

**A Legal Analysis of the Application of Articles I and III of the GATT 1994 on the
Economic Development of ECOWAS Member States**

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by

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Abstract

This dissertation examines the tension inherent in the relationship between the Economic Community of West African States (ECOWAS) as Member States Parties of the GATT/WTO and the GATT/WTO regime. It focuses specifically on the tension triggered off by the requirements of Article I – the Most-Favoured-Nation principle (MFN) and Article III – the National Treatment principle (NT) GATT 1994. It shows that while the non-discrimination principles are meant to promote trade liberalisation and economic growth, they produce the opposite effect in developing and least developed countries like ECOWAS and aggravate the tension between those countries and the WTO. It argues that the MFN is used to deny market access to the developing countries by exposing them to stiff but unequal competitive conditions and the NT to deny national governments the policy space to protect and promote national industries, employment and economic growth. It challenges the general assumption that the MFN and the NT are good and in the interest of all the WTO Members and rather identifies them as lynch-pins of economic development in the ECOWAS region. It also shows, contrary to the assumption of non-participation, how the ECOWAS High Contracting Parties are adapting their trading systems and harmonising their laws to the key provisions of Articles I and III of the GATT. It shows that the principles of non-discrimination are the outcome of the standard-setting procedures legally formulated as the SPS and TBT Agreements which favour the developed countries and how the Dispute Settlement Body has rejected the ‘aims-and-effect’ approach, taken a literal approach, overly emphasising trade liberalisation to the neglect of market access and economic development.

This dissertation concludes that it is pre-mature for ECOWAS to assume Articles I and III obligations and recommends using the provisions of Article XXIV to build up effective influence through regional organisations and incrementally uniting to transform the GATT.

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AB	Appellate Body (of the World Trade Organisation)
ACHPR	African Charter on Human and Peoples Rights
ACP	African, Caribbean and Pacific States
AGOA	African Growth and Opportunities Act
AJIL	American Journal of International Law
AMS	Aggregate Measure of Support
AU	African Union
BCEAO	La Banque Centrale des Etats de l’Afrique de l’Ouest (‘Central Bank of West African States’)
BYIL	British Yearbook of International Law
CAC	Codex Alimentarius Commission
CFA	<i>Coopération financière en Afrique centrale</i> ("Financial Cooperation in Central Africa")
CET	Common External Tariff
Colum. J. Eur. L	Columbia Journal of European Law
COMESA	Common Market for Eastern and Southern Africa
CON-SAD	Community of Sahel-Saharan States
CUSFTA	Canada-United States Free Trade Agreement
CVA	Canadian Value Added (Tax)
DDA	Doha Development Agenda
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EAC	East African Community
EBA	Everything But Arms
EC	European Communities
ECCAS	Economic Community of Central African States
ECJ	European Court of Justice
EEC	European Economic Communities
ECOSOC	Economic and Social Council (of the United Nations)
ECOWAS	Economic Community of West African States
EJIL	European Journal of International Law
EPA	Economic Partnership Agreement
ERA Forum	Journal of the Academy of European Law
FAB	Framework Agreement on Bananas
FAO	Food and Agricultural Organisation
GA	General Assembly (of the United Nations)
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GNP	Gross National Product
GSP	General System of Preferences
GSTP	Global System of Trade Preferences
HIPC	Heavily Indebted Poor Countries

ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICLQ	International & Comparative Law Quarterly
IEC	International Electrotechnical Commission
IGAD	Inter-Governmental Authority on Development
IMF	International Monetary Fund
IPPC	International Plant Protection Convention
ISO	International Organisation for Standardisation
ITO	International Trade Organisation
JAMA	Journal of American Medical Association
JIEL	Journal of International Economic Law
JWT	Journal of World Trade
LDCs	Least Developed Countries
MCC	Millennium Challenge Corporation
MDG	Millennium Development Goals
MFN	Most Favoured Nation
MVTO	Motor Vehicle Traffic Order
MTN	Multilateral Trade Negotiations
MTS	Multilateral Trading System
NAFTA	North American Free Trade Agreement
NAMA	Non-agricultural Market Access
NATO	North Atlantic Treaty Organisation
NBER	National Bureau of Economic Research
NEPAD	New Partnership for African Development
NICs	Newly Industrialised Countries
NT	National Treatment
NTBs	Non-technical Barriers
NYU int'l L & Pol	New York University Journal of International Law and Politics
OAPI	African Intellectual Property Organisation
ODA	Official Development Aid
OECD	Organisation for Economic Co-operation and Development
OHODA	Organisation for the Harmonisation of Business Law in Africa (French abbreviation)
OIE	International Office of Epizootics (Organisation for Animal Health)
QJE	Quarterly Journal of Economics
RtD	Right to Development
SADC	Southern African Development Authority
SCM	Subsidies and Countervailing Measures
SDT	Special and Differential Treatment
SIC	Sectorial Initiative on Cotton
SIEL	Society of International Economic Law
SPS	Agreement on Sanitary and Phytosanitary Measures
SON	Standards Organisation of Nigeria
Syracuse Int'l L. & Com	Syracuse Journal of International Law and Commerce
TBT	Agreement on Technical Barriers to Trade
TEDs	Turtle Excluder Devices
TFEU	Treaty on the Functioning of the European Union
TPRB	Trade Policy Review Body
TPRM	Trade Policy Review Mechanism
TPRR	Trade Policy Review Report
TRIMS	Trade-Related Investment Measures

TRIPS	Trade-Related Aspects of Intellectual Property
UMA	Union of the Arab Maghreb
UNCTAD	United Nations Conference on Trade and Development
UNDRD	United Nations Declaration on the Right to Development
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNO	United Nations Organisation
UNSWLT	University of New South Wales Law Journal
VCLT	Vienna Convention on Law of Treaties
UNTS	United Nations Treaty Series
WAEMU	West African Economic and Monetary Union
WAMZ	West African Monetary Zone
WHO	World Health Organisation
WTO	World Trade Organisation

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**A Legal Analysis of the Application of Articles I and III of the GATT 1994 on the
Economic Development of ECOWAS Member States**

Short Title: ECOWAS and the WTO Principles of Non-discrimination

Chapter 1: Introduction and Overview of the Study

Chapter Outline

1.8 Introduction

1.9 Statement of the Problem

1.10 Research Questions

1.11 Aims and Scope of the Study

1.12 Methodology

1.13 Limitations of the Study

1.14 Outline of dissertation

1.1 Introduction

The provisions of Article I of the General Agreement on Tariffs and Trade (GATT)¹ 1994 on the ‘Most-Favoured-Nation’² (MFN) Treatment’ and Article III on the ‘National Treatment’³ are ironically anti-development and constrain developing countries Members States Parties of the World Trade Organisation (WTO) because of their requirement of non-discrimination. While the WTO makes ‘redistribution claims,’⁴ it is accused of fostering a ‘hegemonic agenda’⁵ of the powerful states and capitalist transnational corporations by relocating sovereign powers of states in international institutions and thereby denying the states the policy space they need for economic growth and development.

¹ *Marrakesh Agreement Establishing the World Trade Organisation* opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), Annex 1A, *General Agreement on Tariffs and Trade* (hereinafter GATT 1994) 33 I.L.M. 1125 at 1144.

² Article I of the GATT 1994. Other provisions of the GATT 1994 containing MFN or MFN-like treatment are

- i. Article III:7 – on internal quantitative regulations,
- ii. Article V – on freedom of transit,
- iii. Article IX:1 – on marking requirement,
- iv. Article XIII – on the non-discriminatory administration of quantitative restrictions, and
- v. Article XVIII – on state trading enterprises, as well as Article XX the ‘General Exceptions’ which are MFN-like.

The following multilateral agreements also contain MFN treatment obligations

- i. The Technical Barriers to Trade (TBT) Agreement,
- ii. The Sanitary and Phytosanitary Measures (SPS) Agreement, and
- iii. The Agreement on Import Licensing Procedures.

³ Article III GATT 1994.

⁴ The Preamble to the Marrakesh Agreement Establishing the World Trade Organisation.

⁵ Bhupinder Chimni, ‘The WTO, democracy: a view from the South,’ in Carolyn Deere Birkbeck (ed) *Making Global Trade Governance Work for Development, Perspectives and Priorities from Developing Countries* (Oxford University Press 2011) 278. Generally see also Susan Marks, *The Riddle of All Constitutions: International Law, Democracy and the Critique of Ideology* (Oxford University Press 2000) and Shervin Majlessi, ‘From realpolitik of international trade to the Geneva Consensus,’ in Sarah Joseph, David Kinley and Jeff Waincymer (eds) *The World Trade Organisation and Human Rights: Interdisciplinary Perspective* (Edward Elgar 2009) 365-376

The tensions inherent in the multilateral trade regime for developing countries manifested early in the first decade of the GATT as three founding members: China, Lebanon and Syria withdrew from the Agreement. The GATT responded by establishing a panel of eminent economists that published the Haberler Report.⁶ The report pointed out that the GATT was skewed in favour of the industrialised North and against the interests of the developing countries due to the absence of any binding ‘provisions on commodities and industrial development’⁷ as well as market access. The GATT regulates the world trading system and as such ‘controls which development policies can be implemented in conjunction with international trade and the way in which they are implemented.’⁸ For example, it is estimated that there are ‘155 special and differential treatment provisions in the WTO’⁹ that have the potential to hinder the economic growth of developing and least developed countries. Under the GATT, Uruguay persistently complained of ‘576 restrictions maintained by developed countries that allegedly nullified and impaired Uruguayan exports.’¹⁰ There is an inherent tension between the needs of developing countries and the anti-discrimination principle; juridical equality is equality in the abstract that does not translate into capacity to benefit economically.

⁶ G Haberler, R Campos, JE Meade and J Tinbergen, *Trends in International Trade: A Report by a Panel of Experts* (GATT, Geneva, 1958). The report named after (Gottfried Haberler) the chairman of the panel of four eminent economists led to the setting up of three committees one of which was charged with looking into the problems facing the developing countries in international trade.

⁷ Andrew Lang, *World Trade After Neoliberalism: Re-imagining the Global Economic Order* (Oxford University Press 2012) 45.

⁸ KO Kufuor says that the WTO has a ‘considerable authority over its members.’ See Kufuor, *World Trade Governance and Developing Countries* (Blackwell Publishers 2004) and also Yong-Shik Lee, *Reclaiming Development in the World Trading System* (Cambridge University Press 2006) 4. An example of the control of the activities, legal framework and development policies of Member States is *US–Shrimp Turtle* WT/DS58/AB/R adopted 6 November 1998 where the Appellate Body decided that unilateral trade measures could be used to deny market access to exports of developing countries.

⁹ BS Chimni, ‘Developing Countries and the GATT/WTO System: Some Reflections on the Idea of Free Trade and Doha Round Trade Negotiations,’ in Chantal Thomas and Joel P Trachtman (eds) *Developing Countries in the WTO Legal System* (Oxford University Press 2009) 39.

¹⁰ Yong-Shik Lee above p. 32.

*The 'Leutwiler Report' – Trade Policy for a Better Future*¹¹ adumbrated the challenges facing developing and least-developed countries in the world trading system when it stated very bluntly as part of its recommendations that the '[d]eveloping countries receive special treatment in the GATT rules. But such special treatment is of limited value.'¹² It pointed out that

Far greater emphasis should be placed on permitting and encouraging developing countries to take advantage of their competitive strengths, and on integrating them more fully into the trading system, with all the appropriate rights and responsibilities that this entails.¹³

To achieve that, the Report pointed out the inadequacy of the GATT as a stand-alone solution and emphasised the need for greater co-operation, co-ordination and consistency between world economic institutions. It stated how interdependent and mutually re-enforcing the macro-economic policies and budgetary and fiscal policies are to each other:

The health and even the maintenance of the trading system, and the stability of the financial system are linked to a satisfactory resolution of the world debt problem, adequate flows of development finance, better international co-ordination of macroeconomic policies, and greater consistency between trade and financial policies.¹⁴

The GATT is based on three principles: non-discrimination, open markets and fair trade¹⁵ and numerous rules that make up the covered agreements. Commenting on the Leutwiler Report, Roessler observes a missing link: while 'the GATT aims at the integration among markets' by discouraging 'measures that discriminate against imports or in favour of exports, it does not significantly limit other forms of intervention in the economy,'¹⁶ for example, subsidies, yet

The theory of optimal intervention teaches that the most efficient policy to counter market distortions is a policy that attacks directly the source of the distortion. Since most market

¹¹ See Appendix 11 attached.

¹² Recommendation 10, *The Leutwiler Report in Trade Policies for a Better Future – Arthur Dunkel, The 'Leutwiler Report', the GATT and the Uruguay Round* (Martinus Nijhoff Publishers 1987) 14 (hereinafter *The Leutwiler Report*).

¹³ *ibid.*

¹⁴ Recommendation 15, *The Leutwiler Report*.

¹⁵ Frieder Roessler, 'The Scope, Limits and Function of the GATT Legal System,' in Arthur Dunkel (ed) (n 12) 72.

¹⁶ *ibid* 76-77.

imperfections arise within the national economy, the measures needed to attack the source of such distortions directly are generally not border measures but domestic policies, for instance policies to control monopolies or cartels or to subsidise or tax certain activities.¹⁷

The developing countries and the least-developed countries such as members of ECOWAS are severely at a disadvantage in the GATT because the GATT does not prohibit dumping but merely regulates the use of anti-dumping, does not guarantee free access to the supplies of other countries, does not formulate or impose any particular foreign policy goals on the Contracting Parties, does not oblige any country no matter how rich to give tariff preferences to developing or least-developed countries and ‘does not prescribe any system of ownership;¹⁸’ all that matters is if the economy is planned economy or a market economy. But it is [o]nly if the economic agents are autonomous competing entities do tariffs, quantitative restrictions *et cetera* play a role and only then do the GATT commitments regarding these policy instruments become relevant.¹⁹ So despite the fascination of fair trade advocates and writers of economic textbooks with ‘a fair distribution of economic sacrifice’ and ‘adjustment assistance programmes,²⁰’ the GATT is not about either of them. Instead of any of those, Roessler explains the real function of the GATT thus:

A government needs a framework of constraints on its policy options to defend not only the country’s interests but also its own.a government, whatever its structure or colour, effectively resolve in its trade policy the perennial conflicts between short-term political expediency and long-term national welfare, between the interests of producers and the interests of consumers or between society’s desire for economic growth and its desire to avoid the structural adjustments needed for growth.²¹

Patel, one of the authors of the Leutwiler Report takes up ‘the adjustment problem’ by first pointing out that ‘[i]f protection is to be rolled back in reality, we would certainly need to

¹⁷ *ibid* 77-78.

¹⁸ *ibid* 79-81. At page 79 Roessler notes: ‘The provisions on restrictive business practices in the Charter for the proposed International Trade Organisation, the Havana Charter, were not taken into the GATT, which in effect is the Charter’s commercial policy provisions’

¹⁹ *ibid* 81.

²⁰ *ibid* 82.

²¹ *ibid* 84.

arrive at a new and more enlightened consensus on the management of the macro aspects of the major economies of the world; and it is this which makes monetary, financial and trade issues so irrevocably intermixed.’²² Secondly, ‘low savings in the developed countries and – perhaps as a consequence – less willingness to share them with developing countries may well be the main bottleneck in constructive adjustment leading to sound growth all round.’²³

Although the GATT Director-General Arthur Dunkel stated that the seven eminent people who authored the Leutwiler Report ‘represented a spread of relevant disciplines’ and ‘came from many different regions of the world,’ none of them came from any of the fifty-four countries in Africa, the whole continent was left out.²⁴

Ostensibly the support of the developed countries for the Haberler and Leutwiler Reports and the recalibration of the GATT in 1994 was to redress the GATT regime to cater for the interest of the developing countries, but as Steinberg notes, the primary reason was the geostrategic goals of the United States and the West: to make the developing countries attaining independence in large numbers embrace the neoliberal market economy and turn away from Soviet communism. He observes:

By the late 1950s, many in the US Congress and State Department were concerned about the geopolitical alignment of the developing countries, a concern that became even more pronounced in the trade context after Soviet efforts to strengthen the UN Conference on Trade and Development (UNCTAD) in the early 1960s. This was a primary US consideration in supporting the work embodied in the Haberler Report and expanding GATT membership to the developing countries. US policymakers thought it would be impossible to reach agreement on a weighted voting formula and expand the GATT into a broad-based organisation that could attract and retain developing countries. Moreover, decision-making

²² IG Patel, ‘The Adjustment Problem,’ in Dunkel (n 12) 92. See also Recommendation 15 The Leutwiler Report, Appendix 11.

²³ *ibid* 94.

²⁴ Arthur Dunkel (n 12) 2. There was a good representation of developing countries in the eminent persons group: Inderapasad Patel (India) Mario Simonsen (Brazil) and Sumitro Djojohadikusumo (Indonesia). Europe alone was represented by three persons Pehr Gyllenhammar (Sweden), Guy de Lacharriere (France) and Fritz Leutwiler (Switzerland); North American had a representative in the person of Senator Bill Bradley of the United States. See Appendix 11 for the qualifications of the seven eminent persons who wrote the Leutwiler Report.

rules that were consistent with the principle of sovereign equality carried a normative appeal, particularly for less powerful countries.²⁵

Therefore, even though rational institutionalists²⁶ say that the quest for Pareto-improving co-operation among states is the spur, if not the basis, for committing to international institutions, ECOWAS Member States and the other developing and least-developed countries are yet to gain the market access recommended in the reports. The Sutherland Report²⁷ marking the tenth anniversary of the WTO still decried the same disadvantageous position in its conclusions and recommendations numbers 8, 13, and 27.²⁸ Nothing changed.

1.2 Statement of the Problem between the GATT Regime and ECOWAS

²⁵ Richard H Steinberg, 'In the Shadow of Law or Power? Consensus-Based Bargaining and the Outcomes in the GATT/WTO,' *International Organisation* 56, 2, Spring 2002, 344-345. Steinberg states that 'in trade negotiation, relative market size offers the best first approximation of bargaining power,' not sovereign equality despite its appeal to weak states (p.347).

²⁶ See generally Robert O Keohane, 'The Demand for International Regimes,' in Stephen D. Krasner (ed) *International Regimes* (Cornell University Press 1983) 141-172, and also by the same author, *After Hegemony* (Princeton University Press 1984). See also Arthur A Stein *Why Nations Cooperate* (MIT Press 1993).

²⁷ *The Future of the WTO: Addressing the Institutional Challenges in the New Millennium* – Report by the Consultative Board to the Director-General Supachai Panitchpakdi 2005 (hereinafter the Sutherland Report). Available at http://www.wto.org/english/res_e/publications_e/future_wto_e.htm. The Sutherland Report was aimed at addressing 'institutional challenges' in the WTO; it concerned decision-making and one of its most far reaching suggestions was to allow for 'variable geometry' in WTO law (Recommendation 26). The Consultative Board used the phrase 'variable geometry' in the sub-heading to this section of their report and the 'principle of plurilateral' and 'GATS "scheduling" approach' in Number 26 of their Principle Conclusions and Recommendations. As reported by Van den Bossche, Thomas Cottier has questioned whether the Sutherland Report would have a similar influence to the Leutwiler Report. It will not; it was not intended to have a similar influence. According to Jackson, the Consultative Board was not established by the WTO Ministerial Conference or the General Council but by the Director-General as a body to advise him. Jackson was reported as saying, 'the Board was not supposed to look at any issue on the agenda of the Doha Development Round negotiations. The Director-General did not want a report that would interfere with the ongoing negotiations but a report that would form the basis for a discussion over a long period of time on systemic problems facing the WTO. There was no intention to drive towards the implementation of the recommendations of the Report.' See Peter Van den Bossche, 'Debating the Future of the World Trade Organisation: Divergent Views on the 2005 Sutherland Report,' *JIEL* 2005 8(3) 759-768.

²⁸ Twenty years after the Leutwiler Report was first published, the Director-General of the GATT Supachai Panitchpakdi constituted the Consultative Board that wrote the Sutherland Report named after the chairman. The members of the Consultative Board were Peter Sutherland (Chairman), Jagdish Bhagwati, Kwesi Botchwey, Naill FitzGerald, Koichi Hamada, John H Jackson, Celso Lafer and Theierry de Montbrail. Their report touched on the peculiar challenges facing the developing and the least-developed countries: 'The developing countries, as they increasingly turn to trade liberalisation, often cannot afford the adjustment mechanisms to cushion the short-term impact on employment and other aspects of social welfare (Recommendation 8);' 'A special effort should be made to assist civil society organisations dealing with trade issues in least developed countries especially in Africa' (Recommendation 13); 'Whenever possible, new agreements reached in the WTO, in future, should contain provisions for contractual right, including the necessary funding arrangements, for least-developed countries to receive adequate and technical assistance and capacity building aid as they implement new obligations' (Recommendation 27).

The GATT imposes the MFN and National Treatment obligations which trigger off tension and conflict with the trade and development aspirations of ECOWAS as Contracting Parties. Even though there are exceptions to the principles,²⁹ it is important to examine the direct and indirect incidence of Articles I (MFN) and III ('National Treatment') because their scope 'determines how often governments can rely on the Article XX ('General Exceptions') in order to justify their laws and practices.'³⁰ Therefore, this dissertation undertakes a case study of the Economic Community of West African States (ECOWAS) and examines the tension between the WTO regime and the perceived interest of developing states which Robert Howse and Ruti Teitel refer to as 'the current level of dissent about the relationship of trade liberalisation to economic development.'³¹ ECOWAS is a regional economic group founded in 1975 'to promote economic integration in all fields of economic activity,' including 'commerce';³² but while it shares common objectives with the WTO in the area of trade promotion, it has other economic development objectives covering transport, telecommunications, energy, agriculture, natural resources, monetary and financial integration as well as social and cultural matters. The tension is debilitating and therefore unsustainable for the following reasons:

Firstly, while 'the core feature of the GATT/WTO is the requirement of non-discrimination,'³³ Articles I and III of the 'GATT are designed to protect expectations of competitive relationships, not actual trade flow';³⁴ therefore, trade facilitation is not one of the remits of the GATT/WTO and this leaves states without the capacity to engage in

²⁹ Article XX GATT 1994.

³⁰ Lothar Ehring, 'De Facto Discrimination in WTO Law: National Treatment and Most-Favoured-Nation Treatment – or Equal Treatment? Jean Monnet Working Paper 12/01, 27.

³¹ Robert Howse and Ruti G Teitel, 'Beyond the divide: the International Covenant on Economic, Social and Political Rights and the World Trade Organisation,' in Joseph, Kinley and Waincymer (n 5) 42.

³² <http://www.comm.ecowas.int/sec/index.php?id=about_a&lang=en > accessed 24 March 2012

³³ Howse and Ruti (n 31) 9.

³⁴ Thomas Cottier and Petros C. Mavroidis, 'Regulatory Barriers and the Principle of Non-Discrimination in WTO Law: An Overview,' in Thomas Cottier and Petros C. Mavroidis (eds) *Regulatory Barriers and the Principle of Non-Discrimination in WTO Law* (The University of Michigan Press 2000) 32.

international trade on their own. According to Jackson, Davey and Sikes, ‘the objective and purpose of Article I:1 is to prohibit discrimination among like products originating in different countries;’³⁵ it does not help in increasing the volume of trade originating in any country.

Secondly, the scope of Article I is too pervasive and leaves Members of the WTO with little room for manoeuvres for economic growth or recovery. Tension exists between an absolute principle of trade liberalisation and the need for protective measures to enable economic growth for vulnerable economies before they are exposed to the full rigours of competition.

According to the Appellate Body (AB) in *Canada – Autos*:

Article I:1 requires that “*any advantage, favour, privilege or immunity granted by any Member to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territory of all other Members.*” The words of Article I:1 refer not to some advantages granted ‘with respect to’ the subjects that fall within the defined scope of the Article, but to ‘*any advantage*’, not to *some* products, but to ‘*any product*’; and not to like products from some other Members, but to like products originating in or destined for ‘*all other*’ Members³⁶ (original AB emphasis).

Yet ‘[i]t does not, however, apply to the “right of establishment” (often found in FCN treaties)’³⁷ as is the case in the European Union³⁸ where the European Court of Justice has ruled that equal treatment with nationals is one of the fundamental legal provisions of the Community.³⁹ Therefore, while citizens of a WTO Member State can export their goods to another country and demand MFN and National Treatments, citizens of one WTO Member State cannot go and set up a professional business or practice in another WTO Member State

³⁵ John H Jackson, William J Davey and Alan O Sykes, Jr., *Legal Problems of International Economic Relations: Cases, Materials and Text*, (4th edn West Group, 2002) 435/36

³⁶ Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS/139 & 142/AB/R adopted by the DSB on 19 June 2000, para 79.

³⁷ John H Jackson, *The World Trading System* (The MIT Press 1997) 161. ‘Right of establishment’ confers freedom to provide services or the pursuit of an economic activity by a person from one Member State in another Member State.

³⁸ Article 52 of the *EEC Treaty* (Article 49 TFEU).

³⁹ *Jean Rayners v Belgian State*, Case 2-74, EC Reports 1974 00631.

on the basis of the MFN. So while Article I covers ‘any product,’ nothing in it whatsoever applies to *any person* and as such people from low income countries cannot seek jobs in high income countries based on the MFN or National Treatment. People who temporarily go to another WTO Member for purposes of employment are characterised as ‘service providers’ rather than workers.⁴⁰

Thirdly, as pointed out by Jeff Waincymer, the ‘question to ask in tandem is what is the philosophical justification for trade liberalisation.’⁴¹ The commentator answers that it is the ‘economic premise’ which libertarian free market advocates such as Robert Nozick⁴² base their argument. Therefore it is important to examine the application of the principle of non-discrimination on a particular group of WTO Member States, the ECOWAS, to assess whether the Agreement as it stands delivers economic growth. ‘The first level of analysis,’ Jackson states, ‘asks which rules of the GATT explicitly discriminate against the trade of developing countries. The answer to this question is generally *none*’⁴³ (italics added). Nevertheless, Jackson admits that the assessment of the impact of the GATT on ‘countries with low living standards and low wages ... involves the expertise of economists rather than lawyers.’⁴⁴ Many economists are unequivocal that the GATT is detrimental to the economic development of developing countries, that it ties them to a status of perpetual underdevelopment.⁴⁵

Fourthly, as the Pogge/Rawls debate over the interface between international law and economic growth shows, even the claim of redistribution by the WTO is suspect and

⁴⁰ Robert Howse and Ruti G Teitel, in Joseph, Kinley and Waincymer (eds) (n 5) 56.

⁴¹ Jeff Waincymer, ‘Trade and Human Rights Debate: Introduction to an interdisciplinary analysis, in Joseph, Kinley and Waincymer (eds) (n 5) 22.

⁴² Robert Nozick, *Anarchy, State and Utopia* (Basic Books, 1974)

⁴³ Jackson, (n 37) 320.

⁴⁴ *ibid* 319.

⁴⁵ See Part II, chapters 4, 5 and 6 of this dissertation.

arguable. Pogge asserts that international law in general and international economic law in particular is implicated in reproducing massive poverty but Rawls takes issue with that assertion.⁴⁶

Fifthly, the United States (US) and the European Union (EU) coerced other nations into signing the WTO Agreement.⁴⁷ The key results of the Uruguay Round of international trade negotiations, namely, the GATT 1994, the General Agreement on Trade in Services (GATS),⁴⁸ the Trade-Related Aspects of Intellectual Property Rights (TRIPS)⁴⁹ and the Dispute Settlement Understanding⁵⁰ (DSU) were presented to former GATT Contracting Parties and new Members of the WTO as a *single undertaking*⁵¹ leaving no options for

⁴⁶ Thomas Pogge, 'Divided against itself: aspiration and reality in international law,' in James Crawford and Martti Koskeniemi, *The Cambridge Companion to International Law* (Cambridge University Press 2012) 398-420. Pogge's contribution which forms chapter 17 of the book was advertised by the CUP in its catalogue ISBN 978-1-107-91516-9 (2012) as '**The Role of International Law in Reproducing Massive Poverty**' but was changed before the book came out. However, the same article had been published with the original title by the Oxford University Press; see Samantha Besson and John Tasioulas, *The Philosophy of International Law* (OUP 2010) 417-436

⁴⁷ *Marrakesh Agreement Establishing the World Trade Organisation* opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995).

⁴⁸ *Marrakesh Agreement Establishing the World Trade Organisation* opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), Annex 1B (*General Agreement on Trade in Services*, hereinafter the GATS).

⁴⁹ *Marrakesh Agreement Establishing the World Trade Organisation* opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), Annex 1C (*Agreement on Trade-Related Aspects of Intellectual Property Rights* hereinafter the TRIPS Agreement).

⁵⁰ *Marrakesh Agreement Establishing the World Trade Organisation* opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), Annex 2, *Understanding of Rules and Procedures Governing the Settlement of Disputes* hereinafter the DSU.

⁵¹ The so-called 'Single Undertaking' an all-or-nothing approach means that 'nothing is agreed until everything is agreed. Negotiations in the WTO proceed simultaneously, not sequentially, and all Members must accept all the results.' Robert Wolfe, 'The WTO Single Undertaking As Negotiating Technique and Constitutive Metaphor,' *Journal of International Economic Law* (2009) 12(4), 835-858. The Single Undertaking has many critics, some even calling for its elimination: Will Martin and Patrick Messeerlin, 'Why Is It So Difficult? Trade Liberalisation under the Doha Agenda' (September 2007) 23 *Oxford Review of Economic Policy*, 347-66 at 357. See also Robert Howse, 'WTO Governance and the Doha Round (December 2005) 5 *Global Economy Journal* Article 16; Philip I Levy, 'Do We Need an Undertaker for the Single Undertaking? Angles of Variable Geometry' in Bernard M Hoekman and Simon J Evernett (eds) *Economic Development and Multilateral Trade Cooperation* (London and Washington: Palgrave Macmillan; World Bank, 2005); Pierre Pettigrew and others, 'The Multilateral Trade Regime: Which Way Forward?' (University of Warwick: Report of the first Warwick Commission December 2007); Robert Z Lawrence, 'International Organisations: The Challenge of Aligning Missions, Means and Legitimacy' (2008) 31 *World Economy* 1455-70. Lastly, Stuart E Eizenstat and Grant D

nations to sign on to what they wanted. It has been pointed out that ‘TRIPS is an odd inclusion in WTO agreements, given that its implementation mandates the restriction of trade rather than trade liberalisations.’⁵² The developing countries objected to bringing GATS and TRIPS under the multilateral trade regime but immediately the US and the EU signed the new WTO Agreement on 15 April 1994, they ‘burnt the bridge’ by withdrawing from the GATT so that those who refused to sign the new Agreement would not demand the MFN and National Treatments from the two biggest markets and trading nations. The effect of that, Kenneth Shadlen stated, was that

Any country that did not sign the Uruguay Round’s Final Agreement and join the WTO would, formally, retain their rights under GATT 1947, but since the largest countries with the most important markets were no longer bound by GATT 1947, non-joiners would be *left with empty rights*. The result of this is that MFN-based market access is only available to countries that joined the WTO, thereby consenting to TRIPS, TRIMS, GATS, the Agreement on Subsidies and Countervailing Measures, and so on⁵³ (italics added).

This is not uncharacteristic of the US and the EU with its constituent states. The US withdrew from the International Labour Organisation in November 1977 and the US and the UK withdrew from UNESCO at a time.⁵⁴ Reasons: they failed to bend the organisations to carry out their biddings.

Lastly, the ‘WTO procedures and processes’⁵⁵ including ‘Articles I and III as traditionally interpreted’⁵⁶ are biased in favour of commercial trade interests and developed states and are

Aldonas, ‘Transatlantic Leadership for a New Global Economy’ (Atlantic Council of the United States: Policy Paper, April 2007) claim that the Doha Round will be the last ‘round’ of international trade negotiations.

⁵² Sarah Joseph, ‘Democratic Deficit, participation and the WTO’ in Joseph, Kinley and Waincymer (eds) (n 5) 336

⁵³ Kenneth C Shadlen, ‘Resources, rules and international political economy: the politics of development in the WTO,’ in , in Joseph, Kinley and Waincymer (eds) (n 5) 131

⁵⁴ Antonio Cassese, *International Law in a Divided World* (Clarendon Paperbacks 1986) 90

⁵⁵ Sarah Joseph, ‘Democratic deficit, participation and the WTO,’ in Joseph, Kinley and Waincymer (n 5) 320. See also chapter 6 of this research work on ‘WTO Adjudication.’

⁵⁶ William J Davey and Joost Pauwelyn, ‘MFN Unconditionality: A Legal Analysis of the Concept in View of its Evolution in the GATT/WTO Jurisprudence with Particular Reference to the Issue of “Like Product”’ in Cottier and Mavrodís (eds) (n 34) 41. For the adjudication of the MFN and National Treatment at the WTO see chapter 6 of this research.

against the economic growth of developing states. Chapter 6 will elaborate with specific cases on how the panels and the Appellate Body appear to pander to the wishes of the corporations and kowtow to the big trading countries as if trade liberalisation were an end in itself instead of a means to an end – ‘raising standards of living’ by ‘expanding the production and exchange of goods.’⁵⁷

Yet there is no ‘community duty’ which stipulates that disadvantaged states should be assisted by industrialised countries and multilateral corporations.⁵⁸ The present discordant debate within the international law epistemic community involving not only lawyers but international economists as well which Renato Ruggiero described as a ‘dialogue of the deaf’⁵⁹ is due to the coexistence and a clash of two principles: the ‘old’ and the ‘new’ international law, the former not recognising the ‘right to development’ and the latter asserting a ‘right to development’. Power, observes Cassese, is with the former but momentum is with the latter. The ‘old’ flaunts a claim to legality but not legitimacy as it is construed to be ‘inconsistent with the general values of the present world community.’⁶⁰ The world trading system is ‘geared to coexistence rather than cooperation.’⁶¹

But the situation across the developing world is dire and cries for explanations,

why global inequality is increasing so rapidly that substantial global economic growth since the end of the Cold War has not reduced income poverty and malnutrition – *despite* substantial technological progress and global economic growth, *despite* huge reported poverty reductions in China,⁶² *despite* the post-Cold War ‘peace dividend’,⁶³ *despite* substantial

⁵⁷ Preamble GATT 1994 para 2

⁵⁸ Cassese (n 54) 70.

⁵⁹ Renato Ruggiero, former Director General of the WTO, ‘A Shared Responsibility: Global Policy Coherence for Our Global Age’ (Address to the conference on ‘Globalisation as a Challenge for German Business’, Bonn, 9 December 1997) quoted by Jeff Waincymer in Joseh, Kinley and Waincymer (n 5) 6

⁶⁰ *ibid* 80.

⁶¹ *ibid* 71.

⁶² Citing Chen and Ravallion (2008, Table 7) Pogge (n 46) states that the number of Chinese living on less than \$2.50 per day (2005 PPP) decreased by 36 per cent, or 356 million, between 1987 and 2005.

declines in real food prices, *despite* official development assistance, and *despite* the efforts of international humanitarian and development organisations.⁶⁴ (original italics)

Therefore, the most important legal task confronting international economic and trade law experts, arguably, is how to mediate the imbalance in international economic relations.⁶⁵ Like slavery/slave trade, colonialism and apartheid before it, the task seems insurmountable at the beginning but the conviction that it is possible provides the impetus for this work. This dissertation posits that the problem is rooted in the law governing world trade, in the GATT, specifically in Articles I and III. This is a new turn in the theory and practice of international economic law and provides the justification for the substance of this work; and as for its focus on ECOWAS, the reason is that the fifteen-member Economic Community of West African States provides a typical example of a regional trade area that is made up of developing and least developed countries that lack both the political power and the economic leverage to exact influence and extract favourable trade concessions from their trading partners. This will help us assess how the GATT protects the weak and vulnerable against the industrialised and powerful trading nations because Article 3:2 DSU states categorically that ‘the WTO is a central element in providing security and predictability to the multilateral trading system.’ ECOWAS is representative of regional trade areas within Africa and around the world made up of developing countries.

But counterarguments do exist that state that the GATT is good for every nation, especially developing countries. Howse and Teitel contest both the normative and empirical foundations of Pogge’s argument that international law plays a role in reproducing massive

⁶³ According to the UNDP, as a result of the end of the Cold War, military expenditures world-wide declined from 4.7 per cent of aggregate GDP in 1985 to 2.9 per cent in 1996 (UNDP 1998, 197). The peace dividend is said to be worth more than \$1.2 trillion per annum today.

⁶⁴ Thomas Pogge (n 46) 388-9 and also in Samantha Besson and John Tasioulas (eds) *The Philosophy of International Law* (Oxford University Press 2010) 430-431

⁶⁵ *ibid* 396.

poverty, describing it as an ‘imaginary counter-vision’⁶⁶ of the world economic order. GATT economists strongly support the MFN or non-discrimination principle and argue that it has the following five significant benefits from ‘economic’ and ‘not-so-economic’ or political viewpoints:⁶⁷

First, ‘[f]rom the economic viewpoints, (the MFN principle) ensures that each country will satisfy its total import needs from the most efficient sources of supply, allowing the operation of comparative advantage.’⁶⁸ In simple terms, this means that the MFN principle minimises market distortions because states assuming the GATT discipline will apply trade restrictions uniformly without regard to the country of origin of the goods.

Second, ‘[f]rom the trade policy viewpoint, the MFN commitment protects the value of bilateral concessions and “spreads security around” by making them the basis for a multilateral system.’⁶⁹ The thrust of this argument is that the MFN engenders more liberal trade policies as more and more nations accede to the GATT, that is, that the MFN has a multiplier effect.

Third, ‘[f]rom the international-political viewpoint, the commitment to the MFN clause mobilises the power of the larger countries behind the main interest and aspiration of the smaller ones which is to be treated equally. It represents the only way to realise the ideal of sovereign equality of nations; in more practical terms, it guarantees the access of newcomers into international markets.’⁷⁰ This is the selling-point of the MFN to the developing countries

⁶⁶ Robert Howse and Ruti Teitel, ‘Global Justice, Poverty, and the International Economic Order,’ in Samantha Besson and John Tasioulas (eds) (n 46) 444

⁶⁷ *GATT Focus*, Sept-Oct. 1984 at 3.

⁶⁸ *ibid.*

⁶⁹ *ibid.*

⁷⁰ *ibid.*

that it gives economic power to small economies without the large market and influence needed to get what they want in a competitive market environment.

Fourth, '[f]rom the domestic-political viewpoint, the MFN commitment makes for more straightforward and transparent policies and for greater simplicity of administration of protection.'⁷¹ The reduction in transaction costs, the argument goes, comes as a result of the fact that customs officers would have no need to ascertain the origin of the goods controlled by MFN at the border.

Fifth, '[u]ltimately, the unconditional MFN commitment is a constitutional significance. It serves as the safe constraint on the delegated discretionary powers of the executive branch in trade matters.'⁷² A commentator has stated that the greatest merit of the GATT/WTO is its role in global economic governance rather than its pure economic advantages. The MFN contributes to domestic and international peace: at the domestic level, it checks the trade policies of the government in power irrespective of its political leanings and at the international scene, it dowses tension by making it 'illegal' for governments to resort to short-term economic measures that put other nations at a disadvantage, escalate tensions or fuel wars around the world.⁷³

John Fischer William provided the justification for international economic regulations and illustrated the *raison d'être* of trade rules such as the GATT as follows:

... It is open to any State without violating a legal rule, except in so far as it may be bound by commercial treaty, to take any measures which it may think fit in the sphere of international commerce. It may stretch out its hand into the economic life of its neighbour by destroying without compensation such part of its neighbour's trade as consisted in export to its own domestic market. The inhabitants of a particular district in one country may have for many years made their living by the supply of some article to another country; that other country may then suddenly and without warning put on a prohibitive duty against the import of the

⁷¹ *ibid.*

⁷² *ibid.*

⁷³ Kenneth C Shadlen, (n 35) 109-132.

particular article so supplied, and a peaceable group of producers in the first country is ruined without redress, by action over which its own government, in spite of its 'sovereignty', had in fact no sort of control.⁷⁴

Despite the above benefits, this dissertation will argue that at best, for the developed countries, they are confronted with a 'second-best'⁷⁵ option, the 'prisoner's dilemma'⁷⁶ and for the developing countries that Articles I and III of the GATT on the MFN and National Treatments function as 'binding constraints on (economic) growth'⁷⁷ because instead of bridging the gap between the rich and the poor, developed and developing countries, the WTO maintains and actually accentuates 'the prevailing international division of labour.'⁷⁸ As Cassese put it, 'international law was modelled in such a way as to "codify", legitimise and protect the interests' of 'the Great Powers'.⁷⁹ In fact, to the developing countries it is 'the frustration of (development) under WTO law acquired after protracted negotiations.'⁸⁰ Sauv  and Subramanian called the GATT a 'peace treaty among mercantilists'⁸¹ which raises the question whether 'major economic powers would be more or less able to exploit the poor absent a regulatory mechanism such as the WTO'⁸² or conversely if the developing countries would have done better outside the GATT/WTO legal system?

The arguments I will advance in the following chapters will show that the GATT is based on 'legal fictions (MFN and National Treatments) which' are based on juridical equality of

⁷⁴ John Fischer Williams, *Aspects of Modern International Law*, 108-9 quoted in Cassese n 54 above at 25.

⁷⁵ Jeff Waincymer (n 23) 5 & 6

⁷⁶ Applying it to the WTO, Kenneth Shadlen writes, 'the result of each country striving for its most-preferred choice is an outcome that is worse for all actors than had they cooperated and settled mutually on second-best choices' (n 35) 112. John H Jackson describes it as 'an optimum approach to avoid mutually destructive actions .. to enter into an agreement that effectively restrains attempts by any party to engage in "exploitative" behaviour' (n 19) 159

⁷⁷ Theo S Eicher, John H Mutti and Michelle H Turnovsky, *International Economics* (Routledge 2009) 322.

⁷⁸ Carolyn Deere Birkbeck (ed) *Making Global Trade Governance Work for Development* (Cambridge University Press 2011) 293.

⁷⁹ Antonio Cassese, (n 36) 25

⁸⁰ Howse and Teitel (n 13) 64

⁸¹ Pierre Sauv  and Arvind Subramanian, 'Dark Clouds over Geneva? The Troubled Prospects of the Multilateral Trading System' in Pierre Sauv  et al (eds) *Efficiency, Equity, Legitimacy: The Multilateral Trading System at the Millennium* (Brookings Institution Press 2001) 19

⁸² Jeff Waincymer (n 22) 30

states that ‘have no place on the international scene’ because they do not confer rights *erga omnes* and are by their nature ‘synallagramatic’ in that they impose reciprocal obligations between Contracting Parties.⁸³ As Jackson points out, ‘[e]ven when an MFN policy is ostensibly being carried out, an examination beneath the surface can sometimes detect a strong bilateral effect.’⁸⁴ Even though trade liberalisation generates apparent benefits, it merely contemplates transfers but does not mandate them, not even within states and least between states.

Again what Cottier described as ‘the deepest conceptual flaw and irony of the international human rights system,’ namely, ‘the implications of imposing standards that cannot be met by current levels of development’ is equally plaguing the GATT principle of non-discrimination.⁸⁵ I will argue that liberalising trade without the domestic infrastructure to support efficient distribution of its dividends is equally flawed.

Furthermore, that the world trading system and the GATT/WTO regime that supports it is one-sided and starkly adverse to the developing and least developed countries of the world appears to have been acknowledged by even the WTO itself by the addition of Part IV to the GATT 1994 on ‘Trade and Development,’⁸⁶ the Agreement on Safeguards⁸⁷ aimed at addressing the ‘conditions’ emanating from ‘the disciplines of GATT’ that ‘cause or threaten to cause serious injury to domestic industry;’⁸⁸ Articles XVI GATT and XV GATS on

⁸³ Antonio Cassese (n 54) 28

⁸⁴ Jackson (n 37) 171

⁸⁵ Thomas Cottier, ‘A Theory of Direct Effect in Global Law’ in A von Bogdany et al (eds) *European Integration and International Coordination: Studies in Transnational Economic Law in Honour of Clause-Dieter Ehlermann* (Kluwer Law International 2002) 99, 113

⁸⁶ Articles XXXVI to XXXVIII GATT 1994.

⁸⁷ *Marrakesh Agreement Establishing the World Trade Organisation* opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), Annex 1A (*Agreement on Safeguards*).

⁸⁸ Article 2 *Agreement on Safeguards*.

subsidies,⁸⁹ the Declaration on the TRIPS and Public Health,⁹⁰ the Generalised System of Preferences (the Enabling Clause),⁹¹ the Special and Differential Treatment and the naming of the Doha trade negotiations the ‘Development Agenda;’ and, in international law through the adoption of the UN resolution on ‘conflict diamonds.’⁹² International law seems to have admitted that trade should deliver economic growth and development through the establishment of the United Nations Conference on Trade and Development in 1964 and the promulgation of the International Covenant on Economic, Social and Cultural Rights in 1966.⁹³

1.3 Research Questions

My research questions examine various dimensions of the application of the GATT legal policies of the MFN and National Treatment enshrined as Articles I and III on ECOWAS.

Some of the questions were generated from Hudec’s *Developing Countries in the GATT*

⁸⁹ The GATT 1994 does not outlaw subsidies but rather provides in Article XVI:1 as follows: ‘If any contracting party grants or maintains any subsidy, including any form of income or price support, which operates directly or indirectly to increase export of any product from, or to reduce imports of any product into, its territory, it shall notify the CONTRACTING PARTIES in writing of the extent and nature of the subsidisation, of the estimated effect of the subsidisation on the quantity of the affected product or products imported into or exported from its territory and of the circumstances making the subsidisation necessary.’ See also *Agreement on Subsidies and Countervailing Measures, Marrakesh Agreement Establishing the World Trade Organisation* opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), Annex 1A (*SCM Agreement*).

⁹⁰ *Declaration on the TRIPS Agreement and Public Health*, WTO Doc WT/MIN(01)/DEC/2 (14 November 2001).

⁹¹ *GATT Council Decision on Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries (the Enabling Clause)* BIDS 26S/203 adopted on 28 November 1979. The words ‘developing countries’ as used in the text are to be understood to refer also to developing territories.

⁹² WTO Doc WT/L/676 (19 December 2006) <http://www.kimberleyprocess.com> last visited 9 April 2012.

The Kimberley Process started when Southern African diamond-producing states met in Kimberley, South Africa, in May 2000, to discuss ways to stop the trade in ‘conflict diamonds’ and ensure that diamond purchases were not financing violence by rebel movements and their allies seeking to undermine legitimate governments. In December 2000, the United Nations General Assembly adopted a landmark resolution supporting the creation of an international certification scheme for rough diamonds. By November 2002, negotiations between governments, the international diamond industry and civil society organisations resulted in the creation of the [Kimberley Process Certification Scheme \(KPCS\)](#). The KPCS document sets out the requirements for controlling rough diamond production and trade. The KPCS entered into force in 2003, when participating countries started to implement its rules.

⁹³ UN, *International Covenant on Economic, Social and Cultural Rights*, 999 UNTS 3. Opened for signature 16 December 1966 (entered into force 3 January 1976).

Legal System (1987),⁹⁴ the seminal book on the tension between the GATT/WTO regime and the developing countries which was followed twenty-two years later with a celebratory and similar title *Developing Countries in the WTO Legal System* (2009)⁹⁵ by scholars paying tribute to the man regarded as the pioneer and leading-figure of GATT law

- i. Do the new legal undertakings under Articles I and III of the GATT 1994 create new trade opportunities for developing countries?⁹⁶
- ii. Why did the United States which refused to accede to and ratify the Charter of the International Trade Organisation take the initiative for the GATT rounds of trade negotiations?
- iii. If the GATT 1994 is detrimental to the economic interests of the developing countries, as claimed, why did they sign up to it?
- iv. What efforts have the developing countries made to entrench economic development as a legal right recognised by the international community?
- v. Can international institutions such as the WTO serve as a façade and an acceptable public explanation for decisions taken for other reasons, in situations where the other reason would itself be difficult to defend politically?⁹⁷
- vi. How does the harmonisation of trade rules through international standard-setting affect ECOWAS?

⁹⁴ Robert E. Hudec, *Developing Countries in the GATT Legal System* (Gower, Aldershot 1987).

⁹⁵ Chantal Thomas and Joel P Trachtman (eds) *Developing Countries in the WTO Legal System* (Oxford University Press 2009)

⁹⁶ Hudec 168. See John H Jackson, Jean-Victor Louis and Mitsuo Matsushita, *Implementing the Tokyo Round: National Constitutions and International Economic Rules* (University of Michigan Press 1984) for the domestic legal structures in the EC, the US and Japan. Other works on the internal impact of GATT rules include Hudec, 'GATT or GABB? The Future Design of the General Agreement on Tariffs and Trade,' *Yale Law Journal*, Vol. 80, No. 7, 1971 1315-28; Freider Roessler, 'The Scope, Limits and Function of the GATT Legal System,' *The World Economy*, LKondon Vol. 8, September 1985 287-98; Jan Tumlrir, *Protectionism: Trade Policies in Democratic Societies* (American Enterprise Institute, Washington 1985); Tumlrir, *Economic Policy as a Constitutional Problem*, Fifteenth Wincott Memorial Lecture, Occasional Paper No. 70 (Institute of Economic Affairs, London 1985); Kenneth W Abbott, 'The Trading Nation's Dilemma: the Functions of the Law of International Trade,' *Harvard International Law Journal*, Vol. 26, No. 2, 1985, 521-25; Stephanie Lenway, *The Politics of US International Trade* (Pitman Publishing 1985).

⁹⁷ Hudec (n 94) 162.

- vii. How do ECOWAS Member States use the trade policy space provided by the GATT?
- viii. Has the interest in the legal theory of the WTO exceeded its practical relevance?
and
- ix. What are the emerging dynamics between the agreements, states' practices and the WTO dispute settlement mechanism in facilitating or frustrating trade and economic development in developing countries?

In sum, what does the experience of ECOWAS demonstrate about the actual and potential integration of development into the GATT/WTO legal system?

1.4 The Aims and Scope of the Study

This study aims to provide answers to the research questions above and thereby fill the gap in literature with the response, practice and harmonisation of particularly ECOWAS Member States with the international trade regime under the GATT. It is my aim to show that even though the GATT was not set up to address the problems confronting developing countries like ECOWAS; it could be renegotiated and reconstructed to cater for the interests of both developed and developing countries now that an overwhelming majority of the membership of the WTO (with an appreciable volume of the world trade) are developing and least developed countries.

It is also aimed at explaining the underlying current behind the key GATT rounds of international trade negotiations, why the US took the lead and how the international standard-setting procedures and the WTO adjudication process frustrate market access and end up making it impossible for the least developed countries to creep out of poverty.

Equally important and from a legal perspective, this study aims to make it clear that the key thing impeding economic growth and development are the provisions of Articles I and III of the GATT 1994 providing for the Most-Favoured-Nation treatment and National Treatment respectively. I do not suggest that the GATT or indeed international law is solely responsible for the poverty and gross human security crisis in the ECOWAS sub-region or in other developing countries. My point is that taken on its own and given the crucial role of international trade in any economy, the GATT contributes immeasurably to underdevelopment, economic stagnation and even recession.

In scope this study covers the fifteen West African countries that make up ECOWAS.⁹⁸ The rationale for choosing ECOWAS is that no study before this has examined how the regional group adjusts and harmonises its policies with the GATT. Another reason is that ECOWAS could be regarded as a microcosm of the WTO. They both have the common aim of trade liberalisation. Moreover, the WTO has actively encouraged regional trade agreements and markets as building blocks for its own edifice and therefore it is necessary to examine how this particular economic area feed into the WTO objective of trade liberalisation.

Again with the exception of Liberia which is negotiating to join the WTO,⁹⁹ all the other ECOWAS Members States are Member States of the WTO and only three countries (Ghana, Ivory Coast and Nigeria) are categorised as ‘developing’ while the rest are classified as least developed countries (LDCs). It will be both intriguing and revealing to evaluate whether the ‘legal’ platform provided by the GATT has helped this group of developing and LDCs realise the promises held out to them in the preamble to the GATT and WTO agreements.

⁹⁸ ECOWAS Member States are Benin, Burkina Faso, Cape Verde, Gambia, Ghana, Guinea, Guinea-Bissau, Ivory Cost, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo. Available at www.ecowas.int

⁹⁹ The Republic of Liberia submitted an application for accession on 13 June 2007 and a Working Party was established on 18 December 2007 but no chairman has been appointed and it has not yet met. http://www.wto.org/english/thewto_e/acc_e/a1_liberia_e.htm accessed 19 April 2012.

Therefore, it is my aim to assess how far the GATT has been ‘mutually advantageous’ in the ‘elimination of discriminatory treatment in international commerce.’¹⁰⁰

My research analyses the growth of the WTO legal framework through the key GATT rounds of trade negotiations¹⁰¹ It will find answers to why the so called ‘Doha Development Agenda’¹⁰² is floundering and why the WTO is plagued by both the apprehension of the developed countries who are keeping their agricultural subsidies despite the ‘Most-Favoured-Nation’¹⁰³ and ‘National Treatment’¹⁰⁴ principles and the scepticism of the developing countries that see the organisation as a post-colonial colonialism with an ostensibly operational headquarters in Geneva. With agriculture being the recurring exception to the GATT rules on anti-dumping (Art. VI), quantitative restrictions (Art. XI), subsidies (Art. XVI) and emergency action (Art. XIX), the principles seem to lack depth and substance. My aim is to provide a legal analysis that is not usually found in textbooks and general treatises on international economic law¹⁰⁵ by showing what the original club of twenty-three trading nations can and cannot do for its present membership that is over 150 countries.¹⁰⁶

My intention is to go beyond academic prescriptions of reforms by presenting, through the provisions of the GATT and case-law (such as *India – Quantitative Restrictions*)¹⁰⁷, an exposé and a perceptual approach to the WTO to proffer solutions to the excessive or misplaced optimism coming mainly from the developing countries that are making demands

¹⁰⁰ Preamble, GATT 1994 para 3

¹⁰¹ The Kennedy, Tokyo and Uruguay Rounds of multilateral trade negotiations.

¹⁰² Initiated at the November 2001 Declaration of the Fourth Ministerial Conference in Doha, Qatar

¹⁰³ Article I GATT 1947

¹⁰⁴ MFN and National Treatment which some see today as the brain-child of the WTO and unique can be traced back to many economic and trade treaties as far back as the Anglo-French Treaty of 1860.

¹⁰⁵ Harold G. Moulton, ‘Forward,’ William Adams Brown, Jr, *The United States and the Restoration of World Trade* (The Brookings Institution, Washington, D.C. 1950) V Henry Gao and CL Lim, *J Int Economic Law* 2008 11: 899-925

¹⁰⁶ Figure obtained from www.wto.org accessed on 14 November 2009

¹⁰⁷ WT/DS90/AB/R, adopted 22 September 1999.

from an organisation that was not set up with them in mind. ‘By its nature, the reciprocal bargaining that is at the heart of the process of trade liberalization in the GATT framework is a game to be played by countries that have something to bargain with.’¹⁰⁸ Rorden Wilkinson argues that the collapse of the WTO Ministerial conferences and missed deadlines are part of a deeper crisis and states that the GATT and subsequently the WTO have evolved in the service of its main architects (the US and the EU), thus creating ‘asymmetry of opportunities’ for the majority of its developing country members.

Lastly, this study, as the titles says, is limited to a ‘legal analysis’. Therefore, the detailed examination of the trade ‘impact’ or ‘proximate cause’ of the measures complained of ‘on the economy of developing country Members concerned’¹⁰⁹ is, in my view, in the realm of economics and outside the scope of this study. A legal analysis is ‘about competitive opportunities, not actual trade flow’ according to DiMascio and Pauwelyn, and as such, ‘there is no need to demonstrate how such laws or regulations specifically target or affect the rights of individual foreign traders or businesses.’¹¹⁰ As the Appellate Body stated in *Japan – Alcohol*,

[T]he trade effects of the trade differential between imported and domestic products, as reflected in the volumes of imports, are insignificant or even non-existent; Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products.¹¹¹

¹⁰⁸ Martin Wolf, ‘Introduction,’ to Bevan et al, *East African Lessons on Economic Liberalization*, (Gower, Aldershot 1987) xiv

¹⁰⁹ *Marrakesh Agreement Establishing the World Trade Organisation* opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), Annex 2, *Understanding of the Rules and Procedures Governing the Settlement of Disputes* (hereinafter the DSU) Article 21:8

¹¹⁰ Nicholas DiMascio and Joost Pauwelyn, ‘Non-Discrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?’ 102 *Am. J. Int’l L.* 62.

¹¹¹ AB Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, & WT/DS11/AB/R adopted 23 October 1996, (hereinafter *Japan – Alcohol*).

Again and of equal importance, ‘it is irrelevant that protectionism was not an intended objective.... This is an issue of how the measure in question is *applied*,’¹¹² (original emphasis).

1.5 Methodology

My choice of methodology here is a combination of historical, inductive and empirical (panels and AB cases) analyses that are cognate in addressing the research questions posed above. It is not an *ex ante* analysis of what the likely effects of the GATT will be but an *ex post* analysis of what it has been thus far.

Petersmann probes ‘why past doctrinal disputes’ among legal scholars’ have lost much of their relevance for interpreting IEL’ (International Economic Law) and asks, ‘[i]s it possible to share a common methodology for IEL research without a common theory of IEL?’¹¹³ Although he maintains that ‘legal methodology in IEL research remains contested, he favours the empirical method which I adopt here because IEL is ‘multi-disciplinary ... blending legal analysis with political science, economics and other fields.’¹¹⁴ The contestation arises because what is ‘justice’ in the context of IEL is contested and so ‘methodology in IEL research remains contested.’¹¹⁵

The main reason for my adoption of the historical, empirical and inductive method of analysis is due to the nature of the study which relies heavily on primary data (trade policy review reports and Panel and Appellate Body reports) and demands a factual exposition of what happened and not a conjecture or hypothesis of what might have happened. The focus

¹¹² *Japan – Alcohol* *ibid* at 27-28.

¹¹³ Ernst-Ulrich Petersmann, ‘*JIEL Debate: Methodological Pluralism and Its Critics in International Economic Law Research*,’ *JIEL* 15(4) (2012) 921-970.

¹¹⁴ *Ibid* 922.

¹¹⁵ *Ibid*.

is on substantive provisions of the WTO Agreements and ‘on matters of legal interpretation’¹¹⁶ that is, the applicability of and conformity with the relevant covered agreements¹¹⁷ to uncover ‘the factual basis and basic rationale underlying the findings’¹¹⁸ of both the Panel and the Appellate Body. The empirical and historical method is expository, holistic and somewhat exhaustive; analysing events, delineating causation, questioning assumptions and evaluating claims.

Another reason for adopting the empirical and historical analysis is because it is ‘helpful,’ according to the arbitrator in *US – FSC*, ‘in understanding *the overall architecture* of the Agreement’¹¹⁹ (emphasis added). Therefore this method of analysis lends itself to unearthing both the ‘object and purpose,’¹²⁰ and ‘the circumstances of (the) conclusion’¹²¹ of the Marrakesh Agreement Establishing the WTO and its key provisions of non-discrimination in Articles I and III of the GATT 1994.

The methodology adopted here is without prejudice to different approaches taken by some eminent scholars in their analysis of Public International Law generally and International Economic Law and regional economic blocs in particular. While Cassese¹²² adopted the

¹¹⁶ Excerpt from Brazil’s letter dated 23 May 2003 used in the Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R 3 September 2004 adopted 21 September 2004 (hereinafter *US – Upland Cotton*) 20.

¹¹⁷ *US – Upland Cotton* ibid 24.

¹¹⁸ Ibid 25.

¹¹⁹ *United States – Tax Treatment for ‘Foreign Sales Corporations’*, WT/DS108/ARB 30 August 2002, original Panel and Appellate Reports adopted on 20 March 2000 (hereinafter *US – FSC*).

¹²⁰ Article 31, *The Vienna Convention on the Law of Treaties 1969* (hereinafter VCLT).

¹²¹ Article 32, VCLT. See also *US – Upland Cotton* para. 7.7.933 together with footnote 112.

¹²² Antonio Cassese (n 54) particularly chapters 2 and 3, ‘Historical Evolution of the International Community: the Former Setting (1648-1918)’ and ‘Historical Evolution of the International Community: The New Setting (1918- to the Present) respectively, 34-73. Cassese’s thesis is that international law preoccupies itself with the ‘process of formulation of universal principles... (because) [i]n the present world community, where States are divided economically, politically, and ideologically to such an extent that their relations are daily beset with friction and tensions, the principles at issue possess tremendous importance, for they represent the only set of standards on which States are not fundamentally divided.’ (p. 128) Therefore his historical analytic approach best synthesises the developmental process in a holistic way without falling foul of the common vulnerability of hypothetical and theoretical analysis.

historical analytic method to explore the role of international law in a divided world, Kufuor¹²³ deployed the New Institutional Economics and Ordoliberalism theories and subjected the Economic Community of West African States to a thorough institutional analysis; yet Lang¹²⁴ primed into the future of the world trade regime by re-imaging the global economic order after neoliberalism. Irrespective of the methodology adopted, Lang maintains that '[w]hat is at stake is, also – much more importantly – the ways in which the projects, values, mandates, and normative biases of the trade regime are constituted in the first place'¹²⁵ hence my choice of a methodology which goes beyond how the world trade regime was 'constituted' and looks at the 'overall architecture' too. When he resorted to historical analysis Kufuor stated that '[t]he use of history is valuable in that it enables scholars and decision-makers to avoid a misunderstanding of current economic problems.'¹²⁶ I am in full accord because 'the success of the WTO as an effective international institution is

¹²³ Kofi O Kufuor, *The Institutional Transformation of the Economic Community of West African States* (Ashgate 2006) 1-18. Kufuor acknowledges the contributions of the pioneer scholars of institutionalism such as Ronald Coase and Douglas North and their view that 'the world is not free of transaction costs and thus institutions are created to protect mutually agreed bargains by lessening the incentives for post-bargain opportunism' (p. 3). The ordoliberals such as Walter Eucken and Franz Bohm (also known as the Freiburg School), on the other hand posit that the ultimate aim of global economic governance should be a human, socio-economic and political order. Their main contention is that if the market is given a free reign and allowed to run full throttle, it would inevitably lead to inequalities because of the power of the privileged class and their ulterior motives as rent seekers with the capacity to influence both national and international trade policies in their favour resulting in mass inequality and poverty. After subjecting the ECOWAS project to institutional and ordoliberal analysis, Kufuor's research effort turned to identifying the 'persistent paralysis of ECOWAS' which he 'partly explained' as being 'the neglect of national conditions as a pre-requisite for a successful regional order.' Kufuor canvassed for 'the role (of) national courts and civil society in the ECOWAS process' (pp. 66-69).

¹²⁴ Andrew Lang, *World Trade Law After Neoliberalism: Re-imaging the Global Economic Order* (Oxford University Press 2011) 1-57. Lang defined neoliberalism 'for the purposes of (his) book' as 'a turn away from an idea of politics as the creation, mobilisation, and realisation of the collective purposes of a political community, towards an idea of politics as the facilitation of individuals' pursuit of their own private goals and purposes' (p. 1). The neoliberal project is associated with the Washington Consensus which according to Narcís Serra, Shari Spiegel and Joseph E. Stiglitz refers to 'the set of views about effective development strategies that have come to be associated with the Washington-based institutions: the IMF, the World Bank, and the US Treasury. See Narcís Serra and Joseph E. Stiglitz (eds) *The Washington Consensus Reconsidered* (Oxford University Press 2008) 3.

The Washington Consensus was a ... response to a leading role for the state in initiating industrialisation and import substitution. The Washington Consensus said that the era was over – Williamson (1990) quoted by Serra and Stiglitz above.

'Proponents of the Washington Consensus argue that the original conception had three big ideas: a market economy, openness to the world, and macroeconomic discipline.' Serra and Stiglitz above.

¹²⁵ *ibid* 14 and 15.

¹²⁶ *ibid* 19.

not dependent upon acceptance of a particular set of economic theories’ in the face of ‘highly contested uncertainties.’¹²⁷

Trade liberalisation and economic development of developing and least developed countries, the thrust of my study, is different from WTO debates in other fields known as ‘linkage’ or ‘trade and ...’ debate. Even though there might be similarities in tone, I do not intend to approach this study from a human rights perspective because a ‘human rights approach to trade ... implies a different normative standpoint in choosing between different kinds of trade policy: in a human rights approach, the imperative is not to choose the policy which maximises growth or wealth, but rather that which maximises the enjoyment of human rights.’¹²⁸

This is not to say that economic development is not richer with human rights and social dimensions added to it.¹²⁹ It is my position that ‘economic development’ having been used in the opening paragraph of the Agreement Establishing the WTO, that a legal argument can be founded solely on the economic dimension without leaning on the International Convention on Economic Social and Cultural Rights and the attendant debates about their hierarchy and justiciability. Although he was writing about foreign direct investment, what Oliver De Schutter said applies with equal measure to the GATT. His framework on how to advance the responsibilities of corporations is that we should move the discuss from ‘micro’ to ‘macro’ level, for our present purposes, the law that applies to international trade.¹³⁰ According to him, ‘the right to development, defined by the human rights it facilitates, is quite distinct from the question whether, as foreign investors, transnational corporations

¹²⁷ Peter Van den Bossche, ‘Debating the Future of the World Trade Organisation: Divergent Views on the 2005 Sutherland Report,’ *JIEL* 2005 8(3) 759-768.

¹²⁸ Andrew Lang, ‘Inter-regime Encounters,’ in Joseph, Kinley and Waincymer (eds) (n 5) above 172.

¹²⁹ Isabella D Bunn, *The Right to Development and International Economic Law* (Hart Publishing 2012) 287

¹³⁰ *ibid* 288

respect the full panoply of internationally recognised human rights (law) in their operations.’¹³¹

The approach adopted in this study is from an entirely different normative standpoint. While ‘trade and human rights’ sounds like asking the WTO to engage in something that ‘cannot be *core* objectives of a trade regime’¹³² (original italics), ‘trade and economic development’ is challenging the WTO to ensure at *all* levels: policy, process and adjudication that its stated objective of enhancing economic development is not undermined. In this perspective, the principle of non-discrimination is seen as a means to an end and not an end in itself. Again, legally speaking, not much has been achieved in terms of development as a human right and as noted by a commentator, ‘it would seem difficult to argue that the right to development, despite its aspiration ... (and) ... moral dimension ... has succeeded even in changing the terms of the debate.’¹³³

The methodology is causal, historical, case-law based and selective: the analysis will focus on WTO disputes where the parties complained of ‘less favourable’¹³⁴ treatment on the bases of the MFN and National Treatment such as *EC – Bananas III (US)*,¹³⁵ *Brazil – Aircraft*¹³⁶ and *Dominican Republic – Import and Sale of Cigarettes*¹³⁷ which they alleged constituted a ‘nullification’ or an ‘impairment’ of the ‘benefits accruing to them directly or indirectly under the covered agreements.’¹³⁸ I will, through the use of the research questions be

¹³¹ Oliver De Schutter, ‘Transnational Corporations as Instruments of Human Development’ in Philip Alston and Mary Robinson (eds), *Human Rights and Development: Towards Mutual Reinforcement* (OUP 2005) 401-44 at 405

¹³² *ibid* 183.

¹³³ Philip Aston (n 95) 427

¹³⁴ Article III(4) GATT

¹³⁵ WT/DS27/AB/R/USA, adopted 25 September 1997

¹³⁶ WT/DS46/AB/R, adopted 20 August 1999.

¹³⁷ WT/DS302/AB/R/, adopted 19 May 2005.

¹³⁸ DSU Article 3(3)

‘searching for historical patterns, constructing theories to explain them’¹³⁹ and testing the theories against WTO decided cases. This approach or methodology is inductive¹⁴⁰ and scientific rather than deductive¹⁴¹ and presumptive. John Stuart Mill states that ‘all inference, consequently all Proof, and all discovery of truths not self-evident, consists of inductions, and the interpretation of inductions,’ and defines ‘Induction properly so called, ... may, then, be summarily defined as Generalisation from Experience.’¹⁴²

My research methodology is mainly library research drawing from such sources as textbooks, academic journals, WTO case-law and other resources and the publications of non-governmental organisations such as Oxfam and Consumer International. Again my methodology is multidisciplinary drawing from history, politics, economics, literature and philosophy because the ‘study by academic lawyers of ECOWAS as an institution embedded in the socio-political history of West Africa, contributes to understanding its objectives, its institutional design and its failings.’¹⁴³

1.6 Limitations of the Study

The most outstanding limitation of this study is lack of decided GATT/WTO cases involving ECOWAS Member States as complainants or respondents (first or second parties). A few of

¹³⁹ Ha-Joon Chang, *Kicking Away the Ladder – Development Strategy in Historical Perspective* (Anthem Press, London 2005) 6

¹⁴⁰ John Stuart Mill, *System of Logic Ratiocinative and Inductive* (Longmans, Green, & Co., London 1900) 185 and 200. Bertrand Russell, ‘What Is an Inductive Argument?’ in Richard Swinburne ed. *The Justification of Induction* (Oxford University Press 1974) 1 gives the following syllogism as an example of a valid induction:

Premiss 1: Always within human memory the sun has risen in London at intervals of approximately twenty-four hours.

Premiss 2: The sun rose in London this morning at 8.00 a.m.

Conclusion: The sun will rise in London at approximately 8.00 a.m. tomorrow.

He defines an inductive argument as ‘one which in the premises do “make it reasonable” for us to accept the conclusion, as claimed.’

¹⁴¹ According to Roy Harrod, ‘Deduction and induction have traditionally been the two kinds of inference studied in logic. In this tradition deduction consisted in argument from a general premise, while inductive argument proceeded from particulars.’ *Foundation of Inductive Logic* (Macmillan, Totawa, N.J. 1974) 1

¹⁴² n 98

¹⁴³ Kufur, *The Institutional Transformation* (n 123) 124

them have appeared as third parties only in a few cases and even at that without filing long, logical and sustained briefs stating their views and positions. Therefore, the validity of the contested legal principles notwithstanding, the cases analysed in this study are tangentially applicable to ECOWAS as a regional economic group.

Again ECOWAS is only one of the fourteen regional groups in Africa. Time and resources would not allow the study of other similar groups within the continent or even outside the continent such as the Association of South East Asian Nations (ASEAN) to compare any of them with ECOWAS.

1.7 Outline of dissertation

This study is in seven chapters that are divided into three parts. Part I contains the preliminary chapters which are chapters 1, 2 and 3 which adopt the historical, causal and inductive method of analysis. Chapter 1 covers the introduction which concludes with this outline. Chapter 2 is in three sections and the first section gives the historical background to the key GATT rounds of trade negotiations, namely, the Kennedy, Tokyo and Uruguay rounds; the second section traces the history of the most-favoured-nation principle in international economic relations; and, the third and final section concludes with the national treatment principle. Chapter 3, the last chapter in Part I, examines the contested concept of development in international law. It analyses international covenants and declarations on the right to development as well as its legal status.

Part II forms the substantive part of this study and covers chapters 4, 5 and 6. Chapter 4 examines the legal regime of the WTO with respect to international standard-setting and evaluates the operation of the Agreement on the Application of Sanitary and Phytosanitary

(SPS) Measures¹⁴⁴ and the Agreement of Technical Barriers to Trade (TBT).¹⁴⁵ The international organisations involved in setting standards and the implications of their work on the developing and least developed countries are the main focus of the chapter. Chapter 5 is on ‘Trade Policy Reviews’ and seeks to correct the impression that ECOWAS Member States do not make use of the GATT. It explains that due to their level of economic development, ECOWAS Member States make use of the administrative rather than the judicial mechanism of the WTO or engage in what Kufuor calls ‘tactical participation.’¹⁴⁶ The concluding chapter of this part is on WTO adjudication. Through detailed case analysis, it shows that the dispute settlement process is mechanistic, pro-trade liberalisation and seems to pursue a neoliberal agenda different from the stated object and purpose of the WTO and is used to stifle the economic growth and development of developing countries.

Part III which is only chapter 7 makes some findings and concludes this study.

This chapter has introduced the focus of this work which is the tension between the requirement of trade liberalisation based on the non-discrimination principles in Articles I and III of the GATT 1994 and the quest for market access and economic development based on the Preamble and Articles XXXVI to XXXVIII of the same GATT 1994. The tension divides the membership of the WTO between economic lines of developed and developing countries; the former aggressively support the WTO policy of trade liberalisation, the latter insists that economic development should be at the heart of the WTO, otherwise their membership would be useless. The developing countries complain that they are severely

¹⁴⁴ *Marrakesh Agreement Establishing the World Trade Organisation* opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), Annex 1A (*Agreement on the Application of Sanitary and Phytosanitary Measures*) (hereinafter the SPS Agreement)

¹⁴⁵ *Marrakesh Agreement Establishing the World Trade Organisation* opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), Annex 1A (*Agreement on Technical Barriers to Trade*) (hereinafter the TBT Agreement)

¹⁴⁶ Kofi Kufuor, *World Trade Governance and Developing Countries – The GATT/WTO Code Committee System* (Royal Institute of International Affairs and Blackwell Publishing Ltd 2004) 55

constrained by Articles I and III and so cannot attain any appreciable level of economic development with the rules applied in their present form.

The next chapter will explore how the GATT came to be and how the MFN and National Treatment principles came to be the cornerstones of the GATT.¹⁴⁷

¹⁴⁷ For Part I of chapter 2 see Joseph Ife Ogbonna, 'WTO for Who: Towards a Philosophy of WTO Law?' in Nokuhle Madolo (ed) *International Economic Law: The Voices of Africa* (SiberInk 2012) 198-225

Chapter 2

The Evolution of the GATT and the Development of the Most-Favoured-Nation and National Treatment Principles

Part I – A Short Teleology of the GATT/WTO

- 2.1 Introduction
- 2.2 The Pre-GATT World: the Era of Unilateralism
- 2.3 The GATT Era: Multilateralism and Keynesianism
 - 2.3.1 The Kennedy Round
 - 2.3.2 The Tokyo Round
 - 2.2.3 The Uruguay Round
- 2.4. WTO Ministerials
 - 2.4.1 The Infancy Period
 - 2.4.2 The Seattle Ministerial Conference
 - 2.4.3 The Doha Ministerial Conference
 - 2.4.4 The Cancún Ministerial Conference
 - 2.4.5 The Geneva Conferences
- 2.5 Summary

Part II The Most-Favoured-Nation Treatment

- 2.6.1 Introduction to the Development of the MFN Principle
- 2.6.2 Conditional and Unconditional MFN
- 2.6.3 The Principle of Non-Discrimination in Customary International Law
- 2.6.4 The Object and Purpose of Article I GATT
- 2.6.5 The Scope of the MFN Obligation in the GATT
- 2.6.6 Exceptions to the MFN Principle: (i) General Exceptions (ii) Customs Unions and Free Trade Areas (iii) Generalised System of Preferences (the Enabling Clause)
- 2.6.7 ‘Like Product’ in Article I GATT 1994
- 2.7 Summary

Part III The National Treatment Principle

- 2.8.1 Introduction
- 2.8.2 The National Treatment Principle under the GATT Dispute Settlement System
- 2.8.3 ‘Aims and Effects’ versus National Treatment
 - 2.8.3 The National Treatment Principle under the WTO Dispute Settlement System
 - 2.5.3.1 Article III:2 GATT, Internal Tax Measures and National Treatment
 - 2.5.3.2 Article III.4 GATT, Regulatory Measures and National Treatment
 - 2.8.4 The GATT/WTO Jurisprudence: ‘Aims and Effects’ versus Market Liberalisation
 - 2.8.5 National Treatment and Foreign Investment
- 2.9 Summary

Part I A Short Teleology of the GATT/WTO

“Have you forgotten?...

For the world’s events have rumbled on since those gagged days

.....

Look up, and swear by the green of the spring that you’ll never forget.”

- Siegfried Sassoon “Aftermath”

2.1 Introduction

Why study the teleology of law? What are laws *for*?¹ Franck provides functional and purposive answers. Firstly, he states that ‘[s]uch basic questions are the meat and potatoes of jurisprudential inquiry;’ secondly, and arguably more importantly, he declares that ‘[a]ny legal system worth taking seriously must address such fundamentals.’² For our purposes here, what is the teleology of the GATT 1994?

A lot has been written about ‘The Law and Policy of the World Trade Organisation’ (WTO) to use Peter Van den Bossche’s book-title³ that time has come to ask, *what* are we talking about? As George Orwell demonstrates in his *Animal Farm*, antipodal stances like ‘all four good, all two bad’ is not a sustainable proposition. By the same token, ‘trade liberalisation is good, protectionism is bad’ may be nothing more than the surface truth. It is for this reason that philosophy strives towards the fundamental understanding of whatever it is that exists and our experience of it, including the WTO and its law and policy. It questions the

¹ Thomas M Franck, ‘Legitimacy in the International System, *The American Journal of International Law*, Vol 82, No 4 (Oct 1998) 706

² *ibid*

³ Peter Van den Bossche, *The Law and Policy of the World Trade Organisation* (2nd edn CUP, Cambridge 2008)

fundamentals we normally take for granted.⁴ What I set out to do here may be just a scratch of the surface recognising the circumspection that a journal article or a book chapter allows but if it offers a starting point and incites more people to wonder, inquiry and study, then my effort would have translated from activity to productivity. The aim of this chapter is to explain the main reason behind the initiation of the GATT Rounds of multilateral trade negotiations leading up to the WTO. The ambit of this chapter will be limited to how it all began; why it all began: to find markets for the goods of the developed economies, particularly the United States, will become obvious in the following sections. Although philosophy appeals to reason, it is nonetheless a speculative science that relies on the deductive and inductive methods. ‘This is not to deny the normative character of international economic law. But international economic law – like all law but perhaps more so – is a process. Any attempt to define the law as of a given moment cannot help but distort.’⁵

Bowett’s Law of International Institutions begins with this generic paragraph which applies to the WTO as to any other international organisation:

The development of international organisations has been, in the main, a response to the evident need arising *from international intercourse rather than to the philosophical or ideological appeal of the notion of world or global government*. The growth of international intercourse, in the sense of the development of relations between different actors – both private and public, natural and legal – has been a constant feature of maturing societies; advances in the mechanics of transport and communications combined with the desire for trade and commerce have produced a degree of intercourse which ultimately called for international regulation by institutional means⁶ (emphasis mine).

Contrary to this seminal revelation, the Marrakesh Agreement Establishing the World Trade Organisation posits that the WTO has an underlying philosophy or ideology by opening with

⁴ Bryan Magee, *The Story of Philosophy* (Dorling Kindersley, London 1998) 7

⁵ Andreas F. Lowenfeld, *International Economic Law*, (Oxford, Oxford University Press) 765

⁶ Philippe Sands and Pierre Klein, *Bowett’s Law of International Institutions*, (5th edn Sweet & Maxwell, London 2001) 1

‘The Parties to this Agreement, Recognising that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living... steadily growing volume of real income and effective demand... designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth of international trade...’⁷ This preamble which is the same in the General Agreement on Tariffs and Trade (GATT) 1947/94 gives the impression that the GATT/WTO system would (not could) be of benefit to both developed and developing countries, but more so to the developing countries. This notion of the GATT/WTO being a grand and clever design may not be apparently wrong as the substantive provisions of the GATT has Part IV of it devoted to ‘Trade and Development.’ The justification for the resort to the Preamble of the Marrakesh Agreement is because ‘[a] government (for our purposes here, an organisation) is only recognised for what it claims to be.’⁸ However, Andrew K. Rose in his extremely quantitative study submits evidence that the WTO does not even make trade more stable and predictable:

I have searched for indications that membership of the WTO and its predecessor the GATT lowers trade volatility. My hunt has been unsuccessful; I find no reliable evidence that membership increases the predictability of trade flows. I use both bilateral and multilateral data sets that span over 175 countries and 50 postwar years. I use a number of different econometric techniques, relying extensively on estimators that include fixed effects, and control for a host of potential factors. Yet despite an extensive search and a number of robustness checks, I have not been able to find strong indications that the GATT/WTO makes trade more stable and predictable.⁹

Sarah Joseph states that ‘[t]he underlying rationale of the WTO is to preside over the reduction of trade barriers between nations, thereby promoting global free trade.’¹⁰ The putative title of a subsection of her book gives the ‘Raison d’être of the WTO’ as being the

⁷ The Preamble, Marrakesh Agreement Establishing the World Trade Organisation.

⁸ DP O’Connell, ‘The Status of Formosa and the Chinese Recognition Problem,’ 50 (1956) *AJIL* 405, 415 quoted by Ralphe Wilde, *International Territorial Administration – How Trusteeship and the Civilising Mission Never Went Away* (OUP 2008) 103

⁹ Andrew K. Rose, ‘Does the WTO Make Trade More Stable?’ *NBER Working Paper 10207*, January 2004, 13

¹⁰ Sarah Joseph, *Blame It on the WTO? A Human Rights Critique* (OUP, Oxford 2011) 12

benefits of globalisation: making goods available ‘at least in the developed and urban areas of many developing States.’ However, she sounds somewhat sceptical of the objectives of the WTO as declared in the Preamble to the Marrakesh Agreement by stating reservedly that ‘[a]t *first glance*, the WTO’s mission *seems* utterly compatible with the promotion, protection and enjoyment of human rights’ and points out that ‘free trade should be a means to desirable ends rather than an end in itself’¹¹ (emphasis added). We notice a note of incredulity as to the veracity of comparative advantage in her mock epic tone by a derisive testament attributing the concurrence that comparative advantage is ‘arguably the single most powerful insight into economics’ to an undated advertorial hoisted on the WTO website.¹² A leading American economist states that the fascination of the public with comparative advantage is ‘due mainly to the fact that the general public does not read economic textbooks.’¹³

Again contrary to the notion of helping ‘developing countries, and especially the least developed among them’ to reap the benefits of international trade and development assistance, Lowenfeld makes it ‘clear ... that no state is obliged to provide (either trade, technical or) development assistance to another state. Even if *A* is a developed and *B* a developing state, *A* has no duty to establish a foreign assistance program, or if it has such a program, to include *B* within it.’¹⁴

¹¹ *ibid.*

¹² *ibid.* See <http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact3_e.htm> which praises comparative advantage for being responsible for ‘liberal trade policies — policies that allow the unrestricted flow of goods and services — sharpen competition, motivate innovation and breed success. They multiply the rewards that result from producing the best products, with the best design, at the best price.’

¹³ Lowenfeld (n 3) 698. See also Jacob Viner, ‘The Tariff Question and the Economist,’ *International Economics: Studies* (Free Press 1951) ch. 6, p. 109

¹⁴ Andreas F. Lowenfeld, (n 5). The only exception Lowenfeld acknowledges in a footnote is ‘the transitory obligation of a departing colonial power toward a newly independent state.’

Still more, the civil society is restive and rife with suspicion of the true motives behind the formation of the WTO from Cancún to New Delhi and waving banners reading ‘shut down the WTO’,¹⁵ ‘no concessions to WTO against India’s interest’, ‘our world is not for sale’, ‘no to market access for US-EU agribusiness’, ‘no to WTO dictates’, ‘no to FDI in banking and insurance’, ‘improve the food rationing service by providing affordable food items.’¹⁶ The outcry against the WTO is not limited to ‘hungry protesters’ or the ‘irresponsible action of a tiny minority’¹⁷ to borrow a phrase from Ambassador Charlene Barshefsky of the US while apologising to the ministers and officials who were harassed during the WTO Ministerial Conference in Seattle in 1999. Respected international organisations working in the areas of poverty reduction, justice and development such as Oxfam, the South Centre and ActionAid have equally questioned the motives behind the WTO.¹⁸

¹⁵ Insert in the cover image of Sands & Klein (n 6).

¹⁶ Front cover image of Sarah Joseph, *Blame It on the WTO? A Human Rights Critique* (OUP, Oxford 2011)

¹⁷ Available at www.wto.org/english/thewto_e?minst/e-min99 accessed 5 December 2010

¹⁸ For a joint research paper between Oxfam and the South Centre see Ha-Joon Chang, ‘Why Developing Countries Need Tariffs – How WTO NAMA Could Deny Developing Countries’ Right to a Future,’ November 2005; from five NGOs: ActionAid, the ICFTU, Oxfam, Solidar and the Third World Network, ‘Non-agricultural Market Access (NAMA) Talks Threaten Development – Six Reasons Why a Fundamentally Different Approach Is Needed,’ *Joint NGOs Briefing Paper*, November 2005; and the following briefing papers from Oxfam: Kevin Watkins, ‘Eight Broken Promises: Why the WTO Isn’t Working for the World’s Poor,’ *Oxfam Briefing Paper 9* (Oxford, October 2001); ‘TRIPS and Public Health – The Next Battle,’ *Oxfam Briefing Paper 15* (March 2002); ‘False Hope or a New Start?’ The Global Fund to Fight HIV/AIDS, TB and Malaria,’ *Oxfam Briefing Paper 24* (June 2002); ‘Generic Competition, Price and Access to Medicine – The Case for Antiretrovirals in Uganda,’ *Oxfam Briefing Paper 26* (June 2002); ‘Rigged Rules and Double Standards,’ *Oxfam Briefing Paper*, Oxford, 2002; ‘Africa and the Doha Round,’ *Oxfam Briefing Paper 80* (Oxford 2002); Liz Stuart, ‘The Truth or Consequences – Why the EU and the USA Must Reform Their Subsidies, or Pay the Price,’ *Oxfam Briefing Paper No 81* (November 2005); Duncan Green, ‘Blood on the Floor – How the Developed Countries Have Squeezed Development out of the WTO Doha Negotiations.’ *Oxfam Briefing Paper*, 7 (December 2005); ‘What Happened in Hong Kong? Initial Analysis of WTO Ministerial, December 2005,’ *Oxfam Briefing Paper No 85* (December 2005); Emily Jones, ‘Partnership or Power Play? How Europe Should Bring Development into Its Trade Deals with Africa, Caribbean, and Pacific Countries,’ *Oxfam Briefing Paper No 110* (April 2008); ‘Blood from a Stone,’ Oxfam International Briefing Note; ‘Square Pegs in Round Holes: How the Farm Bill Squanders Chances for a Pro-development Trade Deal,’ *Oxfam Briefing Note*, 21 July 2008.

Compare and contrast the view of the editor of the *Journal of International Economic Law* 9(1) of the Hong Kong Ministerial Conference in the ‘Editor’s Note’ which saw it as ‘an enormous potential for ...a reduction of poverty in the world, as well as promoting peace and importantly impacting on nation-state “good governance” practices’ with that of the *Oxfam Briefing Paper 85* which saw the same conference as ‘a lost opportunity to make trade fairer for poor people around the world.’

The credo ‘GATT is good for all’ finds its intellectual support in the economic theory of comparative advantage.¹⁹ Lowensfeld explains, ‘the GATT ... is clearly based on the perception that international trade is beneficial, that the gains to society from trade outweighs the losses to those who are hurt by competition from abroad, and that value is created through specialisation and exchange in open markets.’²⁰ In 1993 the Nobel Prize for Economics was awarded to two distinguished economists Robert W. Fogel and Douglass C. North ‘for having renewed research in economic history by applying economic theory and quantitative methods in order to explain economic and institutional change.’²¹ Simply put, their work gave a boost to international institutions and organisations like the GATT/WTO by validating their importance and showing that there is a corresponding relationship between organisations and economic performance.

Since it is only *a theory* and not *a law*, what are its premises or basic assumptions? Miller²² offers us three contrasting world views: the WTO market model, the multi-centric organisational model and the classical Marxist model. The last one will be left out as it does not reflect the world view espoused by the WTO. According to Miller, the Market Model rests on the seven premises of free, rational individuals, decision-making via aggregation of individual choices, the three functions of money as a medium of exchange, a measure of value and a store of value, material gain, mobility, competition and government support.²³

¹⁹ *ibid.* In the first chapter (pages 3 to 8) Lowensfeld illustrates the theory as first formulated by Adam Smith, fine tuned by David Ricardo and further refined by Eli Hekscher and Bertil Ohlin.

²⁰ Lowensfeld, (n 5) 3

²¹ http://www.nobelprize.org/nobel_prizes/economics/laureates/1993/ accessed 3rd August 2011. See also Douglass C. North, *Institutions, Institutional Change, and Economic Performance* (CUP 1990) and generally John H. Jackson, *The World Trading System* (2nd edn, The MIT Press 1997) 4

²² Raymond C. Miller, *International Political Economy – Contrasting World Views* (Routledge 2008) 19-21

²³ *ibid.*

By contrast the Multi-Centric Organisational Model sees the market as oligopolistic and predatory and one of its proponents Galbraith outlines its eight controlling strategies as the control of consumer demand, profit, labour, prices, growth, universities, government and popular culture.²⁴

The Multi-Centric Organisational (MCO) Model is the school of thought challenging the Market Model and its intellectual base of comparative advantage. The seven premises of the MCO Model are as follows:

- i. Basic actors are organisations
- ii. Choices are made through the exercise of organisational power
- iii. Money represents power
- iv. Wealth and power are the driving objectives.
- v. Power rivalry characterise interaction
- vi. Institutional power controls access
- vii. Government is a major organisational player.²⁵

The International Economic Law epistemic community has not yet come up with a history of the GATT/WTO despite the breath-taking efforts of some scholars like Steve Charnovitz that have shed some light on the development of International Economic Law;²⁶ but even if we were to have such a piece of work, history is usually the victors' version of events, the conquerors' perspective, despite the platitudes of civility and oaths to impartiality. Whoever writes one, it would nonetheless be *a* and not *the* history of the GATT/WTO. The wind is in

²⁴ John Kenneth Galbraith, *The New Industrial State* (Houghton Mifflin, Boston 1967) quoted by Miller *ibid* 97.

