THESIS ON

"WTO'S SYSTEM AND DISCRIMINATION WITH DEVELOPING COUNTRIES AN ANALYTICAL STUDY WITH RECOMMENDATIONS"

by

Muhammad Aamir Behlim

L.L.M (International Trade Law)

Reg No 78-FSL//LLMITL/F06

Supervisor

Mr. Ata Ullah Khan Mahmood
Assistant Professor Law
Faculty of Shariah & Law

INTERNATIONAL ISLAMIC UNIVERSITY
ISLAMABAD

THESIS EVALUATION COMMITTEE

1- **Mr. Muhammad Amir Munir**
Additional Director (Academics)
Federal Judicial Academy
Islamabad

External Examiner

2- **Mr. Muhammad Younus**
Assistant Professor (Law)
Department of Law
Faculty of Shariah & Law
International IslamicUniversity
Islamabad

Internal Examiner

3- **Mr. Ataullah Khan**
Assistant Professor (Law)
Department of Law
Faculty of Shariah & Law
International IslamicUniversity
Islamabad

Supervisor

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STRENGTH, STRATEGIES AND METHODS OF DEVELOPED COUNTRIES (WTO RULES AND MANIPULATION BY DEVELOPED COUNTRIES)

LIST OF ABBREVIATIONS

AB	Appellate Body
ACP	African, Caribbean and Pacific (group of states)
AEC	African Economic Community
AGOA	African Growth and Opportunity Act
ATC	Agreement on Textiles and Clothing
BOP	balance of payments
CG 18	Consultative Group 18
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EC	European Commission
ECOSOC	Economic and Social Council
EEC	European Economic Community
EU	European Union
FAO	Food and Agriculture Organization
FDI	foreign direct investment
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GNP	Gross National Product
IATP	Institute for Agriculture and Trade Policy
ICITO	Interim Commission for the International Trade Organization
ILO	International Labour Organization
IMF	International Monetary Fund
IPR	intellectual property right
LDC	least developed country
LMG	Like-Minded Group
LTA	Long-Term Agreement (in textiles sector)
MEA	multilateral environmental agreement
MFA	Multi-Fibre Agreement
MFN	most favoured nation
MSF	Medecines Sans Frontiers
MTN	multilateral trade negotiation
NAFTA	North American Free Trade Agreement
NGO	non-governmental organization
NTM	non-tariff measure
OAU	Organization of African Unity
OECD	Organization for Economic Cooperation and Development
PPM	process and production method
PSE	Producer Subsidy Equivalent
S&D	special and differential (treatment)
SEATINI	Southern and Eastern African Trade Information and Negotiations Institute
SPS	Sanitary and phytosanitary (measure)
SSG	special safeguard
STA	Short-Term-Agreement (in textiles sector)
TBT	technical barriers to trade
TRIMs	trade-related investment measures

TRIPS	trade-related aspects of intellectual property rights
TSE	Total support Estimate
TWN	Third World Network
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
USTR	US Trade Representative
VER	voluntary export restraint
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

LIST OF CASES

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Dedicated to my parents who always encouraged me and appreciated me to do some good work

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CHAPTER – 1

INTRODUCTION

1.1 History of WTO. From Havana to Doha

There has been a long march for the GATT/WTO from Havana to Doha in a little more than half a century. During this journey, it has gained in stature and added weight. Its pace has variously been slow and fast. It has been hailed and booed. It has passed through changing times. It has absorbed some changes and ignored some others. Amidst all this, however, its basic character and features have remained unchanged. That is its main weakness at the turn of the millennium. Its resilience and adaptability to the new realities of the world will be put to severe test in the coming years. Its progress will depend on its response to these challenges.

The formal foundation of WTO was laid in Havana in 1948, though the international agreement which emerged as the General Agreement on Tariffs and Trade (GATT) had been earlier worked out in October 1947 [1]. In Havana, the UN convened the International Conference on Trade and Employment (Havana Conference) which evolved the Havana Charter in March 1948. It envisaged the establishment of an International

[1] Rules of origin in International trade, A comparative study written by Paul Waer and Jacques Bourgeois and published by University of Michigan press, 1994.

Trade Organization, which would cover areas of international trade like tariffs on import and export as well as some other important areas like employment, economic development, restrictive business practices and commodity issues. The Charter was signed by the participating countries, but it was not ratified by the US Congress. Other countries saw little benefit in ratifying it and bringing it into operation without the participation of the US. Hence, the Havana Charter did not come into effect. But it remained an important landmark as concrete efforts in the field of trade. Many of the basic concerns which it addressed would continue to haunt the international trading system in future[2].

The provisions on tariffs and other matters relating to import and export had been finalized earlier in the preparatory process for the Havana Conference. They had been included in what was called the General Agreement on Tariffs and Trade, which was signed on 30 October 1947. Through a Protocol of Provisional application, the signatory countries agreed to bring the GATT into operation provisionally with effect from 1 January 1948, without waiting for ratification coming into force of the full Havana Charter.

Since the Havana Charter eventually did not come into effect, the other parts of the Charter did not become operative; but the GATT came into operation as an interim step and continued until 31 December 1994. Thereafter, it continued as an annexture to the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement).

[2] Rules of origin and the Uruguay Round's Effectiveness in Harmonizing and Regulating them written by Joseph A. La Nasa and published in American Journal of International law, 1990.

The GATT was only an intergovernmental agreement, not an organization or an institution. It got the institutional support of the Interim Commission for the International Trade Organization (ICITO) which had been formally established by the governments and was hosted by the government of Switzerland in Geneva after 1948 Havana Conference[3].

BACKGROUND

The initiative of the United Nations, through its Economic and Social Council (ECOSOC), in convening the Havana Conference had in its background the extensive devastation of Europe after the Second World War and the still earlier experience of the Great Depression of the late 1920s and early 1930s. The depression had brought in its wake the appreciation that cooperative efforts of countries were needed to bring the economies onto a growth path. Reconstruction of the economies of Western Europe after the war needed a multilateral framework for trade.

On reviving economic growth and expansion of trade, the US took the initiative and entered into bilateral trade agreements with a number of countries. On the reconstruction of Western Europe, the US and UK had prolonged negotiations. All this formed the basis for the provisions in the GATT [4].

During the 1920s and 1930s, Europe was under tremendous economic strain. The problem had started after the First World War. The insistence of the victor countries of Western Europe on repatriations from the defeated countries resulted in severe economic

[3] World Trade and the Law of GATT written by Jackson and published by Bobbs – Merrill company in December 1969.

[4] *Restructuring the GATT System written by John H. Jackson & published by Royal Institute of International Affairs/Printer, 1990.*

strains on the latter. Simultaneously, the insistence of the US on the repayment of loans by the victor countries of Western Europe put a heavy burden on the economies of these countries. Across the Atlantic, the stock market crash of 1929 dealt a severe blow to the US economy. Naturally amidst this gloomy picture, the countries became more inward-looking and tried to protect their respective economies without consideration for the impact on the economies of the other countries. Trade barriers through high tariffs and direct import controls became common [5].

In order to address these serious problems, the League of Nations convened a Diplomatic Conference in Geneva in 1927. A convention for removing prohibitions on import and export was worked out, but it did not get enough signatures to be operative.

Some actions of the two major powers, viz, the US and UK, had encouraged the building up of trade barriers all around. The US enacted the Smoot-Hawley Act in 1930, which raised its unweighted average tariff to 52 percent. The UK gave up its free-trade policy and went in for Imperial Preferences in 1932. Tariffs were raised in other countries of Europe and the American continent and some countries also introduced quantitative import restrictions[6].

Soon the US realised that certain concrete and positive initiatives were necessary to address the problem. It reduced its own tariffs and also encouraged many others to do so. It entered into as many as 27 bilateral reciprocal trade agreements with various

[5] The World Trading System: Law and Policy of International Economic Relations written by John H. Jackson and published by Cambridge, M A: MIT press, 1997.

[6] Trade Policy as Foreign Policy written by R.N. Cooper and published by Cambridge, MA: MIT press, 1987.

countries during 1934-39. Its own average tariff came down to nearly 30 percent. It also started multilateralisation of its reciprocal agreements. The concessions exchanged in a bilateral agreement were to be automatically extended to the countries with which it had entered into other bilateral agreements or with which it would enter into such agreements in future. In this manner, it sowed the seeds of the Most-Favoured-Nation (MFN) principle that would become the most important pillar of the GATT[7].

The Second World War brought its own compulsions for economic cooperation between the US and the UK. There were three main initiatives. Firstly, there was the Atlantic Charter resulting from the summit meeting between the two countries in August 1941. Secondly, a Lend-Lease (Mutual Aid) Agreement between the two countries was concluded to support the war effort. Thirdly, intense bilateral negotiations were conducted between the two countries during 1943-45 on the post-war multilateral trading framework. In preparations for these negotiations, the US had prepared "A Multilateral Conventions on Commercial Policy" and the UK had its framework in "A Proposal for an International Commercial Union." The negotiations finally resulted in "Proposals for Expansion of World Trade and Employment".

These moves provide the main impetus for the convening of the Havana Conference by the UN. The idea was to multilateralise what had gone into these bilateral moves. Most of the important provisions agreed to by these countries at this stage and also of the earlier reciprocal bilateral agreements of the US found their way into the various provisions of the GATT.

[7] US trade policies in changing world economy written by R.M. Stern and published by Cambridge, M.A. MIT press, 1987.

This was, then, the foundation and the background of the GATT, which, as mentioned earlier, formally emerged in October 1947 and became operational in January 1948[8]. Well before GATT's 40th anniversary its members concluded that the GATT system was straining to adopt a new globalizing world economy. In response to the problems identified in 1982 Ministerial Declaration (structural deficiencies, spill over impact of certain countries policies on world trade GATT could not manage etc), the eighth GATT round known as Uruguay Round was launched in September 1986 in Punta del Este Uruguay. It was the biggest negotiating mandate on trade ever agreed and all original GATT articles were up for review. The Final Act concluding the Uruguay Round and officially establishing the WTO regime was signed during April 1994 ministerial meeting at Marrakash, Morocco and hence is known as Marrakash Agreement[9]. Since then, it has passed through many milestones, viz.: several rounds of multilateral trade negotiations, interim steps like the Ministerial Meeting of 1982 as well as important high-level expert group report, and WTO Ministerial Conferences. Brief details of each Ministerial Conferences held, up till now is as follow[10]:-

(a) Singapore Ministerial Conference - December 1996

In the Singapore Ministerial Conference the major developed countries proposed that five

[8] Knneth Dam (1970), The GATT: Law and International Economic Organization, Chicago and London: University of Chicago Press; Shrirang Shukla (2002), "From GATT to WTO and Beyond" pp 410-419. Deepak Nayyar (ed), Governing Globalization: Issues and Institutions pp 16-22.
Chakravarthi Raghavan (1990), Recolonization: GATT, the Uruguay Round & the Third World Network. pp 104-108.

[9] http://en.wikipedia.org visited on 27 December 2008.

[10] GATT Ministerial Declaration by Jhon H. Jackson, published by the Royal Institute of International Affairs.

new subjects, viz, investment, competition policy, government procurement, trade facilitation and social clauses (labour standards), should be included in the WTO negotiations. This was opposed by a large number of the developing countries. The last subject was eventually left out, but the developed countries succeeded in formally starting a study process on the other four subjects in the WTO. Thus a toehold for these new issues in the WTO was assured. This was a significant expansion of the activities of the WTO.

Another important decision of this meeting was an agreement on zero duty on information technology goods. This subject was suddenly brought into the agenda of this meeting. The developing countries had hardly any opportunity to examine the implications, but the decision was taken nonetheless.

This Conference was characterised by three noticeable factors. Firstly, the major developed countries suddenly tabled an important proposal, viz on zero duty on information technology goods, and expected the developing countries to consider it on the spot and agree to it. Surprisingly, the developing countries did not protest, and the proposal was approved. Secondly, intense pressures were exerted by the major developed countries on the developing countries for agreeing to bring new issues onto the WTO agenda. The resistance of the developing countries was broken to a great extent and these subjects did gain entry into the WTO. Thirdly, it has been reported that there were non-transparent negotiations in small groups, which left a large number of the developing countries very much dissatisfied and frustrated.

(b) Geneva Ministerial Conference – May 1998

In the Geneva Ministerial Conference, a new proposal was introduced for having a standstill (i.e. maintaining the status quo) in respect of electronic commerce. As the

countries did not impose any entry tax (customs duty) on such transactions, this proposal actually meant a commitment to duty-free electronic commerce. The developing countries did not have any time to examine the implications, but a decision was taken to effect the standstill for 18 months. In a subsequent Conference, it was extended further.

(c) **Seattle (the US) Ministerial Conference – November/December 1999**

The Seattle Ministerial Conference ended in chaos. No decision was taken. The manner of decision-making in the WTO had an important bearing on this non-result at Seattle. It should be noted that though there was no agreement in this meeting, the major developed countries put up a strong plea for including the subject of labour standards in the WTO, which had been totally rejected by the developing countries in the Singapore Ministerial Conference.

This Conference collapsed because of various reasons. Firstly, the organisation of the Conference and its handling was bad. This has been a unique case of an international meeting where a very large number of the participating countries openly and formally criticised the organisation and manner of handling of the event. Secondly, the developing countries had made serious preparations over the previous year and, unlike in the earlier Conferences, had presented a large number of their own proposals. They insisted that their proposals be considered seriously, but these proposals did not get proper attention from the major developed countries. Thirdly, a large number of Non-Governmental Organisations (NGOs) had converged on Seattle and held demonstrations which disturbed the atmosphere of the Conference. Fourthly, the host country did not play a mediating role, as is often done by the host country; rather, it pressed for its own agenda at a very high level, which left a large number of the countries dissatisfied. Fifthly, there were serious differences among the major developed countries on important issues and

this could not be resolved during the conference. The ultimate result was that the Conference ended without even a formal closing ceremony.

(d) **Doha Ministerial Conference – November 2001**

The Doha Ministerial Conference did produce an agreed Work Programme which is very heavy and ambitious[11]. Indeed, it launched a new round of MTNs in all but none. In some ways it involved tasks heavier than the Uruguay Round. Nearly all the major subjects of the Uruguay Round have been included in the Work Programme and some more have been added. Comprehensive negotiations are envisaged in the areas of agriculture, services, subsidies, anti-dumping, regional trading arrangements, dispute settlement, industrial tariffs and even some aspects of intellectual property rights. Besides, there will be negotiations in the area of environment too. And then intense work is envisaged on new issues, viz, investment, competition policy, government procurement, trade facilitation and electronic commerce.

The Doha Work Programme is highly unbalanced. It has accommodated the proposals of the major developed countries in the new areas while not given serious consideration to the proposals of the developing countries, as has been mentioned above. In this manner, it has enhanced the asymmetry in a WTO system that was already very much unbalanced. The irony is that the Work Programme has started to be called the "Doha Development Agenda", thereby conveying the impression that it is all in the interest of the developing countries. Actually, it is heavily weighted in favour of the major developed countries interests and does not have much content on the interests of

[11] Declaration of the Doha ministerial Conference, adopted on 14 November 2001, WTO document WT/MIN(01)/DEC/1, 20 November 2001.

the developing countries.[12]

A significant step was taken in the Ministerial Conference in Doha in November 2001 in respect of the four "Singapore issues", including investment. (The Singapore issues, which are called thus because they were first indentified for consideration by the Singapore Ministerial Conference in 1996, comprise investment, competition policy, transparency in government procurement and trade facilitation). It was agreed that negotiations in these areas would start after the next Ministerial Conference, i.e. the one in Cancun (September 2003), if there is a consensus on the modalities for the negotiation and on initiating the negotiations. A plain reading of the Doha Ministerial Declaration indicates that the start of the negotiations is contingent "only" on the consensus on the modalities, but read along with the Conference Chairman's statement in the final plenary meeting at Doha, it appears to indicate that the start of the negotiations is contingent on a two-stage consensus, viz, consensus on the modalities and consensus on starting the negotiations.[13]

Also, the Doha Ministerial Declaration has indentified some elements for clarification by the Working Group on investment in the meantime. These are: (i) scope and definition, (ii) transparency, (iii) non-discrimination, (iv) modalities for pre-establishment commitments based on a GATS-type positive-list approach, (v) development provisions, (vi) exceptions and balance-of-payments safeguards, and (vii) consultation and dispute settlement.

[12] GATT Ministerial Declaration Supplement by Jhon H. Jackson, published by the Royal Institute of International Affairs, 1983 pp 14-19.

[13] World Trade Negotiations. The Doha Development Agenda by Fergusson, I an F, published by Congressional Research Service.

