment/integration/pdf/oecd_te_1995.pdf (accessed 11-08-2010).

⁷ Wouters and De Meester *A Legal and Institutional Analysis* (2007) 29.

⁸ World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 289 and Article V (3) (a).

⁹ *Ibid*, at 323.

¹⁰ See Articles 13, Copyright and Related Rights; 17, Trademarks; 24 Geographical Indications; 26(2), Industrial Designs; 30 and 27(2), Patents; 38(3), Layout-designs; and 39(3), Protection of undisclosed information, in World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 325 – 338.

¹¹ Wouters and De Meester *A Legal and Institutional Analysis* (2007) 29.

practice.¹² This may happen for example if foreign producers are subsidised by their governments, as is the case with agricultural products from developed countries. Such unfair practices afford Member countries, in limited circumstances and under specific conditions, the right to impose anti-dumping duties or countervailing duties on the dumped or subsidised imports.¹³ Such measures may also be used where a country wants to protect its infant industry or where it is suffering from balance of payments difficulties.¹⁴

The national treatment obligation neutralises the desire to have domestic instruments being used as measures for protectionism in practice.¹⁵ Consequently, as is the case with the MFN obligation, the national treatment obligation is believed to be an essential instrument in making the principle of comparative advantage work. If all producers have equal access to a certain market, importers and consumers in this market will be able to choose to buy from the producer with the lowest price. It would therefore, be possible to compare prices because national import rules and duties affect them all in the same way. Thus equality of comparative opportunities is established through the national treatment obligation. Furthermore, the national treatment obligation helps with market certainty and predictability, thereby encouraging investment.¹⁶

¹² Article 2.1 of the Uruguay Round Anti-Dumping Agreement defines products as being dumped, in other words introduced into the commerce of another country at less than their normal value, if the export price is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country <http://www.worldtradelaw.net/uragreements/adagreement.pdf> (accessed 02-05-2010). See also Trebilcock and Howse *The Regulation of International Trade* (2005) 235.

¹³ Also, see the recent case of *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* ("ITAC v SCAW"), CCT 59/09 [2010 ZACC 6]; 2010 (5) BCLR 457 (CC), para 1.

¹⁴ This is provided for in Article XII of the GATS and Articles XII of the GATT. See World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 295 and 438. See also Article XVI of the GATT. The GATS however, does not contain provisions allowing for contingent or infant industry protection; this basically reflects the difficulty of applying these concepts to trade in services. However, Members may opt for a waiver of their obligations under the agreements. Such waivers will be granted if consensus is reached within the Ministerial Conference in a maximum period of 90 days. If there is no consensus, then a majority vote of three quarters of WTO Members is required. Such waivers are granted for a limited period and are subject to annual review. See Wouters and De Meester *A Legal and Institutional Analysis* (2007) 29 and 30.

¹⁵ Horn and Mavroidis "Still Hazy after All These Years: The Interpretation of National Treatment in the GATT/WTO Case-law on Tax Discrimination" <http://www.ejil.org/pdfs/15/1/347.pdf> (accessed 21-09-2010).

¹⁶ Understanding the WTO "Basic Principles of the trading system" http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (accessed 12-11-2009). Another rationale or advantage that the two WTO Agreements also provide for are the limitations on non-trade policies that are generally accepted, even though they result in trade barriers, for example Article XIV of GATS and Article XX of

3 BACKGROUND TO THE NATIONAL TREATMENT OBLIGATION

Trebilcock and Giri contend that the national treatment obligation has an ancient genesis in international trade law, arguably dating back to Hebrew Law.¹⁷ Trebilcock and Giri write that the obligation appeared in agreements between Italian city States in the 11th Century as well as in commercial treaties concluded in the 12th Century between England and Continental powers and cities, and in agreements among German city States constituting the Hanseatic League from the 12th Century onwards.¹⁸ They write further that the obligation was also adopted in various shipping treaties entered into between European powers in the 17th and 18th Centuries.¹⁹ Consequently, the principle became common in trade treaties that were concluded in the latter part of the 19th Century. The obligation also appeared in the Paris and

GATT and Article 8 of the TRIPS. See World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 296, 455 and 324 respectively. But such provisions always include a caveat requiring that measures should not result in arbitrary or unjustifiable discrimination between countries and/or amount to a disguised restriction on international trade. See Wouters and De Meester *A Legal and Institutional Analysis* (2007) 30. See also World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 296 – 298, 455 – 456 and 324 respectively. These include the protection of public morals, Articles XIV (a) GATS and XX (a) GATT, protection of human, animal or plant life or health, in Articles XIV (b) GATS and XX (b) GATT, the control of importations or exportations of gold or silver, for example, Articles XX (c) GATT, and intervention on national security grounds, Article XIVbis and Articles XXI GATT and 73 TRIPS being security exceptions. Article 8 of TRIPS sets out the principles whereby Members may, in formulating or amending their laws, regulations, adopt measures necessary to protect public health and nutrition, to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of the TRIPS agreement. See also a commentary on complementarities between the MFN and the national treatment in Panel Report in *United States – Measures Affecting Alcoholic and Malt Beverages*, DS23/R – 39S/206, adopted 19 June 1992, para. 5.9.

¹⁷Trebilcock and Giri “The National Treatment Principle in International Trade Law” <http://law.bepress.com/cgi/viewcontent.cgi?article=1007&context=alea> (accessed 14-07-2010). See also Trebilcock and Howse *The Regulation of International Trade* (2005) 83 – 84. For example, the obligation has been invoked in two ways. Firstly, in one context it represents one of the competing international law doctrines for the treatment of the person and property of aliens which is known as the “Calvo Doctrine”. Under this doctrine aliens and their property would be entitled only to the same treatment accorded to nationals of the host country under its laws. Secondly, in another context, it would be used under the doctrine of State responsibility for injuries to aliens and their property, which has historically been supported by the developed countries. State responsibility would assert that customary international law establishes a minimum international standard of treatment to which aliens are entitled, allowing for treatment more favourable than that accorded to nationals where the treatment accorded falls short of international minimum standards. See United Nations Conference on Trade and Development “National Treatment: UNCTAD on issues in international investment agreements” <http://www.unctad.org/en/docs/psiteiitd11v4.en.pdf> (accessed 07-05-2009).

¹⁸Trebilcock and Giri “The National Treatment Principle in International Trade Law”.

¹⁹Ibid.

Berne Conventions governing intellectual property rights.²⁰ For example, Article 2 of the Paris Convention for Protection of Industrial Property (1883) sanctions the obligation that nationals of Member countries shall have the same protection as nationals of the host Member country in which protection for intellectual property is sought.²¹ The obligation also took its place in the Reciprocal Trade Agreements Act of 1934 between the US and various trading partners. The national treatment obligation also applied in respect of imported products *vis-à-vis* internal measures as one of the basic principles of the multilateral trading system. This obligation is now one of the fundamental pillars upon which the GATT resides.²²

The US insisted on the obligation's incorporation into the GATT framework as one of its fundamental principles.²³ The rationale behind such insistence was to protect concessions reflected in tariff bindings from being undermined by internal taxes or other regulatory measures that express protectionist or discriminatory tendencies towards imports.²⁴ If there were any protectionist policies envisaged by parties, such should be channelled into border measures, for example through tariffs that could be subject to subsequently negotiated reductions and bindings.²⁵ In other words protectionist policies were tolerated only if they were subject to a negotiated settlement. It is submitted that this seems to be the situation that currently prevails as the WTO Agreements allow countries to schedule only sectors that they accord market access to and consider to be of interest/advantage to them. This then allows countries to protect industries that they consider to be in their infancy and unripe for international competition. From that perspective the primary focus of GATT has been the liberalisation of border measures restricting international trade in goods.²⁶ The fundamental rationale here has been the prevention of any border measures designed to give competitive advantage to domestic products which could take the form of customs tariffs imposed at the

²⁰ Ibid. See also United Nations Conference on Trade and Development "National Treatment: UNCTAD on issues in international investment agreements".

²¹ Trebilcock and Giri "The National Treatment Principle in International Trade Law".

²² United Nations Conference on Trade and Development "National Treatment: UNCTAD on issues in international investment agreements".

²³ Trebilcock and Giri "The National Treatment Principle in International Trade Law".

²⁴ Ibid.

²⁵ Ibid.

²⁶ United Nations Conference on Trade and Development "National Treatment: UNCTAD on issues in international investment agreements".

border.²⁷ The underlying intention has been that the level of such customs tariffs should be a matter for negotiation and be bound in national schedules.²⁸ Article III of GATT, through which this obligation has been applied, plays a crucial role as it has been designed to ensure that internal measures are not applied to imported or domestic products so as to afford protection to domestic production. It thus serves the purpose of ensuring that internal measures are not used to nullify or impair the effect of tariffs concessions and other multilateral rules applicable to border measures.²⁹

The jurisprudence of the WTO has established tests by which each Member's compliance with negotiated outcomes is to be determined.³⁰ The interpretation given to these provisions should be consonant with the purpose of the Article.³¹ However, the granting of such national treatment would vary, depending upon the economic sectors and the subject matter involved.³² The concentration on the national treatment principle is surprising since it played a minor role previously as Member countries concentrated on tariff reductions based on an MFN basis, with little role for national treatment in disciplining protectionism or discrimination in international trade. However, the principle has come to form the fundamental pillar upon which all WTO agreements are based.³³

²⁷ The Organisation for Economic Co-operation and Development "Trade Principles and Concepts".

²⁸ United Nations Conference on Trade and Development "National Treatment: UNCTAD on issues in international investment agreements".

²⁹ Article III of the GATT has therefore, over time helped to reduce Member countries' dependence on protectionist measures that discriminate against other Member countries. See United Nations Conference on Trade and Development "National Treatment: UNCTAD on issues in international investment agreements".

³⁰ Trebilcock and Giri "The National Treatment Principle in International Trade Law".

³¹ Ibid. The national treatment obligation in as far as FDI is concerned, fulfils a role not very different from that which it fulfilled under trade related agreements. See United Nations Conference on Trade and Development "National Treatment: UNCTAD on issues in international investment agreements".

³² United Nations Conference on Trade and Development "National Treatment: UNCTAD on issues in international investment agreements".

³³ It in fact has emerged as an important source of discipline for residual forms of protectionism or discrimination that lie beyond each Member country's borders. See Trebilcock and Giri "The National Treatment Principle in International Trade Law". See further discussion of national treatment obligation in Dinwoodie "The Architecture of the International Intellectual Property System" http://works.bepress.com/cgi/viewcontent.cgi?article=1010&context=graeme_dinwoodie (accessed 02-11-2010).

4 THE NATURE AND CONTENT OF THE NATIONAL TREATMENT OBLIGATION

4.1 Introduction

Unlike the MFN obligation, the national treatment obligation applied in international contractual obligations between parties except if expressly excluded.³⁴ In general terms the national treatment obligation seeks to grant treatment comparable to that accorded to domestic suppliers/investors operating in the host WTO Member country. This is in contrast to the MFN obligation which only applies to ensure equal treatment between foreign investors operating in the host Member country.³⁵ In the intellectual property context therefore, the national treatment obligation applies to persons and seeks to protect persons or right-holders rights³⁶ with regard to such intellectual property matter or product. Intellectual property rights refer to specific legal rights which authors, inventors and/or other right-holders may hold and exercise in relation to any intellectual property subject matter³⁷ or a product or service that embodies an intellectual property.

From this perspective it suffices then to say that the national treatment obligation in the GATT context implies that, once the imported goods have entered the domestic market (after the importers' payment of applicable tariffs) they should not be discriminated against in the domestic market by being burdened with higher domestic charges, duties, or taxes that are not levied on domestically produced goods/services.³⁸

³⁴ Reichman *Universal Minimum Standards of Intellectual Property Protection under the TRIPS Component of the WTO Agreement* in: Correa and Yusuf (eds) *Intellectual Property and International Trade: The TRIPs Agreement* (2008) 27.

³⁵ United Nations Conference on Trade and Development "National Treatment: UNCTAD on issues in international investment agreements" <http://www.unctad.org/en/docs/psiteitd11v4.en.pdf> (accessed 07-05-2009).

³⁶ Yusuf *TRIPS: Background, Principles and General Provisions* in: Correa and Yusuf (eds) *Intellectual Property and International Trade: The TRIPs Agreement* (2008) 16.

³⁷ Biadgleng and Tellez "The Changing Structure and Governance of Intellectual Property Enforcement".

³⁸ United Nations Conference on Trade and Development "WTO Core Principles and Prohibitions: Obligations Relating to Private Practices, National Competition Laws and Implications for a Competition Policy" http://www.unctad.org/en/docs/ditclp20032_en.pdf (accessed 07-04-2009). John Howard Jackson confirms this application of the national treatment principle. See Jackson *The World Trading System: Law and Policy of International Economic Relations* (1997) 213. See also Horn and Mavroidis "Economic and legal aspects of the Most-Favored-Nation clause" 2000 *European Journal of Political Economy* 233 http://www.sciencedirect.com/science?_ob=MIimg&_imagekey=B6V97-43BXPPC-3-4&_cdi=5891&_user=2093731&_orig=search&_coverDate=06%2F30%2F2001&_sk=999829997&view=c&wchp=dGLzVlz-zSkzS&md5=a7b9840e667c69a478a2ea9dd3561c82&ie=/sdarticle.pdf (accessed 18-04-2009).

4.2 National Treatment Obligation Under the GATS

In the GATS context the national treatment obligation applies to services and service suppliers where market access has been granted. In other words a commitment to a specific sector or sub-sector or mode of service supply must have been made by a Member country.³⁹ Upon making such commitment, a Member may list horizontal and sector specific exceptions where national treatment shall not be accorded.⁴⁰ Therefore, the national treatment obligation does not apply in a particular sector until a Member has chosen to make a market access commitment in that services sector.⁴¹ When such market access is granted the Member is not permitted/allowed to accord treatment less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.⁴² Implicit in this obligation is the

³⁹ The Panel Report in *Mexico – Measures Affecting Telecommunications Services*, WT/DS204/R, 2 April 2004, para 7.4. See also Van den Bossche *The law and Policy of the World Trade Organisation: Text, Cases and Materials* (2008) 391. See as well Mattoo “National Treatment in the GATS: Corner-stone or Pandora’s Box?” <http://scholar.google.co.za/scholar?hl=en&q=The+National+Treatment+in+GATS&btnG=Search> (accessed 07-05-2009) and Chanda “GATS and its implications for developing countries: Key issues and concerns” <http://www.un.org/esa/desa/papers/2002/esa02dp25.pdf> (accessed 10-04-2009). See further The World Bank “Trade in Information and Communication Services: Opportunities for East and Southern Africa” http://siteresources.worldbank.org/EXTINFORMATIONANDCOMMUNICATIONANDTECHNOLOGIES/Resources/282822-1208273252769/Trade_in_ICT_services-opportunities_for_E&SA_mod.pdf (accessed 13-10-2010). For example countries made 69 commitments on Telecommunications and these are embodied in the Fourth Protocol of the GATS as the Basic Telecommunications Agreement (BTA). Another example of commitments made are the commitments made by the European Communities which have agreed to accord national treatment to higher education services supplied in mode 1 (with a qualification by Italy), mode 2 and mode 3. No commitment however, to accord national treatment with regards to mode 4. In this regard see Van den Bossche *The law and Policy of the World Trade Organisation: Text, Cases and Materials* (2008) 391. See also Sykes “Efficient Protection Through WTO Rulemaking” <http://www.ppl.nl/bibliographies/wto/files/2723.pdf> (accessed 16-11-2009). See also Adlung “The GATS Turns Ten: A Preliminary Stocktaking”. www.wto.org/english/res_e/reser_e/ersd200405_e.doc (accessed 18-12-2009). See also Egger and Lanz “The Determinants of GATS Commitment Coverage”.

⁴⁰ United Nations Conference on Trade and Development “Investor-State Disputes Arising from Investment Treaties: A Review” http://www.unctad.org/en/docs/iteit20054_en.pdf (accessed 07-04-2009). For example Article XIX:2 of the GATS allow developing countries to attach conditions to commitments aimed at achieving the GATS Article IV objectives. See World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 300. Section 5(g) of the Annex on Telecommunications provides the same. See also the EC’s argument in Panel Report in *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, para IV. 616.

⁴¹ United Nations Conference on Trade and Development “WTO Core Principles and Prohibitions: Obligations Relating to Private Practices, National Competition Laws and Implications for a Competition Policy”. This is considered to be one of the most important advantages that the obligation possesses. See The Organisation for Economic Co-operation and Development “The Principles and Concepts”.

⁴² Article XVI of the GATS. See World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 298 – 299. See also Biadgleng and Tellez “The Changing Structure and Governance of Intellectual Property Enforcement”.

fundamental acknowledgement by Member countries not to treat persons, products or services of foreign origin less favourably than like domestic products/services.⁴³ The GATS Agreement does not apply to measures affecting natural persons seeking access to the employment market of a Member, or to measures regarding citizenship, residence or employment on a permanent basis.⁴⁴ The GATS national treatment obligation applies to the GATS Annexes that take into account sectoral specifics and certain Ministerial Decisions relating to the implementation of the GATS.⁴⁵ Mattoo lists four ways by which a Member country can inscribe a commitment into the commitment schedules:

- (a) Full commitment: “none” or “no limitations” which implies that the Member does not seek in any way to limit market access or national treatment through measures inconsistent with Articles XVI or XVII;
- (b) Commitment with limitations: the Member inscribes in detail the measures maintained which are inconsistent with market access or national treatment, and implicitly commits itself to take no other inconsistent measures;
- (c) No commitment: “unbound” which indicates that the Member remains free to maintain or introduce measures inconsistent with market access or national treatment obligation; and
- (d) No commitment technically feasible: “unbound” which indicates that in the sector in question, a particular mode of supply cannot be used, for instance cross-border supply of hair dressing services.⁴⁶

The commitments made to which conditions, qualifications or limitations could be attached are also set out in the schedules of commitments.⁴⁷ These limitations may be interpreted as acts of protectionism or discrimination that are inconsistent with the obligation of national treatment.

⁴³ The OECD “Non-discrimination treatment for national and international investors” http://www.oecd.org/document/29/0,3343,en_39048427_39049329_39634141_1_1_1_1,00.html (accessed 10-07-2010).

⁴⁴ Mattoo “National Treatment in the GATS: Corner-stone or Pandora’s Box?”.

⁴⁵ Ibid.

⁴⁶ Ibid. See also Panel Report in *China – Measures Affecting Trading Rights and Distribution Services for Certain Publishers and Audiovisual Entertainment Products*, WT/DS363/R, 12 August 2009, para 7.920.

⁴⁷ Van den Bossche *The Law and Policy of the World Trade Organisation: Text, Cases and Materials* (2008) 391.

But by scheduling them a Member country seeks to withhold the legal right to continue to apply them, and the GATS regulatory framework sanctions this.⁴⁸ Article XVI of the GATS provides for market access.⁴⁹ The article lays down six types of restrictions that must not be maintained in the absence of scheduled limitations. These are: (a) the number of service suppliers; (b) the value of service transactions or assets; (c) the number of operations or quantity of output; (d) the number of natural persons supplying a service; (e) the type of legal entity or joint venture; and (f) the participation of foreign capital. Except therefore in these specified circumstances, there are no constraints on the manner in which the national treatment obligation may be withheld; any form of discrimination or protectionism in favour of domestic suppliers is in principle permissible as long as it is scheduled.⁵⁰ The liberalising content of GATS therefore, depends largely on the extent and the nature of these specific commitments.⁵¹ This is in contrast to Article III of the GATT which prohibits any policy that denies national treatment on like products.⁵² One could justify this gap as a means by which developing countries' infant sectors can be protected/developed. It should however be noted that the gap is open to all Members, including developed countries.

Most developing Member countries have not made national treatment commitments in their service sectors. When such commitments are made, they are largely subjected to extensive limitations.⁵³ This can be observed from the SADC countries' commitment schedules with regard to their horizontal and specific commitments.⁵⁴ The reason for the limited scheduling is

⁴⁸ United Nations Conference on Trade and Investment "National Treatment: UNCTAD on issues in international investment agreements".

⁴⁹ World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 298 – 299.

⁵⁰ Sykes "Efficient Protection" Through WTO Rulemaking.

⁵¹ Mattoo *MFN and the GATS* in: Cottier *et al* (eds) *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law* (2002) 55.

⁵² Sykes "Efficient Protection" Through WTO Rulemaking.

⁵³ Van den Bossche *The law and Policy of the World Trade Organisation: Text, Cases and Materials* (2008) 392. See also Mattoo "National Treatment in the GATS: Corner-stone or Pandora's Box?"

⁵⁴ For example, See The WTO "Export Horizontal Commitments of Botswana" <http://tsdb.wto.org/simplesearch.aspx> (accessed 15-06-2010); The WTO "Export Horizontal Commitments of Lesotho" <http://tsdb.wto.org/simplesearch.aspx> (accessed 15-06-2010); The WTO "Export Horizontal Commitments of Malawi" <http://tsdb.wto.org/simplesearch.aspx> (accessed 15-06-2010); The WTO "Export Horizontal Commitments of Mauritius" <http://tsdb.wto.org/simplesearch.aspx> (accessed 15-06-2010); The WTO "Export Horizontal Commitments of Namibia" <http://tsdb.wto.org/simplesearch.aspx> (accessed 15-06-2010); and

attributed to the vastness of the services sector which tends to contribute to the risk of premature commitments in services trade as such risk is much greater than in merchandise trade.⁵⁵

4 3 Development of the National Treatment Obligation

The national treatment law of the WTO has over time developed significantly in relation to both *de jure* and *de facto* discrimination analysis.⁵⁶ However, this does not mean that a sectoral exclusion as stated within a national law will be free from challenge under the national treatment obligation.⁵⁷ The key principle here is that of comparison with “like” products or circumstances. However, national treatment provisions do not identify the criteria by which similarities or likeness is to be established.⁵⁸ This gap/loophole in the provisions is prone to be taken advantage of by Member countries when they seek for example to give an advantage to a particular domestic service or service supplier. In the main the national treatment obligation basically operates as a complement to the MFN principle.⁵⁹ The national treatment commitments are now the subject of negotiations in the Doha Development Round.⁶⁰

The WTO “Export Horizontal Commitments of South Africa” <http://tsdb.wto.org/simplesearch.aspx> (accessed 15-06-2010).

⁵⁵ Adlung “Services Liberalisation from a WTO/GATS Perspective: In Search of Volunteers” http://www.wto.org/english/res_e/reser_e/ersd200905_e.pdf (accessed 17-04-2009).

⁵⁶ United Nations Conference on Trade and Development “WTO Core Principles and Prohibitions: Obligations Relating to Private Practices, National Competition Laws and Implications for a Competition Policy”.

⁵⁷ Such a challenge could arise, for example, where an exclusion does not apply to a directly competitive or substitutable product or service, or where the effect of the exclusion is to eliminate any possibility that “like imported services” could participate in the same or similar domestic restrictive arrangements. With particular respect to circumstances pertaining to investment, the UNCTAD is of the view that the scope of the national treatment obligation spans the establishment, operational and winding-up stages of an investment. It also includes the pre-establishment phase of the investment. See United Nations Conference on Trade and Development “WTO Core Principles and Prohibitions: Obligations Relating to Private Practices, National Competition Laws and Implications for a Competition Policy”.

⁵⁸ United Nations Conference on Trade and Development “Investor-State Disputes Arising from Investment Treaties: A Review”.

⁵⁹ Wouters and De Meester *A Legal and Institutional Analysis* (2007) 27.

⁶⁰ Van den Bossche *The law and Policy of the World Trade Organisation: Text, Cases and Materials* (2008) 392.

4.3.1 Summary of Interpretation of Article III:4 of the GATT⁶¹

The language of the national treatment Article in the GATT and the GATS share more similarities than differences. This is, particularly true in connection with the use of the words “likeness” and the standard of “no less favourable treatment” in GATT Article III:4.⁶² This observation is also applicable in the TRIPS context. Accordingly, the national treatment obligation is often a source of dispute among nations as it is normally intimately related to various government interventions that are based on legitimate policy reasons and as such, are not necessarily designed for purposes of restraining imports.⁶³ This makes the obligation vulnerable so much so that it is often associated with the infringement of Member States’ sovereignty. This vulnerability was recognised in the Panel report in *United States – Measures Affecting Alcoholic and Malt Beverages*⁶⁴ where it was stated that the “treatment of imported and domestic products as like products under Article III may have significant implications for the scope of obligations under the GATT and for the regulatory autonomy of contracting parties with respect to their internal tax laws and regulations”.

As stated above the national treatment obligation has overtime been applied through Article III of the GATT as one of the central principles of the WTO Agreement.⁶⁵ Article III not only

⁶¹ World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 427 – 428.

⁶² Thang “Interpreting GATS National Treatment Principle: Possibilities and Problems of Transplant from GATT” <http://www.gsid.nagoya-u.ac.jp/bpub/research/public/forum/32/10.pdf> (accessed 22-02-2010).

⁶³ Jackson further opines that the scope of application of this principle would vary from treaty to treaty and would apply not only to protect but also to other various activities. For example, it would also apply to criminal procedures involving foreign citizens or to the right of establishment for foreign businesses. Jackson *The World Trading System: Law and Policy of International Economic Relations* (1997) 213.

⁶⁴ Panel report in *United States – Measures Affecting Alcoholic and Malt Beverages*, DS23/R - 39S/206, adopted 19 June 1992, para 5.72. The issue in this case arose as a result of Canada considering the US regulatory measures to be inconsistent with its obligations in terms of the GATT Articles III:1, 2 and 4. See paras 3.6 – 3.9.

⁶⁵ See also Teksten “A Comparative Analysis of GATS and GATT: A Trade in Services Departure from GATT’s MFN Principle and The Effect on National Treatment and Market Access” <http://scholar.google.co.za/scholar?start=20&q=History+of+the+MFN+Obligation+&hl=en> (accessed 24-08-2009). As an exception, the GATT also permitted the promotion of infant industries through Article XVIII(C). Other exceptions provided for are in Articles III:10 with regards to maintaining internal quantitative regulations relating to exposed cinematograph films which must meet the requirements of Article IV. Also pertinent in this regard is GATT Article XX which contains the general exceptions, GATT Article XXI relating to security measures and Article IX of the WTO Marrakesh Agreement on waivers. See World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 427 – 429 and 455 - 456.

concerns itself with internal taxation, but regulations are also covered in Article III:4. According to Article III:4:

“The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use”.

The 1987 Panel Report in *Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages (“Japan – Alcoholic Beverages I”)*⁶⁶ set out the test that must be met to satisfy the requirements of Article III:2. The dispute in the case was based on a claim of *de facto* discriminatory internal regulatory measures. The Panel ruled that it is enough to establish that an imported and domestic product are “like” and that the regulatory measure in dispute provided “less favourable treatment” to imported products than that accorded to like domestic products.⁶⁷

The Panel’s concern in the case was the prohibition of discriminatory or protective taxation against certain products from other GATT contracting parties.⁶⁸ It ruled that the different tariff treatment for various types of like products could not remain effective unless these are supplemented by the prohibition of different internal tax treatment for various types of like products.⁶⁹ Therefore, GATT Article I:1 was generally construed, in order to protect competitive benefits accruing from reciprocal tariff bindings, as prohibiting tariffs discriminating against like

⁶⁶ Panel Report in *Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcohol Beverages (“Japan – Alcoholic Beverages I”)*, adopted on 10 November 1987, BISD 34S/83, para 5.6.

⁶⁷ In this case it was further decided that there was no need to inquire as to whether a regulatory measure has been applied “so as to afford protection to domestic production” for the purposes of determining whether there has been a violation of Article III:2 since the Article III:1 provision is more general than the Article III:2 provision which is more specific. What was at issue in that case was that the European Communities requested the Panel to find that the Japanese system of taxation was discriminatory with regard to imported alcoholic beverages in contravention of the provisions of Article III:1 and 2 of the GATT. See Panel Report in *Japan – Alcohol Beverages I*, para 3.1. The test was also set out in the Panel Report of the *United States – Standards for Reformulated and Conventional Gasoline (“US – Gasoline”)*, WT/DS2/R (29 January 1996), which also determined that the criteria followed in the 1987 *Japan – Alcoholic Beverages I* case under Article III:2 first sentence of internal tax measures was also relevant/applicable to the examination of like products under Article III:4.

⁶⁸ Panel Report in *Japan – Alcoholic Beverages I*, para 5.5(b).

⁶⁹ Panel Report in *Japan – Alcoholic Beverages I*, para 5.5(b).

products. Accordingly, only the liberal interpretation of Article III:2 as prohibiting internal taxes discriminating against like products could ensure that the reasonable expectation, protected under GATT Article XXIII, of competitive benefits accruing under tariff concessions would not be nullified or impaired by internal tax discrimination against like products.⁷⁰ The intention here was to ensure trade neutrality so that internal taxes on goods would not be used as means of protection. Article III is meant for the provision of equal conditions of competition once goods have been cleared through custom, and as such its sole purpose is to protect the benefits accruing from tariff concessions.⁷¹ The object of Article III:2 therefore has always been to promote non-discriminatory competition among imported and domestic products.⁷² From this context Articles III:2 and 4 of GATT have been examined by determining: whether the imported and domestic products concerned were like; and whether the internal taxation or other regulation discriminated against the imported products.⁷³

The said Panel's reasoning has received a sustained affirmative ruling from the GATT/WTO Panels and the AB.⁷⁴ But, there are cases that have taken a different view, for example the *United States – Measures Affecting Alcoholic and Malt Beverages* and the unadopted Panel Report in *United States – Taxes on Automobiles*.⁷⁵ The reasoning in these cases was informed by a contextual or subjective interpretation as implicitly reflected in the wording of the WTO Agreements.⁷⁶

In the case of *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef* (“*Korea – Various Measures on Beef*”) the AB held that in order to determine whether a particular measure is in violation of Article III:4, the test that must be applied consists of three elements:

⁷⁰ Panel Report in *Japan – Alcoholic Beverages I*, para 5.5(b).

⁷¹ Panel Report in *Japan – Alcoholic Beverages I*, para 5.5(c).

⁷² Panel Report in *Japan – Alcoholic Beverages I*, para 5.5(c).

⁷³ Panel Report in *Japan – Alcoholic Beverages I*, para 5.5(c). See also in Appellate Body Report in *European Communities – Regime for the Importation, Sale and Distribution of Bananas* (“*EC – Bananas III*”), para 216.

⁷⁴ Trebilcock and Giri “The National Treatment Principle in International Trade Law”. For example see Appellate Body Report in *European Communities – Measures Affecting Asbestos and Products Containing Asbestos* (“*EC – Asbestos*”), WT/DS135/R, 18 September 2000 and its Appellate Body Report, WT/DS135/AB/R, 12 March 2001.

⁷⁵ Panel Report in *United States – Taxes on Automobiles*, DS31/R, 11 October 1994 and Panel Report in *United States – Measures Affecting Alcoholic and Malt Beverages*, DS23/R – 39S/206, 16 March 1992, adopted 19 June 1992.

⁷⁶ See also Trebilcock and Giri “The National Treatment Principle in International Trade Law”.

(i) whether the imported and domestic products at issue are “like products”; (ii) whether the measure at issue is a “law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use”; and (iii) whether the imported products are accorded “no less favourable” treatment than that accorded to like domestic products.⁷⁷ In the 2000 *EC – Asbestos* decision,⁷⁸ the Panel gave “likeness” in the context of Article III:4 the same meaning as was established in the *Japan – Alcoholic Beverages I* case in the context of Article III:2 and in the *US – Gasoline* case.⁷⁹ The Panel after its examination concluded that the products in question were like products.⁸⁰ In that respect the Panel ruled that the European Communities’ measures were inconsistent with GATT 1994.

On appeal the AB stated that the intention of Article III is to avoid protectionism in the application of tax and regulatory measures,⁸¹ and in conformity to that principle:

“Article III:4 must be interpreted to give proper scope and meaning to this principle. In short, there must be consonance between the objective pursued by Article III, as enunciated in the “general principle” articulated in Article III:1, and the interpretation of the specific expression of this principle in the text of Article III:4. This interpretation must, therefore, reflect that, in endeavouring to ensure “equality of competitive conditions”, the “general principle” in Article III seeks to prevent Members from applying internal taxes and regulations in a manner which affects the competitive relationship, in the marketplace, between the domestic and imported products involved “so as to afford protection to domestic production”.⁸²

⁷⁷ Appellate Body Report in *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef* (“*Korea – Various Measures on Beef*”), WT/DS161/AB/R, WTDS169/AB/R, 11 December 2000, para 133.

⁷⁸ Panel Report in *EC – Asbestos*, para 1.

⁷⁹ See *United States – Standards for Reformulated and Conventional Gasoline* (“*US – Gasoline*”), para 6.5.

⁸⁰ Panel Report in *EC – Asbestos*, paras 8.144 and 8.150. The Panel followed an approach based on properties, nature and quality of products; the end-use; consumer’s tastes and habits; and the tariff classification of products. But the Panel declined to apply a criteria of a risk of a product. See paras 8.130 and 8.132.

⁸¹ Appellate Body Report in *EC – Asbestos*, para 97.

⁸² Appellate Body Report, in *EC – Asbestos* para 98. The issue in this case was the general ban imposed by a Decree of the French Government, Decree no. 96-1133 on the manufacture, processing, sale, import, placing on the domestic market and transfer under any title whatsoever of all varieties of asbestos fibres. However, on an exceptional and temporary basis the ban was not to apply to certain existing materials, products or devices

The AB stated that the interpretation of the term “like” must be done in light of the context, and the object and purpose of the provision at issue.⁸³ The AB further said that likeness under Article III:4 must fundamentally be a determination about the nature and extent of a competitive relationship between and among products.⁸⁴ The AB in the *EC – Asbestos* case, confirming what was said in the *Japan –Alcoholic Beverages I* dispute, also ruled that such determination should be done on a case-by-case basis, which would in the main involve some degree of judgment.⁸⁵ As such the AB in the *EC – Asbestos* case found Canada not to have proven the likeness requirement so as to render its products to have been discriminated against by the European Communities.⁸⁶ In fact from this reading it is evident that the idea of a “less favourable treatment” was equated with protectionism where like products are involved.