²⁵ *ibid* 100-104.

²⁶ Steve Charnovitz, 'What Is International Economic Law?' *Journal of International Economic Law*, (2011) 14(1) 3 – 22

our sail now because most of the architects of the GATT/WTO are not only still alive but writing. Therefore the account that follows will draw heavily from the works of GATT/WTO negotiators, trade diplomats and participant-scholars. The aim is to aid undertaking and to foster realistic expectations of the WTO to reduce the incidence of aborted ministerial conferences and stalled trade rounds because the WTO ‘is an extraordinary model in many ways ... there is no government that really knows what it has gotten into.’²⁷

The General Agreement on Tariffs and Trade (GATT 1947) started as a club of twenty-three²⁸ trading nations, many of who were colonies of European powers; the World Trade Organisation (WTO) from its name and objectives was set up as a ‘world’ body, for all nations: developed, developing or in-between. How far does the provision that ‘The GATT 1994 shall consist of the provisions of the General Agreement on Tariffs and Trade dated 30 October 1947’²⁹ cater for the interests of the new members most of who are developing countries from Africa, Asia, the Caribbean and South America?

This research seeks to clarify whose interests the WTO was set up to serve and the increasing challenges facing the multilateral trading system. Part II examines the antecedents to the key trade negotiations under the GATT, namely, the Kennedy, Tokyo and Uruguay Rounds. Part III is on the WTO Ministerial Conferences. Part IV concludes with the synthetic (posthumous) views of Nobel Laureates in Economics on how the WTO could stimulate trade in developing countries while stabilising trade in developed countries.

²⁷ John H. Jackson, quoted by Sara Dillon, ‘Opportunism and the WTO: Corporations, Academics and “Member States,”’ in CB Picker, ID Bunn and DW Arner (Eds), *International Economic Law – The State and Future of the Discipline* (Hart Publishing 2008) 54 note 4

²⁸ Namely Australia, Belgium, Brazil, Burma, Canada, Ceylon, Chile, China, Cuba, the Czechoslovak Republic, France, India, Lebanon, Luxembourg, the Netherlands, New Zealand, Norway, Pakistan, Southern Rhodesia, Syria, South Africa, the United Kingdom, and the United States of America.

²⁹ GATT 1994 1(a).

2.2 The Pre-GATT World of Unilateralism

Poverty anywhere is poverty everywhere.

- The Philadelphia Declaration, the ILO Constitution

Before the GATT, most states maintained policies which stood as obstacles to free trade. The introspective policies were, among others, in the form of excessive customs and excise duties, restrictive quotas, requirements for inspection, certification and registration, prohibitive licensing conditions and even outright bans. They were aimed at foreign traders while at the same time hedging and protecting or in some cases exempting completely their nationals from the same regime imposed on foreigners. The hurdles and frustrations faced by foreign traders were much and were thought of as being capable of crippling foreign businesses completely that they came to be known as ‘beggar-thy-neighbour’ policies.³⁰

The GATT, the predecessor of the WTO was ‘a product of World War II, or to be more precise, the perceptions of the Allied planners of the post-war world.’³¹ The British Prime Minister Winston Churchill and the US President Theodore Roosevelt had thought that the failure of the United States (US) to join the League of Nations was the major cause of its collapse and so any prospect for peace must be based on the establishment of a multilateral or universal organisation of which the US would play a leading part. A meeting was held in Bretton Woods in July 1944 to design post-World War II financial and economic institutions

³⁰ Jackson (n 21) 8

³¹ Lowenfeld, (n 5) 21

and organisations and so came into being the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development better known as the “World Bank”.

The United Kingdom (UK) and the US officials had discussed setting up a trade organisation in 1943 but no details emerged. Riding in the euphoria of victory the US government unilaterally issued a document entitled “Proposals for Expansion of World Trade and Employment” meant for consideration by an International Conference on Trade and Employment even though it was purported to represent a consensus reached between the US and the UK governments in the two preceding years.³² Not long after the *Proposals*, the US nudged fifteen countries³³ to enter into negotiations with a view to reaching conclusions on multilateral trade agreements. The United Nations Conference on Trade and Employment adopted the US proposals and appointed a 19-country Preparatory Committee to draft a document for the conference. Either by quirk or influence, the Preparatory Committee started work from a suggested charter drafted by the US at a series of meetings convened in London in October-November 1946, in New York in January-February 1947 and in Geneva, in August 1947. The draft produced by the Preparatory Committee became the basis on which the United Nations convened a Plenary Conference on *Trade and Development* in Havana, Cuba, in November 1947. Despite the Second World War undermining faith in international organisations, 53 countries signed the Final Act of the Havana Conference that was entitled the Charter of the International Trade Organisation (ITO) “after so much debate and acrimony”³⁴ but without the US. Due to a number of reasons prominent of which was non-approval by the US Congress, the ITO Charter never entered into effect. President Truman

³² *ibid* p. 23.

³³ Those were, Australia, Belgium, Brazil, Canada, China, Cuba, Czechoslovakia, France, India, Luxembourg, New Zealand, South Africa, Soviet Union, The Netherlands and the UK.

³⁴ Lowensfeld (n 5) 25

could not get Congress to approve it³⁵ and the other nations who were waiting for the US to sign the Charter before they would join the ITO withdrew.

However, while the Preparatory Committee of the ITO Charter was at work, one-on-one tariff-cutting negotiations were going on among the participants that led to the production of a *provisional* document the General Agreement on Tariffs and Trade (GATT) which contained the concessions made, schedules of the bindings, a code of conduct to safeguard the undertakings to commit every participant to a common standard of behaviour and most importantly the understanding that any concessions reached between two countries would be passed on to all other members participating in the talks and negotiations, *the principle of the most favoured nation*. Therefore, the GATT was an ad-hoc arrangement in 1947 to be used till the completion of the ITO Charter the following year but when the Charter became still-born it continued in operation till the WTO agreements came into effect on 1 January 1995. In itself and own capacity ‘the GATT treaty never came into effect.’³⁶ The pertinent question to ask is has the accidental nature of its birth ‘affected the operation and vigour of the GATT and ...the new WTO?’³⁷ At its birth on 30 October 1947 only 23 countries³⁸ signed the GATT. The GATT was therefore a “conundrum” with “flawed constitutional beginnings”³⁹ destitute in both legitimacy and democracy as an international organisation but nonetheless a *de facto* one. Worse still the American negotiators in Geneva were under clear instructions that “the president could not accept a GATT if it had attributes of an organisation...the

³⁵ John H Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law*, Cambridge (Cambridge University Press 2006) 91

³⁶ *ibid* p. 91.

³⁷ *ibid*.

³⁸ See (n 28) above.

³⁹ Jackson (n 35) 91 & 92

negotiators returned to Geneva and scrubbed the then draft of GATT's 'organisational' attributes... the word 'member' was taken out, and replaced by 'Contracting Party'.⁴⁰

Although the GATT was never meant to be an intergovernmental organisation, Article XVI of the WTO agreement clearly states that "the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947".⁴¹ But if the GATT was made the way the Americans wanted it, the WTO which follows more or less the same principles cannot be said to be an entirely different establishment.

The Marrakesh Agreement establishing the World Trade Organisation aims through the framework of the WTO at 'raising the standards of living ... , ensuring ... steadily growing volume of real income and effective demand ... to ensure that *developing countries*, and especially the least developed among them, *secure a share* in the growth in international trade *commensurate with the needs of their economic development*'⁴² (italics added). These lofty aims seem to give the impression that the WTO is to spread the benefits of international trade and 'sustainable development' to countries around the world whether rich or poor. It was seen as a genuine desire to found a rules-based trade organisation, beneficial to all parties willing to forgo their pecks, privileges and pomposities by giving or doing to all members what they have done to *a* member – this is the cardinal principle of the most favoured nation (MFN) on which the WTO was founded. As the MFN bait dangled tantalisingly, states swallowed line, hook and sinker all the WTO agreements without reservations believing the

⁴⁰ Ibid, 93

⁴¹ See also GATT 1994 1(a).

⁴² The Preamble to the Marrakesh Agreement establishing the World Trade Organisation.

developed countries had come to dinner with the developing countries on the table of, not just equality, but also of brotherhood. The results so far prove the notion wrong that Sarah Joseph asks do developing countries ‘trade to live or live to trade?’⁴³ Some commentators have pointed out that the WTO needs ‘to avoid being eclipsed into irrelevance’ by regional trade agreements and bilateral investment treaties which ‘have proliferated globally’ as if they present more relevant and preferred alternatives.⁴⁴

The GATT 1947⁴⁵ was preceded by the Bretton Woods institutions, the United Nations Organisation (UNO) – 1944/45 and the League of Nations – 1919. The WTO architecture is crafted on a tripod of agreements: the General Agreement on Tariffs and Trade (GATT 1994), the General Agreement on Trade in Services (GATS) and the Trade-Related Aspects of Intellectual Property Rights (TRIPS) all propped up by the Dispute Settlement Understanding (DSU). I will contextualise the WTO by exploring, in a historical order, the events that gave rise to its formation.

The First World War was unprecedented in the savagery, horror and suffering that it unleashed on mankind. After the slaughter (reflected on by Sassoon in the poem partly quoted at the outset and immortalised with a plaque at the Euston station in London) there arose a sense of duty so that such a calamity would not happen again.⁴⁶ Statesmen owed it to

⁴³ Sarah Joseph, ‘Trade to Live or Live to Trade: The World Trade Organisation, Development and Poverty’ in Mashood A. Baderin and Robert McCorquodale eds *Economic, Social and Cultural Rights in Action* (OUP, Oxford, 2007) 389

⁴⁴ Henry Gao and CL Lim, ‘Saving the WTO from the Risk of Irrelevance: The WTO Dispute Settlement Mechanism As a “Common Good” for RTA Disputes,’ *Journal of International Economic Law* (2008) 11(4) 899-925

⁴⁵ The Marrakesh Agreement establishing the WTO,

⁴⁶ Michael Portillo, “Things we forget to remember”, www.bbcradio4.co.uk accessed on 15/12/08.

the dead to build a better world and its most important institution was the League of Nations set up by

THE HIGH CONTRACTING PARTIES, in order to promote international co-operation and to achieve international peace and security by the acceptance of obligations not to resort to war by the prescription of open, just and honourable relations between nations by the firm establishment of the understandings of international law as the actual rule of conduct among Governments, and by the maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organised peoples with one another.⁴⁷

The saying that ‘International law is what other countries break’⁴⁸ is not just the cynic’s perspective but an oblique justification of international law of which international economic law generally and WTO law in particular is undeniably a part. Wood credits international law with ‘two greatest achievements’, namely, ‘the restriction on the use of force embodied in the Pact of Paris and the United Nations Charter’ and ‘the development of human rights and humanitarian law and their enforcement’⁴⁹ overlooking the glaring harmonisation and ordering of international private and public economic relations as if forestalling the outbreak of wars and enforcing human rights are the only preoccupations of international law. Trade and commerce form the centrepiece of international law today and the need to conduct world trade in a predictable and rules-based manner was the reason for the establishment of the WTO with an enforcement mechanism the DSU.

The setting up of the GATT and its successor the WTO evinces a strong determination by the Contracting Parties to the GATT and Member States of the WTO to conduct international trade on an arithmetic or other objective manner as opposed to the random and rat-race-like manner that was characteristic of international trade before and after the Second World War.

⁴⁷ The Preamble to the Convention on the League of Nations.

⁴⁸ Michael Wood, ‘The Perspective of a Foreign Ministry Legal Adviser’ in Malcolm D. Evans Ed. *International Law*, (2nd edn, OUP 2006) 25

⁴⁹ *ibid*, p25.

How genuine was the desire? Was it borne out of a noble intention to bring order to a hitherto chaotic situation that engulfed the world before the WTO or was it a façade for a benign but nevertheless ‘beggar-thy-neighbour’ policy that marked the pre-WTO era? Put in other words was the WTO set up to offer a new, predictable and justiciable platform for international trade or is it a rebranding and the legitimisation of the old order?

2.3 The GATT Era (1947-1994): The Beginning of Multilateralism and Keynesianism

It is not Wisdom, but Authority that makes a law....all the laws of England have been made by the Kings of England, consulting with the Nobility and Commons in Parliament, of which not one of twenty was a Learned Lawyer.

- Thomas Hobbes, *A Dialogue Between a Philosopher and a Student of the Common Laws of England*.⁵⁰

The GATT era of multilateral trade negotiations witnessed eight rounds of trade talks: Geneva, Annecy, Torquay, Geneva II, Dillon, Kennedy, Tokyo and Uruguay Rounds. The last three were the most important rounds and in the following sub-sections, I will analyse how domestic economic situations in the United States and certain developments in the world combined to push the US that ditched the ITO Charter to play a central role in the launching of each of the rounds and the major achievements of those remarkable years of international trade diplomacy.

2.3.1 The Kennedy Round (1964 – 1967)

This part borrows heavily from a book⁵¹ on the Kennedy Round and the practical experience of a GATT participant-observer John W. Evans who was the chairman of the

⁵⁰ (University of Chicago Press, Chicago, 1971) Pt I “Of the Law of Reason,” p. 55.

United States delegation to the first meeting on the GATT and has given a comprehensive analysis of the post-war trading system covering the United States foreign commercial policy, the history of tariff negotiations, negotiation techniques, governmental motivations and trade theory.

The United States faced a dire economic situation in 1930; imports fell to 33 per cent of their 1929 value. But to increase imports, exports have to be increased too otherwise the nation would face a huge trade deficit. At first the government considered unilateral reduction of tariff but ‘a number of considerations led to the Roosevelt administration’s decision to seek reduction in the high Smoot-Hawley⁵² rates, but only in exchange for “reciprocal” reductions by others.’⁵³ This decision was combined with a ‘fundamental decision to continue the existing policy of avoiding discrimination among sources of supply.’⁵⁴ This policy, under the GATT, metamorphosed as the principle of the most favoured nation.⁵⁵ Therefore, to give a legislative backing to its foreign trade policy, the United States Congress enacted the Trade Agreements Act of 1934 with its express purpose being ‘to obtain foreign markets for U.S. exports *in exchange* for reductions in the United States’ tariff⁵⁶ (italics mine). Also noteworthy, the Trade Agreements Act of 1934 reaffirmed the policy of extending the MFN treatment to virtually all countries. But the US was mindful to limit such tariff reduction on products supplied principally by the trading partner so as to avoid ‘unrequited benefits’ going to other countries.

⁵¹ John W. Evans, *The Kennedy Round in American Trade Policy – The Twilight of the GATT?* (Harvard University Press, Cambridge, Massachusetts 1971)

⁵² The Smoot-Hawley Tariff Act 1930 was an act signed into law on 17 June 1930 that raised US tariffs on over 20,000 imported goods to record levels. U.S. trading partners affected by that engaged in retaliatory tariffs which reduced American exports and imports by more than half and according to some views may have contributed to the Great Depression.

⁵³ Evans (n 51) 5 & 6.

⁵⁴ *ibid* 6.

⁵⁵ The (U.S.) Trade Agreements Act of 1934.

⁵⁶ *ibid*.

Again to show that the US did not set out to spread ‘the blessings’ of international trade to the rest of the world, Evans explains how the country tried to avoid spreading the benefits of the MFN to every country by devising an ingenious solution called ‘ex-ing out’. Thus ‘... many countries produce and export chinaware; but the United Kingdom had a virtual monopoly on expensive bone china. By reducing the duty only on bone china sold at more than a stated minimum price, the benefit of the reduction could be denied other china exporters without technical violation of the MFN.’⁵⁷ Also the desire to protect domestic industry informed the choice of negotiation on item-by-item basis.⁵⁸ The US pursued its trade policy of *implied discrimination* aggressively and from 1934 to 1945 concluded twenty-seven⁵⁹ bilateral negotiations with different countries.

Another remarkable development within the Kennedy Round was that the worsening economic situation in the US contrasted sharply with the economic growth in the European Economic Community (EEC). As Evans puts it:

During the first three years of its existence the European Common Market had achieved spectacular successes, which coincided with economic frustrations in the United States. While the members of the new economic bloc in Europe had accumulated gold and foreign exchange, the United States had been steadily losing gold and increasing its liquid liabilities to foreigners.⁶⁰

The Americans thought that they were losing the trade game because the EEC was not open to competition and were determined that ‘something should be done’. If, it was thought, the growing market in Europe could be made more accessible to outside competition, the

⁵⁷ John W. Evans, (n 51) 6.

⁵⁸ *ibid* 7

⁵⁹ *ibid*.

⁶⁰ *ibid* 133

disappointing performance of American exports could be corrected.’⁶¹ In other words, the Americans pursued the Kennedy Round of trade negotiations aggressively so as to spread the contagion of their external trade deficits to other countries, especially to the EEC. By so doing, they hoped, a level playing field would be created by cancelling the advantages of the EEC’s internal market, and thereby helping the United States maintain its dominant position in world trade. Finally, when Prime Minister Macmillan announced in the House of Commons at the end of July 1961 that Her Majesty’s government would seek membership of the Common Market, the Americans were gripped with ‘both the dangers and opportunities inherent in the resurgence of Europe.’⁶² So the situation in the United States, especially its foreign policy, moved from admiration because the ‘creation of a Europe able to stand on its own feet had been the purpose of the Marshall Plan’ to envy and jealousy because the six original members of the EEC were able within the first three years of the Common Market to ‘collectively, increase their reserves by over \$6.5 billion’⁶³

The major achievement of the Kennedy Round was the reduction of tariffs to an average of 8 to 10 per cent. This is monumental bearing in mind that ‘the U.S. tariff rate in 1933 stood at 54 per cent following the passage of the Smoot-Hawley Tariff Act in 1930.’⁶⁴ It is also to the credit of the Kennedy Round that the US anti-dumping measure was brought into compliance with the GATT rules. Again what was called the American Selling Price, a method of customs valuation applied primarily to benzenoid chemicals, was also dismantled during the Round.

⁶¹ *ibid.*

⁶² *ibid.* 134.

⁶³ *ibid.*

⁶⁴ Joan E. Twigg, *The Tokyo Round of Multilateral Trade Negotiations* (University Press of America, Lanham, MD, 1987) 8

2.3.2. *The Tokyo Round (1973 – 1979)*

The Tokyo Round was also an idea conceived in the United States but born in Tokyo.

On May 21, 1970, President Nixon appointed the Commission on International Trade and Investment Policy (known as the Williams Commission) to ‘study the principal problems, ... assess U.S. policies, and produce a set of policy recommendations for the 1970s which would take full account of the changes that have taken place on the world economic scene since World war II.’⁶⁵

The Tokyo Round has been described by Robert S. Strauss, former United States Special Trade Representative (STR) as ‘an exercise in domestic American politics at its best.’⁶⁶ Strauss worked very much with Congress as much as he worked with foreign trading partners during the multilateral trade negotiations. The United States negotiators were aware of the non-ratification of the Havana Treaty of the ITO by the Congress and eager to avoid a repeat of ‘where diplomats have achieved substantial accomplishments at the negotiating table only to have their final product rejected by the Congress and the American people.’⁶⁷ At the international level the US negotiators knew that in any MTN ‘[t]here must be economic losers, as well as winners, in any trade negotiations. Ultimate success must be measured, when it’s all added up by whether or not there are net economic benefits from the final agreement.’⁶⁸ It is not surprising that President Jimmy Carter signed the Trade Agreements Act (TAA) implementing the results of the Tokyo Round into law on 26 July 1979.

The focus on the United States is because modern trade law and policy is intertwined with American foreign trade policy. According to the Ray Group ‘the radical change in

⁶⁵ *ibid* 12

⁶⁶ Robert S. Strauss, ‘Forward’ Joan E. Twigg, *The Tokyo Round of Multilateral Trade Negotiations* (University Press of America, Lanham, MD, 1987) vii

⁶⁷ *ibid* viii

⁶⁸ *ibid*

international economic relations was originally based very largely on the resolve and generosity of the United States. Given the position in which the European countries and Japan found themselves in 1945, economic co-operation with the United States was bound to be a one-sided affair.⁶⁹ However, the economic truth is that the United States was facing serious threats from the EC and Japan. In the EC, intra-Community trade quadrupled between 1960 and 1970 while Japan's economic growth from 1950 to 1970 was described as an 'unprecedented performance' because its economy was growing at a rate higher than 10 per cent per year in real terms.⁷⁰ It was clear that the formation of the EC presented non-members with 'trade disadvantages' while the rapid recovery of Japan after the Second World War was no less a bad omen and a threat to US trade. Obviously the debate changed in the United States from free trade to fair trade.

What were the new landmarks reached in the Tokyo Round that made it appeal to all parties and made it sail through Congress with minimum opposition? (Its margin of success was 395-7 in the US House of Representative and 90-4 in the Senate⁷¹). The agenda for the Tokyo Round were further reduction of tariffs especially on agricultural goods, subsidies and countervailing duties, nontariff barriers (NTBs) such as 'buy America' and the role of the developing countries now acceding to the GATT. According to Steinberg, 'the Tokyo Round was closed with law-based bargaining'⁷² to the advantage of the developing and least-developed countries because the Tokyo Codes were not presented as a single undertaking.

⁶⁹ Quoted by Joan E. Twigg, *The Tokyo Round of Multilateral Trade Negotiations* (University Press of America, Lanham, MD, 1987) 3

⁷⁰ *ibid*

⁷¹ *ibid* 79

⁷² Richard H Steinberg, 'In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO' 56 *International Organisation* (2002) at 359.

2.3.3. *The Uruguay Round (1986-1994)*

The major achievements of the Uruguay Round are the extension of GATT-like rules to trade in services (GATS), trade-related aspects of intellectual property rights (TRIPS), the introduction of the Trade Policy Review Mechanism (TPRM), a complete overhaul of the GATT dispute settlement system with the Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding – DSU – for short, and the establishment of the WTO with the full apparatus of an international organisation.

Like in the Kennedy and Tokyo Rounds, the United States again had to take the initiative.

Explaining why they had to do so Isaiah Frank writes:

More than a decade has passed since 1982 when the United States took the initiative to propose the agenda for an eighth round of GATT trade negotiations as a follow-up to the Tokyo Round that concluded in 1979. During that period, the pace of change in the nature and composition of international trade has accelerated. International trade no longer conformed to the textbook model of an exchange of British cloth for Portuguese wine. The specialisation of national firms in particular products is being increasingly replaced by the globalisation of production, in which different processes required for the production of individual goods and services are performed in different countries. An American automobile may be designed in Japan, assembled in Canada or Mexico, and consist of parts manufactured in Taiwan, Brazil, or just about anywhere.⁷³

In one phrase it was ‘the threat of globalisation’ especially what was then perceived in the United States as the ‘Japan problem’⁷⁴ that made the United States initiate the Uruguay Round. According to Frank, ‘Globalization’ ... ‘means increased trade in parts, components,

⁷³ Isaiah Frank, ‘Post-Uruguay Round Trade Policy for a Global Economy’ in Orin Kirshner (ed), *The Bretton Woods-GATT System: Retrospect and Prospect After Fifty Years* (ME Sharpe, London 1996) 240

⁷⁴ *Ibid.*

and semi-finished goods.’⁷⁵ Therefore, production must be spread around the world to make the products competitive and commercially sensible; the United States must secure the entire world for that purpose, legally and legitimately.

Two other developments outside the control of the United States government helped spur America into action in launching the Uruguay Round, namely, ‘the rapid advances in communications technology’⁷⁶ and ‘the rapid rise in the importance of trade in services.’⁷⁷ In other words, the United States took the initiative for the Uruguay Round ‘to extend the horizon ... of (American) firms to conduct their operations worldwide’⁷⁸ and being an industrialised country to reap bountiful harvests from the emerging market in intellectual property. These prospects explain the establishment of TRIPS as part of the WTO and its enforcement through the DSU.

Will Martin and Alan Winters hailed the Uruguay Round as ‘a milestone for developing countries.’⁷⁹ This is highly debatable, but suffice it now to note that developing countries took more active parts in the Uruguay Round than in the previous rounds and so issues impinging on development that were of interests to them featured in the agenda even if perfunctorily touched or never discussed entirely.

⁷⁵ Ibid 241

⁷⁶ *ibid.*

⁷⁷ *ibid.*

⁷⁸ *ibid.*

⁷⁹ Will Martin and L. Alan Winters, ‘The Uruguay Round: a Milestone for Developing Countries,’ in Martin and Winters ed, *The Uruguay Round and Developing Countries* (Cambridge University Press, Cambridge 1996) 1

As a result of noticeable roles or the presence of the developing countries an agreement was reached on agriculture but short chained with the conversion of nontariff barriers into tariffs. Other agreements were on substantial liberalisation of manufactured goods which developing countries would not benefit much from due to lack of manufacturing capacities; GATS establishing trade discipline in virgin territory though developing countries have little to export in this sector; TRIPS but not covering traditional knowledge and so of little benefit to developing countries – the barber’s swivel chair syndrome, all motion but no movement. According to Steinberg, ‘[m]ost developing countries got little and gave up a lot in the Uruguay Round’⁸⁰ which he stated was ‘imposed imperially’⁸¹ because the US and the EC chose ‘to coerce by exiting the GATT and reconstituting the new system... they withdrew from the GATT 1947 and thereby terminated their GATT 1947 obligations (including the MFN guarantee) to countries that did not accept the Final Act and join the WTO.’⁸² The Agreement Establishing the World Trade Organisation makes all the trade agreements concluded in the Uruguay Round ‘integral parts’ of the WTO legal system and ‘binding on all Members’⁸³ but ‘the GATT 1994 is *legally distinct* from the GATT 1947’⁸⁴ (emphasis added). By these provisions nobody could sue the EU or the US relying on the GATT 1947 and so everybody was compelled to sign up to the onerous obligations of the GATT 1994 even if thought to be against their national interest.

⁸⁰ Richard H Steinberg (n 71) at 366.

⁸¹ *ibid*

⁸² *ibid* 357-60

⁸³ Article II(2) *Agreement Establishing the World Trade Organisation 1994*.

⁸⁴ *ibid* Article II(4).

2.4. The WTO Era (1995 to date)

I said there was a society of men among us, bred up from their youth in the art of proving by words multiplied for the purpose, that white is black, and black is white, according as they are paid. To this society all the rest of the people are slaves.

- Jonathan Swift, *Gulliver's Travels*.⁸⁵

2.4.1 The infancy period (1995-1998)

The transformation of the GATT into the WTO in 1995 was a watershed in the development of international economic law and trade policy. This is because 'the WTO is both a mechanism for exchanging trade policy commitments, and agreeing on a code of conduct'⁸⁶ standing on the tripod of the GATT-1994, the GATS, and the TRIPS with seven underlying principles: single undertaking, tariffs are the only permissible form of protection, non-discrimination, reciprocity, enforcement of obligations, transparency and safety valves.⁸⁷ However, the WTO neither seeks to manage trade flows nor to determine its outcomes⁸⁸ contrary to the expectations of many not familiar with the law and policy of the organisation.

Structurally, the WTO with its headquarters in Geneva seeks to achieve its aim through an organigram of which the Ministerial Conference is at the apex. The Ministerial Conference meets at least once in two years and some of the conferences have ended in failure or disillusionment. Under the Ministerial Council is the General Council which could meet as the Dispute Settlement Body when adjudicating on trade disputes or as the Trade Review Body when reviewing trade policies. The General Council has got under it three specific councils: Council for Trade in Goods, Council for Trade in Services and Council for Trade-

⁸⁵ (Harmonsworth Penguin, 1967) bk 4, ch 5.

⁸⁶ Bernard M. Hoekman and Petros C. Mavroidis, *The World Trade Organisation: Law, Economics, and Politics* (Routledge 2007) 15

⁸⁷ *ibid*

⁸⁸ *ibid*.

Related Aspects of Intellectual Property with committees on trade and environment, trade and development and sub-committees, for example, on least-developed countries (LDCs).⁸⁹

Article IV:1 of the WTO Agreement states:

There shall be a Ministerial Conference composed of representatives of all the Members, which shall meet at least once every two years. The Ministerial Conference shall carry out the functions of the WTO and take actions necessary to this effect. The Ministerial Conference shall have the authority to take decisions on all matters under any of the Multilateral Trade Agreements, if so requested by a Member, in accordance with the specific requirements for decision-making in this Agreement and in the relevant Multilateral Trade Agreement.

Therefore, the Ministerial Conference is the supreme body of the WTO but ‘it is not clear whether this very broad power to make decisions, in fact, enables the Ministerial Conference to take decisions that are *legally binding* on WTO Members’⁹⁰ (italics in the original). Although the WTO Ministerial Conferences are meant to be held ‘at least once every two years,’ it has not been so. The following eight Ministerial Conferences have been held so far: Singapore (1996), Geneva (1998), Seattle (1999), Doha (2001), Cancún (2003), Hong Kong (2005) and Geneva (2009 and 2011).

2.4.2 *The Seattle Ministerial Conference 1999*

The Seattle Ministerial Conference opened with an apology by Ambassador Charlene Barshefsky (US) to all ‘the ministers and officials who were harassed’ during a

⁸⁹ WTO, *Understanding the WTO*, 5th edn 2010,103

⁹⁰ Van Den Bossche (n 3) 120

demonstration which she said the United States deplored as the ‘irresponsible action of a tiny minority.’⁹¹ Surya P. Subedi called the events in Seattle a ‘debacle’.⁹²

Slated for discussion at the Conference was agriculture which has proved to be very divisive from the days of the GATT due to the controversial topic of subsidies in developed countries and market access for the farm produce from developing countries. On the first day (1 December 1999) the ministers tried to discuss the text of the draft ministerial declaration which dealt with whether agricultural produce should ultimately be treated the same as industrial products, provisions for developing countries, further reduction in subsidies, protection and nontariff measures affecting market access and investment and competition policy.⁹³

A group of 45 Member States, mainly developing countries, ‘expressed concern and called for action regarding (a) difficulty in implementing certain WTO Agreements and asked for extension of deadlines in TRIPS, TRIMS, Customs Valuation, and (b) imbalance in certain Agreements and called for changes in certain provisions of the anti-dumping, subsidies and textiles agreements.’⁹⁴ While Jamaica said that the 71 African, Caribbean and Pacific (ACP) countries were marginalised regarding certain WTO issues, Japan said that improvement of

⁹¹ Available at www.wto.org/english/thewto_e/minst/e_min99 accessed on 5 December 2010

⁹² Surya P. Subedi, ‘The Road from Doha: the Issues for the Development Round of the WTO and the Future of International Trade,’ *ICLQ* vol 52, April 2003, 425

⁹³ Karen Halverson Cross, ‘King Cotton, Developing Countries and the ‘Peace Clause’: the WTO’s *US Cotton Subsidies* Decision,’ *JIEL* (2006) 9(1) 149-195. Writing in 2005, Cross hailed the decision as an ‘overwhelming victory for Brazil – both in terms of the panel and in terms of Appellate Body findings.’ However, the difficult problem was compliance as Brazil had to resort to Article 21.5 panel and also Article 22.6 arbitration (in 2009) and threatened to deploy both the GATS and TRIPS in addition to countermeasures allowed under the GATT to get the US to bring its subsidies in conformity with its obligations under the covered agreements.

The Consultative Board, *The Sunderland Report 2005*, Conclusion/Recommendation 22 acknowledges that ‘compliance with panel and Appellate Body rulings is ... worrisome (especially as) developing country complainants ... cannot resort to a credible retaliatory option.’

⁹⁴ Subedi (n 91).

the Anti-Dumping Agreement was a lynchpin of the new Round. The Conference ended in a deadlock as the ministers and officials neither agreed on developing countries issues nor on the industrialised countries demands.

Regretting the failure of the Conference to reach any agreement, the WTO Director-General said, 'I feel particular disappointment because the postponement of our deliberations means the benefits that would have accrued to developing and least-developed countries will now be delayed.'⁹⁵ Again the underlying statement is still that the WTO is more beneficial to the developing countries and the LDCs. Really?

The editors of the *Journal of International Economic Law* characteristically ask legal scholars and observers of WTO Ministerial Conferences to give their 'reaction comments'. In the 'Reactions to Seattle,' Gary Horlick⁹⁶ reports that 'the glass was more than full' but qualifies it with 'as much as the political will is present.' He points out that the purpose of trade is 'to raise living standards' but fires a salvo at developing countries because they 'came to Seattle with the unrealistic expectations that they could use the launch for immediate release from existing WTO obligations' (much like Pip in Dickens' *Great Expectations*). Unfortunately none of the four observers published in the journal is from a developing country to give the journal's very large readers a developing-country perspective and balance the reportage. Nonetheless, Horlick concedes that the Seattle Ministerial was marred by 'evident rivalry between the US and the EU' and 'colourful protests in the streets of Seattle' which 'had little direct effect on the negotiations beyond wiping out the opening ceremony.' Yet the

⁹⁵ *ibid.*

⁹⁶ All the quotes attributed to him here are from Gary Horlick, 'The Seedbump at Seattle,' *JIEL* (2000) 3(1) 67-72.

commentator observes that those ‘who lost at Seattle’ were fish, poor people, the US economy and the Clinton administrations’ – again there is a continuation of the meta-narrative that the poor or the developing countries are the people the WTO was set up to help. By way of redeeming the pangs of distress of the collapse of the Seattle Ministerial on the poor, Horlick recommends (among others) ‘immediate agreement on market opening for poor-country products’ while the developed countries ‘especially the US, EU and Japan (should) talk like mercantilists but act like liberalisers.’

Ernest H Preeg called the Seattle Ministerial ‘a watershed for the world trading system.’ He accounts for the ‘failure to agree on an agenda for a new round of trade liberalising negotiations’ as ‘a fundamental reorientation of national interests and relationships’ showing that the WTO is now truly multilateral’ because the ‘[d]eveloping countries have indeed become fully engaged in the WTO, and play a decisive role in all important decisions.’⁹⁷ He traces the failure of the Seattle Ministerial to dashed hopes, unfulfilled expectations or ‘unbalanced implementation’ (as he chose to call it) of the Uruguay Round Agreements. He says:

The principal commitment by industrialised countries to developing countries in that round was to progressively phase out import quotas on textiles and apparel over 10 years. But after five years almost nothing has happened.

Market opening by industrialised countries in the proposed new round was equally non-forthcoming from the developing country point of view.⁹⁸

Instead of any of those, the US and other industrialised countries offer reduction in non-agricultural tariffs which of course is of no benefit to developing countries most of which export primary products only. Preeg testifies that he ‘made no converts to free trade’ in

⁹⁷ Ernest H Preeg, ‘The South Rises in Seattle,’ *JIEL*, (2000) 3(1) 183-185

⁹⁸ *Ibid* 184

Seattle and sums up that ‘the North still holds the trump cards.’⁹⁹ It was hard to detect whether that was in a celebratory or despondent note, and harder still to contradict him.

2.4.3 *The Doha Ministerial Conference 2001: Taking Development to the WTO*

The result of the raucous ending of the Seattle Ministerial Conference is the acceptance by the developed countries that the WTO should have development as one of its major agenda items; therefore, the next Ministerial Conference held in Doha, Qatar, ended with a ministerial declaration: the Doha Development Agenda (DDA)¹⁰⁰ formulated very much in language and objectives like the Marrakesh Agreement acknowledging that:

(Paragraph 2) The majority of WTO Members are developing countries. We seek to place their needs and interests at the heart of the Working Programme adopted in this Declaration.

(Paragraph 3) ... recognise the particular vulnerability of the least-developed countries and the special structural difficulties they face in the global economy. We are committed to addressing the marginalisation of least-developed countries in international trade and to improving their effective participation in the multilateral trading system.

The Work Programme specifically mentions agriculture in paragraph 13 to work ‘to establish a fair and market-oriented trading system...to correct and prevent restrictions and distortions in world agriculture ... (to undertake) substantial improvements in market access; reductions of, with a view to phasing out, all forms of export subsidies ... (and to address) non-trade concerns.’

⁹⁹ Ibid 185

¹⁰⁰ A number of developing and least-developed countries ‘argued that to call the negotiation a “round” would contradict their position that the results of the Uruguay Round should be implemented fully before launching a new “round” of trade negotiations. See Richard H Steinberg, ‘In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO’ 56 *International Organisation* (2002) at 353-4.

It is not only developing countries' trade ministers and diplomats that believe that the WTO should be concerned with development, international economic law scholars from developed and developing countries alike agree that the WTO should do development. Tomer Broude states that 'under the general appellation of 'International Economic Law' we should include many areas of international economic activity whose international legal regulation differs in intensity and depth, such as trade, investment, aid, monetary policy, labour migration and development.'¹⁰¹

In respect of the Doha Ministerial, two groups of observers furnish us with comments: one from legal scholars (published in the *Journal of International Economic Law*) and the other from the NGOs in Oxfam briefing papers.

The *Journal of International Economic Law* repeated the practice of asking legal scholars and observers of a Ministerial Conference to give their 'reaction comments' after the Doha Ministerial. Jeffrey J Schott gave a general comment, Gary N Horlick questioned if the speedbump he noticed in Seattle had be jumped over, Alan Wm Wolff asked a direct question: 'What did Doha Do?'; Steve Charnovitz explored the legal status of the Doha Declaration, and Carmen Otero Garcia-Castrillion examined the Doha Ministerial Declaration on the TRIPS and public health.

¹⁰¹ Tomer Broude, 'At the End of the Yellow Brick Road: International Economic Law Research in Times of Uncertainty,' in Colin B. Picker, Isabella D. Bunn and Douglas W. Arner (eds), *International Economic Law: The State and the Future of the Discipline* (Hart Publishing, Oxford 2008) 16

Jeffrey J Schott's assessment of the Doha Ministerial is neither positive nor negative. According to him, '[t]he most conclusive statement one can make about the results of the Doha Ministerial is that the member countries of the WTO agreed to launch new trade negotiations' not in a clear language but in a language 'rich' in 'constructive ambiguity.'¹⁰² The Ministerial 'allowed very one to take home a trophy for their political constituencies' and ended up being of a doubtful impact with members being uncertain as to whether 'to accept the Doha results as a 'single undertaking.'"¹⁰³ He regards the Declaration as 'merely a political document with ambiguous and possibly insignificant legal implications'¹⁰⁴ a point Steve Charnovitz addresses in his contribution to the series of comments.

Gary N Horlick continues his 'speedbump' metaphor and expresses his uncertainty as to the outcome of the results of the Doha Ministerial in a question: '[o]ver the bump in Doha?' Doha 'is only a launch, no outcomes are guaranteed:' market access remained a mirage because 'no decision was made on the modalities for tariff cutting-formula, or request-and-offer.'¹⁰⁵ Again after all the talking when it came to implementation 'most of the implementation issues were folded into the future.'¹⁰⁶

¹⁰² Jeffrey J. Schott, 'Comments on the Doha Ministerial, *JIEL*, (2002) 5(1)191

¹⁰³ See also Matthew Kennedy, 'Two Single Undertakings – Can the WTO Implement the Results of a Round?' *JIEL* (2011) 14(1) 77-120. The Ministerial Declaration launching the Doha Round includes a statement that 'the conduct, conclusion, and entry into force of the outcome of the negotiations shall be treated as parts of a single undertaking,' Doha Ministerial Declaration, WT/MIN(01)/DEC/1, adopted 14 December 2001, para 47.

Kennedy points out twin assumptions that could emerge that

(i) the single undertaking will operate at the implementation phase as it currently does during the negotiation phase (i.e. according to consensus culminating in one spectacular decision); and (ii) that the implementation phase after the conclusion of the Doha Round negotiations will take place in the same way as after the Uruguay Round (i.e. promptly with membership automatically entailing taking on all the results of the Round). Neither assumption is warranted.

¹⁰⁴ *ibid* 195

¹⁰⁵ Gary N. Horlick, 'Over the Bump in Doha?' *JIEL* (2002) 5(1) 195-202. Horlick points out that 'heated complaints in Seattle by some countries about being excluded from closed door small groups "Green Room"' never changed in Doha because 'most of the work was done in private bilateral sessions, and small meetings of 20-25' p. 199.

¹⁰⁶ *ibid* 200

Answering the question, ‘what did Doha do? Alan Wm Wolff says it ‘missed the opportunities’ to address ‘perhaps the most glaring problem with the current world trading system: the deeply flawed WTO dispute settlement system, ... did not address in any substantive way the problem of restrictive business practices that impair market access, e-commerce, agriculture, investment and taxation of trade ‘based on 1947-era rules that make no economic sense whatsoever.’¹⁰⁷ He noted lack of goodwill and faith in the world trading system because the developing countries wanted to ‘pause from trade liberalisation,’ Europe ‘to introduce goals regarding competition and environmental policies, and Japan ‘to undermine the foundation for tolerating open trading in industrial products’ that to him, in comparison with prior rounds, Doha might be called ‘The Retrenchment Round’ rather than ‘The Development Round.’

Arguments fall on both sides as to the legal status of a declaration of the WTO Ministerial Conference. Whether it is a mere political statement or legally binding was weighed by Steve Charnovitz. His conclusion is that ‘[t]he legal status of the Doha Declarations is ambiguous.’¹⁰⁸

The question that is still left hanging after a decade of launching the DDA as Surya P Subedi puts it is, ‘Is it going to be a “Development Round” in more than a name?’¹⁰⁹ Back in 2005 Oxfam was of the view that ‘the rich countries squeezed development out of the WTO Doha negotiations.’¹¹⁰ The Round is still mired in controversies more than ten years after.

¹⁰⁷ Alan Wm. Wolff, ‘What Did Doha Do? *JIEL* (2002) 5(1) 202-206

¹⁰⁸ Steve Charnovitz, ‘The Legal Status of the Doha Declarations,’ *JIEL*, (2000) 5(1) 207211

¹⁰⁹ Surya P. Subedi (n 85)

¹¹⁰ Oxfam, ‘Blood on the Floor,’ Oxfam Briefing Paper, 7 December 2005.

2.4.4 *Cancún Ministerial 2003*

The Cancún Ministerial Conference was the first conference after the launch of the Doha Development Agenda (DDA), but despite that, it was another conference that ended in failure because members remained entrenched, particularly in the ‘Singapore’ issues which were the four issues introduced to the WTO agenda at the December 1996 Ministerial Conference in Singapore: trade and investment, trade and competition policy, transparency in government procurement, and trade facilitation.¹¹¹

Perhaps coming with excessive optimism because of the gains they made at Doha in pushing development into the forecourt of international trade talks, the WTO members from the developing countries arrived in Cancún with the aim of consolidating their gains but that was not to be. The issues that are of interests to them such as TRIPS and public health and poverty reduction as well as a sectoral initiative in favour of cotton proposed by Burkina Faso, Benin, Chad and Mali were sidelined.

Like Seattle, Cancún also ended in a deadlock, without agreements. However, the world noted one thing: developing countries stood together and spoke with one voice and their impacts were felt around the globe.

2.4.5 *The Geneva Ministerial Conference 2009 in the British Press*

The WTO received bad press in Britain in 2008 following serious disagreements among members on development that even the Director-General Pascal Lamy supported a call ‘to

¹¹¹ *ibid.*

suspend the Doha negotiations.’¹¹² *The Independent* in its editorial declares, ‘The trade talks are over. What now?’ stating that when the DDA began ‘the world was much simpler and the issues appeared clearer ... the whole map has been altered by the industrial take-off of China and India.’¹¹³ Explaining what the talks hinged on and why they collapsed, the paper says, ‘the developed countries led by the US have pressed even harder for access to those rapidly-developing markets, they in turn have proved much tougher in their negotiations, arguing that the western nations were able to grow rapidly only with a degree of initial protection of their markets. So must the developing world.’¹¹⁴ As if blaming the developed countries for the collapse of the trade talks the paper headed its news story ‘Trade talks fail over US farm feud,’¹¹⁵ hailing the poorer countries for ‘standing up to the West, concluding that ‘No deal is better than a bad deal,’¹¹⁶ according to Matthew Coghlan, of ActionAid.

The Times proclaims, ‘Peasant armies bring down the powerhouses behind the new world of global trade, brick by brick’ noting that ‘[t]he solution preferred in Delhi and Beijing is protection’ because while India accuses the West of ‘looking for commercial interests and enhancing prosperity rather than looking for content which reduces poverty,’ China ‘wants protection for its rice and soy bean farmers.’ The conclusion: ‘[i]t is political fear that ended the trade talks in Switzerland, fear of the countryside rampant.’¹¹⁷

¹¹² www.wto.org/english/tratop_e/dda_e/negotiations_summary_e.htm

¹¹³ Editorial, *The Independent* (London 30 July 2008) 26

¹¹⁴ *ibid.* For a treatise of how protectionism helped the industrialised countries grow, see Friedrich List, *The National System of Political Economy*, Longman, Green and Co 1885), Ha-Joon Chang, *Kicking Away the Ladder – Development Strategy in Historical Perspective* (Anthem Press 2005) Yong-Shik Lee, *Reclaiming Development from the World Trading System*, (Cambridge University Press 2006)

¹¹⁵ *ibid* 2

¹¹⁶ *ibid.*

¹¹⁷ Carl Mortished, *The Times* (London 30 July 2008) 43

While *The Guardian* came with the headline, ‘WTO talks collapse after India and China clash with America over farm products,’¹¹⁸ *The Financial Times* captured it cryptically as ‘The blindfolds that wrecked a deal to boost global trade.’¹¹⁹ Again as the *FT* explains, ‘Among rich nations, domestic politics militate against trade liberalisation,’ pointing out that ‘[i]n the previous trade rounds, the rich nations set the rules and the rest could take it or leave it.’¹²⁰ Summing up the Geneva fiasco Philip Stephens says that ‘Doha has been a story with few heroes.’¹²¹

After the Sixth Ministerial Conference in Hong Kong in December 2005, it was expected that another ministerial would be held before the end of 2007 but nothing happened until December 2009. At the World Economic Forum in Davos, world leaders were trading accusations and counter accusations as to who dashed the DDA that the *Financial Times* headed its news item ‘Acrimony dashes Doha hopes’¹²² Lamy blamed the quagmire on the financial crisis of 2007/08 which ‘made it both easier and more difficult to conclude the round: easier because the crisis underlined the importance of the round, but more difficult for countries to make concessions that might harm parts of their electorate.’¹²³ While the Indian Prime Minister blamed ‘the US election’ Celso Amorim, Brazil’s foreign minister, attributed the failure to ‘economic nationalism’ such as the ‘buy America’¹²⁴ provisions in the fiscal stimulus package in the United States; but the Americans ironically point in a different direction, saying distractively, ‘[i]t will be very difficult to proceed in Doha unless we make

¹¹⁸ Heather Steward, *The Guardian* (London 30 July 2008) 22

¹¹⁹ Philip Stephens, *Financial Times* (London 30 July 2008) 11

¹²⁰ *ibid.*

¹²¹ *ibid.*

¹²² Chris Giles, *Financial Times*, February 1, 2009

¹²³ *ibid.*

¹²⁴ *ibid.*

progress on labour and environmental standards,¹²⁵ according to Howard Dean, former chairman of the Democratic National Committee.

Although the Seventh Ministerial Conference did take off in Geneva on 30 November 2009, it was more to make a political statement than to advance multinational trade negotiations. The Director-General of the WTO himself said it was not a negotiating session but ‘a platform for ministers to review the functioning of the house,’¹²⁶ in other words, a stocktaking session – the DDA is still in the doldrums at the time of writing – a decade after its launch.

In Geneva 2009 nothing concrete was said about the DDA except a statement by the Director-General Lamy that ‘the desire expressed by the ministers to conclude the Doha Round quickly has provided the “political energy” needed.’ But while the political energy may be there what is obviously lacking is the political will to conclude the Doha trade negotiations for economic recovery and poverty alleviation in developing countries.

2.5 Summary

For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics.

- Justice Oliver Wendell Holmes Jr.¹²⁷

¹²⁵ *ibid.*

¹²⁶ www.wto.org/english/thewto_e/minist_e/min09_e/min09_e.htm

¹²⁷ Quoted by Brian Bix, *Jurisprudence: Theory and Context*, 5th Ed. (Sweet & Maxwell, London) 201

‘Whose WTO is it anyway?’¹²⁸ is the question asked by the WTO itself in the last chapter of its introductory brochure ‘Understanding the WTO.’ This chapter started by probing the ‘why’ and ‘what’ of the Organisation and through extensive analysis showed why it came to be, its stated objectives and what it actually does. In answer to their own question, the brochure says ‘[t]he WTO is “member-driven,” with decisions taken by consensus among all member governments’ which suggests it is a very democratic organisation. The same WTO brochure contains an alternative view of Jeffrey J Schott that ‘an organisation with more than 150 member countries cannot be run by a ‘committee of the whole.’”¹²⁹ He suggests that in order to work more efficiently, the WTO should have an executive board, permanent seats for the major industrial countries on the board and weighted voting like the IMF and the World Bank. If the suggestion is followed, the whole of Africa may not have one permanent seat contrary to the WTO meta-narrative of ‘ensuring that developing countries, especially the least developed among them, secure a share in the growth in international trade’?¹³⁰

Jane Kelsey extends the question slightly further by asking, ‘Serving whose interests?’¹³¹ She sees the GATS as ‘the tools of contemporary global capitalism.’ Although her book focuses on the GATS, what she says applies to the GATT, TRIPS and other appurtenances of the WTO. It needs to be pointed out that capitalism is not bad in itself and that laws or agreements are put in place to check the abuse of the system or ameliorate the incidence of human activities on other people and the environment – hence the place of the WTO.

¹²⁸ WTO, ‘Understanding the WTO’ (WTO Publications 2010) 101

¹²⁹ Jeffrey Schott, quoted in ‘Understanding the WTO’ (n 82)

¹³⁰ The Preamble, Marrakesh Agreement Establishing the World Trade Organisation.

¹³¹ Jane Kelsey, *Serving Whose Interests? The Political Economy of Trade in Services Agreements*, (Routledge-Cavendish 2008)

The Ministerial Conferences in Seattle¹³² 1999, Doha 2001 and Cancún 2003 were marred in controversies over the relevance of the WTO to developing countries. It is over ten years since it was launched,¹³³ yet the Doha Development Agenda of trade negotiations is yet to be concluded due to lack of the political will to create a level playing field for all members.

As shown above, the WTO was not established to do development but to extend the market of its developed states-founders. If it is to serve the interests of developing countries, the initiative to recreate it must come from those not present at its creation, not from the hopeless goodwill of the founders.

If the great economists Keynes, Hayek and Lewis could be incarnated and invited to attend the next WTO Ministerial Conference, what would be their advice to the Director-General on the way forward on the thorny issue of trade and development? In my opinion based on what we know about them and their works, they would most likely offer the following advice:

JOHN MAYNARD KEYNES (1888 – 1946, died before the Nobel Prize in Economics was introduced in 1969): Reiterate the original remit of the World Bank; let it assume the name it had on the day it was set up as International Bank for Reconstruction and Development. As with the stimulus package for Europe called the Marshall Plan, draw up a Lamy Plan for developing countries and LDCs excluding Brazil, Russia, India, China, South Africa and South Korea for ten years to stimulate economic growth and trade in other parts of the world. But note, and I say this with extreme caution, as the different results of the Marshall Plan in

¹³² Available at www.wto.org/english/thewto_e/minst/e_min99 accessed on 1 May 2011

¹³³ 14 November 2001.

Germany and the United Kingdom shows that a development plan is a necessary but not sufficient condition for economic growth. The enabling environment must be present.

FRIEDRICH AUGUST von HAYEK (1889 – 1992, joint winner of the Nobel Prize in Economics 1974 for his ‘pioneering work and penetrating analysis of the interdependence of economic, social and institutional phenomena’): If you keep relying on the WTO Member States to get international economic law and policy right, the Doha Round will never be concluded and you will keep having protests and patch-ups especially if you choose venues within easy reach of protesters and with ample human rights conventions as shields for them – that was partly responsible for the absolute failure of Seattle and the modest success of Doha. Liquidate the pecks of the victorious Allied Powers. Japan has overtaken Britain and France looks up to China with envy. The United States is still in the driving seat but without the seatbelt it had in 1947.

SIR ARTHUR LEWIS (1915 – 1991, joint winner of the Nobel Prize in Economics 1979 for his ‘pioneering research into economic development with particular consideration of problems of developing countries’): The WTO is fundamentally different from the GATT. Therefore, the GATT rules should no longer apply without modifications; same for GATT jurisprudence. Panels and the Appellate Body should be pro-development in their decisions just as the European Court of Justice is pro-EU integration, citizens’ rights and the economic interests of Europe in its judgments. Findings in favour of multi-national corporations¹³⁴

¹³⁴ See *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R adopted 25 September 1997 which the United States filed to advance the commercial interests of American companies: Chiquita International Brands, Inc., Dole Foods and Del Monte (Mexican); Eliza Patterson, ‘The US-EU Banana Dispute’ *ASIL Insight*, February 2001; Mauricio Salas and John H Jackson, ‘Procedural Overview of the WTO EC – Banana dispute,’ *Journal of International Economic Law*, (2000) 3(1)

hiding behind influential WTO Member States are an abdication of legal responsibilities to those the WTO was set up to serve, as stated in the Preamble of its establishment Agreement.

Many states have suffered from discriminatory treaties skewed against them.¹³⁵ At the moment that is where developing countries are in the law and policy of the WTO. So far the Doha Development Agenda is not a 'done deal'. It is better stalemated, as it presently is, to show lack of the political will to make trade just and fair to all by the leading members of the WTO than concluded with three-quarters of the WTO membership bound to poverty. As shown above, previously the United States initiated the rounds, selected the agenda and determined the outcomes which invariably were most favourable to its national interests, all stamped 'world trade law.' It is time other nations' interests were considered.

Part II The Most-Favoured-Nation (MFN) Treatment

2.6.1 Introduction to the Development of the MFN Principle

The MFN originated as a treaty between two states to accord each other best terms of trade given to any other nation. Strictly speaking the term is a malapropism and inappropriate in a

145-166 and John H Jackson and Patricio Crane, 'The Saga Continues: An Update on the Banana Dispute and its Procedural Offspring' *Journal of International Economic Law*, (2001) 4(3) 581-595 contains a table showing 'the procedural history of the banana dispute and its progeny': *Banana I* (GATT Panel) initiated 12 June 1992 by Costa Rica, Colombia, Guatemala, Nicaragua and Venezuela, Panel found violations of GATT Articles I and XI(1) by the EEC and the EEC and ACP countries blocked the adoption of the report; *Banana II* (another GATT Panel) initiated by the same parties in *Banana I* on 28 January 1983, Panel found violations of Articles I and III of the GATT, Panel concluded that EEC Reg.404/93 violated Articles I, II and III of the GATT.

¹³⁵ Professor Junji Nakagwa's paper, 'The importance of an African voice in 'global' international economic law' presented at the SIEL African Network Inaugural Conference at the Mandela Institute, University of Witwatersrand, Johannesburg, South Africa 5 May 2011 observed that Japan was not 'admitted into the modern IEL' until after 'several decades of painstaking diplomatic negotiations to abolish the extraterritorial jurisdiction, and it was finally abolished after Japan defeated Russia in the Russo-Japanese War in 1905' and Turkey had the capitulation against it abolished by the Treaty of Lausanne 1923. Both after winning tough battles.

multilateral agreement covering almost all the nations of the earth. Originally, the ‘MFN was very much a form of discrimination as only a few nations benefited from a given MFN clause.’¹³⁶ However, Jackson states that ‘[d]espite the confusion over the phrase “most favoured” – which seems to imply a specially favoured treatment – the concept is one of equal treatment.’¹³⁷ Therefore, from the outset it is important to draw attention to the words that may be somewhat misleading in the phrase, namely, ‘most’ and ‘favoured’ when, in reality, what it is meant is neither unique nor special but just equal hence it is now commonly characterised simply as ‘non-discrimination’ which, in my view, is a better description of the principle. The aim of this part is to set out the context and current state of affairs of the MFN rule in the GATT; a detailed consideration of the GATT jurisprudence on the MFN is carried out in chapter 6 of this study. This part will only consider the flow and ebb of the application of the MFN principle.

2.6.2 Conditional and Unconditional MFN

Classic examples of conditional and unconditional MFN have been given by Jackson, Davey and Pauwelyn. Under conditional MFN, Jackson explains, ‘when country A grants a privilege to Country C while owing MFN to country B, then country A must grant the equivalent privilege to B – but only after B has given A some reciprocal privilege to ‘pay for it.’¹³⁸

Under unconditional MFN, using the same illustration above, A must grant the equivalent privilege to B without expecting B to reciprocate by way of concessions. As Davey and

¹³⁶ William J Davey and Joost Pauwelyn, ‘MFN Unconditionality: A Legal Analysis of the Concept in View of Its Evolution in the GATT/WTO Jurisprudence with Particular Reference to the Issue of “Like Product,”’ in Thomas Cottier and Petros C Mavroidis (eds) *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law*, (The University of Michigan Press 2000) 13

¹³⁷ Jackson, (n 21) 156

¹³⁸ *ibid* 161

Pauwelyn explain, ‘any advantage of the type covered by the obligation that State A grants to State C must also be afforded by State A to State B. This obligation is unconditional. State B benefits from the advantage whether or not it grants a similar advantage to State A.’¹³⁹

The practice in Europe had been unconditional MFN which ‘necessarily coincided with the decline of mercantilism’ till the birth of the United States of America in the 18th century, the industrial revolution and the ascent of capitalism.¹⁴⁰ The GATT is based on unconditional MFN and the Keynesian economic theory of a free market.

2.6.3 The Principle of Non-Discrimination in International Law

The MFN has a long history dating back to the twelfth century and has been speculated to be a ‘shorthand’ means of avoiding a litany of things in Friendship, Commerce and Navigation treaties.¹⁴¹ But its long history notwithstanding, it could be asked whether an MFN or economic non-discrimination obligation could arise and assume a life of its own outside a treaty in customary international law. Without an agreement such as the GATT, it is within the sovereign right of a nation to discriminate against other nations in their economic relations. Thomas Franck explains that only ‘a rule *which derives from a perception on the part of those to whom it is addressed that it has come into being in accordance with right process*’ that is emanating or perceived as coming from ‘valid sources’ and also ‘encompasses literary, socio-anthropological and philosophical insights’¹⁴² can lay claim to

¹³⁹ Davey and Pauwelyn (n127) 14

¹⁴⁰ John H Jackson, William J Davey and Alan O Sykes, Jr., *Legal Problems in International Economic Relations*, (4th edn ,West Group 2002) 419

¹⁴¹ *ibid* 158

¹⁴² Thomas M Franck, ‘Legitimacy in the International System’, *The American Journal of International Law*, Vol 82, No 4 (Oct 1998) 706

legitimacy under customary international law (original italics). Hudson's¹⁴³ five elements of custom of

- (i) concordant practice by a number of States with reference to a type of situation falling within the domain of international relations,
- (ii) continuation or repetition of the practice over a considerable period of time,
- (iii) conception that the practice is required by, or consistent with, prevailing international law,
- (iv) general acquiescence in the practice by other States, and
- (v) the establishment of the presence of each of these elements by a competent authority

do not seem to have settled the debates about the graduation of a practice into customary international law. According to Chigara, '[t]he standard of sufficiency for each of the elements of customary international law remains undetermined.'¹⁴⁴ In sum, the argument is not so much about the sources of customary international law but rather about its contents and whether a particular source has achieved a binding legal status.¹⁴⁵

The MFN Treatment appears as Article I in the GATT,¹⁴⁶ Article II in the General Agreement on Trade in Services (GATS)¹⁴⁷ and as Article 4 of the Agreement on Trade-Related Aspects on Intellectual Property Rights (TRIPS).¹⁴⁸ It does not feature in any of the articles of the Agreement on Trade-Related Investment Measures (TRIM). So it is good for GATT, for GATS and for TRIPS but not for TRIM, unlike National Treatment which appears in all four.

¹⁴³ (1950) 'Working Paper on Article 24 of the Statute of the International Law Commission,' *Yearbook of International Law*, vol 1, No 5, UN Doc. A/CN.4/16, p. 26

¹⁴⁴ Ben Chigara, *Legitimacy Deficit in Custom: a Deconstructionist Critique* (Ashgate 2001) 48

¹⁴⁵ Leonard H Hammer, *A Foucauldian Approach to International Law: Descriptive Thoughts for Normative Issues* (Ashgate 2007) 49

¹⁴⁶ Annex 1A WTO Agreement

¹⁴⁷ Annex 1B WTO Agreement

¹⁴⁸ Annex 1C WTO Agreement

The MFN treatment which requires that ‘any favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to like product originating in or destined for the territories of all other contracting parties’ did not originate with the WTO. Some researchers say it has its origins in medieval times’ bilateral commerce and trade treaties.¹⁴⁹ A prominent example of the inclusion of the MFN principle in a treaty of commerce in the nineteenth century was in the Cobden-Chevalier (Anglo-French) Treaty of 1860 which was also bilateral.¹⁵⁰ It was later appropriated¹⁵¹ by the GATT ‘club’ of twenty-three¹⁵² trading nations and later adopted by the WTO with the aim of exporting it to *the whole world as a total package*¹⁵³ with ‘national treatment.’

2.6.4 Object and Purpose of Article I (MFN) GATT 1994

The object and purpose of the MFN obligation of Article I:1 of the GATT 1994 is ‘to ensure equality of opportunity to import from, or to export to, WTO Members.’¹⁵⁴ The Appellate Body referred to it as a ‘cornerstone of the GATT’ and ‘one of the pillars of the WTO trading system.’¹⁵⁵

¹⁴⁹ Simon Lester and Bryan Mercurio, *World Trade Law* (Hart Publishing 2008) 322

¹⁵⁰ Frank Trentmann, *Free Trade Nation* (OUP 2008) 6

¹⁵¹ Article I GATT, 1947

¹⁵² The original GATT contracting parties acceded to the Agreement on 30 October 1947. As some of the names (in note 28 above) show the developing-country parties to the Agreement were no better than administrative areas or vast plantations for raw materials destined to European factories.

¹⁵³ Or in WTO parlance, the so called ‘single undertaking’ mechanism which makes it impossible for developing countries to opt out of some unfavourable WTO commitments.

¹⁵⁴ Peter Van den Bossche, *The Law and Policy of the World Trade Organisation* (2nd edn, Cambridge University Press 2008) 324

¹⁵⁵ *EC – Tariff Preferences*, WT/DS246/AB/R, adopted 20 April 2004.

But the central position of the MFN obligation notwithstanding, the principle appears to be more honoured in breach than in observance as it has been very much vitiated by regional trade agreements. As the WTO itself noted:

By July 2005, only one WTO Member – Mongolia – was not party to a regional trade agreement. The surge in these agreements has continued unabated since the early 1990s. By 2005, a total of 330 had been notified to the WTO (and its predecessor, GATT. Of these 206 were notified after the WTO was created in January 1995, 180 are currently in force; several others are believed to be operational although not yet notified.¹⁵⁶

The Sutherland Report on *The Future of the WTO* concluded that in the face of too many exceptions to the MFN obligation due to regional trade agreements entered into by WTO Members, the non-discrimination principle could now be rightly regarded as the exception rather than the rule. In their words:

[N]early five years after the founding of the GATT, MFN is no longer the rule; it is almost the exception. Certainly, much trade between the major economies is still conducted on an MFN basis. However, what has been termed the ‘spaghetti bowl’ of customs unions, common markets, regional and bilateral free trade areas, preferences and an endless assortment of miscellaneous trade deals has almost reached the point where MFN treatment is exceptional treatment.¹⁵⁷

Article I:1 covers both *de jure* (origin-based) *EC – Bananas III*¹⁵⁸ and *de facto* (superficially origin-neutral) measures as both the GATT Panel in *EEC – Import of Beef*¹⁵⁹ and the

¹⁵⁶ Peter Van den Bossche, *The Law and Policy* (n 54) 323

¹⁵⁷ Report by the Consultative Board to the Director-General Suachai Panitchpakdi, *The Future of the WTO: Addressing Institutional Challenges in the New Millennium* (the ‘Sutherland Report’) (WTO, 2004), para 60 and also Conclusions and Recommendations Numbers 2 and 3 of the Report.

¹⁵⁸ Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, para. 190. *EC – Bananas* has been dubbed ‘Dollar Bananas v. ACP Bananas’ because the measure at issue was the place of origin of bananas imported into the European Communities. The ‘dollar’ bananas refers to bananas exported from Latin America by US companies, while the ‘ACP’ bananas refers to the bananas from the former European colonies in Africa, the Caribbean and the Pacific states hence the names.

It was alleged that the ‘dollar’ bananas from Latin America were treated less favourably than bananas from the former European colonies. The acquired the notoriety of being one of the longest lasting cases in the history of the WTO.

Appellate Body in *Canada – Autos*¹⁶⁰ made clear. The first type (*de jure* and origin-based) involves the likeness of the products at issue, while in the second type (*de facto* and origin-neutral) the MFN granted to one country is alleged to result in actual discrimination against like products from yet another country.

2.6.5 The Scope of the MFN Obligation in the GATT

Article I:1 GATT 1994 provides:

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any Member to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other Members.

In addition to *Canada – Autos*¹⁶¹ mentioned in chapter 1, the Appellate Body in *EC – Bananas*¹⁶² stated that ‘[n]on-discrimination obligations apply to all imports of like products, except when these obligations are specifically waived or are otherwise not applicable as a result of the operation of specific provisions of the GATT 1994, such as Article XXIV... irrespective of their origin.’

A likely consequence of the provision of Article I GATT 1994 is increasing the complexity of classification. A classic example is the 1904 Swiss-German treaty providing for ‘a large dapple mountain cattle or brown cattle reared at a spot at least 300 metres above sea level and having at least

¹⁵⁹ GATT Panel Report, *EEC – Imports of Beef from Canada*, paras. 4.2 and 4.3.

¹⁶⁰ Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000.

¹⁶¹ *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS/139 & 142 adopted by the DSB on 19 June 2000, para 191

¹⁶² *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R adopted 25 September 1997. A note of caution, the same citation is used for *EC – Bananas (Ecuador)*, *EC – Bananas III (Guatemala and Honduras)*, *EC – Bananas III (Mexico)*, and *EC – Bananas III (US)*.

one month's grazing each year at a spot at least 800 meters above sea level'¹⁶³ all in an attempt to get some importer in and others out depending on their countries of origin. Two GATT cases *Japan – SPF* and *Spanish Coffee* illustrate the confusion attendant on classification.

In *Japan – Tariff on Import of Spruce-Pine-Fir (SPF) Dimension Lumber* Canada complained that Japan's tariffs on certain lumber cut to specific dimensions violated the MFN in the GATT. While some species of coniferous trees was tariff-free in Japan, the type exported by Canada was dutiable at eight per cent. Canada demanded that Japan accord the SPF timber it exports the same zero tariff accorded the others. The GATT Panel held that tariff differentiations are 'basically a legitimate means of trade policy' and that 'a contracting party which claims to be prejudiced by such practice bears the burden of establishing that such tariff arrangement has been diverted from its normal purpose so as to become a means of discrimination in international trade.'¹⁶⁴ It then concluded that reliance by Canada on the concept of 'dimension lumber' was 'extraneous to the Japanese' and as such 'not an appropriate basis for establishing 'likeness' under Article I of the GATT.

Conversely in *Spain – Tariff Treatment of Unroasted Coffee*,¹⁶⁵ the Spaniards after 1979 subdivided its classification of unroasted, non-decaffeinated coffee into five parts three of which were slammed a duty of seven per cent. (The Spanish tariff was not bound under GATT Article II on 'Schedules of Concessions'). Brazil which was the principal supplier of the type with duty imposed on it complained that Spain was in violation of the MFN principle. After examining all the arguments advanced by the parties on the justification or otherwise of different tariff treatment, the Panel noted that 'the arguments mainly related to organoleptic differences resulting from geographical factors,

¹⁶³ Jackson (n 21) 151

¹⁶⁴ *Japan – Tariff on Import of Spruce-Pine-Fir (SPF) Dimension Lumber*, GATT Panel Report adopted 19 July 1989, 36th Supp. BISD 167 (1990)

¹⁶⁵ *Spain – Tariff Treatment of Unroasted Coffee*, GATT Panel Report adopted 11 June 1981, 28th Supp. BISD 102 (1982)

cultivations methods, the processing of the beans, and the genetic factor.’ It then concluded that such differences were *not* ‘sufficient reason to allow for a different tariff treatment.’¹⁶⁶

Noting the divergence in the decision of the GATT Panel, Jackson, Davey and Sikes ask, ‘was the discrimination challenged in *SPF* and *Spanish Coffee* the type of discrimination that the clause was designed to combat? Or should countries be free to classify products as finely as they wish for tariff purposes?’ Opinions are divided. Among scholars within what Majlessi labelled ‘Jackson’s Paradigm’ the view is that the purpose of the MFN tariff negotiations is to encourage ‘narrower and narrower classification of goods’ and therefore the *SPF* case was a better decision. However, among scholars who are pro-market access such as Chimni, Dillon and Pogge, their view is that *Spanish Coffee* reflects the purpose of the GATT and should be applauded.

As stated at the outset, ‘economists have argued that there are fundamental, efficiency-enhancing properties to trade agreements having MFN’¹⁶⁷ but my underlying argument is that there is an economic threshold in international trade which a country must reach in order to be competitive. Otherwise it may be better off outside the GATT. ‘The central issue is,’ according to Hudec, ‘whether developing countries would do better by accepting the same GATT discipline as everyone else.’¹⁶⁸ In Hudec’s view, ‘the GATT’s current policy is harming developing countries more than it is helping them.’¹⁶⁹ This is due to the fact that the developing countries that accede to the GATT/WTO regime and submit to its disciplines cannot protect their infant industries based on Articles XVIII and XX which offer ‘general exceptions.’ If they did, the WTO Dispute Settlement Body would declare it GATT-inconsistent.

¹⁶⁶ *ibid* 4.6

¹⁶⁷ K Bagwell and R W Staiger, *The Economics of the World Trading System* (2002).

¹⁶⁸ Hudec, *Developing Countries*, *supra* 5.

¹⁶⁹ *ibid* 159.

2.6.6 GATT Exceptions and Waivers

There are three major exceptions to the MFN obligations in the WTO agreements: the general exceptions in Article XX GATT, the exceptions for customs unions and free trade areas in Article XXIV and the Special and Differential Treatment of developing countries following the redrafting of Article XVIII at the 1954-55 GATT Review Session.¹⁷⁰

i. Article XX GATT, General Exceptions

The chapeau of Article XX GATT reads:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

and is followed by ten conditions that would constitute legitimate exceptions to the GATT some of which are the protection of public morals, the protection of human, animal or plant life or health, products of prison labour and the protection of national treasures of artistic, historic or archaeological value. These provisions could be resorted to by any Contracting Party to the GATT whether a developed or a developing country.

ii. Customs Unions and Free Trade Areas

Article XXIV GATT provides a loophole that forms an exception to the Agreement. While in a customs union, customs duties between the parties are eliminated and a common tariff with regard to third countries is adopted, in a free trade area, the parties only eliminate tariffs

¹⁷⁰ Under certain conditions developing countries were permitted to disregard their tariff commitments so as to be able to implement non-tariff measures such as restrictive measures for ‘the establishment of a particular industry’ (Art. XVIII Section A), quantitative restrictions (Art. XVIII Section B) and infant industries protection and trade sanctions (Art. XVIII C).

between themselves but not adopt a common external tariff.¹⁷¹ Both free trade areas and customs unions by their very nature discriminate against non-members as we shall see in *Turkey – Textiles* in chapter 6. While the GATT recognises the ‘desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between economies of the countries parties to such agreements,’ it also recognises that they could constitute ‘barriers to trade’ between the constituent territories and other Contracting Parties.¹⁷² However, while the GATT does not prohibit the formation of free trade areas and customs unions, the Agreement demands specifically that

duties and other regulations of commerce imposed at the institution of any such unions or interim agreement in respect of trade with Contracting Parties not parties to such union or agreement shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such a union.¹⁷³

It is not clear how Article XXIV:5(a) expects nations to go into customs unions and free trade agreements¹⁷⁴ but not impose on third countries duties ‘higher’ than the ones on their members. This seems to defeat the purpose of having such a union or area. Expectedly the interpretation of Article XXIV has been fraught with controversies over what I would like to call systemic issues.¹⁷⁵

*iii. The Special and Differential Treatment and the Generalised System of Preferences (the Enabling Clause)*¹⁷⁶

What the GATT/WTO agreements mediated by the WTO have failed to achieve in the over sixty years of their existence is integrating the developing and least developed countries into

¹⁷¹ Article XXIV:8 GATT. See also Jackson (n 21) chapter 6 ‘The Most-Favoured-Nation Policy’ particularly n 34.

¹⁷² Article XXIV:4 GATT

¹⁷³ Article XXIV:5(a) GATT

¹⁷⁴ The GATS also allows for ‘economic integration’ in Article V.

¹⁷⁵ The cases are discussed in chapter 6 of this work.

¹⁷⁶ See Appendix 2.

the world trading system. According to Edwini Kessie, the ‘developing countries as a group have not benefited significantly’¹⁷⁷ from the world trading system and even though their share of world trade is said to have increased by 25 per cent, the beneficiaries have been a few countries, namely, Brazil, China, India, South Korea and South Africa; the forty-eight countries making up the LDCs have rather seen their share of world trade decline to less than 0.5 per cent, a confirmation of their marginalisation in the world trading system.¹⁷⁸

The Special and Differential Treatment (SDT) is therefore a measure aimed at helping to integrate developing and least-developed countries into the world trading system. The conceptual premise underlying the SDT is that ‘developing countries are intrinsically disadvantaged in their participation in international trade, and therefore, any multilateral agreement involving them and developed countries must take into account this intrinsic weakness in specifying their rights and obligations.’¹⁷⁹ The purpose of the SDT notwithstanding, the debates surrounding it have been about its effectiveness and legal status. As stated at the outset, the former is outside the ambit of this work but the latter is within the purview and it is to the legal status that I devote the rest of this section.

First I would like to examine briefly the fundamental shift in the attitudes of developing countries towards SDT. Right from the moment they joined the GATT developing countries have always expressed the structural disadvantages they face in the world trading system and have demanded to be treated slightly differently. However, the emergence and integration of

¹⁷⁷ Edwini Kessie, ‘The Status of Special and Differential Treatment Provisions under the WTO Agreements’ in George A Bermann and Petros C Mavroidis (eds) *WTO Law and Developing Countries* (Cambridge University Press 2007) 12

¹⁷⁸ UNCTAD, *Statistical Profiles of Least-Developed Countries* (2006)

¹⁷⁹ Kessie (n 177) 13

China, Hong Kong, South Korea and Singapore into the world trading system made some developing countries question the rationale and overall effectiveness of import substitution, quantitative restriction and other trade restrictive policies. Some felt that the costs outweighed the benefits and concluded that they would be better under a multilateral trading system conferring unconditional MFN to everybody. Even before the start of the Uruguay Round in 1986 a good number of developing countries such as Nigeria had had to subject their countries to Structural Adjustment Programmes nigerialised as ‘otanisi’ (Igbo for a ‘head bite’ which expresses the seriousness of the austerity measures) administered by either the International Monetary Fund (IMF) or the World Bank.¹⁸⁰

Again the proliferation of regional trade agreements and bilateral investment treaties which were perceived by the developing countries as a kind of divide-and-rule policies in addition to spiralling contingency protection measures made the developing countries feel more and better protected under a reinforced multilateral trading system which promised a more level playing field. According to Gibbs,

[W]hile seeking to preserve the differential treatment in their favour, they also began to defend the integrity of the unconditional MFN clause, obtaining MFN tariff reductions, and strengthening the disciplines of GATT ... so as to prevent the restriction and *harassment of their trade*. Particular emphasis was laid on an improved dispute settlement mechanism, as a means of defence against bilateral pressures from their major trading partners. At UNCATAD IV (Belgrade 1983), all countries recognised the need to strengthen the international trading system based on the MFN principle (*italics added*).¹⁸¹

So, slowly but surely the developing countries moved from open hostility to mild enthusiasm for the multilateral trading system with less emphasis on SDT. An eminent persons group had earlier expressed the view that SDT had done nothing to advance the interests of the

¹⁸⁰ Kessie (n 177) 19

¹⁸¹ Gibbs quoted by Kessie (n 177) at 21

developing countries but had instead produced perverse effects, on the developed countries, ‘the tendency to treat them as being outside the system;’ and on the developing countries, ‘allow(ing) themselves to be distracted by the idea of preferences ... as an easy substitute for action in more essential areas.’¹⁸² The developing countries then fell under the spell of trade liberalisation and strengthened dispute settlement system but not a reinforced and legally binding Part IV¹⁸³ on Trade and Development.

Furthermore, two other factors made the developing countries acquiesce in the multilateral trading system. First, the General System of Preferences from the developed countries to the developing countries such as the Lomé Convention all had expiry dates and were on the verge of running out. Second, as explained in chapter 1, the GATT and the WTO Agreements were presented as a ‘Single Undertaking’ with no optional provisions. Therefore, as Kessie points out, ‘it is not entirely correct to assert that they (the developing countries) voluntarily accepted a dilution of SDT in exchange for market access and strengthened rules’¹⁸⁴ because there were only the General Agreements or nothing.

There are five kinds of SDT: provisions aimed at increasing trade opportunities through market access,¹⁸⁵ provisions requiring WTO Members to safeguard the interest of developing countries,¹⁸⁶ provisions allowing flexibility to developing countries in rules and disciplines

¹⁸² F Leutwiler et al, *Trade Policy for a Better Future: Proposals for Action* (Geneva, GATT Secretariat) 34

¹⁸³ Part IV, GATT 1994 was drafted by the Committee on Legal and Institutional Framework of GATT in Relation to LDCs and finalised in a Special Session of the CONTRACTING PARTIES between 17 November 1964 and 8 February 1965. Effective *de facto* 8 February 1965 but *de jure* on 27 June 1966,

¹⁸⁴ Kessie (n 177) footnote 23

¹⁸⁵ Article XXXVII, GATT 1994

¹⁸⁶ Article 9.1 Agreement on Safeguards

governing trade measures,¹⁸⁷ provisions allowing longer transitional periods to developing countries,¹⁸⁸ and provisions for technical assistance.¹⁸⁹

Irrespective of its kind, while the developing countries have always insisted on legal enforceability of all SDT provisions,¹⁹⁰ the developed countries see them as no more than ‘best endeavour’ clauses or gentlemen’s agreements wholly dependent on the whims and caprices of the giver and therefore not legally binding. Their desire to see SDT enshrined in law notwithstanding, the language of the SDT provisions seem to undermine the position of the developing countries as they are couched in the phraseology of best endeavours. For example, under the so called ‘commitments’ Article XXXVII GATT 1994 deploys ‘to the fullest extent possible,’¹⁹¹ ‘compelling reasons’ and ‘make it possible’ to wash off any illusion of legality in respect of all the obligations mentioned in Part IV.

Expectedly, GATT/WTO jurisprudence on SDT is inconclusive. In *United Kingdom – Dollar Area Quotas*¹⁹² the United States challenged quantitative restrictions imposed by the UK on grapefruit juice and orange juice which the UK claimed it did to protect vital economic interests of Commonwealth Caribbean countries. The Panel avoided the substantive issue, namely, the compatibility of the measure with Part IV of the GATT and

¹⁸⁷ Article 15 Agreement on Agriculture and Article 27 SCM Agreement

¹⁸⁸ Scattered variously in the Agreement on Agriculture and the TRIPS Agreement

¹⁸⁹ Article 9 SPS Agreement

¹⁹⁰ Edwini Kessie, ‘Developing Countries and the World Trade Organisation – What Has Changed?’ (1999) 22 (2) *World Competition* 83 92-94 and also quoted in Kessie (n 177) 14-15

¹⁹¹ The phrase ‘to the extent possible’ was included in the article after a fierce opposition from developing countries. A note on Part IV observes, ‘The draft model chapter on trade and development prepared initially by the Secretariat on the basis of proposals from delegations for incorporation as Part IV of the General Agreement did not contain any qualifying clause. The words ‘to the extent possible’ appear to have been inserted in the draft later as most of the developed countries consider that they would not be in a position to accept commitments in this area unless there were provisions for exceptions in appropriate cases.’ (WTO Analytical Index (Geneva 2nd edn 1995) vol 2 at 1061

¹⁹² *United Kingdom – Dollar Area Quotas* GATT, Basic Instruments and Selected Documents (1974), 20th Supplement, para 1 at 235 L/3843, adopted 30 July 1973

merely ‘requested the parties concerned to actively seek a mutually acceptable solution to the problem which especially would pay due regard to the importance of the Caribbean countries and territories.’¹⁹³

Norway’s argument that the quantitative restriction it applied was done in the interests of six developing countries was flatly rejected by the GATT Panel in *Norway – Restrictions on Imports on Certain Textile Products*.¹⁹⁴ According to the Panel, Part IV cannot be relied upon to avoid or circumvent GATT obligations in Part II, a ruling considered as meaning that Parts II and IV are *disjunctive*.

However, in *EEC – Restrictions on Imports of Desert Apples* a similar line of argument by Chile hinged on the provision that ‘the developed contracting parties shall to the extent possible ... refrain from introducing, or increasing the incidence of, customs duties or non-tariff import barriers on products currently or potentially of particular export interest to less-developed contracting parties’ persuaded the Panel to hold that the EEC did not make ‘appropriate efforts to avoid taking protective measures on apples originating in Chile’ and interestingly that Part IV is *conjunctive* with Parts I and II but without stating categorically that the EEC was in breach of Part IV. An opportunity to advance the status of Part IV was missed in the following laconic but carefully chosen words ostensibly grounded on judicial economy:

[T]he commitments entered into by contracting parties under Article XXXVII were *additional* to their obligations under Parts I – III of the General Agreements, and that these commitments thus applied to measures which were permitted under Parts I – III. As the EEC’s import

¹⁹³ *ibid* para 6 at 236

¹⁹⁴ *Norway – Restrictions on Imports on Certain Textile Products* GATT, Basic Instruments and Selected Documents (1981), 20th Supplement, para 15, 126. L/4959, adopted 18 June 1980

restrictions [were] inconsistent with [its] specific obligations ... under Part II of the General Agreement, it ... [was unnecessary] to pursue the matter further under Article XXXVII¹⁹⁵ (emphasis added).

However, under the reinforced rules of the WTO, both the Panel and the Appellate Body stated in *EC – Tariff Preferences*¹⁹⁶ that the Enabling Clause is not binding but entirely at the discretion of the nations giving the preferences.

Therefore, with respect to the SDT and their legal status, what the Appellate Body stated in *Japan – Apples*¹⁹⁷ about the doctrine of precedent could be said to apply to special and differential treatments, that is, they merely ‘create legitimate expectations among WTO Members’ but not legal rights. This is because while Article 3.9 of the DSU states that ‘[t]he provisions of this Understanding are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement or a covered agreement which is a Plurilateral Trade Agreement,’ Article IX:2 of the *WTO Agreement* states that ‘[t]he Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements.’ It is the political organ (the Ministerial Conference) and not the judicial arm (the Dispute Settlement Body) that has the final word and that can adopt a Panel or an Appellate Body report.

¹⁹⁵ *EEC – Restrictions on Imports of Desert Apples* GATT, Basic Instruments and Selected Documents (1990), 36th Supplement, para 12.32, 134. L/6491, adopted 22 June 1989

¹⁹⁶ *EC – Tariff Preferences* Panel Report, WT/DS246/R and Appellate Report WT/DS246/AB/R adopted 20 April 2004 discussed in chapter 6 of this study.

¹⁹⁷ *Japan – Apples*, WT/DS8/AB/R, WT/DS10AB/R, WT/DS11/AB/R, adopted on 1 November 1996, Section E ‘Adopted Panel Report’. In the case, the Appellate Body made the following observation in footnote 30, ‘It is worth noting that the Statue of the International Court of Justice has an explicit provision, Article 59, to the same effect. This has not inhibited the development by that Court (and its predecessor) of a body of case law in which considerable reliance on the value of previous decisions is readily discernible.’

iv. *The problem with unconditional MFN*

The problem with unconditional MFN is that it seems to give too much power to countries with a very minor if not inconsequential share of the world trade. Again the greatest trading nation the United States is more inclined towards conditional MFN and the corresponding reciprocity instead of the altruistic unconditional MFN as the following statement of Ambassador Yeutter reveals:

We simply cannot afford to have a handful of nations with less than 5 percent of the world trade dictating the international trading destiny of nations which conduct 95 percent or more of international commerce in this world... Services in particular must be in the round or we are just not going to have a new GATT round from the US standpoint; and we will have to confront those issues in a different way – plurilaterally or multilaterally.¹⁹⁸

While the later part sounds bossy, the first part, it must be conceded, has both economic and moral weight to it. Again the following statement of President Regan does not show an intention for a GATT that works well for all but one that is specifically geared towards the interests of the United States:

To reduce the impediments to free markets, we will accelerate our efforts to launch a new GATT negotiating round with our trading partners, and we hope that the GATT members will see fit to reduce barriers for trade in agricultural products, services, technologies, investments and in mature industries. We will seek effective dispute-settlement techniques in these areas. But if these negotiations are not initiated or if insignificant progress is made, I am instructing our trade negotiators to explore regional and bilateral agreements with other nations.¹⁹⁹

If these statements evince the real intentions of the US Government, then unconditional MFN is no more than a smoke-screen in international trade diplomacy.

¹⁹⁸ Jackson (n 21) 171
¹⁹⁹ *ibid*

2.6.7 'Like Product' in Article I GATT

Article I:1 makes it clear that the basis for demanding MFN treatment is that the products are alike and as such should be granted the same 'favour, privilege or immunity' irrespective of country of origin. The Appellate Body has used the imagery of the accordion to characterise the concept of 'like product' showing that it is taken on a case-by-case basis whether what is alleged is *de jure* or *de facto* discrimination. According to the Appellate Body,

[t]he concept of 'likeness' is a relative one that evokes the image of an accordion. The accordion of 'likeness' stretches and squeezes in different places as different provisions of the WTO Agreement are applied. The width of the accordion in any one of those places must be determined by the particular²⁰⁰ provision in which the term 'like' is encountered as well as by the context and circumstances that prevail in any given case to which that provisions may apply.²⁰¹

2.7 Summary

The MFN underpins the principle of non-discrimination in the GATT. Nations started with conditional MFN and acquiesced in the unconditional MFN under the multilateral trading system but that has not eliminated the tendency for some countries to resort to actions in breach of the obligations under the GATT. The next subsection will examine the principle of National Treatment.

Part III The National Treatment Principle

2.8.1 Introduction

The National Treatment principle complements the MFN as the second arm of the principle of non-discrimination on which the multilateral trading system under the GATT regime rests. It anchors the philosophy of the General Agreement that protection should be transparent and only by way of

²⁰⁰ There are no less than nine articles of the GATT in which 'like product' is mentioned: Article I (MFN), Article III (National Treatment), Article VI (Anti-dumping and Countervailing Duties), Article VII (Valuation for Customs Purposes), Article IX (Marks of Origin), Articles XI and XIII (Quantitative Restrictions), Article XVI (Subsidies) and Article XIX (Safeguards).

²⁰¹ *Japan – Apples* (n 197) 21

tariffs.²⁰² While the MFN deals with tariffs prohibiting discrimination between goods from different countries, the National Treatment clause outlaws the use of internal taxes or regulations to discriminate between domestic goods and imported ones.²⁰³ It stipulates that imported products should be treated in the same way as domestic products once they have been cleared through the customs. The National Treatment clause dates back to ancient laws and agreements and has been identified in ancient Hebrew Law,²⁰⁴ treaties of commerce between England and other countries in the Middle Ages,²⁰⁵ the German city states making up the Hanseatic league and somewhat recently between the 17th and 19th centuries in shipping treaties amongst European powers.²⁰⁶

In Article III GATT 1994 the National Treatment provision is primed towards two measures considered to be counter-productive to international trade, namely, internal tax measures²⁰⁷ and regulatory measures.²⁰⁸ Article III:1 states:

The contracting parties recognise that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic products.²⁰⁹

²⁰² Jackson, Davey and Sykes (n138) 480

²⁰³ *ibid* 479

²⁰⁴ William Smith Culbertson, *International Economics Policies: A Survey of the Economics of Diplomacy* (D Appleton Company 1925) 24

²⁰⁵ Georg Schwarzenberger, 'The Most-Favoured-Nation Treatment in British Practice,' in *The British Yearbook of International Law*, XXII, 1945, 97, and also by the same writer 'The Principles of Standards of International Economic Law,' in RECUEIL DES COURS, Vol I, 1966, Academie De Droit International, Hague, at page 80.

²⁰⁶ Gerard Curzon, *Multilateral Commercial Diplomacy* (Michael Joseph 1965) 15.

²⁰⁷ Article III:1 GATT

²⁰⁸ Article III:4 GATT

²⁰⁹ *Ad Article III*, Paragraph 1 states:

The application of paragraph 1 to internal taxes imposed by local governments and authorities within the territories of a contracting party is subject to the provisions of the final paragraph of Article XXIV. The term 'reasonable measures' in the last-mentioned paragraph would not require for example, the repeal of existing national legislation authorizing local governments to impose internal taxes which, although technically inconsistent with the letter of Article III, are not in fact inconsistent with its spirit, if such repeal would result in a serious financial hardship for the local governments or authorities concerned. With regard to taxation by local governments or authorities which is inconsistent with both the letter and spirit of Article III, the term 'reasonable measures' would permit a contracting party to eliminate the inconsistent taxation gradually over a transition period, if abrupt action would create serious administrative and financial difficulties.

The rationale behind the National Treatment principle was to hedge in the MFN principle, to protect concessions made in tariff bindings based on the MFN principle from being sabotaged by internal taxes or other regulatory measures otherwise the MFN would in itself be rendered nugatory or ineffectual.²¹⁰ Therefore, once the products originating in a contracting state has entered the market of another contracting state, ‘it shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products.’²¹¹ This is meant to prohibit not only formal *de jure* discrimination, but also *de facto* discrimination.²¹²

But the GATT extended the National Treatment principle; instead of applying the principle to only cases of imports that were subject to tariff bindings, it extended National Treatment to internal taxes and regulatory measures that impacted on imports discriminatorily. So apart from internal taxes on imported products, regulatory measures on domestic products which confer on domestic products some advantages and have discriminatory effects on imported products all come under Article III of the GATT.