(e) **Mexico Ministerial Conference - 2003**

The Ministerial Conference was held in Cancun, Mexico aiming at forging agreement on the Doha round. An alliance of 22 Southern States, the G 20 developing countries led by India, China and Brazil resisted demands from the North for the agreements on the so-called "Singapore issues" and called for an end to agriculture subsidies within the EU and the US. The talks broke down without progress.

(f) **Hong Kong Ministerial Conference -2005**

This was the sixth Ministerial Conference which was held in Hong Kong from 13 December-18 December 2005. It was considered vital if the four years old Doha Development Agenda negotiations were to move forward sufficiently to conclude the round in 2006. Further to phase out all their agricultural export subsidies by the end of 2013 and terminate any cotton export subsidies by the end of 2006. Further concessions to developing countries including an agreement to introduce duty free, tariff free access for goods from the Least Developed Countries with up to 3% of tariff exempted. Other major issues were left for further negotiations to be completed by the end of year 2006.

1.2 Basic features of WTO/GATT

There are three basic features in these agreements, viz, non-discrimination as between different Members of the WTO (called "most-favoured-nation treatment", i.e. MFN treatment), non-discrimination as between an imported product and a like domestic product (called "national treatment") and transparency.

The provision on MFN treatment requires that a country cannot give more favourable treatment to a product from another Member country than what it gives to any other Member country. The provision on national treatment requires that a country cannot give less favourable treatment to an imported product than what it gives to a "like"

domestic product. The former ensures competition among the products from different countries, while the latter ensures competition between an imported product and domestic product. There are, of course, exceptions to the MFN provision, e.g, preferential tariffs, regional trading arrangements, etc.

The principle of national treatment has assumed a new importance because of the attempts by some major developed countries to determine "likeness" of products based on the processing and production methods. By doing so, these countries want to stop the import of a product which, according to them, has been produced by a method that is polluting the environment in the producing country, even though the product itself may not be containing any harmful constituent or characteristics and may be exactly like a domestic product in the importing country in its composition and characteristics.

National treatment is an extremely hallowed principle of the GATT/WTO as it ensures competition between an imported product and a domestic product. It tames the protectionist instincts of an importing country. It may be a very relevant principle in a system where the countries are of similar or near-similar economic strength; but in the GATT/WTO system, it acts, in many ways, against the interests of the developing countries. It prohibits them from giving special facilities to a domestic product. In a possible environment where the domestic product has to face competition from an imported product backed by the immense economic strength of the producer and exporter of a developed country, the former naturally suffers a great disadvantage and handicap. The prohibition imposed by the national-treatment provision has the potential of hindering the industrialization process in the developing countries. A new product that is

only beginning to be produced in a developing country may require protection against imports at least for some time, but this is not possible at present[14].

1.3 International Transactions in services

The WTO provisions relating to services are contained in the General Agreement on Trade in Services (GATS). Essentially this agreement is on liberalisation of the import of services. It provides a framework for the countries to undertake commitments in specific services sectors for allowing import of services. These commitments relate to market access, i.e., the entry of services, and also to national treatment, i.e., treatment to the imported services being no less favourable than that accorded to like domestic services.

Each country has prepared a schedule of commitments where it has included services sectors in which it has undertaken commitments. If a sector is not included by a country in its schedule, it has no obligation on market access and national treatment in that sector. On the other hand, if a sector is included in the schedule, a country is obliged to provide full market access and national treatment in that sector, except if it has specified some limitations and conditions. Almost all countries have prescribed various types of conditions and limitations in most of the sectors included in their schedules.

The inclusion of sectors and specification of conditions and limitations were done mostly as a result of the negotiations in the final stage of the Uruguay Round. In some specific sectors, particularly financial services and telecommunication services, enhanced commitments have been undertaken as a result of subsequent negotiations.

The GATS envisages further negotiations for liberalization in the services sectors.

[14] Development, Trade and the WTO, A hand book Washington DC World Bank, published by World Bank press.

The GATS also contains some disciplines of a general nature which are applicable to all services sectors. A country is obliged to follow these disciplines in respect of all sectors, including those not included in its schedule of specific sectoral commitments. An important obligation is the provision of most-favoured-nation treatment, i.e., the obligation on a country not to discriminate between the services and service providers of various countries.

As mentioned earlier, the obligation on liberlisation of services was brought into the WTO framework at the instance of major developed countries. They have plentiful opportunities in exporting services, which is not the case with the developing countries, which do not have much supply capacity in service sectors. Their service sectors are not developed. With such a wide gap between the opportunities of the developed and developing countries, an agreement on the framework for liberalization of import of services is ab initio unbalanced. Because of the widely differing supply capacity between the developed countries and the developing countries, there will naturally be a big difference in the potential export benefits. Thus such a framework is very much inconsistent with the principle of reciprocity which is the underlying theme in the GATT/WTO system. Clearly, the very inclusion of this area in the GATT/WTO system has resulted in an imbalance, which is further aggravated by the taking up of some service sectors for priority negotiations, e.g., financial services and telecommunication services.

The main provisions for special treatment of developing countries in the GATS have been worded in such a manner that they are not really enforceable. For example, Article IV of the GATS says that "the increasing participation of developing country Members in world trade shall be facilitated through negotiated specific commitments, by

different members.....; relating to .... the strengthening of their domestic services capacity....; the improvement of their access to distribution channels and information networks;... the liberalization of market access in sectors and modes of supply of export interest to them." Further, Article XIX of the GATS says that "there shall be appropriate flexibility for individual developing country Members for opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access in line with their development situation...". Both these provisions are clear in their intent and objective and specific in their content; but neither of them prescribes how these intentions and objectives will be achieved. They do not specify on whom these obligations fall and in what manner these obligations will be discharged by them. It is not specified how a developing country that feels it is being denied these benefits will get relief. In fact there have instead been cases of pressurization of the developing countries by major developed countries in some sectors.[15]

1.4 Protection of Intellectual Property Rights (IPRs)

The provision relating to the protection of intellectual property rights are contained in the Agreement on Trade-Related Aspects of Intellectual Property Rights (Agreement on TRIPS). The agreement lays down the minimum levels of protection of the rights of intellectual property owners. The type of protection and the duration of protection have been stipulated. All Members are obliged to provide protection of IPRs at least up to these levels. A Member has the discretion to provide for higher levels of protection and duration. A Member has to adopt domestic legislation, procedures and

[15] Trade policy in the developing countries by Douglas North, Cambridge University Press, 1990 pp 190-195.

practices for the protection of IPRs. Elaborate provisions have been made in the agreement regarding the legal processes and other aspects of domestic practices in pursuance of implementing the legislation on IPRs.

Seven types of IPRs have been included in the agreement. These are: patents, copyright, trademarks, geographical indications, industrial designs, layout-designs of integrated circuits and undisclosed information. Some of these were already covered by some earlier international agreements; yet there was seen to be a need for this new agreement. This is mainly because the earlier agreements, most of which were within the framework of the World Intellectual Property Organization, did not have provisions for effective implementation. Now all these can be implemented and enforced through the dispute settlement mechanism of the WTO. The earlier treaties, which are still valid and operational, are: the Paris Convention, 1883 for patents, trademarks and industrial designs, Berne Convention, 1886 and Rome Convention, 1961 for copyright and Washington Treaty,1989 for layout-designs of integrated circuits.

Patents and copyright are two relatively more important IPRs and they have been given wide coverage in the Agreement on TRIPS. It may be useful to go over the relevant provision in these areas briefly.

A person who has invented a new product or a new process for production of a product is given a patent for that product or process. A government registers a patent on a product or a process and thereby confers some rights on that person. The requirement before registering a patent is that the product or the process should be novel, should be the result of an inventive step and should be useful for industrial application. The patent holder has the exclusive right to make the product or sell it or authorize somebody else to

make or sell the product. Similarly, in respect of the patented process, the patent holder has the exclusive right to use the process or authorize somebody else to use it.

In special situations, however, the government may authorize somebody to make the product or use the process without the consent of the patent holder, who will get appropriate remuneration in such cases.

The government may refuse to grant a patent on a product or a process for certain specific reasons, viz, to protect public order or morality, to protect human, animal and plant life or health and to protect the environment. A country may exclude from patentability certain products and processes, viz., (i) diagnostic, therapeutic and surgical methods for the treatment of humans or animals, (ii) plants and animals, and (iii) essentially biological process for the production of plants and animals. A country has the option not to allow patents on such products and processes; but it also has the option to allow patents in these areas. Hence if a country so chooses, it can allow for the patenting of plants and animals and their parts.[16]

1.5 Dispute Settlement Process

Disputes relating to the implementation of the various agreements in the WTO framework are settled through the Dispute Settlement Understanding (DSU). It is the mechanism for the enforcement of the rights and obligations of Members.

The process can be started only by a Member which has a grievance against another Member and not by firms or individuals. The grievance could be about any particular action or inaction of the other Member.

[16] Commission on Intellectual Property Rights, Integrating Intellectual Property Rights and Development Policy, UK, Chapter 3 pp 58-66.

www.twnside.org.sg/title/cecilia.htm visited on 28 July 2008.

In case of a grievance, a Member has first to have formal consultations with the other Member that is to the cause of the grievance. If the consultations between the two Members do not yield satisfactory results, the aggrieved Member approaches the Dispute Settlement Body (DSB) of the WTO, which then establishes a panel of experts to examine the issues involved and give recommendations. The DSB is constituted of all the Members of the WTO.

The panel gives its findings and recommendations. If any party to the dispute is not satisfied, an appeal can be filed with the Appellate Body of the WTO. This body has seven persons on a standing basis out of which a group of three form the bench of the Appellate Body for an appeal. The Appellate Body is expected to consider the legal aspects of the matter and give its findings and recommendations.

The report of the panel/Appellate Body is placed before the DSB. The approval of the report is automatic as the rule is that the report will be approved except if there is a consensus not to approve it. And consensus is presumed to have been reached when no Member present in the meeting raises a formal objection and withholds the consensus. Normally a Member that has a report in its favour will never agree to the report not being approved; hence there will be no consensus on it and the repot will be automatically approved.

If the panel/Appellate Body has found that the complaint had not been proved, no further action is called for. If it has found that the complainant is right and the respondent has to take some corrective measure, the later is expected to implement the recommendations of the report within a reasonable time frame. If there is inadequate implementation, the complaining party is authorized to take retaliatory action against the

respondent[17]. However, the dispute settlement system has a question mark over its impartiality in giving judgements. In many cases the panel/AB has shown discriminatory behaviour towards the developing countries. Brief details of some of these cases are given at Annexure "A".

17 Jackson, The World Trade Organisation Dispute Settlement Understanding: Misunderstanding on nature of legal obligations: American Journal of International Law, 1990.

www.wto.org/wto/dispute/bulletin.htm visited on 30 July 2008.

CHAPTER - 2

STRENGTH, STRATEGIES AND METHODS OF DEVELOPED COUNTRIES

WTO RULES AND MANIPULATION BY DEVELOPED COUNTRIES

2.1 WTO Process (From Proposals to Agreements)

The description given above is of proposals that are generally acceptable and need negotiations only on non-controversial issues over which the positions of the countries do not diverge widely. It is interesting to now see, how the important proposals of the major developed countries that do not have general acceptance, but rather face stiff resistance from the developing countries, meander through the labyrinth of the WTO process.

Generally, when the major developed countries decide on pursuing a proposal in the GATT/WTO, they do not give it up even if it meets with prompt rejection by the developing countries. They keep it alive in some manner and then give it further momentum at an appropriate time. For example, they may start a process of "examination" or "study" of the subject, without insisting on starting negotiations. In the course of a few years, however, the "examination" or "study" is upgraded to the status of "negotiations". And once negotiations get started, the major developed countries generally succeed in ending them with an agreement after a few years.

Though the major developed countries sometimes lower their demand from "negotiations" to "examination" or "study" and project it as an innocent process, it should be appreciated that a "study" or "examination" in the WTO has deep implications. The

GATT/WTO is a serious forum. It takes up an issue for examination or study only with a clear indication of the problems involved and with even a definite final objective in view. Several times in the past, working parties or groups have been established in the GATT/WTO to study and examine specific issues. In practice, these exercises have consisted of joint consideration and examination by governments. To a great extent, this exercise involves negotiations among the interested governments on the identification of issues involving different interests and on the possible compromises. In this manner, by its very nature, a "study" or "examination" in the GATT/WTO takes the shape of negotiations.

Once the process of "study" or "examinations" starts, "negotiations" and "agreement" generally follow sooner or later. Some examples of past experience in this regard are given below:-

In the GATT Ministerial Meeting of 1982, strong pressures were built up on developing countries to start negotiations on the subject of services. This was strongly opposed. The final agreement in the meeting was that countries would take up national examination of services, exchange information among themselves and then consider whether a multilateral framework was necessary and appropriate. This process later led to negotiations in the Uruguay Round and to a final agreement on services.

Further, when the subjects of investment, competition policy, government procurement and trade facilitation were brought up by the major developed countries in the Singapore Ministerial Conference in 1996, they lowered their sights to "study", rather than insisting on "negotiations", as there was stiff resistance from the developing countries. The study process duly started. Later, they came up with the argument that enough study had been done and it was time to start negotiations in these areas. In the Doha Ministerial

Conference in 2001, they were able to upgrade the study process significantly and have the objective of negotiations established, though actual negotiations could get started.

Another example of the step-by-step approach or tactics of the major developed countries when they face stiff opposition can be seen in the areas of services and intellectual property rights. When these subjects were proposed by the union the Uruguay Round, the developing countries opposed their entry into the GATT system. Due to the persistence of the major developed countries, the developing countries then agreed on negotiations, but insisted that services would be kept outside the coverage of the GATT and there would be no linkage with the trade in goods. In respect of IPRs, they insisted that only the trade-related aspects, and not IPRs protection standards, would be the subject of negotiations. But, with the major developed countries persistence, the ultimate result is that IPRs protection standards have all been integrated into the expanded system of the WTO. And instead of keeping services separated from goods, now there is a close integration through the provision of cross-sector retaliation in the Dispute Settlement Understanding.

Once a subject enters the GTATT/WTO in any shape or form at the instance of the major developed countries, it usually results in a multilateral agreement.

2.2 Strength and strategy of developed countries

It is relevant to examine how the major developed countries are able to have their way in the WTO. Their strength in this organisation is due to three main factors. Firstly, they are politically and economically strong and they use this strength to achieve their objectives in the WTO. Secondly, they almost always coordinate among themselves while preparing a proposal or a response; and their combined and coordinated strength and clout are naturally formidable. Thirdly, the governments of these countries coordinate fully with their industry,

trade and services sectors; and combine their political and strategic strength with the economic and technological muscle of the later.

Even, if there are differences among the major developed countries on some issues, they very often sink these differences or accommodate each other and face the developing countries with their combined strength and common strategy. Also, the goals and objectives of their governments on the one hand and of their industry, trade and services sectors on the other converge to a great extent in matters relating to expanding their economic space in the developing countries.

Some current examples will illustrate these points. For including investment in the agenda of the WTO, the EU and Japan are the main sponsors while the US is not as enthusiastic. In fact, there had been no enthusiasm on the part of the new US administration in the beginning of 2001, well before the Doha Ministerial Conference, for the launch of a new round of negotiations. But as the Conference drew nearer, after very high-level contacts between the EU and the US, the latter supported the efforts of the EU and Japan on this proposal.

Then, the story of agriculture towards the end of the Uruguay Round is a well-known one. The EU and the US adjusted their differences in this sensitive sector, which were indeed considerable, and evolved a common frame which preserved their own subsidy policies and practices and enabled them to extract significant commitments from the developing countries.

Similarly, the combined efforts of the major developed countries governments and the pharmaceutical sector as well as financial services sector achieved the objectives of having

liberalization of services sectors and protection of the intellectual property rights included in the ambit of the WTO against stiff resistance from the developing countries.[18]

2.3 Methods and Motivation of Developed Countries

In operating in the WTO, the major developed countries start with a clear identification of their objective in the negotiations in a particular area. Then they undertake intense technical work in the preparation of proposals and supporting arguments. Side by side, they cooperate closely among themselves in pursuing these proposals. Whenever there is a need, they try to put pressures on the developing countries, often dividing the burden among themselves so as to be most effective and almost invariably, they are effective.

On the rare occasions when they are not able to achieve their objective as mentioned above, they still do not give up, rather, they will adopt a step-by-step approach to achieve their objectives after few years. Ultimately, it is the clarity of objective and no-holds-barred approach that give them the desired results.

Usually the major developed countries initiate the idea of a new proposal in a small group. They would first discuss it among themselves. If there is no opposition from any of them, they will go ahead even if all of them may not be equally enthusiastic about it. They will discuss it in a bigger group and gain the support of some other countries. Then they will take it to a still bigger group. In this manner, they follow the process of enlarging the circle of support. It is an effective method in multilateral negotiations.