In the *European Communities – Regime for the Importation, Sale and Distribution of Bananas* dispute⁸⁷ the Panel ruled that the words “treatment no less favourable” in paragraph 4 of Article III call for effective equality of opportunities for imported products in respect of the application of laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products. Ortino is of the view that the national treatment obligations in the GATT and the GATS are genetically linked and thus unavoidably strong. Hence it is generally accepted that in interpreting the national treatment provisions in the GATS, the interpretation of the GATT counterparts will be relevant.⁸⁸ One important aspect of the national treatment obligation is the degree to which it may be appropriately applied/interpreted in the context of services and intellectual property rights.⁸⁹

containing chrysotile fibre when, to perform an equivalent function, no substitute for that fibre was available which posed a lesser health risk. See paras 1 – 2 of the Report and paras 2.1 – 2.7 of the Panel Report.

⁸³ Appellate Body Report in *EC – Asbestos*, para 88.

⁸⁴ Appellate Body Report in *EC – Asbestos*, para 99. However, there is a spectrum of degrees of “competitiveness” or “substitutability” of products in the marketplace and it is difficult to determine where the work “like” falls within that spectrum, but a relationship between two products is important. See para 99.

⁸⁵ Appellate Body Report in *EC – Asbestos*, para 102.

⁸⁶ See Appellate Body Report in *EC – Asbestos*, paras 131, 138, 141, 147 and 148.

⁸⁷ Panel Report in *EC – Bananas III*, para 7.179.

⁸⁸ This is consistent with what has been stated in WTO jurisprudence that one WTO Agreement may be useful in the interpretation of the provisions of another WTO Agreement. See Ortino “The Principle of non-discrimination and its exceptions in GATS: Selected legal issues”.

⁸⁹ Jackson *The World Trading System: Law and Policy of International Economic Relations* (1997) 214. In its application/interpretation it should always be borne in mind that the inherent disadvantages which are as a result

5 INTERPRETATION OF THE NATIONAL TREATMENT OBLIGATION UNDER THE GATS

Article XVII of the GATS stipulates the national treatment obligation as follows:

- (1) The obligation of Members to accord to services and service providers of any Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own “like” services and service suppliers;
- (2) This treatment may be formally identical or formally different to that which it accords to its own like services and service suppliers; and
- (3) Such formally identical or formally different treatment shall not modify the conditions of competition in favour of services and service suppliers of the Member compared to like service or services suppliers of any other Member.⁹⁰

The wider the definition of a “like” product, the wider the scope of measures deemed inconsistent with Article XVII will be.⁹¹ The challenge arises when determining whether or not two services are “like” each other in order for them to be accorded the same treatment.

In order to establish whether a breach of the national treatment obligation under the GATS has occurred, three elements must be proved: (i) a commitment must have been undertaken in a relevant service sector and mode of supply; (ii) a measure affecting the supply of services in that sector/subsector and/or mode of supply must have been adopted or applied; (iii) the

of the foreign character of the relevant service or service supplier shall not be compensated for. See World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 300, fn 10. See also Jackson *The World Trading System: Law and Policy of International Economic Relations* (1997). See also Panel Report in *Canada – Certain Measures Affecting the Automotive Industry* (“Canada – Auto Pact”), WT/DS139/R, WT/DS142/R, 11 February 2000, para 10.300 and its Appellate Body Report, WT/DS139/AB/R, WT/DS142/AB/R, 31 May 2000.

⁹⁰ World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 299-300.

⁹¹ Where for example a domestic air passenger carrier is offered tax incentive, and this is not offered to a foreign air passenger carrier operating domestically, such differentiation would be inconsistent with the Member’s obligations under national treatment, and as such inconsistent with the principle of “likeness” as contained in GATS Article XVII. See Mattoo “National Treatment in the GATS: Corner-stone or Pandora’s Box?”.

measure must accord to service suppliers of any other Member treatment less favourable than that which it accords to the Member's own like service suppliers.⁹²

5 1 Measures Affecting trade in Services

In applying the *EC – Asbestos* case reasoning to the GATS context it is worth referring to the AB decision in the *Canada – Auto Pact* dispute⁹³ which, when examining whether Article II:1 of the GATS was met, ruled that a threshold determination must be made under Article I:1 that the impugned measure is covered by the GATS. This determination requires that there be “trade in services” in one of the four modes of supply, and that there also be a measure which “affects” this trade in services. If the determination establishes that the measure is covered under the GATS, the next step would be to undertake an appraisal of the consistency of the measure with the requirements of Article II:1 (in this case Article XVII).⁹⁴ In the GATS context, what is said to be of importance is to determine whether services or service suppliers of WTO Members are “like” services or service suppliers.

It is submitted that in essence the concern here is the accordance of different competitive conditions to the same service or service supplier which tends to favour the domestic services

⁹² Panel Report in *EC – Bananas III*, para 7.314. See also Ortino “The Principle of non-discrimination and its Exceptions in GATS: Selected legal issues” http://papers.ssrn.com/sol3/papers.cfm?abstract_id=979481&download=yes (accessed 01-08-2010). See further Van den Bossche *The Law and Policy of the World Trade Organisation: Text, Cases and Materials* (2008) 393. In the Panel Report in *EC – Bananas III*, para IV. 632 US argued that the test be (i) the Member had undertaken a commitment in the relevant sector; (ii) the Member had adopted or applied a measure affecting the supply of services in that sector; and (iii) the measure accorded to services and service suppliers of any Member treatment less favourable than that it accorded to the Member's own like services and service suppliers.

⁹³ Appellate Body Report in *Canada – Auto Pact*, para 170 – 171. What was at issue before the Panel was Canada's Motor Vehicles Tariff Order (MVTO) 1998 which had its trade treaty history since 1965 with the United States. See para 2.1 – 2.15 and from para 3.1 – 3.09. In order then for a company to qualify a minimum Canadian value added (CVA) and production must maintain a minimum ratio (production to-sales ratio) with respect to its sales of motor vehicles in Canada. Japan argued that these measures were inconsistent with Canada's obligations under Articles II and XVII of the GATS and Article I:1 of GATT. The European Communities also argued that the CVA maintained by Canada was inconsistent with its obligations under Article XVII of the GATS and that the Tariffs exemption was also inconsistent with Article I:1 of the GATT and Article II of the GATS. Canada requested that these claims be dismissed as the two complainants had failed to show the inconsistency alleged. See also paras 10.223 – 10.227.

⁹⁴ Appellate Body Report in *Canada – Auto Pact*, para 155. The first issue was found to have been satisfied, see para 158. With regard to the second issue, the requirement was how the measure affects the supply of service and the service suppliers involved, see para 160. However, the Appellate Body criticised the Panel in this case for not following the fundamental logic and structure of a provision in its interpretative duties since this might result to flawed conclusions, see paras 151 – 167.

or service suppliers to the detriment of foreign services or service suppliers. In this regard, a competitive relationship is therefore the determining factor in establishing likeness; the nature and extent of the competitive relationship between and among products is also fundamental.⁹⁵ In the *EC – Bananas III* dispute⁹⁶ the Panel ruled that the measures in question were measures affecting trade in terms of Article III: 4 of GATT. On appeal in the *EC – Bananas III* case the AB agreed that the measures in question affected internal sale, offering for sale, purchase within the meaning of Article III:4 of GATT.⁹⁷

In the *Canada – Auto Pact* dispute the Panel stated that:

“...the drafters of the GATS consciously adopted the terms ‘affecting’ and ‘supply of a service’ to ensure that the disciplines of the GATS would cover any measure bearing upon conditions of competition in the supply of a service, regardless of whether the measure directly governs or indirectly affects the supply of the service”.⁹⁸

The AB in the *EC – Bananas III* dispute upheld the Panel’s ruling in that case and stated that “...the use of the term ‘affecting’ reflects the intent of the drafters to give a broad reach to the GATS. The ordinary meaning of the word ‘affecting’ implies a measure that has ‘an effect on’, which indicates a broad scope of application”.⁹⁹ The Panel in the *Canada – Auto Pact* dispute further stated that the determination of whether a measure affects trade in services cannot be made in abstract terms in isolation from examining whether the effect of such a measure is consistent with the Member’s obligations and commitments under the GATS.¹⁰⁰ According to

⁹⁵ Appellate Body Report in *EC – Asbestos*, paras 99 – 100.

⁹⁶ See Panel Report in *EC – Bananas III*, para 7.178.

⁹⁷ See Appellate Body Report in *EC – Bananas III*, para 211. See further discussion of GATT case law in Morrison *WTO Dispute Settlement in Services: Procedural and Substantive Aspects* in: Petersmann (ed) *International Trade Law and the GATT/WTO Dispute Settlement System* (1997) 384 – 391.

⁹⁸ Panel Report in *Canada – Auto Pact*, para 10.231. The case made a quote from a Panel Report in the *EC – Banana III* dispute. See para 7.281 in the Panel Report in *EC – Bananas III* case. See also Van den Bossche *The Law and Policy of the World Trade Organisation: Text, Cases and Materials* (2008) 394.

⁹⁹ Appellate Body Report in *EC – Bananas III*, para 220. See also Panel Report in *Canada – Auto Pact*, para 10.232. See also Appellate Body Report in *Canada – Auto Pact*, para 158. See also Panel Report in *Italy – Agricultural Machinery*, para 12.

¹⁰⁰ Panel Report in *Canada – Auto Pact*, para 10.234.

Ortino, in order to determine whether a measure affects trade in services, there is no need to determine actual effects; rather it is enough to demonstrate a potential effect on trade.¹⁰¹

5.2 Like services and services suppliers

The test here is whether foreign and domestic services or service suppliers are like services or services suppliers.¹⁰² In the six cases interpreting the national treatment obligation that have been decided under the GATS precedents are too scanty to establish general principles of interpretation under this concept.¹⁰³ For example the Panel Report in the *Canada – Auto Pact* dispute did not elaborate on the criteria that should be used to establish likeness. But this was criticised by the AB on Appeal.

In *Japan – Alcoholic Beverages I*¹⁰⁴ a case by case establishment of likeness was suggested. It was further said that amongst other relevant factors, the product's end-uses in a given market, consumer's tastes and habits, which change from country to country and the product's properties, nature and quality should be considered. Also the determination of likeness should clearly set out: (i) the characteristics of the service or the service supplier; (ii) the classification and description of the service in the United Nations Central Product Classification (CPC) system; and (iii) consumer's habits and preferences regarding the service or the service supplier.¹⁰⁵ The degree of similarity is one other relevant characteristic of determining likeness in comparison to those that are not. This would lend some credence towards determining likeness of service

¹⁰¹ Ortino "The Principle of non-discrimination and its Exceptions in GATS: Selected legal issues".

¹⁰² Van den Bossche *The Law and Policy of the World Trade Organisation: Text, Cases and Materials* (2008) 394.

¹⁰³ See The WTO "Dispute Settlement: The Disputes – Index of dispute issues" http://www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm#selected_subject. See also discussion in Matsushita *Appellate Body Jurisprudence on the GATS and TRIPS Agreements* in: Ortino and Petersmann (eds) *The WTO Dispute Settlement System 1995 – 2003* (2004) 460.

¹⁰⁴ Panel Report in *Japan – Alcoholic Beverages I*, para 5.6. See also Appellate Body Report in *EC – Asbestos*, para 101.

¹⁰⁵ To determine if two service suppliers have a competitive relationship between themselves, other factors may necessitate looking at the size of the companies, their assets, their use of technology, and the nature and extent of their expertise. See Van den Bossche *The law and Policy of the World Trade Organisation: Text, Cases and Materials* (2008) 394. See also Mattoo "National Treatment in the GATS: Corner-stone or Pandora's Box?". See also Zdouc *WTO Dispute Settlement Practice Relating to the General Agreement on Trade in Services* in: Ortino and Petersmann *The WTO Dispute Settlement System 1995 – 2003* (2004) 396 – 403. See also Ortino "The Principle of non-discrimination and its Exceptions in GATS: Selected legal issues". See also Panel Report in *China – Measures Affecting Trading Rights and Distribution Services for Certain Publishers and Audiovisual Entertainment Products*, WT/DS363/R, 12 August 2009, para 7.923.

suppliers.¹⁰⁶ Further, in the 2001 case of *EC – Asbestos*¹⁰⁷ the AB was of the view that establishing likeness fundamentally meant the determination of the nature and the extent of a competitive relationship between products since such products are involved in a competitive relationship in the marketplace. Zdouc opines that the classification of service transactions in the GATS schedules could be relevant for defining like services and service suppliers.¹⁰⁸ This provides some credence to the view that legitimate expectations arising from concessions or commitments made on the basis of a particular product classification should not be nullified or impaired.¹⁰⁹

5 3 Standard of “Treatment no less favourable”

The test is whether foreign services or service suppliers are granted treatment no less favourable than that granted to local services or service suppliers. In the *United States – Standards for Reformulated and Conventional Gasoline* dispute¹¹⁰ the Panel set the test as, first, the establishment of whether there is a law, regulation or requirement affecting the internal sale, offering for sale, purchase, transportation, distribution or use of an imported product; and second, whether the treatment accorded in terms of the law, regulation or requirement is less favourable to the imported product than the like product of nation origin.¹¹¹ The decision in this case followed that reached in the *United States – Section 337* dispute. It follows that the principle set out in the *Canada – Auto Pact* is also applicable here.¹¹² According to Ortino the

¹⁰⁶ Zdouc *WTO Dispute Settlement Practice Relating to the General Agreement on Trade in Services* in: Ortino and Petersmann *The WTO Dispute Settlement System 1995 – 2003* (2004) 398.

¹⁰⁷ Para 99. In the Panel Report in *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/R, 29 January 1996 and its Appellate Body Report, WT/DS2/AB/R, 29 April 1996, case the Panel was of the view that likeness mean similar or identical. The Panel further stated that the practice to establish like products has been conducted with regard to the 1970 Working Party Report on Border Tax Adjustments. See para 6.8. See further para 5.5 in Panel Report in *Japan – Alcoholic Beverages I*.

¹⁰⁸ Zdouc *WTO Dispute Settlement Practice Relating to the General Agreement on Trade in Services* in: Ortino and Petersmann *The WTO Dispute Settlement System 1995 – 2003* (2004) 396. See also Panel Report in *Japan – Alcoholic Beverages I*, para 5.6.

¹⁰⁹ Zdouc *WTO Dispute Settlement Practice Relating to the General Agreement on Trade in Services* in: Ortino and Petersmann *The WTO Dispute Settlement System 1995 – 2003* (2004) 396.

¹¹⁰ Panel Report in *US – Gasoline*, para 6.5.

¹¹¹ The case is discussed as well by Trebilcock and Giri “The National Treatment Principle in International Trade Law”.

¹¹² The principles referred to here are the principles of competitive relationships and effective equality of opportunities. See *Canada – Auto Pact*, para 170 – 171. In addition Van den Bossche’s view is that Paragraphs 2

wording of GATS Article XVII paragraphs 2 and 3 draws heavily on the reasoning of two well known GATT Panel Reports: the *US – Section 337* and the *Italian Agricultural Machinery*.¹¹³ These cases addressed claims under GATT Article III:4 which includes a prohibition against discriminatory non-fiscal regulation very similar to GATS Article XVII:1. In its decision in the *US – Section 337* dispute, the Panel ruled that treatment no less favourable would call for equality of treatment of imported products, effectively meaning the according of effective equality of opportunities for imported products in respect of the application of laws, regulations and requirements affecting internal sale of products under both the MFN and the national treatment obligations of Article III of GATT.¹¹⁴ Different formal legal requirements may however be applied so long as doing so would accord imported products no less favourable treatment than that accorded to domestic products. This is the minimum permissible standard that must be paramount in preventing protectionist tendencies amongst Member countries.¹¹⁵ Clearly, the fact that imported products are subjected to different legal provisions to those that apply to domestic products does not in itself conclusively determine that the provisions are

and 3 of Article XVII of the GATS further clarify the requirements of “treatment no less favourable” set out in paragraph 1 by stating that: (2) A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either formally identical or formally different treatment to that it accords to its own like services and service suppliers; and (3) Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or services suppliers of any other Member. See Van den Bossche *The Law and Policy of the World Trade Organisation: Text, Cases and Materials* (2008) 394. See also World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 300. See further Ortino “The Principle of non-discrimination and its exceptions in GATS: Selected legal issues”. Van den Bossche has it that if a Member accords formally identical treatment to foreign and domestic services or service suppliers, that Member may nevertheless be in breach of the national treatment obligation. This may happen, for example if such identical treatment results in a modification of conditions of competition in favour of the domestic services or service suppliers. If the conditions of competition are not modified, even if the Member country accords formally different treatment to domestic and foreign services or service suppliers, the national treatment obligation will not be breached. See Van den Bossche *The Law and Policy of the World Trade Organisation: Text, Cases and Materials* (2008) 395.

¹¹³ Ortino “The Principle of non-discrimination and its exceptions in GATS: Selected legal issues”. See also Zdouc *WTO Dispute Settlement Practice Relating to the General Agreement on Trade in Services* in: Ortino and Petersmann *The WTO Dispute Settlement System 1995 – 2003* (2004) 404. See also Diebold “Non-Discrimination and the Pillars of International Economic Law: Comparative Analysis and Building Coherency”.

¹¹⁴ Panel Report in *US – Section 337 of the Tariff Act of 1930 (“US – Section 337”)*, adopted on 7 November 1989, BISD 36S/345, para 5.11

¹¹⁵ Panel Report in *US – Section 337*, para 5.11. Discussed also in Trebilcock and Giri “The National Treatment Principle in International Trade Law”.

inconsistent with GATT Article III:4.¹¹⁶ The fundamental outcome that is sought to be achieved here therefore is that competition conditions should not be modified with negative effects on foreign suppliers because what is prevalent currently are regulations that are not discriminatory on their face, but those that have an effect that results in discrimination.¹¹⁷

The decision whether there was less favourable treatment or distortion of expectations on the competitive relationship between imported and domestic products would be based on the distinction made by the contested measure itself and would also depend upon its potential impact rather than on the actual consequences for specific imported products or actual trade effects. The guarantee of equality of treatment is the ultimate purpose.¹¹⁸ In effect if parties enter into an agreement their expectations in respect of the fulfilment of that agreement must be protected; Article III:4 of the GATT must be construed in that light.¹¹⁹ Therefore, Article XVII:3 of the GATS seems to provide sufficient basis for the expectations envisaged in the *US – Section 337* case and similar GATT/WTO case law.¹²⁰

Van den Bossche views “treatment no less favourable” as seeking to ensure that conditions of competition in the domestic market are not changed to favour domestic services or service suppliers.¹²¹ But, within that requirement of “treatment no less favourable” the analysis does

¹¹⁶ Panel Report in *US – Section 337*, para 5.11.

¹¹⁷ The 1987 *Japan – Alcoholic Beverages I* dispute was the first affirmative ruling to sustain this claim of implicit or *de facto* discrimination. Before then what was prevalent in GATT (from 1948 – 1990) were cases of explicit or *de jure* discriminatory measures. Since then the WTO has dealt more with facially neutral rather than explicit discriminatory regulatory measures. This case however was brought under Article III:2 of the GATT rather than Article III:4 of the GATT. See Trebilcock and Giri “The National Treatment Principle in International Trade Law”.

¹¹⁸ Panel Report in *US – Section 337*, para 5.10 – 5.20. The requirement of equal competitive conditions for imported products in relation to domestic products as well as the related expectations was also confirmed in the Panel Report in *Japan – Taxes on Alcoholic Beverages*, WT/DS8/R, WT/DS10, 11 July 1996 and its Appellate Body Report, WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R, 4 October 1996; Appellate Body Report in *Canada – Certain Measures Concerning Periodicals* WT/DS31/AB/R, 30 June 1997; Panel Report in *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, 2 July 1998; Appellate Body Report in *Korea – Taxes on Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R, 18 January 1999; and Appellate Body Report in *Chile – Taxes on Alcoholic Beverages*, WT/DS87/AB/R, WT/DS110/AB/R, 13 December 1999. But all these cases interpreted Article III:2 of the GATT.

¹¹⁹ Panel Report in *US – Section 337*, para 5.13.

¹²⁰ Panel Report in *US – Section 337*, paras 5.10 – 5.20.

¹²¹ Van den Bossche 341. Also, the decisions in the *Agricultural Machinery* and the *US – Section 337* cases were criticised for adopting an interpretation that added to the obligations of Contracting Parties under the GATT 1947. But even though these cases were criticised for such an interpretation, the Panel Reports in both cases were adopted with the consent of the GATT Council. Since then, these interpretations have been considered as

not, as a yardstick, take into account any rationale for the differential treatment, but only considers the effect of the measure. It is the disproportionate adverse impact on foreign services compared with treatment afforded to like domestic services that matters most. Intention here does not represent a central element.¹²² Formally identical treatment of domestic and imported products may constitute less favourable treatment for imported products for the purposes of GATT Article III:4. In such instances the burden of proving such detailed disproportionate impact lies with the complaining party. Such proof might however be difficult to provide if the relationship between the product and the measure is questionable.¹²³ The disproportionate impact is therefore advanced as the key criterion in order to determine whether treatment is less favourable.¹²⁴ The measure under review must be the cause of such an adverse impact and that adverse impact should not be *de minimis*.¹²⁵ With regard to *de facto* and *de jure* discrimination the argument made in chapter 3 applies equally here.¹²⁶

From a developmental perspective it is submitted that the formulation of a regulatory measure does not at all times reflect a discriminatory purpose/intent. A *bona fide* purpose should therefore suffice as a defence depending on the circumstances. This was recognised in the *United States – Taxes on Automobiles* dispute.¹²⁷ In its ruling the Panel reasoned that the tax measures introduced served a *bona fide* regulatory purpose and the competitive effects of these measures were neither clear enough nor inherent enough to be considered protective.¹²⁸

landmark decisions for the interpretation of the national treatment obligation seeing that they cover all forms of *de jure* and *de facto* discrimination in GATS and given that the GATS even covers a wider spectrum than the GATT.

¹²² Ortino “The Principle of non-discrimination and its exceptions in GATS: Selected legal issues”.

¹²³ Panel Report in *Japan – Measures Affecting Consumer Photographic Film and Paper* (“Kodak – Fuji”) WT/DS44/R, circulated 31 March 1998, adopted 22 April 1998, para 10.379.

¹²⁴ Ortino “The Principle of non-discrimination and its exceptions in GATS: Selected legal issues”. From a development perspective in the Panel Report in *Brazil – Export Financing Programmes for Aircraft*, WT/DS46/R, 14 April 1999, in para 7.57 the Panel ruled that the complaining Member bears the burden of proof if the Member not in compliance is a developing country. See also its Appellate Body Report, WT/DS46/AB/R, 2 August 1999.

¹²⁵ Ortino “The Principle of non-discrimination and its exceptions in GATS: Selected legal issues”.

¹²⁶ See Chapter 3 page 69.

¹²⁷ Panel Report in *United States – Taxes on Automobiles* (“US – Taxes on Automobiles”), DS31/R, 11 October 1994, unadopted.

¹²⁸ Panel Report in *US – Taxes on Automobiles*, from paras 5.1 – 5.37 and 6.1. The US in this case had argued that its threshold distinction in the gas guzzler tax was aimed at a policy goal other than the protection of domestic production. She argued the overall purpose of the gas guzzler tax as being to conserve fossil fuels. See para 5.24. In its findings the Panel was of the view that the gas guzzler tax nature of regulatory distinction were consistent with

6 SCOPE OF THE NATIONAL TREATMENT OBLIGATION UNDER THE TRIPS

Article 7 of the TRIPS states the objectives of TRIPS as the protection and enforcement of intellectual property rights which should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to the balance of rights and obligations. Article 8 recognises the right of Member countries to adopt measures that are consistent with the agreement to protect public health and nutrition and to control anti-competitive practices.¹²⁹ But it is also important to note that the TRIPS Agreement protects the legitimate interests of third parties as well.

Due to the delicate historical background as well as the purpose and objective that the multilateral system seeks to achieve, the WTO Panels and the AB are faced with a difficult task of balancing the interests that Member countries have.¹³⁰ This balancing task would include the: (i) scope of interpretation; (ii) private rights and collective interests; (iii) diplomatic and legal considerations; and (iv) judicial activism and strict constructionism.¹³¹ However, the TRIPS embodies provisions at the heart of which lie policies of developed countries that emphasise the need for intellectual property protection.¹³²

Gad has argued that the conflict of interests that was reflected during the TRIPS negotiations between developed and developing countries over intellectual property issues has tended to encumber the unfolding practice of TRIPS dispute settlement under the WTO.¹³³ As a result the TRIPS Agreement was designed to permit a substantial measure of national discretion in its

the overall purpose of the measure and did not appear to create categories of automobiles of inherently foreign or domestic origin. See para 5.25.

¹²⁹ World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 324.

¹³⁰ Gad *TRIPS Dispute Settlement and Developing Country Interests* in: Correa and Yusuf (eds) *Intellectual Property and International Trade: The TRIPS Agreement* (2008) 353.

¹³¹ Gad *TRIPS Dispute Settlement and Developing Country Interests* in: Correa and Yusuf (eds) *Intellectual Property and International Trade: The TRIPS Agreement* (2008) 353 – 354.

¹³² Gad *TRIPS Dispute Settlement and Developing Country Interests* in: Correa and Yusuf (eds) *Intellectual Property and International Trade: The TRIPS Agreement* (2008) 356.

¹³³ Gad *TRIPS Dispute Settlement and Developing Country Interests* in: Correa and Yusuf (eds) *Intellectual Property and International Trade: The TRIPS Agreement* (2008) 332.

implementation.¹³⁴ The adjudicating bodies will as a consequence not find the broad provisions of the agreement perfectly instructive in some contexts.¹³⁵ Developing countries have used the dispute settlement system in relation to the TRIPS in very limited circumstances.¹³⁶ As in the GATS context, the fundamental challenge for the developing countries is the manner of interpreting the elements enshrined in the TRIPS national treatment obligation since the substantive rules and procedures that they will enact should be consistent with this obligation. Reference can however be made to other WTO jurisprudence that have interpreted this obligation. This is so because the manner of application/interpretation by the WTO adjudicating bodies of the national treatment obligation may subvert the interests of developing countries, albeit, unintentionally.

7 INTERPRETATION OF NATIONAL TREATMENT UNDER THE TRIPS

The national treatment obligation in the TRIPS is found in Article 3 which requires that:

- 1 Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property, subject to the exceptions already provided in the Paris Convention (1967), and the Berne Convention (1971), the Rome Convention or Treaty on Intellectual Property in Respect of Integrated Circuits. In respect of performers, producers of phonograms and broadcasting organizations, this obligation only applies in respect of the rights provided under this Agreement. Any Member availing itself of the possibilities provided in Article 6 of the Berne Convention (1971) or paragraph 1(b) of Article 16 of the Rome Convention shall make a notification as foreseen in those provisions to the Council for TRIPS.

¹³⁴ Abbott *WTO Dispute Settlement Practice Relating to the Agreement on Trade-Related Intellectual Property Rights* in: Ortino and Petersmann (eds) *The WTO Dispute Settlement System 1995 – 2003* (2004) 421.

¹³⁵ Ibid.

¹³⁶ They have used the system as respondents nine times. See The WTO “Dispute Settlement: The Disputes – Disputes by Agreement” http://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A26#selected_agreement (accessed 29-11-2010).

- 2 Members may avail themselves of the exceptions permitted under paragraph 1 in relation to judicial and administrative procedures, including the designation of an address for service or the appointment of an agent within the jurisdiction of a Member, only where such exceptions are necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of this Agreement and where such practices are not applied in a manner which would constitute a disguised restriction on trade.¹³⁷

The disputes arising in terms of the TRIPS are required to be settled in accordance with Articles XXII and XXIII of GATT 1994.¹³⁸ The Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) apply to all consultations and dispute settlements in the WTO and to all agreements under the WTO umbrella.¹³⁹

The principles for interpreting the national treatment obligation in the GATT and GATS context were established in the Panel and Appellate Body Reports in *European Communities - Measures Affecting Asbestos and Products Containing Asbestos* ("EC – Asbestos")¹⁴⁰ and *Canada – Certain Measures Affecting the Automotive Industry* ("Canada – Auto Pact").¹⁴¹ It is assumed that these are the same principles that the adjudicating bodies will use in the TRIPS context.¹⁴²

If those principles are to be followed then the assumption is that what should be at issue here is, firstly, the presence of one of the categories of intellectual property that are the subject of sections 1 through 7 of Part II of the TRIPS as defined in Article I:2 of the agreement. The meaning of intellectual property was confirmed in the *US – Section 211 Omnibus Appropriations*

¹³⁷ World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 323.

¹³⁸ See also Delich *Developing Countries and The WTO Dispute* in: Hoekman *et al Development, Trade, and the WTO – A Hand Book* (2002) 71.

¹³⁹ See Article 64 of TRIPS. See World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 348 – 349.

¹⁴⁰ Panel Report in *EC – Asbestos*, para 98.

¹⁴¹ Appellate Body Report in *Canada – Auto Pact*, para 170 – 171. See further from paras 78, 79 and 81 and para 84 of the ruling.

¹⁴² World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 322.

Act of 1998 dispute.¹⁴³ Next, there should be a measure that affects intellectual property in respect of one of the categories of intellectual property.¹⁴⁴ Lastly, the intellectual property in respect of which the different intellectual property categories apply must receive or be treated less favourably than intellectual property belonging to nationals of the host Member country as a result of the application of the measure in question. It is submitted that a fourth element may be relevant in that if the above three elements are proven then the next enquiry should be whether the person in question had a vested right in the intellectual property in question.

In the *US – Havana Club* dispute¹⁴⁵ the AB, in agreement with the Panel’s decision,¹⁴⁶ construed Article 3.1 of the TRIPS in terms of Article III:4 of the GATT and ruled that:

“As we see it, the national treatment obligation is a fundamental principle underlying the TRIPS Agreement, just as it has been in what is now the GATT 1994. The Panel was correct in concluding that, as the language of Article 3.1 of the TRIPS Agreement, in particular, is similar to that of Article III:4 of the GATT 1994, the jurisprudence on Article III:4 of the GATT 1994 may be useful in interpreting the national treatment obligation in the TRIPS Agreement”.¹⁴⁷

The *US – Section 337* dispute was concerned with the consistency of a non-tax regulatory measure with Article III:4 of the GATT. The Panel had to determine whether the US patent enforcement procedures, which were formally different for imported and domestic products, violated Article III:4. The concept of “likeness” was not considered; rather, the Panel only examined the meaning of the terms “laws, regulations and requirements” and “no less favourable treatment” as provided in Article III:4 of the GATT.¹⁴⁸ With regard to “laws,

¹⁴³ Appellate Body Report in *US – Section 211 Omnibus Appropriations Act of 1998 (“US – Havana Club”)*, WT/DS176/AB/R, 2 January 2002, para 335 and its Panel Report, WT/DS176/R.

¹⁴⁴ In the *EC – Bananas III* dispute the Panel and the AB concluded that the licensing measures in question constituted an advantage within the meaning of Article III:4 of GATT. See the Panel Report in *EC – Bananas III* para 7.249 and the Appellate Body Report, para 214.

¹⁴⁵ Appellate Body Report in *US – Havana Club*.

¹⁴⁶ Panel Report in *US – Havana Club*, para 8.129.

¹⁴⁷ Appellate Body Report in *US – Havana Club*, para 242.

¹⁴⁸ Article III:4 of GATT requires that products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale,

regulations and requirements”, the Panel was of the view that not only substantive laws, regulations and requirements are covered, but Article III:4 also covers procedural laws, regulations and requirements. In fact according to the Panel, Article III:4 is not only meant to cover laws, regulations and requirements that only directly govern the conditions of sale or purchase but also any laws or regulations which might adversely modify the conditions of competition between the domestic and imported products on the internal market.¹⁴⁹

With regard to treatment no less favourable the Panel ruled that the requirement set out in Article III:4 was unqualified as an expression of the underlying principle of equality of treatment of imported products as compared to the treatment given to domestic products. Treatment no less favourable therefore calls for effective equality of opportunities for imported products. This is the minimum permissible standard.¹⁵⁰ The arguments for consideration of the effect of a regulatory measure were rejected.¹⁵¹ The basis for the rejection was that expectations in respect of the competitive relationship between imported and domestic products were paramount and must be protected.¹⁵² So, the important consideration is whether the contested regulatory measure will lead to an application of treatment less favourable than that accorded to domestic products.¹⁵³ The potential impact, rather than the actual effects of a regulatory measure is the determining factor.¹⁵⁴

purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product. See World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 427 – 428.

¹⁴⁹ See para 5.10. The principle of transparency also applies in TRIPS in terms of Article 63 in respect of which Members must publish relevant laws, regulations, decisions and rulings and agreements with other Members and as well furnish these to the Council for TRIPS for review and to other Members as well upon request. See World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 348.

¹⁵⁰ Panel Report in *US – Section 337*, paras 5.1 – 5.20.

¹⁵¹ This aims and effect test was also rejected in the Panel Report in *Japan – Taxes on Alcoholic Beverages*, WT/DS10/R and WT/DS11/R, 11 July 1996 and its Appellate Body Report, WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R, 4 October 1996. Both Japan and the US had argued at Panel and Appellate Body level for the consideration of the aims and effect of the measure in dispute based on the *US – Malt Beverages* and the *US – Taxes on Automobile* cases.

¹⁵² Panel Report in *US – Section 337*, para 5.1 – 5.20.

¹⁵³ Panel Report in *US – Section 337*, para 5.1 – 5.20.

¹⁵⁴ Panel Report in *US – Section 337*, para 5.1 – 5.20.

The *US – Havana Club* dispute was the first in which the Appellate Body interpreted the substantive intellectual property rights rules of the TRIPS Agreement and the Paris Convention on the protection of industrial property. It was also the first case to apply the national treatment and the most-favoured-nation treatment obligations of the TRIPS.¹⁵⁵ The EC brought this dispute before the WTO Panel and the AB the principal issue being whether Section 211 of the Omnibus Appropriations Act of 1998 which banned protection and recognition of trademarks and trade names in connection with Cuban business relations, was compatible with the TRIPS Agreement.¹⁵⁶ This case will be dealt with extensively in chapter 5.

