AN EXAMINATION OF INTERNATIONAL TRADE AGREEMENTS: ISSUES AND CHALLENGES FOR NIGERIA

BY

Paul Igoche ONUH, LL.B, BL. LL.M
Ph.D/LAW/00816/ 2006-2007

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A DISSERTATION SUBMITTED TO THE SCHOOL OF POSTGRADUATE STUDIES, AHMADU BELLO UNIVERSITY, ZARIA IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE AWARD OF DOCTOR OF PHILOSOPHY IN LAW – Ph.D DEGREE

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FACULTY OF LAW

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DECLARATION

I declare that the work in this Dissertation entitled AN EXAMINATION OF INTERNATIONAL TRADE AGREEMENTS: ISSUES AND CHALLENGES FOR NIGERIA has been carried out by me in the Department of Commercial Law. The information derived from the literature has been duly acknowledged in the text and a list of references provided. No part of this dissertation was previously presented for another degree or diploma at this or any other institution.

Paul Igoche ONUH, _____ _____
Signature Date

CERTIFICATION

This Dissertation entitled "INTERNATIONAL TRADE AGREEMENTS: CHALLENGES AND PROSPECTS FOR NIGERIA" by Paul Igoche ONUH, meets the regulations governing the award of the degree of Doctor of Philosophy Ph.D in Law of Ahmadu Bello University, Zaria and is approved for its contribution to knowledge and literary presentation.

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DEDICATION

To my wife Franka, my children Felicia, Kenny, Jennifer and Charles, to my mother Esther Achobe Okpe and to the memory of my late father Jeremiah Amali Onuh; their affection and love have been a great source of inspiration and joy.

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ABSTRACT

The WTO and its predecessor GATT have formed rules and discipline for ensuring multilateral trade among nations. Its overriding objective is to ensure that trade flows smoothly, freely, fairly and predictably. At the heart of the system are the WTO's Agreements which are the legal rules for international commerce. This appears to be the greatest supranational, international economic institutional structure established to promote international trade and globalization. However, these global trade rules formulated by the WTO are fraught with many inadequacies and hence pose serious challenges to developing member countries such as Nigeria. The immediate objective of this research was examine the propriety of developing countries like Nigeria signing these international trade agreements hoping that by doing so, they will reap huge economic benefits. However, the benefits and costs of trade liberalization (the driving force of globalization championed by the WTO) for developing countries constitutes an increasingly controversial issue. Thus, the central question for this dissertation is whether strict adherence to the obligations and commitments made by Nigeria to WTO's GATs and TRIPs will not pose serious challenges to Nigeria's economic development objectives as a third world country. And if it does, how can these challenges be addressed. Despite the inherent unbalanced nature (as it seems to favour only developed countries) of the terms of these international trade agreements, governments especially in developing countries are still vulnerably and helplessly opening up their local economies to the global markets with all the attendant dislocation in economic growth projection. Therefore, the main objective of this research was examine the WTO's General Agreement on trade in services (GATs) and Agreement on Trade Related Aspects of Intellectual Property (TRIPs) with a view to identifying the issues and challenges underlying the application of these trade agreements and make recommendations as

appropriate. Finally, this study increases our understanding of the need to have sound national development policies and laws that must be properly implemented and pursued consistently and well coordinated in Nigeria to achieve economic growth. Added to this is a clarion call for a drastic reform of the WTO to address the marginalization of developing countries.

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LIST OF ABBREVIATIONS

ACP:	African, Caribbean and Pacific Group
AECT:	African Economic Community Treaty
AGOA:	African Growth and Opportunity Act
AOA:	Agreement on Agriculture
ASEAN:	Association of Southern East Asian Nations
AU:	African Union
BPP:	Bereau of Public Procurement
CBI:	Caribbean Basin Initiative
CLS:	Child Labour Standards
CODPR:	Copyrights Optical Discs Plant Regulation
CRTA:	Committee on Regional Trade Agreement
DDA:	Doha Development Agenda
DSB:	Dispute Settlement Body
DSU:	Understanding on Rules and Procedure Governing the Settlement of Disputes
EBA:	Everything But Arms
EC:	European Community
ECOSOC:	United Nations Economic and Social Council
ECOWAS:	Economic Community of West African State
EEC:	European Economic Council
EEG:	Export Expansion Grant
EPA:	Economic Partnership Agreement
EPF:	Export Processing Factories

EPV:	Export Processing Village
EPZ:	Export Processing Zone
EU:	European Union
FCN:	Friendship, Commerce and Navigation
FDI:	Foreign Direct Investment
FTA:	Free Trade Agreement
GATS:	General Agreement on Trade in Services
GATT:	General Agreement on Tariff and Trade
GSM:	Generalised System of Preferences
GSTP:	Global System of Trade Preferences
HDR:	Human Development Report
ILO:	International Labour Organization
IMF:	International Monetary Fund
IPRs:	Intellectual Property Rights
ITO:	International Trade Organization
LDCs:	Least Developed Countries
MDAs:	Ministries, Departments and Agencies
MFN:	Most Favoured Nation
MTA:	Multilateral Trade Agreement
NAFTA:	North American Free Trade Agreement
NEEDS:	National Economic Empowerment and Development Strategy
NIEO:	New International Economic Order
NIPPS:	National Institute of Policy and Strategic Studies
PFA:	Preferential Trade Agreement
PTA:	Plurilateral Trade Agreement

SCM:	Agreement on Subsidies and Countervailing Measures
SON:	Standards Organization of Nigeria
SPFS:	Special Programme for Food Security
SPS:	Agreement on the Application of Sanitary and Phytosanitary Measures
TBT:	Agreement on Technical Barriers to Trade
TNCs:	Transnational Corporations
TPRB:	Trade Policy Review Board
TPRM:	Trade Policy Review Mechanism
TRIPs:	Agreement on Trade-Related Aspects of Intellectual Property Rights
UNDEAC:	Central African Economic and Custom Union
UN:	United Nation
UNGTRAL:	United Nations Commission on International Trade Law
UNCTAD:	United Nations Conference or Trade and Development
UNDP:	United Nation Development Programme
USA:	United States of America
WTO:	World Trade Organization.

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CHAPTER ONE

GENERAL INTRODUCTION

1.1 BACKGROUND TO THE STUDY

International trade encompasses problems and challenges for both emerging markets and even in some cases highly developed economies. For instance after almost 12 (twelve) years of intense negotiations, Russia only in 2007 signed agreements with the United States of America which will enable them to join the World Trade Organization (WTO).

International trade is a matter of vital importance for developing countries since it can stimulate growth and contribute to poverty reduction. Trade is however an increasing complex issue, and policy makers in developing countries will need to understand the many ramifications of multilateral trade agreements if their countries are to benefit from this engine of growth.

The laws that regulate International trade are often complex and difficult to apply. This is so because, like other branches of International Law, apart from regulating the conduct of parties, they have no force of law. Sanctions imposed usually come very late and are sometimes ineffective.

Similarly, International trade issues have always been a source of serious controversy among nations. This is natural as every country very often tries to protect and put in place restrictive policies that would guarantee their citizens well being. For instance, in 2006, the USA imposed trade restrictions on the export of high technology equipment from China. Infact, Chinese goods generally, have suffered and are still

suffering severe restrictions in US markets. Even in Europe, EU countries have consistently subsidized their local agricultural products at the detriment of imported ones.

The nature of international relations and international law has changed radically since the end of the cold war and the emergence of the New World Order. Rapid, pervasive, relentless and fundamental changes are taking place in all countries, for better or for worse. One such change is in the establishment, enlargement and strengthening of economic and trade groups across the globe.

People's lives are now more interdependent as global integration limits time and space and erode national borders. New global, mostly private actors have emerged and are wielding greater influence. As privatization proceeds, private enterprises and corporations such as the WTO, the Bretton Woods Institutions i.e. The World Bank and International Monetary Fund, IMF, Microsoft and the Global Media led by the CNN & BBC – all have significant impact on the lives of people around the world.[1]

Governments particularly those in developing countries including Nigeria are vulnerably and helplessly opening up their local economies to the global market and aligning them with global policies by lowering their customs tariffs or making labour markets more flexible[2].

Large economic zones have been established in Europe and elsewhere (e.g. the EU, European Union) which resulted from a process of co-operation and integration that began in 1951 among six countries – Belgium, Germany, France, Italy, Luxembourg and the Netherlands, but now has a membership of 25 countries though the number keeps

[1] Nsongura J. Udombana: How Should We Then Live? Globalization and the New Partnership for Africa's Development. Boston University International Law Journal 2002, Vol. 20, No. 2 Pg. 298.

[2] A case in point is the Nigerian textile industry which has been overwhelmed by the importation of cheap Chinese and Indian textile products with all the attendant social and economic problems such as closure factories, unemployment, etc.

increasing as new members are admitted.[3] Also in America there is North American Free Trade Agreement (NAFTA) which evolved to address the economic and social problems associated with drug trafficking and migration. NAFTA also sought to create a strong trading block in the face of growing concern over American industrial decline, the mounting trade deficit with Japan and China, and the deepening rationalization in Western Europe. Similarly in Asia there is the Association of Southern East Asian Nations (ASEAN) established on August 8, 1967 through the signing of the Bangkok – declaration. Other geo-economic regional bodies were also established in Africa such as the Central African Economic and Custom Union (UDEAC); the South African Development Community (SADC); the Common Market for East and Southern Africa (COMESA); the South African Custom Union (SACU); the West African Economic Monetary Union (UEMOA); and the Economic Community of the West African States (ECOWAS). The African Union (AU) has also been established with the objective *inter-alia* to accelerate the political and socio-economic integration of the continent. Meanwhile, the world economy is dominated by a few rich countries who possess both the greatest financial influence and the main industrial conglomerates as well as the bulk technological innovations. Free trade agreements have been signed in many places, and new global rules, developed in all areas – including human rights, environment, trade and communication – now bind national policies.[4]

Nigeria and indeed other African countries are signatories to most of these international trade agreements and are therefore bound by the terms and conditions contained in them. However, as a result of the imbalance in the nature of the terms of trade agreements, these poor countries are unable to benefit from international trade with

[3] Nsongura J. Udombana, op.cit.
[4] Ibid

the attendant consequences of growing poverty, disease, illiteracy, underdevelopment occasioned by huge debt profiles and balance of payment problems.

1.2 STATEMENT OF THE RESEARCH PROBLEM

In Nigeria, apart from the oil and gas sectors of the economy, export trade has performed very poorly. Nigeria has thus in the past few years continued to record trade deficits against her major trading partners.

Several attempts have been made by successive governments to revitalize the agriculture sector[5] to boost export trade, but all these resulted in a dismal failure. In the manufacturing sector, Nigerians have watched helplessly as cheap Chinese and Indian goods especially textiles, electronic items/appliances and drugs, flood the markets while the domestic fledgling factories remain closed thus fueling the unemployment crisis.[6]

Similarly, a significant number of developing countries are largely behind other members of the international community in trade performance and face increasing marginalization if they remain unable to adapt to the rapidly evolving structure of the global economy. As the maker and arbiter of international trade rules, the WTO can contribute to redressing the situation by promoting the beneficial integration of Third World Countries into the multilateral trading system.

However, submerged within the WTO Rules and their interpretation are a wet of rules/agreements that subordinate all other values ranging from environmental sustainability, consumer and worker safety, public health freedom of labour and human rights to maximizing trade. The provision and interpretation articulating these rules impede nations from enforcing their own laws to protect the public good.

[5] Before the discovery of oil in the 1950s Agriculture was the main foreign exchange earner in Nigeria.
[6] It is so bad that Nigerians even import toothpicks from China

Given the above background the central question for this dissertation is whether strict adherence to the obligations and commitments made by Nigeria to the WTO's agreements in GATs and TRIPs will not pose serious challenges to Nigeria's economic development objectives as a third world country. And if it does, what measures should be adopted to address these challenges.

1.3 AIM AND OBJECTIVES OF THE RESEARCH

The main objective of this study is to examine the WTO's Agreements on Agriculture, the General Agreement on Trade in Services (GATs) and Agreement on Trade Related Aspect of Intellectual Property Rights (TRIPS) with a view to identifying the issues and challenges underlying he application of these trade agreements.

This research further aims at establishing the propriety of the membership of the WTO by a developing country such as Nigeria and having analysed the various issues, to provide recommendations.

1.4 JUSTIFICATION FOR THE RESEARCH

The rapid pace of technological change and globalization has produced vast economic activities across the globe thereby increasing the volume of international trade. However, despite the importance of international trade to national economies, most African countries like Nigeria are yet to fully tap the benefit afforded by global trade.

This study analysed critical issues and examined the challenges inherent in international trade agreements and policies of the World Trade Organization with a view to proffering solution on how D.C can take advantage of same and leverage economic development and it is therefore both deserving and relevant.

This research is important for showing the relevance of International Trade agreements and its application under the WTO in promoting and regulating balanced trade relations between rich and poor countries. This work therefore is a call for action to address identified problems.

1.5 SCOPE AND LIMITATION OF THE RESEARCH

The WTO legal text, and together with the subsequent WTO's Intellectual Property and Services agreements (TRIPs and GATs) form the global legal framework within which governments now regulate international trade in goods and services, and intellectual property rights.

The scope of this research therefore covers issues relating to the implementation of the WTO's Agreements on services and intellectual property (GATs & TRIPs) and the challenges faced by developing countries such as Nigeria.

The interpretations placed on the above agreements by the WTO dispute settlement bodies and initiatives taken by the members both to liberalize trade and to shape international business regulation all come within the scope of this study.

Although, Nigeria is the focal point of this study, references are made to countries in Africa, Asia and Latin America generally referred to as developing and least developed countries that have been affected most disproportionately by those international instruments regarding trade and development issues.

1.6 RESEARCH METHODOLOGY

The main approach to this research was doctrinal. This means an examination and review of existing literature (historical and contemporary) on the area. This study therefore, was largely based on library and archival research. The principal legislation

examined was the Legal Text of the WTO agreements on GATs and TRIPs.[7] The aim here is to examine the various provisions on these agreements especially as they affect Nigeria. The adequacy or otherwise of the agreements were examined in order to ascertain whether they have actually impacted on Nigeria[8] positively.

At the secondary level, resort was made to the works of legal writers in the area of the study. Other complementary sources included; journal articles, unpublished write-ups, searches conducted at the Federal Ministry of Industry and Investment and the Nigeria Export Promotion Council, Abuja.

International trade is an integral part of the economy of every nation. An inter-disciplinary approach was adopted to determine the impact of other disciplines such as economics, sociology, political science and recently environmental studies on international trade and their overall effect on the development of Nigeria.

1.7 LITERATURE REVIEW

This research made use of existing literatures on the topic with a view to identifying the extent to which other researchers have studied the subject. The review showed the coverage made by the writers on the topic while disclosing to the researcher Lacuna and problems associated with the research area. The legal texts[9] being the principal legislation only provided for agreements in the different area of negotiation.[10] Though the WTO agreement has undergone several modifications, it still remains the primary text that regulates international trade and business transactions.

[7] The WTO's agreements are often called the Final Act of the 1986-1994 Uruguay Round of trade negotiation.
[8] Together with other LDC's
[9] i.e. the WTO agreements
[10] which includes but not limited to Agriculture, Sanitary and Phytosanitary measures, agreements on Textiles and Clothing, Technical Barriers to trade and others.

Several scholars have contributed to knowledge in this field. However, it must be stated here that most of these authors, unfortunately are foreign authors whose scope did not target Nigeria. This area of study has not received wide contributions by many Nigeria scholars.

Among the foreign authors, Van den Bosshe, P. wrote an outstanding book[11] which sets out the core legal rules and policy of the WTO in a uniquely comprehensive and straight forward manner.

The book provides both a detailed examination of the law of the WTO and a clear introduction to the basic principle and underlying logic of the world trading system. It explores the institutional aspects of the WTO together with the substantive laws New to this edition are examinations of the WTO rules on the protection of intellectual property and the rule on technical barriers to trade and sanitary and phyto-sanitary measures.

Another scholar, Adamantopoulous K, in his book[12] provides an overview of the history, structure and functions of the WTO. This book is intended to be a practical guide for people who are involved in the area of inter-natural trade, but it is written in a style that is accessible to newer researchers. It begins with a preview of GATT and the Uruguay Round and describes the numerous agreements produced as a result. The book then proceeds to an indepth look at the WTO from the scope of its authority to the general functions to the specific organization within it. There is a discussion of the WTO's dispute settlement mechanism and procedure and an analysis of how the WTO differs from the GATT.

[11] The Law and Policy of the WTO - Cases, Texts and Materials, Cambridge University Press, 2nd Ed. (2008)
[12] An Anatomy of the World Trade Organization (1997)

The World Trade Organization is still undergoing several changes and thus generates several debates, controversy and outrage. Rulings on beef hormones and tuna-dolphin cases provide explicit examples of how the organization regulates into areas of individual consumer choice, ethical preferences and cultural habits; the deep and far – ranging impact of the WTO on people's every day lives means that it is not just an institution of interest to economists, but to everyone, a fact that was perhaps most graphically illustrated by the demonstrations that have become a regular feature associated with high – level meetings of the WTO.

In response to the above Murita Marlikar[13] provided a carefully considered explanation of what the WTO is, what it does and how it goes about executing its tasks, and gives a clear understanding of the mandate, structure and functioning of the WTO that is essential to appreciating the controversy behind the organization.

The WTO Agreements provide for the legal framework regulating international commerce and trade policy. As such it has attracted and will continue to occupy the attention of legal authors.[14] This part of the review deals with literature that could be described as standard text on the law of International Trade and the policy and practice of the WTO. The literatures considered above state only the rules and make salutary, commentaries on them. Some authors even encourage developing states to lower their tariffs and comply with WTO rules as the best measures for achieving development and

[13] *The World Trade Organization: A Very Short Introduction*, Oxford University Press, USA (Nov. 3, 2005)
[14] Lester, S. and Mecurio, B., with Arwel D and Leitner, K., *World Trade Law: Text, Materials and Commentary*; Hart Publishing, Oxford and Portland, Oregon (2008); Mitsuo Matsushita; The World Trade Organization: Law, Practice and Policy, Oxford University Press, USA (October 2, 2006) Barton, J. H. *The Evolution of the Trade Regime: Politics, Law and Economics of the GATT and WTO:* Princeton University Press (Jan 7, 2008) Trebilcock, M.J., and House, R. *The Regulation of International Trade*, 2nd Ed. Routledge, New York (2001) Gilles, P., and Moens, G., *International Trade and Business: Law, Policy and Ethics*, Cavendish Publishing (Austrialia) Ltd., (1998) Denin, J. F., *Law and Practice of the World Trade Organization*. Oceana Publication Inc. Dodds Ferry, New York, (2001)

obtaining favourable trading terms. They have not examined the impact of unbalanced trade[15] on the economy of developing countries.

Trade in general and the WTO in particular are essential building blocks for a better world. Interdependence, however, can only develop effectively within a balanced rule-based system. Arup, C. in his insightful book[16] assesses the impact of the WTO and the globalization of law through new multilateral agreements – the General Agreement on Trade in Services (GATs) and trade Related Aspects of Intellectual Property (TRIPs). It explains how these agreements push trade policies "behind the border" mediating conflicts between contrasting legalities. Detailed case studies address topics of global significance such as competition between legal services, ownership claims to the genetic codes and access to on-line media.

Arup's book is followed by a second edition[17] which analyses the provisions of the agreements and examine closely the 13 years of implementation and revision. This book is a very useful resource to this study even though, it focused only on the agreements of GATs and TRIPs.

Global trade in services has been growing in prominence and given the substantial role it plays in world economy, it has caught the attention of several scholars.[18] Ms. Jumoke Akinjide in a paper titled: *Globalization of legal services – fears of African*

[15] Which has resulted from the operation of the rules and policies of the WTO and free trade agreements.
[16] *The New World Organization Agreements: Globalizing Law through Services and Intellectual Property* (Cambridge Studies in Law and Society) Cambridge University Press, 1st ed. Aug. 8, 2000
[17] *The World Trade Organization Knowledge Agreement* (Cambridge Studies in Law and Society) Cambridge University Pres, 2nd Ed. (June 9¸2008).
[18] Blouin, C. *International Trade in Health Services, and the GATs: Current Issues and Debates* (World Bank Trade and Development Series) (Nov. 15, 2005) Hoekman B. et al., *Development Trade and the WTO: A Handbook* (World Bank Trade and Development Series) (Nov. 1, 2002) Sue Arrowsmith; *Government Procurement in the WTO* Kluwer Law International, 1st Ed. (June 1, 2003 Sampson G. *The WTO and Sustainable Development, United Nations*, University Press, (Sept. 2, 2005, Jackson J. The World Trading System: Law and Policy of International Economic Relations. The MIT Press, 2nd Ed. (October 10, 1997, Cline W. *Trade Policy and Global Poverty*, Peterson Institute June, 2004).

Countries[19] made a very insightful contribution to the ongoing debate on International Trade in services. In this paper the author addresses the threat posed by the internationalization of legal services to the small economies of African Countries by the developed countries. The paper informs and assists policy-makers in formulating trade policies and negotiating internationally.

There is an ongoing and animated international debate about the impact of GATs on public services, especially legal services. In response the paper offers different perspectives from other jurisdiction notably India and China.

Das, B.L.[20] presents an analysis of the most recent and on-going negotiations on World Trade. It provides an overview of the Doha work program as well as examining fourteen key issues in detail. These issues include areas such as agriculture provision of services and intellectual property. The author considers implementation issues and explores aspects of trade as they specifically affect developing countries. In the second part of the book, the author presents suggestions for improving the WTO agreement and rules, again with focus on developing countries. The full text of the Ministerial Declaration from the Doha Conference, which led to the current round of negotiation, is included in this volume.

While these resources (Akinjide J. and Das B.L.) might be too specific for a beginning researcher, the information provided would be useful for indepth analysis of numerous aspects of the activities of the WTO.

[19] A paper delivered at the 2007 Annual General Conference of the Nigerian Bar Association (NBA), August 26 – 31, 2007 at Illorin, Kwara State, Nigeria.
[20] WTO! The Doha Agenda (Third World Network) 2003

In the area of economic integration, mention must be made of the work of Akinyemi A.B., Falegan S.B. and Aluko I.A.[21] This book is a collection of articles/papers presented at a 5-day conference organized by the Central Bank of Nigeria and the N.I.I.A in 1977 on ECOWAS, which had earlier been established in 1975.

Noting the central role of ECOWAS as an important international economic body for integration, co-operation and development of the West African Sub-region, the essays in this book serve as good bearings/lessons on Africa's integration and the benefits African states stand to derive from integration.

This is very important because, one of the ways that African Countries can actually fight the dominance of and controlling effect of developed countries is by actually coming together and forming strong regional groups or blocks and speaking with one voice as in OPEC.

A similar work was also done by Ajomo M.A. and Adewale O.[22] on African Economic Community Treaty. The objective of the Conference was to formulate a blue print for the implementation of the treaty and thereby launch a sensitization campaign for the popularization of the concept of African Community Integration.

The work is therefore an overview of the social, political, economic and legal issues on the A.E.C.T. as perceived by scholars throughout the length and breath of Africa who participated in the conference. The aim is to expedite action on the implementation of the treaty so as to attain the objective of an African Common Market as envisaged in the OAU (now AU).

[21] *Readings and Documents on ECOWAS*, Nigerian Institute of International Affairs, McMillan Ms. Lagos (1984).
[22] *African Economic Community Treaty (A.E.C.) Issues, Problems and Prospects* – a collection of papers delivered at the International Conference on A.E.C.T. held at Abuja from Jan 27 – 30 (1992).

Carl B.M.[23] provides a comprehensive overview of regional trade organizations with a focus on the developing countries of the world. He examines how regional trade organizations can help countries in areas such as tariffs, quotas and subsidies. Chapters review the organizations patterns for international trade from both a worldwide perspective and a regional perspective. The book is an excellent resource for information about the individual regional trade organizations with detailed history and explanation of their development.

Of particular importance to international trade is dispute settlement. The basis for the WTO dispute settlement process is the understanding on Rules and Procedures Governing the Settlement of Disputes (generally referred to as the DSU), which appears as Annex 1 of the WTO Agreement. Notable authors have written extensively on this topic, but Palmeter D. and Mavroid's P.[24] provides a comprehensive introduction to the dispute settlement policies of the WTO. There are sections discussing the Dispute Settlement Body, the Appellate Body, the respective jurisdiction and the sources of law for the WTO decisions. The book contains analysis of all the stages of the dispute settlement process. It is clearly and understandably written and can serve as good resource for beginning research into the WTO's dispute settlement rules and procedure. There is a detailed index and table of contents as well as a bibliography for additional resources.

Further on dispute settlement, Petersmann E.[25] has also made a worthy contribution. It is intended to serve as an introduction to the dispute settlement procedures of the WTO. It begins with a history of dispute settlement policies of GATT beginning in

[23] *Trade and the Developing World in the 21st Century* (2001)
[24] *Dispute Settlement in the World Trade Organization: Practice and Procedure*. 2nd Ed. (2004)
[25] *International Trade Law and the GATT/WTO Dispute Settlement System* (1997)

1947 and proceeds to a discussion of the current system under the WTO. Part two of the book explores dispute settlement practice in specific subject areas, such as anti-dumping, intellectual property and restrictive business practices. The book also discusses the WTO dispute settlement system in conjunction with regional trade agreements and domestic courts.

The authors mentioned in the foregoing clearly state the rules, practice and procedure of the dispute settlement mechanisms of the WTO. However, an important aspect left out in their discussions is the rigorous, often confusing and highly expensive process of bringing a trade dispute before the WTO – DSU. Infact most developing countries develop cold feet when ever they consider bringing a claim or they sometimes even withdraw such claims as a result of these factors.

In further pursuit of sourcing for materials towards the attainment of the objectives of this research, various trade law resources on the internet were consulted. While the internet is a good tool for accessing information about international trade, it cannot provide all the materials needed for researching this topic.

1.8 ORGANIZATIONAL LAYOUT

This work comprises seven chapters; Chapter one which is the general introduction provides the background of the study, statement of the problem of the research, objective, methodology, scope, literature review and organizational layout of the research.

Chapter two discussed conceptual and basic issues relating to international trade. The chapter specifically examined the main concepts germane to this study such as the 'Most-Favoured Nation Principle', National Treatment Principle, sanitary and Phy-to

Sanitary Measures (SPS), Technical Barrier to Trade (TBT); Subsidies and Countervailing Measures and finally; Free Trade and Preferential Trade Agreements.

The chapter goes further to examine the WTO as an institution; it's origins, first as GATT established in 1947 and then as WTO in 1995. It also examined the scope, structure and organization of the WTO. This is necessary in order to provide broad background knowledge for the study.

Chapter three focused on the international trade legal order and examined the extent to which the establishment of the WTO was an effective move towards the completion of the globalization of the world economy.

Thus, any country that neglected or refused to be a member of the WTO risked isolation. The WTO's Agreement on Agriculture (AOA) was examined being an important aspect of the economy of most developing countries. The discourse showed that developing countries have increasingly been marginalized in the global agricultural markets by the developed countries. They have done so by providing huge subsidies to their farmers therefore making agricultural products from developing countries uncompetitive in the global market.

The chapter ultimately examined Preferential Trade Agreements (PFA's) and considered how the proliferation of PFAs has threatened the sustainability of the WTO and the entire multilateral trading system. It anchored on ECOWAS as a regional trade organization.

Chapter four further highlighted the challenges of trading in the multilateral trading system. In this regard, the study examined a number of issues relating to the participation of developing countries in the WTO system. For instance, it considered the role of developing countries in the WTO; including; the negotiating of the rules, dispute

settlement; and the formal treatment of developing countries in relation to that of developed countries.

Other issues examined are whether the policies promoted under the WTO rules are appropriate or suitable for developing countries. The WTO's policy of trade liberalization as a Panacea for the economic development of developing countries came under the spotlight. One hard fact however, is that most developed countries today achieved industrialization at a time when their markets for some products were heavily protected. Even today, a protection in the form of high tarrifs and heavy subsidy is still an ongoing process.

The chapter finally reviewed the GATs and TRIPs agreements and other WTO rules that affect social policy issues such as labour, environment and human rights issues in developing countries. These could be regarded as the most controversial issues facing the WTO today. On the one hand, developed countries are mounting pressures on developing countries to make commitments and binding obligations in different areas concerning these issues. Developing countries on the other hand are reluctant arguing that it will limit their policy options, affect domestic regulation and further diminish or completely erode their sovereignty.

In chapter five research examined Nigeria's Trade policies and laws. In 2004, the Federal Government of Nigeria launched the NEEDs programme in response to the development challenges of Nigeria. One of the major objectives of NEEDs is to promote exports and diversify exports from oil. In response to this objective, the government continued to liberalise trade and embarked on other measures to encourage exports. The chapter analysed the trade regimes and various measures for promoting trade. It further examined Nigeria's membership of the WTO with a view to determining what prospects the organization holds for Nigeria. The chapter concludes on how trade policies and laws

can be made more effective in the face of rapid globalization and WTO's unacceptable trade practices.

Chapter six dealt with WTO rules and disputes settlement. Having traced the evolution of dispute settlement in the multilateral trading system, the chapter proceeded to discuss the dispute settlement process and other important procedural systemic issues. The chapter anchored on the participation of developing countries in the proceedings and reviewed the DSU to ascertain its effectiveness.

Chapter seven is the concluding part of the study: it contains the summary, conclusion and suggestions for reforms.

CHAPTER TWO

THE WTO: ESTABLISHMENT, BASIC PRINCIPLES AND RULES

2.1 INTRODUCTION

The General Agreement on Trade and Tariffs (GATT) was enacted as an attempt to reduce the number of tariffs and trade barriers and to foster international trade in the years following World War II. It was signed in 1947 by over 100 countries and has served the international community for decades. Under the auspices of GATT there have been numerous rounds of trade negotiations on a variety of issues. Beginning in 1956, the Uruguay Round negotiation included the areas of tariffs, service and intellectual property. Over seven years of negotiations the GATT agreement evolved into their current state. The Uruguay Round concluded in 1994 with numerous agreements to reduce trade barriers and institute more enforceable World Trade Rules. One of the major results of the Uruguay Round was the creation of the World Trade Organization (WTO), which officially began operations on January 1, 1995. The WTO is a multilateral organisation with the mandate to establish enforceable trade rules, to settle trade disputes and to provide a forum for further negotiations into reducing trade barriers. According to the WTO website, there are 147, WTO member countries and observer countries[1] Beginning in 2001 and proceeding through at least 2005 the Doha Agenda represents the current round of negotiations.[2]

In this chapter, we shall first examine some common concepts associated with international trade and thereafter proceed to deal with the WTO as an institution; its

[1] For a complete list of member countries, see the WTO webpage at www.wto.org. retrieved on Sept. 12, 2009

[2] Lester S. Mercurio, B. Davies; A and Leitner K. et al, *World Trade Law: Text, Materials and Commentary,* Hart Publishing Oxford and Portland, Oregon, 2008, p.65

origins first, as GATT established in 1947 and then WTO in 1995. Furthermore, we examine the scope, structure and organisation of the WTO.

2.2 DEFINING THE CONCEPTS

In addition to agreeing to maximum tariffs levels, negotiated separately for each country, each GATT/WTO member is bound to the obligations and principles of the trading system. Non-discrimination has long been and remains one of the core principle of the GATT,. The two most important non-discrimination provisions of the GATT are the Most Favoured Nation (MFN) provision in Article 1 and the National Treatment Provision in Art III[3]

The non-discrimination requirement exists in various other agreements, such as the GATS, the TRIPS Agreement and the SPS/TBT Agreement. These and other related concepts are examined below.

2.2.1 The Most-Favoured-Nation Principle

The Most-Favoured-Nation (MFN) principle is one of the oldest and most important legal obligations in the area of international economic law, with origins in medieval times. It became prominent in bilateral commerce and trade treaties negotiated in the eighteenth century.[4] The term itself may be somewhat confusing, as it has been

[3] Lester S. Mercurio, B. Davies; A and Leitner K. et al, *World Trade Law: Text, Materials and Commentary*, Hart Publishing Oxford and Portland, Oregon, 2008, p.273

[4] The Most-Favoured-Nation clause in the law of treaties;. Working paper submitted by Mr. E. Ustor, special Rapporteurs (A/CN 4/L.127) extract from the year book of the international law commission, 1968 Vol. II para. 6).

mistakenly construed as indicating that there is a country or countries that are 'most favoured'.[5]

However, the principle is actually a (somewhat) straightforward non-discrimination requirement. The MFN principle means that a country must treat other countries at least as well as it treats the 'most favoured' country'. For example if Australia imposes a 10 percent tariff on German cars imports, it cannot charge 20 percent on car imports from France or other trading partners, but rather must give these others the 10 percent rate as well. Thus a key aspect of the principle is a prohibition of discrimination among trading partners.

One of the key developments in the evolution of the MFN was World War I. During the lead up to the war, the European powers formed many alliances including trade alliance and it was felt by many that these alliances were a major cause of the war. As a result, in the aftermath of the war, many countries recognized the important role equal treatment in trade relations could play in peace and security more generally. The role of MFN was discussed during the league of nation economic and financial conferences in the 1920's and 1930's, and an MFN principle was generally included in the various bilateral trade agreement negotiated in the inter-war years.[6] It was during this

[5] In United State Domestic Law, the term has now been officially replaced by 'normal trade relations' in order to clarify the policy behind it (i.e the goal is not to favour certain countries by designating them with MFN treatment, but rather to provide those countries with the normal treatment given to others) see e.g. US Bill S. 747 'To amend trade laws and related provisions to clarify the designation of normal trade relations).
[6] Jackson J.H,, *World Trade and the Law of GATT* Bobbs – Merril Co. Charlottesville V.A 1969.

period that unconditional MFN became the dominant approach[7] in part, most likely, because the conditional form undermined the goals of promoting peaceful trade relations.[8]

With its long history and strong backing by the major trading nations, it was no surprise that the MFN principle was included in the GATT. Along with National Treatment (discussed later), MFN was one of the original cornerstones of the GATT. Indeed, it is set out in the first Article of the GATT (as well as in a number of other provisions).

Article 1(1) provides:

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

This article specifies four categories of exchange concession agreement;

i) Those relating to an obligation to pay customs duties and charges of any kind imposed on the export and import of goods or imposed on the international transfer of payments for import and export purposes.

[7] Prior to this time, different countries took different approaches; during the 19th Century the U.S practiced conditional MFN whereas the UK followed unconditional MFN as did much of Europe.

[8] In 1922, the U.S made a concession to economic liberalism by turning from the conditional to the unconditional type of the MFN clause; the reason for the departure from previous practices was explained as follows by the U.S Tariff commission: "The use by the U.S of the conditional interpretation of the most-favoured nation clause has for half a century occasioned and if it is persisted in, will continue to occasion frequent controversies between the U.S and European countries". A/CN 4/L 127 Mr. E. Ustor op. cit para. 10.

ii) Those relating to the methods of levying such duties and charges.

iii) Those relating to the rules and formalities of imports and exports.

iv) Those relating to all matters referred to para 2. and 4 of Article III regarding international taxation.

According to the most-favoured nation principle all other contracting parties may automatically take advantage of any concession exchange. The most favoured nation principle set out in the GATT is unconditional. It applies automatically and immediately to third parties without any need for the grant of any compensation or concession to the negotiators. Tariffs which have been negotiated based on the most – favoured nation principle are included in the Tariffs schedules of the GATT and are put on the agenda of the contracting parties. As a result all contracting parties may benefit from any such negotiations.

There are a wide range of economic and political benefits arising from the principle, including [9]

i) It eliminates distortions in production patterns as companies will produce in the most efficient production location allowing comparative advantage to work. Without MFN, by contrast a company may produce in a country favoured with lower tariffs rates so as to take advantage of these rates, even if that country is not the most efficient production location.

ii) It can result in broader trade liberalization as any tariff cuts offered to one country with apply to all countries.

[9] Lester; S. Mercurio, B. Davies, A. and Leitner K., (2008) World Trade Law: Text Materials and Commentary, Hart Publishing Oxford and Portland, Oregon, p.323

iii) Unconditional MFN can simplify trade negotiations, for e.g. by eliminating the need to gauge reciprocity in tariff concession something which is required with conditional MFN.

iv) It makes for straightforward and transparent customs polices, as complex rules of origin to determine where product made in multiple countries originate are unnecessary. This simplicity also helps reduce the opportunities for special interests to lobby for rules that favour them.

v) It reduces international tension because the possibility of one country being treated worse than other countries is eliminated. Furthermore, it treats all nations equally, regardless of size or power. In this way, it spreads peace and security along with trade liberalization.

vi) As a final point, the MFN principle plays an important role in other areas of WTO rules as well. Both the GATs and the TRIPS Agreements, two of the major new areas of negotiation developed during the Uruguay Round contain an MFN provision. MFN also plays a role in many other agreements, for instance, plurilateral agreements, like the Agreement on Government Procurement have an MFN provision; giving countries an incentive to join the agreement so as to receive treatment as good as that received by their trading partners.

2.2.2 National Treatment Principle

The National Treatment requirement has always been and remains one of the core principles of the GATT/WTO, along with the rules on tariff with concessions and MFN. These three areas make up the first three Articles of the GATT; Article 1 is MFN, Article II is tariff concessions and Article III is National Treatment[10]

[10] Ibid

National Treatment and MFN are the two main non-discrimination requirement in WTO rules. Whereas the MFN requirement prohibits discrimination among trading parties, the National Treatment requirement prohibits discrimination against foreign products. As will be seen, many aspects of the national treatment non-discrimination principle are very similar to those discussed in the context of MFN.

Although closely related conceptually, the origins of National Treatment as a principle of International Trade Agreement differ from those of MFN. As explained in the preceding section, MFN arose as a way to ensure that tariff and other concession were provided to all trading partners equally. In essence, this approach to trade negotiation was a way to promote broader trade liberalization[11] and to ensure harmonious trade relations[12]. By contrast, the idea of National treatment originated in part, as a rule against circumvention of tariff concessions by means of discriminatory internal measures. There was a concern that for example, a country might lower its tariff on a product, but then adopt an internal tax or regulatory measure that treated the foreign product worse than the equivalent domestic one. In doing so, the country might even try to disguise its intention by adopting a measure with an ostensibly legitimate non-trade related purpose, which on its face treated foreign and domestic products equally, but nonetheless had an adverse impact on foreign products. The National treatment rule addressed this concern by prohibiting discriminatory internal measures.[13]

In addition to the concern with undermining the concessions, there was also a problem with discrimination against foreign goods and generally as internal measures

[11] By extending tariff concession to all countries rather than limiting them to just the specific trading partner who had requested them

[12] Countries would not form alliances that treated some worse than others, causing conflict and tension.

[13] Lester; S. Mercurio, B. Davies, A. and Leitner K., (2008) World Trade Law: Text Materials and Commentary, Hart Publishing Oxford and Portland, Oregon,. p.278

could be used for protectionist purposes outside the context of tariff concessions. After much debate the drafters of the GATT decided that the National Treatment rule would be applied even where no concessions had been made, thereby creating a broader obligation against discrimination that applied regardless of whether or not circumvention of concession had occurred.[14]

National Treatment is much more prominent than MFN in GATT/WTO jurisprudence. This is likely because the main reason countries breach the MFN principle is due to free trade agreement and customs unions, which are permitted under GATT Article XXIV, provided certain conditions are met. Aside from this circumstance however, MFN violation are fairly infrequent as countries rarely attempt to favour some trading partners over others. By contrast, National Treatment violation are much more common and are very likely to cause friction with trading partners where National Treatment issues arise, it is usually due to perceived attempt to discriminate against foreign products, thereby triggering concerns among competing foreign producers and often leading to formal trade disputes[15].

It is pertinent at this juncture to make some general observation on the importance of this rule in GATT/WTO jurisprudence. Because of its effect on the scope of permissible domestic policy-making, the National Treatment rule is one of the most sensitive of all GATT/WTO rules. The precise scope given to it will have a substantive impact on the ability of the WTO members to regulate in non-trade policy areas. Because all domestic tax and regulatory measures coming within the broad scope of the rule must comply, any domestic policy area, from labour rights to environmental protection to income taxes, can be scrutinized under the National treatment requirement. Generally, it

[14] Jackson J. H. Op. cit at p. 277-8
[15] See Simon Lester et al op. cit.

must be stated that the scope of member's discretion under this rule has shifted considerably over the years.

(a) Analysis of the Provisions of GATT/WTO Article III

The main GATT provisions on National Treatment are contained in Article III, which is entitled 'National Treatment on Internal Taxation and Regulation.[16] The term 'National Treatment' refers to the treatment to be provided to foreign goods which may be just as good as that given to national (i.e domestic) goods. Paragraph (1) states:

> The members recognize that internal taxes and other internal charges and laws regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products and internal quantitative regulation requiring the mixture processing or the use of products in specified amounts or proportion should not be applied so as to afford protection to domestic production.

Thus, under this provision, the internal laws described, when they have the effects set out in the provision should not be applied to imported or domestic product *so as to afford protection to domestic production'* (emphasis added). Based on this language, the Appellate Body has explained that 'the broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures'[17]

Paragraph 2 addresses tax measures stating:

> the products of the territory of any member imported into the territory of any other member shall not be subject directly, or indirectly to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no member

[16] Other National Treatment provision are found in various other agreements e.g. in the SPS and TBT Agreements and in the GATS and TRIPS agreements).
[17] Appellate body Report, Japan – Alcohol, p.16

> shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.

An interpretative note to this provision clarifies that:

> "A tax conforming to the requirement of the first sentence of paragraph 2 will be considered to be inconsistent with the provisions of the second sentence only in cases where competition was involved between on the one hand, the taxed product and on the other hand, a directly competitive or substitutable product which was not similarly taxed.

Thus, taking paragraph 2, paragraph 1 and the interpretative note together, there are two different obligations in the two sentences of paragraph 2. The first sentence of paragraph 2 is fairly straight – forward, setting out rules where the products at issue are "like". Applying the second sentence is however more complicated. Although, in combination with the interpretative note and paragraph I, the second sentence sets out rules for products which are 'directly competitive or substitutable'.

Article III: 4 then deals with regulatory measures providing in relevant part

The products of the territory or any member imported into the territory of any other member shall be accorded treatment no less favourable than that accorded to like products of national *origin in respect of all law, regulation and requirement affecting their internal sales, offering for sale, purchase, transportation, distribution or use.*

Unlike , Article III:2, Article III:4 has only one obligation, which requires that 'no less favourable treatment' be accorded to imported products as to domestic 'like products'. There is no separate category of 'directly competitive or substitutable here.

Turning to the issue of the first sentence in Article III:2 there are two key elements to this provision: (1) are the imported product at issue 'like' the domestic

products? And (2) are the taxes or charges that have been applied to imported products 'in excess of those applied to like domestic products? (In addition, the measure of issue must constitute a 'tax' or 'charge').

(b) Like Products:

In order to find that imported products are being discriminated against, there must be a similar domestic product the treatment of which can serve as the basis for comparison. In Article III:2 first sentence, the degree of similarity required is that, the products at issue must be 'like'.

