

Memorandum

**PROTECTIONISM TO WHAT EXTENT CAN THE GATT PROTECT THE
INTEREST OF DEVELOPING COUNTRIES?**

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Introduction

In the month of April 1989, Sparks and Islam noted:

'An ominous and subtle new form of protectionism is threatening to choke off an increasing amount of exports from developing countries..'

This quotation further confirms the doubts on the movement of liberalization built up over the years'.*

In 1947, when the General Agreement on Tariffs and Trade (GATT) was established, its member countries hoped that this agreement would facilitate world trade liberalization. In order to achieve its objective, several principles and provisions were embodied in the legal structure of the GATT. The General Agreement, however, was not able to bring about absolute free trade. It failed in its ideal because the principles and provisions of the GATT reflected both the disagreements among its member countries and the reality of the world trading system.

One of the oversights in the Agreement was that the GATT was mainly concerned with the liberalization of trade in industrial products. This resulted in the exclusion of Developing Countries (DCs) from the liberalization process of the GATT rounds of negotiations, and thus, from the perspective of DCs, the GATT was protectionist.

After a considerable period of time, the GATT adopted rules and procedures to take into account some of the demands put forward by DCs. Preferential Treatment was introduced in favor of these countries. A Generalized System of Preferences (GSP) and other mechanisms were provided to promote the participation of DCs in the world trading system.

This paper will concentrate mainly on the interests of DCs in the world trading system and the extent to which the GATT has helped them improve their export performance. I

* Spark and Islam, New Push in Dirty War, SOUTH, 23(1989).

plan to discuss the issue within the context of protectionism and the Generalized System of Preferences.

I will demonstrate the extent to which DCs have been neglected in the legal framework of the GATT. Trade in agriculture, and textiles for example, in which many DCs have the ability to expand their exports, has been subject to heavy protectionism.

A brief analysis will be provided on the emergence of the new forms of protectionism (Orderly Marketing Arrangements, Voluntary Export Restraints, Antidumping and Countervailing Duties.) and their impact on the export performance of DCs. Finally, will outline the position of DCs in the last Uruguay Round. What next?

I-Establishment of the GATT and The position of Developing Countries: A Historical Overview

The General Agreement on Tariffs and Trade came into existence after a long period of protection in international trade¹. Most countries had been affected by economic recession since World War I. During the inter-war years, trade figures hit an all-time low and it is during this very period that protectionism took root.

Most countries resorted to protective measures in order to safeguard their domestic industry. For instance, the U.S. the leading protectionist power during the inter-war period, raised duties to an extremely high level². In response to these high US tariffs, other countries introduced strong protective measures.

Due to the ever-worsening economic climate and the increasing conflicts in trade relations, a number of countries agreed to change the direction of world trade through liberalization rather than protectionism. They tried to bring about the desired changes by concluding a vast number of bilateral trade agreements³.

In the early 1940s, the International Monetary Fund(IMF)⁴ and the International Bank for Reconstruction and Development (IBRD)⁵. were established to deal with the financial aspects of

¹. General Agreement on Tariff and Trade, opened for signature Oct. 30, 1947, 61 Stat. A3, T.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter GATT. The current version of the agreement is contained in 4 GENERAL AGREEMENT ON TARIFFS AND TRADE, BASIC INSTRUMENT AND SELECTED DOCUMENTS ("BISD") (1969).

². For the history of high tariff in the U.S. Law, see JOHN H. JACKSON, WORLD TRADE AND THE LAW OF THE GATT, 9-11(1969).

³. Jay Culbert, War-Time Anglo-American Talks and the Making of the GATT, 10 THE WORLD ECONOMY, 368-396 (1987).

⁴. see Joseph Gold, Legal and Institutional Aspect of the International Monetary System: SELECTED ESSAYS (Washington, D.C. IMF, 1985).

⁵. The IBRD (the World Bank) is a sister organization to the IMF, all members of the Bank being obliged to be members of the IMF. The Articles of the Agreement of the IBRD as amended in to be members of the IMF. The Articles of Agreement of the IBRD has two affiliates, the International Development Association (IDA) (11 UST 2284; TIAS 4607; 439 UNTS 249) and the International Finance Corporation (IFC) (as amended 24 UTS 1760; TIAS 7683; 563 UNTS 362). See RICHARD W. EDWARDS, INTERNATIONAL MONETARY COLLABORATION (1985).

international economic relations. However, since it was generally accepted that protectionism was still detrimental to trade, it was believed that an international institution was needed to deal effectively with any arising problems.

In 1942, a Mutual Aid Agreement in trade between the U.S.A. and the UK brought about the concept of Multilateral Negotiations between all nations⁶. The idea of creating an International Organization was initiated, developed and put into practice with a provisional arrangement referred to as the International Trade Organization (ITO)⁷. Since the ITO was never ratified, it was transformed by default into an international instrument called the General Agreement on Tariffs and Trade (GATT).

The GATT established the system needed to provide a legal framework, rules and procedures that would conduct international trade and ensure a better degree of liberalization in the future. It provided a legal structure that embodied principles and rules, rights and obligations between its member countries. Its objective was to promote the re-establishment of world trade that had been disrupted by the protectionism of both the 1930s and the great post-war recession. With these objectives in mind, the twenty-three founding members of the General Agreement, of which ten were Developing Countries (DCs), voiced their intention to create a trading system within the GATT legal framework⁸. This, it was hoped, would bring about stability and further progressive trade liberalization⁹

⁶. Culbert, *supra* note 3, at 376.

⁷. In February 1946 the United Economic and Social Council held a conference on international trade and employment matters which would draft a convention establishing an International Trade Organization (ITO). The UN Conference on Trade and Employment was held in Havana from 1947 to March 1948. It adopted the text of the Charter for the International Trade Organization (the Havana Charter). See US Dept. of State Pub. no. 3117 (1947).

⁸. The ten original developing countries include: Brazil, Burma, China, Ceylon, Chile Cuba, Pakistan Syria and Lebanon. Within the first few years China, Lebanon and Syria Withdrew. For details see ROBERT HUDEC, *DEVELOPING COUNTRIES IN THE GATT LEGAL SYSTEM*, 23 (1987).

⁹. GATT is a body of principles and rules to which contracting parties are supposed to commit themselves. In addition to its legal function, it is considered to be a forum where contracting parties negotiate tariff reductions and facilitate the furthering of its objectives. These objectives are laid down in the preamble of the General Agreement.

II- "Trade and Development" in the GATT: Historical Events

The principles of reciprocity (article XXVIII)¹⁰ and Most Favored Nation (MFN) (article I)¹¹ constitutes two pillars of the GATT legal system. Both of them complement one another. While the latter extends the benefits of trade concession to all GATT members without discrimination, the former provides the basic ground rule of trade negotiations.

However, the growing significance of the DCs in the world trading system implies that it is necessary for them to be as fully integrated as possible into the liberal trading system. This means that the GATT should recognize their different needs and the extent to which they can be expected to implement the fundamental principles of the GATT reciprocity and non-discrimination.

DCs argued that the principle of reciprocity worked to their disadvantage. Their argument was that under the reciprocity principle, a country would only offer tariff reductions in exchange

"their relations in the field of trade and economic endeavor should be conducted within a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods"

The objectives of the GATT are clear regarding the condition that the contracting parties should have the intention to contribute to its objectives. These objectives include entering into reciprocal and mutually advantageous arrangements for a substantial reduction of tariffs and other trade barriers to trade and the elimination of discriminatory treatment in international trade.

The preamble of the GATT shows that the guiding principles and objectives reflected the general liberal agreement on free trade. These principles were embodied into rules governing trade relations between contracting parties. In essence, the most prominent rules are: Non-discrimination and the Most Favored Nation Clause respectively, (article III and I), the Reciprocity Principle (article XXVIII), Non-Tariff Barriers prohibition (article IX), and GATT Safeguard Clause (article XIX). Subsidies and Countervailing Duties (article XVI), Dumping and Anti-Dumping measures (article VI). The General Agreement on Tariffs and Trade, supra note 1. For details see, See John H Jackson, supra note 2 at 35-46. Nada J. Farless, Comment: GATT and the Tokyo Round: Legal Implications of the New Trade Agreements, 11 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL 306 (1981); generally, Smith, The GATT and International Trade, 39 BUFFALO LAW REVIEW, 919-949 (1991).

¹⁰. Reciprocity principle is one of the major principles of the GATT regime. Although the principle of reciprocity is not defined in the General Agreement, its importance comes out clearly in the preamble of the GATT: By entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade. Id.

¹¹. Article I (1) of the General Agreement requires that: Any advantage, favor, privilege and 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". General Agreement, supra note 1, Article I. The MFN Clause was meant to eliminate any preferential treatment and prevent the widespread use of discriminatory trade between contracting parties.

for an equivalent concession from a trading partner¹². In this respect, they would be out of the trade picture since most of them could not offer tariffs on a reciprocity basis until they achieved a comparative advantage. Accordingly, they requested special permission to use restrictive measures to protect their infant industry and easy access to developed country markets¹³.

Under the principle of MFN the equality treatment between trading partners on an equal economic basis tended to ensure trade liberalization and fair trade between equals. The equal treatment between unequals (developing and developed countries), however, would result in discrimination and unfair trade relations between countries in different stages of development each having different bargaining powers.¹⁴

DCs stated that the economically weaker countries should not be expected to abide by the same rules that apply to the others. They insisted on the modification of both principles as a step towards satisfactory consideration of their specific trade problems within the framework of the GATT¹⁵.

In the period between the end of the 1940s and mid-1950s, DCs pushed for the inclusion of some provisions dealing with development. These provisions had become part of the post-war reconstruction which became GATT article XVIII in the Havana Charter¹⁶.

In the period between the mid-1950 and mid-1960s, special treatment slowly achieved importance due to the increased number of developing countries in the GATT system. The

¹². For details see Hudec, *supra* note 8 at 28, 40-52.

¹³. *Id.* at 29-32

¹⁴. Damn Hubbund, *The International Commission of New International Economic Order*, 22 *GERMAN YEARBOOK OF INTERNATIONAL LAW*, 89 (1979).