The AB in its decision made reference to the *US – Section 337*¹⁵⁷ dispute in which the GATT Panel stated that “even though the possibility for a certain type of discrimination to take place under a legislative arrangement may be small, the fact that the possibility was present constituted sufficient discrimination to present a national treatment inconsistency”.¹⁵⁸ Therefore, the AB in *US – Havana Club* was of the view that even though the US’s contention that the likelihood of having to overcome the hurdles of both section 515.201 of Title 31CFR and Section 211 (a) (2) may be small, even the possibility that non-US successors-in-interest face two hurdles is inherently less favourable than the undisputed fact that US successors-in-interest only face one hurdle.¹⁵⁹ The fact that the possibility was present constituted *prima facie* sufficient discrimination to present a national treatment inconsistency.¹⁶⁰ The fact that US citizens had to overcome one hurdle while foreigners needed to overcome two is inherently less favourable.¹⁶¹ So, sections 211(a) (2) and 211 (b) were therefore found to be inconsistent

¹⁵⁵ Abbott *WTO Dispute Settlement Practice Relating to the Agreement on Trade-Related Intellectual Property Rights* in: Ortino and Petersmann (eds) *The WTO Dispute Settlement System 1995 – 2003* (2004) 433.

¹⁵⁶ Abbott and Cottier “Dispute Prevention and Dispute Settlement in the Field of Intellectual Property Rights and Electronic Commerce: *US – Section 211 Omnibus Appropriations Act 1998* (*‘Havana Club’*) in: Petersmann and Pollack (eds) “Transatlantic Economic Disputes: The EU, the US and the WTO” http://www.frederickabbott.com/uploads/Abbott___Cottier_-_From_Transatlantic_Economic_Dispute.pdf (accessed 21-09-2010).

¹⁵⁷ Panel Report in *US – Section 337*, adopted 7 November 1989, BISD 36S/345.

¹⁵⁸ Appellate Body Report in *US – Havana Club*, paras 242 and 265.

¹⁵⁹ Appellate Body Report in *US – Havana Club*, paras 242 and 265.

¹⁶⁰ Appellate Body Report in *US – Havana Club*, para 263. However, in the *US – Section 337* case the circumstances under which the decision was made are said to have been different from the *US – Havana Club* dispute. See Trebilcock and Giri “The National Treatment Principle in International Trade Law”.

¹⁶¹ Appellate Body Report in *US – Havana Club*, para 265.

with Article 2(1) of the Paris Convention (1967) and Article 3.1 of TRIPS - consequently inconsistent with US's obligations.¹⁶² However, Section 211(b) of the Act in question was found not to be inconsistent with the national treatment obligation by the AB as it applied to all nationals irrespective of origin.¹⁶³ The existence of the likelihood that non-nationals will possibly defend imported products in two foras is small, but the existence of the possibility is inherently less favourable than being faced with having to conduct a defence in only one of those foras.¹⁶⁴

The WTO got another opportunity to clarify the national treatment obligation in the TRIPS context in the *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs* (“EC – Trademarks and Geographical Indications”) dispute.¹⁶⁵ The US requested the Panel to find that the EC's Regulations at issue were inconsistent with Articles 3.1 and 4 of the TRIPS Agreement. The EC's Regulations were also challenged for being inconsistent with Article 2 of the Paris Convention (1967) as well as under Articles I:1 and III:4 of GATT 1994.¹⁶⁶ The Panel ruled that to prove that the obligation under Article 3 of TRIPS has been infringed, two elements must be satisfied: (i) the measure at issue must apply with regard to the protection of intellectual property; and (ii) the nationals of other Members must be accorded less favourable treatment than the Member's own nationals.¹⁶⁷

7 1 Protection of intellectual property

In the *EC – Trademarks and Geographical Indications* dispute, the Panel noted that footnote 3 in the TRIPS Agreement which specifies the definition of the term “protection” as used in Articles 3 and 4, has reference.¹⁶⁸ Thereafter, the Panel ruled that the definition of intellectual

¹⁶² Appellate Body Report on *US – Havana Club*, paras 268 – 269 and 280 – 281. See also para 296.

¹⁶³ Appellate Body Report on *US – Havana Club*, para 271.

¹⁶⁴ Appellate Body Report on *US – Havana Club*, para 263.

¹⁶⁵ Panel Report in *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs* (“EC – Trademarks and Geographical Indications”), WT/DS174/R, WT/DS290/R, 15 March 2005.

¹⁶⁶ Panel Report in *EC – Trademarks and Geographical Indications*, para 3.1.

¹⁶⁷ Panel Report in *EC – Trademarks and Geographical Indications*, para 7.125.

¹⁶⁸ The footnote states that: “for the purposes of Articles 3 and 4, “protection” shall include matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as those matters affecting the use of intellectual property rights specifically addressed in this Agreement”. See World Trade

property in Article 1.2 refers to all categories of intellectual property that are the subject of Sections 1 through to 7 of Part II.¹⁶⁹ In the final analysis the Panel's ruling was that the EC Regulations in issue formed part of the categories of intellectual property within the meaning of Article 1.2 of the TRIPS Agreement.¹⁷⁰ This brings the claim in question within the scope of Article 3 of the TRIPS Agreement.¹⁷¹

7 2 Standard of “treatment no less favourable”

In interpreting the second element the Panel stated that the Article 3.1 obligation in the TRIPS Agreement combines elements of national treatment from both pre-existing intellectual property agreements and the GATT 1994. As applied before, Article 3.1 applies to nationals, not products. The Article does not refer to advantages or rights that laws grant or may hereafter grant, and does not refer to likeness. This combination of elements is also reflected in the TRIPS Agreement's Preamble.¹⁷² The term “treatment no less favourable” in the first sentence of Article 3.1 of the TRIPS is very broad. In interpreting this term the Panel referred to the *US – Section 211 Appropriations Act* dispute which approved the interpretation developed in the *US – Section 337* dispute in respect of Article III:4 of the GATT 1947. That interpretation read:

“the words ‘treatment no less favourable’ in paragraph 4 call for effective equality of opportunities for imported products in respect of the application of laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products. This clearly sets a minimum permissible standard as a basis”.¹⁷³

The Panel also opined that the no less favourable treatment standard under other agreements may be relevant in interpreting Article 3.1 of the TRIPS Agreement, taking into account its

Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 323, fn 3. See also Panel Report in *EC – Trademarks and Geographical Indications*, para 7.126.

¹⁶⁹ World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 322. See also Panel Report in *EC – Trademarks and Geographical Indications*, para 7.127.

¹⁷⁰ Panel Report in *EC – Trademarks and Geographical Indications*, para 7.128.

¹⁷¹ Panel Report in *EC – Trademarks and Geographical Indications*, para 7.129.

¹⁷² Panel Report in *EC – Trademarks and Geographical Indications*, para 7.131.

¹⁷³ Panel Report in *EC – Trademarks and Geographical Indications*, para 7.133.

context in each agreement including, any differences arising from its application to like products or like services and services suppliers, rather than nationals.¹⁷⁴

8 SUMMARY AND CONCLUSION

In this chapter the intention was to show the importance of the national treatment obligation by establishing its rationales, its background, the nature and content of this obligation as well as establishing the manner in which it has been applied and/or interpreted by the WTO adjudicating bodies from the GATS and TRIPS perspectives. Within this discussion the study also sought to establish whether there were any gaps/loopholes in the relevant adjudicating bodies' application and/or interpretation of the obligation.

What seems to be clear from the discussion above is that the GATS and TRIPS national treatment provisions curtail Member countries' regulatory freedom since they set limitations that countries should not disturb. In effect if a Member country has made a commitment to offer market access in a particular sector/subsector, that Member countries' right to regulate will extend only as far as it does not offer treatment that is less favourable than that offered to domestic traders. This was recognised by the Panel in the *US – Measures Affecting the Cross-border Supply of Gambling and Betting Services* dispute between Antigua and Barbuda and the US.¹⁷⁵ The curtailment of Member countries' regulatory freedom, as recognised by the Panel, was upheld by the AB.¹⁷⁶ Fundamentally, these decisions prove that the offer of market access where the national treatment obligation is undertaken entails far more than an obligation to provide national treatment.¹⁷⁷

¹⁷⁴ Panel Report in *EC – Trademarks and Geographical Indications*, para 7.135.

¹⁷⁵ Panel Report in *US – Measures Affecting the Cross-border Supply of Gambling and Betting Services*, WT/DS285/R, 10 November 2004, para 6.316.

¹⁷⁶ Appellate Body Report in *US – Measures Affecting the Cross-border Supply of Gambling and Betting Services*, WT/DS285/AB/R, 7 April 2005.

¹⁷⁷ Gould "How the GATS Undermines the Right to Regulate: Lessons from the US – Gambling Case".

CHAPTER 5

WTO JURISPRUDENCE ON NON-DISCRIMINATION UNDER THE GATS AND TRIPS

1 THE GATS

1.1 Introduction

The previous two chapters dealt with the position as it stands in WTO law regarding the application and/or interpretation of the principles underlying the non-discrimination obligation of Member countries. This chapter explores some of the recent disputes involving the non-discrimination obligation in order to determine whether recent WTO jurisprudence has factored in changes in the previous application and/or interpretation of this obligation considering the fact that economic circumstances are not the same. In looking at these cases the chapter seeks to reveal whether there is any possibility to consider a different approach from that which has prevailed since 1987.¹

2 GATS CASE LAW

The WTO record reveals 22 disputes that have arisen within the GATS context since 1995. Twenty of these involved the non-discrimination obligation. Twelve of them are still at the consultation stage and two have been settled. One Panel report and five AB reports have been issued.²

¹ The *Japan – Alcoholic Beverages I* dispute was decided in 1987. The case was the first to decide on facially neutral discriminatory measures. In its decision the Panel relied on the objective standard. The fundamental consequence of that was that the majority of WTO decisions have followed that decision in neglect of other factors involved in trade relations between Member countries.

² The WTO “Dispute Settlement: The Disputes – Index of dispute issues” http://www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm#selected_subject, http://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A8#selected_agreement and http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds182_e.htm (accessed 29 November 2010).

2.1 *European Communities – Regime for the Importation, Sale and Distribution of Bananas (“EC - Bananas III”)*³

In this dispute Ecuador, Guatemala, Honduras, Mexico and the United States, acting jointly and severally, complained that the EC maintained a regime for the importation, sale and distribution of bananas established by Council Regulation (EEC) 404/93, and the subsequent EC legislation, regulations and administrative measures, including those based on the provisions of the Framework Agreement on Bananas (BFA), which implemented, supplemented and amended that regime.⁴ The complaint was also based upon the EC’s common market organisation for bananas introduced on 1 July 1993.⁵ The provisions which the challenged measures were claimed to be inconsistent with included: Articles I, II, III, X, XI and XIII of the GATT 1994; Articles I and 3 of the Licensing Procedures; Article 4.2 of the Agreement on Agriculture; and Articles II, XVI, and XVII of the GATS; and Article 2 of the TRIMs Agreement.⁶ Three broad issues were raised; tariffs issues, allocation issues and import licences issues.⁷

The bananas were imported by the EC from Latin American (2.1 million tonnes)⁸ and African, Caribbean and Pacific (ACP) countries (727, 000 tonnes)⁹ that were parties to the Lomé Convention (“the Convention”).¹⁰ The common market organisation for bananas replaced the

³ Panel Report in *European Communities – Regime for the Importation, Sale and Distribution of Bananas (“EC – Bananas III”)* WT/DS27/R/ECU, WT/DS27/R/GTM, WT/DS27/R/HND, WT/DS27/R/MEX, WT/DS27/R/USA, 22 May 1997 and its Appellate Body Report, WT/DS27/AB/R, 9 September 1997.

⁴ Panel Report in *EC – Bananas III*, para 1.1.

⁵ Panel Report in *EC – Bananas III*, para III.1. These included (a) the Banana production and trade, (b) EC’s common organisation of the banana market: (i) Tariff treatment, quantitative aspects, including country allocations: (1) Traditional ACP imports, (2) Non-traditional ACP and third-country imports, and Hurricane licences. (iii) Licensing requirements: (1) Traditional ACP imports, (2) Non-traditional ACP and Third-country imports.

⁶ Panel Report in *EC – Bananas III*, para IV.1.

⁷ Panel Report in *EC – Bananas III*, para IV. 6 – IV.14.

⁸ The leading countries being Costa Rica, Ecuador, Colombia, Panama and Honduras. See para III. 3.

⁹ The leading countries being Cameroon, Côte d’Ivoire, St Lucia, the Dominican Republic, Jamaica, Belize and Dominica. See para III.3

¹⁰ Panel Report in *EC – Bananas III*, para III.3. The Fourth Lomé Convention was signed on 15 December 1989 between the EC and 70 African, Caribbean and Pacific developing countries. Many of these were WTO Member countries. The Convention was notified to the GATT and contained a protocol concerning bananas, together with provisions applying to products more generally. The Lomé IV Convention was a treaty which was meant to promote economic, cultural and social development of the African and ACP Member States. See Panel Report in *EC – Bananas III*, paras III. 33 and IV.37.

various national banana import regimes previously in place in the EC's member States.¹¹ Different tariffs and allocation formulas applied to Regulation 404/93 categories.¹² In addition the EC made use of Hurricane licences that were issued quarterly.¹³ The EC negotiated the BFA with Colombia, Costa Rica, Venezuela and Nicaragua in 1994. Guatemala, the fifth complainant was not a party to the BFA. The BFA was incorporated into the EC's Uruguay Round Schedule in March 1994 and came into force on 1 January 1995. The BFA contained provisions concerning those different tariffs, formulas and export certificates.¹⁴

On 10 October 1994 the EC and the ACP contracting parties requested and were granted (on 9 December 1994)¹⁵ a waiver from the EC's obligations under Article I:1 of the GATT. On 14 October 1996 the Lomé waiver was granted by decision of the GATT CONTRACTING PARTIES and was extended until 29 February 2000.¹⁶ Only inconsistencies relating to the GATS provisions will be dealt with here.

In terms of GATS¹⁷ the complaining parties argued that the regime's challenged provisions went beyond WTO-inconsistent treatment of imported Latin American bananas. Their belief was that the EC's provisions were offering more competitive advantage to the EC and ACP-owned firms that distributed bananas *vis-à-vis* their Latin American and US counterparts.¹⁸ In interpreting

¹¹ Panel Report in *EC – Bananas III*, para III.4.

¹² Panel Report in *EC – Bananas III*, from paras III. 7 – III. 14.

¹³ Panel Report in *EC – Bananas III*, see from paras III. 15 – III.17. Hurricane licences could be used to import bananas from any source. They are granted to operators who include or directly represent a producer adversely affected by a tropical storm and are unable to supply the EC market. See Panel Report in *EC – Bananas III*, para III. 28. Two Panel reports had previously been issued concerning the bananas dispute brought by the same parties. See para III. 29 – 30.

¹⁴ Panel Report in *EC – Bananas III*, para III. 30.

¹⁵ Panel Report in *EC – Bananas III*, para III. 35.

¹⁶ Panel Report in *EC – Bananas III*, para III. 35.

¹⁷ The broad manner in which GATS was challenged was based upon the use of these measures: that is, operator category allocations, export certificates, hurricane licences and activity function allocation. See para IV.602.

¹⁸ Panel Report in *EC – Bananas III*, para IV.600. The complaining parties further said that since it was the first time the GATS provisions were brought before a Panel, it was important that the challenged GATS issues be addressed carefully. See *EC – Bananas III*, paras IV.600 and IV.608. Their contention was also based upon the fact that the measures also produced distortions which nullified or impaired benefits accruing to them, directly or indirectly, under the Agreements in question. See Panel Report in *EC – Bananas III*, para IV.1. See also submissions from paras IV.2 – IV.3. They argued that just because an agreement is structured to give preference to certain contracting parties to that agreement that did not necessarily mean that that agreement must disturb the fundamental structure upon which all agreements are subject, that is, the fundamental guarantee to provide non-discrimination set in the agreements. See para IV.35.

the GATS the complainants argued that the Panel should take a broad view since this was in fact how such words as “affecting” in Article III:4 of the GATT had been interpreted by other WTO Panels.¹⁹

The EC argued that the Panel should find in its favour since the bananas regime was not incompatible with the GATS. If the Panel finds to the contrary, the EC requested that the Panel should then find that the EC bananas regime was covered by the Lomé waiver.²⁰ The EC argued that the Lomé Convention was fundamentally underlined by development policies that justified preferential treatment for the ACP countries.²¹ As a consequence no discriminatory allegations could be found against her in that regard.²² In effect the EC was arguing for consideration of the aims effect, object and purpose that the measures in question will eventually fulfil.²³ The EC also argued for the consideration of legitimate domestic regulation under Article VI of the GATS.²⁴ The EC further argued for a limited application of the GATS terms.²⁵ The third parties²⁶ in this dispute argued that the Lomé Convention was an essential aspect of their livelihoods. The bananas contributed to employment, fundamental transport and communication infrastructure in their countries and greatly benefited the countries through weekly shipment of bananas without which many of their economies would collapse.²⁷ They claimed that as a result any decision in favour of the complaining parties would directly and severely affect them.²⁸

¹⁹ Panel Report in *EC – Bananas III*, from paras IV.627 – IV.634.

²⁰ Panel Report in *EC – Bananas III*, paras IV. 4 and IV.28.

²¹ Panel Report in *EC – Bananas III*, para IV. 16.

²² Panel Report in *EC – Bananas III*, para IV. 17. In its arguments the EC did not deny that the waiver envisaged preferential treatment, but it argued that this was agreed to by contracting parties and that the waiver’s preferential treatment was designed to promote expansion of trade and economic development of beneficiaries in a manner consistent with the objectives of the General Agreement and with the trade, financial and developmental needs of the beneficiaries.

²³ Panel Report in *EC – Bananas III*, paras IV. 29 – IV. 30.

²⁴ Panel Report in *EC – Bananas III*, para IV. 616.

²⁵ Panel Report in *EC – Bananas III*, paras IV. 635 – IV. 636 and paras IV. 647 - IV. 649.

²⁶ Belize, Cameroon, Côte d’Ivoire, Dominica, the Dominican Republic, Ghana, Grenada, Jamaica, Saint Lucia, Saint Vincent and the Grenadines, Senegal, and Suriname (the “ACP third parties”).

²⁷ Panel Report in *EC – Bananas III*, para V. 1.

²⁸ Panel Report in *EC – Bananas III*, para V. 13. See also para. V. 66.

In its findings the Panel found that bananas were like products.²⁹ With regard to the GATS the Panel was of the view that no measures are excluded *a priori* from the scope of the GATS as defined by its provisions. The scope of the GATS encompasses any measure of a Member to the extent that it affects the supply of a service regardless of whether such a measure directly governs the supply of a service or whether it regulates other matters but nevertheless affects trade in services.³⁰ As such the EC's challenged measures are not excluded from the GATS regulatory regime.³¹ On appeal the AB agreed with the Panel in this regard.³²

In response to the argument for a broader interpretation of the GATS terms, the Panel approached the *de jure* and *de facto* analysis by interpreting "treatment no less favourable" in Article II:1 of the GATS by reference to paragraphs 2 and 3 of Article XVII of the GATS. The Panel's view was that Article II of the GATS must be interpreted in reference to Article XVII of the GATS. The Panel opined that the essence of similar language between Articles II and XVII is not, in their view, a justification for giving a different ordinary meaning in terms of Article 31(1) of the Vienna Convention to the words "treatment no less favourable", which are identical in both Articles II:1 and XVII:1.³³ The Panel, in considering the challenged provisions of the Licensing Agreement, made reference to the consideration of the object and purpose and the context of the EC Licensing Agreement which included a reference to the Agreement's Preamble.³⁴ In the end, the Panel found against the EC in respect of the measures challenged by the complainants. The EC appealed the findings to the AB.³⁵

The EC argued on appeal that its Licensing system for bananas was not discriminatory under Articles II and XVII of the GATS. In this regard, the EC pleaded for consideration of the aims and effects of the measures as was done by the Panel in *United States – Taxes on Automobiles*.³⁶ Its view was that its measures should be considered based on whether the aim and effect seeks to

²⁹ Panel Report in *EC – Bananas III*, paras 7.62 – 7.63.

³⁰ Panel Report in *EC – Bananas III*, para 7.285.

³¹ Panel Report in *EC – Bananas III*, para 7.286.

³² Appellate Body Report in *EC – Bananas III*, para 220.

³³ See para 7.301.

³⁴ Panel Report in *EC – Bananas III*, para. 7.155.

³⁵ Appellate Body Report in *EC – Bananas III*, para 2 – 3.

³⁶ Appellate Body Report in *EC – Bananas III*, para 57, 58.and 240.

confer protection to domestic production. The EC argued that its measures pursued legitimate policies and are not inherently discriminatory.³⁷ Therefore, the Panel should have looked beyond the fact that, because of reasons related to the historical development of the banana distribution sector, service suppliers of the complaining parties were concentrated in one segment of the market, and EC and ACP suppliers in another segment.³⁸

The AB in its ruling disagreed with the manner in which the Panel approached its interpretation of Article II:1 of the GATS by referring to paragraphs 2 and 3 of Article XVII of the GATS.³⁹ The AB was of the view that an MFN Article must be interpreted by reference to another MFN Article,⁴⁰ in this case Article I of GATT, rather than a national treatment Article.⁴¹ Otherwise the framers of the GATS Agreement would have simply transposed the wording of Article XVII to Article II of the GATS.⁴² The AB further stated that the obligation provided by Article II is unqualified. Its ordinary meaning does not exclude *de facto* discrimination. If *de facto* discrimination was not covered then it would be much easier to devise discriminatory measures in the case of trade in services than in the goods sector which would circumvent the basic purpose of the Article.⁴³ So, treatment no less favourable in Article II:1 of the GATS should be interpreted to include *de facto*, as well as *de jure* discrimination.⁴⁴

With regard to the aims and effect of the measures the AB ruled that it saw no specific authority in Article II or in Article XVII of the GATS for the proposition that the “aims and

³⁷ Appellate Body Report in *EC – Bananas III*, para 57, 58. and 240.

³⁸ Appellate Body Report in *EC – Bananas III*, para 57. The complainants did not agree with the EC’s submission for application of an aims and effect test. They argued that a similar submission was rejected in the *Japan – Alcoholic Beverages I* in para 29 of the case. That case ruled in para 80 that in applying the national treatment obligation of Article III:1 of GATT 1994 it is not the measure of the aim and effect that should be engaged into, but rather an examination of “...the underlying criteria used in a particular... measure, its structure, and its overall application to ascertain whether it is applied in a way that affords protection to domestic products. The complaining parties also argued in para 78 that if the GATS provisions were interpreted narrowly, the interpretation of the MFN standard in Article II:1 of the GATS would be incompatible with its non-discrimination objective and purpose; that the negotiating history of the MFN clause in the GATS confirms that the “treatment no less favourable” standard was intended to require effective equality of opportunities.

³⁹ See para 231.

⁴⁰ See para 233.

⁴¹ See para 231.

⁴² See para 231.

⁴³ See para 233.

⁴⁴ See Panel Report in *EC – Bananas III* para. 7.304 and the Appellate Body Report, para 234.

effects” of a measure are in any way relevant in determining whether that measure is consistent with those provisions.⁴⁵ On the challenged provisions of the Licensing Agreement the AB held that it saw no reason to exclude import licensing procedures for the administration of quotas from the scope of GATS.⁴⁶ On the Lomé issue the AB held that neither the circumstances surrounding the negotiation of the Lomé waiver, nor the need to interpret it so as to permit it to achieve its objectives allow the disregard of the clear and plain wording of the Lomé waiver by extending its scope to include a waiver from the obligations under Article XIII of the GATT 1994.⁴⁷ Articles I and XIII of the GATT 1994 are both non-discrimination provisions. Their relationship is not such that a waiver from the obligations under Article I implies a waiver from the obligations under Article XIII.⁴⁸

2.2 China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products⁴⁹

The factual aspects of this dispute and the measures complained about by the US involved China’s obligations with respect to measures relating to goods and services in respect of reading material (e.g. books, newspapers, periodicals, electronic publications), audiovisuals home entertainment (AVHE) products (e.g. videocassettes, video compact discs, digital videos

⁴⁵ See Appellate Body Report in *EC - Bananas III*, from para 240 – 248. In the GATT context, the “aims and effect” theory had its origins in the principle of Article III:1 that internal taxes or charges or other regulations “should not be applied to imported or domestic products so as to afford protection to domestic production”. There is no comparable provision in the GATS. See para 241. In fact in *Japan – Alcoholic Beverages I* the AB rejected the “aims and effect” theory with respect to Article III:2 of the GATT 1994. The EC cited as its authority the *United States – Taxes on Automobiles* wherein it argued that the dispute also looked at statistical evidence and beyond the dominant presence of imported goods in the sector of the market in order to determine presence of imported goods in the sector of the market affected by the measure in order to determine whether the measure had the “aims and effect” of affording protection to domestic production. This was rejected by the AB. See para 241.

⁴⁶ See Appellate Body Report in *EC - Bananas III*, para 194 – 195.

⁴⁷ See para 183.

⁴⁸ See para 183.

⁴⁹ Panel Report in *China – Measures Affecting Trading Rights and Distribution Services for Certain Publishers and Audiovisual Entertainment Products* (“*China – Audiovisual Services*”), WT/DS363/R, 12 August 2009 and its Appellate Body Report, WT/DS363/AB/R, 21 December 2009. In this dispute the US requested consultations with the Government of China with respect to certain trading rights and distribution services for certain publications and audiovisual entertainment products, para 1.1. Consultations were held in three occasions, but the matter remained unresolved, paras 1.4 – 1.5. On 10 October 2007 the US requested the establishment of a Panel by the DSB. The Panel was composed on 27 March 2008, paras 1.6 – 1.7. At its meeting on 25 September 1997, the AB and the Panel reports, as modified by the AB, were adopted by the DSB.

discs), sound recordings (e.g. recorded audio tapes), and films for theatrical release.⁵⁰ The dispute was as a result of certain measures that affected (i) importation into China of relevant goods, (ii) the distribution within China of relevant goods, and (iii) services suppliers in relation to certain of the mentioned products.⁵¹ Only those measures alleged to be violating the GATS agreement will be dealt with here.⁵²

The US claims of the Chinese measures' WTO inconsistency was based on: (i) unjustifiably restricting the right of enterprises in China and foreign enterprises and individuals to import into China reading materials, AVHE products, sound recording, and films for theatrical release by limiting trading rights to Chinese state-owned enterprises; (ii) Chinese measures relating to the distribution of reading materials, AVHE distribution services, and sound recording distribution services;⁵³ (iii) Chinese measures that allegedly do not provide national treatment for imported reading materials, sound recordings intended for electronic distribution, and films for theatrical release.⁵⁴ China requested the Panel to dismiss the challenge since its measures

⁵⁰ Panel Report in *China – Audiovisual Services*, para 2.1.

⁵¹ Panel Report in *China – Audiovisual Services*, para 2.2.

⁵² Third parties in the dispute were Australia, EC, Japan, the Republic of Korea ("Korea"), and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu ("Chinese Taipei"). See para 1.8.

⁵³ For example: (a) these prohibit foreign-invested enterprises from engaging in the master distribution of reading materials, the master wholesalers and wholesale of electronic publications, and the distribution of imported reading material; (b) impose on foreign-invested enterprises permitted to engage in the sub-distribution of reading materials, requirements that are more burdensome than those applicable to wholly Chinese-owned distributors, for example in relation to registered capital, operating terms, pre-establishment legal compliance, examination and approval process, and decision-making criteria; (c) limit commercial presence for the distribution of AVHE products to Chinese-foreign contractual joint-ventures with majority Chinese ownership; (d) as regards the sub-distribution of AVHE products, discriminate against Chinese-foreign contractual joint ventures by imposing on them certain requirements that are more burdensome than those that apply to wholly Chinese-owned enterprises, for example in relation to operating terms, pre-establishment legal compliance, examination and approval process, and decision-making criteria; (e) prohibit foreign-invested enterprises, but not wholly Chinese-owned enterprises, from engaging in the electronic distribution of sound recordings, e.g. through the internet and mobile telecommunications networks.

⁵⁴ For example: (a) Chinese measures restrict distribution channels for certain imported reading materials by requiring their distribution to be conducted exclusively through subscription, by Chinese wholly state-owned enterprises, and only to subscribers that have been examined and approved by the Chinese government, unlike the situation for similar domestic reading materials; (b) limit the distribution of certain imported reading materials (which can be distributed other than through subscription) to wholly Chinese-owned enterprises, while the distribution of similar domestic reading materials can be effected by other types of enterprises, including foreign-invested ones; (c) discriminate against imported sound recordings intended for electronic distribution by subjecting them to more burdensome content review regimes than similar domestic products; (d) discriminate against imported films for theatrical release by limiting their distribution to two state-owned enterprises, while

were not inconsistent with the GATS.⁵⁵ However, China made the Panel's work easier because she did not rebut or contest some of the challenged measures' interpretation by the US.⁵⁶

The Panel followed the precedent set in WTO disputes before it regarding what must be met for Article XVII of the GATS to have been proven. It ruled that it must be proven that the measures at issue affect the supply of services; and whether such measures accord less favourable treatment to services suppliers of other Members, in comparison with like domestic suppliers.⁵⁷ In order to prove the two elements the Panel first had to establish whether China, in its schedule of commitments, had undertaken any specific commitments covering the services sector in issue, and whether such sector was subject to any conditions and qualifications that may have been set out in the schedule of commitments. The Panel found that the measures in question were scheduled.⁵⁸ The Panel also found that the "like" services suppliers requirement was met.⁵⁹ After examining whether China's measures affect services trade the Panel concluded that they did.⁶⁰ In examining whether China's measures accorded treatment less favourable than that accorded to domestic wholesalers, the Panel ruled that treatment is to be assessed in terms of conditions of competition between like services and services suppliers as stated in Article XVII:3 of the GATS.⁶¹ A measure that prohibits foreign services suppliers from supplying a range of services, subject to satisfying certain conditions not applicable to the like domestic supplier cannot constitute treatment no less favourable as it denies foreign service supplier of any opportunity to compete with like domestic suppliers.⁶² Thereafter, the Panel found that China's measures did accord treatment less favourable since

similar domestic products can be distributed by any distributor operating in China. See Panel Report in *China – Audiovisual Services* para 2.3.

⁵⁵ Panel Report in *China – Audiovisual Services*, para 3.3. The case is also discussed by the Third World Network "WTO dispute Panel rules against China on Publications, AV products" <http://www.twinside.org.sg/title2/wto.info/2009/twninfo20090902.htm> (accessed 20-06-2010).

⁵⁶ See paras 7.941, 7.962, 7.967, 7.976, 7.989, 7.990, 7.1032, 7. 1071, 7.1113, 7.1349.

⁵⁷ Panel Report in *China – Audiovisual Services*, para 7.944.

⁵⁸ Panel Report in *China – Audiovisual Services*, para 7.946 and 7.951 – 7.954.

⁵⁹ Panel Report in *China – Audiovisual Services*, para 7.976.

⁶⁰ Panel Report in *China – Audiovisual Services*, para from 7.956 - 7.971.

⁶¹ Panel Report in *China – Audiovisual Services*, para 7.978.

⁶² Panel Report in *China – Audiovisual Services*, para 7.979.

they affected the competitive relationship between foreign and domestic services suppliers.⁶³ In its decision the Panel took the view that the meaning to Article III:4 must be grounded on the fundamental thrust and effect of a measure.⁶⁴ The Panel noted the right that China has to regulate trade in services under the GATS, including adjustment of its foreign investment policy, however that regulation must be in accordance with the GATS commitments which a Member has chosen to make in its schedule.⁶⁵ However on other measures the Panel found for China.⁶⁶ China appealed the Panel's ruling.⁶⁷ On the measures that were appealed⁶⁸ the AB revisited the context in which the Panel approached its interpretation and agreed with the Panel's approach to the interpretation of the measures in question.⁶⁹ The AB considered the object and purpose of the GATS as the Panel also did.⁷⁰ In the final analysis the AB ruled that it was in agreement with the Panel's ruling and found that the Panel did not err in its findings as contended by China.⁷¹

2 3 Mexico – Measures Affecting Telecommunications Services⁷²

In this case the concern was as a result of Mexico's GATS commitments and obligations on basic and value-added telecommunications services.⁷³ The dispute was about Mexico's domestic

⁶³ Panel Report in *China – Audiovisual Services*, paras 7.977 – 7.981. See also paras 7.993, 7.797, 7.998, 7.1039 – 7.1047, 7.1058, 7.1059, 7.1073, 7.1090 – 7.1098 and 7.1118, 7.1140 – 7.1142, 7.1120, 7.1265, 7.1280, 7.1305, 7.1307, 7.1308, 7.1310, 7.1311, 7.1376, 7.1421 and para 8.2.3 of the Panel Report. See also para 8 of the Appellate Body Report, in *China – Measures Affecting Trading Rights and Distribution Services for Certain Publishers and Audiovisual Entertainment Products*, WT/DS363/AB/R, 21 December 2009.

⁶⁴ Panel Report in *China – Audiovisual Services*, para 7.1131.

⁶⁵ Panel Report in *China – Audiovisual Services*, para 7.1139.

⁶⁶ For example on the Internet Culture Rule the Panel found that the US did not prove *prima facie* that there was less favourable treatment. See Panel Report in *China – Measures Affecting Trading Rights and Distribution Services for Certain Publishers and Audiovisual Entertainment Products*, para 7.1305.

⁶⁷ Appellate Body Report in *China – Audiovisual Services*, para 339.

⁶⁸ See the measures that China appeals and its arguments from para 14 – 53 of the Appellate Body Report. See also in para. 124. See further in Annex III attached to the Appellate Body Report for measures challenged on appeal on p. 178 of the Report.

⁶⁹ Appellate Body Report in *China – Audiovisual Services*, from para 338 – 372.

⁷⁰ See Panel and Appellate Body Reports in *China – Audiovisual Services*, para 7.1219 and from 389 – 400.

⁷¹ Appellate Body Report in *China – Audiovisual Services*, para 412 – 414.

⁷² Panel Report in *Mexico – Measures Affecting Telecommunications Services (“Mexico – Telecoms”)* WT/DS204/R, 2 April 2004.

