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International Liberalization of Trade in Textiles and Clothing.

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Institute of Comparative Law,
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A Thesis Submitted to the Faculty of Graduate Studies and Research in Partial
Fulfillment of the Requirements for the Degree of Master of Laws.

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For my mother

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Abstract

Liberalization of textiles and clothing was one of the pillars of the Uruguay Round under the WTO aimed at promoting economic growth, development and alleviating poverty. For over 40 years this sector had been separated from the established principles of liberal trade stemming mainly from protectionist sentiments. The new regime established by the Uruguay Round aimed at integrating the sector into GATT on the basis of its strengthened rules and disciplines in furtherance of its general objective to liberalize trade. This change in international trade rules is a phenomenal development that is bound to have an impact on trade in other areas. The paper explores the liberalization process by analyzing current trends in the textiles and clothing liberalization process. It identifies opportunities and also highlights challenges the process presents to participants in the sector. Although no precise picture of the trade following the full integration can be drawn at this stage, there are some indicators of potential winners and losers explaining both the praises and condemnation in the liberalization debate from the various commentators.

From the beginning of the integration process, one question continues to loom: will the developed countries fulfill their promise to fully liberalize the sector or will they fall back on it. The outcome of this process puts the entire trading system to a test. The issue then becomes one of whether the multilateral system can demonstrate the ability to enforce its own rules. There exists the necessary momentum for the complete integration of the sector. Although the road to this goal has been and probably will continue to be patchy meeting hiccups along the way, with caution I reach the conclusion that the process will be completed according to the original deadline. This however, should not be the end of the matter; more needs to be done to ensure that participants in the trade gain concrete benefits and that these be evenly distributed.

Résumé

La libéralisation du secteur du textile et de l'habillement était un des piliers du cycle d'Uruguay tenu par l'OMC dont le but était de promouvoir le développement économique et la réduction de la pauvreté. Pendant plus de 40 ans, ce secteur était resté à l'écart des principes établies du libre échange, étant essentiellement soumis à des principes protectionnistes. Le nouveau régime établit par le cycle d'Uruguay a pour but d'intégrer ce secteur dans le 'GATT' afin de le soumettre à ses règles renforcées et à sa discipline et ainsi contribuer à son objectif général de libéralisation du commerce. Ce changement important dans les règles internationales aura certainement un impact sur le commerce dans les autres domaines. Cette thèse explore le processus de libéralisation en analysant les tendances actuelles de libéralisation dans le domaine du textile et de l'habillement. Elle identifie également les opportunités et les défis qu'amènent ce processus pour les opérateurs de ce domaine. Bien qu'il ne soit pas possible à cette étape d'avoir un portrait précis de ce que sera le commerce à la fin du processus d'intégration, il y a néanmoins des indications qui permettent d'identifier les gagnants et les perdants potentiels ; ce qui explique aussi qu'on peut à la fois entendre des commentaires négatifs ou positifs au sujet de la libéralisation du commerce.

Depuis le début du processus d'intégration, une question reste sans réponse: Est-ce que les pays développés vont respecter leur engagement et libéralisé entièrement ce secteur ? Le résultat de ce processus constitue un test pour tout le système de commerce. L'issue permettra de déterminer si le système peut faire respecter ses propres règles. Le *momentum* nécessaire pour compléter l'intégration dans ce secteur existe. Toutefois, le chemin vers cette intégration a été, et sera probablement, semé d'embûches. Avec prudence, j'en viens à la conclusion que ce processus sera complété dans le délai initialement prévu. Cela ne sera toutefois pas la fin, il faudra faire plus pour s'assurer que les participants dans ce commerce voient de vrais bénéfices et que ceux-ci soient distribués également.

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Introduction

Before the mid 1980's, integration of the textile and clothing sector into the General Agreement of Tariffs and Trade (GATT) disciplines was distant from the minds of bureaucrats and politicians in the West but more so from the minds of those in the Third world.

The sector was governed by bilateral arrangements and was treated as a special case outside of the aegis of the GATT. What started as a private arrangement between two nations (USA & Japan) translated into an international norm and developed into a unique regime, which was meant at first to be temporary but ended up acquiring a more permanent nature with consequences that continue to characterize the sector and have shaped the structure of the trade to this day. This special regime shaped the trade in a manner that was in complete contradiction with the fundamental principles of the international trading community and more specifically, the doctrine of free trade (liberal trade framework). Members were already violating Articles I and XIX of GATT by taking discriminatory action. They thus sought a multilateral agreement on exceptions to the GATT rules.¹ The effect of this was the creation of the Multi Fiber Agreement (MFA), under the GATT umbrella despite its openly discriminatory characteristics which violated the rules and norms of the trade regime.² The regime stifled trade and fuelled emotions and tensions in trade relations, crippling economies of countries that had considered textile and clothing trade as an opportunity for advancement in their process of industrialization.

Maintaining the regime required enormous amounts of resources in terms of policy and finance to sustain the increasing numbers of uncompetitive industries i.e. industries that were not able to face up to the challenges of the changing trading regime. The regime also had the effect of influencing the direction of resources within the sector by encouraging countries with little or no comparative advantage to continue operating

¹ Sri Ram Khanna, *International Trade in textiles. MFA Quotas and a Developing Exporting Country*, (New Delhi: Sage Publications, 1991) at 22.

² Geoffrey R. D. Underhill, *Industrial Crisis and the Open Economy: Politics, Global Trade and the Textile Industry in the Advanced Economies*, (New York: St Martin's Press, 1998) at 6.

while new ones joined in and maintained some level of productivity but only as long as the trade and the system was artificially manipulated.

In 1986 however, there was a general realization that the system had not worked well and that the time had come for Members to right the wrongs that had previously taken place. This led to the move towards bringing textile and clothing back into the multilateral trading rules- a system it had shied away from for so long. The negotiations that led to the decision for integration of the sector into the GATT were not smooth and this fact is illustrated in the outcome. Also significant to note regarding the results of these negotiations is that they reflected the mood of the two negotiating camps throughout the duration of the negotiating process. Developed countries on their part, sought to come up with a regime that would be acceptable in their home countries while developing countries, due to the many unsuccessful attempts towards freeing the sector, were so preoccupied with the possibility of yet another failure and as a result settled for an agreement that promised an opportunity of liberalization even though the benefits were still tilted in favor of the developed countries. Therefore the result was that developing nations took on more obligations in other areas of the international trade in exchange for the promise made by developed nations to liberalize the textile and clothing sector.

This analysis of the progress of the liberalization process of the textile and clothing sector is written a few months before the deadline for the complete integration of the sector into the multilateral trading system, which is on December 31, 2004. This change in rules governing the sector is a phenomenal development since the multilateral trading system is subjected to the possibility of witnessing a change of regime i.e. the shift from quotas to tariffs which is evidently of benefit. This poses a substantial challenge to the multilateral system and puts its credibility to a test. Equally important is the economic performance of the trading nations since there is a great deal of uncertainty of what the situation will be after the old regime has been dismantled. The goal of this work is to analyze whether the integration process can/will be successful. This will be achieved by analyzing the various developments i.e. the implementation stages, legal and economic adjustments; that have taken place with a view to evaluating whether these are good indicators of the commitment to fully abolish the old regime.

The following section briefly describes what the chapters comprise.

Chapter I introduces the textile and clothing sector by highlighting its basic features. This will be followed by a discussion of the liberalization process pointing out its fundamental features that have informed the discussions and developments in the sector. This discussion of the process of liberalization features throughout the work because it has taken center stage in the debates and will illustrate what the possible impact of the process could be on the entire trading system. An examination of the operations of the GATT and World Trade Organization (WTO) is therefore important to determine how the liberalization process has been set in motion. Emphasis will be placed on the WTO and the opportunities it offers through its rules-based system will be discussed with the aim of analyzing the effectiveness of the organization's rules in the furtherance of the liberalization process. The chapter will also examine the WTO Agreement of Textiles and Clothing (ATC) to determine how the WTO has so far performed in the textile and clothing liberalization process.

Chapter II focuses on the process of liberalization as set out in the WTO system and highlights how the various elements will possibly play out once the sector has been fully integrated. The chapter emphasizes the importance of clearly established rules and systems for governance of international trade to ensure that the trade is beneficial to all parties involved. It discusses the importance of an effective regulatory system in as far as it offers some level of security to the participants and presents them with an opportunity to make informed decisions in their efforts for increased participation in international trade and more importantly attaining a level of economic development that ensures sustainability. This section will draw on examples from participating developing countries to establish what the likely impact of the rules of the WTO as they stand today could be on their economies and performance in the trade.

Chapter III will critically explore the Doha Development Agenda. This is based on my supposition that the Doha offers an opportunity for developing countries to realize their goals in the textile and clothing trade, through effective participation and more crucially because it emphasizes the linkage between trade and development. This chapter begins with an explanation of the underlying reasons for the Development Round and points out the expectations of the countries involved. It must be emphasized that many

developing countries look to the linkage of the trade and development as an opportunity for them to finally overcome their dire economic situations. The chapter highlights issues central to the textile and clothing trade and explores the impediments in the implementation of the liberalization process and therefore sets the stage for the discussion of how the Doha purports to correct the imbalance in the trade. The chapter will also follow the textile developments as they have unfolded at the recently concluded Cancun Ministerial conference and the challenges that still lie ahead.

Chapter IV details the conclusions I have reached as a result of my analysis and highlights possible areas that need further exploration and discussion in this area. In addition this final chapter suggests recommendations that should be made within the international trade system so that the textile and clothing trade can be beneficial to all.

Chapter I:

1 The Textile and Clothing Sector

1.1.1 Nature and Structure

The fabrication of textile products is one of our oldest arts and is in fact one of the bases of civilization.¹ A study of the growth and development of the textile industry is therefore a study of the growth and development of humankind.² Traditionally this sector has been considered a “take-off” industry in economic modernization.³ In many economies the Textile and clothing (T&C) sector forms part of the manufacturing industry. Manufacturing is an important sector of almost every economy and also plays an important role in development theory, often being characterized as the *sine qua non* of development.⁴ The T&C sector is very diverse and heterogeneous, with its products being used by virtually everybody-private house holds and businesses alike.⁵

Also important to note is the fact that the sector is highly competitive.⁶ It has been said to be more vulnerable to the fads and fashions than any other sector.⁷ For textile products the selection criteria in a purchase decision is determined by the appearance, comfort, ease of maintenance, durability and cost.⁸ Some have emphasized that this decision to buy is influenced mainly by the quality or related aspects and to a lesser extent by the price.⁹ Nevertheless success of enterprises depends on their being attuned to the wants and needs of consumers.¹⁰ To this end manufacturers are constantly trying to find ways to meet the ever changing consumer tastes and preferences.¹¹

¹ Betty F. Smith & Ira Block, *Textiles in Perspective* (New Jersey: Prentice-Hall, 1982) at 3; See also John Singleton, *The World Textile Industry*, (London: Routledge, 1997) at 12.

² Smith & Block, *ibid.*

³ Henry R Zheng, *Legal Structure of International Textile Trade* (New York: Quorum Books, 1988) at 9.

⁴ Neil McCulloch, L Alan Winters & Xavier Cirera, “Trade Liberalization and Poverty: A Handbook,” (2001) online: Centre for Economic Policy Research. <<http://www.ids.ac.uk/ids/global/pdfs/lipov.pdf>> (accessed on 10/10/2003) at 254.

⁵ Werner Stengg, “Textiles and Clothing Industry in the European Union” online: <http://www.kabinet.org.tr/kosgebabm/yayinlar/docs/enterprise_paper_02_2001.pdf> (accessed on 11/12/2003) at 1

⁶ Brian McDonald, *The World Trading System: The Uruguay Round and Beyond* (Hampshire: Macmillan Press Ltd, 1998) at 135; See also Smith & Block, *supra* note 1 at 16.

⁷ McDonald, *ibid.* at 135.

⁸ Smith & Block, *supra* note 1 at 19.

⁹ Stengg, *supra* note 5 at 2.

¹⁰ Smith & Block, *supra* note 1 at 15.

¹¹ Stengg, *supra* note 5 at 2.

More generally, clothing is a basic human necessity without which human beings would find it very difficult if not impossible to survive.¹² This crucial role may partly explain the degree of attention given to the trade in almost all participating countries since they recognize that any activity with the potential to adversely affect the industry's structure and performance will have far reaching effects on the economy as well as the general welfare and probably have a lasting impact. As such, efforts are directed toward prevention of the occurrence of such activity.

Production in the sector involves a number of distinct activities ranging from the production of raw materials i.e. natural as well as man made fibers, to the manufacture of a wide variety of semi-finished products and finished products.¹³

Another relevant feature to note concerning the sector is that it works on relatively low margins.¹⁴ The technology in the sector is said to be relatively straightforward and production is relatively labor intensive. Labor costs are an important factor in production and are believed to play a major role influencing the investor's decision to set up a plant in a particular region.¹⁵ Whereas the sector is a major employer in both developed and developing countries the abundance of cheap labor implies that developing countries have an edge.¹⁶ Developing countries have an abundance of low skilled workers, and as such many of them have demonstrated an international competitiveness in the production and the industry thus constitutes an important and often leading sector of their export industry.¹⁷

As indicated above that substantial parts of the sector are highly labor intensive, it has been argued that developed countries do not have a natural competitive advantage in this sector.¹⁸ Whereas this may be valid for some segments, the argument does not hold for the entire sector. For instance, developed countries have managed to hold their own in the yarn end of the market and indeed are still running trade surpluses in this and related areas. The underlying factor being technology i.e. where the demand for capital is great,

¹² Singleton, *supra* note 1 at 12.

¹³ *Ibid.* ; See also Stengg, *supra* note 5 at 1.

¹⁴ McDonald, *supra* note 6 at 135.

¹⁵ *Ibid.* at 19.

¹⁶ *Ibid.* at 135.

¹⁷ Zheng *supra* note 3 at 112.

¹⁸ McDonald, *supra* note 6 at 135.

developed countries still have an advantage and are taking the lead.¹⁹ Because of the low productivity in developing countries explained by low skills of many workers, developed countries supported by the superior capital have been able to stay in the lead.

Significant in the discussion of the T&C sector is the aspect of market opportunities. Many developing countries do not have fully developed domestic markets partly because of the low purchasing power created by the generally low incomes. They have thus tended to rely on foreign markets as a means for advancement in the sector. The Western countries are therefore not only important producers of T&C products but also the most attractive outlets for many developing exporting countries.²⁰

The T&C sector has received trade protection unprecedented in degree and duration.²¹ It has been traded under restrictions which dated back to 1930s.²² The series of bilateral agreements that were created inherently discriminated among supply sources. Surprisingly, they were getting negotiated under General Agreement on Tariffs and Trade (GATT) which strongly affirms the Most Favored Nation principle (MFN) and this inconsistency has been likened to getting the Pope to preside over a pagan rite.²³ For a long time this issue of the liberalization of the trade has divided developing and developed countries.²⁴ The developing countries' position reflects their general frustration at the development of the international textile trade regime and their resolve to bring about improvements.²⁵ Given that the sector is the major export sector in many developing countries, the protectionist trade policies constitute a major source of economic disruption and are therefore a significant obstacle to their economic development.²⁶ Hence although they have disagreed as to priorities and approaches to improvements, developing countries have generally favored liberalizing international

¹⁹ *Ibid.* at 135.

²⁰ Stengg, *supra* note 5 at 1.

²¹ UNDP, *Making Global Trade Work for People* (London: Earthscan Publications Ltd, 2003) at 167.

²² J. Michael Finger & Ann Harrison, "Import Protection for US Textiles and Apparel: Viewed from the Domestic Perspective" in Anne O. Krugger ed., *The Political Economy of Trade Protection*, (Chicago and London: University of Chicago Press Ltd, 1996) 44 at 44.

²³ Jagdish, Bhagwati. *Protectionism* (Cambridge: The MIT Press, 1988) 11.

²⁴ UNDP, *supra* note 21 at 167.

²⁵ Peter Gallagher, *Guide to the WTO and developing countries* (The Hague: Kluwer Law International, 2000) at 6.

²⁶ Zheng *supra* note 3 at 12.

trade in textiles by reforming the system.²⁷ Due to the past experiences and the current efforts towards the liberalization of the sector it is believed that the resultant pattern of the international textile trade's legal framework will have a significant impact on the direction of the overall international legal regime.²⁸

1.2 Trade Liberalization

1.2.1 The debate

Generally speaking trade liberalization means the reduction or elimination of all kinds of government measures which attempt to give domestic suppliers a competitive advantage over foreign suppliers. More narrowly, it relates to measures which create a difference between the net prices received by domestic and foreign suppliers, expressed in one and the same currency.²⁹

Trade liberalization has taken center stage in mainstream policy advice for at least two decades and it is said to be one of the most prominent characteristics of recent globalization.³⁰ To this end, whereas the process of globalization encompasses much more than trade liberalization it is predicted that reducing the barriers to international trade in goods and services will remain one of the main drivers of globalization.³¹

This doctrine of liberal trade was based on David Ricardo's nineteenth century theory of comparative advantage and had as an effect the creation of a justification for the doctrine.³² The theory is to the effect that countries produce what they are best at producing and by trading with others, they are better off than if all countries sought to produce everything they need.³³ On the basis of this theory, a conclusion may be reached that the ultimate purpose of trade liberalization is not to maximize a country's exports or even world trade, but to bring about more productive use of resources.³⁴ The resultant

²⁷ *Ibid.* at 112.

²⁸ *Ibid.* at iv.

²⁹ Lutz Hoffmann, "UNCTAD and Trade Liberalization" in Detlev Chr. Dicke & Ernst-Ulrich Petersmann, eds., *Foreign Trade in the Present and a New International Economic Order* (Switzerland: University press Fribourg, 1988) at 323 at 323.

³⁰ McCulloch, Winters & Cirera, *supra* note 4 at 5.

³¹ *Ibid.*

³² McDonald, *supra* note 6 at 18.

³³ *Ibid.*

³⁴ Richard Blackhurst, Nicolas Marian & Jan Tumli, *Trade Liberalization Protectionism and Interdependence* No.5, (Geneva: GATT Studies in International Trade, 1977) at 22.

economic growth may be thus viewed as a process of innovation leading to new and usually narrower forms of specialization of productive functions.³⁵

The theory of comparative advantage has been subjected to attack emphasizing mainly that reliance on it can lead to an impasse or breakdown in trade. Unable or unwilling to contemplate such a development, nations have tended to protect the affected industries or sectors.³⁶ It is clear therefore that countries have resisted development based on the theory in order to slow down the industrial adjustment of certain sectors or more positively to ensure a renewal of the sectors and their modernization in order to survive.³⁷ Notwithstanding the above criticisms, the theory remains the bedrock for the international trading system.³⁸

1.2.2 The case for liberalization

Trade is essential to the prosperity of the world economy and remains one of the main avenues open to man to increase productivity and growth. By opening markets, the most efficient suppliers get a chance to sell while the less efficient are stimulated to be more competitive.³⁹ Under the liberal trade arrangements therefore, the growth of an economy benefits almost as much from innovations made abroad as from those developed at home.⁴⁰ The trade also improves aggregate productivity and allows for exposure to new technologies which can spur further growth.⁴¹ The resultant industrialization process offers the possibility to usher countries into a more advanced phase of development with a corresponding increase in wages and the number of skilled workers.⁴²

Another justification for the principle of trade liberalization is with regard to its impact on poverty. Poverty is the greatest challenge to public policy and reducing it is the

³⁵ *Ibid.* at 4.

³⁶ McDonald, *supra* note 6 at 19. In most cases of economic development, the comparative advantage of an economy is often created artificially by policy and nurture. Many comparative advantages do not stem from natural resources alone, or availability of capital, but from the skills of the population, which can be fostered, and the policies adopted or assistance given by governments.

³⁷ *Ibid.* at 20.

³⁸ *Ibid.* at 29.

³⁹ *Ibid.* at 3.

⁴⁰ Blackhurst, Marian & Tumlir, *supra* note 34 at 4.

⁴¹ UNDP, *supra* note 21 at 1.

⁴² Zheng *supra* note 3 at 9.

most fundamental objective.⁴³ The connection between trade liberalization and poverty in developing countries has been on the agenda for several years and has recently become a matter of intense public debate.⁴⁴ This connection has raised the question of whether the two complement or hinder each other and how they can be jointly optimized. In an attempt to answer the question, it has been stated that only if poverty and trade policy were known to be wholly independent would there be no case for thinking about the links and this is manifestly not the case.⁴⁵ Trade liberalization affects the direct determinants of poverty and is a significant contributor to reducing poverty. And when compared with alternative policies for poverty alleviation, trade policy offers more positive results.⁴⁶

A discussion on poverty would be incomplete if no mention is made of the principle of human development. This has been defined as a process of expanding people's choices, allowing them to live secure lives with full freedoms and rights.⁴⁷ By expediting economic growth, creating jobs and raising incomes, globalization or more specifically the principle of trade liberalization has the potential to advance human development around the world.⁴⁸ It may thus be concluded that although trade liberalization matters in its own right, given the central role of growth in long-term poverty reduction, it particularly matters for the poor.⁴⁹

It must be emphasized however that liberalizing trade alone does not automatically ensure human development and increasing trade does not always have positive impact on human development. Furthermore, the expansion of trade guarantees neither immediate growth nor long-term economic or human development.⁵⁰ Most trade reforms will hurt someone, possibly pushing them into, or deeper into, poverty, that is, some reforms may increase overall poverty even while they boost incomes in total.⁵¹ What is important here are internal and external institutional as well as social conditions

⁴³ McCulloch, Winters & Cirera, *supra* note 4 at 6.

⁴⁴ *Ibid.* at xix.

⁴⁵ *Ibid.* at 6.

⁴⁶ *Ibid.*

⁴⁷ UNDP, *supra* note 21 at 1.

⁴⁸ *Ibid.*

⁴⁹ McCulloch, Winters & Cirera, *supra* note 4 at 6.

⁵⁰ UNDP, *supra* note 21 at 1.

⁵¹ McCulloch, Winters & Cirera, *supra* note 4 at xxiii.

which play a vital role in determining whether and the extent to which a country or group of people reap the benefits of trade.⁵²

Trade liberalization hence forms an important component in the success of the adjustment programs that many participants in international trade are undertaking.⁵³ Developing countries are being encouraged to expand their participation in the trade in order to secure the advances that the “new liberalism” promises for their economic growth and development.⁵⁴ Before the 1980s most developing countries were bystanders rather than participants in the design of international trading system under the GATT, seeking preferential treatment for their exports rather than taking part in multilateral trade negotiations.⁵⁵ The inherent limitations and trade distorting effects of excessive reliance on import substitution however begun to be better understood.⁵⁶ These policies resulted into isolation and aggravated their marginalized position in the sense that matters of economic interest to them were not being addressed. Developing countries were also faced with the realization that whether or not they chose to take part in the new developments, the bitter truth was that all countries were being affected by the process and were as such better off joining in than to be left out.⁵⁷ They thus started to open their economies to trade.

This “new liberalism” in developing and transition economies has not been without effect on developed country policies. Greater competition in global markets and attractive opportunities for investment in rapidly expanding developing and transition economies has advanced the case for global trade liberalization measures.⁵⁸ These developments have further created opportunities for free movement of capital. This freedom of capital to go where it pleases is beneficial in so far as it leads to productive investment. Frequently however, the flows are highly speculative and therefore unnecessarily disturb the international trade and economic system.⁵⁹

⁵² UNDP, *supra* note 21 at 1; See also McCulloch, Winters & Cirera, *ibid.* at xxiii.

⁵³ Gallagher, *supra* note 25 at 19.

⁵⁴ *Ibid.* at 2.

⁵⁵ Anne O. Krueger, *Trade Policies and Developing Nations* (Washington D.C.: The Brookings Institution, 1995) at vii.

⁵⁶ WTO, “World Trade Report 2003” Press Releases. Press/348.1 (14 August.) Online: WTO <www.wto.org> 153 [WTO, “World Trade Report”].

⁵⁷ Martin Khor, *Rethinking Globalization: Critical Issues and Policy Choices*, (London: Zed Books, 2001)7.

⁵⁸ Gallagher, *supra* note 25 at 2.

⁵⁹ McDonald, *supra* note 6 at 15.

It is no surprise therefore that obstacles and barriers to trade still exist especially against the poorer countries.⁶⁰ For example, protectionism which is a permanent threat in the trade field has become acute in recent years. A variety of factors such as a decline in the economic environment, technological change and the perceived threat from globalization of the world economy are advanced to explain this trend of events. This fear of liberalization is compounded by the perception that some international trading partners are not playing by the rules.⁶¹ With the new protectionist developments it seems developed country governments all favor free trade in principle but too often lack the political strength to confront those within their own countries who have to rely on protectionist arrangements.⁶² Also evident from these developments is that the governments have not yet succeeded in putting across to their peoples the wider interest that every participant shares in having a global market from which everyone, not just the lucky few, can benefit.⁶³ In fact, this basic rationale of liberalization has rarely appealed to policymakers who have always seen liberalization as a means to increase exports. For many countries, liberalization by the trading partner is considered to be good because it helps exports, but this is not the case with one's own liberalization. Consequently, reducing protection at home would only be conceded if this leads to concessions of trade barriers abroad. This is the philosophy on which the GATT functions.⁶⁴ These obstacles and barriers call for closer and greater attention in the global trade talks to ensure that open trade can concretely and not just potentially or ideally benefit all economies in the direction of free trade and efficient production.⁶⁵

⁶⁰ Supachai Panitchpakdi, "Balancing competing interests: The future role of the WTO" in Gary P. Sampson ed., *The Role of the World Trade Organization in Global Governance* (New York: United Nations University Press, 2001) 29 at 29.

⁶¹ McDonald, *supra* note 6 at 8.

⁶² Kofi Annan "Laying the foundations of a fair and free world trade system" in Sampson, *supra* note 60, 19 at 19.

⁶³ *Ibid.*

⁶⁴ Hoffmann, *supra* note 29 at 324.

⁶⁵ Supachai, *supra* note 60 at 29.

1.2.3 Criticisms of the principle

This process and the economic progress that goes with it have proceeded unevenly in time and in space.⁶⁶ The highly praised increased trade and investment has been focused in a few countries.⁶⁷ Consequently, the rise in income per head has differed widely between countries and regions for example, income disparities between the rich and the poor nations have doubled over the last thirty years.⁶⁸

The advancement of the principle of liberal trade has also come along with great uncertainty regarding its feasibility and the possibility of implementing it.⁶⁹ These uncertainties have resulted in subjecting the principle to scrutiny and the problems with which it has been associated have tended to shake people's faith in the principle and its benefits.⁷⁰ The main reason as to why liberalization generates so much public controversy is often concern about the short and medium term costs of adjustment.⁷¹ The economic restructuring and the need for technological changes along with fierce competition both in the markets for goods and for labor have contributed to increased impoverishment, inequalities, work insecurity, weakening of institutions and social support systems as well as the erosion of established identities and values.⁷² Developing countries have as a result of liberalization opened their T&C economies to foreign competition which has taken the form of superior quality goods as well as second hand or used clothing which has greatly affected the performance and existence of local production. Taking for example the issue of unemployment; it is alleged that periods of rising unemployment always erode support for liberal trade policies and result in an increase in the level of trade barriers.⁷³ These negative effects have created anxiety in the minds of many groups and have thus questioned the validity of claims made in support of the principle.

Notwithstanding the above, it is argued that whereas the principle has casualties it is not an enemy of development. Of relevance here is the fact that the main losers in

⁶⁶ Paul Streeten, *Globalization: Threat or Opportunity?* (Copenhagen: Copenhagen Business School Press, 2001) at 31.

⁶⁷ Khor, *supra* note 57 at 7.

⁶⁸ Streeten, *supra* note 66 at 31.

⁶⁹ McDonald, *supra* note 6 at 8.

⁷⁰ *Ibid.* at 15.

⁷¹ McCulloch, Winters & Cirera, *supra* note 4 at xxv.

⁷² Streeten, *supra* note 66 at 27.

⁷³ Blackhurst, Marian & Tumlir, *supra* note 34 at 1.

today's very unequal world are not those who are too much exposed to globalization, but rather those who have been left out.⁷⁴ It is added that this emergence of a global economy does not usually mean less prosperity but more and the problems at issue here as earlier noted are more of adjustment and timing.⁷⁵ The root of the problem has been stated to be that economies are not adjusting fast enough and economic growth rates are probably too low to cope with for example the unemployment created and the result is therefore a climate of uncertainty.⁷⁶ It is therefore suggested that concerns about poverty and related matters should not fundamentally alter attitudes towards trade liberalization nor should open trade policies fundamentally affect the portfolio of anti-poverty policies.⁷⁷ Instead, policy-makers should analyze where the adverse poverty effects may fall and prepare for them by introducing complementary and sometimes compensatory policies to alleviate their policy effects that is, a policy of predicting and pre-empting poverty effects.⁷⁸ Policies such as improving access to credit markets are said to have the potential to help a great deal in such situations along with improvements in asset distribution and in the flexibility of local labor markets.⁷⁹

1.3 The General Agreement on Tariffs and Trade & The World Trade Organization

The conclusion of the General Agreement on Tariffs and Trade (GATT) in 1947-1948 marked the beginning of the legal structure of international trade.⁸⁰ The GATT system was based on the principles of non-discrimination and prohibition of quantitative restrictions with the intention of serving free trade.⁸¹ International trade in textiles rapidly however, became an exception to the GATT liberal trade framework.⁸² The effect of this new textile structure under GATT was to integrate protectionism into the forum so that

⁷⁴ Annan, *supra* note 62 at 20.

⁷⁵ McDonald, *supra* note 6 at 15.

⁷⁶ *Ibid.*

⁷⁷ McCulloch, Winters & Cirera, *supra* note 4 at 6.

⁷⁸ *Ibid.* at 7.

⁷⁹ *Ibid.* at xxv.

⁸⁰ WTO "Understanding the World Trade Organization" online: WTO website <http://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf> (accessed on 3/8/2004) at 10 [WTO, "Understanding WTO"].

⁸¹ *Ibid.*; See also Zheng *supra* note 3 at 1.

⁸² Zheng *supra* note 3 at 1.

Members could address their economic problems and political pressures but still aim for multilateralism.⁸³

It has been argued that the sources of protectionist reflexes in the advanced industrial countries are inherent in the nature of the open economy itself.⁸⁴ And therefore, evolution of the international textile trade legal structure is rooted in international politics and economics.⁸⁵ Furthermore, international trade bargaining, regional dynamics, production and market structures are all part of the same integrated equation and even with a highly institutionalized cooperative rules and norms such as those under the post GATT system, cooperation and conflict co-exist simultaneously.⁸⁶

Because the GATT fell short of the requirements of free trade in the T&C sector, it was predicted that its incorporation into the World Trade Organization (WTO) would not likely bring to an end trade restrictions and loopholes to liberalization. Expressed concern is that protectionism is a fixture in international trade history and will endure in the future global commercial order.⁸⁷

Despite the GATT systems' weaknesses pointed out thus far, failing to recognize the strengths would not be an accurate presentation of the whole picture. Of relevance here is the fact that the opening up of trade during the last forty or so years has been mainly due to the efforts made in the GATT and while this process has been slow with its development rather patchy, the results have nonetheless been impressive. The step-by-step approach that has evolved through the GATT has led to the point where the rules and disciplines of the new WTO, established by the UR, are much more complete and cover nearly everything that is traded.⁸⁸

In 1995, the WTO became the successor to the GATT as a major player in the field of global governance.⁸⁹ Set up as the principal institutional framework to administer

⁸³ Thomas W. Zeiler, *Free Trade, Free World: The Advent of GATT* (Chapel Hill: The University of North Carolina Press, 1999) at 199.

⁸⁴ Geoffrey R.D. Underhill, *Industrial Crisis and the Open Economy: Politics, Global Trade and the Textile Industry in the Advanced Economies* (New York: St Martin's Press, 1998) at 6.

⁸⁵ Zheng *supra* note 3 at 9.

⁸⁶ Underhill, *supra* note 84 at 6.

⁸⁷ Zeiler, *supra* note 83 at 199.

⁸⁸ McDonald, *supra* note 6 at 32.

⁸⁹ WTO, "The world trade organization" Online: WTO website

<http://www.wto.org/english/res_e/dolload_e/inbr_e.pdf> accessed on 12/10/2003: See also Supachai, *supra* note 60 at 31

and enforce all multilateral agreements and related matters, it affords the necessary forum for bargaining, debates, negotiation and adjudication.⁹⁰ Its underlying objective is to promote economic development through effective participation in world trade.⁹¹ It has been stated that its creation therefore represents a new order in multilateral trade.⁹²

1.3.1 Relevance of Established Rules in International Trade

The GATT framework is largely based on a balance of economic and political power; it is a system that primarily benefits the powerful developed countries that have superior bargaining power.⁹³ Least Developed Countries (LDC's) are especially vulnerable to onerous restrictions as a result of their weak bargaining position brought about in part by their lack of economic strength.⁹⁴ For example, despite the various limitations for power excessiveness in the Multi Fiber Agreement (MFA), the results of the negotiations were largely dependent on the bargaining position of the parties concerned. The fact that importing countries would impose unilateral restrictions often on their own sufficed to compel exporting countries to conclude bilateral agreements.⁹⁵ Another essential requirement for leverage in market access negotiations is the existence of a large market, attractive to exporters in other countries.⁹⁶ Many developing countries do not have all the above preconditions for negotiating power. Thus, agreed concepts, principles and rules of trade are especially important to them.⁹⁷ Their growth prospects hinge crucially on the growth of a healthy international trading system and their access to it.⁹⁸ The rules and procedures of the multilateral trade regime determine how they benefit from it.⁹⁹

⁹⁰ M.Rafiqul Islam, "Parochialism in Agricultural Trade liberalization Under the World Trade Organization: Dilemmas and Options for Australia as a Middle-Sized Nations" (2002)36(4) J.W.T. 773-802 at 775.

⁹¹ "WTO, "World Trade Report" *supra* note 56 at 118.

