Chapter V

TRIPS AGREEMENT, TEXTILE AGREEMENT, ANTI DUMPING MEASURES AND THE DEVELOPING COUNTRIES
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A. Background of TRIPS Agreement

Prior to the 1994 GATT negotiation the Intellectual Property Rights could be protected by the National or Municipal laws within the territory of a state concerned. In 1994, GATT negotiation, the intellectual property rights was discussed first time under the concept of multilateral trade negotiation and with the name of TRIPS. Intellectual Property Rights were given the large area of protection due to the development of science and technology and international trades because the world community thought that unless and until the holder of the an intellectual property rights is provided greater protection, science, technology, literature etc can not be developed. It is natural inclination of a person that he must be paid for his labour. On this concept if an inventor is not provided protection in the market of the foreign states he will not apply his intellects for the future invention and the wheel of the development shall come to stand still.

The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) brought about a very important change in international Standards relating to intellectual property rights. Because of its far-reaching implications, particularly with respect to developing countries, the agreement has been of the most controversial components of the WTO system. There was strong disagreement on the scope and content of the Agreement emerged during the Uruguay Round negotiations, both between the developed and the developing countries and among the developed countries themselves.

Implementation of the Agreement and its review under the "built-in agenda" has also been contentious with regard to many aspects.

Many developed countries particularly, United States insisted upon the negotiation and adoption of the standards on intellectual property right (IPRs) in the Uruguay Round, based on the argument that strengthened protection of IPR would promote innovation as well as foreign direct investment (FDI) and technology transfer to the developing countries. Although the TRIPS Agreement only became effective in advanced developing countries on January 1, 2000, meaning that there has not been much time to assess its impact, most developing countries still remain unconvinced about the benefits that they will obtain from the implementation of the new IPR standards. Moreover, many of them fear that the costs to be paid may be too high, particularly in critical areas such as public health. Essentially, many developing countries feel that despite the balance sought in some provisions, the Agreement mainly benefits technology-rich countries. There are a number of reasons for these concerns.

First, higher levels of IPR protection do not appear to lead to tangible increases of FDI in or technology transfer to developing countries. The evidence on the relationship between IPR protection on the one hand and FDI and technology transfer on the other continues to be inconclusive. In addition to that the share of developing countries in world research and development expenditures remains very low (only four percent of the total).

Second, in some sectors IPRs appear to act as a powerful barrier to access to technologies and products, particularly by the poor. This is notably the case in relation to pharmaceuticals. By their very essence, patents enable pharmaceutical manufacturers to charge higher price than those that would have existed in a competitive environment.

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The AIDS crisis in Africa and growing evidence about the negative implications of Patents for access to medicines by the poor, have brought the relationship between TRIPS and health to the forefront with more than thirty million people living with HIV, most of them in the poorest regions of the world, the need to address the problem of access to patented medicines has emerged as a global priority.

Third, the adoption of the TRIPS Agreement as a component of the WTO system\(^5\) means that any controversy relating to compliance with the minimum standards established by the Agreement should be resolved under the multilateral procedure of the WTO. The adoption by another Member of Unilateral trade sanctions would be incompatible with the multilateral rules. Any complaint should be brought to and settled according to the rules of the Dispute Settlement Understanding (DSU).\(^6\)

Fourth, Article 66.2 of the TRIPS Agreement establishes an outright obligation on developed countries “to countries incentives to enterprises and institutions” in their territories for the transfer of technology to the least developed countries. Though Article 66.2 leaves a great deal of leeway to developed countries to determine what kind of incentives to provide, it does require the establishment of a system to encourage technology transfer (including technology protected under intellectual property rights) to the least-developed countries. The provision also provides a general standard to judge the appropriateness of such incentives, i.e., that they should enable the least developed countries “to create a sound and viable technological base”. This obligation remains unfulfilled.

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\(^5\) The TRIPS Agreement is contained in Annex 1C to the Marrakesh Agreement Establishing the WTO.

B. TRIPS Cases and TRIPS Principle of Interpretation

(i) TRIPS Cases

The TRIPS Agreement has been one of the most controversial components of the WTO system. It has given rise to a large number of proceedings under the Dispute Settlement Understanding (DSU), involving alleged violations by the developing and the developed countries, even before January 1, 2000 when the core of the obligations imposed by the Agreement entered into force in the advanced developing countries. Twenty-four complaints have dealt with the TRIPS Agreement (as of June 30, 2002); most of them initiated by the United States and EC communities and their Member states. Six cases involving the TRIPS Agreement have already been decided by panel or the Appellate Body.7

1. Mailbox cases8

In this case two separate complaints brought against India by the United States and the EC and their Member states, argued that India had failed to provide a mechanism for implementing the “mail box” to be established in accordance with Article 70.8 of the TRIPS Agreement. India was found to have failed to comply with its obligations under this provision, since there was no legal basis procedural or substantive for the grant of exclusive marketing right. When a product that was the subject of a patent application under Article 70.8 become eligible for protection under Article 70.9 of the Agreement.

In order to comply with article 70.9, the President of India, on December 31, 1994 promulgated an ordinance (the Patents Amendment Ordinance 1994) so as to provide a means for the filing and handling of Patent applications for pharmaceutical an agricultural chemical product, and for granting of exclusive

marketing rights. The ordinance was issued on the basis of the President’s constitutional power to legislate when Parliament is not in session but, without Parliament’s confirmation, it lapsed on March 26, 1995. The exclusive marketing right "was later implemented by the Patent (Amendment) Act, 1999.

2. Canada- Term of Patent Protection\(^9\)

This case brought by the United States against Canada with respect to the extension of the term of Patent granted before the entry into force of the agreement (Article 70.2). In this case the United States challenged section 45 of the Canada’s patent Act. It claimed that the Patent protection term of seventeen years (counted from the date of grant) accorded to patent application filed before October 1, 1989, often ended before twenty years from the date of filing.

The United States argued that in pursuant to Article 33 and 70.2 of the TRIPS Agreement. Canada was obligated to make available a term of protection that lasted at least twenty year from the date of filing to all inventions which enjoyed patent protection on January 1, 1996, the date on which the TRIPS Agreement went into effect for developed countries, including those protected by the old Patent Act.

The Canadian law was found inconsistent with the Agreement in this respect and violation to the TRIPS Agreement.

3. Canada- Patent Protection for Pharmaceutical products\(^10\)

This case in between developed countries, in which the issue of "exceptions to Patent “right” brought by the EC and their member States against Canada.\(^11\) This case addressed the TRIPS-consistency of section 55(2) (i) and (2) of the Canadian Patent Act, as revised in 1993. Section 55(2) (1), the


"early working", "regulatory review" or "Bolar" exception, permitted the use of a patented invention, without the consent of the Patent holder, for testing required for the submission of date to obtain marketing approval for pharmaceutical or other products. Section 55(2) (2) allowed potential competitors of the patent holder to manufacture and stockpile pharmaceutical products covered by the Patent during the six months immediately prior to the expiry of the twenty-year patent term. The panel found that section 55(2) (1) was consistent with the TRIPS Agreement but section 55(2) (2) was not.

4. United States- section 110(5) of the US Copyright Act\textsuperscript{12}

This case also involved the issues of exceptions brought by EC and their Member States against United States for Copyright upon a complaint brought by the EU, the panel found that section 110(5) (b) of the U.S copyright law\textsuperscript{13}, relating to the enjoyment of non-dramatic musical works by customers in business premises, such as food service and drinking establishments under a certain size limit was inconsistent with Article 13 of the TRIPS Agreement.

5. United States- section 211 Omnibus Appropriation Act of 1998

The last case, brought by the EC and their member States against the United States,\textsuperscript{14} involved the protection of trademark. This case is also known as the "Havana Club" case.