The issue of 'likeness' was discussed in an early WTO case, *Japan – Alcohol*. The issue there was whether various alcoholic beverages were 'like' Shochu, a traditional Japanese drink that was allegedly receiving favourable tax treatment. The panel in that case found that Vodka is 'like' Shochu 'since in addition to its communality of end-uses, it shares with Shochu most physical characteristics'. By contrast, liqueurs, gin and geneva were not like Shochu due to 'the use of additives'; rum was not 'like' Shochu because of the use of ingredients'; and whisky and brandy were not 'like Shochu because of 'appearance (arising from manufacturing process)'.

On appeal, the Appellate body upheld the panels findings that Vodka and Shochu are 'like' without offering any additional analysis of the 'likeness' of the products at issue[18]. However, the Appelate body did offer some general guidance on the issue of 'likeness' under Article III:2 first sentence and offered the following criteria. (1) the product's end uses in a given market; (2) consumer's tastes and habits, and (3) the

[18] Appellate Body Repot Japan – Alcohol, para. 34.

product's properties, nature and quality. It later noted that 'tariff classification can be a helpful sign of product similarity', thus setting a fourth factor[19].

The Appellate Body also made the following statement on the issue of 'likeness':

> No one approach to exercising judgement will be appropriate for all cases. The criteria in Border Tax Adjustments should be examined;, but there can be no one precise and absolute definition of what is 'like'. The concept of 'likeness' is a relative one that evokes the image of an accordion. The accordion of 'likeness' stretches and squeezes in different places as different provisions of the WTO agreements are applied. The width of the accordion in any one of those places must be determined by the particular, provision in which the term 'like' is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply. We believe that, in Article III:2, first sentence of the GATT 1994, the accordion of likeness is meant to be narrowly squeezed[20]

With this limited guidance, and given the wide range of products that can be subject to claims under this provision, it is difficult to come up with any additional direction on this issue except to say that the 'likeness; of any two products must be determined on a case-by-case basis under the criteria referred to by the Appellate Body.

(c) Excess Tax

Under Article III:2 first sentence, the next element is whether imported products are taxed 'in excess of' domestic like products. This is, in effect the 'discrimination' element of the provision.

The panel in the *Japan – Alcohol* case addressed this issue and found that Vodka was taxed more heavily than Shochu, concluding that the tax on vodka is 'in excess of

[19] Ibid para 20-22
[20] Ibid para. 12

that on Shochu. On appeal, the Appellate Body briefly referred to the issue of 'whether the taxes on imported products are in excess of those on like domestic product and upheld the panels legal reasoning and conclusions, in this regard, it stated:

> Even the smallest amount of 'excess' is too much. 'The prohibition of discriminatory taxes in Article III:2 first sentence, is not conditional on a 'trade effect test' nor is it qualified by a de-minimis standard[21]

2.2.3 Sanitary And Phytosanitary Measures

A key objective of the major agricultural exporting countries during the Uruguay Round was to liberalize agricultural trade. This goal was largely achieved and the Uruguay Round resulted in two agreements which have the potential of greatly increasing the international trade of agricultural and food products. The Agreements on Agriculture requires members of the World Trade Organisation (WTO) to replace import quotas with tariffs, to lower tariffs, and to reduce subsidies.

The agreement on Sanitary and Phytosanitary measures (SPS Agreement) provides the framework for reducing the number of arbitrary and scientifically questionable trade barriers ostensibly established for health and safety reasons.[22]

Exporters and importers of agricultural and of food products are familiar with sanitary and phytosanitary (SPS) measures. These measures are designed to protect human, animal and plant health in the areas of agriculture and food safety[23]. The SPS agreement provides definitions of key terms, including sanitary or phytosanitary measure in Annex A. The risks they regulate include toxins, diseases and pests, administering

[21] Appellate Body Report, Japan – Alcohol, para.23

[22] Johnson D. S; *Commentary on the Agreement on the Application of Sanitary and Phytosanitary measures. In Law and Practice of the WTO* Deunim J. F. (Gen. Ed.) McKenna and Cuneio, Oceana Publication, Inc. Dobbs Ferry, New York 2001 p.1)

[23] Sanitary measures concern human and animal health, Phytosanitary measures apply to plants.

fumigation treatment and certifying that commodities come from disease or pest-free areas. The SPS measures can also take the form of complete bans on the trade of certain products for reason of health and safety.[24] All countries implement and maintain SPS measures. Most SPS regulations are based upon scientific evidence that an agricultural or food product threatens the health of human, animals or plants. When such measures are not founded on scientifically proven threats however, they can function as disguised barriers to trade.[25]

The world's agricultural and food products are subject to numerous questionable SPS barriers which may be based upon politics and domestic protection, not scientific evidence. The European Union's prohibition on the exportation of most products treated with growth hormones which has ended most exports of red meat from the United States to the European Union is an example on possibly scientifically unjustified SPS trade measure.[26] Citing possible adverse effect on human health, the E.U since 1988 has prohibited the use of growth promoting hormones in livestock, and the importation of meat treated with growth hormones.[27] The E.U maintain this position despite findings of the Codex Alimentarius Commission[28] and a conference sponsored by the E.U that the

[24] For example, in response to Bovine Spongiform Encephalopathy BSE also known as "Mad Cow Disease" and its possible link to Creutzfeldt Jacob disease, the European Union in March 1996 banned the import of beef from Great Britain. The European Union bases this SPS measure upon risks that BSE might pose to human and animal health. Source: Jidth A. Johnson ad Donne Vogt,, 'Mad Cow disease' or Bovine Spongiform Encephalopathy; Scientific and Regulatory Issues, U.S, Library of Congress, Congressional Research Service Dept. No . 96-641 SPR, 1,4 (July, 19, 1996).

[25] Johnson, D.S. Op. cit. p.2

[26] U.S Trade Representative 1996 National Trade Estimate Report on Foreign Trade Barriers 98 (1996).

[27] Ibid.

[28] The Codex Alimentarious Commission was established in 1962 by the Food and Agricultural Organisation of the UN and the WHO. Codex promotes the use of International Standards in the establishment of food standards, such as maximum pesticides residue levels. Based in Rome, members are permitted to send scientists, government officials, consumer advocates and industry representatives, among others to its, meetings. Sources: Marsha A. Eschols *The International Tower of Babel. The small Business Perspective,* 5.1 Food and Drug Law journal 175, 179 (1996) Union of International Association 1 Yearbook of International Organisation, 603 (1996).

use of these hormones in livestock is not harmful to human health.[29]

Likewise the United States has been accused of maintaining SPS measures as a means of protecting domestic producers. Beginning in 1914, imports of avocados from Mexico were banned by the United States due to concerns that the Seed Weevil and other avocado – damaging pests could be introduced into American Orchards by Mexican avocados.[30] Mexican officials claimed that farmers in their country were capable of implementing production and packaging systems that will address U.S quarantine concerns and that the U.S policy was designed to protect American avocado growers from competition. The U.S department of agriculture announced in February 1997 that the ban was revoked and that beginning in November 1997 under limited circumstances, Mexico could export avocados to the United States[31]

a. The Growing Significance of Sanitary and Phytosanitary Measures

With an expanding world population, improvement in transportation and growing number of affluent consumers in developing countries who can afford high value imported products, the trade in agricultural good has increased dramatically in recent years.[32] The trend is expected to continue as the Uruguay Rounds Agreement on Agriculture further liberalizes trade. With the expansion of International trade has come the heightened potential for the movement of pathogens across national borders which has made multilateral guidelines for SPS measures all the more necessary.

[29] US Trade Representative op. cit.
[30] Economic Research Service, U.S Department of Agriculture, NAFTA 19 (International Agricultural and Trade Reports, Situation and Outlook Series No. WRS 96-3 Sept. 1996.
[31] Johson, D.S Op. cit.
[32] Johson, D.S. Ibid,

In addition, it is predicted that the number of scientifically unjustified SPS barriers will increase precisely because of the WTO's agreement on Agriculture.[33] As tariffs and subsidies are reduced and quotas eliminated in accordance with this agreement, producers throughout the world who were once protected will face new competition. Domestic industries will put pressure on their governments to enact new barriers to imports and many of these barriers will undoubtedly be disguised as health and safety concerns. The SPS agreement is designed to prevent and remove such trade constraints.[34]

(b) Summary of the SPS Agreement

The SPS Agreement does not create specific standards. Instead it provides general rules for government to follow when establishing SPS measures. Members are permitted to maintain measures necessary to protect human, animal and plant health. However, the SPS Agreements obligates WTO members.

i. to base their SPS measures on scientific principles
ii. not to use SPS Measure as disguised barriers to trade.
iii. to harmonise SPS measures with international standards, where feasible (but measures may be stricter than the international norms if they are the consequences of the level of SPS protection a member deems appropriate or are based upon science).
iv. to recognize the equivalency, where possible of different procedures used by other members for protecting against similar risks.
v. to base their SPS measures upon risk assessments.
vi. to recognize the concepts of disease and pest-free regimes

[33] Recognizing that the implementation of the Agreement on Agriculture threatens to increase the number of illegitimate SPS barriers Article 14 of the Agreement on Agriculture states that "members agree to give effect to the Agreement in the Application of sanitary and Phytosanitary measures".
[34] Joshua, D.S. Op. cit.

vii. to maintain transparent SPS regulations and

viii. not to use control, inspection and approval procedures as unjustified SPS barriers to imports.

The SPS Agreement also creates a committee on Sanitary and phytosanitary measures, provide special provision for developing countries and makes SPS disputes subject to the WTO's understanding on Rules and Procedures Governing and Settlement of Disputes.[35]

(c) Basic Rights and Obligations of the Provision of the SPS Agreement

Article 2 contains the most important provision of the SPS Agreement. This article expressly affirms that the WTO members have the right to enact and maintain SPS measures necessary to protect the health of humans, animals and plants.[36] However, each measures can be taken only if they are based upon scientific evidence.[37] SPS measure cannot be used as disguised barriers to trade.[38] Article 2 also states that a WTO member shall not discriminate against another member, "where identical or similar condition prevail" in each member's territory.[39]

Therefore, the SPS Agreement does not prohibit governments from excluding foreign agricultural and food products for legitimate health or safety reasons. It apply these measures in a non-protectionist manner[40]

[35] Understanding on Rules and Procedures Governing the Settlement of Disputes Final Act embodying the Results of the Uruguay Round Multilateral Trade Negotiations (hereinafter Dispute Settlement understanding), (Marrakaesh, April 15, 1994).
[36] SPS Agreement Art 2. para 1
[37] Id. Para 2
[38] Id. Para. 3
[39] For example, the E.U contends that U.S restriction on the importation of goats due to the risk of the spread of scrapie to American Sheep as unjustified..The E.U claims that American sheep are already commonly carry this disease. The U.S Policy could be violative of Article 2 European Union, Report on United States Barriers to Trade and Investment 33 (1996).
[40] David S. Johson, op. cit.

2.2.4 Technical Barriers to Trade (TBT)

The Technical Barrier to Trade Agreement covers three kinds of measures technical regulations, standards and procedures taken by governments related to the assessment of conformity with technical regulations and standards (conformity assessment procedures). These measures are defined in Annex 1 as follows:

1. Technical regulation

Document which lays down product characteristic or their related processes and production methods including the applicable administrative provisions with which compliances is mandatory. It may also include or deal exclusively with terminology, symbols packaging, working or labeling requirement as they apply to a product process or production method.

2. Standard

Document approved by a recognized body, that provides, for common and repeated use, rules guidelines or characteristics for products or related processes and production methods with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirement as they apply to a product, process or production method.

3. Conformity Assessment Procedures

Any product used directly or indirectly to determine that relevant requirement in technical regulation or standards are fulfilled.

According to Simon Lester and Brian Mercurio[41] these definitions are written in fairly dense "legalese". The following is a reproduction of their explanation of the definition in plain English.

> A technical regulation is in essence, a product regulation. It can cover a variety of aspects of the product, such as physical characteristics, labeling or production process. The following examples are instructive: a measure that requires that automobile emissions not exceed a certain level; a measure that requires that products not to be manufactured in a way that harms the environment are surrounding the factory; or a measure that requires a label indicating whether toys contain parts that could harm young children. Note that while the definition refers to 'documents' which could be interpreted narrowly, in practice the provision has been presumed to cover laws and other measures generally. A standard does basically the same things as technical regulation.

The main difference is that standards are not mandatory. Because technical regulations are mandatory, their impact is felt more greatly. In the same sense, technical regulations are more important than standards and the TBT Agreement rules for technical regulations are more detailed and strict. The key provision relating to technical regulations are in Article 2, which is entitled; *Preparation, Adoption and Application of Technical Regulations by Central Government Bodies.*

The provisions of Article 2 have a great deal in common with the SPS Agreement Provision examined in the preceding section. Like the SPS Agreement provision, Article 2 addresses issues of discrimination and other trade effects, as well as harmonization around international standards. However, there is no equivalent to the 'sound science' provisions of the SPS Agreement.

[41] *World Trade Law: Text, Materials and Commentary*, Hart Publishing Oxford and Portland Oregon, 2008, p.5 82

Article 2.1 begins by setting out a basic non-discrimination requirement, *'members shall ensure that in respect of technical regulation, product imported from the territory of any member shall be accorded treatment no less favourable than that accorded to the products of national origin and to like products originating in any other country*. This provision covers both forms of non –discrimination, MFN and National Treatment.

Article 2.2. then addresses other non-discriminatory trade measures;

> Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with effects of creating unnecessary obstacles to internal trade. for this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create. Such legitimate objectives are inter alia; network security requirements, the prevention of deceptive practices; protection of human being or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are inter alia available scientific and technical information, related processing technology or intended end uses of products.

2.2.5 Subsidies and Countervailing Measures

As a leading economics textbook states, a 'subsidy' is a payment by a government to a firm or household that provides or consumes a commodity; for example, government often subsidize food by paying for part of the food expenditure of low income households[42] Based on this definition and the accompanying example, it is clear that there are subsidies that have little effect on trade and promote policies that are widely considered to be desirable. Thus, in crafting rules for subsidies, the negotiators could not simply call for their elimination or reduction, as had been the approach to tariffs. Instead,

[42] P. Samuelson and W. Nordlaus, Economics (Mc Graw – Hill, New York, 1989) 982.

they needed to create a regulatory framework that addressed the problem subsidies may cause in terms of trade distortion and economic harm to trading partners, without limiting the ability of government to use subsidies for important policy goals.

As explained above, a standard economic definition of 'subsidy' involves the notion of payments by a government to a private entity. However, subsidies can be offered through other measures as well. The Subsidies and Countervailing Measures (SCM) Agreements recognize, this and sets out the following rules for identifying subsidies.

Article 1.1 states that a subsidy shall be 'deemed to exist' if two conditions are met. First, there must either be a 'financial contribution by a government or any public body' or 'any form of income or price support'. Secondly, a 'benefit' (i.e. by the financial contribution or the income/price support) be 'conferred'. It is important to emphasise that the existence of a financial contribution or price/income support alone is not sufficient to constitute a subsidy. Rather, the financial contribution or price/income support must also confer a benefit.

(1) Financial Contribution

The financial contribution element is elaborated upon in Article 1:1(a)(1) through four categories. Under this provisions, there will be a financial contribution by a government or any public body where:

i. There is a government practice involving a direct transfer of funds (e.g. grants, loans and equity infusion) or a potential direct transfer of funds or liabilities (e.g. loan guarantees).

ii. Government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits).

iii. A government provides goods or services other than general infrastructure or purchase goods.

iv. A government makes payments to a funding mechanism or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government, and the practice in no real sense differs from practice normally followed by governments.

2. Income or Price Support

As an alternative to financial contribution, a subsidy may also involve 'any form of income or price support in the sense of' Article XVI of the GATT. The Article does not define the terms 'income support' and 'price support', but rather limits the covered support to that 'which operates directly or indirectly to increase exports of any products from, or to reduce imports of any product into (a Members) territory'. Generally, speaking, income and price support are based on the context of agricultural product, and serve to guarantee farmer's incomes at a certain level through government payment, or to support process at a certain level through government guarantees to buy the product if the price should fall below that level.[43]

3. Benefit

As emphasized above, the existence of a financial contribution of income/price support is not sufficient for there to be a subsidy. Rather, the financial contribution or income/price support must confer a benefit.

[43] Lester, S., Mercurio, B. Davies A. and Leitner K. (2008) World Trade Law: Test, Materials and Commentary, Hart Publishing Oxford and Portland, Oregon, p.426

Once the existence of a financial contribution or income/price support along with the conferment of a benefit have been established a subsidy is deemed to exist. However, only subsidies that are 'specific' are subject to regulation by the Subsidies and Countervailing Measures Agreement.

2.2.6 Countervailing Measures

In addition to establishing multilateral disciplines on subsidies, the SCM Agreement also sets limits on the ability of WTO members to impose restraints on subsidized imports through countervailing measures, in particular tariff duties. The use of countervailing tariff duties to limit subsidized imports has a long history under the domestic law of many WTO members. Along with 'dumped' imports, subsidized imports are considered by some to be a form of 'unfair' trade. In response, tariff duties have been used to 'countervail' these imports. As with anti-dumping duties countervailing duties are additional duties imposed in addition to the standard applied tariff rate. Whereas anti-dumping duties are calculated based on the amount of dumping, countervailing duties are determined based on the amount of subsidy.

The GATT has accepted the legality of countervailing duties since its inception, but at the same time it recognizes, in Article VI:3 that these duties must not be abused for protectionist purposes. For instance, the Article makes it clear that such duties are not to be imposed in excess of the subsidised amount. The current rules are provided in Part V of the SCM Agreement, read together with Article VI. The specific domestic procedures for imposing these duties vary among WTO members. However, all members must abide by the SCM Agreement rules.[44]

[44] Ibid

2.2.7 Dumping and Anti-Dumping Measures

The basic concept behind dumping is that when companies sell products in a foreign market at too low a price they may cause economic harm to the domestic products in that market because they will have trouble competing.[45] Responses to such pricing are taken in the form of anti-dumping measures, which are normally additional import tariff duties imposed on the dumped products, thus raising the price of the imported products and helping to eliminate the harm to the domestic industry.[46]

In terms of the underlying policies involved, there is a great deal of contention over many of the fundamental issues. The full scope of the debate cannot be set out here, but the main proposition are as follows. First, some people take the view that these low-prized sales are unfair and are often the result of a protected home market.[47]

On the other side, others believe that such sales are based on normal business decisions and should be appreciated for the benefits they give to consumers[48] rather than punished. Furthermore, it is argued, the anti-dumping laws set up to stop dumping are susceptible to protectionist abuse. And finally, they contend if, there is a problem with protected home markets such protection can be challenged directly through international trade agreements like the WTO.[49] Thus, the current system of domestic and international rules in this area tries to balance the competing views on value and harm of dumping and ant-dumping measures. If it looks at times as if there is no coherent framework, it is probably because various governments and other interested actors do not agree on many of the underlying policy issues.

[45] Ibid at p.265
[46] Ibid
[47] Ibid
[48] In form of lower prices
[49] Simon Lester, Op. cit.

(a) Anti-Dumping: Basic Overview

As noted above, responses to dumping are taken in the form of anti-dumping measures. We now discuss a brief overview of domestic anti-dumping laws and the WTO rules that govern these laws.

(b) Domestic Anti-dumping Rules

The GATT/WTO rules on anti-dumping measures are extremely important, but to a great extent anti-dumping law is domestic in nature. National governments enact domestic anti-dumping laws and regulations and implement them through specialized agencies. Thus, to understand fully how anti-dumping law works, reference must be made to the domestic rule as well.

Because WTO rules offer flexibility as to how anti-dumping proceedings should be carried out at the domestic level, different approaches to imposing anti-dumping duties can be consistent with the rules. Indeed the domestic procedures and institution used take a wide variety of forms in different countries. For example some governments use separate agencies to conduct the dumping and injury analysis. Others by contrast have one Agency that conducts both inquiries.[50] These varieties made the study of the subject difficult.

The anti-dumping process begins with an investigation of whether injurious dumping is occurring in relation to specific products from specific countries. Most of the time, this investigation commences on the basis of a complaint filed by a domestic industry or the responsible government agencies. There are 3 basic issues to consider

i. Is there dumping?

[50] Another significant difference is between prospective and retrospective system.

ii. Is there inquiry?

iii. Is there a causal link between the dumping and the inquiry?

All these must be proved in order for anti-dumping measures to be imposed.

During the investigation, the responsible government agencies (often referred to as the 'investigating authorities') consider information submitted by the domestic industry and the foreign exporters and producers accused of dumping (as well as other interested parties). Both sides submit information on the dumping, injury and causation issues. However, most of the information submitted by the foreign companies relates to dumping (e.g. sale prices in various markets as well as distribution and other costs) where as much of the domestic industry's information relates to whether it is suffering injury. (e.g. information on its financial condition). In essence, the foreign companies try to show that they are no dumping, and the domestic industry tries to show that it is injured. On dumping, the domestic industry responds with information to prove that dumping is occurring and an injury, the foreign company responds with information to prove that there is no injury.[51]

Based on this evidence, the investigating authorities reach a decision as to whether dumping and injury exist (for a specific time period) and whether there is a causal link between them. With regard to dumping, they reach a determination on the amount by which export prices in the investigating country's markets are lower than a comparison price. If they find that there is no dumping, injury, or no causation then no anti-dumping duties will be imposed. However, if dumping injury and causation are found, anti-

[51] Lester, S., Mercurio, B. Davies A. and Leitner K. (2008) World Trade Law: Test, Materials and Commentary, Hart Publishing Oxford and Portland, Oregon.

dumping duties will be imposed. Generally speaking, these duties are imposed in the amount of the dumping margin for each product.[52]

After an anti-dumping investigation is completed and duties imposed, various reviews can occur over the ensuing years to determine whether duties continue to be imposed and at what rate. For example, the exporter can request a review based on any 'changed circumstances that have occurred. In addition, as part of the Uruguay Round, a 'sunset' clause was introduced for anti-dumping duties. Under this provision after five years the duties will be terminated automatically unless the government agency shows that termination of the duty is likely to lead to the continuation or recurrence of dumping.[53]

All of the domestic rules on anti-dumping must conform to the international rules in this area. The main international rules on dumping and anti-dumping measures are contained in the GATT/WTO. Additional rules may also be founded in bilateral and regional trade agreements, but to the extent that they address these issues, most of these agreements simply refer to the GATT/WTO rules.

(c) GATT/WTO Rules on Dumping

Canada enacted the first anti-dumping legislation in 1904 (over concern with US steel imports) and other nations followed quickly with their own laws. By the 1920s many countries were as concerned with anti-dumping laws as they were dumping, as these laws were taught to have been abused for protectionist purposes in some cases.

By the time of the GATT negotiations in the mid – 1940s, views on the issues were quite polarized and thus it was difficult to come up with comprehensive rules in this

[52] Simon Lester, ibid
[53] Ibid

area. The result of the negotiation was Article VI of the GATT which deals with both anti-dumping and countervailing duties[54]. Article VI; reads in part:

> The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry.

Thus, Article VI explains that 'dumping… is to be condemned if it 'causes or threatens material injury'. However, while injurious dumping is condemned', it is not prohibited. Rather, Article VI permits WTO members to take certain action against dumping, to limit its impact. In this regard, paragraph 2 states: '*In order to offset or prevent dumping, a member may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product*. Article VI then offers a few more details of a general framework for responding to dumping through anti-dumping duties. However, the article is brief and vague and the need to agree upon more specific standards quickly became apparent.

These issues were addressed in the several rounds of trade negotiations[55] and the result was the Agreement on the Implementation of Article VI of the GATT (Anti-Dumping Agreement). The Anti-dumping Agreement provides detail clarification to Article VI of the GATT and governs its application. Thus, today, the Anti-Dumping Agreement together with Article VI contains the substantive rules and procedure on dumping and anti-dumping duties.

[54] We focus here on the anti-dumping aspect with countervailing duties having been disused earlier in the preceding section)

[55] Kennedy Round Anti-dumping Code (1967); Tokyo Round Anti-dumping Code (1979): and finally the Uruguay Round negotiations)

2.2.8 International Trade Agreement

International Trade Agreements are legal instruments that regulate trade flows. This includes international agreements related to trade as well as certain domestic laws affecting trade flows. The international agreement begins with the WTO Agreement which established the WTO.

In addition to the WTO there are the numerous bilateral, regional and plurilateral trade agreements. These agreements are in a sense, still part of the multilateral system. This is the case because the WTO Agreement establishes conditions which these agreement must meet in order to be permitted under WTO rules. However, these agreements often go further in terms of economic integration than do WTO rules so there are important substantive differences.[56] The most prominent of the regional agreements are the European Union (EU), the North Atlantic Free Trade Agreement (NAFTA), MERCOSUR (the Southern Common Market) and the ASEAN (Association of South East Asian Nations) Free Trade Area. Having proliferated in large numbers in recent years, bilateral agreements are increasingly gaining in importance in any international trade agreement discussion or debate. We now examine some of the concepts used in bilateral trade agreements.

(a) Free Trade Agreement

Adam Smith is the founder of the concept of free trade; in his book "The Wealth of Nations", published in 1776. He came up with theoretical arguments showing that governmental barriers to trade such as tariffs and subsidies are ultimately not in the best

[56] See Simon Lester et al op. cit. p.33

interest of either side in a trade agreement. Karl Marx, the founder of communism vigorously disagreed[57]

There has been a significant proliferation of bilateral free trade agreements in recent history, particularly FTA's struck between governments in the same region, notably in the Asia-Pacific region. At the time of the Asian financial crisis in 1997/98 there were only six FTAs in the Asia-Pacific region. At the end of 2006, there were more than 60 FTA projects in various stages of development or negotiation. Some governments believe that FTAs are a significant first step towards regional – level and multilateral agreements, and other forms of regional cooperation.[58]

Free Trade Area

This is a type of bloc, a designated group of countries that have agreed to eliminate tariffs, quotas and preferences on most (if not all) goods and services traded between them. It can be considered, the second stage of economic integration form if their economic structures are complimentary. If they are competitive they will choose customs union[59]

Bilateral Free Trade Agreements are distinct from multilateral agreements in that non trade considerations often predominate in FTAs. FTAs are negotiated between two governments (or more if it is a regional agreement as with Australian proposed FTA with ASEAN and New Zealand) and additional, non-trade terms can be negotiated, such as service agreement and improved custom protocol.[60] Typically, there is a phase-in period for free trade between the two countries (over a five, ten or fifteen year period) to take

[57] www.takeonit.com/question/59.apsex retrieved on 03.09.2013
[58] Parliament of Australia net-sit; web. Library @ aph.gov.au accessed on 30.12.2012
[59] http://en.wikipedia.org/wiki/free_trade_agreement accessed on 09/04/2013 .
[60] Parliament of Australia op.cit

account of politically sensitive areas of trade which have high levels of protection so that not all trade is free.

Generally, the WTO is not supportive of FTAs because the trade benefits and welfare gains are limited to the parties. The Most Favoured Nation Clause of the WTO Agreement requires any member benefit that is applied to one member state to be applied to all member countres (thus maintaining liberalization processes and benefits) FTAs are excepted from the WTO via Article XXIV of the WTO which deals with customs unions and free trade areas.[61]

In economic theory, trade diversion resulting from FTAs runs contrary to the general idea of comparative advantage by favouring these countries that have negotiated FTAs. Trade diversion occurs when a country chooses to trade with a partner country because of its preferential or zero-tariff status under the FTA, rather than because of their efficient production or price of inputs.[62]

Research suggests that FTAs offer little in the way of trade liberalization and a shift to more liberal trade policies particularly in agricultural trade policies. Rather, FTAs are used more often to promote other non-economic, diplomatic and regional interests. [63]

The report "The future of the WTO" commissioned by the WTO Director – General and which was published in January 2005 has criticized the proliferation of Bilateral and Regional trade agreement (RTAs) which it says has made the "MFN" (most

[61] WTO 1990 p.522-525
[62] Ibid
[63] See. J. Audley *Bad Bilateral Trade Deals Are No Better than Bad Multilateral Deals, Issue Brief*, Carnegie Endowment for International Peace, October 2003, http:///www.carnegie endowment.org/pdf/files/issuebriefoct2003; pdf accessed on 26 Nov. 2008

favoured nation) principle the exception rather than the rule and which has led to increased discrimination in world trade[64]

However, it appears that FTA negotiations are moving ahead and negotiations on even more FTAs and Preferential Trade Agreements are being announced. Experts have pointed out that whilst bilateral agreements may be tempting for a developing country to get some specific advantages from its developed – country partner, such as better market access for its products, there are also several potential dangers and disadvantages. Developed countries such as the United States and Japan are known to want to use the instrument of bilateral agreements to obtain from their partners what they failed to achieve at the WTO where the developing countries have been able to oppose or resist certain negative elements in various agreements.[65]

2.2.9 Economic Partnership Agreement

Economic Partnership Agreements (EPAs) are a scheme to create a Free Trade Area (FTA) between the European Community of the EU and the African Caribbean and Pacific Group of States (A.C.P) countries. They are a response to the continuing criticism that the non-reciprocal and discriminating preferential trade agreements offered by the EU are incompatible with WTO rules. The EPAs are a key element of the Cotonou Agreement; the latest agreement in the history of ACP-EU development co-operation and are to take effect as of 2008.

[64] *Proposed Malaysia – United States Free Trade Agreement (MUFTA): Implications for Malaysia Economic and Social Development,* Third World Network, 25th Feb. 2007 – tionet@po.jaring.my accessed 2nd Dec. 2008.
[65] Ibid

Background

Europe began manipulating the ACPs as far back as the era of discovery of new territories. Primarily propelled by the need to seek raw materials for the voracious European economy, which resulted from its industrial revolutions; they invaded the ACPs[66] On getting back their freedom, most of Europe's Colonies began to call for social and economic co-operation to build the new independent states. In the West African sub-region the first concrete attempt to create a frame work for co-operation was the EEC and the mainly French speaking West African states and Madagascar. This led to the Yaounde Convention of 1963 which was based on trade and financial aid.[67]

The next step was the Lome Convention which marked the beginning of an inclusive approach to the EU-ACP Cooperation after the demise of the Yaounde agreement, which lasted for five years. Concrete cooperation between the EU-ACP countries began around 1975 evolving from successive agreements called the Lome convention.[68]

The first Lome convention lasted from 1975 to 1980 under the 4th European Development Fund (EDF). The 2nd Lome Convention (Lome II) thrived from 1980-1985 under the 5th EDF, while Lome III lasted from 1985-1990 and was overseen by the 6th EDF. There were two Lome IV conventions. The 1st one was from 1990 – 1995 under the 7th EDF with some amendments bringing about the 2nd that thrived from 1995 to the year 2000 ushering in the Cotonou Agreement that sought development as a pivot for the

[66] *Economic Agreement F.G Private Sector undecided* Crusoe Osagie, Thisday Vol. 13 NO. 4777 Tuesday, May 20, 2008 p.36
[67] Ibid
[68] Ibid

relationship under the 9th EDF. It is the Cotonou Agreement that eventually gave birth to the EPA[69]

As noted earlier, EPA's are essentially Free Trade Agreements (FTAs) that envisage the creation of a free trade area between the EU and the ACP countries in which duties on goods imported and exported between these parties are drastically reduced and eventually completely removed. In essence, EPAs are based on the principle of reciprocity – that is when one party to the agreement makes a concession by lowering its tariffs on goods, the other parties reciprocate by lowering tariffs too. Generally, the EPA is a trade agreement that defines trade and development relations between European Countries and their ACP counterparts.

The agreement ought to have been signed Dec. 31 2007 but was shifted to further refine the conditions and terms of the New pact. Meanwhile a waiver to the WTO rules applying to current EU – ACP trading arrangement expired on January 2008. The European Commissioner for trade, Peter Mandelson maintained he has 'no legal option' other than imposing tariffs in such an eventuality under rules set by the World Trade Organisation.[70]

2.3 INTRODUCTION TO GATT AND THE WTO

Before explaining the details of the WTO, it is useful to trace its historical foundation. Such a review will not only provide important context to the modern day trading system, it will also allow the reader to appreciate more fully and understand the reasons why the WTO operates and exists in the form it does.

[69] Ibid.
[70] Trade Africa. *Power Struggle Continues with unbalanced EPA Talks, 2007* by David Cronia).

At the onset, it may be useful to offer some general clarifications about the nature of the WTO. Reading about the WTO in the popular press, it is sometimes easy to come away with misconceptions about how the organisation operates. There are frequent references to decisions both legal and political, made by the WTO. [71] In some sense, these statements are true, but they can be misleading without further explanation as to what exactly the WTO is in this regard, it is important to understand that the WTO is a member-driver organization in that most of the decisions that come out of the WTO are the result of an agreement among all of the countries or customs territories that are WTO members. That is, nearly all of the decisions reached are in fact made by these countries and territories acting in their capacity as equal members of the WTO. Thus, the WTO is not a global parliament with legislators making decisions that national government must follow. Rather, it is a tool of the government themselves, through which they make joint decisions. It does not govern its members from above, but rather governs through the members.

In addition to the members, there is an actual staff of the organisation. These employees play a key role in carrying out the day-to-day work of the organisation. However, generally speaking, they are not the ultimate decision – makers, but merely assist the members in carrying out their work. [72]

2.3.1 Origins of GATT

Formal trade relationships between countries have existed for centuries. In fact, many of the early explorers discovered new lands to seek out new trading opportunities – from the Phoenicians to the Greeks and Romans, the Maghribi to Marco Polo, through to

[71] For example, it may be said that the WTO Struck down a US Tariff Law as violating WTO rules or that the WTO decided to admit China as a member.
[72] Simon Lester et al, *Op. it. : Text, Materials and Commentary,* Hart Publishing Oxford and Portland, Oregon, 2008, p.65

the modern Portuguese, Spanish, Dutch and English explorers of the fifth-Seventeenth centuries. Generally speaking, these early-modern trading relationships were shaped by colonialism and the corresponding restriction of imports from sources other than the colonizer.[73]

Trade restrictions eased in the late seventeenth and eighteenth centuries, when bilateral Friendship, Commerce and Navigation (FCN) treaties included within their scope non-discrimination provisions calling for conditional 'most favoured nation' status and 'national treatment'. These treaties were the first steps towards more formal trade relationships based on the idea of liberalization. By the late nineteenth century, numerous bilateral effort to rein in international trade restrictions were underway.

This overall trend of co-operation and liberalization continued, with a minor hiccup in the 1870s until World War I. The intervening years between the 1st and 2nd world wars initially involved talk of liberalized trade through the League of Nations. However, while these talks were taking place, there was an outbreak of Protectionism led by the US passage of the isolationist Smooth – Hawley Tariff Act (1930) which sharply raised tariff rates. Many believed the ensuring sharp decline in the importation and exportation of goods actually worsened the Great Depression significantly and in part led to the beginning of the Second World War.[74]

Within a few years of smooth-Hawley, however the league discussions seem to bear fruits as there was a proliferation of bilateral trade treaties which sought to liberalise trade. These treaties offered some progress towards free trade, but were limited in terms of countries involved, and as noted were bilateral not multilateral.

[73] Ibid
[74] Ibid (especially by the United States through the Reciprocal Trade Agreements Programme).

In the aftermath of WW II, many western leaders wanted to reverse the mistakes of economic isolationism that characterized the pre-war years believing that 'Free International trade' would in the long term be mutually advantageous for economic and security reasons, both to individual nations and the world in general.

Desiring to create new world political and economic institutions they viewed as necessary to promote and maintain peaceful international relationship, the leaders united in 1944 at Bretton Woods Conference to address Monetary and Banking issues. At the conference, the Bretton Woods Agreement was negotiated which established the charter for the International Monetary Fund and the International Bank for Reconstruction and Development (the World Bank).However, trade was not covered. In December 1945, the US took the lead in setting up a corresponding institution for trade, publishing a document called, 'Proposals for Expansion of World Trade and Employment' and proposing the creation of the International Trade Organisation (ITO)[75]

However the ITO charter was too ambitious a proposal at that time requiring significant and meaningful commitments for signatures in such areas as disputes settlement, International Commodity arrangements, foreign investment, labour standards and restrictive business practices. This prompted its rejection by the US Congress which eventually led to the demise of the ITO.

In 1947, the major trading countries, initiated comprehensive multilateral negotiations in an effort to prevent a post war contraction of World Trade similar to the

[75] Simon Lester, et al op. cit.

tariff war in the 1930s. The negotiation resulted in the formation of the General Agreement on Tariff and Trade (GATT).[76]

The GATT incorporated a code of International Trade rules, made provisions for multilateral trade negotiations, established a procedure for adjudicating trade grievances among members and provided for the continuing review of actions by member countries. As a result of the reduction of tariff brought about by the implementation of GATT coupled with improvements in transportation and communication at the time, foreign trade grew and by the 1970's the value of total world merchandise reached $300Bn a year and $50 billion to $60 billion annually for services.[77],

The GATT provided the institutional basis for trade negotiations in the Post-War era. The fundamental purpose of the GATT was to achieve "freer and fairer trade" through reduction of tariffs and elimination of other trade barriers, GATT had operated on the basis of:

i) non-discrimination, multilateralism, and the application of the Most Favoured Nation Principle (MFN) to all signatories.
ii) expansion of trade through the reduction of trade barriers; and
iii) unconditional reciprocity among all signatories. GATT's goal was to establish a world trade regime of universal rules for the conduct of commercial policy[78]

The GATT assumed the role of the principal institution concerned with the conduct of World trade. It was also an international agreement by which signatories, had entered into binding legal commitments with one another on important aspects of trade policy. It also

[76] Ibid
[77] *The New Encyclopedia Americana International Ed.,* USA: Grolier Incorp. 1985 vol. 26 at p.269
[78] See Robert Gilpin: *The Political Economy of International Relations*, New Jersey, Princeton University Press; 1987.

became an international forum for multilateral consultation and negotiation on trade problems[79]

The overriding obligation under the GATT assumed by all contracting parties is to accord Most Favoured Nation treatment to products from other contracting parties. It is a fundamental principle of the GATT that protection is to be granted to domestic industries exclusively through tariff. The use of quantitative restriction as a means of protection was expressly prohibited except in certain carefully defined circumstances. Eight rounds of negotiations have been held in respect of the GATT. *The Geneva Round*, 1947, brought tariff concessions (between founding members). *The Annecy Round*, 1949 introduced further tariff concessions as did the *Torquay Round* 1950-51 and a Second *Geneva Round* 1956. In 1960-61, *a Dillion Round* recognized the European Economic Community as a single trading body, while the follow – up *Kennedy Round* 1964-67 for the first time cut tariff by whole sectors instead of product – by- product. In 1973-79, a *Tokyo Round* included newly independent developing countries and agreed to reduce tariffs on tropical products. Participants also signed agreements on subsidies, technical barriers to trade, government procurement, meat and diary products and civil aircrafts.[80]

In summary, while the first five rounds focused solely in reducing tariffs the purpose of the sixth round (Kennedy Round) expanded to include anti-dumping practices. That round focused mainly on tariff reduction, though, and it was not until the Seventh Round (Tokyo Round) that non-tariff measures and systemic issues were comprehensively negotiated.

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[79] Popoola, A. O. *WTO and the Dynamics of International Trade in an era of Globalization Grievances redress Mechanism in focus* in Guobadia D.A. and Akper, P. T., *(Eds) Foreign Investment Promotion in a Globalised World* NIALS, Lagos, NIALS Press Abuja 2006 at p.323

[80] Ibid

The most ambitious, comprehensive and far-reaching round to date has been the *Uruguay Round* not only did the Uruguay Round continue the goal of liberalizing trade through tariff reduction and elimination of non-tariff barriers to trade, it also expanded the multilateral trading system beyond goods and services to include *inter alia*, trade in services and intellectual property. Significantly, the Round also streamlined and strengthened the dispute settlement system and agreed to abandon most plurilateral agreements in favour of multilateral approach to almost every topical area. Finally, and most importantly through this Round, members agreed to the creation of the World Trade Organisation, a formal organisation that would unify all of the various agreements within one institutional framework.[81]

2.3.2 Establishment Of The WTO

The formation of the WTO was not a smooth process. It was the product of over seven years of turbulent negotiations between 127 countries culminating in the most extensive international trade agreement ever concluded.[82]

The then DG of GATT Arthur Dunkel in 1991 was responsible for the preparation of what became known as the Draft Final Act (the Dunkel Text) covering the Uruguay Round negotiations to date and a projection as to what the round proposed to achieve.[83]

The text contained a charter for a Multilateral Trade Organization (MTO) with the aim of providing an international framework within which the result of the Uruguay Round could operate. Within the MTO was set up a new dispute settlement mechanism and a Trade Policy Review Mechanism (TPRM). In addition, the framework provided annexes of the more important areas such as the General Agreement on Trade in Services

[81] Simon Lester et al, op. cit.
[82] Ibid, p.70
[83] Moens G.& Gilles, P. Op. cit p.473

(GATs) and the Agreement on Trade Related Intellectual Property (TRIPS). Virtually all contracting parties to GATT favoured the new MTO, although at the insistence of the USA, It was renamed the World Trade Organisation (WTO).[84]

The WTO exists to regulate International trade. Its key principle is non discrimination, ensuring that similar products from different countries must be treated the same way. As an international organisation, the WTO has a sound and accountable legal basis because all WTO members have ratified the WTO Agreements. Currently, the WTO has over 150 members including China, the EU, Japan, USA, together with many developing states accounting for over 97% of World Trade. Around 30 others are negotiating membership.[85]

2.4 WTO Objectives and Structure

The WTO unlike the GATT is without question an international organisation established by treaty with full legal personality, all privileges and immunities necessary, to exercise its functions and ability and mandate to develop relations with other international organisations[86]. The WTO is the only multilateral body that creates, regulates and manages the rules of trade between nations. Vital and central to the WTO are the various negotiated agreements including commitments and concessions on goods and services. Together these documents – which are essentially binding contracts supply the international trading community with the legal ground – rules for international commerce. Although it is governments who negotiate, sign and implement the

[84] Ibid p.70
[85] WTO Press release, 23rd April 2004 obtained from www.wto.org retrieved on 4th April 2013
[86] Part. VIII, Agreement Establishing the WTO

agreements, the ultimate goal of the WTO is to help producers, importers and exporters conduct business.[87]

2.4.1 Objectives

Defining a specific purpose or purposes for the WTO is difficult. In fact, there is much disagreement among scholars as to the WTO's actual or appropriate objectives.

Officially, the WTO presents its three main objectives as follows:[88]

i. It is a negotiating forum
ii. It provides a set of rules
iii. It helps settles disputes among members.

In addition, the WTO elaborates, that the world trading system is governed by the following principles[89]

i. non discrimination
ii. freer trade through reduction in trade barriers
iii. predictability through binding trade commitments.
vi. Fair and undistorted commitments
v. Special treatment for developing countries.