⁹² Annan, *supra* note 62 at 21.

⁹³ Zheng *supra* note 3 at 113.

⁹⁴ Damian Chalmers, "The Multifiber Arrangement: Ripping the Shirt off the Poor Man's Back?" in Hazel Fox ed., *International Economic Law and Developing States. An introduction* International Economic Law Series (London: The British Institute of International and Comparative Law, 1992) vol. 2. 193 at 195.

⁹⁵ Zheng *supra* note 3 at 34.

⁹⁶ Gallagher, *supra* note 25 at 13.

⁹⁷ *Ibid.*

⁹⁸ Krueger, *supra* note 55 at 2.

⁹⁹ UNDP, *supra* note 21 at 63.

Multilateral trade transactions are characterized by great uncertainty therefore the need for fair rules to bring about predictability and stability is understandable.¹⁰⁰ International economic institutions created at the end of World War II satisfied this need for security and reasonable expectations in the trade by introducing rules delineating permissible monetary and trade behavior, by creating opportunities for the progressive binding of tariff levels, as well as stressing the principle of non-discrimination. These measures and principles combined to create a degree of security and predictability in world markets that was unknown in the interwar period and made possible the long-run commitment of funds to outward looking investment projects.¹⁰¹ In the same vein, the WTO has an important role to promote adherence to predictable rules and reduce barriers to trade wherever possible.¹⁰² The nature of WTO rules, their reach and conditions of market access are the three major areas that determine the quality and utility of the organization for its Members.¹⁰³

Whereas the rule-governed trade may not guarantee peace, it does remove a potent source of conflict and offers an alternative to unbridled force in the trading relations among states.¹⁰⁴ Most general regulations governing commercial activities within any particular country represent an attempt by the government to confine or set limits to the uncertainty that pervades all aspects of economic life. By increasing the ability of economic agents to form reasonable expectations, to count with a sufficient degree of certainty on the occurrence of events, the national economy can be made to run more smoothly and efficiently.¹⁰⁵ This need for security of reasonable expectations is even greater where international economic transactions are concerned. Participation in international trade generally requires more investment per unit sales than corresponding activities in the domestic markets and at the same time, it is perceived by firms as

¹⁰⁰ Gary P Sampson, ed., *The Role of the World Trade Organization in Global Governance* (New York: United Nations University Press, 2001) at 6; See UNDP, *supra* note 21 at 63; See also Blackhurst, Marian & Tumlir, *supra* note 34 at 9.

¹⁰¹ Blackhurst, Marian & Tumlir, *Ibid.*

¹⁰² Christopher Stevens, "The Consequences of the Uruguay Round for Developing Countries" in Harald Sander & Adras Inotai eds., *World Trade after the Twenty-First Century: Prospects and Policy Options for the Twenty-First Century* (London: Routledge, 1996) 71 at 74.

¹⁰³ "WTO, "World Trade Report" *supra* note 56 at 118.

¹⁰⁴ Sampson, *supra* note 100 at 6.

¹⁰⁵ Blackhurst, Marian & Tumlir, *supra* note 34 at 8.

involving more uncertainty than domestic transactions.¹⁰⁶ The uncertainty in this case operates as a highly effective non-tariff barrier to international trade particularly because it discourages long-term investments whose profitability depends on secure access to foreign markets or an assured supply of low-cost imported inputs.¹⁰⁷

Moreover, by reducing uncertainty and transaction costs in the flow of goods and services, acceptance of multilateral rules serves the purpose of reducing the transaction costs of negotiation since the cost of negotiating a multilateral agreement for a country is less than the cost of negotiating similar agreements with each trading partner. This means that there were economies of scale in negotiations. And as more countries trade under the regime, being outside it becomes more costly.¹⁰⁸

It has also been argued that the existence of international obligations makes increasing imports somewhat imperative and it therefore diminishes difficulties the governments of developed countries have in resisting protectionist pressures from their domestic industry.¹⁰⁹ The framework of rules and principles in the WTO helps to clarify the full impact of a trade policy decision, offering guidance and support for governments that choose to resist protectionist pressures in the interest of sustainable development.¹¹⁰ Although these rules do not prescribe a trade policy, they do help governments consolidate development policies based on open competitive markets.¹¹¹ Governments by accepting the rules and principles on trade-related policies can balance these special interest group demands against the advantages of compliance with liberalizing principles. This is principally because these rules offer to governments the assurance that their trading partners are bound by reciprocal obligations to reduce protection and are to act fairly in their trade policies.¹¹²

1.3.2 The change in textile and clothing trade rules

That fact that the principle of globalization has posed a different type of problem for the WTO than in the past insofar as economies with different levels of development

¹⁰⁶ *Ibid.* at 9.

¹⁰⁷ *Ibid.*

¹⁰⁸ UNDP, *supra* note 21 at 64; See also Sampson, *supra* note 100 at 6.

¹⁰⁹ Zheng *supra* note 3 at 116.

¹¹⁰ Gallagher, *supra* note 25 at 14.

¹¹¹ *Ibid.* at 13.

¹¹² *Ibid.* at 14.

and structure now have to be integrated under the global free trade system may be advanced to explain the reason for change in the sector.¹¹³ Years ago the bulk of the trade in manufactured goods was between the developed economies; and although there was an increasing role for the developing countries, this was still relatively limited. This is no longer the case and some developing countries are now in the forefront in the export of manufactured goods and services. They are playing an increasingly important role on the world trade scene and there are many consequences to be drawn from this.¹¹⁴ It is worth noting here that two thirds of the WTO Members are developing countries. The implication of this is that although many of these countries are small and carry little individual weight in the global economy, their combined influence is considerable, and their interests cannot be ignored as easily as they were in the past.¹¹⁵ This issue of numbers has been captured and made use of by the developing countries in tabling their claims concerning the liberalization of the T&C sector.

Developing countries provided the momentum for the negotiation in textiles, agriculture, tropical and natural resource products and, in the latter stages of the negotiations, on services trade and intellectual property issues of importance to them.¹¹⁶ It intensified multilateral trade disciplines and extended them to new areas; and provided improved and more secure access to markets which is a prerequisite for successful export-oriented development strategies.¹¹⁷ In return, developing countries were asked to open up their service markets, to protect intellectual property and to bring their trade rules in line with the more traditional agreements on subsidies, anti-dumping etc. which many of them had not signed in the Tokyo Round. In addition, they were also expected to increase their tariff bindings across the board.¹¹⁸ Some of the provisions of deeper integration such as the phasing out of quantitative restrictions may prove politically difficult for some countries but have been demonstrated to be necessary for satisfactory economic performance.¹¹⁹ Others such as the implementation of protection for intellectual property rights would entail costs in the short run to all but the most advanced

¹¹³ McDonald, *supra* note 6 at 9.

¹¹⁴ *Ibid.* at 10.

¹¹⁵ Krueger, *supra* note 55 at xvi; See also Gallagher, *supra* note 25 at 5.

¹¹⁶ Gallagher, *Ibid.* at 7.

¹¹⁷ Annan, *supra* note 62 at 21.

¹¹⁸ McDonald, *supra* note 6 at 53.

¹¹⁹ Krueger, *supra* note 55 at 57.

developing countries. To the developing countries however, these costs were presumably deemed necessary as part of the bargain to gain increased access and reduced protectionism for several items of interest to them.¹²⁰ If these arrangements were part of the bargain in return for which developing countries expect to gain through the dismantling of the MFA, it can be rightly argued that since they have taken on more responsibility in international trade developing countries have satisfied their end of the bargain. It is only right therefore that developed countries deliver on the promise to dismantle all restrictions in the T&C trade.

Concern in this regard has been the ability of the system to accommodate the numerous interests and varying priorities as this has the potential to limit the countries progress in advancing and attaining of their perceived economic objectives.¹²¹ Although the diversity of circumstances and commercial interests will not necessarily permit common negotiating positions to be adopted, developing countries now have it in their power to make common cause for their collective good by ensuring that their development considerations are taken fully into account in WTO agreements.¹²² This indicates therefore that with their weight of numbers, developing countries have the opportunity to press for multilateral trade rules that are fashioned to their liking and to ensure that future negotiations in the WTO yield agreements that are in the interest of development.¹²³ It is on the basis of numbers coupled with other factors that the possibility of complete integration of the T&C sector into the WTO discipline is founded. The implications of this change are only beginning to be realized by the world's major powers.¹²⁴ Developing countries have in recent developments in the trade demonstrated that they are more organized and have become articulate in their demands for better policies within the T&C sector as well as other areas of interest to them. To sustain the primacy of the multilateral trading system for these countries, work has to be embarked

¹²⁰ Krueger, *supra* note 55 at 57; See also McDonald, *supra* note 6 at 45.

¹²¹ Sampson, *supra* note 100 at 8.

¹²² *Ibid.*; See also Clare Short, "Making the development round a reality" in Sampson, *supra* note 60, 59 at 59.

¹²³ Short, *Ibid.*

¹²⁴ UNDP, *supra* note 21 at 78.

upon to achieve a more equitable distribution of gains from international free trade which is bound to have a positive impact on them.¹²⁵

Key to the discussion of the WTO organization is its introduction of the Single Undertaking mechanism. This also played an important part in the move towards liberalizing the T&C sector. The whole emphasis of the UR was to ensure that all agreements and obligations would be applied to all Member nations.¹²⁶ Sector specific multilateral trade agreements and understandings were concluded throughout the UR to create binding obligations for the contracting nations.¹²⁷ The effect of the Single Undertaking mandate was that it compelled governments to accept agreements as a complete package rather than on an individual basis.¹²⁸ That is, all negotiated agreements and understandings were offered as a package deal to be accepted or rejected on their entirety.¹²⁹ Although the mechanism has been criticized for demonstrating a lack of freedom of contract in the sense that a trading nation was not permitted the option to choose and pick agreements to suit its interests, and also because it was unlike international law instruments as no provision for the established principle of reservation was permissible, it served the benefit of incorporation of the T&C agreement into the final package and as such offers a prospect for freeing the sector.¹³⁰

Another possible explanation for change in the T&C trade rules on the part of developing countries was the failure of the import substitution policy. This disappointment can be said to have created the necessary impetus to push for better rules within the sector. As alluded to earlier, until the 1980s it would have been largely correctly assumed that developing countries would automatically remain outside any such arrangements for deeper integration.¹³¹ Most of developing countries following policies of import substitution tried to reduce their dependence on the international economy by protecting new domestic industries.¹³² This development strategy initially encouraged the establishment and expansion of the industries but it only turned out that these were

¹²⁵ Supachai, *supra* note 60 at 30.

¹²⁶ McDonald, *supra* note 6 at 52.

¹²⁷ Islam, *supra* note 90 at 775.

¹²⁸ UNDP, *supra* note 21 at 4.

¹²⁹ Islam, *supra* note 90 at 775.

¹³⁰ *Ibid.*; See also UNDP, *supra* note 21 at 4.

¹³¹ Krueger, *supra* note 55 at 2.

¹³² *Ibid.* at vii.

industries in which comparative advantage was least.¹³³ The strategy was also characterized by high levels of tariff and non tariff protection for “infant” manufacturing industries.¹³⁴ Overtime, it became clear that these policies had failed and as a result most countries began opening up their economies and integrating them into the international economic system.¹³⁵ This move towards a more neutral stance in respect of trade policy incentives implied not only the opening up more to import competition but also the removal of the policy bias against exports.¹³⁶ Consequently, many developing countries have locked in domestic policy reforms through adopting legally binding WTO obligations.¹³⁷ They now look to assured market access through bound tariffs and commitments to continue their export-led growth strategies. Their legitimate expectation is that the WTO will provide a forum where their views can be effectively expressed and their concerns adequately dealt with. Therefore they are far more active in the WTO than in earlier times and have higher expectations about what the institution can and should do for them.¹³⁸ In particular is the need that their efforts thus far be reciprocated in the form of better rules in areas of export interest to them.

The general movement of the developing countries towards the WTO was also encouraged by the fact that they had been getting less access to GATT advantages in the tariff field than they would have liked, very much less access to non-tariff agreements, and less control over non-tariff measures of importance to their exports, such as Voluntary Restraint Arrangements (VRA).¹³⁹ In addition, the obligations had increased substantially to allow others to avail themselves of them unilaterally and without reciprocity. More generally, it is said this may have led to increasing disrespect for the rules by developed countries and more frequent resort to protectionist measures as VRA which in a sense were a response to what was perceived as an increasingly unbalanced trading system.¹⁴⁰ The above developments can be said to have created an opportunity for

¹³³ *Ibid.* at 34.

¹³⁴ Gallagher, *supra* note 25 at 1.

¹³⁵ Krueger, *supra* note 55 at vii.

¹³⁶ “WTO, “World Trade Report” *supra* note 56 at 153.

¹³⁷ Sampson, *supra* note 100 at 4; See also Gallagher, *supra* note 25 at 4.

¹³⁸ Sampson, *Ibid.*

¹³⁹ McDonald, *supra* note 6 at 54.

¹⁴⁰ *Ibid.* at 50.

developing countries, for a platform upon which they could air their concerns in matters of interest to them.

Failure of the special and differential treatment principle in enabling developing countries attain noticeable gains in the areas of export interest to them may also explain the need for change and thus their participation in the negotiations that led to creation of the ATC. Previously, developing countries successfully campaigned in the United Nations Conference for Trade and Development (UNCTAD) and eventually in the GATT to secure a major revision of the GATT agreement. This was in the form of an exemption from the GATT obligations on the grounds that as developing countries they could not undertake the same obligations as the developed ones, but that they should nonetheless enjoy the benefits of concessions made and obligations undertaken by developed parties on the basis of the MFN principle.¹⁴¹ This however also had some negative consequences for them in the sense that the negotiations on reciprocal tariff concessions took place mainly between the developed countries in connection with products of interest to them. Provided the concessions were applied on an MFN basis, the developing countries also benefited but this was not necessarily with regard to products in which they had an interest. In conjunction with the import substitution drive, this led to poor growth and slow development and hence the need to see a change.¹⁴²

Furthermore, developing countries had made some dramatic changes to their economic management policies and development strategies based, in part, on extensive trade liberalization. Although much of this liberalization had been autonomous, the WTO provided a unique framework of reciprocal obligations and benefits, which supported and reinforced developing country efforts.¹⁴³ The general change in attitude towards trade policy and the greater emphasis on outward-oriented economic policies meant that developing countries wished to be credited for the trade liberalizing efforts they had made on a unilateral basis and to secure concessions in return.¹⁴⁴ That is, developing countries sought to see their outer oriented development efforts be credited in the form of freeing the T&C sector as well as other areas of export interest to them.

¹⁴¹ *Ibid.* at 49.

¹⁴² *Ibid.*; See also McCulloch, Winters & Cirera, *supra* note 4 at 254.

¹⁴³ Gallagher, *supra* note 25 at 1.

¹⁴⁴ McDonald, *supra* note 6 at 52.

From the first discussions in 1981 on the crisis of the GATT and how to deal with outstanding problems, it was evident that T&C would have to be listed among the elements contributing to the crisis and had to be included in any effort to resolve the outstanding problems.¹⁴⁵ By the end of 1980's it had become apparent that the entire set up had become so complex that there seemed to be almost no other reasonable solution than to phase-out the MFA in the course of the UR hence the birth of the ATC.¹⁴⁶ Thirty years of restrictions on T&C had not been the answer to the problem, which lay rather in the comparative advantage of countries with lower labor costs.¹⁴⁷ Quantitatively, the MFA also merited examination, for trade in T&C accounted for about 33% of LDC manufactured exports, by any standards a significant share. It would thus be very difficult for any coverage of the legal regime governing international trade of LDCs to ignore it.¹⁴⁸ The inclusion of the sector liberalization in the talks, through eventual integration of the MFA into GATT regular disciplines was therefore an important element in persuading the skeptical LDCs to participate fully in the Round. It was noted that if the T&C talks were to prove unsuccessful, a conclusion of the Round might have proved difficult.¹⁴⁹

Also, the move to liberalize trade in T&C was based on the notion that by returning the trade to the GATT system developing countries would also gain an opportunity to use as a bargaining chip in the negotiations, trade in other areas in which importing countries are strongly motivated to maintain free trade.¹⁵⁰ In the early 1980s, the U.S argued that a major defect in GATT was its limitation to trade in goods. GATT law did not protect other markets in which the evolving comparative advantage of the U.S was becoming most heavily concentrated i.e. markets for services, intellectual property rights and other high technology information.¹⁵¹ That sectoral imbalance the U.S claimed, was creating a political problem for GATT in the U.S. as support for

¹⁴⁵ Marcelo Raffaelli "Bringing Textiles and clothing into the Multilateral Trading System" in Jagdish Bhagwati & Mathias Hirsch eds., *The Uruguay Round and Beyond: Essays in Honor of Arthur Dunkel* (Ann Arbor, Mich: The University of Michigan press, 2001) 51 at 51.

¹⁴⁶ Dean Spinanger, "Textiles Beyond the MFA Phase-Out" Working Paper No 13/98. July 1998. online: Centre for the Study of Globalization and Regionalization (CSGR), University of Warwick, <<http://www.warwick.ac.uk/fac/soc/CSGR>> (accessed on 10/16/2003) at 3.

¹⁴⁷ Raffaelli, *supra* note 145 at 56.

¹⁴⁸ Chalmers, *supra* note 94 at 196.

¹⁴⁹ Underhill, *supra* note 84 at 223.

¹⁵⁰ Zheng *supra* note 3 at 112.

¹⁵¹ Robert E Hudec, *Essays on the nature of international trade law* (London: Cameron May Ltd, 1999) at 172.

organization was declining on the part of many U.S. goods producers whose comparative advantage was slipping.¹⁵² On the other hand, there was a compensating increase in political support from those service and technology industries who stood to gain from larger international markets, because the GATT legal system was not offering any protection at all to them.¹⁵³ These “new” sectors saw international trade as an advantage and not a constraint.¹⁵⁴ So the matter was one of give and take in that developed countries “gave up” their interests in the T&C sector in exchange and on the assurance that developing countries would agree to their demands in the “new” sectors that had increasingly become of importance to them.

Finally, access to markets of LDC and Newly Industrialized Countries’ (NIC) markets became important.¹⁵⁵ Some developing countries had already become sufficiently important traders that their inclusion in the system was important to the developed countries.¹⁵⁶ Relaxing the restrictions on textile imports from developing countries would further be in the best interests of developed countries since developing countries would have more foreign exchange to purchase goods from developed countries e.g. high technology inputs for use in the textile and other sectors thereby resulting in an expansion of the export market of developed countries and improving the North-South economic cooperation.¹⁵⁷

1.4 The Agreement on Textiles and Clothing

The object of the Agreement on Textile and Clothing (ATC) negotiation was to secure eventual integration of the T&C sector into the GATT on the basis of GATT strengthened rules and disciplines.¹⁵⁸ As pointed out earlier, the sector was regulated under a special regime where much of the trade was subjected to bilateral quotas negotiated under the MFA in contradiction to both the letter and the spirit of the GATT. This system developed mainly due to the political pressures from importing countries

¹⁵² *Ibid.*

¹⁵³ *Ibid.*; See also Underhill, *supra* note 84 at 202 The textile sector coalitions had to compete with other sectoral employers associations which saw international trade as an advantage and not a constraint.

¹⁵⁴ Underhill, *Ibid.*

¹⁵⁵ *Ibid.*

¹⁵⁶ Krueger, *supra* note 55 at 2.

¹⁵⁷ Zheng *supra* note 3 at 117.

¹⁵⁸ Agreement on Textiles and Clothing (1994).

who found themselves unable to adhere to their GATT commitment in this area of trade.¹⁵⁹ As seen earlier, the decision to negotiate in the area of T&C played an important role in convincing developing countries to become actively involved in the UR. These negotiations were lengthy and difficult highlighting the sensitive nature of this sector in both the developed and developing countries.¹⁶⁰ The effect of these negotiations was that the ATC and the entire T&C sector became part of the WTO a more legalistic institution, under the aegis of which the kind of pragmatic solutions resorted to under the GATT are no longer tolerated.¹⁶¹

1.4.1 Nature of the agreement

The transition to the trade liberalization in trade in T&C is to be achieved under the ATC through the gradual removal of existing quotas described by the agreement as integration and accelerated growth of remaining non-integrated quotas which is called liberalization over a ten year period.¹⁶²

On January 1 1995 each importing signatory to the WTO was required to integrate into normal GATT rules including GATT 1947's Article XIX and the Uruguay Round agreements on safeguards. During this transition period, Members had to increase the quota growth rate fixed under MFA agreements for each textile product category of textile products by; 16% per year in the first three years; 25% per year in the next four years; and 27% in the next three years.¹⁶³ This provision for the escalation of quota growth rates on outstanding quotas was considered an important improvement compared to the MFA but one only meaningful to the extent that the growth rates carried over from the former MFA were significant and the quotas to which they apply were binding.¹⁶⁴

¹⁵⁹ Irene Trela, "Phasing Out the MFA in the Uruguay Round: Implications for Developing Countries" in Harmon Thomas & John Whalley, eds., *Uruguay Round Results and the Emerging Trade Agenda: Quantitative-based analyses from the development perspective* (New York: United Nations, 1998) 315 at 359.

¹⁶⁰ Antero Hyvarinen, "The Changing Patterns of International Trade in Textiles and Clothing. Implications of the Introduction of the Agreement on Textiles and Clothing on the Developing Countries Producing/Exporting Textiles and Clothing" ITC/UNCTD/WTO http://www.intracen.org/worldtradenet/docs/information/trainingmat/training_packs/atc/english/atc_brief.pdf (accessed on 10/16/2003) at 1.

¹⁶¹ Raffaelli, *supra* note 145 at 59.

¹⁶² Article 2 Agreement of Textiles and Clothing.

¹⁶³ *Ibid.* Articles 2(13), 2(14).

¹⁶⁴ Trela, *supra* note 159 at 321.

The increases in growth rates for MFA quotas remaining in place during the transition period were intended to replace the renegotiation of bilateral textile agreements. And thus put a check on the risks with which bilateral agreements between partners of unequal bargaining strengths are associated.¹⁶⁵ The quota growth rates were thus hoped to result in substantial improvements in access to markets for the developing exporting Members.¹⁶⁶ The effectiveness of this provision was limited however since a significant number of MFA quotas were non-binding and the quota growth rates for the more 'sensitive' products were considered restrictively low.¹⁶⁷

Article 2(4) provides for the implication of integration which is that the existing quotas on integrated products under MFA rules became void and no new ones may be imposed upon such products unless there has been a determination of serious injury under GATT Article XIX the safeguards provision.

According to the ATC, the quotas in international T&C trade are to be terminated and the tariffs on such products are also to be progressively reduced.¹⁶⁸ While the level of tariffs is not mentioned in the text, Members agreed that these would be reduced and bound.¹⁶⁹ In effect the ATC was designed to generate increased opportunities for trade in the textiles and apparel sector. By providing for the termination of quotas and the progressive reduction of tariffs, it presented an opportunity to reduce poverty indirectly through additional employment opportunities or by a redistribution of the gains from increased trade.¹⁷⁰

In addition to the phasing out of the MFA restrictions, the ATC also recognized the existence of non-MFA restrictions on T&C products which are also inconsistent with

¹⁶⁵ Raj Bhala, *International Trade Law Cases and Materials* (Virginia: Michie Law Publishers Charlottesville, 1996) 1371.

¹⁶⁶ Richard P. Appelbaum, "Assessing the Impact of the Phasing-out of the Agreement on Textiles and Clothing on Apparel Exports on the Least Developed and Developing Countries" (Santa Barbara: University of California, 2003) <www.iccr.org/issues/css.mfa_resources.doc> (accessed on 12/2/2003) at 10; See also UNCTAD, "The implementation of the Uruguay Round Agreement on Textiles and Clothing: Some General Issues" in Thomas & Whalley, *supra* note 159, 265 at 295.

¹⁶⁷ Trela, *supra* note 159 at 323.

¹⁶⁸ Hyvarinen, *supra* note 160 at 1.

¹⁶⁹ Article 7(1) Agreement on Textiles and Clothing; See also David Morris, "The Multilateral Trading System and the New Political Economy for Trade in Textiles and Clothing: An Introduction for Least Developed Countries" Geneva: ITC/UNCTAD/WTO Publications Unit, 2002) ITC/T322.E/PMD/MDS/02-X. at 2.

¹⁷⁰ Myriam Velia, "Trade protection in the Textiles and Clothing Industries" online: <<http://www.ids.ac.uk/tradebriefings/ti4.pdf>> Trade and Investment: Background Briefing no.4. Institute of development studies, University of Sussex (accessed on 2/7/2003) at 3.

the GATT, including all unilateral restrictions, bilateral arrangements and other measures having a similar effect.¹⁷¹ These would be brought into conformity with GATT within one year of the entry into force of the agreement or phased out progressively during a period not exceeding the duration of the Agreement.¹⁷²

The ATC provides for a new transitional safeguard mechanism to be applied by any Member to products covered by the Annex, except those integrated into GATT 1994 under the provisions of Article 2.¹⁷³ The mechanism could be applied on the basis of a determination by a Member and upon demonstration that an increase in the quantities of imports of a particular product were causing or actually threatening the cause of serious damage to the domestic industry. The ATC safeguard provisions are more restrictive than those of the MFA. The criterion of "serious damage" was considered a higher threshold of damage than the MFA's "real risk" of market disruption. Although the measure can be taken against products that had been integrated, the requirement is that the level of imports need not be reduced below the level of the last three years and should be progressively liberalized after one year. This provision it is said was meant to prevent an unraveling of the progress achieved by the progressive integration of products under the WTO rules.¹⁷⁴ In addition, the mechanism could be taken either by mutual agreement following consultations or unilaterally, subject to examination by the Textile Monitoring Body (TMB). The Article's new concept of cumulation of damage caused by the increased imports from more than one source implies that more than one Member could be held responsible for the serious damage and the measure could therefore be imposed on several Members at the same time.¹⁷⁵ The major concern of developing countries is that if safeguard actions are invoked it could roll back liberalization during the transition period.¹⁷⁶

The ATC also made provision for special treatment for certain categories of Members on the same lines as those of the MFA and its 1986 Protocol. These provisions were said to be mainly of a 'best endeavor' nature with their only new feature being that

¹⁷¹ Article 3(1) Agreement on Textiles and Clothing; See also UNCTAD, *supra* note 166 at 265.

¹⁷² Article 3(2).

¹⁷³ Article 6.

¹⁷⁴ McDonald, *supra* note 6 at 141.

¹⁷⁵ UNCTAD, *supra* note 166 at 287.

¹⁷⁶ Trela, *supra* note 159 at 321.

of a quantified definition (or specific threshold) of small suppliers with regard to the MFA restrictions and the special treatment for non-MFA signatories.¹⁷⁷

Article 7 ATC makes a linkage between the benefits of the economic package of the Agreement and some of the obligations under other WTO agreements. These include requirement to achieve improved access to markets in market access; ensure the application of policies relating to fair and equitable trading conditions in respect of dumping and anti-dumping rules and procedures, subsidies and countervailing measures; the protection of intellectual property protection; and to avoid discrimination against imports in T&C products when taking measures for general policy reasons.¹⁷⁸

In case of non fulfillment of these commitments by a Member, the other Member can bring the matter before the relevant WTO bodies and inform the TMB when taking measures for general trade policy reasons.¹⁷⁹ Although the ATC is an integral part of the WTO agreements, a partial role for the settlement of disputes in relation to the implementation of the agreement was assigned to the TMB. In matters remaining unresolved in mutual consultations, WTO Member countries are required to have first recourse to the TMB rather than directly to the Dispute Settlement Body (DSB) under the integrated dispute settlement system. This was feared to have the ability to prolong and delay the settlement of disputes, in as much as WTO Member countries may eventually have to pursue certain matters through the DSB after the TMB process fails to produce a satisfactory resolution.¹⁸⁰

The most celebrated feature of the agreement is the commitment that it is not renewable.¹⁸¹ At the end of the transition period it is provided in Article 9 that the Agreement and all restrictions under it would be terminated and it shall not be extended. This will contribute to restoring the credibility of the Multilateral trading system, as well as guaranteed and increased market access of developing countries for their trade in T&C.¹⁸²

¹⁷⁷ UNCTAD, *supra* note 166 at 284.

¹⁷⁸ Article 7(1); See also UNCTAD, *Ibid.* at 289.

¹⁷⁹ Article 8 Agreement on Textiles and Clothing; See also UNCTAD, *Ibid.*

¹⁸⁰ UNCTAD, *Ibid.* at 292.

¹⁸¹ Trela, *supra* note 159 at 321.

¹⁸² UNCTAD, *supra* note 166 at 295.

1.4.2. Criticisms of the Agreement

In spite of the above provisions aimed at ensuring the full liberalization of the sector and its integration under established rules and principles of international trade, the ATC has met with the following criticisms:

Concern has been raised that the ATC is not the dream of any defender of free trade but simply reflects a reasonable balance of very divergent interests.¹⁸³ Given however, that the MFA had been in existence for such a long time and had thus become entrenched in both developed and developing countries, agreement to liberalize the MFA was difficult to achieve hence the widespread support for integration of the sector over a transition period.¹⁸⁴ This gradual process of liberalization was favored because it allowed importing developed countries as well as a large number of developing exporting countries time to restructure their domestic industries in preparation for the expected enhanced competition resulting from freeing trade in textiles.¹⁸⁵ The agreement was in this respect a delicate comprise between competing interests of importing and exporting countries but most important of all it represented an essential step towards achieving trade liberalization in the sector.¹⁸⁶

As successful as the countries were in achieving an agreement on T&C products, they were just as unsuccessful in structuring it in a manner which would have effectively brought T&C products under the jurisdiction of the GATT framework throughout the phase-out period.¹⁸⁷ A careful wording in Article 2 allowed the developed countries to put off much of the market liberalization until the very end of the transition period in 2005.¹⁸⁸ The effect of this was the creation of a binding obligation for developed countries to remove their MFA quotas though one written so that it did not come due

¹⁸³ Raffaelli, *supra* note 145 at 59.

¹⁸⁴ Trela, *supra* note 159 at 359.

¹⁸⁵ Hanaa Kheir-El-Din M.Maamoun Abdel – Fattah, "Textile and Clothing in the Mediterranean Region: Opportunities and Challenges of Returning Textiles and Clothing to GATT Disciplines" online: World Bank <<http://www.worldbank.org/mdl/mdl3/papers/global/kheir.pdf>> (3/18/2003) at 2; See also Morris, *supra* note 169 at 1.

¹⁸⁶ Trela, *supra* note 159 at 321; See also Nattapong Thongpakde & Wisarn Pupphavesa, "Returning Textiles and Clothing to GATT Disciplines" online: <<http://www.worldbank.org/wbiep/trade/manila/textiles.pdf>> (accessed on 3/9/2003) at 2.

¹⁸⁷ Spinanger, *supra* note 146 at 4.

¹⁸⁸ J. Michael Finger & Julio J Norgues, *The Unbalanced Uruguay Round Outcome: The New Areas in Future WTO Negotiations* (Oxford: Blackwell Publishers Ltd, 2002) at 324.

until the last day.¹⁸⁹ As a result, even after the third stage integration, the number of quotas that remained in place were as high as 701 out of 757 in the case of the United States, 164 out of 219 in the case of the European Communities and 241 out of 295 in the case of Canada.¹⁹⁰

The importance for developing countries attached to the manner and speed with which the commitment to remove restrictions undertaken under the ATC by the year 2005 can not be over emphasized.¹⁹¹ It presented developing countries with the opportunity for increased participation in international markets and the benefits that come along with it. Developing countries have however pointed to cosmetic implementation of the early stages of the ATC where they claim the developed countries have not acted in good faith.¹⁹² There have been loud complaints about the minimal liberalization that has resulted from the implementation of the ATC since importing countries weighted their liberalization towards products that were not under restraint in their country, had little value added or were of little commercial interest to developing countries.¹⁹³ Because the Annex to the ATC which covered T&C products included many products that have never been specifically restricted under the MFA in any importing country or items that are strictly speaking not textile products but have some textile components, it led to an inflation of the volume which forms the base for the integration process and therefore enabled developed countries to meet the percentages as required without creating meaningful liberalization during the earlier stages of the integration.¹⁹⁴ For example, none of the 10 products selected by the EU in the first stage of integration had previously been subject to EU quantitative restrictions and a number of the product groups listed as fully integrated were in fact only partially de-restricted. The importing countries (mainly the EU and US) included in their integration schedules a large number of non-textile and

¹⁸⁹ *Ibid.* at 326.

¹⁹⁰ Major Review of the Implementation of the Agreement on Textiles and Clothing: The Second Stage of the Integration Process. Adopted by the Council on 23 July 2002.

¹⁹¹ UNCTAD, *supra* note 166 at 284.

¹⁹² John Whalley, "The WTO and the New Development-Oriented Trade Round," in Andrea Krizsan & Violetta Zentai, eds., *Reshaping Globalization: Multilateral Dialogues and New Policy Initiatives* (New York: Central University Press, 2003) 179 at 181.

¹⁹³ McCulloch, Winters & Cirera, *supra* note 4 at 263.

¹⁹⁴ UNCTAD, *supra* note 166 at 284.

non-clothing products that happened to contain textile components such as umbrellas, car seat belts and parachutes.¹⁹⁵

Linked to the above is that whereas the criteria in each stage of integration had to encompass products from each of the four groups, the selection of products was left to the discretion of the importing countries. Importing countries had the ability to choose which unrestricted product items they could integrate during the transition period. This of course was not to be without impact to the process and progress of the integration. It provided them with an upper hand in structuring their quota liberalization during the transition period as illustrated by the uneven spread of the integration across product categories.¹⁹⁶

Perhaps more important about this inclination of the importing countries to leave most of the meaningful liberalization of T&C until the very end of the transition period is that it raises concern about the political feasibility of the implementation of the final stage.¹⁹⁷ Such end loading has evoked some doubts as to the credibility of the integration program. The protectionist forces in developed countries were feared to seize every opportunity to lobby their governments to delay the integration process because this would make the process of structural adjustment more painful in the final stage.¹⁹⁸ Unfortunately this fear has become a reality and has raised doubts as to the commitment of the developed countries to fully liberalize the sector as agreed.