On some difficult issues where the major developed countries perceive opposition, they may sometimes follow the method of starting soft and ending hard. They would initially start with a soft version of the proposal so that the opposition is not widespread and intense.

[18] Trends in International Trade. A report by panel of Experts by Rodrik, Dani, 2001 pp 21-24.

This is likely to lull the potential opponents into some degree of complacency. Once the ground has been softened, they may make the proposal progressively stronger and may achieve their full objective after some time. This again is a useful method in negotiations.

It is also relevant to recapitulate here the bilateral route followed by the major developed countries on especially difficult and important proposals. Faced with stiff initial opposition in multilateral discussions, they will take up the subject with some countries in bilateral talks. In this manner, each of these countries is isolated. In such a situation, it finds it very difficult to resist the proposal. A number of bilateral agreements are thereby reached. Thereafter, when the proposal comes up for consideration in the multilateral forum, quite naturally the developing countries that have already agreed to it in the bilateral talks do not put up any resistance.

The major developed countries main motivation arises from their determination to expand the economic space for their manufacturers, traders, service providers, inventors and investors. With their own low economic growth rate of about two percent and near-zero population growth, demand expansion in their countries is limited. The developing countries, on the other hand, are considered highly attractive as potential markets for their goods and services and also for high returns on investments. The current consumption level in these countries is low and the population is large; as such, even a modest rise in the per capita income is likely to boost demand significantly. Moreover, those developing countries which are on a fast-growth path would be able to provide enhanced opportunities for the fast-growing technology sectors and intellectual property owners of the developed countries.

The major developed countries consider the WTO as a useful institution for attaining these objectives. There are various reasons for this. Firstly, they have found, from their past experience that they are able to push their way in the GATT/WTO as they are better

while formulating the initial proposals for the GATT, considered it desirable to keep agriculture under a softer discipline compared to that applicable to the industrial sector. Clearly their principle of totally free trade born of free international competition was not considered by them desirable in this sector.

Then within one decade of the operation of the GATT, the US wanted to shed off even the softer disciplines in this area. It sought and obtained a permanent waiver from its obligations in this sector in the GATT, as has been mentioned earlier. The EEC also did not lag behind. It introduced an elaborate system of protecting its farmers by providing subsidies. Clearly their professed belief in free trade was not to be translated into actual practice in the agriculture sector. Recently in Doha round US disregarding the apprehension of the developing countries and in violation of basic principles of GATT has increased the amount of subsidy by 10 billion dollars which would be granted to farmers in next 10 years. According to Mr. Koleen Petroson, Chairman Agriculture Committee of US Senate, the amount given in recent subsidy is 4 billion dollars more than subsidy funds suggested by the White House, for which legislation is being prepared.[20]

(b) Textiles

The real crunch, however, came in yet another sector, viz, textiles. In over three decades, the conduct of the major developed countries in this sector has exposed them to well-founded criticism that they practice double standards in the GATT/WTO system, that their pronouncements on their belief in free trade are only lip service and they will be prepared to violate any rule if it suits them. The following description of events will make these points clear:-

[20] A news in Daily "JANG" Newspaper dated 28 February 2008.

www. world trade review. com visited on 2 April 2008.

Within just over a decade of the start of the GATT, the textile industry in the major developed countries found itself unable to compete with the imports from Japan and the developing countries. In the normal course of the operation of free market forces and free trade, these industries in the major developed countries would have been allowed to face the consequences. They would have eventually closed down, and the resources of these industries would have been utilized more efficiently in some other sectors. The normal market forces would thus have made competitive imported textiles available to the consumers and would have also resulted in more efficient allocation of resources of the developed countries. But the major developed countries ignored all principles of free trade and efficient allocation of resources. They did not wait to analyse the cost and benefit of free trade for their economies; they just curtailed the import of textiles.

An option within the GATT which the developed countries had at that time was to take action under Article XIX of the GATT, i.e. under the provisions of the safeguard clause. But this would have required a developed country to restrict the imports from other developed countries too, which they did not want to do.

The major developed countries neither allowed the normal market forces to operate freely nor followed the path allowed by the GATT. They simply decided to ignore their obligations under the GATT and by pass it. They decided to carve out special trade rules in the textiles sector in derogation of the normal GATT rules. They persuaded and pressurized the developing countries into agreeing to a special restrictive regime in this sector. The essential operative mechanism was that there would be determined limits to the export of textile times form a developing country to a developed country.

In this manner, the principles of free trade, enhancement of welfare by liberalization of trade, increase in economic efficiency by the market forces making correct allocation of resources and the hands-off policy of governments, so often preached by the major developed countries, were all thrown to the wind.

The special regime in this sector took the form of the Short-Term Agreement (STA), Long-Term Agreement (LTA), Multi-Fibre Agreement (MFA, 1973-94) and the Uruguay Round Agreement on Textiles and Clothing (ATC, 1995). The developed countries went on insisting on extending the MFA, which had been initially installed for four years, i.e. 1973-77. The governments in the major developed countries should normally have been expected to prevail upon their textile sector to bring about industrial structural adjustment, but they did nothing like it. Instead, they continued to be led by their industry into more and more severe protectionist arrangements in this sector. The result was that the special trade regime in this area instead of gradually progressing towards trade liberalization, became increasingly restrictive. The product coverage expanded from cotton in the STA and LTA to wool and man-made fibres in the MFA, which was further enhanced to cover some other fibre silk jute and silk blend. And finally the ATC added to it, by including pure silk.[21]

Reinforcing these restrictions was the enthusiasm of the major developed countries in implementing measures which were of doubtful legality even on the basis of this special regime.

Hypocrisy reached its height in Article 6.1 of the MFA. It included a provision formally recognizing the need to provide more favourable terms to the imports from

[21] Sanjoy Begehi (2001), International Trade Policy in Textiles: Fifty years of protectionism, Geneva: International Textiles and Clothing Bureau pp 102-105.

developing countries in applying restrictions. The restrictions under the MFA were meant to be applied mainly against the developing countries, which in fact became the sole target (with the solitary exception of Japan); and yet this provision talked about more favourable terms to the developing countries. [22]

(c) Grey-Area Measures

The textile sector was only the beginning of the story. As the industries of the major developed countries found it difficult to face competition from imports, they prevailed upon their governments to restrict imports in other sectors. These were more sinister moves, as, unlike the MFA, there was no arrangement for any multilateral surveillance in these areas. The sectors covered were jute, leather, etc. The mechanism was that the developed importing country would ask the developing exporting countries to agree "voluntarily" to restrict exports to a specified level. Such suggestions were backed by the threat that imports would be stopped unilaterally if the exporting countries did not agree to restrict their exports. In order to avoid total dislocation of their trade, the developing exporting countries reluctantly agreed to such arrangements, which were ironically described as "voluntary export restraints" (VER). Since the exporting countries were made parties to these agreements, though under duress, they did not bring it before the GATT in the form of complaints. Hence, their strict legality was never tested, and they were given the rather elevated generic name of "grey-area measures", because of their doubtful consistency with obligations in the GATT.

Later, a similar grey-area arrangement was set up in the steel sector. The main exporting countries in this case were, of course, the developed countries and those of the

[22] Sanjoy Begehi (2001), International Trade Policy in Textiles: Fifty years of protectionism, Geneva: International Textiles and Clothing Bureau pp 114-115.

erstwhile socialist bloc. But a limited number of developing countries having interest in the export of steel were also covered by this restrictive arrangement.

When the US found it difficult to face competition from the automobile and chipmaking industries of Japan, it persuaded the latter to agree to restrict exports. At the same time, it also made the latter agree to certain minimum levels of imports of same products.

In all these cases, the principle of free trade and liberalised trade was completely ignored.

(d) Primacy of Unilateral Action

The GATT was formulated on the principle of supremacy of multilateralism over unilateral actions. But this basic element has often been ignored by the major developed countries. Some instances are given below:-

The Tokyo Round evolved a Code on subsidies, which allowed the developing countries a certain degree of flexibility in the use of subsidies in the course of their development. The US did not abide by it. It started a process of bilateral negotiations with the developing countries asking them to undertake obligations on reduction or elimination of their subsidies. It threatened not to extend the injury test criterion to the countries which did not come to a satisfactory bilateral agreement with it in these negotiations. This would have meant that the developing country concerned would have faced countervailing duties in the US even if the subsidies caused no injury to the domestic industry of the US. This would have had serious consequences for the developing countries; hence they could not resist the pressure in the bilateral negotiations. In this manner, the US went about extracting

commitments from the developing countries well beyond what was contained in the Code that had been finalized only a few months earlier.[23]

Then at the time of the negotiations on Trade-Related Aspects of Intellectual Property Rights (TRIPS) in the Uruguay Round, the US engaged in bilateral negotiations with several developing countries asking them to agree to certain standards of protection of intellectual property rights which were still under negotiation in the multilateral forum. In this manner, it tired to preempt the results of the multilateral process by obtaining bilateral commitments from the developing countries beforehand.

An example of a serious unilateral approach is Section 301 in the US Omnibus Trade and Competitiveness Act of 1988. It calls for trade retaliation within prescribed deadlines against countries that are perceived to have trade restrictions harmful to US trade ("Super 301") or are perceived to provide inadequate protection of intellectual property rights (Special 301"). Any trade restriction against a Member of the WTO can be taken by another Member only in accordance with the provisions of the WTO. A WTO panel that examined the relevant operative provisions of the US law found some of them to be not in accordance with the WTO. The panel, however, did not declare the US law to be in violation of the US obligations in the WTO and recommend a change in the law as the US administration had given some undertaking on its operation.[24]

2.5 Politicisation of WTO by developed countries

Often the developed countries caution the developing countries that the GATT/WTO

[23] Robert E. Hudec (1993),Enforcing International Trade Law: The Evolution of the Modern GATT Legal System, New Hampshire: Butterworth Legal Publishers pp 122-124.

[24] ibid at page 227.

should not be politicised. The gist of their argument is that each country has its own interest in this system, hence it should decide on its course based on its own specific trade interest rather than on any concern for political solidarity with other countries. Consequently, the major developed countries get very much disturbed when they notice any sign of consolidation of the position of some developing countries in respect of some issues or stand. However, the experience so far has been that, rather than the developing countries, it is the developed countries that have often pursued the course of mutual consolidation clearly for political reasons instead of for their own respective individual trade interest. Some examples are given below:-

(a) **Falklands-Malvinas Episode**

During 1982-83 Argentina and the UK fought over the group of islands which the UK called the Falklands and Argentina called Malvinas. Argentina sent its armed forces to the islands and assumed control of them. Then the UK sent its navy and regained control. During this course of events, the UK and several other developed countries imposed trade sanctions against Argentina under Article XXI of the GATT 1994, which is meant for measures for security reasons. It was quite understandable that the UK took such action as it was involved in conflict with Argentina. But the other developed countries had no valid reasons to invoke Article XXI in this case. They were not at war with Argentina, nor did the latter harbour any belligerent intentions towards them. It is obvious that their action was taken to demonstrate their political solidarity with the UK, rather than for any specific trade reasons of their own which could have necessitated action under the security provisions of the GATT 1994.[25]

[25] Falklands/Malvinas: Breakdown of Negotiations and Appendix B, "Early History and Legal issues, Lippimcott, Don (Revised by Gregory F. Treverton), 1986.

http://www.global security.org/military/world/war/malvinas.htm visited on 28 December 2008.

(b) US Action Against Nicaragua

In 1986, the US boycotted all trade with Nicaragua. It was unhappy with the then government of Nicaragua and did not want to have any dealings with it. It took the trade-restrictive action invoking Article XXI of the GATT 1994 on grounds of national security. Nicaragua brought the matter before the GATT and argued that it could not be a threat to the security of the US at all. The EEC and many other developed countries sided with the US.

They laid a condition that the panel hearing the dispute could not examine the validity to the security defence. Ultimately Nicaragua could not get any relief. [26]

(c) US Action Against Poland

In 1982, the US withdrew MFN treatment to Poland because of the treatment given by the then Polish government to the Solidarity movement in that country. The US explained that it was using the protocol of accession of Poland for such action. In any case, the action against Poland was clearly taken for non-trade reasons. [27]

(d) The Textile Story

It has been explained above that the major developed countries sponsored a special trade regime in the textiles sector in derogation of the normal GATT rules. It has been

[26] Robert E. Hudec (1993): Enforcing International Trade Law: The evaluation of modern GATT system, Salem, New Hampshire: Butterworth Legal Publishers p 202.

http://en.wikipedia.org/wiki/nicaragua-Vs-Us visited on 28 December 2008.

[27] ibid at p 203.

pointed out that the normal GATT-consistent approach would have been to take trade-restrictive measures under the safeguard clause of Article XIX of the GATT. But the major developed countries did not follow this route as it would have required them to put restrictions also on the imports from other developed countries. Here against, their consideration for the other developed countries prompted them to ignore the normal GATT rules and evolve new rules altogether.[28]

Further, when the new regime of the MFA was established, it did not specifically mention that restrictive action could only be taken against imports from the developing countries. Such action could be taken against any country if the imports were causing market disruption in the importing country. But no action was ever taken against any developed countries, except for Japan for some time, even though imports from some of these countries had been grown fast. Thus, in the operation of the MFA, the developed countries adopted a policy of "mutual forgiveness" or mutual exemption under "gentlemen's agreement", as has been variously described by experts. [29]

2.6 Restriction on Imports

(a) Tariffs

Normally there can be no restriction on imports except by imposition of tariffs, i.e. customs duty. In the course of the Multilateral Trade Negotiations (MTNs) and sometimes even otherwise countries undertake obligations not to raise tariffs on specified

[28] Sanjoy Bagchi (2001), International Trade Policy in Textiles; fifty years of protectionism, Geneva Textile and clothing Bureau, p 102.

[29] ibid at p 106.

products beyond specified limits. These tariffs are said to be "bound". A country may apply a tariff lower than the bound level on that product, but it cannot go beyond the bound level except through a safeguard action or balance-of-payments action. It may also raise the bound tariff level itself; but for this purpose, it has to negotiate with the countries which have interest in the export of that product and has to offer compensation in the form of reducing its tariffs on certain other products of interest to these countries.

As mentioned in the beginning, tariffs have been substantially reduced over the several rounds of MTNs. In fact, tariffs generally do not operate as a material hindrance to trade among the developed countries, since their tariffs are very low on the products of mutual export interest to them. Also, customs duty is not a substantial source of revenue for them.

The situation is different for the developing countries. Customs duty is an important and convenient source of revenue. It also enables them to ration their scarce foreign exchange among competing imports; for example, they can discourage the import of luxury products and encourage the import of industrial raw materials by having high tariffs on the former and low tariffs on the latter. More importantly, tariffs are virtually the only instrument for protecting their industries from competing imports, as they have almost fully abolished their other import control measures and do not have adequate financial resources to provide domestic subsidies.

Quite naturally, they maintain comparatively higher tariffs than the developed countries. The major developed countries and the purist liberal trade theorists often frown upon it, but there is a good rationale for it. The developing countries have comparative handicaps in the system, and tariffs are an important instrument to provide some balance.

Tariffs are an important tool in the industrial policy of the developing countries, in particular in climbing the ladder of industrial upgradation.[30]

(b) Safeguards

Discouragement of imports through imposition of tariffs is allowed as mentioned above, but direct restraint of imports is prohibited, except under three specific situations, viz, for safeguard purposes, to address balance-of-payments (BOP) problems and as exceptions for environmental and other reasons.

Detailed rules have been laid down for taking safeguard measures, i.e. measures to safeguard the domestic industry. A country can take a safeguard measure if its domestic industry is suffering serious injury or there is a threat of serious injury to it. A country, before actually imposing import restrictions under this provision, has to undertake a transparent, objective and detailed investigation to determine whether the preconditions for applying the safeguard measure are met. The restriction may be in the form of raising of tariff above the bound level or laying down quantitative limits on imports.

An important feature of the safeguard measure is that it has to be generally taken on a non-discriminatory basis against all exporting countries. If the safeguard measure is to be in the form of a quantitative limit, the importing country normally lays down the global quota of imports which it would be permitting; and then this quota is distributed among the exporting countries on the basis of their past exports of the product to this country. There is a provision for deviation from this normal rule of quota division in very specific circumstances, for example, if there has been a rapid rise in exports from a particular country.

[30] Report of the panel on "India-Quantative Restrictions on Imports of Agricultural, Textile and Industrial Products". WTO document WT/DS 90R dated 6 April 1999.

The safeguard measure is to be a temporary measure. The maximum duration for which a measure can be applied has been prescribed and there are restrictions against repeated application of the safeguard measure on a product.