Its basic objectives are similar to those of GATT, which has been subsumed into WTO. These objectives include raising the standards of living and incomes; ensuring full employment, expanding production and trade and allowing for optimal use of the world's resources. These objectives have been extended to give the WTO a mandate to deal with trade in services; to the need to promote sustainable development and to protect and

[87] WTO, Understanding the WTO (WTO, Generva, (2005)
[88] Ibid
[89] Ibid

preserve the environment in a manner consistent with various levels of national economic development, to the need for positive efforts to ensure that developing countries and especially the least developed among them, secure a better share of the growth [90]

Consequently, the WTO's overriding objectives is to help trade flow smoothly, freely, fairly and predictably. The WTO does this by;

i) Administering trade Agreements
ii) Acting as a forum for trade negotiations.
iii) Settling trade disputes
iv) Reviewing national trade policies
v) Cooperating with other international organisations involved in global trade, commerce and economic policy making[91]

The WTO in addition to the above also assists developing countries in trade policy issues through technical assistance and training programmes. It also grants waivers, submit proposed amendments for the vote of members and approve the accession of new members.[92]

Under Article III, the WTO is to oversee the application of the various WTO Agreements and serve as the framework for members governments to conduct their trade relations under those agreements. The WTO is therefore responsible for the surveillance of the implementations of the GATT and its associated agreements GATS Agreement and TRIPS and WTO's other legal instruments.

[90] WTO Press release of 23rd April,2004 obtained from www.wto.org. retrieved on 4th April, 2013
[91] Art. III:1-5 of the WTO, Agreement).
[92] Ibid, Art IX: 3 & 4; X

2.4.2 Structure

While the WTO was created in 1995, many aspects of the organisation are carry-over from its predecessor, the GATT; Members of the WTO continue to use negotiating rounds to develop the rules of international trading system and further liberalise trade through binding tariff and other commitments.[93] Another feature of the GATT carried over by the WTO is the 'consensus approach to the decision-making process. The WTO remains a member driven organisation and consensus decision – making allows members to retain control of the system and avoids the problem of majority voting, weighted voting and any other method which could see a member being forced to adhere to something on which it disagrees. That being said, the WTO agreement does allow for votes to be taken on certain decisions when consensus cannot be reached.[94]

The Basic Rules

The WTO Agreement is a relatively sparse document that merely outlines institutional measures. It contains no substantive trade obligations. Instead, the substantive commitments and rules are contained in four annexes. The substantive rules are made effective through Article XVI: 4 of the WTO Agreements, which states:

> Each member shall ensure the conformity of its laws, regulations, and administrative procedures with its obligations as provided in the annexed Agreement.

The annex structure of the WTO is significant and in theory, allows for amendments, addition and subtractions to specific agreements more easily than if all the rules were in only one agreement. Annex I is comprised of the Multilateral Trade Agreements. (Annex IA Goods, Annex 1B: Services and Annex 1C: Intellectual

[93] Simon Lester, et al p.82
[94] Ibid at p.83

Property). These agreements are ‘mandatory, meaning they are binding on all members. Therefore and unlike the GATT the WTO for the most part is a ‘single package and members can no longer ‘pick and choose’ which agreements to abide by and which to ignore. With the agreements and schedules of concessions on goods and services, Annex 1 contains the bulk of the final text of the Uruguay Round negotiation.

Annex 2 contains the rules of dispute settlement. Unlike the GATT dispute settlement under the WTO is binding and enforceable.

Annex 3 creates the Trade Policy Review Mechanism (TPRM) under which the WTO reviews and reports on the trade policies and practices of the members. Trade policy reviews are undertaken to increase the transparency and understanding of trade policies and practices through regular monitoring so as to improve the quality of public and intergovernmental debate on the issues and to enable a multilateral assessment of the effects of policies on the world trading system.

Annex 4 contains the four plurilateral (i.e optional membership) agreements which remained following the creation of the WTO. Originally negotiated in the Tokyo Round, these agreements targeted relatively few industries and expected a narrower group of signatories. Only two of the original four plurilateral agreements remain in force today, but the structure of the WTO Agreement allows for additional agreement to be added if the membership so decides at some point in the future.

The structure of the WTO Agreement annexes is as follows:

Annex 1:

Annex 1a: Multilateral Agreements on Trade in Goods.

i) GATT 1994 (which incorporates GATT 1947)

ii) Agriculture

iii) Sanitary and Phytosanitary measures

iv) Textiles and clothing (this Agreement terminated on Jan. 2005)

v) Technical Barriers to Trade

vi) Trade related Investment measures

vii) Anti-dumping

viii) Customs valuation

ix) Pre-shipment Inspection

x) Rules of origin

xi) Import licensing

xii) Subsidies and countervailing measures

xiii) Safeguards

Annex 1B General Agreement on Trade in Services (GATS)

Annex 1C: Trade Related Aspects of Intellectual Property Rights (TRIPS)

Annex 2: Dispute Settlement Understanding

Annex 3: Trade Policy Review Mechanism

Annex 4: Plurilateral Trade Agreement

i) Annex 4(a) Agreement on Trade in Civil Air Craft

ii) Annex 4(b) Agreement on Government Procurement

iii) Annex 4(c) International Dairy Agreement (this Agreement terminated in 1997)

iv) Annex 4(d) International Bovine Meat Agreement (this Agreement terminated in 1997.

An important point to note is that Annex 1A refers to the 'General Agreement on Tariffs and Trade 1947'. In essence, with the establishment of the WTO, a new GATT,

called GATT 1994 was formally agreed to. The GATT 1994 does not provide new substantive obligations but rather incorporates the original GATT, now called GATT 1947 as well as various other GATT decisions and other instruments. Thus, technically speaking, the current agreement is called the GATT 1994. For ease of reference however, we use the term GATT in this work.

2.4.3 Governing Structure

The main organs of the WTO are a ministerial conference, a General Council, which also functions as the Dispute Settlement Body and Trade Policy Review Body; and councils for Trade in Goods, Services and Trade Related Aspects of Intellectual Property. Under Article IV, the apex WTO body responsible for decision – making is the ministerial conference which meets every two years. The Ministerial Conference consists of representatives of all WTO members and carries out WTO functions which include decisions in matters that WTO members may raise concerning a Multilateral Trade Agreement. It is the final arbiter on all matters relating to any of the agreements[95]

The day to day work of the WTO is handled by the permanent bodies at the second level, the topmost being the General Council, which reports to the Ministerial Conference. During the two years between meetings, the functions of the conference are performed by the General Council comprising of representatives of WTO member Governments. The general council meets as a Dispute Settlement Body when it considers complaints and takes necessary steps to settle disputes between member countries. It is

[95] World Trade Organisation www.wto.org

also responsible for carrying out review of the trade policies of individual countries on the basis of the reports by the WTO Secretariat[96]

The General Council is also required to make appropriate cooperative arrangement with other intergovernmental oranisations that have responsibility related to those of the WTO. The council may further consult and co-operate with non-governmental organisations with an interest in WTO matters.[97]

The General Council is assisted in its work by three subsidiary councils which oversee the functions of the Multilateral Trade Agreements. These are the Council for Trade in Goods, which oversees the implementation and operation of the agreement on Trade in goods in Annex 1A;[98] the Council for Trade in Services which oversees the implementation and Operation of General Agreement on Trade in Services (GATS) in Annex 1B; and the Council for Trade Related Aspects of Intellectual Property Rights which oversees the operation of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) in Annex 1C. Each of these councils may elect to establish subsidiary bodies.[99]

Under Article IV. 7, the Ministerial Conference is required to establish a committee on Trade and Development, a Committee on Balance of Payment Restrictions, a Committee on Budget, Finance and Administration; and a Committee on Trade and Environment. In addition, the various Plurilateral Trade Agreements (PTAs) may

[96] Art. IV 2, 3 & 4 of the WTO Agreement
[97] See Art V.
[98] GATT 1994 and its associate Agreements
[99] Ibid, Art. IV 5 & 6

establish their own supervisory bodies. These bodies would be required to keep the General Council informed of their activities[100]

2.4.4 WTO Secretariat

The WTO secretariat located in Geneva Switzerland is headed by a Director General who is appointed for four years by the General Council. The secretariat is responsible for the day-to-day operations of the WTO. More specifically, the secretariat is responsible for the administrative and technical support for the WTO bodies[101], for technical support for developing countries, trade performance and policy analysis; legal assistance to panels hearing trade disputes involving interpretation of WTO rules, advice and organisational infrastructure for accession negotiations[102]

The secretariat is funded by assessed contributions on members calculated on the basis of a member's share in the total trade of all WTO members, computed as a three year average of the most recent trade figures. If a member's share is less than 0.12 percent only a minimal contribution is assessed.[103] Like other multilateral organisations, the staff of the secretariat is required to be impartial and member governments may not seek to influence staff action.

2.5 DECISION- MAKING IN THE WTO

2.5.1 Ordinary Decisions

Decision making in the WTO is normally done by consensus. Art. IX;1 states; "*The WTO shall continue the practice of decision – making by consensus followed under*

[100] Ibid Art. IV.8
[101] Councils Committees, working parites, dispute settlement panels etc.
[102] Simon Lester, et al Op.cit.
[103] Ibid.

GATT 1947", following GATT custom, consensus is deemed to exist if no member present at the meeting when the decision is taken, formally objects to the proposed decision. For instance, when adopting a ministerial declaration, the chair will ask if there are any objections to the adoption of the Declaration and if there are none announce that the Declaration has been adopted. Therefore, any member no matter how large or small an economy has the ability to block any decision by explicitly objecting to a proposed decision.[104]

In practice as a result of the very simplistic nature of consensus- decision making, so many bottlenecks have been encountered. In addition, consensus decision making means that progress is slow and sometimes stalls due to the necessity of getting all members to agree on the proposed decision. It is also not hard to imagine that pressure is sometimes applied to recalcitrant members to block 'progress'. As a result consensus decision –making has sometimes proven controversial in practice.

Drawing conclusion from the above, trade experts[105]claim that the consensus-decision making process has 'broken down' in recent years. According to them, the two main causes are expansion in WTO membership which makes consensus building difficult and more participation by developing nations in all of the negotiated agreement as part of a 'single undertaking'. This requirement means that developing countries have to commit to substantially greater reforms of their trade barriers and trade practices than they did in the past. In sum, more active participants representing more diverse interests and objectives have complicated WTO decision – making.

[104] Ibid & p.86
[105] J. Schott and J. Watal, *Decision –making in the WTO* (Institute for International Economics, Washington DC, March 2000

However, consensus is not the only option for decision – making. If consensus cannot be reached, Art. IX: 1 provides for majority voting on the basis of one member, one vote. Therefore, unlike in the World Bank system of weighted voting, all members of the WTO vote in equal proportion.[106]

Generally, Decision-making in the GATT and WTO has been criticized over the years as lacking both internal and external transparency; as well as favouring the larger members.[107]

Also lending his voice on the issue of Internal Transparency and Decision Making, P. Norgaard Pederson[108] concluded:

> The WTO decision making process remains imperfect and will most certainly require further improvements in the future. However with internal transparency and decision making now important systemic issues in their own right, there is little doubt that they will continue to be scrutinized by the membership as well as by observers of the WTO.

And challenging critics of the WTO decision making process he opined.

> Experience at the WTO shows that the legitimacy of the decision making process requires that there is an adequate degree of open – ended and inclusive activity to balance other more restrictive consultative processes. Critics of the WTO often appear to single out the decision – making process of the organisation as uniquely exclusive in comparison with other international institutions. This is disingenuous. All international intergovernmental organizations face challenges when it comes to finding the right balance between efficiency and inclusiveness.

[106] During such votes, the EU is entitled to have a number of votes equal to the numbers of the member states which are members of the WTO.
[107] i.e. the rich industrial nations
[108] Pederson, N, *The W.T.O Decision making Process and International Transparency* (2005) 5(1) World Trade Review 103-31

In addition to the normal decision making process, the WTO also provides for special procedures in certain situations including interpretations, waivers and amendments which are discussed below:-

2.5.2 Interpretations

The ministerial conference and the general council are the sole WTO bodies empowered to issue authoritative binding interpretations of the WTO Agreements and Multilateral Trade Agreements. The conference and council may not, however use that authority to issue interpretations that would undermine the amendments provisions set out in Article X.[109]

Interpretation may be adopted by a vote of three-quarters of WTO members, and must be based on a recommendation from the council charged with overseeing the relevant agreement.[110]

Interpretation of the Agreements are binding on the entire WTO membership and may affect the rights and obligations of the members.

2.5.3 Waivers

A member government requesting a waiver of multilateral trade agreement provision must first submit the request to the council in charge of the agreement in question. The council has up to 90 days to consider the request and submit a report to the General Council.

If a member seeks the waiver of an obligation that is subject to a transition period, such as most of the obligations in the TRIPS Agreement or is subject to staged

[109] Art. IX:2 of the WTO Agreement
[110] For example, the general council may issue an interpretation of the Agreements on safeguards only on the basis of recommendation from the council on Trade in goods.

implementation such as certain tariff cuts, there must be a consensus to grant the waiver. Waivers for other types of obligations must be agreed to by three quarters of the members if a consensus is not reached within 90 days after the request is received.

A decision granting a waiver must include a statement of exceptional circumstances justifying the decision, the terms and conditions governing the application of the waiver and the termination date of the waiver. If a waiver is granted for more than one year, the General Council will conduct an annual review to determine whether the exceptional circumstances continue to apply and whether the country granted the waiver has met any terms and conditions The General Council may extend, modify or terminate the waiver.[111]

One example of a waiver is that under Art. 1.1 (Most Favoured Nation Treatment) Art X1: 1 (Elimination of Quantitative Restriction) and Art. XIII:1 (Non-Discriminatory Administration of Quantitative Restriction) of the GATT for trade measures taken under the Kimberly process certification scheme for Rough Diamonds (an international scheme of certification for rough demands which provides that participants should 'ensure that no shipment of rough diamonds is imported or exported to a non-participant'[112] The waiver provides 'legal certainty' to those taking domestic measures under the Kimberly process to curb the trade in conflict diamonds while at the same time supporting legitimate diamond trade. [113]

The WTO waiver provisions significantly improved upon the current GATT requirement for the grant of a waiver and thereby enhance transparency in the operations

[111] Art IX 3 & 4
[112] Decisions, 'Waiver Concerning Kimberly Process Certification Scheme for Rough Diamonds' WTO Doc. NO. G/C/W/432/Rev.(24 Feb. 2004); See also 'Kimberly Process Certification Scheme for Rough Diamonds – Request for a WTO Waiver', WTO Doc. No. G/C/W/431 (12 Nov. 2002).
[113] See WTO 'Agreement reached on WTO Waiver for 'Conflict Diamonds' (26 Feb. 2013) available at www.wto.org/english/news-e/goods-council 26 Feb. 13 e.htm

of the waiver and provide greater certainty regarding the duration and scope of the waiver. The consensus provision greatly increases the likelihood that important, but politically difficult obligations such as those in the TRIPS agreement will be implemented. Furthermore, the three-quarters majority vote requirement increases the number of members that must agree to the grant of any waiver. The procedures for interpretation and waivers of the plurilateral agreements are governed by the provisions of that Agreement.[114]

2.5.4 Amendments

The process of amending one of the WTO agreements is complicated and difficult. Under Art. X any member may propose that the ministerial conference considers amending the WTO agreement or a Multilateral Trade Agreement. In addition, each of the three subordinate councils for trade in goods, services and TRIPS may submit proposals to amend the multilateral trade agreement it oversees.

During the first 90 days that the Ministerial Conference considers a proposed amendment or any extended period the conference decides, any decision by the conference to submit the proposed amendment to the members for acceptance shall be taken by consensus. If the Conference cannot reach a consensus during this period, two-thirds of the members may vote to submit the proposed amendment to the members for possible ratification.[115]

The Article also sets out rules concerning the manner in which certain types of amendments may enter into force and which members would be bound by those

[114] Art. IX.5 of the WTO Agreement
[115] Article X:1

amendments.[116] For instance, certain provisions of the multilateral trade agreements may not be amended unless all WTO members agree and such amendments do not enter into force for any member until all members have agreed to the amendment. These are Art. IX (decision making) and X (amendment) of the WTO Agreement; Art. 1 (Most Favoured Nation) and II (tariff bindings) of GATT 1994; Art. III:1 (MFN) of the GATS; and Art. IV (MFN) of the Agreements on TRIPS.

Additionally, amendments to the DSU and TPRM can be made by the Ministerial Conference alone – without member acceptance – but according to Article X:8 amendment to the DSU can only be made by consensus, and these amendment shall take effect for all members upon approval by the Ministerial Conference.

The WTO Agreement has been formally amended only once with the waiver reached on 30 Aug. 2003 granting countries with insufficient or no manufacturing capability the ability to import pharmaceuticals under a compulsory health licence which was converted into a permanent amendment to the TRIPS Agreement[117]. The amendment came into force in late 2007 following ratification from two-thirds of WTO member.

2.5.5 Plurilateral Agreement

Decision – making and amendments under these agreements are governed by the rules contained in each agreement.

[116] See Generally Art. X;2-7
[117] See 'Amendment of the TRIPS Agreement: Decision 6 Dec. 2005

2.6 MEMBERSHIP OF THE WTO

As of July 2008, the WTO was comprised of 153 members, including all major industrialized nations and most developing countries. Nigeria became a member of the WTO on 1st Jan. 1995 when it was established, having already been a contracting party to the GATT.[118]

The WTO is not an absolutely close ended organisation. The agreement establishing it allows for withdrawal of any member who so desires. In this respect Art. XV provide *inter alia*

> Any member may withdraw from the agreement such withdrawal shall apply both to this agreement and the Multilateral Trade Agreement and shall take effect upon the expiration of six months from the date on which written notice is received by the D.G of the WTO[119]

[118] Art. XI – WTO Agreements
[119] See Art. XV(1). Similarly XV(2) provides that withdrawal from a plurilateral Trade Agreement shall be governed by the provisions of that Agreement.

CHAPTER THREE

INTERNATIONAL TRADE LEGAL ORDER

3.1 INTRODUCTION

Most countries in the world are members of the World Trade Organization (WTO). WTO members meet every few years to discuss how to liberalize international trade. Liberalizing trade, it has been argued, would remove tariffs and quotas, and allow goods and services to sell only for what they are really worth. This would help poor countries enter new markets and sell their goods. If WTO ministers could agree to slash tariffs in agriculture and manufacturing, the resulting changes in trade could lift more than 140 million people out of poverty.[1]

While WTO works to update and liberalize the international trade rules, it is difficult to negotiate new rules that would meet every country's expectations and concerns.[2] In addition to being a member of WTO, countries that trade a lot with one another often create corporate rules to regulate the flow of goods and services between them. They give each others products preferential terms over products from other countries that are not part of these agreements (i.e. bilateral and regional trade agreements).

In this chapter, we examine the provisions of the WTO Agreements with emphasis on agriculture as it affects developing countries. In addition, we also discuss one important and controversial exception to the MFN[3] which authorize the formation of customs unions and Free Trade Areas (FTAs), in spite of the non-discriminating concepts set-down throughout the GATT. This exception has given rise to the proliferation of

[1] html:file:lle:youthink-issuesTrade.mht visited 15:04:2013.
[2] Ibid
[3] Article XXIV of the GATT

several bilateral, plurilateral or regional trade agreements which we shall refer to collectively, as Preferential Trade Agreements (PTAs). In examining PTAs, we discuss first, the history and development of PTAs both before the GATT and as an exception to the GATT under Article XXIV. Next, we analyze several arguments both for and against regionalism/bilateralism and explore the consequences of regionalism/bilateralism. Then, we examine the requirements set out under Article XXIV that must be followed in order to have a WTO – Compatible customs union or FTA. Finally, we discuss the effect that PTAs are having on the multilateral system and conclude on the impact of ECOWAS as a regional trade organization.

3.2 THE SCOPE AND AUTHORITY OF THE WTO

The WTO as an institution has been discussed extensively in the preceding chapter; it is now left to examine the scope and binding nature of the WTO agreements.

The scope of the WTO is set out in Article II of the WTO Agreements. It states that the WTO shall provide the common institutional framework for the conduct of trade relations among its members in matters related to the agreements and associated legal instruments in the annexes to the Agreements.[4]

3.3 BINDING MULTILATERAL OBLIGATIONS UNDER THE WTO AGREEMENTS

The final Act embodying the results of the Uruguay Round of Multilateral Trade Negotiations states that members present agreed on the desirability of the acceptance of the WTO Agreement by all participants in the Uruguay Round of Multilateral Trade Negotiations with a view to its entry into force by 1 January, 1995. Article XVI(6) of the WTO Agreement 1994, provides that the Agreement shall be registered in accordance

[4] Article II(1)

with the provisions of Article 102 of the Charter of the United Nations. Acceptance of the WTO Agreement by signature or otherwise or by being original members of GATT leads to binding obligations under the Agreement, as provided for by Article XIV of the Agreement.

Legally, the obligations created by the establishment of the WTO are essentially contractual in nature. This is obvious from the preamble (recitals) to the agreement, which states thus:

The parties to this Agreement:

> Recognizing that their relations in the field of trade and economic endeavours should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner. Consistent with their respective needs and concerns at different levels of economic development".

The preamble states further:

> Recognizing further that there is need for positive efforts designed to ensure that developing countries and especially the least developed among them, secure a share in the growth in international trade commensurate with needs of their economic development.
>
> Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations.

It then concludes that:

> Resolved therefore, to develop an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade, the results of past trade liberalization efforts and all of the results of the Uruguay Round of Multilateral Trade Negotiations.
>
> Determined to preserve the basic principles and to further the objectives underlying this multilateral trading system.[5]

The fact of the existence of the WTO Agreement was that a new world organization had been created. The scope of the functions, powers and subject matter regulated automatically created a device for isolating any country that refused to be a member of the WTO as far as trade and international economic activities were concerned. In essence, the establishment of the WTO was an effective move towards the completion of the globalization of the world economy.[6]

3.4 WTO AGREEMENT ON AGRICULTURE:

The original GATT did apply to agricultural trade, but it contained loopholes. For example, it allowed countries to use some non-tariff measures such as import quotas, and to subsidizes. Agricultural trade became highly distorted, especially with the use of export subsidizes, which would not normally have been allowed for industrial products. The Uruguay Round produced the first multilateral agreement dedicated to the sector. It was a significant first step towards order, fair competition and a less distorted sector. It was implemented over a six year period (and is still being implemented by developing countries under their 10 – year period), that began in 1995.[7] The Uruguay Round Agreement included a commitment to continue the reform through new negotiations. These were launched in 2006, as required by the Agriculture Agreement. The objective of

[5] See Preamble (Recitals) to the WTO Agreement, 1994.
[6] See Oluwagbomi D.A.; *Nigeria and the World Trade Organization (WTO): The Crisis of Binding Multilateral Organization Vs. Local Realities. In Guobadia D.A. and Akper P.T.(Eds); Foreign Investment Promotion in a Globalized World*, NIALS 2006, p. 298.
[7] WTO, Understanding the WTO (WTO, Geneva 2005) 12 obtained from www.wto.org.

the Agriculture Agreement is to reform trade in the sector and to make policies more market-oriented. This would improve predictability and security for importing and exporting countries alike.[8]

3.4.1 Scope and Coverage

The agreement covers agricultural products. Article 2 and Annex I define agricultural products as products classified in chapters 1 through 24 of the Harmonized System of Tariff classification (HS) (excluding fish and fish products), and under thirteen headings or sub-headings in other chapters of the HS, including cotton, wool, hides and fur skins.[9]

The rights and obligations in the Agreement supplement those in GATT 1994: Other Uruguay Round Agreement also contained rights and obligations affecting trade in agricultural products. They include the Agreement on the Application of sanitary and phytosanitary measures (S and P Agreement), the Agreement on Technical Barriers to Trade, the Agreement on Subsidies and countervailing Measures (subsidies Agreement), and the understanding on Rules and Procedures Governing the settlement of Disputes (DSU).[10]

The new rules and commitments apply to:

i) Market access – various trade restrictions confronting imports.
ii) Domestic support measures – Subsidies and other programmes, including those that raise or guarantee farm-gate prices and farmer's incomes; and

[8] Ibid
[9] Dennin, J.F., McKenna and Cuneo, *Law and Practice of the World Trade Organization* 2001 Oceana Publishing Inc. Dobbs Farry, New York P. 46.
[10] Ibid

iii) Export subsidies – Including other methods used to make exports artificially competitive.[11]

The agreement does allow governments to support their rural economies, but preferably through policies that cause less distortion to trade. It also allows some flexibility in the way commitments are implemented. Developing countries do not have to cut their subsidies or lower their tariffs as much as developed countries,[12] and they are given extra time to complete their obligations. Least – developed countries don't have, to do this at all – special provisions deal with the interests of countries that rely on imports for their food supplies, and the concerns of least – developed countries.[13]

"Peace" provisions within the agreement aim to reduce the likelihood of disputes or challenges on agricultural subsidies over a period of nine years, until the end of 2004.[14]

The Article also calls on WTO members to exercise restraint in initiating countervailing duty investigations.

The new rule for market access in agricultural products is "tariffs only". Before the Uruguay Round, some agricultural imports were restricted by quotas and other non-tariff measures. These have been replaced by tariffs that provide more-or-less equivalent levels of protection – if the previous policy meant domestic prices were 75% higher than world prices, then the new tariff could be around 75%. (converting the quotas and other measures to tariffs in this way was called "tariffication").[15]

[11] Ibid
[12] Tariffs average cut for all agricultural products is 36% for Developed Countries and 24% for developing countries.
[13] See Generally Part IX: Art. 15 and Part X, art. 16
[14] Art. 13 AOA (Agreement on Agriculture).
[15] WTO understanding the WTO, infra p. 13

The tariffication package ensured that quantities imported before the agreement took effect could continue to be imported, and it guaranteed that some new quantities were charged duty rates that were not prohibitive. This was achieved by a system of "tariff quotas".[16] The newly committed tariffs and tariff quotas, covering all agricultural products, took effect in 1995. For products whose non-tariff restrictions have been converted to tariffs, governments are allowed to take special emergency actions ("special safeguards") in order to prevent swiftly falling prices or surges in imports from hurting their farmers.

The main complaint about policies which support domestic prices, or subsidies production in some way, is that they encourage over-production. The Agriculture Agreement distinguishes between support programmes that stimulate production directly, and those that are considered to have no direct effect. Domestic policies that do have a direct effect on production and trade have to be cut back.[17] WTO members calculated how much support of this kind they were providing per year for the agricultural sector (using calculations known as "total aggregate measurement of support" or "Total AMS") in the base years of 1986 – 88. Developed countries agreed to reduce these figures by 20% over six years starting in 1995. Developing countries agreed to make 13% cut over 10 years. Least developed countries do not need to make any cuts. (The category of domestic support is sometimes called the "amber box", a reference to the amber colours of traffic lights, which means "slow down").[18]

Measures with minimal impact on trade can be used freely – they are in a "green box" ("green" as in traffic lights"). They include government services such as research,

[16] Ibid
[17] Ibid
[18] Ibid

disease control, infrastructures and food security. They also include payments made directly to farmers that do not stimulate production, such as certain forms of direct income supports assistance, and direct payments under environmental and regional assistance programmes.[19]

Also permitted, are certain direct payments to farmers, where the farmers are required to limit production (sometime called "blue box" measures), certain government assistance programmes to encourage agricultural and rural development in developing countries, and other support on a small scale ("de minimis") when compared with the total value of the product or products supported (5% or less in the case of developed countries and 10% or less for developing countries).

The Agriculture Agreement prohibits export subsidies on agricultural products unless the subsidies are specified in members' lists of commitments. Where they are listed, the agreement requires WTO members to cut both the amount of money they spend on export subsidies and the quantities. Taking averages for 1986 – 90 as the base level, developed countries agreed to cut the value of export subsidies by 36% over the six years starting in 1995 (24% over 10 years for developing countries). Developed countries also agreed to reduce the quantities of subsidized exports by 21% over the six years (14% over 10 years for developing countries). Least – developed countries do not need to make any cuts.[20]

During the six-year implementation period, developing countries are allowed to under certain condition use subsidies reduce the costs of marketing and transporting exports.

[19] Ibid
[20] Ibid

3.5 INCREASED MARGINALIZATION OF LEAST DEVELOPED COUNTRIES (LDCS) IN GLOBAL AGRICULTURAL MARKETS.

The participation of LDCs including Nigeria in International trade is insignificant and their share in world agricultural exports has dropped steadily in the last three decades; whereas world agriculture expanded. Similarly, their market share of many key agricultural commodities has fallen significantly from the 1980s to 2004 by over 37% for such commodity as timber, coffee, tea and cocoa.[21]

The Agreement on Agriculture (A.O.A.) that emerged from the Uruguay Round began as a process of bringing the trade distorting agricultural policies of developed countries under multilateral rules and discipline. However, the major external challenge facing LDCs is their inability to exercise their right and their obligation under the new multilateral trading system. Given their high dependency on agriculture for jobs, food, material income and export earnings, they have a large stake in the current and future trade negotiations in agriculture. Multilateral reforms undertaken in the WTO context is likely to both expand their opportunities and amplify the cost of their inherent structural weakness and policy failures.

Although the WTO Agreement on Agriculture made adequate provisions that were intended to limit or completely remove distortions in agricultural trade, it still persisted and in fact growing or becoming more widespread with time. We now look at agricultural subsidy as one major challenge to the growth of the agricultural sector in developing countries.

[21] United Nation's Ministerial Conference on the least Developed countries. 'Making Globalization work for the LDC's, Istanbul, 9 – 11 July 2007 (Globalization, Agriculture and the Least Developed Countries) Issues paper/

3.5.1 Agricultural Subsidy

Subsidy generally as a concept has earlier been discussed in this study,[22] but an agricultural subsidy is a government subsidy paid to farmers and agribusinesses to supplement their income, manage the supply of agricultural commodities and influence the cost and supply of such commodities. Examples of such commodities include wheat, feed grains (grain used as fodder, such as maize or corn, sorghum barley and oats) cotton, milk, rice, peanuts, sugar, tobacco and oil seeds such as soybeans.

Agricultural subsidies has remained one of the major challenges facing developing countries in gaining market, access of the developed countries thereby stunting growth in their agricultural sector. Developed countries especially the 'quad'. (i.e. EU, U.S., Japan and Canada) have used agricultural subsidies and continue to use it to the detriment of agricultural products from developing countries. A brief discussion of agricultural subsidies by regions will further elucidate this point.

(a) European Union – The Common Agricultural Policy (CAP)

The CAP is a system of European agricultural subsidies and programmes. It represents 48% of the E.U.'s budget, Euro49.8 billion in 2006 (up from Euro 48.5 billion in 2005).[23]

The CAP combines a direct subsidy payment for crops and land which may be cultivated with price support mechanisms, including guaranteed minimum prices, imports tariffs and quotas on certain goods from outside the E.U. Reforms of the system are, currently under way reducing import controls and transferring subsidy to land

[22] See chapter 2, section 2:2:5
[23] See Financial Management in the European Union, http://www.nao.org.uk/publicationsacessed 6th Dec. 2010.

stewardship rather than specific crop production (phased from 2004 – 2012). Detailed implementation of the scheme varies in different member countries of the E.U.

The aim of the CAP is to provide farmers with a reasonable standard of living; consumers with quality food at fair prices and to preserve rural heritage. However, there have been considerable criticisms of CAP, by diverse interests since its inception. Criticisms have even wide-ranging and the European community has long been persuaded of the numerous defects of the policy. In May, 2007, Sweden became the first E.U. country to take the position that all EU subsidies should be abolished (except those related to environmental protection).[25]

(b) Agricultural Policy of the U.S. and Food Conservation, and Energy Act of 2008.

The U.S. currently pays around $29 billion per year to farms in direct subsidies as 'farm income stabilization',[26] via U.S. farm bills. This bills date back to the economic turmoil of the Great depression with 1922 Grain Futures Act, the 1929 Agricultural Marketing Act, and the 1933 Agricultural Adjustment Act creating a tradition of government support. A Canadian report claimed that for every dollar U.S. farmers earn, 62 cents comes from some form of government support with total aid in 2009 from all levels of government adding up to $180.8 billion.[27]

The beneficiaries of the subsidies have changed as agriculture in the U.S. has changed. Direct payment subsidies are provided without regard to the economic need of the financial condition of the farm economy. The subsidy programmes give farmers extra

[25] Sweden Proposes abolition of farm subsidy".
http://www.thelocal.se/7443/20070529/fy10/sheets/hist0322:xls. Visited on 26/11/2012 visited on 26/11/2012

[26] Retrieved from http://www.gpoaccess.gov/USbudgets/ fy10/sheets/hist0322:xls. Visied on 28/11/012

[27] Barrie McKenna: '*For U.S. Farmers, Subsidies the best cash crop'*; The Globe and Mail, 25 Nov. 2010. Visited on 28/11/2012.

money for their crops and guarantee a price floor. For instance in the 2002 Farm Bill, for every bushel of wheat sold farmers were paid an extra 52 cents and guaranteed price of 3.85 from 2002 – 03 and 3.92 from 2004 – 2007.[28] That is if the price of wheat was 3.80 farmers would get an extra 58 cents per bushel (52 cents plus the $0.06 price difference).[29]

Corn is the top crop for subsidy payments in the U.S. The Energy Policy Act of 2005 mandates that billions of ethanol be blended into vehicle fuel each year, guaranteeing demand, but U.S. corn-ethanol subsidies are between $5.5 billion and $7.3 billion each year.

(c) Africa Region

In Africa, Agricultural subsidy is applied in the reverse; the farmers are in fact at the receiving end as the prices of seeds/grains and fertilizer keep increasing yearly thereby making it unaffordable for local farmers who are the end users. In Nigeria, for instance, even where the fertilizer is subsidized by the Government, the fraudulent activities of businessmen and government officials in the distribution chain increases the price almost three folds.

What appears to be any semblance of subsidy in Africa is the example of Malawi – The Malawi Government Agricultural inputs subsidy programme which was implemented in 2006/2007 to promote access to and use of fertilizers in both maize and tobacco production to increase agricultural productivity and food security. An evaluation of this programme carried out by the Overseas Development Institute (ODI) shows that

[28] The 2002 Farm Bill, Title 1 commodity Programmes, United States Dept. of Agriculture USDA, 2002 – 05 -22.
[29] Ibid

the coupon system[30] could be an effective way of rationing and targeting subsidy access to maximize production and economic and social gains. But even then, there are still many practical and political challenges in the programme design and implementation required to increase efficiency, control costs and limit patronage and fraud.

3.5.2 Impact of Agricultural Subsidies

Farm subsidies, it is argued have the direct effect of transforming income from the general tax payers to farm owners, thereby ensuring a fair standard of living for the agricultural community. It is further argued that subsidies will stabilize markets, secure availability of supplies and provide consumers with food at reasonable prices. The justification for these arguments and its effects are complex and often controversial. However, one major area where agricultural subsidy has come under criticism is its effects on global food prices which is discussed below.

3.5.3 Global Food Prices and International Trade

Some critics and proponents of the World Trade Organization (WTO) have noted that export subsidies, by driving down the price of commodities can provide cheap food for consumers in developing countries. But low prices are also considered harmful to farmers not receiving the subsidy. Because it is usually wealthy countries that can afford domestic subsidies. Critics, therefore argue that they promote poverty in developing countries by artificially driving down world crop prices.[31]

Agriculture is one of the key areas where developing countries have a *comparative advantage*; but low crop prices encourage developing countries to be dependent buyers of food from wealthy countries so local farmers, instead of improving

[30] A coupon was given to recipients for fertilizer type and when redeemed reduces the cash price of the fertilizer to about $^{1}/_{3}$.
[31] Ibid

the agriculture and economic self-efficiency of their home country, are instead forced out of the market and perhaps even off their land.

Agricultural subsidies often are a stumbling block in trade negotiations. The 2005 Human Development Report (HDR) states that "the basic problem to be addressed in the WTO negotiations on agriculture can be summarized in three words: *rich country subsidies*. In the last round of world trade negotiations, rich countries promised to cut agricultural subsidies. Since then, they have increased them". In 2006, talks at the Doha round of the WTO trade negotiations stalled because the U.S. refused to cut subsidies to a level where other countries non-subsidized exports would have been competitive".[32] On July, 29 2008, the WTO negotiations in the Doha round finally collapsed because of differences between the U.S., India and China over agricultural trade.[33]

Others argue that a world market with farm subsidies and other market distortions (as happens today) results in higher food prices, rather than lower food prices as compared to a free market. Joseph Stiglitz, a Nobel Laureate in Economics has argued that farm subsidies have a long term effect of raising global food prices, which in fact harms the poor and increases malnutrition.[34]

Mark Malloch Brown, former head of the UNDP estimated that farm subsidies cost poor countries about USD 50 billion a year in lost agricultural exports. According to him; "it is the extraordinary distortion of global trade where the West spends USD 360 Billion a year in protecting its agriculture with a network of subsidies and tariffs that

[32] "U.S. blamed as Trade Talks end in acrimony; Financial Times, 2006 – 6 – 07 – 24.
[33] 'Collapse of Negotiations' http://wikipedia.org/wiki/agriculturaltradevisited26.nov.2010.
[34] *The Tyranny of King Cotton* by J. Stiglitz, Guardian co.uk Tues, October 24th, 2006.

costs, developing countries about USD 50 Billion in potential lost agricultural exports. Fifty Billion dollars is the equivalent of development assistance".[35]

Concerns for agricultural subsidies had earlier been raised at a Regional Conference on Globalization and Agriculture held in New Delhi, India from 4 -5 December, 2002. At this conference which brought together over 70 delegates from across the South East Asia region, all the presenters and participants were unanimous in the condemnation of agricultural subsidies, that it distorts international trade in agricultural products and slows down exports from developing countries.

On market access, Dr. Ashok Grilati[36] in his presentation stated that the major challenge confronting the developing countries include the fact that market access in developed countries is constrained due to high domestic support and export subsidies. The issue which needs to be debated upon is how much reduction in domestic support given by the developed countries can be asked for by the developing countries.

Dr. Posh Raj. Pandey[37] brought to the fore some of the new threats emerging in the agricultural sector – negotiations and implementation of WTO provisions. According to him, the Agreement on Agriculture has not succeeded in reducing the trade and production subsidies in Agriculture which was the original objective of the agreement. He also pointed out since agricultural exports structure of South East Asian countries is largely concentrated in a few products and markets, market access conditions in developed countries would play a decisive role in their exports development potentials.

[35] Address by M.M. Brown, UNDP Administrator, Makarare University, Kampala Uganda, 12 November, 2002; see also 'farm subsidies that kill", July 5, 2002 by Nicholas D. Kristof, New York Times.
[36] Division Director, International Food Policy Research Institute, Washington, U.S.A.
[37] President, South Asia watch on Trade, Economics and Environment, Nepal.

In his presentation, Dr. Raji. Mehta[38] raised the issue of shifting subsidies from one box to another under the WTO regime. According to him, Indian farmers are competitive but due to the provisions in Agreement on Agriculture, the competitiveness gets eroded. He expressed his concerns about exports slow down and emphasized that the issues need to be understood in the framework of *agriculture verses organized trade*.[39] Divergence in the economies of scale and levels of investment in developed and developing countries was also highlighted.

Despite the importance of agriculture to developing and least developed countries, their participation in international agricultural trade is insignificant and has been declining[40]. In addition to their small and declining share in world agricultural trade, the LDCs agricultural exports consists largely of few low value-added primary commodities. On average, the top three export items which are predominantly agricultural commodities account for over 68 percent of total export earnings.[41] The major agricultural exports of the LDCs include coffee, tea, cotton, jute and sea food. Tropical wood, spices and bananas; mostly in unprocessed form. Moreover, for African countries in particular, though not exclusively, exports are concentrated on only a few markets of which E.U. is by far the largest (about one third), followed by other Quad markets (U.S., Canada and Japan); although China and India are emerging as important partners.[42]

3.5.4 Trade Preferences as a Rescue Package

Developed countries especially the E.U., U.S.A. and Japan have put in place various trade preferences mechanisms designed to assist developing countries access their

[38] Additional Advisor, Ministry of Agriculture, India.
[39] Emphasis supplied
[40] Globalization, Agriculture and the LDC, making Globalization work for the LDCs, Istanbul 9 – 11 July, 2007, UNDP Issue Papers.
[41] Ibid
[42] Ibid

markets and stimulate export in developing countries. Generally, all LDCs are beneficiaries under the Generalized System of Preferences (GSP). In addition, the majority receive special treatment under other schemes. In 2001, the EU announced a unilateral trade concession that would eliminate all existing tariffs and quotas on all imports from the LDCs. Referred to as the "Everything But Arms" (EBA) proposal, the intention was to extend complete access to all exports from the LDCs except arms and ammunitions, with a phase-in period for 'sensitive' goods i.e. bananas, sugar and rice. The Caribbean Basin Initiative (CBI) of the U.S. is a similar preferential arrangement and in addition, LDCs in Africa can also benefit from the U.S. Trade and Development Act of 2000 (The Africa Growth and Opportunity Act (AGOA), which extends certain benefits to sub-Saharan Africa countries. More recently, in December 2005 Japan expressed its commitment to provide Duty-Free and Quota Free (DF QF) market access for essentially all products originating from all LDCs.

As agricultural tariffs have been lowered under the WTO Agreements, the preferential margin enjoyed by the LDCs is eroded.[43] Available statistics suggest that with the exception of a few countries, *the preference schemes have not contributed significantly to generating export growth of the beneficiaries or improving their trade shares*.[44] While this has been partly because of the various restrictions in the schemes (e.g. in respect of product coverage, quotas and rules of origin), supply-side constraints and the fact the preferences are unilateral and not legal bindings in the WTO appear to have played a significant role.