⁷³ Panel Report in *Mexico – Telecoms*, para 1.1. The US requested consultations with Mexico pursuant to Article 4 of the DSU and Article XXIII of the GATS. The consultations were held on 10 October 2000 with no resolution to the problem. A month later, the US requested the DSB to establish a Panel. On the same date the US also requested additional consultations with Mexico. The consultation took place on 16 January 2001 and again the parties failed

provisions and regulations on telecommunications which govern the supply of telecommunication services.⁷⁴

The facts of the dispute are that prior to 1997 a monopolistic telecommunications market in long-distance and international telecommunications services existed in Mexico supplied by Teléfonos de Mexico, SA de C.V. (“Telmex”). Multiple carriers have been authorised since then to provide international services over their networks. In Mexican law, the largest carrier of outgoing calls to a particular international market is afforded an exclusive right to negotiate the terms and conditions for the termination of international calls in Mexico that apply to any carrier between Mexico and that international market.⁷⁵ Telmex has been the largest carrier of outgoing calls for all markets. At the time of the case there were 27 carriers (“concesionarios” or “concessionaires”) allowed to provide long distance services including two US-affiliated carriers. These were Avantel (WorldCom) and Alestra (AT&T). Eleven of the 27 long-distance concessionaires were authorised to operate international gateways, allowing them to carry incoming and outgoing international calls. Telmex, however, remained the largest supplier of basic telecommunications services in Mexico, including international outbound traffic.⁷⁶ Mexico’s Federal Telecommunications Law (“the FTL”) was the legal framework that provided for the regulation of telecommunications activities in Mexico.⁷⁷ The FTL was administered

to resolve the dispute. On 13 February 2002 the US again requested the DSB to establish a Panel. See para 1.2. On 17 April 2002 the DSB established the Panel and the parties decided in that meeting that the Panel use standard terms, para 1.3. On 16 August 2002 the US requested the Director-General of the WTO to determine the composition of the Panel and the Panel was composed on 26 August 2002. See para 1.4 – 1.5. Australia, Brazil, Canada, Cuba, the EC, Guatemala, Honduras, India, Japan and Nicaragua reserved their rights to participate in the Panel proceedings as third parties.

⁷⁴ Panel Report in *Mexico – Telecoms*, para 2.1.

⁷⁵ Panel Report in *Mexico – Telecoms*, para 2.2.

⁷⁶ Panel Report in *Mexico – Telecoms*, para 2.2.

⁷⁷ Its purpose was to govern the use, utilisation and exploitation of the radio-electrical spectrum of the telecommunications networks and the satellite communication, para 2.3. Its broad purposes was to promote efficient development of telecommunications, and exercise the authority of the State on those matters to ensure national sovereignty and to promote a healthy competition among the different telecommunications service providers in order to offer better services, diversity and quality for the benefit of users and to promote adequate social coverage, para 2.3. Special rules would apply to a commercial agency which is defined as any entity that is not an owner or possessor of any transmission media, provides telecommunication services to third countries using capacity of a public telecommunications network concessionaire, para 2.5.

through a Secretariat of Communications⁷⁸ which operated its International Long-Distance Rules (“ILD Rules”) through an agency called the Federal Telecommunications Commission and Transportation (the “Commission”).⁷⁹ International gateways operators is the only instrument used for direct interconnection with foreign public telecommunications networks in order to carry international traffic, which is required to apply the same uniform settlement rate to every long-distance call to or from a given country, regardless of which operator originates or terminates the call.⁸⁰ Mexico also had the Federal Law of Economic Competition (“FLEC”).⁸¹ A Code of Regulations to the FLEC sets out in detail the rules, *inter alia*, for the analysis of the relevant market and substantial power.⁸²

Mexico undertook specific commitments for telecommunications services under Articles XVI (Market Access), XVII (National Treatment) and XVIII (Additional Commitments) of GATS and these were contained in its Reference Paper.⁸³ The US requested the Panel to find that Mexico’s failure to ensure among others that US basic telecom suppliers had reasonable and non-discriminatory access to, and use of, public telecom networks and services is inconsistent with its obligations under Section 5(a) and (b) of the GATS Annex on Telecommunications. That, Mexico has failed to ensure that US service suppliers may access and use public telecommunications networks and services through: (i) interconnection on reasonable terms and conditions for the supply of scheduled services by facilities-based operators and commercial agencies; and (ii) private leased circuits for the supply of scheduled services by

⁷⁸ It may grant a concession only to a Mexican individual or company, and any foreign investment therein may not exceed 49 per cent, except for cellular telephone services. Panel Report in *Mexico – Telecoms*, para 2.4.

⁷⁹ Its duties are to regulate the provision of international long-distance service and establish the terms to be included in agreements for the interconnection of public telecommunications networks with foreign networks. Panel Report in *Mexico – Telecoms*, para 2.12. International long-distance service is defined as the service whereby all international switched traffic is carried through long-distance exchanges authorised as international gateways, para 2.12.

⁸⁰ Panel Report in *Mexico – Telecoms*, para 2.13. The principle of proportionate return for each international gateway operator was applied. Under this principle incoming calls (or associate revenues) from a foreign country must be distributed among international gateway operators in proportion to each international gateway operator’s market share in outgoing calls to that country, para 2.15.

⁸¹ Its purpose was to ensure protection of the process of competition and free market participation through prevention and elimination of monopolies and monopolistic practices and other restrictions that deter the efficient operation of the market for goods and services, para 2.17.

⁸² Panel Report in *Mexico – Telecoms*, para 2.19.

⁸³ Panel Report in *Mexico – Telecoms*, para 2.22.

facilities-based operators and commercial services.⁸⁴ Mexico requested the Panel to reject all the claims.⁸⁵ This case has been the first under the WTO to deal squarely with GATS provisions and also the first to deal with telecommunications services.⁸⁶

The US argued for the use and the supply of facilities and non-facilities-based basic telecommunications from the US to Mexico.⁸⁷ Mexico had argued that the Telecoms Annex does not apply to these challenged measures since it had not made any commitments to that effect.⁸⁸ The Panel, consistent with the *China - Publications and Audiovisual case*, enquired whether the Annex applied to the challenged measures. It found that it did.⁸⁹ However, the Panel ruled that Mexico had not scheduled a commitment so that what the US was claiming could be possible.⁹⁰ The Panel said that it understood the term “non-discrimination” in Section 5(a) of the Annex to Telecommunications of the GATS to refer to conditions of competition of service suppliers in relation to other suppliers who are users of public telecommunications transport networks and services.⁹¹ On the basis of not providing reasonable terms for access to and use of public telecommunications transport networks and services in Mexico, the Panel ruled that Mexico failed to meet its obligations under section 5(a) of the GATS Annex on Telecommunications.⁹² Mexico, after the Panel ruled against her, invoked the provisions of section 5(g).⁹³ In this regard the Panel ruled that Mexico’s schedule made no reference to section 5(g) and as such those provisions could not be invoked.⁹⁴ Consequently, Mexico was

⁸⁴ Panel Report in *Mexico – Telecoms*, paras 2.3, 3.1(c), 7.1 and 7.270 – 7.271.

⁸⁵ Panel Report in *Mexico – Telecoms*, para 3.3.

⁸⁶ Panel Report in *Mexico – Telecoms*, para 7.2.

⁸⁷ Panel Report in *Mexico – Telecoms*, para 7.271.

⁸⁸ Panel Report in *Mexico – Telecoms*, para 7.272.

⁸⁹ Panel Report in *Mexico – Telecoms*, paras 7.277 – 7.288.

⁹⁰ Panel Report in *Mexico – Telecoms*, para 7.294.

⁹¹ Panel Report in *Mexico – Telecoms*, para 7.330.

⁹² Panel Report in *Mexico – Telecoms*, para 7.335.

⁹³ This section makes provision for developing Member countries, consistent with their level of development, to place reasonable conditions on access to and use of public telecommunications transport networks and services necessary to strengthen their domestic telecommunications infrastructure and service capacity and to increase their participation in international trade in telecommunications services. But, the section also requires that such conditions be specified in the Member’s schedule. See Panel Report in *Mexico – Telecoms*, paras 7.386 - 7.387.

⁹⁴ Panel Report in *Mexico – Telecoms*, para 7.388.

ruled to have failed to meet its obligations in terms of Section 5 of the GATS Annex on Telecommunications.⁹⁵

3 THE TRIPS

3.1 Introduction

As a result of conflicts between the developing and developed countries as well as the pharmaceutical industry lobby which were informed by developments in intellectual property enforcement initiatives in the 1980s and early 1990s, TRIPS-related dispute settlement in the WTO reveals considerable tensions.⁹⁶ The inclusion of intellectual property protection in the WTO dispute settlement system was a profound achievement for the pharmaceutical industry of the developed countries. However developing countries are also considered to have achieved some gains through the outlawing of unilateral trade retaliatory measures⁹⁷ on the basis of which these countries hoped for a dispute settlement mechanism that would provide security and predictability,⁹⁸ consonant with the rationales of the TRIPS obligations.

Irrespective of such an achievement however, the result was that developing countries had to adhere to an international intellectual property regime linked to international trade. This legitimised trade retaliatory actions against them if they were found to have violated the TRIPS Agreement's provisions.⁹⁹ It is no wonder then that in most cases since the start of the TRIPS dispute settlement, developing countries have been respondents in these disputes *vis-à-vis* developed countries who have been the complainants.¹⁰⁰ This validates the apprehensions

⁹⁵ Panel Report in *Mexico – Telecoms*, para 7.389. In its ruling the Panel did not forget to make reference to the rules of interpretation that must be observed in terms of Article 3.2 of the DSU as well as Articles 31 and 32 of the Vienna Convention on the Law of Treaties which it said had attained the status of general international law and form part of customary rules of interpretation of public international law. See Panel Report in *Mexico – Telecoms*, para 7.15. The Panel further said that it also took into account in its findings Mexico's arguments for considerations under Article IV of the GATS, paragraph 5 of the GATS Preamble as well as Article 12.11 of the DSU. See Panel Report in *Mexico – Telecoms*, para 8.3.

⁹⁶ Gad *TRIPS Dispute Settlement and Developing Country Interests* in: Correa and Yusuf *Intellectual Property and International Trade: The TRIPS Agreement* (2008) 332.

⁹⁷ For example Section 301 of the US.

⁹⁸ Gad *TRIPS Dispute Settlement and Developing Country Interests* in: Correa and Yusuf *Intellectual Property and International Trade: The TRIPS Agreement* (2008) 332.

⁹⁹ *Ibid.*

¹⁰⁰ Gad *TRIPS Dispute Settlement and Developing Country Interests* in: Correa and Yusuf *Intellectual Property and International Trade: The TRIPS Agreement* (2008) 338.

voiced by developing countries during negotiations about the TRIPS Agreement being used as a protection instrument for certain narrow developed country interests.¹⁰¹

3 2 Summary of TRIPS Dispute Settlement

Of the twenty-nine disputes that have come before the DSB, the US has initiated seventeen of them, with the EC having initiated seven by December 2010.¹⁰² The other five were initiated by Canada (1), Australia (1), India (1) and Brazil (2).¹⁰³ In the total number of TRIPS disputes, developing countries have been respondents in nine¹⁰⁴ of them whilst developed countries have been respondents in twenty cases. However the developed countries were respondents against other developed countries rather than against developing countries.¹⁰⁵ Thirteen of these have been settled by mutual agreement. Of those decided disputes seven had Panel reports and three had AB reports issued. The nature of the subject matter in the disputes varies. For example patents are involved in 11 disputes with five having been settled and two still at the consultation stage. Two Panel reports and two AB reports have been adopted.¹⁰⁶ In

¹⁰¹ Gad *TRIPS Dispute Settlement and Developing Country Interests* in: Correa and Yusuf *Intellectual Property and International Trade: The TRIPS Agreement* (2008) 340.

¹⁰² See further discussion of WTO dispute settlement in Delich *Developing Countries and The WTO Dispute* in: Hoekman *et al Development, Trade, and the WTO – A Hand Book* (2002) 73 – 77. See also Hudec *The Adequacy of WTO Dispute Settlement Remedies: A Developing Country Perspective* in: Hoekman *et al Development, Trade, and the WTO – A Hand Book* (2002) 81 – 90.

¹⁰³ The WTO “Dispute Settlement: The Disputes – Disputes by Agreement” http://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A26#selected_agreement (accessed 29-11-2010). See also Gad *TRIPS Dispute Settlement and Developing Country Interests* in: Correa and Yusuf *Intellectual Property and International Trade: The TRIPS Agreement* (2008) 338. See also Abbott and Cottier *Dispute Prevention and Dispute Settlement in the Field of Intellectual Property Rights and Electronic Commerce: US – Section 211 Omnibus Appropriations Act 1998 (‘Havana Club’)* in: Petersmann and Pollack (eds) *Transatlantic Economic Disputes: The EU, the US and the WTO* (2003) http://www.frederickabbott.com/uploads/Abbott___Cottier_-_From_Transatlantic_Economic_Dispute.pdf (accessed 21-09-2010).

¹⁰⁴ India, China and Argentina on two occasions each and Pakistan, Indonesia and Brazil on one occasion each.

¹⁰⁵ The WTO “Dispute Settlement: The Disputes – Disputes by Agreement”. This could have been motivated by the fact that developing countries had a transitional period of five years since the entry into force of the TRIPS Agreement in order to comply and an additional five years for those with no protection for pharmaceutical products. See Gad *TRIPS Dispute Settlement and Developing Country Interests* in: Correa and Yusuf *Intellectual Property and International Trade: The TRIPS Agreement* (2008) 342. See also Abbott and Cottier “Dispute Prevention and Dispute Settlement in the Field of Intellectual Property Rights and Electronic Commerce: US – Section 211 Omnibus Appropriations Act 1998 (‘Havana Club’)” in: Petersmann and Pollack (eds) “Transatlantic Economic Disputes: The EU, the US and the WTO”. Also there was a moratorium on non-violation complaints in terms of Article 64.2 of the TRIPS.

¹⁰⁶ The WTO “Dispute Settlement: The Disputes – Disputes by Agreement”.

sound recordings (2) copyrights (3), trademarks and GIs (2) and enforcement (5) disputes have arisen. Six other disputes were related to various provisions of the TRIPS.¹⁰⁷ Of all the TRIPS disputes seven involved non-discrimination provisions. Of these one was agreed to and one is still in consultations. Of the seven cases four Panel reports and one AB report have been adopted.¹⁰⁸

4 TRIPS CASE LAW

The TRIPS dispute settlement system is not an implementation tool; this duty is entrusted to the TRIPS Council in terms Article 68 of TRIPS as well as the WTO Trade Policy Review Mechanism by ensuring reviews of Members' national implementing legislation, in compliance with WTO obligations, including TRIPS.¹⁰⁹ The WTO Panels however, have shown that at times they may be used as compliance mechanisms by developed countries, for example, where the US used the dispute settlement mechanism to force India to implement the mailbox obligation in terms of Articles 70.8 and 70.9 of the TRIPS.¹¹⁰

4.1 *Indonesia – Certain Measures Affecting the Automobile Industry*¹¹¹

This case is one of the first cases to deal with non-discrimination measures in the TRIPS context. The factual issues in the case concerned a series of measures maintained by Indonesia with

¹⁰⁷ Gad *TRIPS Dispute Settlement and Developing Country Interests* in: Correa and Yusuf *Intellectual Property and International Trade: The TRIPS Agreement* (2008) 340.

¹⁰⁸ The WTO "Dispute Settlement: The Disputes – Disputes by Agreement".

¹⁰⁹ The WTO "Dispute Settlement: The Disputes – Disputes by Agreement". See also Gad *TRIPS Dispute Settlement and Developing Country Interests* in: Correa and Yusuf *Intellectual Property and International Trade: The TRIPS Agreement* (2008) 341.

¹¹⁰ Gad *TRIPS Dispute Settlement and Developing Country Interests* in: Correa and Yusuf *Intellectual Property and International Trade: The TRIPS Agreement* (2008) 341.

¹¹¹ Panel Report in *Indonesia – Certain Measures Affecting the Automobile Industry* ("Indonesia – Autos"), WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, 2 July 1998. In this case various consultations requested by Japan were held, the last being on 3 December 1996. No mutual resolution was reached by the two parties, para 1.1 - 1.3. On 17 April 1997 Japan requested the establishment of a Panel, para 1.4. The EC also requested consultations with Indonesia on 3 October 1996, para 1.5. They however, also resulted in no resolution, para 1.6. On 12 May 1997 the EC requested the establishment of a Panel, para. 1.7. The US also requested consultations with Indonesia on 8 October 1996, para 1.9. The consultations resulted in no solution and the US requested the establishment of a Panel on 12 July 1997, paras 1.10 - 1.11. The DSB established a Panel as requested by Japan and EC on 12 June 1997, para 1.13. On 30 July 1997 the DSB agreed to the US's request for the establishment of a Panel and also agreed that the Panel established on 12 July 1997 to examine complaints by Japan and the EC would also examine the US complaint, 1.13. The Director-General composed the Panel and India and Korea reserved their third party rights to the dispute, paras 1.15 – 1.16.

respect to motor vehicles, and parts and components thereof.¹¹² The measures at issue included the tax and tariff treatment in Indonesia of imported completely built-up motor vehicles, the 1993 Incentive System which was amended in 1995 and 1996; the National Car Programme which encompasses the February 1996 programme and the June 1996 programme; and lastly a \$690 million loan to PT Timor Putra Nasional.¹¹³ The challenged provisions were said to be inconsistent with Articles I:1 III:2, III:4, III:8, X:1 and 3(a) of GATT 1994, Article 2 of the TRIMs Agreement, Article I, 2, 6, 27 and 28.2 of the SCM Agreement, Articles 3, 20 and 65.5 of the TRIPS Agreement.¹¹⁴

Only the challenge of inconsistency with Article 3 of the TRIPS will be dealt with here. The US challenged Indonesia on the basis that its measures were in violation of Article 3 of the TRIPS Agreement, being the national treatment obligation because the measures in its National Car Programme discriminated against nationals of other WTO Members with respect to the acquisition and maintenance of trademarks, and the use of trademarks as specifically addressed in Article 20 of the TRIPS Agreement.¹¹⁵

In terms of Article 3 of TRIPS, the US argued that Indonesia discriminated against foreign nationals in respect of the acquisition of trademarks because any trademark that could apply to a “national motor vehicle” must be acquired by an Indonesian company, whether that company is a joint venture or a wholly-owned Indonesian company.¹¹⁶ The Panel opined that since the TRIPS Agreement requires certain treatment to be accorded to nationals of other WTO Members in respect of the protection of their intellectual property, the issue that must be examined was whether, under the Indonesian law and practice the treatment accorded to foreign nationals in respect of the acquisition of trademark rights, through the applicable

¹¹² Panel Report in *Indonesia – Certain Measures Affecting the Automobile Industry*, para 2.1.

¹¹³ See Panel Report in *Indonesia – Certain Measures Affecting the Automobile Industry*, from paras 2.3 – 2.43 and 3.1 – 3.6.

¹¹⁴ Panel Report in *Indonesia – Certain Measures Affecting the Automobile Industry*, paras 3.1 - 3.6.

¹¹⁵ See Panel Report in *Indonesia – Certain Measures Affecting the Automobile Industry*, para 14.263.

¹¹⁶ See Panel Report in *Indonesia – Certain Measures Affecting the Automobile Industry*, para 14.267.

procedures, was less favourable than that accorded to an Indonesian company in the National Car Programme.¹¹⁷

The Panel's decision was decided under three headings: acquisition of trademarks, maintenance of trademarks, and use of trademarks. It concluded that the US did not provide enough evidence to support its claim and as such could not demonstrate the breach claimed under Article 3 of the TRIPS Agreement in respect of the acquisition of trademarks.¹¹⁸ It further ruled that while it is true that the cars marketed under the National Car Programme have to bear a trademark belonging to an Indonesian-owned company which has created that trademark, and, therefore, that trademarks owned by the US and other foreign companies may not be employed for this purpose, which may give rise to questions regarding the scope for the use of trademarks owned by US companies on cars under the National Car Programme, it does not in its view pose a problem regarding the acquisition of trademark rights. The fact that only certain signs can be used as trademarks for meeting the relevant qualifications under the National Car Programme, and many others cannot, does not mean that trademark rights as stipulated in Indonesian trademark law cannot be acquired for the other signs in a non-discriminatory manner.¹¹⁹

With respect to maintenance of trademarks, the US advanced two arguments. The first was that the Indonesian system places US companies in a position that, if they were successful in becoming a partner in the National Car Programme, they would be unable to use in Indonesia the mark normally used ("global" mark) on the vehicle marketed as a "national motor vehicle" in Indonesia, for fear of creating confusion, and consequently it was more likely that the global mark would be subject to cancellation for non-use in Indonesia. The Panel rejected the US argument, firstly due to lack of evidence to refute Indonesia's defence that the system, in requiring a new, albeit Indonesian-owned, trademark to be created, applies equally to pre-existing trademarks owned by Indonesian nationals and foreign nationals. Secondly, the Panel opined that if a foreign company enters into an arrangement with a Pioneer company, it would

¹¹⁷ See Panel Report in *Indonesia – Certain Measures Affecting the Automobile Industry*, para 14.268.

¹¹⁸ See Panel Report in *Indonesia – Certain Measures Affecting the Automobile Industry*, para 14.269.

¹¹⁹ See Panel Report in *Indonesia – Certain Measures Affecting the Automobile Industry*, para 14.268.

do so voluntarily, with knowledge and any consequent implications for its ability to maintain pre-existing trademark rights.¹²⁰

The second argument by the US was that foreign holders of trademarks in Indonesia were *de facto* at a disadvantage in meeting use requirements in relation to the Indonesian holder of a trademark satisfying the National Car Programme requirements, because the tariff, internal tax and other benefits to which the Indonesian company is entitled gives it a competitive advantage over foreign companies in the marketing of cars bearing trademarks.¹²¹ In response the Panel noted that any customs tariff, subsidy or other governmental measures of support could have a *de facto* effect of giving such an advantage to the beneficiaries of this support. However the Panel cautioned that restraint needs to be exercised in respect of *de facto* based arguments of this sort, because of the danger of reading into a provision obligations which go far beyond the letter of that provision and the objectives of the Agreement. It would not be reasonable to construe the national treatment obligation of the TRIPS Agreement in relation to the maintenance of trademark rights as preventing the grant of tariff, subsidy or other measures of support to national companies on the grounds that this would render the maintenance of trademark rights by foreign companies wishing to export to that market relatively more difficult.¹²² From that perspective the Panel found that the US did not demonstrate that Indonesia breached its obligations under Article 3 of the TRIPS Agreement in respect of maintenance of trademark rights.¹²³ With regard to the use of trademarks the Panel also ruled against the challenge. Even the argument that Indonesian cars bearing an Indonesian trademark are placed at a competitive advantage by benefiting from the tariff, subsidy and other benefits was rejected by the Panel.¹²⁴

¹²⁰ See Panel Report in *Indonesia – Certain Measures Affecting the Automobile Industry*, para 14.271.

¹²¹ See Panel Report in *Indonesia – Certain Measures Affecting the Automobile Industry*, para 14.272.

¹²² See Panel Report in *Indonesia – Certain Measures Affecting the Automobile Industry*, para 14.273.

¹²³ See Panel Report in *Indonesia – Certain Measures Affecting the Automobile Industry*, para 14.274.

¹²⁴ See Panel Report in *Indonesia – Certain Measures Affecting the Automobile Industry*, from para 14.278 – 14.279.

4.2 United States – Section 211 Omnibus Appropriations Act of 1998 (US – Havana Club)¹²⁵

This dispute was the first in which the AB interpreted the substantive intellectual property rights rules of the TRIPS Agreement and the Paris Convention on the protection of industrial property. It also was the first case to apply the national treatment and the MFN treatment obligations of the TRIPS.¹²⁶ The EC alleged that section 211 of the Omnibus Appropriations Act of 1998 was inconsistent with certain obligations of the US under the TRIPS as read with the relevant provisions of the Paris Convention for the Protection of Industrial Property, as amended by the Stockholm Act of 1967 (the “Paris Convention (1967)”) which are incorporated by reference into the TRIPS.¹²⁷ The principal issue in this dispute before the Panel and the AB was whether the said section 211 which banned protection and recognition of trademarks and trade names in connection with Cuban business relations, was compatible with the TRIPS Agreement.¹²⁸

Before the Cuban revolution the Arechabala family had ownership of a liquor producing and distribution business in Cuba known as Jose Arechabala or JASA.¹²⁹ The business produced rum that was marketed under the trademark “Havana Club”. The trademark was registered by the Arechabala family in Cuba and in the US prior to being confiscated by the Cuban government.

¹²⁵ Panel Report in *United States – Section 211 Omnibus Appropriations Act of 1998* (“US – Havana Club”), WT/DS176/R, 6 August 2001 and its Appellate Body Report, WT/DS176/AB/R, 2 January 2002.

¹²⁶ Abbott *WTO Dispute Settlement Practice Relating to the Agreement on Trade-Related Intellectual Property Rights* in: Ortino and Petersmann (eds) *The WTO Dispute Settlement System 1995 – 2003* (2004) 433. The case has been discussed by Matsushita as well. See Matsushita *Appellate Body Jurisprudence on the GATS and TRIPS Agreements* in: Ortino and Petersmann (eds) *The WTO Dispute Settlement 1995 – 2003* (2004) 470. The Panel in this dispute was established on 26 September 2000 to consider a complaint by the European Communities (EC) with respect to Section 211 of the Omnibus Appropriations Act of 1998 (“Section 211”), Appellate Body Report in *US – Havana Club*, para 1.

¹²⁷ Appellate Body Report in *US – Havana Club*, para 1.

¹²⁸ Appellate Body Report in *US – Havana Club*, para 9. See also the discussion of the case in Abbott and Cottier *Dispute Prevention and Dispute Settlement in the Field of Intellectual Property Rights and Electronic Commerce: US – Section 211 Omnibus Appropriations Act 1998* (‘Havana Club’) in: Petersmann and Pollack (eds) *Transatlantic Economic Disputes: The EU, the US and the WTO* (2003) http://www.frederickabbott.com/uploads/Abbott___Cottier_-_From_Transatlantic_Economic_Dispute.pdf (accessed 21-09-2010).

¹²⁹ Abbott and Cottier *Dispute Prevention and Dispute Settlement in the Field of Intellectual Property Rights and Electronic Commerce: US – Section 211 Omnibus Appropriations Act 1998* (‘Havana Club’) in: Petersmann and Pollack (eds) *Transatlantic Economic Disputes: The EU, the US and the WTO* (2003).

After the trademark was confiscated, the Arechabala family did not renew the trademark registration in the US. A Cuban government-owned enterprise (Cubaexport) registered the Havana Club trademark in Cuba in 1974 and in the US in 1976. This entity made and sold the rum outside of the US under the Havana Club trademark. However, the entity was prevented from trading in the US as a result of US legislative restrictions. In the early 1990s the Cuban enterprise entered into a joint-venture (Havana-Club Holding SA or HCH) with a French company, Pernod Ricard SA, with a view to promote sales of the Havana Club rum throughout the world.¹³⁰ In April 1997, Bacardi acquired from the Arechabala family any interests the family might still have in the Havana Club trademark and associated rights. After the acquisition of such rights, Bacardi initiated a legislative process in the US Congress which sought to nullify with retroactive effect the registration of the Havana Club mark in the US by the Cuban State enterprise.¹³¹ By denying Cuba the right to renew the trademark and by instructing the US federal courts not to recognise Cuba's claims to rights in the Havana Club mark, nullity was achieved and Cuba was eventually denied assignment of the trademark to the Cuba-Pernod joint venture (HCH).¹³² The Cuban-French joint venture challenged this in the US courts. The joint venture sought to enjoin Bacardi from using the trade name and trademark "Havana Club" in connection with the marketing and sale of rum in the US. This was rejected by US courts and even the US Supreme Court denied a writ for appeal. The European Union stepped into the matter and initiated a dispute at the WTO.¹³³ The argument was that the US was acting inconsistently with its obligations under the trademark obligations of the TRIPS Agreement and the incorporated rules of the Paris Convention.¹³⁴ It also argued that US's measures were inconsistent with Articles 3 and 4 of the TRIPS Agreement.

¹³⁰ Abbott and Cottier *Dispute Prevention and Dispute Settlement in the Field of Intellectual Property Rights and Electronic Commerce: US – Section 211 Omnibus Appropriations Act 1998 ('Havana Club')* in: Petersmann and Pollack (eds) *Transatlantic Economic Disputes: The EU, the US and the WTO* (2003).

¹³¹ Ibid.

¹³² Ibid.

¹³³ This was set for resolution in the *US – Havana Club* case.

¹³⁴ The EC relied heavily on Article 6 *quinquies* of the Paris Convention which embodies the "*tellesquelles*" (as is) rule. Basically, the rule's purpose was to prevent trademark authorities from demanding that changes be made to the form or appearance of marks to conform with national preferences, and thereby allow for the use of marks on a uniform basis throughout the Paris Convention system. The rule provides that the trademark registration authorities of a party must accept for registration a mark in the same form it has been previously registered in the

After examining the measures in question the decision of the Panel was that sections 211(a) (2) and 211 (b) of the US legislation were not inconsistent with both Articles 3 and 4 of the TRIPS Agreement.¹³⁵ In fact the Panel was of the view that the differences in the manner in which the legislation sought to treat US nationals and foreign nationals did not support the conclusion that US nationals would receive preferential treatment as the possibility of this was extremely remote since an affirmative administrative action would be required from US authorities for such an action to be taken. On appeal¹³⁶ the EC argued that the Panel erred in finding that these sections are not inconsistent with Articles 3 and 4 of the TRIPS Agreement.¹³⁷ The AB took the view that the national treatment obligation of the Paris Convention extended back to the 1880's and that the parties to the dispute before it would be subject to the national treatment rule of the Paris Convention even if they were not parties to the TRIPS Agreement.¹³⁸ According to the AB, the decision to include the national treatment provision in the TRIPS Agreement indicated the purpose and the fundamental significance of the application of the national treatment obligation.¹³⁹

In considering whether the EC made a compelling case in its appeal arguments, the AB agreed with the Panel's views on the differential treatment that the challenged measures gave which caused less favourable treatment, and in the process denied effective equality of opportunities to non-US nationals.¹⁴⁰ The AB also approved the way the Panel interpreted the discretionary authority conferred on the executive branch.¹⁴¹ The problem according to the AB was that this is where the Panel stopped; it did not continue on to address the EC's arguments about the

trademark holder's country of origin. Article 2.1 of the TRIPS Agreement provides that the interpretation of the Paris Convention should be treated as the interpretation of the TRIPS Agreement since the Convention in fact forms part of the agreement. See World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 322 - 323. See also Abbott *WTO Dispute Settlement Practice Relating to the Agreement on Trade-Related Intellectual Property Rights* in: Ortino and Petersmann (eds) *The WTO Dispute Settlement System 1995 – 2003* (2004) 434.

¹³⁵ Panel Report in *US – Havana Club* paras 8.140 and 9.1 and its Appellate Body Report, paras 10(g), (h), (m) and (n).

¹³⁶ Appellate Body Report in *US – Havana Club*, para 12.

¹³⁷ Appellate Body Report in *US – Havana Club*, paras 41 – 52.

¹³⁸ Appellate Body Report in *US – Havana Club*, paras 235 – 237.

¹³⁹ Appellate Body Report in *US – Havana Club*, para 240.

¹⁴⁰ Appellate Body Report in *US – Havana Club*, from para 258.

¹⁴¹ Appellate Body Report in *US – Havana Club*, from para 259.

extra hurdle that the measures presented.¹⁴² In considering this point, the AB made reference to the *US – Section 337*¹⁴³ dispute, and agreed with the GATT Panel when it stated that “even though the possibility for a certain type of discrimination to take place under a legislative arrangement may be small, the fact that the possibility was present constituted sufficient discrimination to present a national treatment inconsistency”.¹⁴⁴

Therefore, the AB in *US – Havana Club* was of the view that even though the likelihood of having to overcome the hurdles of both section 515.201 of Title 31CFR and section 211 (a) (2) may be small, the very possibility that non-US successors-in-interest face two hurdles is inherently less favourable than the undisputed fact that US successors-in-interest only face one.¹⁴⁵ The fact that the possibility was present constituted *prima facie* sufficient discrimination to present a national treatment inconsistency.¹⁴⁶ The fact that US citizens had to overcome one hurdle while foreigners needed to overcome two is inherently less favourable.¹⁴⁷ Sections 211(a) (2) and 211 (b) were therefore found to be inconsistent with Article 2(1) of the Paris Convention¹⁴⁸ and Article 3.1 of TRIPS, and consequently inconsistent with the US’s obligations.¹⁴⁹ However, Section 211(b) of the Act in question was found not to be inconsistent with the national treatment obligation by the AB as it applied to all nationals irrespective of origin.¹⁵⁰ The AB also found section 211(a) (2) and (b) to be discriminatory on their face if considered from the perspective of designated nationals as defined in section 515.305 of Title

¹⁴² Appellate Body Report in *US – Havana Club*, from para 260.

¹⁴³ Panel Report on *United States – Section 337 of the Tariff Act of 1930 (US – Section 337)*, adopted 7 November 1989, BISD 36S/345.

¹⁴⁴ Appellate Body Report in *US – Havana Club*, from para 261 – 265.

¹⁴⁵ Appellate Body Report in *US – Havana Club*, paras 242 and 265.

¹⁴⁶ Appellate Body Report in *US – Havana Club*, paras 263 - 264. However, in the *US – Section 337* case the circumstances under which the decision was made are said to have been different from the *US – Havana Club* dispute.

¹⁴⁷ Appellate Body Report in *US – Havana Club*, para 265.

¹⁴⁸ The Paris Convention (1967).

¹⁴⁹ Appellate Body Report in *US – Havana Club*, para 268 – 269 and 280 – 281. See also para 296.

¹⁵⁰ Appellate Body Report in *US – Havana Club*, from para 270 - 272.