Further on the method of integration, by the provisions laid down in the ATC only 51 per cent in volume terms of the products covered in the Annex will be integrated into the GATT in the first three stages leaving the balance of 49 per cent to be integrated on the very last day of the 10 year transitional period. As a result, developing countries are apprehensive that when the final phase-out arrives the major importing countries will not be in the political position to implement the program because it will have left too many sensitive products to the end.¹⁹⁹ On the basis of calculations made, this fear is not an exaggerated one. The final implementation phase will result in a substantial adjustment and restructuring of the industry i.e. approximately 80 per cent of the quotas, consisting

¹⁹⁵ Velia, *supra* note 170 at 2.

¹⁹⁶ Trela, *supra* note 159 at 323.

¹⁹⁷ McCulloch, Winters & Cirera, *supra* note 4 at 263.

¹⁹⁸ UNCTAD, *supra* note 166 at 286; See also Trela, *supra* note 159 at 322.

¹⁹⁹ McDonald, *supra* note 6 at 142.

of a total of 239 quotas maintained in Canada, 167 by the EU and 701 by the U.S are left to be eliminated by the end of 2004.²⁰⁰ In addition, because the early integration stages did not seem to have made any material change in the protection of the domestic industries of the restraining countries, it did not entail any need for structural adjustment; thus if the integration process is fully respected it could make the process of adjustment more painful in the subsequent stages for the developed country industries as well.²⁰¹

The debate on the implementation of the ATC has been divided with some commentators arguing that the fact that the integration process within the ATC has been far from satisfactory should be seen as a blessing in disguise in that it gives the exporters in developing countries and transition economies more time to prepare themselves for the forthcoming more liberal and transparent trade.²⁰² Whether this should be taken as an advantage for either side (developed or developing) is however questionable.

1.5 Textile Tariff Rates

Since as seen above that the ATC does not address the issue of tariff protection, the complete integration of the textiles sectors into GATT by eliminating the quantitative restrictions will only bring the tariffs to the forefront. The rate that will replace the quotas is a key issue that is hotly debated in the T&C negotiations. Currently imports of T&C products are subject to MFN import duties. A look at the prevailing tariff rates in the major textile and clothing importing countries namely the Canada, EU and the US serves as an important indicator of what the rate will be following the integration in 2005.

The tariff schedules of all these countries employ a uniform categorization in stating the applicable MFN tariff rates. The textile and clothing products are generally divided into 14 categories of Silk; Wool, fine or coarse animal hair, horse hair yarn and woven fabric; Cotton; Other vegetable textile fibers, paper yarn and woven fabrics of paper yarn; Man made filaments; Man made staple fibers; Wadding felt and non woven; special yarns, twine, cordage, ropes and cables and articles thereof; Carpets and other textile floor coverings; Impregnated, coated, covered or laminated textile fabrics, textile articles of a kind suitable for industrial use; Special woven fabrics, tufted textile fabrics,

²⁰⁰ WTO, "World Trade Report" *supra* note 56 at 133.

²⁰¹ UNCTAD, *supra* note 166 at 278.

²⁰² Hyvarinen, *supra* note 160 at 10.

lace, tapestries, trimmings, embroidery; Articles of apparel and clothing accessories, knitted or crocheted; Articles of apparel and clothing accessories not knitted or crocheted, knitted or crocheted fabrics and finally Other made up textile articles, sets, worn clothing and worn textile articles; rags.

Under the Canadian Customs Tariff the percentage average MFN tariffs in each of the above categories is 0, 6.4, 6.8, 2.8, 5.4, 7.6, 6.7, 10.8, 6.6, 13.5, 17, 17, 7.1, and 15.3 respectively.²⁰³

The average tariff rate in Canada calculated by the simple average method is therefore;

$$\text{Average tariff (AT)} = \frac{\text{Tariff rates}}{\text{No. of Import Categories}}$$

$$\frac{0+6.4+6.8+2.8+5.4+7.6+6.7+10.8+6.6+13.5+17+17+7.1+15.3}{14} = 8.8\%$$

14

In the EU the percentage average tariff rate in each of the above categories is 5.1, 4, 6.4, 2.9, 6, 6.4, 6.1, 7.6, 6.6, 7.3, 11.7, 12, 8, and 9.6 respectively.²⁰⁴

$$\frac{\text{AT} = 5.1+4+6.4+2.9+6+6.4+6.1+7.6+6.6+7.3+11.7+12+8+9.6}{14} = 7.1\%$$

14

The U.S. average percentage tariff rate in each of the above 14 categories is 1, 6.9, 8.5, 1.7, 10.5, 11, 4.2, 2.8, 3, 6.6, 11.6, 10.2, 10.1 and 7.4 respectively.²⁰⁵

The average tariff rate in the US is therefore;

$$\frac{1+6.9+8.5+1.7+10.5+11+4.2+2.8+3+6.6+11.6+10.2+10.1+7.4}{14} = 6.8\%$$

14

²⁰³ Canadian Customs Tariff Schedule. Section IX: Textile and Textile Articles. Issued January 2004 online: <<http://www.cbsa-asfc.gc.ca/general/publications/tariff2004/table-e.html>> (accessed on 31/5/2004).

²⁰⁴ European Union Tariff Schedule (international Customs Tariffs Bureau) Journal No.14 (26th Edition) January 2004. ISSN: 1378-4048. <<http://www.trade.gov/tic/tariff/EuropeanUnion.pdf>> (accessed on 31/5/2004).

²⁰⁵ USA Harmonized Tariff Schedule 2004. <http://hotdocs.usitc.gov/tariff_chapters_current/toc.html> (accessed on 31/5/2004).

1.5.1 Average Tariff Rate

From the preceding figures the expected average tariff rate to replace the quota also calculated by the simple average method i.e.

Expected Average Rate = Average rate in each country

Number of countries

$$\frac{8.8 + 7.1 + 6.8}{3} = 7.6\%$$

3

The expected Average tariff rate in 2005 is 7.6%.

But this average does not tell enough about the applied rates in the breakdown in the various categories. Although the average rate appears reasonable, in areas where the developing countries have most inroads, MFN rates continue to be high in the tariff schedules of all the three countries. Taking the example of the articles of apparel and clothing accessories, knitted or crocheted; Canada has its average being 17%, the European Union 11.7%, while the U.S. 11.6%.

Again the above average conceals the high tariff peaks under this category which go as high as 18% in Canada.²⁰⁶ In the EU tariffs on apparel and clothing are as high as 12%.²⁰⁷ The US has the highest tariff rate in this category which goes as high as 32%.²⁰⁸ This implies therefore that going by the average tariff rate as an indicator of positive steps in the liberalization process can be misleading. There is therefore a need to address the high tariff concentrations in this and other categories where developing countries are competitive producers for there to meaningful liberalization of the sector. That is, tariff reductions should not be focused on general product averages but rather on rates applicable to specific products.

²⁰⁶ Chapters 61 and 62, Section XI-Canadian Customs Tariff Section.

²⁰⁷ Chapters 61 and 62, European Union Tariff Schedule.

²⁰⁸ Chapter 61, USA Harmonized Tariff Schedule.

Chapter II: Liberalization under the WTO

2.1 Introduction

Extension of the multilateral trading rules to cover the textiles and clothing (T&C) trade was registered as a great achievement in the history of international trade. On its own however, this accomplishment is inadequate to enable the countries to realize their goals in the trading system. It is therefore necessary to recognize the complementary achievement registered by the WTO which is its strengthening of the multilateral framework of rules and agreements. WTO rules have been tightened on the use of measures that often target the exports of developing countries and it is hoped that this will help to ensure that countries extract the greatest benefit from international trade.¹ On 31 December 2004, the highly praised WTO rules will begin to apply and direct the flow of trade in the T&C sector. It is every participant's hope that integration of the sector into the multilateral rules will afford a much better opportunity in the T&C trade. Perhaps the most outstanding element in all this is that the integration into the multilateral system will import into the T&C trade a vital element of international trade relations i.e. certainty in the sense that the rules to be applied will now be generally known to all participants. The following discussion is an illustration of the rules as provided for in the WTO Agreement in promoting liberalization. It highlights therefore the possibilities these rules offer with a view to establish how they will probably play out following the full integration of the sector in 2005.

2.2 Most Favored Nation & National Treatment

The Most Favored Nation (MFN) principle is basic to the whole edifice of the General Agreement on Tariffs and Trade (GATT).² In Article I the GATT provides for this principle which prohibits discriminatory application of tariffs and other trade policy measures. The Article also emphasizes that the application of these measures shall be unconditional and multilateral. The implication of this is that any agreement reached by a Contracting party will automatically be extended to the rest. Moreover, the transfer is

¹ Peter Gallagher, *Guide to the WTO and developing countries* (The Hague: Kluwer Law International, 2000) at 13.

² WTO, "The WTO Agreement Series" online: WTO, http://www.wto.org/english/res_e/booksp_e/agrmntseries2_gatt_e.pdf at 2.

carried out irrespective of whether the advantage gained has been agreed with a Member state or a third party non-Member of GATT. Similarly, a non- Member third party which enjoys an MFN clause with a Member state will receive all the benefits which the latter offers within the framework of the General Agreements.³ It has thus been stated that the principle protects expectations of participants in multilateral bargaining by forbidding subsequent more favorable treatment of other participants and avoids the dead weight loss of trade diversion.⁴

Article III of the GATT stipulates the National Treatment Clause (NT) and its principal objective is to ensure that market access commitments made by a Member are not nullified through the introduction of offsetting domestic policies. By this stipulation an attempt is made to equal the conditions in which products have to compete once they are within a given state's market. This principle requires that domestic charges on imported products with the potential to bring about discrimination or unequal treatment in relation to national products be eliminated.⁵

The MFN and NT clauses combined constitute the principle of non-discrimination of the GATT.⁶ The non discrimination principle forms the bedrock upon which the multilateralism is supported and provides the assurance that Members will derive benefit from their participation in international trade. It is important to note that the bilateral agreements which characterized the T&C sector discriminated against supply sources i.e. between exporters from developed and developing countries and among developing countries, and were as such a clear violation of the fundamentals of liberal trade and multilateralism and therefore harmful to the exporting countries potential for a meaningful share of the benefits of the trade.⁷ By agreeing to bring back the sector into the application of the non-discrimination principles, developed countries have therefore

³ Claudia Jimenez Cortes, *GATT, WTO and the Regulation of International Trade in Textiles*, trans. by Christopher D.Tulloc (Aldershot: Ashgate publishing limited, 1997) at 125.

⁴ Michael J. Trebilcock & Robert Howse, *The Regulation of International Trade*, 2nd ed. (London: Routledge, 1999) at 115.

⁵ Cortes, *supra* note 3 at 126.

⁶ Michihiro Ohyama, "The Economic Significance of GATT/WTO Rules" in Alan D. Woodland ed. *Economic Theory and International Trade: Essays in Honour of Murray C. Kemp* (Cheltenham: Edward Elgar Publishing Ltd, 2002) 71 at 75.

⁷ Sri Ram Khanna, *International Trade in textile: MFA Quotas and a Developing Exporting Country* (New Delhi: Sage Publications, 1991) at 31.

taken an important step in improving not only the trade conditions by correcting the imbalances but also their relations with T&C exporting nations.

2.3 Tariffs

2.3.1 Introduction

Tariffs are a specific charge levied on imports.⁸ As such, they are import taxes levied at the border.⁹ Tariffs were probably the most common or at least the most visible form of protection in use. At the GATT's inception in 1947, the level of tariffs for industrialized countries averaged 40 per cent or more.¹⁰ In its early years the GATT's primary focus was therefore on their reduction. Laid down in Article II, tariff reduction operates as the central mechanism for carrying out liberalizing policies and the expansion of trade and constitutes another measure within the GATT for obtaining the liberalization of trade.¹¹ After the Tokyo Round, the tariff level fell to an average of 6.3 per cent and following the Uruguay Round of trade negotiations (UR) this level was hoped to fall to 3.8 per cent.¹²

On the modalities of tariff negotiations, Article XXVIII *bis* leaves it to participants to decide whether the negotiations should be carried out on a selective product-by-product basis or by the application "of such multilateral procedures as may be accepted by the contracting parties concerned". The Article envisages that the negotiations could result in the reduction of duties at existing levels or commitments not to raise duties on particular products beyond specified levels.¹³ Owing to this, it has been concluded that tariffs are not presumptively good or bad and as such, there is no obligation under the GATT to reduce them.¹⁴

2.3.2 Uruguay Round on Tariffs

A technique used for the first time in the UR was tariffication. This method was developed to eliminate as far as possible, the rather large number of non tariff barriers

⁸ Bela Balassa, *Studies in Trade Liberalization: Problems and Prospects for the Industrial Countries* (Baltimore & Maryland: The Johns Hopkins Press, 1967) at 217.

⁹ Brian McDonald, *The World Trading System: The Uruguay Round and Beyond* (Hampshire: Macmillan Press Ltd, 1998) at 65.

¹⁰ *Ibid.* at 69.

¹¹ Cortes, *supra* note 3 at 126.

¹² McDonald, *supra* note 9 at 69.

¹³ Anwarul Hoda, *Tariff Negotiations and Renegotiation under the GATT and the WTO: Procedures and Practices* (Cambridge: Cambridge University Press, 2001) at 8.

¹⁴ Trebilcock & Howse, *supra* note 4 at 114.

(NTB) principally quotas that existed or had recently come into being in the T&C sector. The idea was to convert these restrictions into tariffs which are inherently less trade restrictive. The solution was born out of general frustration with the proliferation of the non-tariff restrictions and the relative failure of GATT to do anything about them.¹⁵ This phase out of the quantitative import barriers sanctioned by the Multi Fiber Agreement (MFA) leaving only tariff protection for domestic markets represents a fundamental change in protection policy.¹⁶ Essentially, T&C products will be accorded the same treatment as other industrial products.¹⁷

After textile and apparel items are assigned a tariff, every country will face the same tariff rate under the WTO and the stage will be set for the gradual reduction of these tariffs.¹⁸ It is important to note that the pattern and level of MFN tariff reductions within the WTO framework will also have an impact on the extent of trade diversion.¹⁹ Developing countries are expected, to be the biggest beneficiaries of changes in trade flows, investment and the location of production that will develop in the sector.²⁰ The tariff reductions made by the major developed countries it is hoped, will in the long run effectively improve the access of developing countries to their markets and provide increased security and predictability for developing countries' trade in T&C.²¹

2.3.3 GATT and Tariffs

From the discussion above it is evident that the main effort of the GATT has been twofold i.e. to reduce the average level of tariffs and to ensure that they are fixed or 'bound' at the new reduced level and cannot be raised again without a cost being incurred. Article XXVIII *bis* stipulates that "the binding against increase of low duties or of duty free treatment shall in principle be recognized as a concession equivalent in value

¹⁵ McDonald, *supra* note 9 at 70

¹⁶ Gallagher, *supra* note 1 at 17.

¹⁷ UNCTAD, "The implementation of the Uruguay Round Agreement on Textiles and Clothing: Some General Issues" in Harmon Thomas & John Whalley, eds., *Uruguay Round Results and the Emerging Trade Agenda: Quantitative-based analyses from the development perspective*, (New York: United Nations, 1998) 265 at 266 [UNCTAD, "Implementation"].

¹⁸ Aaron Schavey, "Choosing to Lead: Liberalizing Trade in Textiles and Apparel" Backgrounder 214 Massachusetts Avenue. No. 1366 (May 9, 2000). Online: The Heritage Foundation.

<http://www.heritage.org/library/backgrounder/bg1366.html> at 2.

¹⁹ Hanaa Kheir-El-Din & M. Maamoun Abdel – Fattah, "Textile and Clothing in the Mediterranean Region: Opportunities and Challenges of Returning Textiles and Clothing to GATT Disciplines" Online: World Bank <http://www.worldbank.org/mdf/mdf3/papers/global/kheir.pdf> (accessed on 3/18/2003) at 14.

²⁰ Gallagher, *supra* note 1 at 17.

²¹ "UNCTAD, "Implementation", *supra* note 17 at 266.

to the reduction of high duties".²² For example if a country raises a 'bound' tariff on a particular product it must compensate the principal suppliers of that product with equivalent tariff reductions on other products or face sanctions in the form of the withdrawal of tariff concessions by the affected party.²³ The rationale for this provision is based on the fact that importers and exporters depend of stable tariff policy. If a tariff lowered during a WTO negotiating Round could be unilaterally raised again later, the concession would have little or no value to foreign or domestic producers.²⁴ For domestic producers it is argued, the fact that the national government might subsequently raise a tariff also creates uncertainty not only for the firms that use the import as an input into their production but especially for export oriented firms that have to compete for human and financial resources with import-competing firms.²⁵

In line with the MFN principle is the requirement that when tariffs are bound the benefit from them be extended to all Members of the WTO.²⁶ The GATT forbids the use of taxes in a manner that discriminates between foreign and domestic goods, whether this discrimination is obvious, or non discriminatory on the face of it but discriminatory in effect.²⁷ Taken as a whole, the above provisions seem to offer a better chance for reaping benefits from the T&C trade than was previously the case when the trade was essentially out of the GATT system.

From the foregoing discussion it can also be said that at moderate levels tariffs tend to promote competition and trade, and ensure that domestic prices are not free to rise unduly.²⁸ With a non prohibitive tariff highly efficient foreign producers may be able to surmount the tariff and still compete effectively with domestic producers, thus creating some incentives for the latter to enhance their productive efficiency.²⁹ Tariff liberalization in this case helps to raise consumers' real income, reduce the welfare losses associated with inefficient levels of production and consumption, as well as boost exports

²² Hoda, *supra* note 13 at 8.

²³ McDonald, *supra* note 9 at 66; See also Gallagher, *supra* note 1 at 18.

²⁴ Gallagher, *Ibid.* at 17.

²⁵ *Ibid.* at 18.

²⁶ McDonald, *supra* note 9 at 35.

²⁷ *Ibid.* at 77.

²⁸ *Ibid.* at 65.

²⁹ Trebilcock & Howse, *supra* note 4 at 113.

through redistribution of resources from inefficient industries to the competitive export sector.³⁰

2.3.4 Shortcomings of the current tariff system

Without attempting to forecast the outcome of the ongoing T&C tariff negotiations, it is important to note that there is a great deal of skepticism about the outcome result arising mainly from the past experiences in other sectors with regard to the operation of the tariffs. These have in general not been so positive as the following discussion illustrates and it remains doubtful whether the situation in the T&C will be different once the sector is fully integrated.

To begin with, Article VIII provisions on NT and internal taxation and regulations terms have been said to be vague and as a result, they do not significantly constrain domestic policies. At present domestic authorities retain a great deal of discretion in this area of customs administration.³¹ Normally calculating import duties involves a number of tasks i.e. valuing the imported goods, locating the goods in the appropriate product classification and identifying the goods country of origin. It is important to note that each stage of the process of calculating the import duties from valuation system to the paper work and administrative fees is a potential barrier to trade since the domestic administration can increase the level of protection afforded by tariffs or even make the importing process prohibitively complicated.³²

The tariff reductions by developed countries referred to above have tended to be concentrated in areas that already had low tariffs.³³ As shown earlier, developed countries still maintain protection against manufactured goods supplied by developing countries. The average tariff on the latter's bundle of exports is four times higher than that on the set of manufactures imported from other developed countries.³⁴ In the T&C sector, the tariff reductions fell far below the one third reduction that was intended.³⁵ It is not clear however whether these higher tariffs will keep out imports from the cheaper suppliers

³⁰ Neil McCulloch, L Alan Winters & Xavier Cirera, "Trade Liberalization and Poverty: A Handbook" (2001) online: Centre for Economic Policy Research <<http://www.ids.ac.uk/ids/global/pdfs/lpov.pdf>> (10/10/2003) at 257.

³¹ Trebilcock & Howse, *supra* note 4 at 129

³² *Ibid.* at 124

³³ McCulloch, Winters & Cirera, *supra* note 30 at 260.

³⁴ *Ibid.* at 256

³⁵ *Ibid.* at 260

once quotas are lifted.³⁶ It should be pointed out though that tariff peaks can play an even more important role in determining the success and extent of industrial exports both from and to developing and developed countries.³⁷ The higher the tariff, the more strongly developing countries' exports are cut back and perhaps their prices depressed, and the more the production is switched away from the goods subject to such peaks. Since the tariff peaks occur in precisely those industries in which developing countries have a strong comparative advantage, exploitation of comparative advantage is frustrated, their incomes are reduced and as a result they incur large welfare costs.³⁸

In addition, tariffs distort both domestic production and consumption decisions, first by attracting resources into the protected sector and second by raising prices to consumers above world prices, which in general reflect least cost means of production, thus inducing consumers to allocate their resources to less preferred levels of consumption.³⁹ Tariff impositions often have the effect of encouraging trade as well as labor and capital to move in undesirable directions which may not necessarily be in a country's economic interest.⁴⁰ They thus reduce the welfare of the country that imposes them by distorting the allocation of resources away from other products the production of which would possibly maximize national income at world prices. Important here is that although producers gain from tariff protection, consumers lose and their loss is not fully compensated by producer gains generated by the tariff.⁴¹

High tariffs in industrial countries have also been said to encourage developing country producers of labor intensive manufactures to engage in wage competition-lower real wages, decreasing employment or both.⁴² This is done partly with the aim of cutting down the costs inflated by the high tariffs so as to ensure that production remains competitive on the international market. If this is a valid depiction of what high tariffs can do to labor conditions then the future of workers in T&C industries particularly in developing countries where the labor situation is generally in a sorry state is bleak.

³⁶ McDonald, *supra* note 9 at 142.

³⁷ UNDP, *Making Global Trade Work for People* (London: Earthscan Publications Ltd, 2003) at 158.

³⁸ McCulloch, Winters & Cirera, *supra* note 30 at 258

³⁹ Trebilcock & Howse, *supra* note 4 at 114

⁴⁰ Balassa, *supra* note 8 at 217.

⁴¹ McCulloch, Winters & Cirera, *supra* note 30 at 257

⁴² UNDP, *supra* note 37 at 161.

Maintenance of high tariffs is not a sphere exclusive to developed countries. In fact even after the completion of the UR, industrial tariffs are higher in developing countries for developed country exports than in developed countries.⁴³ It has been observed that most developing countries bind their tariffs at levels well above their applied rates so that they could in principle substantially increase their applied rates without infringing their WTO commitments.⁴⁴

The prevalence of high tariffs in the two worlds may be justified for the following reasons;

Higher industrial tariffs avoid deindustrialization and build competitiveness by shielding the domestic industries from foreign competition. This is illustrative of the fact that the rationale for the supposedly defunct infant industry protection argument has not been abandoned altogether and thus continues to have traces in the current trading system. It is argued that binding industrial tariffs at low levels in developing countries for instance where industries do not have the capacity to withstand competition from cheaper and usually high quality imports by efficient producers creates difficulties for their manufacturing sectors.⁴⁵ It is also pointed out that a major difference between developed and developing countries is that developed countries have the capacity to provide safety nets for people whose jobs are affected by the increased imports caused by tariff reductions whereas developing countries do not have such capacity.⁴⁶

In developing countries, tariffs also have an advantage of generating the much needed tariff revenue. As a result, it is argued that these countries and especially the least developing among them must for all fairness have a certain threshold of tariff protection.⁴⁷ When compared to other forms of raising revenue, taxation of imports at the point of entry is relatively cheap and convenient. It cuts down on the amount of administrative costs that would be required for other forms of taxation schemes yet these are clearly beyond reach for many developing countries. The lowering of tariffs applied to T&C imports it is argued will thus affect the amount of tariff revenues collected by

⁴³ *Ibid.* at 158; See also McCulloch, Winters & Cirera, *supra* note 30 at 258.

⁴⁴ IMF & WB, "Market Access of Developing Country Exports-Selected Issues" (26/9/2002). at 11 online: <<http://www.imf.org/external/np/pdr/ma/2002/eng/092602.htm>> (accessed on 4/16/2004)

⁴⁵ UNDP, *supra* note 37 at 161.

⁴⁶ *Ibid.* at 164.

⁴⁷ *Ibid.* at 162.

these governments and so their use in these countries should be maintained.⁴⁸ The problem lies however in drawing the line between tariffs imposed to generate revenue and those that are protectionist because even the former may have a protectionist effect.

Reverting to the discussion of the shortcomings of the tariff system, another area that did not follow the low post UR average tariff relates to the structure of tariffs which still exhibits tariff escalation.⁴⁹ Most tariffs today are *ad valorem* and so require the importer to pay a certain percentage of the good's value in duty. Thus the value of the imported goods is an important determinant of the ultimate import duty 'any advance in value is accompanied by a commensurate increase in both duties collected and in the level of protection'.⁵⁰ Tariff escalations are intended to increase with each stage of processing thus enhancing the effective protection to higher value-added products in imposing countries.⁵¹

The prevalence of the phenomenon of tariff escalation goes to illustrate that there is still a bias against imports from developing countries compared with imports from all sources.⁵² That is, tariffs on a particular product increase as the product moves through the value added chain e.g. the tariff is low or zero on primary products but increases as the product undergoes additional processing. This can be a significant bias against trade of the processed product.⁵³ Tariff escalation biases protection against the production of final goods in developing countries in the sectors where most of the value added is concentrated.⁵⁴ It has as a result been argued that developed countries it seems are happy enough to export manufactured goods to each other, but from developing countries they still want only raw materials and not finished products.⁵⁵ The strength of this argument is

⁴⁸ Peter Walkenhurst, "Liberalizing Trade in Textiles and Clothing: A Survey of Quantitative Studies" TD/TC/WP (2003)2/FINAL. Working Party of the Trade Committee. Unclassified online: <<http://ideas.repec.org/p/wpa/wuwpit/0401007.html>> (accessed on 10/15/2003) at 9.

⁴⁹ Sam Laird, Lucian Cernat & Alessandro Turrini, "Back to Basics: Market access issues in the Doha Agenda" online: <<http://r0.unctad.org/p166/module2002Bangk/Module4/Backtobasics.pdf>> (accessed on 10/17/2003) (New York & Geneva: UNCTAD/ United Nations, 2002) at 18.

⁵⁰ Trebilcock & Howse, *supra* note 4 at 125; See also McCulloch, Winters & Cirera, *supra* note 30 at 258.

⁵¹ Fattah, *supra* note 19 at 2; See also McCulloch, Winters & Cirera, *supra* note 30 at 258.

⁵² McDonald, *supra* note 9 at 76.

⁵³ John Waino, "Agriculture and the Evolution of Tariff Bargaining" online: Economic Research Service website, <www.econ.ag.gov/briefing/wto> (accessed on 4/16/2004) at 4.

⁵⁴ McCulloch, Winters & Cirera, *supra* note 30 at 259.

⁵⁵ Kofi Annan, "Laying the foundations of a fair and free world trade system" in Gary P. Sampson, ed., *The Role of the World Trade Organization in Global Governance* (New York: United Nations University Press, 2001) 19 at 22.

reflected in the classification of certain products as sensitive and subject to special internal procedures, as in the United States Trade Act of 2000.⁵⁶ Furthermore, as was seen in the previous chapter, tariffs on clothing are higher than tariffs on textile products and this also offers sufficient evidence of the presence of tariff escalation.⁵⁷

Because tariff escalation is particularly pronounced for products that offer developing countries the best chance of starting industrial exports, it discourages these countries from processing their products for export.⁵⁸ Thus, while development strategies in many countries aim to upgrade production processes in order to capture a larger share of the value added, tariff escalation pushes in the opposite direction.⁵⁹ Developing countries end up gaining less from trade because they engage in low value added commodities that are susceptible to price fluctuations and the uncertainty that it creates.⁶⁰

Important to note is the fact that tariff escalation is a quite widespread phenomenon and affects both agricultural and industrial products. Also, it is not just a feature of developed markets but is present in developing countries as well.⁶¹ Therefore, it is in every country's interest that tariff valuation techniques be uniform and predictable to reduce the negative impact of the tariff escalations. A system that is unpredictable or unfair to exporters serves as a non tariff barrier to trade and therefore undermines the effects of tariff reductions.⁶²

For the benefits of trade liberalization to be distributed as evenly as possible, between developed and developing countries, a forum is needed in which all interests can be balanced. This requires first and foremost, that the markets of the developed and developing countries be open to each other by eliminating tariff restrictions.⁶³ It has been argued that the developed world will find it easier to accept imports from the developing countries if they can also export to them. Implying that the ability of both the developed

⁵⁶ Section 211(b) U.S., H.R. 434 Trade and Development Act, 106th Cong., 2000.

⁵⁷ Marc Bacchetta & Bijit Bora, *Industrial Tariff Liberalisation and the Doha Development Agenda* (Geneva: WTO Publications, 2003). Online: WTO <www.wto.org> at 9.

⁵⁸ UNDP, *supra* note 37 at 161.

⁵⁹ McCulloch, Winters & Cirera, *supra* note 30 at 258.

⁶⁰ UNDP, *supra* note 37 at 15.

⁶¹ Laird, Cernat & Turrini *supra* note 49 at 19.

⁶² Trebilcock & Howse, *supra* note 4 at 125.

⁶³ Supachai Panitchpakdi, "Balancing Competing Interests: The future role of the WTO" in Sampson, *supra* note 55, 29 at 31.

and the developing world to lower trade barriers depends at least in part on their ability to export.⁶⁴

2.4 Dispute Settlement System

2.4.1 Introduction

As was noted earlier the WTO provides a strengthened and expanded framework of rules for international trade. These rules however would be worth little without an effective dispute settlement system to enforce rights and obligations.⁶⁵ The viability of the trading system requires that the principles of non-discrimination and market access commitments be protected by a series of rules that guard against policy slippage or erosion. If Members could not exercise their WTO rights through recourse at the multilateral level, they would be tempted to do so unilaterally. Others would also take a different view of their own obligations if they did not believe that others were abiding by theirs. It is thus recognized that without multilateral dispute settlement the trading system would be less stable and effective.⁶⁶ Its no surprise therefore that the GATT dispute settlement system has long been considered a cornerstone of the multilateral trading system. The system has provided countries with the ability to challenge actions taken by trading partners and obtain rulings from independent panels of experts on the GATT consistency of such measures.⁶⁷

2.4.2 Dispute Settlement after the Uruguay Round

The WTO Dispute Settlement Understanding (DSU) incorporates major improvements in the GATT dispute settlement procedures.⁶⁸ Incidentally, to many commentators the strengthening of the dispute process is regarded the most important element of all the institutional changes created by the UR.⁶⁹

One of the central provisions of the DSU is that unilateral action is forbidden. Members are required to use the multilateral dispute settlement rules and procedures of the WTO to resolve all disputes.⁷⁰

⁶⁴ McDonald, *supra* note 9 at 47.

⁶⁵ Gallagher, *supra* note 1 at 57.

⁶⁶ WTO, "World Trade Report 2003" Press Releases. Press/348.1 (14 August.) Online: WTO <www.wto.org> [WTO, "World Trade Report"] at 173.

⁶⁷ Gallagher, *supra* note 1 at 57.

⁶⁸ *Ibid.*

⁶⁹ McDonald, *supra* note 9 at 44.

⁷⁰ Gallagher, *supra* note 1 at 58.

Very important about the procedure is also that consensus is no longer required to proceed in disputes. A consensus decision is now only required to halt the proceedings at any stage of the formal dispute settlement procedures.⁷¹ And this is unlikely to happen. The change implies that the international community is moving towards a more rule-based system rather than one that leans towards negotiated solutions.⁷² It also greatly enhances the confidence of all trading nations, large or small, in the multilateral trading system since the potential for procedural blockage is removed.⁷³

Another change is the introduction of more precise and shorter time limits for each stage of the procedures.⁷⁴ The new mechanism is more time bound, predictable, consistent and binding on all members.⁷⁵

The dispute settlement mechanism protects the trading rights of developing countries the same way as of developed countries.⁷⁶ Despite the dominance of developed countries and skewed distribution of the bargaining power, WTO offers developing countries a rules-based forum at which to defend their trading interests and rights.⁷⁷ As a result, developing countries are participating more in the dispute settlement process than was previously the case.⁷⁸

In addition, unlike in the GATT, the WTO dispute settlement process moves forward automatically with the panel and appellate body reports being adopted unless there is a consensus against them (Articles 16.4 and 17.14 respectively). This rule of negative consensus, backed up by a mechanism providing for compensation and sanctions in case of non compliance has greatly increased the effectiveness of the process and made it very different from the compliance mechanisms of other international agreements.⁷⁹

⁷¹ Article 16.4 Understanding of the Rules and Procedures Governing the Settlement of Disputes.

⁷² McDonald, *supra* note 9 at 44.

⁷³ Gallagher, *supra* note 1 at 57.

⁷⁴ Article 20 Understanding of the Rules and Procedures Governing the Settlement of Disputes.

⁷⁵ UNDP, *supra* note 37 at 6.

⁷⁶ Gallagher, *supra* note 1 at 6.

⁷⁷ Arvind Panagariya, "Developing countries at Doha: A Political Economy Analysis" Department of Economics, University of Maryland) on line <<http://econwpa.wustl.edu/eps/it/papers/0308/0308015.pdf>> (accessed on 2/16/2003) at 30.

⁷⁸ UNDP, *supra* note 37 at 6.

⁷⁹ Gary P. Sampson, ed., *The Role of the World Trade Organization in Global Governance* (Tokyo: United Nations University Press, 2001) at 3.

As a special provision for least developing countries, Article 24.1 provides that in case of a dispute involving such countries, Members “exercise restraint” in bringing formal complaints or, if a complaint succeeds, that they exercise restraint in seeking compensation or authorization to suspend equivalent rights or concessions.