¹⁵ In 1955, India was the most influential country on receiving trade preferences in favor of DCs. When the contracting parties to the GATT met for a review session, the Indian representative noted that 'equality of treatment is equitable only among equals'. The GATT was established for non-discrimination in world trade. In practice, however, it could not prevent discrimination against the weakest members unable to compete on an equal footing. For details see DIANA TUSSIE, *THE LESS DEVELOPED COUNTRIES AND THE WORLD TRADING SYSTEM, A CHALLENGE TO THE GATT*, 25 (1987).

¹⁶. *Id.* at 18.

special treatment was confirmed with the addition of Part IV called "Trade and Development" 1965¹⁷. Part IV allowed for a major departure from the most important provision of the GATT, reciprocity principle. The departure embodied non-reciprocity treatment for developing countries (article XXXVI)¹⁸

The trend towards special treatment for DCs accelerated with significant successive events notably, the acceptance of the Generalized System of Preferences GSP in 1971¹⁹, and the adoption of some other provisions at the end of Tokyo Round(1979), i.e. "Enabling Clause" a permanent binding GSP in the GATT²⁰, and the permission for LDCs to use export subsidies to foster their export performance²¹.

-The New Ideology of Development

In the 1950s, the GATT was basically concerned with the 'import side' of DCs which gave them special treatment with non-reciprocity in order to protect their vulnerable markets. Accordingly, in 1955 the GATT's article (XVIII) (waiver), recognized the right of DCs to benefit

17. GATT, BASIC INSTRUMENT AND SELECTED DOCUMENTS (BISD), 13 Supp. 2 (1965). (Protocol introducing part IV)

18. Article XXXVI states: "The developed contracting parties do not expect for commitment made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less developed countries". Id.

19. GATT, BISD, 24, 26 (1972)

20. The Enabling Clause is found in Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries, GATT, BISD, 265/203 (1980). The Clause States, "Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favorable treatment to developing countries, without according such treatment to other contracting parties." See Yusef, Differential and More Favorable Treatment: The GATT Enabling Clause, 14 J. WORLD TRADE LAW 488(1980).

21. Article XVI considers any subsidies that cause or threaten to cause material injury to the importing party or to the third party may be subject to countervailing duties to offset the material injury. Whereas the GATT does not prohibit domestic subsidies, it is straightforward with regard to the prohibition of "export subsidies" which produce a lower price for exported products than is charged domestically. For details see J. Barcelo, Subsidies, Countervailing Duties and Anti Dumping After the Tokyo Round, 13 CORNELL INTERNATIONAL LAW JOURNAL 1-9 (1980). For details on the exemption granted to LDCs see Jock A. Finlayson and Mark Zacher, The GATT and the Regulation of Trade Barriers: Regime Dynamics and Function, 35 INTERNATIONAL ORGANIZATION 581-584 (1981).

from special dispensation to grant them greater opportunity to restrict trade for development purposes.²²

In the 1960s, the GATT's system became more concerned with the export side of DC products as they sought to increase their export performance to boost their economy. During this period, a large number of newly independent developing countries joined the GATT which increased the pressure within GATT's rules to widen the scope of preferential treatment²³.

The new initiative of preferential treatment that facilitated the origin of a Third World campaign to reform GATT rules in favor of DCs, came from the so-called "trade and development" movement in the UN Conference on Trade and Development (UNCTAD). UNCTAD was established in Geneva in 1964²⁴. In its first session, priority was given to relations between developed and developing countries in order to enable the latter to expand their exports of manufactured goods to the former²⁵. The Secretary General of UNCTAD wrote in 1965:

"However valid the MFN principle may be in regulating trade relations among equals, it is not a suitable concept for trade involving countries of vastly unequal economic strength."²⁶

²². Finlayson, Id. at 581.

²³. in the 1960s, developing countries membership to the GATT increased by 36. See Hudec, *supra* note 12 at 24.

²⁴. As its name implies, UNCTAD began life as a mere international conference. The conference, held in Geneva in 1964, voted to transform itself into an organization. See UNCTAD, final Act, United Nations Document E/CONF. 46/141 (1964). The institution was established by subsequent resolution of the General Assembly, United Nations Document, GENERAL ASSEMBLY RESOLUTION 1995 (1965). See Generally, *The History of UNCTAD 1964-1984*, United Nations Document UNCTAD/OSG/286 (New York: United Nations, 1985).

²⁵. HANS SINGER AND JAVED ANSARI, *RICH AND POOR COUNTRIES*, 76 (1989).

²⁶. The Report of the Secretary General stressed the need for developing countries to increase their exports. This report dealt with two major problems. The first was the slow growth of earnings from exports of primary products and the second was the need to increase the export of manufactured products from developing countries. Report by Secretary General of UNCTAD, *Towards a New Trade Policy for Economic Development*, UNITED NATIONS 66 (1964). In the UNCTAD resolution there was a difference between poor and rich countries. Furthermore, inside the poor countries there were different groups according to economic levels of these developing countries. The members of UNCTAD were divided into four groups: Group A: contains developing countries in Africa, Asia and Yugoslavia. Group B: contains the OECD countries. Group C: contains Latin American countries. Group D: contains the socialist countries of Eastern Europe. For details see generally, TRACY MURRAY, *TRADE PREFERENCES FOR DEVELOPING COUNTRIES*, (1972).

Generally, the goal of the UNCTAD was to establish a new international trade policy that would contribute to raising the material wealth of the developing countries through trade rather than aid²⁷.

The progressive evolution of the new doctrine in UNCTAD and the increased membership by developing countries resulted in the establishment of a new section in the General Agreement. This new section is known as "Trade and Development" within the significant Part IV of the GATT²⁸. Part IV of the GATT 'Trade and Development' was adopted by the CONTRACTING PARTIES on the 26th of November 1965 and became effective on the 27th of June 1966²⁹. It added three articles, XXXVI, XXXVII and XXXVIII. Part IV of the GATT provided a legal basis and framework for systematic examination of trade problems of developing countries in order to find a solution for their economic promotion³⁰. Article XXXVI (8) stated:

'The developed contracting parties do not expect reciprocity on commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to trade of DCs contracting parties'³¹.

As discussed above, the concept of preferential treatment for DCs appeared at the first Conference of UNCTAD in 1964. In this Conference, new articles were enacted to offer special treatment for developing countries, but no definable legal obligations were provided³². Subsequently, at the second Conference of UNCTAD in 1968 and under Resolution 21.11, the

²⁷. For details see ROLF J. LANGHAMMER AND ANDRE SAPIN, *ECONOMIC IMPACT OF GENERALIZED TARIFF PREFERENCES*, 7 (1978)

²⁸. Dale E. Hathaway, *Agriculture and the GATT Rewriting the Rules*, *INSTITUTE FOR INTERNATIONAL ECONOMICS*, 72 (Sep. 1987).

²⁹. GATT, *BISD*, 13th Supp. 76 (1965); GATT, *BISD*, 14th Supp. 18 (1966); GATT DOCUMENT Com. TD/F/W.1, and Com. TD/F/W 4 (1965).

³⁰. *Id.*

³¹. See FLORY, *DROIT INTERNATIONAL ET COMMERCE MONDIAL*, 343-346 (1968)

³². For instance, See GATT article 36, para 1(f), notes that the "Contracting Parties may enable less-developed contracting parties to use special measures to promote their trade and development." See Tracy Murray, *supra* note 32 at 11-15

GATT members agreed to grant tariff preferences to developing countries through the Generalized system of Preferences (GSP)³³.

In the 1970s, many factors had helped developing countries to impose their existence and create a new legal framework within the GATT system. The recognition of DCs' need for a preferential treatment evolved into a much broader United Nations (UN) strategy. In this respect, their position was affirmed in two historic UN declarations: The Declaration of a New International Economic Order³⁴ and the Charter of Economic Rights and Duties³⁵. These Declarations significantly reinforced the evolution of the GATT policy regarding special differential treatment for developing countries in which contracting parties began to implement GSP programs .

III-GATT and Developing Countries: The Generalized System of Preferences (GSP)

The GATT adopted the GSP doctrine recognizing non-reciprocity in favor of DCs. This was agreed upon between contracting parties in the Kennedy Round of trade negotiations (1963-1967).³⁶ Thereafter, the CONTRACTING PARTIES to the GATT voted for a waiver of ten year commencing 1971. The waiver exempted DCs from the MFN requirement of article I of the GATT. It allowed developed countries to grant preferential tariff treatment to developing countries³⁷. The main objective of the waiver was to encourage the expansion and diversification

³³. Preferential Treatment under GSP would violate the MFN obligation of article I. Rather than removing the MFN provision, developed countries in GATT agreed to relieve contracting parties that instituted preference programs with developing countries from the MFN obligations through a waiver. See Kofele-Kale, *The Principle of Preferential Treatment in the Law of GATT: Toward Achieving the Objective of an Equitable World Trading System*, 18 CAL. W. INTL. L. J. 291, 292 (1988).

³⁴. G.A. Res. 3201, U.N. GAOR 6th Sess., Agenda Item 5, U.N. Doc. A/RES/3201 (1974).

³⁵. G.A. Res. 328, U.N. GAOR 29th sess., U.N. Doc. A/RES/328 (1974).

³⁶. See Braham Nawzad, *The Resurgence of Protectionism*, FINANCE AND DEVELOPMENT 18 (1978).

³⁷. Kofele-Kale, *supra* note 33 at 291, 292

of DC products and to fully bring them into the international trading system.³⁸ It was also designed to replace the regional preferences systems, the growth of which had previously threatened to divide the world market into a small number of restricted markets³⁹. Thus, the proposal of the GSP was meant to be a common system giving all DCs equal conditions of access in all developed countries.