The safeguard is based on the principle of burden-sharing in the GATT/WTO system, as mentioned earlier. When a country suffers from a sudden rise in imports and its industry is required to adjust to the emerging situation, this provision ensures the burden is shared by the entire membership of the system. In its absence, the burden of adjustment would fall totally on the country suffering from the surge in imports. In some ways, it is the counterpart of the MFN provision which ensures benefit-sharing among the membership.

(c) **BOP Problems**

A country is allowed to restrict its imports if it faces a BOP problem. The developed countries have discontinued resort to this provision. Developing countries continue to have this option, but the actual utilization of this provision has become very difficult for them. A developing country, while taking such action, is required to give preference to price-type measures (i.e., those affecting the product price directly, e.g. raising of tariff beyond the bound level or imposing some other type of charges on the import) over quantitative restrictions on imports.

The measure is to be temporary and is to be continued only if the BOP problem persists. The developing country applying a BOP measure is called upon to have consultations with the BOP Committee of the WTO, where it is subjected to a great deal of detailed scrutiny on its BOP situation and also on its need to impose trade restrictions for BOP reasons. Generally the International Monetary Fund (IMF) gives a report during such consultations on the BOP situation of the country.

This provision is not a special "favour" to the developing countries; instead, it is in the nature of a balancing provision for a special handicap. The rationale behind this provision is that a developing country, in the course of its development, will be needing high volumes of imports and it may not have commensurate export earnings. This may result in a BOP problem. To resolve this problem, the country may need support from other countries, in terms of restricting those imports which are not a priority for its development purposes. Hence, the choice of the sectors on which import restraints are imposed is left to the country itself. There is, however, multilateral surveillance through the consultations in BOP Committee on the desirability of continuing the overall BOP action.

Like the safeguard action, a BOP measure also has to be non-discriminatory as between different exporting countries. Hence, if there is a quantitative restriction on the import of any product, its implementation has to be done on a non-discriminatory basis.

In the past, many developing countries applied BOP measures by laying down quantitative restrictions on imports. No compensation needed to be paid to other countries in this case. Hence, the developing countries took recourse to it liberally. But now the rules and practices have been made more strict; hence hardly any developing country is able to take a BOP measure.

Imports can also be restricted according to the general-exception provisions contained in Article XX of the GATT 1994. The most prominent and frequently used of these provisions are those for environmental reasons, in particular those for protection of the life and health of human beings, plants and animals. The provisions of this article are further elaborated, clarified and supplemented by the Agreement on Technical Barriers to Trade (TBT) and the Agreement on the Application of Sanitary and Phytosanitary (SPS) measures.

Article XX of the GATT 1994 also has provisions for the preservation of exhaustible natural resources.

The agreements on TBT and SPS stipulate the formulation of international standards and give pre-eminence to them. If a country adopts these standards and measures, it will be presumed that these are "necessary". Otherwise, if a country formulates its own standards or SPS measures, it has to justify that these are "necessary", i.e., the burden of proof is on the country in this case. Also, it has to justify that the standards are not "unnecessary obstacles to international trade" and the SPS measures are not applied in a manner which would constitute a "disguised restriction on international trade". It has been widely established now that a measure will not be considered "necessary" if its objectives can be fulfilled by taking measures which are less trade-restrictive.

If a country proposes to establish its own standards which differ from the international standards, there are elaborate procedures for prior notification of the standards, for opportunities to others to make comments and for consideration of these comments.

The measures for the preservation of exhaustible resources, however, have to satisfy a somewhat less stringent condition. In this case, the requirement is only that the measures should "relate" to the preservation. Thus the criterion of "necessity" has been replaced by "relationship". But even these measures have to satisfy the overall condition that they are not applied in a manner which would constitute a "disguised restriction on international trade".

(d) **Unfair Trade**

Two types of practices are considered to cause "unfair trade", viz, subsidies and dumping. A subsidy is a government measure, whereas dumping is the practice of a firm. Both of them are supposed to distort trade in an unfair way. There are provisions for remedial actions against such measures. The disciplines in respect of subsidies and dumping are

contained in the Agreement on Subsidies and Countervailing Measures and the Agreement on Anti-dumping. The original provisions on these subjects contained in Articles XVI and VI of the GATT 1994 are also applicable in so far as they do not conflict with the two agreements mentioned above.[31]

(i) **Subsidies**

This aspect of subsidy was recognized earlier in the GATT. For example, the Tokyo Round Code on Subsidies says: "Signatories recognize that subsidies are an integral part of economic development programmes of developing countries ... Accordingly, this Agreement shall not prevent developing country signatories from adopting measures and policies to assist their industries, including those in the export sector... There shall be no presumption that export subsidies granted by developing country signatories result in adverse effects, as defined in this Agreement, to the trade or production of another signatory. Such adverse effects shall be demonstrated by positive evidence, through an economic examination of the impact on trade or production of another signatory... A developing country signatory should endeavour to enter into a commitment to reduce or eliminate export subsidies when the use of such export subsidies is inconsistent with its competitive and development needs". Clearly the WTO Agreement on Subsidies and Countervailing Measures has now curtailed the options and flexibility of the developing countries.[32]

Another relevant factor to be considered is the differential abilities of the developed and developing countries in providing subsidies to their industry and trade. If the developed countries are permitted to provide subsidies, they can do so quite conveniently as they have

[31] http://www.wto.org/englis/tratop-e/adp-e/adp-e.htm visited on 29 December 2008.

[32] http://www.wto.org/english/thewto-e/whatis-e/agrm8-e.htm visited on 29 December 2008.

instrument of protection for their industry. On several occasions, the developed countries have initiated an anti-dumping investigation which leads to a finding that there is no dumping or there is no injury. In such a situation, anti-dumping duty is naturally not imposed, but the exports of the developing country facing such an investigation would be disrupted considerably only on such action. Thus even the launch of an investigation is enough to harm the trade of a developing country.

There is yet another aspect. Most of the developing countries have embarked on a massive liberalization of their import regime. There is a possibility of dumped exports from developed countries entering the market frequently and in huge volumes. The risk gets aggravated, as the firm in the developed countries may have adequate financial resources to sustain dumped exports. The motivation for dumping is particularly enhanced in times of under-utilization of their production capacity in the domestic market, which is generally the case during times of recession in a country.

It is in this background that one should assess a particular suggestion which has been made in some quarters for some time. It has been suggested that since the developing countries are being harassed by the developed countries through anti-dumping investigations and measures and since anti-dumping is being used there as a neo-protectionist tool, a preferred course may be to abolish the provisions on anti-dumping in the WTO altogether. Lately, some developing countries have also been arguing on economic grounds, in the context of the study on competition in the WTO, that anti-dumping action undermines competition as it puts constraint on an exporting firm in determining the price of its product. Further, it has also been argued that anti-dumping measures cause welfare loss to the consumers who are denied the benefit of buying the product at a lower price.

These arguments are persuasive; but the real situation at present is that the developing countries themselves need the anti-dumping provisions to protect their industries from dumped imports, particularly from the developed countries. It is desirable for the developing countries to retain the option of taking anti-dumping action; otherwise their industries may suffer unfair and even fatal competition from the dumped exports of the developed countries.[34]

Another aspect of the rules on dumping is noteworthy. As we know that dumping occurs when the export price is lower than the price in the exporting country. This provision should operate more in favour of the developing countries, as often their domestic prices are lower than those of the like products in the developed countries. It is thus very likely that an exporter of a developing country will charge a higher price for the export of a product to a developed country than the price prevalent in the exporting (home) developing country. Exactly the opposite is true for the products of the developed countries. Hence, if comparison of the export price with the price in the exporting country is taken to be the basis for determining dumping, it should generally be difficult to prove dumping in the case of the exports from the developing countries to the developed countries. But the developed countries often do not adopt these parameters for comparison; they prefer to adopt other methods, e.g. comparing the export price with the cost of production.

[34] Article 14 of the Tokyo Round Code on subsidies by Bhagirath Lal Das, 1998 pp 115-117.

Article on WTO, anti-dumping law and tariff published in the World Trade Review newspaper by Mr. Saeed, dated 16-31 March 2008 p-5.

CHAPTER 3

RESPONSE BY DEVELOPING COUNTRIES

3.1 Complex Task and Adverse Environments

In contrast to the developed countries, the developing countries are in a very weak state in the WTO. Often, most of them find themselves completely lost in the jungle of negotiations there. Their task is quite formidable for many reasons.

Firstly, the subjects and pattern of negotiations are now much more complex than in the past. For example, the negotiations on the liberalization of financial services or in the various areas of intellectual property rights are really intricate. Likewise, participation in the dispute settlement process, either as a complainant or as a defendant, has become very complex, because of the intricacies of the legal interpretation which has routinely become a part of the panel or appeal process in the disputes these days.

Secondly, the subjects covered by the agreements of the WTO now have deeper and wider implications for a nation's economy, particularly that of the developing countries. For example, the agreements in the areas of services and IPRs, which are the new entrants into the system, may have significant impact on the production process, technological development, operation of financial institutions like banks and insurance firms, inflow and out flow of funds on the non-trade account, vital modern infrastructure, like telecommunication, etc. The new agreements in the areas of information technology goods and electronic commerce will have significant impact on the countries revenue resources too.

Thirdly, the role of the developing countries has undergone a basic change. Earlier, they negotiated for getting concessions; whereas now the negotiations are more about their giving concessions, which is naturally much more difficult.

Fourthly, the economic of the developing countries are much more vulnerable at present than before, because of their own weakness and also exposure to an uncertain external environment.

Fifthly, the developed countries, particularly the major ones, are more coordinated in their objectives and methods in the WTO, whereas the developing countries have been losing whatever solidarity they had in the past.

Finally, the environment in which these negotiations are now taking place has also changed significantly. In the 1960s, 1970s and early 1980s, the developed countries perceived the developing countries as partners in economic progress and growth. The problems of developing countries received sympathetic and serious consideration on the basis of enlightened self-interest. But since the mid-1980s, the developed countries have been proceeding with a new confidence in their capacity to solve their economic problems by proper coordination of their own macroeconomic policies. Their concern for the needs of the developing countries has thereby diminished. [35]

3.2 Compulsions to be in the GATT/WTO

Given the above scenario, the following question naturally arises: why are the developing countries in the WTO if it is not working to their advantage and welfare and is so unbalanced and iniquitous? Out of the 23 original signatories to the GATT 1947, there were as many as 12 countries that are currently classified as developing countries.

[35] www. third world network Malaysia. com visited on 10 August 2008.

Many developing countries joined the GATT/WTO later. Now a number of the remaining developing countries are trying to join the WTO. Amidst all the problems, what attraction does WTO membership hold for these countries? The answer lies partly in the past and partly in expectations for the future.

In the initial negotiations for tariff reduction in the rounds prior to their Tokyo Round, there was practically no expectation on the developing countries to reduce their tariffs, whereas they were eligible to benefit from the reduced tariffs of the developed countries through the operation of the MFN principle. Thus there was not much cost to them. The cost materialized to some extent only in the Tokyo Round and then in a big way in the Uruguay Round and later. Thus the initial attraction to them was the application of low tariffs through the operation of the MFN principle. This may give an impression that it was a "free ride", i.e. one-way benefit to the developing countries; but it also benefited the developed countries. Their opportunities in the markets of the developing countries expanded as some of the developing countries progressed along the development path.

The developing countries are attracted to the GATT/WTO system as they hope that it will provide a predictable and stable trading environment that can have a beneficial effect on their development.

There are also other compulsions and motivations for the developing countries to join the GATT/WTO. A country that is not in the GATT/WTO will have to contract bilateral trade agreements with other countries for the conduct of international trade. It cannot conduct the business of export and import with another country without an agreement, as the goods of a country do not have free access into another country automatically nor does a country have an automatic right to import goods from another

country. Membership of the system obviates the need for such a plethora of bilateral agreements. Besides, it is almost certain that a developing country will not get more favourable conditions in a bilateral agreement than what it has in the GATT/WTO. The recent experience of some developing countries has been that they are asked to yield much more in bilateral agreements than what would be the norm in the WTO. Even a big country like China, before it joined the WTO, had to face a very unpleasant experience when renewing its bilateral agreement with the US every year. Hence, a developing country prefers to be in the system rather than out of it, even though it may not be a totally beneficial system. It is something like choosing the lesser of two evils.

Also, the multilateral system provides some safeguard against unilateral subjective actions of major developed countries. The dispute settlement mechanism, though deficient and iniquitous, does provide some protection to a weak country against possible subjective and arbitrary decisions of powerful countries.

Then there is also some hope among the developing countries, particularly those that are comparatively stronger, that they can influence the system to some extent and prove it in future. This cannot be achieved if they remain out of it. They may also have some faith in their strength in numbers in the WTO and may be expecting this to have a role in future.

3.3 Ground experiences of the developing countries

(a) Export Prospects Capped

The actual experience of the developing countries has been that their numerical advantage in the GATT/WTO has not helped them. Even though the decision-making process in the WTO is on the basis of one-country-one-vote and a decision, in the absence of a consensus, is normally to be taken by the majority, the developing countries

have hardly had a decisive voice, whereas the developed countries have had almost everything going their way, sooner or later. This is the big irony of the GATT/WTO process. Their real reason for this lies in the strength and strategies of the developed countries, explained earlier, and the weakness of the developing countries, to be explained later. First, we should note important examples of the unfortunate experience of the developing countries.

As mentioned earlier, developing countries got the theoretical benefit of lower tariffs in the developed countries without having to reduce their own tariffs. Very few developing countries could actually avail themselves of this facility, however, because they did not have adequate supply capacity in the products on which tariffs in the developed countries had been lowered. Some countries in Latin America, South-East Asia and East Asia did build up their supply capacity and got the benefit of entering the developed countries markets. But as they started expanding their exports to the developed countries, they faced various problems. Some of them are as follows:-

The first problem was faced in the textile sector. This is an area in which some developing countries had made investment and built up supply capacity. But as their exports to the developed countries picked up, these were curtailed by the introduction of a special trade regime in the textile sector, as has been explained in detail earlier. The exports from individual developing exporting countries were almost caped. Thus, the prospects of future expansion of industrial production in this area where competitiveness had been achieved by these developing countries were wrecked.

The developing countries also faced similar problems in other areas where their exports started competing with the domestic production in the major developed countries. Special restrictions were imposed in some of these sectors, like jute, leather and steel, as

had been explained earlier. Thus, future expansion in these areas was made almost impossible, and in fact even the existing production was threatened, as there was a lowering of confidence in the future of these sectors in the developing countries.

Later, the developed countries adopted more innovative methods of protection. A large number of anti-dumping investigations were started in respect of the export products of the developing countries. In some cases, anti-dumping duties were also imposed. Even if the investigations indicated that there had been no dumping and thus duties were not imposed, the trade and production would nevertheless still suffer because of the uncertainty caused by the initiation of investigations itself.

Lately, some other methods of protection have been used. The major developed countries started restraining the exports from the developing countries ostensibly to protect the environment. These trade-restrictive measures were taken under the general-exception provision of Article XX of the GATT 1994 and also under the TBT and SPS agreements. A spate of investigations got started and in several cases imports were stopped. In many cases, the GATT/WTO dispute settlement panels later found the actions of the major developed countries to be wrong. Even though the measures were thus lifted, a lot of damage had already been done.

There appears to be no end to the conception of instruments for curbing the export prospects of the developing countries. New methods of protection are constantly sought to be introduced. The major developed countries are trying to introduce the social clause, i.e. labour standards, in the WTO, which can be a potential tool of neo-protectionism.

(b) Developing Countries Interests Ignored

The main interests of the developing countries have generally been ignored in the GATT/WTO. Part IV was introduced in the GATT 1947 but its provision were never

seriously implemented by the developed countries. Then, as a follow-up to the Haberler Report, tropical products were identified for special liberalization in the developed countries in the early 1960s so as to give some benefit to the developing countries. But the developed countries did practically nothing in this area.[36]

In recent years, there have been more pronounced cases where the interests of the developing countries have been ignored. It is relevant to cite some examples here. Tariffs in the developed countries on the products of special export interest to developing countries continue to remain high. Quantitative restraints on imports continue to exist in some important sectors of interest to them like textiles. Practically nothing has been done to eliminate or reduce the harassment of the developing countries through measures taken on grounds of anti-dumping, conformity with technical standards, protection of the environment, etc. Service sectors of interest to them have not been taken up for serious negotiations; for example, the movement of labour in the liberalization of services has been given very little consideration so far. The possibility of unilateral trade action by the US till remains in its legislation and it continues to be a threat to the developing countries.