The key provisions of Article III are paragraph 1 establishing the general principle, paragraph 2 requiring National Treatment in respect of internal taxation, paragraph 4 requiring ‘no less favourable’ treatment of imported products than like domestic products and paragraph 8 which creates exceptions to the National Treatment principle with respect to (a) government procurement and (b) subsidies. ‘The significant difference between the national treatment

²¹⁰ John H Jackson, *World Trade and the Law of GATT* (The Bobbs-Merrill Company 1969) 37; see also Kenneth D Dam, *The GATT Law and International Economic Organisation* (University of Chicago Press 1970) 6-12

²¹¹ Article III:2 GATT

²¹² *US – Section 337* (n 210)

obligations set forth in Article III:4 and Article III:2,' Michael Trebilcock points out, 'is that Article III:4 in its wording only applies to "like" products and not to "directly competitive or substitutable" products.'²¹³

2.8.2 The National Treatment Principle under the GATT Dispute Settlement System

As will be reviewed in chapter 6, there have been many GATT/WTO panel and Appellate Body rulings on the interpretation of Article III but the two most important ones are probably *Italy – Agricultural Machinery* and *US – Section 337* both of which were GATT panel reports. Their importance lies in the fact that the former delineated the provisions of Article III early in the life of the GATT and the latter consolidated the legal principles laid down thirty years after the first interpretation. Taken together, they provide answers as to the scope of Article III.

In *Italian Discrimination Against Imported Agricultural Machinery*²¹⁴ the United Kingdom challenged an Italian law (No 949) pursuant to which the Italian Government had established a fund, used to grant special credit terms for the purchase of agricultural machinery made in Italy. The loans were granted at 3 per cent for a period of five years to finance up to 75 per cent of the cost of the Italian agricultural machinery. However, should the purchasers wish to buy foreign machinery, the credit terms would be less favourable. The UK indicated that the commercial credit rate stood at 10 per cent.

²¹³ Michael Trebilcock, 'The National Treatment Principle in International Trade,' American Law and Economics Association Annual Meetings, *Working Paper 8*, 2004, 35

²¹⁴ *Italian Discrimination Against Imported Agricultural Machinery*, GATT Panel Report, 7th Supp., BISD 60 adopted 23 October 1958 (hereinafter *Italian – Agricultural Machinery*)

The UK alleged a breach of Article III:4. They would not challenge the consistency of the Italian Law No 949 with the General Agreement on subsidies which the Italian Government was minded to provide domestic producers of tractors as that would be in line with Article III paragraph 8(b). The complaint of the UK hinges on the fact that in this case the assistance of Italy was not given to producers but *purchasers* and as such was not covered or protected by the provisions of paragraph 8(b).²¹⁵

Italy had defended its law and action by stating that the General Agreement was a trade agreement with its scope limited to ‘measures governing trade’ and as such that Article III:4 applied only to laws, regulations and requirements which were concerned with the actual conditions for sale, purchase, transportation, distribution or use and should not be interpreted extensively.

Italy also argued that ‘it would be inappropriate for the CONTRACTING PARTIES to construe the provisions of Article III in a broad way’ because to do so ‘would limit the rights of the contracting parties in the formulation of their domestic economic policies in a way which was not contemplated when they accepted the terms of the General Agreement.’²¹⁶

The Panel noted that the provisions of Article III:4 were not exactly the same in its French and English originals and it was the French version which provides that the imported products ‘ne seront pas soumis à un traitement moins favorable’ that was submitted to the Italian Parliament as against the English which reads ‘the imported product shall be accorded

²¹⁵ *Italian – Agricultural Machinery* para 5

²¹⁶ *ibid* para 10

treatment no less favourable’ and so that might have influenced the contention of the Italian Government.²¹⁷

However, both in English and French the text of paragraph 4 refers to laws, regulations and requirements *affecting* internal sale and other activities and not to law, regulations and requirements *governing* the conditions of sale or purchase. According to the Panel,

[t]he selection of the word ‘affecting’ would imply ... that the drafters of the Article intended to cover in paragraph 4 not only the laws and regulations which directly governed the conditions of sale or purchase but also any laws or regulations which might adversely modify the conditions of competition between the domestic and imported products on the internal market.²¹⁸

The Panel then suggested to the CONTRACTING PARTIES to ‘draw the attention of the Italian Government to the adverse effects on the UK exports of agricultural machinery, particularly tractors, of those provisions of Law 949 limiting the prescribed credit facilities to purchasers of Italian produced machinery.’ Lastly, the Panel recommended that the Italian Government should ‘consider the desirability of eliminating within a reasonable time the adverse effects of the Law on the import trade of agricultural machinery by modifying the operation of the Law.’²¹⁹

Secondly, in the *United States – Section 337 of the Tariff Act of 1930*²²⁰ the European Communities complained that the Section 337 of the US Tariff Act violated Article III of the GATT. The Act declared as unfair and unlawful any acts or methods of competition which

²¹⁷ *ibid* para 11

²¹⁸ *ibid* para 12

²¹⁹ *ibid* para 25

²²⁰ *United States – Section 337 of the Tariff Act of 1930*, GATT Panel Report, 36th Supp. BISD 345 (1990) adopted 7 November 1989 (hereinafter *US – Section 337*).

had ‘the effect or tendency to (1) destroy or to substantially injure an industry efficiently and economically operated in the United States, (ii) prevent the establishment of such an industry, or (iii) restrain or monopolise trade and commerce in the United States.’²²¹

The facts as put to the Panel are that, in patent infringement cases, proceedings before the United States International Trade Commission (USITC) under Section 337 are only applicable to imported products alleged to infringe a United States patent, and they are markedly different from those applying to products of US origin challenged in a federal district court for patent infringement. The EC maintained that the differences in proceedings amounted to a treatment less favourable for imported products and therefore inconsistent with Article III:4 of the GATT and unjustifiable under Article XX(d).

The Panel had to consider the relationship of Article III to Article XX(d). Both the US and the EC agreed that Article III:4 applies to substantive patent law as it affects ‘internal sale, offering for sale, purchase, transportation, distribution or use’ of imported and domestic products. Again the parties agreed that what was at issue was not the consistency of substantive provisions of US patent law. They also agreed that in cases of alleged patent infringement, Section 337 is applied to secure compliance with US patent law. The contention of the parties, however, centred on whether a measure aimed at securing the compliance with US patent laws, as opposed to the part of the substantive patent law itself, is covered by Article III:4.

²²¹ *ibid* 2.2

Although the Panel ‘found that some elements of Section 337 are inconsistent with the GATT obligations of the United States, it found no evidence that these elements had been deliberately introduced so as to discriminate against foreign products.’²²² Nonetheless, ‘the Panel concluded that Section 337 of the US Tariff Act of 1930 is inconsistent with Article III:4 ... and ... cannot be justified under Article XX(d).’²²³

Therefore, the Panel was of the view that Article III:4 makes no distinction between substantive and procedural laws, regulations or requirements; that enforcement procedures cannot be separated from the substantive provisions that they enforce,²²⁴ and that the ‘no less favourable’ treatment requirement set out in the article is ‘unqualified’.²²⁵

2.8.3 ‘Aims and Effects’ versus National Treatment

The GATT/WTO jurisprudence favours trade liberalisation over the ‘aims-and-effect’ test. The only GATT case where the ‘aims-and-effect’ principle was applied was in *US – Malt Beverages* but the Panel report was never adopted by the CONTRACTING PARTIES and so it cannot be cited as an authority even for persuasive purposes only.²²⁶ In *Japan – Alcoholic* a WTO panel rejected the ‘aims-and-effect’ test while interpreting Article III:2 mainly because it was not couched in treaty language and that its application would have rendered Article XX superfluous. According to the Panel:

Article III:2, first sentence does not refer specifically to Article III:1. There is no specific invocation in this first sentence of the general principle in Article III:1 that admonishes Members of the WTO not to apply measures ‘so as to afford protection.’ This omission must

²²² GATT Panel Report *US – Section 337*, para 6.2

²²³ *ibid* para 6.3

²²⁴ *ibid* para 5.10

²²⁵ *ibid* para 5.11

²²⁶ William J Davey and Joost Pauwelyn (n 136) 37

have some meaning. We believe the meaning is simply that the presence of a protective application need not be established separately from the specific requirements that are included in the first sentence in order to show that a tax measure is inconsistent with the general principle set out in the first sentence.²²⁷

However, with respect to the second sentence of Article III:2 which refers specifically to Article III:1, the demonstration of trade-distorting effect becomes crucial but this mentions only ‘taxes and other internal charges’ and not ‘laws, regulations and requirements’ mentioned in Article III:1.

Under the GATS, the WTO Appellate Body also rejected the ‘aims-and-effect’ test in *EC – Bananas*²²⁸ with respect to Article III:4 which refers only to ‘like products’ and not to directly competing products. The Appellate Body said,

We see no specific authority either in Article II (MFN Treatment) or in Article XVII (National Treatment) of the GATS for the proposition that the “aims and effects” of a measure are in any way relevant in determining whether that measure is inconsistent with those provisions. In the GATT context, the ‘aims and effects’ theory had its origins in the principle of Article III:1 There is no comparable provision in the GATS.²²⁹

William J Davey and Joost Pauwelyn describe the rejection of the aims-and-effect test of the contested *measure* in *Japan – Alcohol* as ‘a positive development’ because, in their view, when it comes to determining whether two products are ‘like,’ the objective characteristics of the product itself are what should matter. Again, in their view, ‘a decision on likeness can never be completely objective and the concept of equal treatment is tautological.’²³⁰

²²⁷ *US – Measures Affecting Alcoholic and Malt Beverages*, GATT Panel Report, DS23/R/1 6 March 1999, *unadopted*.

²²⁸ *Japan – Alcohol* para 6.16

²²⁹ *EC – Bananas* para 241

²³⁰ William J Davey and Joost Pauwelyn (n 136) 38

Logical, nonetheless, but the argument of the United States in *US – Section 337* and the ruling of the GATT Panel in the case shows that a measure that was conceived entirely for some innocuous reasons that have nothing to do with protectionism could be found to be inconsistent with the General Agreement. Therefore, this limits the policy space available to governments for economic growth and development.

2.8.4 National Treatment and Foreign Investment

As demonstrated in the immediate preceding section, foreigners who take their goods to other GATT Contracting States Parties insist on and do get the National Treatment for their products which is a ‘treatment no less favourable than that accorded to like products of national origin.’²³¹ In respect of the goods, all that matters is the preservation of effective equality of competitive opportunities so as not to disturb the equilibrium between domestic and foreign like products. However, when the same foreigners take their capital to other countries to invest, they demand a treatment higher than that given to nationals and this causes friction and the position of international law on this is far from being settled. This ‘relative lack of international regulation,’ Cassese points out, ‘favours the economic development of the more powerful States.’²³²

As Emmanuel Laryea notes, ‘the current construction and application of the principle, requiring importing countries to treat imports and exports equally, clearly favours exporting countries, and disadvantages importing countries.... The NT principle is, thus, more

²³¹ Article III:4 GATT 1994

²³² Antonio Cassese, *International Law in a Divided World* (Clarendon Press 1986) 320

beneficial to developed economies.’²³³ If the application of National Treatment to trade in goods demanding equality of competitive opportunities is disadvantageous to developing countries, National Treatment in international investment which demands a more favourable treatment of foreigners in cases of expropriation or nationalisation is even more disadvantageous and expectedly has been met with stiff opposition all around the world.

The protection of foreign property has been an incessant cause of friction between nations. Following the birth of the USSR and the rise of communism in October 1917 (by the old Russian calendar) the new Soviet Government nationalised all foreign property and businesses without any provision for compensation. There was no distinction made between property owned by Russian nationals and foreigners. The United States protested in its own right and on behalf of others that they ‘all considered that the decrees on the repudiations of Russian State debts, the confiscation of property and other similar measures were without effect as regards their nationals.’²³⁴ Later the Soviet Union was compelled to provide some form of indemnity or compensation for the nationalised assets, the so-called Litvinov Assignment, but did not higher than affected Soviet citizens got. The Western powers, on their part, had to make some form of compromise; they never accepted the Soviet position as legal but had to come to terms with the ‘facts on the ground’ and the United States formerly extended recognition to the Soviet Union in 1933.²³⁵

²³³ Emmanuel Laryea, ‘Rules for Permanent Economic Dominance by Developed Countries: Examples in International Trade and Investment Laws,’ presented at the First African International Economic Law Network Conference, Mandela Institute, University of Witwatersrand, Johannesburg, South Africa, 5 & 6 May, 2011

²³⁴ Cassese (n 232)

²³⁵ Andreas Lowenfeld, *International Economic Law*, (2nd edn, Oxford University Press 2008) 471

Following the success of the Mexican Agrarian reform of 1927 a different revolution swept across Mexico in the late 1930s and by a decree of 18 March 1938 the Mexican Government seized the property of the American, British and Dutch oil companies operating in the country. The Mexican government justification of its action had this logic and tempo:

There does not exist in international law, any principle universally accepted by countries, nor by the writers of treatises on this subject, that would render obligatory the giving of adequate compensation for expropriations of a general and impersonal character. Nevertheless, Mexico admits, in obedience to her own laws, that she is indeed under obligation to indemnify in an adequate manner; but the doctrine which she maintains on the subject, which is based on the most authoritative opinions of writers of treatises on international law, is that the time and manner of such payment must be determined by her own laws.²³⁶

This note of the Mexican Foreign Minister represents the position or view of the developing countries.

The Western view as expressed by the US Secretary of States Cordell Hull in subdued indignation, rebuttal and threat states:

I do not hesitate to maintain that it is the first occasion in the history of the western hemisphere that such a theory has been seriously advanced. In the opinion of my Government, the doctrine so proposed runs counter to the basic precepts of international law and of the law of every American republic, as well as to every principle of right and justice upon which the institutions of the American republics are founded. It seems to the Government of the US a contention alien to the history, the spirit and the ideals of democracy as practised throughout the independent life of all nations of this continent.

If such a policy were to be generally followed, what citizen of one republic making his living in any of the other twenty republics of the western hemisphere could have any assurance from one day to the next that he and his family would not be evicted from their home and bereft of all means of livelihood? Under such conditions, what guarantees or security could be offered which would induce the nationals of one country to invest savings in another country, or even to do ordinary business with the nationals of another country.²³⁷

What came to be known as the Hull formula and the prevailing Western view is that compensation should be ‘prompt, adequate and effective.’

²³⁶ *ibid* 321, see also text in GH Hackworth, *Digest of International Law*, iii (Washington, 1943), 658

²³⁷ Text in *AJIL* 32 (1938), Suppl., 192

While many jurists supported the Western view, the Mexican position did not lack intellectual support from the leading legal minds of the time. Among the distinguished scholars who did not take the official view of the Great Powers were ‘the British Sir John Fischer Williams and Brierly, the Italian Cavaglieri, the Belgian Rolin and the Frenchman Duguit.’²³⁸ Their position was that no government is under any obligation to pay compensation if expropriating or confiscating private property for public good unless it had entered into a treaty to that effect. This partly accounts for the current proliferation of investment treaties both bilateral and regional. Fischer Williams perceptively and articulately argued:

If Sates have not the same freedom to deal by law with the property of aliens as with the property of their own nationals, by what act or omission of their own have they been deprived of it? Whiteacre belongs to a British subject: the British Parliament is sovereign to expropriate him how and when it pleases. The British subject sells Whiteacre to an alien: Parliament has lost a portion of its former power. But Parliament has done nothing and has omitted nothing. On what principle must it suffer an abridgement of its authority by the act of third parties – a British vendor and an alien purchaser – both of whom are in this respect persons subject to its power?²³⁹

Cassese argues that the ‘prevailing view voiced by Fischer Williams and the other jurists referred to above were different from those underlying the Third World assault on the duty of compensation.’²⁴⁰ Granted that the jurists underscored the fact that the expropriation should be for ‘the common good’, he is silent on the Russian ‘assault’ (if that is what we must call it) of 1917 and the agrarian reform in Rumania in 1921 which were blatant confiscations without compensations. Cassese even seems to have conceded that faced with the great slump of

²³⁸ Cassese (n 232) 321

²³⁹ John Fischer Williams, ‘International Law and the Property of Aliens,’ *BYIL* 9(1928) 1

²⁴⁰ Cassese (232) 323

1929 the ‘intervention of the State proved necessary to avert a worsening of the economy’²⁴¹ in the United States.

Carlos Calvo, an Argentine jurist argued,

[i]t is certain that aliens who establish themselves in a country have the same right to protection as nationals, but they ought not to lay claim to a protection more extended. If they suffer any wrong, they ought to count on the government of the country prosecuting the delinquents, and not claim from the state to which the authors of the violence belong any pecuniary indemnity.

...

The rule that in more than one case it has been attempted to impose on American states is that foreigners merit more regard and privileges more marked and extended than those accorded even to the nationals of the country where they reside.

The principle is intrinsically contrary to the law of equality of nations.²⁴²

This doctrine which has found acceptance and is enshrined in some Latin American constitutions²⁴³ is contested in the West and is far from being ‘certain’. It has also spread to Africa as the Nigerian Enterprises Promotion Decrees of 1972 and 1977 which were aimed at indigenising the ownership of companies based in the country show.²⁴⁴

²⁴¹ *ibid* 324

²⁴² The Calvo doctrine quoted by Lowensfeld (n 235) 473

²⁴³ Article 27 of the Mexican Constitution of 1917 provides:

Ownership of the lands and materials included within the boundaries of national territory belongs originally to the Nation, which has had and continues the right to transit ownership thereof to private parties, thereby constituting private property. Expropriation may only be made for reasons of public utility and by means of compensation. The nation shall have at all times the right to impose on private property the modalities required by the public interest, as well as the right to regulate the expropriation of natural resources capable of appropriation in order to conserve them and to make an equitable distribution of public wealth.

In interpreting the article, the Supreme Court of Mexico ruled,

[Article 27] sought to eliminate the classical concept which defined the right of property as an absolute untouchable right, and to replace it with a concept which recognises private property as a social function. Thus, private property would not be the exclusive right of one individual, but a right subordinated to the common welfare.

In Chile a similar provision Article 10(10) of the Constitution of 1925 only adopted in 1967 reads:

No one may be deprived of his property except by virtue of a general or special law which authorises expropriation for reasons of public utility or social interest determined by the legislature. ... The law shall determine the norms for fixing compensation, the tribunal which shall hear claims concerning the amount of compensation according to law, the form of satisfying the obligation to compensate, and the opportunities and manner in which the expropriating agency shall take material possession of the expropriated property.

²⁴⁴ Cap 303, Laws of the Federation 1990

In Europe and North America, the prevailing view has found judicial support in arbitral awards and judicial rulings. In a dispute between Norway and the United States where the US requisitioned ships being constructed in American shipyards for war during World War I, the US agreed to pay for only the value of the materials actually taken which they estimated at \$2.6 million. The Norwegian owners of the shipyard demanded the full value of the ship including interests, all amounting to about \$18 million. The arbitral tribunal under the Permanent Court of Arbitration found essentially for Norway and stated:

Whether the action of the United States was lawful or not, just compensation is due to the claimants under the municipal law of the United States, as well as under the international law, based on the respect of private property.²⁴⁵

It is interesting that the award referred directly to both US law and international law. The United States paid the amount awarded but Secretary of States Hughes (later Chief Justice of the US) wrote that ‘the award cannot be deemed by this Government to possess an authoritative character as precedent.’²⁴⁶

In another war-related dispute, the *Chorzow Factory*²⁴⁷ case grew out of boundary adjustments between Germany and Poland and the subsequent Polish government takeover of a nitrogen factory erected in Poland when the territory was part of the German Reich based on a Geneva Convention on the implementation of the Treaty of Versailles authorising it. The property in Silesia was credited to Germany as part of her obligations to make reparations for the war. The Polish position was that the Chorzow factory had been owned

²⁴⁵ *United States – Norway Arbitration Award* (13 Oct 1922), 1 UN Rep. Int’l Arbitral Awards[R.I.I.A] 307 (1918)

²⁴⁶ 17 *AJIL* (1923) 287 at 289

²⁴⁷ *Case Concerning Germany Interests in Upper Silesia*, P.C.I.J. Series A, Nos 7, 9, 17, 19 (1926-29)

by the German government, or that it had fraudulently transferred it to individuals. The World Court found in favour of Germany that she was entitled to the full value plus interests.

It ruled:

It follows that the compensation due to the German Government is not necessarily limited to the value of the undertaking at the moment of dispossession, plus interest to the day of payment

The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.²⁴⁸

The *Chorzow Factory* case is quoted incessantly by various groups in support of various propositions: (a) as an enunciation of the principle of compensation in cases of State expropriation of private foreign property, (b) as showing that unlawful expropriation in violation of express treaty provisions demands higher compensation than lawful ones carried out in exercise of State sovereign powers in public interest, and (c) that the case was brought pursuant to the Peace Treaty and the Geneva Convention of 1922 and as such should not be taken as stating a rule of customary international law.²⁴⁹

2.9 Summary

This chapter started with an overview of the formation of, first, the GATT; then, the WTO, and how each fitted into the Bretton Woods structure of post-World War II Keynesian economic order. It analysed how against the backdrop of the collapse of the League of

²⁴⁸ P.C.I.J. Series A, No 17 at 47

²⁴⁹ Samy Friedman, *Expropriation in International Law*, (1953 repr. 1981) 176-223. See also Lowenfeld (n 234) 475

Nations and the International Trade Organisation efforts were made to tailor the GATT/WTO to suit the foreign economic policy of the United States and the dominant European powers.

The second part analysed in some detail how the United States started with conditional MFN but later changed to unconditional MFN and persuaded other countries to have it enshrined as the key provision of the General Agreement. My analysis shows how efforts were made to ameliorate the constraints of the MFN principles by the GATT CONTRACTING PARTIES so that they will have the much needed policy space for growth by building in the so-called general exceptions which the States are yet to use to found an action that would otherwise have been considered to be GATT-inconsistent.

Lastly, Part III has shown how the National Treatment principle has been used to demand for equal treatment with national products of foreign goods but an extended treatment above that given to nationals when it comes to foreign investment and the ensuing arguments on all sides.

The next chapter will explore the concept of growth and economic development which are what the MFN, the National Treatment or the GATT generally is meant to deliver as a dividend from the multilateral trade agreement.

Chapter 3

The Development Debate in International Trade Law

Outline

- 3.1 Introduction
- 3.2 The Evolution of the Right to Development
- 3.3 Hierarchy of Rights?
- 3.4 Current Debates and Declarations
 - 3.4.1 The Views of International Economic Lawyers
 - 3.4.2 The UN Independent Expert on the Right to Development
 - 3.4.3 The Millennium Declaration
 - 3.4.4 The Monterrey Consensus
 - 3.4.5 The Paris Declaration on Aid Effectiveness
 - 3.4.6 The Lomé Convention and the Cotonou Agreement
 - 3.4.7 The Open-Ended Working Group
 - 3.4.8 The High Level Task Force
 - 3.4.9 The UN General Assembly Resolution 63/178 on the Right to Development
- 3.5 The Legal Status of the Right to Development
- 3.6 The African Charter of Human and Peoples Rights 1981
- 3.7 The WTO Ministerial Conferences
- 3.8 The MFN and Development
- 3.9 The National Treatment Principle and Development
- 3.10 The Development Dimension of the National Treatment Principle
- 3.11 National Treatment and TRIPS
- 3.12 The WTO Dispute Settlement Body and Development
- 3.13 Oxfam on the WTO and the Right to Development
- 3.14 Summary

3.1 Introduction

The debate about trade and development is analogous to the debate about economic (austerity) measures and growth which saw François Hollande elected as Socialist President of France¹ and led to an inconclusive election in Greece. However, one major difference between the two is that while world leaders have been forced by the French electorate to concede that austerity should have a growth dimension, the same world leaders are yet to agree that development should underpin the GATT.² Another contrast between the two is that while the economic interests of the biggest trading nations are tied to the Euro-zone economy, ECOWAS seems to be at the fringes of world trade. Prime Minister David Cameron stated that the Euro-zone crisis ‘carries huge risks for everyone’ and the Governor of the Bank of England Sir Mervyn King was quoted as saying that ‘[o]ur greatest trading partner is tearing itself apart with no obvious solution.’³ Therefore, it appears that the interest in the Euro-crisis stems from the fear of contagion, the spread of the crisis to Britain and other countries. Labour Party leader Ed Milliband went as far as declaring that it was ‘time to end the arrogance of “Camerkozy” economics,’⁴ referring to the economic policies pursued by the British, German and French leaders without any significant boost to the economy. Even a re-run of the election in Greece on 17 June 2012 has been referred to as a ‘referendum on euro membership’.⁵ There is no corresponding desire and genuine political will to see growth and development in ECOWAS and other developing countries as their share of world trade does not mean much to the rest of the world.

¹ François Hollande was elected Socialist President of France on 6 May 2012 defeating the incumbent Nicolas Sarkozy.

² Peter Spiegel and Kerin Hope, ‘European Leaders Raise Pressure on Merkel,’ *Financial Times* (London 21 May 2012) 1

³ George Parker and Chris Giles, ‘Cameron to spell out fears of eurozone unravelling,’ *Financial Times* (London 17 May 2012) 1

⁴ Ed Milliband, ‘Time to end the arrogance of “Camerkozy” economics,’ *Financial Times* (London 19 May 2012) 13

⁵ Spiegel and Hope (n 2)

This chapter will analyse the efforts to enshrine the right to development (RtD) as a universal human right, the current debates (which reflect the views of experts such as the UN independent expert on the right to the RtD, scholars, leading economists and non-governmental organisations (NGOs)) and the legal status of the RtD side-by-side with the principles of the MFN and national treatment.

3.1.1 Historical Background: Evolution of the Right to Development

The right to development (RtD) comes under human rights which in international law are protected at the UN level by two legally binding covenants, the International Covenant on Civil and Political Rights (ICCPR)⁶ and the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁷ The ICESCR emphasises the right to *economic* development, among others.⁸ Direct references and oblique allusions to economic development can be traced back to the Charter establishing the United Nations Organisation (UN). The Preamble to the Charter states the determination of the UN ‘... to promote social progress and better standards of life ... to employ international machinery for the promotion of the economic and social advancement of all peoples.’ Article 1 of the Charter sets out ‘promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion’ as the purpose of the UN. Article 55(a) links ‘peaceful and friendly relations among nations’ to ‘conditions of economic and social progress and development.’ Article 60 entrusts the General Assembly (GA) with the responsibility for ‘international economic and social co-operation’ which it will discharge

⁶ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966 in New York, 999 UNTS 171, entered into force 23 March 1976

⁷ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 999 UNTS 3, entered into force 3 January 1976

⁸ Article 2(1) enjoins States Parties to the ICESCR ‘to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights covered in the ... Covenant.’ Article 6 provides for the ‘right to work,’ and Article 8 for the ‘right of everyone to form trade unions and join the trade union of his choice.’

through the Economic and Social Council (ECOSOC). Article 68 empowers ECOSOC to form commissions which it did with the Commission on Human Rights formed in 1946. Under Article 13 the GA is mandated to conduct studies and make recommendations on the observance of both the ICCPR⁹ and the ICESCR.¹⁰

The RtD is not expressly stated in the three most important human rights documents that followed the UN Charter and are together referred to as the Bill of Human Rights¹¹ due to the political situation in the world at the time. Both in politics and academia ‘first’ and ‘second’ generations have been used to characterise the rights contained in the ICCPR and the ICESCR respectively with each demanding different duties from the state. ‘[T]he first-generation of rights invokes the duty to *respect and protect*, while the second-generation rights invoke the duty to *protect and fulfil*’ yet ‘both covenants identify the individual human person as the right-holder.’¹²

At the UN, the Declaration on the Right to Development (UNDRD) 1986¹³ was passed with a very large majority, but not a unanimous vote¹⁴ due to, in the views of the UN Independent Expert on the RtD Mr Arjun Senguta, ‘the conceptual differences ... reflecting the tensions of

⁹ UN Article 13(a) provides for the GA to initiate studies and make recommendations for the purpose of ‘promoting international co-operation in the political field and encouraging the progressive development of international law and its codification’

¹⁰ UN Article 13(a) provides for the GA to initiate studies and make recommendations for the purpose of ‘promoting international co-operation in the economic, social, cultural, educational, and health fields, and assisting in the realisation of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.’

¹¹ The term ‘Bill of Human Rights’ does not stand for a single document but denotes The Universal Declaration on Human Rights 1948, the ICCPR 1966 and the ICESCR 1966.

¹² Felix Kirchmeier, ‘The Right to Development – where do we stand?’ in *Dialogue on Globalization*, Friedrich Elbert Stiftung Occasional Papers No. 23, Geneva, July 2006.

¹³ Appendix 5. *The Declaration on the Right to Development*, adopted Dec. 4, 1986 GA Res. 41/128 UN GAOR, 41st Sss., UN Doc.A/Res/41/128 Annex (1987), hereinafter Declaration (1986). See also Annex, Agenda Item 101, 97th plen. Tg. At 1, U.N. Doc. A/RES/41/128 (1987) arguing that social, political, economic, and cultural rights must accompany the right to development as a fundamental human right in order for it to reach its full potential.

¹⁴ There was *one* dissention, the United States and *eight* abstentions, namely, Denmark, Finland, Federal Republic of Germany, Iceland, Israel, Japan, Sweden, United Kingdom.

the Cold War period.’¹⁵ Those ‘conceptual differences’ divided the world into three parts with some rights identified with each position: the so-called First World, the industrialised countries of Western Europe and North America which oppose the right to development but champion civil and political rights, the socialist Second World of communist countries that supports economic, social and cultural rights and the Third World made up of the developing countries, mostly in Africa, who are the foremost advocates of the right to development and for a new international economic order (NIEO).¹⁶

The UNDRD defines ‘development’ as ‘a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire

¹⁵ Arjun Sengupta, ‘The Human Right to Development,’ in Bard A. Andreassen and Stephen P. Marks (eds) *Development As a Human Right – Legal, Political and Economic Dimensions*, (Harvard University Press, 2007) 9

¹⁶ Appendix 6. The last paragraph of the Preamble and Paragraph 1 of the UN GA Res. 3201 (S-VI) adopted in New York on 1 May 1974 provide the following rationale for the NIEO: *Solemnly proclaim* our united determination to work urgently for the Establishment of a New International Economic Order based on equity, sovereign equality, interdependence, common interest and cooperation among all States, irrespective of their economic and social systems which shall correct inequalities and redress existing injustices, make it possible to eliminate the widening gap between the developed and the developing countries and ensure steadily accelerating economic and social development and peace and justice for present and future generations, and, to that end, declare:

1. The greatest and most significant achievement during the last decades has been the independence from colonial and alien domination of a large number of peoples and nations which has enabled them to become members of the community of free peoples. Technological progress has also been made in all spheres of economic activities in the last three decades, thus providing a solid potential for improving the well-being of all peoples. However, the remaining vestiges of alien and colonial domination, foreign occupation, racial discrimination, apartheid and neo-colonialism in all its forms continue to be among the greatest obstacles to the full emancipation and progress of the developing countries and all the peoples involved. The benefits of technological progress are not shared equitably by all members of the international community. The developing countries, which constitute 70 per cent of the world's population, account for only 30 per cent of the world's income. It has proved impossible to achieve an even and balanced development of the international community under the existing international economic order. The gap between the developed and the developing countries continues to widen in a system which was established at a time when most of the developing countries did not even exist as independent States and which perpetuates inequality.

See also *Programme of Action on the Establishment of a New International Economic Order*, U.N. GAOR Ad. Hoc. Comm., 6th Sess. 2229th mtg., U.N. Doc. A/RES/3202 (S-IV)(1974) [hereinafter NIEO Program of Action] (describing efforts needed to realise these goals, and addressing problems of raw materials and primary commodities, the restructuring of the International monetary system, increased industrialisation in the developing countries, technology transfer, and control over the activities of transnational corporations and natural resources).

population of all individuals on the basis of their active, free and meaningful participation in development and the fair distribution of benefits resulting therefrom.’¹⁷ Then Article 1 defines the RtD itself as ‘an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised.’¹⁸

Two dominant figures in the conceptualisation and advocacy of the right to development are Senegalese jurist Keba M’Baye and Karel Vasak, former director of UNESCO’s Division of Human Rights and Peace. M’Baye in a 1972 lecture at the International Institute of Human Rights in Strasbourg distinguished between ‘le droit du développement’ and the ‘le droit au développement’ (‘the law of development’ and ‘the right to development’). He held the view that ‘every man has a right to live and a right to live better.’¹⁹ Vasak elaborated third generation or solidarity rights with the right to development as a key example.²⁰ M’Baye’s assertion that ‘every man has a right to life and a right to live better’²¹ has been criticised by a commentator as having a ‘justification more in political-economic and moral terms, rather than in legal analysis.’²²

3.3 Hierarchy of Rights?

A ‘third generation’ presupposes first and second generations. Vasak has calibrated rights into the following three divisions with the right to development at the bottom:

¹⁷ The Preamble, UNDRD, para. 2.

¹⁸ Art. 1, UNDRD 1986 supra.

¹⁹ Isabella D Bunn, *The Right to Development and International Economic Law: Legal and Moral Dimensions* (Hart Publishing 2012) 41

²⁰ *ibid*

²¹ Keba M’Baye, ‘Le Droit au Développement comme un Droit de L’Homme, 5 *Revue Des Droits ~de L’Homme* (*Hum. Rts, J.*) 503, 515 (1972). M’Baye suggested that since all human beings are theoretically entitled to the same basic rights, the RtD should, by the same token, be extended to all without limits.

²² Isabella D. Bunn, ‘The Right to Development: Implications for International Economic Law, *Am. U. Int’l L. Rev.* (2000) 1433.

- a. *First generation*: civil and political rights such as those enunciated in the US Declaration of Independence and the French Declaration of the Rights of Man and of the Citizen with which governments may not interfere,
- b. *Second generation*: economic, social and cultural rights as embodied in the Russian Revolution of 1917 and the New Deal in the United States which require affirmative actions by governments on behalf of citizens, and
- c. *Third generation*: solidarity rights – so called because unlike the first and second generations of rights which individual states can fulfil, the third generation rights require joint international action or solidarity. They include the right to development, the right to peace and the right to a supportive and healthy environment.²³

The attendant problem of this categorisation is that it conflicts with the United Nations legal position that all rights are indivisible and interdependent. In the same vein, if the right to development is seen as the mother of all rights, ‘the alpha and omega of human rights ... the core right from which all the others stem,’²⁴ it then follows that all other rights may be breached until it is fulfilled.²⁵

The revised criteria of the High Level Task Force on the implementation of the RtD at its fifth session shows that there are three components to the RtD, namely, ‘comprehensive human-centred development,’ ‘enabling environment’ and ‘social justice and equity.’²⁶ With the introduction of environmental friendliness and sustainable development in the 1990s, the Brundtland Commission (1987) came up with an authoritative definition of sustainable

²³ Karel Vasak, ‘A Thirty Year of Struggle – The Sustained Efforts to Give Force of Law to the Universal Declaration on Human Rights’ (Nov 1977) *UNESCO Courier*, at 29; see also Isabella D Bunn, *ibid*

²⁴ Mohammed Bedjaoui, ‘The Right to Development, in Mohammed Bedjaoui (ed) *International Law: Achievements and Prospects* (1991) 1177 at 1182 quoted in Bunn above.

²⁵ Bunn (n 19) 80

²⁶ *Report of the High-Level Task Force on the implementation of the right to development at its fifth session*, 27 April 2009, UN Doc. a/HRC/12/WG.2/TF/2, para. 119.

development as ‘development that meets the need of the present generation without compromising the ability of future generations to meet their own needs.’²⁷

The evolution of the RtD dates back to the 1950s and 1960s following the emergence of many countries from colonialism and their declaration of independence and subsequent joining of the UN. It started with the leading role of Raul Prebisch, then director of CEPAL²⁸ who argued that the newly emergent developing countries were at a structural disadvantage in the existing international organisations.²⁹ A consensus was reached only in 1993 when the United States officially supported the right to development at the Vienna Second UN Conference on Human Rights.³⁰ The last part of this sub-section will look at the legal status of such a declaration.

This chapter will therefore examine to what extent the elaboration of the right to development has been achieved or anchored in law beyond the level of rhetorical devices. Petersmann laudably argues for an ‘integration approach’ which would put human rights into the law of worldwide organisations as opposed to the 1945 paradigm of “specialised agencies’ canvassing strongly that ‘[g]lobal integration law (e.g. in the WTO) should not focus one-

²⁷World Commission on Environment and Development, *Our Common Future* (Oxford, oxford University Press, 1987) 42 and also A. Lindroos, *The Right to Development*, Forum Iuris Publications of the Faculty of Law, University of Helsinki, Helsinki, 1999, p.40.

²⁸Economic Commission for Latin America and the Caribbean, established by ECOSOC resolution 106(VI) of 25 February 1948

²⁹Felix Kirchmeier, ‘The Right to Development – where do we stand?’ in *Dialogue on Globalization*, Friedrich Elbert Stiftung Occasional Papers No. 23, Geneva, July 2006.

³⁰See the Vienna Declaration and Programme of Action adopted by the World conference on Human Rights in Vienna on 25 June 1993. According to the UN Independent Expert on Human Right, (in note 15) ‘Recognising the right to development as a human right by a declaration or resolution, expressing the consensus of the international community on the meaning of that right contributed to the norm-creating process, which may eventually generate legally binding obligations related to the right. The reaffirmation of the principle behind the right in many subsequent international pronouncements must be accompanied by consistent state practice in order for the norm to gain the status of customary international law. Even if the right to development cannot be described as binding on all states because it is not yet a part of an international convention or established customary law, one could claim that there is a presumption that the principles embodied in this declaration constitute law.

sidedly on liberalisation.’³¹ As indicated above, seeing development as the ‘mother of all rights’ leaves it without parameters and as such, unrealistic of fulfilment. An all-encompassing view of development potentially triggers off the violation of other rights, equally deserving of observation, until it is fulfilled. At the other end of the opposition to the RtD is the resigned feeling it generates that if it cannot be realistically enforced, it perhaps should not at all be enforced and is better left as a moral right without any force of law. Philip Alston’s stiff rebuttal describes Petersmann’s proposition as an ‘epistemological misappropriation’³² and it is to the clash of academics, diplomats, governmental and non-governmental organisations, experts and protesters that I devote the rest of this chapter.

3.4 Current Debates and Declarations

Since the 1986 Declaration on the Right to Development,³³ arguments have ensued as to its real import and ramifications. It has been a clash of opinions between economic law scholars, the UN independent expert, Nobel laureates in the economic sciences and NGOs. The UNDRD has a much longer preamble that even the Charter of the United Nations because of the difficult issue it attempts to grapple with.³⁴ Article 1(1) declares:

The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised.

While Article 1(2) recognises peoples’ ‘inalienable rights to full sovereignty over all their natural resources,’ it is Article 3 which provides that ‘States should realise their rights and fulfil their duties in such a manner as to promote a new international economic order based

³¹ Ernst-Ulrich Petersmann, ‘Time for United Nations ‘Global Compact’ for Integrating Human Rights into the Law of Worldwide Organisations: Lessons from European Integration,’ (2002) 13(3) *EJIL* 621-650

³² Philip Alston, ‘Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann,’ (2002) 13(4) *EJIL* 815-844

³³ GA/RES/41/128, 4 Dec 1986, [hereinafter the UNDRD]

³⁴ The Preamble runs in sixteen paragraphs across two pages.

on sovereign equality, interdependence, mutual interest and co-operation among all states' that seemed to have upset the developed countries that either voted against it or abstained from voting entirely.

3.4.1 *The views of international economic law scholars*

Back in 1981, Alston asserted that

in terms of international human rights law, the existence of the right to development is a *fait accompli*. Whatever reservations different groups may have as to its legitimacy, viability or usefulness, such doubts are now better left behind and replaced by efforts to ensure that the formal process of elaborating the content of the right is a productive and constructive exercise.³⁵

Another commentator Bedjaoui was even effusive in his praise. He saw the RtD as the mother of all rights, 'the core from which all others stem.'³⁶ According to him it is, 'the precondition of liberty, progress, justice and creativity. It is the alpha and omega of human rights, the first and last human right, the beginning and the end, the means and the goal of human rights...'³⁷

However, many leading legal scholars have been less complimentary and even critical of the RtD. Professor Stephen Marks' article describes the RtD as a rhetoric or an expression of a political opinion lacking in legal certainty and he prefixes his writing with the two contradictory statements of the American President and that of the US to the U.N. Commission on Human Rights to amplify the rhetorical undertone of the right: 'Developed nations have a duty not only to share our wealth, but also to encourage sources that produce

³⁵ Philip Alston, 'Development and the Rule of Law: Prevention Versus Cure As a Human Rights Strategy,' in International Commission of Jurists eds. *Development, Human Rights and the Rule of Law* 31, 106 1981 quoted by Isabella D. Bunn next.

³⁶ Isabella D. Bunn, 'The Right to Development: Implications for International Economic Law,' *Am. U. Int'l L. Rev.* (2000) 1435.

³⁷ Mohammed Bedjaoui, 'The Right to Development,' in *International Law: Achievements and Prospects*, 1177, 1182 quoted by Isabella D. Bunn *ibid*.

wealth: economic freedom, political liberty, the rule of law and human rights,³⁸ and ‘States ... have no obligation to provide guarantees for implementation of any purported “right to development”’³⁹ According to Marks, ‘the debate on the legal significance of the right ranges from hailing it as a major breakthrough in the history of human rights to debunking it as a distracting – if not dangerous – ideological initiative.’⁴⁰ Prior to the appointment of an independent expert on the RtD by the U.N., the right to development had ‘received scant scholarly attention’⁴¹ with most of its advocates seen as being on the fringes of international economic law scholarship. A commentator denounced it and said,

If it achieves any significance, the right to development will divert attention from the pressing issues of human dignity and freedom, obfuscate the true nature of human rights, and provide increasing resources and support for the state manipulation (not to say repression) of civil society and social groups. It will keep the international and diplomatic community engaged for many years in useless and feigned combat on the urgency and parameters of the right.⁴²

Pointing out what he feels is the major issue with the right to development, Ghai explains, ‘[t]he value of the concept of a right is it creates entitlements, and the entitlements are easier to enforce if the contents and beneficiaries of the right are clearly specified. In the case of the right to development, it is not clear who are the right and duty bearers. Equally vague is the content of the right.’⁴³

A more vitriolic attack came from Carty. According to him, ‘The debate about the right to development marks a crisis in legal theory, because it encompasses a determined attempt to

³⁸ Credited to George W. Bush and quoted by Stephen Marks, *Harvard Human Rights Journal*, Vol. 17 – 2004, 137.

³⁹ United States Government, Statement at the U.N. Commission on Human Rights, 59th Sess., comment on the Working Group on the Right to Development (Feb. 2003) also quoted by Stephen Marks above.

⁴⁰ Isabella D. Bunn (n 36) 1426

⁴¹ *ibid* 1427

⁴² Yash Ghai, ‘Whose Right to Development?’ *Human Rights Unit Occasional Paper*, Commonwealth Secretariat, Nov. 1989, 5-6

⁴³ *ibid* at 12.

place material content before form and yet retain whatever advantages are supposed to attach to the use of legal language.’⁴⁴

3.4.2 *The UN Independent Expert on the Right to Development*

Over the last two decades the United Nations has made great efforts to promote the right to development. It has pushed development into the forecourt of international discuss and global consultations⁴⁵ with different expert working groups and a key agency the UN Development Programme (UNDP) having a three pronged approach to realising the right to development as a human right. The three levels of commitment for the UNDP are full realisation of the right to development, particularly the eradication of poverty, the grafting of human rights as part of development and the promotion of good governance.⁴⁶ Then following the Commission on Human Rights Resolution 1998/72 and the UN General Assembly Resolution 53/155 the Chairman of the Commission appointed ‘an independent expert with high competence in the field of the right to development, with a mandate to present to the working group at each session a study on the current state of progress in the implementation of the right to development as a basis for a focused discussion.’⁴⁷ The aim of the independent expert was to ‘initiate a process of international confidence-building around the methods of realising the right to development.’⁴⁸

⁴⁴ A. Carty, ‘From the Right to Economic Self-Determination to the Right to Development: A Crisis in Legal Theory,’ *Third World Legal Studies* (1984) 73

⁴⁵ See Global Consultation on the Realisation of the Right to Development as a Human Right, U.N. Commission on Human Rights, 46th Sess., Agenda item 8, U.N. Doc. E/CN.4/1990/9/Rev. 1, 91990) 39

⁴⁶ Isabella D Bunn, (n 36) 1437

⁴⁷ Commission on Human Rights Res. 1998/72, *The Right to Development* (b), 58th Meeting, 22 April 1998

⁴⁸ A Senguta, First Report to the Commission on Human Rights, 56th Sess. Open-ended Working Group on the Right to Development, Geneva, 13-17 September 1999, E/CN.4/1999WG.18/2 27 July 1999

In his first report, ‘Study on the current state of progress in the implementation of the right to development submitted by the independent expert, pursuant to the Commission on Human Rights and GA resolutions’, Sengupta reiterated his objective which was to elaborate on the measures ‘that could be taken for the more effective realisation of the right to development at the national and international levels’⁴⁹ and made the following clarifications:

The Declaration (on the RtD) is not a treaty and so would call for a different approach to its monitoring compared to that followed in the case of the two Covenants (ICCPR and ICESCR)... it should apply to all countries and all agencies and institutions of the international community. The commitment to its provisions may not be legally binding, but they have the force of consensus and moral legitimacy which is almost equally binding on all. That would apply only a difference in the method but not in the importance, coverage and effectiveness of the monitoring itself.⁵⁰

The Independent Expert drew attention to the following mile stones in the evolution of the right to development: the Philadelphia Declaration⁵¹ (1944), the Proclamation of Tehran⁵² (1968), the Declaration on Social Progress and Development⁵³ (1969) The United Nations Declaration on the Right to Development (1986) and the Vienna Declaration and Programme of Action⁵⁴ (1993) Article 1 of which states very authoritatively that ‘The universal nature of these rights and freedoms is beyond question.’ Sengupta’s first study centred on the

⁴⁹ *ibid*

⁵⁰ *ibid*

⁵¹ A. Sengupta traces the promotion of economic, social and cultural rights to the Philadelphia Declaration of the international Labour Conference 1944 that influenced the UN Charter adopted the following year.

⁵² Appendix 7, The Proclamation of Tehran of 13 May 1968, UN Doc. A/CONF.32/41, para. 13: ‘Since human rights and *fundamental freedoms are indivisible*, the full realisation of civil and political rights without the enjoyment of economic, social and cultural rights is impossible. *The achievement of lasting progress in the implementation of human rights is dependent upon sound and effective national and international policies of economic and social development*’ (emphasis mine).

⁵³ UN General Assembly Res. 2542 (XXIV) of 11 December 1969, *Declaration on Social Progress and Development*, Art. 2: ‘Social progress and development shall be founded on respect for dignity and value of the human person and shall ensure the promotion of human rights and social justice.’ This declaration, according to the Independent Expert, emphasises the interdependence between the two sets of rights and unifies civil and political rights with economic, social and cultural rights.

⁵⁴ Vienna Declaration and Programme of Action, UN, GAOR, World Conf. on Hum. Rts., 48th Session. The milestone attained was the political consensus of recognising the right to development as a universal and inalienable right and an integral part of the fundamental rights of the human person.

evolution of an operational framework, explanation of development as a process,⁵⁵ its contents⁵⁶ and how it could be realised.⁵⁷

In his Fourth Report⁵⁸ the Independent Expert focuses on international institutions, namely, the Organisation for Economic Cooperation and Development, the International Monetary Fund and the World Bank. Two issues needing further discussions on them were presented as questions:

- (a) What happens when the chance of countries meeting their goals or improving on them is close to zero? and
- (b) What happens when another entity outside the State is at fault for the State's not meeting goals?

He concluded by drawing attention to the duties of states and international institutions to cooperate as stated in Article 4 of the Declaration on the RtD.

The Fifth Report of the Independent Expert declares that 'All the elements, whose improvement constitutes development, depend on each other, both at a point in time and over time, and are realised progressively,'⁵⁹ or as the Independent Expert puts it in his report to the 57th Session of the CHR, 'all these elements are interdependent in the sense that the level of realisation of a right, say the right to health, depends on the level of realisation of other rights,

⁵⁵ Article 2(1) of the ICESCR states, 'Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.' Article 10 of the Declaration on the RtD states that 'steps should be taken to ensure the full exercise and progressive enhancement of the right to development, including the formulation, adoption and implementation of policy, legislative and other measures at the national and international levels.

⁵⁶ The contents of the Right to Development as contained in Articles 1 to 10 of the UNDRD.

⁵⁷ The Independent Expert describes development as a 'compact' requiring a step-by-step approach to implement the rights to food, primary health care and primary education. He a

⁵⁸ Argun Sengupta, Fourth Report of the Independent Expert on the Right to Development, E/CN.4/2002/WG.18/2Add.1 5 March 2002.

⁵⁹ Argun Sengupta, Fifth Report of the Independent Expert on the Right to Development, E/CN.4/2002/WG.18/6 18 September 2002.

such as to food or to housing, or to liberty and security of person or to freedom of expression that included freedom of information.’⁶⁰

On the importance of economic development in the right to development, the Independent Expert says,

For economic growth to be included as an element of the claims representing the right to development, it must satisfy the basic condition of facilitating the increasing availability of the corresponding goods and services in accordance with the human rights norms. . . From the very beginning, the developing countries clamoured for an international social order and social arrangement that would allow them to grow out of the quagmire of their underdevelopment, poverty and all-round deprivation to a higher level of income and living standard.⁶¹

He explains ‘a rights-based development programme’ as ‘a process that is equitable, non-discriminatory, participatory, accountable and transparent.’⁶² Each of these words he explains as follows: ‘equity’ means that there should be a diminishing of disparities; ‘non-discrimination, that people should be treated equally regardless of their sex, race, language, political affiliation, or socio-economic status. ‘Participation’ abhors a top-down approach to economic development; the beneficiaries must be involved in the decision making process and ownership of their development process. ‘Accountability’ involves establishing monitoring and dispute resolution mechanisms both state and alternative independent processes. ‘Transparency’ denotes not openness, making sure that things are not just done but are seen to have been done. All this, the report says should be done with the aim of meeting poverty reduction and social indicator targets with mutuality of obligations otherwise called ‘development compact’ between the State and the international community.

⁶⁰ Argun Sengupta, Fifth Report of the Independent Expert on the Right to Development, E/CN.4/2000/WG.18/CRP.1 11 September 2000.

⁶¹ Sengupta (n 43).6

⁶² Sengupta (n 43) 7

3.4.3 The Millennium Declaration

As part of the activities marking the turn of the millennium, the UN General Assembly adopted the Millennium Development Goals.⁶³ Its relevance to my thesis is the declaration of the ‘collective responsibility of States to uphold the principles of human dignity, equality and equity at the global levels’ and ‘to *making the RtD a reality for everyone* and to freeing the entire human race from want’ as well as creating ‘an environment – at national and global levels alike – which is conducive to development and to the elimination of poverty,’⁶⁴ (emphasis mine). It stresses the fundamental principles of the UN and the international community: freedom, equality, solidarity, tolerance, respect for nature, and shared responsibility. According to the Declaration, good governance is required at both national and international levels, together with transparency in financial, monetary and trading systems. They need to be open, predictable and rules-based. Again the Declaration stresses the importance of democracy and the rule of law.

3.4.4 The Monterrey Consensus

In 2002 the UN Conference on Financing for Development adopted the Monterrey Consensus⁶⁵ in Monterrey, Mexico. It was aimed at financing the Millennium development goals with emphasis on those that address the issue of economic development and the right to development. The key contribution of this consensus is the recognition of the complimentary role of the international legal environment to the State. In addition to reinforcing the rule of 0.7 per cent of GNP as ODA, it contains eloquent commitments in relation to a multilateral

⁶³ Millennium Declaration, GA Res. A/55/2, 8 September 2000

⁶⁴ Millennium Declaration, Section III paras. 11 & 12

⁶⁵ UN International Conference on Financing for Development, *Outcome of the International Conference on Financing for Development* (Monterrey Consensus), 2002, UN Doc. A/CONF/198/3, para. 6.

trading system that is open, structurally non-discriminatory and rules-based.⁶⁶ Issues of importance to developing countries such as debt relief, foreign investment and taxation together with economic and social infrastructures, the setting up of anti-corruption agencies and social security programmes are covered.⁶⁷ The Consensus concludes on the need to expand the international economic decision-making and norm-setting to make the institutions both legitimate and democratic.⁶⁸

3.4.5 The Paris Declaration on Aid Effectiveness

The Paris Declaration on Aid Effectiveness⁶⁹ which came at the instance of the OECD is like a multi-stakeholder agreement between developed and developing country governments and also a consortium of bilateral and multilateral development organisations. The aim is to increase the effectiveness of aid through a robust support for all the stakeholders both donors and recipients in order to raise development aid effectiveness.⁷⁰ It sets targets to be met within a time frame, review, monitoring and evaluation mechanisms with mutual obligations for donors and recipients. These are indexed and evaluated under the following heads: ownership, participation of all the stakeholders especially the recipient country in designing development that is appropriate to their needs and taking part in the formulation of policies and the execution of programmes; alignment, aligning the donor's activities to those of the recipient government's structures and facilitating its projects, that is channelling aid through existing institutions; harmonisation, making donor's action transparent and effective; managing results, ensuring that both decision-making and resources are in accord; and accountability, this has to be on all sides involved.⁷¹

⁶⁶ Monterrey Consensus, paras. 20, 26 and 42.

⁶⁷ Monterrey Consensus, paras. 11-16.

⁶⁸ Monterrey Consensus, para. 62.

⁶⁹ The Paris Declaration on Aid Effectiveness (Paris Declaration), adopted in Paris, 2 March 2005.

⁷⁰ Paris Declaration, *Statement of Resolve*, Pt 1.

⁷¹ Paris Declaration, *Partnership Commitments*, Pt II.

3.4.6 The Lomè Conventions and The Cotonou Agreement

The Cotonou Agreement⁷² is the successor to the Lomè Conventions. It is a binding development cooperation agreement between the European Community and its Member States and the ACP countries. Its aim is the integration of the ACP countries into the world trading system for the overriding goal of eradicating poverty.⁷³ It provides for the observation of human rights, social and human development, security, economic development and the MDGs, especially as it relates to MDG 8 – ‘Developing a global partnership for Development’ covering, among others:

- a. the extent to which the partnership reflects human rights standards and a rights-based approach to development,
- b. the extent to which the partnership respects the right of each state to determine its own development policies,...
- c. The extent to which partner countries have incorporated human rights into their national development strategies and receive support from international donors and other development actors for these efforts to attain positive development outcomes;
- d. The extent to which partnership values and promotes good governance and the rule of law;
- e. The extent to which partnership applies itself and promotes the principles of accountability, transparency, non-discrimination, participation, equity, and good governance;
- f. The extent to which the partnership includes institutionalised mechanisms of mutual accountability and review, such as the African Peer Review Mechanism;
- g. The extent to which partnership ensures that adequate information is available to the general public for the purpose of public scrutiny of its working methods and outcomes;
- h. The extent to which the partnership provides for the meaningful participation of the affected populations in processes of elaborating, implementing and evaluating the related policies, programmes and projects, and
- i. The extent to which, in applying the preceding criteria, indicators and benchmarks are identified to assess progress in meeting theme, and, in particular, whether the indicators used are reflective of human rights concerns, disaggregated as appropriate, updated periodically, and presented impartially and in a timely fashion.⁷⁴

⁷² The Cotonou Agreement adopted on 23 June 2000 O.J.E.U. L317; Appendix 3.

⁷³ Article 1, the Cotonou Agreement.

⁷⁴ Felix Kirchmeier, ‘The Right to Development – Where so we stand?’ *Dialogue on Globalisation*, Occasional Paper No. 23, Geneva, July 2006/

3.4.7 The Open-Ended Working Group

The UN Commission on Human Rights (CHR) passed a resolution⁷⁵ mandating that a Working Group (WG) be established and charged with monitoring and reviewing progress made in the promotion and implementation of the right to development at the national and international levels as elaborated in the Declaration on the Right to Development, analysing obstacles and making recommendations, analysing reports from different stakeholders, and presenting to the Commission on Human Rights reports with respect to implementation of the right to development and suggesting technical assistance needed by different countries.⁷⁶ The WG was to be supported by the Independent Expert who was succeeded in 2004 by a High Level Task Force on the implementation of the RtD.⁷⁷

3.4.8 The High Level Task Force (HLTF)

The HLTF⁷⁸ came into being in 2004 as a subsidiary of the WG⁷⁹ with a one-year mandate, though renewable. At its first meeting held from 13-17 December 2004 it considered the following three issues covering its national and international remits:

- (a) Obstacles to the implementation of the MDGs in relation to the RtD,
- (b) Social impact assessment in the areas of trade and development at the national and international levels, and

⁷⁵ CHR Res. 1998/72. para. 10(a)

⁷⁶ CHR Res. 1998/72. para. 10(a) (i-iii)

⁷⁷ CHR Res. 2004/7, UN Doc. E/CN.4/RES/2004/7.

⁷⁸ The HLTF is made up of the following members:

First Meeting: Silvio Baro Herrera (Cuba), Ellen Sirfealf-Johnson (Liberia), Chairperson: Stephen P. Marks (United States of America), Sabnine von Schorlemer (Germany), Arjun Sengupta (India). Organisations and institutions represented are the UNDP, UNICEF, UNCTAD, IMF, WTO and the World Bank. Experts co-opted to contribute are A.K. Shiva Kumar, Robert Howse and Margot Salomon.

Second Meeting had Stephen Marks (USA), Sabnine von Schorlemer (Germany), Leonardo Garnier Rímolo (Costa Rica), and Habib Ouane (Mali). Trade, Development and financial institutions who participated as experts were UNDP, UNCTAD, IMF, WTO and the World Bank. In addition, individual experts to the task force were Fateh Azzam, Sakiko Fajuda-Parr and Margot Salomon.

⁷⁹ CHR Res. 2004/7. para. 9.

(c) Best practices in the implementation of the right to development.

The second meeting of the HLTF was held in November 2005 ‘to examine MDG 8 on global partnership for development and to make suggests for its periodic evaluation’⁸⁰

3.4.9 The General Assembly Resolution 63/178 on the Right to Development

General Assembly Resolution 63/178 on the Right to Development adopted on 18 December 2008 seems to be the most adventurous and far-reaching of all the UN resolutions on development. It left the hortatory and diplomatic language of its predecessors and spoke of the ‘consideration of an international legal standard of a binding nature.’⁸¹ It is a landmark resolution because no one before it ever mentioned a ‘legally binding’ instrument, yet it received the support of most of the developed countries in the EU.⁸² Months before that and in the previous session of the UN the countries had voted for ‘the further consideration of the elaboration of a convention on the RtD.’⁸³ Having come this far, ‘What is necessary,’ says the Independent Expert on the RtD ‘is the political will, a determination by all the countries who have accepted the right to development as a human right that they would implement it in a time-bound manner through obligations of national actions and international cooperation.’⁸⁴

3.5 The Legal Status of the Right to Development

An international convention, treaty or covenant on the RtD is still anticipatory and within the realm of legal fiction, *de lege ferenda*. The USA has consistently opposed any instrument of

⁸⁰ E/CN.4/2005/25, para. 54(i).

⁸¹ *Resolution on the Right to Development*, adopted by the GA at its 63rd Session on 18 December 2008, UN Doc A/RES/63/178.

⁸² The GA resolution had 182 countries (votes) in favour, 4 against (Marshall Islands, Palau, Ukraine and the United States of America), and 2 abstentions (Israel and Canada).

⁸³ *Resolution on the Right to Development*, adopted by the GA at its 63rd Session on 13 March 2008, UN Doc A/RES/62/161, para. 10(d).

⁸⁴ Arjun Sengupta, Report of the Independent Expert on the Right to Development, E/CN.4/2000/WG.18/CRP.1

a binding nature; so have other leading and developed economies⁸⁵ who fear a backlash from recognising the RtD as legally binding. According to Felix Kirchmeier, ‘the RtD can be described as “soft law.” the term denotes a group of human rights which have been generally accepted by the world community and reaffirmed in declarations and resolutions by the leaders of many states.’⁸⁶ What seems to be in issue is that the RtD belongs to those rights known as group rights, for example, protection of the environment, that are not usually attributed to individuals but groups of people. The view of the positivist school is that if certain rights are not legally enforceable, they are not human rights, insisting on categories known as *rights holders* and *duty bearers*. The Independent Expert says that this is a wrong view because it confuses human rights with legal rights. ‘Human rights precede law and are derived not from law but from the concept of human dignity.’⁸⁷

3.6 The African Charter on Human and Peoples Rights 1981

The African Charter on Human and Peoples Rights⁸⁸ has the distinction of being the only regional or continental instrument with the RtD clearly mentioned in it. In Article 22 the Charter provides that

1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom, and identity and in the equal enjoyment of the common heritage of mankind,
2. States shall have the duty, individually or collectively to ensure the exercise of the RtD.⁸⁹

⁸⁵ The United States cast her vote against the UN Declaration on the Right to Development, GA Res 41/128, adopted 4 Dec 1986, 41 UN GAOR; Supp No 53.

⁸⁶ Felix Kirchmeier *supra*.

⁸⁷ Senguta, First Report *supra*.

⁸⁸ *The African Charter on Human and Peoples Rights* adopted in Banjul, The Gambia, 27 June 1981, 1520 UNTS 217, 245, ILM 58, 59 (1982)

⁸⁹ *ibid* Article 22.

3.7 The MFN Treatment and Development

At the current count of over 155⁹⁰ Member States of the WTO out of the 190-plus⁹¹ (80 per cent) United Nations Organisation members on earth, it sounds illogical to use ‘most-favoured’ to characterise any thing that gets to ‘most’ nations of the world. It is argued that if tariff concessions to a country will apply to other countries based on the MFN principle, then the MFN in itself does not make any special provision for economic development and growth.

3.8 National Treatment and Development

The Appellate Body described the national treatment principal of non-discrimination as ‘a cornerstone of the world trading system.’⁹² Article III captioned ‘National Treatment on Internal Taxation and Regulation’ stipulates to Contracting Parties that ‘internal taxes and other charges ... should not be applied to imported or domestic products so as to afford protection to domestic products’⁹³ and also that ‘[t]he products of the territory of any contracting party imported into the territory of any other party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products’⁹⁴ and still further that the products imported from abroad ‘shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.’⁹⁵ Again this

⁹⁰ www.wto.org accessed on 27 October 2012

⁹¹ <http://www.un.org/en/members/index.shtml> accessed 9 February 2010

⁹² Appellate Body Report, *US – Section 211 Appropriations Act*, para. 241

⁹³ Paragraph 1

⁹⁴ Paragraph 2

⁹⁵ Paragraph 4

second arm or the GATT principle of non-discrimination does no more than ensuring equality of competitive opportunities.

3.9 Object and Purpose of the National Treatment Principle

The title of Article III is often used half-way: ‘National Treatment’ giving the wrong impression that *all* protection is prohibited. If taken fully: ‘National Treatment on Internal Taxation and Regulation,’ it will be clear that Article III endorses customs duties. Therefore, Article III generally prohibits discriminatory internal taxation once the goods have been cleared through the customs. The following cases bring out the object and purpose of Article III:

In *Italy – Agricultural Machinery* the Panel held: ‘That the intention of the drafters of the Agreement was clearly to treat the imported products in the same way as the like domestic products once they had been cleared through customs. Otherwise indirect protection could be given.’⁹⁶ Again, in *US – Section 337*, the Panel pointed out that ‘the purpose of Article III ...is to ensure that internal measures are ‘not to be applied to imported or domestic products so as to afford protection to domestic production.’⁹⁷

In *Japan – Alcoholic Beverages II* the Appellate Body stated regarding Article III:

The broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures. More specifically, the purpose of Article III ‘is to ensure that internal measures “not be applied to imported or domestic products so as to afford protection to domestic producers”’. Toward this end, Article III obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products. ‘[T]he intention of the drafters of the Agreement was clearly to treat the imported products in the same way as the like

⁹⁶ GATT Report, *Italy – Agricultural Machinery*, para. 11.

⁹⁷ GATT Panel Report, *US – Section 337*, para. 5.10.

domestic products once they had been cleared through customs. Otherwise indirect protection could be given.⁹⁸

In sum the Appellate Body in *Korea – Alcoholic Beverages* stated the object and purpose of Article III as ‘avoiding protectionism, requiring equality of competitive conditions and protecting expectations of equal competitive relationships.’⁹⁹ Article III of the GATT 1994 covers *de jure* and *de facto* discrimination such as an ‘origin-based’ measure such as in *Korea – Various Measures*¹⁰⁰ where the measure at issue was a dual retail distribution system selling imported beef in a separate store or a different section of a supermarket and ‘origin-neutral’ measure as in *Japan – Alcoholic Beverages* where a tax legislation provided for higher taxes on vodka (domestic and imported) than on *shochu* (domestic and imported), that is, indirect discrimination in the form of a disproportionately negative impact on foreign goods is prohibited. The national treatment principle also extends to internal taxation on directly competitive or substitutable products.¹⁰¹

3.10 National Treatment and TRIPS

Underscoring the ‘fundamental significance of the obligation’¹⁰² in the TRIPS Agreement in *US–Section 211 Appropriations Act* the Appellate Body observed:

Indeed, the significance of the national treatment obligation can hardly be overstated. Not only has the national treatment obligation long been a cornerstone of the Paris Convention and other international intellectual property conventions. So, too, has the national treatment obligation long been a cornerstone of the world trading system that is served by the WTO.¹⁰³

⁹⁸ Appellate Body Report, *Japan – Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, 109.

⁹⁹ Appellate Body Report, *Korea – Alcoholic Beverages* WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999; see also *Argentina – Hides and Leather*, para. 11.182.

¹⁰⁰ Appellate Body Report, *Korea – Various Measures on Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001.

¹⁰¹ Article II:2

¹⁰² Appellate Body Report, *US – Section 211 Appropriations Act*, para. 240

¹⁰³ *ibid*, para. 241

But even though national treatment is of much importance to TRIPS, its application to TRIPS is limited in scope to IP rights addressed in the TRIPS. As the Panel noted in *Indonesia – Autos*

As is made clear by the footnote to Article 3 of the TRIPS Agreement, the national treatment rule set out in that Article does not apply to use of intellectual property rights generally but only to ‘those matters affecting the use of intellectual property rights especially addressed in this Agreement.’¹⁰⁴

The footnote states:

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

Article 1(2) TRIPS Agreement states that “‘intellectual property’ refers to all categories of intellectual property that are the subject of Sections 1 through 7 of Part II’.¹⁰⁵ The implication of this for the developing countries is that their traditional knowledge is not covered by the TRIPS and as such enjoys no protection under the multilateral trading system.

3.11 Applications of Article III of the GATT 1994 on Development

While the principles of non-discrimination have been hailed as the pivot of the WTO,¹⁰⁶ the developing countries that are writhing under a situation of near destitution see them as ‘kicking away the ladder’ so that they will remain for ever undeveloped.¹⁰⁷ Again while countries who have industrial goods and services for export see the GATT provisions as a means of extending their markets worldwide, those who have little for export and keen to

¹⁰⁴ Panel Report, *Indonesia – Autos*, para. 14.275.

¹⁰⁵ In Part II, the sections of the TRIPS under reference are (1) copyright and related rights, (2) trademarks, (3) geographical indications, (4) industrial designs, (5) patents, (6) layout-designs (topographies) of integrated circuits, and (7) protection of undisclosed information.

¹⁰⁶ Peter Van den Bossche, *The Law and Policy of the World Trade Organization* 2nd edn (Cambridge University Press, Cambridge 2008) 321-98

¹⁰⁷ Ha-Joon Chang, *supra*.

build and nurture their domestic industries see the principles as handicaps to their development, hence the paradox.

Moreover, each WTO Ministerial Declaration enticed developing and least developed countries with some promise of economic growth; for example, in the Tokyo Declaration recognition was, as is always the case, given to the special needs of developing countries ‘so as to achieve a substantial increase in their foreign exchange earnings, the diversification of their exports (and) the acceleration of the rate of growth of their trade...’¹⁰⁸ But the preceding round of trade negotiations which held a similar promise offered little. At the end of the Kennedy Round, ‘the less developed nations which participated issued a statement indicating their disappointment over the paucity of benefits that they had received.’¹⁰⁹ Two major disappointments of the developing countries were their failure to achieve a reduction or elimination of duties on particular products that are of interest to them, ‘particularly tropical crops,’¹¹⁰ and the fact that non-tariff barriers remained much unaffected in the developed countries. An independent analysis done by the United Nations Commission on Trade and Development (UNCTAD) found that the average tariff reductions were more on products of interest to developed countries and less on those of interest to developing countries.¹¹¹ The odds are still against developing countries even after concluding a trade round of negotiations.

3.12 The WTO Dispute Settlement Body and Development

The DSB has a normative role of ‘legalisation’ of the policies of the WTO and ‘legitimation’ of Member States practices or as David Trubek and Patrick Cottrell put it the

¹⁰⁸ Tokyo Ministerial Declaration, para. 2.

¹⁰⁹ Leslie Alan Glick *supra* 6

¹¹⁰ *ibid.*

¹¹¹ UNCTAD, Supp. 2 (Sept, 1967).

organisation has ‘three functions: communication, facilitation, and coercion.’¹¹² Regarding the dispute settlement mechanism, Chimni says that it is suffering from ‘indeterminacy’ due to (i) the object and purpose of the WTO agreements, (ii) the linguistic ambiguity and unanticipated gaps in the text (iii) the fact that legal texts are written in very general terms and then applied to complex factual situations, (iv) the inability to reach closure during negotiations on particular issues, and (v) the inapplicability of the formal doctrine of precedent.¹¹³

Therefore it is the duty of the WTO Panel and Appellate Body to resolve different contending interests that are often fraught with political undertones. As Chimni observed, ‘the rules of GATT/WTO have always favoured the developed world.’¹¹⁴ Could the interpretation of the rules be development-friendly? The subsequent chapters will evaluate how the WTO dispute settlement mechanism has been used to support or stifle development.

Arguments have raged since the publication of *Developing Countries in the GATT Legal System*¹¹⁵ by Robert E. Hudec, the founding father of GATT/WTO law, in 1987. While some people¹¹⁶ believe that the GATT/WTO law should be concerned with trade liberalisation and that development is peripheral to it, others¹¹⁷ insist that development should be at the heart of

¹¹² David M Trubek and M Patrick Cottrell, ‘Robert Hudec and the Theory of International Economic Law: the Law of Global Space,’ in Chantal Thomas and Joel P Trachtman (eds) *Developing Countries in the WTO Legal System* (Oxford University Press, Oxford 2009) 131

¹¹³ BS Chimni, ‘Developing Countries in the GATT/WTO System,’ Chantal Thomas and Joel P. Trachtman eds, *Developing Countries*, ibid 32

¹¹⁴ Ibid 30

¹¹⁵ Gower 1987.

¹¹⁶ Robert E Hudec, *Developing Countries in the GATT Legal System* (Gower 1987) and John H. Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law* (Cambridge University Press, Cambridge, 2006)

¹¹⁷ Sarah Joseph, ‘Trading to Live or Living to Trade’ in Baderin and McCorquodale eds. *Economic, Social and Cultural Rights in Action* (Oxford University Press, Oxford, 2007) 389 and Ediwini Kessie, ‘The Legal Status of the Special and Differential Treatment Provisions under the WTO Agreements,’ in Barmann and Mavroidis (eds) *WTO Law and Developing Counties*, (Cambridge University Press, Cambridge, 2007) 3.

it. The following are the views expressed by some writers on the effects of WTO law on developing countries.

Following Hudec and written in his honour George A. Bermann and Petros C. Mavroidis' edited book *WTO Law and Developing Countries*¹¹⁸ is a review of key WTO agreements and their *effects* on developing countries.

Nuno Limao and Marcelo Olarreaga¹¹⁹ examine the usefulness of the generalised system of preferences (GSP) or the Enabling Clause giving preferences to developing countries and question whether they speed up or slow down multilateral trade liberalisation. In their views, the GSP slows down trade liberalisation and they support their assertion with data from 170 countries and more than 500 products on the effects of the GSP from the triad of the US, the EU and Japan. They urge the three and the WTO to switch from unilateral preferences for LCDs to an import subsidy scheme which, according to their calculations, adds 10 per cent to the estimated trade liberalisation gains of the Doha Round. According to them 'the stumbling-block effect can be avoided by replacing the unilateral preferences by a fixed import subsidy, which,' they argue, 'generates a Pareto improvement... for each group: the United States, the European Union, and Japan (\$2,934 million), LDCs (\$520 million), and the rest of the world (\$900 million).'

Frederick Abbot's "Law and Its Limitations' in the Context of TRIPS"¹²⁰ analyses the awkward position the United States and the European Union have found themselves in the

¹¹⁸ Cambridge University Press, Cambridge, 2007.

¹¹⁹ Nuno Limao and Marcelo Olarreaga, 'Trade Preferences to Small Developing Countries and the Welfare Costs of Lost Multilateral Liberalisation,' Barmann and Mavroidis (eds) *WTO Law and Developing Counties*, (Cambridge University Press, Cambridge, 2007) 36.

¹²⁰ In Barmann and Mavroidis (eds) *WTO Law and Developing Counties*, (Cambridge University Press, Cambridge, 2007) 61.

face of China that is unmindful of its TRIPS obligations under the WTO agreement nor bothered about the threat of withdrawal of concessions. He asks two questions: '(1) will the United States be justified in imposing extra-WTO legal sanctions on China? and (2) if this is justified, will it be a good idea?' He answers his own questions equivocatingly with 'probably yes' and 'probably no' pointing out that the situation defines 'the limits of the law in the WTO system.'¹²¹ The second answer is in the negative because, in his view, the 'WTO dispute settlement is not designed to force immediate changes to government behaviour.'¹²² Worthy of note in the article is the observation that 'China's entry into the WTO is not responsible for (its) transformation' though he concedes that it 'played an important role.'¹²³ What the accession to the WTO did for China, according to Abbot, 'was to *stabilise* access to foreign markets' (italics added). But having stabilised her access, China 'appears to perceive that its national interest is not aligned with its TRIPS Agreement and Accession protocol obligations' and has chosen to ignore the rules and nobody seems willing to face the economic consequences of a stand-off with China within the WTO.

Turning to the General Agreement on Trade in Services (GATS) Juan Marchetti states that although the Doha Round of negotiations offers developing countries an opportunity to edge their way into the multilateral trading system, 'trade liberalisation and integration into the world economy are not ends in themselves, but are powerful means to achieve...economic growth and development.'¹²⁴ Therefore, one may ask, would the developing countries based mainly on agriculture and produce primary products be able to use the WTO forum as a 'means to ...development?'

¹²¹ *ibid.*

¹²² *ibid.* Why this appears to be the case will be taken up in the concluding chapter of this thesis.

¹²³ *ibid* p 59.

¹²⁴ Juan A. Marchetti, 'Developing Countries in the WTO Services negotiations: Doing Enough?' Barmann and Mavroidis (eds) *WTO Law and Developing Countries*, (Cambridge University Press, Cambridge, 2007) 82 & 83.

Arising from Marchetti's article, Kal Raustiala asks 'why barriers to trade in goods are easy to dismantle but those for services are hard,'¹²⁵ in relative terms. According to him, 'we can look at more than 50 years of marked success in reducing barriers to trade in goods through multilateral negotiations, but so little success in the area of services – especially when services comprise the bulk of economic activity in the most powerful and important WTO members.'¹²⁶ The writer seems to imply here that trade discipline is swift in issues dealing with matters of interest to developing countries but slow with matters that concern the industrialised and developed countries. Neither evidence from the WTO Agreements nor States practice seems to contradict the assertion, and I agree.

3.13 Oxfam on the WTO and the Right to Development

As noted in the middle section of this chapter, the RtD has multiple stakeholders which include the civil society and non-governmental organisations of which one of the very notable is the British charity Oxfam International. Ironically based in England, the most vitriolic, scathing and co-ordinated attack on the WTO has come from Oxfam. This section will review eight briefing papers either published on their own or in conjunction with other organisations in a chronological order.

i. *'Eight broken promises: Why the WTO isn't working for the world's poor'*¹²⁷ The eight broken promises held out to the world's poor are

Promise 1 – open markets for poor countries

industrialised countries have used their control of the IMF and World Bank to reinforce trade liberalisation through loan conditions. One recent IMF review of 23 of its programmes found that they included 186 loan conditions...and that tariffs facing developing-country exports to

¹²⁵ *ibid* 125.

¹²⁶ *ibid*.

¹²⁷ Kevin Watkins, 'Eight broken promises: Why the WTO isn't working for the world's poor,' Oxfam International, *Briefing Paper 9*, Oxford, October 2001,

high-income countries are on the average four times higher than those facing exports by industrialised countries.¹²⁸

Promise 2 – Reduced agricultural protectionism – ‘At the end of the 1990s, subsidies accounted for almost 40 per cent of the value of OECD farm outputs, the same as in 1986-88’,¹²⁹ before the WTO came into being.

Promise 3 – Improved market access for textiles and garments – here as in other places, Oxfam points out that the ‘industrialised countries have found various ways to comply with the letter of the Agreement on Textile and Clothing while comprehensively violation its spirit.’¹³⁰

Promise 4 – A better deal for the Least Developed Countries (LDCs) – apart from Cape Verde, none of the 49 countries classified as LDCs has managed to creep out of grinding poverty.

Promise 5 – Special action for Africa – According to the briefing paper, ‘the challenge facing Africa is immense. It has 12 per cent of the world’s population, but accounts for less than one per cent of exports , one quarter of the share it enjoyed in the 1970s’ despite almost all the countries in Africa belonging to the WTO.

Promise 6 – Global patent rules that safeguard public health in poor countries – the TRIPS agreement of the WTO seems to have constrained the developing countries from adopting ‘measures necessary to protect public health.’¹³¹

Promise 7 – Aid and technical assistance to developing countries – ‘Of the 38 African countries in the WTO, 15 have no resident delegate; four maintain only one-person offices’ yet ‘there are 46 delegate meetings per week at the WTO.’¹³²

¹²⁸ Ibid 3.

¹²⁹ ibid 5.

¹³⁰ Ibid 6. A classic example of how Canada circumvented the implementation of the WTO ruling in *Canada – Autos* is in Jacqueline C Krikorian, ‘Planes, Trains and Automobiles: The Impact of the WTO “court” on Canada in Its First Ten Years,’ *Journal of International Economic Law*, 8(4) 921-975

¹³¹ ibid 10.

¹³² ibid 12.

Promise 8 – The WTO will help create the conditions for sustained growth and poverty reduction in developing countries – it is stated here by Oxfam that ‘WTO agreements restrict governments from introducing policies that might enable their countries to reap the benefits of integration into the global economy.’¹³³

ii. *‘Rigged Rules and Double Standards – trade, globalisation and the fight against poverty.’*¹³⁴ This compendious paper from Oxfam acknowledges the benefits of international trade but notes that ‘there is a paradox at the heart’ of it. The paper extols ‘trade as a force for poverty reduction’ and quotes a Vietnamese farmer Lam Van who said, ‘If you ask me how our lives compare with our parents’ lives, I will tell you that things are better. We are still vulnerable. But there is less poverty today.’¹³⁵ However, the anger of Oxfam which one feels as one reads the briefing paper is that most of the poor have been left behind in the multilateral trading system. The areas it points out as being most notable for the double standards of the richer countries are market access and agricultural trade.

iii. *‘Africa and the Doha Round’* is the title of a 2005 Briefing Paper 80 from Oxfam. In summary the paper states,

As a result of unfair trade rules and falling commodity prices, Africa has suffered terms-of-trade losses and increasing marginalisation. Ten years after the Uruguay Round, the poorest continent on earth, which captures only one per cent of world trade, risks even further losses, despite promises of a ‘development round’ of trade negotiations. This would be a great injustice. There cannot and should not be any new round without an assurance of substantial gains for Africa.¹³⁶

Briefing Paper 80 gives an example of a vegetable exporter from Uganda who would not be eligible for the duty-free access to the EU simply by using imported packaging from Kenya

¹³³ *ibid* 13.

¹³⁴ Oxfam International, *Rigged Rules and Double Standards*, Oxfam Briefing Paper, Oxford, 2002, p.5

¹³⁵ *ibid* 8.

¹³⁶ Oxfam International, *‘Africa and the Doha Round’* Oxfam Briefing Paper 80, Oxford, 2002, p.16.

because ‘the value of the Kenyan packaging outweighs the value of the product originating in Uganda.’¹³⁷

iv. *Non-agricultural market access (NAMA) talks threaten development*. This joint NGO Briefing Paper gives six reasons why a fundamentally different approach is needed. It declares that the current NAMA negotiations will not lead to pro-development outcomes’ because the ‘developed countries are demanding excessive opening of imports which, if agreed, could destroy local businesses and jobs in developing countries.’¹³⁸

v. *Blood on the floor* is another briefing paper from Oxfam showing how the rich countries have squeezed development out of the WTO Doha negotiations. The paper is entitled blood on the floor because the rich countries extract ‘economically painful concessions’ from the poor ones.¹³⁹

vi. *Blood from stone* is the slimmest or shortest of the Oxfam briefing papers and as its alarmist title suggests, this paper focuses on the accession of the island Kingdom of Tonga in the South Pacific ‘on what are arguably the worst terms ever offered to any country.’ The question we need to address later is if the terms are very unfavourable to some countries, why do they join?

vii. ‘What happened in Hong Kong’¹⁴⁰ seeks to explain what usually happens at WTO ministerial conferences every other year by using the one held in Hong Kong as a case study. In Hong Kong the difficult decisions were put off till the following year. As the time of

¹³⁷ *ibid* 16.

¹³⁸ Action Aid, ICFTU, Oxfam Int’l, Solidar, and Third World Network., *Non-agricultural market access (NAMA) talks threaten development*, November 2005, p. 1

¹³⁹ Duncan Green, ‘Blood on the floor, Oxfam Briefing Paper, December 2005.

¹⁴⁰ Duncan Green, ‘Blood on the floor, *Oxfam Briefing Paper 85*, December 2005.

writing, five years after, those issues, reform of Northern agricultural policies, increased access to rich country markets for developing country farmers and industries and providing policy space for developing countries, have not been solved thereby lending credence to the reports from Oxfam.

viii. ‘Partnership or Power Play – How Europe should bring development into its trade deals with Africa, Caribbean, and Pacific countries’¹⁴¹ In this extensive briefing paper, Oxfam evaluated the economic partnership agreement (EPA) against eight criteria and the EU-ACP EPA was found wanting on all counts. The criteria are (a) integrate their economies with their regional neighbours, (b) develop new industries and create jobs, (c) overcome insecure access to food and support vulnerable farmers (d) upgrade their infrastructure, (e) have full access to Europe’s markets, (f) attract high quality investment, (g) provide affordable access to services, and (h) stimulate innovation and increase access to technology.¹⁴²

All the above show that the WTO is yet to garner praises from Oxfam or even from other development organisations like Actionaid, Solidar and Third World Initiative.

3.14 Summary

In the preceding sections, we have traced the evolution or rather the evolutionary process of the RtD, the debates surrounding it, the studies done by the Independent Expert within the five years he held office, the outcries for a right to economic development that marred WTO Ministerial Conferences in Seattle, Doha and Cancun.

¹⁴¹ Emily Jones, ‘Partnership or Power Play – How Europe should bring development into its trade deals with Africa, Caribbean, and Pacific countries,’ Oxfam International *Briefing Paper 110*, Oxford, April 2005.

¹⁴² *ibid* 4.

We have also seen that there is no binding international instrument on the RtD and the African Charter on Human and Peoples Rights¹⁴³ is the only regional instrument that expressly mentions the right to development but without expressing it in a strong language carrying the force of law.

In the last decade there have been expressions of disenchantment with the WTO and this has not only disrupted its ministerial conferences but brought the Doha Round into a deadlock. The criticisms of the WTO have been trenchant and scathing with the civil society and the non-governmental organisations leading the way. The next chapter will analyse the processes of international standard setting by the WTO and efforts at harmonisation by the developing and least-developed countries within ECOWAS

¹⁴³ 1981, OAU Doc CAB/LEG/67/3 rev 5, 21 ILM 58 (1982)

Chapter 4

Implications of the Legal Regimes of the WTO International Trade Harmonisation through International Standard Setting for ECOWAS

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4.7 Summary

4.1 Regulating or Restricting International Trade

The international economic regime is ‘extraordinarily complex.’¹ While the legal framework is formulated and supervised by the WTO,² the technical regulations and standards are set by some international standard-setting bodies following ‘definitions adopted within the United Nations system’³ and the execution is shared between the WTO Member States and the WTO. While the Member States are charged with ‘conformity,’ ‘harmonisation’ and implementation,⁴ the WTO is vested with monitoring through its trade policy review mechanism.⁵ ECOWAS Member States find the multilateral framework of rules and disciplines governed by the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) and the Agreement on Technical Barriers to Trade (TBT) structurally exclusive, legally challenging and economically frustrating as it appears to have excluded them as if it was set up to defeat their economic aspirations. Jules Katz, a former US trade official and senior negotiator in the Uruguay Round once boasted that ‘[t]he WTO was created in the image of the US. We are responsible for its strengths and weaknesses.’⁶ In political-economic terms, the purpose, according to Gill, being ‘to redistribute power and intensify inequality.’⁷ This chapter analyses how the exclusion of ECOWAS is achieved through standard-setting by some international organisations specified in the SPS Agreement and others not mentioned in the TBT Agreement and the negative effects it has on trade in agricultural products from ECOWAS and the legitimacy of the WTO. Cassese describes international economic relations as an ‘abstruse admixture of law and economics,’⁸ but

¹ John H Jackson, ‘International Economic Law: Complexity and Puzzles’ (2007) 10 *JIEL* 3, 7, 8.

² Article II, *The Marrakesh Agreement Establishing the World Trade Organisation*.

³ Article 3, Agreement on the Application of Sanitary and Phytosanitary Measures (hereinafter the SPS Agreement) and Article 1.1 of the Agreement on Technical Barriers to Trade (hereinafter the TBT Agreement).

⁴ Article 5.1 TBT Agreement

⁵ Annex 3 to the Marrakesh Agreement Establishing the World Trade Organisation.

⁶ Quoted by Jane Kelsey, *Serving Whose Interests? The Political Economy of Trade in Services*, (Routledge-Cavendish, 2008) 16

⁷ S Gill, *Power and Resistance in the New World Order*, (Palgrave Macmillan, 2003) 189

international standard-setting is even more abstruse as it adds science and politics to the conundrum hence the technicality and complexity of this chapter. Yet it is important that I analyse international standard-setting because the focus of my study is on the *terms* of trade and not on the volume of trade.

The WTO system is organised in a voluntarist fashion and as such efforts should be made so that states obey the agreements without coercion, whether political or economic. The compliance by ECOWAS Members has not been entirely voluntary because of the structural problems they encounter due to their peculiar circumstances, aspirations, challenges and economic realities, on the one hand, and the provisions of the SPS and TBT Agreements and developed Member States practices, on the other hand, which appear to be a contradiction in terms as will be discussed below. Under such situations compliance becomes difficult if not impossible and the organisation suffers from a legitimacy deficit in the absence of inclusion and recognition of the peculiar needs of Member States.

However, in order to achieve the desired conformity through harmonisation, ‘the source of every rule – its *pedigree*,’ writes Thomas M. Franck, ‘is one determinant of how strong its pull to compliance is likely to be.’⁹ Again, in order to ‘exert a pull to compliance’ or achieve legitimacy, a rule must derive ‘from a perception on the part of those to whom it is addressed that it has come into being in accordance with right process.’¹⁰ Add to that three other characteristics of fairness, justice and integrity¹¹ (that is consistency) identified by Ronald Dworkin and the rule is very likely to achieve ‘consensual compliance’ as a self-enforcing obligation. Critics, however, point out that Dworkin does not distinguish clearly enough tight

⁸ Antonio Cassese, *International War in a Divided World* (Clarendon Press 1986) 317

⁹ Thomas M. Franck, ‘Legitimacy in the International System,’ *The American Journal of International Law*, Vol. 82, No. 4 (Oct., 1988), 705.

¹⁰ *ibid* 706-8.

¹¹ *ibid* 709

and loose coherence.¹² This chapter will examine the process through which international standards and technical regulations are set to assess how fair and just or otherwise they are to developing countries generally and to ECOWAS in particular. As signified above, the examination will be conducted following the standard-setting processes of international organisations working for the realisation of the SPS and TBT Agreements.

Under the GATT 1994, Contracting Parties are allowed to take ‘measures necessary to protect human, animal or plant life or health,’¹³ but are prohibited from applying such measures ‘in a manner which would constitute a means of arbitrary or unjustified discrimination.’¹⁴ The SPS and the TBT Agreements are aimed at the facilitation of international trade. The WTO is not a regulatory body with capacity to issue technical or sanitary and phytosanitary standards. The governance of the SPS Agreement, as set out in the SPS Agreement itself, is entrusted to three international standard-setting organisations: the Codex Alimentarius Commission (Codex), International Office of Epizootics (OIE), and International Plant Protection Convention (IPPC)¹⁵ also known as “the three sisters.” With respect to technical regulations, the TBT Agreement does not specifically mention any international standard-setting organisations but simply urges usage of ‘relevant international standards’ that ‘exist or their completion is imminent.’¹⁶

Although the SPS and TBT Agreements are aimed at ‘improving efficiency of production and facilitating the conduct of international trade’¹⁷ recognition has been given to the fact ‘that

¹² L Alexander and K Kress, ‘Against Legal Principles,’ in A Marmor (ed) *Law and Interpretation: Essays in Legal Philosophy* (Clarendon Press 1995)

¹³ Article XX(b) the Agreement on the Application of the Sanitary and Phytosanitary (hereinafter, the SPS Agreement)

¹⁴ Preamble, SPS Agreement, para. 1.