This legal protection afforded by the dispute settlement body has had and will continue to have great impact on textile trade liberalization process. The shift towards a more legalistic adjudicating system instills confidence in the credibility of the entire system and offers a possibility for better dealings within the sector.⁸⁰

Important to note however is the fact that although procedurally the GATT is capable of adjudicating most legal claims, legal rulings can still be blocked by unwilling defendants and the enforcement of rulings still depends almost entirely on normative pressure.⁸¹ This impasse greatly affects market opportunities as well as the exporter’s incomes.

In addition to the above, the financial and technical resources required to use the system are beyond the reach of many poor countries. What is more, the effect of imposing sanctions against more economically powerful WTO Members may be inconsequential for developing countries, if not harmful to themselves.⁸² So this cuts down on the use of the system by the developing countries and thus leaves some of their claims unattended.

The above still holds even where a developing country wins a case. Collateral political issues may make it impossible for it to lay claim to the award as the consequences to it if the award is claimed may be quite onerous. Therefore such country has to exercise these rights with caution by weighing all factors to determine whether enforcement of the award is in its best interest.

Whether the above experiences in the dispute settlement system will continue to operate after the complete liberalization of the T&C sector in 2005 remains to be seen. It is said that to achieve the objective of making the system work for all Members on a

⁸⁰ M.Rafiqul Islam, “Parochialism in Agricultural Trade liberalization Under the World Trade Organization: Dilemmas and Options for Australia as a Middle-Sized Nations” (2002)36(4) J.W.T. 773-802 at 784.

⁸¹ Robert E Hudec, *Essays on the nature of international trade law* (London: Cameron May Ltd, 1999) at 167.

⁸² Oxfam International, “Harnessing Trade for Development” Oxfam Policy Papers. August 2001. Online: Oxfam <<http://www.oxfam.org.uk/policy/papers/trade/trade.pdf>> (accessed on 4/5/2003) at 9.

more equitable basis, it is important to look at the working mechanisms of the system to see whether or not there is some room for improvement.⁸³ So where the dispute settlement system has fallen short of the reasonable aspirations of the countries efforts should be made to rectify the situation.

2.5 Regional Trade Agreements

2.5.1 Introduction

In Article XXIV of GATT, the WTO formally embraces these arrangements. It allows such regional customs unions and free trade areas to exist. The Article requires that barriers to trade not be raised against those outside the arrangement and that Members embrace all trade and move quickly towards free trade or customs union. It has been argued that this second provision was designed to avoid partial arrangements meaning that parties to the arrangement must be genuinely pursuing a full free trade arrangement and not a preferential deal for some individual sectors.⁸⁴ Article 24.5 provides another important condition to the effect that the duties and other regulations of the arrangement applied to international trade with non-Member countries shall not be higher or more restrictive than the corresponding duties and restrictions existing prior to the formation of the arrangement.

Recently, regional trade agreements have become an important feature of the international trade system and this has intensified concerns and debates on promoting national and local interests alongside international trade regimes.⁸⁵ Although the structures of these arrangements vary hugely, they all have one thing in common i.e. the objective to reduce barriers to trade between Member countries. At their simplest they merely remove tariffs on intra-bloc trade in goods but many have gone beyond that to cover NTBs and have extended liberalization to trade and investment.⁸⁶

Significant to note in the discussion of regionalism is that no country is immune from its effects. It shapes world economic and political relations and influences the

⁸³ Supachai "Balancing", *supra* note 63 at 30.

⁸⁴ McDonald, *supra* note 9 at 54.

⁸⁵ UNDP, *supra* note 37 at 98.

⁸⁶ World Bank, *Trade Blocs: A World Bank Policy Research Report* (New York: Oxford University Press, 2000) at 1

development of the multilateral trading system, and as a result all countries face policy choices concerned with regionalism.⁸⁷

2.5.2 General Issues

It is relevant to explore some of the general issues concerning the establishment of these arrangements with the aim of examining how their increasing importance in international trade will perhaps shape the T&C sector following its complete liberalization.

Regional groupings accord highest trade policy priority to their Members by means of their inward looking trade policies and hence create economic security to Member states.⁸⁸ Within the arrangements, countries are able to achieve gains to trade through the reciprocal exchange of concessions on trade barriers and greater market access yet these privileges are not shared with those on the outside thus giving a *de facto* advantage to Members.⁸⁹ Given the changing nature on international protection characterized by a shift from tariffs to NTBs which are difficult to contend with, as well as the difficulties in achieving multilateral solutions to the challenges posed by these barriers, it is argued that regional trade arrangements are often seen as a preferred alternative to engaging in global competition.⁹⁰ The arrangements facilitate their Members to overcome most of these hurdles which enables Members imports to become cheaper relative to those of other producers and as is usually the consequence, there are shifts in demand causing further changes in the flow of trade and in output levels in many sectors.⁹¹

In addition, because the arrangements reduce or abolish barriers on trade within the group while maintaining high import control measures against non members they create some kind of buffer against global competitive pressures which enables Member states to exploit the economies of scale within the bloc.⁹² Also, the regional cooperation offers one route to overcome the disadvantages of smallness by pooling resources or

⁸⁷ *Ibid.* at 5.

⁸⁸ Islam, *supra* note 80 at 775.

⁸⁹ Bob Switky, "The Importance of Trading Blocs: Theoretical Foundations" in Bart Kerremans & Bob Switky eds., *The Political Importance of regional Trading Blocs* (Aldershot: Ashgate Publishing Ltd, 2000) 13 at 23

⁹⁰ *Ibid.* at 30.

⁹¹ World Bank, *supra* note 86 at 9.

⁹² Switky, *supra* note 89 at 31

combining markets and this market enlargement again allows firms to exploit economies of scale more fully. With the combined markets comes the benefit of reducing monopoly power since firms from different countries are brought into more intense competition as well as induced to eliminate internal inefficiencies and raise productivity levels, expand sales and cut prices.⁹³

Although the global approach is essential, by its very nature it cannot move as far or as fast as regional arrangements. Global trade negotiations take time and enormous effort. They involve many partners whose economies are simply not compatible and whose interests are not commensurate and are at different levels of development.⁹⁴ The regional arrangements on the other hand permit a very substantial trade liberalizing effort to take place among countries that are prepared to do so and have economies that are compatible both from a geographical and an economic point of view. This ensures that the world does not come to a stand still and waste time because it is looking for the perfect solution to all its problems.⁹⁵

A country may seek membership in a regional arrangement in order to enhance its political voice in multilateral bargaining forum.⁹⁶ Except for the largest economies, achieving agreement in WTO negotiations requires Members who share an objective to work together to build a broad consensus and the most likely source of initial support will be other Members of a regional group who are predisposed by their trade relations and shared policy interests.⁹⁷ An example here would be in the UR T&C trade negotiations. Although the developing countries were not a regional bloc *per se*, the illustration aims at showing how effective team work can be in producing favorable rules especially for weak nations as these would be hard if not impossible to negotiate individually. Therefore, the regional effort puts the Members in a much better position to make the concessions that are necessary for successful global discussions.⁹⁸

A threat that economists see in these regional arrangements is that they may be more trade diverting than trade creating i.e. exports to the region might be reduced and

⁹³ World Bank, *supra* note 86 at 31

⁹⁴ McDonald, *supra* note 9 at 59.

⁹⁵ *Ibid.*; See also Switky, *supra* note 89 at 31.

⁹⁶ Switky, *Ibid.* at 18.

⁹⁷ Gallagher, *supra* note 1 at 106.

⁹⁸ McDonald, *supra* note 9 at 59.

trade might be diverted to producers within the free trade area.⁹⁹ It has been argued however that changes in trade flows caused by regional trade arrangements do not necessarily have an adverse effect. But where each Member country substitutes cheaper imports from the rest of the world with more expensive partner imports the outcome is trade diversion and a loss for Member countries.¹⁰⁰ Whatever the argument, the reality is that while some countries might benefit from their trade creating effects, i.e. from the stimulus to growth along with import demand, the arrangements trade diverting costs and investment diversion may outweigh any gains.¹⁰¹

In addition to the above, the arrangements affect and distort comparative advantage and consequently exporting countries incomes. Some countries are heavily dependent on a non-discriminatory trading order therefore a circumvention of the principles of free trade such as MFN, comparative advantage and transparency in trade thwarts all their efforts to come out of the economic misery and further exacerbates their economic marginalization.¹⁰²

Another concern is that the regional trading arrangements are inherently protectionist and are as such a hindrance to freeing international trade. Although formed under Article XXIV, these arrangements are said to remain largely unregulated by the WTO.¹⁰³ It has thus been concluded that although the Article is generally an aid to better regional arrangements, it is certainly not sufficient for good economic policy. That is, even if the Articles conditions were applied without exception they would not preclude harmful arrangements implying that wholly GATT compatible regional arrangements can still be predominantly trade restrictive.¹⁰⁴ As a consequence, regional arrangement formation has become associated with tariff increases.¹⁰⁵ Existing arrangements do not help the situation at all as they are often easily tempted to raise the effective level of protection so as to improve the region's terms of trade.¹⁰⁶ The effect of this is to provide

⁹⁹ *Ibid.* at 54.

¹⁰⁰ World Bank, *supra* note 86 at 42.

¹⁰¹ Gallagher, *supra* note 1 at 109.

¹⁰² Islam, *supra* note 80 at 792.

¹⁰³ *Ibid.* at 791.

¹⁰⁴ World Bank, *supra* note 86 at 109.

¹⁰⁵ *Ibid.* at 95.

¹⁰⁶ Harald Sander, "Multilateralism, Regionalism and Globalization: The Challenges to the World Trading System" in Harald Sander & Adras Inotai, eds., *World Trade after the Twenty-First Century: Prospects and Policy Options for the Twenty-First Century* (London: Routledge, 1996) 17 at 27.

greater protection to the insiders while freezing out all outsiders and thus thwarting all liberal trade strategies.¹⁰⁷

2.5.3. Arrangements and the Textile and Clothing trade

A major impact on T&C trade flows during the 1990s has ensued from regional trade agreements which enabled firms to circumvent the MFA quotas.¹⁰⁸ It has been observed however that the European Union (EU) and North American Free Trade Arrangement (NAFTA) are the most dynamic and important blocs affecting the global T&C trade.¹⁰⁹ Modeling results have thus predicted welfare benefits arising from the T&C trade for the participating countries while trade diversion is expected to adversely affect outsiders.¹¹⁰ As such it is pertinent to look at the some of NAFTA crucial elements in as far as the T&C trade is concerned to establish whether the assertions made thus far are valid.

The textile and apparel sector was one of the most contentious in the entire NAFTA talks. This was perhaps not surprising since the sector was and continues to be very important in terms of trade and employment.¹¹¹ At its conclusion the NAFTA provided manufacturers of textiles with continued as well as new preferential access.¹¹² Under its terms virtually all tariffs on originating textiles between the three Member states were to be eliminated by January 1 2003.¹¹³ In addition a nil quota requirement was provided in clothing exports under the agreement.¹¹⁴

¹⁰⁷ Islam, *supra* note 80 at 791.

¹⁰⁸ Walkenhurst, *supra* note 48 at 16.

¹⁰⁹ K. F. Au & N. Y. Chan, "The World Textile and Clothing Trade: Globalization versus Regionalism" <<http://blake.montclair.edu/~cibconf/conference/DATA/Theme5/Hongkong1.pdf>> (accessed on 4/27/2004) at 1107.

¹¹⁰ Walkenhurst, *supra* note 48 at 4.

¹¹¹ David A. Lynch, "Negotiating with Goliath: Cross-national and Cross-level Interactions in NAFTA's Auto and Textile Sectors" in Bart Kerremans & Bob Switky eds, *The Political Importance of regional Trading Blocs* (Aldershot: Ashgate Publishing Ltd, 2000) 241 at 249.

¹¹² Canada & Industry Canada, *NAFTA and the Textiles Sector* (Ottawa: Ministry of Supply & Services Canada, 1994) at 1.

¹¹³ *Ibid.* at 3.

¹¹⁴ Au & Chan, *supra* note 109 at 1108.

While each Member maintains its own external tariff, the NAFTA preferential tariff is extended only to goods originating from a Member country.¹¹⁵ NAFTA imposes very strict rules of origin for textile and apparel more than other products.¹¹⁶ These strict rules of origin for textiles and apparel are one factor contributing to the changes in direction of the trade in the region.¹¹⁷ The rules require that certain production steps be taken within North America before a good can qualify as a NAFTA good.¹¹⁸ In effect the NAFTA has increased performance of its Members in the T&C trade created mainly by the secured markets due to strict rules of origin. In 2001 performance figures showed Mexico as the largest supplier of apparel products into the US, while Canada and Mexico ranked first and second as suppliers of textiles respectively.¹¹⁹

Another factor that has favored the T&C sector in this region is the fact that T&C markets have increasingly become demand driven and require new products much more frequently and rapidly.¹²⁰ The off shore processing trade has also made nearer locations cheaper particularly in terms of the transport costs involved. Bearing in mind that tariffs are applied only to the value added when domestically produced intermediate inputs are re-imported as a final or near final product this leads to considerable cost savings relative to direct importation.¹²¹ The effect of these considerations has resulted in the move toward relocation of economic activities.¹²² NAFTA has had such effect by shifting demand away from Asian suppliers of T&C.¹²³ Hence while industries expand in some countries due to regional arrangements they contract in others and as this happens demand for labor and real income levels also changes.¹²⁴ It is argued that the relaxing of quota restraint as provided for in the ATC will further increase the relative importance of geographical proximity because it reduces delivery time contributing further to the

¹¹⁵ Article 401 North American Free Trade Agreement.

¹¹⁶ Article 402 North American Free Trade Agreement; See also, Nattapong Thongpakde & Wisarn Pupphavesa, "Returning Textiles and Clothing to GATT Disciplines" online: <<http://www.worldbank.org/wbiep/trade/manila/textiles.pdf>> (accessed on 3/9/2003) at 10.

¹¹⁷ *Ibid.*

¹¹⁸ World Bank, *supra* note 86 at 5.

¹¹⁹ David Morris, "The Multilateral Trading System and the New Political Economy for Trade in Textiles and Clothing: An Introduction for Least Developed Countries" (Geneva: ITC/UNCTAD/WTO Publications Unit, 2002). ITC/T322.E/PMD/MDS/02-X at 5.

¹²⁰ McDonald, *supra* note 9 at 143.

¹²¹ UNDP, *supra* note 37 at 178.

¹²² World Bank, *supra* note 86 at 51.

¹²³ UNDP, *supra* note 37 at 177.

¹²⁴ World Bank, *supra* note 86 at 51.

strength of trading blocks.¹²⁵ This is tolerable but where it involves investment diversion from third countries it is feared that it may constitute another threat to the multilateral system.¹²⁶

The WTO should therefore confront and challenge the protectionist policies within the trading blocks as these expose weak countries to economic peril. This can be done through the imposition of hard and strict multilateral trading rules. Increasing globalization of trade needs a trade regulatory regime that is global in nature and scope. A regional arrangement it is argued should exist only as a stepping-stone towards achieving global free trade. Furthermore, the MFN principle ought to be made equally applicable to trade blocs pursuant to a fixed time schedule after formation to guard against the “fortress” mentality.¹²⁷

2.6 Generalized System of Preferences

2.6.1 Introduction

Preferential treatment of developing countries is a well established practice of international trade relations whose origins could be traced back to the Havana Charter.¹²⁸ Whereas the GATT rules are aimed at mutual advantage and the balancing of interests, they originally reflected a consensus in which the interests of the developing countries were not properly accommodated.¹²⁹ Efforts were therefore made to redress international inequalities and in 1979, the Tokyo Round of trade negotiations produced the Enabling Clause-allowing developing countries to benefit in principle, from preferential market access and flexible trade mechanisms not enjoyed by developed countries. The Clause legitimized the Generalized System of Preferences (GSP) and provided more favorable treatment with respect to NTBs, preferential trade rules for developing countries and

¹²⁵ Richard P. Appelbaum, “Assessing the Impact of the Phasing-out of the Agreement on Textiles and Clothing on Apparel Exports on the Least Developed and Developing Countries” (Santa Barbara: University of California, 2003) <www.iccr.org/issues/css.mfa_resources.doc> (accessed on 12/2/2003) at 13.

¹²⁶ Sander, *supra* note 106 at 25.

¹²⁷ Islam, *supra* note 80 at 792.

¹²⁸ Wolfgang Benedek “Preferential Treatment of Developing Countries in International Trade- Past Experiences and Future Perspectives in Detlev Chr. Dicke & Ernst-Ulrich Petersmann eds., *Foreign Trade in the Present and a New International Economic Order* (Fribourg: University press, 1988)71 at 71.

¹²⁹ *Ibid.* at 103.

special treatment for least developed countries.¹³⁰ The original idea of the United Nations Conference on Trade And Development (UNCTAD) Secretary General at the time was to introduce a GSP, whereby the developed countries would allow across-the-board, duty free access to developing countries. Instead of the single scheme, each developed country drew up its own GSP system for all their beneficiary countries unless these were excluded for political reasons.¹³¹

The provisions were expected to counterbalance the perceived inequality in economic conditions and power relations between developed and developing countries.¹³² By allowing for participation of developing countries on a more equal basis, the GSP's assured a better balance of mutual advantages to be gained from the international trading order.¹³³ And this was achieved by not only allowing developing countries not to reciprocate, but also through granting them preferential tariffs in the markets of developed countries.¹³⁴

Most developing countries have as a result relied from time to time on special preferential access to developed country markets under the GSP. This has been in part because these non-reciprocal trade preferences have sometimes offered developing countries substantially better access to developed country markets than was available under bound MFN tariff rates.¹³⁵ By charging lower tariffs or granting duty free entry to developing countries' exports are stimulated.¹³⁶ This has translated into an expanded export led sector backed by the security of access to markets and has further attracted export-oriented investment.¹³⁷

2.6.2. WTO and Preferential Treatment

Whereas, the special and differential treatment (SDT) for developing countries is institutionalized in the WTO, it operates under a waiver in Article 9 and has become little

¹³⁰ UNDP, *supra* note 37 at 55.

¹³¹ McDonald, *supra* note 9 at 50.

¹³² Lutz Hoffmann, "UNCTAD and Trade Liberalization" in Dicke & Petersmann, *supra* note 128,323 at 325.

¹³³ Benedek *supra* note 128 at 75.

¹³⁴ Hoffmann, *supra* note 132 at 325 ; See also UNDP, *supra* note 37 at 65

¹³⁵ Gallagher, *supra* note 1 at 15.

¹³⁶ *Ibid.* at 30.

¹³⁷ Rubens Ricupero, "Rebuilding Confidence into the multilateral trading system: Closing the Legitimacy Gap" in Sampson, *supra* note 55, 37 at 53.

more than longer transitional periods to implement the same rules as developed countries rather than positive discrimination in the rules in favor of developing countries.¹³⁸

There is also concern expressed that market access opportunities for developing countries under the GSP are being reduced by the cuts in MFN tariffs agreed in the UR.¹³⁹ The increases in bound market access commitments resulting also from the UR, is considered even more significant than the MFN tariff reductions in the erosion of GSP preference margins.¹⁴⁰ Whichever argument one decides to make it is clear that these new developments in the multilateral system place in doubt the possibility of developing countries attaining meaningful economic benefit from the schemes.

The above notwithstanding, it is said that the system of preferential treatment will have to be a distinct feature of the GATT legal system for a long time to come.¹⁴¹ This is mainly because enforcing MFN obligations cannot be considered to constitute an alternative to preferential treatment rather, both have to go hand in hand. Although restoration of the MFN discipline must be the primary objective it is argued that this will have to coexist with preferential treatment for a long time to allow for developing country participation on mutually advantageous terms.¹⁴²

2.6.3 Current Schemes and Textile and Clothing Trade

With regard to the T&C sector, it is relevant to highlight one of such schemes that have played an important role in the facilitation of development in the T&C trade within the beneficiary countries economies. The United States Trade and Development Act 2000 provided for duty and quota free access for selected African products to the US market, under the African Growth and Opportunity Act (AGOA). Most of the apparel shipped under AGOA is in fact exported under the so-called Special Apparel Provision i.e. a temporary apparel concession, additional to the Act's general apparel provision. The concession which runs until 30 September 2004 enables apparel makers to source yarn and fabric from any country without losing AGOA benefits. This gives least developed beneficiary countries a strong competitive advantage by enabling them to source

¹³⁸ Oxfam International, *supra* note 82 at 8.

¹³⁹ WTO, "World Trade Report" *supra* note 66 at 155; See also Gallagher, *supra* note 1 at 30.

¹⁴⁰ Gallagher, *Ibid.*

¹⁴¹ Benedek *supra* note 128 at 97.

¹⁴² *Ibid.* at 100.

materials from the world's competitive suppliers but only as long as it remains in force.¹⁴³ This provision it is said marks a significant departure from most U.S preferential access programs, which are usually designed to encourage the use of domestic fabrics and yarns in the manufacture of apparel for the US market.¹⁴⁴

2.6.4. Limitations

Although preferential treatment schemes remain potentially valuable, for a number of reasons they have made only limited contributions to developing countries' trade and economic growth.¹⁴⁵

Some have summed up the situation and said that the difficulties encountered by the developing countries with regard to these schemes have in many cases been due to continued lack of access for certain product categories.¹⁴⁶ Most schemes have excluded what are generally known as "sensitive" products including T&C.¹⁴⁷ Since product coverage itself represents only one of the several dimensions to substantially enhance market access conditions for LDCs exports, exclusion of some products from benefiting from the preferential treatment has meant that the preference receiving countries have attained only minimal benefits from the schemes.¹⁴⁸ With this state of affairs it has thus been concluded that developing countries have failed to obtain the sort of access they might have achieved if they had entered into real reciprocal negotiations.¹⁴⁹

The schemes have also had fundamental limits due to their discretionary and unilateral nature.¹⁵⁰ The parameters of unilateral and unbound GSP preferences often mean that they provide only limited market access advantages to developing countries.¹⁵¹ The absence of agreed multilateral criteria for a single scheme also means that developed countries can unilaterally modify and revoke the preferential treatment.¹⁵² In addition,

¹⁴³ Morris, *supra* note 119 at 44.

¹⁴⁴ *Ibid.* at 45.

¹⁴⁵ Gallagher, *supra* note 1 at 30.

¹⁴⁶ McDonald, *supra* note 9 at 51.

¹⁴⁷ Gallagher, *supra* note 1 at 31.

¹⁴⁸ Stefano Inama "Market access for LDCs: Issues to Be Addressed" (2002) 36(1) J.W.T. 85-116 at 86.

¹⁴⁹ McDonald, *supra* note 9 at 51.

¹⁵⁰ Gallagher, *supra* note 1 at 30.

¹⁵¹ *Ibid.* at 33.

¹⁵² Benedek *supra* note 128 at 88

each developed country sets its own rules for eligibility for GSP treatment.¹⁵³ Taking the example of rules of origin an important feature in the determination of eligibility for preference, each preference giving country has different rules of origin, the effect of this is that a specific origin product may meet the rules in one market but not in another therefore countries have to incur high compliance costs to meet the demands of each individual country. This coupled with the fact that the time frames of the schemes do not allow for an investment response to trade incentives puts the position of the beneficiaries trying to take advantage of the benefits offered by the scheme at a disadvantage.¹⁵⁴

Developing countries have also expressed resentment to the conditionalities attached to this trade assistance program that had traditionally required no reciprocal action.¹⁵⁵ Using the example of AGOA, to qualify for GSP treatment a country must offer reasonable and equitable market access to U.S goods and services, protect U.S intellectual property rights adequately, ensure that internationally recognized workers rights are respected among other things.¹⁵⁶ In addition one version of the AGOA required that all inputs including zippers, buttons, and thread to be used be of U.S origin. This new practice of utilizing GSP benefits for extra GATT purposes by conditionality is not in conformity with the spirit of preferential treatment in GATT. It is illegal because it abuses the situation of the beneficiary of preferential treatment to gain some kind of reciprocity.¹⁵⁷ Developing countries have thus frequently made the observation that it is the developed countries that actually benefit from the 'special treatment'.¹⁵⁸

To the extent that some of the preferences have proved useful there is always an additional risk that beneficiary countries may specialize in areas where they do not possess comparative advantage.¹⁵⁹ The secured market access provided by the schemes resulted in continued flow of resources into the T&C sector for instance in countries where the trade was of little economic value and that should have been abandoned a long

¹⁵³ Anne O. Krueger, *Trade Policies and Developing Nations* (Washington D.C.: The Brookings Institution, 1995) at 41.

¹⁵⁴ Gallagher, *supra* note 1 at 33.

¹⁵⁵ Gijsbert Van Liemt, "Production Conditions and International Trade: Protection or Protectionism" in Ludo Cuyvers & Bart Kerremans, eds., *The International Social Issue- social Dumping and Social Competition in the Global Economy* (Anterpen: Intersentia Economische Wetenschappen, 1998) 83 at 96.

¹⁵⁶ Morris, *supra* note 119 at 45.

¹⁵⁷ Benedek *supra* note 128 at 92

¹⁵⁸ Ricupero, *supra* note 137 at 51.

¹⁵⁹ WTO, "World Trade Report" *supra* note 66 at 155.

time ago and prevented the countries from establishing other sectors of substantial benefit.

Some have argued that if instead of using such bargaining power as they had for GSP developing countries had sought lower tariffs and fewer restrictions on developed countries' imports of goods from these countries, the beneficial impact of even small reductions in tariffs of interest to developing countries would probably have exceeded that from GSP.¹⁶⁰

An alternative suggested here is to establish multilateral rules and procedures to ensure the transparency and predictability of preferential treatment. There is no convincing reason why it should not be possible to adopt a general criterion that is of competitive need limiting the discretion of individual preference giving countries and to be applied under multilateral surveillance.¹⁶¹ It is added that although market access and special treatment under multilateral trade rules may not, by themselves be sufficient to accelerate growth in the LDCs, they are certainly necessary.¹⁶²

2.7 Exceptions to the Liberalization rules

2.7.1 Introduction

Certain GATT/WTO rules define circumstances in which Members can reverse, temporarily or otherwise, their market access commitments.¹⁶³ One common element regarding all these rules is that they allow Members in certain circumstances to temporarily stop applying some aspect of the agreement while ensuring that its objectives are never undermined. The justification for such measures is that they help the governments of the states to find a way of confronting delicate situations. Taken as a whole the rules demonstrate the recognition that governments must enjoy a certain level of flexibility in order to fulfill their fundamental aim of adapting the norms to the

¹⁶⁰ Krueger, *supra* note 153 at 42.

¹⁶¹ Benedek *supra* note 128 at 101.

¹⁶² UNCTAD, Secretary General at WTO meeting stresses need for action beyond market access for least developed countries.

<<http://www.unctad.org/Templates/webflyer.asp?docID=3279&intItemID=2068&lang=1>> (11/11/03) at 1.

¹⁶³ "WTO, "World Trade Report" *supra* note 66 at 173.

circumstances.¹⁶⁴ The relevant rules here are anti-dumping, safeguards and subsidies and countervailing measures.

2.7.2 Anti Dumping

Under Article VI GATT, a Member country can unilaterally impose anti-dumping duties to protect its domestic industry from imports of 'dumped' goods and offset material injury caused by such imports. The rationale for this measure is that otherwise competitive producers should not be put out of business by unfair competition by a dumper attempting to establish a dominant position and later raise its prices.¹⁶⁵ These actions are targeted at firms not governments and are therefore not required to be imposed on a MFN basis. These two characteristics combined make anti dumping duties the politically least difficult to apply of all the trade measures available to WTO Members.¹⁶⁶

Anti dumping duties have become the most popular tool of protectionism in the developed countries and the ease with which they can be imposed has had a deterrent effect well beyond the set of exports that actually face them.¹⁶⁷ By way of illustration, the number of anti dumping initiations notified by Members to the WTO rose steadily from 157 in 1995 to a peak of 355 in 1999. Also the number of new measures imposed as reported by Members was 235 in 2000 and 159 in 2001.¹⁶⁸ Part of the problem is that the Agreement on Anti-dumping contains sufficient ambiguities and loopholes which enable powerful countries like European Union Members and the US to place excessive restrictions on imports from developing countries on the grounds of injury to domestic industry from dumped imports.¹⁶⁹ Consequently, the actions have been captured and manipulated in a bid to legitimize protectionist tendencies and they operate quite well i.e. by shifting from overt to covert protectionism.¹⁷⁰ In the *Bed Linen* case for example, the

¹⁶⁴ Cortes, *supra* note 3 at 147.

¹⁶⁵ UNDP, *supra* note 37 at 187.

¹⁶⁶ *Ibid.* at 185.

¹⁶⁷ McCulloch, Winters & Cirera, *supra* note 30 at xxvii

¹⁶⁸ WTO "Annual Report 2003" online: <http://www.wto.org/english/res_e/booksp_e/anrep_e/anrep03_e.pdf> (accessed on 5/7/2004) at 24 [WTO, "Annual Report"].

¹⁶⁹ Oxfam International, *supra* note 82 at 44.

¹⁷⁰ Islam, *supra* note 80 at 789.

European Communities (EC) investigating authorities in determining injury decided that all imports attributable to Indian producers for which no individual margin of dumping was calculated were dumped. The Appellate body (AB) stated that from the text of Article 3.1 of the Anti-Dumping Agreement, it is clear that investigating authorities must ensure that “determination of injury” is made on the basis of positive evidence and an objective examination of the volume and effect of imports that are dumped. The method employed by the EC predetermined the results and as such did not pass the objectivity test. The imports attributable to non-examined producers were simply presumed in all circumstances to be dumped for purposes of Article 3 therefore, the authorities failed to satisfy the requirements of paragraphs 1 and 2. The AB thus recommended that the Dispute Settlement Body (DSB) request the EC to bring its measure into conformity with that Agreement.¹⁷¹ The facts and decision above confirm the observation that emerging economies are almost assumed to be incapable of competing honestly such that whenever they do produce something at a competitive price they are accused of dumping and subjected to anti-dumping duties.¹⁷²

Other instances have been that investigations are initiated without adequate justification and later terminated within short periods for lack of evidence.¹⁷³ It is estimated that around half of all anti dumping investigations are terminated without imposition of final measures.¹⁷⁴ It must be noted that initiation of an anti-dumping proceeding alone has a significant impact on the exporting industry targeted whether a claim is found to be valid or not. Empirical evidence has shown that once anti-dumping measures are imposed against developing countries, they have an immediate effect on trade flows by prompting importers to seek alternative sources of supply.¹⁷⁵ Furthermore, the uncertainty generated by the restrictive measures actually taken as well as the

¹⁷¹ European Communities-Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India WT/DS141/AB/RW

¹⁷² Annan *supra* note 55 at 22.

¹⁷³ “Agreement on Textiles and Clothing” online: at <www.jurisint.org/pub/06/en/docC14.pdf> (accessed on 5/4/2004).

¹⁷⁴ “WTO, “Annual Report” *supra* note 168 at 24.

¹⁷⁵ UNDP, *supra* note 37 at 189.

pressure for additional ones is in itself a highly effective deterrent to trade and is damaging to targeted economies.¹⁷⁶

In developing countries economies, the rapid liberalization of their trade regimes has led them to pass anti-dumping legislation and to rely on it heavily because it is the most effective way to counter increased import competition while still conforming to WTO disciplines.¹⁷⁷ In 2001, India came second after U.S in the list of the four leading initiators of anti dumping investigations with a total of 75 initiations.¹⁷⁸ It should be pointed out that although developing countries have dramatically increased their use of anti dumping measures as a group accounting for half the cases filed, they nevertheless remain the main victims of such measures.¹⁷⁹ It can thus be argued that anti-dumping as a protectionist tool tilts the balance of trade against developing countries given as shown above, the bias in industrial countries' legislation as well as the high costs involved in initiating and defending against these cases.¹⁸⁰

Also important to note about anti dumping duties is that the effects of their use is generally damaging for the poor. The measures favor profits over wages and the jobs they preserve are unlikely to involve the poor. Regrettably however, the price increases they induce are likely to hurt the poor.¹⁸¹

It is feared that without a change in the anti dumping legislation this will be the main form of protectionism in the textile industry from 2005. As shown above the rules will certainly have a negative impact on the T&C sector once it is fully liberalized and this will frustrate all efforts for meaningful economic advancement for weak participating nations. It is thus suggested that the agreement be revised to foremost reduce the unwarranted cases against developing countries to enable them gain greater benefits from their increased participation in world trade.¹⁸²

¹⁷⁶ Richard Blackhurst, Nicolas Marian & Jan Tumir, *Trade Liberalization Protectionism and Interdependence* No.5 (Geneva: GATT Studies in International Trade, 1977) at 44.

¹⁷⁷ UNDP, *supra* note 37 at 185.

¹⁷⁸ "WTO, "Annual Report" *supra* note 168 at 23.

¹⁷⁹ UNDP, *supra* note 37 at 185.

¹⁸⁰ *Ibid.* at 192.

¹⁸¹ McCulloch, Winters & Cirera, *supra* note 30 at xxvii.

¹⁸² UNDP, *supra* note 37 at 193.

2.7.3 Safeguards

Article XIX of the WTO allows a GATT Member in certain circumstances to avoid GATT obligations on a product whose importation is increasing and is as such causing serious injury to domestic industries producing like or competitive products. This provision was intended as an emergency measure to provide temporary relief for the industry. During the time that the relief is in place, it is hoped that the industry would have an opportunity to adjust to the new competition.¹⁸³

For the provision to apply, the surge of imports must cause serious injury to the domestic industry or a threat thereof. Serious injury is defined by the WTO and is set at a level higher than material injury, which is the criterion used for unfairly dumped or subsidized goods. In this case, the imports need not be dumped, subsidized or in any sense fall foul of the other provisions of GATT against unfair trade practices. It is the sudden surge of imports whether legitimate or not and the injury to a domestic industry that entitles the importing country to introduce temporary controls.¹⁸⁴

On January 1 2005, textile and apparel products should go back under Article XIX. It must be noted however that GATT does not contain a quantifiable and therefore verifiable limitation on the extent of import restrictions once they are justified under GATT provisions. Under the provision, importing countries are allowed to impose import restrictions 'to the extent and for such times as may be necessary to prevent injury'. Such a broad provision it is said, leaves much greater room for abuse and manipulation.¹⁸⁵ Consequently, Members have resorted more frequently to this measure than was previously the case. For instance in 2002 Members notified initiation of 30 investigations. This compares to 14 in 2001 and 26 and 15 in 2000 and 1999 respectively.¹⁸⁶ In *Argentina-Transitional Safeguard Measures on Certain Imports of Woven Fabrics of Cotton and Cotton Mixtures Originating in Brazil*.¹⁸⁷ Brazil requested for a panel to dispute the transitional safeguard measures on its imports by Argentina. Shortly

¹⁸³ Brenda Jacobs, "Trade in Textiles", online: <<http://www.usvtc.org/Documents/USVTC%20TA/Technical%20Assistance/textiles/Trade%20in%20textiles%20II.pdf>> (accessed on 9/12/2003) at 1.