(c) Less-Than-Equal Treatment

It is ironical that the developing countries have been accorded less-than-equal treatment in the GATT/WTO, rather than getting special and more favourable treatment as should have been the case. Some examples are cited here:-

1. The process of enforcement of rights and obligations through the dispute settlement process is very complex and costly. The capacity of the developing countries

[36] www. twnside.org.sg/title/undp2.htm visited on 30 December 2008.

in resorting to this process is constrained because of the cost involved; and they may sometimes have to live with the impairment of their rights as they cannot afford the cost of enforcement. Similarly, their capacity to defend themselves against the complaints brought by other countries is also limited. There is a further handicap in that they cannot easily take to retaliation, which is the ultimate instrument for enforcement of rights and obligations, as has been explained earlier. The developed countries do not suffer from these handicaps. Clearly, the developing countries are placed in a disadvantageous position in respect of enforcement of rights and obligations.

2. In the area of subsidies, the measures mostly used by the developed countries were made immune from counter-action, e.g., subsidies for research and development, adaptation to new environmental standards and regional development. But the subsidies normally needed by the developing countries for their industrial diversification and technological upgradation did not get such favoured treatment. Further, immunity to export credits granted in accordance with OECD norms (proviso to item (k) in Annex I to the Subsidies Agreement) is like special treatment to the developed countries, something like special and differential treatment in reverse. It is almost impossible for the developing countries to take advantage for this provision; it benefits only the developed countries.[37]

3. In the area of tariffs, agreements on zero tariff for certain products which are mainly of export interest to developed countries were rushed through in the Singapore Ministerial Conference in December 1996. Then during the Ministerial Conference in

[37] http://en.wikipedia.org/wiki/OECD visited on 30 December 2008.

Geneva in May 1998, there was a provisional agreement on standstill in respect of the duty on electronic commerce, which practically means zero duty. Products of export interest to developing countries have never received such prompt and decisive consideration in the GATT/WTO System.

4. Negotiations on services sectors of interest mainly to developed countries, have been rushed through culminating in agreements, e.g., financial services and telecommunication services. But the subject of main interest to the developing countries in this area, viz, the provision of services by movement of persons, has not got proper attention.

5. International technical standards and rules of origin are being formulated which will have important implications for the market access of goods. The developing countries have hardly got the resources and capacity to participate in this process. In spite of that, the system does not wait for them and goes about finalizing standards and rules which may have an adverse effect on their market access.

6. In the agriculture sector, the subsidies used mainly by some developed countries (listed in Annex 2 to the Agreement on Agriculture), e.g., those for research and development, crop insurance, etc., have been made immune from any counter-measure. But the subsides needed generally by the developing countries (some of them included in Article 6.2 of the Agreement on Agriculture), e.g., land improvement subsidies and input subsidies do not enjoy such favoured treatment.

7. The eligibility criteria for applying the special safeguard provision in agriculture for protecting farmers without the need to prove injury to domestic production have been framed in such a manner that while the developed countries can use this provision, the developing countries, with very few exceptions, cannot use it.

8. In the textiles sector, as mentioned earlier, developed countries have followed in practice of "less-than-equal treatment" of developing countries for more than three decades. A special multilateral trading regime was introduced in this sector in the early 1970s in derogation of the normal GATT rules and it has continued for some three decades.

9. As mentioned earlier, some other products of interest of developing countries, e.g. leather, jute, etc, have been subjected to special import restraints in developed countries.[38]

(d) **Victims of Traps and Pitfalls**

The developing countries have often been the victims of traps and pitfalls. They have been rushed into agreeing to certain provisions which were found later to be dangerous. Also sometimes, they have been given some seemingly favourable treatment in some agreements on some points perhaps to silence their opposition; but in actual practice these have not proved to be beneficial at all. Later experience showed that these provisions were merely traps for the developing countries. Some examples from the areas of textiles, agriculture,, service and anti-dumping are given below:-

1. In the textiles sector, the developed countries undertook the obligation to liberalize their restraint regime progressively from 1995-2004. The liberalization was to be done in terms of percentages of the import of products listed in an annex to the Agreement on Textiles and Clothing. The trap lay in the fact that the annex contained a large number of products, many of which were not actually under restraints. There was hardly any likelihood of their coming under restraints in future either. The developed

[38] Third world network; implementation related issues and concerns by Lal Das, 1998 pp 10-14.

countries took advantage of this provision and included in their liberalization at various stages mostly the products from the annex that were not under restraints. Thus the developing countries did not get the benefit of any significant liberalization that they had expected from the agreement.

2. The Agreement on Textiles and Clothing also contains a provision that may be in the nature of a trap. Its Article 7.3 contains a requirement of sectoral balance of rights and obligations concept, which is alien to the GATT/WTO system that works on the principle of overall balance. There are grounds for apprehension that this is a trap which may be used to justify the possible reluctance of developed countries on the mandated deadline of 1 January 2005 to abolish the special restrictive regime in this sector on the pretext that developing countries have not adequately liberalized their own textile sector.

3. In agriculture too, Annex 2 to the Agreement on Agriculture contains a list of the types of subsidies which were made immune from any compulsory reduction or any counter-action. These subsidies are mostly used by the major developed countries. In actual experience, this provision has proved to be a dangerous trap. The developed countries have been able to subsidise their farmers in a massive way through this loophole. Besides, there being no cap on the subsidies in this annex, the major developed countries have in fact increased these subsidies to more than offset their reduction of the reducible subsidies.

4. In the services sector, a provision has been introduced in Article XIX of the General Agreement on Trade in Services allowing the developed countries to undertake liberalization commitments in fewer sectors and fewer activities. On the face of it, this appears attractive. But in actual practice, it did not provide any benefit to them, as the method of enforcement of this provision has not been specified. In actual experience, this

provision was ignored by the developed countries, and the developing countries instead found themselves pressurized by the major developed countries into giving major concessions.

5. The special provision on dispute settlement in the Agreement on Anti-dumping is also an example of a major loophole. While this agreement has brought some objectivity into anti-dumping investigations, the whole subject of anti-dumping has been practically excluded from the normal dispute settlement process of the WTO. In these cases, the role of the dispute settlement panels in pronouncing whether an action or omission of a country violates its WTO obligations has been severely curtailed, a role which is almost a routine feature in the disputes in all other areas. Although the limitation imposed by this provision has not actually been experienced by the panels so far, the fact remains that such a limiting provision exists and there is a potential for imitation of the panel's role.

(e) **Victims of Harassment**

The developing countries have often had the sad experience of being harassed. This has been particularly pronounced after the Uruguay Round and after the formation of the WTO. Two specific examples are given below, though there are other similar examples:-

1. Immediately after coming into force of the WTO agreements on 1 January 1995, the US took a large number of "transitional" safeguard actions against the import of textiles from the developing countries. Some of these cases were brought before the dispute settlement machinery of the WTO and were found to be illegal. Though the measures were removed by the US following the pronouncements of the panels/Appellate Body or even on its own, the actions had already resulted in severe harassment of the developing countries.

The situation has been somewhat changing lately. Now more and more developing countries are trying to familiarise themselves with the issues and participate in the meetings. This may probably be due to two reasons. Firstly, their domestic industry and trade sectors are feeling the adverse impact of the workings of the WTO agreement and are thus motivating their governments to participate more effectively in the meetings and discussions. Secondly, the Ministers and senior officials of the developing countries have been rather frustrated at being pushed around in the Ministerial Conferences. This might have given impetus to their increasing assertiveness.[39]

(b) **Stiff Resistance and Sudden Collapse**

Some developing countries, though very small in number, participate keenly in the meetings and discussions. But very often, they do so without a detailed examination of the subjects under discussion. They do not have adequate resources for a deep analysis of the issues. Most of the time, they work on the basis of their quick and instinctive response to the proposals. If they feel that any proposal is not in the interest of their country, they oppose it firmly, sometimes almost till the very end. But finally, with intense pressures built up by the major developed countries in their capitals, they also drop their objections and become sullenly silent, particularly when the other developing countries have acquiesced in the proposal. At that stage, the only way they can prevent agreement on the proposal is by openly and formally withholding consensus. But a developing country may find it very difficult to stand out as a lone opponent of some proposal which is not being objected to by any other country. It will appear to be

[39] Tilting balance against South, Trade and development series 9, Penang; by Chakravarthi Raghavan, 2000, Third world network pp 24-26.

blocking a forward move which has been agreed to by all the others, and thereby incur a high cost in its international economic and political relations. The immediate political cost of withholding consensus may appear much heavier than the burden of the future obligations in the agreement.

Such persistent initial opposition and sudden collapse at the end evokes the example of an army running away in confusion from the battlefront, rather than having a well-planned strategic retreat. Apart from the battle being lost, the added danger is that it is very difficult to put the army unit back into fighting formation quickly again.

The transition from persistent and vocal opposition to sudden collapse into acquiescence results in denial of the opportunity to get commensurate benefits in return for the concessions finally made in the negotiations. [40]

(c) Caught in a Vicious Cycle

The description given above indicates that the developing countries, though constituting more than two-thirds of the membership of the WTO, have been treated as second-class Members in the system. They are like aliens in their own home. Their rights and options have been curtailed without any commensurate benefit in return. Their vital development interest have been ignored in the negotiations and resulting agreements. Their weakness has enhanced their handicap in the system, which in turn, has further deepened their weakness. It has been a vicious cycle of weakness and deprivation.

[40] Chakravarthi Raghavan (2002), Developing Countries and Services Trade; chasing a black cat in a dark room; Third world network pp 76-78.

CHAPTER – 4

FUTURE PROSPECTS OF WTO'S SYSTEM WITH SPECIFIC RECOMMENDATIONS

4.1 Need for a Multilateral Trading System

The discussions in the previous chapters have shown that though there are some positive elements in the current multilateral trading system, it is mostly operating against the interest of the developing countries. Also, it is neither oriented towards development nor working for development, particularly that of the developing countries. A question naturally arises; should it be abolished or should the developing countries withdraw from it? This is not a purely theoretical question. There are strong opinions among some thinkers and activists, both in the developing countries and in the developed countries, that the WTO should be abolished. In several developing countries there are calls for these countries to withdraw from the WTO. Hence, this question must be addressed squarely. If the answer is "no", then serious thought must be given to improve the system radically so that it works for development and particularly in the interest of the majority of its membership.

The answer should, of course, be "no". A smoothly operating multilateral trading system is preferable to each country taking its own path according to its own subjective judgment. Industry and trade operate with a certain degree of confidence within an organized system. It ensures stability and predictability. It is conducive to long-term planning for expansion and growth. The experience of the developed countries during the last century with both the autonomous and the multilateral routes points to the relevance

and utility of the latter. Apart from the benefits in normal times, a multilateral system can provide a cushion against shocks in times of crisis.

A multilateral trading system can benefit all countries, but it can be particularly beneficial to economically weaker one. These days it is difficult even for a very strong country to fashion the external environment according to its own preferences. For a weak country it is impossible. A multilateral system can help it by generating and maintaining a healthy and beneficial environment. A collective effort by a large number of countries towards a common goal of creating an economic and trading environment which is generally beneficial to all and can go a long way to ensure the full utilization of the potential of these countries. Also, a multilateral system can protect a weak country against the subjective and whimsical actions of strong and powerful countries.

A multilateral system is useful if countries need to have trade across borders. Of course, one may argue: why trade at all; why can a country not be self-sufficient? Convincing theories have been built up over the past two to three centuries on the benefits of international trade. However, credible analysis has lately become available to indicate that international trade may not be an unmixed blessing; in any case, it may not lead to an assured growth path.[41] Economic transaction, in particular trade, between two grossly unequal partners may not be fully beneficial to the weaker partner. But this does not justify a repudiation of international trade; what it calls for is a guided system that can assure mutual benefit to the partners and credible protection against exploitation of the weak.

[41] The Global Governance of Trade. As if Development really mattered, New York; United Nations Development Programme; Trade and Development Report 2002 pp 42-48.

4.2 Basic Structure

(a) Current Inadequacies

The fundamentals of the current GATT/WTO system are improper and inappropriate. The workings of the WTO's system for the last ten years have given rise to ever-increasing discontent and frustration among the large majority of the membership. Clearly the system cannot remain stable in this situation.

The main goal of the system is liberalisation of trade in goods and services. Of course, the protection of IPRs does not belong in the system at all; but it has gatecrashed it under the circumstances already mentioned. Lately, there have been calls for separating it out from the WTO's system. There is a convincing rationale behind this. The Agreement on TRIPS is concerned with protection of IPRs and is not integrally connected with trade. Including it in the WTO's system makes the system unnecessarily bulky and complex and also diverts the attention of the system from its rightful ambit, i.e. the trade in goods and services. It will be proper if the Agreement on TRIPS is taken out of the WTO system and placed in either the World Intellectual Property Organization (WIPO) or a separate Organization of its own.

Thus both "liberalization of trade in goods and services" as the goal and "reciprocity" as the tool to achieve this goal are improper and inappropriate in the current multilateral trading system.

Moreover, retaliation as the ultimate weapon for enforcement of rights and obligations is very much impractical and unusable for the weak countries that constitute the large majority in the current system. It needs to be replaced by a more appropriate instrument.

A basic requirement for the stability of a system is that all members should feel that they are deriving benefits from the system. A large number of the developing countries do not have that feeling. Also, there is a natural fear among them that the system, with the current basic structure and approach, will further enhance the already high imbalance in the capacities of the developed and developing countries to derive benefit from the system.

It is quite understandable that these elements of the basic structure were introduced in the system at the time of its creation. Largely, it was an exercise undertaken between the UK and the US. Neither of them was poor. Even then, there were serious differences between these two during the negotiations because of their differing economic strength. The developing countries lived with the system for a long time without much rumblings, as they did not have much to loose. Now the situation is totally different. The entire system is being used for extracting concessions from the developing countries, as has been explained in the previous chapters. Hence, it is only natural now for the flawed basic structure of the system to be questioned and changed.

An improved multilateral trading system should naturally be self-preserving and not self-destructive. It should generate internal impulses for stability, rather than gain momentum towards instability and disintegration. Further, if there is a crisis in the world economy, it should help in restoring the world economy to a healthy state. It should itself not get torn apart during such critical periods.

All this can happen if all the members of the system feel that they have a stake in it. And that can arise and continue if there is a well founded perception of shared benefit among the countries. The greatest strength of any multilateral system is the sustained

satisfaction of its membership and a sense of dependence on it. While thinking about an improved multilateral trading system, all these basic imperatives have to be considered.[42]

(b) Desirable Elements of New Structure

(i) For Benefiting the Developed Countries

Starting from the primary objective of shared benefits, let us see what elements are relevant and necessary. Since we are considering here.the trading system, naturally we should limit ourselves to aspects of international trade and the factors that affect it.

Clearly the developed countries that have a highly developed supply capacity and trading infrastructure in goods and services will benefit from liberalization of trade and elimination of obstructions to trade in these areas. This is particularly so because the prospects of expansion in their own countries are limited. Hence, for the developed countries to derive benefits from the system, liberalization in the trade regimes in goods and services will be relevant. There should be liberalization in different countries at varying degrees of intensity. For example, the countries, including the developing countries, may reduce their tariffs and liberalise the conditions for the entry and operation of foreign services and service providers. There should, of course, be adequate accommodation for a country if the liberalisation process there comes into conflict with its sharing in the benefits of the system.

[42] Development, Trade and the WTO; A hand book, Washington DC World Bank by World Bank Press pp 72-73.

(2) For Benefiting the Developing Countries

(i) Relevant Objectives

As mentioned earlier, a vast number of the developing countries will not gain from liberalisation in other countries; hence liberalisation is not adequate for them to share in the benefits from the system. Therefore, there is a need for them to get concessions in some other ways. As we are limiting ourselves here to international trade, these concessions should be closely related to it. The concessions should have the potential of delivering two results, viz, (i) expansion of the export of goods and services from these countries, and (ii) enhancement of the benefit to them from the expanded exports.

Expansion of exports can be facilitated by: (i) development of export production, (ii) development of export infrastructure, and (iii) expansion of export opportunities in major markets. Enhancement of the benefits from export can be ensured by: (i) expansion of domestic economic activity in the course of developing export production, (ii) retention of high value-added in the country, and (iii) obtaining an appropriate price for the exports.[43] The concessions to the developing countries will be relevant if they are targeted towards these results. This can be done

[43] Trade Policy in Developing Countries, by Hockman 2002, published by Cambridge University press pp 190-191.

in two ways, viz, (i) by the developed countries taking positive steps in addition to their liberalization exercise, and (ii) by the system allowing the developing countries certain immunity and flexibility to achieve these goals.