The U.S. favored non-discriminatory preferences for all developing countries as more desirable than a regionalization of world trade based on selective preferences⁴⁰. It opposed the European Community (EC)^{40a} policy of regionalizing world trade through a preferential trading arrangement. The US considered preferential trading arrangements such as the one brought on by the Yaounde Convention between the European Community (EC) and African associates in 1963, as discrimination against other developing countries and US exports to Africa.⁴¹

Though its formal announcement in favor of the GSP in 1967, The U.S. did not introduce its own GSP scheme until 1976⁴². The adoption of the GSP program by the US came only after the EC signed a convention in 1975 in which it removed the reciprocal preferences and introduced 63 countries of Africa, the Caribbean and the Pacific countries (ACP) under the GSP⁴³.

³⁸. The specialists estimated that while DCs contain one half of the world's population, they account for less than one fifth of all world exports and only one tenth of global manufacturing output. For details see Robert O. Berger, *Differential Trade Treatment for Less Developed Countries: Implication of the Tokyo Round*, 20 *HARVARD INTERNATIONAL LAW JOURNAL* 541 (1979)

³⁹. See Bebontu, *Tariff preferences Revisited*, 11 *JOURNAL OF WORLD TRADE LAW*, 353-3709 (1970).

⁴⁰. JOHN H. JACKSON, *THE WORLD TRADING SYSTEM*, 278-179 (1989).

^{40a} . Then called the European Economic Community (EEC).

⁴¹. For details about special preferential trading arrangement between the EEC and other countries see Tracy Murray, *supra* note 32 at 119-135.

⁴².. In the second UNCTAD conference of 1968, one year after the Kennedy Round negotiations, the United States voted to support a Generalized system of Preferences" (GSP) under which developed countries would grant tariff preferences to almost all developing countries, without reciprocity, on almost all products. See Rachel McCulloch, *United States Preferences: The proposed System*, 8 *JOURNAL OF WORLD TRADE LAW*, 217-18 (1974). For details on U.S. GSP see J.H. Jackson, *supra* note 42 at 280-281.

⁴³. Although the EEC accepted the US proposal, it insisted to grant additional, selective preferences to developing-country member of its existing arrangements. See U.N. Doc. TD/B//332, Supp. No1(1971). (the agreed conclusion).

The GSP generally allowed developed countries to extend duty-free treatment to eligible commodities by the donor states (developed ones) from (beneficiary) developing ones. Although developed countries allowed tariff preferences under their GSP, they stressed that these preferences should be temporary and non-binding. It was also stressed that tariff preferences should not impede MFN tariffs which were the cornerstone of the GATT principles and therefore preferential treatment should not be bound as MFN were⁴⁴.

Developing countries expressed their dissatisfaction with the non-binding character of the GSP. They argued that the possibility of arbitrary withdrawal could affect the security of their access to developed ones. They believed that the GSP should be given a permanent binding character in order to secure the future of their preferential treatment. Dissatisfaction with the insecure status of the GSP led Brazil to put forward a plan to incorporate into the GATT a more integrated preferential treatment.

Accordingly, Brazil submitted in the Tokyo Round a proposal which suggested two reforms.⁴⁵ The first suggestion called for a binding preferential concession and its application on a non-discriminatory basis to all DCs. The second requested the integration of DCs into trade negotiations. The two suggestions would transform DCs "from passive recipients of tariff concessions, into active fully fledged members."⁴⁶

Most observers believed that the issues were not finally settled until informal United States European Community agreement. The agreement, known as the Casey-Soames Understanding, was reached in meetings in 1973. Accordingly, the EEC agreed to give up reverse preferences in exchange for a United States undertaking not to challenge the GATT legality on Lome Preferences. See also *Agricultural Trade with Developing Countries*, OECD Publication, 90 (1984)

⁴⁴. Kofele-Kale, *supra* note 44 at 292-293. It was pointed out that because preferences were introduced *ex-gratia*, they could also be withdrawn unilaterally with prior notification, and therefore could not be a long-term treatment.

⁴⁵. The philosophy of change was behind the Brazilian proposal. To be a little more specific, Brazil aimed to: '(a) introduce differential rules governing the trade of developing countries that will take account of the differences in economic development between developed and developing countries; (b) to ensure that the exports of developing countries obtain free access to the markets of developed countries; (c) to provide for increased benefits in trade negotiations and in the normal conduct of trade transactions for developing countries, and (d) to change the GATT from the passive forum that it is now into an active instrument capable of giving assistance to developing countries in the resolution of their trade problems with other countries. See MACIEL ALVARES, *THE INTERNATIONAL FRAMEWORK FOR WORLD TRADE: BRAZILIAN PROPOSALS FOR GATT REFORMS*, 5-12 (1979).

On November 28, 1979, under the framework of the Tokyo Round, a decision made by the GATT's CONTRACTING PARTIES, entitled 'Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries', whose first article in the general statement states:

"Notwithstanding the provisions of article I of the General Agreement, contracting parties may accord differential and more favorable treatment to developing countries, without according such treatment to other contracting parties."⁴⁷

This article has been explained as having four aspects: (1) the Generalized System of Preferences (GSP); (2) differential and more favorable treatment of developing countries in relation to codes on non-tariff barriers such as quantitative restrictions (QRs) for balance of payment purposes and the freedom of export subsidies; and (3) emphasis on special treatment for least developed countries⁴⁸.

The GSP was part of the agreement which allowed preferential treatment to all DCs under this article. The GSP of 1979 strengthened the position of DCs by providing a binding character to the special treatment. It was introduced into the GATT system under the name of Enabling Clause⁴⁹.

IV-The GSP: Does it really enhance trade development of DCs?

Theoretically, preferential treatment under the framework of the GATT Tokyo Round gave great support to DCs and fully integrated them into the process of trade development based on a secure, binding character. However, practically speaking, the outcome of preferential treatment in the favor of DCs was merely encouraging.(as will be analyzed in the following sections)

⁴⁶. See Diana Tussie, supra note 15 at 31.

⁴⁷. For details see GATT, 'Differential and more favorable treatment reciprocity and fuller participation of developing countries', (Decision of 28th November 1979). An agreement relating to the framework of the conduct of international trade, Geneva, 5-7 (1979).

⁴⁸. Id

⁴⁹. See the Report by the Secretary-General, 'The Generalized System of Preferences', Review of the First Decade, OECD, 15 (1983)

Even though the initial proposal for a GSP envisaged a common system, giving all DCs equal conditions of access in all developed countries, conflicting interests in both developed and developing countries led to the agreement that preferences be provided according to each developed donor country's scheme. Accordingly, preferential treatment has been limited to the national level so that each granting country applies differential schemes at different times and determines its modalities according to its national policies⁵⁰. Even the United States which lobbied for one set of rules for GSP, changes its position as it began to implement its scheme⁵¹. In the 1980s, the U.S. implemented its preferential treatment scheme on a more discriminatory basis, after opposing the EC's special preference agreements. The 1983 Caribbean Basin Initiative, is a clear cut example in which the U.S. granted special preference to selected developing countries in that region⁵². In addition, The list of disqualifying conditions progressively expanded as the U.S. government followed a strict policy to offer preferential treatment to developing countries⁵³.

⁵⁰. Id.

⁵¹. The 1974 legislation creating the GSP scheme contained a number of provisions denying benefits to individual developing countries. Some of these exclusions were based on the fact that assistance was no longer necessary and thus the exclusions were consistent, at least in principle, with the idea that GSP was supposed to help those who needed help. The primary limitation of this kind was the so-called "competitive need" limitation, which provided that a certain volume of imports from one developing country (\$25 million[1974] or 50 per cent of total imports) was proof that the exporting country was sufficiently competitive to render GSP unnecessary. Trade Act of 1974, Section 504, 88 Stat. 2070, as amended (19 U.S.C. Section 2070). The other exclusion may be relied on the president executive power on foreign affairs. These exclusion may be based on the country's conduct towards the economic interest of the United States. For instance, the president has the authority to deny GSP benefits to countries that expropriate United States property without paying prompt, adequate and effective compensation, countries who are member of international cartels such as OPEC, countries of communist governments, countries that fail to cooperate with the US narcotic law enforcement, and countries that fail to recognize or enforce arbitral awards. Trade Act of 1974, Section 502(b), 88 Stat. 2067, as amended (19 U.S.C. 2462(b)).

⁵². Caribbean Basin Recovery Act, 97 Stat. 384, 19 U.S.C. 2701 (1983).

⁵³. the 1984 legislation extended the GSP arrangement to make it appear clearly an instrument of United States "self-interest". It provided the list of criteria to be considered before granting preferential treatment to any country. these criteria include: The country's protection of the intellectual property rights of businesses in the US, the countries initiative to liberalize foreign investment and liberalize trade in services, the country's recognition of workers rights. Id. Section 503(c), 98 Stat. 3019, amending 19 U.S.C. 2462(c) (1974). the 1984 legislation created new mechanism which turned the GSP benefit into bargaining game to induce developing countries to accept reciprocal obligations. countries that suffered from this bargaining chip are mostly the most advanced developing countries which had to be "graduated from preferential treatment and accept more obligations. The mechanism followed two strategies. First,

The European Community's scheme contains its limitations as well. These are designed to prevent its GSP scheme from interfering with the commercial advantages of its special arrangements with ACP, Mediterranean as well as Maghreb and Mashreq countries⁵⁴.

Generally speaking, although it seems that developing countries succeeded in imposing their rights of preferential treatment on a permanent basis, many conditions and bargaining chips rendered the application of the GSP ineffective:

a-Products Coverage

While DCs have been asking for positive discrimination in their favor, they were unwary of the increasing trend to discriminate against them. Even though the coverage of some sensitive products such as agriculture many of which increased across different schemes by an average of more than 20 per cent from 1975 to 1981⁵⁵, the other products in which DCs have increased their exports were excluded from most of the developed country schemes⁵⁶. Countries, such as the U.S., provided a wide range of exclusions for many sensitive products in which DCs could

the president was given the authority to limit GSP benefits under the "competitive need" standard. Second, the president can waive these limitations if he deemed that the action is in the economic interest of the U.S economy. Generalized System of Preferences Renewal Act of 1984. Report of the Committee on ways and means, House of Representatives, House Report No. 98-1909, 2nd Session, 19(1984).