¹⁸⁴ McDonald, *supra* note 9 at 110.

¹⁸⁵ Henry R Zheng, *Legal Structure of International Textile Trade* (New York: Quorum Books, 1988) at 113.

¹⁸⁶ "WTO, "Annual Report" *supra* note 168 at 24.

¹⁸⁷ WT/DS190/1 online: website www.wto.org.

afterwards Argentina issued a regulation which withdrew the measures on these imports of textile products and categories that were subject to recommendations of the TMB to which Brazil noted with satisfaction. The final measure to withdraw the safeguard reflected a mutually agreed solution on the basis of the situation. Such occurrences are indicative of measures imposed in total disregard to the requirements of the agreement. If Members clearly followed the provisions of the agreement to the letter it is highly doubtful if many such measures would be instituted. Although they are eventually withdrawn, the period within which they remain in operation is just long enough to have a negative impact on incomes of the targeted economies. As well, the number of definitive measures has also risen steadily from 6 each in 1999 and 2000 to 9 and 10 in 2001 and 2002 respectively.¹⁸⁸

Also because of the latitude in making a determination on whether or not safeguard measures should be imposed, it is observed that importing countries would only then have to extensively invoke GATT safeguard provisions to justify the restrictions if they want to maintain a level of protection comparable to that provided by the MFA.¹⁸⁹

Likewise, some countries have managed to import into the new textile regime safeguard measures that are clearly outlawed so as to maintain the same protective effect as was provided within the MFA. For example, the US retrospectively applied the transitional safeguard measure on its imports under Article 6 of the ATC against imports of cotton and man-made fiber underwear from Costa Rica.¹⁹⁰ Costa Rica challenged this retrospective application of the measure and the appellate body (AB) held that the disappearance in the ATC of the earlier MFA express provision for backdating the operative effect of a restraint measure strongly reinforced the presumption that such retroactive application was no longer permissible. It added that the issue of permissibility of backdating was in fact prohibited under Article 6.10 and to inject into this Article an authorization for backdating the effectivity of a restraint measure would encourage return to the practice which was wide spread under the MFA regime. Accordingly, the AB

¹⁸⁸ "WTO, "Annual Report" *supra* note 168 at 24.

¹⁸⁹ Zheng *supra* note 185 at 115.

¹⁹⁰ *United States-Restrictions on Imports of Cotton and Man-made Fiber Underwear (complaint by Costa Rica)* (1996) WT/DS24/AB/R WTO online: website www.wto.org.

recommended that the DSB request the US to bring its measure into conformity with its obligations under the ATC.

The safeguards clause has also been altered in ways that may increase its use against developing countries. In the past, developed countries have been reluctant to use it as a justification for import controls because these had to be applied against all suppliers. The new agreement however permits selectivity if it can be established that imports from certain countries have increased disproportionately.¹⁹¹ On the other hand however, it can be argued that this new requirement is a positive and welcome development in the sense that a country's goods will not be locked out if its imports have not increased and no injury will be attributed to it as was stated in the *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*¹⁹² the AB stated that U.S acted inconsistently with the requirements of Article 6.4 of the ATC because it attributed serious damage to imports from Pakistan without a comparative assessment of the imports from Pakistan and Mexico and their respective effects. It pointed out that damage that is actually caused to the domestic industry by imports from one Member cannot be attributed to a different Member imports from whom were not the cause of that part of the damage. From the facts, Pakistan was not the only Member from whom imports had increased sharply and substantially as required by the provision before the measure can be validly imposed.

As an exception to its rules, Article XIX provides that safeguard measures may not be taken against a developing country with less than 3 percent of the market share or to developing countries with less than 9 per cent of the market. This offers some element of security to weak exporting countries as their exports will not be subjected to the mechanism that is injurious to their economic development efforts.

2.7.4 Subsidies and Countervailing Action

While the general trend of subsidization appears to be decreasing, it is still substantial and individual subsidies to individual industries can create tensions and set off

¹⁹¹ Christopher Stevens, "The Consequences of the Uruguay Round for Developing Countries" in Harald Sander & Adras Inotai eds., *World Trade after the Twenty-First Century: Prospects and Policy Options for the Twenty-First Century* (London: Routledge, 1996)71 at 76.

¹⁹² WT/DS192/AB/R online: website www.wto.org.

trade friction. It should also be pointed out that once granted, subsidies tend to perpetuate themselves and can become a way of life.¹⁹³ The effect of subsidies is to offset the benefits gained from market access since they contribute to holding down prices and thus give the beneficiaries a competitive edge.¹⁹⁴ Therefore their existence can ultimately lead to a general siege mentality and protectionism in managing the economy.¹⁹⁵

The UR set out with more clarity what is meant by a subsidy and set up three categories of prohibited, actionable and permitted subsidies.¹⁹⁶ Actionable subsidies; these are not forbidden *per se*, but may be attacked under certain circumstances. Non-actionable subsidies; these subsidies are not harmful it is nonetheless left open to a party that feels it has suffered serious adverse effects from such a subsidy to seek a determination or recommendation to that effect.¹⁹⁷ In such cases the assumption was that the dispute settlement mechanisms would resolve these issues in a way that favors undistorted trade.¹⁹⁸ Prohibited subsidies however are those that require recipients to meet certain export targets or to use domestic goods instead of imported goods. They are prohibited because they are specifically designed to distort international trade and are therefore likely to hurt other countries' trade.¹⁹⁹ In the *U.S versus Australia* case, the panel found that payments made under a grant contract between the government of Australia and Howe and Co proprietary Ltd, and its parent company were subsidies within the meaning of Article I of the Agreement on Subsidies and Countervailing duties contingent upon export performance within the meaning of Article 3.1(a) of Article 3.1(a) of that agreement. They were tied to the companies actual or anticipated exportation or export earnings. The panel accordingly recommended pursuant to Article 4.7 of the same agreement that Australia withdraw those subsidies without delay.²⁰⁰

¹⁹³ McDonald, *supra* note 9 at 99.

¹⁹⁴ David Vanzetti & Ralf Peters, "Strategic interaction in trade policy negotiations" in 2003 Agency Report: UNCTAD GTAP-related activities of UNCTAD <http://www.gtap.agecon.purdue.edu/events/Board_Meetings/2003/agencies/unctad.asp> (accessed on 10/17/2003) at 3.

¹⁹⁵ McDonald, *supra* note 9 at 99.

¹⁹⁶ Article 8 The Uruguay Round Subsidies Agreement.

¹⁹⁷ McDonald, *supra* note 9 at 107.

¹⁹⁸ *Ibid.* at 103.

¹⁹⁹ WTO "Understanding the WTO: The agreements" online

<http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm#subsidies> (accessed on 5/7/2004)

²⁰⁰ [1996]WT/DS126/RW LEXIS (00-0227) Panel Report (Lexis).

Furthermore the UR also introduced a new set of rules on the use of countervailing measures. It set out disciplines on the initiation of cases and rules of evidence to ensure greater transparency, improve the possibility of parties presenting their cases and ensure that complaints are well founded.²⁰¹

From the above discussion it is illustrated that the WTO has taken steps to arm the parties affected by the actions of their trading partners with a possibility of seeking redress and this is very positive and acts as an assurance to traders that their interests in this regard will be protected. It must be noted however that the use of countervailing measures is costly. They increase the value of imports and their effectiveness depends on the attractiveness of the market of the retaliating WTO member and at the end of the day it all depends on who is threatening whom with such measures.²⁰² Economically weak nations thus have to think twice before attempting to employ such measures and even where valid grounds exist that such measures be taken this may not be in the best interests of their economies.

In conclusion, although the quantitative restrictions of the international trade are supposed to disappear when the ATC will cease to exist, as shown above the use of these mechanisms may rise and other NTBs may come up and will represent a serious obstacle in the trade.²⁰³ As has been illustrated in the recent years the use of such protective measures has increased significantly and the trend is likely to accelerate.²⁰⁴ The WTO rules do not provide an assurance that the importing countries will not invoke these exceptional clauses to invoke import restrictions similar to those under the MFA.²⁰⁵ Therefore by simply returning international trade in T&C to the GATT framework, it has been argued the trade will not necessarily become liberal.²⁰⁶ The use which is made of

²⁰¹ McDonald, *supra* note 9 at 108.

²⁰² Petros C. Mavroidis, "The Meeting in Doha. Keep on Keeping on" (2002) 36(2) J.W.T. 167-169 at 168

²⁰³ Antero Hyvarinen, "The Changing Patterns of International Trade in Textiles and Clothing. Implications of the Introduction of the Agreement on Textiles and Clothing on the Developing Countries Producing/Exporting Textiles and Clothing" online: ITC/UNCTD/WTO (accessed on 10/16/2003) <http://www.intracen.org/worldtradenet/docs/information/trainingmat/training_packs/atc/english/atc_brief.pdf> at 10.

²⁰⁴ Mohamed Aslam & Jomo K. S., "Implications of the GATT Uruguay Round for Development: the Malaysian Case" in Jomo K. S. & Shamala Nagaraj eds., *Globalization versus Development* (New York: Palgrave, 2001) 26 at 30.

²⁰⁵ Zheng *supra* note 185 at 115.

²⁰⁶ *Ibid.* at 113.

exceptions must thus be clearly regulated so as to prevent governments from using them as justification for avoiding obligations for liberal trade in T&C.²⁰⁷

2.8 China and Bangladesh

2.8.1 Introduction

The most important sectoral impact of China's accession to the WTO in 2001 was said to concern the clothing industry.²⁰⁸ China is already the world's largest and among major producers, the most rapidly growing exporter of apparel even though it is highly constrained by quotas. China had long been set up for full package production, making it relatively easy for the US, European and Japanese manufacturers to reliably source completed garments from Chinese factories.²⁰⁹ With its accession to the WTO China has thus benefited from the WTO's collective move towards continuous trade liberalization which could have perhaps been very difficult to negotiate on its own.²¹⁰ Because WTO accession implies lowering of tariff rates levied on goods imported from Member countries, an additional opportunity is created for improved market access.²¹¹ The access to larger markets enables domestic producers to reap the benefits of economies of scale and in so doing lower production costs are yielded that may translate into lower prices which may further accrue to consumers in the form of cheaper domestic goods.²¹²

It is observed that without the imposition of the MFA, exports of T&C from developing countries to developed countries would have been a good deal greater.²¹³ The quantitative restrictions, coupled with the generally high levels of tariff protection reduced the import demand in many developed country markets.²¹⁴ The effect of this was a corresponding decline in income and employment in the affected countries. In view of

²⁰⁷ Cortes, *supra* note 3 at 147.

²⁰⁸ Walkenhurst, *supra* note 48 at 18.

²⁰⁹ Appelbaum, *supra* note 125 at 31.

²¹⁰ Islam, *supra* note 80 at 774.

²¹¹ Appelbaum, *supra* note 125 at 33.

²¹² David P. Levine, "Global Interdependence and National Prosperity" in Robert A. Blecker, ed., *U.S. Trade Policy and Global Growth: New Directions in the International Economy* (Armonk, New York: Economic Policy Institute M. E. Sharpe Inc., 1996) 37 at 41.

²¹³ Irene Trela, "Phasing Out the MFA in the Uruguay Round: Implications for Developing Countries" in Harmon Thomas & John Whalley, eds., *Uruguay Round Results and the Emerging Trade Agenda: Quantitative-based analyses from the development perspective* (New York: United Nations, 1998) 315 at 326.

²¹⁴ Gallagher, *supra* note 1 at 38.

the fact that much of the labor involved is unskilled and so encounters difficulties in finding alternative employment, the poverty implications of these restrictions have been very great.²¹⁵ Its phase out will thus do away with the greatest limitation on the exporting capacity of many nations. Whereas removing quotas is not a panacea for developing countries' problems, bearing in mind that the quotas are eliminated on one of the most important industries in these countries, this would help to encourage growth, increase production, create more stable jobs, and alleviate some of the abject poverty.²¹⁶

It is important to note that the above mentioned limitations of the MFA do not apply to all developing countries. In Bangladesh for instance, the MFA has yielded benefits. Bangladesh's ready-made garment business grew from US\$ 1 million in 1978 to US\$4.5 in 2001 an equivalent to 76 per cent of the country's exports. Consequently the apparel sector accounts for about a fourth of the economy's value added, a third of the country's manufacturing employment and a fifth of its annual investment.²¹⁷

2.8.2 China's Performance

The issue of China's accession to the WTO reinforced the fear of competition after the complete liberalization of the sector since it would strengthen the country's competitiveness in the market.²¹⁸ Today China's strength as a global garment exporter is not seriously rivaled by any other single country. Rather, it competes with entire trading blocks of countries.²¹⁹ China has also shown excellent performance in the few categories that have been liberalized thus far.²²⁰ In Japan for instance, the pattern of imports is overwhelmingly dominated by China, whose share of Japanese imports grew from 31% in 1990 to 76% in 2000. It has been said that this dominance in Japan's apparel imports may be showing the rest of the world what the future will look like when the MFA is phased out.²²¹

²¹⁵ McCulloch, Winters & Cirera, *supra* note 30 at 259.

²¹⁶ Schavey, *supra* note 18 at 5.

²¹⁷ UNDP, *supra* note 37 at 171.

²¹⁸ Thongpakde & Pupphavesa, *supra* note 116 at 12.

²¹⁹ Neil Kearney, "Trade in Textiles and Clothing after 2005," (2003) International Textile, Garment and Leather Workers' Federation" Online: <trade-info.cec.eu.int/textiles/documents/153.doc> (accessed on 12/1/2003) at 2.

²²⁰ UNDP, *supra* note 37 at 180.

²²¹ Appelbaum, *supra* note 125 at 25.

2.8.3 Reasons for Success

The factor endowments give China a comparative advantage in the production. China is nearly self-sufficient in the raw materials to supply its own textile industry, including the world's largest production capacities for cotton, man-made fibers such as flax and ramie and silk.²²²

China's almost inexhaustible supply of cheap labor is another factor explaining the sector's success. The country is said to have a skilled labor force that is difficult to match elsewhere in the world.²²³ Bearing in mind that the nature of production activities in the sector require intensive supply of labor, this was the government's best sell in attracting foreign investment.²²⁴

Related to the above, it is said that the full weight of China's government is dedicated to making textile and apparel exports a principal industry and employer. A total of 50% of textiles and apparel imports from China come from state-owned enterprises, which often operate at a loss and hence require the government to provide a subsidy.²²⁵ This therefore provides the sector with a boost in its competitive capacity vis-à-vis other T&C producing countries.

Chinese textile and apparel industries are also said to benefit from marketing, managerial and financial expertise from Hong Kong and Taiwanese investors.²²⁶ This leads to improvement in the productive capacity as well as the level of competitiveness when compared to other world producers and gives the country a further competitive edge.

2.8.4 The Challenge

Among the anticipated problems of China's performance were excess supplies and falling prices.²²⁷ These fears became a reality. Between the first half of 2001 and the first half of 2002, China's exports in the category including cotton dressing gowns, robes etc to the US market increased by 483 percent. In the same period however, such exports

²²² *Ibid.* at 36.

²²³ *Ibid.*

²²⁴ Anita Chan, "A Race to the Bottom: Globalization and China's Labour Standards" *China Perspectives* No. 46 2003. <<http://rspas.anu.edu.au/~anita/pdf/Achacp461.pdf>> at 41.

²²⁵ Appelbaum, *supra* note 125 at 36.

²²⁶ *Ibid.*

²²⁷ UNDP, *supra* note 37 at 10.

from Bangladesh fell by 42.7 per cent.²²⁸ Also, during 2002 alone the average Chinese price for apparel products in 29 apparel categories fell by 44%.²²⁹ These developments have serious repercussions for economies of other textile exporting nations.

Bangladesh like many other developing countries relies on export markets for the expansion of its manufacturing sector due to the small size of its domestic market caused principally by the low purchasing power.²³⁰ It must be pointed out however that global free trade allows consumers and firms to purchase from the cheapest source of supply hence ensuring that production is located according to comparative advantage.²³¹ Likewise, under the MFN rule a Member country has the incentive to import goods from the trading partners where it can buy at lowest prices and export goods to the partners where it can sell at the highest prices.²³² What China's aggressiveness demonstrated by increased output and the resultant fall in prices means for Bangladesh as well as other countries unable to sell at competitive prices is that the survival and future of their industries is uncertain. Since the sector contributes significantly to the GDP, they are likely to see their economies destroyed over the coming few years.²³³

In addition to the above, it is noted that since international competition brings with it a concentration rather than a dispersion of production and investment, economic development will be an uneven process favoring some and injuring others i.e. the world economy grows unequally and global growth concentrates rather than diffuses.²³⁴ The current developments in the sector are illustrative of this. Factories are closing across the world as orders are re-directed to China.²³⁵ The industries that come under competitive pressure are forced to reduce employment. In Bangladesh the closure of a large number of garment manufacturing units will leave few options for workers mainly the young female workers since this is the only source of large scale formal employment for them to earn a decent standard of living.²³⁶ In view of the fact that most of the workers are

²²⁸ *Ibid.* at 180; See also Kearney, *supra* note 219 at 2.

²²⁹ Appelbaum, *supra* note 125 at 34.

²³⁰ Michael Zammit Cutajar & Alison Franks, *The Less Developed Countries in World Trade: A Reference Handbook* (London: The Overseas Development Institute Ltd, 1967) at 75.

²³¹ World Bank, *supra* note 86 at 39.

²³² Ohyama, *supra* note 6 at 76.

²³³ Kearney, *supra* note 219 at 3.

²³⁴ Levine, *supra* note 212 at 52.

²³⁵ Kearney, *supra* note 219 at 3

²³⁶ UNDP, *supra* note 37 at 181

unskilled, opportunities for finding alternative employment are slim. Even those workers that are fortunate to remain will face extra pressure in the form of further erosion to their already meager conditions and wages. Thus confirming the widely held view that workers everywhere will lose.²³⁷

Moreover, the effects of falling performance would be felt beyond the garment manufacturing sector. In Bangladesh many industries feed off garment exports ranging from textile and accessory production to transport, hotel, banking and shipping services. That is, the larger economy of the poor relies heavily on garment workers wages. An estimated \$2 billion in economic activity is derived from garment exports as a result of these linkages. It is thus stated that a broad decline in this industry would harm far more people than most estimates suggest.²³⁸

As alluded to earlier, the MFA quota system generated a structure of exporting countries that had little to do with comparative advantage and much to do with market shares based on the availability of quotas.²³⁹ In Bangladesh there are no indigenous natural industrial raw materials.²⁴⁰ Key to the MFA system was that whenever the quotas became binding in one country, investment was directed to initially unconstrained exporting countries who then later became constrained also with investment flowing elsewhere.²⁴¹ This pattern of quota restrictions thus kept valuable productive resources flowing into the T&C industries long after they should have been flowing into more efficient production areas.²⁴² It must also be noted that whereas these quota entitlements did not guarantee sales in the restricted markets, they offered protection against third country competitors in markets where prices were high due to the level of protection and therefore provided "rents" for the exporting country.²⁴³ Bangladesh received large quota allotments from the US. In 1999 the US accounted for about 42% of total garments

²³⁷ Kelly Dent & Mathew Tyne, "Unraveling the MFA: What Impact will the Abolition of Quotas under the MFA have on the Garment Industry of Sri Lanka?" TIE Asia – Transnationals Information Exchange Asia –141-Ananda Rajakaruna Ma-Colombo – 10 Sri Lanka. <tieasia@sri.lanka.net> at 8; See also UNDP UNDP, *supra* note 37 at 175

²³⁸ UNDP, *supra* note 37 at 181

²³⁹ *Ibid.* at 176

²⁴⁰ Morris, *supra* note 119 at 4

²⁴¹ Walkenhurst, *supra* note 48 at 9; See also Gallagher, *supra* note 1 at 38.

²⁴² Dean Spinanger, "Textiles Beyond the MFA Phase-Out" Working Paper No 13/98. July 1998. Centre for the Study of Globalization and Regionalization (CSGR), University of Warwick, online: <<http://www.warwick.ac.uk/fac/soc/CSGR>> at 11.

²⁴³ Gallagher, *supra* note 1 at 38; See also Zheng *supra* note 185 at 122.

exports from it.²⁴⁴ Accordingly, vested interests have grown that feel safe under the protection of assured quotas and are thus naturally apprehensive of new competition that will result from the freedom to export.²⁴⁵ There is therefore a general view that whereas the abolition of quotas will benefit some developing countries like China others like Bangladesh will lose dramatically.²⁴⁶

The other expected welfare loss from the liberalization of the T&C trade is with regard to the loss of quota rents as the improved market access would not compensate for their disappearance. It is added that these losses would be even more wide spread and pronounced if the textiles market liberalization would consist of eliminating quotas but leaving tariffs unchanged.²⁴⁷

In conclusion, the new era that will be ushered in by the termination of the MFA provides an opportunity for real change. While the overall outlook appears optimistic, most of the exports as illustrated above come from a handful of developing countries.²⁴⁸ The sector faces a crisis globally that is likely to worsen following the end of the MFA. It is to be observed that countless countries and their peoples are highly dependent on the benefits of textile trade being spread evenly. This has not happened in the past so the question is whether the situation is likely to improve after the abolition of quota controls under the MFA.²⁴⁹ Developing countries have been told now and again that they need to adapt to the intensified competition following the opening of markets.²⁵⁰ Unfortunately this does not offer much help in a situation where millions of T&C workers along with their families face a dire future.

With the current events within the sector the argument made that it is not true that any attempt to protect major industries or industries of national importance is misguided is a valid one. Whereas very often countries go about it the wrong way sometimes the protection can be successful.²⁵¹ No market can operate without rules thus the market must

²⁴⁴ Appelbaum, *supra* note 125 at 40.

²⁴⁵ Chakravarthi Raghavan "Textile Negotiations seen as Test of Uruguay Round," September 15, 1988. online: <<http://www.sunsonline.org/trade/areas/industry/09150088.htm>> at 3.

²⁴⁶ Dent, *supra* note 237 at 7.

²⁴⁷ Walkenhurst, *supra* note 48 at 12.

²⁴⁸ McDonald, *supra* note 9 at 47.

²⁴⁹ Kearney, *supra* note 219 at 2-3.

²⁵⁰ Morris, *supra* note 119 at 4.

²⁵¹ McDonald, *supra* note 9 at 24.

embody the principles and practice of a level playing field. It is stated that the market can only function if rules are properly observed and there are ample doses of mutual respect not only between buyers and sellers but also among sellers. That is to say markets are not just about healthy competition but also tolerance and compromise. For that reason a strong market position must not be abused, as ultimately, it might risk destroying the market.²⁵²

In line with the above, under the terms of Chinas accession to the WTO a safeguard mechanism is to be in place for four years following the elimination of quotas through the end of 2008, although actions taken under the mechanism are limited to one years duration. After one year, a re-application is required, unless both countries agree to continue the action. There is also a product-specific safeguard that is part of China's accession agreement that can be applied against any import surge from China.²⁵³ It is doubtful if this will operate to prevent Chinas dominance in the sector considering that it has been able to overcome the quota limitations in place to capture a noticeable share of the trade.

All in all continuation of trade regulation after the end of the ATC in 2005 is necessary in the form of measures designed to help emerging and struggling industries to adjust to the threat posed by dominant producers such as China. These may include clear restraints on such dominant producers so as to promote sustainable development in the T&C trade.

²⁵² Jean –Pierre Lehmann, "Why Trade Must Triumph in the 21st Century: Lessons from the Past" in Andrea Krizsan & Violetta Zentai (eds), *Reshaping Globalization: Multilateral Dialogues and New Policy Initiatives* (New York: Central University Press, 2003) at 155 at 156-7.

²⁵³ Appelbaum, *supra* note 125 at 14.

Chapter III: New Developments

3.1. Doha Development Agenda

3.1.1 Background

The World Trade Organization (WTO) in addition to administering trade agreements and the procedures for the settlement of disputes was to be a forum for further multilateral trade negotiations as well as the trade policy review mechanism.¹ This process of redefining and expanding its program of work has continued since the end of the UR.² The organization was to be led by biannual ministerial conferences, to take decisions on all matters under any of the multilateral agreements a process that led to the Doha meeting.³ At the Fourth Ministerial Conference in Doha Qatar in November 2001, the Doha Development Agenda was launched. The Doha meeting launched a new and substantive negotiating Trade Round the first since the UR in 1986.⁴ Under the leadership of an ad hoc committee, negotiations had to be held starting 1 January 2002 and be completed on 1 January 2005.⁵

As seen earlier in chapter I, a recurring theme by many civil society groups and press reports in the post UR years has been that the Uruguay Round Agreement shortchanged developing countries.⁶ It is argued that the WTO has been an unequal treaty and its agreements and system are weighted against the interests of the South.⁷ Others arguments are that whereas both developing and developed countries benefited from the Uruguay Round Agreement, the balance was in favor of developed countries.⁸ It is clear that developing countries have assumed significantly higher levels of obligations in a

¹ John Whalley, "The WTO and the New Development-Oriented Trade Round" in Andrea Krizsan & Violetta Zentai, eds., *Reshaping Globalization: Multilateral Dialogues and New Policy Initiatives* (New York: Central University Press, 2003) 179 at 186.

² WTO, "World Trade Report 2003" Press Releases. Press/348.1 (14 August.) Online: WTO <www.wto.org> at 119 [WTO, "World Trade Report"].

³ Whalley, *supra* note 1 at 186.

⁴ WTO, "The Road to Doha and Beyond" <http://www.wto.org/english/res_ebooksp_e/roadtodoxa_e.pdf> (accessed on 4/9/2003) at 9 [WTO, "Road to Doha"].

⁵ *Ibid.* at 6.

⁶ Arvind Panagariya, "Developing countries at Doha: A Political Analysis" (Department of Economics, University of Maryland) on line <<http://econwpa.wustl.edu/eps/it/papers/0308/0308015.pdf>> (accessed on 2/16/2003) at 24.

⁷ Martin Khor, *Rethinking Globalization: Critical Issues and Policy Choices* (London: Zed Books, 2001) at 13.

⁸ Panagariya, *supra* note 6 at 42.

range of areas where this had not previously been the case.⁹ On their part, the developed countries' key concession in industrial products was the phase out of the Multi Fiber Arrangement (MFA). According to many civil society groups therefore, the promises of large benefits made to developing countries during and immediately after the Uruguay negotiations have not translated into reality.¹⁰

Supported by civil society groups, developing countries demanded the imbalance in the Uruguay Round Agreement be corrected at Doha.¹¹ As a subject of negotiation, the Doha agenda unlike the Agreement on Textiles and Clothing (ATC) (a complete agreement) presents an opportunity to strengthen WTO rules and create a fairer and more open playing field in T&C trade.¹²

The Doha Agenda includes several items of specific interest to developing countries and focused on trade liberalization. It was as such a welcome development from the viewpoint of developing countries.¹³ Developing countries at Doha had an interest in preserving and strengthening multilateral rules and disciplines which kept the trading system open.¹⁴ This new Round could also be the venue for negotiations seeking to achieve further exchanges of concessions on trade barriers beyond what had been achieved by the end of the UR. The possibilities the Doha proffers would be portrayed as positive for development and hence central to a development Round. However, it is argued this clearly depended on what was included in the agenda and how one interpreted benefits for developing countries.¹⁵

At Doha, WTO trade ministers agreed to launch a “broad and balanced work program which includes an expanded negotiating agenda and other important decisions and activities necessary to address the challenges facing the multilateral trading system”.¹⁶ Its agenda contains matters for immediate negotiation, matters for future

⁹ “WTO, “World Trade Report”, *supra* note 2 at 119.

¹⁰ Panagariya, *supra* note 6 at 24.

¹¹ *Ibid.*

¹² Supachai Panitchpakdi, “The Importance of Quota Elimination for the Strengthening of the Multilateral Trading System” online <<http://trade-info.cec.eu.int/textiles/documents/108.doc>> at 3 [Supachai, “Quota Elimination”].

¹³ Panagariya, *supra* note 6 at 42.

¹⁴ Whalley, *supra* note 1 at 182.

¹⁵ *Ibid.* at 190.

¹⁶ Sam Laird, Lucian Cernat & Alessandro Turrini, “Back to Basics: Market access issues in the Doha Agenda” (New York & Geneva: UNCTAD/United Nations, 2002) online

negotiations that are subject to “explicit consensus” among WTO Members on modalities, to be decided at the Fifth Ministerial Meeting and matters for further examination in relevant WTO bodies.¹⁷ These negotiations, their conclusion and the implementation of their results will be treated as parts of a Single Undertaking.¹⁸

3.1.2 A development Dimension

At the Doha Ministerial Meeting the name coined for the entire work program was the Doha Development Agenda. In the eyes of many, this is not only a description reflecting the pervasiveness of the focus on development in the declaration and associated decisions and texts, but also a bench mark against which the results of the negotiations will be judged.¹⁹ Some have expressed skepticism about the development approach noting that the WTO is by its structure not primarily a development oriented organization, highlighting that its predecessor was set up to establish a rule regime to keep markets open and to foster exchanges of concessions to reduce barriers through Rounds of trade negotiations.²⁰ They argue that by making ‘development’ the focal point of the new WTO Round it seems to imply either that the WTO will devote much or all of its negotiating capital to an enterprise that logically does not fit its central mandate, or that the word “development” will be used as a fig leaf for developed countries to continue with a negotiating agenda which in the main is “non-developmental”, while nonetheless keeping the developing country majority at the negotiating table.²¹

Trade and development are linked through the effect of trade policy on the level and pattern of domestic aggregate spending and hence on the savings-investment mechanism. In modern growth theory, trade is seen as an instrument of capital accumulation or as a means of stimulating efficiency through better resource allocation and enhanced competition.²² It is said, trade policy can create an environment that favors investment through the creation of more predictable and secure trade and investment

<<http://r0.unctad.org/p166/module2002Bangk/Module4/Backtobasics.pdf>> (accessed 10/17/2003) at 20;
See also Paragraph 11 Doha WTO Ministerial Declaration WT/MIN (01)/DEC/1 online: WTO website
<www.wto.org>

¹⁷ “Laird, Cernat & Turrini, *ibid.*

¹⁸ “WTO, “Road to Doha” *supra* note 4 at 6.

¹⁹ “WTO, “World Trade Report”, *supra* note 2 at 122.

²⁰ Whalley, *supra* note 1 at 179.

²¹ *Ibid.* at 180.

²² “Laird, Cernat & Turrini, *supra* note 16 at 3.

regime, an issue that links trade policy and good governance. Conversely, trade policy should permit investment to operate as productively as possible that is through its effects on resource allocation. Furthermore, trade policy determines the allocation of scarce resources within the domestic economy, generating efficiency gains that derive from inter-sectoral shifts of production in favor of those production activities that use more intensively the relatively more abundant factors of production.²³

But as noted earlier in the work, until more recently most initiatives aimed at expanding the GATT/WTO's work program and negotiating mandates have emanated from developed countries. Of late developing countries have also become more active, seeking modifications to a wide range of existing provisions in an effort to make them more responsive to development needs as well as introducing such topics as trade and technology transfer and debt and finance onto the agenda.²⁴ While far from having a common WTO position, developing countries have generally thought that global trade arrangements should be designed to foster their own growth and development and not simply to yield gains from trade through exchanges of trade concessions between Members. Developed countries in response generally claim that they have met their commitments in global trade and also take a different line on the role of trade policy in development stressing mainly openness and freedom in trade.²⁵

The linkage between trade policy and economic development thus remains the subject of considerable debate. It should be pointed out that there has been a remarkable convergence however on the longer-term aim of progressive liberalization and the need for accompanying institutional reforms. Major areas of continued concern relate to the relative importance of different elements of a trade policy package and the timing and sequencing of the implementation.²⁶

One of the most challenging tasks for the WTO Doha meeting was therefore, to give some meaning to trade and development linkages. Some Members considered giving meaning to the linkage important to overcome the opposition of many developing countries to wider negotiations than those covered by the "built-in-agenda" agreed during

²³ *Ibid.* at 4.

²⁴ "WTO, "World Trade Report", *supra* note 2 at 120.

²⁵ Whalley, *supra* note 1 at 181.

²⁶ "Laird, Cernat & Turrini, *supra* note 16 at 1.

the UR. Many others felt the need to ensure that trade worked for development and as such, the concerns of the developing countries needed to be reflected in the negotiating mandates.²⁷

It should also be noted here that while enhanced trade is not sufficient to alleviate poverty and ensure development, it is seen as a vital component of any growth strategy. By way of illustration, a strong link is believed to exist between increased T&C exports on one hand and higher GDP growth on the other. In fact one study argued that the expansion of T&C exports had become for developing countries an increasingly important determinant for development. Hence the conclusion that growth in T&C is central to wider economic growth and social development.²⁸ Reflecting this core belief, the Doha Development Agenda places development issues and the interests of the poorer Members at the heart of its work.²⁹ The texts agreed to provide an opportunity to improve the developing countries' effective participation in international trade.³⁰ The Agenda is thus crucial for bolstering international economic growth and helping developing countries integrate into the global economy.³¹

How a development Round should be structured to foster both development in its narrower sense and human development more broadly is not an issue on which there is uniform agreement.³² But since development concerns sufficed the entire text, it has been expressed that this is the real challenge for Doha. It must find ways to genuinely respond to the development needs of developing countries. This means avoiding twin traps of mere lip service and an attitude of tokenism to development issues on one hand and the misguided assumption on the other that disengagement and minimal commitments are the best recipe for supporting the development process through the WTO. It is concluded that

²⁷ *Ibid.* at vii.