A Panel considered the consistency of section 211 of the U.S. Omnibus Appropriation Act of 1998 which deals with trademarks, trade names, and commercial names that are the same as or substantially similar to trademark, trade names, or commercial names that were used in connection with businesses or assets that were confiscated by the Cuban Government on or after January 1, 1959. The panel was requested to examine the consistency of that provision with Article 2.1, 3.1, 4. 16.1 and 42 of the TRIPS Agreement, in

\textsuperscript{12} Report of the WTO penal, United States- section 110(5) of the Us Copyright Act, WT/DS 160/R (2000).
\textsuperscript{13} United States Copyright Act of 1976, as amended, pub L.94-553, 90 stat. 254.
conjunction with the relevant provisions of the Paris Convention (Article 2(1), 6 bis, 6 quienquies, and 8). The Panel also considered whether the Agreement was applicable to trade names (as argued by the EC), but concluded that trade names were not a category of TPR covered by the Agreement. The Appellate Body reversed several findings of the panel; in particular, it considered that trade names were covered by the TRIPS Agreement since it incorporates the Obligations under the Paris Convention.

(ii) TRIPS Principle of Interpretation

The rulings in the six cases discussed above, as well as other WTO jurisprudence, allow one to draw some lessons on the interpretation of the TRIPS Agreement. Though Panels and Appellate Body reports are not strictly precedential in the sense that they do not be future opinions on the same matter, they do provide guidance to both government and the DSU bodies as to how future cases are likely to be decided.

The GATT/WTO Panels and Appellate Body have interpreted the WTO Agreement in accordance with the Principles contained in article 31 and 32 of the Vienna Convention on the law of the Treaties. In accordance with Article 31(1) of the Convention, “a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” The Convention also admits as an element for interpretation the “subsequent practice” by the parties to a treaty, as well as certain “supplementary Means of Interpretation”.

A corollary of these rules of interpretation, addressed in several GATT/WTO cases, is the concept of “effective interpretation” (or “I' effect utile”), which requires that a treaty be interpreted to give meaning and effect to

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all the terms of the treaty. Accordingly, whenever more than one interpretation is possible, preference should be given to the interpretation that will give full meaning and effect to other provisions of the same treaty. The “effective interpretation” principle has been applied by the Supreme Court of Argentina in a case concerning the application of TRIPS Article 70.7 and 70.8.

Panels and Appellate Body have used the negotiation history of the TRIPS Agreement to confirm the literal interpretation of particular provisions. In India-Patent Protection for Pharmaceutical and Agricultural products, for example, the panel used the negotiating history of the TRIPS Agreement to confirm its interpretation of Article 70.8.

One interesting feature is that the negotiation history may include not only the negotiating history of the TRIPS Agreement as such but also the history of the conventions that are specifically referred by the TRIPS Agreement, such as the Paris Convention and the Berne Convention. Therefore, a negotiation that took place more than one hundred years ago, such as in the case of the Paris Convention, may be used as a supplementary means of interpretation of the TRIPS Agreement.

Thus, in Canada-Patent Protection for Pharmaceutical Products, the panel noted that in the framework of the TRIPS Agreement, which incorporates certain provisions of the major pro-existing interpretational instruments on intellectual property, the context to which the Panel may have recourse for purposes of interpretation of specific TRIPS provisions is not restricted to the text, Preamble and Annexes of the TRIPS Agreement itself, but also includes the provisions of the international instrument on intellectual property incorporated into the TRIPS Agreement, as well as any agreement between the parties relating to these agreements within the meaning of Article 31 (2) of the Vienna Convention on the law of Treaties. Also, in the United States section 110(5) of the U.S Copyright Act, the panel supported its interpretation

by reference to the negotiation history of the Berne Convention that has become part of the TRIPS Agreement.\textsuperscript{19}

In the United States section 211 of Omnibus Appropriations Act of 1998 (Havana club), the panel had used the preparatory work of the Paris Convention (1967). The EC argued that such an invocation was erroneous under Article 32 of the Vienna Convention failed to provide a clear indication of the intentions of the negotiators. The Appellate body, however, relied on the negotiating history of the Paris Convention in order to confirm its own interpretation of Article 6 quinquies B of the Convention.\textsuperscript{20}

This jurisprudence indicates clear inclination by Panels and Appellate Body to firmly consider the obligations emanating from the IPR conventions incorporated in the TRIPS Agreement as forming part of the set of Members’ obligations under the Agreement, as well as to have recourse to the negotiation history of the Conventions to confirm their own interpretations. This approach may put an unexpected burden on developing countries, since many of them were not parties to the conventions at the time of the adoption of the Agreement, or were not familiar with developments with respect to the Conventions.

C. Some Other Contentious Issues of TRIPS and Exceptions to Patent Rights

The TRIPS Agreement only incorporates minimum standards for the protection of intellectual property; and constituted neither a uniform law nor an exhaustive codification of IPR law. It deals with some issues relating to intellectual property, but leaves out many others on which it was not possible to reach consensus or which were deemed in appropriate for standardization. In addition to these deliberate “gaps”, there are many ambiguities in the text that

\textsuperscript{19} Report of the WTO penal, United States- section 110(5) of the Us Copyright Act, WT/DS 160/R (2000).
were the result of difficult compromises reached during the negotiations. These gaps and ambiguities mean that Members have been left a certain amount of room for manoeuvre for national level by interpretations that may eventually be provided by panels or the Appellate Body.\textsuperscript{21}

Maintaining the flexibility allowed by the TRIPS Agreement is an important object for developing countries. Thus, in relation to health issues, the African Group and other developing countries have indicated that:

Some provision of the TRIPS Agreement may elicit different interpretations. The room for manoeuvre left serves the purpose of accommodating different positions held by Members at the time of negotiations of the Agreement. It believes that nothing in the TRIPS Agreement reduces the range of options available to Governments to promote and protect public health, as well as other overarching public policy objectives.

The EU and its Members States have also accepted the existence of such flexibility:

The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), which emerged from the Uruguay Round negotiations has, however, sometimes been criticized as limiting policy options in relation to public health concerns. In the view of the EC and their member states the Agreement objectives, principles and purpose (set out in Article 7 and 8), special transitional arrangements and other provisions given these countries sufficiently wide margin of discretion in implementing it. This margin enables them to set up an intellectual property regime that meets their policy needs and is capable of responding to public health concerns.

The extent of the flexibility allowed by the Agreement will ultimately depend upon the interpretation given to particular provisions by Panels and Appellate Body which are expressly prohibited by DSU Article 3.2 from

adding rights and obligations when adjudicating disputes. However, “the line between interpretation and providing clearer parameters of the rights and obligations of the Members under these agreements is often very fine.”

(i) Exception to patent Rights

1. GATT Jurisprudence

The GATT 1947 provides for various circumstances under which the Members may ignore their general obligations under the GATT. Article XX specifically provides for exceptions to GAAT/WTO obligations, including national treatment.22

The United States-Standards of Reformulated and Conventional Gasoline,23 which was the first case to be considered by the WTO Appellate Body ("AB") the Panel had accepted that a policy to reduce air pollution was consistent with measures for the protection of human, animal or plant life or health.

In reviewing the Panel decision, the AB stated that the exceptions listed in Article XX “related to all of the obligations under the General Agreement”, and not only the national treatment and the most favoured-nation cause.24 The AB held that any Article XX analysis is two-tiered. The first question is whether the measure is provisionally justified under the specific exception invoked; if the answer to this question is affirmative, the same measure must be further appraised under the introductory clauses ("or chapeau") of Article XX.