¹⁵ Article 3(4) SPS Agreement.

¹⁶ Article 2.4 & 2.5 Technical Barriers to Trade (hereinafter the TBT Agreement)

¹⁷ The Preamble, TBT Agreement, para. 3.

developing countries may encounter special difficulties in the formulation and application of technical regulations and procedures for assessment of conformity.¹⁸ Yet the arguments surrounding these two important Agreements of the WTO revolve around ‘legitimacy,’¹⁹ the cortex of scholarly debates and the penchant of those from developing countries; ‘openness and consensus’²⁰ as interpreted by the Appellate Body; ‘global acceptance and use by industry’²¹ as canvassed by the US; and ‘market technology relevancy’²² which is advocated by Japan. All, as it will be shown in this chapter, miss the issue that is of major concern to ECOWAS Member States and other developing countries, namely, market access and genuine integration into the world trading system as well as inclusion at the different stages of standard-setting from proposal to publication so that what the agreements aim to achieve *theoretically* will be realised *in practice*.²³ John H. Jackson posits that most of the arguments about the regulation of international trade are ‘misleading’ and Joanne Scott refers to international trade regulation as ‘a world about which (lawyers) know too little.’²⁴ The

¹⁸ *ibid*, para 9.

¹⁹ Yoshiko Naiki, ‘Accountability and Legitimacy in Global Health and Safety Governance: The World Trade Organisation, the SPS Committee, and International Standard-Setting Organisation,’ *Journal of World Trade* 43, No 6 (2009) 1256. See also Robert Howse, ‘A New Device for Creating International Legal Normativity: The WTO Technical Barriers to Trade Agreement and ‘International Standards,’” in *Constitutionalism, Multilevel Trade Governance and Social Regulations*, Christian Jeorges & Ernest-Ulrich Petersmann (eds) (Hart Publishing 2007); Michael A Livermore, ‘Authority and Legitimacy in Global Governance: Deliberation, Institutional Differentiation, and the Codex Alimentarius,’ *New York University Law Review* 81 (2006): 766-801; Joanne Scott, ‘International Trade and Environment Governance: Relating Rules (and Standards) in the EU and the WTO,’ *EJIL* 15 (2004) 307-354; David G. Victor, ‘The Sanitary and Phytosanitary Agreement of the World Trade Organisation: An Assessment after Five Years,’ *NYU Int’l & Pol* 32 (2000) 865-937.

²⁰ This is the WTO or institutional view as spelt out by the Appellate Body in the following three cases: *European Communities – Measures Concerning Meat and Meat Products (Hormones)* (hereinafter ‘*EC-Hormones*’), Panel Report, WT/DS26/R, WT/DS48/R, as modified by the Appellate Report, WT/DS/26/AB/R, WT/DS48/AB/R, adopted 13 February 1998; *European Communities – Trade Description of Sardines*, (hereinafter ‘*EC-Sardines*’), WT/DS231/AB/R, adopted 23 October 2003; *European Communities – Measures Affecting the Approval and Marketing of Biotech Products (hereinafter EC-Biotech (GMOs))*, Panel Report, WT/DS291/R, WT/DS292/R, WT/DS293/R, Adopted 21 November 2006.

²¹ J Thomas, ‘What is an International Standard?’ Dec. 1997. In OECD Doc. TD/TC/WP(98)36/FINAL ‘Regulatory Reform and International Standardisation’ (1999), 22 and UN Document, ‘International Product Standards: Trends and Issues,’ (1991), 50. For criticisms of international standard setting bodies such as ISO, see J Thomas, ‘Time to Take Stock,’ *ASTM Standardisation News* (Aug. 2000), and for criticism of the ‘Geneva System’ see also J Thomas, ‘Locked In?’ *ASTM Standardisation News* (May. 2000)

²² WTO Doc. G/TBT/W/121, Amendment of the TBT Agreement, proposal by Japan, 7 Oct. 1999, at para. 6.

²³ Humberto Zuniga Schroder, ‘Definition of the Concept of ‘International Standard’ in the TBT Agreement,’ *Journal of World Trade*, 43, No, 6 (2009) 1232-33

²⁴ Joanne Scott, *The WTO Agreement on Sanitary and Phytosanitary Measures: A Commentary* (Oxford University Press 2007) 43

subsequent parts of this chapter will demonstrate how the WTO institutional framework and the practices of the big trading countries are impeding agro-food trade by maintaining SPS and TBT measures that are often too difficult²⁵ to comply with by ECOWAS Member States. The institutional framework and procedure of the standard-setting organisations seem to be all *but* inclusive and consequently restrict trade from developing countries. The consequence of non-compliance is denial of market access, a negation of the very purpose for which Members acceded to the WTO Agreements. Considering this, the focus of this chapter is on analysing the remits and organisational structure of the international standard-setting and regulatory bodies whose standards are used for monitoring and conformity to the SPS and the TBT Agreements from an International Economic Law perspective, that is, analysing law, policy and compliance and not from an International Trade angle of transactional parts of contracts, credit, volume of trade and balance of payment. The chapter ends with the Art. XX ‘General Exceptions’ jurisprudence of what is regarded as an ‘unjustifiable discrimination’ or a ‘necessary measure’ under the GATT.

We begin with the setup of the regulatory organisations to show how the facilitation of trade through the SPS and TBT Agreements seems to have remained fictitious or at best spurious for ECOWAS Member States and most of the other countries in Sub-Saharan Africa. The objectives of the Agreements appear unimpeachable, but like most legislation, what makes them successful and admirable is not how they are drafted but how they are applied. The SPS and TBT Agreements recognise that ‘developing countries may encounter *special difficulties* in the formulation and application of technical regulations and standards and procedures for assessment of conformity with technical regulations and standards’²⁶ (emphasis added). Yet

²⁵ In the case of the TBT Committee, 212 concerns have been raised by the end of 2008. See, G/TBT/GEN/74/Rev. 1 (18 Feb. 2009). The most frequent defendants were (1) against the EC with 49 concerns; (2) against China, 26 concerns; (3) against the U.S., 24 concerns.

²⁶ The Preambles to the SPS Agreement, para. 7, and TBT Agreement, para. 9.

the only solution devised to counter the adverse effects of the agreements is the perfunctory desire lacking in concreteness ‘to assist’ the developing countries which includes ECOWAS. The promised assistance notwithstanding, compliance by ECOWAS is very difficult and costly due to the number and the stringency of the measures in different export markets.

4.2 Standard Setting by Organisations Accepted by the WTO – a form of Structural Exclusion?

As Yishiko Naiki acknowledges while commenting on the three standard-setting organisations to which the WTO ceded regulatory powers, ‘introducing such a new form of governance does not occur without complications’.²⁷ This is especially so for those not present at their creation which is the case with ECOWAS and most Sub-Saharan African countries who were hardly consulted when the organisations were set up.

Before looking at the set up or organisational structures of the standard-setting bodies, it is worthy of note that there are, generally speaking, six different stages which are followed before an international standard is said to have been established. These are:

- i. the proposal stage (in which it is confirmed that a particular international standard is needed),
- ii. the preparatory stage (where a working group is set up for the preparation of a working draft),
- iii. the committee stage (where comments are made on the first committee draft until a decision on a draft international standard is reached),
- iv. the enquiry stage (where a draft international standard is circulated for voting and comments),
- v. the approval stage (where the final draft international standard is circulated to all Member Bodies for a final ‘yes’ or ‘no’ vote), and
- vi. the publication stage (in which the final text is published by the organisation’s secretariat).²⁸

²⁷ Naiki (n 19) 1256

²⁸ Schroder (n 23) 1232. As he observes in n 34, ‘Even though the procedure can vary in details, in general the work in different standardising bodies is very much the same,. Strictly, the Codex and the IEC procedures comprise eight and seven steps, respectively; nevertheless, they can be summarised in the proposed scheme.’ He makes reference to three more stages after the publication of the relevant standard: *publicity* (of the new

However, Schroder argues that the overriding consideration of any particular regulation should not be technical efficiency. He is concerned with ‘the decision making process of relevant international bodies,’ and draws an analogy with ‘the QWERTY keyboard layout, which was designed to slow down typing speed to further reduce jamming.. Interestingly, this standard was technically deficient, but it prevailed as the de facto worldwide accepted standard.’²⁹ By the same token, international standards and regulations should not just aim at finesse if too many countries will be left out. It is necessary to examine the default setting of the international standard-setting organisations, so as to provide an analysis of how the standards are approved and whose interests they serve.

4.2.1 The Codex Alimentarius Commission (CAC)

A joint resolution by the Food and Agricultural Organisation and the World Health Organisation brought the CAC into being with the aim of protecting human health by ensuring food quality and safety.³⁰ It sets out the Minimum Residual Levels (MRLs) for food additives and veterinary drugs minimum limits for pesticides used on food crops.³¹ According to the Codex Procedural Manual it currently has over 3,000 standards which it promotes through harmonisation of national standards to them in order to facilitate international trade. The CAC membership is open to all members of the FAO and the WHO and currently stands at 183,³² nearly as many as the UN. The only other criterion that

standard), *implementation* (by companies and other organisations) and *evaluation* (revision after a certain period of time usually five years).

²⁹ *ibid.*

³⁰ WHO/FAO ‘Understanding the Codex Alimentarius’ (3rd edn FAO Publications, Rome, 2006) 13 ftp://ftp.fao.org/codex/Publications/understanding/Understanding_EN.pdf accessed 21 Dec. 2010.

³¹ International Trade Centre UNCTAD/WTO, *Influencing and Meeting International Standards Challenges for Developing Countries, vol 2 – Procedures Followed by Selected International Standard-Setting Organisations and Country Reports on TBT and SPS* (1st edn ITC, Geneva 2004) 33.

³² See < <http://www.codexalimentarius.net/web/members.jsp?lang=EN>> accessed on 21 Dec. 2010.

countries who are already FAO and WHO members have to meet is an expression of interest in food standards.

4.2.1.1 CAC Standard-Setting Procedure

As may be inferred from the six standard-setting steps above, the procedure at the CAC is a much decentralised one with so many subsidiary bodies.³³ Its Rules of Procedure states that the CAC could delegate its work to committees which handle the technical and preparatory work. There are fifteen committees made up of experts who are delegates from Member States.³⁴ The criterion for inviting the experts is personal merit and so they are not invited as representatives of their countries and as such mostly world-famous scientists³⁵ get called. The implication is that scientists in countries without a strong scientific publication record may be left out especially as the Oxford and Cambridge University presses do not publish much from the universities within the ECOWAS sub-region.

As pointed out above,³⁶ the CAC procedure has eight steps; and as explained by the Panel and the Appellate Body in *EC – Hormones*,³⁷ the CAC when nudged by a member initiates a project proposal but when initiated by a member it must be approved by the CAC before it can progress to the next stage. At the second stage the CAC assigns the proposal to a committee of experts which prepares a draft proposal. In the third stage the Secretariat receives the draft proposal and distributes it to members for comments. Stage 4 involves feedback and redrafting; then in stage 5 the redrafted standard is submitted by the Secretariat

³³ Art. 7 CAC Statute.

³⁴ Terence P. Stewart and David S. Johanson, 'SPS Agreement of the World Trade Organisation and International Organisations: The Roles of the Codex Alimentarius Commission, The International Plant Protection Convention, and the International Office of Epizootics' (1999) 26 *Syracuse Int'l L. & Com.* 27, 41.

³⁵ Lee Ann Jackson and Marion Jansen, 'Risk Assessment in the International Food Safety Policy Arena: Can the Multilateral Institutions Encourage Unbiased Outcomes?' (2009), WTO Staff Working Paper available at http://www.wto.org/english/res_e/reser_e/ersd200901_e.pdf accessed 21 Dec. 2010.

³⁶ (n 28).

³⁷ *EC-Hormones* (n 19) Panel Report (USA) 18 Aug. 1997, Appellate Report 16 January 1998.

for possible adoption. Next, if adopted it is sent to all members and other interested international organisations to assess its possible impacts especially with people whose economic interests might be affected. In stage 7 the comments received are remitted to the committee that drafted the proposal originally. The last stage of approval is the voting process in which each member has one vote though most of the time approval is reached through consensus.³⁸

How do ECOWAS Member States and other developing countries trail in the institutional framework of an organisation that sets out and determines the standards they are to use? First and foremost is the problem of participation. The committees are not funded by the FAO and the WHO who are the joint owners of the CAC rather each committee is hosted by a member country and the host bears the full costs of transport, boarding and administration. The host country is rewarded with appointing the committee chairman.³⁹ This affords the host country an opportunity to influence both the agenda and the decision-making of the CAC committee. This is an influential structural advantage conferred on the rich and developed countries by default and for which ECOWAS Member States are financially and technologically ill equipped to 'buy'.⁴⁰

Again the work at the committee level has been criticised for being very subjective.⁴¹ None of the CAC committees conducts any laboratory research; instead they call on individuals, governments, industry, and universities to make their contributions. It follows that the result

³⁸ Rules of Procedure of the Codex Alimentarius Commission, Rule XII, 2.

³⁹ Art. 9 CAC Statute.

⁴⁰ International Trade Centre UNCTAD/WTO, *Influencing and Meeting International Standards: Challenges for Developing Countries, Vol. 1 – Background Information Findings from Case Studies and Technical Assistance Needs* (1st edn ITC, Geneva, 2003) 9

⁴¹ Jackson and Jenson (n 35)

of the contributions can only be as reliable as their sources.⁴² Expectedly the contributions are often country-specific and biased in favour of some countries and regions.⁴³ There is a heavy reliance on companies based in developed countries for their research and development efforts and scientific evidence. Moreover some industries may favour the technology at their disposal or a procedure they are familiar with so that, if approved, they will not overstretch themselves too much to meet the conditions.

Another criticism is that much of the ‘independent’ research used is the research and development efforts of some companies who aim to reap economies of scales if approved as an international standard.⁴⁴ Again in terms of outreach to governments for participation, it has been observed that only twenty government members of the CAC supply the data mostly used in committee’s risk assessment.⁴⁵ These are developed countries which have the capacity to generate the data and submit to committees for consideration. Therefore, the ‘scientific’ inputs could simply be a reflection of government partisanship and corporate interests.

Furthermore the committee work may not be free from political influence because ultimately approval only flows from the voting pattern or consensus of the CAC. The delegates from developed countries include a large number of representatives of business and industry that could be affected by a proposed standard. They bring their clouts and influence to bear on a supposedly scientific procedure.

⁴² Regine Neugebauer, ‘Fine-tuning WTO Jurisprudence and the SPS Agreement to Improve Trade Integration and Harmonisation,’ in Edith Brown Weiss, John H. Jackson & Nathalie Bernasconi-Osterwalder (eds), *Reconciling Environment and Trade* (Transnational Publishers, Ardsley, NY 2001) 344.

⁴³ *ibid*

⁴⁴ Justin E. Bekelman, Jan Li and Cary P. Gross, ‘Scope and Impact of Financial Conflicts of Interest in Biomedical Research: A Systemic Review (2000) 289 *Journal of the American Medical Association* 454, 456.

⁴⁵ Sri Ram Khanna, ‘Codex Standards: New Challenges for Developing Countries,’ in Sri Ram Khanna and Madhu Saxena (eds), *Food Standards and Safety in a Globalised World: The Impact of the WTO and Codex* (New Century Publications, New Delhi 2003) 23.

Finally, for purposes of the WTO Agreement, ‘consensus’ means that ‘no member, present at the meeting when the decision is taken, formally objects to the proposed decision.’⁴⁶ An even weaker and paradoxically more puzzling is the definition of ‘consensus’ by the International Organisation for Standardisation (ISO) and the International Electrotechnical Commission (IEC); according to them ‘consensus’ can be defined as:

[A] general agreement, characterised by the absence of sustained opposition to the substantive issues by any major part of the concerned interests and by a process that involves seeking to take into account the views of all parties concerned and to reconcile any conflicting arguments.⁴⁷

In the case of the ISO and the IEC consensus need not imply unanimity. Note that even when there is a ‘sustained opposition’ such opposition must come from an ‘important part of the concerned interest’ to be counted. Who decides who or what is important is anybody’s guess, may be purely subjective and deeply flawed.

4.2.2 The International Organisation for Standardisation (ISO) from the Greek ‘isos’ meaning ‘equal’ hence ISO

The ISO is a Geneva not-for-profit⁴⁸ organisation established in 1947 with the remit of publishing international standards in all fields save electrical, electronic and allied technologies. Its aim is the development of worldwide standards to enhance the exchange of goods and services internationally. It also aims to foster friendship in scientific, technological and intellectual areas.⁴⁹

⁴⁶ See Footnote 1 of The WTO Agreement.

⁴⁷ ISO/IEC Guide 2:2004, Standardisation and Related Activities – General Vocabulary, para 1.7 and ISO/IEC Directives, Part 1, ‘Procedures for the Technical Work,’ 6th edn, 2008. Available at www.iso.org (accessed on 21 Dec. 10)

⁴⁸ WTO Document G/TBT/W/106, 26 March 1999, para. 20.

⁴⁹ International Trade Centre (n 31) 7

The ISO operates a three-membership⁵⁰ category, namely, the member bodies, the correspondent members and the subscribing members. The member bodies are the national groups which are in different countries that initiate and promote standardisation in their countries. The correspondent members are composed of developing countries that have no thriving national branches and no developed national standards.⁵¹ Such members are under no obligation to take active parts in policy formulation and they are conferred with observer status. They have no voting rights but could be informed of any work in progress deemed to be of interest to them.⁵² The subscribing members are countries with limited economic resources: they do not vote, take no active part in ISO activities and receive no standards even after approval but are sent bulletins and ISO publications. ISO membership fees correspond to the category of membership⁵³ and as with the Codex it excludes most ECOWAS Member States, only five out of the fifteen of them are full members.⁵⁴

4.2.2.1 Standard-Setting Procedure at the ISO

The ISO operates through technical committees (TCs) and sub-committees (SCs) which have the specific role of drafting the standards.⁵⁵ All national bodies have the right of participation as a participating member (P-Member) or an observing member (O-Member) with responsibilities corresponding to their names. Of all the five ECOWAS members of the ISO,

⁵⁰ *ibid* 8.

⁵¹ Jurgen Kurtz, 'A Look Behind the Mirror: Standardisation Institutions and the WTO SPS and TBT Agreements' (2007) 30 *U.N.S.W.L.J.* 504, 520

⁵² International Trade Centre (n 31) 9

⁵³ The membership fees run short of the operational or administrative costs of the ISO and so the balance is made up by the sale of the approved standards and statutes.

⁵⁴ ECOWAS has a total membership of fifteen states; five (Ivory Coast, Ghana, Mali, Nigeria and Senegal) are full members, another five (Benin, Gambia, Guinea, Liberia and Sierra Leone) are correspondent Members. The Remaining five (Burkina Faso, Cape Verde, Guinea-Bissau, Niger and Togo) are not members and do not even appear on the ISO website as subscribers. See http://www.iso.org/iso/about/iso_members.htm accessed on 15 February 2011.

⁵⁵ Michael J. Trebilcock and Robert Howse, *The Regulation of International Trade* (3rd edn, Routledge 2005) 227

only Nigeria had a participating status of the three committees on conformity assessment, consumer policy and developing country matters of the organisation. Mali and Senegal are mere observers on conformity assessment and consumer policy.⁵⁶

In terms of compositions the TCs and SCs are made up of experts with technical, industrial and business background. In most cases the industries are those that have requested the specific standard and are those that are expected to put them into use on approval. Unlike the Codex committees, the ISO SC and TC members operate as national groups. Therefore they present both their industry-specific view points and their national perspectives too,⁵⁷ casting some doubts as to their objectivity.

The ISO follows the six-stage procedures outlined in paragraph 3.2 above. Again it is necessary to sketch out the stages so as to highlight the problems ECOWAS Member States face at the participatory stages. It has been stated above that the first stage involves the agreement that there is a need for a given standard. Often such a need emanates from an industry which identifies it and alerts its national body that the standard in a given area be formulated. It is the national body such as the Ghana Standards Board or the Standards Organisation of Nigeria (SON) or the British Standards Institution that files the proposal at the ISO as a new work item proposal. It is also at the preparatory stage that the TC/SC would set up the working group that will come up with the committee draft (CD). If all goes well and the draft progresses to the publication stage, the ISO Secretariat would publish it as the international standard.

⁵⁶ http://www.iso.org/iso/about/iso_members.htm accessed on 15 February 2011.

⁵⁷ www.iso.org/iso/about/discover-iso_who-develops-iso-standards.htm visited on 21 Dec. 10

Like the Codex, the work of the ISO TCs and SCs are not supported by the ISO Central Secretariat, the number of committees involved and the volume of work to be done frequently overwhelm the capacity of ECOWAS Member States and this puts them at a structural disadvantage. The member that agrees to host the TC or SC must provide technical assistance and pay for the administrative support. The financial burden attendant on this role puts off developing countries from ever thinking of hosting the committees.⁵⁸ The consequence of this is the disproportionate hosting rights grabbed by developed countries.⁵⁹

Again like the Codex by placing the standard-setting procedure outside the confines of the WTO and by having consensus devoid of unanimity, voting is reduced to a mere token of goodwill. The single vote that each member has which in their aggregate would have produce a combined effect for developing countries, including ECOWAS, are therefore without any legislative, advisory or even consultative powers.

4.2.3 The International Office of Epizootics

The World Organisation for Animal Health better known by its French abbreviation OIE (for *Office International des Épizooties*) is a veterinary services intergovernmental organisation set up in 1924 and based in Paris, France. The OIE is the WTO reference organisation for standards relating to animal health and zoonoses. Its remit is the harmonisation of national regulations and standards with its own for animal health, international trade in animals and animal products.⁶⁰ It publishes two codes (Terrestrial and Aquatic) and two manuals (Terrestrial and Aquatic) as principle references for WTO Members. Its membership which

⁵⁸ International Trade Centre UNCTAD/WTO (n 31) 39.

⁵⁹ *ibid.* In 2001 the developed countries hosted of 90 per cent of the TCs and SC meetings

⁶⁰ Semonetta Zarrilli, 'WTO Sanitary and Phytosanitary Agreement: Issues for Developing Countries,' (1999) T.R.A.D.E. Working Paper (UNCTAD).

was limited to European countries at its inception currently stands at 178⁶¹ because it is now open to all independent countries. It has different categories of membership with the last group contributing only 12 per cent of the top group. States are allowed to choose an entry point category and move up with time. Arguably membership is on the bases of equality but the divergence of burdens resulting from the categorisation of memberships and the attendant fee rates obviously lead to differences in participations, decision-making and, of course, outcomes or benefits.

4.2.3.1 OIE Standard-Setting Procedure

The supreme organ of the OIE is the International Committee which is made up of technical experts representing Member States.⁶² This Committee does not undertake technical work on its own but delegates such work to the following four Specialist Commissions:

1. The Terrestrial Animal Health Standards Commission ('Terrestrial Code Commission'),
2. The Scientific Commission for Animal Diseases ('Scientific Commission')
3. The Biological Standards Commission ('Laboratories Commission'), and
4. The Aquatic Animal Health Standards Commission ('Aquatic Animals Commission').

The members of the Special Committees who are appointed by the International Committee⁶³ are people with long experience in veterinary science, medicine and regulation.⁶⁴

OIE's standard-setting procedures are very much like those of the Codex and the ISO and starts with the identification of a need by a Member State or an expert. Approval is based on

⁶¹ < www.oie.int/about-us/our-members/member-countries > accessed 21 May 2012

⁶² Organic Statutes of the OIE, Art. 11.

⁶³ General Rules of the OIE, Art. 20.

⁶⁴ Above (n 45).

voting⁶⁵ which in turn is based on a simple majority which is based again on a quorum of half of the delegates representing the Member States plus one.⁶⁶ Such a quorum would have favoured the developing countries that make up a majority of the membership but for the fact that most developing country members do not attend the meetings due to financial problems.

Unlike the other international standard-setting organisations discussed above, OIE meetings are covered by the OIE budget.⁶⁷ Therefore, there seems to be no need to subrogate or cede legislative authority to a country that hosts a meeting of the Technical Committees and there is also no reason for a host country to exert undue influence on a committee. Another potentially positive indicator for a more scientific outcome is the fact that the experts are appointed with geographical diversity in mind.⁶⁸ Again decisions taken are binding despite controversies preceding it. On the whole the OIE is the most inclusive of all the international standard-setting organisations because of the breadth of its specialist committees and the payment for the meetings from the OIE budget.

4.2.4 *The International Plant Protection Convention (IPPC)*

The treaty that covers standard-setting in the botanical field is the International Plant Protection Convention (IPPC) which is under the supervision of the Food and Agricultural Organisation (FAO) and deposited with its Director-General.⁶⁹ The Convention is administered by the Commission on Phytosanitary Measures (CPM) established under Article XI. The FAO is the host and funder of the IPPC. The IPPC was set up:

⁶⁵ Organic Rules of the OIE, Art. 5.

⁶⁶ General Rules of the OIE, Art. 6.

⁶⁷ See section 3.2.1 above.

⁶⁸ The current representation in 2012 is four representatives for Africa (representing the east, west, north and south), two for the Americas (one for the whole region and the other for Central America), two for Asia and the Pacific (one for the whole region and the other for South-East Asia), two for Europe (for Eastern and Western Europe) and one for the Middle East, see www.oie.int/about-us/wo/regional-representations accessed 21 May 2012

⁶⁹ IPPC, Guide to the International Plant Protection Convention (2002) UNTS 150.

With the purpose of securing common and effective action to prevent the spread and introduction of pests of plants and plant products, and to promote appropriate measures for their control, the contracting parties undertake to adopt the legislative, technical and administrative measures specified in this Convention and in supplementary agreements pursuant to Article XVI.⁷⁰

Art. XVI outlines the measures as:

The contracting parties may, for the purpose of meeting special problems of plant protection which need particular attention or action, enter into supplementary agreements. Such agreements may be applicable to specific regions, to specific pests, to specific plants and plant products, to specific methods of international transportation of plants and plant products, or otherwise supplement the provisions of this Convention.

This gives Member States the latitude to take measures deemed necessary to combat pests invasion. Like sanitary measures, phytosanitary measures could also be used as ‘a means of arbitrary or unjustified discrimination or a disguised restriction, particularly on international trade.’⁷¹

All members of the FAO are eligible for membership of the CPM. While the IPPC is binding on all the Contracting Parties, Art. XVIII on ‘Non-Contracting Parties’ provides:

The contracting parties shall encourage any state or member organization of FAO, not a party to this Convention, to accept this Convention, and shall encourage any non-contracting party to apply phytosanitary measures consistent with the provisions of this Convention and any international standards adopted hereunder.

Therefore, even though the Convention was designed to come into effect with it being ratified by *three*⁷² signatory states only, it was designed to play a global role by urging that even non-contracting parties should be encouraged to apply its provisions as if it were a rule of customary international law.⁷³

4.2.4.1 *Standard-Setting by the IPPC Commission*

⁷⁰ Art. 1(1) IPPC 1952

⁷¹ Preamble to the IPPC, para. 2.

⁷² Art. XXII, IPPC.

⁷³ See Franck, Hudson and Chigara, notes 133, 134 & 135 in chapter 2

Each member of the Commission is entitled to delegate one person to the Commission and has one vote.⁷⁴ What is unique about the delegates to the Commission is that they could be accompanied by advisers or experts though the advisers and experts do not have voting powers.

The development of International Standards on Phytosanitary Measures (ISPM) involves the following four procedures: the preliminary stage, the drafting stage, the consultation stage and the approval stage. These stages are more or less like in the order organisations discussed above. However, in terms of composition, the Standards Committee are twenty-five in number and are drawn from the seven FAO regions, namely, Africa, Asia, the Caribbean, Europe, Latin America, North America, the Near East and the South-West Pacific.⁷⁵ The CPM does not develop the standards by itself but delegates the work to a group of experts to draft. At the consultation stage the contracting parties and relevant interest groups are given 100 days to submit their comments. If adoption of the draft by consensus fails, voting follows and approval is by a two-thirds majority.⁷⁶

Although the funding for the IPPC committees comes from the IPPC budget which is from the FAO, the technical work is not done at the plenary sessions but at the select committee of expert levels. The FAO has some collaborators that do give financial support to the host of the committee meetings and so influence the work of the experts. Again although two-thirds is a high threshold, standards could nonetheless be adopted with a considerable opposition considering the fact that there is no minimum number of votes required.

⁷⁴ Art. XI(3), IPPC.

⁷⁵ FAO, International Plant Protection Convention: Procedural Manual (FAO, Rome 2008) available at www.ippc.int accessed 22 Dec. 10.

⁷⁶ Art. XI(5) IPPC.

4.2.5 The International Electrotechnical Commission (IEC)

The IEC's remit covers setting-standards in the fields of electricity, electronics and allied technologies.⁷⁷ Its membership consists of national committees which could be public or private sector organisations or employees and could register as full members or associates. The full members participate in all IEC standard-setting processes and have voting rights. The associates, on the other hand, are accorded observer status and as such are without voting rights.

The levying of annual dues and membership subscriptions is not demographic but rather economic and technical. Each national committee's dues are based not on the number of people in the country or the number of members but are based on the countries GNP and electricity consumption. However,

A country may apply for Associate Membership in order to pay reduced dues if its percentage of the total dues as calculated in accordance with the method approved by Council (i.e. based on its Gross National Product, Population and Electricity Consumption) is less than the lowest percentage of dues required for full membership, as decided annually by Council.

Though laudable, the fact that the category of membership determines the degree of participation seems to put off the least developed countries in ECOWAS such as Mali and Burkina-Faso from joining the IEC. Out of the fifteen Member States of the ECOWAS only Nigeria has an associate membership.⁷⁸ The standard-setting procedures of the IEC and that of the ISO are very similar and what is presented above (under 3.1) about the ISO holds true

⁷⁷ Art. 2 IEC Statute.

⁷⁸ The IEC has 60 full members and 22 associate Members. Nigeria is the only ECOWAS Member State that is an associate member; the others are not members at all. Data obtained from www.iec.ch/dyn/www/f?p=103:5:0 accessed 21 May 2012

for the IEC as well. Again many towns and communities within ECOWAS are without electricity, the basis of the calculation, that determines category of membership and influence and those that have electricity have very low consumption rates of less than six hours supply of power a day.

The next subsection will analyse the provisions, ambit and applications of the SPS and TBT Agreements because while the latter refers to ‘relevant international standards,’⁷⁹ the SPS Agreement specifically mentions the Codex Alimentarius Commission, the OIE and the ‘organisations operating within the framework of the International Plant Protection.’⁸⁰ My choice of these two agreements is ‘due to their close link with agricultural trade’⁸¹ which has a direct impact on the economic development of ECOWAS Member States and also because they ‘are merely an elaboration of GATT rules on non-discrimination’⁸² which is the thrust of my thesis: the application of Articles I & III of the GATT on ECOWAS. These two agreements also require deeper analyses because as Wouters and Meester observe ‘even if a measure is not discriminatory, it may form a trade barrier mainly by the fact that it exists and differs from the rules with which importers have to comply in their home country.’⁸³ Again the two agreements take the GATT a step higher because apart from their substantive provisions on ‘increased trade scrutiny of national measures,’⁸⁴ they take the GATT to a collaborative level by referring to international standards set by organisations outside the WTO.

⁷⁹ Article 2, TBT Agreement

⁸⁰ Preamble, *SPS Agreement*, para 5

⁸¹ Peter Van den Bossche, *The Law and Policy of the World Trade Organisation* (2nd edn Cambridge University Press, Cambridge 2008) 863.

⁸² Simon Lester and Bryan Mercurio, *World Trade Law* (Hart Publishing, Oxford 2008) 557.

⁸³ Jan Wouters and Bart de Meester, *The World Trade Organisation: A Legal and Institutional Analysis* (Intersentia, Antwerpen, Oxford 2007) 69.

⁸⁴ *Ibid.*

4.3 SPS Measures and the Economic Development of ECOWAS

An SPS measure is defined as

Any measure applied:

- a) to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms;
- (b) to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs;
- (c) to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or
- (d) to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.

Sanitary or phytosanitary measures include all relevant laws, decrees, regulations, requirements and procedures including, *inter alia*, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labelling requirements directly related to food safety.⁸⁵

A study for the OECD provides the *raison d'être* for the SPS Agreement as well as its perverse side or unintended consequences. According to the study:

It is widely recognized that SPS regulations, which are in general primarily aimed at safeguarding public health and avoiding losses from pests, diseases and contaminants in the domestic sphere, can have significant transboundary implications (OECD, 1999).⁸⁶ Indeed, such regulations can become rather effective barriers to trade, and there have been concerns that negotiated reductions in tariff protection might be replaced through stringent SPS requirements. In this context, agriculture and food exports from developing countries are seen to be particularly vulnerable.⁸⁷

Put in other words, the SPS Agreement could and has been used as a justification or cover-up for practices that are thought to be contrary to the principles of non-discrimination set out in Articles I and III, GATT. Nevertheless, some commentators have argued that the developing

⁸⁵ Para. 1, Annex A, SPS Agreement.

⁸⁶ The OECD publication referred to was *Food safety and quality: trade considerations*, Paris, 1999.

⁸⁷ Peter Walkenhorst, *The SPS Process and Developing Countries*, (Paris, OECD 2003) 1.

countries may be better off under the multilateral trading system than under bilateral or regional trade arrangements,

For example, using a gravity model, Otsuki, Wilson and Sewadeh (2001a) estimated the impact of a new harmonized aflatoxin standard set by the European Union (EU) on food exports from Africa. They found that the new EU standard, which is expected to reduce health risk by approximately 1.4 deaths per billion a year, will decrease African exports of cereals, dried fruits and nuts to Europe by 64 per cent or \$670 million, compared to regulations set through an international standard.⁸⁸

But what does the SPS Agreement cover and going by the analyses of the international standard-setting organisations above how could the developing countries reduce their vulnerability to the whims and caprices of the organisations bearing in mind that the cost of ‘compliance with obligations concerning customs valuation, intellectual property rights, and sanitary and phytosanitary (SPS) practices would in many least developed countries exceed an entire year’s development budget.’⁸⁹

As Van den Bossche points out, it is the purpose of applying a measure that makes it an ‘SPS measure’ which could be one of three, namely, to protect human or animal life or health from (a) food-borne risks, (b) pests and diseases or (c) to prevent or limit other damage from risks from pests.⁹⁰ Therefore, SPS measures fall broadly speaking into two categories: those that prohibit discrimination and those that impose positive obligations to take measures (a) necessary to protect health, (b) based on scientific principles and (c) not maintained

⁸⁸ *ibid.* See also M. Iynedjian, *L'accord de l'Organisation mondiale du commerce sur l'application des mesures sanitaires et phytosanitaires: une analyse juridique*, (Paris, L.G.D.J. 2002) 262; D. MacLaren, *Trade Barriers and Food Safety Standards*, (University of Melbourne, Melbourne 2003) 11; G. Marceau and J. Trachtman, ‘The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the GATT: a Map of the World Trade Organisation Law of Domestic Regulation of Goods,’ *Journal of World Trade* (2002) 811-881; M. M. Slotboom, ‘The Hormones Case: an Increased Risk of Illegality of Sanitary and Phytosanitary Measures,’ *C.M.L. Rev.* (1999) 471-491; G. Stanton, *The Multilateral Trading System and the SPS Agreement*, (WTO, Geneva 2000) 19; P. Vergono, ‘The Sanitary and Phytosanitary Agreement’; *ERA Forum* (2001) 118-128.

⁸⁹ J. S. Wilson, ‘Standards, Regulations, and Trade: WTO Rules and Developing Country Concerns,’ in B. Hoekman, A. Mattoo and P. English (eds), *Development, Trade and the WTO: a Handbook* (World Bank, Washington D.C. 2002) 428-438.

⁹⁰ Van den Bossche, (n 81) 835

arbitrarily but based on sufficient scientific advice.⁹¹ Although the GATT Contracting Parties are allowed to set their own level of acceptable risk, the Appellate Body has held that they are required to choose this level in a consistent way,⁹² (as will be discussed under Article XX ‘General Exceptions’ jurisprudence below). But for present purposes, it is worthy of note that the burden of proof of justifying that an SPS measure is not ‘more trade protective than is required to achieve their appropriate level of protection,’⁹³ stands in sharp contrast with the burden of proof for the positive obligations ‘necessary to protect public morals...human, animal or plant life or health, national treasures of artistic, historic or archaeological value, the conservation of exhaustible natural resources, etc,’⁹⁴ as well as ‘national security interests.’⁹⁵ While under the SPS Agreement the ‘necessary-test’ is for the respondent (the challenged party) to prove, that is, the respondent could use necessity as his defence, under Art. XX GATT, it is the complaining party that bears the burden of proof that ‘(a) a significantly⁹⁶ less trade-restrictive measure was (b) reasonably⁹⁷ available taking into account technical and economic feasibility and (c) would be able to achieve the appropriate level of protection.’⁹⁸ In outlining the burden of proof, the Panel in *EC – Sardines*⁹⁹ ‘ruled’:

In paragraph 7.50, we determined that the European Communities, as the party asserting that Codex Stan 94 is ineffective or inappropriate to fulfil the legitimate objectives pursued by the Regulation, has the burden of proving this assertion. Although the burden of proof rests with the European Communities to prove that Codex Stan 94 is an ineffective or inappropriate means for fulfilment of the legitimate objectives pursued, we note that Peru has provided sufficient evidence and legal arguments, as set put below, to demonstrate that Codex Stan 94 is not an ineffective or inappropriate means to fulfil the legitimate objectives pursued by the EC Regulation.

⁹¹ Wouters and Meester (n 83) 70.

⁹² *European Communities – Measures Affecting Asbestos and Asbestos-Contaminated Products* (hereinafter *EC-Asbestos*), WT.DS135/AB/R, adopted 5 April 2001, para. 168. See also Art. 3(3) SPS Agreement.

⁹³ Footnote 3 SPS Agreement.

⁹⁴ Art. XX GATT.

⁹⁵ Art. XXI GATT.

⁹⁶ In footnote 198 Wouters and de Meeters (n 65) 71 pointed out that ‘the fact that an alternative must be “significantly” less restrictive, gives WTO Members some leeway in selecting the appropriate measure to pursue the objective.’

⁹⁷ Federico Ortino, ‘From “non-discrimination” to “reasonableness”: a paradigm shift in international economic law,’ *Jean Monnet Working Paper* 01/05 (April 2005), 42-43, available at www.jeanmonnetprogram.org.

⁹⁸ Wouters and de Meeters (n 83).

⁹⁹ Panel Report, *European Communities – Trade Description of Sardines*, WT/DS231/R, adopted 23 October 2002.

Delving into the explication of the terms the Panel said,

Concerning the terms ‘ineffective’ and ‘inappropriate’, we note that ‘ineffective’ refers to something which is not ‘having the function of accomplishing’, ‘having a result’, or ‘brought fitting’... An inappropriate means will not necessarily be an ineffective means and vice versa The question of effectiveness bears upon the *results* of the means employed, whereas the question of appropriateness relates more to the *nature* of the means employed (italics in the original).¹⁰⁰

By the use of the disjunctive ‘or’ it is clear that the respondent relying on Article 2.4 need not prove that a relevant international standard is ineffective *and* inappropriate. It suffices to prove either of them. The significance of this is that the burden of proof on the respondent is less onerous and so measures that restrict market access may scale through the legal huddle.

4.3.1 *The Scope of the SPS Agreement*

Article 1.1 of the SPS Agreement limits its application to ‘all sanitary and phytosanitary measures which may, *directly or indirectly, affect international trade* (italics mine). Therefore the underlying purpose of the Agreement is not scientific but *commercial*; not the eradication of pests and diseases, but the facilitation of trade across national borders. The WTO, like many other international organisations, has legislative and quasi-judicial arms but no executive organ.¹⁰¹ Therefore, Art. 13 of the SPS Agreement provides that:

Members are fully responsible under this Agreement for the observance of all obligations set forth herein. Members shall formulate and implement positive measures and mechanisms in support of the observance of the provisions of this Agreement by other than central government bodies. Members shall take such reasonable measures as may be available to them to ensure that non-governmental entities within their territories, as well as regional bodies in which relevant entities within their territories are members, comply with the relevant provisions of this Agreement.

¹⁰⁰ *ibid* para. 116.

¹⁰¹ Philippe Sands and Pierre Klein, *Bowett’s Law of International Institutions* (5th edn Sweet & Maxwell, London 2001) 116-118. See also Dapo Akande, ‘International Institutions,’ and Gerhard Loibl, ‘International Economic Law,’ in Malcolm D. Evans (ed) *International Law* (Oxford University Press, Oxford 2006) 277-306 and 699-708 respectively.

The Panel in *Australia – Salmon (Article 21.5 – Canada)*¹⁰² held that the SPS measures taken by the state government of Tasmania in Australia was under the responsibility of Australia. The implication of this is that a country may be held liable for something done not by its government officials but by non-governmental and independent entities operating within its territories. This underscores the importance of private standards in international trade; while they may be burdensome, they have the potential to boost international trade.

Whether the SPS Agreement could apply retrospectively to measures already adopted and in place before the entry into force of the SPS Agreement has been raised by the European Communities before the Appellate Body. In their report, the Appellate Body seems to have answered in the affirmative:

If the negotiators had wanted to exempt the very large group of SPS measures in existence on 1 January 1995 from the disciplines of provisions as important as Articles 5.1 and 5.5, it appears reasonable to us to expect that they would have said so explicitly. Articles 5.1 and 5.5 do not distinguish between SPS measures adopted before 1 January 1995 and measures adopted since; the relevant implication is that they are intended to be applicable to both.¹⁰³

Showing that in the absence of reservations, the SPS Agreement applies to measures prior as well as post of its entry into force.

Where do the provisions of the SPS Agreement and the jurisprudence flowing from them leave ECOWAS Member States? By the provisions they are mandated to use the resources they do not have to enforce some ‘international’ standards they (in many cases) opposed but were not listened to because they lacked the capacity to press on long enough with their objections to qualify as ‘sustained opposition’ and going by the rulings of the Panel and the Appellate Body they were expected to enforce the standards both retrospective and

¹⁰² Panel Report, *Australia-Salmon (Art. 21.5 – Canada)*, WT/DS18/RW, adopted 30 March 2000.

¹⁰³ Appellate Body Report, *EC Measures Concerning Meat and Meat Products* (hereinafter *EC – Hormones*) WT/DS26/AB/R, WT/DS48/AB/R adopted 25 September 1997 para 128

prospective with little concrete assistance (whether technical, logistical or scientific) from the rest of the world for purposes of control, inspection and approval of procedures.¹⁰⁴

4.4 TBT Regulations and the Economic Development of ECOWAS

It needs to be pointed out from the outset of this subsection that for purposes of the TBT Agreement, compliance with technical *regulations is mandatory* but compliance with *standards is not*. The Annex to the TBT Agreement defines a regulation as a '[d]ocument which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory' but defines standards as a '[d]ocument approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory.'¹⁰⁵ This appears understandable because, for example, an engine plug made by Bosch in Germany should be able to fit into a Toyota car engine made in Japan, otherwise it may not be sold or if sold, the market would be very limited.

4.4.1 Scope of the TBT Agreement

The TBT Agreement has three ambits covering 'regulation,' 'standards' and 'procedures' by governments in relation to conformity assessment and covers 'terminology, symbols, packaging, marking or labelling requirements as they apply to product, process or production method.'¹⁰⁶ The Agreement does not apply to sanitary and phytosanitary measures.¹⁰⁷ This rules out forum-shopping. According to Peter Van den Bossche, if it were otherwise, it

¹⁰⁴ Art. 8 *SPS Agreement*.

¹⁰⁵ Annex 1.1 and 1.2 *TBT Agreement*.

¹⁰⁶ *ibid*.

¹⁰⁷ Art. 1.5 *TBT Agreement*.

would have been more advantageous for a complaining Member to challenge a measure under the SPS Agreement rather than under the TBT Agreement.¹⁰⁸

I am in agreement because the supermarket chains in the developed countries now set their own standards; for example, Sainsbury's to flower growers in Kenya and grape farmers in South Africa. In a report, 'the island state of St Vincent and the Grenadines first drew the attention to the challenges it faced when trying to access the EU market due to strict standards set by commercial supermarket chains.'¹⁰⁹

It might be helpful to think of the SPS Agreement loosely as being biological in scope while the TBT Agreement is mechanical though 'SPS measures may often take the form of technical regulations, standards or conformity assessment procedures.'¹¹⁰ Article 1.3 TBT provides that its scope shall cover [a]ll products, including industrial and agricultural products' and States have the right to adopt a level of technical regulations they consider appropriate but this cannot be in violation of their Most-Favoured-Nation and National Treatment obligations.¹¹¹ Like the *SPS Agreement*, the *TBT Agreement* involves a 'weighing and balancing' of interests to assess the validity of the legitimate objective sought to be achieved through a TBT measure so as not to be a disguise for trade distortion. In the 'weighing and balancing' scientific evidence does not rank uppermost in the consideration as other contingent factors such as end-uses of the products are considered. The 'TBT Agreement,' according to one commentator, 'has an open list of legitimate objectives,'¹¹² and this may call some measures to question which may detract from the lofty objectives of the

¹⁰⁸ Van den Bossche (n 81) 839-840.

¹⁰⁹ *BRIDES Weekly Trade News Digest*, 4 July 2007 quoted in Van den Bossche *ibid*.

¹¹⁰ *Ibid*.

¹¹¹ *Ibid* 2.1.

¹¹² Wouters and de Meester, (n 83) 75.

Agreement authorising a Member State to set the protection ‘at the levels it considers appropriate.’¹¹³

I am inclined to agree with the ‘open list’ assertion because the phrase ‘*inter alia*’ in Art. 2.2 shows that the list is illustrative and not exhaustive; so the possibility exists that other objectives not explicitly mentioned could qualify as TBT measures.

4.5 GATT Article XX ‘General Exceptions’ Jurisprudence

4.5.1 The Provisions

The WTO core policy of non-discrimination embodied in the MFN and National Treatment principles do not apply at large without exceptions. Article XX warrants Member States to take sovereign actions that apparently seem to run counter to the overarching purpose of the GATT (Articles I & III) if such actions are:

- (a) necessary to protect public morals,
- (b) necessary to protect human, animal or plant life or health,
- (c) relating to the importations or exportations of gold or silver,
- (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of (the) Agreement,
- (e) relating to products of prison labour,
- (f) imposed for the protection of national treasures...
- (g) relating to the conservation of exhaustible natural resources,
- (h) undertaken in pursuance of obligations under any intergovernmental commodity agreement ...
- (i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry..., and
- (j) essential to the acquisition or distribution of products in general or local short supply....

The chapeau to Article XX provides a qualification to the ten exceptions to the general GATT rules by subjecting their application to ‘the requirement that such measures are not

¹¹³ Preamble TBT Agreement, para. 6.

applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries ... or a disguised restriction on international trade.’¹¹⁴

In *US-Shrimp* the Appellate Body emphasised that any claim founded on Art. XX must follow the ‘fundamental structure and logic’ of the Article. According to them, the first thing to determine is whether the matter at issue falls within the listed exceptions (a) to (j) and see if the measure qualifies as ‘provisionally justified’. This is the satisfaction of the ‘necessity test’. Then, the next thing is to subject the measure for screening under the terms of the chapeau such as not being ‘a disguised restriction on international trade.’¹¹⁵

4.5.2 *The Chapeau to the General Exceptions*

The chapeau (introductory clause) to the GATT Article XX(a-j) ‘General Exceptions’ provides:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures ...[(a), (b) and (d) used ‘necessary to’ ..., (c), (e) and (g) used ‘relating to’...and (j) used ‘essential to’...to introduce the ten exceptions].

The reason for this chapeau as tellingly pointed out by the Appellate Body, in the determination of a similar provision¹¹⁶ with a corresponding application, is to ‘reflect the shared understanding of Members that substantive (WTO) obligations should not be deviated from lightly.’¹¹⁷

¹¹⁴ In *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996 at 22 and *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, (hereinafter, *US-Shrimp*) para. 158. the Appellate Body held that the purpose of the chapeau (introductory clause) was to ensure that the exceptions are not abused or even wantonly resorted to.

¹¹⁵ Preamble, TBT Agreement, para 6

¹¹⁶ GATS Art. XIV and GATT Art. XX have similar chapeaux and it has been stated that the jurisprudence of one applied to the other. See particularly para 291 of the *US – Gambling Services* which found that the previous decisions under the GATT Art. XX to be ‘relevant for (the) analysis under Art. XIV of the GATS.’

¹¹⁷ *Ibid US – Gambling Services* para. 308.

4.5.3 GATT Article XX(a) – ‘Public Morals’

As pointed out above, the jurisprudence under ‘GATT Article XX is relevant for analysis under GATS Article XIV’ because of the similarities of their chapeaux and subsections and presumably vice versa, the WTO dispute based on ‘public morals’ is *US – Gambling Services*.¹¹⁸ Although contested based on GATS Article XIV, it will be used to illustrate the meaning of ‘public morals’ as the Appellate Body adopted the definition of ‘public morals’ by the Panel as classic. In its analysis of GATS Article XIV(a), (the equivalent of GATT Art. XX(a)), the Panel found that "the term 'public morals' denotes standards of right and wrong conduct maintained by or on behalf of a community or nation."¹¹⁹ The Panel further found that the definition of the term "order", read in conjunction with footnote 5 of the GATS, "suggests that 'public order' refers to the preservation of the fundamental interests of a society, as reflected in public policy and law."¹²⁰ The Panel then referred to Congressional reports and testimony establishing that "the government of the United States considers that the Wire Act, the Travel Act, and the IGBA were adopted to address concerns such as those pertaining to money laundering, organized crime, fraud, underage gambling and pathological gambling."¹²¹ On this basis, the Panel found that the three federal statutes are "measures that are designed to 'protect public morals' and/or 'to maintain public order' within the meaning of Article XIV(a)

There are two differences though between GATT Article XX(a) and GATS Article XIV(a). While Article XX(a) simply says ‘necessary to protect public morals,’ Article XIV(a) has an extension, ‘necessary to protect public morals and public order.’ Again, Art. XIV(a) has a qualifying or limiting footnote which provides that ‘[t]he public order exception may be

¹¹⁸ *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, (hereinafter *US-Gambling*), WT/DS285/AB/R, adopted 20 April 2005.

¹¹⁹ *ibid.*, para 296; Panel Report para 6.465.

¹²⁰ *ibid.*, para 6.467

¹²¹ *Ibid.*, para. 6.486.

invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.’

4.5.4 *Definition of Terms: ‘Necessary’ versus ‘Relating to’ GATT Art. XX(a-j)*

The fact that the GATT Article XX makes use of different introductory words and phrases in the sub-paragraphs has been in contention and demanding judicial clarifications from the WTO Panel and Appellate Body. While the interpretation of ‘relating to’ has been somewhat simpler,¹²² ‘necessary’ has been undergoing some metamorphosis and is still the subject of arguments and judicial reasoning.

In interpreting ‘relating to’ the Appellate Body in *US – Shrimp*¹²³ affirmed that it involves looking into the ‘means’ and ‘ends’ and seeing whether they are ‘reasonably related’. So the first step is to analyse the measure itself and as pointed out in *EC – Tariff Preferences*,¹²⁴ this means examining ‘the design, architecture and structure’ to see if they are related to the goal pursued. For example, the Appellate Body held in the *US-Shrimp* that the ‘means and ends relationship between Section 609 and the legitimate policy of conserving an exhaustible , and, in fact, endangered species, is observably a close and real one.’

Conversely, what has been held to be ‘necessary’ has not been abundantly clear and seems to be taken on a case-by-case basis. Before the birth of the WTO, the GATT Panel in the *US – Section 337* (in 1989) while called upon to determine the application of Article XX(d) concluded that:

¹²² Simon Lester and Bryan Mercurio (n 82) 383 say that ‘[o]ther ... provisions use the following phrases: ‘imposed for the protection of’, ‘undertaken in pursuance of’, involving restrictions on’, and ‘essential to the acquisition or distribution of’.

¹²³ *US-Shrimp* paras. 135-142.

¹²⁴ *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, adopted 20 April 2004, (hereinafter *EC-Tariff Preferences*).

a Contracting Party cannot justify a measure inconsistent with another GATT provision as 'necessary' in terms of Article XX(d) if an alternative measure which it could be reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting Party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with the GATT provisions. This statement reflects the traditional GATT interpretation of 'necessary', that a measure is not 'necessary' if there is a reasonably available alternative measure that leads to a lesser degree of inconsistency with GATT rules.¹²⁵

The above Panel determination coupling 'necessity' with 'a reasonably alternative measure' has been amended in the *Korea – Beef*¹²⁶ and the amendment amplified in *Thailand – Cigarettes*¹²⁷ and also in *US – Gambling Services*¹²⁸ as there will always be alternatives. In the *Korea – Beef* the Appellate Body explained

161 We believe that, as used in the context of Article XX(d), the reach of the word "necessary" is not limited to that which is "indispensable" or "of absolute necessity" or "inevitable". Measures which are indispensable or of absolute necessity or inevitable to secure compliance certainly fulfil the requirements of Article XX(d). But other measures, too, may fall within the ambit of this exception. As used in Article XX(d), the term "necessary" refers, in our view, to a range of degrees of necessity. At one end of this continuum lies "necessary" understood as "indispensable"; at the other end, is "necessary" taken to mean as "making a contribution to." We consider that a "necessary" measure is, in this continuum, located significantly closer to the pole of "indispensable" than to the opposite pole of simply "making a contribution to".

After explaining that 'necessity' is like a spectrum or in their own word a 'continuum', the Appellate Body in the *Korea – Beef* went further in paragraph 162:

In appraising the "necessity" of a measure in these terms, it is useful to bear in mind the context in which "necessary" is found in Article XX(d). The measure at stake has to be "necessary to ensure compliance with laws and regulations ... , including those relating to customs enforcement, the enforcement of [lawful] monopolies ... , the protection of patents, trademarks and copyrights, and the prevention of deceptive practices". Clearly, Article XX(d) is susceptible of application in respect of a wide variety of "laws and regulations" to be enforced. It seems to us that a treaty interpreter assessing a measure claimed to be necessary to secure compliance of a WTO-consistent law or regulation may, in appropriate cases, take into account the relative importance of the common interests or values that the law or regulation to be enforced is intended to protect. The more vital or important those common interests or values are, the easier it would be to accept as "necessary" a measure designed as an enforcement instrument (emphasis added).

¹²⁵ GATT Panel Report, *US – Section 337*, para 5.26.

¹²⁶ *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, (hereinafter *Korea-Beef*) WT/DS161/AB/R, WT/DS169/AB/R DSR 2001, adopted 10 January 2001.

¹²⁷ Panel Report, *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, (hereinafter *Thailand-Cigarettes*).

¹²⁸ *US-Gambling* (n 118).

Therefore, on the authority of the *Korea – Beef*, the relevant factors for determining whether a measure is necessary are (a) its contribution to the enforcement of the law, (b) the degree/importance of the common interest or values protected by the measure adopted and (c) the effect of the impact on trade. This has also been adumbrated in *EC – Asbestos* in which Canada accused France of violating GATT’s principle of non-discrimination enshrined in Article III by prohibiting the manufacture, sale, distribution or import of chrysotile asbestos fibres and products of the kind. Canada challenged the outright ban as being a means of protecting the French market for French substitutes.

However, it seems to me that the steps outlined in *US – Gambling* for determining if a measure is ‘necessary’ are clearer. As stated in paragraph 306 of the AB Report, (i) [t]he process begins with an assessment of the “relative importance’ of the interests or values furthered by the challenged measure, (ii) the contribution of the measure to the ends pursued by it, and (iii) the restrictive impact of the measure on international trade.’

4.5.5 Article XX(b) Cases: *US-Gasoline*, *EC-Asbestos* and *EC-Tariff Preferences*

4.5.5.1 *US-Gasoline*¹²⁹

The United States law purported to have been enacted to reduce motor vehicle emissions was found to violate the GATT core principle of non-discrimination¹³⁰ for failing to accord ‘treatment no less favourable than that accorded to like products of national origin.’ The US made an affirmative defence that its law came under GATT Article XX(b) and was ‘necessary to protect human, animal or plant life or health.’ While subjecting the measure to the ‘necessity test’ the Panel made a finding of whether it would achieve its objective under

¹²⁹ *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996

¹³⁰ GATT Article III:4

Article XX(b) and concluded that imported gasoline received ‘less favourable’ treatment and also that the law was not necessary.

However, because the Americans did not appeal the findings under Article XX(a) – public morals - but predicated their appeal on Article XX(g) ‘the conservation of exhaustible natural resources’ and ‘domestic production or consumption’ the Appellate Body refused to endorse the approach of the Panel of singling out the discriminatory aspect of the measure rather than the measure as a whole. This left the core and the often contested part of the issue untouched.

4.5.5.2 *EC-Asbestos*¹³¹

Because asbestos is commonly known to be harmful to human health, the Panel held that the French policy in question was covered by GATT Article XX(b) for being ‘necessary to protect human, animal or plant life or health.’ A brief point that needs to be highlighted here is ‘that it is indisputable that WTO Members have the right to determine the level of protection of health that they consider appropriate in a given situation.’¹³² Therefore many powerful and big trading nations can mount technical barriers to trade and restrict the market access of developing countries like ECOWAS Member States under whatever guise.

4.5.5.3 *EC-Tariff Preferences*¹³³

This case developed the GATT Article XX(b) as having two dimensions: the first is the ‘necessity test’ based on the phrase ‘necessary to;’ and the other, the objective set out to be achieved, in other words, the means and the ends must correlate and be mutually reinforcing, much like the proportionality test which requires a balancing act.¹³⁴ As this case illustrates, to be taken to ‘protect human, animal or plant life or health’ as provided in GATT

¹³¹ *EC-Asbestos* (n 92)

¹³² *ibid* para 168

¹³³ *EC-Tariff Preferences* (n 124)

¹³⁴ TA Aleinikoff, ‘Constitutional Law in the Age of Balancing’, 96(5) *Yale Law Journal* 943- 1005 (1987)

Article XX(b), it must be so stated as the objective of the measure. In the *Tariff Preferences* case, the stated objective of ‘development policy, in particular, the eradication of poverty and the promotion of sustainable development in the developing countries’ was held to be too remote by both the Panel and the Appellate Body to have a direct and strong nexus with the protection of ‘human, animal or plant life or health.’¹³⁵

While agreeing with the Appellate Body on its key findings such as the fact that ‘the EC Regulation provides no monitoring mechanism on the effectiveness of the Drug Arrangements for protecting human life or health in the European Communities,’ it is hard to dismiss it as being entirely ‘insecure for the future.’ However, the legal reason for taking an exception to the judgment is that it seems to stand in contrast to the objectives and the jurisprudence of the WTO. The backdrop to the WTO was that it came into being to counter the ‘beggar-thy-neighbour’ and ‘race-to-the-bottom’ policies that some countries practised which had adverse consequences on other countries. Conversely, a measure to curtail ‘the risk posed by narcotic drugs’ in one country could have a positive effect on another country. The underlying philosophy for creating the WTO is that ‘[t]he system helps to keep the peace’ In the words of the WTO itself:

History is lettered with examples of trade disputes turning into war. One of the most vivid is the trade war of the 1930s when countries competed to raise trade barriers in order to protect domestic producers and retaliate against each other’s’ barriers. This worsened the Great Depression and eventually played a part in the outbreak of World War 2.

Two developments immediately after the Second World War helped to avoid a repeat of the pre-war trade tensions. In Europe, *international cooperation* developed in coal, and in iron and steel. Globally, the General Agreement on Tariffs and Trade (GATT) was created. Both have proved successful, so much so that they are now considerably expanded – one has become the European Union, the other the World Trade Organisation (WTO)¹³⁶ (emphasis mine).

WTO jurisprudence shows that international co-operation or threat should not be dismissed with a wave of the hand. The findings of the Panel and the Appellate Body in *EC – Asbestos*

¹³⁵ *ibid* paras 7.200-7.210

¹³⁶ WTO, *10 benefits of the WTO trading system*, Benefit 1, (World Trade Organisation, Geneva 2008) 2.

that the measure ‘protects human life or health’ and that no ‘reasonable available alternative measure’ existed and as such was justified under Article XX(b) and that it also satisfied the conditions of the chapeau of Art. XX shows that either ‘co-operation’ or ‘threat’ could be pleaded as a reason. It was accepted in *EC-Asbestos* but rejected in *EC-Tariff Preferences*.

It is therefore submitted that although the objectives of the Drug Arrangements between the EU and some developing countries were loosely put as ‘development policy, in particular the eradication of poverty and the promotion of sustainable development in the developing countries,’ without even an oblique allusion to the control of narcotic drugs in the EC, it nonetheless was aimed at the control of illicit trafficking on those substances. Perhaps what could be added here is that this is often the drafting style of many European directives or legislation which in order to appear noble in intent and charitable in conception leave their real intentions or motives eclipsed completely from non-discerning readers: legislative objective sacrificed on the altar of political correctness.¹³⁷

However, it has to be pointed out that the precautionary principle (as claimed by the EC in the *EC-Preferences*) has not taken roots within WTO jurisprudence. In *EC – Biotech GMOs*,¹³⁸ the Panel quoted with approval the following long passage from *EC – Hormones*:

The status of the precautionary principle in international law continues to be the subject of debate among academics, law practitioners, regulators and judges. The precautionary principle is regarded by some as having crystallized into a general principle of customary international *environmental* law. Whether it has been widely accepted by Members as a principle of *general* or *customary international law* appears less than clear.¹³⁹ We consider, however, that it is unnecessary, and probably

¹³⁷ There are many literary examples that lampoon European hidden motives in their African missions: Chinua Achebe’s *Things Fall Apart* ends with ‘the pacification of the primitive peoples of the lower Niger,’ a euphemism for genocide, Hamidu Kane gives his novel the title *The Ambiguous Adventure* while Mongo Beti ironically calls the lecherous parish priest *The Poor Christ of Bomba*.

¹³⁸ *EC – Biotech (‘GMOs’)* (n 9) 336.

¹³⁹ (*original footnote*) Authors like P. Sands, J. Cameron and J. Abouchar, while recognizing that the principle is still evolving, submit nevertheless that there is currently sufficient state practice to support the view that the precautionary principle is a principle of customary international law. See, for example, P. Sands, *Principles of International Environmental Law*, Vol. I (Manchester University Press 1995) p. 212; J. Cameron, "The Status of

imprudent, for the Appellate Body in this appeal to take a position on this important, but abstract, question. We note that the Panel itself did not make any definitive finding with regard to the status of the precautionary principle in international law and that the precautionary principle, at least outside the field of international environmental law, still awaits authoritative formulation.¹⁴⁰

That notwithstanding, a relationship does exist between the precautionary principle and the SPS Agreement. According to the Panel:

It appears to us important, nevertheless, to note some aspects of the relationship of the precautionary principle to the *SPS Agreement*. First, the principle has not been written into the *SPS Agreement* as a ground for justifying SPS measures that are otherwise inconsistent with the obligations of Members set out in particular provisions of that Agreement. Secondly, the precautionary principle indeed finds reflection in Article 5.7 of the *SPS Agreement*. We agree, at the same time, with the European Communities, that there is no need to assume that Article 5.7 exhausts the relevance of a precautionary principle. It is reflected also in the sixth paragraph of the preamble and in Article 3.3. These explicitly recognize the right of Members to establish their own appropriate level of sanitary protection, which level may be higher (i.e., more cautious) than that implied in existing international standards, guidelines and recommendations. Thirdly, a panel charged with determining, for instance, whether "sufficient scientific evidence" exists to warrant the maintenance by a Member of a particular SPS measure may, of course, and should, bear in mind that responsible, representative governments commonly act from perspectives of prudence and precaution where risks are irreversible, e.g. life-terminating, damage to human health are concerned. Lastly, however, the precautionary principle does not, by itself, and without a clear textual directive to that effect, relieve a panel from the duty of applying the normal (i.e. customary international law) principles of treaty interpretation in reading the provisions of the *SPS Agreement*.

the Precautionary Principle in International Law", in J. Cameron and T. O'Riordan (eds.), *Interpreting the Precautionary Principle* (Cameron May, 1994) 262, p. 283; J.Cameron and J. Abouchar, "The Status of the Precautionary Principle in International Law", in D. Freestone and E. Hey (eds.), *The Precautionary Principle in International Law* (Kluwer, 1996) 29, p. 52. Other authors argue that the precautionary principle has not yet reached the status of a principle of international law, or at least, consider such status doubtful, among other reasons, due to the fact that the principle is still subject to a great variety of interpretations. See, for example, P. Birnie and A. Boyle, *International Law and the Environment* (Clarendon Press, 1992), p. 98; L. Gündling, "The Status in International Law of the Precautionary Principle" (1990), 5:1,2,3 *International Journal of Estuarine and Coastal Law* 25, p. 30; A. deMestral (et. al), *International Law Chiefly as Interpreted and Applied in Canada*, 5th ed. (Emond Montgomery, 1993), p. 765; D. Bodansky, in *Proceedings of the 85th Annual Meeting of the American Society of International Law (ASIL, 1991)*, p. 415.

¹⁴⁰ (original footnote) In *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, the International Court of Justice recognized that in the field of environmental protection "... new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight ...". However, we note that the Court did not identify the precautionary principle as one of those recently developed norms. It also declined to declare that such principle could override the obligations of the Treaty between Czechoslovakia and Hungary of 16 September 1977 concerning the construction and operation of the Gabčíkovo/Nagymaros System of Locks. See, *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, I.C.J. Judgement, 25 September 1997, paras. 140, 111-114.

The precautionary principle is a double-edged sword for both development and trade liberalisation: developed countries and supermarket chains may use it to restrict access to their market but it is hard to justify when used by developing countries because of its subjective nature. On the relevance of the rule of international law to the interpretation of WTO Agreements, the Panel looked back to its constitutive document and source of authority the Dispute Settlement Understanding (DSU) and read it *vis-à-vis* the Vienna Convention on the Law of Treaties with a specific comment on Art. 31(3)(c).

Pursuant to Article 3.2 of the DSU, we are to interpret the WTO agreements "in accordance with customary rules of interpretation of public international law". These customary rules are reflected, in part, in Article 31 of the *Vienna Convention*.¹⁴¹

Article 31 provides in relevant part:

Article 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
 - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) any relevant rules of international law applicable in the relations between the parties.

¹⁴¹ Appellate Body Report, *US – Carbon Steel*, paras. 61-62.

It is important to note that Article 31(3)(c) mandates a treaty interpreter to take into account other rules of international law ("[t]here shall be taken into account"); it does not merely give a treaty interpreter the option of doing so.¹⁴² It is true that the obligation is to "take account" of such rules, and thus no particular outcome is prescribed. However, Article 31(1) makes clear that a treaty is to be interpreted "in good faith". Thus, where consideration of all other interpretative elements set out in Article 31 results in more than one permissible interpretation, a treaty interpreter following the instructions of Article 31(3)(c) in good faith would in our view need to settle for that interpretation which is more in accord with other applicable rules of international law.¹⁴³

It seems that the taking of a precautionary measure based on GATT Art. XX(b) has not gained currency and crystallised as a customary rule of international law. However, the combined effect of Art. 3.2 of the DSU (allowing importation of customary rules of interpretation of public international law) and Art. 31(1) of the VCLT (on interpretation based on 'good faith') may give repeated interpretations based on good faith a stamp of authority.

4.6 ECOWAS Participation in the SPS and the TBT Processes of notification of draft measures and discussions of specific trade concerns

The SPS and TBT Agreements provide for an advance notification of draft regulations and the discussion of their potential and actual trade effects in the relevant committees. This is of huge importance to developing countries who deploy the administrative law approach in dealing with the world trading system instead of litigation as shown in chapter 5. The SPS Agreement demands that 'Members shall notify changes in their sanitary or phytosanitary measures and shall provide information on their sanitary or phytosanitary measures in accordance with the provisions of Annex B'¹⁴⁴ (detailing the 'publication of regulations,' setting up 'enquiry points' and outlining the 'notification procedures') and also 'encourage

¹⁴² This view is confirmed by the negotiating history of Article 31(3). The International Law Commission, in its commentary to Article 27 of the draft *Vienna Convention*, which contained language identical to the current Article 31 of the *Vienna Convention*, stated that "the three elements [the three sub-paragraphs of what is now Article 31(3)] are all of an obligatory character and by their very nature could not be considered to be norms of interpretation in any way inferior to those which precede them". *Yearbook of the International Law Commission* (1966), Vol. II, p. 220, para. 9.

¹⁴³ *EC – Biotech ('GMOs')* (n 19) 328.

¹⁴⁴ SPS Agreement, Art. 7.

and facilitate ad hoc consultations or negotiations among Members on specific SPS issues.’¹⁴⁵

Under the TBT Agreement notification requirement is worded differently. It begins with a chapeau and provides in relevant part as follows:

Whenever a relevant guide or recommendation issued by an international standardizing body does not exist or the technical content of a proposed conformity assessment procedure is not in accordance with relevant guides and recommendations issued by international standardizing bodies, and if the conformity assessment procedure may have a significant effect on trade of other Members, Members shall:¹⁴⁶

.....

notify other Members through the Secretariat of the products to be covered by the proposed conformity assessment procedure, together with a brief indication of its objective and rationale. Such notifications shall take place at an early appropriate stage, when amendments can still be introduced and comments taken into account;¹⁴⁷

and in cases of ‘urgent problems of safety, health, environmental protection or national security,’

notify immediately other Members through the Secretariat of the particular procedure and the products covered, with a brief indication of the objective and the rationale of the procedure, including the nature of the urgent problems.¹⁴⁸

The above requirements notwithstanding, the findings of Peter Walkenhorst in his study (for the OECD) of the participation of the developing countries in the SPS process in 2003 is at variance with the 2010 trade monitoring and review report by the Director-General of the WTO to the Trade Policy Review Body. According to Walkenhorst, ‘developing countries do not participate as intensively in the SPS implementation as their share of WTO membership would suggest.’¹⁴⁹ He points out that ‘[d]eveloping countries in Africa make-up a third of WTO membership, but account for much less of the SPS implementation activities.’¹⁵⁰ He describes the African group performance as falling ‘far short of their membership,’ being ‘considerably lower than their WTO membership share’ unlike

¹⁴⁵ SPS Agreement, Art. 12.2.

¹⁴⁶ TBT Agreement, Art. 5.6

¹⁴⁷ TBT Agreement, Art. 5.6.2

¹⁴⁸ TBT Agreement, Art. 75.7.1

¹⁴⁹ Peter Walkenhorst (OECD), *The SPS and Developing Countries*, (OECD Paris 2003) 9.

¹⁵⁰ *ibid.*

developing countries in Latin America who ‘are to a considerable extent “punching above their weight”.’ He concludes that ‘African countries have played only a marginal role’ and submits that his ‘analysis points to some particular groups of developing countries that might warrant special attention with respect to their trade policy capacities.’¹⁵¹ He suggests that ‘complementary qualitative research’ (to his report), ‘perhaps in the form of case studies, seems warranted to establish to what extent developing countries have encountered obstacles during the implementation process.’ The reason for such research, in his view, is to ascertain ‘whether the low participation rates of some groups of developing countries are *a rational choice in the context of resource priority setting or the result of government failure*’¹⁵² (emphasis mine) which is the research I will undertake in the next chapter. My findings might give Sub-Saharan Africa in general and ECOWAS Member States in particular a shot in the arm or at least make their plight clearly known to the world by presenting independent research of their situations and a ‘policy path’ different from the ‘often misleading’ ‘roadmaps’ that currently exist as Jackson stated:

The policy path through the many facts and circumstances which have good or bad effects on world economic situations, and thus on international economic law, is extraordinarily complex and unclear. This ‘landscape’ truly needs some roadmaps, but *few of these exist and those that are used are often misleading* (emphasis added).¹⁵³

For example, ECOWAS Member States have not learnt to pull their resources together and may be establish a mission in Geneva or to work closely with the Advisory Centre on WTO Law which was established to support developing and least-developed countries in the area of international economic law and practice. There is no single case used in this study or even in the whole GATT/WTO disputes where ECOWAS Member States presented a common front even as a third party which seems to suggest that they may be divided by disparate interests.

¹⁵¹ *ibid* 11.

¹⁵² *ibid*.

¹⁵³ John H Jackson, ‘International Economic Law: Complexity and Puzzles’ (2007) 10 *JIEL* 3, 7, 8.

The Report to the Trade Policy Review Body (2010) from the Director-General on Trade-Related Developments gives bewildering figures of sharp increases in notifications and specific trade concerns under the SPS and TBT Agreements. According to the Report ‘[d]uring the period from 1 November 2009 to 15 May 2010, 635 regular notifications and 50 emergency notifications were submitted by Members.... Around 79 per cent of the notifications ...came from developing countries (the corresponding figure for the same period in 2008-2009 was around 67 per cent).’¹⁵⁴ The Director-General says that ‘[t]he higher number of notifications signals either an increase in regulatory activities or an improved implementation of the SPS Agreement.’ This is doubtful and does not admit an ‘either...or...’ analysis as the Director-General has put it because there might be other factors such as the effect of globalisation that has not been factored into the analysis. Another important thing to note is of the term ‘developing countries’ which amorphously is fast becoming a loose term for non-Western Countries.

On the TBT the same Director-General’s Report states that 1,030 notifications were submitted between November 2009 and May 2010 and the percentage from developing countries was about 80 per cent. However, the report makes it clear that the ‘rise is mainly driven by China, Korea, Indonesia and Saudi Arabia’¹⁵⁵ which cuts off ECOWAS and Sub-Saharan Africa. Again this highlights the importance of taking specific research on ECOWAS to determine the harmonisation,¹⁵⁶ transparency,¹⁵⁷ implementation and monitoring¹⁵⁸ of their compliance procedures.

¹⁵⁴ WTO, *Report to the TPRB from the Director-General on Trade-Related Developments*, WT.PRR/OV/W/3, 14 June 2010, 22.

¹⁵⁵ *ibid* 23.

¹⁵⁶ SPS Agreement, Art. 3.

¹⁵⁷ SPS Agreement, Art. 7.

¹⁵⁸ SPS Agreement, Art. 12.

4.7 The Internal/Structural Weaknesses of ECOWAS

This sub-section deals with the weaknesses within ECOWAS that have made it a mere observer, a follower and, as will be shown in the next chapter, a third party participant and not a front runner in the world trading system.

Arguably, one of the worst weaknesses of ECOWAS is ethnic jingoism which sounds in self-attrition as the terminated membership of Mauritania illustrates. There is a strong tendency among Members not to co-operate to build a strong customs union or economic community. Mauritania was one of the founding Member of ECOWAS that signed the Treaty of Lagos on 28 May 1975. However it withdrew in December 1999 after twenty-four years in the Community, but Cape Verde had joined in 1977.

[Mauritanian President] Ould Taya's stated reason for leaving ECOWAS is the organisation's decision to establish a common currency by 2004, for which the regime is not ready to give up its own currency, the Ouguiya. However, the real problem is that Mauritania has no intention to integrate or have an open-border policy with black Africa. Mauritania has not paid its membership contribution to ECOWAS for the last 16 years, since Colonel Ould Taya seized power through a coup.¹⁵⁹

Yet this is a country with its ethnic composition of 40-45 per cent being black African of the Fulani, Soninke, Wolof and Bambara hues and 25 per cent Moors who are of the Arab/Berber stock.¹⁶⁰ The Moors dominate over 80 per cent of power positions in the country and discriminate against the black Africans to the extent that the results of the 1977, 1978 and 1988 censuses were never published because they show them in the minority. The government is accused of carrying out a proactive policy of ethnic cleansing and Arabisation

¹⁵⁹ Garba Diallo, 'Mauritania – Neither Arab Nor African,' available at www.nai.uu.se/publications/news/archives/002diallo/ accessed 28 December 2012.

¹⁶⁰ Ibid

of the country as shown in the amnesty it issued on 29 May 1999 before the Vienna human rights summit to cover up its members of the armed and security forces who carried out the campaign of terror, torture, forceful expulsion and killing of black Mauritians between 1989 and 1993.¹⁶¹

Although the official reason given by Mauritania for withdrawing from ECOWAS was to preserve its currency, it is argued that the main reason was to cover up gross human rights violations in the country and to foreclose inquiry and intervention because it was at the 1999 ECOWAS summit that the Community agreed on a Protocol for the Establishment of a Mechanism for Conflict Prevention, Management and Resolution, Peace and Security.¹⁶² Contrastingly some members of the EEA have economic reasons not to be in the EU.

Kufuor has identified many other weaknesses of ECOWAS that could be characterised into two as initial and systemic arising prior and subsequent to the Treaty of Lagos 1975 and from the 1993 Treaty respectively.

Prominent among the initial problems, according to Kufuor, are the dependence of ECOWAS Members on trade taxes for government revenue, different ideological positions adopted by the Member States especially between the Francophone and the Anglophone countries, lack of a strong Member that could bear the burden of open market by compensating losers in the trade liberalisation scheme, multiple regional integration bodies and the subsequent conflict of interests, the inadequacy of the organs of the Community created by the 1975 Treaty, the non-binding nature of the activities of the Community under the 1975 Treaty, national

¹⁶¹ Ibid

¹⁶² <http://globaledge.msu.edu/Trade-Blocs/ECOWAS/History>

interests put on a pedestal above Community interests, the existence of an ‘elite-mass gap’ and the decline in the economic fortunes of Nigeria, the ‘regional hegemon.’¹⁶³

Following the adoption of the revised ECOWAS Treaty 1993, Kufuor further outlines ‘mimetic isomorphism,’ the ‘billiard-ball’ effect of the EU, that is, imperfect copying of a more advanced system, little demand for a supranational organisation, the ‘dissolution’ of the nation-state in the classic sense, the sloop move within ECOWAS as opposed to the ‘incremental nature of the process in Europe,’ and the absence of long standing parliamentary democracies building up to international Community law with the characteristics of legitimacy, namely, ‘determinacy, symbolic validation, coherence, and adherence.’¹⁶⁴

In addition to the weaknesses outlined above, there are still other weaknesses plaguing ECOWAS among which are inability to stick together – yielding easily to centrifugal forces and paucity of market power. As the Egyptian playwright Tawfik Al-Hakim dramatises in his *Fate of a Cockroach*, they only come together when there is a common thing to be shared and fight over it but not commit themselves to build anything; yet when turned on their back, none would be able to reverse itself and stand on its legs. Secondly, the fact that in trade negotiations one’s relative market size is relative to one’s bargaining power¹⁶⁵ seems to elude ECOWAS Members who put little into building the Economic Community.¹⁶⁶ What they refuse in Abuja or Accra they humbly accept in Brussels or Washington.

¹⁶³ Kofi O Kufur, *The Institutional Transformation of the Economic Communities of West African States* (Ashgate 2006) 26-34.

¹⁶⁴ Ibid 54-63. See also Thomas Franck, ‘Legitimacy in International Systems,’ 82 *American Journal of International Law* (1998) 705-59.

¹⁶⁵ Richard H Steinberg, ‘In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO,’ 56 *International Organisation* 339-374 at 347.

¹⁶⁶ As at the date it withdrew from ECOWAS and during the 24 years of her membership, Mauritania had not paid its annual subscription fees for 16 years.

4.8 Summary

The chapter opened with the latitude given to WTO Members to take ‘measures necessary to protect public morals, human, animal or plant life or health,...or to secure compliance with laws or regulations which are not inconsistent with the provisions of [the GATT] Agreement.’¹⁶⁷ These apparently libertine provisions have been chaperoned with the SPS and TBT Agreements so that in taking such measures Members have to guard against using the measures as ‘a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade’¹⁶⁸ and as such they turn out to ‘be more trade-restrictive than is necessary to fulfil a legitimate objective.’¹⁶⁹ The caveats are an indication that SPS measures or TBT regulations could facilitate or frustrate international trade especially market access for imported agricultural products. As stated by the Director-General of the WTO in his 2010 Report, ‘measures that have the potential to restrict trade outnumbered those that facilitate trade by a factor of 3:2,’ and specifically ‘export restricting measures outnumber export facilitating measures by a factor of 5:2’¹⁷⁰

It has been pointed out that the WTO itself does not set international standards that apply to sanitary and phytosanitary measures or technical regulations, therefore, that aspect of the work has been ‘farmed out’ to different organisations outside the WTO three¹⁷¹ of which are mentioned in the SPS Agreement but none in the TBT Agreement which simply refers to ‘relevant international standards.’¹⁷²

¹⁶⁷ GATT, Art. XX(a-j).

¹⁶⁸ GATT, the Chapeau to Art. XX

¹⁶⁹ TBT, Art. 2.2.

¹⁷⁰ WTO (n 132) 2

¹⁷¹ Art. 3(4) SPS Agreement.

¹⁷² Art. 2.4 & 2.5, TBT Agreement.

A review of the history of the international standard-setting organisations shows that they date back to when all the 15-Member countries of ECOWAS but one (Liberia) were under colonial rule, the OIE dates back to 1924 and the IEC even further back to 1906. However, this does not seem a very good reason to question the legitimacy of such standard-setting organisations as accession to membership means acceptance of their legitimacy, at least implicitly. It is humbly submitted that the formal legitimacy arguments or debates are ‘misleading’ and misdirected because they leave out the issue of grave concern to ECOWAS and Sub-Saharan Africa which is inclusion or integration into the world trading system under the WTO multilateral agreements. Bandyng the issue of market technology relevancy, legitimacy or use by industry seems tendentious and meretricious and therefore distractive from the core concerns of ECOWAS and other developing ‘countries where the same conditions prevail.’

The issue is that despite joining the FAO and the GATT/WTO, ECOWAS Member States still find themselves ‘play(ing) only a marginal role with respect to SPS implementation activities.’¹⁷³ Therefore, their exclusion from the international standard setting organisations seems structural and not political, but with economic consequences. For ECOWAS Member States funding their participations in the organisations is an issue of epic proportions. As stated above participants at some of the organisations are not funded and this alone screens off potential participants from countries in dire economic straits. The Committee meetings of the organisations depend on the benevolence of the host countries that are understandably conferred with an advantage of formulating the agenda and influencing the outcome.

¹⁷³ Walkenhorst (OECD) (n 149).

It was explained above that the reason for the choice to analyse the SPS and TBT Agreements was because of their direct effects on the agricultural trade. However, when the General Agreement and the GATT/WTO cases based on it are juxtaposed with the ‘General Exceptions’ we find in the GATT Article XX, the emerging jurisprudence does not show a tendency to be purposive or inclusive enough to cater for the acknowledged ‘special difficulties’ that developing countries may encounter in the implementation of the Agreements. Even though the Agreements provide for the international standards to be approved by consensus,¹⁷⁴ it does not mean unanimity but rather the absence of ‘sustained opposition to a substantial issue by any major part of the concerned interests’¹⁷⁵, from (the subjective) ‘major part’ thereby making it easy to overcome the tepid oppositions from ECOWAS and other developing countries at both the formulation or drafting, and, the approval or voting stages. The diction of the definition needs to be noted: ‘major’ not ‘majority’ was used, therefore, a ‘major part’ could be the US or Japan, not necessarily the majority who are developing countries.

Even when the participation of developing countries is said to be improving, some of the studies belie the real situation on the ground. The two reports cited earlier by Peter Walkenhorst and Paschal Lamy, the WTO Director-General, are a bit suspect because of the participation indicators used. For example, Walkenhorst used the generalities of per capita income, the importance of agriculture in the countries’ economies and the agricultural trade orientation of the countries. None of them has specific country participation. Walkenhorst acknowledges that

Trying to determine whether countries have implemented their obligations under the SPS Agreement is an extremely difficult undertaking. The data requirements would be formidable. Even evaluating countries’ compliance with the transparency obligations and their participation in the SPS Committee is tricky, because only parts of the required information

¹⁷⁴ SPS Agreement, Art. 12.1.

¹⁷⁵ ISO/IEC Guide (n 36).

are accessible. For example, a country might not have submitted any SPS notifications, but might be in perfect compliance with the SPS Agreement, if there were no changes in SPS measures that required reporting. On the other hand, some other country might have notified a considerable number of SPS measures and might, hence, appear to actively implement the provisions of the SPS Agreement. Yet, there might have been a number of other changes to SPS regulations that should have been notified but were not. Getting consistent information on such “passive noncompliance” seems virtually impossible.¹⁷⁶

This is why the analysis in the next chapter will focus on ECOWAS Members’ specific, active compliance practices of designated ‘notification authorities’ and established ‘enquiry points’,¹⁷⁷ with a comparative section on the EU.

Lastly, although no accusation of imbalance or unfair reporting is intended here, there seems to be overreliance on reports commissioned by the Washington Consensus and the OECD. A report funded by the OECD and carried out by an economist¹⁷⁸ in the Trade Directorate of the Organisation would need to be corroborated with an independent research; so would a report from the Director-General of the WTO to the Trade Policy Review Body of the same organisation he is the head would need to be backed up from a neutral and independent source. Research effectiveness and robustness are directly linked to integrity and integrity is directly linked to financial independence.

¹⁷⁶Peter Walkenhorst (OECD), (n 149) 6 & 7.

¹⁷⁷ SPS Agreement, Annex B(1 & 3).

¹⁷⁸ Although there was a disclaimer that the ‘views expressed in the paper are those of the author and do not necessarily reflect those of the OECD or its Member countries,’ at the time of writing his paper, Peter Walkenhorst was an economist in the Trade Directorate, Organisation for Economic Co-operation and Development, Paris, France.

Chapter 5

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5.1 Object and Purpose of Trade Policy Reviews

The WTO Trade Policy Review Mechanism (TPRM) was set up ‘to contribute to improved adherence by all Members to rules, disciplines and commitments made under the Multilateral Trade Agreements ... and hence to the smoother functioning of the multilateral trading system by achieving greater transparency in, and understanding of, the trade policies and practices of Members.’¹ Although it is not intended to be used ‘for the enforcement of specific obligations under the Agreements or for dispute settlement procedures, or to impose new policy commitments on Members,’² its ‘function is to examine the impact of a Member’s trade policies and practices on the multilateral trading system.’³ It has a great supportive role in enhancing ‘the inherent value of transparency of government decision-making’⁴ at the national level. Interestingly the WTO states that ‘the implementation of domestic transparency must be on voluntary basis and take account of each Member’s legal and political systems’⁵ and surprisingly omits each Member’s level or stage of economic development. Yet, the constitutive document establishing the Trade Policy Review Body (TPRB) in a seemingly contradictory provision stipulates that ‘[t]he trade policies and practices of all Members shall be subject to periodic review.’⁶

The TPRM stipulates the frequency of reviews to be undertaken by Members to ascertain ‘[t]he impact of individual Members on the functioning of the multilateral trading system.’ The WTO Quad (USA, EU, Canada and Japan) are to be reviewed ‘every two years,’ the next sixteen ‘every four years,’ other Members ‘every six years’ except for least developed

¹ Agreement Establishing the World Trade Organisation, Annex 3(a) Trade Policy Review Mechanism

² Annex 3(a)(i).

³ Annex 3(a)(ii)

⁴ *ibid* 3(b).

⁵ *ibid*.

⁶ Annex 3(c)(ii)

countries who may have ‘a longer period’ fixed for them.⁷ The reviews which must be in the Outline Format for Country Reports will be based on:

- a. a full report . . . supplied by the Member or Members under review, and
- b. a report, to be drawn up by the Secretariat on its own responsibility, based on the information available to it and that provided by the Member or Members concerned of their trade policies and practices.⁸

Trade policy reviews (TPRs) attracted a flurry of attention from scholars and academic commentators⁹ between the dying years of the GATT and the first few years of the establishment of the WTO (1990 to 1996) with each commentator providing an overview and analysis of trade laws, policies and activities of a particular country of interest. Following the establishment of the Trade Policy Review Division of the GATT in 1989, a few country-specific Trade Policy Review Reports (TPRRs) and comments appeared on Australia, Canada, India, Mexico, South Africa and Zimbabwe.¹⁰ But even while the attention of scholars was on the TPRs, nobody commented on the Trade Policy Review Reports (TPRRs) of any of the ECOWAS Member States despite the importance of the surveillance measure for strengthening the multilateral trading system. Therefore, this chapter will examine the

⁷ *ibid* 3(c)(ii).

⁸ *ibid* 3(c)(v)

⁹ Abbot, Roderick (1993), “GATT and the Trade Policy Review Mechanism: Further Reflections on Earlier Reflections”, *Journal of World Trade*, Vol. 27 No. 3, pp 117-119; Anderson Kym (1995), “The GATT's Review of Australian Trade Policy”, *The World Economy: Global Trade Policy 1995*; Arndt, Sven and Chris Milner (1995), “Editorial Introduction”, *The World Economy: Global Trade Policy 1995*; Arndt Sven and Chris Milner (1996), “Editorial Introduction”, *The World Economy: Global Trade Policy 1996*; Balasubramanyam, VN (1995), “India's Trade Policy Review”, *The World Economy: Global Trade Policy 1995*; Blackhurst, Richard (1988), “Strengthening GATT Surveillance of Trade-related Policies”, in Meinharf Hilf and Ernst-Ulrich Petersman (eds.), *The New GATT Round of Multilateral Trade Negotiations: Legal and Economic Aspects*, Kluwer Law and Taxation Publishers, Deventer (The Netherlands); Curzon Price, Victoria (1991), “GATT's New Trade Policy Review Mechanism”, *The World Economy*, Vol.14 No. 2, pp- 227-238; Curzon Price, Victoria (1992), “New Institutional Developments in GATT”, *Minnesota Journal of Global Trade*, Vol.1 No.1; G Fane (1996), “Indonesia”, *The World Economy: Global Trade Policy 1996*.