⁵⁴Robert E. Hudec, *supra* note 12 at 63. Under the regional arrangement of the EEC, beneficiary countries benefit more from special treatment than they do under the GSP. One convention that was originally signed in 1975- preceded by Yaounde -and extended twice under Lome II, Lome III, includes African, the Caribbean and the Pacific countries. According to this convention, the EEC provides duty free entry without preferential limits to all products. The advantage of the Lome Convention, is that it involves a great number of least developed countries and provides them with more liberal access than is accorded by the GSP. For details see COMMONWEALTH SECRETARIAT, *Protectionism threat to international order: the impact on developing countries*, 99-103 (1982). Furthermore, the EEC has concluded a wide range of agreements with Maghreb (Algeria, Morocco and Tunisia) and Mashreq (Egypt, Syria and Lebanon) countries. These arrangements cover trade, economic, industrial cooperation and financial aid. (For instance, in 1980 over \$4 billion worth of imports from the Mashreq and Maghreb countries were included for preferences under this agreement. These preferences represented one third of the community's total imports from the countries concerned and 96.3 per cent of its dutiable imports from them. For details see OECD, *Agricultural Trade with Developing Countries*, 91 (1984)

⁵⁵. The EC raised the number of processed agricultural products covered by the GSP from 145 in 1971 to 333 in 1983. For details see Rolf J. Langhammer and Andre Sapin, *supra* note 27 at 41,42,43.

⁵⁶. *Id.*

compete with the developed domestic industries. These products usually included textiles and apparel in which DCs have shown comparative competition⁵⁷.

b-Rules of Origin

It was recognized that the purpose of the GSP included the industrialization and acceleration of developing economies. However, in order to narrow the scope of preferential treatment, rules of origin were established. These rules tended to prevent the beneficiaries from simply re-exporting goods produced elsewhere⁵⁸.

Most GSP schemes have required that goods be wholly produced in the beneficiary country, or had been produced in the beneficiary exporting country through the substantial transformation of imported materials⁵⁹.

c-Safeguard Measures

At the time of the GSP negotiations, it was agreed that the donor countries would reserve the right to take safeguard measures when deemed necessary to protect their domestic markets from any injury that could be caused by GSP imports⁶⁰.

⁵⁷. Id. at 18

⁵⁸. The rules specify three conditions that must be met before exporting goods which qualify for GSP tariff treatment. First, Goods must be shipped directly from the beneficiary developing countries. In other words, goods have to be directly consigned to the donor country without passing through the territory of any other country. Second, documentary evidence must demonstrate that goods presented for customs clearance have originated in a particular beneficiary developing country and have met the substantial transformation requirements. Third, minimum processing is required in the beneficiary developing countries

⁵⁹. For instance, under the GSP schemes of Australia, Canada, New Zealand and the United States, an added criterion of substantial transformation was required. The schemes of Austria, the EEC, Finland, Japan, Norway, Sweden and Switzerland, a processing criterion was required under which 'a determination of specific processing operations carried out in the beneficiary country show that the final goods must be defined for tariff purposes as different from any imported materials'. In other words, the requirements are generally met if the products have undergone sufficient processing in the beneficiary country. See Georges and Anne Meloy, 'The System Generalize de preferences en faveur des pays en voie de developement', REVUE ALGERIENNE 825 (1977).

⁶⁰. From the Ministerial Declaration at Punta del Este, Uruguay, announcing agreement to start the 'Uruguay Round' of Multilateral Trade Negotiations with the framework of the GATT, September 1986. Martin Wolf, 'Differential and More Favorable Treatment for Developing Countries and the International Trading System', 1 THE WORLD BANK ECONOMIC REVIEW, 647-648 (1987).

Thereafter, measures such as the ceiling system introduced by the EC and Japan, intended to protect their domestic market from a surge of import from developing countries⁶¹. Accordingly, although the ceiling system did not limit import quantities, it determined tariff rate up to a ceiling. Anything that exceeded the ceiling was charged under MFN tariffs⁶². The logic of the ceilings ultimately determines the growth factor. If developing countries are already major suppliers of a product, this in turn means that they are able to compete in world markets on a MFN basis and, consequently, do not need preferential treatment. In theory, this logic appears to be reasonable. In practice, however, the ceiling system varied according to the sensitivity of the product imported. If the import was sensitive to the domestic industry or producer, the donor developed country would apply a new low ceiling to protect its industry⁶³. Before 1981, Japan and the EC classified manufacturers into group product and placed ceilings according to each group. After 1981, the EC applied the ceiling system according to each beneficiary case.⁶⁴

While safeguard measures of the EC and Japan were based on the ceiling system, the U.S. restrictions of the GSP under safeguard measures were based upon the "competitive criterion"(graduation system)⁶⁵. In addition, "import relief" action were used as a measure to

⁶¹. For details on ceiling system application by the EC and Japan see, Report written by the Secretary General, The Generalized System of Preferences, OECD, 30-33 (1983).

⁶². Id.

⁶³. The EC divided imported products into three categories, sensitive, semi-sensitive and non-sensitive products. Therefore the more sensitive the product, the lower the ceiling becomes. For details see Rolf J. Langhammer and Andre Sapin, *supra* note 57 at 22.

⁶⁴. The New Ceiling System was established for certain products with respect to specified beneficiaries. For each product considered as 'sensitive' by the EC (there were 31 in 1982), a ceiling is determined on individual beneficiaries. For details see the Report written by the Secretary General, The Generalized System of Preferences', Review of the First Decade, OECD, 31 (1983).

⁶⁵. The U.S. law had something called a 'competitive need formula'. This means when a particular GSP beneficiary country was shipping a quantity of an eligible article to the U.S. market in an amount that exceeds a certain threshold either in dollars (15 million adjusted for inflation), then GSP treatment for that product would be withdrawn for that country. The principle behind this, is that when such a threshold was reached, the GSP beneficiary country no longer could claim that its industry was 'infant' and needed the special treatment. The graduation policy and annual reviews provide domestic producers and other lobbies opportunity to petition for the withdrawal of GSP status. For instance, in December 1987, the president withdrew the GSP status from Chile because Chile had not taken steps to afford workers internationally accepted rights. The Graduation rules are found at 19 USCA Sec. 2464 (a) (1980 and Supp.

protect the domestic industry from injury caused by the importing country. Pursuant to this principle, the president of the U.S. has the power to ask for an increased tariff on the product or to proclaim tariff quotas or quantitative restriction on an Orderly Marketing Arrangement (OMA)⁶⁶.

-Deficiency of the GSP

The GSP was created to increase exports and export earnings of developing countries and to promote industrialization and accelerate their economic growth.

In practice, However, it appears that the efficiency of the GSP was diminished due to the use of different schemes by donor countries in which a discriminatory atmosphere was created. With a multitude of exclusions and limitations of different products combined with the other complex restrictions such as the rule of origin and a safeguard measure, the generalized system of preferences would surely have had a modest expansionary influence on developing countries. The main weakness of the existing GSP schemes is the exclusion of sensitive products through safeguards, exceptions and escape clauses as well as quantitative limitations applied under the ceiling system⁶⁷. In addition, 'The competitive need criteria' of the US scheme place importers under strict law.

Just when exporting DCs start to reach comparative competition with the industrialized countries, quantitative ceilings in various GSP schemes are imposed. In the case of the open-ended non-sensitive products, it is the rule of origin which seems of great importance in limiting imports since DCs do not have the ability to produce a product of a 100 per cent domestic origin.

In addition, the significant tariff cuts on the basis of MFN affected the margin of preference under the GSP schemes. After the Kennedy and Tokyo Rounds of tariff negotiations, MFN duties

1988). For details on Chile example see Proclamation 5758 of December 24, 1987, 52 FEDERAL REGISTER, 49129 (1987).

⁶⁶. For details see Generalized System of Preferences, Renewal Act of 1984, supra note 53.

⁶⁷. For details see Tracy Murray, Tokyo Round of Trade Negotiations and the Generalized System of Preferences, 88 THE ECONOMIC JOURNAL, 50 (1978).

were so reduced that tariffs are now no longer a serious barrier to trade⁶⁸. In contrast, the GSP tariff preferences had been limited in different schemes. The calculations of Tracy Murray and Baldwin suggested that the loss of GSP benefits due to a 60 per cent MFN tariff cut would be \$32 billion.⁶⁹

While DCs declared their dissatisfaction with the GSP stating that it did not encourage their expansion of trade, some lawyers and economists from the developed world argued that the root of the problem was not the limited scope of the GSP but its very concept of discriminatory and non-reciprocal trade relations. Phedon Nicolaides argued that when DCs claimed that liberalization was incompatible with development they exempted themselves from the two most fundamental GATT disciplines; non-discrimination and reciprocity. They maintained their uncompromising insistence regarding special and differential treatment which caused eventual impatience on the part of developed countries⁷⁰. He went on to argue that the GSP has created all the problems that DCs have tried to avoid by refusing traditional GATT responsibilities. Nicolaides contended that:

'The fact is: it is difficult to think how the GSP can be made fairer when the very essence of it is based on discrimination. Arbitrariness, discrimination and unfairness are likely to be embedded in the GSP for as long as LDCs insist on exempting themselves from GATT rules, procedures and responsibilities'⁷¹.

Although Nicolaides's statement carries a well founded argument, it is important to stress that the GSP was intended to help developing countries and the developed world committed to apply their scheme on a bona fide basis and not use the scheme as a bargaining chip to reach their trade, economic or political interest. Developing countries, due to their weak bargaining power,

⁶⁸. For details see LE MONDE DIPLOMATIQUE, April 1988, at 15.

⁶⁹. R.E. Baldwin and T. Murray, MFN tariff reductions and DC benefits under the GSP, ECONOMIC JOURNAL 41 (March 1977).

⁷⁰. See Phedon Nicolaides, 'The generalized system of preferences and GATT, WORLD TODAY 50 (1988).

⁷¹. Id. at 51.

would have to accept strict conditions imposed by developed countries. Furthermore, Nicolaides's argument may not be applied when a number of products that are of great importance to DCs have been excluded from the GSP schemes⁷². Agricultural products and textiles in which developing countries have a relative comparative advantage in the world market have been the most protected areas in developed countries⁷³. The problem of protectionism and selective discriminatory measures against developing countries is not a GSP problem per se but a problem of the world trading system in general and the GATT, in particular.