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The AB added that the burden of demonstrating that a measure falling within one of the specific Article XX exceptions does not constitute abuse under the chapeau in its application rest on the party invoking the exception.25

Article XX of GATT has been interpreted narrowly, even in the context of public health issues, For instance, in the Tai Cigarette case,26 decided under the GATT dispute resolution system, the panel applied the "less trade restrictive" test and held that other measures (not simply banning the imports of cigarettes, as the Thai government had done) that were less incompatible with the GATT were available to achieve the intended public health objects.

This extreme interpretation of exceptions has been somewhat qualified by the doctrine established Measures concerning Meat and Meat Products (Hormones) case, in which the Appellate Body held that "Merely characterizing a treaty provision as an "exception" does not by itself justify a "stricter" or "narrower" interpretation of the Provisions than would be warranted by examination of the ordinary meaning of the actual treaty words, viewed in context and in light of the treaty's object and purpose...”27

2. The TRIPS Agreement

Article 8.1 of the TRIPS Agreement provides that:

Members may, in formulating or amending their national Laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital important to their social-economic and technological development, provided that such measures are consistent with the provisions of this agreement.

3. Doha declaration Paragraph 5(b)

The Doha Declaration established in paragraph 5(b) that “Each member has the right to determine what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health crises, including these relation to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency.”

This provision is important for three reasons: first, it clarifies that “public health crises” can represent “a national emergency or other circumstances of extreme urgency”, thereby allowing for the granting of compulsory licenses when provided for under national law and, pursuant to TRIPS Article 31(b), without the obligation for prior negotiation with the patent owner.

Second, the reference to “HIV/AIDS, Tuberculoses, malaria and other epidemics” indicates that an “emergency” may be not only a short term problem, but a long lasting situation, as is the case with the epidemics specifically mentioned for illustrative purposes. This recognition may be deemed an important achievement for developing countries in the Doha Declaration, since it implies that specific measures to deal with an emergency may be adopted and maintained as long as the underlying situation persists, without temporal constraints.

Third, if a Member complains about the qualification of a specific situation by another Member as a “National Emergency or other circumstances of extreme urgency”, the language of Paragraph 5(c) places the burden on the complaining Member to prove that such emergency or urgency does not exist. This represents an important difference with respect to earlier GATT/WTO jurisprudence outside of the TRIPS context that, under the “necessity test” put the burden of proof on the Member invoking an exception to its obligation.
D. Public Health and Doha Declaration

The Doha Declaration includes preambular provisions (paragraph 1 to 4), the paragraph 5 aimed at confirming the interpretation of certain rules of the TRIPS agreement, and paragraph 6 deals with two operative provisions requiring action by the council for TRIPS in relation to countries with no or insufficient manufacturing capacity in pharmaceuticals paragraph 7 for the extension of the transitional period for LDCs in relation to the protection of Pharmaceutical products.

Paragraph 4 of the Doha Declaration was one of the most controversial provisions of the document and the subject of intense negotiations during the preparations for and at the Ministerial Conference in Doha. The negotiating target of the developing countries was to obtain recognition that nothing in the TRIPS Agreement should be interpreted as preventing Members from adopting measures necessary to protect public health. After intense negotiations a compromise text was reached which apparently satisfied all parties.

Paragraph 4 of the Doha Declaration says, we agree that the TRIPS Agreement does not and should not prevent members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that to the Agreement can and should be interpreted and implemented in a manner supportive of WTO members' right to protect health, and, in particular, to promote access to medicines for all.

In this connection, we reaffirm the right of WTO members to use, to the full, the provisions in the TRIPS agreement, which provide flexibility for this purpose.

Though interpretations on this paragraph are likely to differ, it seems clear that the intention of the Members was to indicate that in cases where there is conflict between intellectual property rights and public health, the former should not be an obstacle to the realization of the later. The realization of
public health becomes, with the Doha Declaration, a clear stated purpose of the Agreement. In affirming that the TRIPS Agreement, “can and also 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”, paragraph 4 gives guidance to Panels and the Appellate Body for the interpretation of the Agreements provisions in cases involving public health issues. In doing so, Members have developed a specific rule of interpretation that gives content to the general interpretive provisions of the Vienna Convention on the law of the Treaties (hereinafter “the Vienna Convention”) on which GATT/WTO jurisprudence has been built up.

In paragraph 6 the Doha Declaration instructed the council for TRIPS to address a delicate issue: how can Members lacking or within sufficient manufacturing capacities make effective use of compulsory licensing. The Declaration requests the council for TRIPS “to find an expeditious solution to this problem and to report to the General Council before the end of 2000”. In order to be effective such a solution should be economically viable, and not only legally acceptable.

Finally, the Doha Declaration agree that LDCs should be granted an extension until 2016 of the transitional period provided for under Article 66.1 of the TRIPS Agreement with respect to pharmaceutical patents (TRIPS section 5) and protection of undisclosed information in relation to pharmaceuticals (TRIPS section 7). Paragraph 7 constitutes a “duty motivated request”- in the term of Article 66.1 of the TRIPS Agreement on the basis of which the council for TRIPS must give effect to that extension. LDCs do not need to individually follow the procedure provided for under Article 66.1 to obtain the extension. The Declaration, however, explicitly preserves the right of LDCs to request extensions for other matters (not related to pharmaceutical Patents) in
accordance with the Article 66.1 procedure without diminishing their right to request further extensions for pharmaceutical Patents after 2016.28

It is implicit within the Doha Declaration that differentiation in patent rule may be necessary to protect public health, and in particular pharmaceuticals (paragraph 6 and 7), as an issue needing special attention in TRIPS implementation constitutes recognition that public health related patents deserve to be treated differently from other patents.

Moreover, the declaration can be regarded as “subsequent agreement” between the parties regarding the interpretation of a treaty or the application of its provisions, under article 31.3(a) of the Vienna Convention on the law of the Treaties.

The WTO disputes Settlement system face a very complex and delicate task in the area of the TRIPS agreement, perhaps more difficult than with respect to other WTO agreements. The great sensitivity of the issues involved both for developing and developed countries, suggests that opinions on the matter will be subject to very strict security and may significantly influence future development in the area of IPRs.

As “activist” approach by the Panels and the Appellate Body (AB) in the interpretation of the TRIPS Agreement would be likely to imperil the dispute settlement system. The Agreement has neither addressed nor resolved all issues in IPR law. Its gaps and ambiguities were the unavoidable result of difficult negotiations. If the Panels or Appellate Body try to make expansive interpretations or to make choices which the Members did not make during the negotiations, the credibility of the dispute settlement system will be seriously undermined.

If confronted with the task (in applying the rules of Article 39(1) of the Vienna Convention on the Interpretation of Treaties) of the defining the

28 Available at www.wto.org
“purpose” of the treaty in relation to a disputed provisions Panels and Appellate Body should be aware that the role the TRIPS agreement is not merely to guarantee the commercial interests of IPRs holders, but also to further the public interest.

Panels and the Appellate Body should recognize that there are fundamental differences among the WTO members in relation to the role of intellectual property and, in particular, on how it can affect the realization of basic human rights as well as the development prospects of developing countries. Decisions on TRIPS matters should be adopted having in view the objectives and principles set forth in Article 7 and 8 of the TRIPS Agreement.

The adoption of the Doha Declaration has represented an important step in recognizing the flexibilities permitted by the TRIPS Agreement, and the right of Members to adopt measures to protect public health. The Declaration not only has political value but legal effect, equivalent to those of an authoritative interpretation under WTO rules.