[43] Globalization, Agriculture and the LDC, making Globalization work for the LDC's op.cit.
[44] Emphasis supplies

3.6 THE RISE OF REGIONAL INTEGRATION: (History of Preferential Trade Agreements)

PTAs arrangements between two or more nations to reduce or eliminate barriers between or among countries while maintaining barriers against imports from other nations are not a new development. In fact, early versions of PTAs date as far back as the eighteenth century and more coordinated versions appeared in the nineteenth century, when the various states of the European empires established numerous agreements between, and among each other.[45] PTAs flourished in the first half of the twentieth century, with agreements between European, African and South American states, and a large number of Agreements (such as Commonwealth Preferences and the Lome Convention) forged between countries with colonial ties. The U.S. also became involved in bilateral agreements via the Reciprocal Trade Agreements Act of 1934.[46]

Even after the formation of GATT, PTAs between contracting parties continued to develop at a reasonable rate. However, until the 1980s regional or bilateral PTAs were quite limited and only extensively used in Western Europe (such as when various members of Western Europe formed the European Economic Community (EEC) (now known as the EU); the European Free Trade Area (EFTA) and the European Economic Area (EEA), in countries within close – geographical proximity (such as Australia and New Zealand in the Australia-New Zealand Closer Economic Relations Agreement); in a handful of developing countries and as preferences granted from developed to developing countries.[47]

In fact, at the same time as the European Community was deepening its ties within the community and negotiating a common external tariff, the United States was strongly

[45] See c. Schonhardt – Bailey, *The Rise of Free Trade* (Rutledge, 1997, Vols I – IV).
[46] Simon Lester et al, World Trade Law, op.cit.
[47] Ibid

committed to the multilateral process and even argued against PTAs. Perhaps as a result of the strife caused by protectionism and fractured trading arrangements throughout the Great Depression and World War II still engrained in its psyche the United States had been referred to as 'Champion of a non-discriminating global trade regime, grounded firmly in the MFN (most favoured Nation) principle.[48]

The American aversion to bilateralism began to waiver in 1982 as the EU resisted American efforts to start the eight round of multilateral trade negotiations (which eventually became the Uruguay Round). At that point, the U.S. felt that PTAs were the only way further to liberalize international trade, and it correspondingly abandoned its steadfast opposition to preferential arrangements.[49] The U.S. completed two PTAs in the 1980s one with Israel (1985) and one with Canada (1989), (the agreement with Canada was expanded to include Mexico in 1992, becoming the NAFTA). At the same time, the EU continued its expansion, adding six new members during the 1980s and 1990s and negotiating PTAs with the western European countries not in the EU, several eastern and central European countries and with the Baltic Republics.[50] Moreover, PTA negotiations also began between other regional markets at this time including smaller countries in Africa, Central and South America, South and Central Asia, Central and Eastern Europe, Oceania, and the Baltic States. In fact, during this period, the only region not to embrace PTAs was East Asia, and, by the conclusion of the Uruguay Round, all but three members (Hong Kong, Korea and Japan) were party to at least one of the 62 PTAs in force.[51]

[48] A. Panagariya, '*The Regionalism Debate: An Overview Working Paper*, University of Maryland, Faculty of Economics, 1998 at p.6. One explanation for the US's stance against PTAs was that it did not have colonial ties or many neighbours and therefore it was simply looking after its best interest.
[49] Simon Lester et al World Trade Law, op.cit.
[50] Ibid
[51] Ibid

The rise of PTAs, with their inherent discriminating qualities led many to question whether they might undermine the multilateral trading system. This growing discontent led to the formation of the WTO Committee on Regional Trade Agreements (CRTA), which was established in 1996 to examine individual PTAs and to consider whether PTAs were systematically compatible with multilateralism. At the same time, the WTO's Singapore Ministerial Declaration stated:

> We note that trade relations of WTO Members are being increasingly influenced by regional trade agreements, which have expanded vastly in numbers, scope and coverage. Such initiatives can promote further liberalization and may assist least – developed, developing and transition economies in integrating into the international trading system. In this context, we note the importance of existing regional arrangements involving developing and least – developed countries. The expansion and extent of regional trade agreements make it important to analyze whether the system of WTO rights and obligations as it relates to regional trade agreements needs to be further clarified. We reaffirm the primacy of the multilateral trading system; which include a framework for the development of regional trade agreements, and we renew our commitments to ensure that regional trade agreements are complimentary to it and consistent with its rules. In this regard, we welcome the establishment and endorse the work of the new Committee on Regional Trade Agreements. We shall continue to work through progressive liberalization in the WTO as we are committed in the WTO Agreement and Decisions adopted at Marakesh; and in so doing facilitate mutually supportive process of global and regional trade liberalization.[52]

[52] World Trade Organization: Ministerial Conference, Singapore Ministerial Declaration, adopted on 13 December, 1996, WT/MIN (96) Dec, para 7 available at www.wto.org/English/thewto/e/min/96-6/wtodoc-ehtm.

Thus, despite some misgivings, the official position of the WTO Membership is that PTAs are compatible with multilateralism and can be used to promote liberalism and development.[53]

Since the establishment of the WTO, however, the number of PTAs has grown rapidly. To be more specific, there were only 124 PTAs during the GATT years, while the succeeding 10 years of the WTO have seen an additional 196 notified PTAs.[54] More importantly, the rate at which PTAs are being negotiated has accelerated since the failed Seattle and Cancun Ministerial and the painstakingly slow progress of the Doha Round. This rapid rise in PTAs can be shown by the fact that 43 PTAs were notified to the WTO between January 2004 and February 2005.[55]

This explosion of PTAs appears not to be driven by any particular country, as every WTO member except Mongolia is now a member of one or more PTAs or is negotiating one or more PTA at present.[56] However, it must be noted that the United States, the European Community and several nations in the Asia – Pacific region are all negotiating several PTAs and their combined economic strength is causing other nations to follow. This rise in PTAs and correspondingly the dramatic rise in world share of preferential trade over the last 10 years have several important consequences.

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[53] Several academics and Commentators have studied the effects of PTAs on Member and non-member countries and have disagreed in their conclusions. See e.g. S. Devos, *Regional Integration and the Multilateral Trading System: Synergy and Divergence* (OECD) Paris 1995; A Panganya, '*The Regionalism Debate: An Overview* (supra). A Krugar 'Are Preferential Trade Agreements, Trade – Liberalizing or Protectionist?" (1999) 13(4) Journal of Econ. Perspective

[54] J.A. Crawford and R.V. Florentine, *'The Changing Landscape of Regional Trade Agreements,* World Trade Organization. Working paper (Geneva, 2005) available at www.wto.org/english/res/booksp.e./discussion-papers-e.pdf.

[55] Simon Lester et al 'World Trade Law.

[56] Ibid

3.6.1 Regionalism versus Multilateralism

Deeper economic integration accomplished through PTAs has been undertaken for a number of reasons. First, PTAs ease trade between natural trading partners (such as the United States and Canada) and encourage trade and investment in developing countries from developed countries. In addition, it has been argued that PTAs can be negotiated much faster than the multilateral process, enable parties to liberalize beyond the levels achievable through multilateral consensus and may be able to address specific issues that do not even register on the multilateral menu.[57] In this regard, the resulting achievements in trade liberalization substantially complement the WTO and can be an important building block for future multilateral liberalization.

In addition bilateral/regional opportunities may help developing countries to gain from regional integration and stronger economic ties to developed countries improving both the trading regimes and the rule of law while implementing structural reforms necessary to further their integration into the world economy.[58] As a flow on effect, this could serve further to open and liberalize developing country economies on the multilateral stage. PTAs often also force change to several areas not fully covered by the multilateral system (such as trade and the environment labour and investment) and, in a sense, are laboratories for experimentation.

For example, if the U.S. succeeds in including environmental and labour standards in its Free Trade Areas with both developed and developing countries, such provisions may become common place and eventually be eased into the multilateral agreements. As it currently stands, strong developing countries opposition is blocking the inclusion of any

[57] Ibid
[58] Ibid

environmental or labour standards into the WTO agreements.[59] In fact, those countries have incentives to encourage their inclusion into the multilateral agreements for the simple reason that if they know how to abide by the stringent rules and other developing countries (i.e. competitors) do not, they lose any competitive advantage they may have had over those countries, and are effectively disadvantaged. This aspects of PTAs has been championed by some and condemned by others.

The feeling among many WTO Members now is that, because multilateralism is stalled, the momentum created by Free Trade Areas is needed to underpin the multilateral environment. Therefore, they do not view Preferential Trade Agreements as mutually exclusive of multilateral negotiations, but rather as a tool to influence the multilateral agenda positively by going beyond what is available at the present time. Put simply, they feel that PTAs have the ability to establish prototypes for liberalization in a wide range of trading areas; including services; e-commerce, intellectual property, transparency in government regulations and procurement and better enforcement of labour and environmental protections that are simply not possible on the multilateral stage.[60]

Another arguably more important, reason why members are negotiating PTAs is so that they do not wish to be left behind and become disadvantaged in the world trading system. As a result of increased bilateralism in recent years, nations that remain relatively inactive on the bilateral front, face actual discrimination in many key markets.[61]

[59] For arguments against the inclusion of environmental and labour standards in FTAs. See J. Bhagwati *'Preferential Trade Agreements: The Wrong Road'* (1996) 27 Law and Policy in International Business 865.
[60] Simon Lester et al 'World Trade Law' op.cit.
[61] Ibid

To illustrate using an actual example, Japan and Mexico recently[62] agreed to a bilateral FTA which will see, among other things, Japan lowering its tariffs and increasing market access to Mexican imports of pork, oranges and other agricultural products, while Mexico will import more steel, motor vehicles and other industrial products from Japan. Negotiating this agreement was difficult for Japan, as the powerful Japanese agriculture lobby worried about cheap agricultural imports flooding the Japanese market. But Japan realized its lack of bilateral activity was disadvantaging its exports, as Mexico already had FTAs with the US and EU thus rendering Japanese industries uncompetitive in the market. As a result of the agreement, existing Mexican MFN tariffs rates, ranging between 18 and 30 percent on Japanese games, motorcycles, computer peripherals, photocopiers, telecommunications equipment, CD players and musical instruments will be lifted, as will the duty-free export quota for cars, this means that Japanese products will enter Mexico on an equal footing with products originating in the US and EU.[63]

This agreement has ramifications for other countries. For instance, as food products make up a large amount of Australian exports to Japan, many of which are directly competitive with food products from Mexico, Australian exports to Japan are now disadvantaged vis-à-vis Mexican products. Thus, it is thought that Australian agriculture and food exports to Japan will most likely witness slower than expected or even negative growth in the coming years.[64]

Another example of this occurred as a result of the Canada – Chile Free Trade Agreement signed in 1997, which was only negotiated following American resistance to

[62] It was signed on March 12, 2004 but entered into force in January 2005.
[63] Simon Lester et al, op.cit.
[64] Ibid

adding Chile to the NAFTA. American businesses soon realized that they were disadvantaged vis-à-vis their Canadian competitors and soon began lobbying Washington to negotiate an FTA with Chile. By no coincidence, the United States – Chile Free Trade Agreement (2003) was one of the first PTAs the United States negotiated following its decision to expand its PTAs.

The above scenarios are not unique or even rare, but are now common place in the world trading system. It is clear that certain nations[65] have become disadvantaged worldwide and it is apparent in a number of markets. With the number of PTAs rapidly increasing and with every major trading nation negotiating PTAs with multiple countries, the problem can only increase.

On the other hand, it has been posed that PTAs have the potential to threaten the sustainability of the multilateral trading system. PTAs by their very nature, are inimical to the non-discriminatory principle of the WTO. In this regard, it is clear that PTAs undermine Most Favoured Nation and weaken the transparency and predictability of the entire multilateral trading system, and if the number of FTAs multiplies in too great numbers, critics argued that the entire foundation of the multilateral system could be weakened.[66] Indeed, the line dividing the positives of PTAs (such as using them to spur multilateral progress) and the negatives (such as hampering multilateral progress) is sometimes unclear.[67]

In addition, the economic benefits of bilateralism/regionalism are uncertain: on the one hand, PTAs may lead to 'trade creation', whereby trade is expanded between

[65] More especially developing and least Developed nations mostly in Africa and Asia – Pacific regions.
[66] See J. Bhagwati; *Regionalism and multilateralism: An Overview'* in J. Melo and A. Panagariya (eds). *New Dimensions in Regional Integration* (Cambridge University Press, Cambridge, 1993. P. Krishna, 'Regionalism and Multilateralism: A Political Economy Approach' (!998) 113 Quarterly Journal of Economics, 227.
[67] Simon Lester et al; op.cit.

efficient producers/suppliers within the preferential trading arrangement. On the other hand, PTAs can also lead to 'trade diversion', whereby trade is not created but is shifted from an efficient producers/suppliers outside the preferential trading arrangement to a less efficient producer/suppliers inside the preferential trading arrangement.[68]

While the benefits and burdens of each PTA must be studied individually, it is generally presumed that trade diversion can be problematic, that is diversion outweighs creation and the PTA partners are economically worse off, in two instances.[69] First when a PTA is reached between two nations which are not already significant trading partners, and secondly, between nations that have significant tariff barriers to trade. Thus, if two nations that have an insignificant trading relationship and high external barriers to trade agree to a PTA, trade diversion is likely to occur. Conversely, when a significant amount of bilateral trade flowing between two countries that have low barriers to trade diversion is not thought to be a considerable problem.[69]

Another potential downfall of bilateral agreements is the complexity resulting from multiple PTAs. Each PTA contains different conditions and obligations. The differing standards and rules can create obstacles to trade facilitation by increasing administrative complexity at customs and creating a 'web' of differing rules.[70] This is a major source of concern for the international trading community. One specific example of the complexities that are a by-product of PTAs is the proliferation of differing Rules of Origin – a prominent source of trade, costs and complexity in today's global market place

[68] Ibid. See also De La Rosa '*The Trade Effects of Preferential Arrangements*:' New Evidence from the Australian Productivity Commission' Peterson Inst. For International Economics Working Paper.
[69] Series 07-01 Jan. 2007 available at www.peterson-stute.org/publcations/wp/wpo7-1pdf.
[69] See D. Salvatore, *International Economics* (Wiley, New York) 1995. For more on trade creation and Diversion affects see J. Viner; *The Custom Union Issue* (Carnegie Endowment for' International Peace, London, 1950). See also R. Lipsey and K. Lancaster, '*The General Theory of the Second Best* (1956 -7)' 24. Review of Economic Studies, 11.
[70] Simon Lester et al op.cit.

where companies depend on the rapid delivery of products and components from multiple overseas sources.[71]

Harmonization of standards and rules, through cohesive negotiations or international intervention, and simplification of preferential rules could alleviate some of these obstacles, but the process of harmonizing schemes is slow and certainly will not be completed in the next decade. Jagdish Bhagwati refers to the differing standards in PTAs as a "spaghetti bowl" and uses the complexity and dissimilarity of the various standards to argue against further development of PTAs.[72]

Another shortfall of PTAs, is that while some issues can easily be negotiated bilaterally – industrial tariffs, for example – many problems cannot be solved between two countries, particularly the 'hard core' issues that have survived more than 50 years of multilateral trade negotiations. For instance, inefficient agricultural policies, discriminatory, sanitary and phytosanitary measures, technical barriers to trade and biased trade remedy rules remain, despite pressure from almost all of the trading nations in the previous eight rounds of intense multilateral trade negotiations and transparent information flowing between all the parties. It may be unrealistic to expect that two nations of unequal economic levels will have the same bargaining knowledge and power on sensitive issues and therefore highly unlikely that a smaller trading nation can convince a larger nation to change its agricultural subsidies scheme or modify anti-dumping rules in a bilateral framework.

[71] Ibid – for instance the NAFTA contains over 200 pages dealing with Rules of Origin requirement.
[72] See J. Bhagwati; *The wind of the Hundred Days: How Washington Mismanaged Globalization* (MIT Press, Cambridge Mass, 2000).

Other serious concerns raised with regards to certain forms of Regional Trade Agreements such as the EU – EPAs are that they threaten to weaken regional integration process amongst countries of a similar level of development.[73]

3.6.2 Conclusions on Preferential Trade Agreements

Regional Trade Agreements negotiated by developed industrial countries clearly do not represent a model for the development of countries in the south. Although they are not always necessary against the interest of the developing countries, they serve primarily to advance the interests of these advanced countries and their multinational companies.[74]

These regional agreements have also resulted in structural changes, fostering new global players in the world economy. The US-NAFTA, for example brought about a further take-over of trade in corn by a handful of corporate traders.[75]

It is clear that bilaterialism cannot replace the multilateral trading system. In short, however, many nations deem it to be the best option to liberalise economies and drive the multilateral agenda.[76] In addition, one must accept the reality that non-economic, political interests sometimes motivate the formation of PTAs. For instance, a PTA could be negotiated to bring peace, security and stability to a region (e.g. EEC and ASEAN); to enhance political and economic influence in the region or internationally (e.g. MERCOSUR); or for a host of broader foreign policy goals (e.g. US-Israel, US-Jordan, US-Gulf Corporation Council states. (GCC)). A PTA may be negotiated for one or all of the above reasons. Therefore, while economic considerations are always taken into

[73] 'Agriculture in Regional Trade Agreements. A Comparative Analysis of US and EU Agreements. April, 2008, DSE, available at www.cidse.org.visited2ndJuly,2009.
[74] Ibid
[75] Ibid
[76] Simon Lester, et al op. cit.

account, the actual motives behind a country entering into a PTA often encompass a wide range of considerations.

3.7 GATT /WTO ARTICLE XXIV

Article XXIV of the GATT establishes the basis for allowing PTAs as an exception to the Most Favoured Nation (MFN), requirement. Similar provisions were developed for trade in services negotiated during the Uruguay Round and are found in Article V of the GATS. However, the focus here will be on Article XXIV because of its longer history, but occasional reference will be made to the GATS provisions as well.

At the onset, Article XXIV states

> The members recognize the desirability of increasing freedom of trade by the development through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories *and not to raise barriers to the trade of other contracting parties with such territories* (emphasis added).

The provision refers to 'customs unions' and 'free trade areas' as ways of achieving 'closer integration'. As mentioned above, we refer to these agreements, generally as 'Preferential Trade Agreements' or 'PTAs' but we distinguish between the two where relevant. In this regard, Article XXIV:4 explains that PTAs are 'desirable' but should 'facilitate' rather than raise new barriers. Article V of the GATS does not contain a similar statement regarding the 'desirability' of PTAs, but in paragraph 4 does refer to facilitating trade and not raising barriers. Article XXIV of the GATT also provides three basic rules that WTO members must comply with in order to establish a PTA covering

trade in goods. The first is a procedural requirement to notify the WTO of the PTA (with a subsequent review by the relevant WTO committee).[77]

The next rules are substantive in nature: (1) an obligation not to raise the overall level of protection and make access for products and services from members not participating in the PTA more onerous (the external trade requirement); and (2) an obligation to liberalise substantially all trade among members of the PTA (the internal trade requirement). The reasons behind these obligations is clear: the drafters wanted to ensure that each PTA, on the whole facilitated, as opposed to hindered or burdened, trade and further wanted to ensure that PTAs could not be used merely to disguise preferential arrangements on a select range of goods or economic sectors.

(a) The Obligation to Notify to the Committee on Regional Trade Agreement (CRTA)

WTO members desiring to enter into a PTA covering trade in goods must notify the council of Trade in Goods of their intention. As stated in the understanding on the interpretation of Article XXIV of the GATT 1994, the Council of Trade in goods transfers the notification to the Committee on Regional Trade Agreement on examine the compatibility with WTO rules.[78]

Established in 1996, by the WTO General Council, the CRTA is the successor to 'GATT Art. XXIV working parties. Every member of the WTO can participate in the CRTA. Decisions in the committee are made by consensus. Technically, the scope and mandate of the CRTA are broad and far-reaching. For instance paragraphs 1(a) and 1(d) of the Decision establishing the CRTA provides the committee with authority to 'carry out the examination of (PTAs) … and thereafter present (a) report to the relevant body for

[77] Simon Lester et al op. cit.
[78] A similar provision is contained in GATS Art. V: 7(a) However, the only difference is that examination is optional under the GATS where it is mandatory under the GATT.

appropriate action and further direct the committee to 'consider the systemic implications of such PTAs and regional initiatives for the multilateral trading system'. Furthermore, article XXIV:7(a) of the GATT requires members to 'make available to them such information … as will make (the working party) to make such reports and recommendations to contracting parties as the working party deem appropriate'.

These broad powers would seem to encompass the possibility that the CRTA could conclude in its report that the PTA at issue is incompatible with Article XXIV and recommend either its dismantling or alteration. Of course, such determination would have to be made by consensus and this requirement has thus far proven insurmountable.[79] The majority of PTAs have in fact been notified to the GATT/WTO after their successful completion. This is contrary to the language of Article XXIV: 7(a) of the GATT.

It must be noted, however, that Article XXIV:7(a) of the GATT does not require working party/CRTA approval to form a PTA. Therefore, as long as the requirements of Article XXIV of the GATT are met, members are free to enter into PTAs. Nonetheless, what was originally intended to be an *ex ante* review has become an *ex post* review.

(b) External Trade Requirement

The external trade requirement differs under Article XXIV:5 of the GATT depending upon whether the PTA at issue is a custom union or a free trade area.

(i) Free-trade Areas

With regard to free-trade areas Article XXIV:5 requires that 'duties' and other regulations of commerce… applicable at the formation of such free-trade area or the adoption of such interim agreement to the trade of the contracting parties not included in such area or not parties to such agreement shall not be higher or more restrictive than the corresponding territories prior to the formation of the free-trade area'. In other words,

[79] Simon Lester et al: 'World Trade Law', op. cit.

when entering into an FTA, members may not alter their external protection in such a manner as negatively to affect non – FTA members.[87] The reason behind this prohibition is simple. FTAs are aimed at trade liberalization. Thus, the goals are to remove trade barriers among FTA participants rather than increase barriers with nations not included in the particular FTA at issue.

This is not to say that liberalizing internal trade does not affect nations not included in the particular FTA at issue, FTAs can and do shift production sources and often result in trade diversion from an efficient producer in an external country to a less efficient producer internally. Furthermore, FTAs often include a complex set of rules of origin requirement which can significantly affect external protection .while FTAs differ widely in substance all provide the same basic guidelines.[88]

(ii) Customs Unions

The external trade requirement is a bit more complicated in the case of customs unions. Customs unions have two obligations. First they have an obligation not to raise the overall level of external protection above a certain threshold. Secondly, they have a specific obligation to compensate external members in cases where the customs duties in some members of the customs unions have been raised to match the level deemed appropriate by the customs union.[89]

(c) Obligations not to raise the overall level of external protection

Like free-trade areas, customs unions seek further to liberalize trade among the members. However, customs unions go beyond FTAs in that they also require common external protection. In other words, members forming a customs union must adjust their external protection (i.e. tariffs) so that all members provide the same level of protection.

[87] Ibid
[88] Ibid
[89] Ibid

As nations historically provide differing levels of protection in various industries due to a variety of factors including but not limited to, economic rationale, political considerations and level of development among others, the likelihood that all members forming a customs union will have the exact level of protection is very small.

In adjusting external protection levels when forming a customs union members must be mindful of their Article XXIV:5(a) obligations, which states

> *"with respect to a customs union, or an interim agreement leading to a formation of a customs union, the duties and other obligations of commerce imposed at the institution of any such union or interim agreement in respect of trade with contracting parties not parties to such union or agreement shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union or the adoption of such interim agreement as the case may be.*

(d) Obligation to Make Compensatory adjustment

Under Article XXIV:6 of the GATT customs unions have a specific obligation to compensate external members in cases where the customs duties in some members of the customs unions have been raised to match the level deemed appropriate by the customs union. Specifically, Article XXIV:6 provides:

> *If, in fulfilling the requirements of sub-paragraph 5(a); a member proposes to increase any rate of duty inconsistently with the provisions of Article 11, the procedure set forth in Article XXVII shall apply. In providing for compensatory adjustment, due account shall be taken of the compensation already afforded by the reduction brought about in the corresponding duty of the other constituents of the union.*

It must however be noted that the problem with the provisions of Article XXIV relating to PTAs generally is that of interpretation which has caused so much acrimony for GATT working parties and a clear consensus never emerged.

Despite the above, there can be no denying that there has been an explosion of PTAs following the implementation of the WTO and more specifically, following the failed Seattle, and Cancun ministerial. As outlined earlier in the chapter, the reasons members are pursuing a bilateral track of trade negotiations are many. The fear is that these nations will become inward-looking and be less interested in forwarding the multilateral agenda. Members pursuing PTAs are, without exception taking a two-pronged approach to multilateral and bilateral trade.[90] But the question whether increased bilateralism can indefinitely sit comfortably next to the multilateral system remains unanswerable.

The above may depend upon another question: whether the WTO will strictly enforce the discipline of Article XXIV. The understanding on the interpretation of Article XXIV of the GATT 1994 expects both the Committee on Regional Trade Agreement and the Dispute Settlement Body to be active in the monitoring of PTAs. The CRTA has until date proven itself an ineffective committee due to the constraints of consensus decision – making. The DSB, however, through the actions of panels and the Appellate Body has begun to lay the foundation for effective monitoring and enforcement of Article XXIV.

As part of the Doha Round, members of the 'Negotiating Group on Rules' have been discussing ways to improve the systems, including by setting guidelines, timelines and meaningful standards for controversial interpretative issues. The successive

[90] Ibid

conclusion of this Group's work could provide for meaningful obligations, and enforceable at the first instance by the Committee on Regional Trade Agreement.

3.8 REGIONAL TRADE AGREEMENTS IN AFRICA: Perspectives on ECOWAS

Efforts at regional and sub-regional integration in Africa go back to the immediate post colonial period. It was seen as an extension of the liberation movements and an effort to construct geographic entities that were economically viable and politically united.[91] It also reflected the prevailing European experience with its emphasis on free trade within a common external tariff areas.[92]

Regional and sub-regional integration in Africa has met with limited success on account of several factors. Chief among them are the parallel and often competing groupings that divert the needed political will to succeed, the conflict with the developmental objectives and expectations of their development partners, usually the former colonial masters or their associated groups; conflict between national structures and policies and group objectives and agenda; personality conflicts; infrastructural constraints; institutional constraints and national security constraints.[93]

The promise that integration holds in the form of the enlargement of local markets, the realization of economies of scale, and the strengthening of bargaining positions in global negotiations i.e a significant allure to make the countries of Africa try time and again to forge these regional trade agreements.[94]

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[91] Victor Essien; 'Regional Trade Agreement in Africa: A Historical and Bibliographic Account of ECOWAS and CEMAC 2006, available at www.file:/1/c:/users/desktop/regionaltradeagreementsinafrica.htm visited on 4th Nov. 2010, at 10.10am.
[92] Ibid
[93] Ibid
[94] Ibid

ECOWAS, the Economic Community of West Africa states represent one major effort at regional integration in Africa. The idea for a West Africa Community goes back to President William Tubman of Liberia who made the call in 1964. A subsequent agreement was signed between Cote D'Ivoire, Guinea, Liberia and Sierra Leone in February 1965, but this came to nothing. In April 1972, General Gowon of Nigeria and General Eyadema of Togo reluanched the idea, drew up proposals and toured 12 countries, soliciting their plan from July to August 1973. A meeting was then called at Lome from 10-15 Dec. 1973, which studied a draft treaty. This was further examined at a meeting of experts and Jurists in Accra in Jan. 1975; and a ministerial meeting in Monrovia in Jan. 1975.[95]

The treaty establishing the ECOWAS was signed in Lagos, Nigeria on May 28th 1975 by the Heads of States and Government of 14 West African nations, namely Benin, Burkina Faso, Cote D'Ivoire, Gambia, Ghana, Guinea, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone and Togo. Guinea Bissau acceded to the Treaty later in 1975 and in 1979, Cape Verde became the 16th member nation. In accordance with the terms of the treaty, the treaty came into force in June 1975 with the ratification by seven states.[96] Recently in 2002, Mauritania withdrew from the Union and justified her actions on the ground, that apart from geographical locality, it does not have anything in common with other member states; thereby bringing the total membership back to fifteen.[97]

Article 2(1) of the 1975 Treaty described the aims of the community as follows:

> … to promote co-operation and development in all fields of economic activity particularly in the fields of industry,

[95] See www.iss.co.za/af/reg.org/unity_to_union/ecowasprof.htm visited on 2.03.2013
[96] See Victor Essien, Regional Trade Agreements in Africa, op. cit. P.105
[97] R. Robert 'The social Dimension of Regional Integration in ECOWAS" being working paper, No. 49 of the Policy Integration Dept. ILO, Geneva Dec. 2004 p.6

> transport, telecommunications, energy, agriculture, natural resources, commerce, monetary and financial questions and… of contributing to the progress and development of the African continent.

Article 2(2) of this Treaty explains that the community shall by stages inter alia ensure

> (a) The elimination as between the member states of customs duties and other charges of equivalent effect in respect of the importation and exportation of goods.
>
> (b) the abolition of quantitative and administrative restrictions on trade among the member states.
>
> (c) the establishment of a common customs tariff and a common commercial policy towards third countries
>
> (d) the abolition as between the member states of the obstacles to the free movement of persons services and capital.

The 1975 Treaty – had envisaged the establishment of a common market in fifteen years. Given the many logistical infrastructural, financial and political obstacles and problems, this was not realistic. In the end, the much anticipated increase in intra-regional trade did not materialize and the many protocols for the elimination of trade barriers were not honoured. In short, most economic activity in the region was unaffected by the organization and its goals.[98]

Expectedly in 1993, the Treaty was revised to rationalize the aims and objectives of the community and to improve upon the limitations of the past. The revised treaty was designed to accelerate economic integration and to increase political co-operation. Further, it identified the ECOWAS as ultimately the sole-economic community in the

[98] Victor Essien op. cit.

region for the purpose of economic integration and the pillar for the realization of the African Economic Community.[99]

In addition, the Treaty provided certain fundamental principles, among them, the promotion and consolidation of a democratic system of governance in the member states.

However, seventeen years after the Revised Treaty, the most significant results of ECOWAS have been those concerning organizational matters such as the drafting of protocols and conduct of studies. The implementation of treaty obligations leave a lot to be desired. Genuine attempts at implementation are also undercut by other measures. For instance even though visas have been abolished for nationals of member states, there are a large number of checkpoints which remain a constant source of harassment for ECOWAS travelers.

The pre-eminent objective of creating a common market has not fared any better. In pursuance of this objective, the community adopted a trade liberalization scheme aimed at the elimination of customs duties and taxes of equivalent effect on imports of ECOWAS origin since 1981 and the abolition of no-tariff barriers to intra-ECOWAS trade by May 28,1985. The ECOWAS fund for cooperation; compensation and development was also established to make compensation for loss of customs revenue under the liberalization scheme.[100] The problem, however, is refusal or failure to implement the scheme. There are in fact cases of member states still maintaining non-tariff barriers such as bans and the requirement of special permits against products of ECOWAS origin.[101] Below are some major constraints to ECOWAS integration.

[99] The aim was to counter the influence of other organization such as the communicate Economique de L'Afrique de L'Ouest (CEAO) set up by Francophone countries enjoying support by France
[100] Victor Essien; op. cit.
[101] Ibid

3.8.1 Obstacles to ECOWAS Integration

As noted earlier ECOWAS aims at promoting cooperation and development among member states in all fields of economic activity for the purpose of raising the standard of living of its peoples. The ultimate objectives of its efforts is to achieve accelerated and sustained economic development of member states through elimination of all types of obstacles to (trade), capital and persons.[102]

In pursuing these objectives there are constraints that have limited the smooth and quick realization of these goals of desired economic union. These constraints may be considered briefly under four broad headings; viz economic, political, national development planning and social matters

i. Economic Problems:

The attachment of member states to their former colonial masters is manifested in the system of trade and monetary arrangements those states have had and may still be having since their political independence. The former French colonies under the Younde convention entered into a system of trade preferences with the European Economic Community (EEC) at the initiative of France. The Anglophone countries on the other hand benefited from the commonwealth preferences following their independence from Britain. These preferences have the effect of discriminating against member states not forming part of such groupings.[103]

In the West African sub-region there is also a common inadequacy of infrastructural development (road, rail, air, and water transport, communications and power) in and among member states. Most of the intra state road and rail link are

[102] Eguare I.N, "Problems and Prospects of the Economic. Community. Of West Africa States" In *Readings and Documents on ECOWAS* Akinyemi, A.B. et al (eds) NIALS, Lagos, 1983) p.73
[103] Ibid at p.554

vertically arranged from the coast to the hinterland reminiscent of colonial interest of the past. The inter member states road link are few and the situation is even worse in case of telecommunications. The absence of a good transport and communication systems as well as other infrastructural facilities cannot aid trade and rapid industrialization which economic union seeks to promote.[104]

The result, therefore, has been very little increase in intra-regional trade at the official level; unofficial or unregistered trade continues to account for more than two-thirds of commercial intercourse between the states in the sub-region. The tardy implementation of the free movement regime has not been of much avail in this regard. On the contrary deteriorating economic conditions across the sub-region seem to have pushed member states into looking more inward, leading to discriminatory, internal, economic and immigration policies, that further undermine the free movement principle.

ii. Political Problems

ECOWAS member states seem to jealously guard their sovereignty. An integration problem would arise where the expected cooperation is not forthcoming from member states because of their unwillingness to surrender part of their sovereignty. According to Jeggan Senghor, the singular issue underlying obstacles to integration is that national political elites attach more importance to the preservation of national sovereignty recently acquired at the end of the colonial epoch.[105] This often leads them to direct political and financial recourse to national integration than to regional integration.

[104] Ibid
[105] Senghor, J.C (1990) "*Theoretical foundations for integration in Africa*" (Nairobi: African Academy of Sciences) Chap. 2

Administrative structures and policies are also designed to promote national interests, rather than regional aspirations.[106]

iii. National Development Planning

A number of other factors have also been responsible for the palpable lack of speed and enthusiasm in implementing economic integration in West Africa. These include the absence of a development and integration culture, which should make national development planning to be premised on regional considerations and have the regional market as the point of reference. Regional insecurity arising from armed conflicts within and across member states and the existence of a bloated public bureaucracy which treats regional integration as peripheral to the national economic agenda[107] are also strong obstacles.

Furthermore, in some countries of the community, emphasis is placed on comprehensive national development planning while in others, the national plans could be regarded as not being so comprehensive. Thus, with differing goals of planning among member states, harmonization of development plans can at best be selective.

iv. Social Problems

Economic Integration as envisaged under the ECOWAS Treaty involves the movement of labour of various categories as well as entrepreneurship, free of any restriction within and between member states. Thus, social and cultural friction sometimes occur as the unemployed and the under employed would tend to migrate to the prosperous areas of the sub-region where job opportunities are available. For instance in the early 1980s, Ghanaian citizens flocked into Nigeria in search of job and better living

[106] Ibid
[107] Bundu, A. (1993) "ECOWAS and the future of integration" 1992-93 Report of ECOWAS Executive Secretary, West Africa Magazine, July 1993 (No.3956)

conditions, but they were later expelled when the Nigerian government discovered that they constituted serious social problems especially by engaging in criminal activities. Nigerians have equally faced expulsion and mass deportation from other West African countries on account of similar accusation. Presently, immigrants from Niger Republic and Chad can be found in large numbers across cities in Northern Nigeria particularly in Sokoto, Kano, Katsina and Maiduguri who share border with the two countries mentioned. Most of these immigrants are engaged in unskilled labour like hawking water, cobblers/shoe-shinners, while others engage in petty trading activities.

3.8.2 The Need for Genuine Integration in the ECOWAS sub-region

The advantages of regionalism are significant and not in dispute. This has accounted for the upsurge in preferential trade agreements. It is however worth highlighting a few of these advantages in order to underscore the importance and urgency of having a genuine economic and political integration in the ECOWAS sub-region. The pooling of resources and unrestricted access of such resources enhance the development potential of the countries involved in integration process. Furthermore, the larger regional market encourages large investment employing more efficient technologies, enjoying economies of scale and thus operating at lower cost. The harmonization of policies improves the management of national economies and makes the policies more effective because of their being mutually supportive and applied in a synchronized manner. Having outlined the economic benefits of regionalism, it is noteworthy to state that ECOWAS as a regional grouping should be given enough support and commitment by member states to ensure an accelerated and sustainable integration of the national economies of the region.

The prospects for the success of regional integration in West Africa are enhanced by the focus and relevance of the ECOWAS integration process, and by the strategies that have been adopted. In other words, the legal and institutional framework have been created by ECOWAS to make integration a real possibility. It is worth recalling that the ECOWAS treaty has the objective of fostering economic development and raising the living standard of West Africans. The goal of ECOWAS therefore, goes beyond the simple creation of a common market. It is to make regional integration an effective tool for the development of the participating countries. This is the focus of the changes that the regional integration process has been undergoing in ECOWAS.[108]

On balance, ECOWAS remains of marginal interest to the western countries. Apart from Nigeria's oil exports to the United States and Niger's uranium to France and possibly France's continuous alliance with its former colonies, ECOWAS is only a source of strife and of economic, demographic and environmental crisis. Its relevance to the West may be in the form of its ECOMOG forces in the security issues in the region and saving the western nations from direct involvement in foreign conflicts.

[108] These changes include; Revision of ECOWAS Treaty, Restructuring of the Executive Secretariat; Takeoff and effective functioning of both the Court of justice and the West African Parliament; Giving more push to ECOWAS priority programmes in key areas such as liberalization of regional trade free movement of persons and service, establishment of a regional currency zone through the harmonization of monetary and fiscal policies, harmonization of business laws, development of transport, communication and energy networks and promotion of private sector participation in the integration process.

CHAPTER FOUR

THE CHALLENGES OF TRADING IN THE MULTILATERAL TRADING SYSTEM

4.1 INTRODUCTION

At its inception in 1947, the GATT was dominated by industrialized countries. Developing countries were few in number and some of these were still within the sphere of influence of the European powers. Not surprisingly, then, the original GATT trade rules did not have much to say about economic development concerns. Over the years, however, more and more developing countries joined the GATT and they now make up a large majority of the WTO's memberships[1].

As developing countries have grown in terms of membership numbers, their role has also changed. In the early years of the GATT, developing countries took on fewer obligations than did the industrialized world, and correspondingly played a less active role. However, as part of the Uruguay round, developing countries made substantial commitments in a number of areas, including binding more tariffs and signing on to new agreements in intellectual property and services. As a result, developing countries are now much more active in the negotiations, as the current rules have a significant impact on them.

This chapter examines a number of issues relating to the participation of developing countries in the WTO system[2]. It also examines challenges faced by developing countries in the WTO including; first, the political realm, in particular the negotiating of the rules, secondly, third, the formal treatment of developing countries in relation to that of developed countries. The chapter further considers whether the polices

[1] Nigeria joined the WTO in 1995.
[2] Any reference to developing country impliedly refer to Nigeria

promoted under the WTO rules are appropriate for developing countries. Finally, it reviews the GATS and TRIPS agreements and other WTO rules that affect social policy issues such as labour, environment and human right issues in developing countries.

4.2 PARTICIPATION OF DEVELOPING COUNTRIES IN THE WTO: (Negotiations, Disputes And Special And Differential Treatment).

There is hardly any doubt that power remains an important element in terms of member's participation in the GATT/WTO system. According to Gerhart and Kella: [3]

> *The WTO'S primary purpose is to allow members to bargain with each other in order to obtain binding commitments to change policies that adversely affect the welfare of other member countries. This bargaining is inherently power based. WTO members negotiate market access commitments, for example, based on the size and diversity of their economies members with the greatest economic wealth and most diversified economies such as the United States and the EC have more to offer in negotiations and less to lose in the event that negotiations breakdown. Thus they have more bargaining power than other members. At the other end of the spectrum, members with little wealth and diversity in their economies have the least to offer if any given negotiations are unsuccessful. Consequently, in the absence of effective coalition building or other strategic considerations, these countries have the least bargaining power in the system and wealthy countries are significantly more likely to secure their desired outcomes under the WTO.*

Thus, in these negotiations, the relative power of the members continues to shape the negotiations, both in process and in outcome.

4.2.1. The Negotiating Process

The role of developing countries in the negotiating process has been a particularly contentions one[4]. WTO negotiations have now moved far beyond a tariff-cutting exercise, leading to fairly complex negotiations. Even developed countries with vast resources are

[3] Gerhart P.M and Kella A.S *'Power and Preferences: Developing Countries and the role of the WTO Appellate body'* (2005) 30 North Carolina journal of International Law and Commercial Regulation 515

[4] Simon Lester and Bryan Mercurio et al; world Trade. Law, Text, Materials and Commentary, Hart Publishing, Oxford and Portland Oregon, 2008 p.785

stretched thin trying to promote their interest in the midst of myriad rules and commitments being discussed. It goes without saying that developing countries, especially the least developed countries, are often completely overwhelmed[5].

In addition to these difficulties, one of the criticisms of the WTO is that developing countries are largely excluded from the process to a great extent. The process has improved in recent years as at least some developing countries are usually, present at key negotiating meetings. However, it is usually larger developing countries such as Brazil, China and India which play this role, rather than smaller and poorer countries[6].

According to Kwa [7], an avowed critic of the WTO negotiating process:

> *Decision – making essentially takes place in concentric circles. First, the U.S and the E.U come together to decide on a common position. The circle is then expanded to Japan and Canada. They make up the 'Quad'. After this the , circle is enlarged to include other developed countries, followed by friendly developing countries (e.g South Africa, Chile, Singapore etc). this group is sometimes known as friends of the chair: And finally, other influential developing countries, such as lndia and Malaysia are brought on board, since they carry weight and it would be impossible for the 'majors' to leave them out. China, a new member, also falls into this category. The majority of developing countries never make it into this circle of decision-making.*

The above closely represent an accurate description of the process. Even so, judging whether the negotiating process is fair and equitable for developing countries is a difficult task. This is so because, developed countries have taken a number of actions to help developing countries on their own, therefore arguably they do have developing countries interest in mind to some extent. Thus, in theory, the process could be fair to developing countries. However, the discrepancy in the resources between rich and poor

[5] ibid
[6] Simon Lester et al op.cit
[7] A. Kwa, Power Politics in the WTO (focus on the Global south, Bangkok, 2003), p.36-7

countries on the key negotiating points is almost going to lead to some of the concerns of poor countries being overlooked.

On the other hand, the current system may not be quite as bad as some critics imagine, as developing countries have been able to work together and form negotiating blocs. Thus, not all developing country members need to participate to have their interests represented. Partly, as a result developing countries have been flexing their negotiating muscles in recent years putting development concerns higher on the WTO's agenda than have ever been (with the word 'development' now part of the title of the current negotiating round)[8]. Nevertheless, exclusion of some WTO members from key aspects of the negotiating process still persists.

4.2.2. Dispute Settlement

The Dispute Settlement Understanding (DSU) is discussed at length in chapter 6 and it has been called the 'crown jewel' of the Uruguay round negotiations. However, one persistent criticisms of the DSU is that it does not work for developing countries. There are two main aspects of this criticism. First, some argue that developing countries do not have the human or financial resources to participate effectively in dispute settlement.[9] Secondly, some consider that the dispute settlement rules are skewed against developing countries (and small economies in general) because the impact of any retaliation they undertake pursuant to the DSU is limited[10]. Each of these issues may now be considered in greater detail below:

[8] i.e. The Doha Development Agenda (DDA)
[9] Simon Lester et al op.cit
[10] ibid

(i) Limited Resources

With regards to challenges that developing countries encounter in dispute settlement the number of government personnel that can be devoted to disputes is much higher in developed countries especially the United State of America and European Community as a result, developed countries have a large contingent of well-trained government lawyers with expertise in WTO law. Furthermore, developed countries have greater financial resources to devote to the case. This includes the resources of the private companies with interests in the dispute, who can hire expensive private lawyers to work on the case, as well as the resources of the government itself to cover various litigation costs[11.]

However, there are a few instances where a developing country may be assisted by the advisory centre on WTO law (A.C.WL). This is an inter governmental organization that was formed specifically to help developing countries with disputes as well as understanding WTO laws more generally. It operates as a law firm representing these governments at discounted rates, and also helps to defray the costs of hiring private lawyers where it cannot advise directly. The downside of this of course is that utilizing outside help can inhibit the growth of in-house expertise.

(ii) Inherent Bias in the DSU Rules

Under the DSU, complainants that have brought a successful case have the right to retaliate with trade sanctions when the defending party does not implement a ruling properly; Clearly, retaliation by the U.S or E.U is likely to have a greater impact than retaliation by a small country which only has a small amount of imports in absolute terms as the U.S or E.U will almost always be able to find imports from another member that

[11] ibid

they can target effectively with sanctions. This is much less likely to be the case for developing countries[12].