31CFR.¹⁵¹ Since the section does not include US nationals in the definition, it is inherently discriminatory. Thus the sections in question are discriminatory on their face.¹⁵²

With respect to Article 4 of the TRIPS, the Panel found that the challenged measures were not inconsistent with this provision for the reason that the challenged provisions did not refuse to give any advantage, favour, privilege or immunity to Cuban nationals that they accord to other foreign nationals.¹⁵³ On appeal the EC's arguments were based on similar arguments as those of Article 3 of the TRIPS Agreement which were premised on the fact that the EC believed that the Panel erred in finding that the challenged sections are not inconsistent with Articles 3 and 4 of the TRIPS Agreement.¹⁵⁴ The AB ruled that the US's sections 211 (a) (2) and 211 (b) provided formally different treatment on their face in respect of nationals from Cuba who are original owners and non-Cuban foreign nationals who are original owners.¹⁵⁵ Accordingly sections 211 (a) (2) and 211 (b) were *prima facie* inconsistent with the MFN obligation.¹⁵⁶ With regard to trade names the AB reversed the Panel's decision and ruled that the TRIPS Agreement covers the Paris Convention as well. In this regard section 211(a) (2) was found to have violated Article 3.1 and Article 2.1 of the TRIPS Agreement in conjunction with Article 2(1) of the Paris Convention since it imposes additional burdens on successors-in-interest to trade names compared to US nationals who are successors-in-interest. The AB also ruled section 211(a) (2) and (b) violated the MFN provision with regard to the treatment of original owners.

¹⁵¹ This section defines a designated national as "Cuba and any national thereof including any person who is a specially designated national".

¹⁵² Appellate Body Report in *US – Havana Club*, from para 280 - 281.

¹⁵³ Panel Report in *US – Havana Club*, paras 8.148 and 301. There is no MFN provision in the Paris Convention (1967), para 297.

¹⁵⁴ Appellate Body Report in *US – Havana Club*, from para 305.

¹⁵⁵ Appellate Body Report in *US – Havana Club*, para 306 – 309.

¹⁵⁶ Appellate Body Report in *US – Havana Club*, para 308 – 309.

4 3 *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*¹⁵⁷

The factual issues in this dispute involved the EC Council Resolution (EEC) No.2081/92 of 14 July 1992, provisions of which the EC applied as requirements¹⁵⁸ on the protection of geographical indications (GI) and designations of origin for agricultural products and foodstuffs.¹⁵⁹ In this regard the US requested the Panel to find that the measures in issue are inconsistent with the EC's obligations under: (i) Articles I.1, 3.1, 4, 16.1, 22.2, 41.1, 41.2, 41.4, 42, 44.1, and 65.1 of the TRIPS and, through its incorporation by Article 2.1 of the TRIPS, Article 2 of the Paris Convention (1967); and (ii) Articles I:1 and III:4 of GATT 1994.¹⁶⁰ The discussion here will only address the TRIPS challenged measures relating to Articles 3.1 and 4.

The US requested the Panel to find that the EC's Articles 12a and 12b of the Council Regulations were inconsistent with Articles 3.1 and 4 of the TRIPS Agreement.¹⁶¹ The US and Australia each brought claims alleging that the EC's system of protecting geographical indications discriminated against foreign applicants for protection.¹⁶² The EC's view was that its regulations did not apply to geographical areas located in WTO Members. It argued that the fact that its regulations were qualified by reference to international obligations assured WTO

¹⁵⁷ Panel Report in *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs* ("EC – Trademarks and Geographical Indications"), WT/DS174/R, WT/DS290/R, 15 March 2005 adopted 20 April 2005. See The WTO "Dispute Settlement: Dispute DS290 – European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs" http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds290_e.htm (accessed 01-12-2010). In this dispute the US held the last consultations with the EC on 27 May 2003, wherein no resolution was reached, para 1.2. The DSB on 2 October 2003 established a Panel and on 23 February 2004 the Director-General composed a Panel, para 1.4 – 1.5. Argentina, Australia (in respect of the US' complaint), Brazil, Canada, China, Colombia, Guatemala, India, Mexico, New Zealand, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu ("Chinese Taipei"), Turkey and the US (in respect of Australia's complaint) reserved their rights to participate in the Panel proceedings as third parties, para 1.6.

¹⁵⁸ See US arguments in Panel Report in *EC – Trademarks and Geographical Indications*, para 7.39.

¹⁵⁹ Panel Report in *EC – Trademarks and Geographical Indications*, para 2.1.

¹⁶⁰ Panel Report in *EC – Trademarks and Geographical Indications*, para 3.1.

¹⁶¹ Panel Report in *EC – Trademarks and Geographical Indications*, para 3.1.

¹⁶² The EC's Articles 12a and 12b of the Regulations required as a condition for granting protection that the home country of the foreign applicant maintain a system of GIs protection equivalent to that of the EC. This was called the "material reciprocity" requirement. See Panel Report in *EC – Trademarks and Geographical Indications*, from paras 7.38 -7.40.

consistency.¹⁶³ The EC further argued that the regulations applied to GI located in third countries which were not WTO Members.¹⁶⁴

With regard to Article 3 the US's argument was that Article 12(1) of the Council Regulation was inconsistent because it imposed conditions of reciprocity and equivalence on the availability of protection.¹⁶⁵ She argued further that the Article accords neither same protection nor no less favourable treatment to non-EC nationals because they are unable to register their home-based GI. Such registration may take place only if the foreign national's country grants reciprocal GI protection for agricultural products and foodstuffs from the EC and adopts an equivalent system of GI protection.¹⁶⁶ This was essentially a denial of effective equality of opportunities with respect to the protection of GI.¹⁶⁷ The US's view was that the jurisprudence on Article III:4 of the GATT 1994 offers useful guidance in the interpretation of Article 3 of the TRIPS Agreement. The broad and fundamental purpose of Article III which seeks to avoid protectionism could be extrapolated to the interpretation of the TRIPS Agreement since its national treatment obligation also seeks to avoid protectionism.¹⁶⁸

The EC argued that the conditions prescribed in Article 12(1) of the Council Regulation did not depend on nationality.¹⁶⁹ She argued that the fact that different procedures applied according to the location of GI is not sufficient to show less favourable treatment, but that there should

¹⁶³ Panel Report in *EC – Trademarks and Geographical Indications*, para. 7.41.

¹⁶⁴ Panel Report in *EC – Trademarks and Geographical Indications*, from paras 7.44 – 7.51. Third parties were of the belief that the application of the EC's regulations could have been explicitly stated as not applicable to GI located within WTO Member countries. The Panel had therefore to determine whether the conditions set out in Article 12(1) apply to the availability of protection for GI located in WTO Members, that is, whether the registration procedure in Articles 12a and 12b is available for GI located in WTO Members that do not satisfy the conditions in Article 12(1). See Panel Report in *EC – Trademarks and Geographical Indications*, para. 7.60.

¹⁶⁵ Panel Report in *EC – Trademarks and Geographical Indications*, para 7.104.

¹⁶⁶ US also argued the Regulation applies to nationals because EC nationals are permitted to register their home-based EC GIs but US nationals and nationals of other WTO Members are not able to register their home-based GI. See Panel Report in *EC – Trademarks and Geographical Indications*, para 7.105.

¹⁶⁷ The explicit purpose of the Regulation is to bestow significant commercial and competitive advantages through the registration of GI, including higher profits, the right to use a label, rights to prevent uses by third parties, enforcement and guarantees against the GI becoming generic. See *EC – Trademarks and Geographical Indications*, para 7.106.

¹⁶⁸ Panel Report in *EC – Trademarks and Geographical Indications*, para 7.107.

¹⁶⁹ Panel Report in *EC – Trademarks and Geographical Indications*, para 7.112.

be a substantive difference between the provisions which entail less favourable treatment.¹⁷⁰ A measure would therefore have to modify the conditions regarding the protection of intellectual property rights within the meaning of the TRIPS Agreement to the detriment of foreign nationals.¹⁷¹ The EC also argued against the use of GATT Article III jurisprudence.¹⁷²

The Panel in considering Article 3 of the TRIPS Agreement ruled that in order to prove that this obligation has been infringed two elements must be satisfied:

- (i) the measure at issue must apply with regard to the protection of intellectual property; and
- (ii) the nationals of other Members must be accorded less favourable treatment than the Member's own nationals.¹⁷³

The Panel took note of footnote 3 in the TRIPS Agreement which specifies the definition of the term "protection" as used in Articles 3 and 4.¹⁷⁴ Thereafter, the Panel ruled that the Council Regulation in issue formed part of the categories of intellectual property within the meaning of Article 1.2 of the TRIPS Agreement.¹⁷⁵ This brings the claim in question within the scope of Article 3 of the TRIPS Agreement.¹⁷⁶ In interpreting the second element the Panel ruled that the Article 3.1 obligation in the TRIPS Agreement encompasses the national treatment obligation as it has applied before, but that Article 3.1 applies to nationals, not products. The Article refers not to advantages or rights that laws grant and does not refer to likeness. This combination of

¹⁷⁰ Panel Report in *EC – Trademarks and Geographical Indications*, para 7.113.

¹⁷¹ Panel Report in *EC – Trademarks and Geographical Indications*, para 7.113.

¹⁷² Its reasoning being that the provisions of the Article were not relevant to the present dispute because of differences between paragraphs 2 and 4 of Article III and between Article III and Article 3.1 of the TRIPS Agreement. There is no general concept of discrimination common to all WTO Agreements. There has never been a *de facto* application of Article 3.1 and the concept of conditions of competition is not easily transposable to the TRIPS Agreement. See Panel Report in *EC – Trademarks and Geographical Indications*, paras 7.113 - 7.114. The arguments by the third parties are essentially similar to those advanced by the US, see from paras 7.115 – 7.122.

¹⁷³ Panel Report in *EC – Trademarks and Geographical Indications*, para 7.125.

¹⁷⁴ "For the purposes of Articles 3 and 4, "protection" shall include matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as those matters affecting the use of intellectual property rights specifically addressed in this Agreement". See Panel Report in *EC – Trademarks and Geographical Indications*, para 7.126.

¹⁷⁵ Panel Report in *EC – Trademarks and Geographical Indications*, para 7.128.

¹⁷⁶ Panel Report in *EC – Trademarks and Geographical Indications*, para 7.129.

elements is also reflected in the TRIPS Agreement's Preamble.¹⁷⁷ The term "treatment no less favourable" in the TRIPS is very broad. In interpreting this term the Panel referred, with approval, to the *US – Section 211 Appropriations Act* dispute, which adopted the interpretation developed in the *US – Section 337* case in terms of Article III:4 of the GATT 1947. That interpretation read:

"the words "treatment no less favourable" in paragraph 4 call for effective equality of opportunities for imported products in respect of the application of laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products. This clearly sets a minimum permissible standard as a basis".¹⁷⁸

The Panel further stated that the present dispute must be resolved based upon the fundamental thrust and effect of the measure as well as careful analysis of the contested measure and of its implications in the marketplace.¹⁷⁹ With regard to the TRIPS Agreement however, what is relevant are the practical implications concerned with opportunities regarding the protection of intellectual property.¹⁸⁰

With regard to whether the conditions of EC equivalence and reciprocity in Article 12(1) of the Council Regulation modify the conditions for competition, the Panel ruled that they do in two ways. Firstly, the GI protection is not available under the Regulation in respect of geographical areas located in third countries which the European Commission has not recognised.¹⁸¹ Secondly, GI protection under the Regulation may become available if the third country in which the GI is located enters into an international agreement or satisfies the conditions in Article 12(1). Both of these requirements require an extra hurdle in obtaining GI protection

¹⁷⁷ Panel Report in *EC – Trademarks and Geographical Indications*, para 7.131.

¹⁷⁸ Panel Report in *EC – Trademarks and Geographical Indications*, para 7.133. The Panel also said that the no less favourable treatment standard under other agreements may be relevant in interpreting Article 3.1 of the TRIPS Agreement, taking into account its context in each agreement including, any differences arising from its application to like products or like services and services suppliers, rather than nationals. See Panel Report in *EC – Trademarks and Geographical Indications*, para 7.135.

¹⁷⁹ At the same time, however, the examination need not be based on the actual effects of the contested measure in the marketplace. See Panel Report in *EC – Trademarks and Geographical Indications*, para 7.136.

¹⁸⁰ Panel Report in *EC – Trademarks and Geographical Indications*, para 7.137.

¹⁸¹ Panel Report in *EC – Trademarks and Geographical Indications*, para 7.139.

that does not apply to geographical areas located in the EC.¹⁸² Therefore, the equivalence and reciprocity conditions modify the effective equality of opportunities with respect to the availability of protection to persons who wish to obtain GI protection under the Regulation, to the detriment of those who wish to obtain protection in respect of geographical areas located in third countries, including WTO Members. The Panel concluded that this is less favourable treatment.¹⁸³

The Panel made reference to the fact that it also consulted supplementary means of interpretation, for example the Regulations' draft text in order to confirm the meaning resulting from the application of the general rule of treaty interpretation which must not leave the meaning ambiguous or obscure or lead to a result which is manifestly absurd or unreasonable.¹⁸⁴ The Panel continued on to state that it would not adopt an approach in treaty interpretation that produced a result that might further the object and purpose of the Agreement, but which is not supported by the ordinary meaning to be given to its terms in their context.¹⁸⁵ In this regard the EC invoked the TRIPS exceptions embodied in Article 17 of the TRIPS Agreement.¹⁸⁶ The consideration of the application of the measures by the Panel was "as such", and not as applied. In other words what it needs to consider is the potential impact

¹⁸² Panel Report in *EC – Trademarks and Geographical Indications*, para 7.139.

¹⁸³ Panel Report in *EC – Trademarks and Geographical Indications*, para 7.140. The Panel also made reference to the fact that nationals that are relevant to an examination under Article 3.1 of the TRIPS Agreement should be those who seek opportunities with respect to the same type of intellectual property in comparable situations. This basically excludes comparison opportunities for nationals with respect to different categories of intellectual property, such as GI and copyright. See Panel Report in *EC – Trademarks and Geographical Indications*, para 7.181. The purpose of the TRIPS Agreement depends on the obligation in Article 1.3 to accord the treatment provided for in the Agreement to the nationals of other Members, including national treatment under Article 3.1. That object would be undermined if a Member could avoid its obligations by simply according treatment to its own nationals on the basis of close substitute criteria, such as place of production, or establishment, and denying treatment to the nationals of other WTO Members who produce or are established in their own countries. See Panel Report in *EC – Trademarks and Geographical Indications*, para 7.199. Article 3.1 also calls for a comparison of the effective equality of opportunities for groups of nationals of other Members who may wish to seek GI protection under the Regulation and groups of the EC's own nationals who wish to seek GI protection under the Regulation. See Panel Report in *EC – Trademarks and Geographical Indications*, para 7.200.

¹⁸⁴ Panel Report in *EC – Trademarks and Geographical Indications*, para 7.624.

¹⁸⁵ Panel Report in *EC – Trademarks and Geographical Indications*, para 7.624.

¹⁸⁶ Panel Report in *EC – Trademarks and Geographical Indications*, para 7.640.

rather than the actual effects.¹⁸⁷ After considering all the evidence the Panel ruled in favour of the EC in terms of Article 17 of the TRIPS Agreement.¹⁸⁸

On Article 4 of the TRIPS Agreement, the US claimed that the Council Regulation was inconsistent with the MFN obligation embodied in that Article and the Paris Convention because the Regulation imposes conditions of reciprocity and equivalence on the availability of protection for geographical indications. The US cited the case of *Belgium – Family Allowances* in which entitlements to an advantage for imported goods made conditional upon the system of family allowances in the exporting Member were found to be inconsistent with the MFN obligation in GATT.¹⁸⁹ The US claimed that the Regulation did not immediately and unconditionally accord the same advantages with respect to availability of protection that it accords to EC nationals. Rather, nationals of WTO Members that satisfy those conditions are accorded more favourable treatment than nationals of WTO Members that do not. The conditions are placed on third party governments, but deny rights to third party nationals.¹⁹⁰ The US challenged the Council Regulation “as such”. The terms of the Regulation prevent the European Commission from determining that all WTO Members satisfy the conditions in Article 12(1). The Regulation cannot be administered in such a way that it will treat nationals of all WTO Members as favourably as each other and as favourably as EC nationals.¹⁹¹

The EC’s argument was similar to that advanced under Article 3 of the TRIPS Agreement on the national treatment obligation.¹⁹² The EC further argued that in the absence of a decision under Article 12(3) of the Regulation, Article 12 does not confer any advantage on a third country. It contended that in GATT Panel reports, i.e. both the *Belgium – Family Allowances* and the *EEC –*

¹⁸⁷ Panel Report in *EC – Trademarks and Geographical Indications*, para 7.644.

¹⁸⁸ Panel Report in *EC – Trademarks and Geographical Indications*, para 7.687 – 7.688. However, the Panel indicated that the limited exception would not extend to linguistic versions of GI that were not specifically registered.

¹⁸⁹ Panel Report in *EC – Trademarks and Geographical Indications*, para 7.689.

¹⁹⁰ Panel Report in *EC – Trademarks and Geographical Indications*, para 7.689. The US also drew attention to the EC and Switzerland joint declaration for the mutual protection of GI to be incorporated in a bilateral agreement.

¹⁹¹ Panel Report in *EC – Trademarks and Geographical Indications*, para. 7.690. Third parties argued that the Regulation was inconsistent with the MFN treatment obligation in Article 4 of the TRIPS Agreement. See *EC – Trademarks and Geographical Indications*, paras 7.695 – 7.696.

¹⁹² Panel Report in *EC – Trademarks and Geographical Indications*, para 7.691. See also in paras 7.52 – 7.103 for a similar argument.

Imports of Beef from Canada disputes, violations were found after the respondents had actually granted advantages to certain third countries.¹⁹³

The Panel ruled that in order for Article 4 of the TRIPS Agreement¹⁹⁴ to be satisfied two elements must be present: (i) the measure at issue must apply with regard to the protection of intellectual property; and (ii) the nationals of other Members are not “immediately and unconditionally” accorded any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country.¹⁹⁵

With regard to the first element of protection of intellectual property Article 4 applies as the Panel decided with respect to Article 3 based on footnote 3¹⁹⁶ and Article 1.2 of the TRIPS Agreement. This connects the claim in question to the protection of intellectual property within the scope of Article 4 of the TRIPS Agreement.¹⁹⁷

With regard to the second element of any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country, the Panel, remembering that the US had made a *prima facie* case against the challenged measures, found that GI protection was not available under the Council Regulation in respect of geographical areas located in third countries which the Commission has not recognised under Article 12(3), even though the GI protection may

¹⁹³ Panel Report in *EC – Trademarks and Geographical Indications*, para 7.693.

¹⁹⁴ Article 4 of the TRIPS reads: “With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members”.

¹⁹⁵ Panel Report in *EC – Trademarks and Geographical Indications*, para 7.698

¹⁹⁶ Footnote 3 reads: “For the purposes of Articles 3 and 4, “protection” shall include matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as those matters affecting the use of intellectual property rights specifically addressed in this Agreement”. See Panel Report in *EC – Trademarks and Geographical Indications*, para 7.126. In the Article 3 context the Panel ruled that intellectual property is defined in Article 1.2 as referring to all categories of intellectual property that are the subject of Sections 1 through to 7 of Part II. See Panel Report in *EC – Trademarks and Geographical Indications*, para 7.127. Therefore, the Panel ruled that the Regulations in issue formed part of the categories of intellectual property within the meaning of Article 1.2 of the TRIPS Agreement. See Panel Report in *EC – Trademarks and Geographical Indications*, para 7.128.

¹⁹⁷ See Panel Report in *EC – Trademarks and Geographical Indications*, paras 7.699 – 7.701. The MFN treatment obligation also applies to the protection of intellectual property, even where measures provide a higher level of protection. MFN treatment under the TRIPS Agreement generally only has an independent application where a Member grants to the nationals of any other country a level of protection that is higher than it grants to its own nationals and higher than the minimum standards laid down in the TRIPS Agreement. See Panel Report in *EC – Trademarks and Geographical Indications*, para 7.702.

become available if the third country in which the GI is located enters into an international agreement or satisfies the conditions in Article 12(1).¹⁹⁸ The Panel ruled that this constitutes an “advantage, favour, privilege or immunity” granted by the EC with regard to the protection of intellectual property. It was subject to satisfaction of the equivalence and reciprocity conditions, or the conclusion of an international agreement, or both which indicates that it is not accorded “immediately and unconditionally”.¹⁹⁹ The Panel further ruled that the advantage, favour, privilege or immunity must be granted by a Member “to the nationals of any other country”.²⁰⁰

5 CONCLUSION: LESSONS FROM THE CASE LAW

The conclusion of the discussion undertaken in this chapter is expressed in the form of lessons from the recent case law which were the subject of the discussion. The lessons here are three-fold. First, although the dispute settlement bodies are not obliged to follow a particular precedent, the cases discussed here show that the AB is taking that direction. The interpretation of terms such as “like product” and “no less favourable treatment” and “immediately and unconditionally” confirms this especially when these are applied in order to ensure the existence of a competitive relationship between the contracting parties. The consistency of the adjudicating body decisions is commendable since the application of one precedent directly speaks to predictability and certainty in the application of law at the multilateral level. Whether that law is favourable or not to the interests of developing countries *vis-à-vis* those of developed countries is another matter. This consistency will assist Member countries with regard to their arguments when certain measures are challenged at the WTO. This consistency will also help developing countries in making their arguments in negotiations for change since consistency professes less controversy, thereby promoting mutual respect. The

¹⁹⁸ Panel Report in *EC – Trademarks and Geographical Indications*, para 7.703.

¹⁹⁹ Panel Report in *EC – Trademarks and Geographical Indications*, para 7.704.

²⁰⁰ Panel Report in *EC – Trademarks and Geographical Indications*, para 7.705.

consistency will also assist with the scheduling of commitments by Member countries, especially the developing countries, considering their lack of technical capacity.²⁰¹

Secondly, another observed consistency is that where developing countries have not inscribed a developing condition in their commitment schedules, the adjudicating bodies refuse to rule in their favour. For example, section 5(g) of the GATS Annex on Telecommunications allows developing countries to schedule limitations based on the objectives recognised in section 5(g), thereby allowing them to filter in a developmental argument. This arose in *Mexico – Telecoms*.²⁰² However, these developmental arguments are always measured against limitations that the WTO Agreements contain.²⁰³

Thirdly, the interpretation of these concepts²⁰⁴ reveals that the adjudicating bodies do take into account the circumstances surrounding the introduction of a measure under scrutiny.²⁰⁵ But the case law seems, as a final analysis, to consider only the objective criteria in the interpretation of those measures and their surrounding circumstances. In other words the case law seems to require strict application of the text contained in the provisions of the agreements. That is, parties must strictly adhere to what the text of the agreement says and not rely on text that the agreement does not contain. According to the case law the adjudicating bodies seem to consider only in limited circumstances that which is contained in the Preamble of the agreements under scrutiny, for example they do so if it is prayed by a party. It is submitted that this is surprising since the Preamble seems to contain all that the parties to the agreement intended to achieve, irrespective of whether or not that has been transposed into Articled provisions within the agreement. The adjudicating bodies should seek solace from the

²⁰¹ See also discussion in Abbott *WTO Dispute Settlement Practice Related to the Agreement on Trade-Related Intellectual Property Rights* in: Ortino and Petersmann *The WTO Dispute Settlement System 1995 – 2003* (2004) 437.

²⁰² Panel Report in *Mexico – Telecoms*, para 7.388.

²⁰³ For example this was the case in the Indonesian dispute when Indonesia invoked the development condition.

²⁰⁴ The concepts of “like product”, “no less favourable treatment” and “immediately and unconditionally”.

²⁰⁵ For example in Panel Report in *Mexico – Telecoms*, para 7.118 the Panel considered the contextual elements of the measure that was in question. The case also considered the object and purpose of the Agreement upon which the measures challenged were based. See para 7.121. The case even considered the supplementary means of interpretation. See para 7.122.

Preamble without having to require a particular provision within the agreements to explicitly state that which is prayed by a Member country.

It is encouraging that the *China – Measures Affecting Trading Rights and Distribution Services for Certain Publishers and Audiovisual Entertainment Products* case approached its interpretative duties by also constructing sub-headings for terms such as “ordinary meaning”, “context” and “object and purpose”.²⁰⁶ In fact the case even made reference to the Preamble and found that it had interpreted China’s commitments as reflected in the Preamble of GATS.²⁰⁷

²⁰⁶ Panel Report in *China – Measures Affecting Trading Rights and Distribution Services for Certain Publishers and Audiovisual Entertainment Products*, paras 7.1172, 7.1182, 7.1323, 7.1338, 7.1348

²⁰⁷ Panel Report in *China – Measures Affecting Trading Rights and Distribution Services for Certain Publishers and Audiovisual Entertainment Products*, para 7.1348.

CHAPTER 6

INTERPRETATION OF NON-DISCRIMINATION UNDER THE GATS AND TRIPS: NEUTRAL OR PRO-DEVELOPMENT

1 INTRODUCTION

The three preceding chapters have set out the principles that the WTO adjudicating bodies take into account in the application and/or interpretation of the MFN and the national treatment obligations. Those chapters have also set out a detailed account of what the adjudicating bodies consider to be relevant to ensure that allegations of violations are satisfactorily proven. In this chapter effort will be made to determine whether those principles that the WTO adjudicating bodies have set as being requirements for compliance with the non-discrimination obligation bear any fundamental enabling considerations for developmental purposes. The intention here is to provide a broader view from a developmental perspective seeing that the WTO tribunals applying/interpreting a specific agreement have no obligation to take into account the jurisprudential developments and precedents from other fields of international law or even from previous GATT/WTO decisions applying/interpreting the same provision.¹

2 FACTORING CONTEXT INTO THE INTERPRETATION OF THE GATS AND TRIPS AGREEMENTS

The WTO Panels and the AB seem to be weary of engaging in judicial activism lest they end up in law creation rather than simply applying it. But what is not clear is why the Panels and the AB are rigid in applying the objective standard approach and seem unwilling to consider other approaches or even consider applying that approach in conjunction with other approaches. Diebold opines that the adjudicating bodies prefer to use the combination of economic and objective standards in defining like products, instead of economic and subjective standards that are used where like circumstances prevail which would allow for a differentiation between

¹ The non-observance of precedent obviously contributes towards inconsistency and uncertainty in the multilateral sphere. See Diebold "Non-Discrimination and the Pillars of International Economic Law: Comparative Analysis and Building Coherency" http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1632927 (accessed 01-09-2010). Reference in this regard can be made to the decision in the *US – Havana Club* case which took a different view compared to the Appellate Body Report in *United States – Anti-dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000.

competing investors or service providers in order to pursue a legitimate domestic policy objective.² This basically creates an impression that the developmental aspect found in the various WTO Agreements is given less attention because, even if it is argued, as was done in the *Indonesia* dispute, the adjudicating bodies require that the provisions upon which the developmental argument is based not be read in contravention with the non-discrimination provisions. In effect the implication is that as long as there is no provision that explicitly authorises the adjudicating bodies, within the WTO Agreements' non-discrimination regulatory framework to consider the developmental aspect of a regulatory measure, the Panels and, especially, the AB will continue to interpret the non-discrimination obligations in accordance with the text as explicitly reflected in the WTO Agreements and within the limitations elaborated in the agreements.

Ortino's view seems to be consistent with the approach that the Panels and the AB have adopted.³ For example, he opines that the requirement of "treatment no less favourable" does not, as a yardstick, take into account any rationale for the differential treatment, but only considers the effect of the measure.⁴ It is the disproportionate adverse impact on foreign products compared with treatment afforded to like domestic products that "matters most".⁵ Intention here does not represent a central element.⁶ In effect domestic policy considerations have no relevance, so long as they are not within the limitations set out in the GATS and the TRIPS Agreements.

It is submitted that the decisions of the adjudicating bodies, as well as Ortino's submission are flawed in that they ignore the fundamental structure upon which the WTO Agreements are built. They fail to adequately acknowledge the rationales behind the non-discrimination obligation. For example, Jackson puts it eloquently when he acknowledges the fact that the national treatment obligation is often a source of dispute among nations because it has

² Diebold "Non-Discrimination and the Pillars of International Economic Law: Comparative Analysis and Building Coherency".

³ Ortino "The Principle of non-discrimination and its exceptions in GATS: Selected legal issues" http://papers.ssrn.com/sol3/papers.cfm?abstract_id=979481&download=yes (accessed 11-09-2010).

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

reference to domestic regulation and tax measures that are intimately related to various government interventions that are based on legitimate policy reasons and are not necessarily designed for purposes of restraining imports.⁷ The Panels and the AB fail to realise this link between the provision of competitive conditions that are free of internal discrimination and the importance of facilitating development in developing countries.

Pertinent to this argument, it is submitted, is the fact that the WTO normative framework allows developing countries to invoke their development condition in certain circumstances as a justiciable issue consonant with their developmental aspirations. This fact and the fact that these countries are recognised as developing countries in the WTO regulatory framework suggests the importance attached to the different economic levels which Member countries are at. It also implicitly reflects an aspiration that developing countries' economic levels will be on par with those of developed countries in future. Accordingly, their neglect in the adjudicating bodies' interpretative rulings reflects a lack of commitment to the development of the economies of these countries. The seriousness of the neglect is exacerbated by the fact that developing countries are mostly respondents in dispute settlement matters rather than being complainants.⁸ The fact that the WTO Agreements under discussion also state that measures taken by Member countries should not be contrary to the provisions of the agreements negates even the development aspirations that the agreements contain. This clearly implies that developing countries' interests shall not be countenanced if the developed countries do not approve of the manner in which such interests are sought to be achieved.

From this point on one wonders whether developing countries' interests will ever be seriously accommodated in WTO law. This skepticism is reflected in the fact that, in order to protect any measures that the developing countries have introduced for development purposes, these countries have often invoked the development condition as their defence.⁹ But, the developed countries have often challenged the use by developing Member countries of the development

⁷ Jackson *The World Trading System: Law and Policy of International Economic Relations* (1997) 213.

⁸ Qureshi *Participation of Developing Countries in the WTO Dispute Settlement System* in: Ortino and Petersmann *The WTO Dispute Settlement System 1995 – 2003* (2004) 482.

⁹ Ibid.

condition as a basis for departure from common WTO obligations.¹⁰ In fact it has been a question of debate as to when exactly the development condition can be properly raised by a developing country in a dispute; whether it can be done when interpreting a particular measure and/or practice without express WTO guidance or reference to special and differential treatment.¹¹ It is submitted that this manner of interpreting the WTO non-discrimination provisions adds credence to the view that the WTO legal framework would seem to be taking into account only the interests of developed countries rather than accommodating all the contracting parties.

This can be seen for example in the fact that since 1987 in the *Japan – Alcoholic Beverages I* dispute, the WTO jurisprudence has focused on interpreting the non-discrimination obligation in the GATT and eventually in the GATS context¹² in accordance with the text of the agreements rather than by also examining the context in which a measure is introduced. The problem is that where these cases make reference to context it seems that the reference is to the context to which the text of the provisions refer rather than the context/outcomes that the whole agreement seeks to achieve as reflected in the agreement's Preamble. The Preamble of an international agreement/treaty should form the basis upon which the agreement's object and purpose stand to be achieved; also where there is lack of clarity in the text, assistance/guidance could be sought from such Preamble so as to give meaning to the context of the agreement rather than to a single provision within that agreement. The manner of interpretation adopted in the cases seems to suggest that the contextual/subjective approach has no relevance at the multilateral level.

¹⁰ Qureshi *Participation of Developing Countries in the WTO Dispute Settlement System* in: Ortino and Petersmann *The WTO Dispute Settlement System 1995 – 2003* (2004) 482 – 483.

¹¹ Ibid.

¹² The requirement of equal competitive conditions for imported products in relation to domestic products as well as the related expectations was also confirmed in the Panel Report in *Japan – Taxes on Alcoholic Beverages*, WT/DS8/R, WT/DS10, 11 July 1996 and its Appellate Body Report, WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R, 4 October 1996; Appellate Body Report in *Canada – Certain Measures Concerning Periodicals* WT/DS31/AB/R, 30 June 1997; Panel Report in *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, 2 July 1998; Appellate Body Report in *Korea – Taxes on Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R, 18 January 1999; and Appellate Body Report in *Chile – Taxes on Alcoholic Beverages*, WT/DS87/AB/R, WT/DS110/AB/R, 13 December 1999. But all these cases interpreted Article III:2 of the GATT.

The AB followed the textual approach in the first case concerning the TRIPS when it overruled the Panel's decision which was based on legitimate expectations in the *India – Mailbox* dispute¹³ and ruled that the text of the agreement was plain and as such India should have complied with its obligations. The AB emphasised the fact that India's textual obligation under the TRIPS was to provide a means to implement its mailbox obligations by providing a sound legal mechanism.¹⁴ The AB report in this case has been criticised by Gad as not considering the context of Article 30 of the TRIPS Agreement which was under scrutiny.¹⁵ The AB considered only the right-holders rights rather than also considering social factors.¹⁶

3 TEXTUAL VERSUS CONTEXTUAL INTERPRETATION

At this point it is important to provide a brief summary of how the terms textual and contextual interpretation/approach have been explained by Trebilcock and Giri from the GATT perspective.¹⁷ On the one hand the textual approach has three features:

“first, it defines likeness *a priori* in terms of one or a combination of product characteristics, its end-use and its tariff classification; second, it makes a distinction between “like” products and “directly competitive or substitutable” products in a manner faithful to the two sentences in Article III:2, and applies different standards of discrimination to the two cases; and third, it preserves a distinct role for Article XX and other exception provisions in that they could come into play (and only after) a measure is deemed to transgress Article III”.¹⁸

On the other hand the contextual approach is defined as having two features:

¹³ Appellate Body Report in *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* (“*India – Mailbox*”), WT/DS50/AB/R, 19 December 1997.

¹⁴ Appellate Body Report in *India – Mailbox*, para 14.169. In other words where the text is unambiguous, parties to the agreement should simply comply with their obligations without delay.

¹⁵ Gad *TRIPS Dispute Settlement and Developing Country Interests* in: Correa and Yusuf *Intellectual Property and International Trade: The TRIPS Agreement* (2008) 370 – 371.

¹⁶ Ibid.

¹⁷ Trebilcock and Giri “The National Treatment Principle in International Trade Law” <http://law.bepress.com/cgi/viewcontent.cgi?article=1007&context=alea> (accessed 14-07-2010).

¹⁸ Ibid.