Finally, due attention should be given to the fact that one of the Principal objectives of the GATT/WTO system is to expand the production of trade in goods and services by reducing barriers to trade and ensuring the realization of competitive opportunities on a non-discriminatory basis. The TRIPS provisions should therefore be interpreted bearing in mind that it is the promotional rather than the restriction of competition that is the foundation of the international trade system.

E. Background of Textile Agreement

The textile and clothing sector is one of the most important sectors of international trade. In 1997 it accounted for nine percent of world exports in manufactured products. It is a significant contributor to many national

economies, providing 142 million jobs (formal and informal) around the world. In the European Community, it accounts for nine percent of all jobs in the manufacturing sector. Textile and apparel industries in the United States are expected to continue to provide more than 1.3 million jobs in 2005 or nearly eight percent of all projected jobs in manufacturing.

For developing countries, its importance is much higher. As one of the important sources of export earnings, textiles and clothing accounted for approximately twenty percent of total exports of manufactures by developing countries and 15.5 percent of their total merchandise exports. Some of these countries are extremely dependent on the textile and clothing industry for their export earnings. For example, 73 percent of Pakistan’s overall merchandise exports is in textiles an clothing. The share of textile and clothing in the export trade of many least developed countries is even larger.

(i) Restriction on Textiles and Clothing

Trade in textiles and clothing has been subjected to a large variety of protective measures since the early 1960s. Because the developing countries were not treated as full-fledged members in the GATT. So the Developed countries chose to deal with textiles and clothing sector was removed from the purview of GATT rules and disciplines and placed under extended special arrangements that allowed the developed countries to restrict trade in textiles and clothing, and to apply a wide range of discriminatory actions, particularly against the developing countries.

33 Submission by the International Textiles and Clothing Bureau to the CTG, Implementation Issues and Concerns: The Agreement on Textile and clothing, IC/W/251/REV.1, March 1, 2002, para.4.
Initially, restrictive arrangements were instituted cautiously and were justified as short-term adjustment measures in the cotton industry. Restrictive measures gradually expanded and eventually encompassed virtually all of the textiles and clothing industry, covering nearly all types of cloth, including man-made fibers, wool, and silk blends. The result was the corruption of the original objective of these arrangements, which eventually became purely protectionist measures rather than a means of helping industries in the developed countries to adjust to changing circumstances. In its last years of existence, the Multi-fiber Arrangement (MFA) even permitted importing countries to apply import restrictions products that they did not produce domestically.34

The Textile sand clothing sector was essentially withdrawn from the GATT system in the early 1960s. During the Tokyo Round in the 1970s, the developed countries were feeling increased pressure from recently independent developing countries that wanted additional market access in textiles and clothing, but it was not until the early 1980s that exporting developing countries made their first serious attempt to change the system. By this time, the developing countries were becoming conscious of their strengthened status in the international arena, and they began to act more uniformly, pushing for the tabling of the textiles and clothing sector in the new round of trade negotiations.

(ii) The Uruguay Round and Beyond

It was the promise that liberalization of textile trade would lead to greater foreign earnings and a significant increase in domestic employment that motivated many developing countries to participate in the Uruguay Round negotiation of the Agreement on Textiles and Clothing.35 The 1998 WTO Annual Report concludes that if the Uruguay Round Agreements are fully

implemented, world income would grow by up to one percent per year, or by U.S. $200-500 billion, and world trade would increase by 6-20 percent. More specifically, "more than one-third of the benefits were expected to derive from liberalization of textiles and clothing and another one-third form liberalization of other manufactures". When one realizes that in 1996 approximately 59 percent of world textiles exports came from developing countries, while their share of clothing exports was 73 percent of the world's total, it become clear that developing countries would gain considerably from the liberalization of this sector.

Unfortunately, although the developing countries were promised an opening of markets with an increase in trade and gains in textiles and clothing exports, nothing has materialized from these promises. This is because while the GATT and the WTO aim at liberalizing trade, agreements on textiles and clothing do just the opposite. The Multi-Fiber Agreement (MFA) and the Agreement on Textile and clothing ("ATC") undermine the integrity of both the GATT and the WTO, and threaten the credibility of negotiations in other sectors.

This is no surprise. Textile agreements not only inflict "violence" on the very concepts of the GATT system they jeopardize the framework upon which trade liberalization is built. It is no exaggeration to say today in terms of mistrust and the hardening of positions of some major developing exporting countries is a backlash from a badly negotiated agreement and, even worse, a badly implemented agreement. In sum, credibility in multilateral trade negotiations has always been important, but it is now more critical than ever, because the WTO works by consensus and the developing countries are likely to block an agreement that does not adequately satisfy their interests. The

37 WTO Secretariat, Background Statistical Information with Respect to Trade in Textile and Clothing, WTO Document G/L/184 (Sept.30, 1997) at 5, 31.
Seattle Ministerial failed in part due to opposition to a new Round by the developing countries. The MFA and the ATC are thus not models to be used when considering new sectors in future trade negotiations. Indeed, Textiles agreements have undermined trade liberalization and feed widening divisions in the perceptions of developed and developing countries about the benefits of participation on the multilateral trading system.

F. Prior to GATT, Agreement on Textiles and Clothing

The roots of the current textiles and clothing regime date back to the 1930s and grew out of highly restrictive measures later to be known as "voluntary export restraints" ("VERs"). At that time the Japanese exports were beginning to out-compete the traditional British textiles and clothing industry, as well as that of the United States. In response to complaints by the United Kingdom and the United States, in 1936 Japan agreed to limit its exports through self-imposed restraints. In 1937, an agreement formalizing these constraints was signed between the United States and Japan in Osaka. United States, then in the midst of a depression, sought a transitional period during which jobs would be protected. Japan decided that agreeing to a system of voluntary restraints was preferable to stricter unilateral measures that could be invoked, such as higher duties and quantitative restrictions on textile and clothing exports.

Unlike agriculture, the GATT 1947 did not treat trade in textiles and clothing as an exception to the normal rules. Yet, it became evident early in the trade liberalization process that, like agriculture, the textiles and clothing sector was prone to capture by protectionist interests. This became the basis for the exceptional protectionist treatment of this sector but the most outspoken proponents of free trade.

End of December 1956, after protracted bilateral negotiations, an agreement was struck between Japan and The United States, where Japan agreed to restrain its exports for five years with an aggregate ceiling covering its entire cotton cloth, made-up goods, woven apparel, knitted goods and miscellaneous textiles. There were further specific limits for particular products, which could be increased up to ten percent by borrowing from unused quotas. This structure of restrictions, with some modifications, became the model for subsequent bilateral agreement that have continued ever since. Perhaps inspired by the Japan/United States Agreement, Britain reached agreement with three Common wealth countries, India, Hong Kong and Pakistan, to limit their exports of cotton products for three years beginning February 1, 1959 for Hong Kong, and January 1,1960 for India and Pakistan. However, the United States failed in its attempt to reach a bilateral agreement with Hong Kong similar to the one it had concluded with Japan, which led the United States to drop the bilateral overtures and to seek multilateral solution (initially) in the GATT.40 A new framework for managing trade in textiles and clothing was emerging.

Parallel negotiations on textiles and clothing began in 1960 in the Dillon Round of trade talks.41 Where negotiators attempted to restructure the system of bilateral arrangements that was emerging. The eventual result was the Short-term Arrangement Regarding International Trade in Cotton Textiles ("STA") and the Long-term Arrangement Regarding International Trade in Cotton Textiles (LTA), which led to the Arrangement Regarding International trade in Textiles, known as the Multi-Fiber Arrangement ("MFA").42 These arrangements wee primarily the result of the concern of developed importing countries that the GATT Article XIX Safeguard provision was inadequate to protect their textile industries. These special arrangements, initially meant to

40 Sanjoy Bhgchi, International Trade Policy in Textiles; Fifty Years Of Protectionism 27-29 (2001)
41 The Dillon Round was the fifth round of multilateral trade negotiations. It was held in Geneva from 1960-1961.
allow industries in the United States and Europe to adjust over a one year period to market shocks, were expanded in coverage an extended in time for over thirty years.