Proposals have been made to address the problem, in particular by allowing developing countries to act as a group in this kind of retaliations, so as to have a better chance of finding an effective product or service on which to impose sanctions[13].

4.2.3 Special and Differential Versus Equal Treatment.

There are many provisions in the WTO agreement that provide for special and differential treatment for developing countries. Not all of the provisions actually use these exact terms, but the common thread is that they offer looser rules for these countries. In general terms, according to the WTO's website, these provisions offer extra time for developing countries to fulfill their commitments; they are, 'designed to increase developing countries trading opportunities through greater market access; require WTO members to safe guard the interests of developing countries adopting some domestic or international measures' and provide various means of helping developing countries [14]. The following are some examples:

First, GATT article Xiii is entitled 'Government Assistance for Economic Development' and *inter alia* allows developing countries more flexibility in using trade restrictions to address balance of payment concerns.

Second, DSU article 4.10 provides: during consultations members should give special attention to the particular problems and interest of developing country members.

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[12] ibid

[13] See B. Mercurio, 'Improving Dispute Settlement In The WTO: The DSU' Review-Making It Work?' (2004) Journal of World Trade 795

[14] WTO, 'Understanding the WTO: Developing Countries Overview' available at www.wto.org/english/thewto-e/whatis-ehtm (visited 30 July, 2010).

Third, DSU article 12.10 provides that in the context of consultation involving a measure taken by a developing member the parties they agree to extend the relevant periods. In addition if states 'in examining a complaint against a developing country member, the panel shall accord sufficient time for the developing country member to prepare and present its argument'..

Fourth, Anti-dumping (AD) Agreement Article 15 provide; it is recognized that special regard must be given by developed country members to the special situation of developing country members when considering the application of anti-dumping measures under this agreement. Possibilities of constructive remedies provided for by this agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country members'.

Many of these provisions are drafted in fairly vague terms, leaving the scope of the obligation somewhat unclear. For example, DSU article 4.10 use the term 'should' and it is not clear how it would be determined what constitutes 'special attention' and whether it was given.

Such treatment can also be seen in the more limited commitments made by developing countries in their GATT and GATS schedules. With regard to the GATT, part iv, entitled 'trade and development' includes provisions on the concept of non-reciprocity on trade negotiations between developed and developing countries - when developed countries grant trade concessions to developing countries they should not expect the developing countries to make matching offers in return[15]. The result is that developing countries have fewer tariff lines that are bond.

[15] ibid

Furthermore, developing countries have bond their tariffs at much higher rates on average than have developed countries, giving them flexibility to impose fairly high duties. In the agriculture sector, developing countries have committed to smaller percentage tariff reduction over a longer period of time than developed countries and least developed countries were not required to make commitments at all[16]. Similarly, developing countries have made fewer GATS commitments. Thus, in the area of tariff concessions have less burdensome obligations than others[17].

On the other hand, despite the general incidence of lower tariffs in the developed world, rich countries maintain many of their highest barriers on the products of greatest export interests to developing countries, such as textile and clothing products and agricultural products. As a result, despite some explicit favoritism towards developing countries it is very difficult to judge the overall 'fairness' of the current system to them[18].

Finally, in addition to these scattered rules and policies, there is a specific mechanism established to promote the exports of developing countries: the Generalized System of Preferences (GSP). Under the GSP rich counties are permitted to charge lower tariff rates on products imported from developing countries, even though this type of discrimination would normally violate the MFN principle. The goal of these preferences of course, is to promote developing country exports and thus industrialization and income growth.

The origin of the GSP system are explained by the United Nations Conference on Trade and Development (UNCTAD) as follows.

[16] 'Agriculture: Fairer Market for Farmers', Available at www.wto.int/english/thewto_e/whatis_e/tif-ekegrmze.htm (visited 30 July 2012).
[17] Simon Lester et al op.cit.p.790
[18] ibid

> The idea of granting developing countries rates tariff in the markets of industrialized countries was originally presented by Raul Prebisch, the first Secretary –General of UNCTAD at the first UNCTAD conference in 1964. The GSP was adopted at UNCTAD II in New Delhi, in 1968.
>
> In 1971, the GATT contracting parties approved a waiver to article 1of the agreement for 10years in order to authorize the GSP scheme. Later the contracting parties decided to adopt the 1979 Enabling Clause Decision of the contracting parties of 28 November 1979 (265/203) titled "Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries" creating a permanent waiver to the most-favoured-nation clause to allow preference giving countries to grant preferential tariff treatment under their respective GSP schemes[19].

As noted by UNCTAD, these schemes are run by individual governments. They are purely voluntary, as there is no requirement that they be undertaken. Nonetheless most countries in the developed world maintain such a programme[20].

As to the relevant WTO legal provisions relating to the use of GSP schemes, the UNCTAD summary quoted above refer to the 1971 GSP waiver and the 1979 Enabling Clause. In Essence, the Enabling Clause permits the WTO members to provide better treatment to developing countries than to others.

4.3 APPROPRIATNESS OF WTO'S GOALS FOR DEVELOPING COUNTRIES

As discussed in chapter 2, broadly speaking, one of the main purposes of WTO rules is to promote trade liberalization, that is, the elimination or reduction of barriers to trade. While there appears to be support for this goal among many, if not most economists, the public at large is more evenly split on this issue, and there are many

[19] UNCTAD, 'About GSP', available at www.unctad.org/templates/page.asp?intltenID=23098lawlang=1 (visited 30 july,2012)

[20] Ibid. There are currently 16 national GSP schemes notified to the UNCTAD secretariat. The following countries grant GSP schemes: Australia, Belarus, Bulgeria, Canada , and the CZech Rep. The European community, Hungary, Japan, New Zealand, Norway, Poland the Russian federation, the Slovak Rep. Switzer land, Turkey and the United States of America.

interest groups which strongly oppose it with regards to whether a policy of trade liberalization is right for developing countries, there is even greater opposition. Without getting into an unnecessarily economic analysis of the issue, an attempt is made to present below some of the arguments relating to whether trade liberalization is an appropriate policy for developing countries.

One argument that is made against the idea of having developing countries liberalize is that today's developed countries reached their current status not through open trade policies, but rather through protecting their domestic markets. Evaluating this claim is difficult because it is hard to prove cause and effect, what is true however, is that many of today's rich countries achieved industrialization at a time when their markets for some products were heavily protected, even if this may not be the cause of the industrialization[21].

A related claim is the idea that the trade liberalization policies pushed by rich countries today are a form of 'neo-colonialism'. A common view among peoples of the developing nations is that rich countries promote the liberalization so that their companies can take control of the economic resources of poor countries. In a limited sense, this claim is probably true. Governments of rich countries are looking out for the interests of their domestic companies. However focusing on this motivation in isolation is probably not a fair assessment of the policy. In pushing for trade liberalization, policy makers in rich countries also have the interests of their own consumers in mind, as well as the general economic welfare of the world as a whole, (they will benefit if the world is wealthier)[22]. Furthermore, some of the more altruistic leaders of the developed world are probably thinking about the welfare of foreign consumers and workers in poor countries

[21] Simon Lester et al p. 792
[22] Ibid

as well. Whether trade liberalization policies actually promote all of these interests may be open to debate, but it is clear that many people believe they do and are not simply out to exploit the world's poor[23].

It is important to note that claims of harm to developing countries by trade liberalization maybe rather exaggerated. The reality is that developing countries have not made extensive commitments to liberalize and they benefit from numerous exceptions in the rules. Moreover few complaints are brought against them under the WTO's dispute settlement process. Thus, the whole debate about the effect of trade liberalization on developing countries is somewhat theoretical. Much of the concern is really about what might occur if liberalization were to progress considerably as opposed to what is actually happening now.

Finally, we recall an inherent contradiction in the WTO's negotiating process. WTO rules explicitly state in various places that trade liberalization is a goal and its substantive rules clearly, promote this liberalization. Thus, the assumption is that liberalization is a good policy. Why, then do the rules treat liberalization as a 'concession' to be made? If it is such a good policy, should members not just under take it on their own? This applies generally, but especially to developing countries, which need economic growth the most. The answer of course lies in the uneven benefits that liberalization engenders, as well as the nature of the trade negotiating process. With regard to the former, even if, on balance, most people benefit from trade liberalization, there will be people who are hurt by it at least in the short term, and their resistance makes it difficult for governments to adopt liberalizing policies. As to the latter, given that governments are not likely to liberalize unilaterally, there is a need for a mechanism

[23] Ibid

to provide incentives for them to do so, the negotiating process allows countries to use an 'I will open my market if you open yours' approach, which arguably leads to the greatest overall reduction of trade barriers

4.4. INTERNATIONAL TRADE IN SERVICES

Given the substantial role that services play in the world economy, excluding them from world trade rules would leave a major gap in the system. Until 1994, though, they were not covered at all. This changed as part of the Uruguay Round trade talks. While not as important as they are today, services had been growing in prominence for many years by the time the Uruguay Round negotiations began in 1986, especially in the economies of developed countries. As a result, there was a great deal of interest among these countries in increasing sales of services to foreign markets by encouraging liberalization in this area. Negotiations on trade in services were therefore established, and the result was the General Agreement in Trade in Services (GATS), which provides a set of rules and commitments on trade in services[24].

The WTO called the GATS the world's first multilateral investment agreement because its rules cover every conceivable way a service might be delivered including granting foreign corporations the right to buy or establish new companies within other countries and sending people across borders to perform services. GATS is known as a "bottom-up" agreement because most of its requirements only cover service sectors countries agree to open up for competition by foreign corporations. GATS negotiators like to portray GATS as a very flexible agreement from which countries may completely exclude certain sectors. In reality, the GATS text is very ambiguous and can be used in

[24] Moans G. And Gillies P.: *International Trade and Business: Law, Policy And Ethics*, Cavendish Publishing Australia Ltd 1998, London.

unpredictable ways to challenge domestic policy. Some GATS constraints apply even if a country has not committed a sector. GATS also contain rules constraining how governments can regulate in the service sector.

4.4.1. The Nature of Services

Because of their tangible physical nature goods are relatively easy to identify and classify. By contrast, services are conceptually more difficult to understand. Thus, it is helpful first to explain the nature of services.

Black's law dictionary defines services in a relatively straight forward manner: 'things purchased by consumers that do not have physical characteristics.'[25] Along the same lines, services have been described more colloquially as 'every thing you cannot drop on your foot'[26] In explaining the term "trade in services," a WTO secretariat note provides a more detailed statement: 'international trade in services is any service or labour activity across national borders to provide satisfaction to the needs of the recipient or consumer other than the satisfaction provided by physical goods (although they might be incorporated in physical goods), or to furnish an input for a producer of goods and/or services other than physical inputs (although the former might be incorporated in the latter)[27].

Distinguishing between goods and services is not always easy.[28] The definitions above are useful, but there will always be some items that have characteristics of both.

[25] Blacks Law Dictionary, 6th Edn. (West Publishing, St. Paul Minn, 1990) at 1369

[26] Public Citizen's lori wallach and EU trade commissioner sound off on GATS available at www.citizen.org/trade/wto/gats/articles ctm?ID=10940 visited 28 June, 2011

[27] WTO, Draft Glossary Of Terms GNS/W/43 8 july1988 available at www.wto.org/gat-docs/eng.sulpdf/920501/7.pdf

[28] For a discussion of the distinction between Goods And Services See Smith F. and Woods L. 'A Distinction Without A Difference: Exploring The Boundary Between Goods And Services In The World Trade Organization And The European Union' (2005-6) 12 Columbia Journal Of European Law 1 at 47-58

Simply stated some purchased items clearly have both a goods and services component. For example, when you pay for construction services you have paid for certain services that are involved such as a design of the building, but in the end you also have a physical structure. Similarly, when buying a car, the car, itself is a product, but part of the cost covers distribution, marketing and labour inputs. Nonetheless, the goods and the services aspects of the purchase can usually be distinguished and separated conceptually, allowing for separate regulations of goods and services.

4.4.2. How Services are Traded

Due to the nature of services, International trade in services is very different from trade in goods. As a result, trade in services is conceptually more difficult to understand than trade in goods. For trade in goods, the basic process can be illustrated as follows:-

Produced in country X→ shipped to country y → sold in country Y.

Thus, goods are traded internally through the manufacture in one country and the eventual sale in another country (sometimes going through an intermediary company that provides export/ import trading services). The process becomes a bit more complicated where, for example, inputs are shipped to another country for additional manufacturing and then sold to consumers in other countries. The resulting goods will then be comprised of products of multiple national origins. However, the basic concept is still the same[29]

Trade in services, on the other hand, works very differently. GATS article 1:2 sets out four modes of supply for trade in services':

a. 'From the territory of one member into the territory of any other member' (*cross-border supply*).

[29] Simon Lester, et al op.cit P. 601

This mode is the one that is most analogous to trade in goods, in that a service (like an exported good) crosses a national frontier. Examples are: a US trade lawyer doing work from an office in Washington, DC for the Japanese government or a lawyer in England prepares a legal advice which is sent via mail or e-mail to a client in Nigeria. Furthermore, an international telephone call from Ghana to Nigeria where a caller located in Ghana uses the Nigeria telecommunications net work to connect the call. Basically, this mode involves a situation where the services crosses the border, but neither the consumer nor the supplier does.

b. 'In the territory of one member to service consumer of any other member' (*consumption abroad*).

This mode involves the movement of consumers to the territory of a supplier. Examples include an American company coming to Nigeria to obtain legal advice from a Lagos- based firm; in the education field, a Nigerian student attending Harvad University, or the repair of a ship in a foreign port. Thus, in this mode, the consumer crosses the border\ to consume a service abroad.

c. 'By a service supplier of one member, through commercial presence in the territory of any other member' (*commercial presence*).

This, mode of supply effectively means foreign investment which can take various forms. For example, when McDonalds operates a restaurant in china, there is a U.S. company providing restaurant services to Chinese (and other) citizens. Further examples include, a foreign trade or financial institution establishes a branch or subsidiary in the territory of a country and supplying financial services and an American law firm establishing a branch office in Abuja.

d. ‘By a service supplier of one member, through presence of natural persons of a member in the territory of any other member’ (*presence of natural persons)*.

This mode involves services provided through the movement of citizens of one country to another country. For instance, a lawyer t ravels with a client from England to assist the client in conducting contract negotiation during the clients visit in Nigeria.

This mode popularly referred to as mode 4 has been a very thorny issue and is still being negotiated at the ongoing Doha Round. Much as it suits the developed countries, developing countries such as Nigeria find it very challenging. The constraint inherent in this mode involves citizen of developing countries finding it very difficult to process visa to enter developed countries either to carry out service or to live and permanently work in the developed countries where their services are needed. Even if they secure the visa, other challenges are still awaiting them such as residence permits, work permits and certification whereby they have to be properly certified by their respective professional regulatory authorities before they will be allowed to work or perform a particular service. This development has been a source of serious concern for most developing countries. India for instance has comparative advantage in the ICT industry but her citizens face serious difficulties obtaining visa to places like the US, where their services are highly needed. The same applies to most developing countries thus calling to question the manner of implementation of mode 4.

4.4.3. General Obligations and Disciplines

Part II of the GATS is entitled ‘general obligations and disciplines’. In this section, we discuss some of the more prominent rules in this part.

a. Most- Favoured Nation Treatment (MFN)

GATS article II requires that most favoured nation treatment be provided to all trading partners. In many ways, this provision is the same non- discrimination requirement under the GATT, but the wordings are slightly different. Article 11.1 provides:

"With regards to any measure covered by this agreement each member shall accord immediately, and unconditionally to services and service supplier of any other member treatment no less favourable than that it accords to like services and service suppliers of any other country".

Pursuant to article II:2 of the GATS, members were allowed to notify exemptions from the GATS MFN requirement as of the GATS entry into force. For example, the United States has listed as one of its MFN exemptions the following: 'Canadian small businesses, but not small businesses of other countries, may use simplified registration and periodic reporting forms with respect to its securities'.[30] This example illustrates one of the main reasons countries choose to derogate from MFN treatment: regional integration: here, the United States gives special treatment to companies from its neighbours to the north. Other common reasons for not granting MFN treatment are to provide favourable treatment for developing countries; requirements that benefits be given only to countries that offer reciprocal treatment; special treatment under friendship, commerce and navigation or investment treaties; or the result of political cooperation between countries on various issues that lead to special treatment[31].

[30] United States of America, final list of article II (MFN) exemptions, GATS/EL/90 (15 april, 1994 at 11.
[31] Simon Lester et al op. cit. 604

b. Transparency

Article III of the GATS provides obligations on the transparency of laws regulating services. Transparency is particularly important for services due to the often extensive regulation in the area. In this regard, paragraph 1 of this provision states: 'each member shall publish promptly, and except in emergency situations, at the latest by the time of the entry into force, all relevant measures of general application which pertain to or affect the operation of this Agreement. International agreements pertaining to or affecting trade in services to which a member is a signatory shall also be published'.

c. Domestic Regulation

Article VI of the GATS is entitled 'domestic regulation'. From the title alone, it appears that this provision could have a broad impact on members ability to regulate services.

The first paragraph of article vi states:

> 'in sectors where specific commitments are undertaken, each member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner'.

d. Exceptions

Part II contains a number of exceptions but the focus here is on the 'general exceptions' provision of article XIV of GATS which states:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail or a disguised restriction on trade in services, nothing in this agreement shall be construed to prevent the adoption or enforcement by any member of measures.

a. Necessary to protect public morals or to maintain public order;

b. Necessary to protect, human, animal or plant life or health

c. Necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this agreement including those relating to:

   i. The prevention of deceptive and fraudulent practices or to deal with the effects of a default on services constraints.

   ii. The protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;

   iii. Safety

4.4.4. Specific Commitments

Part II of the GATS covers specific commitments made by members. There are three types of commitments: 'market access, 'national treatment and 'additional' commitments. There is no requirement to make commitments. The decisions to make commitments or not is part of the negotiating process, similar to the process for tariff concessions.[32] However where members have made commitments, they must abide by them. The existence of commitments for national treatment illustrates an important difference between the GATT and the GATS. Under the GATT national treatment is a general obligation that applies to all measures. By contrast under the GATS national treatments only applies where a commitment has been made[33]

[32] However, it should be observed that developing countries in the on-going round of negotiations (DDA) are being put under severe pressures to make commitments thereby negating the freedom of choice envisaged in the GATS Agreement.

[33] Simon Lester, et al op. cit

GATS commitments are set out in individual members' schedules. These commitments are made either horizontally (across all services sectors) or for specific sectors only.

Part 1 of the commitment schedules deals with horizontal commitments, Part II deals with sector- specific commitments. For both kinds of commitments, the members indicate in the schedules which commitments have been made for each mode of supply in relation to market access, national treatment and any additional commitments.

a. Market Access

The term "market access" is used in many different contexts, with different meanings. However, in the context of the GATS, the term is explained in article XVI, which states in relevant part:

In sectors where market access commitments are undertaken, the measures which a member shall not maintain or adopt either on the basis of a regional subdivision on the basis of its entire territory, unless otherwise specified in its schedule are defined as:

a. Limitations on the total number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test

b. limitation on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test.

c. Limitations on the total number of service operations or on the total quantity of service out put expressed in terms of designated numerical units in the form of quotas or the requirements of economic needs test.

d. limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirements of an economic needs test.

e. measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service, and

f. limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.

Thus, from the above, the member can not take measures which would restrict market access in the sectors in a members schedule of commitments.

b. National Treatment

The GATS provisions on national treatment are set out in article XVII, which states:

1. In the sectors inscribed in its schedule, and subject to any conditions and qualifications set out therein, each member shall accord to services and service suppliers of any other members, in respect of all measures affecting the supply of services, treatment no less favorable than that it accords to its own like service supplier.

Thus, the member cannot discriminate between domestic and foreign service provider: foreign firms must be treated as favourably as domestic firms. However, it should be noted national treatment applies only where commitments have been scheduled.

4.4.5 Liberalization Commitments in GATS

Under GATS, members of the WTO have two levels of decision that they must make with regard to any of the listed sectors: first is whether or not to schedule any commitments for that sector, and secondly what kind of commitments they are prepared to make. If a country does not submit a schedule of commitments for particular service sector, such an economy is free to be as liberal or as restrictive as it prefers [34]

However, immediately a country submits a schedule of commitments to a particular service sector, it is compulsory for it to be transparent about its current policies towards the sector and must publish its regulation about the sector for other countries.[35] With the submission, it implies that no further barriers must be imposed unless the concerned members of the WTO are informed. Schedule of commitments could be very complex to cover the entire 155 sub-sectors in the 12 main sectors.

GATS has become a fairly controversial part of the WTO, and it has been a focal point of the WTO's critics. Some of these aspects are discussed below:

- **Privatization and Deregulation:**

There is a concern that the continued push for trade liberalization in certain sectors will lead to the privatization and deregulation as a sector that are often government –owned; with negative consequences for certain segments of society. Clearly, the merits of privatization and deregulation as policy choice are controversial issues. However, it is less clear whether the GATS promote these policies[36]. On the one hand, government is bound by the commitments they make under the GATS, so there is no need

[34] Aremu, J.A. Towards Accessing The Global Market: Strategies For Nigeria And Other Developing Countries in Foreign Investment Promotion In A Globalized World By Guobadia and Akper Op cit.
[35] Ibid
[36] Simon Lester, et al Op.cit

to privatize or deregulate if the government does not wish to. Furthermore, the GATS explicitly exclude 'services supplied in the exercise of governmental authority'. On the other hand, in the negotiating process governments will sometimes be asked to liberalise sectors that are government owned, and this will often occur through privatization or deregulation[37].

- **Domestic laws and regulations:**

Whereas tariffs are a primary barrier to trade in goods- domestic laws and regulations are the primary barrier to trade in services and they pose serious challenges to developing countries. They are grappling with the challenge of ensuring that the rules on domestic regulation strengthen their" right to regulate while, at the same time allowing them to challenge those developed countries which utilize domestic regulations with a "protectionist" tendency, especially on mode 4 (movement of Natural Persons)[38].

- **Necessity standard**

The necessity standard under WTO rules has long been a source of criticism. The majority of developing countries have expressed opposition to the inclusion of necessity tests, which are employed to determine whether a trade restriction measure is absolutely essential or if there are other less trade restrictive ways to achieve certain end. These tests can result in severe restraints to the "right to regulate". The March 2009 draft of the disciplines does not mention necessity tests[39]. However, it does include a number of provisions that could operate as the equivalent of necessity tests including those

[37] Ibid

[38] South Centre Policy Brief no 20,Nov-2009 (the South Centre was established in Aug. 1995, as a permanent inter-governmental organization of developing countries. It prepares, publishes and distributes information strategic analysis and recommendations on international economic, social and political matters of concern to the south. In1998, the South centre with funding from the UNDP initiated a project to monitor and analyze the work of the WTO from the perspective of developing countries.

[39] In 1999, the Council for Trade in Services established the Working Party on Domestic Regulation (WPDR), and ever since, its members have produced various drafts and position papers to facilitate negotiations. The latest draft 'Disciplines on domestic Regulation pursuant to GATS article VI: 4 is dated march 20, 2009

prohibiting disguised restrictions on trade (paragraph 2) and those requiring that licensing and qualification procedures be as simple as possible.

- **Negotiations on specific commitments:**

Developed countries have complained repeatedly that developing countries are not providing substantial offers for liberalization commitments. Their assessments is based on their request, which have generally called for full liberalization of sensitive markets such as financial, telecommunication, energy and other sectors. Developing countries have in place a very important flexibility mechanism in GATS through article XIX:2, which allows them to open fewer sectors, liberalize fewer types of transactions, progressively extend market access in line with their development situation and attach conditions to their market access which enable them to meet article IV objectives. Many developing countries simply cannot match the level of ambition expected by developed countries because on the one hand, they generally do not have strong domestic service suppliers that are able to compete on an equal footing with developed countries service suppliers and, on the other hand, retaining strong domestic suppliers in key and sensitive sectors is an important development objective. Moreover developed countries have not provided offers that are meaningful to developing countries. This is mainly due to lack of substantial mode 4 commitments by developed countries.[40]

The current obstacles to mode 4 trade are considerable. These include economic needs tests conducted in the absence of clearly defined criteria; vague definitions for the categories of persons included in schedules;; the limited number of commitments for categories de- linked from commercial presence, the bias in favour of highly skilled persons; the impact of domestic regulatory measures;, the lack of recognition of certain

[40] South Centre be Policy brief op. cit.

qualification and visa and requirements related to work permits. Therefore, in this game of market access negotiations, developing countries do not have an incentive to open markets without getting anything in return.

- **Assessment of trade in services:**

Paragraph 14 of the negotiating guidelines mandates the preparation of an assessment of the costs and benefits of trade in services in overall terms as well as on a sectoral basis with reference to the objectives of the GATS agreement and in article IV, in particular. Negotiations are to be adjusted in light of the results of such an assessment. Technical assistance is to be provided to individual developing countries to carryout national or regional assessment. The council on trade in services has not fulfilled this mandate. Without a comprehensive assessment developing countries are unable to assess the benefit and costs of GATS liberalization[41]

4.5. TRADE AND INTELLECTUAL PROPERTY: THE TRIPS AGREEMENT.

The TRIPS agreement is one of the many agreements concluded in the Uruguay Round multilateral trade negotiations (1986-1994) which also created the World Trade Organization. As noted earlier, the WTO agreement entered into force on January 1, 1995.

The TRIPs agreement is seen as the greatest achievement in the field of intellectual Property Rights during the last century. The agreement is based on certain International Conventions in the field of intellectual property namely the Paris convention for the protection of Industrial Property (1883)[42] the Berne convention for the protection

[41] ibid

[42] Its last amendment was on October, 2, 1979. The convention was reproduced in WIPO, Paris convention for the protection of industrial property (Geneva: WIPO publication no. 201(E), 1998), WTO members are mandated to comply with article 1 to 12 and 19 of the convention as amended in Stockholm in 1969, in respect of part II, III and IV of the TRIPS agreement.

of literary and Artistic Works signed in 1886[43] and the Rome Convention[44] as well as the treaty on Intellectual Property in Respect of Integrated Circuits[45] it also provides other obligations additional to those stated in the above- mentioned conventions. The minimum standards of protection included in the agreement are concerned with the availability of almost all categories of intellectual property rights and their enforcement.[46] The agreement furthermore regulates certain anti- competitive practices in contractual licences. At first glance those levels of protection embodied in the TRIPS agreement mirror the existing standards in developed countries laws and regulations[47]. These are regarded by developing countries as exceptionally high. It must be noted that all WTO members are required to include these standards in their own national laws. Non-compliance with such an agreement will trigger the initiation of dispute settlement procedures[48]

4.5.1. The Framework of the TRIPS Agreement: An Overview

Broadly speaking, the TRIPs Agreement focuses on and regulates five main intellectual property related concerns:

1. How basic principles of the trading system and other international intellectual property agreements should be applied:

[43] The convention was reproduced in WIPO (Geneva: WIPO publication no. 287, (e), 1992). WTO members are required to comply with articles 1 to 21 of the convention as amended in 1971 and its appendix organizations concluded at Rome or October 1961. the provisions of the Rome convention mentioned in the TRIPS agreement were reproduced in WIPO, agreement between WIPO and the WTO (1995) (Geneva) : WIPO publication no. 223(e), 1997.

[44] The Rome Convention refers to the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting organizations concluded at Rome on October 1961. The Provisions of the Rome Convention mentioned in the TRIPS Agreement were reproduced in WIPO Agreement between WIPO and the WTO o(1995) (Geneva); WIPO Publication no. 223 (e) 1997

[45] The treaty on Intellectual Property in respect of integrated circuits (IPIC), adopted at Washington may, 26, 1989. (Geneva: WIPO publication 223 (e),1997

[46] Correa, Carlos M., Intellectual Property Rights, the WTO and developing countries: the TRIPS agreement policy options, (London: 2ed books ltd) p.2

[47] Ibid p.3

[48] Gervais, Daniel, (1998), the TRIPS agreement: Drafting History and Analysis (London: sweet & Maxwell).

2. How to give adequate protection to intellectual property rights:

3. How countries should enforce those rights adequately in their own territories;

4. How to settle disputes on intellectual property between members of the WTO;

5. Special transitional arrangements during the period when the new system is being introduced[49]

As with other covered agreements, of the WTO, a fundamental principle of the TRIPS agreement is non discrimination in the form of most- favoured- nation status and national treatment.

However, the TRIPS agreement also establishes minimum levels of intellectual property protection that each member must provide to other members. It is important to understand that such a regulatory, harmonized approach to this issue is unlike the approaches of the other covered agreement of the WTO. Additionally, Article 1.1 makes clear that members are 'free to determine the appropriate method of implementing the provisions of the TRIPS agreement within their own legal system and practice'[50]

Substantively, the TRIPs Agreement not only sets out the subject matter to be protected but also sets out obligations on members, rights to be conferred, the permissible exceptions to those rights and the minimum duration of protection[51]. In formulating standards, the TRIPS agreement incorporates most of the substantive obligations of World Intellectual Property Organisation (namely, the Paris convention and Berne convention) and certain provisions of the treaty on intellectual property in respect of integrated circuits and the Rome convention (see articles 2.1 and 9.1). In addition, the

[49] See WTO understanding the WTO (WTO, Geneva, 2005) 42-43
[50] Simon Lester et al, op. cit. 707
[51] ibid.

TRIPS agreement goes beyond the scope of the aforementioned convention and treaties and also sets standards in areas which were either not addressed or, according to members were not sufficiently or properly covered. The TRIPS agreement also contains provisions providing for extended transitional periods such as granting Least Developed Countries until January 2006 to comply with the TRIPS agreement and giving developing countries that had not previously protected IPRs until January, 2006 to legislate for the application of the TRIPS agreement, while giving those same members until January 2005 to apply other provisions, including several provisions of particular importance to pharmaceuticals[52]. The TRIPS agreement also includes a number of exceptions to the exclusive rights of the patent holders. The most important of these in terms of patents are the general exceptions provided by article 30, the compulsory licensing provision of article 31, and the parallel importing clause contained in articles 28 and 5. The TRIPS agreement also contains other important exceptions, including those for copyright (articles13) and trade marks (article 17).

In addition to the substantive legal provision, the TRIPS agreement contains provisions relating to domestic procedure and remedies for the enforcement of intellectual property rights. The agreement also provides for dispute settlements as well as various other institutional and other matters.[53]

Members are required to comply with the entirety of the TRIPS agreement but it is important to note that the agreement only sets minimum standards, which allows members to provide more extensive intellectual property protection if they desire.

[52] See articles 65 and 66

[53] ibid @ p. 708

Additionally, members are free to determine the appropriate method of implementing the provisions of the agreement within their own legal system and practice.

Generally, the issue of intellectual property rights is addressed under eight broad headings in the TRIPS agreement viz:- Copy rights, Trademarks, Geographical indicators, Industrial designs, Patents, Integrated Circuits, Undisclosed information (know how and show how) and Trade secrets. Protection of all categories is located in part 3 of the TRIPS agreement, and members are required under this provisions to provide protection for intellectual property rights. The section also includes sanctions for infringements. Piracy is criminalized and government is to ensure that counterfeit goods are detected and impounded possibly for disposal at the ports. In addition the local courts are empowered to act to protect intellectual property rights[54]. Clearly the strong protection offered in the TRIPS agreement is evidence that the Multinational Corporations triumphed in this area. According to Y.F. Agah[55]

> The regime for TRIMS, TRIPS and services apparently closely concide with the interest of the multinational corporations which are the major service providers and exporters of capital and technology in the world. In all of these the needs of the developing countries are continuously ignored to the extent that even much needed technologies may no longer be available at affordable costs.
>
> It is no surprise then that this is one of the areas, which gives rise to most of the conflict between developed and developing nations as witnessed most recently at Cancun, Mexico.

[54] Mohammed Balat; The TRIPS agreement and Developing Countries: A legal Analysis of the Impact of the New Intellectual Property Rights law on the pharmaceutical Industry in Egypt. (2004) 2 web JCLI

[55] Agah, Y.F, In, Globalization and Development: Policy Issues for Nigeria. Paper presented at Globalization forum, organized by USTR, USAID and Federal Ministry of Commerce of Nigeria, On 27th June, 2000.

4.5.2. Criticisms of the agreement:

As IPRs had not been part of the international trading system prior to the negotiation and implementation of the TRIPs agreement, considerable debate has taken place over their inclusion in the WTO Agreement. Such debate has focused on such issues as the place of IPRs in the international trading system as well as the merits of specific provisions of the agreement. Much of the debate has centred on the (perceived) effect of the agreement on the developing world. The following extract is a useful illustration of some of the criticisms leveled at the agreement.

Asia Pacific Research Network, Re- thinking TRIPS in the WTO: NGO's Demand Review and Reform of TRIPs at Doha ministerial conference, 27 may, 2003[56]

> The TRIPS agreement (TRIPS) is facing a crisis of legitimacy. In the six years since it came into force there has been ever increasing evidence of social environmental and economic problems caused by the implementation of TRIPS. Yet, little, if any, of TRIPS promised benefits of technology transfer, innovation and increased foreign direct investment has materialized.
>
> For many hundreds of civil society groups and NGOs around the world, TRIPS represents one of the most damaging aspects of the WTO. The legitimacy of the WTO is closely linked to that of TRIPS. TRIPS has, infact, given the multilateral trade system a bad name contrary to the so-called free trade and trade liberalization principles of the WTO, TRIPS is being used as a protectionist instrument to promote corporate monopolies over technologies; seeds, genes and medicines. Through TRIPS, large corporations use intellectual property rights to protect their markets, and to prevent competition. Excessively high levels of intellectual property protection required by TRIPS have shifted the balance away from the public interest, towards the monopolistic privileges of IPR holders. This undermines sustainable development objectives, including eradicating poverty, meeting public health needs,

[56] available at www.apruet.org/index.php?a=show&1=21

> conserving bio diversity, protecting the environment and the realization of economic, social and cultural rights.

Trips and Public Health

> Strict patent regimes required by TRIPS allow pharmaceutical corporations to set prices of patented medicines at high, often exorbitant levels; Under TRIPS, the 20- year minimum patent protection period for product and processes confers exclusive monopoly for the manufacture, distribution and sale of medicines. The monopolies granted by T RIPS allow pharmaceutical giants to suppress competition from alternative, low-cost producers and to charge prices far above what is reasonable. Appropriate national legislation, providing for compulsory licensing and parallel imports, is needed to ensure that chemical intermediates, raw materials and finished pharmaceutical products are available at competitive prices in the world market. Measures- such as compulsory licensing and parallel imports and other exceptions to patent rights- are allowed under TRIPS. Despite this, and the clear need for developing countries to exercise their rights for compulsory license and parallel imports to enable access to affordable medicines, bilateral pressure and bullying tactics have been used to prevent developing countries from implementing TRIPS provision on compulsory licensing and parallel imports, such bullying is outrageous and unacceptable.

This issue-(access to affordable medicine-) touches on one of the most sensitive issues between rich and poor countries and has been cited by developing countries as an example of rising protectionism in the economic crisis, rocking the multilateral trade system

Jonathan Lynn of the trade observatory[57] in an article entitled 'Developing States attack EU on generic drug seizure' dated Feb. 26, 2009 noted that:

[57] Trade observatory is a project of the Institute of Agriculture and Trade Policy, Minneapolis based NGO. Since 1999, trade observatory (formerly WTO watch) has been documenting the WTO, the NAFTA, the Free Trade Areas of the Americas (FTAA) and other International Trade Agreement and Institutions. Additionally, trade observatory posts the work of IATP and other organizations working towards fairer trade systems and alternative approaches to globalization. Their website is www.tradeobservatory.org.

"Developing countries accused the European Union on Monday of seeking to use tough intellectual property laws to seize generic drugs, putting lives at risk in emerging nations where the cheaper medicines are often destined" According to him, 'at a meeting of the World Trade Organization, Brazil and India criticized the European Union over an Indian generic drug to treat high blood pressure that was seized later last year in transit in the Netherlands for Brazil'.

He further stated that Brazil's then WTO Ambassador Roberto Azevedo told the WTO's general council that the case reflected a trend by industrialized countries to try and circumvent global trade rules by pushing tough intellectual property standards in other bodies, such as the world Customs Organization and World Health Organization. The ambassador further remarked that "the decision to impede the transit of a cargo of generic medicines- which was not headed for the Dutch market is unacceptable and sets a dangerous precedent".

4.5.3. Doha: Time for a Fundamental Re-Thinking of TRIPS.

It should be re-stated that the protection of intellectual property rights is not an end in itself. The objectives of technological innovation and transfer of technology[58] should place intellectual property rights protection in the context of the public interest of social and economic welfare. Furthermore, TRIPS also acknowledge the right of WTO members to adopt measures for protecting overriding public policy objectives such as public health and nutrition, and socio- economic and technological development, and to prevent abuse of intellectual property rights, and anti- competitive practices[59]. Yet, these fundamental objectives and principles have been blatantly ignored by certain developed

[58] Article 7 of TRIPS
[59] Article 8 of TRIPS

countries in their interpretations and implementation of TRIPS. Attempts by these developed countries to force developing countries to adopt such flawed interpretations will only perpetuate the crisis of legitimacy that TRIPS is already facing.

It is thus, the common view among civil society groups and NGOs that TRIPS represents a significant shift in the balance in intellectual property rights protection that is too heavily in favour of private rights holders and against the public interest.[60]

The Doha declaration on the TRIPS agreement and public health was adopted on Nov. 14, 2001 as a result of the pressure received from a number of developing countries, supported by non- governmental organizations (NGOs). The main purpose was to clarify the rights of TRIPS members particularly developing and least developed countries to use TRIPS safe guards[61], such as compulsory licences and parallel imports, with a view to supporting and protecting public health through promoting both access to existing medicine and the creation of new medicines[62]. The use of these measures, and others, by developing countries although permitted (and still so) under TRIPS, was to some extent hindered by a number of developed countries on the advice of their pharmaceutical companies. Therefore, the conclusion of the Doha declaration was to re-affirm the rights of developing countries to use measures included within the agreement.[63] This separate declaration was further meant to answer concerns about the possible implication of the TRIPs agreement in access to medicines. The declaration states that:

[60] The secrecy and protection of intellectual property by MNCs has affected the developing countries, This is most evident in the lack of access to drugs for people undergoing HIV/ AIDS treatment. This issue generated a lot of problems due to the reluctance of the MNCs dominating the pharmaceutical business to yield their patent rights.

[61] Ellen't Hoen (2001) 'The Declaration on TRIPS and Public Health: A step in the right Direction available at http://www.ictsd.dorg/iprsonline/resorces/trips

[62] For the importance of the use of compulsory licence to meet public health needs: see Abbott Fredrick, (2002), compulsory licensing for public health needs: the TRIPS Agenda at the WTO after the Doha declaration on public health' occasional paper 9, available @ http://www.geneva.guno.info/pdf/ op9%20abbott.pdf.

[63] Mohammed Balat op. cit

'The TRIPS agreement does not and should not prevent member governments from acting to protect. It affirms governments rights to use the agreements' flexibilities in order to avoid any reticence the government may feel. It states that the agreement should be interpreted in a way that supports government's right to protect public health. This provides guidance to individual members and to dispute settlement rulings'.

This declaration shows the elasticity achievable in compulsory licensing and parallel importation of intellectual property by developing state. The declaration specified two tasks.

1. The TRIPS council had to find an answer to the problems States could encounter in making use of compulsory licensing if they lacked pharmaceutical manufacturing capacity.
2. The declaration also extends the deadline for least-developed countries to apply beneficial provisions on pharmaceutical patents until 1 January, 2016[64]

Despite the above flexibilities in the Doha declaration on TRIPS and Public health there are vast areas of the TRIPS agreement that are still subject to debates and serious disagreement between rich and poor countries.

Thus, given the slow pace of work and frequent breakdown of negotiation at the Doha Rounds of talks, an agreement on these important issue is still a long way from being reached[65]. Meanwhile a number of civil society groups and NGOs have suggested areas that mostly needs to be addressed at the ongoing rounds of the Doha ministerial conference. These include:-

[64] This is especially favourable for the production of generic HIV/AIDS drugs in developing countries

[65] Lately, (9th march, 2011), the bridges weekly trade news digest (vol. 15 no.8) posted an article on its website entitled; 'TRIPS council: members debate biodiversity, access to medicine', where it was, reported that WTO members met a week earlier and debated how current global intellectual property rules affect bio diversity protection and access to medicine but made little progress on either issue, both of which are priorities for developing countries. The said article can be accessed at http://ictsd.org/i/news/bridges weekly/102136

a. Undertake a fundamental review and reform of TRIPS.

A review of trips under article 71.1 is necessary to take into account new developments that may warrant modification or amendment of TRIPS. Such a review should include a critical impact assessment of TRIPS on food security, Public health and nutrition the environment and its implications for social and economic development, with a view to revising TRIPS.

As part of the review, clarify that all provision of the TRIPS agreement must be interpreted in the context, and against the background, of articles 7 & 8 of the TRIPS agreement. WTO members should put into operation the objectives and principles enshrined in articles 7 & 8 of the TRIPS Agreement to ensure the primacy of public interests over the security of private intellectual property rights. Developing countries must be given maximum flexibility implementing TRIPS.

b. End bilateral pressures and bullying tactics.

The conference should affirm a commitment not to apply bilateral pressures or tactics on developing countries to give up the use of options available to them under TRIPS. Similarly pressures should not be put on developing countries, either through bilateral means or regional arrangements or in the WTO accession process, to force them into implementing "TRIPS-plus' measures or standards higher than those in TRIPS.

Further suggestions made to the conference includes; the extension of implementation deadlines for developing countries, a moratorium on dispute settlement action and review of TRIPS place in WTO to consider the rationale and desirability of its location; as TRIPS is presently viewed as protectionist, promotes monopolistic practices and profits and almost exclusively, benefits developed countries.

4.6. TRADE AND THE ENVIRONMENT

Concern for the environment has grown in present decades, areas such as clean air and water, protection of endangered species, and global warming believed to be caused in large part, by carbon emissions. Environmentalists have been some of the WTO's fieriest critics arguing that trade rules often undermine environmental protection and exacerbate environmental damage. They have a number of concerns in this regard[66].

First to the extent that the economic policies promoted by WTO rules lead to growth and industrialization, there is the concern that the Earth's resources will continue to be used in a way that is not sustainable. In reaction to this perceived threat, environmental campaigners often call for the trade regime to be reformed to promote 'sustainable development', which has been defined as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs'[67]

Secondly, environmentalists complain that trade agreements are given precedence over environmental agreement and thereby undermine the effectiveness of the environmental agreements. For instance, environmental agreements may ban the trade of some products i.e. harmful chemicals); or they may rely on trade sanctions to enforce environmental rules in those agreements. The possibility that such provisions would violate trade rules worries environmentalist, as it would undermine the effectiveness of these agreement. This fear has not been realized in a specific instance as yet, but there is a

[66] Simon Lester et al op. cit
[67] see the World Commission on Environment and Development Report (the Bruntland commission) our common future (oxford university press, oxford, 1987)

concern that, if such case arose, the trade officials who hear disputes under trade agreements would decide in favour of environmentalists[68].