¹⁰ J Gunning, (1996), “Zimbabwe”, *The World Economy: Global Trade Policy 1996*; Holden, Merle (1995), “GATT Trade Policy Review — South Africa: 1993”, *The World Economy: Global Trade Policy 1995*; Kehoe, Timothy (1995), “A Review of Mexico's Trade Policy from 1982 to 1994”, *The World Economy: Global Trade Policy 1995*; Spriggs, John (1991), “Towards an International Transparency Institution: Australian Style”, *The World Economy*, Vol.14 No.2, pp. 165-180; Togan, Subidey (1995), “Trade Policy Review of the Republic of Turkey”, *The World Economy: Global Trade Policy 1995*; Wonnacott, R. (1996), “Canada”, *The World Economy: Global Trade Policy 1996*.

TPRRs of ECOWAS Member States to assess their implementation and compliance to the commitments they assumed under the WTO Agreements. It will also analyse the participation of ECOWAS in the WTO dispute settlement and compare that with those of the new countries that joined the EU in 2004 and 2007. This will provide an indication of how well the Economic Community is operating and the challenges it faces in the effort to be integrated into the world trading system through the harmonisation of its trade law and policy. As at May 2012 the WTO has not carried out any trade policy review on two (Portuguese-speaking countries) of the fifteen Member States of ECOWAS, namely, Cape Verde and Guinea Bissau and as such they will not form part of our analysis here. The sparse population of Cape Verde (only 500,000 people flung across an archipelago of ten islands) and the economy being service oriented and not based on trade in goods does not support much of agricultural production; Guinea-Bissau is ravaged by political instability and ranked by the UNDP among the poorest countries on earth.¹¹

In his report to the Trade Policy Review Body (TPRB), the Director-General of the WTO referred to trade monitoring exercise as being of ‘systemic value to the multilateral trading system.’¹² But despite its importance, the recently published ‘Report on G20 Trade and Investment Measures’ covering mid-October 2010 to April 2011 shows that protectionist measures by the G20 are on the rise. According to the joint report by the Secretary-General of the OECD, the Director-General of the WTO and the Secretary-General of UNCTAD,

Over the past six months most G20 governments have put in place more new trade restrictive measures than in previous periods since the (2008/09 financial) crisis. Their restraint to resist protectionism appears to be under increasing pressure. The commitment to roll back export restrictions has not been followed; in fact, new export restrictions are on an increasing trend.¹³

¹¹ UNDP *World Report 2011*

¹² Report to the TPRB from the Director-General on Trade-Related Developments, WT/TPR/OV/W/3, 14 June 2010.

¹³ Reports on G20 Trade and Investment Measures, (Mid-October 2010 to April 2011), 24 May 2011.

The new trade restrictive measures were taken despite ‘their standstill commitment to resist protectionism until the end of 2013 (as agreed at the Toronto summit) and affirmed in Soul on 1 November 2010.’ The results are ‘[c]ontinued imbalances in the global economy, weaknesses in governments’ fiscal positions and commodity price volatility.’¹⁴

Globally, there have ‘continued to be concerns raised by trading partners that some countries are restricting market access for imported agricultural product.’¹⁵ The prospect of that abating remains gloomy as export restricting measures are on the increase.

ECOWAS Member States’ Trade Policy Reviews

5.2 Benin, Burkina Faso and Mali¹⁶

The TPRs of smaller members of the WTO is done jointly and so that of the Republic of Benin, Burkina Faso and Mali was done together and appeared as a single report in August 2010. The three French-speaking countries belong to the eight countries that make up the West African Economic and Monetary Union (WAEMU) which all together belong to the larger 15-member Economic Community of West African States (ECOWAS). All three countries have a common currency, the CFA (the African Financial Community) franc¹⁷ pegged at a fixed parity to the Euro, import all their petroleum products and belong to the Organisation for the Harmonisation of Business Law in Africa (OHADA). There is little mechanisation of agriculture in all three countries and they depend on the budget-support

¹⁴ *ibid.*, 4.

¹⁵ (N 11) 2.

¹⁶ WT/TPR/S/236, 30 August 2010.

¹⁷ Article 12 of the WAMU Treaty.

furnished by their technical and financial partners for 3-6 per cent of their GDP'.¹⁸

WAEMU has a common framework for agricultural and mining policy.

4.2.1 *Harmonisation with the MFN and National Treatment Principles of Non-Discrimination by Benin, Burkina Faso and Mali*

The Investment Codes in the three economies proclaim the principle of national treatment and as WTO members they grant the MFN treatment to all their trading partners. Again the WTO Customs Valuation Agreement has been transposed into the ECOWAS community which covers all the three countries. On the harmonisation of their tariff bindings, the Report states,

In each of the three countries, binding currently affects around 40 per cent of tariff lines; and for over 27 per cent of the bound tariff lines, the customs duties applied exceed the bound levels, sometimes by as much as 20 percentage.... The legislative competence of States essentially relates to consumer protection. The national regulatory frameworks on government procurement have been harmonised by transposing the WAEMU directives, including those provisions giving a community preference; the implementing texts have not yet been adopted. The three countries have signed the Bangui Agreement establishing the African Intellectual Property Organisation¹⁹ (OAPI) whose provisions are mostly in line with those in the WTO TRIPS Agreement.²⁰

The TPRRs on the three countries highlight the following challenges facing them:

- i. Lack of stable financing for their budgets. Official Development Aid (ODA) is still indispensable to them as it is the source of 43 per cent of the State's total current spending in Burkina Faso.

¹⁸ The Report, (n 11) p. vii.

¹⁹ The other parties to the Bangui Agreement are Cameroon, Central African Republic, Chad, Congo, Côte d'Ivoire, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mauritania, Niger, Senegal and Togo. Viewed at: <http://www.wipo.oapi.net>. The Bangui Agreement (1997) was revised on 24 February 1999 and entered into force on 28 February 2002 together with its Annexes I to VIII on: patents (Annex I), utility models (Annex II), trademarks and service marks (Annex III), industrial designs (Annex IV), trade names (Annex V), geographical indications (Annex VI), literary and artistic property (Annex VII), and protection against unfair competition (Annex VIII). Annex X on plant varieties, for which patents are required pursuant to Article 27 of the WTO TRIPS Agreement, entered into force on 1 January 2006.

²⁰ *ibid*, p. ix.

- ii. Making the use of some approved customs agents mandatory. Burkina Faso and Mali are landlocked and the national shippers' council in Benin levies a series of additional duties and taxes on international trade.
- iii. There has not been any major change to the WAEMU CET (Common External Tariff) since the review of the three countries' respective trade policies in 2004.
- iv. The production of cotton in the three countries has fallen partly because of the low global prices and poor governance of the subsector. Again they have not been able to obtain quota-free access for cotton exports from least developed countries.
- v. There has been poor governance of the energy sector and a clear absence of long-term investment.
- vi. Livestock farming which caters for 10 per cent of the GDP is facing a serious problem of land tenure and 'poultry breeding farms face strong competition from imports of frozen poultry. Because they did not meet the European Union's health standards, Benin had to suspend its exports of fisheries products, including shrimps, to this key market as of July 2003'²¹ and the market is proving too hard to regain.

Table 1: Notifications submitted to the WTO by or on behalf of Benin, Burkina Faso and Mali, January 2000 - May 2010²²

Agreement and subject	Country/Entity	Reference	Date
GATT 1994 - Regional Agreements			
WAEMU Treaty (Enabling Clause)	Senegal	WT/COMTD/N/11	03/02/2000
ECOWAS Treaty (Enabling Clause)	Ghana	WT/COMTD/N/21	26/09/2005
Agreement on Agriculture			
Article 18.2 - absence of export subsidies	Burkina Faso	G/AG/N/BFA/3	11/01/2001
		G/AG/N/BFA/4	14/12/2009
Article 18.2 - absence of export subsidies	Burkina Faso		
Agreement on the Application of Sanitary and Phytosanitary Measures			
Import prohibition on poultry	Benin	G/SPS/N/BEN/5	28/07/2006
Agreement on Implementation of Article VI of the GATT 1994 - notified measures (Article 16.4)			
1996: no measures	Benin	G/ADP/N/22/Add.1/Rev.9 G/ADP/N/16/Add.1/Rev.12	27/04/2009
1997: no measures	Benin, Burkina Faso	G/ADP/N/29/Add.1/Rev.9 G/ADP/N/35/Add.1/Rev.2	27/04/2009
1998: no measures	Burkina Faso	G/ADP/N/41/Add.1/Rev.9 G/ADP/N/47/Add.1/Rev.6	27/04/2009
1999: no measures	Burkina Faso	G/ADP/N/53/Add.1/Rev.7 G/ADP/N/59/Add.1/Rev.7	27/04/2009

²¹ Trade Policy Review WT/TPR/S/236, p. x.

²² WT/TPR/S/236, p. 9.

Agreement and subject	Country/Entity	Reference	Date
2000: no measures	Burkina Faso	G/ADP/N/65/Add.1/Rev.7 G/ADP/N/72/Add.1/Rev.7	27/04/2009
Agreement on Customs Valuation (Article VII of the GATT 1994)			
WAEMU regulations	Burkina Faso	G/VAL/N/1/BFA/1	30/10/2002
	Burkina Faso	G/VAL/N/1/BFA/1/Rev.1	21/01/2004
Deferred application	Benin	WT/Let/331	24/02/2000
Agreement on Rules of Origin			
Preferential rules of origin	Mali	G/RO/N/35	24/09/2001
Agreement on Import Licensing Procedures			
Notification under Article 7.3 - regulation	Burkina Faso	G/LIC/N/3/BFA/1/Add.1	18/12/2000
Notification under Article 7.3 - regulation	Burkina Faso	G/LIC/N/3/BFA/2	16/11/2009
Legislation under Articles 1.4(a), 8.2(b) and 7.3	Mali	G/LIC/N/1/MLI/1	27/08/2001
Agreement on Safeguards			
Article 12.6: no measures	Burkina Faso	G/SG/N/1/BFA/1	14/12/2009
Agreement on Subsidies and Countervailing Measures			
Notification for 2001 (absence of measures)	Mali	G/SCM/N/71/MLI	02/08/2001
Notification (absence of measures)	Burkina Faso	G/SCM/N/186/BFA	14/12/2009
Agreement on Technical Barriers to Trade			
Annex 3C (Code of conduct)	Benin	G/TBT/CS/N/142	14/05/2002
Annex 3C (Code of conduct)	Burkina Faso	G/TBT/CS/N/158	10/11/2004
Agreement on Trade-Related Aspects of Intellectual Property Rights			
Laws and regulations (Article 63.2)	Burkina Faso	IP/N/1/BFA/C/1 IP/N/1/BFA/C/2 IP/N/1/BFA/C/3 IP/N/1/BFA/C/4 IP/N/1/BFA/C/5	08/07/2004
Contact point (Article 69)	Burkina Faso	IP/N/3/Rev.10/Add.12	11/12/2009
Absence of incompatible measures	Mali	G/TRIMS/N/2/Rev.9	28/09/2001
Contact point (Article 69)	Mali	IP/N/3/Rev.6	01/03/2002
Integrated Data Base (IDB)			
Applied tariffs, 2003	Benin, Burkina Faso	G/MA/IDB/2/Rev.30	30/09/2009
Applied tariffs, 2003-2008	Benin, Burkina Faso, Mali	Data supplied by WAEMU	2010
Imports, 2000-2003	Burkina Faso	G/MA/IDB/2/Rev.30	30/09/2009
Imports, 2003-2007	Benin	Data supplied by WAEMU	2010
Imports, 2003-2006	Burkina Faso		
Imports, 2006-2009	Mali		

With respect to Intellectual Property rights, all the WAEMU countries including Benin, Burkina Faso and Mali are signatories to the following subjects and terms of protection under the Bangui Agreement (1999)

Table 2: Subjects and terms of protection under the Bangui Agreement (1999)²³

Agreement	Bangui Agreement (1999)
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²³ Source: WTO, Trade Policy Review Body, WT/TPR/S/236, 30 August 2010, p. 39.

Agreement	Bangui Agreement (1999)
Patents	20 years
Utility models	10 years
Trademarks and service marks	10 years, renewable every 10 years
Industrial designs	5 years
Trade names	10 years, renewable every 10 years
Appellations of origin	n.a.
Literary and artistic property	
Copyright	Lifetime of the author + 70 years
Films, radio and audiovisual programmes	70 years
Photographic works	25 years
Related rights for performances	50 years
Related rights for phonograms	50 years
Related rights for radio broadcasts	25 years

The above list does not seem to confer intellectual property rights to traditional knowledge nor does it have patents for local products such as wines made from palms growing in the countries.

5.2.2 Relationship within the Economic Community of West African States (ECOWAS)

Benin, Burkina Faso and Mali together with all members of the WAEMU are founding members of ECOWAS²⁴ which was established by the Lagos Treaty of 1975. The Treaty establishing ECOWAS was revised in 1993 to enable economic integration.²⁵ ECOWAS rules of origin²⁶ were harmonised with those of WAEMU²⁷ in 2003 with the long view being

²⁴ ECOWAS information available online at: <http://www.ecowas.int>. The ECOWAS members are Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo. See Appendix 10.

²⁵ The revised 1993 Treaty was notified to the WTO in 2005 by Ghana on behalf of the ECOWAS member States (WTO document WT/COMTD/N/21 of 26 September 2005). The text of the Treaty is available under reference WT/COMTD/54. See Appendix 9.

²⁶ Protocol A/P1/1/03 of 31 January 2003 on the concept of originating products of ECOWAS member States.

²⁷ Additional Protocol No. III/2001 establishing the WAEMU Rules of Origin (applicable as of 1 January 2003) replaces Additional Act No. 4/96 of 10 May 1996 establishing a preferential tariff regime for trade within WAEMU, as amended by Additional Act No. 4/98. Additional Protocol No. III/2001 was revised by Additional Protocol No. 01/2009/CCEG/WAEMU.

the creation of a Common External Tariff (CET) which is a prerequisite for the conclusion of an EPA with the EU. ECOWAS itself is part of a bigger step-by-step integration project of the African Union (AU)²⁸ The AU is currently nurturing fourteen (14) regional economic communities (RECs)²⁹ including ECOWAS with the aim of forming the African Economic Community³⁰ and a monetary and economic union by 2034 that would finally lead to the United States of Africa.³¹

5.2.3 Relations with the European Union and the United States of America

Benin, Burkina Faso and Mali belong to the seventy-nine (79) African, Caribbean and Pacific (ACP) countries that concluded the Cotonou Agreement with the EU (to replace the Lomé Convention) covering the period up to 2020.³² By the terms of the Agreement the EU admits duty-free non-agricultural products³³ and processed agricultural products originating in 78 ACP countries (excluding South Africa). With the EU-ACP regime excluding agricultural products, the main stay of the economies of the ACP countries, it is suggested that the examination of the economic benefits of the Cotonou Agreement to both parties should form the subject of another study. Since UNCTAD classified forty-nine countries as ‘least

²⁸ The OAU Charter was signed on 25 May 1963. The Constitutive Act of the African Union was adopted at the summit held in July 2000 in Lomé (Togo). The African Union, which succeeded the OAU, was proclaimed on 11 July 2001 at Lusaka in Zambia, after ratification of the Constitutive Act by more than 44 of the 53 member States of the OAU. The African Union was launched at the Durban Summit of 9 July 2002.

²⁹ Community of Sahel-Saharan States (CEN-SAD), Common Market for Eastern and Southern Africa (COMESA), East African Community (EAC), Economic Community of Central African States (ECCAS), Economic Community of West African States (ECOWAS), Inter-Governmental Authority on Development (IGAD), Southern African Development Community (SADC), and Union of the Arab Maghreb (UMA).

³⁰ Instituted by the Treaty of Abuja

³¹ The Accra Declaration of available at <http://www.africa-union.org>

³² WTO Members had agreed to a derogation from the EU's obligations under Article I:1 of the

GATT 1994 (on MFN treatment) for the period from 1 March 2000 to 31 December 2007 (WTO document

WT/MIN(01)/15 of 14 November 2001).

³³ The non-inclusion of agricultural products casts a serious doubt on the usefulness of the Agreement to ECOWAS Member States who are all producers of primary agricultural products.

developed' only Cape Verde left the cocoon and joined the next class, the so called 'developing countries.'³⁴

The EU plans to conclude a regional Economic Partnership Agreement (EPA) with all the West African countries which would replace the ones concluded with individual countries like Ivory Coast and Ghana that will allow all the member countries to enjoy duty-free access to EU markets for their products. This project which is being led by the European Centre for Development Policy, a Maastricht-based think-tank, has raised some concerns by ECOWAS Member States due to the envisaged loss of government revenue and the wiping away of the competitiveness of domestic businesses as a result of the anticipated over-flooding of West African markets with products originating in the EU.³⁵ This is because

imports from the EU accounts for 10-15 per cent revenue in Burkina Faso, Ivory Coast, Guinea Bissau, Nigeria and Senegal; 15-20 per cent of government revenue in Benin, Ghana, Guinea and Mali; 25-30 per cent of government revenue in Cape Verde, Gambia, Niger and Sierra Leone; and more than 30 per cent in the case of Togo.³⁶

Although the 'Everything but Arms' initiative forms the basis of preferential access to EU markets since 1 January 2008 and allows all products (including bananas from 2006 and sugar and rice from September 2009), it is doubtful that these countries will be able to get equivalent or higher revenue through the initiative. As the Trade Policy Report of the countries under analysis shows:

³⁴ Cape Verde ceased to be an LDC on 1 January 2008 and is benefiting from the EU's "Everything

but Arms" initiative for a transitional three-year period. Nigeria, which is not an LDC, benefits from the Generalized System of Preferences (GSP).

³⁵ The negotiation of this EPA concerned trade in goods and services and investment, among other chapters. An overview is available on the European Centre for Development Policy Management (ECDPM) website. ECDPM online information, "Overview of the Regional EPA Negotiations: West Africa-EU Economic Partnership Agreement". Viewed at: www.ecdpm.org visited 21 May 2011.

³⁶ WT/TPR/S/236, p. 15.

For the year 2008, about one third (36.4 per cent) of EU imports from Benin (which totalled €77.9 million) entered duty-free under these preferences, while 46 per cent were admitted under MFN conditions (the remainder could not be allocated owing to statistical problems). More than 73 per cent of EU imports from Burkina Faso entered with MFN treatment, and only 5.4 per cent were admitted under these preferences. The proportion in the case of Mali was even smaller, with 4 per cent entering duty-free under these preferences; 60.6 per cent entered with MFN treatment, while the remainder (32.6 per cent) could not be allocated to any specific tariff regime.³⁷

This raises normative concerns over the complex institutional architecture built up by the EU for what appears to be a small gain. The data from the US is even more worrying. Although Benin, Burkina Faso and Mali are among the countries covered by the so called African Growth and Opportunities Act (AGOA) to benefit from duty-free and quota-free access to the US market, only paltry sums came to each of them. In 2008 the total US imports from Benin was US\$31 million, Burkina Faso US\$59,000. Mali got only US\$59,000 but imported US goods worth US\$5.1 million. The trade imbalance between Mali and the US is more than a ratio of 1:8.³⁸ Therefore, the foreign-backed initiatives ostensibly aimed at boosting Africa trade need to be reviewed for relative effectiveness or marginal utility.

5.2.4 “C-4” Trade Policy on Cotton

Benin, Burkina Faso and Mali together with their distant eastern neighbour and fellow cotton-producing country Chad adopted a common Sectoral Initiative on Cotton³⁹ (SIC) because cotton represents more than 15 per cent of their GDP and more than half of their total export earnings. They requested other WTO members to remove domestic production support

³⁷ *ibid.*

³⁸ *ibid.*

³⁹ WTO Committee on Agriculture Special Session, *Poverty, Reduction: Sectoral initiative in Favour of Cotton: Joint Proposal by Benin, Burkina Faso, Chad and Mali*, WTO document TN/AG/GEN/4, adopted 16 May 2003 in addition to other things calls for special treatment of cotton as a way of poverty reduction, the phasing out of all cotton subsidies, subsidies and tariffs, and a progressive mechanism to give financial support to least-developed countries during the period of transition.

measures and export subsidies for cotton⁴⁰ and to give duty and quota-free access for cotton exports from the least developed countries (LDCs). In terms of cotton production, the “C-4” trail a long way after the world leading producers China, India and the United States and also fall far behind India and Uzbekistan, the leading exporters to the United States.

Again they are also disadvantaged by the fact that their export earnings depend on the Euro-US dollar exchange rate as the CFA franc is pegged to the Euro. The second problem for the countries is that cotton trade is in the main carried out in American dollar.⁴¹ Therefore, the countries called for a reduction in aggregate measurement of support (AMS) with regard to cotton in line with the Hong Kong Ministerial Declaration⁴² which called on WTO members ‘to address cotton ambitiously, expeditiously and specifically, within the agriculture negotiations in relation to all trade-distorting policies affecting the sector in all three pillars of market access, domestic support and export competition.’⁴³ Specifically the four countries in the SIC propounded a formula for cotton support reduction in which the specific reduction applicable to cotton as a percentage would be equal to the general reduction in AMS (as a percentage), that is, to cushion the volatility of the cotton market through support. The rise in the world prices for cotton in 2007-08 did not benefit the countries as any appreciation was cancelled out by the depreciation of the US dollar.⁴⁴ African farmers’ income has fallen steadily since 2004. On market access, they requested the developed countries ‘together with developing countries that are in a position to do so’ to give duty and quota-free access to cotton from the least-developed countries (LDCs). Then on export competition, they

⁴⁰ The United States, China and the EU (for Spain and Greece) give subsidies to cotton farmers.

⁴¹ The depreciation of West African currencies has been a cause for concern. First it was said to be good as it would boost the economy by attracting foreigners to buy ECOWAS products but with time the purchasing power of the local currencies fell so much that it was very difficult for the citizens to buy foreign goods.

⁴² Adopted 18 December 2005.

⁴³ WT/MIN(05)/DEC 22 December 2005

⁴⁴ The austerity measures which Nigeria was subjected to by the IMF never boosted the economy as the country never recovered to get back to the competitive position it had before 1982.

requested that ‘developed countries shall notify the legislative and regulatory measures they have adopted in order to fulfil their commitment to eliminate, by 31 December 2006, their export subsidies for cotton, including all of the disciplines applicable to export competition.’⁴⁵

5.2.5 Notifications of TBT and SPS Measures

As shown in Table I above, Benin, Burkina Faso and Mali have made use of notifications, especially concerning TBT.⁴⁶ On a global scale, the WTO received 635 regular notifications and 132 emergency notifications⁴⁷ from its members concerning SPS measures between 1 November 2009 and 15 May 2010. During the same period, there were 1,030 TBT notifications submitted. As the TPRR of 2010 explains, the ‘higher number of notifications may signal either an increase in regulatory activities or an improved implementation of the transparency provisions of the (SPS and) TBT Agreement(s).’⁴⁸ It needs to be noted that the increase is driven by China, Korea, Indonesia and Saudi Arabia as less than ten SPS and TBT notifications came from Benin, Burkina Faso and Mali within the ten-year period shown in Table I above. Therefore, to say that ‘80 per cent of the notifications came from developing countries’ may hide the fact that not much is coming from the ECOWAS region. As Mali points out, ‘Aid for Trade...should help the developing countries, in particular LDCs, to achieve the supply-side capacity and the trade-related infrastructure they need to be able to implement the WTO Agreements, derive benefits from them and, more generally, expand their trade.’⁴⁹

⁴⁵ WTO document TN/AG/GEN/22-TN/AG/SCC/GEN/6 of 16 June 2006.

⁴⁶ Benin G/TBT/CS/N/142 dated 14 May 2002 and Burkina Faso in G/TBT/CS/N/158 dated 10 November 2004.

⁴⁷ WT/TPR/OV/W/3 p. 22.

⁴⁸ *ibid* 23.

⁴⁹ WT/TPR/G/236 ‘Trade Policy Review Report by Benin, Burkina Faso and Mali’ 30 August 2010, p. 44.

5.3.1 The Gambia, TPRR, August 2010.

The latest WTO TPRR on the Gambia describes the country as ‘a small, least developed economy, with a very narrow economic base’⁵⁰ mainly driven by tourism. The Gambia was a contracting party to the GATT from 22 February 1965 and joined the WTO on 23 October 1996⁵¹ and had its first TPR in February 2004.⁵² Despite the growth of the Gambian real GDP of nearly 6 per cent in the last six years, government revenue from trade-related taxes has fallen from 40 per cent in 2003 to 24 per cent in 2009; merchandise trade has also fallen from 70 per cent to 50 per cent within the same period,⁵³ a situation attributed to ECOWAS tariff harmonisation which eroded the Gambia’s competitive advantage. The economy has also been hit by higher oil prices and the collapse of the country’s export trade on groundnut, its major agricultural produce.

5.3.2 *Relations with the WTO*

The Gambia has its WTO goods and services schedules contained in Schedule CX and GATS/SC/112 respectively. It applies MFN treatment to all trading partners other than members of ECOWAS who are covered by the ECOWAS trade liberalisation scheme.⁵⁴ The country is neither a signatory nor an observer to any of the WTO’s plurilateral agreements. However, as tables 3 and 4 below show, The Gambia has enacted a number of laws and given some five notifications to the WTO as at March 2010.

Table 3: Gambian Laws Relating to Trade and Investment

⁵⁰ The Gambia, ‘Trade Policy Review Report by the Secretariat,’ WT/TPR/S/233 dated 10 August 2010, p. vii.

⁵¹ http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm accessed 30 May 2011.

⁵² http://www.wto.org/english/tratop_e/tpr_e/tp_rep_e.htm#chronologically accessed 30 May 2011.

⁵³ N 4.

⁵⁴ Article 35 of the ECOWAS Treaty refers to Article 54 on the establishment of an economic union, a customs union with common external tariffs.

Area	Instrument/text	Entry into force
Animal health	Diseases of Animals Act	1965
Banks and financial institutions:		
Prudential requirements and supervision	Financial Institutions Act	2003
Prevention of money-laundering	Money-Laundering Act	2003
Central Bank	Central Bank Act	1992
Civil aviation	Civil Aviation Act	2004, revised 2008
Competition: domestic trade	Competition Act	2007
Customs and excise: other public revenue	Gambia Revenue Authority Act	2004
	Income and Sales Tax Act	2004
	Customs and Excise Act	2010
	HS Tariff 2010	2010
Divestiture of State enterprises, State interest in other enterprises, and any related matter; establishment of The Gambia Divestiture Agency	Divestiture Act	2001, repealed 2009
Energy	Electricity Act	2005
Environmental standards, and environmental impact assessments	National Environment Management Act	1994
Establishment of private commercial enterprises	Companies Act	1955
	Business Registration Act	2005
Fisheries	Fisheries Act	2007
	Fisheries Regulations	2008
Food safety	Food Act	2005
Groundnuts	Groundnuts Act	1952
	Groundnut (Standard of Quality) Regulations	1965, revised 1999
	Framework of Agreement between the Government of The Gambia and the Agri-Business Plan Association	1999
Hoarding of goods	Hoarding Prohibition Act	2009
Information and telecommunications	Information and Communications Act	2009
Insurance	Insurance Act	2003
Intellectual property:		
Copyright	Copyright Act	2004
Patents, industrial designs, and trade marks	Industrial Property Act	2007
Investment		
Company registration	Companies Act	1955
	Business Registration Act	2005
Investment incentives and free zones; creation of The Gambia Investment and Export Promotion Agency (GIEPA)	Gambia Investment and Export Promotion Act	2010
Labour	Labour Act	2007
Mining and minerals	Mines and Quarries Act	2005
Petroleum	Petroleum Act	1921, amended 1963 and 1976
	Petroleum Exploration and Production Act	2004
Phytosanitary standards	Hazardous Chemicals and Pesticides Control and Management Act	1994
Public utilities regulation	Public Utilities Regulatory Authority (PURA) Act	2001
Ports	Ports Act	1972
Posts	GAMPOST Act	2005
Public enterprises	Public Enterprise Act	2002

Area	Instrument/text	Entry into force
Public health	Public Health Act	1990
	Public Health Act (Amendment) Decree	1995
	Medicines Act	1984, amended 2007
Public procurement: establishment of The Gambia Public Procurement Authority	Public Procurement Act	2001
River transport	Inland Waterways Act	..
Road transport	Roads and Highways Act	1974
Sanitary and phytosanitary (SPS) measures	Food Act	2005
Statistics	Statistical Act	2004
Tourism	Tourism Authority Act	2001

Source: Information provided by the Government of The Gambia.

The Gambia's new Customs and Excise Act, 2010, incorporates the WTO Customs Valuation Agreement. It also applies ECOWAS common customs tariff and an ECOWAS community levy of 0.5 per cent to all imports from outside the area since 2006. Its tariff lines are fully aligned to ECOWAS CET. The five notifications made by and on behalf of The Gambia to the WTO so far are as follows:

Table 4: Notifications by, or on behalf of, The Gambia to the WTO since 2004 to 2010

WTO Agreement	Description of notification	Periodicity	Document symbol of latest notification
Agreement on Agriculture			
Articles 10 and 18.2	Export subsidies	Annual	G/AG/N/GMB/3 15 September 2005 (covers years 1998-04)
Articles 10 and 18.2	Domestic support	Two yearly	G/AG/N/GMB/1/Rev.1 15 September 2005
Agreement on Import Licensing Procedures			
Article 7.3	Questionnaire on import licensing procedures (concerns Medicines Act)	Annual	G/LIC/N/3/GMB/2 27 September 2007
Committee on Trade and Development			
Enabling Clause	Notification (by Ghana, on behalf of members) of revised ECOWAS treaty	Ad hoc	WT/COMTD/N/21 26 September 2005
Agreement on Sanitary and Phytosanitary Measures			
Article 7, Annex B	Notification of Food Safety and Quality Bill (covering all food products destined for human consumption and also animal feed)	Ad hoc	G/SPS/N/GMB/1 4 March 2010

Source: WTO Secretariat.

5.3.3 Relations with the EU and the USA

The Gambia is in a similar situation with Benin, Burkina Faso and Mali discussed above because it is a signatory to the Cotonou Agreement between the EU and the ACP countries and enjoys the Everything But Arms scheme as well.

The United States' AGOA originally enacted in 2000, offers free access for some manufactured products originating in African countries that make progress in 'establishing a market-based economy; developing political pluralism and the rule of law; eliminating discriminatory barriers to US trade and investment; protecting intellectual property; combating corruption; protecting human and worker rights; and removing certain practices of child labour.'⁵⁵ However,

The Gambia has been eligible for AGOA benefits since 2003, and has held a "textile visa" since April 2008, qualifying it for the special textile and clothing provisions of AGOA⁵⁶; however, statistics compiled by the U.S. Department of Commerce show that: (a) The Gambia's total exports to the United States are minimal (US\$641,000 in 2008); and (b) The Gambia's exports under AGOA provisions are even lower (US\$36,000, all agricultural products, in 2007, nil in 2008).⁵⁷

As the 2010 TPRR on The Gambia sums up, the country 'benefits from duty-free access to the United States under AGOA, although no exports have so far been recorded.'⁵⁸ It has no list of import and export prohibitions but is a member of, and applies the import prohibitions under, the Rotterdam and Stockholm conventions on pesticides and industrial chemicals. The zero export from the Gambia to the US reveals a fundamental problem; provisional statutory entitlement is not enough, what is of crucial importance is the capacity to participate competitively in international trade.

⁵⁵ WT/TPR/S/233, p. 24

⁵⁶ *Gambia News*, "US grants Gambia textile visa", 12 May 2008. Viewed at: <http://www.gambianow.com/news/News/-Gambia-News-US-grants-Gambia-AGOA-textile-visa.html>.

⁵⁷ AGOA.info online information, "Bilateral trade profile: US-Gambia". Viewed at: http://www.agoa.info/?view=country_info&country=gm&story=trade.

⁵⁸ N 51 p viii

5.4.1 Niger and Senegal, TPRR 2009

Niger and Senegal had joint TPRRs in 2003 and again in 2009, both are categorised among the LDCs (according to the UNDP's human development indicators, in 2008, Niger ranked 174th, out of 179 countries; Senegal was in the 156th place), both depend heavily on official aid from their development partners for their government's annual expenditures (one third in Niger and one quarter in Senegal).⁵⁹ The two countries also belong to the WAEMU⁶⁰ and to ECOWAS⁶¹ – one of the eight RECs⁶² nurtured to lead to the African Economic Community by the African Union.⁶³ While Niger depends on export of uranium to France and cattle on hoof to Nigeria, Senegal depends on exporting petroleum products to Mali. ECOWAS has a trade liberalisation scheme (TLS).⁶⁴ It has been observed that despite the TLS 'half of the

⁵⁹ WT/TPR/S/223, p. v.

⁶⁰ The WAEMU Treaty was signed on 11 January 1994 by Benin, Burkina Faso, Côte d'Ivoire, Mali, Niger, Senegal and Togo; Guinea-Bissau acceded to the Treaty on 1 January 1997. It was notified to the WTO in documents WT/COMTD/N/11 of 3 February 2000, WT/COMTD/N/11/Add.1 of 2 March 2001, WT/COMTD/N/11/Add.2 of 22 August 2001 and Corr.1 of 26 March 2002. WAEMU's main objectives are: strengthening the competitiveness of the economic and financial activities of the member States, multilateral oversight of national macroeconomic policies with a view to their potential convergence (Chapter I(2)); the harmonization of legislation; the formulation and implementation of common sectoral policies; and a common market

⁶¹ The revised 1993 treaty was notified to the WTO in 2005 by Ghana, on behalf of the ECOWAS member States (WTO document WT/COMTD/N/21 of 26 September 2005). The text of the treaty is available under reference WT/COMTD/54.

⁶² Community of Sahel-Saharan States (CEN-SAD), Common Market for Eastern and Southern Africa (COMESA), East African Community (EAC), Economic Community of Central African States (ECCAS), Economic Community of West African States (ECOWAS), Inter-Governmental Authority on Development (IGAD), Southern African Development Community (SADC), and Union of the Arab Maghreb (UMA).

⁶³ N 29

⁶⁴ Decision A/DEC.15/83 of 30 May 1983, as amended by Decision A/DEC.6/7/92 of July 1992. The TLS is based on a timetable for the removal of tariff barriers on industrial products originating in the member States, and a mechanism for compensating for the loss of customs revenue. In principle, the tariff barriers to originating industrial products (Chapter III(2)(v)) were to be removed asymmetrically, more rapidly for higher-income than for low-income countries: Group I (Burkina Faso, Cape Verde, Gambia, Guinea-Bissau, Mali and Niger) had a ten-year transition period, with a reduction rate of 10 per cent per year on approved products; Group II (Benin, Guinea, Liberia, Sierra Leone and Togo) had an eight-year period, with a reduction rate of 12.5 per cent per year on approved products; Group III (Côte d'Ivoire, Ghana, Nigeria and Senegal) had a six-year period, with a reduction rate of 16.6 per cent per year on approved products. These periods have expired. The mechanism for compensating for loss of customs revenue does not appear to have been put in place.

trade between ECOWAS member countries does not circulate freely⁶⁵ as there are estimated sixty-nine checkpoints between Abidjan and Lagos.⁶⁶

5.4.2 Relations with the WTO and notifications

Both Niger and Senegal offer the MFN treatment to their trading partners. They have been trying to benefit from the WTO's technical assistance but are hampered by their limited capacities. Their notifications to the WTO of their trade policies have been patchy and outdated.

Table 5: Niger's notifications to the WTO, December 2008

Agreement	WTO document	Content
Multilateral agreements on trade in goods		
GATT 1994	Schedule LIII - Niger, 15 April 1994	Tariff concessions
Agreement on Implementation of Article VII of the GATT 1994	WT/LET/301 of 1 June 1999	Delayed application
Agreement on Preshipment Inspection	G/PSI/N/1/Add.5 of 5 February 1997, Add. 7 of 24 February 1998, Add. 8 of 28 September 1999	Laws and regulations
Agreement on Rules of Origin	G/RO/N/19 of 23 January 1998	Laws and regulations
Agreement on Import Licensing Procedures	G/LIC/N/1/NER/1 of 12 January 1998	Laws and regulations
Agreement on Technical Barriers to Trade	G/TBT/2/Add.95 of 10 September 2007	Implementation and administration of the agreement
General Agreement on Trade in Services		
	GATS/SC/64 of 15 April 1994	Schedule of Specific Commitments in Services
	GATS/EL/64 of 15 April 1994	Article II (MFN) exemption list
Marrakesh Agreement Establishing the World Trade Organization		
	WT/MIN(01)/15 of 14 November 2001	Waiver of obligations under Article I.1 of GATT 1994 for the ACP-EC Partnership Agreement

⁶⁵ WT/TPR/S/223, p. 13.

⁶⁶ ECOWAS online information, "Achievements of ECOWAS: Market Integration Programme". Viewed at: <http://www.sec.ecowas.int/sitecedeo/francais/achievements-1.htm> [31 May 2011].

Agreement	WTO document	Content
Enabling Clause	WT/COMTD/N/11 of 3 February 2000 ^a , WT/COMTD/N/11/Add.1 of 2 March 2001 ^b , WT/COMTD/N/11/Add.2 of 22 August 2001 and Corr.1 of 26 March 2002 ^c	West African Economic and Monetary Union (WAEMU)
	WT/COMTD/N/21 of 26 September 2005 ^d	Economic Community of West African States (ECOWAS)

Source: WTO Secretariat, available at http://www.wto.org/english/tratop_e/tpr_e/s223-02_e.doc visited 31 May 2011.

Table 6: Documents relating to Senegal's participation in the WTO, April 2003

Agreement	List	Content
Multilateral agreements on trade in goods		
GATT 1994	Schedule XLIX - Senegal of 15 April 1994 ^a	Tariff concessions
Agreement on Textiles and Clothing	G/TMB/N/122 of 9 August 1995	Transitional safeguard mechanism
Agreement on Technical Barriers to Trade	G/TBT/CS/N/27 of 23 February 1996	Annex III
	G/TBT/Notif 97.348 of 15 July 1997	Notification of measures
	G/TBT/Notif 00/472 of 3 October 2000 ^b	
	G/TBT/Notif 00/473 of 3 October 2000 ^b G/TBT/Notif 00/474 of 5 October 2000 ^b	
Agreement on Sanitary and Phytosanitary Measures	G/SPS/N/SEN/1 of 25 July 1996	Laws and Regulations
Agreement on implementation of Article VI of GATT 1994	G/ADP/N/1/SEN/1 of 31 July 1996	Laws and Regulations
	G/ADP/N/4/Add.1/Rev.5 of 22 November 1996	Notification of absence of measures
	G/ADP/N/9/Add.1/Rev.3 of 21 November 1996	
	G/ADP/N/16/Add.1/Rev.1 of 22 November 1996 G/ADP/N/153/Add.1 of 17 April 2007	
Agreement on implementation of Article VII of GATT 1994	G/VAL/N/1/SEN/1 of 27 September 2001	WAEMU regulations on customs valuation
Agreement on Preshipment Inspection	G/PSI/N/1/Add.4 of 9 October 1996	Laws and Regulations
Agreement on Rules of Origin	G/RO/N/10 of 16 August 1996	Laws and Regulations
Agreement on Import Licensing Procedures	G/LIC/N/3/SEN/1 of 11 February 1997	Replies to questionnaire
	G/LIC/N/1/SEN/1 of 23 October 2002	Update
Agreement on Subsidies and Countervailing Measures	G/SCM/N/3/SEN/Suppl.1, G/SCM/N/16/SEN/Suppl.1, G/SCM/N/25/SEN of 21 November 1997, G/SCM/N/3/SEN, G/SCM/N/16/SEN of 27 January 1997	Subsidies
	G/SCM/N/19/Add.1/Rev.1 of 26 November 1996	Notification of absence of measures
	G/SCM/N/12/Add.1/Rev.3 of 22 November 1996	
	G/SCM/N/7/Add.1/Rev.4 of 21 November 1996	
	G/SCM/N/153/Add.1 of 18 April 2007	
Agreement on Safeguards	G/SG/N/1/SEN/1 of 1 November 1996	Laws and regulations
Agreement on Trade-Related Investment Measures	G/TRIMS/N/2/Rev.16/Add. of 28 March 2008	Laws and regulations
General Agreement on Trade in Services	GATS/SC/75 of 15 April 1994 et Suppl. 1 of 11 April 1997 and Suppl. 2 of 26 February 1998	List of specific undertakings relating to services
	GATS/EL/34 of 15 April 1994 and Suppl. 1 of 26 February 1998	List of exemptions under Article II (MFN)
	S/C/N/441 of 10 March 2008	Laws and regulations on telecommunications services
Agreement on Trade-Related Aspects of Intellectual Property Rights	IP/N/1/SEN/1 of 6 February 1997	Laws and regulations

Agreement	List	Content
Enabling Clause	WT/COMTD/N/11 of 3 February 2000 WT/COMTD/N/11/Add.1 of 2 March 2001 WT/COMTD/N/11/Add.2 of 22 August 2001 WT/COMTD/N/11/Add.2/Corr.1 of 26 March 2002	West African Economic and Monetary Union (WAEMU)
	WT/COMTD/N/21 of 26 September 2005	Economic community of West African States (ECOWAS)

- a Schedule amended in accordance with the results of the GATT 1994 tariff negotiations under Article XVIII, which ended in 1997.
- b Notified separately under the Agreement on Sanitary and Phytosanitary Measures.

Source: WTO Secretariat. Available at http://www.wto.org/english/tratop_e/tpr_e/s223-02_e.doc visited 31 May 2011.

5.4.3 Relations with the EU and the USA

As with other ACP countries, Niger and Senegal are signatories to the Cotonou Agreement and beneficiaries of the EU's EBA initiative. In relations with the United States, they are among the forty countries eligible under the AGOA for free-duty and quota-free entry to the United States market (except apparel). They were also eligible for the special treatment provisions of third-country fabrics in apparel that expired on 30 September 2012 and can also take advantage of the so called 'Category 9' goods concerning handmade, ethnic fabrics. However due to capacity problems, the provisions are not being exploited as only a few thousands of dollars have come to both countries under the AGOA: US\$89,000 for Niger mainly jewellery, and for Senegal US\$233,000 almost all from live birds, musical instruments, craft and leather products.⁶⁷ Both countries have sought to finance their development projects through the Millennium Challenge Corporation (MCC) and have benefited from the 'MCC Threshold Programme.'⁶⁸

5.4.4 Challenges facing Niger and Senegal within the Multilateral Trading System

⁶⁷ WT/TPR/S/223, p. 19.

⁶⁸ Each year, the MCC selects the countries eligible for financing. In 2009, the 26 eligible countries are: Armenia, Benin, Bolivia, Burkina Faso, Cape Verde, East Timor, El Salvador, Georgia, Ghana, Honduras, Jordan, Lesotho, Malawi, Mali, Moldova, Mongolia, Morocco, Mozambique, Namibia, Nicaragua, Philippines, Senegal, Tanzania, Ukraine, and Vanuatu. See Millennium Challenge Corporation (2009).

Credit is very difficult to obtain in both countries. Niger is landlocked and is constantly rocked by political instability and natural disasters such as draught and famine. Following the outbreak of avian influenza in Niger, its poultry export remained banned by the OIE since 2006. The domestic law on copyright and other aspects of intellectual property rights in Niger are still below the standards of the WTO TRIPS Agreement. On its part, Senegal extended its copyright protection from fifty to seventy years after the author's death. Again Senegal still gives protection to local producers far beyond the WAEMU's CET. There is the intractable problem of institutional poverty and illegal practices (including by the Customs and Excise Department and the Police) plaguing the whole region to which Niger and Senegal are not immune but are rather more vulnerable to because of their small economies.

5.5.1 Ghana, TPRR 2008

Ghana's economic policy objective is to be a middle-income country by 2015. Its economy is mainly driven by agriculture which provides employment to about 50 per cent of the population; the government relies on import duties (including VAT and excise duties) for public revenue. While the European Communities are Ghana's most important trading partner, its current account is mainly financed by official transfers and remittances from Ghanaians living abroad.⁶⁹

5.5.2 Relations with the WTO

⁶⁹ Ghana, Trade Policy Review Report by the WTO Secretariat, WT/TPR/S/194, 17 December 2007, p. vii.

Ghana is an original member of the WTO and a signatory to the Fourth⁷⁰ and Fifth⁷¹ Protocols to the GATS but not a party to any of the plurilateral agreements including the Information Technology Agreement. Ghana extends MFN treatment to all its trading partners. It has never been a complainant or a respondent to any WTO case but was a third party in the *EC – Bananas*⁷² case between the European Communities and the United States on the importation, sale, and distribution of bananas. Ghana does not have any non-preferential rules of origin.

Along with other developing countries, Ghana has submitted proposals on agriculture and market access for non-agricultural goods.⁷³ Ghana also submitted a document stressing the importance of the special and differential treatment for developing countries at the Hong Kong Ministerial Conference.⁷⁴ Up to the TPR of 2007, Ghana has made the following notifications to the WTO but none yet on SPS measures:

Table 7: Selected notifications to the WTO, 2007

WTO Agreement	Description of requirement	WTO document number (latest if recurrent)
Agreement on Agriculture		
Articles 10 and 18.2	Export subsidies	G/AG/N/GHA/2, 21 August 2001
Committee on Trade and Development		
Enabling Clause	ECOWAS revised treaty	WT/COMTD/N/21, 26 September 2005
Agreement on the Implementation of GATT Article VI		
Article 16.4	Semi-annual reports	G/ADP/N/85/Add.1/Rev.3, 20 October 2004
Understanding on the Interpretation of GATT Article XVII (State-trading)		
Paragraph 1	New and full notification	G/STR/N/10/GHA, 19 April 2004
Agreement on Import Licensing Procedures		
Articles 1.4(a), 8.2(b), and 7.3	Notification	G/LIC/N/1/GHA/1 and 3, 21 April 2004
Decision on Notification Procedures for Quantitative Restrictions		
	Quantitative restrictions	G/MA/NTM/QR/1/Add.10, 28 March 2006

⁷⁰ Ministerial Decision on Negotiations on Basic Telecommunications adopted at Marrakesh on 15 April 1994, entered into force 1 January 1998.

⁷¹ Negotiations under the terms of the Second Decision on Financial Services adopted by the Council for Trade in Services on 21 July 1995 (S/L/9).

⁷² WTO document WT/DS27/AB/R, 9 September 1997.

⁷³ WTO documents TN/MA/W/27, 18 February 2003; TN/AG/GEN/5, 29 July 2003; and TN/MA/W/40, 11 August 2003.

⁷⁴ WTO document WT/MIN(05)/ST/106, 16 December 2006.

WTO Agreement	Description of requirement	WTO document number (latest if recurrent)
Agreement on Rules of Origin		
Article 5	Notification	G/RO/N/44, 6 May 2004
Agreement on Subsidies and Countervailing Measures		
Article 25.1	New and full notification	G/SCM/N/95/GHA, 20 April 2004
Article 25.11	Semi-annual reports	G/SCM/N/81/Add.1/Rev.4, 27 April 2004
Agreement on Technical Barriers to Trade		
Article 10.6	Notification of technical regulations	WTO documents G/TBT/N/GHA/1-4, 18 January 2005, 30 August 2005, 13 October 2006, and 11 February 2007
Annex 3C	Notification of acceptance	G/TBT/CS/N/144, 30 May 2002
Article 15.2	Implementation and administration of the Agreement	G/TBT/2/Add.76, 29 October 2003
Article multiple	Notification	G/TBT/N/GHA/3, 13 October 2006
Agreement on Trade-Related Aspects of Intellectual Property Rights		
Article 63.2	Laws and regulations	IP/N/1/GHA/1, 22 April 2002

Source: WTO documents.

5.5.3 Trade Policy

Ghana hopes to increase its volume and share of world trade and also attract foreign investors through a favourable economic climate. It has no legislation on contingency measures and has not taken any anti-dumping, countervailing or safeguard measures up to the time of its last trade policy review in 2007. It has no legislation of anti-competitive practices. A bill in the Ghanaian parliament on anti-competitive practices has lingered for over seven years.⁷⁵

However, Ghana adheres to strict, mandatory technical regulations based mainly on international standards. It has also adopted new laws on government procurement to increase efficiency and transparency. Ghana seems to evince a strong political will to develop. It re-denominated the cedi, its national currency, by 10,000 to one new cedi. Its sectoral policies have remained focused on cocoa and gold, the most important export products in the country.⁷⁶ Another area of active policy that supports trade that is often not mentioned in WTO TPRRs is the thriving education sector. Ghana has a number of very good educational

⁷⁵ N 69, p. ix.

⁷⁶ *ibid.*

institutions dating back to the old Achimota College of the colonial era. Also important is that the government seems more determined to fight official corruption than most of their West African neighbours as shown not just in the number of the following pieces of legislation but the enforcement mechanism on the ground.

Table 8: Main trade-related laws, 2007

Area	Legislation
Imports and exports	Export and Import Act, 1995; Customs, Excise and Preventive Service (Management) Law, 1993; Customs, Excise and Preventive Service (Management)(Rates, Duties and Other Taxes) Act, 1994
Taxation	Value Added Tax Act, 1998
Free zones	Free Zone Act, 1995
Export finance and promotion	Ghana Export Promotion Council Decree, 1969; Export Development and Investment Fund Act, 2000
Investment	Ghana Investment Promotion Centre Act, 1994
Standards	Ghana Standards Board (Food, Drugs and Other Goods), General Labelling Rules, 1992; Ghana Standards (Certification Mark) Rules, 1970; Seeds (Certification and Standards) Decree, 1972; Food and Drugs Law, 1992
Quarantine	Animals (Control of Importation) Ordinance, 1952; Economic Plants Protection Decree, 1979; Prevention and Control of Pests and Diseases of Plants Act, 1965
Government procurement	Public Procurement Act, 2003
Privatization and small industry	Divestiture of State Interests (Implementation) Law, 1993; National Board for Small-Scale Industries Act, 1981
Competition	Protection Against Unfair Competition Act, 2000
Intellectual property protection	Patents Act, 2003; Industrial Designs Act, 2003; Geographical Indications Act, 2003; Trade Marks Act, 2004; Layout Designs of Integrated Circuits Act, 2004; Copyright Act, 2005
Agriculture	Cocoa Board Law, 1983; Ghana Cocoa Board (Reorganization and Indemnity) Law, 1985; Cocoa Duty Decree, 1974; Grains Development Board Act, 1970
Forestry	Forest Products Inspection Bureau Law, 1985; Forest Protection Decree, 1974; Timber Export Development Board Law, 1985; Trees and Timber Decree, 1974; Forestry Commission Act, 1993
Fisheries	Fisheries Act, 2002
Mining and oil	Minerals and Mining Act, 2006; Petroleum Decree, 1973; Ghana National Petroleum Corporation Law, 1983; Petroleum (Exploration and Production) Law, 1984; Precious Minerals Marketing Corporation Law, 1989; Petroleum Income Tax Law, 1987
Financial services	Bank of Ghana Act 2002; Banking Act, 2004; Securities Industry Law, 1993; Securities and Exchange Commission Regulations, 2003; Insurance Act, 2006
Communications	Postal and Courier Services Regulatory Commission Act, 2003
Transport	Ghana Civil Aviation Authority Law, 1983; Ghana Ports and Harbours Authority Law, 1986; Merchant Shipping Act, 1963; Ghana Shippers' Council Decree, 1974

Source: WTO Secretariat, based on information provided by the Ghanaian authorities.

Ghana is also at the forefront of the ECOWAS Monetary Co-operation Programme, a measure aimed at improving sub-regional payments under the West African Clearing House (the West African Monetary Agency). ECOWAS has a dual approach to its aim of a single

monetary zone, one for the Franco-phone countries and the other for the Anglo-phone countries. It is not clear where the two Portuguese-speaking countries of Cape Verde and Guinea-Bissau belong. While the WAEMU is for the French speaking countries, the West African Monetary Zone (WAMZ)⁷⁷ is mainly made up of the Anglophone countries.

Ghana benefits from a number of non-reciprocal preferential treatments such as the GSP, GSTP (the Global System of Trade Preferences among developing countries), AGOA and NEPAD (New Partnership for African Development)

The NEPAD's goals are to halt the marginalisation of Africa in the globalisation process; eradicate widespread and severe poverty; and promote accelerated growth and sustainable development. Trade and trade-related measures outlined under the NEPAD to promote African exports include: promotion and improvement of regional trade agreements; inter-regional trade liberalisation; harmonisation of tariffs, rules of origin, and product standards; reduction of export taxes, and of costs of transactions and operations; and promotion of African exporting and importing companies. The NEPAD also aims to ensure the active participation of African countries in the multilateral trading system.⁷⁸

Ghana has notified the WTO of its intellectual property laws and is a signatory to the following treaties.

Table 9: Membership of WIPO treaties, 2007

Treaty	Entry into force
Berne Convention (Literary and Artistic Works)	11 October 1991
Paris Convention (Industrial Property)	28 September 1976
Patent Cooperation Treaty (PCT)	26 February 1997
WIPO Convention	12 June 1976

Source: WTO Secretariat.

5.6.1 Togo, TPR 2006

⁷⁷ The WAMZ comprises The Gambia, Ghana, Guinea, Nigeria, and Sierra Leone. Liberia has expressed an interest in joining. A West-African Monetary Institute (WAMI) was established in 2000 to carry out functions leading to the establishment of a West-African Central Bank; the WAMI is based in Accra.

⁷⁸ WT/TPR/S/194, p. 18.

Togo's latest TPR was carried out in 2006⁷⁹ and as an LDC it could only have its reviews done at six-year intervals or even longer. Togo is a small West African country covering only 35,375 square miles (56,600 km²) with a unique Constitution (*Loi Fundamentale*) promulgated in 1992 under which the WTO agreements may be invoked directly although this has never been the case.⁸⁰ However, despite this monist system (the possibility for an individual to invoke international law), Togo has no commercial court, nothing like the Chancery Division⁸¹ of the High Court in England or the Federal High Court in Nigeria,⁸² so business disputes are dealt with by ordinary courts. According to the TPRR,

The President of the Republic (or his delegate) negotiates, signs and promulgates treaties and international agreements ratified by a law of the National Assembly; the WTO Agreement entered into force in Togo under this procedure. From the time of ratification, ratified treaties and agreements take precedence over laws, subject, with respect to each individual agreement or treaty, to its being applied by the other party (except in the case of human rights treaties). These acts are directly applicable as law in Togo and enforceable *ipso jure*.⁸³

Even though this seems an excellent constitutional provision, the UNDP points out that 'the administration of justice is handicapped by a shortage of resources but more particularly by its lack of credibility in the eyes of the citizens and plaintiffs due partly to a climate of corruption and disregard for ethics and professional etiquette and partly due to the timid protection of rights by the judiciary.'⁸⁴ Ironically, the Constitution enshrines the independence of the judiciary.⁸⁵

Togo's economic environment is bleak because of the socio-political problem ravaging the country since 1992; its business climate is sluggish with its banks unable to finance business

⁷⁹ Togo, TPRR by the Secretariat, WT/TPR/S/166, 29 May 2006, p. 9

⁸⁰ *ibid*, para. 5, p. 10.

⁸¹ Gary Slapper and David Kelley, *The English Legal System*, (11th edn, Routledge, 2010) 164 & 165.

⁸² Gregory Akaniro, *Nigerian Legal System*, (Oak Publishers, 1990), 34.

⁸³ *Ibid*. Title XI of the 1992 Constitution. The Constitutional Court may be seized by the President of the Republic, by the Prime Minister or by the President of the National Assembly. When the Constitutional Court has ruled that an international commitment contains a clause that is contrary to the Constitution, ratification or approval cannot be authorized until the Constitution has been amended.

⁸⁴ *Ibid*, 11.

⁸⁵ Article 113 of the Togolese Constitution 1992.

and the country unable to benefit from the Heavily Indebted Poor Countries (HIPC) initiative and the government unable to supply basic services such as water and electricity and the manufacturing and insurance sectors being at their rudimentary stages: manufacturing being only of basic commodities such as beverages, soap and plastic/carrier bags mainly for the domestic market and insurance being mostly of export and motor vehicles.

Togo is a member of the WAEMU which has a common monetary and exchange policy administered by the Central Bank of West African States (BCEAO).⁸⁶ The West African Financial Community (CFA) franc of the WAEMU countries has a fixed parity with the euro at CFAF 1,000 to €1.52449017.⁸⁷

5.6.2 *Participation in the WTO*

With such a fragile and weak economy, Togo's participation in the WTO has been modest as it has no mission in Geneva. It has not made any notifications concerning contingency measures, SPS or standardisation accreditation procedure regime to the WTO.

The ACP–EU pact under the Cotonou Agreement has run its course. The derogation granted by the WTO to the EU from its obligations under Article I:1 of the GATT 1994 (on MFN treatment) up to 1 March 2000 and extended to 31 December 2007 has come to an end with

⁸⁶ Monetary cooperation between WAMU member countries and France dates back to the colonial era. It was given formal status in 1962, with a new Treaty being signed in 1973. The BCEAO is the result of a monetary cooperation agreement signed with France in 1972 and supplemented by the transactions account agreement of 1973.

⁸⁷ The CFA franc had fixed parity with the French franc until the introduction of the euro on 1 January 1999, which did not lead to any substantive changes as far as the arrangements in the franc zone are concerned (Decision of the Council of the European Union of 23 November 1998 concerning exchange matters relating to the CFA franc and the Comorian franc (98/683/EC)).

the transition to an EPA being the next line open to the parties.⁸⁸ Nonetheless, Togo could still latch on to the ‘Everything but Arms’⁸⁹ initiative under which the EU grants duty-free access, with no quantitative restrictions to products (other than arms and ammunition) originating from Togo and other LDCs. The EU also grants LDCs the Generalised Preferences which had bananas added to it in 2005 and rice and sugar only in 2009.⁹⁰ Togo is also eligible for the preferences as an LDC; however, its political turmoil and *de facto* one-party state have cancelled its eligibility under the AGOA.⁹¹ The country also slipped from benefitting under the Integrated Framework both as originally conceived in 1997 and also as currently applied in its revised form.⁹²

5.7.1 Nigeria

The TPR on Nigeria was published on 24 May 2011 and credited the country with ‘robust economic growth averaging 6% per year in real terms since 2005,’ adding that ‘growth has been quite broadly based.’⁹³ Yet the same review states in the same paragraph that ‘oil and gas ... continue to be critical for the economy as they make over 90% of exports and 80% of government revenue.’ The two statements appear contradictory. As a frequent visitor to Nigeria and an observer of her trade policy and economic development, the economy is patchy and unbalanced. Patchy because following the rise of daring militants in the north, the northern states are virtually without effective governments as the towns have been disserted

⁸⁸ WTO document WT/MIN(01)/15 of 14 November 2001. The derogation (WT/L/186), which extended the derogation under Article I (MFN) of the GATT for the Fourth Lomé Convention between the ACP countries and the EEC (GATT document GATT L/7604), ended on 29 February 2000.

⁸⁹ WTO document WT/COMTD/57 of 29 March 2006.

⁹⁰ WTO document WT/TPR/S/119 of 30 June 2003, chapter II.

⁹¹ USTR (2005).

⁹² To benefit from the Revised Integrated Framework, countries must meet certain requirements, such as: (i) a strong commitment by the government to integrate trade into its national development strategy and its Poverty Reduction Strategy Paper; (ii) be at least in the preparatory stage of the PRSP; (iii) be at least in the preparatory stage of upcoming meetings of the World Bank Consultative Group or UNDP Round Table; and (iv) have a conducive operational country environment (for example, level of infrastructure, resource base of the World Bank/IMF and UNDP country offices, donor response, and the pace of domestic reform).

⁹³ WT/TPR/S/247 (vii) 24 May 2011. GATT 1994, Annex 3(c)(ii).

and there are incessant clashes in the middle-belt states. Only about fifteen states in the south and the Federal Capital Territory enjoy reasonably high levels of law and order and discernible economic growth. The economically viable states represent only 40 per cent of the country (15 out of 36 states) and so the reliability of the economic statistic is low.

Nigeria is an original member of the WTO having ratified the WTO Agreement on 6 December 1994⁹⁴ Under the Constitution of the Federal Republic of Nigeria, the Marrakech Agreement Establishing the WTO has no direct effect in the country because a treaty between the Federation and other country or group of countries can have the force of law only to the extent to which it has been enacted into law by the National Assembly.⁹⁵ Nonetheless, as a Member State of the WTO, Nigeria is harmonising her laws with the WTO regime and has made the following notifications:⁹⁶

5.7.2 Selected notifications to the WTO, March 2005 to January 2011

WTO Agreement	Description of requirement	Most recent notification	Date	Period covered by notification
Agreement on Agriculture				
Article 10 and 18.2	Export subsidy	G/AG/N/NGA/11	22/07/2010	2009
		G/AG/N/NGA/10	17/07/2010	2008
		G/AG/N/NGA/8	28/10/2008	2007
		G/AG/N/NGA/6	11/04/2008	2006
Article 18.2	Domestic support	G/AG/N/NGA/4	25/10/2006	1998-2005
		G/AG/N/NGA/12	22/07/2010	2009
		G/AG/N/NGA/9	16/07/2009	2008
		G/AG/N/NGA/7	28/10/2008	2007
		G/AG/N/NGA/5	11/04/2008	2006
		G/AG/N/NGA/3	25/10/2006	1998-2005
Agreement on Subsidies and Countervailing Measures				
Article 25	Subsidies	G/SCM/N/186/NGA	12/11/2009	2007-2008
		G/SCM/N/155/NGA	19/04/2007	up to 2006
Article 32.6	Laws and regulations	G/ADP/N/1/NGA/1	11/05/2007	up to 2006
Agreement on the Implementation of Article VI of the GATT 1994 (Anti-Dumping Agreement)				
Article 18.5	Laws and regulations	G/ADP/N/1/NGA/1	11/05/2007	up to 2006
Agreement on the Implementation of Article VII of the GATT 1994 (Agreement on Customs Valuation)				
Article 22.2	Notification	G/VAL/N/1/NGA/1	5/09/2008	one-off
	Checklist of issues	G/VAL/N/2/NGA/1	3/09/2008	one-off

⁹⁴ GATT document Let/1957, 7 December 1994.

⁹⁵ Article 12, Constitution of the Federal Republic of Nigeria.

⁹⁶ WT/TPR/S/247 24 May 2011 20

WTO Agreement	Description of requirement	Most recent notification	Date	Period covered by notification
GATT 1994 Article XVII:4(a)	State trading enterprises	G/STR/N/12/NGA	6/11/2008	
Agreement on Import Licensing Article 7.3	Questionnaire on import licensing procedures	G/LIC/N/3/NGA/6	26/07/2010	2009
		G/LIC/N/3/NGA/5	21/07/2009	2008
		G/LIC/N/3/NGA/4	19/11/2008	2007
		G/LIC/N/3/NGA/3	24/04/2007	2006
Agreement on Technical Barriers to Trade Annex 3C	Notification of acceptance	G/TBT/CS/N/162	30/01/2006	one-off

Source: WTO Secretariat.

These notifications evince some willingness to keep to the WTO agreements but Nigeria is yet to sign the Agreement on Trade in Civil Aircraft (ATCA) although she is an observer. Whether signing the ATCA will help reduce the spate of air crashes in the country can only be proved with time. Nigeria is neither a signatory nor an observer to the Agreement on Government Procurement.

II. ECOWAS in the WTO Dispute Settlement System

5.8.1 Benin, Burkina Faso, Chad and Mali in *US – Upland Cotton*

This sub-section discusses a WTO cotton case in which some ECOWAS Members, though as third parties, played prominent roles and made the world know the herculean challenges they face in the WTO-supervised world trading system and how the system is undermining their trade and threatening their livelihood when the big trading nations refuse to play by the rules. It is a classic case of a subversion of the legal maxim *ubi jus, ubi remedium*, as there were findings of breaches (nullification and impairment) at the Panel, Appellate Body, Recourse to Article 21.5, Recourse to Article 22.6 arbitration but no remedy because of the prospective nature of the WTO dispute resolution mechanism which awards no damages or financial compensation.

5.8.2 *United States – Subsidies on Upland Cotton*⁹⁷

In *US – Upland Cotton* Brazil invoked the provisions of the *Agreement on Agriculture*, the *SCM Agreement* and the *GATT 1994* alleging that the United States support measures to cotton farmers in the country amounted to prohibited and actionable export subsidies. Brazil's allegation 'include measures referred to as marketing loan programme payments, user marketing (step 2) payments, production flexibility contracts payments, market loss assistance payments, direct payments, counter-cyclical payments, crop insurance payments, cottonseed payments and export credit guarantee programmes.'⁹⁸ Specifically, Brazil persuaded the Panel to find that Article 13 of the *Agreement on Agriculture* is in the nature of affirmative defence and does not exempt the US domestic support measures, that the Extraterritorial Income (ETI) Act 2000 is inconsistent with Articles 3.1(a) and 3.2 of the *SCM Agreement* and that Section 1207(a) of the Farm Security and Rural Investment Act 2002 mandating payments of Step 2 'domestic' payments is a violation of Article III:4 of the *GATT 1994*.⁹⁹ In sum that all the various payments (GSM 102, GSM 103, SCGP) constitute export subsidies within the meaning of the covered agreements

The effects of the prohibited subsidies, according to Brazil, are 'suppressing upland cotton prices in the US, world and Brazil markets for upland cotton.... increasing the US share of the upland cotton world market and the United States having a more than equitable share of world exports of upland cotton'¹⁰⁰ to the detriment of other cotton producers. ECOWAS

⁹⁷ *United States – Subsidies on Upland Cotton* WT/DS267/R; WT/DS267/AB/R, WT/DS267/RW Article 21.5 and WT/DS267/ARB/1 Article 22.6 DSU and Article 4.11 (and Recourse to Article 7.9 – Authorisation to take countermeasures) SCM Agreement, Panel and Appellate Reports adopted 21 March 2005 (hereinafter *US – Upland Cotton*).

⁹⁸ Panel Report *US – Upland Cotton*, para. 2.2

⁹⁹ *ibid* para. 3.1(i-v)

¹⁰⁰ *ibid* 3.1(vi).

Member State Benin together with Chad reserved their rights to participate in the Panel and Appellate Body proceedings as third parties.

In her third party oral statement, Benin impressed on the WTO Panel the enormity of the challenges it faces. In their own words, cotton accounts for '90 per cent of our agricultural exports, and three-quarters of our export earnings over the past four years. It generates 25 per cent of national revenues.'¹⁰¹ In comparison, 'the subsidies paid by the United States to its 25,000 cotton farmers exceed the entire gross national income of Benin ... this demonstrates, rather dramatically, the impossibility of Benin ever competing with such subsidies.... Therefore, for us, the solution lies with the WTO.'¹⁰² If they could not deal with the problem, what would they like to see happen? Benin concluded, 'we are not seeking any special and differential treatment in this case. We are simply asking that the United States abide by the disciplines that it agreed to at the end of the Uruguay Round.'¹⁰³

Again in a joint statement presented to the Trade Negotiations Committee on behalf of Benin, Benin, Burkina Faso, Chad and Mali, President Blaise Compaore of Burkina Faso on 10 June 2003 said, 'our countries are not asking for charity, neither are we requesting preferential treatment or additional aid. We solely demand that, in conformity with WTO basic principles, the free market rule be applied. Our producers are ready to face competition on the world cotton market – under the condition that it is not distorted by subsidies.'¹⁰⁴

¹⁰¹ *ibid* Annex C, 33.

¹⁰² *ibid*.

¹⁰³ *ibid* 34.

¹⁰⁴ *ibid* Annex E, 34.

WTO's Deputy Director-General Dr Kipkir Aly Azad Rana expressed the same idea differently:

They do not ask for add, which is the World Bank's remit, nor do they make political appeals that belong to the United Nations. They have just asked that WTO rules and disciplines apply also in sectors of interest to the poor – that a fair and market-oriented system be established in agriculture and that rich countries' wasteful export and production subsidies be abolished and cease to undermine their comparative advantage.¹⁰⁵

Gung-ho as the ECOWAS Member States may sound, Petersmann notes that 'the prevailing utilitarian conceptions of IEL outside Europe offer neither effective protection of 'consumer welfare' (which is nowhere mentioned in the 30,000 pages of WTO law),' rather the system is geared 'in favour of powerful producer interests ("producer welfare").'¹⁰⁶ The Panel found that the United States acted inconsistently with the covered agreements and was 'under an obligation to take appropriate steps to remove the adverse effects or ... withdraw the subsidy.'¹⁰⁷

On appeal the United States was also found to be in violation of the *Agreement on Agriculture* and the *SCM Agreement*. The Appellate Body upheld the Panel's findings that the 'export credit guarantee programmes are prohibited export subsidies, under Article 3.1(a) of the *SCM Agreement* and are inconsistent with Articles 3.1(a) and 3.2 of that Agreement.' It therefore requested the United States to bring its measures 'into conformity with its obligations under those Agreements.'¹⁰⁸

¹⁰⁵ *ibid* 35.

¹⁰⁶ Ernst-Ulrich Petersmann, 'JIEL Debate: Methodological Pluralism and Its Critics in International Economic Law Research,' *JIEL* 15(4) (2012) 926.

¹⁰⁷ Panel Report, *US – Upland Cotton* 351.

¹⁰⁸ Appellate Report *US – Upland Cotton*, paras 763 and 764.

At the Article 21.5 compliance panel Brazil alleged that the United States had ‘failed to comply with its obligation under Article 7.8 of the *SCM Agreement* to “take appropriate steps to remove the adverse effects or withdraw the subsidy” and also failed ‘to withdraw the subsidy without delay’ in conformity with the *Agreement on Agriculture*.¹⁰⁹ Chad reminded the WTO and the Panel that because it was failing to address cotton ‘ambitiously, expeditiously and specifically’¹¹⁰ as Members agreed at the Hong Kong Ministerial Conference, the distorting domestic subsidies for cotton would make it impossible to attain the Millennium Development Goals.¹¹¹

Article 22.6 of the DSU provides for

authorization to suspend concessions or other obligations... However, if the Member concerned objects to the level of suspension proposed, or claims that the principles and procedures set ... have not been followed where a complaining party has requested authorization to suspend concessions or other obligations..., the matter shall be referred to arbitration.

Article 4.11 of the *SCM Agreement* provides that the arbitrator appointed pursuant to Article 22.6 of the DSU ‘shall determine whether the countermeasures are appropriate.’ Once determined, Article 7.9 of the *SCM Agreement* authorises the taking of countermeasures:

In the event the Member has not taken appropriate steps to remove the adverse effects of the subsidy or withdraw the subsidy within six months from the date when the DSB adopts the panel report or the Appellate Body report, and in the absence of agreement on compensation, the DSB shall grant authorization to the complaining Member to take countermeasures, commensurate with the degree and nature of the adverse effects determined to exist.

The arbitrator determined that Brazil’s claim of US\$1.122 billion was excessive and scaled it down to US\$147.4 million. Brazil also requested to apply countermeasures and proposed to

¹⁰⁹ Recourse to Article 21.5, *US – Upland Cotton* WT/DS267/RW para. 151(a), (b) and (c).

¹¹⁰ Doha Work Programme – Ministerial Declaration adopted on 18 December 2005, WT/MIN(05)/DEC, para.

11.

¹¹¹ *US – Upland Cotton* Annex A, para. 5.

suspend obligations under the GATT 1994, and also under the GATS and the TRIPS Agreements under Article 22.3(c) of the DSU which authorises the suspension of concessions ‘under other agreements.’ The arbitrator ruled that ‘Brazil would be entitled to seek to suspend certain obligations under the TRIPS Agreement and/or the GATS.’¹¹²

Cross stated that ‘Brazil’s victory in *US – Upland Cotton Subsidies* represents a ‘victory’ for ‘all developing countries’ and ‘part of a broader shift within the WTO away from a system dominated by the US and the EC toward a system that increasingly is influenced by emerging markets economies.’¹¹³ But would the United States have bulged if not for the market size, economic influence and the credible threat from Brazil to resort to both the GATS and the TRIPS to retaliate for the injury caused to her economy by the United States? Brazil fought the case through all the levels of WTO dispute settlement (panel, Appellate Body, recourse to Article 21.5 compliance panel and Recourse to Article 22.6 arbitrator). It is doubtful whether based entirely on the rule of law any of the fifteen West African countries within ECOWAS, without the resources of Brazil¹¹⁴ or, indeed, all of them put together, would have had the resources to muster a credible threat that would have made the United States change her trade policy. According to Steinberg, ‘in trade negotiations, relative market size offers the best first approximation of bargaining power.’¹¹⁵ Yet there is a study that shows that the

¹¹² *US – Upland Cotton, Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, WT/DS267/ARB/1 para. 6.5(b).

¹¹³ Karen Halveson Cross, ‘King Cotton, Developing Countries and the “Peace Clause”’: the WTO’s *US Cotton Subsidies* Decision,’ *JIEL* 2006 9(1) 149-195.

¹¹⁴ Brazil retained an American law firm Sidley, Austin, Brown & Wood with an office in Geneva and hired a former US Undersecretary of Agriculture and professor of economics Dr Daniel Sumner as an expert witness at enormous costs. Regarding costs of WTO litigation, the counsel for Kodak and Fuji in the *Japan – Photographic Film* dispute charged \$10 million in legal fees (*ibid* footnote 254). In the face of other government priorities such as health and education, such an amount may be far beyond what any of the least-developed countries within ECOWAS commit into WTO litigation.

¹¹⁵ Richard H Steinberg, ‘In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO’ 56 *International Organisation* (2002) at 347.

developed countries may benefit more than the developing countries from total removal of subsidies on agriculture.¹¹⁶

5.8.3 Côte D'Ivoire, Ghana and Senegal as third party participants: DS27 EC - Bananas¹¹⁷

This section will deal only with the legal arguments marshalled by the parties in the *EC – Bananas* as the concluding chapter will analyse the commercial and political interests that sparked off the case. Third party roles are founded in WTO law. The rights of third parties are important and are dealt with in Article 10 and Annex 3 paragraphs 6 and 9 of the Dispute Settlement Understanding (DSU). Article 10(2) and (3) provides:

Any member having a substantial interest in a matter before a panel and having notified its interest to the DSB (referred to in this Understanding as a “third party”) shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report.

Third parties shall receive the submissions of the parties to the dispute to the first meeting of the panel.¹¹⁸

These provisions were reiterated in the working procedures of the DSB which authorises the DSB to invite third parties ‘in writing’ to present their view or ‘a written version of their oral statements’ to the panel and to ‘be present during the entirety of [the] session.’¹¹⁹

¹¹⁶ Kym Anderson, ‘The Challenge of Reducing Subsidies and Trade Barriers’, World Bank Policy Research Working Paper 3415 (September 2004), at Table 2.

¹¹⁷ *EC – Bananas*, WT/DS27/AB/R adopted 9 September 1997.

¹¹⁸ DSU, Article 10(2) and (3)

¹¹⁹ DSU, Appendix 3, paras. 6 & 9.

The protracted *EC – Bananas* case triggered decisions at three levels: GATT/WTO dispute settlement, the European Court of Justice and the German courts¹²⁰ but it is the dispute at the GATT/WTO level that is of interest to us here because of the contested application of Articles I and III of the GATT 1994 on the MFN and National Treatment principles and the involvement of ECOWAS Member States as third parties at the Panel and Appellate hearings.¹²¹ At both levels, Côte d'Ivoire, Ghana and Senegal joined nine other developing countries in presenting an argument in support of the EC's line of argument. The USA brought multiple complaints against the EC regarding its Framework Agreement on Bananas with the ACP countries. The infringement of GATT rules by the EC as alleged by the USA is summarised in the introduction to the Panel report as follows:

On 5 February 1996, Ecuador, Guatemala, Honduras, Mexico and the United States acting jointly and severally, requested consultations with the European Communities ("the Community" or the "EC") pursuant to Article 4 of the Understanding on Rules and Procedures governing the Settlement of Disputes ("DSU"), Article XXIII of the General Agreement on Tariffs and Trade 1994 ("GATT"), Article 6 of the Agreement on Import Licensing Procedures (to the extent that it related to Article XXIII of GATT), Article XXIII of the General Agreement on Trade in Services, Article 19 of the Agreement on Agriculture (to the extent that it related to Article XXIII of GATT), and Article 8 of the Agreement on Trade-Related Investment Measures (to the extent that it related to Article XXIII of GATT) regarding the EC regime for the importation, sale and distribution of bananas established by Council Regulation (EEC) 404/93,¹²² and the subsequent EC legislation, regulations and administrative measures, including those reflecting the provisions of the Framework Agreement on Bananas, which implemented, supplemented and amended that regime.

The constituted three-man WTO Panel of Mr Stuart Harbinson (Chairman), Mr Kym Anderson and Mr Christian Habèrli (members) examined the EC Framework Agreement on Bananas (FAB) with ACP countries as it relates to the EC's obligations under the WTO agreements, especially Articles I and III of the GATT 1994.

¹²⁰ Mauricio Salas and John H. Jackson, 'Procedural Overview of the WTO EC-Banana Dispute,' *JIEL* (2000) 145-166

¹²¹ John H Jackson and Patricio Grane, 'The Saga Continues: An Update on the Banana Dispute and Its Procedural Offspring,' *JIEL* (2001) 581-595

¹²² Official Journal of the European Communities No. L 47 of 25 February 1993, pp.1-11.

Although the FAB was at the heart of the issue, the real economic interest of ECOWAS Member States affected was very marginal. According to the statistics supplied by the EC for the 1989 to 1991 period on the shares of suppliers of bananas to the EC, whether as GATT Contracting Parties (Côte d'Ivoire) or non-GATT Contracting Parties (Cape Verde), Côte d'Ivoire supplied 98,908 tonnes or 3.8 per cent and Cape Verde 2,820 tonnes or 0.1 per cent, all of which amounted to less than 4 per cent¹²³ in total.

The Complainants specifically claimed that '(i) the conditions for operator B eligibility based on marketing of ACP bananas, (ii) the exemption of traditional ACP imports from operator category rules and (iii) the allocation of 30 per cent of the licences allowing imports of third-country bananas at in-quota tariff rates to Category B operators, are inconsistent with the requirements of Article I:1 of GATT,'¹²⁴ that is, that the discrimination complained of was not based on verifiable quality of the goods but origin-based.

Article I.1 provides as follows:

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed in the international transfer of payments for imports or exports and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any Member to any product originating in or destined for any other country *shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other Members* (emphasis added).

On the National Treatment question, the Complainants brought an argument predicated on Article III.4 GATT 1994. According to them,

the eligibility criteria for Category B operators and the allocation to Category B operators of 30 per cent of the licences required for the importation of third-country and non-traditional ACP bananas at the lower duty rate within the bound tariff quota are

¹²³ Panel Report, *EC – Bananas*, WT/DS27/R/USA adopted 22 May 1997, para. 7.83.

¹²⁴ *ibid*, para 7.188

inconsistent with Article III:4 of GATT because this licence allocation amounts to a requirement or incentive to purchase EC bananas in order to be eligible to import the bananas of Complainants' origin.¹²⁵

Again Article III:4 provides in relevant part:

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

The contested provisions of the Lomé waiver to ACP countries states:

the provisions of paragraph 1 of Article I of the General Agreement shall be waived, until 29 February 2000, to the extent necessary to permit the European Communities to provide preferential treatment for products originating in ACP States as required by the relevant provisions of the Fourth Lomé Convention, without being required to extend the same preferential treatment to like products of any other contracting party.¹²⁶

The Panel found

that the application in general of operator category rules in respect of the importation of third-country and non-traditional ACP bananas at in-quota tariff rates, in the absence of the application of such rules to traditional ACP imports, and in particular the allocation to Category B operators of 30 per cent of the licences allowing the importation of third-country and non-traditional ACP bananas at in-quota tariff rates, are inconsistent with the requirements of Article I:1 of GATT.¹²⁷

On appeal the EC canvassed, among others,

- i. that the Panel endorsed a different interpretation of the Lomé Convention and the Lomé waiver¹²⁸ from the one commonly accepted by the parties to the Convention,
- ii. that the decision taken by the EC Council in its meeting of 14 to 17 December 1992 reflects a common understanding that the Lomé commitments will be met by allowing tariff-free imports from each ACP country as explained in Protocol 5 on Bananas to the Lomé Convention,

¹²⁵ *ibid*, para. 7.171

¹²⁶ Article 168 of the Lomé Convention; see also Protocol 5 of the Convention.

¹²⁷ Para. 7.195 *EC – Bananas (US)*, WT/DS27/R/USA, adopted 22 May 1997.

¹²⁸ The Fourth ACP-EEC Convention of Lomé, Decision of the CONTRACTING PARTIES of 9 December 1994, L/7604, 19 December 1994 (the "Lomé Waiver"); and EC - The Fourth ACP-EC Convention of Lomé, Extension of Waiver, Decision of the WTO General Council of 14 October 1996, WT/L/186, 18 October 1996.

- iii. 'that Article 167 of the Lomé Convention states that the object of the Convention is to promote trade between the ACP States and the European Communities, and that the Lomé Convention highlights the importance of improving conditions for market access for the ACP States,'¹²⁹ and
- iv. that tariff preferences alone have been shown to be insufficient to ensure market access.

On the interpretation of Article I:1 of the GATT, I find the submission of the EC very persuasive; 'the European Communities argues that discrimination occurs in treating identical situations differently, or in treating different situations in the same way.'¹³⁰ In their view, 'nothing in Article I:1 forbids a Member to treat different situations on their merits.'¹³¹ What the WTO regime protects under the General Agreement is that 'like' products be accorded the same treatment irrespective of place of origin.

Equally interesting are the EC arguments and grounds of appeal on Article III:4 of the GATT 1994 (national treatment). The EC argues that the Panel misunderstood a 'border measure' for an 'internal measure' which are two completely different things. Referring to the Panel report in *Italian Discrimination Against Imported Agricultural Machinery* ("*Italian Agricultural Machinery*") the EC asserts that the panel report in *Italian Agricultural Machinery* stands for the proposition that Article III applies only to measures applied to imported products "once they have cleared through customs."¹³²

In their joint third party submission, Côte d'Ivoire, Ghana and Senegal, along with others, argue

¹²⁹ *EC – Bananas*, WT/DS27/AB/R adopted 9 September 1997, para. 29.

¹³⁰ *ibid*, para. 37.

¹³¹ *ibid*.

¹³² *Italian Discrimination Against Imported Agricultural Machinery* ("*Italian Agricultural Machinery*") adopted 23 October 1958, BISD 7S/60.

- i. that the Panel request by the Complaining Parties contains only ‘bare allegations of inconsistencies’ and does not provide, as required by Article 6:2 of the DSU, the summary of a legal basis for the allegations,
- ii. ‘that it is not the function of the Panel to cure errors in the submissions of the Complaining Parties,’
- iii. that the right ‘to observe’ accorded the ACP third participants diminished their ‘full participatory rights’ and ‘thereby tainted the whole proceeding,’
- iv. that the purpose of the Lomé Waiver was not fully considered by the Panel, that the Panel erred in interpreting the recitals to the Lomé Convention and also misinterpreted the Panel report in *United States – Restrictions on the Importation of Sugar and Sugar-Containing Products Applied Under the 1955 Waiver and Under the Headnote to the schedule of Tariff Concessions* (‘*United States – Sugar Waiver*’).¹³³
- v. that Protocol 5 should not be read in isolation from Article 168 of the Lomé Convention and that before 1990, there were no quantitative limitations on ACP exports to traditional markets,
- vi. that the Panel incorrectly determined that the EC commitments under the Lomé Convention were of no legal effects,
- vii. that the preferences granted under the WTO agreements were of a superficial manner and ‘make the demise of the ACP banana industry inevitable,’
- viii. that in the light of the ‘oligopolistic structure of the market, the Lomé Convention should be construed in the light of its object, purpose and context, and

¹³³ Adopted 7 November 1990, BISD 37S/228. The ACP third participants also referred to the *Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character*, done at Vienna, 14 March 1975, *AJIL* 1975, p. 730, as well as to the practice before other international adjudicatory bodies.

- ix. that the Panel misinterpreted the scope and application of GATS which is subsequent and supplementary to the GATT 1994 and as such that ‘Article II:1 of the GATS does not extend to the modifications of conditions of competition.’¹³⁴

With respect to Articles I of the GATT, the Complaining Parities/respondents (Ecuador, Guatemala, Honduras, Mexico and the United States) submit that the Panel correctly found that the procedures applicable to ACP bananas constitute a clear regulatory ‘advantage’ in violation of Article I:1 of the GATT 1994 and, in support of their argument, they referred to the Panel report in *United States – Non-Rubber Footwear*.¹³⁵ They countered the argument of the appellants that ‘different situations concerning the operators require a different allocation of quota rents’ by saying that it ‘legitimises regulations which discriminate explicitly among like products on the basis of their origin.’¹³⁶ The Complaining Parties assert that the MFN principle apply to any ‘rules and formalities,’ and describe the argument put forward by the EC that measures intended to implement competition policies are ‘outside the WTO’ as ‘confused and groundless’.

Subjecting the EC’s FAB to examination under the National Treatment principle of Article III:4 of the GATT 1994, the Complaining Party submit that the Panel correctly found the distribution of Category B licences to be inconsistent with the GATT. They cited *Italian Agricultural Machinery*¹³⁷ and also the Interpretative Note *Ad* ¹³⁸Article III of the GATT 1994. They insist that the ‘dispositive issue under Article III:4 is whether a discriminatory

¹³⁴ *EC – Bananas*, (n 102) paras. 106 to 113.

¹³⁵ *United States – Denial of Most-Favoured-Nation Treatment as to Non-‘rubber Footwear from Brazil*¹³⁵ (*‘United States – Non-Rubber Footwear’*), adopted 19 June 1992, BISD 39S/128, paras. 6.8-6.17.

¹³⁶ *EC – Banana* (102) para 68.

¹³⁷ N 105

¹³⁸ *Ad* Article III GATT 1994 reads, ‘Any internal tax or other internal charge, or any law, regulation or requirement of the kind referred to in paragraph 1 which applies to an imported product and to the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as an internal tax or other internal charge, or a law, regulation or requirement of the kind referred to in paragraph 1, and is accordingly subject to the provisions of Article III.’

advantage is affecting the marketing of the domestic product., they argue that the object and purpose of Article III is to comply with the National Treatment principle and assert that the EC could not claim that their Category B rules treated imported products the same way with domestic products after the foreign products had gone through customs clearance.

The findings of the Appellate Body (AB) read in relevant part that the AB

(k) upholds the Panel's findings that the non-discriminatory provisions of the GATT 1994, specifically, Articles I:1 and XIII, apply to the relevant EC regulations, irrespective of whether there are one or more 'separate regimes' for the importation of bananas;

...

(o) upholds the Panel's findings that Article III:4 of the GATT 1994 applies to the EC import procedures, and that the EC practice with respect to hurricane licences is inconsistent with Article III:4 of the GATT 1994.

The AB then recommends to the DSB to request the EC to bring its measures found to be inconsistent with the GATT and the GATS into conformity with the obligations of the EC under those agreements.

It is submitted that the findings in the case frustrates market access and the realisation of the overriding objective of the WTO to help 'developing countries, and especially the least developed among them, secure a share in the growth in international trade,'¹³⁹ or is the stated objective in the words of Westen an 'empty idea.'¹⁴⁰ This ruling subjects ECOWAS to double jeopardy: they can use neither the General Agreement nor a plurilateral or regional agreement to advance their economic interests. The implications of GATT/WTO rulings for economic development are discussed in detail in the next chapter.

5.8.4 *Nigeria as a third party participant in US – Shrimps WT/DS58*

¹³⁹ Preamble, *Marrakesh Agreement Establishing the World Trade Organisation*, para 2

¹⁴⁰ P Westen, 'The Empty Idea of Equality', (1982) 95(3) *Harvard Law Review* 537-596

The *US – Shrimp* case affected many countries and at the WTO Panel level there were three cases, the first, brought by India, Malaysia, Pakistan and Thailand¹⁴¹ jointly and, the other two, by Ecuador¹⁴² and Thailand¹⁴³ individually. In all three, the US measure at issue was found to be inconsistent with the provisions of the GATT 1994 Articles I:1 (MFN), XI:1 (Elimination of Quantitative Restrictions), XIII:1 (Non-discriminatory Administration of Quantitative Restrictions) and XX (General Exceptions).

The United States enacted Section 106 of Public Law 101 – 102¹⁴⁴ calling on the Secretary of State in consultation with the Secretary of Commerce to, *inter alia*, ‘initiate negotiations for the development of bilateral or multilateral agreements for the protection and conservation of sea turtles, in particular with foreign governments of countries which are engaged in commercial fishing operations likely to affect adversely sea turtles.’¹⁴⁵ Left like that, there would have been no problems or cases but Section 106

further provides that shrimp harvested with technology that may adversely affect certain sea turtles may not be imported into the United States, unless the President certified to Congress by 1 May 1991, and annually thereafter, that the harvesting nation has a regulatory programme and an incidental take rate comparable to that of the United States, or that the particular fishing environment of the harvesting nation does not pose a threat to sea turtles.¹⁴⁶

Research had found that ‘incidental capture and drowning of sea turtles by shrimp trawlers was the most significant source of mortality for sea turtles.’¹⁴⁷ As a result of that the National Marine Fisheries Service developed turtle excluder devices (TEDs), ‘a grid trapdoor installed

¹⁴¹ WT/DS58/R of 15 May 1998, adopted 6 November 1998.