V-Has the GSP Reproduced all the Failings of the GATT?

With the new concept of 'Trade And Development' implemented in the GATT system, DCs benefit from the freedom to market their products in the industrialized world without having to open up their own. The GSP system noted that while most importers are subject to standard duty under the GATT, some imports from poor countries should face much lower preferential tariffs. It was agreed that whatever happens to world trade, poor countries should not suffer. Therefore, if the different rounds under MFN succeed in cutting tariffs worldwide, the value of the GSP will be reduced as well. In addition, if the talks under MFN fail to reduce tariffs, the DCs will keep their preferential duties.⁷⁴

Nonetheless, industrialized countries agreed that they were obliged to discriminate against these poor countries because of the essence of the GSP concept which implied that different DCs should be treated differently. Therefore, a system of quotas would inevitably have to be

⁷². Ahmed Jaleel, 'How helpful is the generalized system of preferences to developing countries?', 8 *ECONOMIC JOURNAL* 440 (1973).

⁷³. Id.

⁷⁴. See *THE ECONOMIST*, Trading down to the GSP; Do special concessions help poor countries to grow richer?', 67 (January 9, 1988).

established creating a multi-tier structure of preferences⁷⁵. This argument tends to lift the burden of responsibility from the shoulders of industrialized countries.

The discriminatory nature of the GSP means that developed countries should help DCs to expand their trade, every country according to its stage of development. The discriminatory aspect in the GSP should be applied in a positive way. It should help DCs to expand their exports rather than to stop their development by imposing quotas on a discriminatory basis. What occurs, however, is that trade concessions are still seen as a gift from the developed countries to developing ones. Hence, beneficiaries always have to pay indirectly - if not directly - for the preferences⁷⁶.

As can be gleaned from the above, the GSP system does not form part of the GATT system of reciprocal trade concessions; it is considered a voluntary measure provided by developed countries which can be changed at the discretion of the country giving preference in terms of coverage of both these countries and the products eligible for preferential treatment. This will, therefore, deprive the DCs of a forum at which to launch a formal complaint to the GATT panel or demand compensation.⁷⁷.

The flexibility and freedom of action allowed by the GSP scheme, have limited the preferential treatment and encouraged protective measures against DCs on a discriminatory and arbitrary bases. These protective measures seem to be a trade off for DCs to accept GSP preferential treatment.

Recently, developed countries have demanded the graduation of most advanced developing countries from preferential treatment as these countries have become competing exporting

⁷⁵. See Phedon Nicolaides, *supra* note 71 at 52.

⁷⁶. *The Economist*, *supra* note 74 at 67.

⁷⁷. A. MACBEAN, *A POSITIVE APPROACH TO INTERNATIONAL ORDER, PART I: TRADE AND STRUCTURAL ADJUSTMENT*, 30 (1978).

countries⁷⁸. It was argued that it is difficult to justify barriers to imports from successful developing countries that not only receive GSP treatment but have both high tariffs and highly restrictive non-tariff barriers against imports. It is clear, however, that if the demand for graduation is made by those inclined to keep trade barriers low or by those who hope that graduation will be refused, this will be a justification for further protection⁷⁹. In that sense developed countries might feel thankful that the existence of protected markets in developing countries provide a convenient excuse to apply protectionist measures. Though tariffs achieved a great decrease in manufactured products, DCs have been subject to highly discriminatory new protective measures which are totally outside the framework of the GSP schemes. These protective measures were meant to reduce DC exports in particular products⁸⁰.

To illustrate this, the following part of this paper will demonstrate the discriminatory protective measures which have been used extensively against the emerging economies in DCs. This will include the increasing use of the new protective measures Non Tariff Barriers (NTBs) and the exclusion of some products pertinent to DCs from the GATT system as well as the GSP.

1-The Emergence of New Protectionism and its impact on the export of DCs

Although the GATT succeeded in reducing tariffs to a very low level, it was and is still not able to deal with the new emerging devices of protection called Non-Tariff Barriers (NTBs). The use of these devices since the 1970s have caused harm not only to developing

⁷⁸. In the framework of the GATT, developed countries demanded for graduation by the more successful of developing countries as these countries show themselves to be competitive and economically successful. Developed countries concluded that they do not warrant preferential access to the successful developing countries which are no longer exempted from the obligations of membership. For details see BRIAN HINDLEY, THE GRADUATION ISSUE,(1986).

⁷⁹. The graduation policy is partly a result of the fact that certain countries, like Brazil and Mexico, Taiwan, South Korea have become major exporters of certain industrial products. The developing nations rejected the idea as arbitrary and damaging. See Yusuf, Differential and More Favorable Treatment: The GATT Enabling Clause, 14 JOURNAL OF WORLD TRADE LAW, 488 (1980).

⁸⁰. For details see Commonwealth Secretariat, supra note 53 at 7,17.

countries but to the developed ones as well⁸¹. Nonetheless, the exports of DCs are less able to cope with NTBs than the competitors in the developed world due to their limited possibilities, and alternative lines of production⁸².

The new protectionism is particularly dangerous to world trade liberalization as well to the exports of developing countries. This is because in general, it does not respect the provisions of international trade rules of the GATT notably, article XIX.⁸³.

Nevertheless, the various protective measures restricting the exports from DCs have caused serious doubts on the commitment of industrialized countries to free world trade and particularly to the preferential treatment in favor of DCs. Preferential treatment provided to DCs has not escaped from the selective protectionist measures of developed countries⁸⁴. These measures have been considered as a grave threat to trade of DCs since it undermines their ability to exploit international trade as an engine for growth. In addition, protection applied against their exports may cause a problem of politics and power, pitting the weak directly

⁸¹. For details see Siegfried Schultz and Dieter Schumacher, *The Re liberalization of World Trade: Some Ideas for Reducing Trade Barriers Against Industrial Products from Developing Countries*, 19 *JOURNAL OF WORLD TRADE LAW*, 205-208 (1985).

⁸². Generally, the introduction of NTBs, have resulted in a substantial reduction of the exports of developing countries at a crucial point in the development of their export industries. See UNCTAD, *Growing Protectionism and the Standstill on Trade Barriers Against Imports From Developing Countries*, Report by UNCTAD Secretariat, TD/B/C.2/194, 16 (1978).

⁸³. Complete trade liberalization is the long term objective of the GATT. However, in order to protect the interests of the contracting parties, it codified a system which was not absolute free trade but offered as second best. Accordingly, although the GATT prohibited the use of quantitative restrictions it accepted their use under circumstances such as the previously explained special treatment for agricultural products. Nonetheless, the GATT allows the use of QRs only on a temporary, unilateral and non-discriminatory basis. To safeguard the balance of payment difficulties, the GATT provides the use of quantitative restrictions by exception. The first exception concerned is within the framework of article XII which authorizes the use of QRs in order to stop the decline of monetary reserves that would occur within a country. the second exception is article XVIII which authorizes QRs for balance of payment purposes. In the 1950s, QRs were used heavily by developed western European countries to facilitate their balance of payment adjustments. See GATT, *BISD* 26 Supp. 295-209 (1980).

In addition, safeguard clause measures (article XIX) permit importing countries to apply protective measures with tariffs and low degree quantitative restrictions. The condition to apply article XIX, however, is very specific. The application of safeguard clause is allowed only if the importing product causes or threatens to cause serious injury to the importing countries. For details see J. H. Jackson, *supra* note 2 at 553-556.

⁸⁴. See David B. Yoffe, *The Newly Industrializing Countries and the Political Economy of Protectionism*, 25 *INTERNATIONAL STUDIES QUARTERLY*, 570 (1981)

against the strong. For instance, the use of Voluntary Export Restraints (VERs) and Orderly Marketing Agreements (OMAs) are particularly harmful to the exports of DCs due to their new based bilateral negotiations⁸⁵. Bilateral negotiations may be appropriate if there are equal bargaining powers between the negotiators. Conversely, due to the weak bargaining position of DCs in comparison with developed countries, VERs terms may be damaging to their exports.

The most affected countries of these protective devices are certainly the so called the "New Industrialized Countries" (NICs). Combining the graduation principles, used by developed countries to exclude the NICs from their GSP schemes, with the increasing use of new protectionism, has certainly affected the outward looking policies of countries such as South Korea, Taiwan and Singapore⁸⁶.

2-The Antidumping and Countervailing Duties and their effect on The GSP.

Since the Tokyo Round negotiation, the GATT has been concerned with the emergence of unfair competition through the use of subsidies and dumping. Accordingly, a new code on subsidies, countervailing duties⁸⁷, and dumping and antidumping⁸⁸ was established⁸⁹.

⁸⁵. VER is an agreement that requires the exporting country to limit its exports of the product in question to the country that has imposed the agreement. See Thomas R. Graham, Reforming the International Trading System, 19 CORNELL INTERNATIONAL LAW JOURNAL, 79 (1979). Alarming VERs have been increased dramatically since 1970s. For instance, the trade coverage of VERs increased from 3.5 per cent in 1981 to 4.9 percent in 1989. The VERs became more generalized and more acceptable in dealing with trade relations. These VERs were generally used on electronic products, steel and particularly textiles and clothing, products were NICs became more successful exporters. The VERs are now being converted into inter-governmental Orderly Marketing Arrangements). Samantha Spark and Shada Islam, New Push in Dirty War, SOUTH, April 1989 at 23.

⁸⁶. Strict measures have been particularly applied by developed countries to protect their domestic markets in products such as textiles and clothing. Accordingly, the EC and the US have negotiated VERs with South Korea and Taiwan to limit their textile and clothing exports to EC and the US markets. For details see UNCTAD, Protectionism and Structural Adjustment, TD/B/1196 Part 1, 12-14 (December 1988).