“first it does not attempt to define likeness *a priori*, it simply allows any distinction to be made between products on regulatory grounds; and secondly, the standard for determining whether an infraction of Article III has occurred is to ensure that no protectionist intent underlies the distinction nor that any protectionist effect follows from it. In effect, it affords governments the freedom to define likeness, thereby permitting a larger set of measures to be deemed origin-neutral, and *prima facie*, consistent with Article III”.¹⁹

Article 31 of the Vienna Convention requires an interpretation in accordance with the ordinary meaning of the terms of the agreement, their context and their object and purpose.²⁰ If this produces a meaning that is ambiguous or obscure, or a result manifestly absurd or unreasonable, the supplementary means of interpretation could be used as provided in Article 32 of the Vienna Convention, including preparatory work and the circumstances of the treaty’s conclusion.²¹ The history of the use of Article 31 is confirmed by the *United States – Standards for Reformulated and Conventional Gasoline* case²² where the AB stated that this rule of interpretation had been relied upon by all participants in the case and that the rule has attained the status of a rule of customary or general international law, making it part of the rules of interpretation of public international law.²³ That, in seeking clarity it must be applied to the “general agreement” and the other “covered agreements” of the Marrakesh Agreement

¹⁹ Ibid.

²⁰ Article 5 of the Vienna Convention on the Law of Treaties (1969) states that the Convention applies to any treaty which is the constituent instrument of an international organisation and to any treaty adopted within in an international organization without prejudice to any relevant rules of the organization. See The Vienna Convention on the Law of Treaties (1969), Done at Vienna on 23 May 1969. Entered into force on 27 January 1980, United Nations Treaty Series, vol. 1155, p. 331. Available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf (accessed 20-07-2009). The Panel in *Mexico – Measures Affecting Telecommunications Services*, WT/DS204/R, 2 April 2004, para 7.3, referred to its duty as to give clarity the existing provisions of international agreements in accordance with customary rules of interpretation of public international law in order to preserve rights and obligations of Members under the covered agreements and to provide security and predictability to the multilateral trading system. See also para 7.16 on rules of interpretation.

²¹ See The Vienna Convention on the Law of Treaties (1969).

²² Appellate Body Report in *United States – Standards for Reformulated and Conventional Gasoline* (“US – Gasoline”), WT/DS2/AB/R, 29 April 1996, pp. 15 – 17. See also Panel Report in *European Communities and its Members States – Tariff Treatment of Certain Information Technology Products*, WT/DS375/R, WT/DS376/R, WT/DS377/R, 16 August 2010, para 7.65 – 7.67.

²³ Appellate Body Report in *US – Gasoline*, p. 17.

Establishing the World Trade Organisation.²⁴ The implication of this statement then is that the WTO Agreements form part of international law and their interpretation should be rendered as such. Consequently, a particular provision under scrutiny should not be read in isolation, but must be read within the broader framework and context of the other provisions contained in the agreement.²⁵

But, what does an interpretation in accordance with the “ordinary meaning of the terms” as stated in Article 31 of the Vienna Convention mean or involve? Gad suggests three possible ways by which the meaning could be sought so as to arrive at a comprehensive interpretation.²⁶ He suggests that an interpretation that seeks to find the ordinary meaning of the terms of an agreement should involve: (i) considerations of the text of the terms and their ordinary meaning; (ii) dealing with the terms’ context; and (iii) dealing with the object and purpose of the terms.²⁷ What is of most importance however is that the enquiry must ensure that these three manners of interpretation are viewed holistically rather than being applied in a hierarchical order as if they are a sequence of a separate text.²⁸ The interpretation of the terms of an agreement indivisibly was also approved by the Panel in *Mexico – Measures Affecting Telecommunications Services*.²⁹ In that case the Panel recognised the importance attached to giving meaning and effect to all the terms of an official document and not adopt an interpretation that would result in reducing any of the terms of such official document to redundancy.³⁰

Where a developing country is involved in a dispute the requirement for a Panel to reflect this in its rulings is found in the Dispute Settlement Understanding (DSU). Article 12.11 of the DSU states that:

²⁴ Appellate Body Report in *US – Gasoline*, p. 17.

²⁵ Appellate Body Report in *US – Gasoline*, p. 17.

²⁶ Gad *TRIPS Dispute Settlement and Developing Country Interests* in: Correa and Yusuf *Intellectual Property and International Trade: The TRIPS Agreement* (2008) 356.

²⁷ Ibid.

²⁸ Ibid.

²⁹ The Panel Report in *Mexico – Measures Affecting Telecommunications Services* (“Mexico – Telecoms”), WT/DS204/R, 2 April 2004, para 7.56.

³⁰ Panel Report in *Mexico – Telecoms*, para 7.56.

“Where one or more of the parties is a developing country Member, the panel’s report shall explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favourable treatment for developing country Members that form part of the covered agreements which have been raised by the developing country Member in the course of the dispute settlement procedures”.³¹

Furthermore, Article 24 of the DSU requires that:

“At all stages of the determination of the causes of a dispute and of dispute settlement procedures involving a least developed country Member, particular consideration shall be given to the special situation of least-developed country Members”.³²

In this regard it is also important to note Article 3.2 of the DSU. That Article requires that:

“the dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system; the Members recognise 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 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”.³³

The question that comes to the fore is whether an interpretation of the non-discrimination obligation should favour the interests of developed or of the developing countries in pursuit of their different goals or should it seek to hold the middle line. The simple answer to this question is: if the text of the agreement is constructed in language that promotes the advantage of one Member to the detriment of another, the contextual interpretation that the Panels and the AB adopt as directed by the text of the agreement is not the one that opens a

³¹ World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 364.

³² World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 373.

³³ World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 355.

gap/loophole. In fact an enquiry as to whether the interpretation of the non-discrimination obligation is developmental in character would seem to be misplaced. The better option would seem to be to direct the enquiry to and seek clarity on the text of the GATS and the TRIPS agreements rather than to their interpretation by Panels or the AB.

4 ANALYSIS OF THE DEVELOPMENTAL ASPECT IN THE INTERPRETATION OF WTO NON-DISCRIMINATION PROVISIONS

In seeking to ensure that the WTO adjudicating bodies consider their economic status in making their rulings, as well as in seeking the determination of the precise scope of the application/interpretation of, for example, their obligation to provide national treatment, developing countries have often argued for a consideration of their developmental condition as a justiciable issue.³⁴ This condition has been used by these countries as a shield when appearing as respondents. For example, in the *Indonesia – Certain Measures Affecting the Automobile Industry*³⁵ dispute, Indonesia argued against the fact that the burden of proof was higher in the case because Indonesia was a developing country, and as such the requirement of “like products” should be interpreted in relation to it being a developing country.³⁶

From a TRIPS perspective, the apprehensions and concerns regarding the TRIPS Agreement caused Member countries to adopt different interpretations of the agreement’s provisions; hence the Panels and the AB were expected to descend into the arena of interpretation to give

³⁴ Qureshi *Participation of Developing Countries in the WTO Dispute Settlement System* in: Ortino and Petersmann *The WTO Dispute Settlement System 1995 – 2003* (2004) 482.

³⁵ Panel Report in *Indonesia – Certain Measures Affecting the Automobile Industry* (“Indonesia – Autos”) WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, 2 July 1998. The issue in the case was about a series of measures maintained by Indonesia with respect to motor vehicles and parts and components thereof. See para 2.1. See also measures at issue from paras 2.3 – 2.43. See as well requests from complainants from paras 3.1 - 3.7.

³⁶ See also paras 5.129 and 14.169. Indonesia based its argument on the Agreement on Subsidies and Countervailing Measures (SCM Agreement) claiming that the agreement is a *lex specialis*. A *lex specialis* is defined as “the concept that a specific norm of conventional international law may prevail over a more general norm”. See para 5.129. Hence the challenged measures would fall out of the scope of the General Agreement. See para 5.130. Indonesia further argued that since the GATS contains no legal definition of subsidies, then the requirements on national treatment (which permit a scheduling of a limitation on the obligation) apply. This would not be so in the GATT Article III context, since there is a definition of a subsidy in the SCM Agreement, which in the main warrant exclusion of subsidies from application of the national treatment obligation in GATT. See para 5.129.

meaning to those provisions.³⁷ This was exacerbated by the fact that the TRIPS was seen as not portraying a uniform law, hence the view that it contained many gaps/loopholes and ambiguities which could result in frictions in interpretation.³⁸ There were also concerns that the Panels and the AB might be tempted to venture into law construction/judicial activism in order to concoct coherence where none existed.³⁹ The result of that would be the addition or diminishing of rights and obligations under the TRIPS Agreement.⁴⁰

The adoption of interpretations that are wide has dangers for developing countries. Even so, danger also exists from the narrow interpretation of exceptions which are meant to allow for more breathing space with regard to the policy interests of developing countries. Ironically, the developed countries are aware of the advantage of interpretative rulings by the Panels and the AB that will favour their interests as well.⁴¹ In fact this has been interpreted as a way of shaping rule-making by the developed countries over time.⁴² The importance of ensuring a fair interpretation that finds balance between safeguarding public policy issues and ensuring sustained development as well as maintaining the diplomatic process as a final arbiter of TRIPS interpretation is a matter that the developing countries have been keen to highlight.⁴³ An interpretation that does not address these issues would therefore seem a distance from serving development interests.⁴⁴

4 1 Determination of Measures covered by the Agreement⁴⁵

Under both the GATS and the TRIPS this concept is interpreted broadly. The standard is that any measure that affects services trade or intellectual property protection will be subject to the scrutiny of the MFN or the national treatment obligation. When interpreting this concept a

³⁷ Gad *TRIPS Dispute Settlement and Developing Country Interests* in: Correa and Yusuf *Intellectual Property and International Trade: The TRIPS Agreement* (2008) 353.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Gad *TRIPS Dispute Settlement and Developing Country Interests* in: Correa and Yusuf *Intellectual Property and International Trade: The TRIPS Agreement* (2008) 354.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ The analysis and comments here are based on the discussion in chapter 3 from pages 61 - 62.

functional interpretation based upon the legal effect in question and not on the formal term used by a government should be considered.⁴⁶ Zdouc has advocated for a contextual/subjective rather than the textual/objective interpretative approach so as to give meaning to what the WTO provision is meant to achieve.⁴⁷ This is so because the contextual/subjective approach considers all the surrounding circumstances around which the provision was developed. It is submitted that the broader the definition of measures covered by the agreements the more the agreements close the regulatory space that developing countries have. This may have adverse implications for developmental initiatives. In the *Mexico – Telecoms* case,⁴⁸ Mexico argued for a developmental consideration under section 5(g) of the Annex on Telecommunications. But the Panel ruled that Mexico did not include limitations based on this section in its schedule of commitments and could therefore not rely on it.⁴⁹

The South Centre believes that paragraph 4 of the GATS Preamble affords Member countries the right to introduce new regulations on services trade within their territories in order to meet national policy objectives.⁵⁰ Since the *Mexico – Telecoms* dispute⁵¹ was based upon the right to regulate and introduce new regulations on the supply of services within Mexico's territory the Panel should have considered this paragraph, especially given that universal access and infrastructure development are important national policy objectives. In the absence of such developmental considerations, the adopted interpretations would seem to be narrow.

4 2 Meaning of Like services and service suppliers⁵²

The interpretation of this concept in the MFN and national treatment perspective seems to advance the goal of preventing discrimination in like circumstances. It is submitted that in

⁴⁶ Zdouc *WTO Dispute Settlement Practice Relating to the General Agreement on Trade in Services* in: Ortino and Petersmann *The WTO Dispute Settlement System 1995 – 2003* (2004) 387.

⁴⁷ Ibid. See also chapter 3, page 61.

⁴⁸ See Panel Report in *Mexico – Telecoms*.

⁴⁹ See Panel Report in *Mexico – Telecoms*, paras 7.386 – 7.389. The Panel ruled that those measures describe the type of commitments that Members should make with respect to developing countries. That they did not provide an interpretation of commitments already made by those developing country Members, see para 7.214.

⁵⁰ South Centre "GATS Dispute Settlement Cases: Practical Implications for Developing Countries".

⁵¹ See Panel Report in *Mexico – Telecoms*, paras 7.386 – 7.389. The Panel ruled that those measures describe the type of commitments that Members should make with respect to developing countries. That they did not provide an interpretation of commitments already made by those developing country Members, see para 7.214.

⁵² See discussion in this regard in chapter 3 pages 65 – 67 and chapter 4 pages 102 – 103.

principle there is no problem with the concept *per se*. The problem arises if the concept is interpreted/applied rigidly. The fact that the concept of “like product” not only varies depending on the GATT provision in which it is mentioned, but according to the context and circumstances in which it is used and referred to suggests that it is possible to consider a developmental condition from a contextual/subjective approach when interpreting this principle for purposes of facilitating development. This means that within that objective of preventing discrimination in like circumstances a developmental goal may be considered. It is submitted that since it is inevitable that services and services suppliers in a particular sector may not be like, especially when world trade is forging closer ties for mutual benefit through the multilateral trading system, the contextual/subjective interpretative approach would in this regard serve the purpose that all parties seek to achieve at the multilateral level seeing that what will have to be established will be the purpose for which such a measure was introduced rather than what the text that introduced the measure portrays. The surrounding circumstances that led to the introduction of the measure and the overall intentions behind it will be the determinants rather than the proof of what the text seeks to achieve. The preservation of a competitive relationship must not be done at all costs. The question that suffices is: where such products are found to be like, within this wide definition, shouldn’t a development condition, argued for example by a developing country, be considered as justification for the existence of such a measure?

4.3 Meaning of Treatment no less favourable

In the TRIPS context the Panel Report in *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs* (“EC – Trademarks and Geographical Indications”)⁵³ followed in the footsteps of the GATS and the GATT jurisprudence in construing this concept. In the final analysis the implication of this approach is that it does not seem to address a situation where the regulatory measure is *prima facie*, not for protectionist/discriminatory purposes but for developmental purposes, except within the limits

⁵³ Panel Report in *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs* (“EC – Trademarks and Geographical Indications”), WT/DS174/R, WT/DS290/R, 15 March 2005.

of the MFN exceptions or Articles XIV and XIV *bis* of the GATS or Article 8 of the TRIPS.⁵⁴ The fact that this concept, from a national treatment perspective, does not, as a yardstick, contemplate any rationales for the differential treatment, but only considers the disproportionate adverse impact on foreign products compared with treatment afforded to like domestic products suggests that its consideration is one-sided. If for example, in the MFN perspective the measure tends to modify the conditions of competition that measure will be deemed discriminatory or protectionist. If there is a distortion of the effective equality of opportunities as well as the distortion of expectations on the competitive relationship, the likelihood is that that measure will be inconsistent with the non-discrimination obligation. This again suggests a one-sided consideration if the decision on discrimination is taken without also looking at the developmental purpose of that measure.

The consideration of a contextual/subjective approach seems to be a much better approach to adopt because, for example where *de jure* and *de facto* measures are involved, the subjective standard requires the determination of whether the measure truly pursues an objective related to the permitted criterion, or whether the true intent of the measure is to discriminate indirectly on the basis of origin.⁵⁵

5 EXPLORING THE POSSIBILITY OF PRO-DEVELOPMENT CONTEXTUAL INTERPRETATION

The problematic aspects of the interpretation/application of the non-discrimination obligation based only on an objective approach, as in the cases discussed in chapters 3 and 4 above, are three fold. Firstly even though WTO adjudicating bodies do not necessarily follow a set precedent, it seems that their jurisprudence has stuck to the principle of protecting the competitive relations between the contracting parties. It is submitted that the problem with the interpretation adopted by the adjudicating bodies is that it seems to require Member

⁵⁴ Article XIV allows the adoption of measures that are necessary to: protect public morals or to maintain public order; protect human, animal or plant life or health; secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to: prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts; the protection of the privacy of individual s in relation to the processing of and dissemination of personal data and the protection of confidentiality of individual records and accounts; and safety. Article XIV *bis* relates to security exceptions.

⁵⁵ See Diebold "Non-Discrimination and the Pillars of International Economic Law: Comparative Analysis and Building Coherency".

countries to “foresee” the implications of according market access or of introducing a particular measure irrespective of the policy goals of that measure.⁵⁶ This is clearly so especially where the adjudicating bodies seek to protect expectations of the competitive relationship between domestic and imported products/services or services suppliers, and hold that the decision whether less favourable treatment has been accorded will be based upon potential impact rather than on actual consequences. If the measure will disturb that competitive relationship, it should not be introduced in the internal market irrespective of its economic aims and purposes in respect of the domestic market, especially if the measure does not, for example meet the requirements of Articles XIV (general exceptions) or XIV *bis* (security exceptions) of the GATS.⁵⁷ In fact if the measure is already in place, then it must be replaced by a more foreigner-friendly measure and if market access is withdrawn against the foreign investor, compensation must be paid. The “potential impact” concept does not allow for developing countries to justify the introduction/existence of a particular measure besides those specified/scheduled even though these could be several, including the development condition. The irony is that the GATS and the TRIPS Preambles allow for the factoring in of this development condition into decision making by the WTO’s judicial bodies. There is no wonder then that Roessler regards Articles 12.11 and 8.10 of the DSU as according to developing countries treatment that is no different from that accorded to developed countries.⁵⁸ In fact these provisions are designed to ensure that countries are treated equally.⁵⁹ It is submitted that if the measure goes beyond the requirements of GATS Articles XIV and XIV *bis*, then the development condition should be

⁵⁶ This argument can be compared to what has been said by Brown *et al*. They opine that the ability to regulate depends on governments knowing how, and when to make exceptions and impose limitations when they commit sectors to liberalisation. This, to developing countries requires an unrealistic level of foresight and capacity. See Brown *et al* 2008 *Sage Journals Online* 17.

⁵⁷ World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 296 – 298.

⁵⁸ Roessler *Special and Differential Treatment of Developing Countries under the WTO Dispute Settlement System* in: Ortino and Petersmann *The WTO Dispute Settlement System 1995 – 2003* (2004) 88.

⁵⁹ *Ibid*.

factored in as justification.⁶⁰ In other words the regulatory purpose can be considered as a stand-alone legal element.⁶¹

The WTO adjudicating bodies have favoured the “like product” test as the test for the validity of any measure as was decided in the *Japan – Alcoholic Beverages I* case in 1987⁶² rather than the “aims and effects” test as decided in the *US – Malt Beverages*⁶³ and *US – Taxes on Automobiles cases*.⁶⁴ The fact that the AB has interpreted the GATT national treatment obligation as protecting expectations, in effect requiring a foreseeability test, thereby only looks at the equal competitive relationship between imported and domestic products, irrespective of the level of development of the affected Member country. This reveals the difficulties that developing countries face in asserting their rights under the WTO multilateral trading system. As Roessler opines, it would seem that the GATT dispute settlement system is more responsive to the interests of the strong countries rather than those of the weak.⁶⁵

On the other hand Lamy is arguing for more development-friendly rules as he has opined that the multilateral trading system rules do need to be improved to factor in the development perspective, and that this is the fundamental challenge of the Doha Round.⁶⁶ Diebold suggests that if a developmental interpretation could be filtered through, such an interpretation would bring in a subjective standard whose doctrinal reasoning will argue that the competitive conditions sought to be achieved must be defined by the regulatory purpose of the measure

⁶⁰ Qureshi seems to agree with this argument. See Qureshi *Participation of Developing Countries in the WTO Dispute Settlement System* in: Ortino and Petersmann *The WTO Dispute Settlement System 1995 – 2003* (2004) 483.

⁶¹ Diebold “Non-Discrimination and the Pillars of International Economic Law: Comparative Analysis and Building Coherency” June 2010.

⁶² Panel Report in *Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcohol Beverages* (“*Japan – Alcoholic Beverages I*”), adopted on 10 November 1987, BISD 34S/83.

⁶³ Panel report in *United States – Measures Affecting Alcoholic and Malt Beverages*, DS23/R - 39S/206, adopted 19 June 1992.

⁶⁴ Panel Report in *United States – Taxes on Automobiles*, DS31/R, 11 October 1994, unadopted. See the cases discussed in Trebilcock and Giri “The National Treatment Principle in International Trade Law” <http://law.bepress.com/cgi/viewcontent.cgi?article=1007&context=alea> (accessed 14-07-2010).

⁶⁵ See in Roessler *Special and Differential Treatment of Developing Countries under the WTO Dispute Settlement System* in: Ortino and Petersmann *The WTO Dispute Settlement System 1995 – 2003* (2004) 87.

⁶⁶ Lamy “More holistic view in helping developing countries” http://www.wto.org/english/news_e/sppl_e/sppl167_e.htm (accessed 16-09-2010).

under scrutiny.⁶⁷ Such a regulatory purpose must however be addressed in a transparent way and not in a cryptic or indirect manner.⁶⁸ It is submitted that this interpretative approach is not necessarily contrary to the objective approach. In fact these two approaches can complement each other. This is what the multilateral trading system should seek to achieve.

However, the main challenge would be to determine the legitimate policy objectives and the appropriate standard for the relationship between the measure under scrutiny and the objective being pursued.⁶⁹ A subjective analysis has problems of its own.⁷⁰ Further, the policy objectives considered sufficient to justify a measure must be taken into account as well, for example the contracting parties may construct a list of general exceptions. Furthermore, there has to be a *nexus* between the measure under scrutiny and the legitimate objective being pursued. Considering the fact that contracting parties' sovereignty should be preserved, this must be stated explicitly.⁷¹

The second point is that the 1987 Panel Report in *Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages* ("*Japan – Alcoholic Beverages I*")⁷² set out the test according to which Article III:2 must be satisfied. As much as in this case the Panel made reference to the context in which Article III:2 must be construed,⁷³ it seems that the Panel narrowed that context. It seems that the context that the case referred to was only that of prohibiting protectionist tendencies where the economic strengths and the marketplace between the contracting parties were in equilibrium. The reading here is that the Panel in the

⁶⁷ Diebold "Non-Discrimination and the Pillars of International Economic Law: Comparative Analysis and Building Coherency".

⁶⁸ Trebilcock and Howse *The Regulation of International Trade* (2005) 109. For further critique of WTO jurisprudence see the authors from 108 – 111.

⁶⁹ Ibid.

⁷⁰ For example it raises procedural issues of the burden of proof, the means of proof, the standard of review, and the high burden that would be placed upon the complainant to prove a protectionist purpose. In fact it is preferred that the burden be upon the respondent to demonstrate the absence of a protectionist purpose. See Diebold "Non-Discrimination and the Pillars of International Economic Law: Comparative Analysis and Building Coherency". See also Trebilcock and Giri "The National Treatment Principle in International Trade Law".

⁷¹ Diebold "Non-Discrimination and the Pillars of International Economic Law: Comparative Analysis and Building Coherency".

⁷² Panel Report in *Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcohol Beverages* ("*Japan – Alcoholic Beverages I*"), para. 5.6, adopted on 10 November 1987, BISD 34S/83.

⁷³ See para 5.5(b).

case seems to have been making reference to the context as explicitly reflected in the agreement. It does not seem that the Panel was making reference to any implicit readings that may be construed from the wording of the agreement as a whole, including its Preamble. It is remarkable that Japan made a subjective argument that economic considerations be taken into account by the Panel.⁷⁴

This analysis confirms what seems to be clear that the Panels and the AB are convinced that the use of the textual interpretative approach in WTO disputes conforms to the letter of the WTO Agreements. Diebold affirms this analysis by stating that the WTO adjudicating bodies, having realised the relevance of the competitive relationship between contracting parties, still in principle apply the formal/strict criteria from the 1970 Working Party Report in their interpretative duties.⁷⁵ The two cases that have however used the contextual interpretative approach have largely been ignored.⁷⁶ It is submitted that the Panels and the AB, where they engage the context they instead do so only to inform the outcomes of the textual approach. This results in the textual approach occupying a more dominant role than the contextual approach. It is as if the interpretation sources are arranged hierarchically with the text occupying the grundnorm position. It is further submitted that this textual approach disregards the general background and the circumstances surrounding the introduction of a measure. Furthermore, the argument is that the contextual interpretation approach should not only form part of the process or be treated as a form of a supplementary approach, but the Panels and the AB should favour the contextual approach where developmental interests are involved. This view is supported by Article 31 of the Vienna Convention.

According to Christo Botha⁷⁷ the contextual interpretative approach involves the general background and the surrounding circumstances of the legislative text. Therefore, it is submitted

⁷⁴ See *Japan – Alcoholic Beverages I* para 3.12.

⁷⁵ Diebold “Non-Discrimination and the Pillars of International Economic Law: Comparative Analysis and Building Coherency”.

⁷⁶ Panel Report in *United States – Taxes on Automobiles*, 11 October 1994, DS31/R; and Panel Report in *United States – Measures Affecting Alcoholic and Malt Beverages*, 16 March 1992 and adopted 19 June 1992, DS23/R – 39S/206. In the latter case however, likeness was established mainly because the respondent did not provide a valid public policy purpose to support its differential tax treatment. See paras 5.23 – 5.26, 5.70 – 5.77.

⁷⁷ Botha *Statutory Interpretation: An Introduction for Students* (2005) 3.

that in terms of Article 31 of the Vienna Convention context is as important as the text of the agreement. Besides, this would not result in a change to the text of the agreement, but rather the interpretation would seek to give meaning to such text and context. It is further submitted that contextual interpretation does not envisage judicial activism. In fact such an interpretation would not even be contrary to the object and purpose that the GATS and the TRIPS seeks to achieve, but rather it would promote the developmental interests of developing countries as envisaged in the GATS' and TRIPS' Preambles.⁷⁸ The purpose of Articles IV of the GATS and 7 of the TRIPS will be achieved in the process. This must be the guiding principle of the multilateral trading system.

The third problem with the current manner of interpretation is that the legal text of the WTO Agreements is construed from the perspective of the developed countries. This view is supported by Gad when he says that the TRIPS embodies provisions at the heart of which lie policies of developed countries aimed at intellectual property protection.⁷⁹ For example, in Article IV of the GATS, which seeks to give effect to developing countries' interests, there is no requirement that when the Panels or the AB interpret the MFN or national treatment provisions special priority should be accorded to these countries' developmental interests. It is submitted that this is a structural gap considering the fact that this article seeks to promote that object and purpose.⁸⁰

The non-discrimination obligation is a credible regulatory policy instrument that seeks to establish equilibrium in relations between two parties that are on economically similar or different standings; hence it still remains a relevant regulatory mechanism for development purposes. But its interpretation impacts negatively on developing countries whose domestic industries are still at their infancy since by opening their markets to trade liberalisation they run the risk of suffocation by services or service suppliers from well developed economies or by

⁷⁸ See paragraph 4 of the GATS Preamble and paragraph 5 of the TRIPS Preamble in World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 286 and 321.

⁷⁹ Gad *TRIPS Dispute Settlement and Developing Country Interests* in: Correa and Yusuf *Intellectual Property and International Trade: The TRIPS Agreement* (2008) 356.

⁸⁰ See World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) 288 – 289.

offering protection to intellectual property which they have no interest in protecting. Therefore, when considered from a non-discrimination perspective, the textual interpretative approach creates a fundamental/structural gap/loophole in the WTO trading system. This is so because as much as countries profess equal treatment that treatment is not reflected in the interpretation of the WTO texts. From this perspective, the textual interpretation approach does not address development thereby giving advantage to the developed countries to the detriment of the developing countries. Against this background it becomes difficult to see how Goal 8 of the Millennium Development Goals will be achieved.⁸¹ Some of the targets sought by this goal are to address: (i) the special needs of the least-developed, landlocked countries and small island developing States; (ii) develop and further an open, rule-based, predictable, non-discriminatory trading and financial system; and (iii) make available the benefits of new technologies, especially information and communication technologies.⁸²

This gap/loophole is exacerbated by the fact that even the developmental mechanisms that the WTO has put in place to help developing countries cope with their developmental needs are not functional. For example the special and differential treatment (S&DT) mechanism meant for developmental purposes is laden with gaps/loopholes. Williams asserts that the S&DT treatment provision has no teeth since it does not include an implementation mechanism, hence the developing countries are now in favour of operationalisation of the S&DT provision, an idea to which the developed countries are opposed.⁸³ The S&DT treatment originated from the contention of developing countries that, just because States have equality of sovereignty

⁸¹ Goal 8 is entitled "Develop a global partnership for development". This goal envisages a partnership for a global development, especially in developing and least-developed countries, so as to rid the world of extreme poverty and hunger in conjunction with Goal 1 where most people survive on less than \$1.25 a day. In Sub-Saharan Africa, for example, the number of such people is 58 per cent. In developing regions overall the percentage stands at 46 per cent. See The United Nations (UN) "Millennium Development Goals Report 2010" <http://www.un.org/millenniumgoals/pdf/MDG%20Report%202010%20En%20r15%20-low%20res%2020100615%20-.pdf> (accessed 18-08-2010).

⁸² The United Nations (UN) "Millennium Development Goals Report 2010". Non-fulfilment of the development obligation would even be against the commitments that the global leaders make, for example as made in the UN Global Compact gathering to pursue sustainable world economy. See The United Nation (UN) News Centre "UN Global Compact gathering ends in pledge to pursue more sustainable world economy" <http://www.un.org/apps/news/story.asp?NewsID=35148&Cr=global+compact&Cr1=> (accessed 18-08-2010).

⁸³ Williams "The General Agreement on Trade in Services (GATS): the Debate between the North and the South" <http://www.ppl.nl/bibliographies/wto/files/975.pdf> (accessed 08-11-2009).

does not mean that such was true economically and that States should therefore not be required to undertake the same level of commitments and obligations.⁸⁴ In fact the character of the S&DT treatment since the Uruguay Agreement has changed from a tool for development to an instrument for the provision of some adjustment tools, for example, whereby countries would be afforded additional time to implement new WTO commitments.⁸⁵ The result of this is that developing countries have lost their space for national policy development, and thus development has been weakened in the concept of S&DT.⁸⁶ This has therefore led to the thinking that the ineffectiveness of all the developmental measures ignore the fundamental issues in the global trading system, that is, the existence of inequities in the system.

6 CONCLUSION

It is submitted that the line of interpretation taken by the Panels and the AB narrows the scope for arrival at decisions favourable to developing countries. It in fact burdens the developing and least-developed countries by requiring them to adopt interpretations that are constructed from text that is not favourable to them or that does not cater for their interests. The line of interpretation of the text by the dispute settlement body (DSB) seems to require that developing and least-developed Member countries “foresee” the impact that a measure may have on other Member countries’ prospects of investment. It does not allow Members to foresee their own legitimate policy objectives or prospects of development based upon their own interests and develop measures as such, except for those already mentioned, for example in Articles XIV and XIV *bis* of the GATS and Article 8 of the TRIPS. The inclusion of a clause to the effect that Panels and the AB must give effect to developmental measures introduced by developing countries would satisfy this requirement in Article IV of the GATS. Diebold suggests that the clause be inserted in Articles XX of the GATT or XIV of the GATS.⁸⁷

The fact that developing countries are required to foresee their interests, even though it is common knowledge that they lack technical expertise, in fact is *de facto* discriminatory in

⁸⁴ Ismail *Mainstreaming Development in the WTO: Developing Countries in the Doha Round* (2007) 3.

⁸⁵ Ibid.

⁸⁶ Ismail *Mainstreaming Development in the WTO: Developing Countries in the Doha Round* (2007) 4.

⁸⁷ Diebold “Non-Discrimination and the Pillars of International Economic Law: Comparative Analysis and Building Coherency”.

itself. A textual approach is discriminatory if considered from the contextual (or aims and effects) approach since a measure may not be for discriminatory purposes or indeed for any purpose other than development purposes.

The truth is that the non-discrimination provisions of the GATS and TRIPS are ambiguous. They do not provide an explicit manner by which the agreements must be interpreted in different situations. The Panels and the AB have to find ways by which to interpret and give meaning the best way they see fit. This is a gap/loophole that cannot be closed by the DSB. Thus it is important that Members in the Doha Round or subsequent thereto, come to an agreed format for the interpretation of the agreements as suggested above. A clause that will help the DSB to interpret in favour of all parties, in the absence of all other expected economic scenarios, should be inserted into the GATS Agreement Article IV to cater for this gap/loophole. This will help to resolve disputes amicably and further help to, as Horn and Mavroidis suggest, coordinate Member's expectations concerning the more precise implications of the vague agreements.⁸⁸

It is no wonder then that the developing countries are willing to take advantage of Article V of the GATS which allows a loophole in respect of compliance with the MFN obligation.⁸⁹ The Article allows for conditional discrimination.⁹⁰ The negative aspect however, is that developed countries use this loophole as well. This is disadvantageous to the developing countries as the conclusion of a regional agreement between developed countries pits the powerful against the

⁸⁸ Horn and Mavroidis *International Trade: Dispute Settlement* in: Guzman and Sykes *Research Handbook in International Economic Law* (2007) 185. The two authors also discuss other mechanisms that may be taken into account in instances of dispute settlement, see from pages 184 – 186.

⁸⁹ The Article requires that:

- i. substantial sectoral coverage. In other words, the number of sectors covered and the volume of trade affected must be taken into consideration, as well as the modes of supply; and
- ii. provided for the absence or elimination of substantially all discrimination, in the sense of Article XVII, between or among the parties in the sectors covered, through elimination of existing discriminatory measures, and/or prohibition of new or more discriminatory measures at entry into force of the agreement or on basis of a reasonable time frame, except for measures permitted under Articles XI, XII, XIV and XIVbis.
- iii. stipulated that implementation shall not result in higher trade and investment barriers against third parties.

⁹⁰ Perdakis *Overview of Trade Agreements: Regional Trade Agreements* in: Kerr and Gaisford *Handbook on International Trade policy* (2007) 87.

less-powerful countries. In this regard the scales of power would obviously favour the developed. This is an arbitrary use of the MFN loophole which could not have been intended for such a purpose. In fact the OECD countries, which is an organisation that includes some of the most powerful countries, already uses the Article V advantage to the disadvantage of the developing countries, for example in the agricultural sector.⁹¹ One may even argue that this constitutes some form of protectionism by the developed countries.