(ii) **Expansion of Export Opportunities**

Expansion of export opportunities for the developing countries in the developed countries can be facilitated by some specific policies and measures of the developed countries as mentioned below:-

1. The developed countries should eliminate or reduce their high tariffs on specific products in which the developing countries have current or potential prospects for export. This should be in addition to the normal liberalization exercise, which mostly gives mutual benefits to the developed countries themselves.
2. The developed countries should target to meet a certain minimum percentage of their government procurement in some goods and services sectors through import from the developing countries.
3. The developed countries should work towards devoting a certain minimum percentage of their overall consumption in specified products to imports from the developing countries. The main instrument to encourage this could be: (i) adequate fiscal incentives to the firms that import goods

and services from the developing countries, and (ii) direct subsidies to the firms for this purpose.

(iii) **Development of Production and Infrastructure**

In the development of export production and export infrastructure and expansion of domestic economic activities related to export production, the developing countries themselves will have the primary role. The main requirements are investment and technology. The developed countries can contribute to this process by encouraging their investors and technology providers to provide finance and technology to the developing countries. The main instruments for such encouragement could again be fiscal incentives and direct subsidies to the firms, investing for the developing countries and for providing technology to them.

Then comes the role of the multilateral system in allowing appropriate immunity and flexibility to the developing countries in the development of export production and export infrastructure and expansion of economic activities related to export production. Such immunity and flexibility are mainly needed in the areas of subsidies, import control and national treatment.

The developing countries should be allowed to use subsidies in some cases to boost the production and export efforts of their firms. It is true that the developing countries do not have adequate financial resources to provide subsidies to their firms; but given the possibility, it is likely that they may sometimes be able to

encourage the development of some critical sectors through subsidisation. They may choose to cut down on some other needs and devote special attention to the development of these critical sectors. Hence, an enabling provision towards this end is desirable. It need not be an open-ended blanket provision, but may be limited to a certain maximum number of sectors at a time.

For the development of certain critical sectors, it may also be necessary for the developing countries to apply direct import controls to protect the budding sector against competition from imports. It should be permitted in a certain maximum number of sectors at a time for a specified duration. No compensation should be required to be given to other countries by the developing countries for this facility.[44]

(iv) **Relaxation of National-Treatment Principle**

Then comes the handicap, the developing countries face through the provision of national treatment. They are prohibited from giving special preference to a domestic product if a similar facility is not provided to a like imported product. In the background of what has been said above, the developing countries should be allowed to provide special facility and preference to the domestic products in critical and selected sectors. This will be an important

[44] Trade Policy in Developing Countries, by Hockman 2002, published by Cambridge University press pp 200-203.

instrument in addition to protection through import control and support through subsidisation. For example, the principle of national treatment reaffirmed by the Agreement on TRIMs prohibits a country at present from imposing domestic-content requirements on firms. Such handicaps should be removed.

Again this immunity may be limited to certain maximum number of sectors at a time.

(v) **Appropriate Export Price**

It was mentioned earlier that an important element in ensuring that the developing countries gain from trade is an appropriate price of their exports. Their handicap in this matter arises mainly because of their low bargaining power and weakness in dealing with the big multinational corporations that are engaged in manufacture and trade in respect of the products from the developing countries. The activities of these corporations are spread across several countries and across several products in the product chain, from raw materials through intermediates to finished products. In order to maximize their profits, these firms often set prices for these products which are not solely based on the cost of inputs and processing; they also take into account the prevailing taxes. For example, a developing country may impose higher taxes on production for revenue purposes. In such a situation, multinational corporations is likely to assign a lower price to the goods producer in that country and a balancing higher price to the goods in the

chain produced elsewhere. This practice will deprive the developing country of higher export proceeds and also higher tax revenue as the price of the goods produced there will have been artificially and deliberately depressed.

4.3 Improvement in Rules

(a) Incorporating Elements of Basic Structure

Improvements in the WTO's rules will be required for: (i) incorporating the new elements of the basic structure, (ii) restoring balance in the current grossly unbalanced rule structure, (iii) incorporating S&D treatment for developing countries (iv) providing flexibility to the developing countries in times of need and (v) conducting Ministerial Conferences.

The elements of the basic structure required to improve the system have been given in detail above. For them to be effectively incorporated in the system, the rules will have to be changed. In particular, change will be needed in Articles III and XI of the GATT 1994, the TRIMs Agreement, the Subsidies Agreement, etc.

Also, there should be clear rules laying down a formal process of negotiations in which concessions on liberalization by the developing countries will be required to be balanced by concessions of the developed countries in areas beyond liberalization, e.g. commitments on minimum imports from the developing countries, related incentives and subsidies by the developed countries, immunity and flexibility for the developing countries in respect of some disciplines, etc.

Further, there should be specific rules permitting the developing countries immunity and flexibility on appropriate occasions when needed. It is very likely that

some of them will need these at times because of the fragility of their economy and also due to an uncertain international economic environment.

(b) ***Restoring Balance***

To restore balance in the currently unbalanced situation, the rules will have to be improved in order to eliminate the current negative discrimination against the developing countries. Several such points in this regard have been identified now by the developing countries and by some experts.

The provisions of the agreements that are specially meant to benefit the developed countries or that are so framed that only the developed countries and a very small number of the developing countries can invoke them, should be removed or suitably modified. Some examples are: domestic support in agriculture (including the measures which are currently immune from the reduction discipline), export subsidies and special safeguard in agriculture, OECD-norm- based export subsidies in industrial products, immunity of certain subsidies on industrial products from counter-action, viz, those for research and development, adaptation to environmental standards and regional development, etc.[45]

It was mentioned earlier that retaliation as the ultimate weapon for enforcement of rights and obligations puts the developing countries at a great disadvantage. One way to improve the rules in this regard is to provide for "joint action" of Members in cases where a developed country has failed to take full corrective action in a dispute where a developing country was a complainant and its case was upheld by the panel/AB. Another effective way may be to prescribe financial compensation to be paid by a developed

[45] Some suggestions for improvements in the WTO agreements, by Bhagirath Lal Das, 1999 Third World network pp 15-18.

Implementation Related Issues and Concerns. WTO General Council document JOB (01)/14, 20 Feb 2001.

country to a developing country in cases where the former does not adequately implement the recommendation made in favour of the latter.

Standards for industrial products and for SPS measures are being worked out without the effective participation of a large number of the developing countries, which may have a significant impact on market access. Hence, the respective rules should prohibit the adoption of standards if a minimum number of developing countries have not been party to the setting of these standards.

(c) **Integration of S & D Provision**

Apart from balancing the existing rules to remove negative discrimination against the developing countries, there is a need to make the provisions on S&D treatment for the developing countries an integral part of the rights and obligations in the rules and not in the nature of exceptions as at present. The discussions above indicate that such provisions are not in the nature of special favours to the developing countries; instead, they are essential elements of the structure and system, to ensure benefit-sharing. Hence, they should be in the form of rights of the developing countries and obligations of the developed countries that can be enforced through the general enforcement mechanism, i.e. the dispute settlement mechanism of the WTO.

The rules should include an enforceable prohibition of the practice of asking for concessions from the developing countries beyond what they are required to give under the rules.

If, however, there are certain S&D provision in the nature of "best-endeavour" clauses, the rules should lay down the manner of monitoring their implementation. Even though these are not absolutely legal commitments, they are to be considered as political commitments in the multilateral system and have to be properly implemented. Right now,

such provisions are mostly ignored by the developed countries. Hence, there is a need for a new machinery for their implementation. One method may be to have a process of normal consultation with individual developed countries in the General Council or another body designated by the General Council. In the consultation, a developed country should explain what steps it has taken to implement the provisions. In case there has been no implementation or only partial implementation, it should explain the reasons for its failure to implement fully. Also it should give an undertaking about the future programme of full implementation.

4.4 Improvement in Implementation

The developing countries have identified a large number of implementation problems over the years. These should be taken up with a view to finding solutions.

The multilateral framework should have a built-in mechanism for elimination of these problems and for ensuring that such problems do not arise in future.

The rules should be implemented in good faith. There should be provision for discouraging repeated instances of faulty implementation, e.g. in the form of some penalty. For example, it is important to take note of the fact that most of the disputes against the developed countries have yielded the finding that they have been violating some rule or another. If a developed country is found to be in repeated violation of the rules, it can result in immense loss to the developing countries. Hence the rules should provide some safeguard against this. One method may be to prescribe financial compensation when a developed country has been repeatedly violating the rules and thereby casing nullification or impairment of benefits to a developing country.[46]

[46] Implementation related issues and concerns, WTO General Council document JOB (01)/14 dated 20 February 2001.

4.5 Need for an Intergovernmental Institution

The developing countries face a grave handicap as they do not have their own intergovernmental machinery that can assist them in preparation and help them in coalition-building. Individually, they do not have much domestic institutional support either; but however, effective such support may be in some developing countries, it cannot play the role rather can be performed by an intergovernmental machinery of the developing countries. The developed countries have very strong support from domestic research institutes and, over and above this, they have the support of the OECD Secretariat. It helps them with analytical reports and provides them with a forum for deliberation and coordination. There is no such support for the developing countries.

There is a small Secretariat of the Group of 77 in New York.[47] Also there is a small machinery, particularly for research support, for the Group of 24 developing countries in the World Bank/IMF. There is, however, no support for the developing countries for their negotiations in the WTO. The discussions so far have indicated how important the negotiations are for the developing countries and how handicapped they are in these negotiations. An important step towards strengthening them in these negotiations will be the creation of an intergovernmental institution. Primarily, it should be undertaking research and analysis in support of the developing countries on issues under consideration in the WTO. It should also be a forum for the developing countries to get together to deliberate on the issues and to coordinate among themselves. This will help them in coalition-building and also in coordination among the specific interest groups within the developing countries.

[47] *http://www.g77.ogr/doc/ visited on 30 December 2008.*

Considering what is at stake for the developing countries in the WTO, they should be prepared to finance such an institution themselves without seeking support from others. Such an institution should draw on the research and analysis work being done in important institutions in the developing countries and should also be supportive of their efforts.[48]

4.6 Strength of Developing Countries

The developing countries will gain the negotiations if they approach them with confidence. And one source of confidence is the identification and appreciation of their strength in multilateral economic negotiations. This can help them to come out of the depth of helplessness.

Their main strength lies in their number. In any group negotiations, the numbers are important. The WTO rules prescribe one-country-one-vote. Although decisions in the WTO are to be taken generally by consensus, there is a provision for decision-making by voting if there is such a need. Developing countries make up an overwhelming majority in the WTO; in fact they outnumber the developed countries by nearly four to one.

It is true that frequent assertion of strength in numbers will not be result-oriented. But ignoring this strength totally is also not a good strategy. The developed countries will naturally not like this strength of the developing countries to come to the fore and manifest itself; hence they often repeat the virtues of decision by consensus. But they have put the developing countries in such a situation that the developing countries may need to use all their strength, including their strength in numbers. On several occasions, it may be enough if the developing countries just let it be known that they are prepared to

[48] Compilation of outstanding Implementation issues raised by the Members, WTO document JOB (01)/152/Rev:1 dated 27 October 2001.

use this strength. If the intention is made clear, even without actually calling for a vote, their demands can be met in many cases. They are pushed around at present as the developed countries have full confidence that the developing countries will never muster enough cohesion and courage for such a step. It may be useful for the developing countries and also for the health of the system if the developing countries assert this strength once in a while.

The developing countries can also draw strength from being a big market and, more so, a potentially fast-growing one. So far they have been allowing access to this market through one-sided concession. If they skillfully use this strength in negotiation, they can get much more benefit than what they will ever get by pleading for sympathy and generosity. They can use this strength by refusing to make any concessions to the developed countries without getting at least commensurate concessions from them in return. They have been making concessions without return over the last 10 years or so. The time has come for them to stop this process and, in fact, even to ask the developed countries to now give them reciprocal benefits for the past concessions. This will be something like belated justice. In any case, the soft and weak approach adopted by them in the past should be entirely discontinued.

Another source of their strength lies in their biological resources. These constitute the bases for future scientific research and technological development. As has often been complained about in recent years, the research and technology firms of the developed countries have been using this wealth of the developing countries without paying a price. The developing countries should recognize this wealth of theirs and the strength arising out of it and use it to their advantage in multilateral economic negotiations. [49]

[49] www. world trade review. com visited on 2 September 2008.

4.7 Role of Developed Countries

The foremost need in this area is for the developed countries to appreciate that the development of the developing countries is also in their interest. For some time now, they have been concentrating only on their short-term interest. As explained in the previous chapters, the developed countries are currently following the strategy of squeezing maximum concessions out of the developing countries. No doubt, they have succeeded in this pursuit so far. But they have to understand that it is at best a static gain. Rapid growth in developing countries will provide much more benefits to the developed countries than if their growth is stunted.

Also, the current process of extracting concessions from the developing countries cannot continue indefinitely. The developing countries, if pushed to the wall, are bound to resist and then this process will come to an end. In any case, there cannot be healthy continuing growth in the developed countries in an atmosphere of utter disappointment and frustration among the developing countries. The system will remain unstable and prospects uncertain.

The prospect of expansion of the markets, particularly for goods, in the developed countries, is limited, as their GNP growth is low and population growth almost non-existent. Currently, demand in these countries is enhanced by slight changes in the products on offer backed by massive publicity. This may not be sustainable. Particularly in times of economic difficulty, people may not be inclined to replace an existing product with a new substitute just because the latter incorporates slight improvements. The life cycle of a product may be lengthened, thus dampening the growth of demand.

In contrast, the developing countries provide good prospects as markets for the products of the developed countries. With their large populations and current low levels

of consumption, the incremental demand with rise in income may be sizable. And the developed countries, with their developed supply capacity, have a good opportunity to derive instant benefit from it. It is thus in the interest of the developed countries to create a proper environment for the growth and development of the developing countries so that they can continue to be ever-expanding markets for the goods and services of the developed countries.

(a) Initial Burden

Several suggestions have been given above for changing the basic structure of the system. The developed countries have a big role in this regard, as the initial burden may appear to fall on them. For example, it has been suggested that they should acquire maximum percentage of their government procurement through imports from the developing countries. Also, it has been suggested that they should provide incentives and subsidies to their firms as encouragement to import goods and services from the developing countries as well as for investment and technological upgradation in the developing countries.

(b) Confidence and Credibility

It will generate confidence in the multilateral system if the developed countries improve their credibility in the negotiations. Often the developing countries are left with the feeling that they have been hoodwinked. The annex in the Agreement on Textiles and Clothing and the annex listing the non-reducible subsidies in the Agreement on Agriculture, which have already been elaborately discussed, are among the sources of this discontent. To build up the atmosphere of mutual confidence that is very much essential

for a stable multilateral system, it is necessary that proposals and their implications are openly and frankly discussed in the course of negotiations.[50]

4.8 Role of Developing Countries

(a) General

Given the current handicaps of the developing countries, they have to improve their role in the system by taking actions at various stages. Firstly there has to be an effective mechanism for determining the national interest of a country in respect of a proposal. This will guide the country in presenting the proposal and pursuing it or in preparing its response to the proposals of another country. Secondly, there should be thorough preparation on the line adopted by the country so that it is effectively put across in the negotiations. Thirdly, the country should build a coalition with other countries on its proposal or the line of response. Fourthly, it should actively participate in the negotiations at all stages. Fifthly, it should examine the results of negotiations carefully before accepting them. These points are discussed in detail below:-

(1) Determining National Interest

In respect of a matter under consideration in the WTO, a country has to determine its national interest after weighing the pros and cons. Almost everything under consideration in the WTO may not have a totally positive or negative effect on all sections of the population in the country. In most cases, there will be differential impacts on different sections. Some typical examples given below will clarify this point:-

A proposal that the customs duty on cold rolled steel coil should be

[50] www. world trade review. com visited on 2 September 2008.

performance. This will be good for the domestic banking industry in the long term.

Similar conflicting impacts and implications may be present in other cases as well. The point to note is that different sections of the economy and society face different types of impacts. Also, there may be a loss/gain in the short run for the domestic economy, but a gain/loss in the long run. The country will have to weigh these differing impacts and implications and then decide on its approach and position on the proposal, taking an "overall" view of the issues from the national angle. Naturally this examination will take account of both economic and political factors.

Weighing the pros and cons is a complex process. A comprehensive and detailed examination of the issues has to be undertaken, based on economic and social considerations, and keeping in view the different interests and linkages with different aspects of the economy as also with overall macroeconomic factors. All this needs serious analytical work based on available and researched information and also wide-ranking consultations with the different wings of government and various interest groups and economic operators involved. In several important cases, there may be a need for wide dissemination of information and consultation with different sections of the intelligentsia and the public in general. It is necessary to built structured mechanisms to have systematic consultation and interactions with farmers, industry, trade, NGOs, academic personnel, media persons, etc.