¹⁴² WT/DS/335/R of 30 January 2007, adopted 20 February 2007.

¹⁴³ WT/DS/343/R of 29 February 2008 adopted August 2008.

¹⁴⁴ Section 106 of Public Order 102 – 102, codified at 16 United States Code (U.S.C.) § 1537.

¹⁴⁵ N 114 para. 2.7.

¹⁴⁶ *ibid.*

¹⁴⁷ National Research Council, National Academy of Sciences, (1990), *Decline of the Sea Turtles: Causes and Prevention*, Washington D.C.

inside a trawling net that allows shrimp to pass to the back of the net while directing sea turtles and other unintentionally caught large objects out of the net.’¹⁴⁸

The United States guidelines issued in 1991 required all shrimp trawl vessels to be fitted with TEDs.¹⁴⁹ Those whose shrimp harvesting methods had no adverse effect on sea turtles were not affected by the law, nor did it apply to aquaculture shrimp.¹⁵⁰ The scope of the law was limited to the ‘wider Caribbean/western Atlantic region.’¹⁵¹ A revised guideline in 1993 based the condition for certification on commitment to require TEDs on all commercial trawl vessels by 1 May 1993 and to receive certification from 1994 all affected countries must demonstrate the use of TEDs.

The US Court of International Trade (CIT) found¹⁵² both the 1991 and 1993 Guidelines to be ‘contrary to law’ because of limiting the scope of Section 106 to wider Caribbean/western Atlantic and so the scope was changed to cover everywhere: ‘to prohibit not later than May 1, 1996 the importation of shrimp or products of shrimp *wherever harvested in the wild* with commercial fishing technology which may affect adversely those species of sea turtles the conservation of which is the subject of regulations promulgated by the Secretary of State’¹⁵³ (emphasis added). As a result of the extraterritorial application of the US Section 106 Public

¹⁴⁸ N 114 para. 2.5.

¹⁴⁹ The 1991 Guidelines also determined that the scope of Section 609 was limited to the wider Caribbean/western Atlantic region, and more specifically to the following countries: Mexico, Belize, Guatemala, Honduras, Nicaragua, Costa Rica, Panama, Colombia, Venezuela, Trinidad and Tobago, Guyana, Suriname, French Guyana, and Brazil.

¹⁵⁰ Note 9 WT/DS58/R says, ‘In particular, vessels whose nets are retrieved exclusively by manual rather than mechanical means are not required to use TEDs, because it is considered that the lack of a mechanical retrieval system necessarily restricts tow times to a short duration, thereby limiting the threats of incidental drowning of sea turtles.’

¹⁵¹ The countries listed in N 117 above.

¹⁵² *Earth Island Institute v Warren Christopher*, 913 F. supp. 559 CCIT 1995).

¹⁵³ WT/DS58/R para. 2.10.

Law, India, Malaysia, Pakistan and Thailand jointly requested consultations with the US without any satisfactory solution and so a panel was set up. Nigeria and Senegal reserved their third party rights in accordance with Article 10 of the DSU.

According to the Panel ‘the US measure at issue is not within the scope of measures permitted under the chapeau of Article XX.’¹⁵⁴ It then ‘*recommends* that the DSB requests the United States to bring this measure into conformity with its obligations under the WTO Agreement’¹⁵⁵ (emphasis in the original). In other words, the US Section 106 was seen as ‘some artifice intended to protect the US fishing industry.’¹⁵⁶

The United States appealed and the issues raised on appeal were:

- (a) whether the Panel erred in finding that accepting non-requested information from non-governmental sources would be incompatible with the provisions of the DSU as currently applied; and
- (b) whether the Panel erred in finding that the measure at issue constitutes unjustifiable discrimination between countries where the same conditions prevail and thus is not within the scope of measures permitted under Article XX of the GATT 1994.¹⁵⁷

It is the second issue that is relevant to the subject of this thesis; it is also the line of argument taken by Nigeria.

5.8.5 *Nigeria at the Appellate Body in US – Shrimp*

At the Appellate Body Nigeria simply presented the same argument it had presented before the Panel as found in paragraphs 169¹⁵⁸ and 171¹⁵⁹ of the Report of the 1996 Committee on

¹⁵⁴ *ibid* para. 7.62.

¹⁵⁵ *ibid* para. 8.2.

¹⁵⁶ Panel Report para. 7.38.

¹⁵⁷ WT/DS58/AB/R 12 October 1998, adopted on 6 November 1998.

¹⁵⁸ Nigeria refers to WT/CTE/1, 12 November 1996. Paragraph 169 of the Report states: "WTO Member governments are committed not to introduce WTO-inconsistent or protectionist trade restrictions or countervailing measures in an attempt to offset any real or perceived adverse domestic economic or competitiveness effects of applying environmental policies; not only would this undermine the open, equitable

Trade and Environment (CTE). As shown in the footnotes below they sound more like an admonition than a legal argument.

III. A comparison of ECOWAS Member States and the New EU Members and at the WTO

5.9.1 Czech Republic

An examination of the TPRs of the twelve new EU Member States before they joined the Union in 2004 and 2007 shows that they had been more active at the WTO than ECOWAS Member States.

Table 10: TPRs of new EU members before joining the EU

s/n	Countries	As Complainants	As Respondents	As Third Parties
1	Bulgaria	0	0	0
2	Cyprus	0	0	0
3	Czech Republic	1 DS159	2 DS148	0

and non-discriminatory nature of the multilateral trading system, it would also prove counterproductive to meeting environmental objectives and promoting sustainable development. Equally, and bearing in mind the fact that governments have the right to establish their national environmental standards in accordance with their respective environmental and developmental conditions, needs and priorities, WTO Members note that it would be inappropriate for them to relax their existing national environmental standards or their enforcement in order to promote their trade. The CTE notes the statement in the 1995 Report on Trade and Environment to the OECD Council at Ministerial Level that there has been no evidence of a systematic relationship between existing environmental policies and competitiveness impacts, nor of countries deliberately resorting to low environmental standards to gain competitive advantages. The CTE welcomes similar policy statements made in other inter-governmental fora."

¹⁵⁹ Paragraph 171 of the Report states: "The CTE notes that governments have endorsed in the results of the 1992 UN Conference on Environment and Development their commitment to Principle 12 of the *Rio Declaration* that "Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global problems should, as far as possible, be based on an international consensus." There is a clear complementarity between this approach and the work of the WTO in seeking cooperative multilateral solutions to trade concerns. The CTE endorses and supports multilateral solutions based on international cooperation and consensus as the best and most effective way for governments to tackle environmental problems of a transboundary or global nature. WTO Agreements and multilateral environmental agreements (MEAs) are representative of efforts of the international community to pursue shared goals, and in the development of a mutually supportive relationship between them due respect must be afforded to both."

			DS289	
4	Estonia	0	0	0
5	Hungary	5 DS143 DS148 DS240 DS256 DS279	2 DS35 DS159	2 DS56 DS76
6	Latvia	0	0	0
7	Lithuania	0	0	0
8	Malta	0	0	0
9	Poland	3 DS122 DS235 289	1 DS19	1 DS114
10	Romania	0	2 DS198 DS240	0
11	Slovak Republic	0	3 DS133 DS143 DS235	0
12	0	0	0	0
Total		9	10	3

Source: Figures compiled with data available in the WTO website

As the table above shows, even before they joined the EU, Czech Republic, Hungary and Poland had complained about measures they considered to either directly or indirectly nullify or impair the benefits accruing to them or impede their attainment of the objectives of the WTO Agreements.

In *Hungary – Safeguard Measures*¹⁶⁰ the Czech Republic on 21 January 1999,

requested consultations with Hungary in respect of the imposition of quantitative restrictions by Hungary on imports of a broad range of steel products from the Czech Republic. The Czech Republic alleged that Hungary imposed a safeguard measure in the form of an import quota on imports of a broad range of steel products from the Czech Republic, and that this measure only applies to the Czech Republic. The Czech Republic contended that these quantitative restrictions are in breach of Hungary's obligations under GATT Articles I and XIX, as well as provisions of the Agreement on Safeguards.¹⁶¹

¹⁶⁰ *Hungary – Safeguard Measures on Import of Steel from Czech Republic*, request for consultations received on 21 January 1999.

¹⁶¹ http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds159_e.htm

5.9.2 Hungary

Before joining the EU, Hungary has been the most active user of the WTO dispute settlement mechanism among all the new members of the EU.

Table 11: WTO cases involving Hungary

Case Number	As Complainant
DS143	<i>Slovak Republic – Measures Affecting Import Duty on Wheat from Hungary</i>
DS148	<i>Czech Republic – Measures Affecting Import Duty on Wheat from Hungary</i>
DS240	<i>Romania – Import Prohibition on Wheat and Wheat Flour</i>
DS256	<i>Turkey – Import Ban on Pet Food from Hungary</i>
DS279	<i>Croatia – Measures Affecting Imports of Live Animals and Meat Products</i>
	As Respondent
DS35	<i>Hungary – Export Subsidies in Respect of Agricultural Products</i> (Complainants: Australia, Canada, New Zealand, Thailand and the USA).
DS159	<i>Hungary – Safeguard Measures on Import of Steel from Czech Republic</i>

As the TPRs of Hungary before joining the EU shows, Hungary had used the WTO platform to extract both the MFN and National treatments from other countries, especially its neighbours. It is also worthy of note that none of the five cases involving Hungary as either complainant or respondent proceeded to full hearing by the Panel, all ended at the stage of requesting consultations. However, in the case with Romania (*Romania – Import Prohibition on Wheat and Wheat Flour*), Hungary, basing its arguments on the nullification or impairment of its benefits under Article III:4 of the GATT 1994, was able to get Romania ‘to abrogate its legislation on quality requirements for imported wheat and wheat flour’ and so

the request was withdrawn.¹⁶² Also the two cases¹⁶³ based on the SPS Measure and the GATT Articles XI and XX ended in mutually agreed solutions by the parties.

Even as a respondent, Hungary had used the WTO dispute mechanism as a shield to protect its agricultural subsidies as it was allowed ‘a waiver of its WTO obligations’¹⁶⁴ and the case also ended in mutually agreed solutions.

5.9.3 Poland

Poland on its part has appeared as a complainant or respondent in four cases.

Table 12

Case Number	As Complainant
DS122	<i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H Beams from Poland</i>
DS235	<i>Slovakia – Safeguard Measures on Import of Sugar</i>
DS289	<i>Czech Republic – Additional Duty on Imports of Pig-Meat from Poland</i>
	As Respondent
DS19	<i>Czech Republic – Additional Duty on Imports of Pig-Meat from Poland</i>

In the three cases listed above in which Poland brought complaints to the WTO before it joined the EU, it succeeded in getting Thailand to revoke its duties¹⁶⁵ which Poland alleged was impeding its attainment of the objectives of the WTO Agreements. *Thailand – Steel* was the only case from the twelve new members of the EU that had full Panel and Appellate Reports on it.

¹⁶² http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds240_e.htm

¹⁶³ *Turkey – Import Ban on Pet Food from Hungary*, DS256, request for consultations received on 3 May 2002 and *Croatia – Measures Affecting Imports of Live Animals and Meat Products*, DS297, request for consultations received on 9 July 2003.

¹⁶⁴ *Hungary – Export Subsidies in Respect of Agricultural Products*, DS35, request for consultations received on 27 March 1996.

¹⁶⁵ *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H Beams from Poland*, WT/DS122/R adopted 5 April 2001 and Appellate Report WT/DS122/AB/R also adopted 5 April 2001.

In *Slovakia – Safeguard Measures*¹⁶⁶ ‘Slovakia agreed to a progressive increase of the level of its quota for imports of sugar from Poland between 2002 and 2004, and Poland agreed to remove its quantitative restriction on imports of butter and margarine’ which was a win-win situation.

The third case¹⁶⁷ from Poland concerned the additional duty on imports of pig-meat from Poland imposed by the Czech Republic. Invoking its rights under the GATT Articles I, II and XXIII, Poland insisted that it be accorded the MFN treatment.

IV. Summary

5.10.1 Compliance with WTO Agreements

In this chapter we have seen that the Member States of ECOWAS are complying with the WTO Agreements at great costs to their governments and citizens. Yet despite the great economic difficulties facing them, they are taking legislative and administrative measures to bring their trade policies in line with the WTO Agreements. At the regional level the ECOWAS Commission ensures that all the trade rules emanating from them are WTO-compliant or tending to comply with the Agreements in a progressive manner. All the countries apply the MFN treatment to their trading partners.

The Gambia’s Customs and Excise Act 2010¹⁶⁸ has incorporated the WTO customs valuation as a domestic law in the country. Ghana is stringently adhering to the mandatory technical

¹⁶⁶ *Slovakia – Safeguard Measures on Import of Sugar*, DS235, request for consultations received on 11 July 2001.

¹⁶⁷ *Czech Republic – Additional Duty on Imports of Pig-Meat from Poland*, DS289, request for consultations received on 16 April 2003.

¹⁶⁸ Cap 472, The Custom and Excise Act 2010, sections 127 and 128(B), see also the Finance Act No. 777 (C. 31) 2011.

standards of international organisations such as the International Organisation for Standardisation (ISO), the International Electrotechnical Commission (IEC) and the World Organisation for Animal Health (OIE).¹⁶⁹ As explained in the last chapter, the West African countries that make up the ECOWAS have both national and institutional memberships of the international standard-setting organisations mentioned in the SPS Agreement. The Constitution of the Fourth Republic of Togo 1992 (*Loi Fundamentale*) enshrines monism and the WTO Agreements can be invoked directly in the country as if national law.

5.10.2 Notifications

The provision for notifications in the Trade Policy Review Mechanism of the WTO is frequently used by ECOWAS Member States. Evidence of ‘the fullest possible degree of transparency’ has to be shown in ‘reports’ and ‘notifications made under the provisions of the Multilateral Trade Agreements.’¹⁷⁰ Benin, Burkina Faso and Mali have given notifications on Anti-Dumping and Countervailing Measures,¹⁷¹ Customs Valuation,¹⁷² TBT and TRIPS.

The Gambia has also used the notifications provision to show how the WTO Agreements on Agriculture¹⁷³ and SPS Measures could impinge on its laws. Both Niger and Senegal have notified the TPRB of the effects of the GATT and GATS on them especially with respect to the Agreement on Textiles and Clothing and the TBT.¹⁷⁴

¹⁶⁹ International Trade Centre, UNCTAD/WTO, *Influencing and Meeting International Standards: Challenges for Developing Countries, Vol. 2 – Procedures Followed by Selected International Standard-setting Organisations and Country Reports on TBT and SPS* (1st endn ITC, Geneva 2004)

¹⁷⁰ WTO Agreements, Annex 3, Trade Policy Review Mechanism, Section D, ‘Reporting.’

¹⁷¹ Agreement on Implementation of Article IV of the GATT 1994, Anti-Dumping and Countervailing Measures (Article 16.4).

¹⁷² Agreement on Customs Valuation, Article VII of the GATT 1994.

¹⁷³ As it affects domestic support, Arts. 10 and 18.2 and export subsidies (G/AG/N/GM/1/Rev.1 15 September 2005 and C/AG/N/GMB/3 of 15 September 2005) and the SPS Measures, Art. 7 (G/SPS/N/GMB/1 4 March 2010)

¹⁷⁴ In the case of Senegal, ‘Transitional Safeguard Mechanism’ G/TMB/N/122 of 9 August 1995 and on TBT, ‘Notification of Measures,’ G/TBT/Notif97.348 of 15 July 1997 and G/TBT/Notif00472 to 00473 of 3 October 2000^b.

5.10.3 *Market Access*

The thorny issue of market access has not gone to plan for the Member States of ECOWAS. This, according to the TPRR on Benin, Burkina Faso and Mali, is mainly due to ‘poor supply-side capacity’ such as the absence of basic services like water and electricity or banks that are not able to offer credits to farmers and traders. Despite the fact that almost all the countries are signatories to or involved in the Lomé Convention, the Cotonou Agreement, bilateral investment treaties with the EU and the USA, the AGOA, the Everything but Arms initiative, the Bangui Agreement and the WTO Agreements, market access has, in the main, remained elusive. Sometimes when they are granted at all, they do not cover agricultural products that are the major products of sub-Saharan or tropical Africa. Even when they are covered, the political caveat excludes the countries they are ostensibly meant to benefit (as is the case with the AGOA which is administered according to the whims and caprices of the President of the United States). The Gambia exported nothing under the AGOA in 2008 and poultry products from Niger to the EU have been banned by the OIE.¹⁷⁵

5.10.4 *Unresolved Issues*

The powerful arguments marshalled by the EC, Côte d’Ivoire, Ghana and Senegal in the *Banana* case are still begging for answers. According to the EC, ‘market preferences alone have been shown to be insufficient to ensure market access.’¹⁷⁶ The African countries submitted that the ‘oligopolistic structure of the market’ made it necessary that the Lomé Convention be ‘construed in the light of its object, purpose and context’ otherwise an adverse ruling would ‘make the demise of the ACP banana industry inevitable.’¹⁷⁷

¹⁷⁵ N 56

¹⁷⁶ *EC – Bananas*, WTO document WT/DS27/AB/R, 9 September 1997

¹⁷⁷ *ibid* paras. 106 to 113.

Following the steady fall in government revenue in the Gambia from taxes (16 per cent) and merchandise trade (30 per cent) from 2003 to 2009, to cite one example, it seems to beg the question that the WTO architecture as presently drawn and built will be able to deliver the promises held out to acceding countries in the Preamble to its Agreement signed in Marrakesh. Recent efforts¹⁷⁸ at addressing the issues are yet to receive the approval of ‘the GATT epistemic community’¹⁷⁹ and have remained apocryphal. Whether this is due to ‘rational ignorance’¹⁸⁰ or ‘Westphalian power politics,’¹⁸¹ the fact remains that the WTO is yet to work for the World’s poor as the TPRs we have examined in this chapter show. Again the fact that the DDA appears to have been stalled since it was launched in 2001 seems to suggest lack of will on the part of the world leading trading nations, namely, the USA, EC, Japan and Canada to reposition the WTO to work for all.

The next chapter will examine the adjudication of the MFN and National Treatment principles at the WTO.

¹⁷⁸ Jane Kelsey, *Serving Whose Interests? The Political Economy of Trade in Services Agreements* (Oxford, Routledge-Cavendish, 2008), see also Roger C. Riddell, *Does Foreign Aid Really Work?* (Oxford, OUP, 2007)

¹⁷⁹ Steve Charnowitz, ‘What Is International Economic Law?’ *Journal of International Economic Law*, 14(1) March 2011, p.22.

¹⁸⁰ Ernst-Ulrich Petersmann, ‘International Economic Law, “Public Reason”, and Multilevel Governance of Interdependent Public Goods,’ *Journal of International Economic Law*, 14(1) March 2011, p.24.

¹⁸¹ *ibid*, p.25.

Chapter 6

Non-discrimination, Market Access and WTO Adjudication:

- **The Application of the Principles of Non-Discrimination by the WTO and the Quest for Market Access and Development by ECOWAS Member States**

Outline

6.1 Introduction

6.2.1 *EC – Hormones* (DS26/48)

6.2.2 A Critique of the Appellate Body's Ruling in *EC – Hormones*

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6.3.2 The Lome Waiver

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6.4 *Turkey – Textiles* (DS34)

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6.6 *India – Quantitative Restrictions* (DS90)

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6.7.2 The Twists and Turns in *Canada - Autos*

6.8.1 *EC – Tariff Preferences* (DS246)

6.8.2 A Dissenting Panel Opinion

6.9 *EC – Biotech* (DS291/292)

6.10 Summary

6.1 Introduction

Promoting economic development through trade is considered one of the policy objectives that the WTO Agreements recognise as legitimate¹ and the principal benefit of assuming the substantive WTO obligations.

The WTO cases selected for analysis in this chapter are the key ones in which the measures at issue have been the prohibitions on the importation and placing on the market of the products of one WTO Member by another. The underlying factor in the cases is ‘the economic development of all trading partners and the development of developing countries.’² Expectedly while the issues have revolved around market access, trade liberalisation and economic development, the provisions of the WTO Agreements most hotly contested are the principles of non-discrimination (MFN and National Treatment),³ quantitative restrictions⁴ and the SPS and TBT Agreements (discussed in chapters 1, 3 and 4). The cases are selected for reasons of ‘compensatory constitutionalism,’ that is, how the WTO dispute settlement mechanism nurtures transnational justice in the international sphere where national courts lack jurisdiction and because of the central role of the DSB in fostering the ‘rule of law in transnational relations,’ as well as in ‘clarifying disputed interpretations of (world trade) rules, principles, and incomplete agreements,’”⁵ and holding up itself as ‘exemplar of public

¹ The Preamble to the Marrakesh Agreement Establishing the WTO (UNTS 3; 33 ILM 1125 at 1144) mentions ‘economic development’ as one of the objectives of the Organisation and in the substantive part provides for the ‘progressive development of the economies of all contracting parties’ in Part IV, GATT Article XXXVI-XXXVIII (GATT Final Act 2nd Sp.Sess.25). Note that Part IV (added 8 February 1965) has no UNTS number.

² Para. 2, Preamble to the GATS.

³ GATT Article I and III respectively.

⁴ GATT Article XI (General Elimination of Quantitative Restrictions), Article XIII (Non-discriminatory Administration of Quantitative Restrictions) and Article XVIII (General Assistance to Economic Development, Balance of Payments).

⁵ Ernst-Ulrich Petersmann, ‘International Economic Law, ‘Public Reason’, and Multilevel Governance of Interdependent Public Goods,’ *Journal of International Economic Law*, Vol. 14(1) March 2011, 71. See also E. U. Petersmann, ‘Constitutional Theories of International Economic Adjudication and Investor-State Arbitration,’ in P. M. Dupuy, F. Francioni and E. U. Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (Oxford: OUP, 2009) 137-94.

reason.⁶ ‘Justice’ in this context means the promotion of the aims of the GATT and the WTO of ‘raising the standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand . . . to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade.’⁷ Therefore, the objective of this chapter is to examine how the DSB has through its adjudicatory role facilitated and enhanced or impeded and forestalled the quest for world market share of ECOWAS Member States all of who are either ‘developing’ or ‘least developed;’ as Steve Charnovitz puts it, how the DSB places ‘economic and social actors at the center of the analysis of how to maximize *market freedom* while respecting *human dignity*,’⁸ in other words, how the DSB tries to balance the conflicting interests for trade liberalisation and private profits of the transnational corporations vis-à-vis the development and market access yearnings of a majority of WTO members including ECOWAS Member States (emphasis mine).

The DSB’s approach to the interpretation of the WTO Agreements is markedly different from the European Court of Justice’s (ECJ) approach to the interpretation of the EU Treaty; while the DSB is literal and mechanistic, the ECJ is creative, purposive and teleological. For

⁶ J. Rawls, *Political Liberalism*, (Cambridge, MA: Harvard University Press, 1993) 231. As Petersmann, above, explains,

The context of Rawlsian ‘public reason’ comprises substantive principles of justice (such as fundamental rights) as well as procedural principles of justice (such as due process of law, independence and impartiality of courts, democratic governance) that tend to be applied most consistently by Supreme Courts as the only democratic institution that has to justify its reasoning on constitutional grounds. Habermas’ theory of ‘deliberative democracy’ focuses on the role of courts as guardians of the constitutional conditions of *procedural legitimacy*: ‘if one understands the constitution as an interpretation and elaboration of a system of rights in which private and public autonomy are internally related (and must be simultaneously enhanced), then a rather bold constitutional adjudication is even required in cases that concern the implementation of democratic procedure...’ (italics in the original).

All that is said here also apply to the WTO’s DSB more or less if one would substitute ‘constitution’ with ‘WTO Agreements’ and in place of ‘Supreme Courts’ insert ‘the DSB.’

⁷ The Preambles, GATT 1947 and the WTO Agreement 1994.

⁸ Steve Charnovitz, ‘What Is International Economic Law,’ *Journal of International Economic Law*, 14(1) 3-22 at 22.

example, in the *EC – Chicken Cuts*⁹ the Panel and the Appellate Body devoted 95 and 67 pages, respectively, explicating the meaning of the word ‘salted’ which appeared as part of a tariff heading. The ECJ, on the other hand, follows the purposive rule which seeks to find out the purpose of the legislative body in enacting a piece of legislation and interpreting the law so as to bring out the prime purpose of the EU legal system. To cite one example, in the *Kadi*¹⁰ judgment the ECJ overruled the judgments of the Court of First Instance in two cases *Kadi*¹¹ and *Yusuf*¹² in deference to the EU Law which accords greater protection of fundamental rights to EU citizens. The ECJ is so strong in upholding EU Law that *Kadi* is said to have raised ‘a number of questions regarding its effects on the structure of the international legal order... whether the primacy of UN Charter obligations is jeopardised.’¹³

In effect, this approach of reciprocal concessions only works if there is a way to implement UN Security Council resolutions in conformity with fundamental rights of the EU. If it would only be possible to put a resolution into effect by adopting a Community act which breaches fundamental rights—if there were a real conflict between obligations arising under the UN Charter on the one hand and EU fundamental rights as “principles that form part of the very foundations of the Community legal order” on the other—EU fundamental rights prevail. Thus, the ECJ’s commitment to accept the primacy of UN Charter obligations and the integrity of UN Security Council resolutions ends in the absence of discretionary power to implement such resolutions in a fundamental rights-friendly way.¹⁴

Gerard Conway points out that the DSB ‘follows relatively restrained and conserving methods of interpretation’ in contradistinction to the ECJ.¹⁵ On the different approaches between the EU court and the WTO judicial arm, Ehlermann’s explanation bears quoting extensively:

⁹ Panel Report, *EC – Chicken Cuts, Complaint made by Brazil*, WT/DS269/R, paras 7.84 – 7.424; modified by *Appellate Body Report, European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, adopted 27 September 2005, paras 170 – 346. See also Isabelle Van Damme, ‘The Interpretation of Schedules of Commitments,’ 41(1) *Journal of World Trade* 1 (2007).

¹⁰ Joined Cases C-402/05 P & C-415/05 P. *Kadi & Al Barakaat v. Council of European Union*, 3 C.M.L.R. 41 (2008).

¹¹ Case T-315/01, *Kadi v. Council & Comm’n*, 2005 E.C.R. II-3649.

¹² Case T-306/01, *Yusuf & Al Barakaat Int’l Found. v. Council & Comm’n*, 2005 E.C.R. II-3533.

¹³ Albert Posch, ‘The Kadi Case: Rethinking the Relationship between EU Law and International Law,’ 15 *Colum. J. Eur. L Online* 1 (2009) 4. See also Ramses A. Wessel, ‘The Kadi Case: Towards a More Substantive Hierarchy in International Law?’ *International Organisations Law Review* 5(2008) 323 – 327 available at www.brill.nl/iolr

¹⁴ *Ibid.*

¹⁵ Gerard Conway, *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge University Press 2012) 22-23.

42. According to Article 31.1 of the Vienna Convention, “a Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Among these three criteria, the Appellate Body has certainly attached the greatest weight to the first, i.e. “the ordinary meaning of the terms of the treaty.” This is easily illustrated by the frequent references in Appellate Body reports to dictionaries, in particular to the Shorter Oxford dictionary, which, in the words of certain critical observers, has become “one of the covered agreements”. The second criterion, i.e. “context” has less weight than the first, but is certainly more often used and relied upon than the third, i.e. “object and purpose”.

43. For somebody having spent most of his professional life observing the European Court of Justice in interpreting European Community law, the difference in style and methodology could hardly be more radical. I do not remember that the EC Court of Justice has ever laid down openly and clearly the rules of interpretation that it intended to follow. What I do remember is that among the interpretative criteria effectively used by the EC Court of Justice, the predominant criterion was – and probably still is – “object and purpose”. While the Appellate Body clearly privileges “literal” interpretation, the EC Court of Justice is a protagonist of “teleological” interpretation....

47 ...This choice has given clear guidance to members of the WTO and to panels....The heavy reliance on the “ordinary meaning to be given to the terms of the treaty” has protected the Appellate Body from criticisms that its reports have added to or diminished the rights and obligations provided in the covered agreements (Article 3.2, third sentence, DSU). On a more general level, the interpretative method, established and clearly announced by the Appellate Body, has had a legitimising effect, and this from the very beginning of its activity.¹⁶

The determination of nullification or impairment¹⁷ of any benefits accruing directly or indirectly to WTO Member States and other findings by the DSB have been of enormous interest to trading nations and the GATT/WTO epistemic community because a dispute settlement system such as exists within the WTO framework should ‘reflect, promote, and depend on “public reason” as a necessary restraint on the rational egoism of the *homo economicus*’¹⁸ which is the justification for the shift from the power-oriented GATT 1947 to the rules-based WTO multilateral trading system. While Petersmann urges the WTO as a body to overcome the ‘Anglo-Saxon conceptions of markets as neutral arenas,’¹⁹ he also stresses that the DSB should apply itself to ‘protecting... against abuses of “rule by law” ...

¹⁶ C-D. Ehlermann, ‘Some Personal Experiences as Member of the Appellate Body of the WTO’, Robert Schuman Centre Policy Paper No. 02/9 (2002), paras 43-47.

¹⁷ Article XXIII GATT 1994.

¹⁸ Petersmann (n 5) 26.

¹⁹ *ibid* 39.

and ... departures from “rule of international law.”²⁰ There is a tension between the idea of a system of rules as the legal paradigm and the idea that the judiciary should seek to achieve substantive justice, because the latter involves policy trade-offs that cannot really be reduced to rules, although there have been attempts, most famously by Robert Alexy, to argue that the balancing of incommensurable interests is objective.²¹ This also touches on the distinction between formal and substantive conceptions of the rule of law,²² or institutional roles and suitability or fitness for purpose and democratic legitimacy.²³

This chapter is divided into three parts: this introduction, the second part which examines some WTO cases in which the provisions on the MFN, National Treatment, quantitative restrictions and the SPS Agreement have been disputed and the last part which summarises the work.

6.2.1 European Communities Measures Concerning Meat and Meat Products (Hormones)²⁴

²⁰ Ibid 36.

²¹ TA Aleinikoff, ‘Constitutional Law in the Age of Balancing’, (1987) 96(5) *Yale Law Journal* 943-1005; R Alexy, ‘Balancing, Constitutional Review, and Representation’, (2005) 3(4) *International Journal of Constitutional Law* 572-581; K Möller, ‘Balancing and the structure of constitutional rights’, (2007) 5(3) *International Journal of Constitutional Law* 453-468

²² B Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press 2004)

²³ N Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* (University of Chicago Press 1994)

²⁴ Appellate Body Report, *EC Measures Concerning Meat and Meat Products* (hereinafter *EC – Hormones*) WT/DS26/AB/R, WT/DS48/AB/R Complaint by Canada and the United States 16 January 1998. There are many scholarly articles in the *Journal of International Economic Law* entirely devoted to or with passing comments on the *Hormones*: Joost Paulwelyn, ‘Evidence, Proof and Persuasion in WTO Dispute Settlement,’ (1998) 1(2) 227-258; Maurts Lugard, ‘Scope of Appellate Review: Objective Assessment of the Facts and Issues of Law,’ 1998 1(2) 323-327; Dona Roberts, ‘Preliminary Assessment of the Effects of the WTO Agreement on Sanitary and Phytosanitary Trade Regulations,’ (1998) 1 (3) 377-405; G S Desmedt, ‘Hormones: ‘Objective Assessment’ and (or as) Standard of Review,’ (1998) 1(4) 695-698; R Quick and A Blüther, ‘Has the Appellate Body Erred? An Appraisal and Criticism of the Ruling in the WTO Hormones Case,’ (1999) 2(4) 603-639; Joost Paulwelyn, ‘The WTO Agreement on Sanitary and Phytosanitary (SPS) Measures As Applied in the First Three SPS Disputes: *EC – Hormones*, *Australian – Salmon* and *Japan – Varietals*,’ (1999) 2(4) 641-664. M McNelis, ‘The Role of the Judge in the EU and WTO: Lessons from the *BSE* and *Hormones* Cases,’ (2001) 4(1) 189-208; Geert A. Zonnekeyn, ‘The Latest on the Indirect Effect of WTO Law in the EC Legal Order: The *Nakajuma* Case Law Misjudged?’ (2001) 4(3) 597-608; Gary Clyde Hufbauer, ‘Navigating by the

In the *EC – Hormones* the Panel dealt with two complaints against the European Communities (EC) relating to an EC prohibition of importation and placing on the market meat and meat products treated with certain hormones from the United States and Canada. In both cases the same conclusion was reached: that the EC had acted inconsistently with the requirements contained in Articles 2.3 and 5.1 of the SPS Agreement by adopting arbitrary or unjustifiable distinctions... which resulted in ‘discrimination or a disguised restriction on international trade.’²⁵

The EC disagreed with the Panel and made claims of errors in law by the Panel on the burden of proof, standard of review, the precautionary principle, objective assessment of facts and procedural issues including the interpretation of certain articles of the SPS Agreement and so appealed the decision. On appeal, the Appellate Body agreed with the Panel that the precautionary principle could not override the explicit wording of Article 5 paragraphs I and 2, that the SPS Agreement applies to measures that were enacted before the entry into force of the WTO Agreement, but that remain in force thereafter, that the EC measures at issue were inconsistent with the requirements of Article 5.1 of the SPS Agreement; but *reversed* the Panel’s conclusions that the term ‘based on’ as used in Articles 3.1 and 3.3 has the same meaning as the term ‘conform to’ as used in Article 3.2 of the SPS Agreement, also *reversed* that the EC by *maintaining, without justification* under Article 3.3, SPS measures which were not based on existing international standards, acted inconsistently with Article 3.1 of the SPS Agreement, further *reversed* the Panel’s finding that the term ‘based on’ as used in Article

Stars,’ (2002) 5(1) 17-89; Alan Wm. Wolff, ‘What do Doha Do? An Initial Assessment,’ (2002) 5(1) 202-206; Yuji Iwasawa, ‘WTO Dispute Settlement As Judicial Supervision,’ (2002) 5(2) 287-305; Chi Carmody, ‘Remedies and Conformity under the WTO Agreement,’ (2002) 5(2) 307-329; Jiaxiang Hu, ‘The Role of International Law in the Development of WTO Law,’ (2004) 7(1) 143-167; Geert A. Zonnekeyn, ‘EC Liability for Non-implementation of WTO Dispute Settlement Decision – Are the Dice Cast?’ (2004) 7(2) 483-490; Claus-Dieter Ehlermann and Nicolas Lockhart, ‘Standard of Review in WTO Law,’ (2004) 7(3) 491-521; Steve Charnovitz, ‘An Analysis of Paschal Lamy’s Proposal on Collective Preferences,’ (2005) 8(2) 449-472; Joel P. Trachtman, ‘The Missing Link: Coherence and Poverty at the WTO,’ (2005) 8(3) 611-622; Caroline E. Foster, ‘Public Opinion and the Interpretation of WTO’s Agreement on SPS Measures,’ (2008) 11(2) 427-458.

²⁵ *Ibid* para. 6.

5.1 of the SPS Agreement entailed a ‘minimum procedural requirement’ that a Member imposing an SPS measure must submit evidence that it took into account a risk assessment when it enacted or maintained the measure and finally *reversed* the Panel’s findings and conclusions on Article 5.5 of the SPS Agreement.²⁶

With all due respect to the Appellate Body, the above reversals of the findings of the Panel is baffling and incites curiosity and even questions if not doubts as to the reasonableness of the decisions of the AB in view of the ‘history of events’ which the Panel stated lucidly in paragraphs II.26 to II.29 of their report containing the report of the EC’s own committee of experts that the hormones in question were in no way harmful to human health.

The EC Council of Ministers adopted its first Directive on the issue (81/602/EEC) on 31 July 1981. In that Directive, and in regard to five of the hormones at issue (all but MGA), the Council directed the Commission to provide, not later than 1 July 1984, a report on the experience acquired and scientific developments, accompanied, if necessary, by proposals taking into account these developments. Accordingly, the Commission set up a Scientific Group on Anabolic Agents in Animal Production, chaired by Professor G.E. Lamming (the "Lamming Group"). The question addressed to the Lamming Group was:

"Does the use for fattening purposes in animals of the following substances: oestradiol-17 β , testosterone, progesterone, trenbolone and zeranol present any harmful effect to health?"²⁷

The Lamming Group issued an interim report on 22 September 1982 (the "Lamming Report"). The Lamming Report concluded as follows:

"The Scientific Working Group is of the opinion that the use of oestradiol-17 β , testosterone and progesterone and those derivatives which readily yield the parent compound on hydrolysis after absorption from the site of application would not present any harmful effects to the health of the consumer when used under the appropriate conditions as growth promoters in farm animals."²⁸

It is worthy of note that the following three other eminent groups supported the Lamming Report: the EC Scientific Veterinary Committee on 9 November 1982, the EC Scientific

²⁶ Para. 253 of the Appellate Report, *EC – Hormones* n 19 above.

²⁷ Report of the (EC) Scientific Veterinary Committee, Scientific Committee for Animal Nutrition and the Scientific Committee for Food on the Basis of the Report of the Scientific Group on Anabolic Agents in Animal Production, pp. 1 & 12.

²⁸ *EC – Hormones*, WT/DS26/R/USA, para. II.28.

Committee for Animal Nutrition on 17 November 1982 and the EC Scientific Committee for Food on 4 February 1983 and all ‘supported the conclusions and recommendations of the Lamming Report.’²⁹ Therefore, the EC ban could not have been based on the ‘scientific justification’ provision of Article 3.3 of the SPS Agreement which is an acceptable exception to ‘arbitrary and unjustifiable discrimination between Members’ and ‘a disguised restriction on international trade.’³⁰

With respect to harmonisation, Article 3.3 of the SPS Agreement provides that:

Members may introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification, or as a consequence if the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5. Notwithstanding the above, all measures which result in a level of sanitary and phytosanitary protection different from that which would be achieved on international standards, guidelines or recommendations shall not be inconsistent with any other provision of this Agreement.³¹

Other provisions of the SPS Agreement contested in *EC – Hormones* were Articles 3.1 enjoining Members to ‘base their SPS measures on international standards, guidelines or recommendations,’ 5.1 to ‘ensure that their SPS measures are based on an assessment ... of the risks to human, animal or plant life or health,’ and 5.5 stressing for ‘consistency in the application of the concept of appropriate level of SPS protection against risks’ so as to ‘avoid

²⁹ *ibid* para. II.29

³⁰ The Preamble para 1 and Article 2.3, SPS Agreement

³¹ The footnote to paragraph 3 of Article 3 reads,

For the purposes of Article 3.3, there is a scientific justification if, on the basis of an examination and evaluation of available scientific information in conformity with the relevant provisions of this Agreement, a Member determines that the relevant international standards, guidelines and recommendations are not sufficient to achieve its appropriate level of sanitary or phytosanitary protection.

Also Article 11.2 of the SPS Agreement provides the following:

In a dispute under this Agreement involving scientific or technical issues, *a panel should seek advice from experts* chosen by the panel in consultation with the parties to the dispute. To this end, *the panel may, when it deems it appropriate, establish an advisory technical experts group*, or consult the relevant international organizations, at the request of either party to the dispute or on its own initiative" (emphasis added).

arbitrary or unjustified distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or disguised restriction on international trade.’

Both at the Panel and the Appellate Body, the EC never argued that its measures were ‘based on international standards’³² but rather that ‘a measure may deviate – but not substantially – from the content of a recommendation of the Codex and still be considered as ‘based on’ that recommendation for the purposes of Article 3.1.’ Again ‘that Article 3 employs the term ‘based on’ in paragraphs 1 and 3, whereas it uses the term ‘conform to’ in paragraph 2 and that the ‘terms differ in meaning.’³³ The reasoning of the Panel is enunciated in the following lines:

According to Article 3.3 all measures which *are* based on a given international standard should in principle achieve the *same* level of sanitary protection. Therefore, if an international standard reflects a specific level of sanitary protection and a sanitary measure implies a *different* level, that measure cannot be considered to be *based on* the international standard³⁴ (original italics).

Then in conclusion, ‘We find, therefore, that for a sanitary measure to be *based on* an international standard in accordance with Article 3.1, that *measure* needs to reflect the same level of sanitary protection as the *standard*,’ says the Panel.

In respect of the first part of Article 5.5 the Panel was of the view that ‘[c]onsistency is not imposed as an *obligation* but as an *objective* which has to be taken into consideration in the interpretation of Article 5.5’ (italics mine). In the view of the Panel, what creates an obligation is the second part of the first sentence of Article 5.5 of the SPS Agreement because

³² Para 3(a) of Annex A of the SPS Agreement defines international standards as: ‘International standards, guidelines and recommendations for food safety, the standards, guidelines and recommendations established by Codex Alimentarius Commission relating to food additives, veterinary drug and pesticide residues, contaminants, methods of analysis and sampling, and codes and guidelines of hygienic practice.’

³³ *EC – Hormones*, WT/DS26/AB/R paras. 20 & 21.

³⁴ *EC – Hormones*, WT/DS26/R/USA, para 8.72

it stipulates that ‘each Member *shall* avoid arbitrary or unjustifiable distinctions’ so as not be in breach of Article 2.3.³⁵ Being constrained because ‘the European Communities has not provided evidence of *an identifiable risk* related to the presence of five of the six hormones at issue for which international standards exist when these hormones are used for growth promotion purposes in accordance with good practice,’³⁶ the Panel found that the EC had ‘not established’ its case (italics mine).

Before analysing the views of the Appellate Body it is necessary to contextualise *EC – Hormones*. The case is older than the WTO as its history or the precursor to it goes back to the Tokyo Round of multilateral trade negotiations during the GATT years. The following two paragraphs of the Panel Report tell the history and how the use of blocking (in the *Hormones* case) prevalent under the GATT frustrated proceedings.

In March 1987, the United States raised the issue of the EC ban under the Tokyo Round Agreement on Technical Barriers to Trade ("TBT Agreement"). Bilateral consultations between the United States and the European Communities failed to resolve the dispute. Arguing that the EC Directive was not supported by scientific information, the United States requested the establishment of a technical experts group ("TEG") under Article 14.5 of the TBT Agreement to examine the question. This request was denied following the EC response that the use of growth promotants was a process and production method (PPM), and that parties to the TBT Agreement only had an obligation not to use PPMs to circumvent the Agreement. The European Communities favoured the establishment of a panel "to evaluate the rights and obligations of Parties deriving from Article 14.25 (of the TBT Agreement)". The dispute went unresolved.

On 1 January 1989, the United States introduced retaliatory measures in the form of 100 per cent ad valorem duties on a list of products imported from the European Communities. The European Communities consequently asked for the establishment of a panel. This request was denied by the United States. In 1989, a joint US/EC Task Force agreed on certain measures which allowed imports into the European Communities of US meat certified to have not been produced with hormones. This resulted in the United States withdrawing some products from the retaliation list. The other EC products figuring in the list remained subject to the retaliatory action. On 19 June 1996, the European Communities requested the establishment of a panel to examine this matter. On 15 July 1996, after this Panel was composed, the United States terminated its retaliatory action in its entirety.³⁷

³⁵ *ibid* para. 8.170

³⁶ *ibid* para. 8.162.

³⁷ *EC – Hormones*, WT/DS26/R/USA, paras II.34 and 2.35.

6.2.2 A critique of the reasoning of the Appellate Body in *EC – Hormones*

Paragraph 6 of Article 17 of the DSU provides that ‘[a]n appeal shall be limited to *issues of law* covered in the *panel report* and *legal interpretations* developed by the Panel.’ According to paragraph 12 of the same article, ‘[t]he Appellate Body shall address each of the issues raised in accordance with paragraph 6 during the appellate proceeding’ and ‘may uphold, modify or reverse the *legal findings and conclusions* of the panel’ as stated in paragraph 13 (italics added). Therefore, these three paragraphs do not only limit the Appellate Body to ‘issues of law and legal interpretations’ but clearly provide that it should base its findings and conclusions solely on law and legal interpretations unlike a panel which hears a case for the first time and whose ‘terms of reference’ and ‘functions’ cover making ‘findings’³⁸ and an ‘objective assessment of the matter before it, including an objective assessment of *facts of the case* and the applicability of and conformity with *the relevant covered agreements*’³⁹ (emphasis added). It is, therefore, humbly submitted that the Appellate Body does not have the dual role which the DSU assigns to the Panel of assessing facts and conformity with the law rather the Appellate Body is restricted to law and its interpretations as stated by the Panel. It cannot go on a frolic of its own.

In line with the views of Ehlermann endorsed by Conway above⁴⁰ that the Appellate Body favours ‘literal interpretation’ over and above the ‘object and purpose’ of the covered agreements and the jibe that ‘the Oxford Shorter Dictionary has become one of the covered agreements,’ the Appellate Body in reversing the interpretation of ‘base on’ as given by the Panel cites a dictionary twice in the same paragraph, the only difference is that this time it is

³⁸ Article 7, DSU.

³⁹ Article 11, DSU.

⁴⁰ N 15.

*The New Shorter Oxford English Dictionary on Historical Principles.*⁴¹ In the opinion and interpretation of the Appellate Body,

"based on" and "conform to" are used in different articles, as well as in differing paragraphs of the same article. Thus, Article 2.2 uses "based on", while Article 2.4 employs "conform to". Article 3.1 requires the Members to "base" their SPS measures on international standards; however, Article 3.2 speaks of measures which "conform to" international standards. Article 3.3 once again refers to measures "based on" international standards. The implication arises that the choice and use of different words in different places in the SPS Agreement are deliberate, and that the different words are designed to convey different meanings. A treaty interpreter is not entitled to assume that such usage was merely inadvertent on the part of the Members who negotiated and wrote that Agreement.⁴²

Ironically, the Appellate Body thought of itself as pursuing the 'object and purpose' of the SPS Agreement and not the Panel.⁴³ I would like to point out here that the 'object and purpose' of the SPS Agreement as pointed out in its preamble is 'to further the use of harmonised sanitary and phytosanitary measures between members on the basis of international standards, guidelines and recommendations developed by the relevant international organisations... so that measures are not applied in a manner which would constitute ... a disguised restriction on international trade.' Since international standards were available for five of the six hormones in dispute and the EC did not follow one of them, it is not surprising that the findings and recommendations of the Appellate Body invited more critical than favourable comments from international economic law scholars and world trade policy commentators around the world.⁴⁴

⁴¹ 'We are unable to accept this interpretation of the Panel. In the first place, the ordinary meaning of "based on" is quite different from the plain or natural import of "conform to". A thing is commonly said to be "based on" another thing when the former "stands" or is "founded" or "built" upon or "is supported by" the latter.¹⁵⁰ In contrast, much more is required before one thing may be regarded as "conform[ing] to" another: the former must "comply with", "yield or show compliance" with the latter. The reference of "conform to" is to "correspondence in form or manner", to "compliance with" or "acquiescence", to "follow[ing] in form or nature".¹⁵¹ A measure that "conforms to" and incorporates a Codex standard is, of course, "based on" that standard. A measure, however, based on the same standard might not conform to that standard, as where only some, not all, of the elements of the standard are incorporated into the measure.' Footnotes 150 and 151 both refer to the dictionary in paragraph 163, WT/DS26 & 48/AB/R.

⁴² Appellate Body Report, *United States – Underwear*, adopted 25 February 1997, WT/DS24/AB/R, p. 17.

⁴³ Appellate Report, *EC – Hormones*, para. 165.

⁴⁴ See (n 24) above.

Again on the issue of ‘risk assessment,’ the Appellate Body seized on the term ‘risk management’ used by the Panel to draw the attention of the EC that it was leaving its duty and doing something else. It is submitted here that while the term used by the Panel to explain itself is important, the legal issue is whether the EC based its ban on an objective assessment of ‘the risks to human, animal or plant life or health.’ ‘Risk assessment’ is defined as

The evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences; or the evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs.⁴⁵

Therefore, the reasoning of the Appellate Body for reversing the findings of the Panel beggars belief because it left the legal argument or interpretation and picked the linguistic nuances that were not the basis of the findings by the Panel. They said:

The Panel observed that an assessment of risk is, at least with respect to risks to human life and health, a "scientific" examination of data and factual studies; it is not, in the view of the Panel, a "policy" exercise involving social value judgments made by political bodies. The Panel describes the latter as "non-scientific" and as pertaining to "risk management" rather than to "risk assessment". We must stress, in this connection, that Article 5 and Annex A of the *SPS Agreement* speak of "risk assessment" only and that the term "risk management" is not to be found either in Article 5 or in any other provision of the *SPS Agreement*. Thus, the Panel's distinction, which it apparently employs to achieve or support what appears to be a restrictive notion of risk assessment, has no textual basis. The fundamental rule of treaty interpretation requires a treaty interpreter to read and interpret the words actually used by the agreement under examination, and not words which the interpreter may feel should have been used.⁴⁶

An Appellate Body has the advantage of the last word on an issue which acts as a foreclosure but that does not mean that it should dispense with superior reasoning or more convincing and, with respect to the object and purpose of the covered agreements, pro-market, WTO-compliant and both SPS- and TBT-friendly findings and conclusions.

⁴⁵ Annex A, para. 4, SPS Agreement.

⁴⁶ Appellate Report, *EC – Hormones*, para.181.

Going by the history of events under the GATT and the WTO, a likely effect of the findings and conclusions of the Appellate Body is that a powerful State could in disregard of international standards and without any identifiable risk assessment impose any SPS measure as a façade of its restriction on international trade and get it endorsed by the DSB as not being inconsistent with the covered multilateral agreements thereby defeating the object and purpose of the World Trade Organisation.

Had the Appellate Body wanted to base its upholding, modifications and reversals on ‘issues of law and legal interpretations’⁴⁷ as it is outside its remit to make findings of fact, it would have provided answers to all or most of the following questions:

1. What requirements must be met for the SPS Agreement to apply to a specific measure?
2. What is the relationship between the SPS Agreement and the GATT 1994? If a measure falls under both, how should a panel proceed?
3. How does the treatment of health measures under the SPS Agreement differ from that under Article XX(b) of the GATT 1994?
4. What options do Members have with regard to international harmonised standards?
5. When is an SPS measure ‘based on’ a risk assessment? In assessing risk, what factors can be looked at?
6. When can Members invoke the ‘precautionary principle’ in justification of SPS measures that are not based on scientific evidence as is the case in *EC - Hormones*? What is the status of this principle in international law and the applications of this in areas other than trade?

Finally, in view of the fact that the Appellate Body Report on *EC – Hormones* did not address all those, Hélèn Lambert asks ‘does the Appellate Body Report in the *Hormones* case suggest deference to the Members of the WTO or rather judicial activism?’⁴⁸

⁴⁷ In keeping with its mandate in the DSU, Article 17 paras 6 and 13.

⁴⁸ This question as well as numbers 1 to 6 above were formulated by Dr Hélèn Lambert as part of the postgraduate Lecture/seminar on International Economic Law for the class of 2006/07 and used for Lecture 12 on 15 January 2007. Both lecture notes and seminar questions are in file with author.

Joost Pauwelyn⁴⁹ has attempted to shade light on the above questions with the help of two other cases *Australia – Salmon*⁵⁰ and *Japan – Varietals*⁵¹ decided like *EC – Hormones* and based on the SPS Agreement and in answer to the first question above she states that ‘[w]hat counts is the objective or purpose of the regulation. Was it enacted with a view to protect human, animal or plant life or health? Only if that is the case can it be an SPS measure.’ This brings a bigger question, since the EC measure was based on the hype of sometimes self-serving NGOs and ‘consumers’ concern’ and ‘suspicion’ coupled with the fact that ‘three EC Member States (Belgium, Ireland and the United Kingdom) sought to have the three natural hormones remain available both as therapeutic drugs and as growth promotion agents and Ireland and the UK also argued for the retention of the synthetic hormones, trenbolone and zeranol,’⁵² can it be validly argued that the EC ban had bases in law as an SPS measure and deftly justified as such? In my view, the answer is in the negative as will be shown below, and I am in very good company.

On risk assessment Pauwelyn further states that ‘the risk evaluated in a risk assessment must, nevertheless, be an “ascertainable risk”. Theoretical uncertainty is not the kind of risk to be assessed. The existence of unknown and uncertain elements does not justify a departure from the risk assessment requirement.’⁵³ The writer endorses the finding of inconsistency of the EC measures in the following words,

In *EC – Hormones*, the Panel – applying the ‘food-borne’ risk assessment definition – followed a two-step analysis. First, did the EC *identify* adverse effects? Second, did it *evaluate* the *potential* of occurrence of these effects? The Appellate Body in *EC – Hormones*

⁴⁹ Joost Paulwelyn, ‘The WTO Agreement on Sanitary and Phytosanitary (SPS) Measures As Applied in the First Three SPS Disputes: *EC – Hormones*, *Australian – Salmon* and *Japan – Varietals*,’ *JIEL* (1999) 2(4) 641-664.

⁵⁰ Reports of the Panel and Appellate Body on *Australia – Measures Affecting the Importation of Salmon*, adopted on 6 November 1998, WT/DS18/R and WT/DS18/AB/R (complaint by Canada).

⁵¹ Report of the Appellate Body on *Japan – Measures Affecting Agricultural Products*, adopted on 19 March 1999, WT/DS76/AB/R.

⁵² *EC – Hormones*, Panel Report, para. II.27.

⁵³ N 24 646.

concluded that the EC had not actually proceeded to such risk assessment and found that the EC had violated the SPS in this respect⁵⁴ (original italics).

Yet, the same Appellate Body had cause to modify and reverse most of the conclusions of the Panel thereby tilting the outcome in favour of the EC.

In respect of the case, Reinhard Quick and Andreas Blüther ask, ‘Has the Appellate Body Erred?’ and offer ‘an appraisal and criticism of the ruling in the WTO *Hormones* case.’⁵⁵

They pick the apogee of the Appellate Body’s reasoning and bluntly disagree with them,

The most striking sentence the AB chooses for its reasoning concerning Article 5.1 SPS is the following:

It is essential to bear in mind that the risk that is to be evaluated in a risk assessment under Article 5.1 is not only risk ascertainable in a science laboratory operating under strictly controlled conditions, but also **risk in human societies as they actually exist**, in other words, the actual potential for adverse effects on human health *in the real world where people live and work and die*.

Whilst this reference helps to make this ruling politically acceptable, it constitutes an unnecessary broad interpretation of risk assessment (emphasis same as in the original).⁵⁶

So they see the Appellate Body’s ‘findings and conclusions’ as politically motivated and ‘politically acceptable.’ Their second reason for disagreeing with the Appellate Body is that the ‘AB’s broad interpretation might also be in conflict with the intention of the drafters of the SPS, which required scientific justification.’⁵⁷

I am persuaded by the explanation given by Quick and Blüther and remain unconvinced by the Appellate Body. The distinction made by Quick and Blüther between GATT Article XX and the SPS Article 2 punctures the reasoning of the Appellate Body as flawed. They explain:

⁵⁴ Ibid 647. See also para. 208 of the Appellate Body Report, para. 8.98 (US Panel) and para. 8.101 (Canada Panel).

⁵⁵ Quick and Blüther (n 24).

⁵⁶ Ibid 618.

⁵⁷ Ibid. See also J. Croome, *Reshaping the World Trading System* (WTO: Geneva 1995) 236; J. J. Schott, *The Uruguay Round, An Assessment* (Peterson Institute for International Economics, Washington DC 1994) 52.

It seems to us that the AB does not take into account the importance which Article 2.2 SPS should give to the other provisions of the SPS. This might indicate that *the AB failed to appreciate the general aims of the SPS as laid down in Article 2 SPS as a whole*. One of the main problems with GATT Article XX prior to the drafting of the SPS was the so-called ‘necessity test’. The test applied to the measure as such and did not set any criteria for the decision making process. Under the SPS, it is not only the measure and its application that is verified but the decision-finding process that leads to the measure. This extension of the SPS to the process by setting objective criteria was aimed at making national health-related measures more transparent so as to *distinguish between trade and health protection*.⁵⁸

Undoubtedly, jettisoning the requirement that the ‘criteria for the decision-making process’ must be based on scientific justification which is objective would mean a return to the subjective ‘necessity test’ of the GATT years that left restriction on international trade to the whims and caprices of the Contracting Parties. In fact, inconsistency in national health protection while relying on the SPS Agreement may serve as an indicator for a disguised trade restriction.

Finally, Quick and Blüther award a pass mark to the Appellate Body’s findings ‘in political terms’ but fault it due to ‘legal weaknesses’ because ‘the AB interprets the obligations ... without always providing a clear legal reasoning for its action’ which ‘leaves a certain suspicion of arbitrariness and capriciousness.’⁵⁹ A closer insight into the *Hormones* case reveals no winners and losers because ‘[g]iven the AB’s rather extensive interpretation of Articles 5.1 and 5.2 SPS, the ruling could develop into a formidable obstacle for exports of foodstuffs from the European Union into third countries.’⁶⁰ The case neither enhances market access nor adherence to the WTO rules; rich and powerful nations could defy the rules and pay compensations or accept retaliatory action while poor countries have to

⁵⁸ Quick and Blüther (n 24) 619.

⁵⁹ Ibid.

⁶⁰ Ibid.

implement them. This would be a ‘destabilization of the WTO dispute settlement process’⁶¹ whose most outstanding selling point is that it is rules-based.

Natalie McNelis did a comparison of the opposing decisions of the WTO Appellate Body in the *Hormones* case and the ECJ in the *BSE* case, two cases with ‘undeniable similarities’: ‘the same actor (the EU institutions), the same product (beef), the same type of measure (a total ban) and the same type of justification for the measure (serious concerns about public health) – and yet, ... opposite conclusions.’⁶² The bovine spongiform encephalopathy (‘BSE’) also known as ‘mad cow disease’ affected cows in the UK. It was discovered in 1996 that the BSE held a potential risk to human beings that consumed affected beef by causing Creutzfeldt Jacob Disease (‘CJD’), a degenerative brain disease, without a known cure. The European Commission adopted a precautionary emergency measure, a total ban of beef exports from the UK to other EU Members. The UK challenged the ban and the ECJ upheld the Commission’s decision to impose the ban. According to her, the difference lies in the standard of review and the relationship between the judge and the ‘judged’. On the standard of review, while in the *BSE* case ‘manifest error’ must be found before the respondent could be held liable, the benchmark used in the *Hormones* was proof of ‘objective assessment’ by the respondent. However, McNelis says that this is not the key determinant of the different outcomes in the two cases. According to her the major determinant was ‘the “insider” looking ‘in”’ (the ECJ judging an act of one of its sister institutions – the *BSE* case) and ‘the “outsider” looking “in”’ (the WTO Appellate Body judging the act of a fraction of its [153]-odd Members – the *Hormones* case). While she does not applaud the Appellate Body or sound overly critical of it, she explains a congruence that must be attained for better

⁶¹ Ibid.

⁶² Natalie McNelis, ‘The Role of the Judge in the EU and WTO: Lessons from the *BSE* and *Hormones* Cases,’ *Journal of International Economic Law*, (2001) 4(1) 194.

outcomes in terms of implementation of Panel's and Appellate Body's findings and conclusions:

...where the burden of a risk (however minimal) is internal, and the benefit of lifting a ban is largely external, it will always be difficult for an authority to justify to its population taking a less trade-restrictive stance perhaps for cases like *Hormones* to ever come to a *BSE*-like resolution, the internal benefit of the less trade-restrictive measures must be more readily apparent to the citizen.⁶³

This compliance benchmark of 'less trade-restrictive measures' being 'more readily apparent to the citizen(s)' will be taken up further in the next chapter which concludes this study.

6.3.1 European Communities – Regime for the Importation, Sale and Distribution of Bananas

*EC – Bananas*⁶⁴ gave the WTO dispute settlement Panel, the Appellate Body and the Article 21.5 and arbitral panels an extensive opportunity to examine and make findings based on the pivotal principle of non-discrimination – Articles I (MFN) and III (National Treatment) of the GATT 1994. Also in contention were GATT Article XI (Quantitative Restrictions), Article XXIII (Nullification and Impairment) and DSU Article 22 (Compensation and the Suspension of Concessions). On Article I the Appellate Body upheld the finding of the Panel 'that the activity function rules, which applied only to the licence allocation rules for imports from other than traditional ACP countries, were inconsistent with Article 1:1.'⁶⁵ The activity function rules refer to the EC rules for allocating import licences based on geographical indicators or place of origin of the goods. Again on National treatment, the Appellate Body did not see any reason to deviate from the finding of the Panel 'that the EC procedures and

⁶³ *ibid* 208.

⁶⁴ *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R adopted 25 September 1997. The same citation is used for *EC – Bananas III (Ecuador)*, *EC – Bananas III (Guatemala and Honduras)*, *EC – Bananas III (Mexico)*, and *EC – Bananas III (US)*.

⁶⁵ WTO, *WTO Dispute Settlement: One-page Case Summaries 1995 – 2009*, 8.

requirements for the distribution of licences for importing bananas from non-traditional ACP suppliers were inconsistent with Art. III:4.⁶⁶ What led to all this?

EC – Bananas is arguably one of the most challenging cases that the DSB has ever been seized with⁶⁷ and as Eliza Patterson⁶⁸ observes ‘also among the more legally and politically complex.’⁶⁸

6.3.2 The Contested Facts in *EC – Bananas*

As the Panel Report explains:

The common market organisation for bananas, as established by Council Regulation (EEC) 404/93 (Regulation 404/93), replaced the various national banana import regimes previously in place in the EC’s Member States. Subsequent EC legislation, regulations and administrative measures implemented, supplemented and amended that regime.

Under the previous national import regimes, France, Greece, Italy, Portugal and the United Kingdom restricted imports of banana by means of quantitative restrictions and licensing requirements. Spain maintained a de facto prohibition on imports of bananas. The French

⁶⁶ Appellate Report, *EC – Bananas* (n 64) para. 255(o).

⁶⁷ John H. Jackson and Patricio Crane, ‘The Saga Continues: An Update on the Banana Dispute and its Procedural Offspring’ *Journal of International Economic Law* (2001) 4(3) 581-595 contains a table showing ‘the procedural history of the banana dispute and its progeny’: *Banana I* (GATT Panel) initiated 12 June 1992 by Costa Rica, Colombia, Guatemala, Nicaragua and Venezuela, Panel found violations of GATT Articles I and XI(1) by the EEC and the EEC and ACP countries blocked the adoption of the report; *Banana II* (another GATT Panel) initiated by the same parties in *I* on 28 January 1983, Panel found violations of Articles I and III of the GATT, Panel concluded that EEC Reg.404/93 violated Articles I, II and III of the GATT.; EU argument based on Article XXIV (customs union) was rejected; *Banana III* (WTO Panel) initiated by Ecuador, Guatemala, Honduras, Mexico and the USA on 3 February 1996, found EU import regime was inconsistent with Articles I:1 and III:4 among others, AB upheld most of the findings; Consultations with the EC on Reg. 404/93, Article 4 DSU initiated by Panama on 24 October 1997 with no request for a panel; Arbitration based on Article 21.3 DSU on the request of the EC on 17 November 1997 which set the reasonable period for implementation at 15 months and one month (i.e. 01/01/99); Article 21.5 (Surveillance of Implementation) Panel on the request of the EC on 14 December 1998, Panel unable to agree with the EC that it was in compliance; Recourse to Article 21.5 DSU by Ecuador on 18 December 1998, inconsistency of EC banana regulation upheld; Recourse to Article 22.2 and 22.7 by the United States on 14 January 1999, DSB agreed to grant authorisation to the US to suspend the application to the EC and its Member States of tariff concessions and related obligations under GATT 1994; Recourse to Article 22.6 (Arbitration on the level of suspension) requested by the EC on 29 January 1998, arbitral award confirmed US right to suspend concessions with regard to the EC; WTO Panel against US Re: Section 301-310 of US Trade Act of 1974 initiated by the EC on 25 November 1998, US Section 301 said to not be inconsistent with the DSU or with the GATT; Authoritative Interpretation action under Article IX:2 WTO Agreement sought by the EC on 10 January 1999, the sequencing conflict between Article 21.5 and 22 not resolved and made consensus impossible; Consultation with the EC on Council Reg. 163/98, Art. 4 DSU sought by Guatemala, Honduras, Mexico, Panama and the US on 7 Dec 1998 but no panel was established; WTO Panel against US Re: Import Measures on Certain Products from the EC initiated by the EC on 4 Mar 1999 which declared the US determination as ‘unilateral’ and contrary to Articles 3.7, 22.6 and 23.2(c) of the DSU; Recourse to Article 22.2 and 22.7 (authorisation to suspend concessions) of 8 Nov 1999, EC objected to Ecuador’s claims of effects of nullification and impairment; EC recourse to Article 22.6 of 22 Nov 1999, DSB agreed to grant authorisation to Ecuador; and many more actions that followed.

⁶⁸ Eliza Patterson, ‘The US-EU Banana Dispute’ *ASIL Insight*, February 2001, 1.

market was supplied principally from the overseas department of Guadeloupe and Martinique, with additional preferential access granted to ACP States of Cote d'Ivoire and Cameroon. The United Kingdom granted preferential access to bananas from the ACP States of Jamaica, the Windward Islands (Dominica, Grenada, St. Lucia and St. Vincent and the Grenadines), Belize and Suriname. Bananas from ACP countries were permitted duty-free into all EC Member States. The Spanish market was almost exclusively supplied by domestic production from the Canary Islands. A major part of Portuguese supply came from Madeira, the Azores and the Algarve, with additional volumes being imported from Cape Verde and any remaining requirements being imported from third countries. The Greek market was in part supplied by bananas from domestic sources (Crete and Lakonia) and in part by third countries. Italy offered preferential access to bananas from Somalia. Belgium, Denmark, Germany, Luxembourg, Ireland and the Netherlands did not apply quantitative restrictions and, except for Germany, used a 20 per cent tariff as the sole border measure. These countries almost exclusively imported bananas from Latin America. Germany had a special arrangement, set out in the Treaty of Rome, permitting duty-free bananas reflecting the level of estimated consumption.⁶⁹

Regulation 404/93⁷⁰ has five titles with Title IV specifically regulating trade with third countries and dividing the third countries into three groups: (i) traditional imports from twelve ACP countries,⁷¹ (ii) non-traditional ACP bananas,⁷² and (iii) third country bananas.⁷³ In *EC – Bananas I and II* Costa Rica, Colombia, Guatemala, Nicaragua and Venezuela challenged the EC Regulation 404/93 and in *EC – Bananas III* the complaining parties changed to Ecuador, Guatemala, Honduras, Mexico and the USA and with the entry of Mexico and the USA, the case acquired more ferocious commercial attrition and political partisanship than clear legal reasoning. While Mexico asserts that it challenges the EC measures 'both from the point of view of Mexico's rights under the GATT and from the point of view of its interest in the international banana trade,' the involvement of the US Government in the case turned into a subject of debate because the US had not been known

⁶⁹ Panel Report, WT//DS27/R/USA paras. III.4 and III.5

⁷⁰ Council Regulation (EEC) No. 404/93 of 13 February 1993, OJ 47

⁷¹ Bananas within country-specific quantitative limits totalling 875,700 tonnes established for each of 12 ACP countries enter duty-free.

⁷² Defined as either ACP imports above the traditional allocations for traditional ACP countries or any quantities supplied by ACP countries which are non-traditional suppliers, enter duty-free up to 90,000 tonnes, divided into country specific allocations and an 'other ACP countries' category; ECU 693 per tonne for out-of-quota shipments in 1996/97.

⁷³ Defined as imports from any non-ACP source and enter ECU 75 per tonne up to 2.11 million tonnes as provided in the EC Schedule. An additional 353,000 tonnes were made available in 1995 and 1996. Country-specific allocations were made for countries party to the Framework Agreement on Bananas (BFA), plus an 'others' category; ECU 793 per tonne for out-of-quota shipments in 1996/97.

as a banana exporter and, in the opinion of the EC, ‘had no legal right or no legal or material interest in the case’ and, by the same token, ‘no legal right or interest in obtaining a ruling from the Panel’ because ‘under the GATT/WTO system the United States could not set itself up as private attorney-general and sue in the public interest.’⁷⁴

Such a debate arose because the action for compensation or loss of market originated from US companies, not the government. In September 1994 Chiquita Brands International and the Hawaii Banana Industry Association basing their action on section 302(a) of the Trade Act 1974 challenged the EC regime and the Framework Agreement as discriminatory because they reduced their market share by more than 50 per cent. The companies also got fifty members of the House of Representatives to back up their application by urging the US Trade Representative to take up their case. It was the first of such a case under the then new Clinton administration.

Common Cause released a study at the time identifying the Chairman and CEO of Chiquita International Brands, Inc, and affiliated companies and executives as among the largest contributors to the Democratic and Republican parties in the 1993/94 election cycle.⁷⁵ This revelation raised questions as to the true motives of the Administration in pursuing Chiquita’s case, particularly in light of the fact, much noted by critics, that the Chiquita facilities allegedly injured by the EU banana policy are located outside the US and have a largely non-US workforce.

⁷⁴ Panel Report, para. II.21.

⁷⁵ N 68

Despite the political steam generated by the case, the legal issue presented to the Panel by the EC was that its banana regime was a legitimate part of the Lomé Convention for which the EU had a WTO waiver. The complaining parties argued that it was not.

6.3.3 *The Lomé Waiver*

The operative paragraph of the Lomé waiver on which the EC based its case provides as follows:

The provisions of paragraph 1 of Article 1 of the General Agreement shall be waived, until 29 February 2000, to the extent necessary to permit the European Communities to provide preferential treatment for products originating in ACP States as required by the relevant provisions of the Forth Lomé Convention, without being required to extend the same preferential treatment to like products of any other contracting party.⁷⁶

The Panel also looked at the provisions of Article 168 and Protocol 5 of the Lomé Convention. Article 168 generally requires that ACP products be admitted duty-free to the EC. Paragraph 2(a) requires that they be (i) accorded duty-free treatment if there are no non-tariff measures applicable to their import or (ii) if (i) is not applicable (as is the case with bananas), given ‘more favourable treatment than that granted to third countries benefitting from the most-favoured-nation clause for the same products’. According to the Panel

for those imports, the basic requirement of Article 168, as expressed in its first paragraph, has been met, and we see no requirement in Article 168 that the EC must provide favourable treatment beyond such duty-free treatment. The Lomé waiver should not be interpreted to permit breaches of WTO rules that are not clearly required to satisfy the provisions of the Lomé Convention.⁷⁷

Protocol 5 of the Lomé Convention provides that in respect of banana exports to the Community markets, no ACP State shall be placed, as regards access to its traditional markets and its advantages on those markets, *in a less favourable condition than in the past or at present*.

⁷⁶ *ibid* para. 7.197.

⁷⁷ *ibid* para. 7.198.

I emphasise the last phrase here because the Panel stated very categorically that ‘nothing in the Lomé Convention specifically requires a licensing system for third-country and non-traditional ACP banana imports, such as is provided by the application of the operator category-activity function system to third-country and non-traditional ACP imports.’⁷⁸

Therefore in their ‘summary of findings’ the Panel stated that:

- the allocation of tariff quota shares to ACP countries in excess of their pre-1991 best-ever exports to the EC is not required by the Lomé Convention.⁷⁹

Yet they observed that:

- it was not unreasonable for the EC to conclude that the Lomé Convention requires the EC to allocate country-specific tariff quota shares to traditional ACP banana supplying countries in an amount of their pre-1991 best-ever exports to the EC.⁸⁰

And even added that

- the failure of Ecuador’s Protocol of Accession to address banana-related issues does not mean that Ecuador must accept the validity of the BFA as contained in the EC’s Schedule or that it is precluded from invoking Article XIII:2 or XIII:4⁸¹

thereby handing out sweet victory to a country that failed in its accession bid to the WTO.⁸²

On appeal, the Appellate Body wholly upheld 21 out of the 24 issues [numbered (a) to (x)] it ruled on, reversed only two [(c) and (j)] and partly reversed and partly upheld (m).⁸³

It is possible to see the findings and conclusions in *EC – Bananas* from different perspectives: as another nail in the coffin of developing countries’ quest for access to the markets of developed countries or as a ruling in favour of trade liberalisation; as an example

⁷⁸ *ibid.*, para. 7.199.

⁷⁹ *ibid.*, para. 7.399(2).

⁸⁰ *ibid.*

⁸¹ *ibid.*

⁸² Ecuador was not a founding member of the WTO; it acceded to the Organisation on 21 January 1996. As at the time of writing, Ecuador is still not a member of the International Centre for the Settlement of Investment Disputes.

⁸³ Appellate Report, para. 255.

of a ‘muted trumpet’ or as judicial activism. As the Panel acknowledges, the case was ‘an exceedingly complex one’ involving ‘six parties (one representing 15 Member States) and 20 third parties,’⁸⁴ meaning that almost one-third of Members (were) involved in the case.’⁸⁵

6.3.4 *The Rule of Law and Spirit of the Law?*

One of the basic objectives of the GATT was to raise the standard of living and progressively develop the economies of all Members, particularly developing country Members.⁸⁶ The Panel buttressed the provisions of the GATT by stating that ‘[f]rom a substantive perspective, the fundamental principles of the WTO and WTO rules are designed to foster the development of countries, not impede it.’⁸⁷ Therefore, taking the provisions of the GATT and the pronouncements of the Panel and the Appellate Body together, it is submitted that the findings and conclusions in *EC – Bananas* apparently stands against protectionism and favours market access but market access for who? It is market access for Chiquita International Brands, Inc., the Hawaii Banana Industry Association and the banana distribution company Del Monte and not developing countries. Perhaps the truth of the matter lies in the argument ironically presented by the EC in the *Tuna Panel*⁸⁸ that *(t)he GATT does not protect actual trade flow, but trading opportunities* created by tariff bindings and other rules’ (emphasis added).

Therefore, if the GATT is used to protect trading opportunities, the question that we may examine next which was the point of view presented by Mexico to the Banana Panel is whether ‘the interpretation of the WTO’s provisions varied according to the characteristics of

⁸⁴ The 20 Third Participants were Belize, Brazil, Cameroon, Colombia, Costa Rica, Côte d’Ivoire, Dominica Republic, Ecuador, Ghana, Grenada, Honduras, Jamaica, Japan, Mexico, Nicaragua, St Lucia, St Vincent and the Grenadines, Senegal, Suriname and Venezuela.

⁸⁵ Panel Report, para. 7.1.

⁸⁶ GATT, Part IV, Article XXXVI:1(a).

⁸⁷ Panel Report, para. 8.3.

⁸⁸ *United States – Restrictions on Imports of Tuna (Tuna Panel)*, DS/29/R circulated 16 June 1994.

the countries involved in a dispute?’⁸⁹ This is because *US – Section 301-310 of the Trade Act 1974* (commonly known as ‘*Section 301*’) had, in the main, remained a domestic debate in the US and never came to the international attention until it was used to attack the DSU. The EC requested for the establishment of a panel on 26 January 1999 because by ‘imposing specific, strict time limits within which unilateral determinations must be made and trade sanctions must be taken, Sections 305 and 306 of the Trade Act 1974 do not allow the United States to comply with the rules of the DSU in situations where a prior multilateral ruling under the DSU on the conformity of implementing measures has not been adopted by the DSB.’⁹⁰ Simply put, the EC’s argument was that the US legislation relating to compliance with WTO rulings was a violation of Article 23 (Strengthening of the Multilateral System) of the DSU which enjoins Member States to ‘seek redress of a violation of obligations’ and provides in paragraph 2 that:

Members shall not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding;

- (a) follow the procedure set forth in Article 21 to determine the reasonable period of time for the Member concerned to implement the recommendations and rulings; and
- (b) follow the procedures set forth in Article 22 to determine the level of suspension of concessions and other obligations and obtain DSB authorisation ...⁹¹

The GATT *Section 301* Panel held that a law ‘reserving the right for unilateral measures to be taken contrary to the DSU rules and procedures, may (as is the case with Section 304) constitute an ongoing threat and produce a “chilling effect” causing serious damage in a variety of ways’ and concluded demonstratively that ‘carrying a big stick is ... an effective means of having one’s way as actually using the stick.’⁹² There is some discussion in the

⁸⁹ Panel Report, para. II.26.

⁹⁰ *US – Section 301-310 of the Trade Act of 1974*, Request for the Establishment of a Panel by the EC, WT/DS152/11 (2 February 1999).

⁹¹ The DSU, Article 23(2).

⁹² *US – Section 301* above at para. 7.89.

literature about whether there may be a fallback on general public international law countermeasures in the event that the dispute settlement system of the WTO fails or is incomplete, e.g. if a Member State does not comply with a Panel or Appellate Body ruling.⁹³ Again what came to be known as the ‘sequencing problem’ between Articles 21.5 and 22 got its seed sown in the *Section 301* Panel when it got to the examination of Section 306. It came to fruition in the Banana ‘saga’.

6.3.5 Procedural or Sequencing Problem

It is submitted here that the *Bananas* Case twisted the DSU Articles 21.5 and 22.6 out of context mainly because of the parties involved. Any dispute that involves any of the dominant WTO quad⁹⁴ members easily cascades out of proportion and engulfs everybody like a bush fire in summer. It is this researcher’s view that the European Communities arrived at a right conclusion in a wrong move and that has tainted its sound reasoning. It is like going to equity with dirty hands. The European bananas tariff having been pronounced to be WTO-inconsistent three times (in *Bananas I, II, III*), the EC position that an Article 21.5 panel should dispose of the matter before it prior to a request for retaliation was, therefore, not well received. However, this is likely to be the line of future amendment of the DSU as borne out by present practice⁹⁵ of bilateral agreements aimed at avoiding the sequencing problem. Apart from concluding the matter before a compliance review panel first before requesting for retaliation pursuant to Article 22, the EC’s position makes sense at another level. Exhausting the measures in Article 21.5 before resorting to those under Article 22 helps avoid the issue of concurrent jurisdiction. The role of the arbitrator should be to determine the level of suspension so that the compliance panel set up pursuant to Article 21.5 and the arbitrator referred to in Article 22.6 will each have exclusive jurisdictions; one on

⁹³ B Simma and D Pulkowski, ‘Of Planets and the Universe: Self-contained Regimes in International Law’, (2006) 17(3) *European Journal of International Law* 483-529

⁹⁴ See the Appendix below.

⁹⁵ See the next three paragraph below .

surveillance of implementation of recommendations, the other on compensation and suspension of concessions.

The right to appeal is enshrined in Article 17.4 of the DSU. In 2002 the EC suggested that an anticipated DSU review should include a systematic right of appeal against rulings of compliance panels. But how far should it go? One appeal, or *ad infinitum*? As the *EC – Bananas* shows, the EC used its resort to an Article 21.5 compliance panel to evade U.S. retaliation that was looming after the expiry of the stipulated period.

Again it is noteworthy that no appeals ensued from the first four Article 21.5 decisions but once the possibility was revealed in *Brazil – Aircraft*, five of the next six cases had their compliance panel decisions appealed. Therefore, the line needs to be drawn somewhere, once. Allowing only one appeal from an Article 21.5 panel decision is important because the purported compliance measure might in itself be WTO-inconsistent.⁹⁶ Stopping litigation somewhere is in line with the stated aim of the WTO of affording security and predictability. Certainty is an aspect of the rule of law. Article 22.7 says that an arbitrator's report cannot be appealed. The same should apply to a compliance review panel report but in a modified form of allowing only *one* appeal. This is because in many cases, resort to Article 21.5 is the third leg of the litigation where it has gone through (DSU) Article 6 panel and the Appellate Body.

An interesting trend is emerging at the WTO where parties to a bilateral agreement state categorically that a complainant “will not request authorisation to suspend concessions until after the review panel has circulated its report”.⁹⁷ The three bilateral agreements flowing

⁹⁶ *EC – Bananas (21.5 – Ecuador)*.

⁹⁷ *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather, Recourse by the United States to Article 21.5 of the DSU*, WT/DS126/8, 4 October 1999 [hereinafter *Australia – Leather*].

from *Brazil – Aircraft*,⁹⁸ *Canada – Aircraft*,⁹⁹ and *Australia – Salmon*¹⁰⁰ stipulate that a compliance panel precedes a request for authorisation to retaliate for failure to comply.

Therefore, the determination by the arbitrator in the *EC – Bananas* that Article 22 does not require the finding of non-compliance before a party can seek authorisation to retaliate and that a determination of non-compliance can be made either by a compliance panel under Article 22.5, or by an arbitrator under Article 22.6¹⁰¹ is no longer in vogue and cannot be said to reflect either the correct position of the law or the trend of practice currently within the WTO. It is anticipated that future amendment of the DSU will be in line with the current practice in bilateral agreements. The fact that Article 21.5 (compliance review) comes before Article 22 (retaliation) makes it logical that determination of non-compliance be made before withdrawal of concessions is triggered off. Again resorting to retaliation is seen as a breakdown of peaceful judicial process and an end to voluntary discharge of one's obligations under the covered agreements and so should be invoked as a last resort after the conclusion and circulation of the compliance panel report and the expiration of the 30-day "reasonable period of time" stipulated by Article 21.3 of the DSU. This position finds support in Article 3 of the DSU which lists the four remedies available under the DSU, namely, settlement, withdrawal, compensation and suspension, and specifically states in Article 3.6 that settlement is the "preferred" outcome.

⁹⁸ *Brazil – Export Financing Programme for Aircraft*, WT/DS46/AB/R, adopted 20 August 1999.

⁹⁹ *Canada – Measures Affecting the Export of Civilian Aircraft, recourse by Brazil to Article 21.5 of the DSU*, WT/DS70/9, 23 November 1999 [hereinafter *Canada – Aircraft*].

¹⁰⁰ *Australia – Measures Affecting the Import of Salmon*, WT/DS18

¹⁰¹ *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, Recourse to Arbitration by the European Communities under Article 22.6 of the DSU, WT/DS27/ARB, 9 April 1999, paras 4.1-4.15. See also 'WTO Banana Arbitrators Find for US on Procedure, Substance', Inside US Trade 9 April 1999.

The WTO stands on clay feet, so to speak, and equally of concern, is that it is suffering from good faith deficit. While some members are espousing its agreements and using them to have unimpeded access from their landlocked countries to the sea, others are fighting off the effects of the agreements in their countries or regions, picking and dropping which and when they should apply. Reflecting on the foundations of the WTO and how it now works in practice, Stoler captioned his article interrogatively, “WTO Dispute Process: Did the Negotiators Get What They Wanted?” and says that today we find ourselves in the situation of asking not “Is this the outcome they wanted?” but rather “Is this an approach to WTO dispute settlement WTO members still want?” According to him, “many commentators on the subject have answered “no”.¹⁰²

The reason for the answer in the negative is lack of goodwill. The GATT was grinding to stagnation before metamorphosing into the WTO in 1995 due mainly to the *mala fide* act of “blocking” by the dominant Contracting Parties hence the DSU reformed it by introducing negative consensus for the setting up of panels and the adoption of reports. It also democratised the multilateral trading system and introduced one member one vote with no member having a veto. It appears that what the major trading nations and the dominant members of the WTO want now is either weighted voting (according to volume of trade or population of the country as done in the European Union) or something akin to the veto some countries have as permanent members of the United Nations Security Council. However, if the WTO was set up to liberalise trade, the dispute settlement should be liberalised too through equality of all Member States and decisions based on due process of law as the DSB is doing now. There is an argument about externalities, that is, the impact of one State’s democratic decision-making on people in another state who are not represented in the former

¹⁰² Andrew L. Stoler, ‘The WTO Dispute Settlement Process: Did the Negotiators Get What They Wanted?’ *World Trade Review* (2004) 3:1, 114.

State's decision-making process – this is an argument that interdependence justifies assigning powers to multilateral institutions.¹⁰³

However, the State seems to remain the decisive unit of legitimate political sovereignty, so equal voting both recognises the interdependence of States, while also reflecting the continuing role of States as the main centre of legitimate political representation. To reverse it and return to the old GATT quagmire is to take the whole world back by more than half a century. The voting pattern of the General Council and the decision-making process of the DSB should remain as they were designed at the Uruguay Round and endorsed in the Marrakesh Agreement.

The GATT/WTO *EC – Bananas* case has given rise to the following separate proceedings:

- i. Bananas I¹⁰⁴
- ii. Bananas II¹⁰⁵
- iii. Bananas III¹⁰⁶
- iv. General consultations under Article 4 of the DSU.¹⁰⁷
- v. Recourse to Article 21.5 of the DSU by the EC.¹⁰⁸
- vi. Recourse to Article 21.5 of the DSU by Ecuador.¹⁰⁹

¹⁰³ Christian Joerges and Jürgen Neyer, "Politics, Risk Management, World Trade Organisation Governance and the Limits of Legalization", (2003) 30 *Science and Public Policy* 219-225; Christian Joerges, 'Constitutionalism in Postnational Constellations: Contrasting Social Regulation in the EU and in the WTO,' in Christian Joerges & Ernst-Ulrich Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and Social Regulation* (Hart 2006) 491-527; C Joerges, 'Judicialization and Transnational Governance: The Example of WTO Law and the GMO Dispute,' in Bogdan Iancu (ed), *The Law/Politics Distinction in Contemporary Public Law Adjudication* (Eleven International Publishing 2009) 67-84

¹⁰⁴ GATT Unadopted Panel Report on *European Economic Community – Member States' Import Regimes for Bananas*, 1993 GATTPD Lexis 11¶ 2, DS32/R (3 June 1993) [Bananas I Panel Report].

¹⁰⁵ GATT Unadopted Panel Report on *European Economic Community 'Import Regime for Bananas'*, 18 January 1994, 34 ILM 177, 181, DS38/R (1995) [Bananas II Panel Report].

¹⁰⁶ *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, 9 September 1997.

¹⁰⁷ WT/DS158/1

¹⁰⁸ WT/DS27/40.

- vii. Recourse to Article 22.6 of the DSU by the United States.¹¹⁰
- viii. Recourse to Article 22.6 of the DSU by Ecuador.
- ix. US – Sections 301-310 of the Trade Act of 1974.¹¹¹
- x. US – Import Measures on Certain Products from the EU,¹¹² and
- xi. The European request for “Authoritative Interpretation Pursuant to Article 9.2 of the DSU.”¹¹³
- xii. EC – Bananas, Article 21.5 II (AB) (Ecuador)/Article 21.5 (AB)(US).¹¹⁴

6.3.6 Article 21.5 Recourse Brief

6.3.6.1 Measures taken to comply with the DSB’s recommendations

EC Regulation No. 1637 was adopted to amend Regulation 404/93, that is, the measure at issue in the original dispute, together with EC Regulation No. 2362/98 which laid down implementing rules for the amended Regulation for the importation of three categories of bananas (a) traditional ACP imports, (b) non-traditional ACP imports, and (c) imports from third (non-ACP) countries into the EC market. The effect of the amendment was to provide a level-playing and fairer ground for everybody, ACP Member or not.

¹⁰⁹ WT/DS27/41.

¹¹⁰ WT/DS27/46.

¹¹¹ WT/DS27/152/1.

¹¹² WT/DS27/165/1.

¹¹³ WT/GC/W/133.

¹¹⁴ *European Communities - Regime for the Importation, Sale and Distribution of Bananas, Second Recourse to Article 21.5 of the DSU by Ecuador / Recourse to Article 21.5 of the DSU by the United States* [EC – Bananas, Article 21.5 II (AB) (Ecuador)/Article 21.5 (AB)(US)], WT/DS27/AB/RW2/ECU and WT/DS27/AB/RW/USA. Adopted 11 December 2008.

6.3.6.2 Findings

The Panel found that the Regulation was inconsistent with GATT Art. XIII:1 as it resulted in disparate treatment between the traditional ACP suppliers and other non-substantial suppliers and third countries by not being “similarly restricted” as required by the GATT. This finding rips the heart out of the Lomé Convention and confines the ACP States to their pre-Lomé and pre-WTO precarious situations without levers for their economic development.

6.3.6.3. Legal Principle Established or Affirmed

- Private Counsel: The Appellate Body ruled that private lawyers may appear on behalf of a government during Appellate Body oral hearing. (The Panel did not allow them but that was reversed).
- The arbitrators nominated pursuant to Article 22.6 determined that an Article 22.6 procedure is not subsequent to the outcome of an Article 21.5 panel and confirmed the US right to retaliate even before the finalisation of an Article 21.5 panel procedure.

The second preceding point is ironical because while appointing the Article 21.5 and arbitration Panel, the Chairman of the DSB said:

There remains the problem of how the panel and the arbitrators would coordinate their work, but as they will be the same individuals, the reality is that they will find a logical way forward, in consultation with the parties. In this way, the dispute settlement mechanisms of the DSU can be employed to resolve all of the remaining issues in this dispute, while *recognizing the right of both parties and respecting the integrity of the DSU* (emphasis added).¹¹⁵

No case has questioned the rights of the parties, defied implementation and challenged the integrity of the DSU’ like *EC – Bananas*.

¹¹⁵ Article 21.5 Report, WT/DS27/RW/EEC, para. 4.16.

6.4 Turkey – Restrictions on Imports of Textile and Clothing Products¹¹⁶

In *Turkey – Textiles* and *India – Quantitative Restrictions*¹¹⁷ the appropriate institutional balance between the legislative, executive and judicial organs of the WTO were contested.

In *Turkey – Textiles* India complained about Turkey's quantitative restrictions pursuant to Turkey-EC customs union on the grounds that they were inconsistent with Articles XI (General Elimination of Quantitative Restrictions) and XIII (Non-discriminatory Administration of Quantitative Restrictions) of the GATT 1994, and Article 2.4 of the Agreement on Textiles and Clothing (the 'ATC'). Turkey relied on Article XXIV (specifically paragraphs 1, 4, 5 and 8) of the GATT providing for 'territorial application, frontier traffic, customs union and free-trade areas' which, according to Turkey, provides an 'exception' from GATT obligations in the contested articles as well as Article I on the Most-Favoured-Nation. Both the Panel and the Appellate Body upheld India's argument and recommended that Turkey should bring its measures found to be inconsistent with Articles XI and XIII of the GATT 1994 and Article 2.4 of the ATC into conformity with its obligations under the agreements.