Thirdly, there is a fear that trade rules will lead to multinational companies (MNCS) seeking out countries with weak regulatory standards for products and production processes, often in developing countries, in order to lower their compliance costs. The result will be that more production takes place in areas with lower standards.

According to a report by Friends of the Earth Internatoinal[69] a large number of companies moved from the USA to Mexico after the North America Free Trade Agreement (NAFTA) had been signed. 'Whilst the reasons for moving are often complex, the main attraction in this case was the ready supply of cheap semi- and unskilled labour. A number of firms also cited more stringent environmental standards in the U.S; wages are low and working conditions are very poor'[70]

Generally, as regards standards- related environmental measures a central problem, in the view of many developing countries, is that in many cases these aim to enforce requirement that do not concern the product itself, but rather the way in which it is produced[71], this being seen as an unacceptable effort to extend the jurisdiction of the country applying the measure beyond its borders.

On a final note, it should be stressed that the linkages between trade, environment and development has many facets, including the formal recognition that poverty is a major cause of environmental degradation; provision of assistance to developing countries to promote sustainable development; issues related to the impact of new

[68] Ibid @ p821
[70] ibid
[71] 'US-Tuna'; In the early 1990s Mexico complained against the United States concerning the US ban on imports of tuna caught by fishing methods which endangered dolphins

environmentally motivated standards imposed by developed countries on the competitiveness of developing countries exports and the broad relationship of different trade liberalization measure and the environment.[72]

4.7 TRADE AND LABOUR STANDARD

Labour issues have been part of trade relations longer than most other social policy issues, mainly due to the significant impact trade policy can have on workers, particularly in the industrial and agricultural sectors. There are a number of ways in which labour issues arise: the fundamental impact of trade on employment in specific industries, an effect which is enhanced when trade is between countries of different developmental levels; the existence of varying degrees of labour rights in different countries, relating to such policies as the minimum wage, unionization, and safe working conditions; and the use of trade measures to coerce better labour practices in other countries[73].

Since the end of the Uruguay Round, the issue of the link between international trade and core labour standards has become central to the policy agenda and has exposed differences of opinion between developing and developed countries.[74] At a WTO ministerial conference in Singapore in 1996, a somewhat ambiguous compromise was reached. The WTO recognized Child Labour Standards (CLS) while rejecting protectionism, and it pointed to the ILO as the most appropriate organization to deal with

[72] Somesh K. Mathur; 'Multilateral Trading System and Developing Countries: Prospects and Perspectives with Special Reference to India'. A paper presented at the National Level Seminar on Globalization and its impact on India organized by the Dept. of Economics Jamia Millia Islamia, New Delhi, March, 2001.
[73] Simon Lester et al op. cit p.836
[74] Farkhanda Mansoor, 'The WTO versus the ILO and the case of child labour (2004) 2 web JCLI (web journal of current legal issues)

the issue of labour standards.[75] Despite the WTO distancing itself from the labour issues,[76] developed countries continued to push for the incorporation of labour standards in the WTO agenda. At the Doha ministerial meeting in November 2001, trade union representatives wanted the WTO to commit itself to close co-operation with the ILO. This proposal was widely condemned by a n umber of African and Asian NGOs who argued that the introduction of core labour standards in the WTO agenda would once again sabotage the success of the Doha ministerial as it happened in seattle'.[77] Their argument was that poverty is the main problem in their countries and that imposing such labour standards will have serious repercussion on the millions of families in Africa and Asia who depend on the income of their children. Accordingly, for developing countries, the issue is not a matter of choosing the best working conditions, but the matter of survival and livelihood. Thus, if for instance, the issue of child labour standards become enforceable under WTO rules, any sanctions imposed against countries with lower labour standards would only perpetuate poverty[79]

Eventually, the Doha Ministerial declaration re- affirmed the declaration made at Singapore, that the ILO is the appropriate body to deal with the CLS[80]. Consequently, CLS are not subject to WTO rules and disciplines nevertheless, some WTO members in Europe and North America continue to agitate that the issue must be taken up by the WTO, if public confidence in the WTO and the global trading system is to be strengthened. Their argument is that bringing the matter to the WTO will provide incentives for its members to improve conditions of workers around the world. However

[75] Linkage between trade and core labour standards was debated at the Singapore ministerial conference of the WTO, with strongest support from the United States and firm opposition from India and other developing countries, Dec. 13 1996, Para. 4, doc. WT/MIN (96)/DEC.
[76] Trade and Labour rights: deferred to the ILO; WTO, understanding the WTO (WTO Geneva, 206) at 79
[77] African and Asian NGOS statements, 2001
[79] Farkhanda Mausoor: 'the WTO versus the ILO and the case of child labour' op.cit
[80] Bridger (2002) 6 no. 8 weekly news digest at http:// www.ictsd.org/weekly/02-03-05/inbrief.htm

most of developing countries remain opposed to the inclusion.[81] They perceive such incorporation as a form of protectionism that will slow down their progress towards better living standards[82]

4.7.1. Relationships between Free Trade and Labour Rights.

The rise in unemployment in many OECD countries led most of the developed countries to look for an external explanation, such as unfair trade practices. The industrialized countries argue that the rapid economic development of certain 'developing countries' has come through the exploitation of labour, low wages (for example by using child labourers) and want of strong internal markets, enabling those countries to run export surpluses[83]. If a country allows its workers to be employed under deplorable conditions, it can export its product at lower prices and they acquire an unfair advantage over its competitors. Hence, the solution is inclusion of social clauses to compel the developing countries to guarantee minimum rights to their workers and to pay them according to their productivity.[84]

Questions arise regarding both the standards to be included and the linking of those standards to trade issues. Two major arguments are advanced for the inclusion; one economic and the other moral.[85] The economic argument suggest that low wage and labour standards in developing countries threaten the living standards of workers in developed countries. The moral argument asserts that low wages and labour standards violate the human rights of workers in developing countries. Hence developed countries

[81] Bhagwati J. (1995) free trade, fairness and the new protectionism, (London: the institute of economic affairs (26-27)
[82] Griswold D, 'Protectionism with a Green Face and a Union Bug' at http://www.freetrade/ org/pubs/articles/ dg-tle.html.
[83] Farkhanda Mansoor op.cit
[84] Servais J.M, (1989) 'The Social Clause in Trade Agreements: Wishful Thinking or an Instrument of Social Progress' 128 no. 43 International labour Review, 423-447.
[85] Farkhanda Mansoor op.cit

claim an association between free trade and labour rights and recommend using that association for eliminating child labour and controlling labour conditions.[86] Both claims have been denied by developing countries. However, the moral argument needs to be considered in further details as discussed in the sub-section below.

4.7.2. Avoidance of Embodied Protection in Labour Standards

Developed countries want labour standards enforceable through the WTO and this issue has been of greatest concern to all developing countires.[87] They are of the view that labour standards should be addressed in the international labour organization (ILO).

Be that as it may, labour standards can be legitimately raised on humanitarian concerns by well meaning individuals appalled at low wages, and poor working conditions in low income countries and by union representatives and producers /employers in industries that use relatively large amounts of unskilled labour in developed countries. However, to insist upon wage and working conditions that are above those that can result in full employment in developing countries is to deny a significant portion of their comparative advantage. There is an element of protectionist content by choking developing countries comparative advantage in labour intensive industries.[88]

There is however, a general agreement on the following labour standards by all including developing countries to prohibit namely; prohibit forced slave labour, minimize hazardous or unsafe working conditions, agree to remove or reduce incidence of child labour in poor countries with certain conditions and adopt freedom of association and the right to bargain collectively.[89] In fact, it would be indeed wrong to dismiss out of

[86] ibid
[87] Several NGOs and civil society organizations have also expressed their opposition
[88] Somesh K. Mathur, op.cit
[89] ibid

hand the humanitarian concerns of citizens of rich countries with high labour standards about poor conditions of work or employment of children in developing countries. However, contrary to the belief among proponents of linking trade policies and labour standards, it is not necessarily the case that such a concern is best dealt with through linkage.

4.8 TRADE AND HUMAN RIGHTS

There is a longstanding concern held by many people with regard to trade with countries who have policies that are considered to violate basic human rights. Of course, there are many different understandings of what constitute human rights, so the concerns may vary; but that does not make people's concern any less strong. One of the most famous examples is the widespread revulsion at South Africa's Apartheid policy. South Africa was way of step with the world when it continued racial discrimination and segregation practice into the 1980s. The result was widespread boycotts of South Africa and of foreign companies doing business there. How these human rights concerns play out in trade relations varies depending on the countries involved and the nature of the alleged abuses.[90]

In the trade and human rights discussion a vast array of issues is brought forward, including the following:

i) Imposition of trade sanctions for human rights abuses,

ii) Inclusion of human rights[91] conditionality in trade agreements.

[90] Simon Lester et al op.cit

[91] For A detailed discussion of these Issues See E.U. Pertersmann 'Time for a United Nations "Global Compac " for Integrating Human Rights into the Law of World Wide Organizations; Lessons From European Integration' (2002) 13 European Journal of International Law 621

iii) Integration of human rights principles and obligations in negotiations in the WTO[92] and the dispute settlement systems ("mainstreaming human rights").

iv) The democratic nature of the WTO (participation of people/civil society in decision- making)

v) Interpreting article XX of the General Agreement on Tariffs and Trade (GATT) as to include human rights concerns; and

vi) The effect of trade on the enjoyment of human rights.

It is not considered necessary to address all the issues mentioned above, but we will rather make an analysis of the broad arguments (that touches on the listed items) between the proponents of free trade which leads to overall human rights benefits ("the trade community") and the opponents of liberalization of trade in order to preserve human rights or ("the human rights community"[93]) These main arguments shall be analyzed under the following sub-headings; viz liberalizing trade as negatively affecting human rights, the lack of human rights concerns at the WTO and prioritizing trade over human right.

4.8.1. Liberalizing Trade as Negatively Affecting Human Rights

The 'human rights community' in its argument against liberalizing agricultural trade claims the current rules on trade in agricultural products cause a violation of the right to food because of the impact of the Agreement On Agriculture (AOA) on farmers in developing countries. According to them the free trade regime advocated by developed countries results in the rise of cheap imports, made possible through market access

[92] See resolution 1999/30 of 26 August 1999 of sub-commission on the promotion and protection of human rights.

[93] We acknowledge that not all NGOs and scholars that consider themselves part of the human right movement have gotten involved in the "trade and human rights' debate. The focus here, however, is on those who have and oppose free trade to defend rights. Similarly, the trade community is internally divided, some being more cautious about the effects of trade liberalization on human rights, others refusing to contemplate human rights altogether.

obligations of the AOA at the expense of local producers who cannot compete with subsidized products.[94] They consider export subsidies a fundamental abuse of human rights. "They have destroyed subsistence agriculture and livelihoods by the million and continue to do so".[95]

On the other hand the 'trade community' argues that the AOA is another step towards the liberalization of trade in all goods and that it is justified. The line of reasoning of supporters of free trade is based on what Sunoff[96] has termed the efficiency model: without interference (i.e. subsidies and tariffs) countries specialize in what they are best at, resulting in efficient trade that is beneficial to all. In response to human rights challenges to support their argument and to convince others of the benefits of liberalizing trade, free trade proponents maintain that human rights will be improved as a side aspect of augmented prosperity. With regard to the right to food, trade scholars assert that

> "The dismantling of trade barriers helps to boost food production in countries and regions where it can be produced at lowest cost, including the many developing countries whose agricultural development is currently adversely affected by trade- distorting measures, including subsidy practices abroad".[97]

In sum, trade lobbyists state that trade opens up economic possibilities; the augmented wealth eliminates poverty, increases individual liberty and enhances human rights such as the right to property and the right to trade.

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[94] FIAN Policy & Analysis, Trade Issue and Human Rights, the Agreement on Agriculture of the WTO and the Right to food, context, conflicts and Human Rights violations, at http://www.fian.org/english/includes/policy/trade.php (accessed 30 Nov. 2020)

[95] Oxfarm, Human Right for social change, p.3, at http://www.oxfam.org/eng/pdfs/doc040119-humanrightsh-Jeremy-speech.pdf(acesed 30 March.2010)

[97] Wolter Frank, 2002. The WTO And The Right to Food. for an Effective Right to Adequate Food: Proceedings of the International Seminar on the Right to Food: A Challenge for Peace and Development In the 21st Century", From 17 to 19 Sept. 2001, Borghi, Marco and Postiglione Blumenstein Retiza (Eds.) Fribourg: University Press Fribourg Pp.119-130

4.8.2. The Lack of Human Rights Concerns at the WTO

Free trade opponents accuse the WTO of taking away popular participation in the development of trade rules and policies by monopolizing the negotiations over issues that have great impact on the domestic plane.[98] In addition, NGOs attack the WTO for its lack of human rights concerns in its rule- making and conflict resolution exercises. WTO, they say only protects the interest of producers. Economists and government representatives in the WTO dictate the content of its policies without assessing their impact on human rights. In fact the WTO explicitly, proclaims its intention not to get involved in human rights. As an alternative, the human rights community claim that instead of pretending that trade has nothing to do with human rights, human rights consideration should play a formal role in the negotiations, adoption and implementation of trade rules. This is the reason why some go as far as demanding a trade Bill of Rights to be included in WTO agreement.[99]

On the other hand, the trade community counters that the underlying principles of the GATT and the WTO is that voluntary trade is a mutually beneficial phenomenon.[100] In that line of thinking, unrestricted trade is to be supported because future general welfare increases resulting from free trade are the best road to achieving and safeguarding human rights.[101] In a nutshell, the argument states that free trade is fair because of the principles it is based on (voluntary co-operation and exchange), and because of the beneficial results that free trade has on human rights.

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[98] Abbott, Fredrick M, 2002. Constitutionalism at the WTO the American Society of International Law, the proceedings of the 96th Annual Meeting, pp.122-127

[99] ibid

[100] Alvarez, Jose E & Bhagwati, Jaglish, 2002 Symposium- The Boundaries of the WTO, Afterword: The Question of Linkage, American Journal of International Law, Vol, Pp. 126-134.

[101] Green, Randall, 1994, Human Right And Most Favoured Nation Tariff Rates For Products The People's Republic Of China, University Of Puget Sound Law review vol. 17 pp. 611-635

4.8.3 Prioritizing Trade over Human Rights

On a more general plane, human rights advocates object to government priorities when trade considerations guide government at the expense of human rights.[102] Instead of focusing on improving individual rights, governments of both developed and developing countries are said to prioritize their trade obligations over their human rights obligations. Human rights defenders criticize this priority on the grounds that trade is not an end itself, but should be used only as means when and insofar as it promotes the improvement of living conditions. They argue that human rights obligation should be the primary concern of governments.[103]

Supporters of free trade are eager to point out that workers reduce cases for war through economic integration, the goal of the WTO system. This line of reasoning is based on the assumption that if trade restrictions and discrimination are replaced by multilateral trade arrangements, they constitute to a strategy of peace, because trade partners will be reluctant to go to war with each other.[104]

The arguments of the human rights and trade communities demonstrate the various ways in which Human Rights concerns have entered the debate for and against the liberalization of trade. Most prominently, human rights serve to highlight the consequences of free trade. Both parties are eager to point out that the trading system of the WTO leads to changes in the lives of individuals to the extent that it affects the exercise of their human rights, but the two communities hold opposite opinions on whether the current systems produces positive or negative effects on human rights.

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[102] Jenkias, Hamish 1999 Democratizing Global Finance: Civil Society Perspectives On People Centred Economics. Human Rights And Economic Globalization: Directions For The WTO. Mehra, Malini (Ed.) Uppsala. Global Publications Foundation, Pp. 227-250

[103] UN Document E/CN.4/2002/54,15 jan.2002,5.

[104] Desta, Melaku Geboye, 2002 The Law of International Trade in Agricultural Products. From GATT 1947 to the WTO Agreement On Agriculture. The Hague Kluwer Law International

We submit that both trade and Human Rights issues are important developmental issues to every nation. As such the central objective of every country, developed or developing is to balance both issues in such a manner that one is not given priority or prominence over the other

CHAPTER FIVE

ASSESSMENT OF NIGERIA'S TRADE POLICIES AND LAWS

5.1 INTRODUCTION

Before the oil boom of the 1970s and 1980s, the economy of Nigeria was relatively balanced with each principal economic sector, namely agriculture, manufacturing and Services contributing its fair share of development to the total national effort and Gross Domestic Product (GDP). Before the decade of the 1960s, the dominant role of agriculture in Nigeria's economy was such that with very little support from government, agriculture was able to grow at a sufficient rate to provide adequate food for an increasing population, raw materials for newly emerging industrial sector, increasing public revenue for government, foreign exchange for growing external needs and employment opportunities for an expanding labour force. The little support given by the government to agricultural development was concentrated on export crops like cocoa, groundnuts palm produce, rubber and cotton; since food sufficiency did not seem to pose any problem worthy of public attention. Other agricultural crops and natural resources with which the country is generously endowed are timber, livestock, cereals, citrus, soya, cassava and yam. Evidently Nigeria had a vibrant rural economy; wealth and development were broadly speaking, evenly spread country wide and people were content to live in their villages.

A part from oil and gas, the country has vast deposits of solid minerals, such as iron-ore, coal, lead, zinc columbite Kaolin, gypsum, barite phosphate, bitumen and gold, which are not sufficiently developed.

Initial indication of problems in the agricultural sector in the first decade of the country's independence (1960-1969) rapidly worsened in the second decade during 1970-79. The situation was further compounded by the "oil boom" that created serious

distortions in the economy and exacerbated mass labour migration from the agricultural sector to the cities. Since then agricultural activity has steadily declined; resulting in the sector reducing its status as the mainstay of the Nigerian economy.[1]

Presently, Nigeria displays the characteristics of a dual economy; a modern sector heavily dependent on oil revenues overlays a relatively traditional agrarian and trading economy. The enclave nature of the capital intensive oil sub-sector and the consequent lopsided development of the economy in general have become a matter of great concern to the federal Government.[2] Thus, in 2004 the Federal Government Launched the National Economic Empowerment and Development Strategy (NEEDS) in response to the development challenges of Nigeria.

One of its four pillars of Policy thrusts is to "promote exports and diversify exports away from oil." It seeks, inter alia, the transformation of Nigeria into an economy that is robust stable, dynamic, competitive and export-led. In line with this set objectives, the federal government has continued liberalization of the trade regimes and taken other measures to encourage exports. This chapter analyses these trade regimes and the various policy measures for promoting trade. It further examines Nigeria's membership of the WTO with a view to determining what prospects the organization holds for Nigeria.

The chapter concludes with how Nigerian trade policies and regimes can be made more effective in the face of rapid globalization and WTO's unacceptable trade practices.

5.2 NIGERIA'S TRADE POLICY OBJECTIVES

The goal of Nigeria's trade policy is to promote the development of a private sector – led growth of the economy and to encourage production and distribution of goods and services for both the domestic and international markets with a view to achieving and

[1] A framework of National Export Strategy for the Federal Republic of Nigeria 2005-2010 prepared by Nigerian Export Promotion council in conjunction with the Commonwealth Secretariat.
[2] Ibid.

accelerating economic growth and development. The objectives of Nigeria's trade policy have endured overtime as most of them stated in the Trade Policy of Nigeria (TPN). Published in 2002 still feature in the Nigeria Vision 20:2020. The need to diversify, drive and promote increased value addition in the various sectors of the Nigerian economy especially where the country has comparative advantage; and tariff reform with the aim of reducing the unpredictability, uncertainty and lack of transparency of Nigeria's tariff regime are some of the enduring objectives of Nigeria trade policy. Efforts at reviewing the current trade policy aimed at making trade policy more realistic and action oriented have produced different versions of TPN with the last version produced in 2009 awaiting final adoption.[3]

The Federal ministry of Commerce was transformed into Federal Ministry of commerce and Industry (FMC & I) in 2007 and was later renamed federal ministry of Trade and Investment in 2011. This ministry is responsible for formulating, implementing and coordinating Nigeria's trade, Industrial and Investment policy. The ministry, as far as trade issues are concerned remains a clearing house as relevant sector based Ministries, Departments and Agencies (MDAs) of the government provide critical inputs necessary for the discharge of the ministry's mandate. Thus, the process of formulating, implementing and co-ordianting trade policy in Nigeria involve extensive consultations not only among the MDAs but also with the organized private sector (OPS), Non-Governmental Organizations (NGOs) including the academia.[4]

The Nigerian government like many other developing countries, considers trade as the main engine of its development strategies because of the implicit belief that trade can create jobs, expand markets, raise incomes, facilitate competition and disseminate

[3] Trade Policy Review: A Report by Government of Nigeria to the WTO Trade Policy Review Board Presented in Geneva at the WTO's Headquarters on the 28th & 30th of June, 2011.
[4] Ibid.

knowledge[5]. The main trust of trade policy is, therefore the enhancement of competitiveness of domestic industries, with a view to, *inter alia*, stimulating local value-added and promoting a diversified export base. Trade policy also seeks (through graded liberalization of the trade regime) to create an environment that is conducive to increased capital inflows, and to transfers and adoption of appropriate technologies.[6]

The government pursues the liberalization of its trade regime in a very measured manner, which would ensure that the resultant domestic costs of adjustment do not out weigh the benefits. The reforms which accompany this policy direction are also aimed at re-orientating attitudes and practices towards modern ways of doing business.[7] However, the instruments of trade policy such as tariffs regime is designed in a manner which allows a certain level of protection of domestic industry and enterprise.

While this is the main trade policy framework to guide economic growth, the trade expansion, employment generation and poverty alleviation dimensions are subsumed in a new overarching economic development policy blueprint adopted in 2003, the National Economic Empowerment and Development Strategy (NEEDS)[8], which is examined below.

5.2.1 National Economic Empowerment and Development Strategy (NEEDS)

NEEDS is a medium term economic strategy covering the period 2003-2007.[9] It has been described as Nigeria's plan for prosperity, the vision of a greater tomorrow. Within that perspective, NEEDS focuses on four key strategies, re-orienting values, reducing poverty, creating wealth and generating employment. The key visionary goals

[5] WTO 2005:15
[6] Inye Nathan Briggs "Nigeria: Mainstreaming Trade Policy into National Development Strategies." African
Trade Policy Centre, work in progress No. 52, Jan. 2007
[7] Ibid.
[8] Ibid.
[9] NEEDS I, though NEEDS 11 has extended beyond 2007.

are in turn, built into three major macro-economic framework namely; empowering people, promoting private enterprise and appropriately reordering approaches to governance. The overall long-term vision of NEEDS includes social and economic transformation of Nigeria on a sustainable and competitive basis.[10]

In the trade policy area, NEEDS seeks to deepen Nigeria's integration with the rest of the world and to maximize the benefits of strategic integration. Accordingly, regional integration and trade is the two instruments identified by NEEDS for maximizing the benefits of globalization. The trade policy objective under NEEDS is to lay a solid foundation for fully exploiting Nigeria's potentialities in international trade. While aspiring to the above, NEEDS has by no means overlooked the challenges which have so far hampered the realization of these potentialities. A number of constraints are identified namely: high cost of doing business; inadequate infrastructure, poorly implemented incentives especially in regard to fiscal and tariff regimes; widespread smuggling, counterfeiting and dumping, lack of standardization required for products to compete internationally; and unfavourable international trade rules.[11]

Under NEEDs, the trade policy trust is to drastically reduce the uncertainty and unpredictability of the trade policy regime, harmonize trade practices with those of other Economic Community of West African States (ECOWAS) countries and hence facilitate full integration; respect obligations under multilateral and regional trading systems; and create conducive and competitive environment in which Nigerian enterprises can thrive and effectively compete in the global and regional economy. The following are therefore the strategies and instruments for achieving the NEEDs objective.[12]

[10] Inye Nathan Briggs "Nigeria: Mainstreaming Trade Policy into Natural Development Strategies" (Supra).
[11] Ibid.
[12] Ibid.

i) Drastic reduction in domestic cost structure especially infrastructure cost to enhance a competitive investment climate necessary for production and exports;

ii) Aggressive promotion of exports and "economic diplomacy".

iii) Harmonization of tariffs with the West African Economic and Monetary Union (UEMOA) and others to create the Common External Tariff (CET).

iv) Continue to use specific systems of import restrictions in particular circumstances to protect industries and critical sectors against unfair competition;

v) Rationalizing and strengthening institutions responsible for trade facilitation;

vi) Co-operation with other African and developing countries to ensure that the WTO trade negotiation address the concerns and interests of Nigeria and Africa, including leadership in the negotiation of Economic Partnership Agreements (EPAs).

vii) Reform customs and Ports to drastically reduce turn around time and transaction costs at the ports, enhance the prompt collection of government revenues and ensure customs clearance within a 48 hour time frame.

viii) Develop deep-sea port facilities, inland containers depots, free trade zones, and ship building capacity to enhance coastal shipping international trade and regional integration.

The policy instruments outlined above, which the government has identified for pursuing its trade policy objectives, are indeed far-reaching, although it has been said that trade policy in itself, no matter how good, would not be enough, without a sound macro-economic policy under pinning and effective implementation mechanisms.

5.2.2 Import, Export and Investment Policies.

Nigeria's trade policy has undergone tremendous changes since 2005 when the last review of its policies was carried out by the WTO. The following extract sums up the

current position of Nigeria's trade policies on import, export and investment as contained in a report presented by the Nigerian government to the WTO's Trade Policy Review Board on June 28, 2011.

a) Import Policy

Nigeria is committed to progressively liberalizing the import regime with a view to promoting efficiency and international competitiveness of domestic industries and do away with undesirable protection. In particular, the country is committed to elimination of quantitative restrictions. However the need to safeguard genuine interests of domestic industries against unfair trade practices; to protect the society from social (health) and moral hazards, to protect plant and animal life and the physical environment necessitates the use of quantitative restrictions simply because of lack of institutional and technical capacities for acceptable alternative trade policy instrument(s). As soon as these capacities are fully developed, the remaining restriction in this category would be eliminated.

Developments since the last Trade Policy Review in 2005, confirmed the Federal Government's commitment to the gradual approach to elimination of quantitative restriction and liberalization of tariffs, notwithstanding the binding constraints to the development of alternative trade policy instruments. Two of such efforts are outstanding. The first is with respect to tariffs. There was a significant reduction in he maximum applicable tariffs during the period under review when the maximum tariff rate reduced from 150 per cent (in 2005) to 35 per cent (in 2010) translating to a 76.67 per cent reduction in the maximum tariff rate. In addition there was an equally significant reduction in the number of tariff bands from 19 to 5…. This effort translates to tariff liberalization from a simple average applied rate of 28.6 per cent in 2003 to 11.5 per cent

in 2010 or 59.8 per cent cut in the applied tariff. The current average rate is below the average for developing countries.

A second bold step relates to import prohibition where Nigeria has equally made significant progress. The number of items under import ban reduced from 44 to 26 items in September 2008…. A careful analysis reveals that outstanding items in the import prohibition list are for protection of public morals; and protection of human, animal or plant life or health. Nevertheless, the remaining items under import ban are reviewed as soon as appropriate alternative mechanisms for dealing with issues that necessitates import ban in the first instance are firmly institutionalized and effectively operational.

b) Export Policy

Nigeria's export policy is guided by the need to diversify the country's export baskets and markets. With oil and gas exports contributing to over 90 percent of total export, changes in the global oil prices potentially introduces instability to the system and complicates economic management. In addition the oil and gas sector has fewer backward and forward linkages with the economy thus limiting the impact of the sector on poverty alleviation except indirectly through government interventions. Government is promoting non-oil export especially in agricultural commodities, solid minerals and a few manufactured goods where Nigeria has significant unexploited/ latent potential for growth. The current strategy of promoting non-oil export is tagged "commerce 44" which involves identification of eleven agricultural commodities, eleven solid minerals and eleven manufactured products with a view to improving their quality and standard up to international level and thus making them suitable for exports to any country in the world but with specific focus on selected eleven markets where the country has preferential market access. These are products where Nigeria has potential comparative advantage but

are constrained by a myriad of challenges. Thus, “commerce 44” would provide the required learning experience for re-launching of Nigeria’s products into the world market.

The need to encourage local processing and increase value addition of Nigeria’s export informed absence of export taxes on some raw or semi-processed products. This is geared towards generating income and providing employment for youths. Export prohibition also applied to some products with a view to ensuring self-sufficiency (mainly on maize, raw cassava and rough timber); to encourage value addition (mainly raw hides and skin, rough or sawn timber, scrap metals, unprocessed rubber latex and rubber limps); and to preserve cultural heritage (mainly artifacts and antiquities). There is a bill at the National Assembly seeking to prohibit the use of export prohibition.

The government is currently reviewing the export incentive system with a view to making it more effective in the promotion of Nigerian exports. In fact, during the period under review the incentive schemes have been reduced to only the Export Expansion Grant (EEG). The establishment of various export free zones in the country under the supervision of Nigerian Export Processing Zones Authority (NEPZA) is another effort in the promotion of Nigerian export. The zones are established with a view to diversifying the nation’s revenue base, attracting foreign direct investment (FDI) and generate employment. Since the last review 25 licenses for export processing zones were issued and 11 of them are operational while others are being processed. Operators of the free zones enjoy some incentives including one-stop approval by the NEPZA, tax holiday, repatriation of capital and profits; 100 percent ownership, rent-free land during construction of factory; domestic sales of up to 25 per cent, and access to essential services such as transportation, and sanitation catering among others.

(c) Investment Policies

The Agency set up in Nigeria for the promotion of investment and implementation of investment policy is Nigerian Investment Promotion Commission (NIPC). The agency was set up by an Act of parliament in 1995. Among the responsibilities of this agency are to facilitate the establishment of businesses in Nigeria and to assist both the existing and new investors in the areas of challenges. In order to promote flow of both domestic and foreign investments in the country, Government provided many incentives to various sectors including, Oil and Gas, industry, agriculture, solid minerals tourism, telecommunication, exporting and Biofuels. These incentives include tax holiday/tax rebate capital allowance, unconditional transfer of funds and profits, low interest on loans, non-application of foreign exchange regulation and export development fund as well as export expansion Grant (EEF). Acquisition of local businesses by foreigners is regulated by the Investment and Securities Act, 1999. Under this Act, foreigners are required to obtain authorization from the Securities and Exchange Commission (SEC) Prior to the process of taking over, while merger must be approved by the Federal High court, Nigeria is also trying to improve its record of investment climate through the establishment of the one stop investment center (OSIC) and improvement in the state of infrastructure.

5.3 NIGERIA'S TRADING ARRANGEMENTS AND LAWS

Nigeria is Africa's most populous nation, endowed with abundant hydrocarbon resources, large fertile land and offering large potential opportunities for international trade and investment. Apart from being a member of the WTO, Nigeria has entered into several trading arrangements while negotiation on further trade agreements are ongoing. On the other hand laws and regulations that govern international trade matters are either non-existent, archaic or insufficient. However there are efforts to review existing laws or

make new ones as will be discussed later, but first let us examine Nigeria's trading arrangements.

5.3.1. Bilateral Trade Arrangements/Agreements (BTAAs).

Nigeria has signed bilateral trade arrangements with some countries with the aim of securing favourable market access conditions for products that are of interest to the country. Some of these are non-reciprocal preferential trade arrangements whereas others also include elements of investment.[13]

In recent years, bilateral trade relations between Nigeria and Finland, USA Ukraine, and Iran were strengthened. Nigeria has also signed Regional Trade Agreements with Ethiopia (2006), and Memorandum Of Understandings with Spain (2006), Greece (2008).

Others include MOUs with the Continental African Chamber of Commerce, Chicago USA (2010); International Trade Centre of Houston, USA (2010) and China Ministry of commerce (2006)[14]. Some Memorandum Of Understandings and Bilateral Trade Agreements are at various stages of negotiation. These include an economic cooperation between Nigeria and South Africa, Botswana and Namibia; while an MOU on trade cooperation and facilitation between Nigeria and American Nigerian International Chambers of Commerce (ANICC) is at an advanced stage of negotiations. Similarly, Nigeria is Currently negotiating BTAs with India and South Korea.[15]

5.3.2 African Growth And Opportunity Act (AGOA)

The performance of Nigeria in the United States African Growth and Opportunity Act (AGOA) has improved in recent years. In a statement, the U.S. representative to the

[13] Trade Policy Review: Report by the Government of Nigeria to the WTO's TPRB. Op. Cit.
[14] Ibid.
[15] Ibid.

WTO acknowledged this fact that "we also note that Nigeria is among the leading beneficiaries of the African Growth and Opportunity Act (AGOA). During 2010, U.S. imports from Nigeria under AGOA and our Generalized System of Preferences totaled USD 25.2 billion, an increase from & 17.2 billion of imports under AGOA in 2009. Most of Nigeria's exports under AGOA are oil but non-oil AGOA imports include increasing amounts of leather products, Cassava, Spices, Cocoa paste, nuts and vegetables"[16]

In terms of agricultural products exports to the United States, Nigeria ranked 8th out of 40 beneficiaries of the non-reciprocal trade arrangements. The country's performance in other areas including textiles and apparel, forestry products, minerals and metals is also improving. The observed improved performances are attributable to government's sensitization and enlightenment campaign and promotional efforts including identification of products that has strong potential export capacity.[17]

5.3.3. Regional Trade Arrangements (RTAs).

Nigeria is an active member of a number of regional trade arrangements (RTAs) such as the Economic Community of West Africa (ECOWAS), D8, and Global System of Trade Preferences (GSTP) among developing Countries.[18] Nigeria and other ECOWAS member states are also negotiating a free trade agreement with the European Union tagged the West Africa – European Union Economic Partnership Agreement (WA-EU EPA) Recently, there has been significant developments in some of these agreements.[19]

[16] Statement of the U.S. Representative in response to WTO Trade Policy Review of Nigeria, Geneva, June 28, 2011.
[17] Ibid.
[18] Trade Policy Review: Report by the Government of Nigeria to the WTO's TPRB, (Op. cit).
[19] Ibid.

(a) D-8

D-8 is a group of 8 developing countries (Bangladesh, Egypt, Indonesia, Iran, Malaysia, Nigeria, Pakistan and Turkey) with the Overriding goal of Improving their position in the world trade, diversifying and creating new opportunities in trade relations, enhancing participation in decision making at the international level and providing better standard of living for their citizens. The 7th summit of the group was held in Nigeria in July 2010. Nigeria is currently providing leadership to the group. Preferential trade negotiations among members are about to be concluded.[20]

(b) Global System of Trade Preferences (GSTP)

The GSTP provides an avenue for preferential tariff concessions and other measures of cooperation with a view to stimulating trade among developing countries within the framework of South-South co-operation. Nigeria participated in the special session of the negotiating committee of the GSTP in December 2009. At this meeting it was agreed by members to reduce tariffs by at least 20 percent on some 70 percent of goods exported among members. Nigeria also participated at the Sao Paulo Round of Negotiation of the GSTP, in December 2010. The country continues to grant concessions on some products to developing counties under the GSTP[21].

(c) Economic Community of West African States (ECOWAS)

As a foundation member and promoter of regional integration in West Africa, Nigeria remains firmly committed to the realization of the goals and objectives of the Economic community of West African States (ECOWAS). Recently, there has been significant developments in regional effort in general and trade liberalization in particular. The regional body developed and launched the regional vision 2020, a long-term strategy.

[20] Ibid.
[21] Ibid.

A short-term rolling plan for the period 2011-2015 was also developed with a view to implementing the ECOWAS Vision 2020[22].

(d) West Africa- European Union Economic Partnership Agreement (WA-EU EPA)[23]. Nigeria through the ECOWAS Commission has been participating in the negotiations of the Economic partnership Agreement (EPA) with the European Union (EU) with a view to establishing a free-Trade Area between West Africa and the European Union. The Negotiations were expected to be concluded in December 2007 in order to respect WTO waiver granted to trade preference under the Cotonou Partnership Agreement (CPA). When it became clear that given the magnitude and complexity of outstanding issues by the early 2007, interim EPA was prepared but was not initialized by Nigeria (the two other developing countries in the Sub-region Ghana and Coted'ivoire) however initialized the interim EPA. The resultant effects of this action and/or inaction is the polarization of West Africa Trade regime with EU: 13 Countries with EBA regime; 2 countries with interim EPA and Nigeria down graded to GSP.

The introduction of a development dimension into the negotiation in 2009 rekindled the process but some outstanding issues are yet to be resolved. Some of the outstanding issues include sensitive products to be excluded from liberalization, rules of origin (RoO), Sanitary and Phytosanitary (SPS) measures, Technical Barriers to Trade (TBT), Contingent Protection Measures (anti-dumping, safeguard etc).

5.3.4 World Trade Organization (WTO)

Nigeria, a foundation member of the World Trade Organization remains firmly committed to the tenets of multilateral trading system. Since inception of the WTO in

[22] Ibid.
[23] A background to EPAs has been laid earlier in Chapter 2 section 2.2.9.

1995, Nigeria has been actively participating in the multilateral trading system including implementation of the various WTO Agreements and also in the negotiations of the Doha Development Round.

Since the last Trade Policy Review in 2005, Nigeria has continued to implement the Uruguay Round Agreements. The country made 22 notifications covering the following agreements and issues; law and regulations in the Agreement on subsidies and countervailing measures; Anti-dumping Agreement; Agreement on customs valuation; state trading enterprises, agreement on import licensing and Agreement on Technical Barriers to Trade. Efforts are being made to improve on the level of notifications as substantial number of notifications is outstanding.[24]

Beyond notification, the country is facing challenges in trade legislation. Most of the country's trade laws as will be discussed in the next section are outdated and are not suitable for modern trade environment. The need to make Nigeria's trade law compatible with evolving trading system has informed the development of a wide range of bills including Competition Bill, Protection of Intellectual Property Rights Bill; Safeguards and Contingency Trade Measures Bill. While the Public Procurement Act is already in place.

These and other legislations are required in order to establish appropriate institutions for enforcement of trade laws and take advantage of modern developments in the management of trade policy. The need to establish a strong trade rules becomes more important especially in the context of the role assigned to trade in the realization of the goals of the Nigeria Vision 20:2020; and to this end efforts are being stepped up to pass these bills and establish appropriate institutions necessary for their implementation.

[24] Trade Policy Review: Report by the government of Nigeria to the WTO's TPRB op.cit.

The need to secure Nigeria's compliance with minimum standards of Intellectual Property Rights (IPRs) protection in compliance with WTO TRIPs Agreement is the main driving force of the efforts at drafting National Bill on Intellectual Property Protection. Added to this are the need to ensure coherence between Nigeria's trade policies, industrial policies and technological needs; to integrate IPRs more explicitly and strategically into the framework with particular reference to addressing the impact of IPRs in key areas such as education, health and agriculture; to stimulate domestic innovation and facilitate technology transfer for the benefit of small and medium enterprises, to further the integration of the country into the multilateral trading system and increase the contribution of IPRs to the achievement of sustainable socio-economic growth and development.

5.3.5 Nigeria's Participation in the Doha Development Agenda (DDA)

At the fourth Ministerial Conference in Doha, Qatar, in November 2001 WTO member governments agreed to launch new negotiations. They also agreed to work on other issues, in particular the implementation of the present agreements. The entire package is called the Doha Development Agenda (DDA)[25].

The negotiations take place in the Trade Negotiations Committee and its subsidiaries which are usually, either regular councils and committees meeting on "special sessions", or specially-created negotiating groups. Other work under the work programme takes place in other WTO councils and committees.[26]

Nigeria has been participating in negotiations under the DDA. In the course of its participation, Nigeria is a member of the African Group, the ACP Group and the G-90 Group. The country is also in different sectoral negotiation group such as Agriculture (G-

[25] www.wto.thewto.org
[26] Ibid

20 and G-33 Groups). Nigeria is one of the proposers of geographical indication and disclosure of genetic resources and traditional knowledge in application of patent (W52 proposal in TRIPs negotiation). Nigeria has its own mandate/interest in the different sectoral negotiations.[27]

With respect to services, Nigeria has submitted an initial offer, and her interest in the negotiations is to attain improved market access under mode 4.[28] In the area of agriculture, the country has particular interest in improved market access into the developed country's market. It is also interested in reduction in domestic support and removal of subsidies on exports.

It should be noted that the DDA has remained inconclusive[29] despite effort by the WTO's negotiating parties as a result of deep conflict between the developed and developing Nations.

5.4 LEGAL & INSTITUTIONAL REFORMS FOR NIGERIAN'S EXPORT TRADE.

Nigeria is Africa's most populous nation, endowed with abundant hydrocarbon resources and offering large potential opportunities for international trade and investment. However, the stability and predictability of Nigeria's legal and institutional framework are issues of major concern.

Most restrictions on foreign investment and related payments have been abolished.[30] The exceptions are those on mineral resources, which, remain under the property and control of the State. Competition and Privatization has recently been emphasized for trade in services, notably in telecommunications and financial services

[27] Trade Policy Review; op.cit.
[28] Discussed earlier in chap.4, section 4.4.2
[29] The initial time set for conclusion of negotiation was Dec. 2005.
[30] See NIPC Act, 1995 and FEMMP Act, 1999

(though a competition law is yet to be enacted). The latter, have been the subject of ambitious liberalization commitments under the GATS. Sectoral reforms undertaken recently to improve Nigeria's export trade are examined below;

5.4.1 OIL & GAS

Nigeria continues to exhibit the features of a dual economy, with a relatively dynamic oil export sector contrasting with sluggish growth in the rest of the economy. Nigeria's crude oil production is mostly carried out under joint – venture arrangements with multinational companies. Exports are subject to licensing and to OPEC's production quotas.[31]

A Deregulation

A host of policy instruments are applied to the downstream petroleum sector. An attempt to completely remove subsidies and deregulate the downstream petroleum sector was met with stiff opposition from organized labour and civil society groups which culminated in a nation wide strike in January 2012. Eventually, government reduced the pump price of petroleum from N141.00 per liter to N97.00 per liter, but this has hardly reduced the crisis in the petroleum sector as shortages of fuel still persist in the domestic market with fluctuations in prices across the nation.

B Nigeria content Law

The Nigeria content Act (2010) was signed into Law in 2011. While many indigenous operators rejoiced over the legislation due to the expected benefits they perceive it will accrue to them, it poses a challenge to the operations of the international oil companies that may need to reposition their operations under the new law. The Act

[31] WTO/Trade policy review – Nigeria 1998

entitled "An Act to Provide for the Development of Nigerian Content in the Nigeria Oil and Gas Industry" introduces new policies and legislations that seem to change the shape of Oil and Gas business in Nigeria.[32]

The Nigerian content Act provides for the development of the Nigerian content in the Oil and Gas Industry. The planning, monitoring and implementation is vested in the Nigeria Content Development and Monitoring Board (NCDMB).[33] The Act seeks to project the Nigeria Oil and Gas players in an industry that hitherto excluded them to the detriment of a healthy and sustained economic development. However, the Act which states that the Nigeria independent operators shall be given first consideration in the award of oil blocks, oil field licenses, oil lifting licenses and all projects for which contract could be awarded; also states that such Nigeria indigenous service must demonstrate ownership of equipment, Nigerian personnel and capacity to execute such work. The Act has provision that allows foreign suppliers of petroleum-based goods and services to invest and /or set up facility, factory, production unit or other operations in Nigeria.