⁸⁷. The GATT is straightforward with regard to the prohibition of 'export subsidies' which produce a lower price for exported products than is charged domestically. Article XVI (B) noted that if a 'contracting party grant... any form of subsidies' that operate 'directly or indirectly' to increase exports or reduce imports, and that cause injury or threaten to cause injury to another party, must be prepared 'to discuss the possibility of limiting subsidization or be subject to countervailing duties to offset the material injury. For details on the new subsidies code see GATT Doc. HTN/NTM/236. 1980

However, to foster the export of developing countries, GATT granted them a preferential treatment thereby exempting them from the prohibition of export subsidies(article 14) ⁹⁰.

Notwithstanding the exemption of DCs from export subsidy prohibition and their preferential treatment with respect to dumping, the use of countervailing duties and antidumping measures against these countries have dramatically increased . These measures have been used as means to protect the industrial world from cheap products imported from DCs. It is true that countervailing and antidumping duties affected both developed countries and DCs. However, the share cases targeting DCs increased sharply between the period of 1980 to 1988. From 18 per cent in 1980, it increased to 38 percent in 1984, to 45 per cent in 1985, and 53 per cent in 1988⁹¹.

The resort to countervailing measures particularly increased against the so called NICs, such as Hong Kong, South Korea, and Brazil. Major developed countries insisted that the relatively advanced developing nations should be gradually phased out (principle of graduation) of their special and differential treatment and be treated without exception with respect to export subsidies⁹².

The U.S. is a major player in antidumping and countervailing duties. The U.S. legislation strongly opposes the use of subsidies. It considers subsidies as unfair competition and an undesirable distortion of international trade. Among the provisions of the U.S. GSP of 1984 ,

⁸⁸. Article VI of the General Agreement provides the possibility to offset or prevent dumping by 'which products of one are introduced into the commerce of another country at less than fair value, and which cause or threaten of the other domestic industry'. 'contracting party may levy on any dumped product an anti-dumping duty...., but not greater in amount than the margin of dumping in respect of such product. Id.

⁸⁹. The new code was evolved in Tokyo Round and came into effect on January 1, 1980. Id.

⁹⁰. For details See Gerald M. Meier, The Tokyo Round of Multilateral Trade Negotiations and Developing Countries, 13 CORNELL INTERNATIONAL LAW JOURNAL, 65-66 (1980).

⁹¹ UNCTAD, Problems of Protectionism and Structural Adjustment, TD/B. 1196, Part I, 12 (December 1988).

⁹². For details see RICHARD E. CARVES, R. JONES, WORLD TRADE AND PAYMENTS, AN INTRODUCTION, 249 (1985).

is the assessment of injury on a cumulative basis (i.e. injury determination is based on the aggregate effect of imports from all sources) in antidumping and countervailing duty actions⁹³. The nature of this provision could affect the small suppliers whose exports alone could not cause injury to the U.S and which might be easily affected on a cumulative basis with larger suppliers alike. For instance, in the late 1980s, the U.S. imposed antidumping and countervailing duties on margarine flowers imported from Ecuador⁹⁴. The minuscule volume of U.S. imports logically makes it inconceivable for Ecuador to affect U.S. flower growers. However, because the U.S. used cumulative theory, Ecuadorian exports were added to flowers from Mexico, Colombia and several other countries⁹⁵.

3-Disadvantage of the GATT System to DCs: Agricultural Products

With the establishment of the GATT, developing countries were at the margin of trade. Most of them were under the colonial rule of industrialized powers. A few of these countries were independent but they did not play a great role in trade because of their poor economic and trade prospects⁹⁶. In addition, while most of the developed countries' suppliers were in manufactured products, primary commodities were the only available products in developing countries.⁹⁷.

⁹³. Trade and Tariff Act of 1984, Pub. L. 98-573, Title V, 98 Stat. 3018, 19 USCA Sec. 2461 et seq. (1988 and Supp. 1988). For an overview on Cumulative principle in dumping and subsidies code see 19 U.S.C Sec. 1303, 1671. For an overview of the GSP renewal program, see Operation of the Trade Agreements Program, 35th Report, USITC PUBLICATION No. 1535 (1984).

⁹⁴. The Economist, supra note 85 at 23.

⁹⁵. Id.

⁹⁶The leading exporting countries were Pakistan, India, Brazil, Argentina and Hong Kong. During the 1950s, for instance, the annual rate of growth of the quantity of exports from LDCs was 3.6 per cent compared to 6.9 per cent from the industrialized countries. Id.

⁹⁷. See Gary G. Johnson, Economic Policies Towards Less Developed Countries, A BROOKING INSTITUTION STUDY, 92 (1967). The supply of manufactures was concentrated only in a few developing countries and the exports themselves were also heavily concentrated on a narrow range of goods - four-fifths of them being textiles. Generally, DC exports in manufactures were as yet very small as they accounted for under 10 per cent of their total

Developing countries were not really integrated in the liberalized trading system of the GATT. Primary products were implicitly excluded from the GATT from the beginning when article XVI:4 exempted primary products from the prohibition of export subsidies, and when article XI:2(c) excepted agricultural products from the prohibition of QR⁹⁸.

In fact, disadvantage was further caused to the performance of DC exports in agriculture when industrialized countries explicitly excluded agricultural products from the discipline of the GATT negotiations. It has been shown that the U.S. in the past and the EEC today insisted

exports and about 4 per cent of world trade in manufactures. Generally speaking between the 1950s and 1960s developing countries depended heavily on their primary products which accounted for some 85 per cent of export earnings most of which were in agricultural commodities. Id. at 84. Between the 1960s and early 1970s DCs still needed to increase agricultural production relative to their population growth. In fact, agricultural imports in developing countries increased by a large degree in comparison to agricultural exports. The increase of imports was by over 100 per cent, while the agricultural exports increased by 35 per cent. For details see J. C. NAGLE, AGRICULTURAL TRADE POLICIES, 19 (1976).

⁹⁸. It is recognized that the GATT rules relating to agriculture are different from those relating to any other commodities. This appears evident in the subsidy issue. The original GATT articles contained no prohibition on subsidies. Article XVI:1 requires 'subsidizing countries to notify the GATT contracting parties..., and meet with other contracting parties concerned' in cases where 'such subsidization causes or threaten serious prejudice to their interests.' Article XVI was extended under paragraph (2) which recognizes that export subsidies may cause harmful effects. For details see KENNETH W. DAM, *The GATT LAW AND INTERNATIONAL ECONOMIC ORGANIZATION*, 259 (1970). Article XVI are our concern in this analysis. These two paragraphs appear less stringent when dealing with primary products (including agricultural commodities). Moreover, these two paragraphs particularly paragraph (3) show the confusion in the GATT operation.

Under article XVI:3 the GATT exercises little discipline over agricultural subsidies specifying only, that 'contracting parties should seek to avoid the use of subsidies in the export of primary products...'. Article XVI:3 prohibits export subsidies in primary products only when the subsidized products have an impact on normal competitive conditions in the world market. It prohibits a contracting party from granting an export subsidy which operates directly or indirectly to increase the exports of primary products resulting in that contracting party 'having more than an equitable share of world export trade in that product.' The definition of equitable share has been as follows: account must be taken 'of the shares of the contracting parties in such trade in the products.'

Even though the equitable share has been defined and article 10(2)(3) of the code defining subsidy tried to clarify the language of article XVI, most of the controversy over the special rules of subsidies in relation to agriculture concern is the ambiguity of the definition of 'equitable share' under article XVI:3. This ambiguity has resulted in the inability of the disputants and the panels to determine what constitutes an equitable share of the world market. Survey of GATT practices demonstrates confusion and uncertainty in the application of the equitable share concept.

The loss of discipline over agricultural commodities with smoother rules of subsidies, including the ambiguity of 'equitable share' cost a lot to countries such as Argentina, Brazil and New Zealand. These countries have suffered particularly from the export subsidies of the EC which has become a net exporter of agricultural products via export subsidies since 1975.

In late 1986, 14 agricultural commodities exporting countries pledged to fight in the Uruguay Round for the complete abolition of agricultural subsidies that negatively affect world trade competition. These countries required that the GATT treat agricultural commodities as other non-agricultural commodities under its rules. If the agricultural commodities were placed under the same rules as other commodities and the exception on subsidies that affect trade in agriculture would be phased out. For details see Sidney Golt, *The GATT negotiations 1986-90, Origins, Issues of Prospects*, BRITISH-NORTH AMERICAN COMMITTEE, 29-32 (1988).

that domestic farm policy measures should not be subject to international limitations. The waiver granted to the USA in 1955⁹⁹, and more generally, the tacit acceptance of the CAP are cases in point¹⁰⁰.

Developing countries have, thus, faced various obstacles when trying to export their agricultural commodities to developed ones. High domestic prices for agricultural commodities by a system of variable levies and excessive high tariff rate on competing processed products have been excessive¹⁰¹. Furthermore, NTBs (which check the quantities of imports and export

⁹⁹. Most of the requirements of the GATT's exceptions are to be legitimized by a Waiver (article XXV:5). J.H. Jackson classified the exceptions legitimized by the Waiver Authority. See J. H. Jackson , *The Puzzle of the GATT: Legal Aspects of Suprising Institution*, 1 *JOURNAL OF WORLD TRADE LAW*, 140-143 (1967).

Under such a waiver, the USA was given the right by contracting parties to impose quantitative restrictions, for a period of time, on imports of agricultural commodities that materially interfered with the operation of any of its domestic programs.

However, the USA have used the waiver on a permanent basis. As result, the GATT started to loose partially its control over agricultural trade until it became completely ineffective in its operation.

There have been many instances of exclusion of agricultural policies contracting parties from the framework of GATT. As an illustration, at the 13th session of the GATT in 1958, Germany proposed that each country should retain its own market regulation and price structure indefinitely. J.C. Nagle, *supra* note 98 at 13.