However, the AB was quick to sound a note of caution on its findings:

We wish to point out that we make no finding as the issue of whether quantitative restrictions found to be inconsistent with Article XI and Article XIII of the GATT 1994 will ever be justified by Article XXIV. We find only that the quantitative restrictions at issue in the appeal in this case were not so justified. Likewise, we make no finding on many other issues that may arise under Article XXIV.¹¹⁸

¹¹⁶ *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R adopted 19 November 1999.

¹¹⁷ *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products* WT/DS90/AB/R, adopted 22 September 1999.

¹¹⁸ N 116 para. 65.

This is judicial economy at its briefest concluded in less than twenty pages and in sixty-six paragraphs. It is also noteworthy that all the three third participants – Hong Kong, China, Japan and The Philippines all sided with the respondent/appellee India whose argument was pro-market access. Japan in her submission, for example, pointed out that ‘the basic tenet of the WTO Agreement is the primacy of the multilateral trading system based on the core principle of the elimination of discriminatory treatment in international trade relations’ and added that ‘[r]egional trade agreements are only allowed if they are complementary to the multilateral trading system,’¹¹⁹ a view which WTO panels and the Appellate Body strongly support in their jurisprudence.

On judicial economy, although the AB asserts in *Turkey – Textiles*, ‘[w]e do not believe it necessary to find more than we have found here to fulfil our responsibilities under the DSU,’¹²⁰ Marc L. Busch and Krzysztof J. Pelc suggest other reasons behind the tendency of the AB to resort to judicial economy. According to them, ‘the AB not only tolerates but promotes the use of judicial economy’ and by ‘conventional wisdom’ ‘politics probably plays a role’ and it ‘is an appropriate means of avoiding “controversial issues” in rendering a decision.’

Another reason given by Busch and Pelc why the AB exercises judicial economy is that ‘the AB has no fact-finding ability of its own. Furthermore, because it cannot remand matters, this means that, on appeal, judicial economy sometimes leaves potentially valid claims unexamined, making the dispute more difficult to resolve, as occurred in *EC – Sugar*.’¹²¹

¹¹⁹ N 116 para. 36.

¹²⁰ N 116 para. 65.

¹²¹ Marc L. Busch and Krzysztof J. Pelc, ‘Ruling Not to Rule,’ in Tomer Broude, Marc L. Busch and Amelia Proges (eds), *The Politics of International Economic Law* (CUP 2011) 268 and 267. See Report of the Appellate Body, *European Communities – Export Subsidies on Sugar*, WT/DS266/AB/R/ (2005), para. 341n

When judicial economy is exercised by the panel, it is, according to Busch and Pelc used to ‘practice self-restraint in cases in which a broader ruling may be politically untenable’ and also used to ‘limit the precedent set by a ruling where the wider membership is ambivalent about its scope.’¹²² A panel does not aim to dispose of all the legal issues raised but precisely aims at gaining litigants’ compliance and avoiding appeal, or should the litigants choose to appeal, to have their findings and conclusions upheld by the AB. In Bartels’ view, judicial economy is used to ‘avoid judicial activism’ in the WTO.¹²³

Therefore, legality does not seem to be the primary concern of the AB but the substantial support of the WTO membership. This explains why the WTO panels and the AB most heartily welcome third party participation which serves them as an antenna for getting broader WTO membership feelings beside the complainant and the respondent.¹²⁴ One study of WTO disputes finds that partisan third parties, as in *Turkey – Textiles* where all the third parties sided the complainant, that there is a significant difference in the direction of the outcome. When the third party participants are pro-complainant, the likelihood of a finding in favour of the complainant rises by ‘one-half’, and that pro-defendant ruling rises by ‘one-third’ as well.¹²⁵

Furthermore, could the brevity of the AB ruling in *Turkey – Textiles* be attributed to the parties to the dispute: two developing country members who apparently did not have much to

¹²² Busch and Pelc, *ibid* 269

¹²³ L. Bartels, ‘The Separation of Powers in the WTO: How to Avoid Judicial Activism’, (2004) 53 *International & Comparative Law Quarterly* 861-895. See also C Sunstein, ‘Beyond Judicial Minimalism’, (2008) *Harvard Public Law Working Paper* 08-40

¹²⁴ James McCall Smith, ‘WTO Dispute Settlement: The Politics of Procedure in Appellate Body Rulings,’ 2(1) *World Trade Review* (2003) 65

¹²⁵ Marc Busch and Eric Reinhardt, ‘Three’s a Crowd: Third Parties and WTO Dispute Settlement,’ 58(3) *World Politics* (2006) 446 quoted in Broude, Busch and Proges (eds) n 114 above.

explain to the AB? It has been suggested that the developed countries have greater capacity and are better able to put their views across to the WTO panels and the AB.¹²⁶ Or could it be that the effects of a decision involving developing countries are not as diverse and tumultuous as the one involving the big trading nations or groups such as the USA and the EU. In any case, any pronouncement of a WTO panel or the AB carries the weight of precedent even though the DSU is not predicated on the doctrine of precedent. One commentator has described this practice as ‘*de facto stare decisis* in WTO adjudication.’¹²⁷ Parties often cite previously decided cases; for example, Canada in *EC – Sugar* cited the ruling against her in *Canada – Dairy*.¹²⁸

Again the ruling in *Turkey – Textiles* granted direct market access to India without the arm twisting and mudslinging we saw in the two cases we have analysed above. Turkey as a defendant in the case used Article XXIV of the GATT 1994 without mentioning the SPS or the TBT Agreement which could have complicated matters.

The relevant provisions of the GATT which Turkey relied on are Article XXIV:5 which provides that,

. . . the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free trade area and paragraph 8 provides definitions and gives explanations as follows:

- (a) A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that
 - (i) Duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between the

¹²⁶ Félix Peña, ‘Why not an ombudsperson at the WTO: A proposal for debate, in Carolyn Deere Birkbeck (ed) *Making Global Trade Governance Work for Development* (Cambridge University Press 2011) 442-458

¹²⁷ Raj Bhala, ‘The Precedent Setters: De Facto Stare Decisis in WTO Adjudication’ (Part Two of a Trilogy),’ 9(1) *Journal of Transnational Law and Policy* (1999) 1 at 48.

¹²⁸ WTO, ‘Report of the Panel, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*,’ WT/DS103/R (1990) para. 7.119(c).

constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories

....

The Appellate Body agreed that the chapeau to GATT Article XXIV ‘shall not prevent’ the formation of a customs union and the adoption of some measures to facilitate trade within the union. Again according to the Appellate Body, ‘the chapeau makes it clear that Article XXIV may, under certain conditions, justify the adoption of a measure which is inconstant with certain other GATT provisions, and may be invoked as a possible ‘defence’ to a finding of inconsistency.’¹²⁹

Joost Pauwelyn finds the argument that GATT Article XXIV would altogether prohibit intra-regional safeguards ‘unconvincing’. This, according to him, is because ‘the argument could be made that since intra-regional safeguards are (or could be) imposed, restrictions on “substantially all the trade” within the region have *not* been eliminated.’¹³⁰ He also points out that the list in Article XXIV:8 is illustrative and not exhaustive as it does not cover Article XIX on safeguards, Article XXI on security exceptions and XXIII:B on balance of payments.¹³¹

Pauwelyn’s argument finds support in the analysis of the Appellate Body itself ‘that “substantially all the trade” is not the same as *all* the trade, and also that “substantially all the trade” is considerably more than merely *some* of the trade.’¹³² However, with regard to trade with third countries, sub-paragraph 8(a)(ii) requires that ‘substantially, the same duties and

¹²⁹ *Turkey Textiles*, WT/DS/34/AB/R, adopted 19 November 1999, para 45.

¹³⁰ Joost Pauwelyn, ‘The Puzzle of WTO Safeguards and Regional Trade Agreements’, *JIEL* 7(1) 126

¹³¹ *ibid.*

¹³² *Turkey Textiles*, para. 48.

other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union.’¹³³

The Appellate Body confirmed that the GATT 1994 Article XXIV provides exceptions to the general rules against discrimination:

we are of the view that Article XXIV may justify a measure which is inconsistent with certain other GATT provisions. However, in a case involving the formation of a customs union, this “defence” is available only when two conditions are fulfilled. First, the party claiming the benefit of this defence must demonstrate that the measure at issue is introduced upon the formation of a customs union that fully meets the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV. And, second, that party must demonstrate that the formation of that customs union would be prevented if it were not allowed to introduce the measure at issue. Again, both these conditions must be met to have the benefit of the defence under Article XXIV.¹³⁴

As the Appellate Body pointed out, the Panel overlooked the first step which was to establish whether the regional trade arrangement between the EC and Turkey qualified as a customs union. The Appellate Body did not wade into that ‘on the basis of the principle of judicial economy’ and ruled that ‘the defence afforded by Article XXIV under certain conditions is not available to Turkey’¹³⁵ in the case. Conscious of its avoidance technique, the Appellate Body declared, ‘we make no finding on the issue of whether quantitative restrictions found to be inconsistent with Article XI and Article XIII of the GATT 1994 will ever be justified by Article XXIV... we make no findings either on many other issues that may arise under Article XXIV.’¹³⁶ It is this habit of side-stepping an important legal issue and postponing it till ‘another day’ that made Marc L. Busch and Krzysztof J. Pelc describe the Appellate Body practice as ‘Ruling Not to Rule.’¹³⁷ This leaves ECOWAS High Contracting Parties and other regional economic organisations not certain of how far they could use their organisations to facilitate the economic development of the regions.

¹³³ GATT XXIV:8(a)(ii)

¹³⁴ *Turkey Textiles*, WT/DS/34/AB/R, adopted 19 November 1999, para 58.

¹³⁵ *ibid* para. 60.

¹³⁶ *ibid* para 65.

¹³⁷ (N 121)

6.5 Indonesia – Certain Measures Affecting the Automobile Industry¹³⁸

This was a case brought by the largest trading and most powerful members of the WTO: the EC (WT/DS54/R), Japan (WT/DS55/R) and the USA (WT/DS59/R) against Indonesia. Article 9 of the DSU provides in respect of multiple complainants that ‘[w]here more than one Member requests the establishment of a panel related to the same matter, a ...single panel should be established to examine such a complaint whenever feasible’¹³⁹ and so all the three actions were consolidated for hearing.

The measure at issue was Decree No. 114/1993 of Indonesia which defined ‘local components’ or ‘local sub-components’ as ‘parts or sub-parts of motor vehicles which are domestically made and have local contents at a level of more than 40 per cent for (light commercial vehicles and passenger cars)’ and ‘if the local content of a passenger car was less than 20 per cent, the importer paid an import duty of 100 per cent.’¹⁴⁰

Decree No. 114/1995 was followed by other decrees (No. 647/1993, No. 223/1995, No. 31/1996, and No. 36/1997 as well as ‘The February 1996 Programme, the Presidential Instruction No. 2/1996 and Government Regulation No. 20/1996) with varying schedules in respect of tax and tariff based on the local contents of various categories of motor vehicles.

All the three complainants requested the Panel to find that the National Car Programme of Indonesia violated Articles I:1, III: 2 & 4 of GATT 1994, Article 2 of the TRIMs, Article 3 of

¹³⁸ Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R; WT/DS55/R, WT/DS59/R, WT/DS64/R circulated 2 July 1998 and adopted 23 July 1998.

¹³⁹ Article 9(1) DSU.

¹⁴⁰ *Indonesia – Autos*, n 127 above para 2.5.

the TRIPS Agreement and Articles 1 and 2 of the SCM Agreement and so request Indonesia to bring its measures into conformity with its obligations under the GATT 1994, the TRIMS Agreement, the TRIPS Agreement and the SCM Agreement.¹⁴¹

Indonesia announced the presence of two private lawyers as members of its delegation; the United States objected and the Panel ruled in favour of Indonesia:

We conclude that it is for the Government of Indonesia to nominate the members of its delegation to meetings of this Panel, and we find no provision in the WTO Agreement or the DSU, including the standard rules of procedure included therein, which prevents a WTO Member from determining the composition of its delegation to WTO panel meeting. Nor does past practice in GATT and WTO dispute settlement point us to a different conclusion.¹⁴²

Indonesia based its argument in part that the SCM Agreement was the only applicable law to the dispute and not the GATT otherwise there would be a conflict between the two agreements, because, in its view, the application of Article III of the GATT to the dispute would reduce the SCM Agreement to 'inutility'. This was rejected by the Panel because 'the obligation contained in the WTO Agreement are generally cumulative, can be complied with simultaneously.'¹⁴³

On the relationship between the TRIMS Agreement and Article III of GATT, the Panel noted that the TRIMS Agreement is a full-fledged agreement in the WTO system¹⁴⁴ pointing out

¹⁴¹ *ibid*, paras 3.2 & 3.5.

¹⁴² *ibid*, para. 14.1

¹⁴³ *ibid*, para. 14.56.

¹⁴⁴ The Panel stated, 'The General Agreement on Tariffs and Trade 1994 ("GATT") is defined as to consist of: (a) the provisions in the General Agreement on Custom duties and Trade, dated 30 October 1947, annexed to the Final Act Adopted at the Conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment (excluding the Protocol of Provisional Application), as rectified, amended or modified by the terms of legal instruments which have entered into force before the date of entry into force of the WTO Agreement; (b) the provisions of a series of the legal instruments (protocols and decisions) set forth below that have entered into force under the GATT 1947 before the date of entry into

that ‘the TRIMs Agreement has an autonomous legal existence, independent from that of Article III.’¹⁴⁵ What sounded like a distinction without a difference by the Panel was that ‘when the TRIMs Agreement refers to “the provisions of Article III”, it refers to the substantive aspects of Article III; that is to say, conceptually, it is the ten paragraphs of Article III that are referred to in Article 2.1 of the TRIMs Agreement, and not the application of Article III in the WTO context as such’¹⁴⁶ as if Article III has a life of its own. The Panel chose to examine the claims under Article 2.1 of the TRIMs first because it is ‘more specific than Article III:4 in keeping with the procedure adopted by the Appellate Body in *Bananas III* while discussing the relationship between Article X of the GATT and Article I.3 of the Licensing Agreement and by both the Panel and the Appellate Body in the *Hormones* case.

A clarification also made by the Panel is that the use of the broad term ‘investment measures’ does not apply to measures taken specifically for purposes of foreign investment. So it is not the nationality of an enterprise that determines whether it is covered by the TRIMs Agreement.¹⁴⁷

It is also noteworthy that the Panel in this case did not exercise judicial economy unlike the Appellate Body in *Turkey – Textiles*. In countering the argument of Indonesia, the Panel stated, ‘[w]e do not agree with Indonesia that we are precluded from considering the effects of the subsidies pursuant to the June 1996 car programme when analysing whether the subsidies in this case have caused serious prejudice to the interests of the complainants.’¹⁴⁸

force of the WTO Agreement; (c) six Understandings on the interpretation of provisions of GATT 1994; and (d) the Marrakesh Protocol to GATT 1994.

¹⁴⁵ *Indonesia – Autos*, para. 14.62.

¹⁴⁶ *ibid*, para. 14.61.

¹⁴⁷ *ibid*, para. 14.73.

¹⁴⁸ *ibid*, para 14.206.

In the light of the foregoing, Indonesia's local content requirements of the 1993 and of the 1996 car programmes were declared in violation of Article 2 of the TRIMs Agreement. The sales tax aspects in favour of domestic motor vehicles incorporating a certain percentage value of domestic products was also declare to be in violation of Article III:2 of GATT; and, the customs duty and sales tax benefits in violation of Article I of GATT. Relying on Article 7.8 of the SCM Agreement providing that '[w]here a Panel report or an Appellate Body report is adopted in which it is determined that any subsidy has resulted in adverse effects to the interests of another Member within the meaning of Article 5, the Member granting or maintaining the subsidy shall take appropriate steps to remove the adverse effects or shall withdraw the subsidy,' the Panel recommended that Indonesia should conform with its obligations under the covered WTO Agreements.

These findings constrain the economic development of ECOWAS and other developing and least-developed countries. The local-content requirement was meant to boost other subsidiary industries that make car components or accessories such as glass, tyres, cables, batteries or paint that are located far from the car assembly plant and provide jobs to millions of people across the country. Again important as this case is in bolstering the WTO objective of trade liberalisation, it has only been cited once in the leading *Journal of International Economic Law* in connection with the 'presumption of consistency'¹⁴⁹ in the practice of treaty interpretation.

6.6 India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products¹⁵⁰

¹⁴⁹ See Michael Lennard, 'Navigating by the Stars: Interpreting the WTO Agreements,' *JIEL*, 5(1) 57, n 107; see also 'Subject Index to Volumes 1-13 (1998-2010), *JIEL*, 14(1) 221-236.

¹⁵⁰ *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/AB/R, adopted 22 September 1999 (hereinafter *India – Quantitative Restrictions*).

In *India – Quantitative Restrictions* the United States complained against quantitative restrictions imposed by India on imports of agricultural, textile and industrial products on 2,714 tariff lines. India stated that it based its actions on the defences afforded by the balance-of-payment justifiable under Article XVII:B of the GATT 1994. The United States argued that the action by India was a violation of Article XI and Article XVIII:11 of the GATT 1994, and Article 4.2 of the *Agreement on Agriculture* and the *Agreement on Import Licensing Procedures*. The Panel found India in violation of the WTO Agreements.

India appealed by submitting that there was a principal legal error because the Panel failed ‘to take into account that each organ of the WTO must exercise its power with due regard to the powers attributed to the other organs of the WTO,’¹⁵¹ in other words the WTO should adhere to ‘the principle of institutional balance’¹⁵² by applying separation of powers within its organs.

India argued that there should be separation of powers between the political and the judicial organs of the WTO and that ‘the question whether one organ created by the CONTRACTING PARTIES could encroach upon the jurisdiction of another arose in the context of Article XXIV of the GATT 1947 in *EC – Citrus* and in *EC – Bananas I*’¹⁵³ pointing out that the key to getting the balance right was striking the right balance between a Committee and a Panel. India stated that it was not ‘whether or not panels may review agreements notified under Article XXIV:7, but the extent to which they should review them.’¹⁵⁴

¹⁵¹ *ibid*, para. 8

¹⁵² *ibid*, para. 10

¹⁵³ *ibid*, para. 12

¹⁵⁴ *ibid*.

India contended that the Panel recognised a ‘dual track system’ by allowing both the BOP Committee and the Panel to have concurrent jurisdiction to examine balance-of-payments justification of measures notified under Article XVIII:B and stated that it was, in her view, incompatible with Article 3.2 of the DSU to permit Members to invoke the DSU in a way that would diminish the rights of the defendant under the WTO Agreements.

In a subsidiary claim of legal error, India canvassed that an immediate removal of all restrictions was bound to reduce India’s reserves below the levels considered adequate by the IMF. India also stated that the IMF confirmed that removing all her quantitative restrictions would necessitate changes in her macroeconomic and structural adjustment policies. India also submitted that while the IMF based its policy advice on ‘economic efficiency considerations,’ it was up to a WTO Member to choose what policy instrument to use taking into account the ‘structural, institutional and political constraints’ that might follow. What the IMF calls ‘economic efficiency’ at the global level may be against the national interests of some countries and domestic policies may dictate otherwise.

Article XVIII:11 of the GATT 1994 provides:

In carrying out its domestic policies, the contracting party concerned shall pay due regard to *the need for restoring equilibrium in its balance of payments on a sound and lasting basis* and to the desirability of assuring an economic employment of productive resources. It shall progressively relax any restrictions applied under this Section as conditions improve, maintaining them only to the extent necessary under the terms of paragraph 9 of this Article and shall eliminate them when conditions no longer justify such maintenance; Provided that no contracting party shall be required to withdraw or modify restrictions on the ground that a change in its development policy would render unnecessary the restrictions which it is applying under this Section (italics mine).

The proviso to Article XVIII:11 of the GATT 1994 clarifies the provisions of the paragraph thus:

The second sentence in paragraph 11 shall not be interpreted to mean that *a Contracting Party is required to relax or remove restrictions if such relaxation or removal would thereupon produce conditions justifying the intensification or institution, respectively, of the restrictions under paragraph 9 of Article XVIII* (italics mine).

Paragraph 9 allows a WTO Member to take measures ‘to safeguard its external financial position and to ensure a level of reserves adequate for the implementations of its *economic development*’ (emphasis added).

The United States disagreed with all the issues raised above which was tantamount to arguing against the GATT itself (as these are clear provisions of the Agreement) and urged the Appellate Body to find that India’s actions were inconsistent with its obligations under the covered agreements.

Spectacularly the Appellate Body found all the arguments of India to be ‘completely beside the point.’ In an unguarded moment as if making the case for the United States and very much like economists rather than a bench of judges in an international trade dispute, the AB stated, ‘[s]tructural adjustments are needed to cause an increase in foreign exchange receipts from export and foreign investment so as to offset the rise in foreign exchange expenditure.’¹⁵⁵

What the Appellate Body did not do was state how the structural adjustments based on the National Treatment principle would operate in practice knowing full well that without the quantitative restrictions India would have to pay for the foreign goods imported without internally generated revenue and also without a corresponding export capacity.

¹⁵⁵ *ibid*, para. 38

The Appellate Body concluded that ‘the Panel did not require India to change its development policy and, therefore, did not err in law with regard to the proviso to Article XVIII:11 of the GATT 1994.’¹⁵⁶

Again another blind spot: it is not clear how India would bring its balance-of-payments restrictions, as recommended by the Panel and the Appellate Body, into conformity with its obligations under Articles XI:1 and XVIII:11 of the GATT 1994 and with Article 4.2 of the *Agreement on Agriculture* without ‘a change to its development policy’.

Still again, *India – Quantitative Restrictions*, like *Indonesia – Autos* is a ‘road not taken’ by the mainstream epistemic community of International Economic Law as it has not attracted even one scholarly comment (to my knowledge) in the leading journal even though it was contested up to the Appellate Body.

6.7 Canada – Certain Measures Affecting the Automotive Industry¹⁵⁷

Another key Articles I and III GATT case is *Canada – Autos*. In it Japan and the European Communities filed a complaint against Canada because of the Agreement Concerning Automotive Products between the Government of Canada and the Government of the United States (the “Auto Pact”), a treaty between the two countries which entered into force in January 1965. The dispute sprang because Canada accorded certain motor-vehicle manufacturers established in Canada the right to import motor vehicles without paying the generally applicable customs duties provided they achieved a minimum amount of Canadian value added (CVA). In order to qualify as a motor vehicle manufacturer under the Auto Pact,

¹⁵⁶ *ibid*, para. 153(c).

¹⁵⁷ *Canada – Certain Measures Affecting the Automotive Industry, WT/DS139/R and WT/DS142/R adopted 119 June 2000* (hereinafter *Canada – Autos*).

the manufacturer must have produced in Canada during the base year (1963-64), and (i) must have maintained a certain ratio of the sales value of its local production of vehicles of that class to the value of that sold in Canada of a prescribed minimum, and (ii) must have achieved a minimum amount of CVA in its production of whole motor vehicles or parts.

Before the Auto Pact was concluded, ‘the Canadian Government requested from the Auto Pact manufacturers some commitments in form of Letters of Undertaking specifying how each company viewed its operations in relation to the Auto Pact.’¹⁵⁸ The Letters to the Government, according to Canada, were not legally enforceable. The GATT set up a Working Party in March 1965 to examine the Auto Pact but while

It was the general consensus of the Working Party that, if the United States implemented the Agreement in the manner proposed, United States action would be clearly inconsistent with Article I and it would be necessary for the United States Government to seek a waiver from its GATT obligations¹⁵⁹

there was not consensus ‘on whether Canada was in violation of its GATT commitments’¹⁶⁰ or not.

To pre-empt any dispute with the complainants in *Canada – Autos*, the United States sought and obtained a waiver under Article XXV:5 in 1965¹⁶¹ and renewed it in November 1996 until 1 January 1998.¹⁶²

¹⁵⁸ *ibid*, para. 2.4.

¹⁵⁹ Report of the *Working Party on Canada – US Agreement on Automotive Products*, submitted to the Council of Representatives 19 November 1965, BISD 13S/112 (hereinafter Report of the *Working Party on Canada – US Agreement on Automotive Products*).

¹⁶⁰ *Canada – Autos (Panel)*, para. 2.8.

¹⁶¹ Decision of the CONTRACTING PARTIES of 20 December 1965 granting the waiver requested by the United States, BIDS 14S/37.

¹⁶² Decision adopted by the General Council at its meeting of 7, 8 and 13 November 1996, WT/L/198.

It is worthy of note that on the same day the waiver was to expire, the US and Canada entered into another agreement, the Canada – United States Free Trade Agreement (CUSFTA) for trade in automotive parts which was suspended because of the entering into force of the NAFTA on 1 January 1994 when Mexico joined the two north American nations and the US leaned on Article XXIV for justifications under the ‘Customs Union and Free-trade Areas’ exceptions provision. Realistically, the favourable conditions existing between the United States and Canada have not been extended to other countries but have been shielded and guarded jealously from others under one form of treaty or another which was why the European Communities stated that both the CUSFTA and the NAFTA were ‘directly relevant to the dispute’ and Japan contended that ‘the agreements amplified and exacerbated the discriminatory effects of the measures.’¹⁶³ Why the EC and Japan stopped short of formulating legal issues for determination on the CUSFTA and NAFTA arrangements is not clear.

The conditions under which the duty free entry would be permitted were given effect domestically in Canada through the Motor Vehicle Traffic Order (MVTO) 1965.¹⁶⁴ There were replacements of the instruments by later MVTOs in 1988¹⁶⁵ and 1998.¹⁶⁶ In addition to a CVA and variable production to sales ratios of between 75 to 100 and 100 to 100 in Canada, the MVTO 1998 laid down the following for the calculation of the CVA:

- the cost of parts produced in Canada and of materials of Canadian origin that are incorporated in the motor vehicles;
- direct labour costs incurred in Canada;
- manufacturing overheads incurred in Canada;
- general and administrative expenses incurred in Canada that are attributable to the production of motor vehicles;

¹⁶³ *Canada – Autos*, para. 2.14.

¹⁶⁴ P.C. 1965-99, of 16 January 1965.

¹⁶⁵ P.C. 1987-2733, of 31 December 1987.

¹⁶⁶ The MVTO 1998 was an Order-in-Council passed by the Governor-General in Council, on the recommendation of the Minister of Finance. The enabling authority is found in subsections 14(2) and 16(2) of Canada’s Customs Tariff. The MVTO 1998 was administered by the Minister of National Revenue.

- depreciation in respect of machinery and permanent plant equipment located in Canada that is attributable to the production of motor vehicles; and
- a capital cost allowance for land and buildings in Canada that are used in production of motor vehicles.¹⁶⁷

The Panel found that

- (a) Canada acted inconsistently with Article I:1 of the GATT 1994 by according the advantage of an import duty exemption to motor vehicles originating in certain countries, pursuant to the MVTO 1998,
- (b) Article XXIV of the GATT does not provide a justification for the inconsistency with Article I,
- (c) Canada acted inconsistently with Article III:4 of the GATT 1994 by according less favourable treatment to imported parts, materials and non-permanent equipment than to like domestic products with respect to their internal sale or use, as a result of application of the CVA requirements as one of the conditions determining eligibility for the import duty exemption on motor vehicles under the MVTO 1998, the SROs and as a result of conditions concerning CVA requirements contained in certain Letters of Undertaking;
- (d) Canada acted inconsistently with its obligations under Article 3.1(a) of the SCM Agreement by granting a subsidy which is contingent in law upon export performance, as a result of the application of the ratio requirements as one of the conditions determining eligibility for the import duty exemption on motor vehicles under the MVTO 1998 and the SROs;¹⁶⁸

At the end of its conclusions, the Panel drew attention to Article 3.8 of the DSU which provides that

In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. This means that there is normally **a presumption** that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought **to rebut the charge** (boldface added).¹⁶⁹

Again at the end of its recommendations, the Panel drew attention to Article 4.7 of the *SCM Agreement* and made the following pedantic analysis:

With respect to the time-period within which the measure must be withdrawn, Article 4.7 of the SCM Agreement requires a Member to withdraw the prohibited subsidy "without delay" and it is "in this regard" that a panel must specify a time-period within which the prohibited subsidy must be withdrawn. The noun "delay" has been defined to mean, *inter alia*, "the action or process of delaying; procrastination; lingering; putting off", while the verb to "delay" has been defined, *inter alia*, as to "put off to a later time; postpone, defer". Thus, in its ordinary meaning, the phrase "without delay" suggests that the Member must not put off, postpone or defer action, but must rather act as quickly as possible to withdraw the prohibited subsidy. Thus, in examining what time-period would represent withdrawal "without delay" in a particular case, we consider that we may take into account the nature of the steps necessary

¹⁶⁷ *Canada – Autos* (Panel), para. 2.26.

¹⁶⁸ *ibid*, XI, 11.1(a), (b) and (e)

¹⁶⁹ *ibid*, para. 11.2.

to withdraw the prohibited subsidy. We do not, however, agree with Canada that we should take into account the existence or absence of adverse or trade-distorting effects resulting from the prohibited subsidy, nor the time required to design replacement measures, as these factors are not related to the consideration of what time-period would represent withdrawal "without delay".¹⁷⁰

It is not clear why the Panel had to draw the attention of the parties to the provisions of the DSU and the SCM Agreement as it did in the quoted paragraphs above, more so when the dispute was between the leading members of the WTO who often make use of the dispute settlement system. By pointing out that a finding of inconsistency is only considered *prima facie* to constitute a case of nullification and impairment of benefits, it was like the Panel was nudging Canada to appeal its findings. Again of more concern to world trade lawyers is the last sentence of Article 3.8 (DSU) that 'it shall be up to the Member against whom the complaint has been brought to rebut the charge' which seems to accord a premier position to economics, and not law, in the final determination of a trade dispute. This appears to be the correct interpretation that is supported by the diction of the Panel that the 'European Communities and Japan have failed to *demonstrate* that' The use of 'demonstrate' rather than 'prove,' it is humbly submitted, demands for evidence based on sound economic theories and econometric analysis, not just legal arguments. Again gathering material and statistical data do 'demonstrate' nullification and impairment may be too difficult in some developing and least-developed countries due to very poor national records and poor communication and transport facilities.

Moreover, the pedantic explication of 'without delay' by the Panel would seem to suggest that the determination of SCM cases should be followed by immediate compliance measures while other GATT disputes do not call for the same urgency in response. I leave it to further

¹⁷⁰ *ibid*, para. 11.6. The Panel relied on *The New Shorter Oxford English Dictionary* (Clarendon Press, 1993), Vol. 1, 623.

research to show whether SCM disputes have been followed by immediate or shorter compliance periods than other GATT cases.

6.7.2 Some twists and turns of the Panel in *Canada – Autos*

The Panel in *Canada – Autos* refused to countenance precedents for the Appellate Body. In her submission, Japan stated,

Despite the fact that the Government of Japan does not discuss in detail the inconsistency of the manufacturing requirement with Article III:4 of the GATT 1994 or Article 2.1 of the TRIMS Agreement in its arguments to the same extent as was discussed in its Request for the Establishment of a Panel (WT/DS139/2), the Government of Japan reserves its right to elaborate during the course of the panel deliberation on these claims already contained in the said request.¹⁷¹

Canada objected to Japan's reservation of 'its right to elaborate during the course of the Panel deliberation' backing up its objection with the Appellate Body decision in *EC – Bananas III* that a complaining party is not permitted 'to eke out its claims incrementally during the various stages of the case'.¹⁷² The Panel countered with the following argument,

However, the situation here is unlike that in *EC – Bananas III*, where the Appellate Body stated that "Article 6.2 of the DSU requires that the *claims*, but not the *arguments*, must all be specified sufficiently in the request for the establishment of a panel in order to allow the defending party and any third parties to know the legal basis of the complaint" (WT/DS27/AB/R, para. 143) In the case before us there is no Article 6.2 issue of specificity of the measures identified in the panel request. Japan in this dispute has not attempted to reserve a right to present a new claim at a later stage of the proceedings; rather, it appears that Japan has simply indicated that it may wish to further elaborate its arguments as to claims already set out in the panel request and in its initial arguments.¹⁷³

It then ruled preliminarily that Canada would not be prejudiced in its ability to defend itself.

Again also in *EC – Bananas III* (referred to in *Indonesia – Autos*¹⁷⁴) the Appellate Body had ruled that 'a claim should be examined first under the agreement which is the most specific with respect to that claim,' a kind of *lex specialis*. Here instead of a refusal to follow the

¹⁷¹ *Canada – Autos*, C para. 4.8.

¹⁷² *ibid*, para. 4.11.

¹⁷³ Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, adopted on 25 September 1997, WT/DS27/AB/R, para. 141.

¹⁷⁴ *Indonesia – Autos*, n 127 above, para. 14.63.

Appellate Body, the Panel distinguished *Canada – Autos* from *EC – Bananas* by saying, ‘we are not persuaded that the TRIMs Agreement can be properly characterized as being more specific than Article III:4 in respect of the claims raised by the complainants in the present case,’¹⁷⁵ I fully support the position taken by the Panel here since Article 2.1 of the TRIMs merely refers to Article III or Article XI of the GATT, is not specific on either, and does not give any details than either of the GATT articles it makes reference to.

While some scholars have examined the findings and conclusions of both the Panel and the Appellate Body in *Canada – Autos*, others have made tangential and oblique references to the case. Jacqueline D. Krikorian¹⁷⁶ analysed how the WTO dispute settlement system has impacted on Canada by looking at eight cases involving the country whether as complainant or respondent in the first ten years of the WTO, one of which was *Canada – Autos*. After stating the perception and opposition of Canadians to the WTO Agreement as a ‘Corporate Bill of Power,’¹⁷⁷ ‘a kind of international constitutional order to entrench market – over citizen – rights,’¹⁷⁸ and a ‘phenomenon of global substantive lawmaking,’¹⁷⁹ she asks the fundamental question of whether there is ‘sufficient evidence to contend that the tribunal’s (WTO dispute settlement) decisions are placing the interests of the market over the public.’ She argues that in *Canada – Autos*, ‘the WTO dispute settlement mechanism broadly interpreted the WTO Agreement, and, arguably, extended the scope of its provisions beyond what the drafters originally intended.’¹⁸⁰ She gives some examples: the *Pharmaceutical Patent Case* where ‘political considerations were influential’ because the only plausible

¹⁷⁵ *Canada – Autos*, para. 10.63.

¹⁷⁶ Jacqueline D. Krikorian, ‘Planes, Trains and Automobiles: The Impact of the WTO “Court” on Canada in its First Ten Years,’ *Journal of International Economic Law* 8(4), 921-975.

¹⁷⁷ Statement of Ralph Nader, *Hearings before the Committee on Ways and Means and Its Subcommittee on Trade*, House of Representatives, No. 103-73 (2 February 1994), 173.

¹⁷⁸ Stephen Gill, ‘Globalisation, Market Civilisation, and Disciplinary Neoliberalism,’ *24 Millennium: Journal of International Studies* (1995) 412, 413.

¹⁷⁹ Gail E. Evans, *Lawmaking under the Trade Constitution, A Study in Legislating by the World Trade Organisation*, (The Hague, Kluwer Law 2000) 219.

¹⁸⁰ Jacqueline D. Krikorian, n 165, 963.

explanation for ‘the legal reasoning used to distinguish the stockpiling and the regulatory review mechanism exemptions under the TRIPS Agreement are difficult, if not impossible, to reconcile;’¹⁸¹ and, the *Wheat Board* and the *Milk and Dairy* cases where the WTO tribunal ‘endorsed the social policy objectives underpinning them.’¹⁸² She was convinced that ‘power politics, and not international trade law, dictated the outcome.’ As she puts it, [p]olitics – as much as law – is an integral and necessary component of the operation of the WTO ‘court,’ for example, Canada lost the *Canada – Autos* case but effectively circumvented ‘the goals of those who initiated the dispute’ by denying Honda and Toyota (Japan claiming MFN) a participation in the Auto Pact arrangement by dismantling the Pact and ensuring that all car companies would be allowed to participate in it, thereby denying Japan the exclusive privilege Honda and Toyota wanted to enjoy.

Tangentially, Andrew Green¹⁸³ mentioned the *Canada – Autos* case while discussing the regulatory policy of the WTO on climate change. He stated that the Panel in *Canada – Autos* interpreted the term very broadly when it stated that for the action of a private party to be a ‘requirement’ that all that was needed was a ‘nexus between that action and the action of a government such that the government must be held responsible for that action.’¹⁸⁴ It was also his view that the Panel’s interpretation of ‘affecting’ as covering laws, regulations and requirements directly governing the sale, offering for sale, purchase, transportation, distribution or use of products was a very broad one.

Krikorian endorses Stephen Gill’s argument that the ‘new constitutionalism’ which the WTO represents entrenches market interests at the international level and limits the ability of governments to act in the public interest and that at the WTO ‘court’ it is ‘the economic

¹⁸¹ *ibid*, 965.

¹⁸² *ibid*.

¹⁸³ Andrew Green, *Climate Change, Regulatory Policy and the WTO: How Constraining Are Trade Rules?* *Journal of International Economic Law* 8(3), 143-189.

¹⁸⁴ Panel Report, *Canada – Autos*, para. 10.107.

strength of the hegemonic power’ and not the letters of the WTO Agreement that counts most. Again, both Krikorian and Gill state that the WTO Agreements create a policy chill on future government initiatives.

I would like to note here that the sectoral free trade agreement (the Auto Pact) which was declared by the Panel and the Appellate Body to be GATT-inconsistent was seen by Canadians as a ‘powerful symbol of prosperity and patriotic pride’¹⁸⁵ and was enormously successful for the 35 years it lasted. Canadians saw it like they were told to commit economic suicide and Roy MacLaren, the Minister of Trade was seen as a traitor for yielding to WTO pressure. If a highly developed Western country experienced the impact of hegemonic power and cried out, developing countries and the least-developed countries with no government-sponsored social security will all the more so.

6.8.1 European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries¹⁸⁶

EC – Tariff Preferences represents a classic example of a clash between the WTO core principles of ‘trade and development’ (market access for exports from developing countries) with non-economic values, ‘trade and human rights’ (environmental standards and labour rights). It split the Panel with one of the three members submitting a strong and persuasive dissenting opinion. India complained against the European Communities for having special arrangements with twelve developing countries and economies in transition to combat drug production and trafficking which was given effect by Council Regulation (EC) No. 2501/2001 of 10 December 2001.¹⁸⁷ The Regulation applied a scheme of generalised tariff

¹⁸⁵ Jacqueline D. Krikorian, n 165, 939.

¹⁸⁶ Panel Report WT/DS246/R circulated 1 December 2003 and Appellate Body Report adopted 20 April 2004, (hereinafter *EC – Tariff Preferences*).

¹⁸⁷ OJ 163/45

preferences for a period of three years (1 January 2002 to 31 December 2004) and was also meant to implement the Drug Arrangements and provided for

- (i) The General Arrangement,
- (ii) the Special Incentive Arrangements for the protection of labour rights,
- (iii) the Special Incentive Arrangements for the protection of the environment,
- (iv) the special Arrangements for least-developed countries, and
- (v) the Special Arrangements to combat drug production and trafficking (the 'Drug Arrangements'¹⁸⁸).

By the way the arrangements were calibrated, India benefited under 'General Arrangements' ((i) above) but not from the other four, that is, (ii) to (v).

Article 10 of the Regulation provides:

1. Common Customs Tariff *ad valorem* duties on products, which according to Annex IV, are included in the special arrangements to combat drug production and trafficking referred to in Title IV and which originate in a country that according to Column I of Annex I benefits from those arrangements, shall be entirely suspended. For products of CN code 0306 13, the duty shall be reduced to a rate of 3.6 per cent.
2. Common Customs Tariff specific duties on products referred to in paragraph 1 shall be entirely suspended, except for products for which Common Customs Tariff duties also include *ad valorem* duties. For Products of CN codes 1704 10 91 and 1704 10 99 the specific duty shall be limited to 16 per cent of the customs value.

India filed a complaint and requested the Panel to find that the Drug Arrangements set out in Article 10 of the Regulation are inconsistent with Article 1:1 of the GATT 1994 and not justified by the Enabling Clause.¹⁸⁹ The Panel summarised the Regulation as giving different opportunities to different countries.¹⁹⁰ The Panel was then faced with deciding whether the

¹⁸⁸ The Drug Arrangements applied to Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Pakistan, Panama, Peru and Venezuela.

¹⁸⁹ The Decision on Differential and More Favourable Treatment, Reciprocity, and Fuller Participation of Developing Countries (the 'Enabling Clause'), GATT Document L/4903, 28 November 1979, BIDS 26S/202.

¹⁹⁰ Panel Report, para. 2.8, 'The result of the Regulation is that the tariff reductions accorded under the Drug Arrangements to the 12 beneficiary countries are greater than the tariff reductions granted under the General Arrangements to other developing countries. In respect of products that are included in the Drug

‘Enabling Clause’ (that is the generalised preferences to developing and least-developed countries) was an ‘exception’ to Article I:1 of the GATT 1994 and whether the Clause precludes the applicability of the Article.

The European Communities posited that the Enabling Clause excludes the application of Article I:1 but India argued that the Enabling Clause would do so only to ‘the extent necessary to implement the GSP schemes, but does not exclude the operation of Article I:1 altogether.’¹⁹¹ India also argued that (i) nothing in the Enabling Clause exempted the EC from the obligation under Article I:1, (ii) that under the Enabling Clause differential and more favourable treatment could not be granted ‘unconditionally,’ (iii) that ‘conditional’ as used in Article I:1 means ‘the granting of tariff preferences in exchange for some form of compensation, and (iv) that the Enabling Clause only prohibits the condition of reciprocity.’¹⁹²

The European Communities relied heavily on the ‘object and purpose’ of the Enabling Clause¹⁹³ arguing that it was meant to promote ‘the trade of all developing countries commensurate with their development needs,’ and that ‘the interpretation of the term “non-discriminatory” should further the objectives of the Enabling Clause and the WTO Agreement.’¹⁹⁴

Arrangements but not in the General Arrangements, the 12 beneficiary countries are granted *duty free* access to the European Communities' market, while all other developing countries must pay the *full duties applicable under the Common Customs Tariff*. In respect of products that are included in both the Drug Arrangements and the General Arrangements and that are deemed "sensitive" under column G of Annex IV to the Regulation with the exception for products of CN codes 0306 13, 1704 10 91 and 1704 10 99, the 12 beneficiary countries are granted *duty-free* access to the European Communities' market, while all other developing countries are entitled only to *reductions in the duties applicable under the Common Customs Tariff*. (Original italics).

¹⁹¹ Panel Report, para. 7.43.

¹⁹² Panel Report, para. 7.150.

¹⁹³ Paragraph 2(a) of the Enabling Clause relied on by the European Communities provides: ‘The provisions of paragraph 1 apply to the following: (a) preferential treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalised System of Preferences.’

¹⁹⁴ Panel Report, para. 7.154.

The Panel concluded that India had *demonstrated* that the European Communities' Drug Arrangements were inconsistent with Article I:1 of the GATT 1994 but that the European Communities 'failed to demonstrate' that the Drug Arrangements were justified under paragraph 2(a) of the Enabling Clause and also 'failed to demonstrate' that it was justifiable under Article XX(b) of the GATT 1994. Under Article 3.8 of the DSU, 'demonstrated' cases of infringement constitute *prima facie* nullification or impairment of benefits of the complaining party under the multilateral trade agreements. It then recommended that the EC should bring its measure into conformity with its obligations under the GATT 1994.

6.8.2 *The Dissenting Opinion by One Member of the Panel*

It is rare in WTO dispute settlement to have a dissenting opinion.¹⁹⁵ The *EC – Preferences* Panel was composed of Mr Julio Lacarte-Muró (Uruguay), Professor Marsha A. Echols (United States) and Professor Akio Shimuzu (Japan) with Mr Lacarte-Muró as chairman. The Panel split two-to-one and because the majority decision does not have the names of the two panellists that authored it, it is difficult to state categorically who the third that handed down the dissenting opinion was but textual evidence (an abundance of GATT negotiating history [the Tokyo Round] and the copious footnotes of Contracting Parties' statements) suggests compellingly the work of a GATT-participant and trade diplomat among them, namely, Mr Julio Lacarte-Muró. Whoever he or she was, the dissenter traced the history, object and purpose of the Enabling Clause to the arguments of the developing countries in UNCTAD in the 1960s and 1970s that 'the benefits expected to result from freer trade had not occurred and that a new approach was needed.' Therefore, the '1971 Waiver,' according to the dissenting opinion, 'which was expressly cross-referenced in paragraph 2(a) and

¹⁹⁵ Another case in this study containing a dissenting opinion is *US – Upland Cotton* in the last chapter. The panellists and judges, much like the trade diplomats and negotiators, appear to follow consensus.

footnote 3 of the Enabling Clause, was created to permit a rebalancing, to improve trade benefits for the many developing countries that had joined the multilateral trading system in the 1960s and 1970s.’¹⁹⁶

It stated that the Enabling Clause was ‘widely understood and intended’ to serve the purpose of the ‘lifting of the Article I obligation of the preference-granting countries’ and a ‘departure from the basic most-favoured-nation principle.’¹⁹⁷ Therefore, the dissenter submitted, ‘(i)f there had been a dispute under the waiver, the complaining party would not have claimed under Article I because its rights under that provision had been relinquished, as had contractual MFN obligation of the preference-giving country.’¹⁹⁸

Concluding his or her opinion, the dissenter stated:

If India's claim is limited to Article I – as India says – it has chosen the wrong theory to characterize this matter and the complaint should be dismissed. A panel may not address legal claims falling outside its terms of reference and, to protect the rights of Members whose measures are challenged, should not add claims and theories to those put forward by the complaining party.¹⁹⁹

So the dissenter was saying that ‘India’s claim should be raised under the Enabling Clause’²⁰⁰ and not predicated on Article I of the GATT 1994 and because India failed to do so, India’s action should fail too.

The European Communities responded to the WTO finding that the Enabling Clause was inconsistent with the multilateral agreements by replacing the Drugs Arrangements with what is popularly known as the ‘GSP+ Arrangement’. Under the new arrangement, additional tariff preferences were made available (duty free) to the developing countries that signed up

¹⁹⁶ Panel Report, para. 9.6.

¹⁹⁷ Panel Report, para. 9.9.

¹⁹⁸ Panel Report, para. 9.10.

¹⁹⁹ Panel Report, para. 9.21.

²⁰⁰ *ibid.*

to a list of sixteen human rights²⁰¹ and eleven good governance²⁰² conventions²⁰³ by 31 October 2005. They also had to give an undertaking that they would accept regular

²⁰¹ Article 9(1)(a) of Council Regulation 980/2005 of 27 June 2005 [2005] UJ L169/1. The next two references to Articles are to this Regulation.

²⁰² Article 9(1)(b)

²⁰³ CONVENTIONS REFERRED TO IN ARTICLE 9 OF THE EU GSP REGULATION

Core human and labour rights UN/ILO Conventions

1. International Covenant on Civil and Political Rights
2. International Covenant on Economic, Social and Cultural Rights
3. International Convention on the Elimination of All Forms of Racial Discrimination
4. Convention on the Elimination of All Forms of Discrimination Against Women
5. Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
6. Convention on the Rights of the Child
7. Convention on the Prevention and Punishment of the Crime of Genocide
8. Convention concerning Minimum Age for Admission to Employment (No 138)
9. Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (No 182)
10. Convention concerning the Abolition of Forced Labour (No 105)
11. Convention concerning Forced or Compulsory Labour (No 29)
12. Convention concerning Equal Remuneration of Men and Women Workers for Work of Equal Value (No 100)
13. Convention concerning Discrimination in Respect of Employment and Occupation (No 111)
14. Convention concerning Freedom of Association and Protection of the Right to Organise (No 87)
15. Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively (No 98)
16. International Convention on the Suppression and Punishment of the Crime of Apartheid.

Conventions related to the environment and governance principles

17. Montreal Protocol on Substances that Deplete the Ozone Layer
18. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal
19. Stockholm Convention on Persistent Organic Pollutants

surveillance of implementation.²⁰⁴ On the face of it, this appears to have addressed the MFN problem raised by India but Lorand Bartels states that it does not conform to the Appellate Body's interpretation of the Enabling Clause 'because of the substantive criteria chosen by the EU to select GSP+ beneficiaries.'²⁰⁵ Of relevance to this research is the fact that the following criteria set by the EC cut off many ECOWAS countries because of the percentage share of export required.

- (i) An applicant had to ratify and implement a list of sixteen human rights conventions by 31 October 2005, and give an undertaking that it would continue to maintain ratification and accept regular monitoring and review of implementation. Exceptionally, applicants facing constitutional constraints had until 31 December 2006 to ratify and implement a maximum of two conventions. This list of conventions is set out in Part A of Annex III to the GSP Regulation.
- (ii) An applicant had to ratify and implement at least seven of eleven listed 'good governance' conventions by 31 October 2005, and the remainder by 31 December 2008, and give an undertaking that it would continue to maintain ratification and accept regular monitoring and review of implementation. This list of conventions is set out in Part B of Annex III to the GSP Regulation.
- (iii) An applicant had to be a 'vulnerable' country. This is defined in terms of three cumulative conditions: (a) poverty (i.e. not classified by the World Bank as a high-income country); (b) non-diversification of exports (i.e. its five largest sections represent more than 75% of its GSP-covered exports to the EU) and (c) share of EU GSP-covered imports (i.e. no more than 1% of these imports).²⁰⁶

20. Convention on International Trade in Endangered Species of Wild Fauna and Flora

21. Convention on Biological Diversity

22. Cartagena Protocol on Biosafety

23. Kyoto Protocol to the United Nations Framework Convention on Climate Change

24. United Nations Single Convention on Narcotic Drugs (1961)

25. United Nations Convention on Psychotropic Substances (1971)

26. United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988)

27. United Nations Convention against Corruption (Mexico)

²⁰⁴ Article 9(1)(d)

²⁰⁵ Lorand Bartels, 'The WTO Legality of the EU's GSP+ Arrangement,' *JIEL* 10(4), (2001) 869-886

²⁰⁶ *Ibid*, 871.

The original GSP did not favour any African country nor did the new GSP+ arrangement include them.²⁰⁷ Sub-Saharan Africa in general and ECOWAS in particular are often below the WTO radar as most policies cut them off. Sometimes the reasons for these are as much political as they are economic²⁰⁸ considerations of the GSP-giving or developed countries rather than the ‘economic development’²⁰⁹ or ‘development, financial and trade needs’²¹⁰ of developing countries as stated in Recital 7 of the GSP Regulation.²¹¹ Bartels does not fault the decision in *EC – Tariff Preferences* on ‘selectivity’ because he agrees with the Appellate Body that ‘certain development needs may be common to only a certain number of developing countries’;²¹² he faults the decision because it ‘underlines how ineffective the

²⁰⁷ The original Drugs Arrangements covered five Andean and six Central American countries and Pakistan, twelve in all. The GSP+ had Pakistan removed while Sri Lanka, Moldova, Georgia and Mongolia were added, bringing the total to fifteen. Again Sri Lanka and Moldova were beneficiaries of the EU’s labour arrangements while Georgia and Mongolia already had their applications being processed for the preferences. Therefore, if Pakistan was taken away, the beneficiaries of the new GSP+ is virtually the same with the beneficiaries of the old. As was the case in *Canada – Autos*, WTO Member States pay lip service to the implementation of Panels and Appellate Body findings and conclusions. The compliance measures adopted are so perfunctory that they are almost useless.

²⁰⁸ Lorand Bartels (n 123) explains in footnote 17, ‘On 14 November 2001, the European Commission proposed adding Pakistan to the list of ‘drugs arrangement’, and this was effected in the new GSP Program as of 1 January 2002: Council Regulation 2501/2001, above at n 3. The EU’s rationale was that as a result of the events of 11 September 2001, including increased refugee flows, Pakistan’s campaign against illicit drugs needed to be supported, and that ‘[t]he GSP drug regime is therefore likely to stabilize its economic and social structures and thus consolidate the institutions that uphold the rule of law’. See the Explanatory Memorandum to the Amended Proposal for a Council Regulation applying a scheme of generalized tariff preferences for the period 1 January 2002 to 31 December 2004, COM (2001) 688, 14.11.2001. It was the addition of Pakistan to the list of ‘drugs arrangement’ beneficiaries that sparked India’s complaint in *EC—Tariff Preferences*.’

²⁰⁹ Article XXVI:1(b) and 3.

²¹⁰ The Enabling Clause para 5.

²¹¹ The special incentive arrangement for sustainable development and good governance is based on an integral concept of sustainable development as recognized by international conventions and instruments such as the UN Declaration on the Right to Development of 1986, the Rio Declaration on Environment and Development of 1992, the ILO Declaration on Fundamental Principles and Rights at Work of 1998, the UN Millennium Declaration of 2000 and the Johannesburg Declaration on Sustainable Development of 2002. Consequently, developing countries which due to a lack of diversification and insufficient integration into the international trading system are vulnerable while assuming special burdens and responsibilities due to the ratification and effective implementation of core international conventions on human and labour rights, environmental protection and good governance should benefit from additional tariff preferences. These preferences are designed to promote further *economic growth* and thereby to respond positively to the need for sustainable development. . . . (emphasis mine).

²¹² WTO Appellate Body Report, *EC – Tariff Preferences*, para 160.

Appellate Body's test is in preventing 'development needs' from being selected illegitimately.²¹³ Another problem Bartels finds with the GSP+ arrangement is that it is a closed list with no possibility of adding any country to it after the 31 October 2005 deadline.

Steve Charnovitz has remarked that '[i]n an interconnected world, value-free trade is a fiction.'²¹⁴ While he was the European Commissioner for Trade in September 2004, Paschal Lamy propagated a controversial idea he called 'collective preferences' for the multilateral trading system, but even that, according to Charnovitz, is fraught with dangers and not significantly better than the Generalised System of Preferences or the Decision of 28 November 1979, the Enabling Clause. Nonetheless, Charnovitz agrees with Lamy that it is important 'to safeguard the WTO from a mercantilist zeal that could undermine public support for the trading system,'²¹⁵ or as Henry Gao and CL Lim put it less diplomatically, to 'save the WTO from the risk of irrelevance'²¹⁶ to an overwhelming majority of its membership.

The next case is not an MFN or National Treatment dispute; it is rather an SPS measures dispute, but I have included it because of its relevance to market access as it demonstrates the problems identified in chapter 4 of this research on 'International Trade Harmonisation through International Standard-setting.'

6.9 European Communities – Measures Affecting the Approval and Marketing of Biotech Products²¹⁷

²¹³ N 123, 878.

²¹⁴ Steve Charnovitz, 'An Analysis of Pascal Lamy's Proposal on Collective Preferences,' *JIEL*, 8(2) 472.

²¹⁵ *Ibid.*

²¹⁶ 'Saving the WTO from the Risk of Irrelevance: The WTO Dispute Settlement Mechanism As a 'Common Good' for RTA Disputes,' *JIEL*, 11(4) 899-925

²¹⁷ Panel Report, WT/DS291/R, WT/DS292/R and WT/DS293/R circulated 29 September 2006 and adopted 21 November 2006, (hereinafter *EC – Biotech Products*).

The United States, Canada and Argentina complained to the WTO against two distinct matters carried out by the European Communities: '(1) the operation and application by the European Communities of its regime for the approval of biotech products; and (2) certain measures adopted and maintained by the EC Member States prohibiting or restricting the marketing of biotech products.'²¹⁸

The Panel found that the way the EC applied its moratorium of approvals of biotech products was not aimed at achieving EC level of sanitary and phytosanitary protection and so was not an 'SPS measure' according to Article 5.2 or 2.2 of the SPS Agreement. Again none of the safeguard measures taken by the EC Member States was based on a risk assessment as required by Article 5.1 which provides that:

Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risk to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organisations.

Again Article 2.2 demands specifically that 'Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence...'

But assuming, *arguendo*, that the complaint was brought by Argentina only (without the US and Canada who have the diplomatic band weight to create market access) would the outcome have been as gratifying as this. The case did not go on appeal partly because of the strong language used by the Panel to condemn the measures taken by the EC Member States.

²¹⁸ Ibid para. 2.1.

Yet despite the fact that the Dispute Settlement Body has in this case followed ‘object and purpose’ contrary to its usual practice of literary interpretation and citation of the Oxford Shorter Dictionary, it has been suggested that the DSB should in popular cases bow to public sentiments instead of the spirit and letter of the WTO Agreements when the dispute concerns sanitary and phytosanitary measures.²¹⁹ The problem with the suggestion is that it would remove the ‘security and predictability’ in the law and defeat the main objective of the world trading system which is to create a rules-based multilateral trading system and not to ‘add or diminish the rights and obligations provided in the covered agreements.’²²⁰ For example, what the EC regarded as an ‘SPS Measure’ was held not to be one at all.

6.10 Summary

In a very extensive and analytical work on ‘winners and losers in the Panel stage of the WTO dispute system,’ it has been pointed out that the focus of most researchers has been on the propensity of developing countries to participate as complainants, respondents and third parties and giving such reasons as lack of economic or legal capacity, market size and limited scope for a credible threatening retaliation as reasons for their poor participation.²²¹ The researchers argue that ‘reduced participation does not capture the damage done to developing countries’ and instead chose to examine ‘*whether the outcomes with regard to legal claims differ between developing and developed countries*’²²² (original italics). Still the researchers rightly acknowledge the problem with ‘assessing outcomes’ or using outcomes (‘win’ or ‘lose’) as a unit of measurement because ‘it is very difficult, if not impossible, for researchers

²¹⁹ Caroline E. Foster, ‘Public Opinion and the Interpretation of the World Trade Organisation’s Agreement on Sanitary and Phytosanitary Measures,’ *JIEL*, 2008 11(2), 427-458.

²²⁰ Article 3.2, DSU.

²²¹ Bernard Hoekman, Henrik Horn and Petros C. Mavroidis, ‘Winners and Losers in the Panel Stage of the WTO Dispute Settlement System, Chantal Thomas and Joel P Trachtman (eds) *Developing Countries in the WTO Legal System* (Oxford University Press 2009) 151.

²²² *ibid* 151.

to determine what “really matter(s)” and what (does) not²²³ to Member States or parties to a dispute. They therefore abandoned Hudec’s stipulation that the ‘appropriate measure of the outcome of a Dispute Settlement case is the policy result of a dispute, that is, whether the case lead to the implementation of policy changes.’²²⁴ The result was that after a review of 351 WTO disputes initiated out of which 144 had Panel reports circulated and adopted between 1 January 1995 and 31 December 2006 (12 years), the researchers reached the conclusion that ‘in WTO DS cases – if measured by the share of claims ‘won’ – is broadly similar across industrialised and developing countries, despite the differences in ‘capacity’ and ‘administrative sophistication’. This the researchers regard as being ‘counterintuitive’, a breakthrough in deed. They hasten to add, ‘(a)s things stand, absent additional research on these questions, the data do not support the argument that the DEV (developing countries) group is disadvantaged.’²²⁵ Their conclusion is the justification, the *raison d’être* of my research: to go beyond statistical data and use decided WTO cases to show that the developing countries are *structurally disadvantaged* in the world trading system and that the dispute settlement system offers little hope or help.

With all due respect, I take exception to this conclusion as the analysis of Table 7 of the researchers data show in their own words that ‘DEV countries have been much less successful against IND (industrialised) countries.’²²⁶ Even going by the criteria chosen by Hoekman, Horn and Mavroidis, the fundamental problem with the conclusion is that it misses the point of what ‘matters’ to parties to the dispute which in the case of ECOWAS Member States in particular and the developing countries in general is market access for their mainly agricultural products and not merely trade liberalisation or just ‘winning’ a dispute.

²²³ *ibid* 153.

²²⁴ Robert E Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System*, (Salem, NH: Butterworth Legal Publishers 1993).

²²⁵ N 220 above 165.

²²⁶ *ibid* 161.

Therefore, the above analysis has been undertaken as a turn away from ‘textbook prescription’ and *a priori* conclusions in order to see how the principles of non-discrimination embodied in the MFN and National Treatment provisions of the GATT 1947/94 are protected and enforced through the WTO dispute settlement mechanism. From the analysis of the foregoing cases on the MFN and National Treatment principles, what stands out is that ‘separating legal and economic issues is difficult because the two sets of issues tend to occupy the same ground;’ moreover, ‘in the GATT (and the WTO), legal measures are never taken for their own sake.’²²⁷

Hudec calls the ‘reciprocity doctrine’ ‘a bargain with the devil.’²²⁸ Again, Edwini Kessie’s statement that ‘the developing countries have not benefited significantly’²²⁹ from (the world trading system) seems to be borne out by the outcome of the WTO jurisprudence. The outcome of the cases that would have created market access to the developing countries and the least developed countries ended with the measures targeting poverty reduction and even the reduction of drug trafficking being declared inconsistent with either Article I or Article III of the GATT thereby closing the way to the poor for a share of the world market.

In terms of market access for the developing countries, *EC – Bananas* could not have been their finest hour as it closed the gate to bananas export from many developing countries to the European Communities; *Turkey – Textiles* ruled out the leverage to use domestic measures to mitigate the flooding of local markets with foreign goods and thereby stifling the growth of

²²⁷ Robert E Hudec, *Developing Countries in the GATT Legal System*, Thames Essay No. 50, Trade (Aldershot, Policy Research Centre 1987) 138.

²²⁸ *ibid*, 165.

²²⁹ Edwini Kessie, ‘The Legal Status of Special and Differential Treatment Provisions under the WTO Agreement,’ George A. Bermann and Petros C. Mavroidis (eds) *WTO Law and Developing Countries* (Cambridge University Press 2007) 12.

domestic industries and exacerbating unemployment. Indonesia's local content requirements of the 1993 and 1996 car programmes were declared in violation of Article 2 of the TRIMs Agreement and so was the sales tax aspects in favour of domestic motor vehicles declare to be in violation of Article III:2 of GATT. The IMF confirmation that the removal of the contested restrictions would push India's reserves below the adequate level was not enough to secure a 'win' for India in *India – Quantitative restrictions*. Canada only survived the WTO ruling in *Canada – Autos* because it is already an industrialised country with the diplomatic means to flex its muscles; *EC – Tariff Preferences* removed the advantages secured with a notification to the WTO for developing and least developed countries and forced everyone onto the conveyor belt of the world trading system. As Israel told the GATT Council, 'equal rules for unequal partners did not bring about equality of trading opportunities,'²³⁰ and Peru submitted that 'economically unequal countries had to be treated unequally.'²³¹

None of the cases analysed here nor the 144 examined by Bernard Hoekman, Henrik Horn and Petros Mavroidis show any substantial improvement in the local production of goods and significantly increased export capacity and, by the same token, the foreign exchange position of the developing countries. Is the plenitude of aims and objectives in the preambles to the WTO Agreements mere rhetoric? As shown above in *Canada – Autos* and *EC – Tariff Preferences* even when there is a finding of inconsistency with a measure, the actions taken by the respondents to bring the measure into conformity with their obligations under the covered agreements amount to inaction and in reality leave the complainants not better than before. Therefore, despite the somewhat ambiguous, diplomatic and artful language of the WTO, the GATT evinces strong characteristics of non-discriminatory discrimination.

²³⁰ Statement of Israel C/M/69.

²³¹ The Dissenting Opinion of One Member of the Panel, *EC – Tariff Preferences*, WT/DS246/R, para 9.5.

The next and concluding chapter will examine the efforts within and outside the WTO which the developing countries have resorted to in order to improve their international trade and economic development. It will conclude with the thesis of this research and point out areas for further research

Chapter 7

Conclusion

Chapter Outline

7.1 Introduction

7.2 'Objectives' is Plural

7.3 The Rationale for the Articles I and III Provisions in the GATT 1994

7.4 Legal and Diplomatic Attempts to Put Development in the GATT/WTO

7.5 The GATT Knots on the Developing and Least-developed Countries

7.6 ECOWAS 'Great Expectations'

7.7 Loosening the GATT Knots on Economic Development

7.8 Conclusion

7.1 Introduction

The economic development argument advanced in this dissertation is one of the systemic debates at the heart of the GATT due to its adventitious origin traceable to Chapter IV of the Havana Charter.¹¹³⁰ The GATT was established to reflect the economic interests of its founders, the developed and trading nations.¹¹³¹ Hudec writes, ‘the GATT did not believe in law, but in pragmatism’¹¹³² and its ‘very unusual concept of “nullification and impairment” ... provides equitable remedies.’¹¹³³ It was intended for guidance on how Contracting Parties were expected to act toward one another but not taken as hard law. It is saturated with the language of polite diplomacy captured in the words ‘ruling’ or ‘finding,’ ‘recommendation’ and ‘request’ as against a ‘cease or desist (legal) order.’ Its distinctive jurisprudence has been described as a ‘jurisprudence puzzling to lawyers’ because ‘it is primarily the work of diplomats rather than lawyers.’¹¹³⁴ The practice of seeing the GATT as a trade organisation and not a legal institution has continued till this day: a member of the Appellate Body Mr Ujah Singh Bhatia (India) appointed in 2011 is an economist and not a lawyer.¹¹³⁵

This research has sought to analyse the application of the principle of non-discrimination in the GATT 1994 and subsequently in the WTO on the economic development of ECOWAS Member States. The focus is on the legal drawbacks or binding constraints on economic development within the GATT 1994. Cassese states that we live in a world ‘divided

¹¹³⁰ Available at www.wto.org/english/docs_e/legal_e/havana_e.pdf visited on 30 December 2011.

¹¹³¹ The Havana Charter appeared the way the major powers wanted it to reflect their interests. Article I permitting the continuance of existing tariffs preferences was hoisted at the instance of the United Kingdom because of the favourable terms of trade it was getting from the British Empire or the Commonwealth, the United States got Article XI:2(C) permitting the use of quantitative restrictions for agricultural support programmes and France got Articles XII-XIV permitting particularly discriminatory quantitative restrictions for balance of payments reasons. None of the exceptions was enshrined because economic position of the developing and least-developed countries of the world.

¹¹³² Robert E Hudec, *The Nature of International Trade Law*, (Cameron May 1999) 10

¹¹³³ *ibid* 18

¹¹³⁴ *ibid* 17

¹¹³⁵ http://www.wto.org/english/news_e/pres11_e/pr647_e.htm Mr Ujah Singh Bhatia (Indian economist) and Mr Thomas R Graham (US lawyer) became members of the Appellate Body from 11 December 2011.

economically, politically, and ideologically to such an extent that their relations are daily beset with friction and tensions' which are 'inherent in their existence.'¹¹³⁶ Both the United Nations Conference on Trade and Development (UNCTAD) and the WTO seek to promote economic development and growth through the market economy model but both the developed and developing countries are apprehensive of what it would mean to them for two different reasons. The developed and industrialised countries of Europe and North America are not sanguine about the prospects of promoting development because of anticipated competition from emerging economies and newly industrialised countries (NICs). The developing countries, especially within ECOWAS who are mainly producers of primary products, on their part, worry about their exposure to the international markets because of the volatility of their products;¹¹³⁷ they lose control of imports, while exposing their export potential to unmanageable market forces that could unleash their power with menace.

This study has sought to analyse the root causes and not the effects or the participation of developing countries in the multilateral trading system, even though it has been noted that in GATT studies, it is hard to separate legal, political and economic issues.¹¹³⁸ The documentation of the scale and scope of the GATT's principle of non-discrimination I leave for economists. This research posits that the GATT served its stated aims and objectives and functioned well within the first decade of its existence (1947-57) but outlived its usefulness thereafter with the birth or independence of new nations such as Ghana (1957), Nigeria (1960), and The Gambia (1965) (as well as the realisation of majority rule in Zimbabwe, Namibia and South Africa which was the culmination of the democratisation of politics in

¹¹³⁶ Antonio Cassese, *International Law in a Divided World*, (Clarendon Press 1986) 128

¹¹³⁷ Theo S. Eicher, John H. Mutti and Michelle H. Turnovsky, *International Economics* (7th ed, Routledge 2009) 301

¹¹³⁸ Robert E. Hudec, *Developing Countries in the GATT Legal System*, (Aldershot, Trade Policy Research Centre 1987,

Sub-Saharan Africa) and the accession of the new nation-states to the GATT. Even before the conclusion of the Uruguay Round in 1994, the fulcrum and the dynamics of world politics and trade had shifted considerably with the breakup of the USSR in 1990 which resulted in some former Socialist Republics joining the European Union and embracing the free market economy. Again, China joined the WTO in 2001 bringing with it more trading opportunities and ideological tensions. Ever since, it has been a struggle to find the relevance of the GATT to the new nations who now form an overwhelming majority of the membership¹¹³⁹ but without a corresponding volume of trade.

7.2 Plurality of ‘Objectives’

The WTO core principles of economic development, the elimination of discriminatory treatment in international trade and trade liberalisation have been referred to as binding ‘norms’.¹¹⁴⁰ In the substantive part of the GATT, non-discrimination is enshrined as Articles I and III and standardised through the SPS and TBT Agreements and interpreted, elaborated and upheld by the panels and the Appellate Body as if it were the sole aim of the WTO. The

¹¹³⁹ Following the agitation of developing countries Article XVIII of the GATT was modified in 1954 to include Article XVIII.B, The UN Conference on Trade and Development was established in 1964 and a Committee on Trade and Development in the GATT was set up in the same year, Part IV (Articles XXXVI to XXXVIII) on Trade and Development in 1965 and the Enabling Clause was adopted in 1979. During the Uruguay Round of trade negotiations the Special and Differential Treatment provisions were also added so as to support the developing countries without violating the MFN and National Treatment principles.

ACCESSIONS: ‘On 16 December 2011, Russia cleared the final hurdle to become a WTO member. WTO Ministers adopted Russia’s WTO terms of entry at the 8th Ministerial Conference in Geneva. Russia will have to ratify the deal within the next 220 days and would become a full-fledged WTO member 30 days after it notifies the ratification to the WTO.’ http://www.wto.org/english/news_e/news11_e/acc_rus_16dec11_e.htm visited on 19/12/2011. Again, WTO Ministers on 17 December 2011 adopted Samoa’s and Montenegro’s WTO terms of entry at the 8th Ministerial Conference in Geneva. Samoa will have until 15 June 2012 to ratify its accession package and Montenegro until 31 March 2012. Both countries will become fully-fledged WTO members 30 days after they notify ratification of their respective accession packages to the WTO. <http://www.wto.org/english/news_e/news11_e/mn11a_17dec11_e.htm> visited 19 December 2011. WTO observers, especially the scholars’ and diplomatic communities, are waiting with interest to see what effect the accession of Russia will bring into the WTO from August 2012.

¹¹⁴⁰ Amin Alavi, *Legalization of Development in the WTO: Between Law and Politics*, (The Netherlands, Kluwer Law International BV 2009) 6.

introduction forms chapter 1, MFN and National Treatment chapter 2, development debates chapter 3, standard-setting, that is, SPS and TBT chapter 4, ECOWAS trade policy reviews chapter 5 and disputes founded on the principles non-discrimination chapter 6, all of which this chapter brings to a conclusion.

This dissertation has shown that while trade liberalisation is one of the core objectives to be pursued, it represents a *part* and not the *sole* objective of the multilateral trading agreements. It argued that having accepted development as Part IV of the GATT in 1964 it should be enforced through the WTO dispute settlement system by panels and the Appellate Body keen on applying the *telos*, object and purpose approach to interpreting the covered agreements. Unlike labour standards or environmental protection that is regarded as being outside the GATT, economic development is part of the GATT/WTO system. It is submitted that the argument that the hortatory language of Part IV makes it non-binding misses the nature of international trade law as a whole and so the WTO Member States should be held to account for their development efforts towards the realisation of the GATT objective, among others. It is also submitted that while the terms of reference of the WTO Panel pinpoints ‘an objective assessment of the facts of the case and the applicability and of conformity with the relevant covered agreement’¹¹⁴¹ and limits the Appellate Body to ‘issues of law covered in the panel report and legal interpretations developed by the panel’¹¹⁴² they should, as a matter of principle, pursue the object and purpose of the WTO Agreements and ensure that their findings and conclusions are development-friendly.

The issue is to what extent the promotion of development can be achieved through legal rule-application which does not necessarily involve the judiciary engaging in complex policy

¹¹⁴¹ Article 11, DSU

¹¹⁴² Article 17, DSU, para 6

choices. There is literature on the justiciability of economic, social and cultural rights, but it is controversial because justiciability is seen as a juridification of what are essentially political complex trade-offs between social and economic goals and policies.¹¹⁴³ To what extent is development something that can be integrated into WTO jurisprudence in a more legal, rule-like fashion, without risking greater politicisation of WTO adjudication?

Sometimes GATT/WTO panels feel uncomfortable with the Agreement they have to apply. For example, the Panel on *EEC – Bananas II* confessed that it ‘was well aware of the economic and social effects of the EEC measures on the ACP banana exporting countries,’ but nonetheless concluded that the ‘purpose of (the) procedures is not to modify the rights and obligations under the existing provisions in the light of social and economic considerations.’¹¹⁴⁴ In other words, as seen in chapter 6, the decision was against market access and anti-development but that was beside the point as long as what was done was considered inconsistent with Articles I and III and not within the allowed exceptions to the GATT rules.

Articles I and III of the GATT are ideal for fairly equal trading partners: not discriminating between Italian Fiat, German Mercedes, French Peugeot, British Vauxhall and American T-Ford once they have entered the domestic market of any of the another Contracting Parties. To have the same rules applying between those industrialised countries and the vulnerable economies that have less than five export commodities, and none out of the five an industrial

¹¹⁴³ Isabella D Bunn, *The Right to Development and International Economic Law* (Hart Publishing 2012); Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (Hart Publishing 2009); Mashood A Baderin and Robert McCorquodale (eds) *Economic, Social and Cultural Rights in Action* (Oxford University Press 2007)

¹¹⁴⁴ *EEC – Bananas II*, DS38/R dated 11 February 1994 para. 168 (unadopted).

product, is a legal farce, ‘a somewhat surrealistic situation – the world’s leading organisation in the field of international trade explaining its policies to the world in terms of voodoo economics rejected by virtually every professional economist in the field.’¹¹⁴⁵ The classical economists Adam Smith and David Ricardo, it has been remarked, ‘were not writing a textbook for university students’ and ‘were not particularly concerned about developing formal models that could easily be applied to answer several related questions about trade, growth, and income distribution.’¹¹⁴⁶

Development (Part IV) is a late comer to the GATT and so does not fit or seat resplendently with the other provisions of the Agreement. Parts I to III have the United Nations Treaty Series numbers but there is none for Part IV.¹¹⁴⁷ It seems like stating the obvious or sounds otiose because people engaged in trade should experience economic development as a result. As Hudec observes, ‘GATT law appears somewhat anomalous. If liberal trade policy is in every country’s interest, why do the governments of developed countries consider it necessary to enter international legal commitments requiring it?’¹¹⁴⁸ The political rhetoric of the Atlantic Charter pledging to seek ‘the enjoyment by all states, great or small, victors and vanquished, of access, on equal terms, to the trade and raw materials of the world which are

¹¹⁴⁵ Hudec, (n 3) 143 & 144. Hudec notes, ‘[m]ost professionals find the incongruence (implicit in reciprocity) amusing, an attitude perhaps best captured by Harry Johnson’s often –quoted comparison of reciprocity theory to seduction: “In each case the benefit to be received is treated as a loss for purposes of negotiations and in each case the consequence of this fiction is continual frustration and frequent non-consummation’. See also Harry G Johnson, *The Canadian Quandary: Economic Problems and Policies* (Toronto, McGraw Hill, 1963).

¹¹⁴⁶ Theo S Eicher, John H Mutti and Michell H Turnovsky, (On 8) 35

¹¹⁴⁷ The United Nations Treaty Series number for Part I is 55 UNTS 196; Part II, 55 UNTS 204; Part III, 55 UNTS 268, all three dated 1 January 1948; but Part IV (Articles XXXVI to XXXVIII) is only cited as GATT, Final Act 2nd Sp. Sess. 25 with 27 June 1966 as the effective date, portraying it as a non-binding declaration.

¹¹⁴⁸ Robert E. Hudec (n 9) 160

needed for their prosperity'¹¹⁴⁹ appears to have seeped into the language of trade diplomats. However, the reality of the free market economy is different and demands reciprocity.¹¹⁵⁰

In the sixty years of the existence of the GATT, there have been legal landmark changes effected to accommodate the interests of developing countries. Article XVIII was expanded in 1954-55 to include Article XVIII:B allowing for use of quantitative restrictions for 'balance of payments difficulties,' the addition of Part IV (Articles XXXVI to XXXVIII) on Trade and Development in 1965 and the adoption of the Enabling Clause in 1979. Equally important and outside the WTO, the agitation for development to be central to the purpose of the GATT/WTO led to the establishment of the UN Conference on Trade and Development (UNCTAD) in 1964. Yet none of those achievements touched the heart of the matter which is the binding provisions in Articles I and III of the GATT on MFN and National Treatment principles, and the absence of anything in the DSU directing WTO panels and the Appellate Body to ensure that their findings and rulings are development-friendly. Until the substantive and judicial changes are effected, the GATT in its present form will continue to work against development and arguments will continue to rage between disputing parties and scholars.

This research argues that though welcome, the above changes are not enough and fail to address the root causes. Again it is disappointing that the scholarly community, including many from developing countries, has distractively joined the participation debate¹¹⁵¹ instead

¹¹⁴⁹ *ibid* 8

¹¹⁵⁰ The Preamble to the GATT calls the GATT regime 'reciprocal and mutually advantageous arrangements' in paragraph 3

¹¹⁵¹ The participation debate of developing countries in the GATT/WTO multilateral trading system was sparked off with the publication of Robert E Hudec's *Developing Countries in the GATT Legal System* by the Trade Policy Research Centre in 1987. The book is now a modern classic and was celebrated in 2007 to mark the 20th anniversary of its publication with Chantal Thomas and Joel P Trachtman (eds) *Developing Countries in the WTO Legal System* published by the Oxford University Press 2009. The celebratory and even adulatory and

of querying the *legal* rules that determine participation in the world trading system. This is what this research has done. The analysis in chapter 4 has dealt with how the SPS and TBT Agreements aimed, on the surface of it, at tackling the standardisation of food and technical products so as not to constitute trade barriers are structurally exclusive to the disadvantage of ECOWAS Member States and other developing countries.

It is also the conclusion of this study that calls for reforms of the WTO is mistaken, misdirected and borne out of a misunderstanding of the very nature of international trade law. Incidentally, even those calling for reforms agree that the WTO is working as it was intended to work.¹¹⁵² The former UN Rapporteur on the Right to Food Professor Olivier De Schutter points out that '[t]he WTO was deliberately placed outside the remit of the United Nations,¹¹⁵³ very much like NATO¹¹⁵⁴ to defy democratisation and control by the world community. Jacqueline D Krilorian does not believe that any improvement of the dispute settlement system would work, 'perhaps, for now,' because 'the dispute settlement system is as "effective" as the public can handle.'¹¹⁵⁵ For the avoidance of doubt, Hudec reminds everybody that 'the GATT did not arrive at its present legal policy through mistakes in economics or ideology,'¹¹⁵⁶ so it was well thought out. He states in his influential book that '[t]he GATT's current legal policy towards developing countries cannot promise any

reverential attitude to the seminal book continues with its republication by the Cambridge University Press with a new introduction by J Michael Finger in 2011. Yet many seem to forget or choose to gloss over the fact that while Hudec categorically stated that 'the GATT's current policy is harming developing countries more than it is helping them' (p. 189), he failed to identify the legal issues.

¹¹⁵² Ernest-Ulrich Petersmann, *Reforming the World Trading System: Legitimacy, Efficiency, and Democratic Governance*, (Oxford University Press, 2005).

¹¹⁵³ 'Forward,' Sarah Joseph, *Blame It on the WTO A Human Rights Critique*, (Oxford University Press 2011) v.

¹¹⁵⁴ The NATO operates like a regional organisation but, in reality it is not one, having evinced no intention to the United Nations that it is one. It was set up deliberately not as a 'regional' organisation so as to be able to maximise the right to 'collective self-defence' (Article 51) and operate outside Article 53 of the UN Charter and thereby retain its pre-emptive strike prerogative and be able to wage war 'without the authorisation of the Security Council.' See also Articles 3 and 5 of the North Atlantic Treaty Organisation.

¹¹⁵⁵ Jacqueline D. Krikorian, 'Plains, Trains and Automobiles: the Impact of the WTO 'Court' on Canada in Its First Ten Years, *JIEL* 8(4) 967

¹¹⁵⁶ Hudec (n 9) 230.

significant improvement.’¹¹⁵⁷ He then concludes that ‘[n]othing will change until developed countries are willing to see the latter group (developing countries) walk away’¹¹⁵⁸ from the GATT. Writing about what he calls ‘the seductive logic of mercantilism’ and ‘the seductive teachings of the GATT reciprocity doctrine,’ Hudec states, ‘[i]t is not an exaggeration to say that developing countries wishing to pursue a liberal trade policy would be better off leaving the GATT entirely than trying to conduct policy changes on the GATT’s present policy.’¹¹⁵⁹ Nonetheless, he rather taunts the developing countries that ‘[t]he critics of the current policy do not have a better answer’ and suggests ‘the strengthening of the GATT’s MFN obligation in all respects.’¹¹⁶⁰ This is the principal problem with the current GATT: both the US and the EU know that it does not make for development but leave it as it is because they know they cannot be ignored; an alternative world trade body without them would be unviable, if not catastrophic.

This thesis argues that in the light of the honest statements made by one of the founding fathers of the GATT himself that the system was not made for and has no room for developing countries; his recommendation of strengthening the GATT’s MFN obligations is only good for the developed country members. Anything short of a total transformation, a bottom-up approach leading to a new GATT would not serve the interests of developing countries. ‘...each round of negotiations,’ write Faizel Ismail and Brendan Vickers, ‘is based on the inequalities of previous rounds. This generates repeated stand-offs whereby developing countries seek to remedy past anomalies and injustices, while developed countries seek to protect sectors of decreasing competitiveness, and to open new areas of economic

¹¹⁵⁷ *ibid*, 227

¹¹⁵⁸ *ibid*, 233

¹¹⁵⁹ *ibid* 171

¹¹⁶⁰ *ibid* 228

opportunity.’¹¹⁶¹ It is my submission that the interests of the developing countries is the enlightened and long-term interests of the developed countries as it would contribute to world peace, in Cassese’s words, ‘to avert the political risk of rebellion’¹¹⁶² and a more stable, more prosperous and mutually beneficial international trade. It has been argued that the GATT/WTO ‘golden’ triangle of decision-making, that is, the dominance of the major contracting parties, the consensus principle and the single undertaking do not reflect the realities of modern international trade and lead to ‘deals that do not generate either new trade flows or new rules for dynamic markets’¹¹⁶³ for developing and least-developed countries.

7.3 The Rationale for the Articles I and III Provisions in the GATT 1994: Yoking Unequal Parties

The GATT is a product of its unique time in history. It was part of the post World War II reconstruction arrangements. Writing about such post-conflict treaties and agreements, Henkin observes, ‘these arrangements are really an attempt by the victors to reap the fruits of victory and with other controlling powers to legislate rearrangement of international society... These agreements are in large hegemonial... legislative... deeply political... capricious...and usually reflect the glow of victorious alliance.’¹¹⁶⁴

It was one of the aims of this research to correct the misunderstanding that is often cited by some scholars even on book covers that ‘the WTO is not functioning as envisioned.’¹¹⁶⁵ Nothing could be further from the truth. The truth which is the argument in this thesis is that the WTO is working very well as ‘envisioned’; it is also keeping very close to the spirit of the GATT but not the letters of the Agreement. As Spivak states, ‘the coloniser constructs

¹¹⁶¹ Faizel Ismail and Brendan Vickers, ‘Fairer Decision-Making in WTO Negotiations,’ in Carolyn Deere Birkbeck (ed) *Making Global Trade Governance Work for Development* (Oxford University Press 2011) 470

¹¹⁶² Antonio Cassese, *International Law in a Divided World* (Clarendon Press 1986) 373

¹¹⁶³ Cottier and Elsig (2009) quoted in Carolyn Deere Birkbeck (ed) (n 31) 462

¹¹⁶⁴ Louis Henkin, *How Nations Behave*, (Columbia University Press 1979) 80 and 81

¹¹⁶⁵ William A Kerr, *Conflict, Chaos and Confusion: The Crisis in the International Trading System*, (Cheltenham, Edward Elgar 2010) backcover.

himself as he constructs the colony. The relationship is intimate, an open secret that cannot be part of official knowledge.’¹¹⁶⁶ In other words, the *raison d’être* of the WTO is different from what was put out to the public in the Marrakesh Agreement; the letters are different from the intendment or the underlying motives or aims it was set out to achieve. Ralph Wilde states that colonisation, ‘trusteeship and the civilising mission never went away’ but subsists in a more subtle form. What has changed is the *modus operandi*, instead of control from within; it is now being done by institutional apparatuses located faraway leaving ‘sovereignty as a title’.¹¹⁶⁷

Those who posit that ‘the WTO is not functioning well’ are either ignorant of how nations behave or the nature of international trade law. Still, it might be a case of selective amnesia. They have chosen to forget why the International Trade Organisation (ITO) was stillborn and that the GATT/WTO did not begin as a legal system, that the GATT did not even have a legal unit until 1973, that it was the conclusion of the Uruguay Round of trade negotiations and the strengthening of the GATT with the Dispute Settlement Understanding (DSU) that has given the WTO its current, dominant legal character.¹¹⁶⁸ As Louis Henkin sums up, ‘[t]hose who do not see much role for law in foreign policy do not know where to look.’¹¹⁶⁹

On the advice to ‘walk away’ nothing could be worse. Any international organisation without the principal architects of the GATT/WTO, namely the US and the EU is bound to fail. As Louis Henkin puts it, ‘if the view rejecting international (economic) law reflected

¹¹⁶⁶ Gayatri Chakravorty Spivak, *A Critique of Postcolonial Reason: Toward a History of the Vanishing Present* (Harvard University Press 1999) 203 quoted in Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004) 1

¹¹⁶⁷ Ralph Wilde, *International Territorial Administration: How Trusteeship and the Civilising Mission Never Went Away*, (Oxford University Press 2008).

¹¹⁶⁸ Frieder Roessler, former Director of the Legal Affairs Division of the GATT and the WTO from 1988 to 1995 in his ‘Forward’ to Robert E. Hudec, *Essays on the Nature of International Trade Law*, (Cameron May 1999) 10

¹¹⁶⁹ Louis Henkin (n 35) 22

the realities of international relations and the attitudes and practices of governments, international (economic) law would be frivolous; universities teaching it would be perpetrating fraud.’¹¹⁷⁰

This dissertation has also shown that part of the problem with ECOWAS and other developing countries is psychological: wanting to be seen as helpless and waiting to be helped instead of taking proactive steps, in concert with others, regionally, continentally and globally to address the international economic order that the world trading system that is skewed against them.¹¹⁷¹ This mental attitude and holding out hands for charity need to stop and an inward search for solutions carried out. The Nigerian Deputy High Commissioner to the United Kingdom, Ambassador Dozie Nwanna stresses that ‘seizing power always involves a fight, at least a contest. Nobody gives you power, whether economic or political. You have to fight for it.’¹¹⁷² Henkin shares the same view that ‘there is no law requiring social and economic assistance by the very rich to the very poor, or providing community relief even to the starving.’¹¹⁷³ According to Junji Nakagawa, Japan did not become a ‘member of the “Great Powers” with full membership in modern International Economic Law until it defeated Russia in the Russo-Japanese War in 1905.’¹¹⁷⁴ So ECOWAS and other developing and least-developed countries must win their economic and technological battles so as to count or matter to the rest of the world. A 1989-91 figure shows that ECOWAS

¹¹⁷⁰ *ibid* 4

¹¹⁷¹ Uche Elelukwa Ofidile, ‘The Politics of African Trade Negotiations in the WTO’s Doha Round,’ *The Politics of International Economic Law*, Broude, Bursch and Porges (eds) (Cambridge University Press 2011) 64-105

¹¹⁷² Dozie Nwanna, ‘The True Meaning of “Republic.”’ Interview on the economic leadership role of Nigeria in ECOWAS conducted on 15 April 2011.

¹¹⁷³ Henkin (n 31) 23

¹¹⁷⁴ Junji Nakagawa, President of the Asian Society of International Economic Law, ‘The Importance of an African Voice in “Global” International Economic Law,’ conference paper presented at the SIEL African Network Inaugural Conference, The Mandela Institute, University of Witwatersrand, Johannesburg, S.A. 5 May 2011. In file with the author.

accounted for only 0.5 per cent of world production of bananas¹¹⁷⁵ and Africa as a whole a negligible 1.6 per cent of world trade.¹¹⁷⁶ The dismal performance from a continent that is home to over 13 per cent of the population of the world calls for urgent action.

It has also been noted in this work that while many human rights academic lawyers and advocates are critical of the WTO, the mainstream international economic law epistemic community are resigned if not supportive of the Organisation.¹¹⁷⁷ While it is acknowledged that different areas of specialisation prime or dispose people to different approaches to a given issue, lawyers, on the whole, should question how the substantive provisions of an agreement evince legitimacy and promote rule of law and also the avowed commitments of nations to international agreements they have signed.¹¹⁷⁸

The real aim of the GATT/WTO is to confer an advantage to the developed country founding members of the GATT (1947) spelt out only in the NATO Treaty as ‘Europe, North America (and) the North Atlantic area north of the Tropic of Cancer.’¹¹⁷⁹ It has been pointed out by some international economists that Ricardo is being quoted out of context.