The prevailing preference, as stated above, is that the WTO adjudicating bodies have set a trend to follow the textual (like product) approach instead of the contextual (aims and effects) approach. However, this approach has neglected the fact that intellectual property rights and the rights that other Member countries have in terms of services trade do not exist in a vacuum. When such rights are interpreted, social and economic welfare policy interests and values must also be taken into account.⁹² This should be the theme that informs the interpretation of the underlying obligation upon which such intellectual property rights and services are granted. The failure to recognise this important factor creates a regulatory loophole within the non-discrimination regulatory framework. Developing countries' interests in this regard are not catered for within the regulatory system to the full extent possible. The adjudicating bodies are required to consider these interests when they are engaged in interpretative duties without having been provided with rules upon which to base their legal authority. This study has identified the consequence of this loophole as contributing towards the continued existence of misapprehensions by developing countries towards the multilateral trading system.

⁹¹ Brown et al "How we got here: the road to GATS: Progress in Development Studies" 2008 *Sage Journals Online* 12 <http://pdj.sagepub.com/cgi/content/abstract/8/1/7> (accessed 06-03-2009).

⁹² Botoy 2005 *The Journal of World Intellectual Property* 95.

CHAPTER 7

CONCLUSIONS AND RECOMMENDATIONS

1 CONCLUSIONS

1.1 Introduction

This study has shown that the non-discrimination obligation is a fundamental pillar upon which the trade relationship between WTO Member countries resides. It has shown the benefits and the importance of why services trade and the protection of intellectual property must continue to be underlined by this obligation. From a developmental perspective, this study has also explored and established the weakest link in the application and/or interpretation of this obligation by WTO adjudicating bodies.

The non-discrimination obligation, as much as it is fundamental, has also proved however to be susceptible to problems. This study's enquiry started by setting out the historical use and practice behind the obligation and has proceeded to explore its economic value in relation to trade between Member countries. The last four chapters of the study have a detailed focus on the obligation whose ultimate purpose has been to establish how susceptible to problems, application and/or interpretation the obligation has been, especially from the period of entry into force of the WTO Agreement to date. Here the chapter concludes and sets out recommendations taking into account all the issues that have been discussed in the preceding chapters.

More directly, chapter 1 of this study has set out the goals and objectives envisaged by this study as well as the importance of services and intellectual property rights protection in general. Chapter 2 sets out the historical and socio-economic background to services and intellectual property rights protection which led to the GATS and the TRIPS incorporation into the WTO framework. The chapter also defined in further detail what services and intellectual property are considered to be and provided a detailed definition of what the non-discrimination obligation entails. Chapter 3 deals with the most-favoured-nation (MFN) obligation under the GATS and TRIPS and discusses how it has been interpreted by the WTO

adjudicating bodies. Chapter 4 examines the national treatment obligation and how it has been interpreted by the WTO adjudicating bodies within the context of the GATS and TRIPS. Chapter 5 discusses selected recent WTO case law that deals with the non-discrimination obligation in the GATS and TRIPS context. From these three chapters the study has shown that the application and/or interpretation of the non-discrimination favours developed countries to the disadvantage of developing countries. This is so because of the interpretative test that the WTO adjudicating bodies have preferred and applied even though these bodies have in fact established how important it is to maintain mutual relations between Member countries.¹ The study has therefore suggested that from a developing country perspective it is important to establish trade relations from a regional perspective first. This may be an important economic base for developing countries enabling them to present a common front at the multilateral level.² Also, the study has revealed that at the multilateral level a precedent is developing in the interpretation of the legal elements of the non-discrimination obligation. What the study also reveals is that developing countries must ensure that, where they have scheduled commitments, those commitments should specify limitations where the developing countries do not wish to offer general market access. If the limitation is not scheduled it would be difficult for an adjudicating body to allow a developing country to rely on its development condition in defence of a challenged measure alleged to be inconsistent with GATS or TRIPS provisions. The most telling finding is that if a developing country does schedule a limitation in its commitments, it remains a mystery whether the WTO adjudicating bodies will rule in its favour seeing that the GATS and the TRIPS provisions³ call for measures that in essence will not be contrary to the provisions contained in these agreements, which could effectively be interpreted to mean that no measures contrary to the provisions of the agreements may be introduced under any circumstances.

Chapter six analysed in greater detail the application and/or interpretations of the non-discrimination obligation adopted by the WTO adjudicating bodies from a developmental

¹ See arguments in chapter 6 page 160.

² See Van der Merwe "Inclusive Approach key to SADC Integration" <http://www.polity.org.za/article/inclusive-approach-key-to-sadc-regional-integration-2010-11-25-1> (accessed 06-01-2011).

³ See Article VI of the GATS and Article 8 of the TRIPS.

perspective. That analysis revealed that the WTO adjudicating bodies narrow the scope of flexibilities for favourable decisions for developing countries. At all times the purpose has been to show the importance that the non-discrimination obligation carries in the international economic and legal interaction and how non-observance of this obligation could negatively affect relations between Member countries. The current chapter sets out the conclusions and recommendations of this study.

1 2 Conclusions

The importance of the WTO Members non-discrimination obligation is indisputable. Its rationales, historical background and application confirm this fact.⁴ However, the nature and content of this obligation reveal structural/systemic cracks in the interpretative process. These cracks bring with them challenges for those Member countries who find themselves negatively affected by them. The submission of this study is that these cracks reveal that the construction of the text of the non-discrimination obligation from the developed countries' perspective is problematic.

The fact that the non-discrimination obligation is the cornerstone upon which trading nations place their trading prospects in Member countries' markets should be a cause for all WTO Member countries to negotiate towards a better commonly defined future.⁵ Developing countries must be equal partners in that future based on mutual relations between all Member countries. For that objective to be achieved mutual purpose must first be reflected in the text of the concluded agreements between WTO Members. That mutual purpose must also be reflected in the interpretation of those agreements. If for example an agreement permits the accommodation of a developmental consideration in the application of its provisions, but again requires that that developmental consideration must not be contrary to the provisions contained in the agreement, such wording basically negates the presence of that developmental consideration. In short, the developmental consideration is reduced to inutility. Hence the non-discrimination obligation will always be applied in practice only to the

⁴ See Trebilcock and Howse *The Regulation of International Trade* (2005) 49 and 83.

⁵ Ibid.

advantage of the developed countries. However, this cannot solely be blamed on the interpretations reflected in the Panels or the AB decisions.

The problem is that the advantage that the developed countries receive through the said cracks cannot be defined within the objectives of a common future which these agreements seek to achieve. It is submitted that this is so because by being afforded an opportunity to have one's challenged measures tested subjectively according to their object and purpose, it seems that this ensures fulfilment of the principle of equality of opportunities as espoused by the "treatment no less favourable" requirement. But again a subjective consideration will not automatically lead to a ruling by the WTO adjudicating bodies favourable to developing countries. However, it is submitted that the interpretation of the non-discrimination obligations would at least be underlined by fair interpretative principles that cater for the mutual benefit of all involved.

It would be interesting to see whether the WTO adjudicating bodies would follow the *US – Malt Beverages*⁶ interpretation or whether they would still follow the *Japan – Alcoholic Beverages I*⁷ interpretation because in two previous cases⁸ the adjudicating bodies ruled against the respondent's prayer for its status as a developing country to be taken into consideration in the assessment of a particular measure. In the one case they ruled against the prayer on the basis that the party had not made that prayer part of its pleadings.⁹ In the second case¹⁰ the denial was based on the fact that the party in question had not scheduled that limitation in its schedule of commitments as required, hence denial of an opportunity to raise the developmental consideration. Since the historical record of the adjudicating bodies shows that they would not countenance any measure that goes against the express provisions of the

⁶ Panel report in *United States – Measures Affecting Alcoholic and Malt Beverages*, DS23/R - 39S/206, adopted 19 June 1992.

⁷ Panel Report in *Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcohol Beverages* ("*Japan – Alcoholic Beverages I*"), adopted on 10 November 1987, BISD 34S/83.

⁸ Those cases are the *Indonesia – Certain Measures Affecting the Automobile Industry* ("*Indonesia – Autos*"), WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, 2 July 1998, Panel Report and the *Mexico – Measures Affecting Telecommunications Services* ("*Mexico – Telecoms*") WT/DS204/R, 2 April 2004, Panel Report.

⁹ *Indonesia – Autos*, para 14.169.

¹⁰ Panel Report in *Mexico – Telecom*, paras 7.386 - 7.389

Agreements, it would be interesting to see how the bodies would rule where a developmental condition is met.

On the other hand an interpretation that favours all parties seems impossible unless the text of the agreements is reflective of this, especially when the WTO Panels and the AB insist on the textual hierarchical interpretation where the text seems to occupy a higher position¹¹ rather than an interpretation that is reflective of equality in the application of the WTO non-discrimination regulatory framework.¹² The two objectives of the MFN as stated in the introduction of chapter 3, that is, to ensure economic stability between the nations of the world in their trade interactions; and to ensure that in such trade interaction no one Member country is discriminated against irrespective of its economic prowess *vis-à-vis* others, will not be achieved as there will always be apprehensions.

Gad opines that the creation of the multilateral trading system should not reflect an approach diverging from the stated intentions of the parties to the WTO agreements,¹³ as both non-discrimination norms in WTO law are intended to protect expectations of the competitive relationship between products.¹⁴ From the national treatment obligation perspective, Mattoo is of the view that it is important that a precise interpretation and meaning be established as between Member countries, so as to avoid the undermining of the ultimate WTO objectives of creating a secure and predictable trading environment.¹⁵ However, it is submitted that the WTO objectives may indeed be undermined if the developmental perspective is not reflected within that precise interpretation and meaning.

During the beginning of the GATS negotiations, developing countries were skeptical of trade liberalisation. They regarded it as a threat to their economies and their sovereignty.¹⁶ Their skepticism was not dampened by the fact that the GATS Agreement deliberately facilitates their

¹¹ As it is shown in the cases of *Japan – Alcoholic Beverages I*, *US – Section 337*, *EC – Banana III* and *Mexico – Telecoms* cases.

¹² As espoused in the WTO Preamble as well as in the GATS and TRIPS Preambles.

¹³ Gad *TRIPS Dispute Settlement and Developing Country Interests* in: Correa and Yusuf *Intellectual Property and International Trade: The TRIPS Agreement* (2008) 354.

¹⁴ Ortino “The Principle of non-discrimination and its exceptions in GATS: Selected legal issues”.

¹⁵ Mattoo “National Treatment in the GATS: Corner-stone or Pandora’s Box?”.

¹⁶ Hilger “Pros and Cons of the General Agreement on Trade in Services (GATS)”.

integration into the world's marketplace. Their skepticism can however be understood from the fact that, as discussed above, the Panels and AB do not seem to cater for their developmental interests in the implementation of the WTO non-discrimination regulatory framework. The inevitable conclusion is that the international trading system still prefers the interests of countries that are economically more powerful; and that the trading system's benefits are distributed asymmetrically to the detriment of the developing countries.¹⁷

It is submitted that the promises of offering flexible ways by which developing countries can achieve their development goals is one way by which the objectives of the non-discrimination obligation can be achieved. But such promises remain promises if they are not accompanied by an implementation mechanism. A developmental approach to trade liberalisation must not be emphasised from one perspective alone. The emphasis must reflect a recognition of the realities that developing countries need policy space and sufficient flexibilities to support developmental programmes in all sectors.¹⁸ Trebilcock and Howse confirm that developing countries have questioned whether the Uruguay Round package of trade treaties¹⁹ was in fact a good deal for them since policy space has been limited by these.²⁰ In this regard development is being reduced to a formula, ignoring that sometimes interventionist policies may be the better option than dogmatic trade liberalisation.²¹ The interpretation of the non-discrimination regulatory framework in pursuit of trade liberalisation needs to occur within a flexible legal framework that is guided by and does not sway from pertinent developmental objectives. The global trade system must therefore seek and strive for corrective measures focusing on rebalancing the trade rules which would contribute to addressing the capacity constraints that developing countries experience and the adjustment costs that hinder the development of these countries.²²

¹⁷ See a more detailed discussion in this regard in chapter 6 pages 145 – 149 and 152 - 157.

¹⁸ Davis "The Doha Round"

http://www.igd.org.za/index.php?option=com_remository&Itemid=69&func=selectcat&cat=4 (accessed 09-09-2010).

¹⁹ That is, the TRIPS, the GATS and the SCM Agreements.

²⁰ Trebilcock and Howse *The Regulation of International Trade* (2005) 472.

²¹ Ibid.

²² Davis "The Doha Round".

Diebold suggests that concepts like “less favourable treatment”, “likeness” and “regulatory purpose” need not be incorporated into the WTO legal framework as strict legal conditions which must be proven by the complainant or the respondent pursuant to the applicable standard of review.²³ Such elements could in fact be viewed as soft-factors to be weighed and balanced in order to come to an overall conclusion on whether or not a measure is discriminatory, hence illegal.²⁴ According to Diebold the idea is to conscientise the adjudicating bodies as well as the Member countries to the significance and mutual relationship of the different legal elements and to propose an alternative approach to the interpretation of non-discrimination for the negotiation of future non-discrimination provisions.²⁵ In this light the underlying importance and purpose of the non-discrimination obligations will always be observed as the fundamental pillar upon which the multilateral trading system resides.

In the GATT context Ghosh, Perroni, and Whalley opine that the free rider benefit to developing countries is one of the consequences of the MFN obligation which helps developing countries in their pursuit of development.²⁶ On the other hand, it serves as a loss to the developed countries, since by allowing free riders they tend to open their markets to a wider group of Members without receiving anything in return.²⁷ This may be one of the reasons why the developed countries are reluctant to open their markets in services trade. But this does not make the non-discrimination obligation any less important.

It is submitted that the obligation of non-discrimination is a necessary tool for a legally stable marketplace between WTO Member States as it seeks to neutralise relations between them, which would ultimately contribute towards stable economic relations. This obligation also informs the aims of the multilateral trading agreements by safeguarding liberalisation especially

²³ Diebold “Non-Discrimination and the Pillars of International Economic Law: Comparative Analysis and Building Coherency”.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ghosh, Perroni and Whalley “The Value of MFN to Developing Countries” <http://economics.uwo.ca/econref/WorkingPapers/researchreports/wp1999/wp9907.pdf> (accessed 08-08-2009).

²⁷ Ibid.

in times of economic crisis, when countries' self-preservation instincts and popular pressure suggest a protectionist tendency.²⁸

The textual approach to interpretation rather than the contextual approach, seems to raise the bar for development purposes too high for developing countries. This is so because it seems that the approach focuses only on what the text of the agreement seeks to achieve irrespective of the level of development of Member countries. It is therefore, likely to contribute towards the subversion of developing countries' interests instead of promoting them. This interpretation has the effect of subjecting the developing countries to what they have signed for irrespective of its unintended consequences. Accordingly, developing countries can be forced to discontinue measures meant for development purposes. Hence the interpretation does not cater for developmental purposes. This study considers the interpretative approach adopted in the *US – Malt Beverages* dispute²⁹ as the most preferable since it reveals flexibility in the application/interpretation of the measures contested by parties. The case carries judicial authority since it was also adopted by WTO Member countries. No people should be left behind; in that sense regulation should evolve as the world of business does³⁰ so as to facilitate sustainable development better.

2 RECOMMENDATIONS

The non-discrimination obligation should not be interpreted in a manner that seeks compliance at all costs. It is submitted that the textual interpretative approach which leads to decisions that require foreseeability seems to subject developing countries to greater economic strain since these countries are not necessarily capacitated, economically, legally or otherwise, to accommodate such burdensome foreseeability requirements.³¹ It is further submitted that the AB should also be prepared to interpret a measure in terms of its aims since failure to do so will be tantamount to accommodating one form of interpretation favourable to one cluster of

²⁸ Mikic and Ramjoe "Preferential Trade Agreements: An Insurance against Protectionism?"

²⁹ See Panel Report in *United States – Measures Affecting Alcoholic and Malt Beverages*, DS23/R – 39S/206, 16 March 1992, adopted 19 June 1992.

³⁰ Lamy "Trade in Services and Economic Recovery: Tuning the instruments of growth" http://www.wto.org/english/news_e/sppl_e/sppl171_e.htm (accessed 28-09-2010).

³¹ In this regard see Brown *et al*'s argument in Brown *et al* 2008 *Sage Journals Online* 17.

Members (the developed countries) to the detriment of others (the developing countries). Such an interpretation would not be conducive to development since developing countries might not necessarily have introduced a measure for discriminatory purposes. It is therefore hoped that the Panels and the AB would in future consider the contextual approach as part of their interpretative approach. The contextual interpretative approach should not be a means to inform the textual approach because that will suggest a hierarchical approach where the textual approach plays the leading role. The AB should be able to hold the middle line so that the one party does not feel that it is in the multilateral trading arena only to play subordinate to the other. This would not strengthen relations amongst WTO Members but rather has the potential to strain them. Economies, including those of developing countries, need to grow and it is only through growth that jobs can be created³² and sustained.

The argument advanced in the immediately preceding paragraph finds support from Gad's observation that developing countries have exclusively been respondents in almost all patent disputes brought to the DSB, for example, in the pharmaceutical patents-related field.³³ The perception is thus created that the DSU was adopted as a means to put pressure on developing countries. Such perceptions are not conducive for mutual relations at multilateral level since the stage is not set to accommodate the interests of one party to the detriment of the other, but it is set to uphold mutual respect for all participants.

It is submitted that to alleviate the developing countries' misapprehensions about the multilateral trading system, GATS and TRIPS rules must reflect accommodation for these countries interests, not only from the perspective of S&DT or Aid-for-Trade (A4T).³⁴ The

³² This statement by Lamy seems to confirm the intentions of the multilateral trading system. See Lamy "Trade in Services and Economic Recovery: Tuning the instruments of growth" http://www.wto.org/english/news_e/sppl_e/sppl171_e.htm (accessed 28-09-2010).

³³ Gad *TRIPS Dispute Settlement and Developing Countries Interests* in: Correa and Yusuf *Intellectual Property and International Trade: The TRIPS Agreement* (2008) 338.

³⁴ The Aid-for-Trade initiative was launched in the Hong Kong Ministerial Conference which is defined as a comprehensive tool for helping developing countries to integrate into the global economy. For example development financing in trade is reported to have reached 42 billion in 2008 as a result. The Integrated Framework (IF) which was started in 1997 as a joint effort by the UNCTAD, the International Trade Centre (ITC), the World Bank, the IMF, UNDP and the WTO to help least-developed countries to become active players in international trade has improved its functioning by helping them identify their trade bottlenecks. The current funding by the IF totals 180 million US \$ as of March 2010. So far 23 donors are supporting the mechanism and 46

economic importance of these countries must be recognised through the insertion of a clause into the GATS and TRIPS non-discrimination regulatory frameworks or within the articles that promotes development in both Agreements. This would facilitate decisions favourable to them and in the main advance/increase their participation on par with developed countries. The proposed clause must seek to recognise the role that developing countries play in the marketplace and the importance of their development. In the process misapprehensions about the role that these countries have to play in the multilateral trading system *vis-à-vis* developed countries will be lessened. The said clause should be drafted in such a manner that it enables an interpretative approach by Panels and the AB that will recognise the importance of such countries' role in the international trading arena. The ultimate goal of the trading system and trade liberalisation should be sustainable development and liberalisation should be pursued as a means towards the attainment of that objective.³⁵

It is recommended that the principle of non-discrimination should be afforded the status of a *jus cogens*.³⁶ Its observance by countries generally since time immemorial suggests that it conforms to international law standards, and also satisfies international customary law requirements. However, it is submitted that its recognition does not suggest that countries will not derogate from its legal requirements, but that this will strengthen its legal standing within the family of international law. This may help to ensure that countries adhere to its requirements, and it may also be legally beneficial to the DSU Panels when enforcing the provisions of the WTO agreements.

The observance of the purposes that the GATS and the TRIPS Agreements seek to achieve is not contrary to the common intentions of the parties to the agreements. Accordingly, the

least-developed countries are benefiting. See Lamy "Lamy calls for "more holistic view" in helping developing countries" http://www.wto.org/english/news_e/sppl_e/sppl167_e.htm (accessed 16-09-2010). See also discussion of A4T in Cali and Te Velde "Does Aid for Trade Really Improve Trade Performance?" http://www.sciencedirect.com/science?_ob=ArticleURL&_udi=B6VC6-51RBGVB-1&_user=2093731&_coverDate=12%2F18%2F2010&_rdoc=1&_fmt=high&_orig=search&_origin=search&_sort=d&_docanchor=&view=c&_acct=C000056142&_version=1&_urlVersion=0&_userid=2093731&md5=39ed248e88b15ab381616a14e9b66436&searchtype=a (accessed 03-01-2011).

³⁵ Khor "Synergies between Liberalisation, Environment and Sustainable Development, WTO Symposium on Trade and Environment" <http://www.twinside.org.sg/title/synergy-cn.htm> (accessed 05-11-2010).

³⁶ See discussion of the *jus cogens* in chapter 3 page 57 – 58.

interpretation of the agreements must take that common interest into account when interpreting the non-discrimination obligations contained in these agreements. The desirability of taking into account the common interest/intentions of contracting parties was also recognized in the *US – Gambling* dispute.³⁷ In that case the AB stated that the task of interpreting any treaty text involves identifying the common intentions of Members.³⁸ The fact that the interests that seem to be taken into account at the multilateral level are those of one group of Members may not lessen apprehensions that the GATS and TRIPS were introduced in order to protect certain narrow interests of industrialised countries.³⁹

³⁷ Panel Report in *US – Gambling*, para 159.

³⁸ Appellate Body Report in *US – Gambling*, para 160.

³⁹ Gad *TRIPS Dispute Settlement and Developing Countries Interests* in: Correa and Yusuf *Intellectual Property and International Trade: The TRIPs Agreement* (2008) 338.

BIBLIOGRAPHY

BOOKS

Botha *Statutory Interpretation: An Introduction for Students* (2005) Juta, Lansdowne.

Correa and Yusuf (eds) *Intellectual Property and International Trade: The TRIPs Agreement* (2008) Kluwer Law International, United Kingdom.

Correa *Intellectual Property Rights, the WTO and the Developing Countries: The TRIPs Agreement and Policy Options* (2002) Zed Books, London.

Cottier, Mavroidis, and Blatter (eds) *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law*, vol. 2. (2002) The University of Michigan Press, United States.

Dugard *International Law – A South African Perspective* (2001) Juta Law, Cape Town.

Evans *Lawmaking under the Trade Constitution: A Study in Legislating by the World Trade Organisation* (2000) Kluwer Law International, United Kingdom.

Evenett *et al* (eds) “The fateful allure of protectionism: Taking stock for the G8” <http://www.voxeu.org/reports/WorldBank.pdf> (accessed 20-09-2010).

Guzman and Sykes *Research Handbook in International Economic law* (2007) Edward Edgar Publishing Limited, UK.

Hocking and McGuire (eds) *Trade Politics: International, Domestic, and Regional Perspectives* (1999) Routledge, London.

Hocking and McGuire *Trade Politics* (2004) Routledge, London.

Hoekman and Kostecki *The Political Economy of the World Trading System: The WTO and Beyond* (2001) Oxford University Press, United States.

Hoekman, Mattoo, and English (eds) *Development, Trade, and The WTO - A Handbook* (2002) The World Bank, Washington D.C..

Ismail *Mainstreaming Development in the WTO Developing Countries in the Doha Round* (2007) <http://library.fes.de/pdf-files/bueros/genf/04888.pdf> (accessed 25-01-2010) Cuts International and Friedrich Ebert Stiftung, Jaipur.

Jackson *The World Trading System: Law and Policy of International Economic Relations* Second Edition (1997) Massachusetts Institute of Technology, United States of America.

Kerr and Gaisford (eds) *Handbook on International Trade policy* (2007) Edward Elgar Publishing Limited, UK.

Krajewski *National Regulation and Trade Liberalisation in Services: the legal impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy* (2003) Kluwer Law International, Great Britain.

Lee *The Political Economy of Regionalism in Southern Africa* (2003) University of Cape Town Press.

Lundahl (ed) *Globalisation and the Southern African Economies* (2004) Nordiska Afrikainstitutet, Uppsala 2004.

Matthews *Globalising Intellectual Property Rights: the TRIPS Agreement* (2002) Routledge Taylor & Francis Group, London.

Mattoo *MFN and the GATS* in: Cottier et al (eds) *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law* (2002) The University of Michigan Press, United States.

Mattoo, Stern and Zanini *A Handbook of International Trade in Services* (2008) Oxford University Press, United States.

Organisation for Economic Co-operation and Development (OECD) *GATS: The Case for Open Services Markets* (2002) OECD.

Ortino and Petersmann *The WTO Dispute Settlement System 1995 – 2003* (2004) Kluwer Law International, Great Britain.

Petersmann *International Trade Law and the GATT/WTO Dispute Settlement System* (1997) Kluwer Law International, Great Britain.

Petersmann and Pollack (eds) *Transatlantic Economic Disputes: The EU, the US and the WTO* (2003) http://www.frederickabbott.com/uploads/Abbott___Cottier_-_From_Transatlantic_Economic_Dispute.pdf (accessed 21-09-2010) Oxford University Press, United States.

Rodriguez, Low and Kotschwar (eds) *Trade Rules in the Making: Challenges in Regional and Multilateral Negotiations* (1999) The Brookings Institution Press, Washington D.C.

Sampson and Chambers (eds) *Developing Countries and the WTO: Policy Approaches* (2008) http://www.unu.edu/unupress/sample-chapters/developing_countries_and_the_WTO_web.pdf (accessed 25-08-2010) United Nations University Press, Tokyo.

Sauve and Stern *GATS 2000: New Directions in Services Trade Liberalization* (2000) The Brookings Institution Press, Washington D.C.

Stefan de Vylder *The Least Developed Countries and World Trade* (2007) Sida Studies No. 19.

Stephenson (ed) *Services Trade in the Western Hemisphere: Liberalisation, Integration and Reform* (2000) The Brookings Institution, Washington D.C..

Stiglitz *Globalisation and its Discontents* (2002) Penguin Books, London.

The World Trade Organisation *A Hand Book on the GATS Agreement* (2005) WTO Publication Secretariat.

Trebilcock and Howse *The Regulation of International Trade* (2005) Routledge Publishers, London.

Van den Bossche *The Law and Policy of the World Trade Organisation: Text, Cases and Materials* (2008) University Maastricht, The Netherlands.

Wouters and Meester *A Legal and Institutional Analysis* (2007) The World Trade Organisation, Intersentia Antwerpen – Oxford.

Yeo, Ng, Kong and Dang *Intellectual Property for Integrated Circuits* (2010) J Ross Publishing, USA.

CHAPTERS IN BOOKS

Abbot *Intellectual Property Rights in World Trade* in: Guzman and Sykes *Research Handbook in International Economic law* (2007) Edward Edgar Publishing Limited, UK.

Abbott and Cottier *Dispute Prevention and Dispute Settlement in the Field of Intellectual Property Rights and Electronic Commerce: US – Section 211 Omnibus Appropriations Act 1998 ('Havana Club')* in: Petersmann and Pollack (eds) *Transatlantic Economic Disputes: The EU, the US and the WTO* (2003) http://www.frederickabbott.com/uploads/Abbott__Cottier_-_From_Transatlantic_Economic_Dispute.pdf (accessed 21-09-2010) Oxford University Press, United States.

Abbott *WTO Dispute Settlement and the Agreement on Trade-Related Aspects of Intellectual Property Right* in: Petersmann (ed) *International Trade Law and the GATT/WTO Dispute Settlement System* (1997) Kluwer Law International, Great Britain.

Abbott *WTO Dispute Settlement Practice Related to the Agreement on Trade-Related Intellectual Property Rights* in: Ortino and Petersmann (eds) *The WTO Dispute Settlement System 1995 – 2003* (2004) Kluwer Law International, Great Britain.

Borchert and Mattoo *Services A Case Study of the United States* in: Evenett *et al* (eds) *The fateful allure of protectionism: Taking stock for the G8* <http://www.voxeu.org/reports/WorldBank.pdf> (accessed 20-09-2010).

Davey and Pauwelyn *MFN Unconditionality: A Legal Analysis of the Concept in View of its Evolution in the GATT/WTO Jurisprudence with Particular Reference to the Issue of “Like Product”* in: Cottier *et al* (eds) *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law* (2002) The University of Michigan Press, United States.

Delich *Developing Countries and The WTO Dispute* in: Hoekman, Mattoo, and English (eds) *Development, Trade, and the WTO – A Hand Book* (2002) The World Bank, Washington D.C..

Evans *Lawmaking under the Trade Constitution: A Study in Legislating by the World Trade Organisation* (2000) Kluwer Law International, United Kingdom.

Gad *TRIPS Dispute Settlement and Developing Country Interests* in: Correa and Yusuf *Intellectual Property and International Trade: The TRIPS Agreement* (2008) Kluwer Law International, The Netherlands.

Horn and Mavroidis *International Trade: Dispute Settlement* in: Guzman and Sykes *Research Handbook in International Economic Law* (2007) Edward Edgar Publishing Limited, UK.

Hudec *The Adequacy of WTO Dispute Settlement Remedies: A Developing Country Perspective: in* Hoekman, Mattoo, and English (eds) *Development, Trade, and the WTO – A Hand Book* (2002) The World Bank, Washington D.C..

Kostecki *International Trade in Services* in: Hocking and McGuire (eds) *Trade Politics: International, Domestic, and Regional Perspectives* (1999) 68 Routledge, London.

Lundahl and Petersson *Economic Integration Efforts in Southern Africa* in: Lundahl (ed) *Globalisation and the Southern African Economies* (2004) Nordiska Afrikainstitutet, Uppsala 2004.

Mattoo *MFN and the GATS* in: Cottier *et al* (eds) *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law* (2002) The University of Michigan Press, United States.

Matsushita *Appellate Body Jurisprudence on the GATS and TRIPS Agreements* in: Ortino and Petersmann *The WTO Dispute Settlement System 1995 – 2003* (2004) Kluwer Law International, Great Britain.

Morrison *WTO Dispute Settlement in Services: Procedural and Substantive Aspects* in: Petersmann *International Trade Law and the GATT/WTO Dispute Settlement System* (1997) Kluwer Law International, Great Britain.

Perdikis *Overview of Trade Agreements: Regional Trade Agreements* in: Kerr and Gaisford *Handbook on International Trade policy* (2007) Edward Elgar Publishing Limited, UK.

Qureshi *Participation of Developing Countries in the WTO Dispute Settlement System* in: Ortino and Petersmann *The WTO Dispute Settlement System 1995 – 2003* (2004) Kluwer Law International, Great Britain.

Reichman *Universal Minimum Standards of Intellectual Property Protection under the TRIPS Component of the WTO Agreement* in: Correa and Yusuf *Intellectual Property and International Trade: The TRIPs Agreement* (2008) Kluwer Law International, The Netherlands.

Roessler *Special and Differential Treatment of Developing Countries under the WTO Dispute Settlement System* in: Ortino and Petersmann *The WTO Dispute Settlement System 1995 – 2003* (2004) Kluwer Law International, Great Britain.

Yusuf *TRIPS: Background, Principles and General Provisions* in: Correa and Yusuf *Intellectual Property and International Trade: The TRIPs Agreement* (2008) Kluwer Law International, United Kingdom.

Zdouc *WTO Dispute Settlement Practice Relating to the General Agreement on Trade in Services* in: Ortino and Petersmann *The WTO Dispute Settlement System 1995 – 2003* (2004) Kluwer Law International, Great Britain.

JOURNALS / SCHOLARLY ARTICLES

Abugattas “The Uruguay Round of Multilateral Trade Negotiations: Developments and Prospects” <http://www.jstor.org/stable/pdfplus/40176275.pdf> (accessed 18-12-2009).

Adam “The WTO and the crisis of multilateralism: A look at the present situation” <http://library.fes.de/pdf-files/bueros/genf/02700.pdf> (accessed 08-07-2009).

Adlung “Liberalising Trade in Services: from Marrakesh to Seattle”, <http://www.springerlink.com/content/3134m2u676vhw06n/fulltext.pdf> (accessed 08-11-2009).

Adlung “Services Liberalisation from a WTO/GATS Perspective: In Search of Volunteers” http://www.wto.org/english/res_e/reser_e/ersd200905_e.pdf (accessed 17-04-2009).

Adlung “The GATS Turns Ten: A Preliminary Stocktaking”.
www.wto.org/english/res_e/reser_e/ersd200405_e.doc (accessed 18-12-2009).

Ahmad and Pracha “Domestic Preparedness under GATS Related Services Trade Liberalisation”
http://www.sdpi.org/10thsdca/abstracts_globalization_panel3.html (accessed 09-04-2009).

Alves, Draper, and Khumalo “Africa’s Challenges in International Trade and Regional Integration: What Role for Europe?”
http://www.saiia.org.za/images/stories/pubs/occasional_papers/saia_sop_32_alves_20090501_en.pdf (accessed 20-11-2009).

Arnold, Javorcik and Mattoo “The Productivity Effects of Services Liberalisation, Evidence from the Czech Republic”
http://www.internationalpolicy.umich.edu/edts/pdfs/czech_services_april25.pdf (accessed 09-04-2009).

Baldwin “Standstills in WTO trade negotiations are not that unusual”
<http://www.voxeu.org/index.php?q=node/4380> (accessed 25-01-2010).

Betts and Nicolaidis “The Trade-Migration Linkage: GATS Mode IV”
http://www.princeton.edu/~pcglobal/conferences/wtoreform/Betts_Nicolaides_memo.pdf (accessed 31-03-2009).

Biadgleng and Tellez “The Changing Structure and Governance of Intellectual Property Enforcement”
http://www.southcentre.org/index.php?option=com_content&task=view&id=952&Itemid=67 (accessed 10-03-2009).

Bonapace “Main Trade and Regulatory Principles in the GATS/WTO” <http://www.itu.int/ITU-D/tregEventsSeminars2002chinapdf07-doc3-2Bonapace.pdf> (accessed 24-03-2009).

Botoy “Potential and Substantial Benefits of the TRIPS Agreement to the Member Countries of the African Intellectual Property Organisation in the Patent Field: An African’s Perspective” 2005 *Journal of World Intellectual Property* 91 103
<http://onlinelibrary.wiley.com/doi/10.1111/j.1747-1796.2001.tb00165.x/pdf> (accessed 11-10-2010).

Braga and Brokhaug “Services and the Doha Development Agenda”
http://siteresources.worldbank.org/EXTPARLIAMENTARIANS/Resources/Services_brief_for_PN_oWB-final.pdf (accessed 14-04-2009).