It must be stated that this Act has already started generating strong responses from the international community, notably the United States of America that has substantial interest in Nigerian Oil and Gas industry. In a statement at the fourth review of Nigeria's Trade Policies and Practices at the WTO, the US Representative made the following remark;

> While the United States supports Nigeria's broad efforts to diversify its economy, we are deeply troubled by trade restrictive measures that have been recently enacted in the oil and gas sector. The Nigerian content Act signed into

[32] Trade Policy Review: Report by the Government of Nigeria presented at the WTO on 28-30 June, 2011
[33] Established under S.69 of the Act.

> law this year, establishes discrimination against foreign goods and services as a central pillar of policy in a critically important sector of Nigerian's economy. The stringent local sourcing requirements mandated by this law not only distort trade across a wide range of goods and services but will also increase cost and disrupt production operation in an industry that both Nigeria and the secretariat have acknowledged is already operating at well below its potential capacity.[34]

While concluding his response on the Act, he further stated that "we urge Nigeria to revisit the Nigeria content Act in light of its declared commitment to economic openness and to ensure that any legislation in this sector is implemented in a manner consistent with Nigeria's WTO commitments".[35]

It is submitted that the above statement by the United States Representative further demonstrates the typical approach adopted by most developed countries when reacting to laws enacted by developing countries to protect vital sectors of their economy. Developed countries condemn such laws in strong terms and urge the developing country concerned to embrace competition citing compliance with WTO commitments. It is further submitted that Nigeria should not bow to this subtle threat from the United States, as doing so would undermine the sovereignty of the nation and adversely affect economic development

5.4.2 Agriculture

A number of programmes have been adopted to improve Agriculture and rural development, the programmes include: Special Programme for Food Security (SPFS), the fadama II and III programmes, the fertilizer Revolving Fund (FRF) the presidential

[34] Statement of the US representatives at the WTO Trade Policy Review of Nigeria, June 28, 2011 available at the WTO website; www.wto.org retrieved on 12 Dec. 2011.
[35] Ibid

initiatives on Cassava, Rice Vegetable Oil, another important development in the Agricultural sector is recapitalization of the Nigerian Agricultural Bank (NAB). Other recently completed policies and programmes in the sectors are Added Value Exemption for locally produced Agricultural inputs such as fertilizer and simple fabricated machines. The Central Bank of Nigeria also adopted new strategies on credit delivery, the Trust Fund Model (TFM) which reduced the risk faced by Banks in agricultural lending with adequate emphasis on production, processing and marketing.[36]

However, we submit that all the above effort by government does not translate to direct subsidy granted to farmers as is done by the E.U and the United States which has generated and continues to generate strong debates at the on-going WTO discussions in Doha, between developing and developed countries. It is submitted further that developing countries such as Nigeria should also provide direct subsidy in form of monetary grants to improve farmer's income which will further increase growth, reduce poverty and attract more people to embrace agriculture.

5.4.3 Developments in the National Food and Drug Administration and Control (NAFDAC) Activities for Promoting Trade.

In order to meet up with the standard and certification set by the World Health Organization (WHO); NAFDAC has upgraded its laboratory. The new development is expected to promote; (a) harmonization of operation in Africa sub-region; (b) trade facilitation; (c) checking of counterfeiting of drugs and food substances; and (d) enhance overall efficiency of NAFDAC and delivery of services. NAFDAC has created an export desk at port inspection in Lagos, which serves as contact point for all intended exporters of products and food commodity regulated by NAFDAC.[37] There is also the e-clearance

[36] Trade Policy Review: Report by the government of Nigeria, op.cit
[37] Ibid.

initiative of NAFDAC with the Nigerian integrated customs information system (NICIS). With these initiatives, NAFDAC has privilege to receive SMS alert notification for consignments of imported regulated products.[38]

Recently, the activities of NAFDAC and other agencies at the port have been halted as a result of pressure on government by exporters who complained of bottlenecks at the port which causes port congestion and delay export activities.[39] It is submitted that NAFDAC is one government agency that has earned the confidence of Nigerians and as such government should immediately revisit the decision to terminate NAFDAC services at the ports. Rather, it is submitted that its activities should be improved upon to better reposition the agency to offer services.

5.4.4 Product Quality Improvement Activities of Standards Organization of Nigeria (SON)

In general SON set quality standards to which producers and traders in manufacturing, Agriculture and Fishing are obliged to adhere in their product development activities with respect to product quality, packaging and labeling in other to meet requirements of health, safety and the environment.[40] The organization is expected to collect, maintain and update data on market access for Nigerian Export Products in foreign trade partner countries and not only disseminate this information to Nigerian exporters but also assist them to comply with the requirements under World Trade Organization (WTO) rules.[41]

In an effort to protect Nigerian consumers from unsafe and substandard finished products, the Standards Organization of Nigeria off-shore conformity assessment

[38] Ibid.
[39] This Day Newspaper of 26th Feb,2012 p. 15
[40] A Framework of National Strategy for the federal Republic of Nigeria 2005-2010, A document prepared by the Nigerian Export Promtion Council in conjunction with the commonwealth secretariat.
[41] Ibid.

programme (SONCAP) was introduced by government through the Standards Organization of Nigeria. This programme is designed to ensure that products meet the specification of acceptable standards and become easier to regulate by Agencies charged with such responsibilities.[42] The programme scope covers among others; (a) verification of product compliance; (b) assurance that regulated products conform to specifications of Nigeria; (c) Industrial Standards or other approved International standards; (d) assurance of review process which covers accreditation of laboratory used, scope of test performed, and validity as well as authencity of test report.[43]

It may be noted that despite effort of the organization to carry out its statutory function, it still faces serious challenges. These include lack of training facilities to upgrade technical knowledge of staff; Technological up-to-date laboratory equipments, consumable and products for scientific research and product testing; electronic data processing, management and dissemination equipment and material and finally, lack of finance for undertaking identified activities.

5.4.5 Sanitary and phyto-sanitary (SPS) measures and Intellectual Property Rights (IPRs)

The Standard Organization of Nigeria (SON) and National Drug Law Enforcement Agency (NDLEA) are the organizations set up by the government to set standard for processed food and packaged water.[44] International Standards (such as those set by CODEX Alimentarius Commission and International Plant Protection Convention) are employed by these organizations in the performance of their responsibilities. Although the Federal Ministry of Trade and Investment has the responsibility of notifying the WTO on issues relating to SPS, NAFDAC serves as the port of enquiries. The

[42] Trade Policy Review: Report by the Government of Nigeria, op.cit
[43] Ibid.
[44] Ibid

Agricultural Act empowers the minister in charge of Agriculture to control the importation of plants, seeds, oil, artificial fertilizers, and related products. Export of fresh plants and plant product to the country requires not only a certificate issued by the authorities of exporting countries but also the phyto-sanitary certificate issued by the Nigerian's Quarantine Service (NQS).[45]

A Plant Protection Bill (which will replace the National Plant Quarantine Service Act of 1959 has been presented to the National Assembly. There have been significant improvement in the compliance with SPS regulations as a result of technical assistance provided by the food and Agriculture Organization (FAO) to address infrastructure challenges.[46]

A National Intellectual Property Rights Bill has been drafted to address further issues on Property Rights which harmonizes the various laws on intellectual property including plant and animal breeder's rights and geographical indicators. In an attempt to curb piracy and provide a favourable atmosphere for copy right system, the Nigerian Copy-right Commission (NCC) initiated the Strategic Action Against Piracy (STRAP) Campaign in 2005. Furthermore, the Copyrights Optical Discs Plant Regulation (CODPR) was put in place in 2006.

It is however, noted that enforcement of Intellectual Property Rights in Nigeria is a slow and cumbersome Process and in this regards, it is submitted that urgent steps be taken to hasten the passage of the Draft National Intellectual Property Bill pending before the National Assembly. This draft Bill provides for enforcement procedure and processes that will serve as effective deterrence against infringement and violation actions.

[45] Ibid
[46] Ibid.

5.4.6 Due Process and Public Procurement

Although Nigeria is not a signatory to the WTO government procurement agreement, the country has established an elaborate government procurement policy and law. It has established a due process mechanism for public procurement.[47] It is a framework for tackling corruption, promoting transparency and accountability in Nigeria Polity. The Public Procurement Act was enacted in 2007. This led to the establishment of a national council on public procurement (NCPP) and Bureau of Public Procurement (BPP). The objectives of the Bureau are to; (a) harmonize existing government policies and practices on public procurement and ensuring probity, accountability and transparency in the procurement process; (b) establish pricing standards and bench marks; (c) ensure the application of fair, competitive, transparent value for money standards and practices for the procurement and disposal of public assets and services; and (d) strive towards attainment of transparency, competitiveness, cost effectiveness and professionalism in the public sector procurement system.[48]

The objectives of the Bureau are laudable and it is expected that, pursuing these objectives will bring some sanity in the way government business is conducted in Nigeria. But almost 5 years after the coming into force of this law, things have hardly changed. Infact, there are pervasive violations of the Public Procurement procedures. In the words of the then Head of Civil Service of the Federation, Isa Bello Sali, "Procurement Officers have been often accused of being impediments to the implementation of government projects through the manipulation of the procurement process."[49] He further remarked "There have been complaints that borders on unwholesome practices such as leaking of

[47] Trade Policy Review: Report of the Government of Nigeria; Op. cit.
[48] Ibid.
[49] Daily Trust Newspaper, Feb. 13th, 2012; Head of Service works against abuse of procurement law; by Muhammed S. Shehu. P. 15..

information to favourite bidders, receiving submissions after the close of bids, bid tampering etc.[50] Certainly, these kinds of corrupt practices and abuse of the process can prevent this law from attaining its set goals.

5.5 TRADE POLICY AND MAINSTREAMING

The approach of the Nigerian government may be described as a gradualist approach to trade liberalization, as expressed in its NEEDs document. A critical assessment of the dynamics of the country's trade policy since the 1960s shows a persistent element of uncertainty. There has been a movement from import substitution strategy in the 1960s and 1980s, to the relaxation of protectionist measures and enhanced openness during the structural adjustment era. Trade policy has witnessed a series of swings in relation to the use of high tariffs, prohibitions and exemptions between 1986 and 2001. There have been sharp policy reversals with a rise in the use of import ban and high tariffs as well as other non-tariff measures geared towards the protection of the domestic sector. Unfortunately, this policy of protection has led to insufficient allocation of resources giving rise to increases in the price of consumer goods. This has undermined the governments efforts at poverty reduction, apart from encouraging smuggling[51]. The heavy reliance or prohibitions and other non-tariff measures, including the wide gap between bound and applied rates, raises credibility issues in trade policy. According to experts[52], the uncertainty surrounding government tariff policy affects private-sector initiatives to commit themselves to long-term investment and production decision, for fear of potential losses that could result from such reversals.

[50] Ibid
[51] Inye N. Briggs; Nigeria: Mainstreaming Trade Policy into National Development. African Trade Policy Centre, Work in Progress No. 52, Jan. 2007
[52] Oyejide, Ademola T. (2002) External Sector Policies in the 2002 Budget: An Assessment NCEMA Political Series, Vol.8, No. 1, 63-78

Export diversification, a component in the trade policy strategy for harnessing growth and expansion, has registered a measure of progress in the development schemes such as Export Processing Zones (EPZs), Export Processing Factories (EPFs) and Export Processing Villages (EPVs). The impact of these schemes is yet to be significantly felt as they are still very much in their early stages. Diversification initiatives had not made much headway until recently; they were mainly hampered by the trade policy strategy of protecting domestic industry through high tariffs. The resultant distortion in the allocation of resources was tantamount to an anti-export bais favouring inefficient domestic sectors. Incentives schemes for the promotion of exports have been beset by poor administration by implementing agencies among others. There is thus, a need to streamline the operation of the implementing agencies.

5.5.1 The Policy Implications of Globalization for Nigerian Trade

The Nigerian Institute of Policy and Strategic Studies (NIPSS) is primarily concerned with strategic (long-term) policy issues for Nigeria. However, as well as having a mandate to research on a vast array of national concerns, it is also interested in short-term (tactical) problems of governance, economics and administration.[53]

(a) Short-term policy concerns

Nigeria has both long-term and short-term objectives in international trade. With respect to the problems and challenges posed by globalization, short term tactical approaches are concerned with the following:

i. Acceptance of the international economic reality represented by the globalization phenomenon.

[53] Yakubu Sankey; A Trade Policy Matrix Schema for Nigeria in a Globalized Economy; in Foreign Investment Promotion in a Globalized World, D.A. Guobadia &P.T Akper(ed) NIALS, Lagos, 2006 P.211

ii. Taking steps to understand globalization in its multidisciplinary, multidimensional and complex nature. In other words, our approach in seeking to understand globalization should as much as possible be eclectic. In the least the Nigerian perspective as well as the western industrial economies perspective should be of concern. This quest should equally be guided by the desire to formulate appropriate policies and legislations.

iii. Armed with adequate information Nigeria should decide on those short-term (tactical) measures to protect areas of strength and to remedy or at least ameliorate areas of weakness.

iv. In the immediate as well as the medium term, moves should be made to promote better international appreciation of our view points and problems in the present globalized economic system. Our focus should be the western industrialized economies and other developing economies.

Among other short and medium term measures; we should also consider appropriate use of the following policy instruments: fiscal, monetary, tariffs, protection, prohibition, subsidies, tax, etc. With regard to prohibition in relation to Foreign Direct Investments (FDI), the examples of India's ruling party's political plat-form is instructive. "The Bharatiya Janata Party welcomes foreign investment in infrastructure industries though not junk food business".[54] Such a stand as is taken here by India shows thorough knowledge not only about what options are available but also about what India wants and what it does not want as a country.

[54] Buckley, Peter J. et al (Eds) Multinationals and World Trade, 1996. P.11.

(b) Strategic Policy Concerns.

i. As was done in the case of GATT, Nigeria can take steps in concert with other disadvantaged economies to renegotiate WTO, IMF and the World Bank Charters of operation towards fairer and more equitable world trade and financial systems.

ii. Move aggressively to develop and strengthen regional and continental organization such as the Economic community of West African States (ECOWAS) and the African Union (AU) as counter weight to the EU, WTO and others.

iii. A third strategy concerns response to the industrialized economies capacity to stay ahead of others. Nigeria could develop a 5-50 years dynamic planning, legal and policy perspective within which to meet the challenges of WTO, IMF and the World Bank and of globalization. This, if well executed will serve to keep us at par with the industrialized nations provided we also develop the capacity for generating and using the volumes of relevant information and data required by such strategy.

iv. A more serious and aggressive policy on Research and Development (R&D) that is long term, but also complements technology transfer. This is one way to sidetrack the poor technological support from industrialized nations and massive importation of sub-standard goods from other developing nations such as China. In the final analysis, it is this approach that made it possible for the export – oriented development strategy of the South East Asian tigers (Korea, Hong-Kong, Taiwan and Singapore) to succeed. The question here to contemplate is whether Nigeria and other African countries could become the next successful African export economies.

v. According to the United Nations Conference on Trade and Development and its division for Transnational Corporation Investments;[55] globalization has virtually eliminated safe havens of a sheltered home – country firms. The new regime of international trade and financial practices represented by the WTO, the IMF and the world Bank, have opened wide crisis-riden undeveloped economies for the goods of industrialized economies. They used their Structural Adjustment Program (SAP) of liberalization and deregulation as conditionalities to turn developing economies like Nigeria into safe havens (dumping grounds) for TNC's. Though not all developing markets however, hold much attraction for TNC's, but Nigeria as a potentially large market is an attractive proposition any day. In the final analysis therefore, any long-term strategy, policy, legislation or plan which Nigeria will formulate concerning safe havens (a.k.a dumping grounds) have to take the above facts into account. Moreover, decisions have to be taken within a dynamic rather than a static framework to successfully deal with the constant currents of change in the global environment.

vi. A last and probably final option for Nigeria is to withdraw from the WTO if it is proven that what WTO stands for is against our genuine national interest. However, the questions to answer here are: Is isolation a viable option in the realities of today's world? Endogenous development strategies may have worked for China and India five decades ago, but the same countries have now opened up their economies. Indeed, they are members of WTO. There are lessons which Nigeria can learn from these case studies.

[55] United Nations Conference on Trade and Development, Division for Transnational Corporation Investments, Report, 1991, p. 53

5.5.2 Concluding Remark

The foregoing discussion clearly demonstrates that trade and appropriate design of trade policy and legislation can set the economy on the path of expansion and growth, employment and income generation, and hence poverty alleviation. Still, the literature is not always explicit on whether there is a concrete causal linkage. There is however, a need for trade reform in the direction of liberalization but usually with the caveat that trade policy and legal framework on their own, no matter how good, cannot achieve the goals of the desired result without being supported by complimentary policies at the macroeconomic level. Added to this is the political will of the administration and ability of the relevant agency of government charged with implementation of the policy.

Finally, it should be noted that at best, Nigeria's engagement in multilateral trade negotiation has mainly been on the side of reaction rather than pro-activity. Yet, as noted earlier, the requisite research based institutions are available but have not been fully taken advantage of, due to a somewhat tenuous relationship between policy-makers and researchers.

CHAPTER SIX

WTO RULES AND DISPUTE SETTLEMENT

6.1 INTRODUCTION

The establishment of the WTO significantly reshaped the world trading system, not only by expanding upon the topical coverage of GATT but also by creating a system of compulsory, binding and enforceable dispute settlement. The primary legal framework for this system is set out in the Understanding on Rules and Procedures Governing the Settlement of Disputes ('Dispute Settlement Understanding' or "DSU').

Without question, the WTO dispute settlement system has become one of the most important and widely utilized international tribunals. In the first 13 years of its existence the WTO received over 367 complaints comprising over 271 'matters', and adopted over 200 Panel and Appellate Body reports. By comparison the International Court of Justice (ICJ) has delivered approximately 100 judgments and provided only 24 Advisory opinions since 1946.[1] In addition, to the high utilization, the system has also been effective in terms of compliance with decisions. The member's willingness to use and comply with the system as intended shows the confidence and faith they have in the WTO effectively to resolve disputes. On the other hand, several high-profile cases have tested both the institutional capacity of the WTO to deal with contentious issues and member's resolve towards the multilateral system.

This chapter, provides an overview of dispute settlement in the WTO.

[1] For a listing of WTO disputes see www.wto.org/english/tratop-/dispute-e/dispute-status-e.htm.for a listing of ICJ decisions, see www.icj.org/icjwww/idecisions.htm. Visited on 11-12-2013.

6.2 EVOLUTION OF DISPUTE SETTLEMENT IN THE MULTILATERAL SYSTEM.

In order to fully appreciate the dispute settlement process of the WTO, it is important to understand dispute settlement in the multilateral trading system as it developed prior to the development of the WTO. In particular, one must realize that the GATT evolved during its 47 year existence from a diplomatic based conciliatory process into a more judicially focused model and that the DSU, far from being an entirely new and separate legal instrument, merely completed the evolutionary process to a system based on rule of law[2]

6.2.1 Dispute Settlement in the GATT.

At its inception, the GATT contained few provisions addressing dispute settlement. When GATT was negotiated, the contracting parties anticipated that the more detailed provisions on dispute settlement under the International Trade Organization (ITO) would soon apply. Because these other rules were expected to govern, it was not considered necessary to develop additional dispute settlement rules specific to the GATT. As a result, when the efforts to create the ITO failed, the GATT was left without a detailed dispute mechanism. Instead, the very brief provisions of *Articles xxii and xxiii* of the GATT provided the foundation of its dispute settlement system.[3]

Article xxii, entitled 'Consultation', provides for consultations regarding any matter affecting the operations of this agreement.' Article xxiii does a bit, but not much more. Entitled '*Nullification of impairment,*' it provides that a party can make a written representation or proposal to another party when it considers that any benefit accruing to it directly or indirectly under the GATT is being *nullified* or *impaired* or that the

[2] Simon Lester and Bryan Mercurio et al; world Trade. Law, Text, Materials and Commentary, Hart Publishing, Oxford and Portland Oregon, 2008 P. 154.
[3] Ibid.

attainment of any objective under the GATT is being impeded as the result of: (a) the failure of another contracting party to carry out obligations under the GATT, or (b) the application by another contracting party of any measure whether or not it conflicts with the provisions of the GATT; or (c) the existence of any other situation.

As noted, while not intended to play such an important role, *Articles xxii and xxiii became* the de facto basis for the GATT dispute settlement process. However, because these provisions fail to provide clear procedural rules to guide the process, the contracting parties were left to discover, invent and reform rules based on their experience with actual disputes.

By the 1950s, however, the process had become more legalistic in nature. Disputes were submitted to an ad hoc 'Panel' of unbiased, neutral trade experts (usually representatives from contracting parties who were not parties to the dispute, acting in their individual capacities) to take evidence, hear arguments, rule on the legal issues and' merits of the complaints and submit a written report to the GATT Council to make 'appropriate recommendations'[4].

The legal nature of the proceedings was tempered, however, by political aspects of the process. For example, once the Council received the written decision of the panel and unanimous vote was needed to 'adopt', that is give legal effect to the panel's decision. Because the Council was made up of all the Contracting Parties the respondent could block any adverse panel decision from having any effect. Thus, each Contracting Party essentially had veto power over every panel decision.

Despite the textual ambiguities and other impediments and shortcomings, the process was very successful in peacefully and amicably resolving disputes in the early

[4] The GATT Council generally met monthly and consisted of all government representatives who wanted to be present. In essence the council was all the contracting parties acting jointly.

years. Most Panel decisions were observed and implemented by the disputing parties. Hudec accounts for the early success in the following way:

> *Governments understood the legal rulings implicit in its vaguely worded decisions, and once these rulings were approved by the GATT Contracting Parties defendant governments almost always felt it necessary to comply. The reason these impressionistic half decisions were successful was that the early GATT of the 1950s was essentially a small 'club' of likeminded trade policy officials who had been working together since the 1946-1948 ITO negotiations… Thus, they did not need a very elaborate decision-making procedure to generate an effective consensus about what particular governments were expected to do*[5].

Eventually, the challenges of the changing conditions of international trade, which brought not only more complex cases but also a larger, more diverse group of nations caught up with the dispute settlement process. The GATT was no longer a small club of like-minded nations, but a larger group with diverse viewpoints on a wider range of trade issues. The textual and procedural weaknesses continued to reveal themselves in the difficulties and failures of the system and increasingly led to a larger number of disputes that the GATT could not effectively resolve.[6] It must also be noted that as time progressed, the frequency of use of the 'veto' power increased. Partly as a result, smaller and developing nations found it difficult to obtain a successful resolution to the GATT process.

More problems, such as panel delays and a concern regarding the quality of the Panel reports, in terms of the reasoning of the vaguely worded decisions, inconsistent Panel decisions and an unsound body of case law, further undermined the system. Moreover, transparency was a major issue.

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[5] See R. Hudec; *The New WTO Dispute Settlement Procedure; An Overview of the First Three Years, 8* Minn. J. Global Trade 1, 5-6 (1999).

[6] Simon Lester etal op. cit.

Furthermore, increased GATT membership led to differing views on international trade and, thus, international trade law. Perhaps more importantly, some Contracting Parties began abandoning, withdrawing or failing to bring disputes to GATT Panels, and instead choosing to resort to unilateral measures to resolve disputes.[7] Therefore, even though the GATT remained a triumph, in that it became one of the, if not the most, successful international dispute settlement mechanism[8], it was apparent that wholesale changes were needed. Negotiations on this subject were carried out during the Uruguay Round, and as part of the Overall Package of agreements resulting from the Uruguay Round, the DSU was created.

6.3 DISPUTE SETTLEMENT IN THE WTO

The Primary WTO dispute settlement rules are set out in the DSU. Article 2.1 of the DSU establishes the Dispute Settlement Body (DSB) to administer the DSU's rules and procedures. In essence, the DSB is all the WTO members acting together. The DSB has the authority to establish dispute settlement Panels, adopt Panels and Appellate Body reports, maintain surveillance of implementation rulings, and, if necessary, authorize members to suspend concessions and other obligations. According to Article 2.3 of the DSU, the DSB meets 'as often as necessary to carry out its functions'. In Practice, the DSB regularly meets monthly. Decisions at the meetings are taken by consensus.[9]

Two of the most important changes from the GATT era are the following. First, the WTO created a standing Appellate Body to review Panel's legal decisions, partly in response to the concern with the uneven quality of GATT Panel reports. Secondly, the

[7] Even the Director-General, in a 1979 report, stated that the scope of cases was too broad for the system and issues too important in terms of national interest. See T. Steward (ed) *The GATT Uruguay Round: A Negotiating History* (Kluwer Law International, The Hague, 1993) at 2706.

[8] Professor Hudec's comprehensive Study of GATT Statistics through to 1989 reveals that Complainants reached full satisfaction in 60% of cases and partial satisfaction in 29%. See R. Hudec; Enforcing International Trade Law: The Evolution of the Modern GATT Legal System (Butters worth, London 1993) 375-83. At the time these statistics were unparallel in any other international dispute settlement forum and today are only rivaled by the DSU statistics

[9] See Art. 2.4 of the DSU.

DSB automatically adopts, that is, gives legal effect to Panel and Appellate Body reports unless it decides by consensus not to adopt the report.[10]

6.4 Basic Overview of the DSU Process

The DSU Process consists of a number of Procedural stages. It begins and proceeds in the following manner. Consultations, Panel, Appellate Review, Implementation, Compliance and Compensation/ Retaliation.[11]

Not all of these stages are reached in every dispute. At each stage, there is the possibility for resolution of the dispute. A dispute may be resolved in consultations, the claims may be rejected by the panel; or findings of violation may be implemented immediately. Very few disputes make it all the way to the compensation/retaliation stage.[12]

6.4.1 Consultations

The WTO dispute settlement process formally begins when a member requests consultations with another member regarding a perceived 'nullification or impairment' of benefits, usually resulting from an alleged violation of the substantive rules. The consultation stage is intended to provide an opportunity for the parties to discuss the dispute and negotiate a resolution of the matter. In furtherance of this goal, consultations are confidential, and without prejudice to the rights of any member in any further proceedings.[13] In *Korea – Alcoholic Beverages*,[14] Korea argued before the Panel that the complainants (United States and European Community) breached the confidentiality requirement of Art. 4.6 Of the DSU by making reference, in their submissions, to information supplied by Korea during consultations. The Panel, in a finding not reviewed

[10] Arts 16.4 and 17.14 of the DSU
[11] Simon Lester et al op. cit p. 158.
[12] Ibid.
[13] Art. 4.6 Of the DSU.
[14] Korea - Taxes on alcoholic Beverages, Appellate Body Report, WT/DS75/AB/R; WT/DS84/AB/R, ADOPTED 17 Feb. 1999.

by the Appellate Body, held that although confidentiality in the consultations between the parties to a dispute is essential, if the parties are to be free to engage in meaningful consultations, however, it extends only to requiring the parties to the consultations not to disclose any information obtained in the consultation to any parties that were not involved in those consultations. Moreover, bearing in mind that Panel proceedings between the parties remain confidential, a party does not breach any confidentiality by disclosing in the Panel proceedings information obtained during consultations. The Panel therefore found that there had been no breach of confidentiality by the complainants in respect of information that they became aware of during the consultations with Korea on this matter.[15] This Position was adopted in several other disputes like *Australia-Automotive Leather II*[16] and *EC-Bed Linen*.[17]

Parties are given great scope in carrying out the consultations, as the DSU does not provide any guidance on how the consultations are to be conducted. Therefore, the manner and form in which the parties discuss the disputes, interpret the facts and reveal legal arguments is left almost entirely to them.[18]

Consultations may be either 'multilateral' or 'bilateral', at the designation of the complainant. Multilateral consultations are open to other members with a 'substantial trade interests'. Such members may request to join in the consultations. By contrast, bilateral consultations are 'private', that is, only the complaining and responding members may participate.

The DSU also states that special attention should be paid to the particular problems and interests of developing country members in the context of Consultations,

[15] Ibid, Paragraph 10.23
[16] *Australia-Subsidies* for Local Producers and exporters of Automotive Leather products II, brought by United States, Panel report, WT/DS126/R, adopted in Feb. 2000, Paragraph 9.32-9.34.
[17] EC-Anti-Dumping Duties on imports of cotton-Types Bed Linen from India, Appellate Body report, WT/DS 141/ AB/R, adopted 12 March, 2001, DSR 2001:V. 2049, Paragraph 6:32-6.35.
[18] Simon Lester et al Op-cit.

for example, under DSU Article 12:10, where a measure taken by a developing country member is at issue, the parties may agree to extend the timeline established in the DSU, or the chairman of the DBS can, after consultation with the parties, decide whether to extend the consultations and, if so, for how long.[19]

A large number of disputes are resolved, either through a mutually agreed solution or through abandonment, at the Consultations Stage of the dispute settlement process. Finally, even when consultations have failed to resolve a dispute, it always remains possible for the parties to find a mutually agreed solution at any later stage of the proceedings.[20]

6.4.2 Panels

If consultations fail to resolve the dispute, the complaining party may request the DSB to establish a Panel. To do so, the complainant simply puts its request on the agenda of a DSB meeting. A Panel will be convened at least at the second meeting of the DSB where the request is heard unless the DSB decides by consensus not to establish one.

The request for establishment of a Panel initiates the adjudication phase, and the adjudicative stage is intended to resolve a legal dispute. Accordingly, the request must be in writing, addressed to the chairman of the DSB and indicate whether consultations were held. The request must in addition identify the specific measures at issue as well as provide a brief but sufficiently clear summary of the legal basis of the complaint.[21] In fact, the establishment of a Panel is very important because it defines and limits the scope of the dispute.[22]

Consequently, the complainant must sufficiently specify the legal claims, not the arguments in the request to avoid having the respondent raise a preliminary objection

[19] Ibid.
[20] See generally Articles 5 and 25 of the DSU.
[21] Ibid, Article 6.2
[22] Ibid, Article 7.1

against individual claim or having the panel decline to rule on certain aspects of the complaint. For instance, in US-Tax Treatment for 'foreign Sales Corporations"[23], the United states argued that the European communities request for the establishment of a Panel failed to identify specific measures at issue because the EC did not identify the specific products in question as the nature of export subsidy obligation imposed by the Agreement on Agriculture differ depending on the products at issue and commitments made by the United States there under. However, the Panel found that the request for the establishment satisfied the requirements of Article 6.2 of the DSU.

Panels are composed on an ad hoc basis of three (or, if the parties agree, five) well-qualified individuals: generally, academics, private lawyers or, quite often, present or former members of government delegations to the WTO who are not parties to the dispute. Panelists serve in their individual capacity, not as representatives of their governments, and members cannot give instructions to Panelists or seek to influence them in any manner.[24]

The Parties to the dispute can, by mutual agreement, select -the Panelists themselves, based on suggestions made by the secretariat. If the party can not agree on the composition of the panel within 20 days following the constitution of the panel, either of the parties can request that the Director General determine its composition.[25]

[23] US-FSC: Tax Treatment for "Foreign Sales Corporations" Appellate Body Report, WT/DS108/AB/R, adopted 20 March 2000, DST 2000: III, 1619 Paragraphs 7.23 and 7.29.

[24] In order to avoid conflict of interests or the appearance of impropriety, the DSB has adopted rules of conduct requiring panelists to be 'independent and impartial' and to 'avoid direct or indirect conflict of interests. Parties to the dispute can allege a violation of the rules and, if upheld can remove a panelist from the Panel. See WT/DSB/RC/1

[25] Art.8.10 mandates that, when a dispute involves a developing country, at least one panelist must be from a developing country member if the developing member so requests.

Once the composition of the panel is determined, the panel process can begin.[26] The panel process is similar to that used under the GATT and in most domestic courts. The panel evaluates the factual and legal aspects of the dispute through written submissions from the parties, meetings with the parties, and the power to seek additional information and expert's opinions. The panel then makes an objective assessment of the matter by examining the facts of the case and the relevant WTO agreements. In practice, panels make every effort to reach decisions by consensus but where a decision can not be arrived at by consensus, decisions are taken by a majority vote. In such a circumstance, the dissenting or concurring opinion of any panelist is included in the panel report, but the author of the opinion remains anonymous.[27]

Based on the evidence presented, the panel reaches conclusion on the legal claims. It then issues an interim report' to the parties (the interim report is another new element introduced by the DSU and is intended to improve the quality of the panel reports). The parties can (and often do) comment on the findings contained in the report. After the interim review process is complete, the panel issues the final report to the parties taking into account the interim review comments. After the report is issued to the parties, it is translated into the official WTO languages,[28] and then circulated to the full WTO membership and the public.

After circulation, the panel report can either be appealed by any party to the dispute or adopted by the DSB. If there is an appeal, the appellate review begins. If no appeal is filed, the panel report is considered for adoption. Upon adoption, the panel's

[26] Art.7 provide the standard terms of reference for panels.
[27] Simon Lester et al op.cit p.160
[28] English, French and Spanish are the three.

findings have legal force, and thus any findings of violation must be implemented by the responding party.

6.4.3 Appellate Review

Appeals of panel reports are made to the Appellate Body.[29] The Appellate Body is a standing body composed of seven persons with demonstrated expertise in law, international trade and the WTO agreements.

According to the working procedure, a notice of appeal shall contain a brief statement of the nature of the appeal, including the allegations of errors in issues of law covered in the panel report and legal interpretations developed by the panel.[30] These allegations of errors must relate to what the appellant wishes the Appellate Body to overturn. It could be a panel's conclusion with the supporting reasoning or an isolated legal finding forming part of the reasoning supporting a conclusion.[31]

The Appellate Body has the authority to uphold, modify or reverse the legal findings and conclusions of the panel.[32] Therefore, it is not the role of the Appellate Body to engage in fact-finding or evaluation of the evidence, and findings of fact are, in a principle, not subject to Appellate Body review. However, factual findings can be reviewed pursuant to Art.11 of the DSU in limited circumstances.

As with Panel, Appellate Body proceedings are confidential and the opinion expressed anonymous. Where consensus can not be reached, decisions are taken by a

[29] Rule 20(1) of the working procedure for Appellate Review, WT/AB/WP/7 dated first may, 2003
[30] Ibid, Rule 20(2) (d). Rule 20 (2) a-c stipulate other formalities that the notice of appeal should contain.
[31] For example, in *Japan-Alcoholic Beverages* 11, Taxes on Alcoholic Beverages, Appellate Body Report, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R adopted 1 November 1996, DSR, 1996; 1, 97 at p.99-100, where the allegation was that the panel erred in its interpretation of Art.111.2 of GATT 1994; by finding that the likeness can be determined purely on the basis of physical characteristics, consumer uses and tariff classification.
[32] Art. 17.13 Of DSU.

majority vote. Dissenting or concurring opinions of any Appellate body member are included in the report of the Appellate Body, but the author of the opinion remains anonymous.

The DSU provides that Appellate proceeding are generally to last no more than 60 days following the notification of the appeal. When the Appellate Body considers that it can not provide its report within 60 days, it informs the DSB in writing of the reasons for the delay and estimates the date when it will submit its report.

After the Appellate Body report is circulated, this report-along with the panel report as upheld, modified or reversed by the Appellate Body report – is placed on the agenda of a DSB meeting and is automatically adopted unless the DSB decides otherwise by consensus.[33]

Under the working procedures, an appellant can withdraw its appeal at any time during the pendency of the Appeal.[34] A withdrawal terminates the appeal and in such cases, the Appellate Body would normally set out the procedural history of the appeal and conclude that it had completed its work in view of the withdrawal.[35]

6.4.4 Implementation

This is the final phase of the WTO dispute settlement process, which is designed to ensure that the recommendations and rulings of panels or Appellate Body, once adopted by the DSB, are implemented by the losing member. The prompt compliance with the recommendations or rulings of the DSB is essential in order to ensure the

[33] Simon Lester et al op.cit. p.162
[34] Rule 30 of the working procedures for the Appellate Review.
[35] *India-Autos*: Measures affecting the Automotive Sector, Appellate Body Report, WT/DS146/AB/R, WT/DS175/AB/R, adopted April, 2002, paragraphs 14-118

effective resolution of disputes,[36] and the DSB is responsible for supervising the implementation of reports.[37]

Although the Panel or Appellate Body may suggest means of implementation, it is left for the losing WTO member to determine how to implement the ruling/recommendations.[38] The losing member is obliged to inform the DSB at a meeting held within 30 days of the adoption of the Panel or Appellate Body report; or of its intension in relation to the implementation of the rulings/recommendations. If it is impracticable to comply immediately with the recommendations/ rulings, the member concerned shall have a reasonable period of time for implementation.[39] As rightly put by the Appellate Body in *Canada- pharmaceutical*, reasonable period of time is available only if immediate compliance is impracticable.[40]

However reasonable period of time does not apply in all cases. For instance, in the event of prohibited subsidies the panel must recommend that the subsidizing member withdraws the subsidy with out delay and must specify the period of time for the withdrawal.[41] Consequently in *Brazil- Aircraft*, the DSB gave Brazil a period of 90 days to bring its Aircraft subsidies in compliance with the WTO law.[42]

The reasonable period of time can be determined in one of three ways, to wit:

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[36] Art. 21.1 of DSU
[37] Ibid, Article 2
[38] Ibid, Article 19.1
[39] Ibid, Article 21.3
[40] *Canada- Pharmaceutical Patients: Patent Protection of Pharmaceutical Products,*- Arbitration under Article 21.3(c) of the DSU, A word of the Arbitrator, WT/DS114/13, 18th Aug. 2000, paragraph 45.
[41] See Article 4.7 of SCM Agreement. Also Art. 26.2 of the DSU implicitly exclude the application of the Reasonable period of time in situation complaints. More over according to the view of some members and trade law experts, Article 8.2 and 8.3 of the agreement on safeguards also provides for a procedure Partially departing from Article 21.3 of the DSU, thereby bypassing the reasonable period of time.
[42] *Brazil- Aircraft* (Art.21.5-canada): Export Financing Program for Aircraft- Resource by Canada to Art.21.5 of the DSU, Panel

a. Proposed by the member concerned and approved by consensus[43] of the DSB. This has never happened, but the DSB did in some cases approve request by the implementing member of the extension of reasonable period of time awarded by the arbitrators. These occur in *US-FSC,* US-section110 (5) of the US copyright Act and US-1916 Act.[44] However, according to the Appellate Body, the implementing member bears the burden of proving that the proposed period of implementation constitutes a reasonable period of time.

b. Mutual agreement of the parties to the disputes within 45 days of the adoption of the report; as was the case in *US-line pipe, US-softwood lumber V and Dominican Republic-import and sale of cigarettes*.[44]

c. Determination by arbitration,[45] upon the request of a member, by individual arbitrator or group of arbitrators.[46]

The arbitrators hold a hearing in which the parties present and explain their arguments and respective position. The arbitrator(s) then make(s) a decision as to the reasonable period with Article 21.3(c) offering the guide line that the reasonable period should not exceed 15 months from the date the ruling was adopted. However, it may be shorter or longer, depending upon a particular circumstance of dispute.[47]

[43] Art.2.4 of DSU
[44] *US- FSC,* op.cit, US-section 110(5) of the US copyright Act- Arbitration under Art. 21.3(c) of the DSU, Award of Arbitrator, WT/DS160/14, 18th July 2001: US-1916 Act, WT/DS136/13, 18th July, 2001
[44] In these cases, the parties reached an agreement on the reasonable period of time before the arbitrator had issued an award, so it became unnecessary for the arbitrators
[45] Article 21.39c) and footnote 12 to. Article (2) of DSU
[46] See footnote 13 to Article 21 of DSU.
[47] Article 21 (4) of DSU

6.4.5 Compliance Review

Where the implementing member implemented the recommendations/rulings, but a disagreement arose between the parties on whether the implementation achieved full compliance with the recommendation; either of the parties can request for a panel, possibly, the original panel to determine the issue within 90 days.[48] This is known as compliance panel procedure. As was stated in *Canada-Aircraft* as well as in *US –shrimp*, the compliance panel must consider the new measure taken to comply in its totality, including its consistency with the covered agreement and not only the recommendation and rulings of the DSB.[49]

If the losing party fails to achieve full implementation of the report within the reasonable period of time, the prevailing complainant may resort to temporary measures to wit: compensation or suspension of WTO obligations owed to the losing party, although the full implementation of the rulings/recommendation is preferred.[50]

In this case, the implementing members would enter into negotiations with the complaining party, with a view to agreeing to mutually acceptable compensation that is consistent with the covered agreements.[51] However, if the parties fail to agree within 20 days of the expiry of the reasonable period of time, the complaining party may request the DSB to authorize it to suspend concessions owed to the non implementing member.[52] This is otherwise known as retaliation.

[48] Article 21.5 ibid
[49] *Canada-Aircraft* (Art. 21.5-Brazil), Appellate Body Report, op.cit Para 37, 40-42; United States-shrimp (Art.21.5-Malaysia)- Appellate Body Report, WT/DS58/AB/RW, adopted 21.Nov.2001, para.85-87
[50] s Art.22 of DSU
[51] Ibid Articles 22.1 and 22.2
[52] Ibid Articles 22.2 and 22.6

Retaliation is the final and most serious consequence a non implementing member would face in the WTO disputes settlement system.[53] Retaliation requires the prior approval of the DSB, and is applied selectively by one member against another. The level of retaliation must be equivalent to the level of nullification or impairment,[54] and must be imposed in the same sector[55] in which the violation or nullification was found.[56] However, the complainant can impose sanction in a different sector under the same agreement or in a different agreement where it is impracticable or ineffective to remain within the same sector or agreement.[57]

Furthermore, the DSB authorization is automatic and must come within 30 days of the expiry of the reasonable period of time, unless there is a consensus to reject the request.[58] If the parties do not agree on the proposed term of retaliation, arbitration may be requested to determine same.[59]

6.5 IMPORTANT PROCEDURAL AND SYSTEMIC ISSUES

Over the years, a number of procedural and systemic issues have arisen in WTO dispute settlement; though not all of them have been addressed by the DSU. In this section, an attempt is made to provide a brief overview of the most important issues below.

[53] Ibid Article 3.7
[54] Ibid Article 22.4
[55] Ibid Article 22.3 (f) stipulates the sectors in which each WTO agreement fails with respect to the suspension of obligation.
[56] Ibid Article 23.3 (a)
[57] Ibid Articles 22.3 (b) and (c)
[58] s Ibid Article 22.6
[59] Ibid Article 22.7

6.5.1 The Complaint

Generally, complaints are of three types namely; violation, non-violation and situation complaints which are examined as follows:

(a) Violation complaint.

In a violation complaint, the complainant alleges that a measure of another member breaches an obligation under one of the covered agreements and that this results in direct or indirect nullification or impairment of a benefit accruing to the complainant. The notion of a violation is straight forward as it exist when a measure is inconsistent with WTO rules.[60]

Thus, once a violation has been established, there is a rebuttable presumption that the breach has caused nullification or impairment.[61] The presumption of nullification or impairment when a violation has been proven has been the subject of several disputes, but it has never been successfully rebutted.