In the Ricardian paradigm, all countries gain from trade if none of them imposes restrictions. But, if one limits access to its own market while all others provide free access to their markets, the country that imposes restrictions may gain even more. The gain occurs in the form of better terms of trade, as the country receives a higher price for the exports its producers sell compared to what foreigners receive for the goods that are imported.¹¹⁸⁰

Therefore, knowing full-well the benefits they will derive from the vigorous pursuit of the MFN and National Treatment clauses, the WTO framework is marketed as a sure route to economic development and out of poverty, but that is yet to happen. What the reality has

¹¹⁷⁵ *EEC – Bananas I*, DS32/R dated 3 June 1993, Annex 1.

¹¹⁷⁶ Uche Elelukwa Ofidile, (n 41) above 70

¹¹⁷⁷ Sarah Joseph, *Blame It on the WTO? A Human Rights Critique*, (Oxford University Press, 2011) 1

¹¹⁷⁸ Uche Elelukwa Ofidile, (n 41) above 88

¹¹⁷⁹ Articles 5 and 6, *The North Atlantic Treaty*, Washington DC, 4th April 1949

¹¹⁸⁰ Theo S. Eicher, John H. Mutti and Michelle H. Turnovsky (n 8) above 275

shown, however, is a general feeling of frustration for unrealised expectations and agitations for correction of the imbalance. No matter how hard the developing countries tried within the GATT/WTO system, their lot remained worsening economic situations; ‘it has meant *the relegation to a permanent status of underclass nations*’¹¹⁸¹ (emphasis mine). Even **concerning** the ‘security and predictability’ of trade which is given as the ‘central element’ for the existence of the WTO’s dispute settlement system,¹¹⁸² it has been found that GATT/WTO membership makes little difference between comparable members and non-members. In his extensive research Rose concludes, ‘I find no consistent substantial difference in the trade volatility between GATT/WTO insiders and outsiders: membership does not appear to bring the privilege of predictability.’¹¹⁸³ Still it could if transformed.

In another study, the Generalised System of Preferences of the United States whose primary objective was to promote industrialisation and economic development of less developed countries has been described as a ‘dismal performance’.¹¹⁸⁴ WTO’s Special and Differential Treatment has not helped matters either as most of the schemes aimed at ameliorating the effects of the GATT/WTO on developing countries are usually undercut and undermined by other intricate, subtle, internal measures.¹¹⁸⁵ Sarah Joseph then asks perceptively, ‘trade to

¹¹⁸¹ Sarah Joseph n 44 above, ix

¹¹⁸² Article 3(2), DSU.

¹¹⁸³ Andrew K. Rose, ‘Does the WTO Make Trade More Stable?’ National Bureau of Economic Research Working paper 10207, (Cambridge, MA, January 2004) 1. In the concluding section, Rose states, ‘In this short paper I have searched for indications that membership of the World Trade Organisation (WTO) and its predecessor the General Agreement on Tariffs and Trade (GATT) lowers trade volatility. My hunt has been unsuccessful; I find no reliable evidence that membership increases the predictability of trade follows. I used both bilateral and multilateral data sets that span over 175 countries and 50 years. I used a number of different econometric techniques, relying extensively on estimators that include fixed effects, and control for a host of potential factors. Yet despite an extensive search and a number of robustness checks, I have not been able to find strong indications that the GATT/WTO makes trade follows more stable and predictable.’

¹¹⁸⁴ Caf Dowlah, ‘The Generalised System of Preferences of the United States: Does It Promote Industrialisation and Economic Development in Least Developed Countries?’ *The Law and Development Review*, Vol. 1. Iss. 1 (2008), Art. 5

¹¹⁸⁵ Edwini Kessie, ‘The Legal Status of Special and Differential Treatment Provisions under the WTO Agreements.’ George A. Bermann and Petros C. Mavroidis (eds) *WTO Law and Developing Countries* (Cambridge University Press 2007) 12-35

live or live to trade’ pointing out that ‘[o]ngoing extreme poverty deprives people of their ... right to development’ and submits that ‘international trade should be a means to such ends, rather than an end in itself.’¹¹⁸⁶

7.4 Legal and Diplomatic Attempts to Put Development in the GATT/WTO

Having realised the true situation, the developing countries have made the following efforts aimed at getting the WTO to address their needs as ostensibly flaunted in the Preamble to the Marrakesh Agreement.

A Summary of Attempts to put development at the heart of the GATT/WTO by developing countries and LDCS	
1947	Twelve of the original 23 signatories to the GATT were developing countries. They acceded on ‘parity of obligations’ because they were colonial territories or as in the case of Pakistan had just been granted independence three months earlier.
1954-5	Article XVIII:B on quantitative restrictions was added to the Article XVIII of the GATT but for purposes of correcting balance of payments ‘arising manly from efforts to expand their internal markets as well as from the instability in their terms of trade.’ The sole purpose for which this is allowed is ‘for restoring equilibrium in its balance of payments’ needed for economic development. The WTO dispute settlement body refused to uphold India’s argument relying on the article.
1964	UNCTAD (set up to tackle the problem of developing countries in international trade) was established. The developing countries demanded to be part of the decision making bodies in the IMF, World Bank and the GATT during the Dillon Round of trade negotiations (1962-4) to address their needs but all they got was UNCTAD which lacks the powers of those three financial and economic organisations. The International Trade Centre is also created.
1965	The GATT gets a new Part IV on ‘Trade and Development’ with no legal force. Still it is all ambiguous and artful language without any substantive improvement in the Agreement, no room for a departure from the basic MFN principle.
1968	UNCTAD persuades the US to accept to voluntarily grant the Generalised System of Preferences (GSP) to developing countries and the ITC turns into a joint venture agreement with the US.
1971	Granting of waivers: (1) Under the GATT for tariff preferences in connection with the GSP and (2) the Geneva Protocol on trade negotiation among

¹¹⁸⁶ Sarah Joseph, ‘Trade to Live or Live to Trade: The World Trade Organisation, Development and Poverty,’ in Mashood A. Baderin and Robert McCorquodale (eds) (n 14) 389

	developing countries.
1973-9	The Tokyo Round of Trade Negotiations. 99 countries participated with over 70 of them developing countries. The Enabling Clause is adopted and the concept of 'Special and Differential Treatment' makes the 1971 waivers permanent.
1986	The launching of the Uruguay Round of trade negotiations at the Punta del Este Ministerial Conference with many SDT references.
1994	Accession to the WTO Agreement by over 100 developing country GATT Contracting Parties.
1997	The Singapore Ministerial Conference creates the Integrated Framework for Trade Related Technical Assistance for least developed countries.
1999	The Seattle Ministerial Conference agenda dominated by developing countries' concerns. Conference ends in a deadlock.
2000	The US passes the so called African Growth and Opportunities Act (AGOA) allegedly granting duty and quota-free market access to African countries. This was a unilateral act of the US, no African country was consulted and none made an input and the decision of who to give or not give is the exclusive prerogative of the President of the United States.
2001	The Doha Ministerial Conference launches the Doha Development Agenda (DDA). Developing and LDCs object to calling it a trade negotiation 'Round' like the previous trade rounds. 'Development' was inserted in the title instead of simply calling it the Doha Round on the suggestion of the British Overseas Development Secretary Claire Short to calm the developing countries and entice them to participate in the negotiations after the failure of the Seattle Ministerial. Not much progress yet.
2002	A WTO Global Trust Fund established to support developing countries' participation in trade negotiations.
2003	A developing-country G20 including Brazil, India, China and South Africa (BICS) emerge. ECOWAS LDC members, the Cotton Four (Benin, Burkina Faso and Mali team up with Chad) push for a sectoral 'Initiative on Cotton.'
2005	Agreement is reached at the Hong Ministerial Conference for industrialised countries to grant 97 per cent of trade duty- and quota-free access to developing countries.
2006	The call for Aid for Trade is sounded by WTO taskforce.
2008	World financial crisis threatens the WTO. The WTO waiver for the EU-ACP preferences expires on 1 January and the Enhanced Integrated Framework is put in place between the LDCs and donors to keep the hope of the developing and the least-developed countries in the WTO still alive.

These efforts, it must be pointed out, are somewhat misdirected and belated: none addressed the main substantive parts of the GATT and all after the developing countries had acceded to the GATT as a single undertaking. By way of a contrast, even though China is a big trading nation, an ancient civilisation and a major world power with a veto at the UN Security Council, it sought to be treated as a developing country from its accession to the WTO

Agreements. Although China was a signatory to the GATT in 1947 it ceased to participate immediately the Communist party came to power in 1949 and even though it came back during the Uruguay Round, the US refused to grant China unconditional MFN status until 2000 when it got Congressional approval.¹¹⁸⁷ Although there are political and ideological dimensions to Russia's accession to the WTO, the Soviet Union participated in the Bretton Woods Conference in 1944 and Russia negotiated its terms of accession from 1993 to 2012 when it extracted some concessions and joined.¹¹⁸⁸ Not being a big trading nation, the Soviets did not see the Anglo-American led and free market-oriented GATT as being appropriate for them. Most developing countries simply signed the WTO Agreements without any regard to the paucity of their economy or their capacity to meet basic GATT commitments in order to enjoy its benefits.

Despite the efforts above, access to the markets of the developed countries has eluded ECOWAS and other developing countries. It is time they turned inward to active trading within the regional market. Even with the much bandied Doha Development Agenda, 'it would appear that the development objective has been significantly watered down or abandoned.'¹¹⁸⁹ Going through the proposal, it has not got much on development and there is no agenda item on renegotiating Articles I and III.¹¹⁹⁰

¹¹⁸⁷ Bernard M. Hoekman and Michael M. Kosteci, *The Political Economy of the World Trading System: the WTO and Beyond*, 3rd ed. (Oxford University Press 2009) 567 and 568. The US invoked Article XIII of the GATT to make sure it did not grant unconditional MFN to China. The Jackson-Vanik amendment to the 1974 Trade Act prohibited the US from granting unconditional MFN to nonmarket economies.

There were concerns in the US over China's human rights record and its policy towards China Taipei [Taiwan]. To the American right, the Republicans, issues such as China's birth control policy and lack of religious freedom were worrisome; to the left, the Democrats feared job losses that full-MFN status to China could cause. Before its accession in 2001 China agreed to make far-reaching commitments such as granting all enterprises based in China access to trade on all goods, liberalisation of the services sector and significant reduction of MFN rates on agricultural and non-agricultural goods.

¹¹⁸⁸ An example is Russia's refusal to allow branch banking by foreign suppliers.

¹¹⁸⁹ Uche Ewelukwa Ofodile (n 42) 65.

¹¹⁹⁰ See the appendix.

This work has sought to demonstrate that the theory and the practice of International Economic Law are at variance. It is in ‘double speak’ when it speaks to ECOWAS and other developing countries, on the one hand, and to the developed countries, on the other hand.¹¹⁹¹ From the outset, this thesis invites the reader to think beyond the substantive provisions of the GATT to its function in world trade, its application, the nature of its influence, its stated aims, its strengths and weaknesses, the opportunities it offers and the threats and limitations that it imposes. There is much literature on developing countries in the GATT/WTO legal system and reforms of the world trading system¹¹⁹² but, as far as I know, none has identified and focused on the MFN and National Treatment principles as the lynch-pins of economic development and none has focused on the application of the principles to the ECOWAS Member States or how they are adapting their trading systems and harmonising their laws to the key provision of Articles I and III of the GATT 1994 on non-discrimination, the subject of this research.

¹¹⁹¹ With respect to Public International Law, see C. de Visscher, *Théories et Réalités en Droit International Public* (2nd ed., 1955) cited in Louis Henkin n 31 above p. x.

¹¹⁹² Whole monographs (not including works with a whole chapter) devoted to ‘developing countries in the world trading system,’ in their order of publication, are Robert E. Hudec, *Developing Countries in the GATT Legal System*, (Trade Policy Research Centre 1987) (this pioneering work was the first admission by an established Western scholar that the GATT trading system was skewed against developing countries); Ernst-Ulrich Petersmann, *Reforming the World Trading System: Legitimacy, Efficiency, and Democratic Governance* (Oxford University Press 2005) (this tenth anniversary publication as the title says shows the substantive and procedural issues with the WTO); Yong-Shik Lee, *Reclaiming Development in the World Trading System*, (Cambridge University Press 2006) (shows that the prescription of the GATT law and adjudication will not bring development to developing countries and should not be followed as it is); George A. Bermann and Petros C. Mavroidis (eds) *WTO Law and Developing Countries* (Cambridge University Press 2007) (analyses the position of the developing countries in the GATT/WTO); Michael J. Trebilcock and Ronald J. Daniels, *Rule of Law Reform and Development: Charting the Fragile Path of Progress* (Edward Elgar Publishing Ltd, 2009) (points out the purpose of rule of law reforms and obstacles to its achievement so as to yield development); Chantal Thomas and Joel P. Trachtman (eds) *Developing Countries in the WTO Legal System* (Oxford University Press 2009) (explores the favourable and unfavourable treatment of developing countries by the WTO); Amin Alavi, *Legalization of Development in the WTO: Between Law and Politics*, (The Netherlands, Kluwer Law International BV 2009) (this ambitious title centres on the politics of development); Sarah Joseph, *Blame It on the WTO? A Human Rights Critique*, (Oxford University Press 2011) (this is as the rider to the title says on how to integrate human rights into the WTO); *The Politics of International Economic Law*, Broude, Bursch and Porges (eds) (Cambridge University Press 2011) (this is on international political economy) and Carolyn Deere Birkbeck (ed), *Making Global Trade Work Governance Work for Development: Perspectives and Priorities from Developing Countries* (Cambridge University Press 2011) (this collection of developing countries scholars or scholars with interests in the relationship between the WTO and developing countries advocates radical reforms of the WTO including civil actions).

The two views of International Economic Law analysed in chapter 1 of this study could be called International Law *of* Development, that is, law as it presently is (*de lege lata*) which is in contradistinction to International Law *for* Development, that is, law as it should be (*de lege ferenda*) to bring development.¹¹⁹³ When the 1971 Waiver to Article 1 (MFN) obligations was introduced to permit a rebalancing of world trade ‘to improve trade benefits to developing countries that had joined the multilateral trading system during the 1960s and 1970s and to supplement Part IV of the GATT’,¹¹⁹⁴ the Government of India called it ‘an historic moment’,¹¹⁹⁵ Jamaica said the move had ‘considerable potential ... for the improvement of the conditions governing international trade of developing countries’,¹¹⁹⁶ Uruguay described it as ‘a decision of enormous importance, not only for the future of international trade relations, but in terms of interpretation and meaning of the General Agreement itself.’¹¹⁹⁷ The United Arab Republic noted that ‘the GATT would be different from what it had been so far.’¹¹⁹⁸ Greece and Argentina expressed similar views.

It should be noted that UNCTAD had advised the developed countries to obtain the necessary ‘legislative’ amendments to the GATT so as to be able to implement the preferences given to the developing countries but they deliberately chose a waiver which is temporary, at the behest of the developed or preference-giving country and legally not of the same rank with Article I.¹¹⁹⁹ This deliberate choice of the developed countries is neither surprising nor

¹¹⁹³ See Panel Report, *EC – Tariff Preferences*, WT/DS246/R/ para. 9.6

¹¹⁹⁴ Panel Report, *EC – Tariff Preferences*, WT/DS246/R/ para. 9.7

¹¹⁹⁵ Statement of India, C/M/69 quoted in *EC – Tariff Preferences*, para. 9.7

¹¹⁹⁶ Statement of Jamaica, C/M/69 quoted in *EC – Tariff Preferences*, para. 9.7

¹¹⁹⁷ Statement of Uruguay, C/M/69 quoted in *EC – Tariff Preferences*, para. 9.7

¹¹⁹⁸ Statement of the United Arab Republic, C/M/69 quoted in *EC – Tariff Preferences*, para. 9.7

¹¹⁹⁹ On the legal significance of the MFN and its difference from a waiver, the dissenting opinion in *EC – Tariff Preferences* added this footnote 443, ‘No country has a right to MFN treatment unless a country with which it trades has undertaken an Article I obligation toward it. Given Article I, the preference-giving countries had an obligation to accord MFN treatment to all the GATT contracting parties and the other contracting parties had rights within the limits of that clause.

Only the developed or preference-giving country had obligations that would be contravened by the offer of preferences. Under the waiver, where the ‘provisions of Article I shall be waived’, the contracting

uncharacteristic. This is because the Enabling Clause aims at better market access for the exports from developing countries which the developed countries would not like to see as a substantive binding provision. Article I GATT should begin with a proviso or have a chapeau that may be drafted thus: ‘Subject to the preferences given to the developing countries and the least-developed countries that is contained in an agreement of which the WTO has been notified’ The requirement of an agreement and notification of the WTO or deposit at the WTO secretariat in Geneva will strengthen the predictability of the world trading system and the WTO legal regime and also address the issue of treating nascent or fragile economies in the same way as developed and strong economies. This dissertation has shown that until there is a legislative amendments to Articles I and III obligations, every other effort would remain cosmetic and ECOWAS Member States and the rest of the developing and the least-developed countries would remain mired in acute poverty, hunger and disease and, of course, underdevelopment.

7.5 The GATT Knots on the Developing and Least-developed Countries

Even with the reprint of Hudec’s *Developing Countries in the GATT Legal System* that came out in 2011, the message from J. Michael Finger remains the same with that of Hudec back in 1987 when it was first published: that the GATT was not created with developing countries in mind: they lack ‘the economic size or power for it (the GATT) to provide them great leverage.’¹²⁰⁰ The GATT/WTO legal system creates a momentum for trade liberalisation among trading nations. The WTO is currently in a ‘rut’ because its membership has been overwhelmed by developing countries that acceded to it forgetting it was not meant for non-export economies. Again any examination of the GATT/WTO system without reference and

parties relinquished their right to demand MFN treatment for their products when the preference giving country complied with the conditions of the waiver.

¹²⁰⁰ Joseph Michael Finger, ‘Introduction to the New Edition,’ *Developing Countries in the GATT Legal System*, (Cambridge University Press 2011) 2 and 4

even more so, acknowledgement of it as a diplomat's jurisprudence is like decrying the behaviour of an adolescent without reference to his childhood. Its dispute settlement system is not like other international courts and tribunals. It does not award compensations to 'winners' with the effect that apart from using it to push one's way into a particular market if one has something to export, there is little else to gain. It therefore holds little appeal for developing or least-developed countries even when they decry the activities of multinational corporations causing environmental disasters or putting local industries out of business.

Some economists point out that even though the Uruguay Round is hailed as having broken ground in many new areas¹²⁰¹ that 'it merely marked the status quo in some of them'¹²⁰² and used coded words to limit the potential exports of the developing countries that overwhelmed the GATT/WTO in the last quarter of the 20th century and the first decade of the 21st century. The economists point out that 'where learning allows costs to fall at a constant rate as cumulative output rises, the initial innovator of a product has a tremendous advantage. A late-comer will never catch up.'¹²⁰³ Again, that where 'one large country produces only goods where learning occurs (high tech goods such as cars and electronics) and one small country produces only those goods where learning has been exhausted (primary products), the same pattern of trade will be maintained into the future and the technological gap between them will grow.'¹²⁰⁴ The only way out, they say, is if 'the less advanced country is larger and thereby able to consume a wider range of goods and achieve a faster rate of technical progress,'¹²⁰⁵ (Brazil, China and India are good examples). Within ECOWAS only three

¹²⁰¹ For example, the DSU with permanent members of the Appellate Body.

¹²⁰² For example, with respect to realisable trading opportunities for developing and least-developed countries.

¹²⁰³ Alwyn Young, 'Learning by Doing and the Dynamic Effects of International Trade,' *Quarterly Journal of Economics*, 106: 369-405.

¹²⁰⁴ Theo S. Eicher, John H. Mutti and Michelle H. Turnovsky n 8 above 309

¹²⁰⁵ *ibid.*

countries have a population of over 20,000,000 people while three have a population of less than 2,000,000 people each.¹²⁰⁶

But it is not all down to population, large territories and export trade. There are other views on the high priority assigned to export trade as the ‘engine of growth.’ Dani Rodrik’s study of Korea and Taiwan ‘suggests that the exports are too small a share of national output to explain these economies’ strong growth.’ He attributes their growth to their escape of ‘the problem of a self-serving elite dictating policy.’¹²⁰⁷ So while exporting labour-intensive goods is important, efficient allocation of resources counts as well, as even the World Bank maintains that there is no single way to move forward.¹²⁰⁸

There is a clear lack of the political will to do something really serious to step up development in different regions of the world trapped in poverty like ECOWAS. The current SDT agenda¹²⁰⁹ on the table for the DDA are mute on Articles I and III of the GATT, yet the DDA has not seen much progress after ten years, making it the longest running trade round in the history of the GATT/WTO.

Again the WTO, unlike the UNO, has no foundation in common interest.¹²¹⁰ ‘The new law which the developed states have sought is law that would reinforce the system as they have known it’¹²¹¹ and so insisting on geographic distribution of power or governance and even of the appointment of members of the Appellate Body in a trade organisation misses the point

¹²⁰⁶ Ivory Coast 20.6 million; Ghana 24.2 million and Nigeria 167.0 million while Cape Verde is 567,000, Guinea-Bissau is 1.6 million and The Gambia 1.7 million < <http://www.population.gov.ng>>

¹²⁰⁷ Dani Rodrik, ‘Getting Interventions Right: How South Korea and Taiwan Grew Rich,’ *Economic Policy*, 10: 55-107 cited in Theo S. Eicher n 8 above 324 and 333.

¹²⁰⁸ The World Bank, *Economic Growth in the 1990s: Learning from a Decade of Reform* (2005)

¹²⁰⁹ See the appendix

¹²¹⁰ Louis Henkin, n 31 above 83

¹²¹¹ Ibid 194

and will never be countenanced by the developed and big trading nations. Neither a global government nor *global development* is on anybody's agenda. A world government is unrealistic; what is feasible is a form of order or at least a semblance of it.

The greatest merit of the WTO is its semblance of justice. The GATT though rules-based, could not lay claim to the application of the rule of law in support of the multilateral trading system. It was a matter of economic and diplomatic power. However, under the WTO dispute settlement mechanism, aggrieved parties could assert that 'where there is law, there is a remedy' despite the fact that WTO's equitable remedies are only prospective.

If under the world trading system that the GATT 1994 seeks to achieve, the profits made by one country were used as commonwealth to develop another country or other people in faraway places, there would, perhaps, be no need for the GATT, *ab initio*. By the same token, the GATT/WTO law would have been to everybody's benefit if there was a world government that determined how the gains or profits from international trade would be used to develop all parts of the world, very much like national governments use proceeds from minerals to develop the whole country and not just the particular community or region from where the mineral is mined or drilled. This hypothesis explains the centrifugal and centripetal forces on international trade and why there are tensions. It does not advocate a world government, nor does it suggest that such a government is desirable.

However, if the present dichotomy and asymmetric practice is not addressed legislatively with a *new* GATT ameliorating the application of Articles I and III, the developing countries and especially the least-developed countries will hardly ever develop because the MFN and National Treatment provisions lay them bare to compete in very unequal markets.

Development which was examined in chapter 3 is defined by the UN Independent Expert/Reporteur on Development Sengupta as a ‘process’¹²¹² requiring incremental elaboration both at the national and international levels. In order to make development ‘sustainable’ it has to ‘meet the needs of present generation without compromising the ability of future generation to meet their own needs.’¹²¹³ The present unfavourable terms of trade is mortgaging the future of the next generation of developing country to be unable to creep out of their debt burdens. The world trading system is also seen as a ‘process’ and a form of ‘governance’ broadly defined to include ‘principles and norms as well as the institutional architecture through which rules and practices for managing global trade are made, implemented and enforced.’¹²¹⁴ Lowenfeld states that ‘international economic law – like all law but perhaps more so – is a process.’¹²¹⁵

7.6 ECOWAS ‘Great Expectations’

It is a competitive world but this fact ECOWAS and other Sub-Saharan African countries do not seem to grasp much. All the proposals put forward by President Blaise Compaore of Burkina Faso on behalf of the ‘Cotton Four’ have one latent defect: they all depend on the developed countries doing something or refraining from doing something.¹²¹⁶ They are all external solutions and as such very precarious. Development is home-grown, articulated by the government and facilitated with inputs from abroad, not dependent on foreign goodwill.

¹²¹² The Preamble, *The United Nations Declaration on the Right to Development*, adopted 4 December 1986, GA Res. 41/128 UN GAOR, 41st Sss.

¹²¹³ World Commission on Environment and Development, *Our Common Future* (Oxford University Press 1987). See also A. Lindroos, ‘The Right to Development,’ Forum Iuris Publications of the Faculty of Law, University of Helsinki, Helsinki, 1999, 40.

¹²¹⁴ Carolyn Deere Birkbeck (ed), *Making Global Trade Work Governance Work for Development: Perspectives and Priorities from Developing Countries* (Cambridge University Press 2011) 580

¹²¹⁵ Andreas Lowenfeld, *International Economic Law*, (Oxford University Press 2008) 927.

¹²¹⁶ Quoted by Uche Ewelukwa Ofodile n 38 above 78

Seen dispassionately some of the suggestions are ridiculous because they amount to asking foreign governments to harm their citizens or hurt their voters.

7.7 Loosening the GATT Knots on Economic Development

Instead of asking the US or China to phase out support for their cotton farmers, Campaore should say how the government of Burkina Faso will support Burkinabe farmers to counterbalance what the US and China do for their farmers. ECOWAS governments should revive their abandoned farm settlements and marketing boards to support their own farmers in growing high yielding crops and marketing them internationally, even if it is only within the region and within the African Union.

In Nigeria, for example, the Cocoa Research Institute, the National Institute for Oil Palm Research and the tannery for hides and skin have all virtually closed down and so have the marketing boards. The marketing boards were popular in the colonial days when the countries operated under the auspices of their mother countries or colonial masters and exported their produce to the imperial countries; as independent countries subjected to WTO GATT disciplines, the routes are closed. There is a near absence of extension service officers disseminating research results from the universities and research centres to the farmers in their co-operatives. All that is left now are individual holdings with aging farmers and declining productivity, with no access to loans and no clout and access to even the regional market. The examples of comparable economies such as Singapore, Malaysia, Korea and Taiwan bode well for ECOWAS and other SSA countries.

Deere Birkbeck's and other contributors' debates on 'how development should feature in the mandate and core principles of the WTO',¹²¹⁷ misses a salient but important point. This research points out that it has already featured. 'Trade and Development' is Part IV of the GATT, but it is flouted, frustrated and emasculated by the big trading nations and sidelined in the Dispute Settlement Body with development-stalling findings and recommendations. The challenge is how to actualise the substantive provision which seems to have been put in Articles XXVI-XXXVIII in a mere perambulatory and hortatory language on purpose. Chimni calls for recasting the SDP principle in the language of 'hard law'.¹²¹⁸ It is submitted that the GATT needs to be renegotiated with both the SDP and GSP forming substantive and binding exceptions to Articles I and III.

ECOWAS and other developing and least-developed countries should follow the track record set by Dr Arjun Sengupta by first getting the WTO to accept 'nullification and impairment' of economic development as constituting 'actionable damage,' a 'compensatable head of damage' or a 'recoverable head of damage',¹²¹⁹ to borrow a phrase from, tort law; then insist that much like the European Court of Justice makes unification and the supremacy of the Union law its target in judicial interpretations, the WTO panels and the Appellate Body must be development-friendly in their findings and rulings. As noted earlier, the DSU limits the terms of reference of panels to 'facts of the case and the applicability of and conformity with the relevant covered agreements',¹²²⁰ and the Appellate Body 'to issues of law covered in the panel report and legal interpretation'.¹²²¹ It is submitted that these are too restrictive and make the dispute settlement system too mechanistic and out of tune with current judicial trends as they leave the object and purpose of the WTO outside the terms of reference.

¹²¹⁷ Carolyn Deere Birkbeck (ed) (n 85) 611

¹²¹⁸ *ibid* 614.

¹²¹⁹ *Gregg v Scott* [2005] UKHL 2

¹²²⁰ DSU Article 11.

¹²²¹ DSU Article 17(6).

The developing countries should emulate the UN that designates a year ‘International Year of ...’ by adopting a sectoral approach to international trade and development. They could start with basic infrastructures such as electricity, water, transport network, education/capacity building before taking on small scale industries, large scale industries and export promotion. Friedrich List¹²²² and Ha-Joon Chang¹²²³ explain that all industrialised and big trading nations did the same and built up their effective economic influence. The argument put forward in this research is that ECOWAS and other developing and least-developed countries who feel being unduly repressed by the application of Articles I and III should build up effective influence through regional organisations and incrementally unite for a common purpose. Both development and International Economic Law have been described as a ‘process’ and it is submitted that the New International Economic Law with amended Articles I and III of the GATT be undertaken as a process.¹²²⁴

ECOWAS should not leave the participation of its Member States at the WTO Ministerial Conferences to the financial capacity of individual members. It should be provided for in the ECOWAS regular budget because of the incidence of the macro-economic decisions taken at the WTO level on the national economy of every Member State. This will boost the confidence of ECOWAS delegates and give them freedom of thought and of expression. The government officials attending the WTO Ministerials should have the active intellectual support of development-friendly scholars in academia and from research centres and organisations. Deere Birkbeck remonstrates that ‘to date (2011), the visibility of

¹²²² Friedrich List, *The National System of Political Economy*, (Longmans, Geen and Co 1885)

¹²²³ Ha-Joon Chang, *Kicking Away the Ladder: Development Strategy in Historical Perspective*, (Anthem Press 2005)

¹²²⁴ Andreas Lowensfeld, *International Economic Law*, (2nd ed, Oxford University Press 2008) 927

development perspectives on the scholarly debates on global trade governance has been weak.¹²²⁵

7.8 Conclusion

There is much misunderstanding about the participation of the developing and the least-developed countries in the world trading system. They are using the WTO system at the level it suits them best, even if not how they like it most which Kufuor describes as ‘tactical participation.’¹²²⁶ Chapter 4 of this research on trade policy reviews shows that ECOWAS Member States are using the administrative law mechanisms¹²²⁷ rather than the litigation or dispute settlement mechanism which attracts more media and scholarly attention. Administrative law is by no means less law than litigation or the judicial process. In the WTO legal system, trouble-shooting through notifications, consultations, good offices, conciliation and mediation are preferred to judicial settlement.¹²²⁸

ECOWAS Member States feel the pangs of the application of the MFN and National Treatment principles (Arts I and III) but are navigating their way through them by using notifications which serve the purposes ‘commensurate with the needs of their economic development.’¹²²⁹ Their understanding of ‘development is at cross-purposes with the industrialised countries.’¹²³⁰

¹²²⁵ Caroly Deere Birkbeck (n 85) 579

¹²²⁶ KO Kufuor, *World Trade Governance and Developing Countries: the GATT/WTO Code Committee System* (The Royal Institute of International Affairs and Blackwell Publishing 2004) 55

¹²²⁷ All ECOWAS Member States have made several notifications of MFN, NT, TBT and SPS measures to the Trade Policy Review Body in full compliance with Annex 3 ‘Trade Policy Review Mechanism’ to the GATT 1994.

¹²²⁸ See Articles 4, 5 and 22 of the DSU.

¹²²⁹ Para. 2, The Preamble to the WTO Agreement.

¹²³⁰ M Stocchetti, ‘The Development Dimension or Disillusion? in Y Ngangjoh-Hodu and FAST Matambalya (eds), *Trade Relations Between the EU and Africa: Development, Challenges and Options Beyond the Cotonou Agreement* (Routledge 2012) 40-54.

There is an inherent paradox in international economic law. The most important principle of international law, Henkin tells us, is *pacta sunt servanda*¹²³¹ (agreements are to be kept), the nature of world trade law, Hudec highlights is that it is the diplomat's jurisprudence and so the agreements are not meant to be enforced to the letter.¹²³²

Again instead of talking about the Doha Development Agenda (DDA) as if development has just been newly introduced into the WTO norms, the emphasis should be on giving a legally binding force to some Articles of the GATT. No WTO agreement is hard law. Perhaps the current division between the General Agreement (in force between all WTO Members) and the Plurilateral Agreements (in force between WTO Members that signed up to them only) needs to be extended further so that the GATT will have a part everybody knows to be legally binding and a part that depends on members committing to it. For the 'security and predictability to the multilateral trading system' this thesis argues that it is necessary to have a new GATT with some legally binding provisions which no WTO Member State is allowed to 'cherry-pick' from and a DSB that is pro-development in its interpretation of the agreements. Although Article 96 of the Havana Charter was not carried into the GATT, it provided for a legally binding judgment by reference of dispute to the International Court of Justice:

The Organization may, in accordance with arrangements made pursuant to paragraph 2 of Article 96 of the Charter of the United Nations, request from the International Court of Justice advisory opinions on legal questions arising within the scope of the activities of the Organization.¹²³³

International trade will neither be predictable nor stable until the GATT features a provision similar to Article 96 of the Havana Charter. It provided in paragraph 5 that the 'Organisation

¹²³¹ Henkin (n 35) 200.

¹²³² Hudec (n 3) 21.

¹²³³ Article 96(1) *The Final Act of the United Nations Conference on Trade and Employment: Havana Charter for an International Trade Organisation* 24 March 1948.

shall consider itself bound by the Court’ and so was never reflected in the GATT 1947 or 1994. The door to abuse the ‘rules-based’ system was intentionally left open in the interest of leading trading nations who prefer the door ajar. Nevertheless I recommend a progressive legal development from codes to agreements to economic law; from the Tokyo Codes to the WTO Agreements to binding *international* economic law enshrining the three GATT principles of non-discrimination, open markets and fair trade because non-discrimination invokes images of market and fairness and is empty of meaning without either of them legally embedded in it.

An effective treatment starts with diagnosis of ailment. All the works published so far from Hudec’s *Developing Countries in the GATT Legal System* in 1987 to the two brilliant collection of essays published in 2011: Carolyn Deere Birkbeck edited *Making Global Trade Work for Development* and Tomer Broude and others edited *The Politics of International Economic Law* focus on the effects of the GATT/WTO on developing countries and reforms of the WTO. None of them has identified Articles I and III of the GATT as the linchpins that were used to hammer the developing countries to a permanent state of underdevelopment. Despite being able to assemble twenty-six stellar scholars for her book from around the ‘world,’ Carolyn Deere Birkbeck registers one regret that her ‘book does not include a dedicated chapter on the particular challenges African countries face in the global trading system.’¹²³⁴ This work fills that yawning gap in literature with a special focus on the fifteen West African countries that make up the ECOWAS.

¹²³⁴ Deere Birkbeck (n 82) 606

ECOWAS lacks visibility in the GATT/WTO system. Kufuor states that '[q]uestion marks hang over ECOWAS relevance as an economic body.'¹²³⁵ No proposal, so far as I know, has been presented by ECOWAS as a negotiating coalition whether previously to the GATT or currently to the WTO. As at writing, there has also not been any institutional submission by ECOWAS to a WTO panel or the Appellate Body. Yet each member of ECOWAS is inconsequential on its own and insufficiently beneficial to the big trading nations such as the US, China the EU or Japan. The legal analyses carried out here and the legal approaches recommended, in sum, show that leaving the GATT is not an option. Those who left (China, Lebanon, Syria and Liberia) fared worse on their own and have either come back or are renegotiating their accession.

The GATT 1994 resulting from the Uruguay Round was a renegotiation and multilateralisation of the Tokyo codes where like-minded countries agreed to new, legally binding commitments without having all GATT Contracting Parties on board. There is an increasing convergence that the GATT is not a balanced and 'fair' agreement.¹²³⁶ Therefore, ECOWAS should team up and form a strong coalition with the G11, G20 and G90 as well as with the African Union, the ACP countries and other pro-development states to renegotiate both the MFN and the National Treatment principles and refuse to be distracted by pressure or with 'inducements' from the developed countries. The US and France introduced labour standards in Singapore (the so-called 'Singapore issues' which the developing countries saw as an attempt to cancel out their competitiveness in the labour market) in 1996 and the US sponsored the formation of the Central American Free Trade Agreement (CAFTA)¹²³⁷ and lured some countries away from the G20 made up of developing countries when it was

¹²³⁵ KO Kufuor, *The Institutional Transformation of the Economic Community of West African States* (Ashgate 2006) 128

¹²³⁶ Hoekman and Kostecki n 55 above 140. See also A. Panagariya, 'Preferential Trade Liberalisation: the traditional theory and new developments,' *Journal of Economic Literature*, 37 (June 1987), 287-331.

¹²³⁷ Hoekman and Kostecki n 55 above 142.

getting better organised, more articulate and respected and so reduced their momentum and weakened their influence.

The first approach should be a legislative amendment that will substantially alter the GATT 1994 without inciting the US and the EU to turn their back on the GATT. Taking on a hodgepodge of issues, all at the same time, is self-defeating. Multilateral trade negotiations are a *process* and should be pursued incrementally as such. ‘By 1939,’ writes Hudec, ‘the organising principle for rich-poor relationships had been colonialism;’¹²³⁸ this research adds that after the Second World War, the organising principle changed from colonialism to institutionalism, chiefly, through the UN, the World Bank, the IMF and the WTO. Since the nationalist movements were able to force the imperial powers to give up the odious forms of colonialism, they can also be ‘forced’ to relinquish the ‘wrong and harmful’ aspects of institutionalism through a protracted but persistent process of trade negotiations.

¹²³⁸ Hudec (n 9) 6.

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Appendix 1

ANNEX 1

**WORLD TRADE
ORGANIZATION**

WT/DS246/7
8 January 2004
(04-0070)

Original: English

**EUROPEAN COMMUNITIES – CONDITIONS FOR THE GRANTING OF
TARIFF PREFERENCES TO DEVELOPING COUNTRIES**

Notification of an Appeal by the European Communities
under paragraph 4 of Article 16 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes ("DSU")

The following notification, dated 8 January 2004, from the Permanent Delegation of the European Commission, is being circulated to Members.

Pursuant to Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the Working Procedures for Appellate Review, the European Communities hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the report of the panel established in response to the request from India in the dispute

European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries (WT/DS246R).

The European Communities seeks review of the Panel's legal conclusion that the Special Arrangements to Combat Drug Production and Trafficking provided in Council Regulation (EC) No. 2501/2001 (the "Drug Arrangements") are inconsistent with Article I:1 of the *General Agreement on Tariff and Trade 1994* (the "GATT"). This conclusion is based on the following erroneous legal findings:

- that the Enabling Clause is an "exception" to Article I:1 of the GATT;
- that the Enabling Clause does not exclude the applicability of Article I:1 of the GATT;
- that the EC had the burden of proving that the Drug Arrangements were consistent with the Enabling Clause.

The above legal conclusion, and the related legal findings and interpretations are set out in paragraphs 7.31 to 7.60 and 8.1 (b) and (c) of the Panel report.

India did not make any claims under the Enabling Clause and, therefore, the Appellate Body should refrain from examining the consistency of the Drug Arrangements with the Enabling Clause. However, if the Appellate Body were to uphold the Panel's conclusion that the Drug Arrangements are inconsistent with Article I:1 of the GATT, or if the Appellate Body were to decide that India made a valid claim under the Enabling Clause, the European Communities appeals subsidiarily the Panel's legal conclusion that the European Communities "failed to demonstrate that the Drug Arrangements are justified under paragraph 2(a) of the Enabling Clause". That conclusion is based on the following erroneous legal findings:

- that "the term "non-discriminatory" in footnote 3 to Paragraph 2(a) requires that identical tariff preferences under GSP schemes be provided to all developing countries without differentiation, except for the implementation of a priori limitations"; and
- that the term "developing countries" in Paragraph 2(a) means all developing countries.

This legal conclusion and the related legal findings and interpretations are set out in paragraphs 7.61-7.177 and 8.1(d) of the Panel report.

Finally the EC seeks review of the Panel's legal conclusion that the European Communities has nullified or impaired benefits accrued to India under GATT 1994, which is set out in paragraph 8.1(f) of the Panel report

Appendix 2

ANNEX 2

DIFFERENTIAL AND MORE FAVOURABLE TREATMENT RECIPROCITY AND FULLER PARTICIPATION OF DEVELOPING COUNTRIES

*Decision of 28 November 1979
(L/4903)*

Following negotiations within the framework of the Multilateral Trade Negotiations, the CONTRACTING PARTIES *decide* as follows:

1. Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries¹, without according such treatment to other contracting parties.

2. The provisions of paragraph 1 apply to the following:²

(a) Preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences,³

(b) Differential and more favourable treatment with respect to the provisions of the General Agreement concerning non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT;

(c) Regional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the CONTRACTING PARTIES, for the mutual reduction or elimination of non-tariff measures, on products imported from one another

(d) Special treatment of the least developed among the developing countries in the context of any general or specific measures in favour of developing countries.

3. Any differential and more favourable treatment provided under this clause:

(a) shall be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of any other contracting parties;

(b) shall not constitute an impediment to the reduction or elimination of tariffs and other restrictions to trade on a most-favoured-nation basis;

¹ The words "developing countries" as used in this text are to be understood to refer also to developing territories.

² It would remain open for the CONTRACTING PARTIES to consider on an *ad hoc* basis under the GATT provisions for joint action any proposals for differential and more favourable treatment not falling within the scope of this paragraph.

³ As described in the Decision of the CONTRACTING PARTIES of 25 June 1971, relating to the establishment of "generalized, non-reciprocal and non-discriminatory preferences beneficial to the developing countries" (BISD 18S/24).

(c) shall in the case of such treatment accorded by developed contracting parties to developing countries be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries.

4. Any contracting party taking action to introduce an arrangement pursuant to paragraphs 1, 2 and 3 above or subsequently taking action to introduce modification or withdrawal of the differential and more favourable treatment so provided shall:⁴

(a) notify the CONTRACTING PARTIES and furnish them with all the information they may deem appropriate relating to such action;

(b) afford adequate opportunity for prompt consultations at the request of any interested contracting party with respect to any difficulty or matter that may arise. The CONTRACTING PARTIES shall, if requested to do so by such contracting party, consult with all contracting parties concerned with respect to the matter with a view to reaching solutions satisfactory to all such contracting parties.

5. The developed countries do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of developing countries, i.e., the developed countries do not expect the developing countries, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs. Developed contracting parties shall therefore not seek, neither shall less-developed contracting parties be required to make, concessions that are inconsistent with the latter's development, financial and trade needs.

6. Having regard to the special economic difficulties and the particular development, financial and trade needs of the least-developed countries, the developed countries shall exercise the utmost restraint in seeking any concessions or contributions for commitments made by them to reduce or remove tariffs and other barriers to the trade of such countries, and the least-developed countries shall not be expected to make concessions or contributions that are inconsistent with the recognition of their particular situation and problems.

7. The concessions and contributions made and the obligations assumed by developed and less-developed contracting parties under the provisions of the General Agreement should promote the basic objectives of the Agreement, including those embodied in the Preamble and in Article XXXVI. Less-developed contracting parties expect that their capacity to make contributions or negotiated concessions or take other mutually agreed action under the provisions and procedures of the General Agreement would improve with the progressive development of their economies and improvement in their trade situation and they would accordingly expect to participate more fully in the framework of rights and obligations under the General Agreement.

8. Particular account shall be taken of the serious difficulty of the least-developed countries in making concessions and contributions in view of their special economic situation and their development, financial and trade needs.

9. The contracting parties will collaborate in arrangements for review of the operation of these provisions, bearing in mind the need for individual and joint efforts by contracting parties to meet the development needs of developing countries and the objectives of the General Agreement.

⁴ Nothing in these provisions shall affect the rights of contracting parties under the General Agreement.

Appendix 3

Consolidated Version of the ACP-EC Partnership Agreement

Signed in Cotonou on 23 June 2000, revised in Luxembourg on 25 June 2005 and revised again in Ougadougou on 22 June 2010

ARTICLE 34

Objectives

1. Economic and trade cooperation shall aim at fostering the smooth and gradual integration of the ACP States into the world economy, with due regard for their political choices and development priorities, thereby promoting their sustainable development and contributing to poverty eradication in the ACP countries.

2. The ultimate objective of economic and trade cooperation is to enable the ACP States to play a full part in international trade. In this context, particular regard shall be had to the need for the ACP States to participate actively in multilateral trade negotiations. Given the current level of development of the ACP countries, economic and trade cooperation shall be directed at enabling the ACP States to manage the challenges of globalisation and to adapt progressively to new conditions of international trade thereby facilitating their transition to the liberalised global economy. In this context, close attention should be paid to many ACP countries' vulnerability resulting from their dependency on commodities or a few key products, including value-added agro-industry products, and the risk of preference erosion.

3. To this end economic and trade cooperation shall aim, through national and regional development strategies as defined in Title I, at enhancing the production, supply and trading capacity of the ACP countries as well as their capacity to attract investment. It shall further aim at creating a new trading dynamic between the Parties, at strengthening the ACP countries' trade and investment policies, at reducing their dependency on commodities, at promoting more diversified economies and at improving the ACP countries' capacity to handle all issues related to trade.

4. Economic and trade cooperation shall be implemented in full conformity with the provisions of the WTO, including special and differential treatment, taking account of the Parties' mutual interests and their respective levels of development. It shall also address the effects of preference erosion in full conformity with multilateral commitments.

ARTICLE 35

Principles

1. Economic and trade cooperation shall be based on a true, strengthened and strategic partnership. It shall further be based on a comprehensive approach which builds on the strengths and achievements of the previous ACP-EC Conventions.

2. Economic and trade cooperation shall build on regional integration initiatives of ACP States. Cooperation in support of regional cooperation and integration as defined in Title I and economic and trade cooperation shall be mutually reinforcing. Economic and trade cooperation shall address, in particular, supply and demand side constraints, notably

interconnectivity of infrastructure, economic diversification and trade development measures as a means of enhancing ACP States' competitiveness. Appropriate weight shall therefore be given to the corresponding measures in the ACP States' and regions' development strategies, which the Community shall support, in particular through the provision of aid for trade.

3. Economic and trade cooperation shall take account of the different needs and levels of development of the ACP countries and regions. In this context, the Parties reaffirm their attachment to ensuring special and differential treatment for all ACP countries and to maintaining special treatment for ACP LDCs and to taking due account of the vulnerability of small, landlocked and island countries.

ARTICLE 36

Modalities

1. In view of the objectives and principles set out above, the Parties agree to take all the necessary measures to ensure the conclusion of new WTO-compatible Economic Partnership Agreements, removing progressively barriers to trade between them and enhancing cooperation in all areas relevant to trade.

2. The Economic Partnership Agreements, as development instruments, aim to foster smooth and gradual integration of the ACP States into the world economy, especially by making full use of the potential of regional integration and South-South trade.

3. The Parties agree that these new trading arrangements shall be introduced gradually.

O.J. L287 04 November 2010.

The Cotonou Agreement

The Cotonou Agreement's main objectives are the reduction and eventual eradication of poverty and the gradual integration of African, Caribbean and Pacific States into the global economy, whilst adhering to the aims of sustainable development.

ACT

Partnership agreement [2000/483/EC](#) between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000.

SUMMARY

The Cotonou Agreement offers a framework for the European Union's (EU) cooperation relations for the economic, social and cultural development of the African, Caribbean and Pacific States (ACP).

Centred on the target of reducing, and in the longer-term, eradicating poverty, the cooperation must also contribute to the peace and security and the democratic and political stability of the ACP states. In this regard, the partners to the agreement shall act jointly to gradually achieve the [Millennium Development Goals](#) (MDGs).

The Cotonou Agreement is based on equality between the partners and ownership of the development strategies. It was signed on 23 June 2000 for a period of 20 years and may be revised every five years.

Political dimension

The Agreement has a strong political dimension resulting in:

- **regular political dialogue**, aimed at strengthening cooperation and promoting an effective system of multilateralism;
- **peace-building policies, conflict prevention and resolution**. In this field, the partnership concentrates on regional initiatives and on building local capacities, and also on the involvement of regional organisations such as the African Union;
- **promoting human rights, democratic principles based on the rule of law and transparent and accountable governance**. A new procedure has been developed for cases of violation of these elements, stressing the responsibility of the country in question;
- identifying **questions of common interest** connected with general (regional integration) or specific (trade, military expenditure, drugs, organised crime, child labour and discrimination) issues;
- developing **cooperation strategies**, including an agenda for aid efficiency, sectoral policies concerning the environment, climate change, gender equality and migration;
- attention paid to the subject of **security**, in particular with regard to countering the proliferation of weapons of mass destruction, provisions on the Statute of the International Criminal Court, provisions on international cooperation in the fight against terrorism and illegal trafficking.

The political dialogue is conducted in a flexible way, under either a formal or an informal framework and at the most appropriate territorial level. The regional organisations and national parliaments may also participate.

The Agreement envisages a substantial role for non-State actors (NSAs) during the design and implementation of development strategies and programmes. In particular, the NSAs are local authorities, civil society organisations and the private sector, which have access to specific partnership financing.

Development strategies and poverty reduction

The Agreement is based on an integrated approach which includes actions for promoting economic, social and human development, as well as regional integration. The action priorities are set for each country in accordance with the principle of differentiation.

Economic development focuses on:

- macro-economic and structural policies and reforms;
- sectoral policies (in particular, developing the industrial, agricultural, tourism, fisheries and traditional knowledge sectors);
- investment and development of the private sector, in particular the cooperation supports public sector investment in infrastructure which promotes the development of the private sector, economic growth and poverty eradication.

The key elements of **social and human development** concern:

- sectoral social policies regarding improving education, health and nutrition systems;
- youth issues, in particular participation in public life and exchanges between the partner countries;
- health and access to services, fighting diseases connected with poverty and sexual and reproductive health protection;
- cultural development.

Regional cooperation and integration are aimed at facilitating development in all sectors. Cooperation must also support inter- regional and intra-ACP cooperation schemes and initiatives, including those involving non-ACP developing countries. Regional cooperation and integration seek, among other things, to:

- accelerate diversification of the ACP States' economies;

- promote and expand trade, which equally benefits the [least developed countries](#) (LDCs) among the ACP States;
- implement sectoral reform policies at regional level.

Lastly, the development strategies systematically take into account three **cross-cutting issues**:

- gender equality;
- sustainable management of the environment and natural resources;
- institutional development and capacity building.

Economic and trade cooperation

The Agreement complies with the World Trade Organisation (WTO) rules. It enables the ACP States to play a full part in international trade.

It provides for the negotiation of regional economic partnership agreements with a view to liberalising trade.

The Agreement highlights the vulnerable situation of the ACP states and the importance of cooperation and [trade assistance](#). In this respect, cooperation on trade matters is not restricted to trading activities; it also extends to the protection of intellectual property rights and compliance with international labour standards.

The most vulnerable states

Special treatment is granted to the least developed, landlocked and island ACP States, and to post-conflict countries. They receive special attention in certain areas, namely on matters relating to food security, regional cooperation, transport infrastructure and communications.

Joint institutions

The **Council of Ministers** meets once a year. It consists of members of the Council of the EU, the Commission and a member of the government of each ACP State. The presidency is held in turn by a member of the Council of the EU and by a member of the government of an ACP State.

It conducts the political dialogue and ensures that the Agreement is properly implemented. It may take decisions that are binding on the parties and draw up resolutions, recommendations and opinions. It may also delegate responsibilities to the Committee of Ambassadors. It

presents an annual report to the Joint Parliamentary Assembly on the implementation of the Agreement.

The **Committee of Ambassadors** assists the Council of Ministers. It is made up of each Member State permanent representative to the EU, a Commission representative and a head of mission for each ACP State to the EU. Its presidency is held in turn by the representative of an EU Member State and by an ACP State.

The **Joint Parliamentary Assembly** is an advisory body made up of an equal number of Members of the European Parliament and representatives of the ACP States. The Assembly may adopt resolutions and submit recommendations to the Council of Ministers. It meets twice a year in plenary session, alternating between the EU and an ACP country. The members of parliament may also meet at regional or subregional level if desired.

Violation of essential elements of the Agreement

The Agreement lays down measures in cases of non-compliance with the requirements of essential elements of the Agreement, namely respect for human rights, democratic principles and the rule of law.

The Agreement provides for a preliminary consultation procedure, however, in the absence of an acceptable solution, supplementary measures may be taken, including suspension of the Agreement, although this is a last resort.

Context

The Cotonou Agreement represents a new phase in the cooperation between the ACP states and the EU. For certain ACP states, the cooperation started with the signing of the Treaty of Rome in 1957. It was extended with the two Yaoundé conventions and the four Lomé conventions.

Source:

http://europa.eu/legislation_summaries/development/african_caribbean_pacific_states/r12101_en.htm accessed 20 June 2012.

Appendix 4

EEC Treaty of Rome 1957

PART FOUR — The Association of Overseas Countries and Territories

Article 131 The Member States hereby agree to bring into association with the Community the non-European countries and territories which have special relations with Belgium, France, Italy and the Netherlands. These countries and territories, hereinafter referred to as “the countries and territories”, are listed in Annex IV to this Treaty.

The purpose of this association shall be to promote the economic and social development of the countries and territories and to establish close economic relations between them and the Community as a whole.

In conformity with the principles stated in the Preamble to this Treaty, this association shall in the first place permit the furthering of the interests and prosperity of the inhabitants of these countries and territories in such a manner as to lead them to the economic, social and cultural development which they expect.

Appendix 5



United Nations

A/RES/41/128

General Assembly

Distr. GENERAL

4 December 1986

ORIGINAL:
ENGLISH

A/RES/41/128
4 December 1986
97th plenary meeting

41/128. Declaration on the Right to Development

The General Assembly,

Having considered the question of the right to development,

Decides to adopt the Declaration on the Right to Development, the text of which is annexed to the present resolution.

ANNEX

Declaration on the Right to Development

The General Assembly,

Bearing in mind the purposes and principles of the Charter of the United Nations relating to the achievement of international co-operation in solving international problems of an economic, social, cultural or

humanitarian

nature, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion,

Recognizing that development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom,

Considering that under the provisions of the Universal Declaration of Human Rights everyone is entitled to a social and international order in which the rights and freedoms set forth in that Declaration can be fully realized,

Recalling the provisions of the International Covenant on Economic, Social and Cultural Rights and of the International Covenant on Civil and Political Rights,

Recalling further the relevant agreements, conventions, resolutions, recommendations and other instruments of the United Nations and its specialized agencies concerning the integral development of the human being, economic and social progress and development of all peoples, including those instruments concerning decolonization, the prevention of discrimination, respect for and observance of, human rights and fundamental freedoms, the maintenance of international peace and security and the further promotion of friendly relations and co-operation among States in accordance with the Charter,

Recalling the right of peoples to self-determination, by virtue of which they have the right freely to determine their political status and to pursue their economic, social and cultural development,

Recalling also the right of peoples to exercise, subject to the relevant provisions of both International Covenants on Human Rights, full and complete sovereignty over all their natural wealth and resources,

Mindful of the obligation of States under the Charter to promote universal respect for and observance of human rights and fundamental freedoms for all without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

Considering that the elimination of the massive and flagrant violations of the human rights of the peoples and individuals affected by situations such as those resulting from colonialism, neo-colonialism, apartheid, all forms of racism and racial discrimination, foreign domination and occupation, aggression and threats against national sovereignty, national unity and territorial integrity and threats of war would contribute to the establishment of circumstances propitious to the development of a great part of mankind,

Concerned at the existence of serious obstacles to development, as well as to the complete fulfilment of human beings and of peoples, constituted, inter alia, by the denial of civil, political, economic, social and cultural rights, and considering that all human rights and fundamental freedoms are indivisible and interdependent and that, in order to promote development, equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights and that, accordingly, the promotion of, respect for and enjoyment of certain human rights and fundamental freedoms cannot justify the denial of other human rights and fundamental freedoms,

Considering that international peace and security are essential elements for the realization of the right to development,

Reaffirming that there is a close relationship between disarmament and development and that progress in the field of disarmament would considerably promote progress in the field of development and that resources released through disarmament measures should be devoted to the economic and social development and well-being of all peoples and, in particular, those of the developing countries,

Recognizing that the human person is the central subject of the development process and that development policy should therefore make the human being the main participant and beneficiary of development,

Recognizing that the creation of conditions favourable to the development of peoples and individuals is the primary responsibility of their States,

Aware that efforts at the international level to promote and protect human rights should be accompanied by efforts to establish a new international economic order,

Confirming that the right to development is an inalienable human right and that equality of opportunity for development is a prerogative both of nations and of individuals who make up nations,

Proclaims the following Declaration on the Right to Development:

Article 1

1. The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.

2. The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their

natural wealth and resources.

Article 2

1. The human person is the central subject of development and should be the active participant and beneficiary of the right to development.

2. All human beings have a responsibility for development, individually and collectively, taking into account the need for full respect for their human rights and fundamental freedoms as well as their duties to the community, which alone can ensure the free and complete fulfilment of the human being, and they should therefore promote and protect an appropriate political, social and economic order for development.

3. States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.

Article 3

1. States have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development.

2. The realization of the right to development requires full respect for the principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations.

3. States have the duty to co-operate with each other in ensuring development and eliminating obstacles to development. States should realize their rights and fulfil their duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence, mutual interest and co-operation among all States, as well as to encourage the observance and realization of human rights.

Article 4

1. States have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development.

2. Sustained action is required to promote more rapid development of developing countries. As a complement to the efforts of developing countries, effective international co-operation is essential in providing these countries with appropriate means and facilities to foster their comprehensive development.

Article 5

States shall take resolute steps to eliminate the massive and flagrant violations of the human rights of peoples and human beings affected by situations such as those resulting from apartheid, all forms of racism and racial discrimination, colonialism, foreign domination and occupation, aggression, foreign interference and threats against national sovereignty,

national unity and territorial integrity, threats of war and refusal to recognize the fundamental right of peoples to self-determination.

Article 6

1. All States should co-operate with a view to promoting, encouraging and strengthening universal respect for and observance of all human rights and fundamental freedoms for all without any distinction as to race, sex, language or religion.

2. All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights.

3. States should take steps to eliminate obstacles to development resulting from failure to observe civil and political rights, as well as economic, social and cultural rights.

Article 7

All States should promote the establishment, maintenance and strengthening of international peace and security and, to that end, should do their utmost to achieve general and complete disarmament under effective international control, as well as to ensure that the resources released by effective disarmament measures are used for comprehensive development, in particular that of the developing countries.

Article 8

1. States should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicating all social injustices.

2. States should encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights.

Article 9

1. All the aspects of the right to development set forth in the present Declaration are indivisible and interdependent and each of them should be considered in the context of the whole.

2. Nothing in the present Declaration shall be construed as being contrary to the purposes and principles of the United Nations, or as implying that any State, group or person has a right to engage in any activity or to perform any act aimed at the violation of the rights set forth in the Universal Declaration of Human Rights and in the International Covenants on Human Rights.

Article 10

Steps should be taken to ensure the full exercise and progressive

enhancement of the right to development, including the formulation, adoption and implementation of policy, legislative and other measures at the national and international levels.

Appendix 6

Resolution adopted by the General Assembly

3201 (S-VI). Declaration on the Establishment of a New International Economic Order

The General Assembly

Adopts the following Declaration:

Declaration on the Establishment of a New International Economic Order

We, the Members of the United Nations,

Having convened a special session of the General Assembly to study for the first time the problems of raw materials and development, devoted to the consideration of the most important economic problems facing the world community,

Bearing in mind the spirit, purposes and principles of the [*Charter of the United Nations*](#) to promote the economic advancement and social progress of all peoples,

Solemnly proclaim our united determination to work urgently for the Establishment of a New International Economic Order based on equity, sovereign equality, interdependence, common interest and cooperation among all States, irrespective of their economic and social systems which shall correct inequalities and redress existing injustices, make it possible to eliminate the widening gap between the developed and the developing countries and ensure steadily accelerating economic and social development and peace and justice for present and future generations, and, to that end, declare:

1. The greatest and most significant achievement during the last decades has been the independence from colonial and alien domination of a large number of peoples and nations which has enabled them to become members of the community of free peoples. Technological progress has also been made in all spheres of economic activities in the last three decades, thus providing a solid potential for improving the well-being of all peoples. However, the remaining vestiges of alien and colonial domination, foreign occupation, racial discrimination, apartheid and neo-colonialism in all its forms continue to be among the greatest obstacles to the full emancipation and progress of the developing countries and all the peoples involved. The benefits of technological progress are not shared equitably by all members of the international community. The developing countries, which constitute 70 per cent of the world's population, account for only 30 per cent of the world's income. It has proved impossible to achieve an even and balanced development of the international community under the existing international economic order. The gap between the developed and the developing countries continues to widen in a system which was established at a time when most of the developing countries did not even exist as independent States and which perpetuates inequality.

2. The present international economic order is in direct conflict with current developments in international political and economic relations. Since 1970 the

world economy has experienced a series of grave crises which have had severe repercussions, especially on the developing countries because of their generally greater vulnerability to external economic impulses. The developing world has become a powerful factor that makes its influence felt in all fields of international activity. These irreversible changes in the relationship of forces in the world necessitate the active, full and equal participation of the developing countries in the formulation and application of all decisions that concern the international community.

3. All these changes have thrust into prominence the reality of interdependence of all the members of the world community. Current events have brought into sharp focus the realization that the interests of the developed countries and those of the developing countries can no longer be isolated from each other, that there is a close interrelationship between the prosperity of the developed countries and the growth and development of the developing countries, and that the prosperity of the international community as a whole depends upon the prosperity of its constituent parts. International co-operation for development is the shared goal and common duty of all countries. Thus the political, economic and social well-being of present and future generations depends more than ever on co-operation between all the members of the international community on the basis of sovereign equality and the removal of the disequilibrium that exists between them.

4. The new international economic order should be founded on full respect for the following principles:

- a. Sovereign equality of States, self-determination of all peoples, inadmissibility of the acquisition of territories by force, territorial integrity and non-interference in the internal affairs of other States;
- b. The broadest co-operation of all the States members of the international community, based on equity, whereby the prevailing disparities in the world may be banished and prosperity secured for all;
- c. Full and effective participation on the basis of equality of all countries in the solving of world economic problems in the common interest of all countries, bearing in mind the necessity to ensure the accelerated development of all the developing countries, while devoting particular attention to the adoption of special measures in favour of the least developed land-locked and island developing countries as well as those developing countries most seriously affected by economic crises and natural calamities, without losing sight of the interests of other developing countries;
- d. The right of every country to adopt the economic and social system that it deems the most appropriate for its own development and not to be subjected to discrimination of any kind as a result;
- e. Full permanent sovereignty of every State over its natural resources and all economic activities. In order to safeguard these resources, each State is entitled to exercise effective control over them and their exploitation with means suitable to its own situation, including the right to nationalization or transfer of ownership to its nationals, this right being an expression of the full permanent sovereignty of the State. No State may be subjected to economic, political or any other type of coercion to prevent the free and

- full exercise of this inalienable right;
- f. The right of all States, territories and peoples under foreign occupation, alien and colonial domination or apartheid to restitution and full compensation for the exploitation and depletion of, and damages to, the natural resources and all other resources of those States, territories and peoples;
 - g. Regulation and supervision of the activities of transnational corporations by taking measures in the interest of the national economies of the countries where such transnational corporations operate on the basis of the full sovereignty of those countries;
 - h. The right of the developing countries and the peoples of territories under colonial and racial domination and foreign occupation to achieve their liberation and to regain effective control over their natural resources and economic activities;
 - i. The extending of assistance to developing countries, peoples and territories which are under colonial and alien domination, foreign occupation, racial discrimination or apartheid or are subjected to economic, political or any other type of coercive measures to obtain from them the subordination of the exercise of their sovereign rights and to secure from them advantages of any kind, and to neo colonialism in all its forms, and which have established or are endeavouring to establish effective control over their natural resources and economic activities that have been or are still under foreign control;
 - j. Just and equitable relationship between the prices of raw materials, primary commodities, manufactured and semi-manufactured goods exported by developing countries and the prices of raw materials, primary commodities, manufactures, capital goods and equipment imported by them with the aim of bringing about sustained improvement in their unsatisfactory terms of trade and the expansion of the world economy;
 - k. Extension of active assistance to developing countries by the whole international community, free of any political or military conditions;
 - l. Ensuring that one of the main aims of the reformed international monetary system shall be the promotion of the development of the developing countries and the adequate flow of real resources to them;
 - m. Improving the competitiveness of natural materials facing competition from synthetic substitutes;
 - n. Preferential and non-reciprocal treatment for developing countries, wherever feasible, in all fields of international economic co-operation whenever possible;
 - o. Securing favourable conditions for the transfer of financial resources to developing countries.
 - p. Giving to the developing countries access to the achievements of modern science and technology, and promoting the transfer of technology and the creation of indigenous technology for the benefit of the developing countries in forms and in accordance with procedures which are suited to their economies;
 - q. The need for all States to put an end to the waste of natural resources, including food products;
 - r. The need for developing countries to concentrate all their resources for the cause of development;
 - s. The strengthening, through individual and collective actions, of mutual economic, trade, financial and technical co-operation among the developing countries, mainly on a preferential basis;
 - t. Facilitating the role which producers' associations may play within the

framework of international co-operation and, in pursuance of their aims, inter alia assisting in the promotion of sustained growth of the world economy and accelerating the development of developing countries.

5. The unanimous adoption of the International Development Strategy for the Second United Nations Development Decade (Resolution 2626 (XXV)) was an important step in the promotion of international economic co-operation on a just and equitable basis. The accelerated implementation of obligations and commitments assumed by the international community within the framework of the Strategy, particularly those concerning imperative development needs of developing countries, would contribute significantly to the fulfilment of the aims and objectives of the present Declaration.

6. The United Nations as a universal organization should be capable of dealing with problems of international economic co-operation in a comprehensive manner and ensuring equally the interests of all countries. It must have an even greater role in the establishment of a new international economic order. The Charter of Economic Rights and Duties of States, for the preparation of which the present Declaration will provide an additional source of inspiration, will constitute a significant contribution in this respect. All the States Members of the United Nations are therefore called upon to exert maximum efforts with a view to securing the implementation of the present Declaration, which is one of the principal guarantees for the creation of better conditions for all peoples to reach a life worthy of human dignity.

7. The present Declaration on the Establishment of a New International Economic Order shall be one of the most important bases of economic relations between all peoples and all nations.

2229th plenary meeting

1 May 1974

Appendix 7

Proclamation of Teheran, Final Act of the International Conference on Human Rights, Teheran, 22 April to 13 May 1968, U.N. Doc. A/CONF. 32/41 at 3 (1968).

The International Conference on Human Rights,

Having met at Teheran from April 22 to May 13, 1968 to review the progress made in the twenty years since the adoption of the Universal Declaration of Human Rights and to formulate a programme for the future,

Having considered the problems relating to the activities of the United Nations for the promotion and encouragement of respect for human rights and fundamental freedoms,

Bearing in mind the resolutions adopted by the Conference,

Noting that the observance of the International Year for Human Rights takes place at a time when the world is undergoing a process of unprecedented change,

Having regard to the new opportunities made available by the rapid progress of science and technology,

Believing that, in an age when conflict and violence prevail in many parts of the world, the fact of human interdependence and the need for human solidarity are more evident than ever before,

Recognizing that peace is the universal aspiration of mankind and that peace and justice are indispensable to the full realization of human rights and fundamental freedoms,

Solemnly proclaims that:

1. It is imperative that the members of the international community fulfil their solemn obligations to promote and encourage respect for human rights and fundamental freedoms for all without distinctions of any kind such as race, colour, sex, language, religion, political or other opinions;

2. The Universal Declaration of Human Rights states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and constitutes an obligation for the members of the international community;

3. The International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Declaration on the Granting of Independence to Colonial Countries and Peoples, the International Convention on the Elimination of All Forms of Racial Discrimination as well as other conventions and declarations in the field of human rights adopted under the auspices of the United Nations, the specialized agencies and the regional intergovernmental organizations, have created new standards and obligations to which States should conform;

4. Since the adoption of the Universal Declaration of Human Rights the United Nations has made substantial progress in defining standards for the enjoyment and protection of human rights and fundamental freedoms. During this period many important international instruments were adopted but much remains to be done in regard to the implementation of those rights and freedoms;

5. The primary aim of the United Nations in the sphere of human rights is the achievement by each individual of the maximum freedom and dignity. For the realization of this objective, the laws of every country should grant each individual, irrespective of race, language, religion or political belief, freedom of expression, of information, of conscience and of religion, as well as the right to participate in the political, economic, cultural and social life of his country;

6. States should reaffirm their determination effectively to enforce the principles enshrined in the Charter of the United Nations and in other international instruments that concern human rights and fundamental freedoms;

7. Gross denials of human rights under the repugnant policy of apartheid is a matter of the gravest concern to the international community. This policy of apartheid, condemned as a crime against humanity, continues seriously to disturb international peace and security. It is therefore imperative for the international community to use every possible means to eradicate this evil. The struggle against apartheid is recognized as legitimate;

8. The peoples of the world must be made fully aware of the evils of racial discrimination and must join in combating them. The implementation of this principle of non-discrimination, embodied in the Charter of the United Nations, the Universal Declaration of Human Rights, and other international instruments in the field of human rights, constitutes a most urgent task of mankind at the international as well as at the national level. All ideologies based on racial superiority and intolerance must be condemned and resisted;

9. Eight years after the General Assembly's Declaration on the Granting of Independence to Colonial Countries and Peoples the problems of colonialism continue to preoccupy the international community. It is a matter of urgency that all Member States should co-operate with the appropriate organs of the United Nations so that effective measures can be taken to ensure that the Declaration is fully implemented;

10. Massive denials of human rights, arising out of aggression or any armed conflict with their tragic consequences, and resulting in untold human misery, engender reactions which

could engulf the world in ever growing hostilities. It is the obligation of the international community to co-operate in eradicating such scourges;

11. Gross denials of human rights arising from discrimination on grounds of race, religion, belief or expressions of opinion outrage the conscience of mankind and endanger the foundations of freedom, justice and peace in the world;

12. The widening gap between the economically developed and developing countries impedes the realization of human rights in the international community. The failure of the Development Decade to reach its modest objectives makes it all the more imperative for every nation, according to its capacities, to make the maximum possible effort to close this gap;

13. Since human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible. The achievement of lasting progress in the implementation of human rights is dependent upon sound and effective national and international policies of economic and social development;

14. The existence of over seven hundred million illiterates throughout the world is an enormous obstacle to all efforts at realizing the aims and purposes of the Charter of the United Nations and the provisions of the Universal Declaration of Human Rights. International action aimed at eradicating illiteracy from the face of the earth and promoting education at all levels requires urgent attention;

15. The discrimination of which women are still victims in various regions of the world must be eliminated. An inferior status for women is contrary to the Charter of the United Nations as well as the provisions of the Universal Declaration of Human Rights. The full implementation of the Declaration on the Elimination of Discrimination against Women is a necessity for the progress of mankind;

16. The protection of the family and of the child remains the concern of the international community. Parents have a basic human right to determine freely and responsibly the number and the spacing of their children;

17. The aspirations of the younger generation for a better world, in which human rights and fundamental freedoms are fully implemented, must be given the highest encouragement. It is imperative that youth participate in shaping the future of mankind;

18. While recent scientific discoveries and technological advances have opened vast prospects for economic, social and cultural progress, such developments may nevertheless endanger the rights and freedoms of individuals and will require continuing attention;

19. Disarmament would release immense human and material resources now devoted to military purposes. These resources should be used for the promotion of human rights and fundamental freedoms. General and complete disarmament is one of the highest aspirations of all peoples;

Therefore,

The International Conference on Human Rights,

1. Affirming its faith in the principles of the Universal Declaration of Human Rights and other international instruments in this field,

2. Urges all peoples and governments to dedicate themselves to the principles enshrined in the Universal Declaration of Human Rights and to redouble their efforts to provide for all human beings a life consonant with freedom and dignity and conducive to physical, mental, social and spiritual welfare.

Appendix 8

UNGA Resolution 32/130, Alternative Approaches and Ways within the United Nations System for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms

1. *Decides* that the approach to the future work within the United Nations system with respect to human rights questions should take into account the following concepts:
 - a. All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of both civil and political, and economic, social and cultural rights;
 - b. ‘The full realisation of civil and political rights without the enjoyment of economic, social and cultural rights is impossible; the achievement of lasting progress in the implementation of human rights is dependent upon sound and effective national and international policies of economic and social development’ as recognised by the Proclamation of Tehran of 1968 (paragraph 13);
 - c. All human rights and fundamental freedoms of the human person and of peoples are inalienable.

Appendix 9

The TREATY OF ECOWAS, Cotonou, 24 July 1993

CHAPTER II

ESTABLISHMENT, COMPOSITION, AIMS AND OBJECTIVES AND FUNDAMENTAL PRINCIPLES OF THE COMMUNITY

ARTICLE 2 : ESTABLISHMENT AND COMPOSITION

1. THE HIGH CONTRACTING PARTIES, by this Treaty, hereby re-affirm the establishment of the Economic Community of West African States (ECOWAS): and decide that it shall ultimately be the sole economic community in the region for the purpose of economic integration and the realisation of the objectives of the African Economic Community.
2. The members of the Community, hereinafter referred to as "the Member States," shall be the States that ratify this treaty.

ARTICLE 3 : AIMS AND OBJECTIVES

1. The aims of the Community are to promote co-operation and integration, leading to the establishment of an economic union in West Africa in order to raise the living standards of its peoples, and to maintain and enhance economic stability, foster relations among Member States and contribute to the progress and development of the African Continent.
2. In order to achieve the aims set out in the paragraph above, and in accordance with the relevant provisions of this Treaty, the Community shall, by stages, ensure;
 - a) the harmonisation and co-ordination of national policies and the promotion of integration programmes, projects and activities, particularly in food, agriculture and natural resources, industry, transport and communications, energy, trade, money and finance, taxation, economic reform policies, human resources, education, information, culture, science, technology, services, health, tourism, legal matters;
 - b) the harmonisation and co-ordination of policies for the protection of the environment;
 - c) the promotion of the establishment of joint production enterprises;
 - d) the establishment of a common market through:

- i) the liberalisation of trade by the abolition, among Member States, of customs duties levied on imports and exports, and the abolition among Member States, of non-tariff barriers in order to establish a free trade area at the Community level;
- ii) the adoption of a common external tariff and a common trade policy vis-a-vis third countries;
- iii) the removal, between Member States, of obstacles to the free movement of persons, goods, service and capital, and to the right of residence and establishment;
- e) the establishment of an economic union through the adoption of common policies in the economic, financial social and cultural sectors, and the creation of a monetary union.
- f) the promotion of joint ventures by private sectors enterprises and other economic operators, in particular through the adoption of a regional agreement on cross-border investments;
- g) the adoption of measures for the integration of the private sectors, particularly the creation of an enabling environment to promote small and medium scale enterprises;
- h) the establishment of an enabling legal environment;
- i) the harmonisation of national investment codes leading to the adoption of a single Community investment code;
- j) the harmonisation of standards and measures;
- k) the promotion of balanced development of the region, paying attention to the special problems of each Member State particularly those of landlocked and small island Member States;
- l) the encouragement and strengthening of relations and the promotion of the flow of information particularly among rural populations, women and youth organisations and socio-professional organisations such as associations of the media, business men and women, workers, and trade unions;
- m) the adoption of a Community population policy which takes into account the need for a balance between demographic factors and socioeconomic development;
- n) the establishment of a fund for co-operation, compensation and development; and
- o) any other activity that Member States may decide to undertake jointly with a view to attaining Community objectives.

CHAPTER III

INSTITUTIONS OF THE COMMUNITY - ESTABLISHMENT, COMPOSITION AND FUNCTIONS

ARTICLE 6 : INSTITUTIONS

1. The Institutions of the Community shall be:

- a) the Authority of Heads of State and Government;
- b) the Council of Ministers;
- c) the Community Parliament;
- d) the Economic and Social Council;
- e) the Community Court of Justice;
- f) the Executive Secretariat;
- g) the Fund for Co-operation, Compensation and Development;
- h) Specialised Technical Commissions; and
- i) Any other institutions that may be established by the Authority.

2. The Institutions of the Community shall perform their functions and act within the limits of the powers conferred on them by this Treaty and by the Protocols relating thereto.

ARTICLE 13

THE COMMUNITY PARLIAMENT

1. There is hereby established a Parliament of the Community.

2. The method of election of the Members of the Community Parliament, its composition, functions, powers and organisation shall be defined in a Protocol relating thereto.

ARTICLE 14 THE ECONOMIC AND SOCIAL COUNCIL

1. There is hereby established an Economic and Social Council which shall have an advisory role and whose composition shall include representatives of the various categories of economic and social activity.

2. The composition, functions and organisation of the Economic and Social Council shall be defined in a Protocol relating thereto.

ARTICLE 15 THE COURT OF JUSTICE ESTABLISHMENT AND FUNCTIONS

1. There is hereby established a Court of Justice of the Community.

2. The status, composition, powers, procedure and other issues concerning the Court of Justice shall be as set out in a Protocol relating thereto.

3. The Court of Justice shall carry out the functions assigned to it independently of the Member States and the institutions of the Community.

4. Judgements of the, Court of Justice shall be binding on the Member States, the Institutions of the Community and on individuals and corporate bodies.

ARTICLE 16 ARBITRATION TRIBUNAL ESTABLISHMENT AND FUNCTIONS

1. There is hereby established an Arbitration Tribunal of the Community.

2. The status, composition, powers, procedure and other issues concerning the Arbitration Tribunal shall be as set out in a Protocol relating thereto.

Appendix 10

ECOWAS Member States



The Republic of [BENIN](#)



[BURKINA FASO](#)



The Republic of [CABO VERDE](#)



The Republic of [COTE D'IVOIRE](#)



The Republic of [GAMBIA](#)



The Republic of [GHANA](#)



The Republic of [GUINEE](#)



The Republic of [GUINEE BISSAU](#)



The Republic of [LIBERIA](#)



The Republic of [MALI](#)



The Republic of [NIGER](#)



The Republic of [NIGERIA](#)



The Republic of [SENEGAL](#)



The Republic of [SIERRA LEONE](#)



[TOGOLESE](#) Republic

Appendix 11

The Leutwiler Report: Trade Policy for a Better Future

Introduction and Summary by Arthur Dunkel, Director-General, GATT

The decade of inflation, unemployment and stagnation which began in 1973 has been succeeded by the beginning of an economic upturn – but that long-sought recovery is far from secure.

In the industrialised nations, unemployment remains high and growth is still relatively weak. In the developing world, there is a shortage of the domestic and external resources needed for growth, and in some countries huge foreign debts threaten to abort recovery before it can begin. Even in the United States, where the economy has improved most visibly, it remains an open question whether and how long the growth can be sustained.

The challenge is clear. How can the current upturn become the beginning of a new era of non-inflationary growth, lower unemployment and rising standards of living?

Open international trade is a key to sustained growth. Trade opens vast markets to each nation's enterprises. It carries technology and innovation around the world. It spurs each nation to greater productivity.

Today, however, the world market is not opening up; instead it is being choked by a growing accumulation of restrictive measures. Demands for protection are heard in every country, and from one industry after another. The trading rules set under the General Agreements on Tariffs and Trade are increasingly ignored or evaded.

In the industrialised world, countries have imposed a patchwork of restrictions on their imports, sometimes disguising them with the polite name of 'voluntary export restraints'. Everywhere, governments increasingly provide subsidies to favoured industries and to farmers. In many developing countries, measures to protect infant industries and preserve foreign exchange have outlived their usefulness.

Demands for protection may be understandable during periods of economic stagnation and hardship. To workers facing the loss of their jobs, the real but intangible promises of free trade must come as cold comfort. But trade restrictions act only as brakes on each economy's ability to take advantage of new technology, and to grow. If today's threatened workers – and their children – are to be assured of abundant jobs in growing economies, they will need the opportunities offered by more open trade. They will also need bold programmes to enable them to benefit from these opportunities, including short-term adjustment assistance and long-term education.

If the trend towards trade restrictions continues, the sustained economic growth we seek will become impossible. The current signs of worldwide recovery will turn out to be only a sad illusion. And deteriorating trade relations will also create new political conflict.

The alternative is a new commitment to open trade, backed up by improvements in the operation of the GATT system. Both developed and developing countries have a contribution to make in this process.

But better trade policies alone cannot put the world economy securely on the path to growth. That achievement will require the wide use of monetary and fiscal policies and of debt and development policies.

Our Report is in three chapters:

Chapter One, *The Challenge of Economic Change*, examines the role of international trade in the world economy. It argues that:

- Advances in technology, industrial change and population trends, as well as rising demand and output in developing countries, give the world economy the potential to achieve a new era of growth. Expanding trade will be essential to achieving growth.
- Rapid change will be painful for the labour market, as old jobs cease to exist and workers are forced to move on to new jobs and skills. The temptation simply to resist change will be very great. But change is not only inevitable; it is the key to growth and to a better future.
- Economic prospects will be critically influenced by the financial and monetary developments, and by the world's success in co-ordinating macroeconomic policies, confronting the debt crisis, and maintaining flows of development aid.
- Trade has a vital part to play in helping the world economy to take advantage of change. But the trading system itself, the rule of law embodied in the General Agreement on Tariffs and Trade (GATT), is suffering serious and continuing erosion.
- Trade rules that are consistently enforced and kept up-to-date enhance everybody's freedom of action, give the trading system a sense of fairness, and minimise political conflict. They help stimulate and promote investments by providing a reasonable confidence that markets will remain open.
- The trade rules are no longer seen as fully effective, nor generally obeyed. Countries have abused the system's flexibility and have sought advantage through national measures not adequately dealt with in negotiations or the GATT rules.
- In some areas, such as agriculture, countries have failed to live up to GATT rules from the beginning. In others, they have found new ways to evade the intent of the rules, by erecting such trade barriers as 'voluntary export restraints' and by providing subsidies to domestic industries.
- Developing countries have been placed in a separate and supposedly privileged category from which they have in fact benefited little.

Chapter Two: *Why Open Trade Is Better Trade*, looks at the pros and cons of liberal trading policies. It makes the points that:

- Although the classic theory of international trade remains valid today, the real world is more complicated than the economist's abstract model suggests. Unemployment and labour difficulties, exchange rate misalignments, security considerations and the need of developing countries to launch infant industries have all led governments to

impose protectionist restrictions. But these valid arguments are seized on as excuses for wholesale protection of special-interest industries.

- Virtually all protection is introduced to avoid the consequences of economic change. But since economic growth is a process of adjustment to change, attempts to avert it by imposing trade restrictions inevitably stunts an economy.
- The ‘benefits’ of protectionism are immediate and visible, while its costs are long-term and largely invisible. As a result, those who lose out rarely know that they are being made to bear the costs. In all countries, this creates a fundamental imbalance in the process of making trade policy: the advocates of protectionism start with built-in advantages.
- In most public discussion of protection, the right questions are seldom asked, What will the total costs be if trade restrictions are imposed? Is protection the most efficient way to help the industry in trouble? Will paying higher consumer prices protect jobs for more than just the short run? What will be the effects on inflation? On the long-term economic growth?
- Protection also carries political costs. Attempts to restrict and manage trade inevitably increase the conflicts among nations.
- Contrary to widespread belief, protection cannot protect jobs for long. Indeed, in many cases protectionist measures actually eliminate jobs. Jobs which are ‘saved’ from the competition of imports are preserved only at the expense of jobs lost in the same country’s export sector.
- Instead, job losses in import-competing industries can be remedied in two ways. One is the creation of new jobs, in export industries and through faster economic growth. The other is energetic policies to help workers adjust, including policies to make high quality education available to all.
- Nor is protection an effective means of securing other objectives such as preservation of the farm sector, overcoming exchange rate difficulties, or seeking economic and social stability.

Chapter Three, *The Way Forward*, contains our recommendations for the concerted action we believe necessary to put the world trading system on the right path.

We put forward the following *fifteen recommendations for specific, immediate action to meet the present crisis in the trading system*:

1. In each country, the making of trade policy should be brought into the open. The costs and benefits of trade policy actions, existing and prospective, should be analysed through a ‘protection balance sheet’. Private and public companies should be required to reveal in their financial statements any subsidies received. Public support for open trading policies should be fostered.
2. Agricultural trade should be based on clearer and fairer rules, with no special treatment for particular countries or commodities. Efficient agricultural producers should be given the maximum opportunity to compete.
3. A timetable and procedure should be established to bring into conformity with GATT rules voluntary export restraints, orderly marketing agreements, discriminatory import restrictions and the other trade policy measures of both developed and developing countries which are inconsistent with the obligations of contracting parties under the GATT.
4. Trade in textiles and clothing should be fully subject to ordinary rules of the GATT.
5. Rules on subsidies need to be revised, clarified and made more effective. When subsidies are permitted, they should be granted only after full and detailed scrutiny.

6. The GATT 'codes' governing non-tariff distortions of trade should be improved and vigorously applied to make trade more open and fair.
7. The rules permitting customs unions and free-trade areas have been distorted and abused. To prevent further erosion of the multilateral trading system, they need to be clarified and tightened up.
8. At the international level, trade policy and the functioning of the trading system should be made more open. Countries should be subject to regular oversight or surveillance of their policies and actions, about which the GATT Secretariat should collect and publish information.
9. When emergency 'safeguard' protection for particular industries is needed, it should be provided only in accordance with the rules: It should not discriminate between different suppliers, should be time-limited, should be linked to adjustment assistance, and should be subject to continuing surveillance.
10. Developing countries receive special treatment in the GATT rules. But such treatment is of limited value. Far greater emphasis should be placed on permitting and encouraging developing countries to take advantage of their competitive strengths, and on integrating them more fully into the trading system, with all the appropriate rights and responsibilities that this entails.
11. Governments should be ready to examine ways and means of expanding trade in services, and to explore whether multilateral rules can appropriately be devised for this sector.
12. In support of improved and strengthened rules, GATT's dispute settlement procedures should be reinforced by building up a permanent roster of non-governmental experts to examine disputes, and by improving the implementation of panel recommendations. Third parties should use their rights to complain when bilateral agreements break the rules.
13. We support the launching of a new round of GATT negotiations, provided they are directed towards the primary goal of strengthening the multilateral trading system and further opening world markets.
14. To ensure continuous high-level attention to problems in international trade policy, and to encourage prompt negotiation of solutions to them, a permanent Ministerial-level body should be established in GATT.
15. The health and even the maintenance of the trading system, and the stability of the financial system, are linked to a satisfactory resolution of world debt problem, adequate flows of development finance, better international co-ordination of macroeconomic policies, and greater consistency between trade and financial policies.¹²³⁹

The Report was commissioned by the Director-General of GATT. The members of the group of seven eminent persons who wrote the Report and their qualifications are as follows:

¹²³⁹ According to Arthur Dunkel, Director-General GATT, 'the Report is not an official GATT publication'. It first appeared in 1985, received minor amendments and reappeared as a new publication in 1987 to mark the 40th anniversary of the signing of the General Agreement on Tariffs and Trade... to set the report in an historical context and to relate it to ...the Uruguay Round of Multilateral Trade Negotiations (launched in 1986). Its first edition was made possible by the financial contributions of a number of sponsors. See Arthur Dunkel (ed) *Trade Policies for a Better Future – The 'Leutwiler Report', the GATT and the Uruguay Round* (Martinus Nijhoff Publishers 1987) vii, 9-15.

1. Dr Fritz Leutwiler – Chairman (Swiss) was until the end of 1984 Chairman of the Swiss National Bank and President of the Bank for International Settlements. At the time of his appointment as a member for the group, he was the Chairman of the Brown Boveri, Baden, Switzerland.
2. Senator Bill Bradley (American) was a United States Democrat Senator from New Jersey from 1979 to 1997. He was a member of the Senate Committee on Finance, and its Sub-Committee on International Trade.
3. Dr Pehr Gyllenhammar (Swedish) was Chairman and Chief Executive Officer of AB Volvo, Göteborg, Sweden. He also chaired the informal Roundtable of European Industrialists.
4. Dr Guy Ladreit de Lacharriere (French) was Vice-President of the International Court of Justice, He was legal adviser to the French Ministry of Foreign Affairs; earlier, he headed the Ministry's service dealing with the United Nations and the international organisations.
5. Dr Indraprasad G. Patel (Indian) was Director, London School of Economics and Political Science. He has previously been Governor of the Reserve Bank of India and Deputy Administrator of the United Nations Development Programme.
6. Prof. Mario Henrique Simonisen (Brazilian) was Director of the Post-graduate School of Economics of the Getulio Vargas Foundation, Rio de Janeiro. He is a former Minister of Finance and Minister of Planning of Brazil.
7. Dr Sumitro Djojohadikusumo (Indonesian) was a Professor of Economics at the University of Indonesia. He served in the Indonesian government successively as Minister of Trade and Industry, Minister of Finance, and Minister of State for Research.

The Director-General GATT then Mr Arthur Dunkel (Swiss) was a man of shining eminence in his own right: 1956: Degree in Economic and Commercial Sciences, University of Lausanne.

Same year: Federal Office for Foreign Economic Affairs (Department of Public Economy), Bern.

Successively Head of the sections for OECD matters (1960), for co-operation with developing countries (1964), for world trade policy (1971). In 1973 appointed Permanent Representative to GATT with the rank of Minister Plenipotentiary. In 1976 promoted Delegate of the Federal Council for Trade Agreements, Ambassador Plenipotentiary. In this capacity, in charge of world trade policy matters, multilateral trade and economic relations with developing countries, industrialisation, trade in agriculture and primary products, bilateral trade relations with various partners. Head or acting head of the Swiss delegations to the Tokyo Round negotiations, UNCTAD IV and V, UNIDO, Commodities Conferences, etc.

International functions: Vice-Chairman and Rapporteur of UNCTAD

Intergovernmental Group on Supplementary Financing (1968); Rapporteur of UNCTAD Board (1969); Chairman of Balance-of-payments Committee of GATT (1972/75); Chairman of the United Nations Conference on a new Wheat Agreement (1978), etc.

Director-General GATT 1980-1993.

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