¹⁰⁰. In order to increase their agricultural efficiency, provide their fair standard of living, stabilize markets, ensure security of supply and maintain reasonable prices for consumers, developed countries provided specific protective policies in agriculture. For instance, to achieve these objectives, the European Community created the so-called 'Common Agricultural Policy' (CAP) When the CAP was being developed, the original six members were large importers of most agricultural products. Therefore, to achieve the aims cited above, the agricultural system of the EEC involved market regulations including schemes for internal prices support, external protection measures and the application of subsidy measures. Broadly speaking, the CAP began with three basic cornerstones. These are as follows: '1. Common prices for agricultural products in all member countries; 2. An absolute preference for EC producers over outside producers; 3. Common funding of its agricultural programs through the EC Commission. Accordingly, the CAP was established with the objectives listed as follows: '1. To create a common market in agricultural products; 2, To boost the efficiency in agriculture; 3. To provide a fair standard of living in agricultural community by raising farm incomes through the market policies but with emphasis on family farm and through agricultural policies of structural improvement; 4. To stabilize the market and increase the security of supply, especially with respect to prices in order to develop trade in agriculture.' See Dale E. Hathaway, *supra* note 28 at 39

¹⁰¹The most important market regulation for price support was the evolution of the so-called system of variable import levies, being the principal means of providing protection against outside competition. The theory of variable import levies aims at maintaining continual level of prices for domestic consumer and insulate domestic consumers from the consequences of domestic supply variation .Gary P. Sampson , Richard H. Sharpe, *Effect of the EEC's Variable Import Levies*, 88 *JOURNAL OF POLITICAL ECONOMY*, 1029 (1980)

subsidies that cause fluctuation in prices), have been the most severe protective tools in destroying any hope of trade expansion for DCs in this sector¹⁰².

GSP has not played a great role in expanding DCs agricultural exports since it only includes tariffs and excludes NTBs, whereas agricultural products are mostly subject to NTBs. Furthermore, GSP covers a smaller portion of agricultural commodities than of manufactured goods¹⁰³. Trade liberalization in manufactured products has been a major aim for the GATT system since its establishment. In primary products, however, the GATT has not paid great attention to the process of trade liberalization. This resulted in an exclusion of DCs, the major exporters of primary products, from trade liberalization.

4-Multi Fiber Arrangement (MFA): Another obstacle to DCs export

Just as in the case of agricultural products, textiles and clothing have received special attention. This special attention followed a protectionist trend rather than liberalization since textiles and clothing are the most systematically protected sectors today¹⁰⁴.

¹⁰². the EC, Japan and the U.S. all applied subsidies on cheap sales which competed unfairly with the exports of DCs and caused injury to the low cost developing ones. The EC programs provided both import controls and export subsidies to producers which were not as advantageous to the major exporting countries. For details see Dale E. Hathaway, *supra* note 100 at 74, 106. These subsidies included: eggs 1957, flour 1958 and 1981, sugar 1958, 1982, pasta 1982. *Id.*

Protection against agricultural products exported from DCs increased dramatically in the 1980s. The average tariff rate facing their exports in 1983 was about 5.5 per cent for food and 0.5 per cent for agricultural raw materials as against 2.7 per cent for all items. Of 20 selected agricultural imports (raw and processed) by the EEC from LDCs, ten items had tariff rates higher than 10 per cent and two higher than 20 per cent. Of 18 items imported by the U.S. eight had tariffs greater than 10 per cent and two were over 20 per cent. UNCTAD, 'Liberalization of Barriers to Trade in Primary and Processed Commodities', (January 1983). The percentage of all agricultural imports from developing countries subject to non-tariff barriers (the most effective trade barriers) of all types in 1983, ranged from 67 per cent for Switzerland to 53 per cent for Japan, with 27 per cent for the EC, 25 per cent for the U.S. and 15 per cent for Norway. under the expansion of export subsidies by the EC on sugar, DCs and even the African Caribbean Pacific (ACP) suppliers which benefit from preferential treatment, suffered from reduced prices as a result of the Community's subsidized exports. *Id.* at 37, 39-40, 41

¹⁰³. In 1988, for instance, the share of GSP covered commodities in all MFN dutiable agricultural imports was 30 per cent for Canada, 21 per cent for Japan, 30 per cent for the EEC and 43 per cent for the USA. The corresponding percentage for manufactured imports were 55 per cent, 94 per cent, 87 per cent and 55 per cent. See Islam, *supra* note 85 at 183.

¹⁰⁴. Protection in textiles and clothing was widely spread in the inter-war period during the economic depression of 1930. For instance, in 1930, the average of U.S. tariffs on cotton goods were 45 per cent, 60 per cent on

The complexity of protectionism in textiles and clothing necessitated special arrangements. During the 1960s, these arrangements were set up under the auspices of the GATT, notably the Short-Term Arrangements (STA) in 1961 and the Long-Term Arrangements (LTA) in 1962¹⁰⁵. From the 1970s until recently, textiles and clothing have been negotiated under the so-called Multi Fiber Arrangement (MFA)¹⁰⁶.

Today, protectionism in textiles and clothing is controversial to the extent that it has created tension between developed and developing countries. International trade in textiles is an important arena to both developed and developing countries. On the one hand, developing countries sought to expand their exports in textiles due to their initial success¹⁰⁷. On the other

woolen goods compared with 35 per cent on manufactures and 39 per cent on chemicals. For details see WILLIAM CLINE, *THE FUTURE OF WORLD TRADE IN TEXTILES AND APPAREL*, 146 (1987). Today the situation has not changed since the textile industry is the most troublesome to trade liberalization. See DONALD B. KEESING AND MARTIN WOLF, *TEXTILES QUOTAS AGAINST DEVELOPING COUNTRIES*, 6-11 (1980).

¹⁰⁵. The GATT started to deal with trade in textiles and clothing as a special case in 1959. Under U.S. pressure the GATT developed the notion of "Market Disruption", defined as the instance of sharp import increases associated with low import price. At the end of the discussion in 1960, the GATT acknowledged the necessity of avoiding market disruption. The decision of the avoidance of market disruption, however, amended the GATT article XIX by allowing the use of restrictive measures regardless of the concept of a 'actual injury', an important provision in article XIX. In addition the concept of market disruption allowed the use of protective measures on individual countries thereby breaching the most fundamental principle of the GATT, MFN. See Cline, *Id.* at 146-147.

The agreements on textile went further away from the principles of the GATT in July 1961 when 16 countries signed the Short-Term Arrangement (STA) on cotton textiles. This was followed in 1962 by a five year Long-Term Arrangement (LTA) on cotton textiles. The LTA was renewed in 1967 and 1970. Both arrangements provided the use of import restraints unilaterally or through the use of bilateral trade agreements. See COTTON TEXTILES, *LTA Regarding International Trade in Cotton Textiles*, (February 9, 1962). See also Ben Yamin Bardau, *The Cotton Textile Agreement 1962-1972*, 7 *JOURNAL OF WORLD TRADE LAW*, 8-25 (1972).

¹⁰⁶. Since 1970s, a need was felt for a new and more comprehensive multilateral Agreement. Accordingly, intensive preparatory work on a new multilateral agreement commenced in 1972 under the auspices of the GATT. This culminated in the establishment of the Multi-Fiber Arrangement (MFA) in 1973 covering man-made textiles and wool. The MFA began to regulate international trade in textiles on January 1, 1974. See Generally, GATT, *Arrangement Regarding International Trade in Textiles*, Preamble of the MFA (1974).

¹⁰⁷. Since 1960s, the importance of the textile industry in a number of DCs started to grow. These countries realized that textile manufacturing was a 'take-off industry' at their first stage of their economic development. The realization was Complemented by the fact that this industry did not require a high standard of technology and was relatively easy to develop. The largest DCs net exporters South Korea, China, Hong Kong, India, and Thailand, Brazil, and Egypt. See James Meade, *Textiles Import Quotas and United States-China Trade Relations: The Dangers of Protectionism*, 10:2 *BROOKLYN JOURNAL OF INTERNATIONAL LAW*, 466-471 (1985).

hand, developed countries alarmed by the increasing competition from the DCs sought to protect their textiles industry¹⁰⁸.

The MFA negotiations reflected two different concerns of trade in textiles and clothing. First, the conflict between developing -developed countries. Second, the nature of the product considered the most sensitive issue for both blocs. The fundamental conflict of interest existing in the MFA (article 1(2) had already been expressed in the LTA preamble. Article 1(2) of the MFA declares:

'...the expansion of trade, the reduction of barriers to such trade, and the progressive liberalization of world trade in textile products, while at the same time ensuring the orderly and equitable development of this trade and avoiding disruptive effects in individual markets and on individual lines of production in both importing and exporting countries.' ¹⁰⁹

To achieve the aim of the preamble, the MFA enacted central provisions under article 3 and 4. Article 3(5) provides the use of quotas if 'particular products from particular sources cause market disruption in importing countries'. Market disruption is defined as 'the existence of serious threat to domestic producers or actual threat thereof'¹¹⁰. Pursuant to article 3, protective measures can be used either on unilateral measures on bilateral agreements.¹¹¹. Article 4 is more politically oriented since it permits contracting parties to enter into bilateral agreements 'to eliminate real risks of market disruption' and 'to ensure the expansion and

¹⁰⁸. Under such circumstances the GATT had a difficult task in trying to balance the interest of the two groups. The tension between market protection on the one hand, and market access on the other, became apparent since the 1950s, when Britain convinced India, Pakistan and Hong Kong to agree on VERs. See Anne E. Heyman, *The United States Trade Policy in Textiles and Apparel: Does the Multi-Fiber Arrangement have a future*, 19 *THE GEO. WASHINGTON JOURNAL OF INTERNATIONAL LAW AND ECONOMICS*, 554 (1985).

¹⁰⁹. GATT, *supra* note 1, article 1 (2).

¹¹⁰. *Id.*

¹¹¹. If no mutual understanding is reached within 60 days, the importing country may impose unilateral restriction *Id.* article 3(5).

orderly development of trade in textiles and the equitable treatment of participating countries.¹¹²

Notwithstanding the selective and strict protective provision, the MFA carries special treatment for the benefit of DCs. It has declared favorable treatment for DCs so as to 'secure a substantial increase in their export earnings from textiles products', and to provide them with a greater share 'in world trade' (article 1(3)). In addition, article 6(3) requires that quotas on small suppliers should be avoided.