(2) **Preparation**

Part of the preparation for the negotiations would have already been done during the course of studies and discussions while determining the national interest and position. But there is a need for a further in-depth and comprehensive preparation which will help the country in putting forward its position and points of view with clarity and force. The preparation should focus on explaining how rational and logical the country's proposal is, how it is of benefit to many other countries and how the rest of the countries should also not feel apprehensive about adverse impacts.

The preparation process needs detailed analytical studies of various aspects of the proposal. Naturally, it needs the support of research institutes and universities. As the subjects are varied and the institutions in the developing countries are short of resources, allocation of specific subjects among different institutions may be desirable. Of course, there would be a close linkage between the institutions working on the WTO issues. It will also be useful to have linkages with such institutions in other developing countries.

(3) **Building Coalitions**

Coalition-building is an important exercise in multilateral negotiations. Even a strong country, acting alone, may find it difficult to carry its proposal through to a successful conclusion. For the developing countries, it is imperative to form coalitions within the developing countries group and also with some developed countries, if possible. Formation of coalitions on specific subjects and issues is, of course, a necessity; but it is

also useful to have continuing coalitions among some countries across the spectrum of subjects and issues.

A good technique in coalition formation is one of expanding the circle of support. A country may coordinate with a limited number of countries in the beginning on a specific subject. In fact, consultations may be held among these countries even at the stage of initial preparation, which may help in evolving a common proposal. After that, some other countries having almost similar interest in the particular subject may be approached for support. Thereafter, the circle may be further enlarged.

The risk in marking the circle too big, however, is that the initial nucleus of coalition countries may be required to dilute or soften their initial proposal to satisfy the new group of prospective supporter countries. Hence, there will be a limit beyond which the coalition on a subject or an issue should not expand. A time will come when the nucleus countries have to balance between expanding the support circle and retaining the essentials of their proposal. For a proposal to be taken seriously by the other countries, even a support base of about 8-10 countries will be quite effective.

A coalition of developing countries across subjects and issues requires a degree of commonness of perception of risks and benefits in the system. The Like-Minded Group (LMG) of the developing countries, which informally emerged after the Singapore Ministerial Conference, was a product of the common perception of some developing countries about the risks faced in the system. Of course, the LMG was cemented into effective

group through its common approach on the implementation issues in preparation for the Seattle Ministerial Conference.

(4) ***Participation in Negotiations***

The most important tool in multilateral negotiations is "speaking out". Here lies a basic difference between bilateral negotiations and multilateral negotiations. In bilateral negotiations, a country may remain silent and hear the other country. This can be advantageous as it gives the country an indication of how far the other side can go. Also, in bilateral negotiations, the other side will provoke a country to speak in order to ascertain its position and flexibility. In multilateral negotiation, on the other hand, if a country is silent, all the rest may be happy to let it remain silent so that decisions can be taken without a possible addition, a complexity coming in. Other countries would prefer to see a country remain silent than listen to its propositions and oppositions. Hence, in multilateral negotiations, it is necessary for a country to voice its views clearly. The initiative has to be taken by the country itself, as the others will not coax it into eloquence.

There is a need for mutual support among the developing countries. Hence, even if a developing country is not directly concerned with a subject under discussion, it is desirable for it to speak in support of another developing country that may be the prime party in the discussion, if such a move is not against its national interest. It will strengthen that developing country in the discussion. This can be a good "investment" for the future. The other developing country may then similarly support it at a time when it is the principal party in a discussion or negotiation. This can

be an instrument for building mutual cooperation and even coalitions. The developing countries have noticed in the past that the major developed countries generally support one another on issues where they do not have violent differences among themselves. This helps them to consolidate their already formidable strength in extracting concessions from the developing countries. The developing countries need such mutual support among themselves much more and should follow the major developed countries example.

One has to remain especially alert against clever and loaded proposals being placed on the table at such times of strain. The negotiating process itself can be taxing on the skill and patience of a negotiator. The following is a hypothetical example of a typical negotiation process on a text:-

In view of the fact that the major developed countries have put up many proposals on negotiating new issues in the WTO without offering anything in return to the developing countries, let us assume a hypothetical situation when a developing-country negotiator places the following proposal on the table:-

"A developed country shall obtain at least 10 percent of its government procurement of goods and services through import from the developed countries".

"The developed countries oppose it promptly and do not agree to negotiate on it at all. The developing countries become adamant and say

that all negotiations are off if this proposal is not taken up seriously by the developed countries.

Then a developed-country negotiator grudgingly agrees to consider the text if the following small phrases are added:-

"After the word shall, add 'endeavour to', and also add the end as far as possible".

With the suggested change, the text will read: "A developed country shall endeavour to obtain at least 10 percent of its government procurement of goods and services through import from the developing countries as far as possible.

The developing countries notice immediately that the new phrases make the text totally unenforceable; and in fact it has become nearly useless. Hence, they do not agree and prepare to break up.

The developed-country negotiator then graciously agrees to do one of the two new phrases, either "endevour to or as far as possible", and then asks the developing countries to agree in the spirit of cooperative and constructive negotiation.

The developing countries find that dropping just one of the two phrases does not help at all, as each of the two, on its own, nullifies the enforceability of the obligation. They do not agree. The developed countries are then adamant and say that they will call off the negotiations. The developing countries then face the risk of losing all opportunity to get a minimum share in the government procurement of the developed

countries. The developing-country negotiator, displaying a constructive approach, then comes up with a new proposal:-

"Let us keep 'endeavour to' as proposed by the developed countries; remove 'as far as possible' and add at the end: and can deviate from this minimum import normally with the approval of the General Council of the WTO".

The developed countries assess this proposal and find that it will absolve them of the obligation only if the General Council approves it case by case. They know that the approval cannot be obtained as the interested developing countries will block consensus in the Council and can even defeat it if a voting takes place. Thus their addition of "endeavour to" becomes useless and they will be saddled with the obligation of a minimum import norm. They find the latest amendment unacceptable. However, they are in need of many concessions from the developing countries in the later negotiations and do not want to appear negative. The developed-country negotiator then comes up with an alternative:-

"Put a full stop after 'developing countries; and add a new sentence at the end: 'A developing country that is affected by the failure of a developed country to conform to this norm may take counter-action against the developed country if the General Council approves such counter-action by consensus".

The developing countries assess this text and find that any action against a developed country for not adhering to the norm will be impossible, as the General Council will never approve a counter-action by

consensus, because at the very least, the affected developed country will oppose it. In this manner, the obligation again becomes unenforceable. Hence, the developing countries do not agree and start thinking on a suitable response.

In this way, the negotiations on the text go on and on.

This is an illustration of how exasperating the negotiations on a text can be. A negotiator has to have both skill and patience to handle such negotiations successfully. As the proposals to change the text at each stage suggest, a negotiator has to remain alert and vigilant all the time. Seemingly, small and unimportant phrases can make a big difference to the final content of the text and the rights and obligations involved in it.[51]

4.9 Role of Ministerial Conference

The WTO Ministerial Conferences have come to be events of considerable tension and frustration for the developing countries. The developed countries have been bringing in new subjects and insisting on decisions. Sometimes, proposals are placed all of a sudden and instant decisions are expected. The host country, meanwhile, is keen to ensure that the event is a "success" and is thus concerned about differences that may emerge. On its part, the WTO Secretariat is naturally anxious to have agreed results. Amidst all this rush, the developing countries are very much lost.

There is thus a need to reform the process of the Ministerial Conference. It should be seen as a sober event where decisions on the agenda are taken in a spirit of goodwill and mutual understanding. It should not become an arena for the powerful countries to

[51] *WTO, can it inspire confidence?* by Bhagirath Lal Das, 2001 pp 43-48.
www. thunderlake.com visited on 4 September 2008.

flex their muscles and put intense pressures on "recalcitrant" countries that oppose their will and design. The host country and the Secretariat have to ensure that, in their keenness to see the event become a "success", they do not become instruments for unfairness and exploitation. In fact, they should resolutely oppose any such moves.

To eliminate unnecessary burdens and pressures on a host country, proper course is to hold the Ministerial Conferences only at the headquarters of the WTO, i.e. in Geneva. After all, several other intergovernmental and international organizations convene meetings of their highest bodies at their headquarters. They do not go about seeking any special hosting at various places around the world. These Conferences are a normal feature of the WTO, and they should be seen as such and not as highly special occasions.

Rules should be framed for the conduct of the Conference. These rules should lay down, for example, the procedures for: adoption of the agenda, presentation of the results of the preparatory process (for example, making it mandatory to include differing proposals on issues where there has been no consensus in the preparatory process), establishing subsidiary bodies (e.g. the negotiating groups to consider various proposals), election of the chairpersons of these subsidiary bodies, proper circulation of intermediate texts among the ministers during the Conference, etc. There should be a minimum time gap, of at least 24 hours, between the preparation of the final text of the Conference and the final plenary meeting for adopting the text. This will enable the Ministers to go through the text and consider its implications with care.

4.10 Role of WTO's Secretariat

(a) Need for Total Neutrality

The WTO Secretariat is an important pillar in the WTO structure. While it is true that the initiatives for proposals and negotiations in the WTO lie with the governments, one must not underestimate the role of the Secretariat in the WTO process. In order to improve confidence in the WTO system and its credibility, it is important to improve the role of the Secretariat.

First and foremost, the Secretariat must be totally impartial and objective and also appear to be so. In an organisation like the WTO where the vital stakes of the major developed countries are involved, the Secretariat will have to make a special effort to keep clear of any suspicion that it is being influenced by them.

The Secretariat at all levels has to be careful that it does not itself support or oppose a proposal which is the subject of controversy among the Members and over which there are serious differences among the Members. For example, an issue which was extremely controversial before the Doha Ministerial Conference was whether a new round of negotiations should be launched in the WTO. Any championing of a new-round by the officials for the Secretariat at that time would be extremely improper.

Of course, the Director-General of the WTO has been assigned certain specific active roles, e.g. under the Dispute Settlement Understanding. Also, sometimes the Director-General is made the chairman of some committees or working groups. It is expected of him/her to take action on his/her own initiative in these matters to achieve results. In other matters, however, he/she has to treat with great caution in assuming an activist role. Whenever the Members have made decisions on some points, he/she, of

course, has to take an active interest and play an active role in having the decisions implemented efficiently and smoothly. But during negotiations, he/she has to refrain from pursuing and pressing for any particular line in the negotiations, if the countries differ on that line.[52]

Apart from the technical question of the neutrality of the Secretariat, there is also the question of trust and confidence of the Members in the Secretariat. If the Members in general observe that the Secretariat is interested in pushing a particular line in any subject, the Secretariat will loose their trust and confidence as a useful machinery for the smooth functioning of the WTO system. More so, if it is noticed that the Secretariat is in particular supporting, even by indirect implication, a line taken by the few powerful countries which is opposed by a large number of the other countries, the trust of the vast majority of the membership will be totally shattered. The Secretariat has a grave responsibility in ensuring that such a situation never arises.

(b) Broad-based Recruitment

Another matter which is important for the confidence of the membership in the Secretariat is the process of selection of the Secretariat staff. The Secretariat has to be fully cognisant of the diversity among the membership. Its approach and functioning must take into account the wide differences in the social, political and economic background and approaches of the Members. Thus, while the Secretariat must work as an integrated unit, it must have within it a rich and healthy plurality of talent, background, training and experience. The geographical dispersal of the sources of recruitment can only achieve a limited result in this respect, as one can have a veritable monolith of

[52] Building a new Trade Architecture (on Doha Desert Sands) by Chakravarthi Raghavan, 2001 pp 104-107.

people of a particular type and persuasion drawn from a range of geographical regions. What is needed is the broadening of the recruitment process, so that the staff is an ensemble of different backgrounds, training and experience. This applies to all the three types of people that are recruited to the professional and higher posts, viz, the economists, the lawyers and the diplomats.

In the WTO, as in the case of the GATT earlier, the recruitment process is totally internalised. The candidates are evaluated and interviewed by some of the Directors and the Deputy Directors-General, whose recommendations are given to the Director-General, who makes the appointment. This process is unlikely to bring diversity and plurality into the staff composition. In fact, the process ensures that there is a continuation and perpetuation of the total 'sameness" of thinking and approach.

In order to inculcate diversity and plurality, one way may be to improve the recruitment process. An external role and support may be introduced for this purpose. For example, there may be a Recruitment Board; constituted of some insiders and some outsiders. This board may evaluate and interview the candidates and give its recommendations for recruitment. The Director-General will, of course, be the final authority to take the decision, as the WTO agreement gives him the responsibility for appointment of the staff. The role of such a board constituted of both internal and external parties, will ensure that while the requirements of the Secretariat will be fully kept in view, there will be a possibility, at the same time, of bringing some "freshness" from outside into the process of recruitment. [53]

[53] WTO, who can inspire confidence? by Bhagirath Lal Das 2001 pp 74-78.

(c) **Servicing of Panels/Appellate Body (AB)**

The dispute settlement panels/AB have emerged as a very significant part of the WTO system. Their final findings and recommendations cannot be contested further and have to be acted upon. These findings are necessarily in favour of one side in the dispute and against the other. Consequently, they leave the winning country happy and the losing one unhappy and dissatisfied.

In this back ground, it is desirable and necessary to insulate the WTO Secretariat from the panel/AB process, as the Secretariat should not be seen as being party to or involved in their findings and recommendations. The secretariat should appear to be totally aloof from the interests of the countries in a dispute. Similarly, the credibility of the panel/AB process will be enhanced if it does not have to depend on the Secretariat for servicing, which necessarily involves expressions of opinion on substantive issues and offering advice.

Accordingly, the secretariat that services the panels and the one that services the AB should be organically separated from the WTO Secretariat. At present, the panels are serviced by the staff members of the WTO. Technically, the AB has a separate secretariat, but it normally comprises the staff members of the WTO Secretariat. There is a frequent exchange of staff between the secretariat of the AB and the WTO Secretariat. In this manner, the WTO Secretariat gets involved in the process that results in the findings and recommendations of the panels/AB. This is not a healthy practice. As explained above, it is harmful for the credibility of both the WTO Secretariat and the panel/AB process.

CONCLUSION

To briefly conclude the above discussion, I would say that we should ponder the question of whether reform and improvement of the multilateral trading system will be possible. There are two strong currents running against it. Firstly, the two "majors", viz, the US and the EU, are confident about achieving results in bilateral agreements with different countries. They may prefer this route to the cumbersome process of the multilateral negotiations. Secondly, there is a move all around to develop regional trading arrangements. The major developed countries are expanding their opportunities through this process. They are also making use of special arrangements like the EU-African, Caribbean and Pacific (ACP) arrangement (Cotonou Agreement) and the US-Africa arrangement through the African Growth and Opportunity Act (AGOA). The US is trying to expand the process of regional arrangements to Latin Africa and also to South-East Asia. The EU which already wields influence in Africa, is also trying to extend its reach in Latin America and Asia. The bilateral and regional routes are bound to detract from the importance of the multilateral system, howsoever one may argue that all these sidesteps are not meant to harm the multilateral system.

While taking the bilateral and regional routes, the major developed countries may not actually work to dismantle the multilateral trading system, but they may become more impatient and intolerant if their objectives are not achieved quickly. They may find the multilateral route too cumbersome. Their firms are anxious to expand their opportunities and secure quick profits all around the world. They will certainly be pushing their governments for quick results through whatever possible route.

But as mentioned in the beginning, this cannot always ensure good results in the long term, even though it may appear to give some quick results. And over a course of time, even short-term may no prove fruitful. This process will certainly come to an end sooner or later.

Even an important regional arrangement like the North American Free Trade Agreement (NAFTA) has generated considerable discontent in many sections of the population in Mexico and also in Canada. The African countries have started doubting the actual benefits that will accrue to them through the AGOA. Some large developing countries, like China, Brazil and India, may sometimes perceive benefits in bilateral agreements with the major developed countries, but even they have to realize that the latter will allow them benefits only to a limited extent. Their opportunities will be curtailed and even closed off once they are seen as a source of threat to domestic production. The sad experiences of the developing countries in the past, as discussed in the chapters, are clear pointers in that direction. A developing country, however, big should not expect to get a better deal in bilateral arrangements than what it gets in a multilateral arrangement.

Even for the major developed countries, there will be a limit to the gains from the bilateral and regional routes. If the developing countries have been placed in adverse situations in these arrangements, it is more likely to provoke severe criticism and discontent that would be the case in a multilateral framework. In a bilateral or regional arrangement, the party that might be perceived as having imposed an unfavourable arrangement can easily be identified and therefore criticism will naturally be trained on it. All this is likely to lead to "expanding ill will".

The real situation is that the developed countries and the developing countries have to work together for their common good. One-sided domination cannot continue. The governments of the developing countries cannot go on explaining to their people all the time that they have been pressurized into accepting harmful deals. Sooner or later, their people will ask them firmly to resist pressures. And they will have to find a way out.