(i) The Short-term Agreement

The Kennedy Administration found itself facing a difficult predicament in its first year in office. On the one hand, the United States faced mounting criticism from the developing countries, notably Korea, Taiwan, Hong Kong and Brazil, who were resisting repeated U.S. requests to restrict their textile exports. On the other hand, the Administration faced growing domestic pressure by textile lobbies that wanted additional restrictions placed on textile imports. In response to pressure from both sides, the United States orchestrated the creation to the STA, which was presented as a formal means of striking a textiles deal with the exporting countries, thereby legitimizing restrictive actions and helping to restore the image of the United States as a bastion of free trade.

The STA was signed in July 1961 at which time it had nineteen participation countries: Australia, Austria, Belgium, China, Taipei, Canada, France, Germany, Hong Kong, India, Italy, Japan, Korea, the Netherlands, Pakistan, Portugal, Spain, Sweden, the United Kingdom and the United States, it was a short document, containing two Articles based on a U.S. proposal.43 The primary objective was the entitlement of Members to impose quotas on countries whose imports caused market disruption. Article I enabled a country to restrain imports from a source, with or without its consent, at specified levels. It also obliged countries maintaining restrictions to increase access to their markets significantly. Article II established a Cotton Textiles Committee to find a long-term solution to the problems in the trade of cotton textiles.

The STA was confined to cotton and cotton textiles, and covered 64 categories of products, subjecting them to a wide range of quantitative

43 GATT: Basic Instruments and Selected Documents, 10S/18.
restriction on exports and imports. The short-term agreement would permit the United States to control and regulate imports of cotton textiles from sources perceived to be responsible for market disruption. It shortly became clear that the transitional character of the STA was an illusion, and that the Agreement contained the seeds of a perpetual “special” system for textile and clothing.

(ii) The Long-term Agreement

It was not long before the STA, initially negotiated for a one-year period became the Long-term Arrangement (LTA). The LTA was agreed on October 1, 1962 and was renewed several times. Renewal of the LTA became a condition for the Grant of negotiating authority by the U.S. congress, and thus allowed the Administration to enter into the Kennedy Round of multilateral trade negotiations (1964-67). Like the preceding arrangements, the LTA only covered cotton textiles.

The LTA was considered to be a solution for emerging conflicts in the area of textiles and clothing. Even before the expiration of the ATA and the establishment of the Cotton Textiles Committee on November 16, 1961, the LTA had emerged from the deliberations in the committee.

The LTA started with 24 members, and expanded over the years to include all exporting and importing countries that had an interest in the cotton textile trade. At its height the members were Australia, Austria, Belgium, Brazil, Canada, China, Colombia, Denmark, Egypt, France, Finland, Germany, Greece, Hong Kong, India, Israel, Italy, Jamaica, Korea, Luxembourg, Mexico, the Netherlands, Norway, Pakistan, Portugal, Spain, Sweden, Chinese Taipei, Turkey, United Kingdom, United States, and Yugoslavia. Non-member countries were under constant threat from the United States which had made clear that no country outside the new frame work would benefit “... and have unlimited access to the Unites States market while cooperating nations were held down”.


The LTA was based on the above-mentioned definition of “market disruption”, and its stated objective was the “reasonable and orderly” expansion of trade. The LTA was designed to permit the continuation of existing discriminatory restrictions on the developing countries, and, upon insistence of the EC Member States, the introduction of new ones where none existed.\textsuperscript{44}

After twelve years of application, the LTA was deemed inadequate by developed countries. Exporting developing countries, finding their exports of cotton and cotton textile products “restrained”, had shifted production to other materials, in particular artificial fiber. The accelerated growth of non-cotton fiber exports that flooded into the developed country markets produced a reaction similar to that in the 1950s with respect to cotton fiber exports.

Prior to the launch of the Tokyo Round negotiations (1973-1979), domestic political lobbies in the United Stated and Europe began to push for broadening the coverage of the LTA. The increased competitiveness of Japan and developing countries in synthetic fiber products outside the scope of the LTA led to the negotiation of the Multi-fiber Arrangement.

(iii) The Multi-fiber Agreement

It was the cumbersome nature of bilateral negotiations, and the desire for equity in case other countries swiftly acted to fill the space in the U.S. market left by the restraints of Japan, Hong Kong, Korea and Chinese Taipei, that prompted the negotiation of a new multilateral framework. The result was a negotiation that led to “The Arrangement Regarding International Trade in Textiles”, also known as the Multi-fiber Arrangement (MFA). The MFA was initially a four-year agreement, It was Signed on December 20, 1973 and came into force on January 1, 1974. The MFA had 44 signatories, among them approximately 31 exporting developing country members. It included China,

\textsuperscript{44} GATT Document L/1659, December 5, 1961, Para. 41.
even though China was not a GATT Contracting Party. The MFA stands in sharp contrast to the 1961 STA which only had India and Pakistan as developing country members. This is testament to the fact that the developing countries felt a strong need to be part of the MFA in order to promote their position in the market place. This was not without cost. The MFA permitted importing countries to apply import restrictions on products in which there was no domestic production.\(^45\) Also, excessive protection in the developed countries, and the additional restrictions on products that were not yet produced domestically, discouraged innovation by the developing country producers who were sure that the new products they developed would also be refused entry by the developed countries or be subject to new restrictions.

The most significant change in the MFA was tightening the use of the concept of “market disruption” by establishing the requirement of a causal link between the disrupting imports and the existence of serious damage to the domestic industry.\(^46\) Another important change, which was due to the active participation of exporting developing countries in the negotiations, was a reference to consideration to the interest of the exporting country when taking into account the question of “market disruption”.\(^47\) This issue had previously been ignored, but its addition did not remove the biases inherent in the concept of “market disruption”.

MFA II, which entered into force on January 1978, resulted in a significant tightening of the developed countries’ restrictions on imports from the developing countries.\(^\) The developed countries successfully pushed for a modification of the rules to make it much easier for them to avoid the requirement that quotas be increased six percent per year. The key to this change was provision for “jointly agreed reasonable departures” from the MFA’s rules which themselves are a jointly agreed departure from the rules of


\(^{46}\) Arrangement Regarding International Trade in Textile (MFA), Annex A, Para. I.

\(^{47}\) MFA, Article III.
the General Agreement. The protocol; of MFA III, which entered into force in January 1982 for a period of four years and seven months, involved a further tightening in the application of restrictions. Its main addition become known as the “anti-surge” provision governing the use of unutilized quotas carried over from the previous year.\(^48\) Also the unilateral one-year application of quantitative restrictions in situations of market disruption was extended to a second year to be applied unilaterally if the restricting country faced special difficulties.\(^49\) The MFA itself was a departure from the GATT, and the renewed MFA was labeled a “departure from the departure”.\(^50\)

**G. The Agreement on Textiles and Clothing: Policies or Principles**

The first serious attempt by the developing countries to bring the textiles and clothing sector under the umbrella of GATT disciplines was made in the early 1980s in the aftermath of the Tokyo Round. The frustration of the exporting developing countries had its origin in the belief that the MFA had (1) failed to rectify the imbalances inherent in textiles and clothing trade, and (2) had not allowed for a sufficient “orderly” expansion of such trade. Exporting countries also became increasingly aware that certain “improvements” that were negotiated during MFA renewals were detrimental to their interest. Despite strong resistance, the exporting developing countries eventually had to accept two concepts, “reasonably departures”; and the “anti-surge clause” that were introduced by the European Commission in the 1977 and 1981 Protocols of Extension of the MFA. These two concepts were portrayed as a way of easing restrictions, but in reality they gave impetus to the continuation an even increase of restrictions, irritated by the prevailing injustices in the system and the lack of progress, exporting developing countries made the integration of the textiles and clothing sector into the GATT regime their most important priority.