British Screen Advisory Council “Essential Background to Understanding the Current GATS Negotiations” <http://www.bsac.uk.com/reports/gatsbackground.pdf> (accessed 10-03-2009).

Brown, Cloke and Ali "How we got here: the road to GATS: Progress in Development Studies" 2008 *Sage Journals Online* 7 22 <http://pdj.sagepub.com/cgi/content/abstract/8/1/7> (accessed 06-03-2009) SAGE Publications.

Cali and Te Velde "Does Aid for Trade Really Improve Trade Performance?" http://www.sciencedirect.com/science?_ob=ArticleURL&_udi=B6VC6-51RBGVB-1&_user=2093731&_coverDate=12%2F18%2F2010&_rdoc=1&_fmt=high&_orig=search&_origin=search&_sort=d&_docanchor=&view=c&_acct=C000056142&_version=1&_urlVersion=0&_userid=2093731&md5=39ed248e88b15ab381616a14e9b66436&searchtype=a (accessed 03-01-2011).

Chanda "GATS and its implications for developing countries: Key issues and concerns" <http://www.un.org/esa/desa/papers/2002/esa02dp25.pdf> (accessed 10-04-2009).

Commission on Intellectual Property Rights "Integrating Intellectual Property Rights and Development Policy" http://www.iprcommission.org/papers/pdfs/final_report/CIPR_Exec_Sumfinal.pdf (accessed 25-01-2010).

Correa "Review of the TRIPS Agreement: Fostering the Transfer of Technology to Developing Countries" <http://www.twinside.org.sg/title/foster.htm> (accessed 11-10-2010).

Creamer "SA a top priority global investment destination – UNCTAD Survey" http://www.tralac.org/cgi-bin/giga.cgi?cmd=cause_dir_news_item&cause_id=1694&news_id=92488&cat_id=1026 (accessed 10-09-2010).

Davis "The Doha Round" http://www.igd.org.za/index.php?option=com_remository&Itemid=69&func=selectcat&ca=4 (accessed 09-09-2010).

Denner "Overview of trade developments in 2009" http://www.tralac.org/cgi-bin/giga.cgi?cmd=cause_dir_news_item&cause_id=1694&news_id=79611&cat_id=1058 (accessed 05-01-2010).

De Siqueira "The Regulation of education through the WTO/GATS" 2005 *Journal for Critical Education Policy Studies* 41 <http://www.jceps.com/index.php?pageID=articleID=41> (accessed 06-03-2009).

Diebold "Non-Discrimination and the Pillars of International Economic Law: Comparative Analysis and Building Coherency" http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1632927 (accessed 01-09-2010).

Dinwoodie "The Architecture of the International Intellectual Property System"
http://works.bepress.com/cgi/viewcontent.cgi?article=1010&context=graeme_dinwoodie
(accessed 02-11-2010).

Disenyana "SA: Services and Development [Opinion]" http://www.tralac.org/cgi-bin/giga.cgi?cmd=cause_dir_news_item&news_id=52219&cause_id=1694 (accessed 04-09-2009).

Economic Commission for Africa "The Doha Round and African Development: Turning Words into Deeds"
http://www.uneca.org/eca_resources/Conference_Reports_and_Other_Documents/trid/Cancun-ECAPositionPaper-ENG.pdf (accessed 13-04-2009).

Egger and Lanz "The Determinants of GATS Commitment Coverage"
<http://www3.interscience.wiley.com/cgi-bin/fulltext/121543797/PDFSTART> (accessed 22-02-2010).

Erasmus "Regional trade arrangements: Developments and implications for Southern African States" 2009 *Namibian Law Journal* 29 41.

Evenett, Hoekman and Cattaneo (eds) "The fateful allure of protectionism: Taking stock for the G8" <http://www.voxeu.org/reports/WorldBank.pdf> (accessed 20-09-2010).

Findlay "Background paper for the U.N. Millenium Project Task Force on Trade"
<http://66.102.1.104/scholar?q=cache:wg3F8ElZzE4J:scholar.google.com/+GATS+MAIN+CHALLENGES+&hl=en> (accessed 11-07-2009).

Francois and Wooton "Market structure, trade liberalisation and the GATS" 2001 *European Journal of Political Economy* 389 402
http://www.sciencedirect.com/science?_ob=MIimg&_imagekey=B6V97-43BXPPC-8-W&_cdi=5891&_user=2093731&_pii=S0176268001000337&_orig=search&_coverDate=06%2F30%2F2001&_sk=999829997&view=c&wchp=dGLbVzW-zSkWA&md5=5cc79de8e56ec8876120ae1592a4f925&ie=/sdarticle.pdf (accessed 01-06-2009)
Elsevier Science, B.V. Netherlands.

Gamberoni and Newfarmer "Trade Protectionism: Incipient but Worrisome Trends"
http://siteresources.worldbank.org/NEWS/Resources/Trade_Note_37.pdf (accessed 02-03-2010).

Ghosh, Perroni, and Whalley "The Value of MFN to Developing Countries"
<http://economics.uwo.ca/econref/WorkingPapers/researchreports/wp1999/wp9907.pdf>
(accessed 08-08-2009).

Gould "How the GATS Undermines the Right to Regulate: Lessons from the US-Gambling Case" http://www.policyalternatives.ca/documents/National_Office_Pubs/2005/brief6_4_GATS_and_Gambling.pdf (accessed on 31-03-2009).

Hibbert "The new framework for global trade in services – all about GATS" 2003 *The Service Industries Journal* 67 78
<http://www.informaworld.com/smpp/content~db=all?content=10.1080/02642060412331300892> (accessed 26-06-2009) Frank Cass, London.

Hilger "Pros and Cons of the General Agreement on Trade in Services (GATS)" http://esbserv4.fh-reutlingen.de/fileadmin/_research/dokumente/Workingpaper/WP_2005_03_GATS_Oliver_Hilger.pdf (accessed 10-11-2009).

Hoekman "New Issues in the Uruguay Round and Beyond" 1993 *The Economic Journal* 1528 1539 <http://www.jstor.org/stable/pdfplus/2234482.pdf> (accessed 01-12-2009).

Hoekman "The General Agreement on Trade in Services: Doomed to Fail? Does it Matter?" 2008 *Journal of Industry, Competition and Trade* 295 318
<http://www.springerlink.com/content/k228675144p5343x/fulltext.pdf> (accessed 12-12-2009) Springer Science, London.

Hoekman and Braga "Protection and Trade in Services: A Survey" http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2000/02/24/000009265_3971110141258/Rendered/PDF/multi_page.pdf (accessed 13-11-2009).

Horn and Mavroidis "Economic and legal aspects of the Most-Favored-Nation clause" 2000 *European Journal of Political Economy* 233 279
http://www.sciencedirect.com/science?_ob=MIimg&_imagekey=B6V97-43BXPPC-3-4&_cdi=5891&_user=2093731&_orig=search&_coverDate=06%2F30%2F2001&_sk=999829997&view=c&wchp=dGLzVlz-zSkzS&md5=a7b9840e667c69a478a2ea9dd3561c82&ie=/sdarticle.pdf (accessed 18-04-2009) Elsevier Science, B.V..

Horn and Mavroidis "Still Hazy after All These Years: The Interpretation of National Treatment in the GATT/WTO Case-law on Tax Discrimination" <http://www.ejil.org/pdfs/15/1/347.pdf> (accessed 21-09-2010).

Irwin "A Brief History of International Trade Policy" <http://www.econlib.org/library/Columns/Irwintrade.html#> (accessed 08-03-2009).

Jansen and Low "Dealing with Internal Measures in the Multilateral Trading System: Why, How and With What Consequences?"

<http://webprod.iheid.ch/webdav/site/ctei/shared/CTEI/3413/Fuzzy-Borders-Jansen-Low.pdf>
(accessed 16-11-2009).

Jensen and Gibbon "Africa and the WTO Doha Round: An Overview"
<http://www3.interscience.wiley.com/cgi-bin/fulltext/117999583/PDFSTART> (accessed 13-04-2009).

Jonathan "WTO issues new proposals for services sector" http://www.tralac.org/cgi-bin/giga.cgi?cmd=cause_dir_news_item&cause_id=1694&news_id=46248&cat_id=1064
(accessed 08-07-2009).

Kets and Tang "Free Trade and its Enemies"
<http://0-www.springerlink.com.wam.seals.ac.za/content/x24202xu8n26p47p/fulltext.pdf>
(accessed 29-03-2009).

Khor "Disappointing results for South so far in GATS talks"
<http://www.twinside.org.sg/title2/twninfo200.htm> (accessed 07-04-2009).

Khor "Synergies between Liberalisation, Environment and Sustainable Development, WTO Symposium on Trade and Environment" <http://www.twinside.org.sg/title/synergy-cn.htm>
(accessed 05-11-2010).

Khumalo "From Controlling to Managing the Movement of Persons in SADC"
http://saiaa.org.za/images/upload/trade_report_no16.pdf (accessed 20-03-2009).

Kruger "Importance of trade in services" http://www.tralac.org/cgi-bin/giga.cgi?cmd=cause_dir_news_item&cause_id=1694&news_id=42479&cat_id=1107
(accessed 15-03-2009).

Kruger "The brave new World" http://www.tralac.org/cgi-bin/giga.cgi?cmd=cause_dir_news_item&cause_id=1694&news_id=61942&cat_id=1030
(accessed 24-07-2009).

Kwa "Trade-Africa: Doha Round Stuck on Issues of Development (Again)"
<http://ipsnews.net/news.asp?idnews=40857> (accessed 13-04-2009).

Lehloenya "Trade in services: Examples for SADC" 2003 *Journal for Juridical Science* 86 111
<http://ajol.info/index.php/jjs/article/view/27151> (accessed 30-06-2009).

Livramento "Examining How TRIPS Implementation Affects Access to Foreign Technologies for Developing Countries" http://biblion.epfl.ch/EPFL/theses/2009/4455/EPFL_TH4455.pdf
(accessed 25-01-2010).

Manuel “The Knowledge Management in SADC Countries”
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=902423 (accessed 16-04-2010).

Marconini “Emergency Safeguard Measures in the GATS: Beyond Feasible and Desirable”
http://www.uneca.org/eca_programmes/trade_and_regional_integration/atpc/documents/June/GATS%201.pdf (accessed 12-11-2009).

Matambalya “Profile of Small and Medium Scale Enterprises (SME’s) in the SADC Economies”
http://www.wipo.int/about-ip/en/studies/pdf/study_f_matambalya.pdf (accessed 04-04-2010).

Mattoo “MFN and the GATS” <http://www.iatp.org/tradeobservatory/library.cfm?refID=25142>
(accessed 01-10-2009).

Mattoo “National Treatment in the GATS: Corner-stone or Pandora’s Box?”
<http://scholar.google.co.za/scholar?hl=en&q=The+National+Treatment+in+GATS&btnG=Search>
(accessed 07-05-2009).

Mattoo, Chang, Karsenty, and Richtering “GATS, The Modes of Supply and Statistics on Trade in Services” <http://diplomaticwebsites.ch/ISTIA/wtopapers/statisticspaper.pdf> (accessed 23-07-2009).

Maurer, Magdeleine and d’Andrea “International Trade in Services – GATS, statistical concepts and future challenges” <http://www.iaos2006conf.ca/pdf/Andreas%20Mauer.pdf> (accessed 01-10-2009).

McCulloch, Winters, and Cirera “Policies for the Poor”
http://www.cepr.org/pubs/eep/EEP29/policies_for_the_poor.htm (accessed 24-03-2009).

Mikic and Ramjoue “Preferential Trade Agreements: An Insurance against Protectionism?”
<http://www.unescap.org/tid/artnet/pub/alert2.pdf> (accessed 27-11-2009).

Mutume “Trading services: an opening or a noose”
<http://www.un.org/ecosocdev/geninfo/afrec/vol16no1/161trade.htm> (accessed 24-07-2009).

Nazeer and Pracha “Domestic Preparedness under GATS Related Services Trade Liberalisation”
http://www.sdpi.org/10thsdca/abstracts_globalization_panel3.html (accessed 09-04-2009).

Ndulo, Hansohm and Hodge “State of Trade in Services and Service Trade Reform in Southern Africa” <http://www.nepru.org.na/index.php?id=126> (accessed 07-04-2009).

Nicholson “Intellectual Property: Benefit or burden for Africa” 2006 *IFLA Journal* 310 324
<http://0-ifl.sagepub.com.wam.seals.ac.za/cgi/reprint/32/4/310> (accessed 11-07-2009) SAGE Publishers Online.

Ortino "The Principle of non-discrimination and its Exceptions in GATS: Selected legal issues" http://papers.ssrn.com/sol3/papers.cfm?abstract_id=979481&download=yes (accessed 11-09-2010).

Osakwe "Emerging Issues and Concerns of African Countries in the WTO Negotiations on Agriculture and the Doha Round" http://mpa.ub.uni-muenchen.de/1850/1/MPRA_paper_1850.pdf (accessed 03-12-2009).

Oyewole "Prospects for Developing Country Exports of Services to the Year 2010: Projections and Public Policy" 2001 *Journal of Macromarketing* 32 46 <http://0-jmk.sagepub.com.wam.seals.ac.za/cgi/reprint/21/1/32> (accessed 08-04-2009) SAGE Publishers Online.

Palmer "Balancing Intellectual Property Rights with public obligations in developing nations: Lessons from Africa" 2006 *Critical Arts: A Journal of South-North Cultural and Media Studies* 62 82 http://pdfserve.informaworld.com/348298_751313789_790471586.pdf (accessed 25-03-2010) Routledge Publisher, Taylor and Francis Group, UK.

Phiri "Economic Partnership Agreements and Intellectual Property Rights Protection: challenges for the Southern African Development Community (SADC) region" http://www.saiia.org.za/index.php?option=com_content&view=article&id=861:economic-partnership-agreements-and-intellectual-property-rights-protection-challenges-for-the-southern-african-development-community-sadc-region&catid=78:diplomatic-pouch&Itemid=230 (accessed 20-10-2009).

South Centre "Increasing LDC Participation in Services through Special Priority Market Access in the WTO". http://www.southcentre.org/index.php?option=com_content&task=view&id=599&Itemid=67 (accessed 15-04-2009).

Puri "Trade in Services and Development Implications" http://www.unctad.org/sections/ditc_dir/docs/statement_0112_20-03-07_en.pdf (accessed 24-07-2009).

Reichman "The Know-How Gap in the Trips Agreement: Why Software Fared Badly, and What Are the Solutions" http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1614&context=faculty_scholarship (accessed 08-11-2009).

Reichman and Lange “Bargaining Around the TRIPS Agreement: The Case for Ongoing Public-Private Initiatives to Facilitate Worldwide Intellectual Property Transactions” <http://www.ppl.nl/bibliographies/wto/files/5489.pdf> (accessed 09-11-2009).

Sander “Much needed to make South-South trade work” http://www.tralac.org/cgi-bin/giga.cgi?cmd=cause_dir_news_item&cause_id=1694&news_id=62989&cat_id=1026 (accessed on 15-04-2009).

South Centre “GATS Dispute Settlement Cases: Practical Implications for Developing Countries”. http://www.southcentre.org/index.php?option=com_content&task=category§ionid=12&id=52&Itemid=213&lang=en (accessed 15-04-2009).

Štěrbová “Regional Integration: a New Trade Protectionism” <http://www.g-casa.com/PDF/Krakow%202008/krakow%20papers%20pdf/paper%20database%20krakow/Sterbova.pdf> (accessed 14-11-2009).

Sykes “Efficient Protection: Through WTO Rulemaking” <http://www.ppl.nl/bibliographies/wto/files/2723.pdf> (accessed 16-11-2009).

Teksten “A Comparative Analysis of GATS and GATT: A Trade in Services Departure from GATT’s MFN Principle and The Effect on National Treatment and Market Access” <http://scholar.google.co.za/scholar?start=20&q=History+of+the+MFN+Obligation+&hl=en> (accessed 24-08-2009).

Thang “Interpreting GATS National Treatment Principle” Possibilities and Problems of Transplant from GATT <http://www.gsid.nagoya-u.ac.jp/bpub/research/public/forum/32/10.pdf> (accessed 22-02-2010).

The OECD “Non-discrimination treatment for national and international investors” http://www.oecd.org/document/29/0,3343,en_39048427_39049329_39634141_1_1_1_1,00.html (accessed 10-07-2010).

The Organisation for Economic Co-operation and Development “The Principles and Concepts” http://ec.europa.eu/environment/integration/pdf/oecd_te_1995.pdf (accessed 11-08-2010).

The United Nations Conference on Trade and Development (UNCTAD) “Investment Provisions in Economic Integration Agreements” http://www.unctad.org/en/docs/iteit200510_en.pdf (accessed 12-11-2009).

The World Bank “Trade in Information and Communication Services: Opportunities for East and Southern Africa” <http://siteresources.worldbank.org/EXTINFORMATIONANDCOMMUNICATIONANDTECHNOLOGI>

ES/Resources/282822-1208273252769/Trade_in_ICT_services-opportunities_for_E&SA_mod.pdf (accessed 13-10-2010).

The World Trade Organisation “Modalities for the Special Treatment for Least-Developed Country Members in the Negotiations on Trade in Services” http://www.wto.org/english/tratop_e/serv_e/nego_mandates_e.htm (accessed 15-04-2009).

The World Trade Organisation “WTO background: Doha Round and current state” http://www.tralac.org/cgi-bin/giga.cgi?cmd=cause_dir_news_item&cause_id=1694&news_id=36873&cat_id=1050 (accessed 07-04-2009).

The WTO “Dispute Settlement: Dispute DS290 – European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs” http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds290_e.htm (accessed 01-12-2010).

Trebilcock and Giri “The National Treatment Principle in International Trade Law” <http://law.bepress.com/cgi/viewcontent.cgi?article=1007&context=alea> (accessed 14-07-2010).

UNCTAD “Ministers of Southern African Development Community Approve Protocol on Services Trade Liberalisation” <http://www.unctad.org/Templates/Webflyer.asp?docID=8622&intlItemID=1584&lang=1> (accessed 20-06-2009).

UNCTAD Secretariat “Issues of Doha Trade Negotiations” <http://www.unctad.org/Templates/Webflyer.asp?docID=9177&intlItemID=1584&lang=1> (accessed 07-04-2009).

UNCTAD Secretariat: “Trade in Services and Development Implications” http://www.unctad.org/en/docs/c1d71_en.pdf (07-04-2009).

United Nations Conference on Trade and Development “Investor-State Disputes Arising from Investment Treaties: A Review” http://www.unctad.org/en/docs/iteiit20054_en.pdf (accessed 07-04-2009).

United Nations Conference on Trade and Development “National Treatment: UNCTAD on issues in international investment agreements” <http://www.unctad.org/en/docs/psiteiitd11v4.en.pdf> (accessed 07-05-2009).

United Nations Conference on Trade and Development “WTO Core Principles and Prohibitions: Obligations Relating to Private Practices, National Competition Laws and Implications for A

Competition Policy” http://www.unctad.org/en/docs/ditccclp20032_en.pdf (accessed 07-04-2009).

Ustor “Most-Favoured-Nation Clause in the law of treaties: working paper” http://untreaty.un.org/ilc/documentation/english/a_cn4_l127.pdf (accessed 18-07-2009).

Van der Walt “Fanrpan Economic Policy Research Study of Plant Variety Protection in the SADC Region” http://www.fanrpan.org/documents/d00242/FANRPAN_EPRS_Nov2005.pdf (accessed 04-04-2010).

Van der Merwe “Inclusive Approach key to SADC Integration” <http://www.polity.org.za/article/inclusive-approach-key-to-sadc-regional-integration-2010-11-25-1> (accessed 06-01-2011).

Visser and Hartzenberg “Trade Liberalisation and Regional Integration in SADC: Policy Synergies Assessed in an Industrial Organisation Framework” http://www.commerce.uct.ac.za/Research_Units/DPRU/DPRU-Conference2004/Papers/Trade_Liberalisation_Visser_Hartzenberg.pdf (accessed 15-05-2009).

Von Moltke “Discrimination and Non-Discrimination in Foreign Direct Investment Mining Issues” <http://www.oecd.org/dataoecd/1/59/1819921.pdf> (accessed 21-09-2010).

White “International Trade in Services: More than meets the eye” <http://www.stern.nyu.edu/eco/wkpapers/workingpapers02/02-13White.pdf> (accessed 05-11-2009).

Williams “The General Agreement on Trade in Services (GATS): the Debate between the North and the South” <http://www.ppl.nl/bibliographies/wto/files/975.pdf> (accessed 08-11-2009).

Woodroffe “GATS: A Disservice to the Poor” <http://www.ppl.nl/bibliographies/wto/files/2331.pdf> (accessed 13-11-2009).

Woolfrey “South Africa and the Doha Round” http://www.tralac.org/cgi-bin/giga.cgi?cmd=cause_dir_news_item&news_id=70251&cause_id=1694 (accessed 25-01-2010).

Yanai “The Function of the MFN clause in the Global Trading System” <http://202.244.105.129/English/Publish/Download/Apec/1863ra0000006alg-att/1863ra0000006cgb.pdf> (accessed 21-07-2009).

Zebaze “Effect of Services Trade Liberalisation in Africa” http://hal.archives-ouvertes.fr/docs/00/30/68/28/PDF/These_C._DJIOFACK.pdf (accessed 24-07-2009).

REPORTS

Kamall "Reporting on behalf of the Committee on International Trade"
<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A6-2008-0283+0+DOC+XML+V0//EN> (accessed 15-03-2009).

Schwab (ed) "The Global Competitiveness Report 2009-2010"
<http://www.weforum.org/pdf/GCR09/GCR20092010fullreport.pdf> (accessed 16-04-2010).

The United Nations (UN) "Millennium Development Goals Report 2010"
<http://www.un.org/millenniumgoals/pdf/MDG%20Report%202010%20En%20r15%20-low%20res%2020100615%20-.pdf> (accessed 18-08-2010).

The United Nations "Manual on Statistics of international trade in Services"
<http://www.oecd.org/dataoecd/32/45/2404428.pdf> (accessed 29-04-2010).

NEWSPAPER ARTICLES / NEWS PAPER PIECES

Hazelhurst "Sub-Saharan policies praised" Business Report, 26 April 2010.
http://www.busrep.co.za/index.php?from=rss_&ArticleId=5444575 (accessed 29-04-2010).

WTO SOURCES / REPORTS

Lamy "Lamy calls for "more holistic view" in helping developing countries"
http://www.wto.org/english/news_e/sppl_e/sppl167_e.htm (accessed 16-09-2010).

Lamy "Why services are crucial for concluding the WTO Doha Round"
http://www.lse.ac.uk/collections/LSEPublicLecturesAndEvents/pdf/20071015_Lamy.pdf
(accessed 13-04-2009).

Lamy "WTO Public Forum 2008 - Trading into the Future"
http://www.wto.org/english/forums_e/public_forum08_e/dg_speech_e.pdf (accessed 25-01-2010).

Lamy "Trade in Services and Economic Recovery - Tuning the instruments of growth"
http://www.wto.org/english/news_e/sppl_e/sppl171_e.htm (accessed 28-09-2010).

The General Agreement on Trade in Services (GATS) "Objectives, coverage and disciplines"
http://www.wto.org/english/tratop_e/gatsqa_e.htm (accessed 08-03-2009).

The World Trade Organisation “Basic Purpose and Concepts”
http://www.wto.org/english/tratop_e/serv_e/cbt_course_e/c1s1p1_e.htm (accessed 07-04-2009).

The WTO “Dispute Settlement: The Disputes – Disputes by Agreement”
http://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A26#selected_agreement (accessed 29-11-2010).

The WTO “Dispute Settlement: The Disputes – Index of dispute issues”
http://www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm#selected_subject,
http://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A8#selected_agreement and http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds182_e.htm
(accessed 29 November 2010).

The WTO “Export Horizontal Commitments of Botswana”
<http://tsdb.wto.org/simplesearch.aspx> (accessed 15-06-2010).

The WTO “Export Horizontal Commitments of Lesotho” <http://tsdb.wto.org/simplesearch.aspx>
(accessed 15-06-2010).

The WTO “Export Horizontal Commitments of Malawi” <http://tsdb.wto.org/simplesearch.aspx>
(accessed 15-06-2010).

The WTO “Export Horizontal Commitments of Mauritius”
<http://tsdb.wto.org/simplesearch.aspx> (accessed 15-06-2010).

The WTO “Export Horizontal Commitments of Namibia” <http://tsdb.wto.org/simplesearch.aspx>
(accessed 15-06-2010).

The WTO “Export Horizontal Commitments of South Africa”
<http://tsdb.wto.org/simplesearch.aspx> (accessed 15-06-2010).

The WTO: Services Schedules “Guide to reading the GATS schedules of specific commitments and list of Article II (MFN) Exemptions”
http://www.wto.org/english/tratop_e/serv_e/guide1_e.htm (accessed 20-05-2009).

Understanding the WTO “Basics Principles of the trading system”
http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (accessed 12-11-2009).

Understanding the WTO “The Doha Agenda”
http://www.wto.org/english/thewto_e/whatis_e/tif_e/doha1_e.htm (accessed 12-04-2009).

Understanding the WTO “The Organisation: Members and Observers”
http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (accessed 25-03-2010).

World Trade Organisation “Measuring Trade in Services, a training module for the World Bank”
http://www.wto.org/english/res_e/statis_e/services_training_module_e.pdf (accessed 15-03-2009).

World Trade Organisation “Opening Markets for Trade in Services: Countries and Sectors in Bilateral and WTO Negotiations”
http://www.wto.org/english/res_e/booksp_e/open_markets_e.pdf (accessed 08-04-2009).

World Trade Organisation “Regional Trade Agreements: Scope of RTA’s”
http://www.wto.org/english/tratop_e/region_e/scope_rta_e.htm (accessed 13-11-2009).

World Trade Organisation “The Doha Declaration Explained”
http://www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm (accessed 12-04-2009).

World Trade Organisation “World Trade Report 2009” http://us-cdn.creamermedia.co.za/assets/articles/attachments/22406_world_trade_report09_e.pdf
(accessed 24-07-2009).

WTO: “SERVICES: Negotiations Negotiating Mandates”
http://www.wto.org/english/tratop_e/serv_e/nego_mandates_e.htm (accessed 15-04-2009).

World Trade Organisation *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) The World Trade Organisation Secretariat.

DOCUMENTS

2009 LIST OF DEVELOPING COUNTRIES
http://www.aoac.org/meetings1/123rd_annual_mtg/2009_LIST_OF_DEVELOPING_COUNTRIES%5B1%5D.pdf (accessed 27-07-2009).

Declaration and Treaty of SADC (1992) <http://www.sadc.int/index/browse/page/119#article5>
(accessed 20-11-2009).

Economic Report on Africa 2009 “Developing African Agriculture Through Regional Value Chains” <http://www.uneca.org/era2009/> (accessed 28-07-2009).

GATS Services sectoral classification list <http://www.smeda.org/downloads/AppendixV-TradeinService.pdf> (accessed 07-04-2009).

The OECD “Regional Integration Agreements”
<http://www.oecd.org/dataoecd/39/37/1923431.pdf> (accessed 30-11-2009).

SADC Trade “Services Sector Liberalisation: Literature Review”
<http://www.sadctrade.org/files/Service%20Sector%20Liberalisation%20Literature%20Review.pdf> (accessed 08-04-2009).

Southern African Development Community (SADC) “One Team 15 Nations”
<http://www.sadc.int/sadc2010> (accessed 23-04-2010).

Southern African Development Community (SADC) “Protocol on Trade”
<http://www.sadcstan.co.za/Secure/downloads/protocol.pdf> (accessed 23-05-2009).

UNCTAD Secretariat “The draft SADC Annex on Trade in Services: Sub-regional Conference on Improving Industrial Performance and Promoting Employment in SADC”
http://www.unctad.org/60523_SADCAPCI_Services (accessed 15-03-2009).

The United Nations (UN) “Millennium Development Goals Report 2010”
<http://www.un.org/millenniumgoals/pdf/MDG%20Report%202010%20En%20r15%20-low%20res%2020100615%20-.pdf> (accessed 18-08-2010).

The United Nation (UN) News Centre “UN Global Compact gathering ends in pledge to pursue more sustainable world economy”
<http://www.un.org/apps/news/story.asp?NewsID=35148&Cr=global+compact&Cr1=> (accessed 18-08-2010).

United Nations (1948) “Universal Declaration of Human Rights”, UN, Geneva
<http://www.un.org/en/documents/udhr/index.shtml> (accessed 25-03-2010).

United Nations (2005): Vienna Convention on the Law of Treaties 1969. Done at Vienna on 23 May 1969. Entered into force on 27 January 1980. United Nations Treaty Series, vol. 1155, p. 331. http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf (accessed 11-11-2009).

United Nations “Draft Articles on Most-Favoured-Nation Clauses (1978)”
http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/1_3_1978.pdf (accessed 20-05-2009).

United Nations Treaty Series,
http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf (accessed 20-07-2009).

WIPO Performances and Phonograms Treaty 1996.

WTO CASE LAW

Appellate Body Reports

Brazil – Export Financing Programmes for Aircraft, WT/DS46/AB/R, 2 August 1999, Appellate Body Report.

Canada – Certain Measures Affecting the Automotive Industry (“Canada – Auto Pact”), WT/DS139/AB/R, WT/DS142/AB/R, 31 May 2000, Appellate Body Report.

Canada – Certain Measures Concerning Periodicals WT/DS31/AB/R, 30 June 1997, Appellate Body Report.

Chile – Taxes on Alcoholic Beverages, WT/DS87/AB/R, WT/DS110/AB/R, 13 December 1999, Appellate Body Report.

China – Measures Affecting Trading Rights and Distribution Services for Certain Publishers and Audiovisual Entertainment Products, WT/DS363/AB/R, 21 December 2009, Appellate Body Report.

European Communities - Measures Affecting Asbestos and Asbestos-Containing Products (“EEC – Asbestos”), WT/DS135/AB/R, 12 March 2001, Appellate Body Report.

European Communities – Regime for the Importation, Sale and Distribution of Bananas (“EC – Bananas III”), WT/DS27/AB/R, Appellate Body Report.

India – Patent Protection for Pharmaceutical and Agricultural Chemical Products (“India – Mailbox”), WT/DS50/AB/R, 19 December 1997, Appellate Body Report.

Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef (“Korea – Various Measures on Beef”), WT/DS161/AB/R, WTDS169/AB/R, 11 December 2000, Appellate Body Report.

Korea – Taxes on Alcoholic Beverages, WT/DS75/AB/R, WT/DS84/AB/R, 18 January 1999, Appellate Body Report.

Mexico – Measures Affecting Telecommunications Services, WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R, 4 October 1996, Appellate Body Report.

United States – Anti-dumping Act of 1916, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, Appellate Body Report.

United States – Measures Affecting the Cross-border Supply of Gambling and Betting Services, WT/DS285/AB/R, 7 April 2005, Appellate Body Report.

United States – Section 211 Omnibus Appropriations Act of 1998 (“US – Havana Club”), WT/DS176/AB/R, 2 January 2002, Appellate Body Report.

Panel Reports

Brazil – Export Financing Programmes for Aircraft, WT/DS46/R, 14 April 1999, Panel Report.

Canada – Certain Measures Affecting the Automotive Industry (“Canada – Auto Pact”), WT/DS139/R, WT/DS142/R, 11 February 2000, adopted 19 June 2000, Panel Report.

China – Measures Affecting Trading Rights and Distribution Services for Certain Publishers and Audiovisual Entertainment Products, WT/DS363/R, 12 August 2009, Panel Report.

European Communities – Measures Affecting Asbestos and Asbestos-Containing Products (“EEC – Asbestos”), WT/DS135/R, 18 September 2000, Panel Report.

European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs (“EC – Trademarks and Geographical Indications”), WT/DS174/R, WT/DS290/R, 15 March 2005 adopted 20 April 2005, Panel Report.

European Communities – Regime for the Importation, Sale and Distribution of Bananas (“EC – Bananas III”), WT/DS27/R/ECU, WT/DS27/R/GTM, WT/DS27/R/HND, WT/DS27/R/MEX, WT/DS27/R/USA, Panel Report.

European Communities and its Members States – Tariff Treatment of Certain Information Technology Products, WT/DS375/R, WT/DS376/R, WT/DS377/R, 16 August 2010, Panel Report.

Indonesia – Certain Measures Affecting the Automobile Industry (“Indonesia – Autos”), WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, 2 July 1998, Panel Report.

Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages (“Japan – Alcoholic Beverages I”), adopted on 10 November 1987, BISD 34S/83, Panel Report.

Japan – Measures Affecting Consumer Photographic Film and Paper (Kodak – Fuji) WT/DS44/R, 31 March 1998, adopted 22 April 1998, Panel Report.

Japan – Taxes on Alcoholic Beverages, WT/DS8/R, WT/DS10 and WT/DS8/AB/R, 11 July 1996, Panel Report.

Mexico – Measures Affecting Telecommunications Services (“Mexico – Telecoms”), WT/DS204/R, 2 April 2004, Panel Report.

Mexico – Measures Affecting Telecommunications Services, WT/DS204/R, 2 April 2004, Panel Report.

United States – Measures Affecting Alcoholic and Malt Beverages, DS23/R - 39S/206, adopted 19 June 1992, Panel Report.

United States – Measures Affecting the Cross-border Supply of Gambling and Betting Services, WT/DS285/R, 10 November 2004, Panel Report.

United States – Section 211 Omnibus Appropriations Act of 1998 (“US – Havana Club”), WT/DS176/R, Panel Report.

United States – Standards for Reformulated and Conventional Gasoline, WT/DS2/R, 29 January 1996, Panel Report.

United States – Taxes on Petroleum and Certain Imported Substances, BISD 34S/136, 138, adopted on 17 June 1987, Panel Report.

US – Section 337 of the Tariffs Act of 1930 (“US – Section 337”), adopted on 7 November 1989, BISD 36S/345, Panel Report.

SOUTH AFRICAN CASE LAW

International Trade Administration Commission v SCAW South Africa (Pty) Ltd (“ITAC v SCAW”), CCT 59/09 [2010 ZACC 6]; 2010 (5) BCLR 457 (CC).