²⁸ Irene Trela, "Phasing Out the MFA in the Uruguay Round: Implications for Developing Countries" in H. Thomas & J. Whalley, eds., *Uruguay Round Results and the Emerging Trade Agenda: Quantitative-based analyses from the development perspective* (New York: United Nations, 1998) 315 at 333.

²⁹ "WTO, "Road to Doha" *supra* note 4 at 6.

³⁰ "Laird, Cernat & Turrini, *supra* note 16 at vii

³¹ Aileen Kwa, "The Doha Development Agenda: WTO Cancun: EU determined to make trade work for all-a stronger multilateral trading system at hand" Brussels 4 September 2003.

http://europa.eu.int/comm/trade/issues/newround/doha_da/cancun/fishler_en.htm Focus on the Global South Geneva [Kwa, "Doha Development"]

³² Whalley, *supra* note 1 at 180

succumbing to either temptation would make the results less meaningful and the WTO less useful to all parties.³³

3.2 Developing Country Issues

3.2.1 Implementation of WTO Rules

Part of the Doha development related work includes the examination of specific proposals for modifications to WTO provisions and procedures made in the context of the post-Uruguay Round Implementation discussions.³⁴ Important to note is the fact that implementation was not a matter of negotiations on new issues *per se* but rather on the details of implementation of the existing agreements.³⁵ It was a request expressed by the overwhelming majority of developing countries supported by thousands of Non-Governmental Organizations in their wish to see that work on implementation and its impact would eventually lead to the review of the WTO agreement.³⁶ The implementation debate was as a result engaged and it became a major element in the discussions at Doha and beyond.³⁷

Two distinct elements have informed the Doha implementation discussions. One concerns the difficulty some developing countries are encountering as they seek to implement their WTO obligations, bearing in mind the costs, administrative aspects and human capital requirements of implementation.³⁸ It is recognized that the existence of open external markets and of trade policies does not guarantee success in trade-based economic growth. To enjoy the full benefits of trade liberalization other factors such as human resources, investment say in transport and communications infrastructure, sound macroeconomic policy, and low corruption are crucially important.³⁹ Without provision

³³ "WTO, "World Trade Report", *supra* note 2 at 122

³⁴ *Ibid.*

³⁵ Raoul Marc, "Despite Breaks, the Trade- Based Organization of the World Continues" (21/11/2001) <<http://www.urfif.org/news-eng-doha-qatar-declaration-jennar-pt.htm>> (accessed on 2/16/2003) at 8.

³⁶ *Ibid.*

³⁷ "WTO, "World Trade Report", *supra* note 2 at 154.

³⁸ *Ibid.*

³⁹ Clare Short, "Making the development round a reality" in G.P. Sampson ed., *The Role of the World Trade Organization in Global Governance* (New York: United Nations University Press, 2001) 59 at 61.

being made to accommodate such factors liberalization then fails to generate the investment and productivity improvements needed for growth.⁴⁰

Developing countries have expressed concern about the costs of implementation of WTO commitments and as a result, there is greater emphasis in the Doha being devoted to institutional and capacity building as well as the removal of supply-side constraints.⁴¹ In the T&C sector, it is clear that the post 2005 era offers opportunities of export markets that will be free from quota restriction. Many developing countries have a competitive edge in yarn and textile production and other made-ups and still others in apparel. It has thus been concluded that there is something in the lifting of restrictions for everyone. The new trend will entail fast changing phenomena at work in the textile industry, i.e. new ways of doing business, new technologies, and better fabrics. It is argued that specialization in niche products and diverse exports is probably the only way to remain in the new market. Translating these opportunities that the new regime offers into actual trade performance will require appropriate domestic policies in the form of political and social measures in areas such as production, technology and marketing strategies to build a competitive edge and this is the big challenge for developing countries.⁴²

The other aspect of implementation relates to the substantive provisions of various WTO arrangements. Developing countries are seeking modifications to many provisions on the grounds that they need to be more operationally effective in order to support development and become less restrictive in relation to the degree of policy flexibility afforded to them.⁴³ In a similar vein, they have expressed the view that they need policy space to pursue industrialization policies that are appropriate to their stage of development which has as a result of the increased WTO commitments been limited.⁴⁴ They further note that the transitional periods for implementing the agreements have

⁴⁰ Neil McCulloch, L Alan Winters & Xavier Cirera, "Trade Liberalization and Poverty: A Handbook," (2001) online: Centre for Economic Policy Research <<http://www.ids.ac.uk/ids/global/pdfs/lipov.pdf>> (accessed on 10/10/2003) at xxiv.

⁴¹ Laird, Cernat & Turrini, *supra* note 16 at vii; See *Ibid.* at 11; See also "WTO, "World Trade Report", *supra* note 2 at 154.

⁴² Humayun Ali, "Textile sector –Post 2005 era: will the benefits reach developing countries?"

<<http://www.jang.com.pk/thenews/investors/sep2003/confidence.htm>> (accessed on 12/1/2003) at 2.

⁴³ "WTO, "World Trade Report", *supra* note 2 at 154.

⁴⁴ Laird, Cernat & Turrini, *supra* note 16 at vii.

proved insufficient in light of the inadequacy of their administrative resources as well as access to financing. In the T&C sector developing countries have highlighted the unfairness of the ATC which effectively granted to developed countries transitional periods approaching half a century to implement their GATT obligations within this sector. This has been contrasted with the requirement that the whole set of intellectual property instruments on which many had no prior legislation be implemented within a mere five years.⁴⁵ Developing countries have in this regard found their WTO obligations onerous. And as a result, there is an increasing recognition in the international trading community that no policy of trade reform is complete without anticipatory measures to facilitate transition. It is noted that the focus of such measures should be to minimize frictional costs without losing the gains from efficiency and growth.⁴⁶

It is perhaps relevant to show why this discussion of implementation issues within the WTO Round is of vital importance. It is said that a global trading system that brings together the poorest and richest countries in the world should provide special provisions to ensure that all countries are able to benefit from the agreements they have signed. In the same way, the implementation of obligations by the signatory countries has to account for the same disparities. It is with this concept of balance and fairness in mind that the UR negotiations devised a number of special provisions and measures for developing countries.⁴⁷ In addition, the viability of the system requires that this diversity be managed to ensure that all parties believe that they are better off within the system than outside it and at the most basic level, this is said to be another challenge for the Doha.⁴⁸ Problems arise when all the interests are not represented in meetings and the results therefrom are not widely and rapidly communicated. Representation in the WTO meetings and the communication of outcomes has been far from perfect.⁴⁹ A problem of systematic absence of many developing countries has been noted from both informal and formal meetings. Most small delegations from developing countries do not have the

⁴⁵ Rubens Ricupero, "Rebuilding Confidence into the multilateral Trading System: Closing the legitimacy gap" in Sampson ed., *supra* note 39, 37 at 51.

⁴⁶ Short, *supra* note 39 at 61.

⁴⁷ Peter Gallagher, *Guide to the WTO and developing countries* (The Hague: Kluwer Law International, 2000) at vi.

⁴⁸ "WTO, "World Trade Report", *supra* note 2 at 119.

⁴⁹ Gary P Sampson, ed., *The Role of the World Trade Organization in Global Governance* (New York: United Nations University Press, 2001) at 7.

appropriate resources either in Geneva or at home to service the increasingly frequent, complex and resource-intensive negotiation process at the WTO.⁵⁰ Because most issues have been steered by a handful of Members, this has at times resulted in a slanted view of the issues at hand. For there to be a balance of interests, it is necessary for all Members to be able to project their concerns and views in such a manner that positive action can be taken after all the WTO is a negotiating forum for legally binding commitments.⁵¹

At a basic level, this should include the training of administrators and policy makers, as well as legal reform. Since many have to rely on the technical assistance offered by others, there is a pressing need for a considerable increase in the inadequate resources currently available to them through the regular WTO channels.⁵² Financial assistance is also suggested in the form of cash or in kind, so that they can be present at important meetings on a temporary or a permanent basis. Other suggestions made are to the effect that capacity building for developing countries should focus not only on meeting obligations under the WTO but also on the capacity to produce, which encompasses infrastructure, financial resources, appropriate trade policies, and other supply side capacities. Supply-side constraints will have to be eliminated through domestic restructuring policies that are predictable and transparent to foreign direct investment.⁵³ More generally, complementary policies likely to underpin particular liberalization should be provided. These will include ensuring that safety nets are in place or that the poor have opportunities to improve their level of skills.⁵⁴

3.2.1.1 Doha position on implementation

The Doha Declaration has been said to have marked a new departure in the GATT/WTO approach to technical assistance and capacity building. While references to the need for technical assistance can be found in Part IV of the GATT, the Tokyo Round

⁵⁰ *Ibid.* at 8.

⁵¹ Supachai Panitchpakdi, "Balancing Competing Interests: The future role of the WTO" in Gary P. Sampson ed., *The Role of the World Trade Organization in Global Governance* (New York: United Nations University Press, 2001) at 29 at 31 [Supachai, "Balancing Competing"].

⁵² Sampson, *supra* note 49 at 8.

⁵³ Supachai, "Balancing Competing" *supra* note 51 at 32.

⁵⁴ McCulloch, Winters & Cirera, *supra* note 40 at 7.

agreements and arrangements as well as the UR texts, the importance of this kind of support for developing countries is more strongly emphasized in the Doha Declaration.⁵⁵

About half of the original 90 implementation issues raised were addressed by a separate Declaration adopted at Doha. Among these is the decision on the extension of exemptions of certain small developing countries, which allows a longer phase-out period for certain types of subsidies.⁵⁶ Paragraph 38 of the Ministerial declaration states that “technical assistance and capacity building are core elements of the development dimension of the multilateral trading system.” Effectively, specific commitments on technical assistance and capacity building form an integral part of the negotiating mandates on market access for non-agricultural products, trade and environment, and of the work programs on trade and investment, trade and competition policy, trade facilitation etc.⁵⁷ It was also agreed that the outstanding issues will be addressed under the relevant negotiating mandate of the new work program or in the standing WTO bodies on a priority basis.⁵⁸

Dissatisfaction with the Doha approach on the implementation and impact of existing agreements and more specifically the ATC has been expressed. Developing countries sought that their concerns regarding the ATC would be addressed at the meeting. However, no significant progress by developed countries was made in this respect.⁵⁹ Consequently even after the Conference these implementation issues remain a key concern for developing countries.⁶⁰ Accordingly, it is has been asserted that if trading Members want the Round to be a truly “Development Round” they need to ensure that this time implementation will follow the negotiation agreements. If it is the true wish of negotiators to put an end to protectionism in T&C, they need to make sure that this is indeed the case in tangible terms.⁶¹ That is, the immediate purpose of all policy measures

⁵⁵ “WTO, “World Trade Report”, *supra* note 2 at 159.

⁵⁶ “WTO, “Road to Doha” *supra* note 4 at 16.

⁵⁷ “WTO, “World Trade Report”, *supra* note 2 at 159.

⁵⁸ “WTO, “Road to Doha” *supra* note 4 at 16.

⁵⁹ Marc, *supra* note 35 at 8.

⁶⁰ UNDP, *Making Global Trade Work for People* (London: Earthscan Publications Ltd, 2003) at 167.

⁶¹ Petros C.Mavroidis, “The Meeting in Doha. Keep on Keeping on” (2002) 36 (2) J.W.T.167-169 at 169.

should be to expand developing countries' access and opportunities in T&C.⁶² Unless progress in this area occurs, there can be no talk of a Development Round.⁶³

3.2.2 Special and Differential Treatment

The agenda emanating from the 2001 Doha conference resurrected and reaffirmed special and differential treatment (SDT) as a legitimate, integral principle of WTO agreements.⁶⁴ In Paragraph 44 of the Declaration, ministers at the conference agreed to review all special and differential provisions with a view to make them more precise, effective and operational.

In the previous chapter we saw that different countries have different initial conditions and capacities for effective integration with the global economy. To the extent that developing countries face constraints different from those of developed countries a case is made for the principle of SDT in the multilateral trading system. It is alleged that the issue then becomes one of balance and emphasis. Consequently identifying appropriate SDT provisions for developing countries as they determine their national interests in relation to the WTO and the Doha Agenda is fundamental.⁶⁵

It has been stated however that the greater the differences in obligation levels, the more likely it is that countries will feel that exemptions for others are prejudicial to their own interests. Trying to achieve a balance that responds to the demonstrable needs of every Member therefore becomes a challenge. In light of these considerations it is argued that it is not surprising that a good deal of the discussion in the Doha has focused on which countries should enjoy access to SDT and how much SDT individual countries should enjoy.⁶⁶

At Doha it was also important for a significant segment of the membership to define an appropriate approach to SDT and to find an adequate set of SDT provisions.⁶⁷ For instance few WTO provisions on this principle are phrased in contractual language making them difficult to operationalize. In most cases SDT is conditional on negotiations

⁶² UNDP, *supra* note 60 at 182.

⁶³ Mavroidis, *supra* note 61 at 169.

⁶⁴ UNDP, *supra* note 60 at 57.

⁶⁵ "WTO, "World Trade Report", *supra* note 2 at 151.

⁶⁶ *Ibid.* at 157.

⁶⁷ *Ibid.* at 155.

for extended transitional periods and on industrial country discretion.⁶⁸ Such provisional aspects of measures for the principle imply that countries constantly need to renegotiate extensions which if granted are political decisions based on asymmetric bargaining power. Very often the weaker countries bargain away other important concessions to get extensions on transition periods or other measures that are inadequate.⁶⁹ If a declaration on the principle is made at the Doha it would mean that the principle becomes accepted as a general rule rather than as an exception or special case. Suggestions have been made that the principle should be made unconditional, binding and operational with countries able to suspend certain WTO commitments if they can show that doing so is necessary to achieve human development goals.⁷⁰ It is with this in mind that the Decision on Implementation-Related Issues and Concerns adopted at Doha contemplates the possibility of making non-binding SDT provisions mandatory.⁷¹ However, whether this right to opt out of commitments by developing countries for the purpose of their development needs will acceptable to the developed world remains in doubt.

By acknowledging that there were special developmental problems in the developing countries it is argued, the door was opened to a wider debate on how the principle is best dealt with under the WTO.⁷² In this case it was crucial that the Doha defines access to SDT in a manner that supports development. It is generally recognized that a practical and analytically clear needs-driven approach is required. Accordingly, two guiding principles have been presented i.e. that the provisions must be designed to respond to specific development needs of individual Members and also be designed to respond to clearly articulated needs. A needs based approach it is argued, avoids undue politicization and symbolism tendencies that are unlikely to support the development of effective special and differential provisions.⁷³

Furthermore, developing countries have been pointed out that the political, social and cultural diversity of the world does not lend itself to a “one size fits all” prescription and as such, countries must be given the flexibility in policy making or they risk loosing

⁶⁸ UNDP, *supra* note 60 at 79.

⁶⁹ *Ibid.* at 80.

⁷⁰ *Ibid.* at 74.

⁷¹ “WTO, “World Trade Report”, *supra* note 2 at 158.

⁷² Whalley, *supra* note 1 at 192.

⁷³ “WTO, “World Trade Report”, *supra* note 2 at 158.

control of their own economies.⁷⁴ Some Members have responded to this analysis saying that if “one size does not fit all” then the principle of SDT must be understood in a time specific context i.e. the provisions should not define a permanent distinction among Members but only a temporary one.⁷⁵ As well, by recognizing that most of the benefits should go to LDCs another door was opened for introducing the concept of tier development benefits in the WTO across types of countries.⁷⁶ It is my own perspective that no developing country desires to see SDT as a permanent feature but one that should be in place only to enable their economies attain meaningful development. If schemes are designed with an honest development objective in mind there would be no need for anyone to mention that they should be transitory. Ensuring that such development oriented schemes are established however, is a huge challenge for all countries but even more so for the preference giving countries.

Proposals have thus been developed that graduation from using special and differential provisions be based on clear and objective criteria.⁷⁷ It is suggested that by using several levels of graduation for example, countries should move from more to less comprehensive provisions for SDT with an eventual phase out if warranted by objective criteria. It is added that thresholds to determine whether countries should lose eligibility for SDT should be based on comprehensive indicators of human and technological capabilities or an achievement of specific development goals.⁷⁸

3.2.3 WTO Rules and related issues

Theoretically at least, textiles and apparel were not supposed to be a big agenda at the Doha ministerial. After all, the WTO has a separate agreement covering trade in fabrics and clothing.⁷⁹ As was seen in chapter I, prior to the Doha conference developing countries had complained that the liberalization under the ATC in the initial phases had yielded them virtually no expansion of market access and the growth in quotas during the

⁷⁴ India, “India and the WTO,” Vol.2 No.2. (Ministry of Commerce and Industry, 2000). Online: <<http://commin.nic.in/doc/wtofeb2k2.htm>> (accessed on 10/16/2003) at 2.

⁷⁵ “WTO, “World Trade Report”, *supra* note 2 at 157.

⁷⁶ Whalley, *supra* note 1 at 192.

⁷⁷ UNDP, *supra* note 60 at 74.

⁷⁸ *Ibid.* at 81.

⁷⁹ White Papers, “Learn about Trade. A consumers Guide to the Doha Ministerial” online: Consumers for World Trade <<http://www.cwt.org/learn/whitepapers/ConsumersGuidetoDoha.htm>> at 3

transition had been inadequate and demanded higher growth rates. Led by India, developing countries at Doha sought an agreement to eliminate quotas faster through increased quota growth. Meanwhile, it is alleged that the developed countries were under direction from their domestic industries to avoid any new textile concessions and to take steps to ensure that the Doha Round did not require any concessions on textile tariffs.⁸⁰

Neither side won the day in Doha. There was no acceleration in the elimination of quotas, demands relating to growth on growth of T&C quotas were not granted and textiles tariffs are very much on the agenda.⁸¹ In Annex II of the Doha Decision on Implementation-Related Issues and Concerns a proviso was included to encourage faster movement on liberalizing textile quotas. The Decision calls upon the Council for Trade in Goods to examine speeding up textiles liberalization with the aim of making recommendations for action by July 2002.

This Decision has been criticized because it in most cases provides measures to take the form of “taking note” or “best endeavor” clauses. It does not give developing countries extra leeway in challenging developed countries on the speed of elimination of quota restrictions beyond that available under ATC. Similarly it was not clear how except as already provided under ATC one was to determine that a country has failed to use the provisions relating to the elimination of quotas “effectively”.⁸²

Recent debates have suggested that the T&C quota phase-out needs to be seen in light of the Doha Development Agenda. Since the Agenda is scheduled to be finalized at the same time as quotas disappear, the deliberations under it are bound to have impacts on the T&C trade. In that respect, the possible threat of quota replacements by an increased use of anti-dumping and countervailing measures and the stringent rules of origin requirements which are not only trade restrictive but also price distorting were discussed.⁸³

For some time developing countries had been complaining that in implementing the Agreement on Anti-dumping, developed countries failed to maintain the principle of

⁸⁰ *Ibid.*

⁸¹ *Ibid.* at 4.

⁸² Panagariya, *supra* note 6 at 7.

⁸³ Matthias Knappe., “Report on the conference on the future of Textiles and Clothing after 2005” Brussels, 5-6 May 2003. ITC: UNCTAD/WTO. Online: <<http://www.intracen.org/mds/sectors/textiles/brussels.pdf>> (accessed on 9/9/2003) at 2.

good faith because they investigated the same firms and products repeatedly within short periods of time.⁸⁴ In most of these cases the targeted countries were already subject to quota restrictions. It must also be noted that these investigations are characterized by delays which have resulted in the disruption of textile exports and have had negative impacts on developing country trade. With such actions, the apprehension that the post 2005 quota free age may in fact prove to be a nightmare for developing countries involved in T&C exports is strengthened. There is a fear that if such trends do not end and further proliferation of protective measures prevail in the post ATC era, all anticipated benefits of the removal of quotas will be nullified. It is therefore necessary that clearly defined rules are devised to address developing countries so as to end this disparity within the T&C sector.⁸⁵

Although developing countries and academics expressed these fears, it is stated that the US and European Union textile and clothing industry lobbyists were calling for their explicit use because they feel that many products are simply being dumped on the markets.⁸⁶

At Doha paragraph 4.2 of Annex II of the Doha Decision on Implementation Related Issues and Concerns (herein under The Decision) contains an important agreement by liberalizing countries to exercise restraint in the application of anti-dumping for two years after the full integration of T&C into the GATT. In paragraph 4.3 the Decision requires that developed countries notify any changes in their rules of origin concerning products falling under the coverage of the Agreement to the Committee on Rules of Origin which may decide to examine them. Whereas making stipulations for such rules is a welcome development it is not clear how they will work in practice.⁸⁷ There is concern that these items are merely promises of 'good-faith effort' or simply a notification requirement. For instance the grounds under which a country can be deemed to have failed to exercise "particular consideration" before initiating antidumping

⁸⁴ Panagariya, *supra* note 6 at 8.

⁸⁵ Ali, *supra* note 42 at 2.

⁸⁶ Knappe, *supra* note 83 at 2.

⁸⁷ Laird, Cernat & Turrini, *supra* note 16 at 23.

investigation are not well defined. In effect therefore, moral force is all developing countries have to enforce compliance.⁸⁸

Even if the Decision were considered as constituting progress as well as signifying an assurance that quota and managed trade protection will be eliminated by end of the integration period, the comments of the US officials cast doubt. In an effort of calm the outrage emanating from North and South Carolina lawmakers, it is said an official commented that the US did not regard that the language of the Decision as in any way limiting or preventing it politically or any other way from using its trade remedy laws as appropriate.⁸⁹ This illustrates a lack of commitment on the part of some Members and sends a not so good message to developing countries who have to rely on the strength of established rules so as to realize tangible economic benefits.

Another important feature of the Decision is with regard to the subsidies and countervailing measures. In paragraph 10 the Decision reaffirmed the agreement on subsidies and countervailing measures provision for special treatment for developing countries whose GDP is below US\$1000, the extension of the transition period for certain export subsidies provided by certain developing countries and also the exemption from the prohibition of export subsidies and countervailing measures.

In conclusion, it is important that the Doha provides clear measures for dealing with the issues at stake in the trade regarding non-tariff barriers in general. As seen above what is in place is a mere expression of good intentions. These provisions need to be supported by means of enforcement so as to serve the T&C trade interests.

The following is a discussion of the trade linkages that were important issues at the Doha. The negotiations in these areas are particularly important for the T&C trade because they will have a significant bearing on the flow of this trade.

3.2.3.1 Trade and Labor

The worldwide lifting of barriers to international resource flows has had noticeable results. Cross-border investments are on the increase and a global division of labor is seen to be emerging with the sourcing of components being done from all over

⁸⁸ Panagariya, *supra* note 6 at 7.

⁸⁹ White Papers, *supra* note 79 at 4.

the world. On the whole these developments are seen as positive. However, the world wide search for low cost production sites also places pressure on labor standards in exporting countries.⁹⁰

Some have argued that globalization and free trade have now reached the point where its benefits are being questioned.⁹¹ There have been intense debates over the effects of trade and foreign direct investment on employment and working conditions in the global economy, and concerns have been expressed that development objectives may be pursued at the expense of worker's rights.⁹²

Another expressed view is that it was alright when only the developed countries were the major trade players as their wages and costs were more or less comparable. But once developing countries joined the trade scene as active participants and capital flows were liberalized, there was a perceived risk of instability developing in the trading system, and the threat of a low-skilled underclass emerging in the developed countries.⁹³

It is important to note that the multilateral trading system currently does not take account of the conditions under which traded goods are being produced. Activists i.e. consumer lobbies, workers rights advocates feel that this is unacceptable and advocate that such issues should be covered by multilateral rules.⁹⁴ It is believed that by bringing these concerns under the purview of WTO, they would then be applicable to all GATT Members and could be made more effective through the use of trade sanctions or simply through discussion and negotiation.⁹⁵

The biggest concern is with regard to "unfair competition" in the global economy and its implications for labor standards. There are fears that increased economic integration is placing downward pressure on social welfare programs and labor standards i.e. "the race to the bottom". Part of this concern is that as a result of increasing

⁹⁰ Gijsbert Van Liemt, "Production Conditions and International Trade: Protection or Protectionism" in Ludo Cuyvers and Bart Kerremans (eds.) *The international Social Issue- social Dumping and Social Competition in the Global Economy* (Anterpen: Intersentia Economische Wetenschappen, 1998) 83 at 85.

⁹¹ Brian McDonald, *The World Trading System: The Uruguay Round and Beyond* (Hampshire: Macmillan Press Ltd, 1998) at 279.

⁹² Juan Somavia, "Trade and Labour Standards-Beyond the Current Controversies," online: <<http://www.southcentre.org/info/southbulletin/bulletin14/southbulletin14-05.htm>> (accessed on 12/1/2003) at 1.

⁹³ McDonald, *supra* note 91 at 279.

⁹⁴ Liemt, *supra* note 90 at 91.

⁹⁵ McDonald, *supra* note 91 at 281.

international trade and the mobility of capital, poor labor standards and labor market conditions in some countries will lead to deteriorating labor market conditions in others.⁹⁶ Essentially all objections are linked to the perceived unfairness of “competing with cheap labor”.⁹⁷ Workers in countries at a low level of economic development tend to receive low wages. When wages are low people need to work long hours in order to make ends meet. In such situations the safety and health conditions are usually inferior and when compared to those in the rich industrialized countries they give developing countries an unfair competitive advantage. The other argument is that the low wages and poor working labor standards prevailing in some developing countries have no bearing at all with the existing economic conditions but rather are a result of suppression or control of labor movements or a general laxity of labor laws.⁹⁸

While the significance of these matters for trade does not appear important, for economic and moral reasons there is general interest in seeing such rights applied in countries that do not have them.⁹⁹

A proposal has been made that ethical trade should be seen in the context of sourcing requirements of major retailers and buyers. It is argued that ethical trade or the assurance that T&C products are sourced from companies in developing countries child labor-free and in full respect of basic labor rights are now seen as an integral part of the product just like price or quality and this is simply because the final customer expects it from the retailer. For example in the Western countries, a retail company's reputation has now become how and where to source from. The sourcing choices made contribute to the positive or negative image of the retail company.¹⁰⁰

Developing country governments are opposed to any setting up of a Working Party on this issue and argue that labor standards are an issue for the International Labor Organization (ILO). In their view, the suggestion that trade and labor standards might be linked is inspired above all by protectionist sentiments in developed countries.¹⁰¹

⁹⁶ Somavia, *supra* note 92 at 1.

⁹⁷ Anne O. Krueger, *Trade Policies and Developing Nations* (Washington D.C.: The Brookings Institution, 1995) 76 [Krueger, *Trade Policies*].

⁹⁸ Liemt, *supra* note 90 at 87-88.

⁹⁹ McDonald, *supra* note 91 at 282.

¹⁰⁰ Knappe, *supra* note 83 at 3.

¹⁰¹ Liemt, *supra* note 90 at 92.

One of the reasons for the above reaction to the trade and labor linkage is that although superficially these arguments appear plausible, on closer inspection, they are problematic.¹⁰² In many cases those who advance such arguments are usually voicing genuine fears and anxieties about the effects of globalization, which need to be addressed. They are right to be concerned about jobs, about human rights and child labor. It is added that they are right above all, to be concerned about the desperate poverty in which so many people in developing countries are condemned to live.¹⁰³ The challenge lies however in sorting out legitimate concerns from protectionist pressures masked under calls for labor.¹⁰⁴ This calls for a careful evaluation of pleas for labor standards since it is on the treatment of these issues that the economic fate of developing countries is likely to hang.¹⁰⁵

Another argument put forward against the policy is that unlike measures such as enforcement of intellectual property rights which has at least a possible rationale grounded in economic efficiency, the case for labor standards can neither be made in terms of economic efficiency nor in terms of the impact on the poor in developing countries.¹⁰⁶ It is not surprising therefore, that developing countries suspect that the arguments for using trade policy to advance various good causes are not just another form of disguised protectionism.¹⁰⁷

Since the comparative advantage of many of the developing countries lies so heavily in products intensive in the use of unskilled labor like T&C, concern naturally arises about any proposals for labor standards.¹⁰⁸ It should be remembered that for countries with abundant unskilled labor, the early years of an outer-oriented trade strategy will be years in which entrepreneurs produce goods competitively by combining cheap unskilled labor with other scarcer and more expensive factors in labor intensive processes.¹⁰⁹ It is stated that this comparative advantage that developing countries enjoy

¹⁰² "Krueger, *Trade Policies*" *supra* note 97 at 76.

¹⁰³ Kofi Annan "Laying the foundations of a fair and free world trade system" in Sampson, *supra* note 39, 19 at 22.

¹⁰⁴ "Krueger, *Trade Policies*" *supra* note 97 at 76.

¹⁰⁵ *Ibid.* at 77.

¹⁰⁶ *Ibid.* at 75.

¹⁰⁷ Annan, *supra* note 103 at 22.

¹⁰⁸ "Krueger, *Trade Policies*" *supra* note 97 at 75.

¹⁰⁹ *Ibid.* at 78.

today on account of low-cost labor, has been affirmed as a legitimate advantage in trade, as it was historically for today's developed countries.¹¹⁰ Any activity with the effect to raise the cost of production will no doubt reduce competitiveness.¹¹¹ It is added that if failure to conform to the set standards is then used as a reason for denying developing countries access to markets, the effects of such actions would be extremely detrimental to growth prospects for developing countries.¹¹²

It is tempting and almost instinctive to conclude that the solution must be to ban the importation of goods produced with the use of child labor. But with the poverty prevailing in developing countries it is crucial to ask what the likely effects of such a ban will be. These children's earnings though seem pitifully small by developed country standards, make a significant difference to the family budget. In some instances, children and especially girls may be enabled to stay at home and to avoid alternatives like early marriages or prostitution that are seen as worse than factory employment.¹¹³ Furthermore it is far from clear that internationally negotiated standards can improve the well being of the intended beneficiaries in this case children.¹¹⁴

As well, some have argued that core labor standards are an imposition by rich developed countries on poor developing countries which cannot afford them.¹¹⁵ It is also stated that developed countries would also have difficulty with such rules. With the prevailing economic situations in developing countries it is thus argued that the imposition of these labor standards would be wrong and of no impact.¹¹⁶

The other argument is that the cost of labor in many developing countries generally reflects their productivity. The fact that wages are low does not necessarily mean that prices are low since their productivity may be poor. In such situations, developed countries with high wages and high productivity can compete without difficulty on price.¹¹⁷

¹¹⁰ Somavia, *supra* note 92 at 1.

¹¹¹ "Krueger, *Trade Policies*" *supra* note 97 at 78.

¹¹² *Ibid.* at 76.

¹¹³ *Ibid.* at 84.

¹¹⁴ *Ibid.* at 107.

¹¹⁵ Somavia, *supra* note 92 at 1.

¹¹⁶ McDonald, *supra* note 91 at 283.

¹¹⁷ *Ibid.* at 279

If poor working conditions are simply the result of low level of development, there is a clear case for helping to accelerate economic development by providing more capital and increasing market access in importing countries.¹¹⁸ History has shown that as economies develop, wages go up, working hours come down and safety and health considerations receive more attention.¹¹⁹ Developing countries have low incomes because productivity is low due to few if any skills.¹²⁰ Although pockets of exploitation may occur, any increases in wages that workers would receive as a result of global minimum wages would have to be weighed against the losses incurred by lower levels of non farm employment (and hence wages) for other workers who have failed to find jobs as a result of the global wage.¹²¹

The Doha Agenda excludes labor standards from the study program.¹²² However others have argued that trade liberalization can go hand in hand with efforts towards public policy objectives around sustainable development and governance and that this is the key for the long term economic and social development of all trading countries.¹²³

It is thought that it is in developing countries long term interest to ensure that autonomous measures are brought within a multilateral framework and the WTO would be an appropriate body to ensure that such measures do not become protectionist and impede trade.¹²⁴ At the Brussels trade meeting it was emphasized that ethical trade requirements need to be strengthened and more rigorously pursued after the phase out of quota restrictions in the T&C sector.¹²⁵

It is recognized that while these policies can certainly benefit developing countries and the poor, they must be consistent with a country's level of development. Non-trade measures like educational programs and the promotion of civil society

¹¹⁸ Liemt, *supra* note 90 at 88.

¹¹⁹ Liemt, *supra* note 90 at 88.

¹²⁰ "Krueger, *Trade Policies*" *supra* note 97 at 77.

¹²¹ *Ibid.* at 83.

¹²² Panagariya, *supra* note 6 at 42.

¹²³ Alberto S. Bichi, "Federation of the European Sporting Goods Industry (FESI) Position Paper on Doha Development Agenda New WTO Round-Footwear, Apparel and Textile Duties" (December 2002) online: FESI website <<http://trade-info.cec.eu.int/textiles/documents/89.doc>> at 3.

¹²⁴ McDonald, *supra* note 91 at 283.

¹²⁵ Knappe, *supra* note 83 at 3.

institutions are developed as proposals providing more efficient ways to improve labor conditions than trade sanctions.¹²⁶

One way of ensuring that countries adhere to certain minimum standards is to persuade them to ratify relevant international conventions since governments which ratify the ILO not only commit themselves to introducing the contents of these Conventions into their national legislation but also submit themselves to a supervisory procedure.¹²⁷

3.2.3.2 Trade and the environment

The relationship between trade and the environment is clearly an issue that is now influencing all major trade agreements. The debate has attracted the attention of people and organizations with divergent aims, attitudes, biases, cultures, ideologies, disciplines, assessment methods and policy priorities. Their expectations and allegations have been magnified in the media giving the impression to trade and environment in conflict.¹²⁸

The greatest indictment is that the rate of growth and development of the world's economy has put increasing pressure on the world's environment in the search for raw materials and this has resulted in the degradation and pollution of the surroundings.¹²⁹

An argument promulgated from the time of the Stockholm Conference on Environment is that trade liberalization without harmonization of environmental standards would cause rich country businesses to move to "pollution havens" in poor country jurisdictions.¹³⁰ The increase in trade has thus been perceived as enabling some firms to transfer their environmental problems elsewhere since the markets in those other countries are not as heavily regulated as their home markets.¹³¹ The argument here is that stronger environmental measures would lead to an unfair loss of competitiveness, market shares, income, jobs and future investment to areas with cheaper production costs generated by the lax environmental regulations than if they had been produced at

¹²⁶ McCulloch, Winters & Cirera, *supra* note 40 at xxvii.