At a meeting held in November 1980 in Bogota, a group of the exporting developing countries clarified their position in a communique: For more than two decades, developing countries have faced an increasingly discriminatory and restrictive regime that has derogated the normal rules and practices of the GATT. This regime has been renewed repeatedly and expanded in scope despite the original and specific understanding that it would be temporary. The perpetuation of this discriminatory and restrictive regime is unacceptable to the exporting developing countries. World trade in textiles and clothing must be liberalized in real terms by means of a gradual return to free trade in conformity with normal GATT rules and practices.\textsuperscript{51}

Following the issuance of the communique, the exporting countries succeeded in generating sufficient momentum to place the textile and clothing sector on the negotiating table during the 1982 GATT Ministerial Meeting that took place in Geneva. The proposal by the developing countries, which was substantially diluted by the developed countries in the curse of negotiation, was finally included in the GATT Ministerial Declaration of 1982 and in the work programme that resulted. As a result of the strenuous efforts of the exporting countries, the first “working Party on Textile and Clothing”(c984-1986) was established.

A difficult debate took place in the Working Party between exporting and importing countries about how to achieve liberalization of the textiles and clothing sector. Although the debate achieved little, its seriousness indicated that this sector would stay on the negotiating agenda. It did however not prevent the developed importing countries from extending the MFA for the third time in 1986, while propagations were ongoing for the launching of the Uruguay Round of trade negotiations. In spite of this extension, it seemed

\textsuperscript{51} Bogota Declaration (November 1980).
beyond doubt that the textiles sector would eventually be brought under GATT rules.

Aware of divergent interests and conflicting views, the textile-exporting developing countries were determined to develop an effective common position. They succeeded in doing so within the framework of the International Textile and Clothing Bureau (ITCB), which was established for that purpose in 1985 in preparation for the next round of multilateral trade negotiations.

A GATT preparatory committee met from January to July of 1986 to prepare for the new round of negotiations. This committee succeeded in forcing the “restraining” countries to come into the open. A group of exporters argued forcefully for a “rollback commitment” on textiles and clothing, and pushed for an ambitious three-year phase-out programme, under which all restriction measures incompatible with the GATT system would be withdrawn.

On the other side, the European Community argued against the integration of the sector, stating that until the conditions which had necessitated the creation of the LTA, and subsequently the MFA, were eliminated, an ill-prepared return to GATT rule would cause problems.

After a protracted and often intense debate between the restriction and restricted countries, a joint proposal was put forward by Colombia and Switzerland to the preparatory Committee that found its way unaltered in the Punta Del Este Declaration that launched the Uruguay Round. It provided that:

Negotiations in the area of textiles and clothing shall aim to formulate modalities that would permit the eventual integration of the sector in GATT on the basis of strengthened GATT rules and disciplines (SGRAD), thereby also contributing to the objective of further liberalization of trade.

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52 The group consisted of Argentina, Brazil, India, Nigeria, Pakistan, Peru, and Tanzania.
The result was that for the first time the textiles and clothing sector was included as a subject in the multilateral trade negotiations, in sharp contrast to earlier GATT rounds in which the textiles and clothing sector was either dealt with before negotiations began, or handled in negotiations that ran parallel to the rounds.

(ii) The Uruguay Round Negotiations

The negotiating Group on Textiles and Clothing was established in February 1986. It was entrusted with the task of examining the techniques and modalities for the liberalization and eventual integration of the textiles sector into the GATT/WTO system. The negotiations were cumbersome and in many instances highly politicized. It was only towards the end of 1990, after the failed mid-term review in Montreal, that the negotiations started to take shape. Four issues remained highly controversial:

1. product coverage under the agreement,
2. the percentage for the integration of products in each sage ("stage integration"),
3. Increases in the MFA quota growths rates for products not yet integrated, and
4. The duration of the agreement.55

(iii) The Agreement on Textile and Clothing

The ATC was drafted by experts who had the MFA negotiations very much in mind. These experts formed what can be viewed as an exclusive club in which everyone was cognizant of the maximum political limits of their negotiating partners. This was clearly reflected in the ATC, which came out as a highly sensitive "deal" between the exporting and the importing country negotiators.

The ATC calls for the integration of the textiles and clothing sector over a ten-year period that is explicitly non-renewable. Some see the agreement as delicate compromise between the competing interest of importing developed and exporting developing countries, and as representing an essential step toward achieving trade liberalization in a sector that has served as the engine of growth for many developing countries. Others view the ATC, with all its inherent weaknesses, as asymmetrical since the overall balance of the Agreement tilts very much in favour of the developed restricting countries. This is so to the extent the ATC allows developed countries extra time for protection and only provides the appearance of special and differential treatment for cotton producers small suppliers ad LDCs.

The ATC is a relatively short agreement containing nine Articles, and an Annex entitled “List Products Covered by this Agreement”. The Annex lists approximately 800 HS tariff lines, including all textiles and clothing products, whether subject to existing MFA restrictions or not the Agreement operates on the basis of three essential principles. These principles are: (1) the flexibility provisions adopted from the MFA, (2) the “integration” process, and (3) the “liberalization” process. The “flexibility” provisions permit an exporting country to maintain existing rights under the MFA with respect to products under MFA quota and not yet integrated. Accordingly, an exporting country is entitled to trade off part of a quota on one product against the quota on another product, or to use part of one year’s quota for a particular product in either the preceding or subsequent year. The “integration” process manages the gradual removal of existing quotas and the inclusion of products into the GATT system. This process is compounded by what is known as the “liberalization” process or “growth-on-growth.” “Growth-on-growth” is intended to increase the rate of integration of non-integrated quotas there by producing additional growth in textiles and clothing trade.

\[\text{ATC Article 9.}\]
H. Disputes Relating to Textile and Clothing

The bulk of textiles and clothing imports remain subjects to stringent quota restrictions. In spite of this, and the fact that all commitments made under the ATC are not yet in place, importing countries have not shied away from protectionist actions. Although the disputes brought to the Dispute Settlement Body (DSB) are few in number, they are revealing. In addition, numerous disputes dealt with in the TMB did not find their way to the DSB. These disputes were significant in their own right in rectifying actions by the major importing countries that some developing country exports considered tantamount to trade harassment.57

The importance of ATC disputes brought to the DSB should not be underestimated. The dispute settlement system has given the developing countries new leverage in trade negotiations involving their highly sensitive sector, Developing countries score victories in four cases involving textiles and clothing.

(i) United States—Shirts and Blouses

In this case, when TMB examined this dispute between India and the United States, it concluded that the U.S. transitional safeguard action was in conformity with the ATC, whereupon India invoked its right in the DSB to establish a panel to examine the legality of the U.S. action.

Although the United States announced its withdrawal of its transitional safeguard measure on wool shirts and blouses from India in November 1996 before the panel ruling was due, India nevertheless wanted the panel to rule on the legality of the U.S. measure. Furthermore, in spite of a clear finding by the Panel that the United States had violated the provisions of Articles 2 and 6 of ATC when imposing its transitional safeguard measure, India appealed certain

issues of law covered in the Panel Report and certain legal interpretations developed by the Panel. Included in the appeal by India were three important issues: (a) the issue of the burden of proof, (b) the relationship between the TMT and the DSU and the legal role of the former, and lastly (c) the question of judicial economy—whether a panel must examine all claims submitted.