From the theoretical point of view, it seems that the MFA, though it has strict restrictive provisions, it protected the interests of DCs exports. Since the establishment of the MFA, however, trade in textiles and clothing has been increasingly distorted and selective protective measures against the exports of DCs has become alarming¹¹³. Throughout this situation, the MFA has been renewed several times¹¹⁴. The renewal of the MFA ended up with more restrictive provisions. This new more stringent protective provisions reflected the overwhelming negotiating power of developed countries in the MFA¹¹⁵.

¹¹². Id. Article 4(2).

¹¹³. For instance, From the establishment of the MFA until 1984, trade of products covered under the MFA expanded from \$35 billion to over \$90 billion. This increase was about 11% a year which is less than 14% average annual growth in total world trade. *The Economist*, 55 (1984). The average annual rate growth of MFA imports into the EC was 0.8% for light sensitive products constituting over 60% of trade and where LDCs are the most successful and 2.3% for all products combined. See K. A. Koekkoek, *Liberalizing the Multi Fibber Arrangement: Some Aspects for the Netherlands, the EC and LDCs*, 20 *JOURNAL OF WORLD TRADE LAW*, 149 (1986).

In 1966, the U.S. applied approximately 650 separate quotas from 41 LDCs exporting countries, with the most advanced being the most controlled. In the case of the biggest exporters to the U.S., Taiwan's exports were controlled by 90% of its total textiles and clothing and Hong Kong's by 95%, the most restrictive U.S. measures. See Craig R. Giesse and Martin J. Lewin, *The Multi Fiber Arrangements Temporary Protection: Rum Amuck*, 90 *LAW AND POLICY IN INTERNATIONAL BUSINESS*, 123 (1989).

¹¹⁴. MFA II (1978-1982), MFA III in 1981, and MFA IV in 1986.

¹¹⁵. In 1977, the protocol of the MFA was renewed for four years (1978-1982) (MFA II). The new protocol, however, became more protectionist than the original. MFA guaranteed 6% of a maximum annual export growth in favor of DCs. Within this percentage DCs are protected from developed countries protection. In MFA II, however, and under the EC pressure, the protocol allowed the so called 'jointly agreed reasonable departures'. This clause has particularly allowed the EC to negotiate more restrictive bilateral agreements in terms of import growth than provided in the MFA I. Hence, the EC sensitive product provisions, restricted the annual import

It appeared that the MFA was a good approach in regulating textiles and clothing since the GATT was not able to control the arbitrary measures applied by importing countries¹¹⁶. The MFA, however, has proven to be unsuccessful. It created trade diversion rather than trade creation and developing countries were the victims of such a selective protective arena. MFA rules are based on unilateral QRs and bilateral restrictive measures. All these measures are outside the framework of the GSP which is based on tariffs. Under such circumstances, the application of MFN within the framework of the GATT, will be more beneficial to DCs than the MFA. In fact, it would not be surprising to know that many developing countries want the governance of the GATT. They would be the first countries to encourage such an approach given the actual MFA discriminatory provisions against their exports. If international trade in textiles and clothing is returned to the framework of the GATT, developing countries will also get the opportunity to bargain with the developed nations (under the unilateral trade negotiations) in other products in which importing developed countries have a great interest in maintaining free trade. Hence, DCs would be able to receive more concessions in textiles and clothing.

In the conclusion of the MFA IV, in 1986, the GATT secretariat issued a summary negotiating guide document entitled 'Future Regime for Textiles and Clothing'. It included

growth from DCs to no more than 0.2%. See Diana Tussie, *supra* note 46 at 67. The EC bilateral agreements divided MFA 114 categories products into five groups. The first group contained the most sensitive products that are subject to 0.2% annual growth. For details on the provisions of MFA II and the EC restrictive measures see K. A. Koekkoek, *supra* note 114 at 146.

MFA III was extended for four years and seven months. the MFA III terminated the reasonable clause established in MFA II. Nevertheless, MFA III enacted new provision called 'the anti-surge provision. this provision allowed a special restraint to counteract the sharp increases in imports of sensitive products with the utilization of quotas. In 1986 the new MFA IV further added to the list products that should be protected under the MFA. The expansion of the product coverage came after the U.S. asked for the inclusion of unrestricted natural fibers, such as silk, ramie, coir, sisal, abaca, manny and henequen. GATT Textiles Committee Meeting, July 23, 1985, reprinted in GATT, BISD 32 Supp. 139-213 (1986).

¹¹⁶. The existence of the MFA has been considered as evidence that the GATT is not capable of coping with political pressures in this special industry. In fact, the preamble of the MFA noted that one of the reasons the MFA was necessary to come into being. "This unsatisfactory situation is characterized by the proliferation of restrictive measures including discriminatory measures, that are inconsistent with the principle of the GATT". GATT, *supra* note 106. Preamble of the MFA (Para. 3).

suggestions relating to the phase out of the existing framework¹¹⁷. The main thrust of the suggestion was that the 'phase out should be effected over a period of three years ending in July 1989. However, the phase out of the MFA did not occur in 1989. The unfinished business of the Uruguay Round did not end until December 1993 and therefore delayed the unraveling of the MFA.

Today, the conclusion of the Uruguay round has left some open ended questions about the treatment of textiles and the future of developing countries in this sector. The proposal negotiated in last December referred to the phase out of the bilateral quotas which make up the MFA for textiles and clothing¹¹⁸. The suggested phase out of the MFA would be over a period of ten years¹¹⁹. At this point, however, no official report has been printed to value the outcome of the December GATT negotiations and the possibility of unraveling the MFA.

VI-The GATT and LDCs: What next? Concluding remarks

Since its inception, the GATT has been relatively effective in liberalizing trade between developed countries, whereas it has not been nearly as effective in freeing trade of DCs.

It could be argued that the GATT could not be blamed for the exclusion of DCs during the first decade of its existence. During that period DCs were insignificant participants in international trade. This argument can no longer be used since the following decades until recently developing countries have become an important player in the world trading system.

¹¹⁷. At the GATT ministerial meeting in Punta del Este, Uruguay, governments decided 'to formulate under modalities that would permit the eventual integration of textiles and clothing into the GATT on the basis of strengthened GATT rules and disciplines. GATT Press Release, Ministerial Declaration on the Uruguay Round, No 1396 (Sep. 1986).

¹¹⁸. The ECONOMIST, A guide to GATT, 25 (December 4-10, 1993).

¹¹⁹. Id.

The introduction of GSP in the GATT cannot be blamed for the increasing NTBs against the exports of DCs. Agricultural and Textiles products, the leading exports of DCs, are negotiated outside the GATT system. NTBs including QRs, VERs and OMA cannot be justified with the argument that GSP calls for such measures since these measures are outside the framework of tariff preferences under the GSP.

The GATT was not able to protect the interest of DCs. The GSP did not help them expanding their exports but rather opened the door to discriminatory protective measures against their exports. In addition, extensive use of NTBs in agricultural and textiles products has prevented DCs from participating in the process of trade liberalization.

After reassessing the balance of their interests, most developing countries are now convinced that they should negotiate directly and within the framework of the GATT with other contracting parties. They are willing to open their markets to international competition. To this effect, for instance, Brazil, Zimbabwe, Mexico and Indonesia have undertaken broad programs of trade liberalization¹²⁰. DCs realized that special status has been of a detrimental rather than beneficial as it has marginalized them from trade liberalization. Therefore, for the first time these countries have taken an active role and showed special interest in the Uruguay Round¹²¹. They were more willing to participate in the process of the Uruguay Round and abide by the same rules as the other contracting parties, notably MFN and the principle of reciprocity¹²². Many of them were worried about being required to open up their service sectors, particularly banking and insurance. Others were more concerned about patents and other aspects of "intellectual property". However, in return for more discipline and protection of their interests, they might have to compromise.

¹²⁰. For details see R. H. Hudec, *GATT and the Developing Countries*, 67 *COLOMBIA BUSINESS LAW REVIEW*, 4 (1992).

¹²¹. *The Economist*, supra note 119.

¹²². *Id.*

Developed countries asked developing countries to grant access to their markets for service industries, intellectual property products, and general investment. They declared that opening these markets would constitute significant new concessions for most developing countries¹²³. These demands became the cornerstone of the last Uruguay Round¹²⁴.

The last Uruguay Round provided substantial reciprocity for developing countries. It also promised numerous endeavors in several areas of major interest to developing countries, primarily, textiles, agriculture and tropical products¹²⁵. As seen above, the GATT has disfavored developing countries in these areas as it failed to liberalize these trade sectors in the past.

Despite the new initiatives in the last Uruguay Rounds' negotiations, a substantial question arises as to whether the GATT will be able to protect the rights of developing countries since they are more willing to abide by the same rules as the developed countries. Many open questions are on the minds of many lawyers, economist and politicians.

1-Will the GATT be able to bring under its system the use of NTBs notably QRs and VERs? These measures have been very damaging to the performance of DCs exports. If any agreement is reached on these protective measures, they will have to be justified under the 'safeguard clause'(article XIX).

2-Is the GATT able to restrict the use of antidumping and countervailing duties? In many instances, These measures have been applied by the developed nations for purely protective purposes.

¹²³. For instance the U.S. believes that developing countries still owe unilateral concessions in areas like services, investments, and intellectual property. The U.S. argues that Failure to make such concessions, leaves the current situation out of balance and thus justifies U.S. retaliation through imposition of new trade barriers. For details see generally, *AGGRESSIVE UNILATERALISM: AMERICA'S 301 TRADE POLICY AND THE WORLD TRADING SYSTEM* (J. Bhagwati & H. Patrick eds. 1990)

¹²⁴. Hudec, *supra* note 120 at 4-5.

¹²⁵. *The Economist*, *supra* note 121.

3-Can the GATT resolve the controversial issues of Agricultural products? Developing countries have great interest in the outcome of the discussions in this sector. Therefore, a more liberalized system in agriculture would be very beneficial to them.

4-Would textile and clothing be less protected in the future? Will there be any strict rules to secure the liberalization of trade in this sector, the most important to DCs?

At this point the answers to these questions are not available. The future will determine if the Uruguay Round achieved the objectives it sets for. In addition, the implementation of the Uruguay Round goals will depend on the willingness of developed countries to deliver their side of bargain if developing countries are willing to negotiate with them on an equal basis.

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