The issue arose in *EC-Bananas III*, where the EC attempts to 'rebut' the presumption of nullification or impairment on the basis that the United States has never exported a single banana to the European community, and therefore, could not possibly suffer any trade damage.[62] In deciding the issue the Appellate body noted that the issues of nullification or impairment and of standing are 'closely related'. The Appellate Body then recognized in relation to the question whether the EC had rebutted the presumption of nullification or impairment, the fact that the 'United States is a producer of bananas and that a potential export interest by the United States can not be excluded and that the

[60] Simon Lester et al op.cit p.183
[61] See Article 3.8 of the DSU
[62] See Appellate Body Report, EC-Bananas, Para. 249- 250

internal market of the US of bananas could be affected by the EC bananas regime and by its effects on world supplies and prices of bananas,[63]

(b) Non – violation complaints

In addition to the violation complaint which is the standard type of complaint, a complainant may also make a 'non- violation complaint pursuant to Article XX111: 1(b) of the GATT. With this complaint, the complainant alleges that even though there is no violation of any covered agreement, benefits have been nullified or impaired as a result of the application of a measure of another member.

The basic reason for the non-violation complaint is simple. There is a concern that members may act in a manner that complies with the letter of the law but nevertheless frustrates an objective or undermines commitments contained in the agreement. In other words, a non violation complaint protects certain benefits members have accrued under the WTO agreement and guarantees that those benefits are not affected by measures that may not have been foreseen at the conclusion of the agreement. In a sense, the non-violation remedy is a way to ensure that members act in good faith when carrying out the obligation.[64]

In terms of the substantive aspects of a non- violation complaint, the panel in *Japan- film* described three elements that must be proven as part of such a claim: (1) the application of the measure by the responding party; (2) the existence of a benefit and (3) nullification or impairment of that benefit as the result of the application of the measure (causal relationship).[65] The panel also explained that the traditional rules governing the burden of proof in WTO disputes were applicable in non- violation claims. In this regard,

[63] Ibib Para 251, see also panel report, *Turkey-Textiles,* Para 9, 204.
[64] Simon Lester et al, op.cit p.185.
[65] Panel Report, *Japan-film,* Para 10.41

the panel stated: 'it is for the party asserting a fact, claim or defense to bear the burden of providing proof there of'.[66]

Turning to some practical issues related to the non-violation remedy, it is important to note that if the responding party losses a non-violation case, it has no obligation to withdraw the measure concerned. Instead, DSU Article 26.1(b) instructs, the panel or Appellate Body to recommend that the members concerned reaches a 'mutually satisfactory adjustment; pursuant to Article 26.1(c), upon the request of either party, arbitration to decide the reasonable period of time may include a determination of the level of nullification or impairment and may also suggest possible ways and means of reaching a mutually satisfactory adjustment (including compensation).

As a result of these rules, the non-violation remedy is as effective as the violation remedy, in terms of inducing another member to change its measures, which perhaps explains, in part, why so few of this complaints have been filed. The sequencing of the three possible complaints under Article XXIII may also be a sign that non-violation cases are a secondary choice.

(c) 'situation' complaint

Article XXIII: 1 (c) provide for the possibility of a complaining party bringing a dispute in relation to carry other situation' that caused nullification or impairment. In such a circumstance, as with non-violation complaints, the complaining party must present a detailed 'justification' in support of its complaint. The 'situation complaint was designed to be used in situation such as macro-economic emergencies (i.e. General depression,

[66] Ibid Para 10.28

high unemployment, commodity prices collapses, balance of payment difficulties[67]) and although there were a few situation complaints under the GATT (complaints were made regarding the withdrawal of concessions, failed re-negotiations and unrealized trade expectations), non resulted in Panel report.[68] There has not been a situation complaint under the WTO.

6.5.2 The Panel Request Identification of the measures and the claims

Article 6.2 of the DSU requires that panel request (1), 'identify the specific measures at issue' and (2) 'provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly'. In an early case, the Appellate Body made clear that it takes these requirements seriously. In *Guatemala – Cement*, which involved claims against an anti-dumping measure and therefore implicated certain Anti-Dumping Agreement dispute settlement provision in addition to Article 6.2 of the DSU, the panel had made a number of findings of violation. However, on appeal, the Appellate Body concluded that the panel request had not properly identified the issues because it had not explicitly mentioned a definitive anti-dumping duty, the acceptance of a price undertaking or a provisional measure. Instead, it had only referred to actions taken by the investigating authority during the investigation. As a result the Appellate Body reversed all the finding of violation, finding that the claims had not been brought properly.[69]

It is difficult to state briefly any general principles in the application of the Article 6.2 requirements. The key is simply to be sufficiently precise in explaining the measures that are the subject of the complaint and the legal provisions that are alleged to have been violated.

[67] See WTO, a hand book on the WTO dispute settlement system (Cambridge University Press, Cambridge 2004) 12-14 (hereafter 'WTO Handbook')
[68] Ibid, 30, 34,
[69] Appellate Body Report,- *Guatemala – Cement Para* 57-59.

6.5.3 **The measure at issue:** What types of measures can be challenged?

In trying to understand individual WTO disputes, one of the most important aspect is to determine what government action is being challenged. Is it a piece of legislation? An implementing regulation? A judicial or quasi-judicial decision by a court or government agency? These are the main types of government 'measures', a term used in various places in the DSU, that may be the subject of a complaint.

The precise level of government involvement required for the action to qualify as a 'measure' is difficult to define. However, what is clear is that an action as limited as the statement of a parliamentarian is not enough. Thus, for example, a Nigerian senator saying in a television interview 'I encourage my constituents to boycott all Chinese goods' is unlikely to be deemed a 'measure', that can be challenged (even though it may actually have some impact on imports). The areas that are most problematic are often reports and policy statements generated by government agencies where the force and effect is not clear.[70]

6.5.4 **Burden of Proof**

As with any litigation proceedings, a key question under the DSU is which party bears the burden of proving its prima facie case. In general, the complaining party in a WTO dispute must present arguments and evidence sufficient to establish a prime facie case for each of the various elements of its claims. Once the complaining party has made its case, it is for the respondent to rebut that prima facie case. The panel in *Turkey-Textiles* succinctly summarized the established rules on burden of proof.

(a) It is for the complaining party to establish the violation it alleges

[70] Simon Lester et al op.cit p. 189.

(b) It is for the party invoking an exception or an affirmative defence to prove that the conditions contained there in are met; and

(c) It is for the party asserting a fact to prove it. [71]

In cases of uncertainty as to whether a prima facie case has been made, the panel in *US-Section 301 stated*:

> 7.14 Since, in this case, both parties have submitted extensive facts and arguments in respect of the EC claims our task will essentially be to balance all evidence on record and decide whether the EC, as party bearing the original burden of proof, has convinced us of the validity of its claims. In case of uncer tainty, i.e. in case all the evidence and arguments remain in equipoise, we have to give the benefit of the doubt to the U.S as defending party.[72]

In *Canada – Aircraft*[73] the Appellate Body defined a *prima facie* case to be a case which, in the absence of effective refutation by the defending party requires a Panel as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case.

6.6 PARTICIPATION IN THE PROCEEDINGS

As stated earlier,[74] only the WTO member governments can participate either as parties or third parties in the WTO settlement proceedings. Moreover, the entire procedure, starting from consultation to the Appellate review, apart from the stage of the circulation of panel report to the WTO members is confidential[75], although members have the right to disclose their submission to the public.[76] Consequently; Non-participants do not contribute to the proceedings. Several legal issues arise in the WTO dispute settlement proceedings. They include;

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[71] Panel Report, *Turkey- Textiles*. Restriction on Imports of Textiles and clothing products, WT/DS34/R, as up held by Appellate Body Report.
[72] Panel Report *US- Section 301, para* 7.14
[73] *Canada- Aircraft*: Measure affecting the export of civilian Aircraft Appellate Body Report, WT/DSTO/AB/R, adopted 20 Ang. 1999: 111, 1377, Paras 144-146.
[74] See Section 6.2.2 ante
[75] See Article 4.6, 14.1, 18.2, 17.10 and Para 3 of the working procedure in Appendix 3 of the DSU
[76] Ibid Article 18.2 and Para 3

6.6.1 Rights to Bring a Complaint

The DSU does not contain any explicit requirement that a complainant must have a legal right or interest in the claim it is pursuing.[77] Thus, in the *EC-bananas III* dispute, the European community challenged the standing of the United States to bring a violation complaint under the GATT 1994, and argued that a complaining party must normally have a legal right or interest in the claim it is pursuing. In deciding this issue, the Appellate Body stated *inter alia*;

> "135 Accordingly, we believe that a member has broad discretion in deciding whether to bring a case against another member under the DSU…"

In addition the Appellate Body stated that the United States being a producer of bananas, a potential export interest by the United States cannot be excluded. It therefore agreed with the panel that:

…with the increased interdependence of the global economy… members have a greater stake in enforcing WTO rules than in the past since any deviation from the negotiated balance of right and obligations is more likely than ever to affect them, directly or indirectly.[78]

This decision was adopted in *Korea – Diary*, when Korea argued that there is a requirement for an economic interest to bring a matter to the panel and that EC had failed to meet that requirement.[79] Indeed WTO members have been allowed to bring complaints

[77] *EC-Banana III*, Op.cit., Paragraph 132
[78] Ibid Paragraphs 135-138.
[79] *Korea –Diary: Definitive Safeguard measures on inputs of certain Diary products*, Panel Report WT/DS98/R and corr. 1, adopted 12, Jan, 2000 DSR 2001:13 at para 7.13.

against the violation of WTO Agreements even though such violations were to the detriment of other members.[80]

These decisions of the Appellate Body have far reaching implications, as it is conceivable that all WTO members have an interest in any other member's violations of any of the covered agreements, regardless of their commercial interest in the issues.

6.6.2 Third Parties

If any member believes that it has a 'substantial interest' in a matter before a panel, it can generally participate in the case as a third party. The DSU fails to define the term 'substantial interest', but in practice third party participation requests are generally approved at the DSB without substantial comment.[81]

Third parties can play an important role in the dispute settlement process and are encouraged to have meaningful participation. The DSU facilitates this in three different ways (1) third parties receive submission of the parties to the dispute to the first panel meeting in a timely fashion; (2) third parties make submissions to the panel and have their arguments reflected in the panel reports; and (3) third parties present their views at a meeting with the panel. Third parties can choose to participate both in writing and orally, or they may choose simply to follow the progress of the case and obtain the relevant documents with out observing the third party session.[82]

[80] See for instance, *US. Section 211* omnibus Appropriation Act of 1998 Appellate Body Report WT/DS176/AB/R, adopted 1st Feb., 2002, para 275-281, 309.
[81] Simon Lester et al. Op.cit., p. 194
[82] Ibid

Members who participate in a dispute as third parties can also participate in any appeal of the panel report as "third participants".[83]

6.5.3 Amicus Curiae

One of the most controversial issues that has arisen at the WTO in recent years is whether Panels and the Appellate Body may consider unsolicited amicus curiae briefs submitted by normally non-state actors such as private industry groups, non-governmental organizations (NGOs) and academics. To further complicate matters, both the DSU and the working procedure for Appellate Review did not address the issue specifically.

The issue of amicus submission came to the fore in the highly visible and controversial *US- Shrimp* dispute. The dispute gained attention when environmental groups worldwide publicized the issues involved, and two NGOs attempted to influence the process by submitting amicus briefs to the panel. The panel refused to consider the content of these submissions, concluding that although it had the authority under Article 13 to seek information from 'any relevant source', it would be 'incompatible' with the DSU to accept unsolicited information from a non-governmental source. Instead, the panel attempted to reach a compromise position by permitting the parties to the dispute to attach the NGOs brief as an appendix to their own submissions.[84]

However the Appellate Body held that given the breath of a panel's mandate to seek information under Article 13 of DSU, a panel has the authority either to accept and

[83] See Panel Report *India – Patents (*EC), paras 7.16-7-7.19
[84] Panel Report, *US-Shrimp* para 78, see also Appellate Body Report, US-Shrimp, Paras 79-91

consider or to reject information and advice submitted to it, whether requested by the panel or not.[85]

Thus, with regards to panel Procedures, the Appellate Body has, on several occasions confirmed that the panel is permitted, by virtue of the powers vested on it by the DSU,[86] to accept and consider or to reject such non-requested amicus curiae submissions.[87] Notwithstanding this position of the Appellate Body, many WTO members are of the strong view that the DSU does not permit panel to accept and consider such unsolicited amicus curiae submission. According to them, dispute settlements are purely between members and they do not see any role for non-parties especially non-governmental organization in the proceedings.

In fact, only a few panels have made use of their discretionary right to accept and consider unsolicited amicus curiae submissions. This was the case in *India-Quantitative Restriction* where the panel accepted the submissions of the International Monetary Fund.[88] Consequently, interested entities that are not parties or third parties to a dispute have no legal right to be heard by a panel.

On the other hand, the Appellate Body has frequently received amicus curiae submission, if the submission is attached to a participant's written submission, the Appellate Body considers it as an integral part of the participant's submission, and the participant assumes responsibility for the contents of the amicus curiae submission.[89]

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[85] Ibid para 108
[86] Article 13 of the DSU which permitted it to seek information from any relevant source; Art 12.1 allowed the panel to add to or depart from its working procedure contained in Appendix 3
[87] US-Shrimp, op.cit paragraph 105-108
[88] *India –Quantitative Restrictions on imports of Agricultural, Textile and industrial Products* Panel Report, WT/DS90/R, adopted 22 September 1999 as upheld by the Appellate Body Report, UT/DS90/AB/R, DSR 1999: v, 1799.
[89] *US-Shrimp,* Appellate Body Report, op.cit paragraphs 89 and 91

However, if the Appellate Body received the amicus curiae submission directly from the non-participant, the Appellate Body would not consider it.[90]

Notwithstanding this attitude of the Appellate Body, it has maintained that in line with the power vested on it by the DSU[91], it had the right to accept and consider any information including unsolicited amicus curiae submission which it considers important and useful in deciding an appeal.[92]

Accordingly, the Appellate Body adopted additional procedure in the *EC-Asbestos* dispute by requiring all the entities that intended to file amicus curiae submission to apply for leave to file them. However, the Appellate Body denied all the applicants leave to file the submissions.[93] Expectedly, most WTO members, except the United States and a few developed countries condemned the Appellate Body's adoption of additional procedure, and in a special session of the general council where the issue was discussed, concluded that it is not acceptable for the Appellate Body to accept and consider amicus curiae submission.[94] Thus, even though only a minority of members initially supported, or continue to support, the decision to allow these submissions, the situation remains that NGOs and other non-state actors can submit unsolicited amicus briefs to both the panels and the Appellate Body. Be that as it may, 'acceptance of any amicus curiae brief is a matter of discretion, which we must exercise on a case by case basis'.[95]

[90] *See US-lead Bismuth* 11, Appellate Body Report, Paragraph 40-41
[91] See Article 17.9 of DSU
[92] *US-lead Bismuth* 11, Appellate Body Report, op.cit paragraph 43
[93] *EC-Asbestos*, Appellate Body Paragraph 52-55
[94] General council, minutes of the meeting of 22 November 2000, WT/GC/M60.
[95] *EC-Trade description of sardines*, Appellate Body Report, Adopted 23 Oct. 2002, WT/DS23/AB/R Para 165-170.

6.6.4 Judicial Economy and standard of Review.

The principle of judicial economy is recognized in WTO jurisprudence and, in practice, panels frequently rely on it and do not examine all the legal claims made by the complainant, but address only the ones that are necessary to resolve the matter at issue in the dispute. Thus, in *US-Wool shirts and Blouses,* the panel decided to address only the legal issues it thinks are needed in order to make such findings as will assist the DSB in making recommendations or in giving rulings with respect to India's claims in the dispute.[96] The Appellate Body upheld the panel's findings and rejected India's argument that pursuant to Article 3.2, panels were obliged to address all legal claims raised by the parties.[97]

In *EC-Poultry,* the Appellate Body recalled and agreed with the findings in *US-Shirts and Blouses,* that nothing in Article 11 required panels to examine every legal claim raised by the complaining party, and it seemingly extended the principle of judicial economy by holding that the panel has similar discretion to 'address only those arguments it deems necessary to resolve a particular claim.[98] Thus, the Appellate Body rejected Brazil's argument that the panel had not made an objective assessment of the matter before it because the panel had failed to consider various arguments made by Brazil regarding GATT/WTO Jurisprudence.[99]

The principle of judicial economy does have its limits. For instance, in *US-lead and Bismuth 11*, the Appellate Body rejected an argument that the panel was required to

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[96] *US-Wood Shirts and Blouses: Measures Affecting imports of woven Wool Shirts and Blouse from India, panel Report*, WT/DS33/R and Corr.1, as modified by Appellate Body WT/DS33/AB/R, adopted 23 may, 1997 DSR 1997:1,323 para 18-19

[97] Ibid paragraph 19.

[98] *EC-Poultry: Measures Affecting the Importation of Certain poultry products, Appellate Body Report,* WT/DS69/AB/R, adopted 23 July, 1998, DSR 1998, v. 2031, paragraph 133 and 135

[99] Ibid para 136

exercise judicial economy and not address issue which did not need to be addressed for resolving the dispute at hand. In its ruling, the Appellate Body underscored the fact that the exercise of judicial economy was within the discretion of a panel, but that a panel was never required to exercise judicial economy.[100]

In practice, some panels consider additional issues that are seemingly unnecessary to resolve the dispute, as an alternative basis for its findings. They often take this approach so that if the Appellate Body reverses one aspect of the panel's reasoning on an issue, the Appellate Body can still uphold the alternative finding.[101]

With regards to standard of review, Article 11 of the DSU stipulates that a panel must make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreement, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. In some cases, members who 'lose' at the panel stage of proceedings (both complainants and respondents) base an appeal in part on an allegation that the panel failed to make 'objective assessment' of the matter and the facts. In several early cases, the Appellate Body appeared to set a high standard for such claims characterizing to conduct an objective assessment as a 'very serious allegation' that challenges the 'very core of the integrity of the WTO dispute settlement process itself'.[102]

In *EC-Hormones,* the EC argued that the panel failed to make an 'objective assessment of the facts' by 'disregarding and distorting' the evidence submitted and the

[100] Appellate Body Report, US-lead and Bismuth 11, op.cit para. 71
[101] Simon Lester et al op.cit p.217.
[102] Appellate Body Report, *EC-Poultry*, para 133

opinions and statements made by the scientific experts advising the panel.[103] The Appellate Body explained that making a claim that a panel has disregarded or distorted evidence is a claim that the panel has denied the party submitting the evidence 'fundamental fairness' or 'due process of law or natural justice'[104]. It further noted that the issue of whether a panel has made an objective assessment of the facts under Article 11 of the DSU was a 'legal question' and thus within the scope of Appellate review under Article 17.6 of the DSU.[105] The Appellate Body then considered the four evidentiary issues for which the EC claimed that the panel failed to make an objective assessment. In rejecting all of the claims, the Appellate Body made clear that, 'it is generally within the discretion of the panel to decide which evidence it chooses to utilize in making findings', and further that 'the panel cannot realistically refer to all statements made by experts advising it and should be allowed a substantial margin of discretion as to which statements are useful to refer to explicitly'.[106] In addition, while recognizing that the panel misinterpreted a portion of the evidence, the Appellate Body found that the mistakes did not rise, to the level of 'deliberate disregard or willful distortion or misrepresentation' of the evidence.[107]

More recently, however, the Appellate Body seems to have loosened the standard a bit. Thus, different standards of review now apply to the Agreement on Textile and Clothing,[108] Safeguards measures,[109] and the Anti-dumping Agreement.[110]

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[103] Appellate body Report, *EC-Hormones* Para 131
[104] Ibid para 133
[105] Ibid para 132-133
[106] Ibid para 135,138
[107] Ibid para 133, 138, 139, 253(e)
[108] See *US- Underwear: Restrictions on imports of cotton and man-made fibre underwear,* Panel Report, WT/DS24/R, as upheld by the Appellate Body Report WT/DS24/AB/R, adopted 25 February 1997, DSR A997, paras, 7.10,7.12-13
[109] For the standard of Review applicable to safeguards measures; see Adopted pursuant to Article XIX of GATT 1994 and the Agreement on Safeguards
[110] For detailed discussion on the standard of Review applicable to Anti-Dumping Agreement, see Article 17.6 and 17.6(1) of the Anti-Dumping Agreement.

6.7 DEVELOPING COUNTRIES IN THE PROCEEDINGS.

Developing and least developed country members of the WTO face considerable burdens while trying to avail themselves of the benefits of the dispute settlement system. For instance, most developing and least developed countries often do not have a sufficient number of specialized human resources who are experts in the intricacies of the substance of the WTO law or the dispute settlement procedure.

However, the DSU recognizes the peculiar situation of the developing and least developed country members, and has created rules of special and differential treatment to address the situation. Consequently, the DSU made available to developing and least developed country members' additional or privileged procedures and legal assistance in relation to disputes involving them.

First members should give special attention to the particular problems and interests of developing country during consultation.[111] Where consultation involves a measure taken by a developing country member, the parties may agree to extend the regular period of consultation, if after the relevant periods has elapsed, the parties consulting cannot agree that consultation has been concluded.[112]

Second, at the panel stage, where the dispute is between a developing country member and a developed country member, the DSB must, at the request of the developing country member, include at least one panelist from a developing country member in the panel.[113]

Moreover, the panel must accord a developing country member who is a respondent sufficient time to prepare and present its defence. However, this must not

[111] Article 4.10 of the DSU
[112] Ibid, Article 12.10
[113] Ibid, Article 8.10

affect the overall time period for the panel to complete its work.[114] For instance, in the India *Quantitative Restrictions disputes,*[115] the panel upon India's request granted an additional period of ten days to India to prepare its first written submission to the panel, despite the United State's objection.

Third, at the implementation stage, the DSU mandates that particular attention should be paid to matters affecting the interests of developing country members with respect to measures which have been subject to dispute settlement.[116]

The DSU also mandates the DSB to consider what further and appropriate action it might take in addition to surveillance and status reports, if a developing country member has raised the matter.[117] Moreover in considering what appropriate action to take in a case brought by a developing country member, the DSB should take into account not only the trade coverage of the measure complained of, but also its impact on the economy of the developing country member concerned.[118] Thus, in *Indonesia – Autos,*[119] the Arbitrator in determining the reasonable period of time pursuant to Article 21.3(c) of the DSU, took into account not only Indonesia's status as a developing country in determining the reasonable period of time, but also the fact that it is a developing country that is currently in a dire economic and financial situation. As a result, the Arbitrator explicitly granted an additional period of six months to Indonesia for implementation.[120]

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[114] Ibid, Article 12.10

[115] India- quantitative restriction of import of Agricultural, Textile and industrial products; Panel Report, WT/DS90/R, adopted 22 September 1999: , 1799, paragraph 5.10

[116] Article 12.2 of DSU

[117] Ibid, Article 21.7 of the DSU

[118] Ibid, Article 21.8

[119] Indonesia –Autos: certain measures Affecting the Automobile Industry. Arbitration under Article 21.3 (c) of the DSU, Award of Arbitrator, WT/DS54/15, WT/DS55/14, WT/DS59/13, WT/DS64)12, 7 Dec. 1998,DSR 1998, M, 4029 paragraph 24

[120] For other instances of Cases where Article 12.1 was applied, see *Chile – Alcoholic Beverages;* Award of Arbitrator, WT/DS87/AB/R, WT/DS110/AB/R, adopted 12 Jan. 2006, DER, 2000: 1,281 para 45; and *Argentina –Hides and leather, Award of Arbitrator,* WT/DS155/10, 31 August, 2001.

Fourth, Article 24 of the DSU made specific provisions relating to proceedings involving least-developed country member. According to the Article, particular consideration of the least –developed country member at all stages of the dispute settlement proceedings and other members must exercise due restraint in asking for compensation or seeking authorization to suspend obligation against such member.

Fifth, although the WTO secretariat assists all members in respect of dispute settlement at their request the DSU provides for additional legal advice and assistance to be given to developing country members. To this end, the secretariat shall make available a qualified expert from the WTO Technical Corporation Services to any developing country member which so requests. These experts must assist the developing country member in a manner ensuring the continued impartiality of the secretariat.[121]

Finally, developing and least developed country members of the WTO can receive effective assistance in dispute settlement from the recently established Advisory Centre on WTO law.[122] The Advisory centre provide legal services by representing the country before Panel or Appellate Body at a discounted fee or by offering legal advice and training to developing and least developed countries that are WTO members or accession candidate. Since July 2001, the Advisory centre has regularly represented developing country members in WTO dispute.

6.8 MEASURING THE EFFECTIVENESS OF THE DSU

Measuring the success of WTO dispute settlement is difficult. Does success mean that many disputes have been brought, indicating that members have confidence in the

[121] Article 27.2 of the DSU

[122] Established by the Agreement – Establishing the Advisory centre on WTO Law signed by 29 members of the WTO in Seattle on 1 Dec. 1999. The Agreement entered into force on 15 June, 2001 and the official opening of the Advisory Centre in Geneva took place on 15 June, 2001. Obtained from WTO Press release available at www.wto.org

system? Does it mean that a high percentage of disputes are resolved before the panel process begin? There are a wide range of factors that could be taken into account in evaluating the system, but several problems in the current operation of the WTO dispute settlement system still persists. Notable among these are; decline in the number of cases brought before the DSU which may be a sign of dissatisfaction among users of the system and implementation problems and delays; though these problems do not raise immediate threat to the WTO dispute settlement system. However a major threat to the system is concerns raised by the United States that its sovereignty is threatened by the WTO dispute settlement system.[123]

The United States as the only super power and a major player in the international economy is a traditional user of the DSU system. In the process issues concerning its sovereignty have been raised especially where the United States loses a case and has been required to implement decisions of the WTO tribunals.

Ultimately, the United States will have to decide if it is in its long-term interest to have a rule-based dispute settlement system which clearly is the preferred outcome. Thus, as China, India and others become more and more economically stronger, with the concomitant shrinking proportion of world economic activity represented by the United States, its dominance of the world economy will end soon. At that point, it seems clear that a long-standing, effectively-operating rules-based system will be in the US interest, especially given the past and current ability of the US to shape those rules. The view that the WTO threatens US sovereignty is at least a shortsighted view of the world.[124]

[123] W.T Davey, 'The WTO looking forwards' (2006) 9 journal of international Economic Law at 9-23
[124] Ibid

Finally, although the activities of the WTO Dispute settlement system has been described as successful by some scholars,[125] it is still debatable whether the dispute settlement mechanism as presently constituted under the DSU is capable of effectively and efficiently resolving trade disputes under international law.

[125] W.J Davey, 'The WTO dispute Settlement in Trade, Environment and the Millennium 119, Gory P. Sampson & W. Bradnee Chambers Edition, (United Nations University Press; New York, 1999) a page 157.

CHAPTER SEVEN

SUMMARY CONCLUSION AND RECOMMENDATIONS

7.1 SUMMARY

Established on 1st January, 1995, the World Trade Organisation (WTO) replaced the General Agreement on Tariffs and Trade GATT. The most significant difference between WTO and GATT lies in its unification of all trade policy and trade related matters under a single undertaking with the WTO as the only umbrella organization responsible for overseeing the implementation of all agreements – multilateral (signed by all WTO members) and plurilateral (signed by a group of members for specific issues) – that have been negotiated under the Uruguay Round (U.R.) or will be negotiated in the future. The WTO appears to be the greatest supranational, international economic institutional structure established to promote international trade and globalization.

Most developing countries Nigeria inclusive have seen their independent policy-making capacity eroded and have to adopt policies made by global entities, which may on balance be detrimental to the countries concerned. The developed countries on the other hand where the major economic players reside and which also control the processes and policies of international economic agencies, are better able to maintain control over their own national policies as well as determine the policies and practices of international institutions and the global system.

Furthermore, developed countries are well organized within their own countries, with well staffed departments dealing with international trade and finance and with university academics and private and quasi government think – tanks helping to obtain information and map policies and strategies. They also have well-organised associations and lobbies associated with their corporation and financial institutions, which have great influence over the government departments. The developed countries also have

institutions and mechanisms helping to coordinate their policies and positions; for example, the European Commission, the OECD and the G7, and their subsidiary bodies and agencies.

In contrast, the developing countries are not well organized within their own countries. The government departments dealing with the interface with the global economy are understaffed, especially in relation to the rapid developments in international trade matters and complexities involved in negotiating agreements. The academic sector and the few think – tanks which exist are not geared up to obtain and access information on international trade trends, and less still to formulate policy proposals that governments can make use of. The links between these intellectual sectors, NGOs, and Governments are also often weak. The business and financial community is not organized well enough to monitor global trends or to lobby governments on international trade issues. At the regional level, there is increasing collaboration among the countries through regional groupings[1] however, cooperation is still not as sophisticated as in the European Union.

A theme central to this dissertation is to examine the speed at which developing countries such as Nigeria join these international organizations and sign various international trade agreements hoping that by doing so, they will reap huge economic benefits. The benefits and costs of trade liberalization (the driving force of globalization championed by the WTO) for developing countries constitutes an increasingly controversial issue. The conventional view that trade liberalization is necessary and has automatic and generally positive effects for development is being challenged empirically and analytically. It is thus, timely to examine the record and to formulate appropriate approaches towards trade policy in developing countries.

[1] For e.g ECOWAS, SADC, ASEAN etc.

The notion that all are gainers and there are no losers in trade liberalization has proven to be overly simplistic. Some countries have gained more than others and many (especially the poorest countries) have not gained at all but may have suffered severe loss to their economic standing.

The GATT which transformed to the WTO was negotiated and signed in 1947 when many developing countries (Nigeria inclusive) were still under colonial rule. Thus, they actually did not participate in the negotiation process. By 1995, when the WTO came into force, developing countries who signed the agreement did so because several multilateral institutions and research institutions projected large global gains particularly for developing countries if they signed the agreement. However, they were deeply disappointed.

The foregoing notwithstanding, governments in developing countries are still vulnerably and helplessly opening up their local economies to the global markets and aligning them with global policies by lowering their customs tarrifs or making labour markets and environmental standards more flexible in compliance with the terms of these international trade agreements.

In summary, therefore, it must be stated that international trade no doubt is a matter of vital importance for developing countries since it can stimulate growth and contribute to poverty reduction. However, the strategy of major developed countries has been to seek several concessions from the developing countries simultaneously through bilateral, regional and multilateral routes without a corresponding gain to the developing countries. This study therefore articulates the position of Nigeria in the multilateral trading system.

7.2 CONCLUSION

Nigeria is blessed with abundant resources which if properly exploited, processed and managed will enable her to favourably compete with the developed countries in the global market. The challenge now is for Nigeria to use the enormous resources it has to build a coherent, internally consistent, self sustaining economy, which will be competitive in the world market, and can access the various international institutions available to facilitate economic development.

This work examined the WTO's agreements on Trade Related Aspect of Intellectual Property Rights (TRIPs) and General Agreement on Trade in Services (GATs) within the multilateral trading system. In particular, it evaluated the challenges faced by developing countries such as Nigeria in the strict implementation of these agreements. The dissertation makes the following findings as discussed hereunder:

7.2.1 The chief agents of globalization (the WTO inclusive) have canvassed forcefully that liberalization of trade under the various WTO agreements aims at growth of the economies of third world countries. However, in practice this does not seem to be the case. Infact WTO/GATs only benefit the rich and developed states as the following example, illustrate. Trade in services dominates the economic landscape of advanced economies, accounting for close to 70 percentages of production and employment in the Organisation for Economic Co-operation and Development (OECD) countries. Secondly, despite its small size, the United Kingdom is the fifth- largest trading nation in the world. Due to its reliance on trade, the UK has a major stake in maintaining a vigorous and open world trading system; and it favours the launch of a new round of trade negotiations focused on further liberalization of agriculture industry products and services. Finally, International services markets offer huge opportunity for U.S firms and their employees.

The foregoing explains why rich nations who have very strong influence in the WTO will not allow WTO agreements to favour developing countries since their market are target of the developed nations who are members of the WTO.

7.2.2 Nigeria's economy which basically has been an open one allowing free market access for both local and foreign investors has been further widened with little or no proper regulation. In a bid to attract foreign investment the Federal government over the years, particularly from 1988, to date had tried to create a conducive environment for foreigners to operate. Laws, regarded as obnoxious were repealed and new "liberalization laws"[2] (which allowed foreigners to own and control their investment 100 per cent in Nigeria). The essence was to link Nigeria up with the globalization of finance and investment which has become the new world order. By brutally hooking up to the globalization train, the Nigerian economy has been left unprotected with all the attendant consequences.

7.2.3 The integration of world economies as championed by the WTO has tended to encourage the movement of capital which is an essential ingredient in productive activities and the sustenance of profit driven economic ventures. On the other hand this has not been accompanied by a comparable movement of people across national borders. Thus, whereas capital could easily move from developed to developing countries, there is no corresponding movement of Labour from developing countries to developed Countries where the unskilled labour force is needed. The use of migration laws, strict travel regulations and outright travel bans are employed to control the movement of labour. This research finds that developed countries are rich in capital which moves around the globe looking for the highest returns; but on the other hand developing countries have an

[2] Nigerian Investment Promotion Commission (NIPC) and Foreign Exchange (Monitoring and Miscellaneous) Provision (FEMMP).

abundance of unskilled workers who want to move around the globe in search of better jobs, but are highly restricted. For the past couple of decades the United States and EU have pressed with considerable success, for liberalization of capital markets' which enable investment to flow freely round the world arguing that this is good for global efficiency, but have always tightened the rules for liberalizing migration. The only exception being high skilled labour because of the benefits that will accrue to them. This in itself amounts to taking the developing countries most valuable intellectual capital without compensation; after the developing countries have invested their scarce resources in educating these personnel the developed countries often inadvertently try to skim off their best and brightest.

7.2.4 The complex nature and far-reaching consequences of the GATs and TRIPs negotiation necessitate or require a painstaking and sophisticated process in order to reap the benefits of trade liberalization while avoiding the ills. As a result, developed countries (particularly the U.K. and USA) adopt a multi-faceted approach in the ongoing WTO Doha Round negotiations: These include in the case of the U.K; the use of the European Union[3]; the Law Society,[4] the Department of Trade and Industry and the House of Commons Select Committee on Trade and Industry.

In the USA for instance, the office of the U.S Trade Representative (USTR) is responsible for developing and coordinating U.S. International trade policy[5]. Furthermore, a Private Sector Advisory Committee was established by the US Congress to ensure that the US trade policy adequately reflects US commercial and economic interests. The advisory committees provide information and advice with respect to US

[3] The umbrella body of all European member states.

[4] Which is the regulatory and representative body for solicitors of England and Wales

[5] The USTR is part of the Executive Office of the President. USTR also provide detailed briefing on a regular basis for the Congressional Oversight Group.

negotiating objectives before entering into trade agreements and on the operation of any trade agreements once entered into. This research finds that developing countries on the other hand are not so endowed as they lack this effective mechanisms for approaching international trade negotiations.

7.2.5 Finally this research finds that, the application of Intellectual Property Rights (IPRs) to plant genetic material can and infact do result in constraining farmers in their use of seeds since patented seeds varieties cannot be grown for future use by a person not holding patent rights. Thus, farmers face the threat of becoming dependent on for vital supplies such as seeds. Over a long period this might reduce breeding alternative, for local and indigenous farmers and communities. Strong IPRs systems, thus can promote genetic erosion which entails serious implications for the genetic pool. Furthermore, the TRIPs Agreement grants holders a right to exclude third parties from infringing on their monopoly. This monopoly can be used negatively and can thus create public health concerns in developing countries by closing avenues of generic drug supplies.

7.3 RECOMMENDATIONS

7.3.1 One of the major problems militating against national development is policy inconsistency. It is thus recommended that government policies on trade should be consistent and properly coordinated. Long term policies should be formulated with rolling plans and milestones to ensure effective implementation: A good policy if properly implemented can transform the economy. Thus appropriate policies and laws should be formulated to check the effect of globalization and trade liberalization as they affect the economy.

Presently, Nigeria's current policies and laws on trade liberalization are simply not adequate. The strict adherence to opening up of the economy as propounded by the WTO and other agents of globalization has exposed Nigeria's market to the influx of all

kind of foreign goods (ranging from hardware to consumables such as soaps, and biscuits).

Thus whereas major developed countries in the America and Europe still engage in protectionism, Nigeria on the other hand is committed to opening up its economy as clearly stated in the Vision 2010 document. Specifically, chapter III paragraph 61 and 62 provides that:

> In view of the lessons of the present global and Nigerian economic realities, Nigeria's economic aspiration shall hence forth be: to make Nigeria a major industrialized nation and economic power that continually strives for sustained economic growth and development towards improving the quality of life of Nigerians.

The elements of these aspirations amongst others include;

> Promotion of entrepreneurship and competition within the ambit of fair, equitable and enforceable laws; and *opening, up the economy to participation by indigenous and foreign investors.*[3]

From the foregoing, it can be stated that Nigeria has failed to learn from the lessons of China and India who first developed a virile manufacturing based economy before opening their markets for competition and participation to foreigners. Here in Nigeria, the reverse is the case. We thus recommend that Nigeria should adopt the method of China and India by first amending the "liberalization laws" as presently constituted and secondly enacting new laws and policies that will not only protect infant industries but are also consistent with her development objectives. This has worked effectively for the two nations and has made them leading exporters of manufactured goods in the global economy today. In this regard, it is recommended specifically that the elements of the aspiration in vision 2010 document be amended to include the opening up of the economy in a manner that would not compromise national growth and development. This will

[3] Emphasis supplied.

answer to the worries that globalization will benefit the rich countries only to the detriment of developing countries like Nigeria.

7.3.2 Considerable care must be given to assessing the nature, pace and sequencing of liberalization undertakings and regulatory reform in order to reap the benefits of greater market openness and ensure that public policy goals such as the protection of consumers are attained. These challenges can be particularly acute for developing countries, which have weaker regulatory regimes and enforcement capacities.

Globalization cannot be stopped, it has been, it is trending and will continue to dominate the global landscape. It is therefore opined that each nation should manage globalization as best as it can. Liberalization for developing countries should be very carefully calibrated and the timing for liberalization has to be précised. In this regard it is recommended that the Indigenization Local Content adopted in the Oil and Gas Industry policy should be contemplated for other critical sector of the Nigerian economy especially in the service sector.

7.3.3 Since the Marrakesh agreement, the WTO has acquired certain responsibilities in the liberalization of trade in Goods, Services and Intellectual property as well as capital flows. As globalization continues to deepen and widen, the WTO and other international financial institutions must discard conservatism in preference for better tool of economic management that will cater for the needs of all, especially developing countries.

To be sure, the WTO still has a long way to go in trade reform. Protectionism, though waning, is still a common place. Infact, the WTO appears almost helpless in stopping the EU from providing subsidies to their farmers despite its serious consequences on global trade in agricultural products.

As a third world country, Nigeria needs more protection of its economy. Thus the liberalization laws should have restriction on the free inflow of foreign goods except in

areas where local substitutes are completely unavailable. Furthermore, it is recommended that developing countries approach trade policy formulation like the developed countries. Nigeria must create the infrastructure and advisory bodies with the necessary capacity to advise or make input into her trade polices and agreement. This kind of robust approach will put Nigeria and the developing countries at par and not left behind as it is presently the case.

7.3.4 Nigeria has so far, not benefited significantly from globalization. But this need not be so in view of the country's great potential and resource endowments: huge amounts of natural resources (oil and gas, solid minerals) a vast, arable agricultural land and a sizable population. Thus the insignificant benefit notwithstanding, the choice is not for Nigeria to retreat from globalization, which has become an economic, political and social reality. Rather it is for the country to meet the major challenge of enhancing the economy's competitiveness. This requires designing and implementing sound economic policies and activities aimed at transforming the economy from a resource-based economy to an industrial and knowledge-driven one so as to turn globalization into a positive development for the country.

Specifically, the following deserve serious consideration:

(i) Promotion of manufactured products

Dependence on primary commodity exports has not significantly aided Nigeria's integration with the global economy nor minimized its marginalization, even though the economy is open. The development of the economy will therefore require a major commitment to policies and institutions that promote manufactured exports in areas of comparative advantage, as well as focus on the recovery of the real sector of the economy.

(ii) Adequate Infrastructure

Policy must continue to focus on adequate provision and rehabilitation of infrastructure – Electricity, fuel supply, water supply, transportation, telecommunication etc, as a critical element of enabling environment for private sector led growth.

Furthermore improving infrastructure will greatly encourage foreign investment as most foreign companies will prefer to come and set up industries in Nigeria especially because of the availability of cheap labour. The multiplier effect of outsourcing cannot be over emphasized in terms of employment generation, technology transfer, quality products and financial gains resulting from exports to smaller African states.

In addition, as observed earlier, developed countries often adopt a multifaceted approach to WTO negotiations. Infact the WTO has been criticized for promoting inequality among states and thereby undermining sovereignty in the manner decisions are taken. This can be seen in the fact that some members are excluded from the "Green room" negotiations while a few members are invited. And yet, decisions which emerge from the Green rooms are to be implemented by all members. Thus, whereas developing countries are not invited for negotiations, yet decisions that come from the meeting still affect them. In addition, it has been said that developing countries are forced not to oppose the outcome of the green room meetings and they are coerced to ratify treaties. Example is given of the TRIPS which was entered into by developing countries under a backdrop of coercion and threats by developed countries. In this light, we recommend that developing countries speak together with one voice and strongly resist these tactics of developed countries as was done in Seattle and as they are doing now in the present Doha negotiation.

7.3.5 There is very little doubt that the dramatic changes that occurred with the IPR regime with the emergence of the TRIPS have significant implications in the area of

Public health delivery system of the developing countries as noted earlier. However, despite the "One-Size-fits-all" scheme on international IPR system created by TRIPs some flexible provisions within still remains. Lending support to these flexibilities is the Declaration on the TRIPs Agreement and Public health adopted by the Ministerial Conference of the WTO on Nov. 14, 2001 commonly referred to as the Doha Declaration.[4] The declaration acknowledges the importance of IP for development of new drugs,[5] but it also recognizes the concerns about the effects of IPRs on prices. The ministers pointed out, "TRIPs Agreement does not and should not prevent members from taking measures to protect Public health. Accordingly, while reiterating our commitments to the TRIPs agreement, we affirm that the agreement can and should be interpreted and implemented in a manner supportive of WTO members right to protect public health and, in particular, to promote access to medicines for all"[6]. The members are to implement the minimum standards laid down in the TRIPs Agreement, but the Doha Declaration recognizes that they may use, to the full, the flexibilities in the agreement. We recommend that developing countries avail themselves of these provisions to avoid the restrictive effect of patent monopoly enjoyed by the Western multinational pharmaceutical companies over essential drugs necessary for effective and efficient public health service delivery system in their countries. This should also go for genetic seedling breeding in the light of the fact that agriculture is a mainstream of the economies of most developing countries. Bulling and subtle threat form developed countries multira tural companies should be re

[4] Declaration on the TRIPs Agreement and Public health WT/MIN(01)/Dec/2
[5] Doha declaration, Para. 3
[6] Ibid, Para. 4

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