With respect to judicial economy, India submitted that the Panel’s application of the notion of judicial economy undermines the objectives of DSU, as set forth in Article 3.2 of the DSU and in India’s view, included both dispute resolution as well as dispute prevention. India maintained that these objectives could only be achieved if panels resolved both the disputed over the particular contested measure and the issues of interpretation arising from all legal claims made in connection with that measure.

The Appellate Body disagreed and upheld the application of judicial economy. A lesson to be learned from the case is that one cannot expect to much “rule making” from the WTO dispute settlement system.

(ii) **EC-----Bed linen**

This case brought by India against European Community, involving an EC antidumping measure on bed linen from India, demonstrates that developing countries are not powerless to challenge abusive antidumping measure taken against textiles and clothing products. Antidumping measures had become a standard EC tool to protect its textiles and clothing manufacturers, even before the creation of the WTO. Counting on the relatively high cost of dispute settlement proceeding for the developing countries, as well as the low probability of winning antidumping cases as a result of the restrictive standard of review established in the Antidumping Agreement, the European Commission applied excessive dumping margins. The use of antidumping actions against products under quota, and repeated actions against

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58 Agreement on Implementation of Article VI of the GATT. Article 17.6 (ii) sets out the standards of review for cases arising under this agreement.
the same products, ran counter to the objective of liberalization of this sector that the ATC was meant to achieve.\textsuperscript{59}

The findings and conclusion of the Panel, in which Egypt participated as a third party, criticize the European Commission's calculation of dumping margins. The Panel found that the method applied (the practice of "zeroing") by the European Commission was inconsistent with Article 2.4.2 of the Antidumping Agreement, and the Appellate Body affirmed the Panel's decision in this regard.\textsuperscript{60}

(iii) United States—Underwear

Costa Rica's dispute against U.S. restrictions on imports of cotton and man-made fiber underwear was also significant for developing countries. It has become a frequently cited example for the effectiveness of the WTO's Dispute Settlement understanding (DSU). It was the first Challenge under the DSU in the textiles and clothing sector. As a result of losing this case, and its portrayal in the TMB and the Council for Trade in Goods for United States began to restrain its use of the transitional safeguards mechanism.

After having unilaterally invoked the transitional safeguards 24 times in the first year of implementation, the United States, under constant criticism from developing countries, stopped its use of these actions altogether. The 24 safeguard measures taken by the United States in 1995 involved nine product groups. Of the nine, the TMB did not find any evidence of serious damage in five categories. In regard to actual threat of serious damage, the TMB's findings were positive with respect to one category and negative with respect to two categories. The TMB was unable to reach consensus in the two other categories. The excessive use of transitional safeguard by the United States prompted the exporting countries to contest the U.S. claims of serious damage,


\textsuperscript{60} European Communities— Antidumping on Imports of cotton-type Bed Linen from India, Report of the Panel, WT/DS141/AB/R, PP62-64.
and to use the good offices of the DSB to redress their complaints. The strict requirements of Article 6 were upheld by the DSB "this played an important role in the decline in U.S. actions".

(iv) United States — Cotton Yarn

This dispute involve a typical case of an abusive measure by a major importing country and the clear exploitation of the dispute settlement procedure.

Already in April 1999, one month after the measure became effective on March 17, 1999, the TMB ruled on the matter and asked the United States to rescind its measure. The TMB found that the United States was unable to demonstrate serious damage or any threat thereof to its industries by the imports of yarn from Pakistan. The matter was examined in June for the second time by the TMB, which did not alter its first recommendation. Refusing to heed the recommendation of the TMB, and with the failure to reach a mutually agreed solution through consultations, Pakistan had recourse to the DSU and requested the establishment of a Panel on April 3, 2000. In its Report on May 31, 2001, the Panel concluded that the transitional safeguard measure imposed by the United States on Imports on Yarn from Pakistan was inconsistent with the provisions of Article 6 of the ATC. Without further ado, the Panel suggested that the United States bring its safeguard measure into conformity with its obligations under the ATC and that this could best be achieved by the prompt removal of the safeguard measure.

The United States, however, decided to file an appeal and requested the Appellate Body to reverse the Panel's findings, in particular with regard to Article 6.4 of the ATC, which concerned the attribution of serious damage or actual threat thereof. The Appellate Body upheld the Panel's main finding and requested the United States to bring its measure into conformity with its obligations in the Agreement.
Despite the fact that both the TMB and a Panel found against the United States, the United States choose to buy more time by taking this dispute to the Appellate Body. The result was that the United states was able to impose its safeguard measure from March 17, 1999 until after the Appellate Body’s ruling against the United States in October 2001.

Labeling the new round of negotiations “The New Development Agenda” was an attempt to lure the developing countries into the next round of trade talks. Nevertheless, the fate of textiles and clothing in the lead up to, and at Doha, remained unclear. At no stage in the Doha preparations did the sector have the potential to be a “make or break” issue. Intellectual property rights (TRP), agriculture and the environment were far thornier issues. Few exporting developing countries tried to table textiles and clothing in the framework of the so-called Implementation issues. In the Doha Ministerial Meeting (November 9-13, 2001) India demanded that the pace of liberalization in the textiles and clothing area be quickened, and it held up the negotiations on the issue until the eleventh hour.

Although textiles and clothing were a lower priority issue in Doha, their importance has not diminished. The next few years will see more aggressive bargaining in this vital sector. One need only remember that textiles and clothing were among the problem sectors that led to the extension of the negotiations in the Uruguay Round. With a prolonged and difficult round of trade negotiations in sight, textiles and clothing are likely to surface once again as a principal bargaining chip for an increasing number of developing countries.

In this context, the smoothing out of tariff peaks and the reduction of tariff escalation in the area of textiles and clothing will become even more important as a negotiation chip tariffs. Although some already speculate that the ATC will be replaced by some new form of agreement, It believed that
developing exporting counties will not allow tariffs on textiles and clothing to be considered separately or governed again by a separate agreement.

It viewed that the low priority given to textiles and clothing could well change as negotiations proceed in the new round. The subject will be pushed forcefully not only by the traditional proponents of liberalization in this sector, such as India and Pakistan, but also by countries like Egypt, Indonesia and Malaysia, who want something in return, perhaps in the textiles and clothing sector, if they are to lower their industrial tariffs. Furthermore, it expected that negotiation on textiles and apparel will go beyond traditional borders and encompass negotiations among developing country exporters themselves, based on their desire:

a) To open up each other’s markets in addition to the markets of the expected newcomers from Africa and the LDCs;

b) To prepare for the possible outcome of additional regional integration which, with more modern machinery and better quality products, may facilitate the relocation of industries such as textiles and clothing from the North to the South; and

c) To develop new markets in preparation for new types of restriction in the developed importing countries, perhaps based on more stringent environmental standards.

To many, the ATC is and remains a ten year "quasi-extension" of the MFA. This is undoubtedly contrary to the perception of many other, notably among the exporting country negotiators who like to view the ATC as a full-fledged, stand-alone agreement.\(^6\) Whichsoever view is correct, the ATC has failed, after more than seven years of implementation, to further the liberalization of trade in textiles and clothing, to provide greater market access. Spinanger notes that

\(^6\) Marcelo Raffaelli and Tripti Jenkins, The Drafting History of The Agreement of Textiles And Clothing 10 (International Textiles and Clothing Bureau 1995).
“it was indeed a masterpiece of watering down and postponing.” It “watered down” the liberalization process by including a far wider range of textiles and clothing products than necessary. It “postponed” significant liberalization until the final stage in January 1, 2005 (back-loading). The integration to date has concentrated on products of less exports interest to the developing countries, and only a few quota restrictions have been removed, leaving the bulk in place. The additional access provided through increases in quota growth rates during the transition period has not significantly lessened the restrictive nature of the quotas. The developing countries, including their small suppliers, as well as least-developed countries, have not received and “meaningful” increase in their access possibilities. It remains to be seen what will happen between now and January 1, 2005.