¹²⁷ Liemt, *supra* note 90 at 88.

¹²⁸ Nevin Shaw & Arthur Hanson, "Linking Trade and Environment to Promote Sustainable Development" in Harald Sander & Adras Inotai (e.ds) *World Trade after the Twenty-First Century: Prospects and Policy Options for the Twenty-First Century* (London: Routledge, 1996)134 at 138.

¹²⁹ McDonald, *supra* note 91 at 257.

¹³⁰ Shaw & Hanson, *supra* note 128 at 139.

¹³¹ McDonald, *supra* note 91 at 257.

home.¹³² Caution is advised when one is listening in on such claims. It has been observed that protectionist reflexes are very strong in these circumstances and environmental protection can be a convenient excuse for giving them a free rein. So far, no systematic relationship between existing environmental policies and impact of competition has been identified.¹³³

It is also stated that where all negative externalities are in the country where the pollution takes place, there is little reason for international concern. In poor countries where pressing day to day consumption needs lead to few expenditures on environmental issues, it can be argued that the lower costs of pollution there in contrast to costs to rich countries can and should legitimately be a part of the developing countries comparative advantage.¹³⁴

Important to note is the fact that whereas few would argue that low wages of workers with low labor productivity in developing countries have spillover effects, many recognize that there are environmental spillovers and this creates a valid reason for international concern.¹³⁵ The issue is furthered by the fact that while national regulations can control abuses of the environment that take place nationally or locally, they cannot control events taking place in other countries.¹³⁶ This therefore creates a great deal of pressure to utilize trade policy as a means of controlling environmental destruction outside national limits with regard to issues of increasing global concern.¹³⁷

It is on the basis of the foregoing discussion that arguments are made that the use of instruments of trade policy could be very effective in controlling environmental degradation in other countries by preventing the importation of their products into important markets. Proponents allege that in this case, trade instruments could ensure that countries wishing to export adopt environmental standards similar to those in countries with tighter regulations or at least ensure some degree of environmental protection and sustainable development.¹³⁸

¹³² Shaw & Hanson, *supra* note 128 at 139.

¹³³ McDonald, *supra* note 91 at 260.

¹³⁴ "Krueger, *Trade Policies*" *supra* note 97 at 87.

¹³⁵ *Ibid.* at 86.

¹³⁶ McDonald, *supra* note 91 at 257.

¹³⁷ *Ibid.* at 258.

¹³⁸ *Ibid.*

No one can deny that there are some very real environmental concerns. It is also obvious that failure to develop an international consensus on environmental standards will eventually result in global degradation that is so bad that major problems may arise.¹³⁹ A central question is however whether these concerns can be effectively addressed through trade measures.¹⁴⁰ In an attempt to answer the question it is pertinent to highlight issues that have informed debates challenging the trade and environment linkage.

To begin with, whereas environmental issues are important so is the global trading system and to saddle it with mechanisms for carrying out environmental regulation is not only likely to be destructive of the trading system, but also unlikely to achieve the desired environmental purposes.¹⁴¹ By implication, proposals that would result in common standards, in increasing uniformity of competition policy or in alignment of other domestic economic policies are calls for deeper integration.¹⁴² It is observed that any such deeper integration schemes with the effect to penalize outsiders or transform nations into fortresses against less developed participants would be inimical to the growth of the international economy and world trade.¹⁴³ It is important to note that trade measures that have been taken have not always worked as expected. For example tariffs or quotas imposed on grounds of environmental protection have in many cases led to higher prices and encouraged smuggling or simply be misdirected i.e. have made no contribution to environmental protection.¹⁴⁴

The importance of the international economy for developing countries can not be overemphasized. If trade sanctions are imposed against developing countries that fail to meet costly environmental standards this could prove detrimental to their growth and developmental prospects and rather than an improvement it would result in further environmental deterioration whose impact as explained earlier could be felt far beyond the borders of the polluting nations.¹⁴⁵ As well, sanctioning the use of punitive trade policy as an instrument to coerce countries into enforcing environmental issues presents

¹³⁹ *Ibid.* at 257.

¹⁴⁰ "Krueger, *Trade Policies*" *supra* note 97 at 85.

¹⁴¹ *Ibid.* at 91.

¹⁴² *Ibid.* at 2.

¹⁴³ *Ibid.* at 97.

¹⁴⁴ McDonald, *supra* note 91 at 261.

¹⁴⁵ "Krueger, *Trade Policies*" *supra* note 97 at 86.

the risk of having these captured by the professional industrial protectionists for narrow benefits.¹⁴⁶ It is added that the device of linking trade and other issues when the intention is really to link the dispute settlement system of the WTO to new policy areas is being increasingly used for the purpose of further opening up Third World economies or to reduce their competitiveness in the scramble for world market shares.¹⁴⁷

Another argument presented against the use of trade sanctions is with regard to their enforcement. Trade sanctions are difficult to enforce beyond the point of refusing imports produced with pollutants. Likewise it would be politically difficult if not infeasible and inappropriate on other grounds-to cut off all trade for countries failing to adhere to environmental standards decreed by developed countries.¹⁴⁸

It is also stated that the rich despoiled their environments in the nineteenth century in the process of economic growth. Life expectancies were as a result low and other more pressing concerns occupied the minds of developed country decision makers. Later, after they had attained a greater productive capacity they were able to carry out environmental clean up. Developing countries request for the same kind of policy space regarding environmental issues. It should be emphasized here that people in developing countries are poor and do not choose to expend the same resources as do citizens in developed countries not because they want a polluted environment but due to budgetary constraints. It is no surprise therefore that any effort the impact of which is to impose environmental standards on developing countries in the early stages of development is viewed as rich countries' efforts to keep the wealth for themselves.¹⁴⁹

It is observed that environmental protection even in the developed countries is often patchy and inadequate. There are many parts of the developed world where environmental standards are not what they should be. With such state of affairs the question is whether developed countries are going to allow their exports to be countervailed or refused entry to certain countries where the standards are higher or

¹⁴⁶ Shaw & Hanson, *supra* note 128 at 149.

¹⁴⁷ Martin Khor, "The World Trade Organization and the South: Implications of the Emerging Global Economic Governance for Development" in Jomo K. S. & Shamala Nagaraj (eds) *Globalization versus Development* (New York: Palgrave, 2001) 59 at 68 [Khor, "Trade Organization"].

¹⁴⁸ "Krueger, *Trade Policies*" *supra* note 97 at 88.

¹⁴⁹ *Ibid.* at 86.

where the means they have employed to produce the particular goods are considered environmentally unsound.¹⁵⁰

Another argument is that the WTO should be given a much narrower trade oriented remit.¹⁵¹ It is added that the global trade regimes agenda should not be overburdened with new issues. The organization should be limited to issues that are purely multilateral and require multilateral agreement as well as those that reflect all the countries interests.¹⁵² At the moment developing countries are unprepared individually or as a group for new negotiations.¹⁵³ The argument here is for specific international agreements to deal with the environmental issues. It is stated that the non-trade issues can be properly addressed by the appropriate international institutions more competent and better equipped than WTO.¹⁵⁴ If environmental issues can be handled under international agreements while trade relations are under the aegis of a strengthened multilateral trading system under the WTO, prospects for the healthy growth of the international economy will be favorable.¹⁵⁵ It is concluded that in the absence of internationally agreed standards it would be extremely difficult for the WTO or any other body to determine whether a proper environmental standard or for instance a set level of environmental expenditure were being applied in an exporting country.¹⁵⁶

On the other hand it has been said that it is not correct to assume that more environmental protection means less development or at least a deceleration of it.¹⁵⁷ It is argued for example that Mexico's changes in policies and accession to NAFTA dramatically illustrate the speed with which developing countries can alter their trade and payments regimes, undertake policy reforms, and be in a position to accept measures for deeper integration.¹⁵⁸ The NAFTA included side agreements on the environment among several other provisions that were arguably costly to the Mexican economy at least in the short run. It is said that a condition precedent in such situations is for negotiations to

¹⁵⁰ McDonald, *supra* note 91 at 260.

¹⁵¹ India, *supra* note 74 at 3.

¹⁵² UNDP, *supra* note 60 at 75.

¹⁵³ "Khor, "Trade Organization" *supra* note 147 at 67.

¹⁵⁴ India, *supra* note 74 at 3.

¹⁵⁵ Krueger, *Trade Policies* *supra* note 97 at 92.

¹⁵⁶ McDonald, *supra* note 91 at 260.

¹⁵⁷ *Ibid.* at 259.

¹⁵⁸ Krueger, *Trade Policies* *supra* note 97 at 73.

permit an adequate time for meeting these standards for deeper integration and that if this is, granted Mexico's experience would suggest that once advanced Newly Industrialized Country status is attained, participation in deeper integration can on net provide a further stimulus for growth and not intolerable strains on the economies of countries.¹⁵⁹

The Doha Agenda on the relationship between trade and environment reflects the variety of Member interests and priorities in this area.¹⁶⁰ In paragraph 31 of the Doha Ministerial Declaration, the commitment on the environment is focused on the relationship between existing WTO rules and the trade obligations in multilateral environmental agreements and on the reduction or elimination of tariffs and NTBs to environmental goods and services with a view to enhance the mutual supportiveness of trade and environment.¹⁶¹

In addition to the above negotiating mandate, in paragraph 32 it is stated that in its continuing work program, the Committee on Trade and Environment should give particular attention to the effect of environmental measures on market access especially in relation to developing countries, in particular the least developed among them as well as situations where trade liberalization would benefit trade, the environment and development the relevant provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights.¹⁶² The third element of work singled out in the Ministerial Declaration for special attention concerns labeling requirements for environmental purposes.¹⁶³

Of the three environmental stipulations in the Doha Declaration the use of eco-labeling has featured prominently in the meetings of market access for T&C and so may warrant further discussion here. There is a continuing development in the utilization of trade marks and labels to aid product sales not only at retail but also throughout the textile processing chain.¹⁶⁴ These labels or certificates indicate that the product has been manufactured in a sound environmental manner. If they apply to domestic and imported

¹⁵⁹ *Ibid.* at 74.

¹⁶⁰ "WTO, "World Trade Report", *supra* note 2 at 182.

¹⁶¹ "WTO, "Road to Doha" *supra* note 4 at 16.

¹⁶² *Ibid.*

¹⁶³ *Ibid.*; See also "WTO, "World Trade Report", *supra* note 2 at 182.

¹⁶⁴ David Morris, "The Multilateral Trading System and the New Political Economy for Trade in Textiles and Clothing: An Introduction for Least Developed Countries" (Geneva: ITC/UNCTAD/WTO Publications Unit, 2002). ITC/T322.E/PMD/MDS/02-X at 14.

products alike they do not infringe the WTO rules. Although they are usually voluntary in application they can have a very profound impact on consumer choice and on trade.¹⁶⁵ There is therefore an urgent need for clear rules on this and other environmental policies that are likely to have an impact on the flow of trade in the T&C sector so that the trade can be carried out with some degree of certainty.

As the preceding discussion illustrates, developing countries have not tended to be active proponents of the trade and environment agenda. It should be noted that in spite of the negative social and economic effects highlighted, the developed countries seem determined to continue introducing new issues to the agenda for negotiation.¹⁶⁶ Environmental issues will thus maintain their high profile in the T&C sector. The pressing question is how best to react to them.¹⁶⁷ It should be emphasized that developing countries have a direct interest in the removal of trade restrictions and distortions that have a positive effect on the environment, development and trade, as well as in measures that may help them fulfill or even benefit from environmental requirements in developed country markets.¹⁶⁸ Hence the need for putting in place internationally agreed standards.

3.2.3.3 Dispute Settlement Mechanism

A widely held view is that the dispute settlement mechanism of the WTO has generally functioned well.¹⁶⁹ Many Members however believe there is still room for improvement and it is on this basis that the Doha Declaration called for negotiations to improve and clarify the Dispute Settlement Understanding (DSU).¹⁷⁰ A large number of specific proposals for clarifications and improvements were submitted by participants representing a large part of the membership of the WTO. These proposals touched on almost all the provisions of the DSU.¹⁷¹

¹⁶⁵ McDonald, *supra* note 91 at 263.

¹⁶⁶ Mohamed Aslam & Jomo K. S, "Implications of at 55.

¹⁶⁷ Morris, *supra* note 164 at 9.

¹⁶⁸ "WTO, "World Trade Report", *supra* note 2 at 186.

¹⁶⁹ *Ibid.* at 173; See also Peter Balas, "Dispute Settlement Body" Special Session Report WTO TN/DS/9 Trade Negotiations Committee. 6 June 2003(03-2978) online:

http://www.rieti.go.jp/jp/columns/a01_0090.pdf at 1.

¹⁷⁰ "WTO, "World Trade Report", *supra* note 2 at 173.

¹⁷¹ Balas, *supra* note 169 at 1.

A recurring claim in the discussions on the dispute settlement mechanism is that its design favors its use by the larger and more economically powerful countries. Two basic shortcomings feature prominently in these discussions. Firstly the use of the dispute settlement mechanism involves considerable costs in terms of human and financial resources and some developing countries are unable to meet these costs. Secondly even in those cases where the system has been used successfully to bring a dispute, developing countries find it difficult in certain circumstances to ensure compliance with outcomes on the part of the developed country trading partners. For instance in situations where a Member against whom a determination has been made in a dispute decides not to bring the offending policies into conformity, retaliatory or compensatory rights can be difficult for small countries to enforce. This has raised the question of how effectively the system deters inconsistent behavior when smaller parties are implicated.¹⁷²

At Doha dispute settlement was treated separately due to its role as the ultimate arbiter of good faith among trading partners, the guarantor of security under international agreement embodying enforceable rights and obligations.¹⁷³ The mechanism plays an important role in this context since it allows governments to seek recourse in circumstances where they believe a trading partner has failed to respect its obligations. It should be noted that these benefits can only be acquired with the existence of an explicit co-operation with trading partners.¹⁷⁴

Reform of the dispute settlement mechanism is the only negotiation in Doha which will focus on an existing agreement and on the actual operations of the WTO.¹⁷⁵ The Doha Declaration states in paragraph 47 that negotiations on the DSU will not be part of the Single Undertaking that is they will not be tied to the overall success or failure of the other negotiations mandated by the negotiation.¹⁷⁶ The negotiations were scheduled for completion by the end of May 2003. This presented an opportunity to correct an

¹⁷² WTO, "World Trade Report", *supra* note 2 at 174.

¹⁷³ *Ibid.* at 123.

¹⁷⁴ *Ibid.* at 121.

¹⁷⁵ Marc, *supra* note 35 at 8.

¹⁷⁶ WTO, "Doha Declaration Explained" online: WTO
<http://www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm#dispute> at 1.

imbalance in the system so as to improve developing country position in the trading system.

Unfortunately the May 2003 deadline was not met. On the 24th July 2003 acknowledging the fact that the Dispute Settlement Body special session needed more time to conclude its work, the General Council agreed to extend the special sessions time frame by one year to May 2004.¹⁷⁷

The results of negotiations are of great significance to all Member countries. This may perhaps explain why there was a request for more time. The starting point in these negotiations for Members should be a reminder that any legal system wishing to ensure that its law is always respected should also possess the legal means to enforce what has been agreed. It should in other words provide for the institutional reasons to respect the contract.¹⁷⁸ Mere principles making up the structure of the legal system are not of themselves sufficient to carry out the objectives laid down in any treaty. An effective dispute settlement mechanism is needed to achieve these objectives.¹⁷⁹

3.2.3.4 Market Access for Non-Agricultural Products (NAMA)

Market access negotiations are said to be the traditional fare of the GATT/WTO trading system. The original mandate of these negotiations is found in Article XXVIII *bis* of GATT 1947. The GATT has registered real progress in lowering barriers to trade over the years but a lot more remains to be done. As mentioned earlier, significant obstacles in the form of tariff peaks and escalations remain in the schedules of many countries. Important to note about these GATT negotiations is that all parties wanted something and had something to give. This facilitated exchange and partly explains the GATT's historical success and continues to be a valid feature in today's market access negotiations i.e. there is something for everyone.¹⁸⁰

At Doha, market access for non-agricultural products covers customs duties and tariffs as well as NTBs. It is under this general umbrella of non-agricultural products or

¹⁷⁷ WTO, "New Negotiations on the Dispute Settlement Understanding" Online: WTO <http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm#negotiations> at 1.

¹⁷⁸ Mavroidis, *supra* note 61 at 16.

¹⁷⁹ Claudia Jimenez Cortes, *GATT, WTO and the Regulation of International Trade in Textiles*, trans. by Christopher D.Tulloc (Aldershot: Ashgate publishing limited, 1997) at 19.

¹⁸⁰ "WTO, "World Trade Report", *supra* note 2 at 122.

industrial products that market access issues of T&C are covered. It has been observed that although the Doha brought a number of new issues onto the WTO agenda, market access remains one of the most important trading issues between developing and developed countries.¹⁸¹

In paragraph 16 of the Doha Declaration, Members acknowledged the importance of enhanced market access for industrial products of interest to developing countries and agreed to start negotiations on the reduction or elimination of tariff peaks, high tariffs and tariff escalation, as well as on tariff barriers on all industrial products.

The Doha mandate also specifies that “no sector” will be *a priori* excluded from the negotiations. Implicitly, the liberalization of the T&C sector is on the table.¹⁸² In addition, participants had to agree on modalities to conduct the tariff cutting exercise. To this end, The Negotiating Group on Market Access (NGMA) was created at the first meeting of the trade negotiations committee in early 2002. Negotiations in NGMA are to conclude by January 1 2005 and its results will be part of the Single Undertaking. The Single Undertaking requirement under Doha implies that a successful result on services for example is contingent upon successful results in agriculture and other negotiations. These are of course all ingredients for a balanced outcome and one that could bring very significant results. The breadth of the negotiations offer opportunities for trade-offs and something of interest to everyone.¹⁸³

Approximately 43 submissions were made in the negotiating group for negotiations on tariffs and NTBs. All submissions suggest modalities that would have the effect of tariff reductions ranging from as little as possible to their staged elimination by 2015.¹⁸⁴

Also, Members agreed that the modalities be established by 31 May 2003 so as to set parameters of the final agreements to be reached by the 1 January 2005 deadline.¹⁸⁵ Modalities agreed upon to address tariff peaks and escalation are expected to have a bearing on further market opening of the T&C sector where these features tend to be

¹⁸¹ “Laird, Cernat & Turrini, “Back to Basics” *supra* note 16 at 12.

¹⁸² “Supachai, “Quota Elimination” *supra* note 12 at 4.

¹⁸³ Supachai Panittchpakdi, “The Multilateral Trading System: Challenges and Opportunities” online: WTO <http://www.wto.org/english/news_e/spsp_e/spsp18_e.htm> at 1 [Supachai, “Multilateral System”]

¹⁸⁴ “Supachai, “Quota Elimination” *supra* note 12 at 4.

¹⁸⁵ WTO, “Draft Element of Modalities for negotiations on Non-Agricultural Products” 16 May 2003 TN/MA/W/35 (accessed on 4/9/2004) at 1 [WTO, “Draft Modalities”].

concentrated.¹⁸⁶ Unfortunately, the May 31 2003 deadline for agreeing to framework for negotiations was not met. Nonetheless progress has been made towards producing an agreement on modalities. The discussion below highlights the Doha position on market access and the Members proposals weighed against the draft modalities.

Before proceeding further, it may be important to point out that the mandates for the Doha did not specifically mention the use of formulae as the core modality. However, during the negotiations, proposals for modalities based on formula have figured prominently.¹⁸⁷ At the non-agricultural market access negotiations (NAMA), the chair proposed a number of elements for the reduction of tariffs. At the center of the elements is a formula to be applied on a line by line basis.¹⁸⁸

$$ti = \frac{B \times ta}{ta + to}$$

$$B \times ta + to$$

Where, ti is the final rate to be bound in *ad valorem* terms, to is the base rate, ta is the average of the base rates and B is a coefficient with a unique value to be determined by the participants.

As observed earlier one of the most challenging tasks of the Doha was to ensure that the concerns of the developing countries were reflected in the negotiating mandates. In the area of market access, the texts provide an opportunity to improve the developing countries' effective participation in international trade.¹⁸⁹ To begin with, the negotiating mandate focuses on reducing or eliminating distortions on products of interest to developing countries. Here too, the mandate states that "the negotiating states shall take fully into account the special needs and interests of developing and least developed country participants".¹⁹⁰ In addition, in order to ensure that developing countries and LDCs benefit the most from these negotiations, it was agreed that appropriate studies and capacity-building measures should be undertaken to help LDCs to participate effectively in the negotiations.¹⁹¹ It was observed that the above provisions cannot be taken for

¹⁸⁶ "Supachai, "Quota Elimination" *supra* note 12 at 4.

¹⁸⁷ "WTO, "World Trade Report", *supra* note 2 at 149.

¹⁸⁸ "WTO, "Draft Modalities" *supra* note 185 at 1.

¹⁸⁹ "Laird, Cernat & Turrini, *supra* note 16 at 37.

¹⁹⁰ Paragraph 16 Doha Ministerial Declaration; See also "WTO, "Road to Doha" *supra* note 4 at 16

¹⁹¹ "Laird, Cernat & Turrini, *supra* note 16 at 13.

granted and will have to be given substance in the negotiations.¹⁹² In this respect the draft element of modalities released by the Chair of NGMA provide that developing countries and LDCs will be granted longer implementation periods for tariff reductions and up to five percent of tariff lines may remain unbound provided that they do not exceed five percent of the total value of a Member's imports, calculated for the reference period.¹⁹³ Further, the Chairs proposal also provides that in addition to the application of the above formula a sector elimination approach is proposed in a whole range of sectors including the T&C with the view to eliminate and bind all tariffs on products of particular export interest to developing and LDC participants as provided for in the Doha.¹⁹⁴

The African Caribbean Pacific (ACP) group believes however, that negotiations on NAMA must give attention to ensuring that ACP states are allowed to choose their own rate and extent of future liberalization, so as not to cause further adverse effects on local industries.¹⁹⁵ The group therefore calls for the adoption of a tariff reduction formula that provides such flexibility and scope to enable these States to continue to have adequate and effective levels of preferences necessary for the maintenance of their competitiveness in their export markets. The group argues further that only such approach guarantees balance, equity and benefits for all WTO Members in the outcome of the Doha Round.¹⁹⁶

Conversely, it is widely agreed among trade economists that a relatively uniform tariff structure i.e. a flat tariff structure is preferable to one exhibiting considerable dispersion. One of the arguments is that the costs in terms of welfare and economic inefficiency of a tariff regime increase as the degree of dispersion increases. Also, uniform tariff rates are more transparent and easier to administer than non-uniform tariffs and are less likely to be determined by the relative political power of domestic industries. A strong case is then made for a formula to reduce tariff peaks.¹⁹⁷ It should be recalled that in the T&C sector tariff reduction was not necessarily realized in the UR as each

¹⁹² *Ibid.* at 37.

¹⁹³ "WTO, "Draft Modalities" *supra* note 185 at 1.

¹⁹⁴ *Ibid.*

¹⁹⁵ WTO, "Market Access for non-Agricultural Products: Communication from Trinidad and Tobago on behalf of the ACP Group of States. WTO, TN/MA/W/47 (30 March 2004) (04-1471) at 1 [WTO, "ACP Group"].

¹⁹⁶ *Ibid.*

¹⁹⁷ "Laird, Cernat & Turrini, *supra* note 16 at 13.

Member had discretions to tackle issues in this area. A proposal by Japan and reflected in the modalities released by the Chair is that the different rates applied by Members should be finally harmonized into an agreed duty or below on a line by line basis which should be applied by both developed and developing members.¹⁹⁸

It is important to note that multilateral trade negotiations focus on bound tariffs that are applied on a MFN basis. These rates are called concessions granted to each member of the WTO on a MFN basis and are not necessarily the same rates that are applied at customs points, which are called MFN applied rates.¹⁹⁹ It is the applied rates that matter for commerce.²⁰⁰ But as seen above that the negotiations address bound tariffs, this therefore raises the question of the extent to which the ongoing Round of negotiations will yield sufficient improvements if they do not target applied rates.²⁰¹

Bound average tariffs remain high in many developing countries.²⁰² Their applied rates however are often far below the level of bindings.²⁰³ Significant gaps resulting from autonomous economic reforms therefore exist between the applied and bound rates in these countries. In the current WTO negotiations, there are considerable demands being put on developing countries to increase the share of their trade covered by binding commitments and also to reduce applied tariff rates.²⁰⁴ It is argued that tariff cutting based on bound MFN rates is the only legal basis for negotiations and this should provide some latitude or “comfort zone” for developing countries with bound rates exceeding applied rates.²⁰⁵ In addition it is said that improving the binding ratio is an important issue in securing predictability and credibility in world trade.²⁰⁶

Since a wide disparity in tariff rates still exists among Members after the conclusion of the UR, a proposal is made that tariffs should be reduced by setting a target level of a trade-weighted average tariff rate for each Member according to the level of its bound rate (trade-weighted average) while giving consideration to the level of

¹⁹⁸ Ministry of Economy, Trade and Industry, “Policy Information” online: <http://www.meti.go.jp/english/information/data/cWTOonag_a1c.html> (accessed on 3/16/2004) at 1.

¹⁹⁹ “WTO, “World Trade Report”, *supra* note 2 at 124.

²⁰⁰ *Ibid.* at 133.

²⁰¹ *Ibid.* at 149.

²⁰² *Ibid.* at 122.

²⁰³ *Ibid.* at 133.

²⁰⁴ “WTO, “ACP Group” *supra* note 195 at 1.

²⁰⁵ “Laird, Cernat & Turrini, *supra* note 16 at 38.

²⁰⁶ Ministry of Economy, *supra* note 198 at 2.

development of each Member. It is believed that this approach will contribute to the harmonization of tariff levels of WTO Members, which is necessary for promoting appropriate liberalization of world trade.²⁰⁷

Given that the binding coverage for some ACP countries for example is as low as 3 percent, these countries feel this would constitute a disproportionate level of commitment. Developing countries further allege that if they are obliged to reduce MFN bound rates to levels that are below their applied rates, it would eliminate any flexibility that they have to use tariffs for development purposes.²⁰⁸

It has been observed that a request and offer in tariff cuts negotiation tends to lead to exceptions especially in the most protected sectors i.e. where developing countries are exporters. A recommendation has thus been made that exceptions to the rules be avoided, and if this is unfeasible, then there should be a minimum cut on each tariff line.²⁰⁹

Another proposal is that if developing countries cut MFN bound rates, leaving applied rates as they are or only partly reduced, such MFN reductions should still be seen as affording increased security of access to their market. This would itself be considered a valid legal commitment in the negotiations in non-agricultural products even where rates are set at ceiling levels, higher than applied rates as was done in the UR agricultural negotiations by many developed and developing countries.²¹⁰

It is also suggested that concerns about possible deterioration in some of the developing countries terms of trade would need to be addressed by special provisions in the WTO negotiations.²¹¹

The Chair's draft proposal also contains another technical criteria i.e. the conversion of non *ad valorem* duties into *ad valorem* equivalents before the formula can be applied.²¹² It is argued that the elimination of non-*ad-valorem* rates would enhance transparency in tariff regimes.²¹³ And with the transparency trade is likely to expand and be more profitable under conditions of certainty and security as to the terms of market access and rules of trade. It is recognized that a shared commitment among trading

²⁰⁷ *Ibid.*

²⁰⁸ "WTO, "ACP Group" *supra* note 195 at 1.

²⁰⁹ "Laird, Cernat & Turrini, *supra* note 16 at 37.

²¹⁰ "WTO, "ACP Group" *supra* note 195 at 1.

²¹¹ "Laird, Cernat & Turrini, *supra* note 16 at 36.

²¹² "WTO, "Draft Modalities" *supra* note 185 at 1.

²¹³ "Laird, Cernat & Turrini, *supra* note 16 at 38.

partners to specify *ex ante* the terms and conditions upon which products may be sold in their markets can give a significant boost to trade since it does away with arbitrariness or unrelated elements of conditionalities.²¹⁴ On the other hand, if it were felt that the elimination of non-*ad-valorem* rates could lead to an increase in anti-dumping actions, then it may be preferable to allow specific rates with a maximum percentage and an obligation to publish the *ad valorem* equivalent of such rates.²¹⁵

At the end of the day what matters most when considering the modalities is the overall balance of the outcome of the negotiations.²¹⁶ The Chair noted that the modalities should be seen as a set of basic elements for possible modalities which will need to be adjusted, completed, refined or further expanded upon.²¹⁷ It is very important that the final agreement accommodates the interests of all Members with a view to improve the conditions for market access in the furtherance of economic development. Since the draft was not finalized comprehensively, there is room for Members to table their views and perhaps have them incorporated in the final agreement.

3.2.4 Conclusion

Doha was to have been the time when the rich nations started honoring their promises to make trade rules fairer to the poor.²¹⁸ Its outcome offers a better balance when taken by itself but does not go so far as to significantly correct the imbalance in the Uruguay Agreement.²¹⁹ For example, it offers opportunities for developing countries to improve their access to markets in the developed countries through new negotiations, but the inclusion of get-out clauses and loopholes suggests that the outcome will be more broken promises.²²⁰

²¹⁴ "WTO, "World Trade Report", *supra* note 2 at 121.

²¹⁵ "Laird, Cernat & Turrini, *supra* note 16 at 38.

²¹⁶ Ministry of Economy, *supra* note 198 at 2.

²¹⁷ "WTO, "Draft Modalities" *supra* note 185 at 1.

²¹⁸ World Development Movement, "A Development Agenda without Development: Analysis of the Final Ministerial of the 4th Ministerial Conference of the WTO in Doha" <<http://www.wdm.org.uk/presrel/current/analysis.htm>>

²¹⁹ Russell Smith, "The Coming Trade Agenda: climb Every Mountain" Scott B. Macdonald ed., KWR International Advisor # 12 December 2001. Global Economic, Political and Financial Analysis. Online:

<<http://www.kwrintl.com/library/2001/advisor12/index.html>> at 2; See also Panagariya, *supra* note 6 at 42.

²²⁰ World Development Movement *supra* note 218 at 1.

Some have expressed concern that the Doha program is limited to a few expectations of rich countries without any opening whatsoever for negotiations on the issues forwarded by developing countries.²²¹ The organization of the work program was carried out in a context of power struggles and in the end reflected that much of the negotiating power continues to reside with developed countries.²²²

The most encouraging sign from the Doha was the determination by developing countries to participate fully in negotiations. Their positions were sound, well coordinated, both in the preparatory process and at the actual meeting.²²³ They illustrated expertise and cohesion and so limited the ambitions of the developed countries.²²⁴

3.3 Cancun Ministerial Conference

3.3.1 Background

The Fifth Ministerial Conference in Cancun was an important staging post on the road to a successful conclusion of the Doha Development Agenda (DDA) by end 2004.²²⁵ This meeting was not intended to be the end of negotiations but an important milestone in the process. Members hoped to achieve an agreement on a Text which would serve as a road map for the final phase of the negotiations.²²⁶

The outcome of this meeting was thus to be measured in terms of how successful it was in moving the negotiations into their next phase so that conclusion of the Round could be achieved by the agreed date. To achieve this goal, ministers had to take the necessary substantive decisions and provide political impetus for the whole of the DDA. Members had to ensure that progress was maintained on the outstanding issues i.e. market access, global rule making and that the important development dimension of the negotiations was respected in full. It also had to remain clear that the DDA's final result remains an indivisible package in the form of a Single Undertaking for all WTO Members i.e. nothing was to be agreed until everything was agreed.²²⁷

²²¹ Marc, *supra* note 35 at 4.

²²² Russell Smith, *supra* note 219 at 2.

²²³ World Development Movement *supra* note 218 at 1.

²²⁴ Marc, *supra* note 35 at 2.

²²⁵ Kwa, "Doha Development" *supra* note 31 at 1.

²²⁶ Supachai, "Multilateral System" *supra* note 183 at 1.

²²⁷ Kwa, "Doha Development" *supra* note 31 at 1.

The timely conclusion of the Round would bring good news to a world economy in need of stimulus.²²⁸ On the other hand a failure to advance at Doha would certainly be for developing countries a lost opportunity to become more fully integrated into the global economy and to benefit from the economic growth that trade generates.²²⁹ Failure in Cancun could send an equally damaging signal to the developing world they turned to open trade after being convinced of the need for stronger multilateral rules not weaker ones. More trade liberalization and not less, an effective WTO and not an impotent one.²³⁰ It was accordingly critical that Cancun be a success.

The September 2003 European Union meeting on trade in Brussels underscored the need to meet the expectations of all WTO Members if Cancun was to be a success.²³¹ The draft Cancun Ministerial Text reflected many areas of agreement as well as the substantial differences remaining between WTO Members that had to be resolved by ministers in Cancun.²³² Some commentators envisaged that the wide divergences between developed and developing countries would not be resolved by Cancun and instead would be papered over by Members' agreeing to 'frameworks' rather than detailed modalities.²³³ More than that, the meeting ended without an agreement on the Ministerial Text.²³⁴ And therefore with no progress on the issues which had been on its agenda for action.²³⁵ The discussion that follows is an illustration of the events that led to the collapse of the Cancun Ministerial with a view to establishing what the next step for Members is going to be to ensure that the negotiations are put back on track and seen through to a timely conclusion by the set deadline.