Just as economic disparity may threaten peace and stability within a country, so too can increasing disparity among countries cause tension and instability. International economic relations and linkages can play a significant role in fostering peace and stability in the world. And the multilateral trading system can be a useful instrument for deepening these relations and strengthening the linkages. As has been discussed in this text, the malaise has been caused mainly by the mighty ignoring the interests, needs and concerns of the weak. It has been encouraged by the weak not defending themselves resolutely. A solution for the future can emerge if both these trends are halted or at least curtailed.

The GATT/WTO system provides a challenge. However, it also provides a supportive layout in as much as it has an innate democratic feature in its basic decision-making process, viz, the principle of one-country-one-vote. The mighty minority has seen it as a serious threat; the weak majority has considered it as an impractical weapon. Rather than viewing it as a threat or a weapon, it should be seen as a backdrop in a play, visible all the time while the main action takes place in front of it, yet not directly taking part in it. It should motivate the mighty to look beyond themselves and strengthen the weak to defend themselves.

The compulsions arising from the emerging tensions in the world will make it imperative for all countries, big and small, strong and weak, to work in unison for their common good. The multilateral trading system can be a good area in which to start.

Annexure - A

BRIEF DETAILS OF CASES

1. Hormone – Treated Beef Case

Complaints by: U.S. and Canada.

Complaints against: European Union.

WTO Cases WT/DS26 (U.S.) and WT/DS48 (Canada).

In 1980, as a result of consumer concern over reports of harm caused by eating hormone-treated meat, the EU (European Union) instituted a series of bans on the use of growth hormones in meat production and, subsequently, on the import of meat from animals treated with such hormones. In 1996, the Unites States and Canada challenged the European ban as a violation of the WTO rules.

A WTO dispute panel found (the bans) to violate the WTO Agreements (food-safety rules) because the EU had not definitively demonstrated that the beef would cause harm to consumers. While the EU argued that it had the right to protect its citizens against uncertain risks from the hormones, the panel concluded that the WTO rules require proof of such harm before trade can be restricted.

Despite the Appellate Body's determination that the European hormone ban violated the WTO rules, the EU refused to rescind the ban. As a result, the WTO granted

the United States permission to impose $ 116.8 million in retaliatory trade sanctions each year that the EU maintains its ban.[1]

Actions/Opinions about discrimination

As you recommended, we have initiated action against the EU ban under the dispute settlement procedures of the World Trade Organization.

Letter from U.S. Trade Representative Mickey Kantor to the National Cattlemen's Association, February 8, 1996.

The WTO SPS (Sanitary and Phytosanitary Measures) agreement has had a terrible impact on the right of the world's citizens to safe food. Canada and the U.S. successfully used the SPS agreement to strike down a European ban on North American beef containing harmful, possibly cancer-causing hormones. The EU, deeply sensitive to lingering concerns about Mad Cow disease, implemented a ban on the non-therapeutic use of hormones in its food industry, citing many studies linking them to illness. The WTO panel demanded 'scientific certainty' that these hormones cause cancer or other adverse health affects, thus eviscerating the precautionary principle as a basis for food safety regulations.

Maude Barlow, national chairperson, Council of Canadians.

The EU has banned the non-therapeutic use of hormones in its food industry,

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[1] Debi Barker & Jerry Mander. Invisible Government. The World Trade Organization: Global Government for the New *Millennium*? San Francisco: International Forum on Globalization, October 1999. "The Beef Hormone Case", p. 26.

http://www.ifg.org/aboutwto.html

citing many studies that indicate that hormones, particularly implants of pellets containing estradiol, could cause cancer. Following the challenge by the U.S. and Canada, citing the onerous provisions of the SPS Agreement and other WTO rules, the WTO ruled against Europe's ban.

The WTO panel demanded scientific certainty that hormones cause cancer or other adverse health effects, thus eviscerating the precautionary principle as a basis for food safety regulations. This ruling has frightening implications for the ability of governments to set high standards to protect public health. It means that European consumers and governments are forced to accept imports of beef raised with hormones or be penalized with harsh trade sanctions. Public opinion in Europe is strongly demanding defiance of this WTO ruling. The U.S. and Canada have produced lists of exports important to Europe, including luxury items such as prosciutto, cheeses, and Dijon mustard, among other things, on which they intend to slap 100 percent tariffs if the EU fails to comply. These retaliatory measures will total more than $125m.

Debbi Barker and Jerry Mander, International Forum on Globalization.

2. **Pesticide Residues Case**

Complaint by: U.S.

Complaint against: Japan

WTO Case WT/DS76

In this case, the U.S. challenged Japan's public-health standards requiring testing for pesticide residues in certain imports of fruits and nuts. The testing was required when a poisonous chemical, methyl bromide, was used to fumigate these products against

infestation by coddling moths. Because Japan's safety standards were higher than relevant WTO standards, the WTO found that they violated WTO agreements.

A dispute-settlement panel ruled in October 1998 that Japan's requirements for testing of agricultural imports was not based on "sufficient scientific evidence" as required by Article 2.2 of the Agreement on the Application of Sanitary and Phytosanitary Measures. An appellant body upheld the ruling in February 1999. The two countries finally issued a joint letter settling this dispute in August 2001[2].

3. **Asbestos Case**

Complaint by: Canada

Complaint against: France

WTO Case WT/DS135

In this challenge brought by Canada against France's ban on chrysotile or white asbestos, a WTO dispute-settlement panel ruled in favor of France. This was the first case in which the WTO upheld national public-health protections. The initial ruling occurred 10 months after the Seattle Ministerial meeting.

The Canadian government argued that French regulations should not have banned asbestos outright when it could have restricted its use, citing an International Organization for Standardization (ISO) standard for regulating asbestos. The ISO is an industry-dominated body, however, and requiring the use of such international standards

[2] Debi Barker & Jerry Mander. Invisible Government. The World Trade Organization: Global Government for the New Millennium? San Francisco: International Forum on Globalization, October 1999. "Pesticide Residue Levels", pp. 26-27.

http://www.ifg.org/aboutwto.html

tends to reduce national standards to the least common denominator.

Canada also charged that France discriminated in favor of asbestos substitutes. It claimed that the French ban "nullifies and impairs" benefits from Uruguay Round tariff concessions. This line of reasoning, had it been accepted, would make it harder to ban dangerous substances after a trade agreement is adopted.

The dispute-settlement panel ruled in September 2000 that the ban was justified to protect the health of French workers under Article XX(b) of the 1994 General Agreement on Tariffs and Trade (GATT), which provides a general exception to WTO rules for measures considered necessary to protect human health. But the panel agreed with Canada that France had discriminated against Canadian asbestos; it concluded that white asbestos and less-dangerous domestic substitute fibers are "like" products as defined by Article III: 4 of GATT, which should in principle be accorded the same treatment on the French market. The WTO Appellate Body upheld the ruling on Article XX(b), but reversed the initial panel's decision on Article III:4.

The European Commission called the ruling a "landmark." Canadian asbestos producers protested, however, that the ruling favoured affluent countries, who consider asbestos dangerous, over developing countries, where they claimed asbestos cement helps to reduce mortality rates[3].

[3] Bridges Between Trade and Sustainable Development. "Asbestos Ruling Breaks New Ground in 'Like Product' Determination" Geneva: International Centre For Trade And Sustainable Development, January-Aril 2001.

http://www.ictsd.org/English/BRIDGES5-1-3.pdf

4. Automobile Fuel-Efficiency Case

Complaint by: E.U.

Complaint against: U.S.

GATT Case DS31.

In the wake of 1970s energy crisis, the United States passed Corporate Average Fuel Efficiency (CAFÉ) standards that were successful in doubling the average fuel economy of passenger cars operating in the U.S. by the early 1990s. These rules contributed to substantially cutting U.S. emissions of greenhouse gases and were consistent with United Nations standards on reducing global warming.

The CAFÉ standards applied equally to all U.S. and foreign automobile manufactures. They aimed to reduce emissions by all passenger vehicles sold in the U.S. by requiring that the average fuel-efficiency of all the cars sold by each firm fall below a given figure. For U.S. companies who also imported foreign-made vehicles, it required that both the foreign and the domestic fleets meet the same fuel-efficiency standards.

U.S. car manufacturers complied and began to produce smaller, more fuel-efficient models. But although many European manufacturers had met CAFE standards in the 70s and early 80s, they later shifted to a strategy of exporting more profitable, less fuel-efficient luxury cars to the U.S. market. They voluntarily chose not to comply with the CAFE standards and as a result paid substantial penalties under the law.

In 1993, Europe challenged the CAFE standards under the General Agreement on Tariffs and Trade (GATT, now enforced by the WTO), arguing that their effect was to discriminate against European automobile manufacturers. The GATT panel upheld the challenge, ruling that - regardless of its intent - the requirement that each separate fleet

meet the standards had a negative impact on European manufacturers and thus violated GATT non-discrimination rules.

This ruling established an apparent precedent that even if a rule is not discriminatory, a party that chooses not to comply with it and then suffers the consequences can claim discriminatory effect. This perverse logic is an invitation to foreign firms in any country to violate standards designed to protect the environment or people and then claim injury under the WTO[4].

5. Shrimp/Sea Turtle Case

Complaint by: India, Malaysia, Pakistan and Thailand.

Complaint against: U.S.

WTO Case WT/DS58.

In 1989, Congress amended the U.S. Endangered Species Act to prohibit the import of shrimp from countries that do not have sea turtle protections comparable to those of the U.S. (which requires turtle excluder devices in shrimp fishing). Thailand, Pakistan, India and Malaysia mounted a trade challenge in the WTO. According to the WTO, the U.S went too far when it blocked trade because other countries did not have the desired conservation policies in place.

All the countries involved acknowledged the sea turtles are endangered, that it is a legitimate goal to protect the turtles, and that turtle excluder devices are effective and inexpensive. Nonetheless, the United States could not prohibit imports of shrimp from

[4] International Energy Agency. Energy Efficiency and the Environment. 1991.

http://www.citizen.org/publications/release.cfm?ID=7081

countries that did not require turtle excluder devices unless the other countries agreed to such a requirement. Moreover, the United States had to allow each country an opportunity to prove that its fishing practices did not cause excessive harm to sea turtles.

The U.S. has promised the WTO that it will change its regulations in early December 1999.

- Earthjustice Legal Defense Fund.

After the U.S. made the changes in the Endangered Species Act required by the Dispute Settlement Body's November 6, 1998 recommendations, Malaysia continued to assert that the U.S. had not fully complied with the WTO ruling. In a May 16, 2001 ruling, a WTO compliance panel ruled in favor of the U.S. It found that the U.S.'s continuation of the import ban on shrimp and shrimp products was justified under Article XX(g) of the General Agreement on Tariffs and Trade (GATT), which provides a general exception to GATT rules for measures relating to the conservation of exhaustible natural resources[5].

Opinions about discrimination

The purpose of the WTO is to regulate world trade. However, it is now being used as the forum through which to resolve other international issues, such as protection of the environment. The fact that the WTO is the arena in which global environmental issues are being argued and decided is frightening. By stepping beyond the bounds of regulating

[5] Debi Barker & Jerry Mander. Invisible Government. The World Trade Organization: Global Government for the New Millennium? San Francisco: International Forum on Globalization, October 1999: p. 18.

http://www.ifg.org/aboutwto.html

trade, the WTO is creating a precedent by which global environmental decisions are made in a trade (rather than scientific) framework and in a manner that does not include public participation.

The outlook for sea turtles is bleak. The WTO has always ruled against environmental measures when they conflict with commerce. This ruling has set the wheels in motion for the dismantling of the US law. The WTO is creating the path for the rapid destruction of our global resources and the plundering of local economies.

- Sea Turtle Restoration Project, U.S.

6. **Plant and Animal Patents Case**

Complaint by: U.S.

Complaint against: India.

WTO Case WT/DS50.

In this case, the U.S. challenged an Indian law that, in an effort to keep prices down on pharmaceuticals and other products, excluded plant and animal varieties from patenting. The WTO Agreement on Trade-Related Aspects of Intellectual Property (TRIPS) requires that by 2005 developing countries change their patent laws to allow foreign companies to patent local plant varieties.

Even though the deadline had not yet been reached, the WTO dispute-settlement panel ruled that India was not moving fast enough towards compliance. As a result, India

must grant monopolies to foreign corporations on plant and animal varieties based on patents granted by any other WTO member[6].

Opinions about discrimination

Months before the July 1997 decision of a dispute settlement panel of the WTO, which agreed with the U.S. that India had failed to implement the so-called "mail-box" provisions of Article 70 of TRIPs, the U.S. Ambassador to India had announced that "certain areas of research and training will be closed to cooperation" if India failed to amend its patent laws, threatening some 130 scientific projects supported by the U.S. India Fund. (Despite the five-year transition period for developing countries, Article 70 requires them to establish legal procedures for receiving applications for patents on pharmaceutical and agricultural chemicals immediately so that, upon their full implementation of TRIPs, patents can be back-dated to the date of filing. India had developed a legal administrative procedure, which the dispute panel deemed insufficient).

Kristin Dawkins, Director of the Trade and Agriculture Program, Institute for Agriculture and Trade Policy, U.S.

7. **Chiquita Banana Case**

Complaint by: U.S.

Complaint against: European Union

WTO Case WT/DS27

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[6] Debi Barker & Jerry Mander. Invisible Government. The World Trade Organization: Global Government for the New Millennium? San Francisco: International Forum on Globalization, October 1999: p. 34.

http://www.ifg.org/aboutwto.html

This dispute was initiated by the U.S. government on behalf of Chiquita Brands, a U.S. based corporation, in response to Europe's Lome Convention preferences for small banana producers in former European colonies in the Caribbean. Chiquita grows bananas in Latin America and exports them to Europe and the rest of the world.

In the Lome Convention, the European Union granted its former colonies special low tariffs and quotas on bananas. The Uruguay Round of trade negotiations exempted these preferences from the most favored nation requirements of the General Agreement of Tariffs and Trade. GATT, now enforced by the World Trade Organization, allows rich countries to grant preferential tariffs to poor countries to encourage development.

The economies of most of the Caribbean islands aided by the tariff breaks depend solely on bananas, and most of the banana producers who benefit are small farmers. They cannot compete with the large Latin American plantations of Chiquita Brands and the other agribusiness giants who grow two-thirds of the world's bananas. Chiquita already controls 50 percent of the EU banana market, while Caribbean island producers supply only 8 percent. Without the Lome preferences, as the prime minister of Santa Lucia has pointed out, these countries "would have little or no possibility of participating in the global trading system".

In 1997, a WTO dispute-settlement panel decided in favour of the Clinton administration's challenge. Arbitration panels in 1998 and 1999 upheld the original panel's decision.

These WTO rulings striking down the EU-Caribbean arrangement threaten to undermine higher-priority U.S. efforts in the region. "I really do not see why it is in the interest of the Unite States that poor countries in the Caribbean and elsewhere, which are

not able to do anything other than grow bananas, should be driven into more dangerous economic activity such as drug trafficking, commented EU Trade Commissioner Sir Leon Brittan. The commander of U.S. forces in the region, Marine General John Sheehan, concurred: if Caribbean banana producers are deprived of their only means of providing for their families, he said, they will resort to drug dealing or illegal migration.

None of Chiquita's bananas are grown in the United States. Yet CEO Carl Lindner effectively hired the United States government to represent his firm. In 1996, two days after the Clinton administration filed a complaint with the WTO against the EU banana policy, Lindner donated $500,000 to the Democratic Party. A model of bipartisanship, Lindner also showered $350,000 on the Republican National Committee and campaign committees in 1998. One month later, the Republican Senate leadership introduced a bill imposing retaliatory tariffs on the EU.

On April 11, 2001, the U.S. and E.U. reached an agreement to begin to dismantle the barriers to which the U.S. banana companies object. In July 2001, U.S. Trade Representative Robert Zoellick said the U.S. was satisfied with Europe's implementation of the agreement and the Bush administration lifted $191 million worth of retaliatory trade sanctions the U.S. had imposed on the EU[7].

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[7] BRIDGES Weekly Trade News Digest. *WTO Confirms EU Banana Regime Violates Rules*. Geneva: International Centre for Trade and Sustainable Development, Vol. 1, No. 33, 15 September 1997. http://www.newsbulletin.org/bulletins/getbulletin.cfm?browse=1$Issue-ID=243$Bulletin-ID=14$SID=

Opinions about discrimination

Bananas are 'like' products, for purposes of Article I, III, X and XIII of GATT, irrespective of whether they originate in the EC, in ACP countries, in BFA countries or in other third countries.

-WTO. European Communities-Regime for the Importation, Sale and Distribution of Bananas-Complaint by the United States-Report of the Panel. WT/DS27/R/USA, May 22, 1997.

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