The Cancun failure occurred after two years of missed deadlines and postponement of decisions leading to a clearly overloaded agenda. It is argued that the lack of progress before the Cancun Ministerial caused by a lack of political will on the

²²⁸ *Ibid.*

²²⁹ Supachai, "Multilateral System" *supra* note 183 at 1.

²³⁰ Supachai, P., "Why Cancun Matters" Online: WTO <http://www.wto.org/english/news_e/spsp_e/spsp08_e.htm> at 1 [Supachai, "Cancun Matters"].

²³¹ Kwa, "Doha Development" *supra* note 31 at 3.

²³² *Ibid.* at 2.

²³³ Aileen Kwa, "Comments on Cancun Draft Ministerial Text. 25 August 2003. Focus on the Global South-Geneva at 1 [Kwa, "Cancun Draft Ministerial"].

²³⁴ Martin Khor, "An Analysis of the WTO's Fifth Ministerial Conference" online: (accessed on 2/20/2004) at 1 [Khor, "WTO's Fifth Ministerial"].

²³⁵ Anu Mahmud, "The Lesson from Cancun Ministerial Meeting of WTO" online: Nation <<http://nation.ittefaq.com/artman/publish/printer7159.shtml>> Jan 29 2004 (accessed on 4/13/2004) at 1.

part of developed countries to fulfill the promises made at Doha caused the collapse of the meeting.²³⁶ A number of development issues had been earlier agreed upon at the DDA. It is right to say that the conference raised a flicker of hope about coming to terms among different groups of countries.²³⁷ More importantly, it pledged to place the needs of developing countries at the heart of its work program. In the post-Doha, there was supposed to be a strong development dimension to the WTO's work.²³⁸ Unfortunately this was not delivered and the 'development' promises went in a serious state of stalemate.²³⁹ This failure to meet the deadlines thus resulted in a growing frustration among all stake holders and more especially the developing countries.²⁴⁰ Furthermore, the absence of significant progress before Cancun turned the idea of a Development Round into a hollow slogan.²⁴¹

To illustrate this point the deadlines for the completion of work on implementation and SDT which are key issues for the poorest of the WTO Members were all missed and proposals presented in the Cancun draft ministerial text were completely inadequate.²⁴²

Developing countries were promised that their implementation concerns would be addressed if they entered into a new Round. The post Doha period showed no substantial progress on these issues as they were down graded and neglected.²⁴³ It became clear therefore that the developed countries did not have any political will to give in this area. The Cancun draft simply reiterated these promises and suggested that another deadline be given again to the disappointment of developing countries.²⁴⁴

Also, with regard to SDT, developing countries were promised in Doha that all such provisions would be reviewed with a view to strengthening them and making them more precise, effective and operational. There was no such strengthening as most of the proposals were met with hostility from the rich countries. The assurance was thrown to

²³⁶ EPHA, "The Cancun Ministerial Conference of the WTO: What went wrong?" online: European Public Health Alliance (EPHA) <<http://www.epha.org/r/55>> at 1; See also Mahmud, *supra* note 235 at 1.

²³⁷ Mahmud, *Ibid.*

²³⁸ Khor, "WTO's Fifth Ministerial" *supra* note 234 at 6.

²³⁹ *Ibid.*; See also "Kwa, "Cancun Draft Ministerial" *supra* note 233 at 4.

²⁴⁰ Mahmud, *supra* note 235 at 1.

²⁴¹ "Supachai, "Cancun Matters" *supra* note 230 at 1.

²⁴² EPHA, *supra* note 236 at 1.

²⁴³ Khor, "WTO's Fifth Ministerial" *supra* note 234 at 6.

²⁴⁴ "Kwa, "Cancun Draft Ministerial" *supra* note 233 at 4.

the winds and in its place proposals giving the opposite effects were placed.²⁴⁵ The Cancun Draft package outlined twenty four special and differential provisions. Many of them were again more of 'best endeavor' language or stipulated Members to find solutions in the future.²⁴⁶ They thus lacked commercial value and did not expand policy space.²⁴⁷ This clearly illustrated the dearth of concrete commitment as well as the political will on the part of developed country Members to fulfill their promises.²⁴⁸

It must be remembered that the implementation and SDT issues were critical and a key motivation for many developing countries to buy into the Doha Development Agenda. Because they were not even discussed at the Cancun Ministerial conference, it meant that there was very little on the table for countries like the African Caribbean and Pacific states (ACP).²⁴⁹

At Cancun there was general difficulty in addressing rules to resolve what are rather wide differences in collective preferences.²⁵⁰ One of the elements of great concern was the draft's commitment to a "non-linear formula" in which the higher the tariffs, the higher the reductions. Since developing countries generally have higher bound tariffs, they would be hit much harder than developed countries where most tariffs are low.²⁵¹ Developing countries were opposed to this because it showed that the developed countries were proposing to drastically press down their tariffs in industrial goods without regard to the disastrous effect on local firms and livelihoods.²⁵² There was already much evidence of de-industrialization in many developing countries due to past liberalization.²⁵³ If accepted, the 'framework' would aggravate the trend and would have serious employment and development implications.²⁵⁴

In addition to the above, the Text also endorsed an approach to negotiations which developing countries had already rejected. The sector-for-sector approach it was argued,

²⁴⁵ "Khor, "WTO's Fifth Ministerial" *supra* note 234 at 6/8.

²⁴⁶ "Kwa, "Cancun Draft Ministerial" *supra* note 233 at 4.

²⁴⁷ "Khor, "WTO's Fifth Ministerial" *supra* note 234 at 6.

²⁴⁸ EPHA, *supra* note 236 at 2.

²⁴⁹ *Ibid.* at 1.

²⁵⁰ Pascal Lamy, "The EU, Cancun and the Future of Doha Development Agenda" <<http://www.southcentre.org/info/southbulletin/bulletin67/southbulletin67-07.htm>> at 3.

²⁵¹ "Khor, "WTO's Fifth Ministerial" *supra* note 234 at 8.

²⁵² *Ibid.* at 6.

²⁵³ *Ibid.* at 7.

²⁵⁴ "Kwa, "Cancun Draft Ministerial" *supra* note 233 at 3.

was dangerous since it essentially called for reduction or elimination to zero tariff levels in certain sectors and above all this approach had not been agreed to in the Doha.²⁵⁵ The draft Cancun text in complete contradiction to the expressed arguments stated that this sector tariff component 'is a key element in achieving the objectives of paragraph 16 of the Doha Ministerial Declaration'.²⁵⁶

Developing countries were also outraged at the poor treatment of the cotton initiative in the Text.²⁵⁷ The proposal made by West African countries which had the support on many developed and developing country governments was treated with derision by the US which refused to make specific commitments regarding cotton subsidies but instead tried to link the issue to its controversial proposal for a sectoral initiative on textiles (Zero-for Zero) which had so far received almost no support from WTO Members. In a revised Draft a suggestion was made that the West Africans, who are the most efficient cotton producers in the world, should diversify out of cotton and to this was added vague promises about development aid. This further angered the whole developing country camp and cotton became the symbol of rigged rules and double standards plaguing the world trading system where a handful of US cotton producers have more power than the opinion of most WTO Members.²⁵⁸

Furthermore, the institutional problems which exist for the WTO added to the myriad of systemic problems at Cancun.²⁵⁹ In the end it is argued that it was the WTO's un transparent and non participatory decision making process that caused the unmanageable situation that led to the collapse of the Cancun Ministerial.²⁶⁰ The leadership to the conference was marked by the rise of particularly undemocratic practices such as the drafting of texts under the sole responsibility of the Chairman. The draft ministerial declaration was developed on this basis and sent to ministers without the approval of the General Council to be used as the basis for negotiations.²⁶¹ Attempts to undertake reforms to bring about internal transparency and the participation of developing countries were rejected by the major developed countries. They were told that

²⁵⁵ *Ibid.*

²⁵⁶ *Ibid.*

²⁵⁷ "Khor, "WTO's Fifth Ministerial" *supra* note 234 at 3.

²⁵⁸ EPHA, *supra* note 236 at 2.

²⁵⁹ Lamy, *supra* note 250 at 3.

²⁶⁰ "Khor, "WTO's Fifth Ministerial" *supra* note 234 at 3.

²⁶¹ EPHA, *supra* note 236 at 3.

ministers must be given the flexibility to run Ministerials the way they want without being hampered by procedures.²⁶² As was with any unbridled exercise of power the drafts reflected the views of the powerful in this case the minority and consequently lacked the support of most of the developing country Members.²⁶³ A gap began to grow between the positions of the vast majority of the membership and the minority, on the content of the Declaration and led a number of countries to question the meaning of their participation in the conference. The revised declaration was not any different from the earlier Text since reactions and counter proposals of developing countries were ignored. The sidelined countries felt extremely pessimistic about the possibility of ever improving the Text.²⁶⁴

Also, the decision to prioritize Singapore issues on the agenda delayed discussions on the core agenda of the Conference. It is said that this further contributed to the polarization of discussions as many developing countries felt they could not show flexibility without knowing what they would get in other areas of negotiations.²⁶⁵ In this state of uncertainty created by the desire of each group of negotiators to see their interests through at conference, there was a general realization that an amicable solution could not be reached and hence the eventual collapse.

Another reason advanced to explain the collapse of the conference is the misreading by the US and the EU of changing politics among developing countries. Developing countries went to the conference in the hope of securing a meaningful agreement. Conflicts of interest between developing countries with similar export profiles existed at the conference. Mindful however of the fact that their divisions had in the past led to adverse results, they worked in coalitions and this enabled them to stand firm on issues of vital interest. The emergence of the G-20 which remained strong and united until the very end despite repeated pressures to divide its core group was a turning point in the conference. Also the formation of the African Union, ACP and LDC coalition in close coordination with the G-20 completed the picture. The united developing country camp representing more than two thirds of the WTO Membership decided to demand that

²⁶² "Khor, "WTO's Fifth Ministerial" *supra* note 234 at 5

²⁶³ *Ibid.* at 4

²⁶⁴ EPHA, *supra* note 236 at 3

²⁶⁵ *Ibid.*

the promises at Doha of a development Round start to be fulfilled at Cancun.²⁶⁶ A failure to reach an agreement on these issues led to the premature ending of the conference.

3.3.2 The Closing

The closing session at Cancun adopted a brief and simple Ministerial statement in lieu of the substantive Ministerial Text that had been under discussion. The statement expressed that more work needs to be done in some key areas to enable Members to proceed towards the conclusion of the negotiations. Ministers also instructed their officials to continue working on outstanding issues taking fully into account all views expressed in the conference and to convene a meeting no later than 15 December 2003 to take the action necessary at that stage to enable the move towards a successful and timely conclusion of the negotiations.²⁶⁷

3.3.3 Implications of the Collapse

Many considered the collapse of the Cancun negotiations a serious blow to the Doha Round which undermined WTO credibility at a time of a strong need to strengthen the multilateral organization.²⁶⁸ The stakes at Cancun were high and went beyond trade. They were about working to build a strong global economy by reducing instability and uncertainty as well as advancing a new approach to international relations based on rules and not power rules to manage the powerful forces of globalization for everyone's benefit. It is said that Cancun failure left the trading world a more insecure and uncertain place. This inability to advance a new agenda also raises fresh doubts about the WTO's suitability as a forum for future negotiations.²⁶⁹ Although there are no winners, it is a missed opportunity to give the world economy a much needed boost. These talks are vital for the global economy. Members then had to see to it that they return to the hard work of defining the terms on which the DDA can be moved forward.²⁷⁰

²⁶⁶ *Ibid.*

²⁶⁷ WTO, "Cancun Ministerial Conference" Online: WTO, <http://www.wto.org/english/thewto_e/minist_e/min03_e/min03_14sept_e.htm> at 1; See also "Khor, "WTO's Fifth Ministerial" *supra* note 234 at 1.

²⁶⁸ Mahmud, *supra* note 235 at 1.

²⁶⁹ "Supachai, "Cancun Matters" *supra* note 230 at 1.

²⁷⁰ Mahmud, *supra* note 235 at 1.

It has also been argued that the Cancun failure sent a clear message to the leadership of developed countries about the gross inequalities in world trade and global economy. And as was the case at Doha, it demonstrated the resolve on the part of developing countries to stand unitedly and determinedly against its perpetuation.²⁷¹ The conference served the vital purpose of a united front of the poor and developing countries and helped put into sharp focus what the developed countries must do to work for a fairer economic order. In general the Cancun experience is a message that the poor and developing countries have reached a dead end as far as making concessions and that it is high time for the world's rich and powerful countries to make a befitting response to developing countries dire needs.²⁷²

With the collapse of Cancun it is also stated that the issue of the WTO's decision making and Text drafting process has again emerged to the fore. That the ministerial's are run without rules and proper procedures can no longer be ignored if the system is to survive. Having a failure rate of two out of three of the most recent ministerials is not a record any organization can be proud of. Pushing developing countries into adopting last minute Texts worked in Doha for the majors. In Cancun it didn't. The ultimate lesson of Cancun is that the organization must change its decision making and text drafting procedures to accommodate the participation of the developing countries.²⁷³

With the risk of continued deadlocked and diminished prospect of advancement on the multilateral front, there is a fear that the pressure to turn to regional and bilateral deals could prove irresistible.²⁷⁴ At Cancun the US indicated that a failure was not of great importance to them because of its focus on bilateral and regional trade negotiations where it believes concessions can be more easily extracted from developing countries than at the WTO.²⁷⁵ With such regular occurrences of failures bilateral and regional negotiations can be expected to proliferate in order to fill the vacuum left by WTO trade

²⁷¹ *Ibid.* at 2.

²⁷² *Ibid.* at 3.

²⁷³ "Khor, "WTO's Fifth Ministerial" *supra* note 234 at 5.

²⁷⁴ "Supachai, "Cancun Matters" *supra* note 230 at 1.

²⁷⁵ EPHA, *supra* note 236 at 2.

ministers. However the losers will still be developing countries who could find themselves isolated in one-on-one or small negotiations.²⁷⁶

3.3.4 The December 15 2003 Geneva Meeting

At this meeting Members expressed a willingness to restart work in the negotiating groups but there is still no major break through. The Chair expressed that while the Round is not back on track yet Members had made considerable progress in that direction. This meeting reflected a pragmatic approach that more time is needed in order to deal with the unfinished business. Perhaps more important is the fact that the meeting reflected a renewed support for efforts directed towards trying to finish this Round on time.²⁷⁷

The meeting proceeded to take up cotton, NAMA as part of the issues for discussion. In the two intensive rounds of consultation undertaken, delegations largely avoided general statements and key issues of the outstanding subjects were explored. It was observed that as they went deeper into the substance of the negotiations the persisting difficulties became more apparent.²⁷⁸

On market access it is evident that the notion of a common approach for both developed and developing countries seems to be gaining ground. There is general acceptance that a formula type approach should be a key element to the modalities for NAMA. While there is no agreement yet on the specific formula to be used, it is clear that it should fully respect the Doha mandate. The Members acknowledged that the formula would have to incorporate a clear differentiation through SDT in order to take care of the development needs of developing countries. It was concluded therefore that further work is needed in formulas in order to ensure that all Members will have to share

²⁷⁶ Luke Eric Peterson, "After the Collapse: Developed Countries must become re-engaged after the failed Cancun Ministerial" online: International Institute for Sustainable Development <http://www.iisd.org/pdf/2003/commentary_trade_4.pdf> (accessed on 2/20/2004) at 2.

²⁷⁷ WTO, General Council, "Chair wraps up: Groups can restart but still no deal on tough issues" 16 Dec 2003 Follow-up to the Cancun Ministerial Conference online: WTO <http://www.wto.org/english/news_e/news03_e/stat_gc_chair_16dec03_e.htm> at 1.

²⁷⁸ WTO, General Council, "Key Issues Clearer, Possible Solutions becoming Visible" Follow up to the Cancun online: WTO <http://www.wto.org/english/news_e/news03_e/stat_gc_chair_15dec03_e.htm> at 1. [General Council, "Issues Clearer"].

the burden of tariff reductions and that developing countries would not be called upon to assume a disproportionate part.²⁷⁹

Another aspect of trade liberalization that has attracted a great deal of discussion concerns the sectoral component. The key issue here relates to the mandatory versus the voluntary nature of sectoral negotiations and whether these sectoral negotiations are to be viewed as a core or supplementary modality. It is clear that a lot of work needs to be done on the outstanding issues so as to define product coverage, participation and adequate provisions of flexibility for developing country participants. These issues need further definition as they will most likely be the main elements that will determine tariff liberalization in NAMA.²⁸⁰

3.3.5 Way Forward

Although the situation has not yet gone out of hand much depends on the positive response from the developed countries. Of high priority is the work aimed at ensuring a more equitable global system or put another way a balance in the rich-poor relationship. The developed countries refusal to treat the poor developing nations fairly in global trade would be enough to cause damage to the WTO's agenda of free and fair multilateral trade.²⁸¹

It is crucial that the points of view of developing countries be finally taken into account in order to avoid further failures. Sincere initiatives on Cotton, SDT would be demonstrations of a commitment to the Development Round. These would be strong signals that developing countries have indeed been heard which would clear the atmosphere in Geneva and allow talks to restart on a new and more constructive basis.²⁸²

Likewise, having asserted their collective strength in Cancun, developing countries must now articulate a positive agenda which will rekindle Western interest in the WTO as a viable negotiating forum and which can move the Doha Round forward.²⁸³

More needs to be done particularly in the area of NAMA to ensure that developing countries concerns and interests in the T&C sector be addressed. It is evident

²⁷⁹ *Ibid.*

²⁸⁰ *Ibid.*

²⁸¹ Mahmud, *supra* note 235 at 2.

²⁸² EPHA, *supra* note 236 at 4.

²⁸³ Peterson, *supra* note 276 at 3.

that tension exists in this area and issues have to be dealt with extra caution. Members must get to the bottom of these issues if there is to be any further advancement of the multilateral system into other areas of export interest to developed countries. It is very important that the current negotiations go beyond the expressions of well intentioned policies but back this up with mechanisms to facilitate the realization of meaningful economic results for developing countries. Members should also bear in mind the urgency of the negotiations they should work towards sticking to the agreed deadline as this is illustrative of their commitment to improve the conditions for market access and an important step in reviving developing countries' confidence in the multilateral trading system.

Chapter IV:

4.1 Conclusions

The objective of this thesis has been to examine the decision to integrate the textiles and clothing sector into the multilateral system and the opportunity this process presents to participating countries.

Chapter I presents an introduction to the textiles and clothing sector. It is illustrated that the sector is one in which many developing countries have a comparative advantage mainly due to the nature of its operations i.e. it requires relatively low technology and start up capital and makes use of one of the most abundant factors of production in developing countries principally labor. The chapter therefore addresses the role of the textiles and clothing sector in the economic development of developing countries but as well stresses the continued relevance of the sector in developed economies. Developing countries' reliance on foreign markets is another issue that has been explored in this section and it has been argued that this is mainly due to poorly developed internal markets. These countries have to rely on Western countries whose population, high incomes and purchasing power make them attractive markets for developing country products. By enabling developing countries to exploit the international markets this will have a positive impact on their growth prospects.

Also important in this chapter is the illustration that the textiles and clothing sector had for a long time been separated from the normal rules of multilateral trade. The decision to finally integrate the sector under the GATT/WTO rules and principles is a significant development in the history of the multilateral system. It presents an undreamed of opportunity to change rules and the prospect to improve the living conditions of the poor men and women who look to the sector as their only opportunity to improve their standard of living. The chapter therefore scrutinizes the principle of trade liberalization as the leading characteristic in the modern day globalization drive and how this is going to impact on the textiles and clothing sector. In evaluating the principle I have explored both its theoretical and practical underpinnings. The premise of this part of the chapter is that trade liberalization is an important step in the realization of economic benefits in the participating countries but even more so for the developing among these. It is illustrated that whereas there exists some difficulty in determining the exact

quantitative gains of the elimination of bilateral quotas all studies foresee significant increases in global welfare as a result of the conclusion of the ATC.¹

I have explored the current trends in the liberalization process highlighting the short term problems with which the principle is associated. While there are longer term benefits of liberalization there are significant short term risks and there is no clear cut formula that guarantees the avoidance of such risks.²

The chapter also discusses the importance of the multilateral system and its continued relevance. It is stated that the multilateral trading system is the most effective way of defending the interests of the weaker Members of the trading community. The creation of the WTO it has been stated is illustrative of the continued relevance of the multilateral approach.³ The chapter therefore analyses the viability of the WTO as a medium for the textiles and clothing liberalization process. I have made the argument that the multilateral system continues to be the most viable means of attaining economic development principally by reducing uncertainty among other things. This deduction is arrived at by illustrating the other avenues that have been tried and tested but whose results have shown that no noticeable benefits have been realized.

Developing countries hoped to gain significantly from the liberalization of the textiles and clothing. The discussion as such scrutinizes the ATC implementation process. It is concluded from the illustration that no significant progress was made in the implementation stages. As a result there is a fear of an enormous strain that is going to be placed on domestic economies and the multilateral system at the last stage of the integration process. This also raises concern about the commitment of developed countries to give up the protectionist tendencies in the sector. This discussion also illustrates that the impact of a successful implementation of the ATC which is on various fronts. Politically there is a gain related to the credibility of the multilateral trading system. It is argued that the system will be strengthened by commitment of Members

¹ Supachai Panitchpakdi, "The Importance of Quota Elimination for the Strengthening of the Multilateral Trading System" online <<http://trade-info.cec.eu.int/textiles/documents/108.doc>> (accessed on 2/2/2004) at 3.

² Sam Laird, Lucian Cernat & Alessandro Turrini, "Back to Basics: Market access issues in the Doha Agenda", (New York & Geneva: UNCTAD/UN, 2002) online: <<http://r0.unctad.org/p166/module2002Bangk/Module4/Backtobasics.pdf>> (accessed 10/17/2003) at 10.

³ Paul Streeten, *Globalization: Threat or Opportunity?* (Copenhagen: Copenhagen Business School Press, 2001) at 154.

illustrated by the willingness to effect commitments they have undertaken and also whether the WTO can demonstrate the ability to enforce its own rules. From an economic perspective there will be efficiency gains from eliminating the highly distorting MFA quotas and it is hoped that this will lead to increased production and trade.

Of particular importance is the provision in the ATC which stipulates that the agreement is not to be extended. This offers some assurance that the liberalization that begun under it will be completed as agreed. This is however dependent on Members acting on the spirit of the agreement.

Chapter II explores the specific multilateral rules under which the T&C will be traded following the integration in 2005 to ensure that the maximum possible benefit is realized through its defending of Members' interests. It is illustrated that overall the UR succeeded in establishing a more effective set of trade rules to be applied in the textiles and clothing trade. The other side to this argument is however that the UR rules shortchanged developing countries.

In this chapter an examination of current trends in textile and clothing trade performance, case law is indispensable to illustrate the conclusion that there is an opportunity as well as a challenge posed by the new regime. Significant barriers to the effective liberalization process under the multilateral rules still remain and this is expounded by the increased use NTBs as well as the potential threat of new ones coming up to replace the protective position that has been occupied by the MFA. The analysis therefore highlights the deficiencies and loopholes that continue to exist in the multilateral trading system and that require immediate attention since they will determine the volume as well as direction of the trade and its benefits once the sector is fully integrated. The principal argument is that considering that the international community is made up by many countries with varying capacities of performance, there is a need to ensure that the risks that come along with the benefits of liberalization do not wipe countries off the trade scene. The system should ensure mutual co-existence of the divergent needs and expectations and emphasize the principle of sustainability.

Chapter III proceeds to devise means of trying to correct the imbalances and deficiencies identified in the previous chapters as this was stated to be one of the principal goals of the Doha Development Agenda. The chapter underscores the trade and

development linkage pointing out that the principal goal of trade should be to improve the participant's conditions of life. The key issue for discussion in this section is market access. It is demonstrated that important biases against developing countries trade still exist and this therefore calls for further negotiations in this area so as to secure further opening to developing country textiles and clothing exports.

Also important in this chapter is that the discussion illustrates that the multilateral systems decision making process is characterized by asymmetries and imbalances. One explanation for this is a clash of fundamental interests with regard to issues of priority between developed and developing countries making it much more challenging to find a common cause and this has led to a state of stalemate in trade talks on achieving further liberalization.

The trade rules are unfair and clearly point to the fact that it is not the intention of the developed countries to promote or accommodate the views of developing countries in their efforts towards attaining meaningful development. Power struggles also continue to be an impediment in the trade negotiations. The rules are downplayed with the balance of benefits tilting in favor of those with the greatest muscle. I have argued therefore that for all fairness protectionist tendencies within the sector should be abandoned. There is a ray of hope in that developing countries in the discussions have become more united, are more articulate and it is doubtful if this negotiating strength that they have displayed so far is going to weaken.

4.2 Recommendations

The dismantling of the MFA presents unimagined benefits to participants in the textiles and clothing trade but in order for these to be reaped, conditions in the form of structural programs should be put place so that participants may take full advantage of the opportunities that the new regime promises to offer. It is important to note that these structural adjustments need to be made by not only the developing participating countries but also the developed ones since the new regime is not going to leave any country unaffected.

In addition, the opportunities for economic advancement and social development presented by the decision to liberalize the textiles and clothing sector as the discussion

has illustrated, come along with threats to the survival of sectors and in some instances those of entire economies. The situation therefore calls for the provision of safety nets for potential losers from the liberalization process to ensure that they are not wiped off the international trading scene. These safety nets may take the form of financial support and other forms of capacity building mechanisms. Financial support without conditionalities is welcome. Whether or not this is feasible bearing in mind that the whole edifice of the international trading system is founded on the principle of reciprocity is a challenge. Nonetheless the emphasis should be on mechanisms that will lead to diversification of commodities for export. Diversification of export commodities will provide some level security in international trade performance and cut down on the problems associated with over reliance on a few commodities. Also important is for such initiatives to involve natives in their administration reason being that they are more acquainted with the realities on the ground and will therefore be in a better position to identify areas upon which international experts will develop. Such an approach will ensure that countries make adjustments from the grass root level and improve performance in the international textiles and clothing trading community as well as other areas whose potential has been identified.

Although the WTO rules have worked well thus far and have led countries to experience greater levels of economic development, bearing in mind that there are can never be lasting solutions, the rules have been manipulated and abused, loopholes have emerged which have negatively affected the trading nations particularly the economically weak ones. As we saw earlier, with the elimination of the quotas in the sector, the use of NTBs is likely to come to the fore. It is therefore required that the WTO rules in this area be tightened to deal with the growing and pressing concerns of its Members in this area that NTBs will be take up the protective place that had been occupied by the MFA. By way of illustration, there is an urgent need to tighten anti dumping rules to prevent malicious and often unwarranted actions against developing countries' exporters with a view to cut down on their vulnerability in this area. By doing so these Members will offer their allegiance to the system knowing that their vulnerable position in international trade has not only been acknowledged but that the international system also provides assurance that their needs will be adequately dealt. The new rules should emphasize that Members

retract from their obligations of free trade only in those situations where there is a clear and imminent threat to the survival economies or perhaps a serious threat to human development. Perhaps more important is that this should be an ongoing process to deal with the new challenges as they arise.

Also in relation to the WTO rules, with regard to the DSB, efforts should be made to improve access to it especially by developing countries. This is a vital institution to the survival and performance of the system. Conditions for access to it by these countries however, requires improvement as this is the only avenue that they have to ensure that their interests in the international trading community are protected. As the trading system gets more complex, there is the need for constant personnel and economic resources to advance the growing concerns. By having a fully functional and readily accessible DSB system it provides a means of assurance that aggrieved Members will hold their transgressors accountable for their wrongful acts and be required to put right measures found to be in contravention with the letter and spirit of the WTO agreement. For weak nations also, an effective DSB is some kind of assurance that they will have the same treatment as their economically powerful nations in bringing claims. Disputes should also be completed expeditiously so as to limit on the additional costs incurred due to prolonged processes. Serious attention should be given to dealing with those instances where the Members due to the vacuity in the rules have been able to drag their feet in implementing decisions and remedies when 'unfavorable' rulings have been made against them. Requiring that a Member pay financial damages to another Member for costs incurred due to a delay by the first Member in removing a policy adjudged to be in contravention of the trade rules for instance will be an effective deterrent remedy. The challenge however will lie in devising a means to enforce the remedy. Multilaterally agreed rules on this matter should be formulated and this will cut down on the arbitrariness in the application of the remedy.

Also, the principle of SDT will continue to play an important role in the new textiles and clothing regime. With the persistence of significant inequalities in the level of development a case is made for continual operation of SDT so as to address some of the imbalances and reduce on the strain they place on the international trading system. This means therefore that in order for the principle to serve a meaningful purpose in this new

regime, it is required that it be strengthened. All efforts should be made to improve conditions of market access to make them more operational by increasing product coverage to areas of economic importance to developing countries like textiles and clothing. It is important that SDT not be a permanent feature but one that is in place for such time as is necessary to deal with the perceived imbalance by enabling Members attain tangible results from the multilateral system. This requirement presents a challenge to the preference giving countries to formulate schemes that are responsive to the development needs of the receiving nations. Such schemes could be in the form of policy space and flexibility in implementing of trade agreements for instance, not as to create shields from international developments as this will be an equivalent of reducing the relevance of underlying principles of the multilateral system but rather to bring the system more in line with the goals and aspirations of its weak participants. In addition, since there are variations in the level of economic development among developing countries, no general system for the application of preferences can adequately apply to all and therefore preference schemes should reflect these differences. To ensure that SDT does not become a permanent feature, graduation from taking benefit of the schemes should be based on multilaterally agreed objective criteria.

The final decision on the rate of tariff that will be applicable to the sector is crucially important. The rate at which this will be set will determine the level of performance of textiles and clothing producing and exporting countries. The applicable rate should be set at a level that allows for fair competition among the various traders and also one that serves the purpose of protecting domestic industries from unfair trade practices. It must be emphasized that a rate that is so high will be just as restrictive as the MFA. Members will be reliving the experience of the old regime under a new name.

Labor and environmental issues as well as other concerns falling under the 'new issues' category need to be addressed and the matter be resolved once and for all. There are a number of pressing issues in the international trading system that require the immediate attention of the WTO. By introducing a whole bundle of new issues it is clear that the system will be overburdened and fail operate to its utmost as it is expected even in those areas that are closely linked to its original mandate. It is evident that its effectiveness as a medium for trade facilitation may therefore be in a balance. It may thus

be argued that these issues are better off being dealt with under organizations with the specific directives to do so.

The above notwithstanding, the fact that labor and environment issues informed current textiles and clothing debates and also because it does not seem like the pressure from developed countries to introduce these issues within the trade policies is going to wane, perhaps the developing countries should think seriously about making provision for these “new issues” under their domestic systems because they will surely have an impact on their performance in the trade. Developing countries that have attained a certain level of competitiveness should incorporate demands by the international community for improved labor and environmental standards within their general development strategies to ensure that they are in line with the generally accepted principles. This will demonstrate that the principle of trade liberalization is aimed at improving the standard of life of the masses by providing them with a decent way of life i.e. the increases in global welfare should translate into a system that ensures for instance that the welfare of the man on the textiles and clothing production line is such that it facilitates his self development by emphasizing that the conditions under which he is working are geared towards this goal. Although many a time human beings are at the mercy of trade this is not what it should be. Trade does not exist for its own sake but to improve the quality of lives of the people. Policies and conditions under which people work should therefore be such that they promote the peoples general welfare and concerns.

Labor policies to be applied to developing countries should be reasonable i.e. according to their economic capacity to realize and maintain them. Overly ambitious legislation would clearly be of no effect as it will remain on the law books of many developing nations as skillfully drafted ideas serving no purpose because it is not backed by a means of enforcement which is crucial for the success of any legal policy. Also important is that the rules in this area be unambiguous so as to guard against the possibilities of being captured by protectionist sentiments.

For the Doha to be truly a ‘Development Round’ it should do more than simply mention the trade development linkage. While trade in some areas leads to development in others especially the economically weak nations who can not face up to the

competition, it leads to deceleration. The Doha Development Agenda should acknowledge these negative impacts created by the implementation of various UR agreements and also the liberalization of the sector by providing for positive steps to correct these imbalances and devise means for redress.

Members should also be mindful of the fact that whenever there is a discord on issues as was in Seattle and then repeated in Cancun it does not send a positive message about the relevance of the international trading system. There should be reflected a commitment to make the system work by not simply agreeing to general principles but also core issues aimed at improving the economic situation of participants. It is clear that each country benefits from the performance in the multilateral system. This means therefore, that there should be efforts to ensure that the existing conflicting views are accommodated to facilitate their mutual co-existence and be reconciled within the system to make the international trading community that we all want to see. To ensure that the experience of Cancun is not repeated, transparency and non discrimination in the operations of the system should be key in the administration of the multilateral system. All participating nations should feel that there is a reason for them to be involved in the discussions. Due consideration should therefore be given to the expressed positions of all Members of the trading community i.e. equality in the formulation of international trading policies is also important. Although this may not always be feasible, the weak Members should perceive the system to be an effective forum for negotiations. Although individually they lack the capacity to influence the direction of policies their support for the system is necessary to enable the system move forward. Members should guard against arbitrary exercise of power and the guiding principles in these meetings should therefore be fairness and equality.

With the numerous number of missed deadlines coupled with the recent collapse of the Cancun ministerial there is a fear that DDA will be extended. Extension is not the solution to the problem which lies in the already articulated positions of the developing countries. The international community must avoid all instances of stagnation. All efforts should be towards the successful completion of the textiles and clothing integration process and the Doha development Round so as to lead to a healthy trading system. This will create needed momentum for dealing with new issues. By getting the textiles and

clothing issue off the negotiating table, space will be freed up for other issues that are now increasing in importance. A successful completion of negotiations in this area will rekindle the trust of developing countries in the system. It will illustrate the willingness of developed countries to make good on their promises. Developing countries will as such be more willing to engage in negotiations aimed at extending discussions in the development agenda further into other areas.

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