I. Concept of Dumping

In his celebrated work The Wealth of Nation, Adam Smith advised never to attempt to make at home what it would cost more to make than to buy. Successive generation of economists have supported and refined Smith’s argument contending that “if foreign country can supply us with commodity cheaper than we ourselves can make it, better buy it of them with some part of the produce of our own industry, employed in a way in which we have some advantage”.

This is known as the concept of comparative advantage on which the principle of free trade rests. Economists’ contend that a decentralized market system that allows producers and consumers the freedom to choose according to market process will result in gain in real national income. Under free trade, comparative advantage dictates that a country should exchange what it can produce most efficiently for what others can produce more efficiently. Free Trade, however, is contrasted with unfair trade. Unfair Trade like

62 Dean Spinanger, Textiles Beyond the MFA Phase Out, paper presented at the GATT/WTO Fiftieth Anniversary Conference at the University of Warwick (July 17-18, 1998).

63 Adam Smith: An Inquiry into the Nature and causes of the wealth of Nations (Glasgow Edn.1976),Book IV, Ch. III
subsidies and dumped imports hurt the free competitive mark considered essential to free trade. Dumping is defined in Oxford Dictionary as sale of goods in foreign market at low price. The supporters of anti-dumping measures argue for the protection of home industry against unfair competition. In case of anti-dumping measures, it has to be kept in mind that dumping occurs when products are sold buy a form in an export market for less than what is charged inlets home market for the same product. Dumping occurs often and forms integral part of world trade.

It has often been observed that anti-dumping actions have risen rapidly in number since the conclusion of the Uruguay Round negotiations. The WTO (and before it the GATT) Committee on Anti-dumping produces semi-annual reports which give data on the number of anti-dumping investigations and measures adopted by numbers of the organization. Until the mid-1980s only the United States, Australia, New Zealand and countries that are now members of the EU took anti-dumping action regularly. In 1990 only nine members were reported as taking anti-dumping action during the year. The WTO reported the 27 members had taken anti-dumping action in the six-month period January 1-June 30, 2002. The main new users have been Mexico, Brazil, South Africa, India and Korea.

More countries are introducing legislation providing for anti-dumping duties, providing for anti-dumping duties though there is no obligation for them to do so under WTO rules. These includes developing and transition economies such as China. As of October 5, 2002, 75 countries reported to the WTO that

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65 The Concise Oxford Dictionary, (10th Edn.).
they had legislation providing for anti-dumping action. Thus anti-dumping action is become a standard tool of international trade policy.

Action may take the form of a price undertaking as well as the imposition of a duty. But the problem is not merely that anti-dumping actions are becoming a major restraint on trade. There is concern with other characteristics of anti-dumping actions. First, the only conditions that must be satisfied relate to proof of dumping and injury and, therefore, actions can be taken unilaterally even when the substantive rates of duty are bound at a zero rate. Consequently, they breach the reciprocity involved in past tariff negotiations. Second, again because of the nature of the proof if dumping and injury required under the rules, anti-dumping action discriminated among countries of origin of imports of the goods concerned. Hence it has become another of the issues that divide the developing countries in the WTO. Third, though this characteristic is not evident from the trade statistics alone, conduct that is actionable when the seller is outside a country is not actionable when the same conduct occurs but the seller is a domestic supplier. This is a discriminatory in another way and obviously leads to economic inefficiencies. Fourth, anti-dumping actions have become a major source of conflict among the members of the WTO. The imprecision of the present rules has led to an increasing number of complaints under the Dispute Settlement Procedures in recent years. Although, these features mean the anti-dumping action has become a major problem for the organization.

J. GATT and WTO Laws on Dumping

Dictionary meaning of dumping is to “sell (excess goods) to a foreign market at a low price.” However, dumping has a more specific meaning under

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70 The Concise Oxford Dictionary, (10th Edn.).
Article VI of GATT and the Anti-dumping Agreement. Under paragraph 1 of Article VI dumping connotes a practice 'by which products of one country are introduced into the commerce of another country at less than the normal value of the products.'

Dumping entered the set of international trade policies subject to GATT regulation from the outset in 1947. Articles VI differs from other Articles in GATT in that it is concerned with "unfair trade" whereas the other Articles are concerned with trade restrictions as an aspect of the objective of efficiency in the world economy. Dumping (and subsidization which is also covered by the Article) was perceived as being "unfair" to domestic competitors and therefore a practice which tends to undermine respect for the rules of the international trading system and the willingness of countries to liberalize international trade.\textsuperscript{71}

Article VI of GATT (1947) defined dumping as a situation in which "....... The price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country." If there is no such domestic price, a constructed price can be calculated based on the highest comparable price for the like product in a third country of the cost of production. The difference between the "normal value" and the "export price" is called the "margin of dumping". The duty cannot exceed the dumping margin.

The Article allows members to apply anti-dumping duties on imports of a product so long as two conditions are met. The goods must cause or threaten material injury to an established domestic industry or materially retard the establishment of a domestic industry. The GATT/WTO law does not seek to regulate dumping the action of private parties but instead regulates the use of anti dumping measures.

\textsuperscript{71} John H. Jackson, the World Trading System, Chapter 10 (1989).
An attempt was made to tighten the GATT rules in the Anti-dumping code that was agreed to in 1967 as a part of the Kennedy Round and later revised in the Tokyo Round. The code gave greater precision to the definitions of Article VI relating to like products, dumping, injury and domestic industry. The code laid down for the first time procedures and rules of administration; time limits for the period of investigations and retro-activity of anti-dumping duties, the right of interested parties to be heard, rules of evidence and other administrative rules.

The code also introduced two new measures. First, it provided a definition of a price undertaking as a “satisfactory voluntary undertaking from any exporter to revise its prices or to cease exports to the area at dumped process so that authorities are satisfied that the injurious effect of the dumping is eliminated.” The code explicitly permitted a price undertaking that raised prices, no more than the margin of dumping, but only allowed it to be entered into after preliminary findings of dumping and injury. This measure resulted from British and Canadian complaints during the Kennedy Round that the U.S. Treasury (which at that time was responsible for dumping investigations) had been slow in its dumping investigations and had encouraged producers to give price undertaking even though the Tariff Commission enquiry might not have resulted in a finding of injury and the imposition of a duty. Second, the code introduced a provision for preliminary duties. Both became widely used.

The Uruguay Round Agreement on the Implementation of Article VI made a stronger attempt to tighten the regulation of government’s anti-dumping actions. It introduced a “Sunset Clause”, requiring an anti-dumping duty to terminate within five years unless a fresh review determines that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. But the Agreement retained all of the central features of the system.

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72 Article 7 of the code.
A new feature of the Agreement, compared to the earlier Article and code, is that it allowed consideration of the combined effect of dumped imports from several supplying countries. This was called "cumulation". With the experience of six years of application of the Uruguay Round amendments, the change relation to cumulation across countries can now be seen as a change for the worse. Before, the Uruguay Round Agreement the proactive was used on a limited scale and it was doubtful that if conformed to the GATT law. The Uruguay Round Agreement made the practice WTO-legal. This has increased the coverage of complaints and their likelihood of success in countries that use this provision. The United States, in ten years following the introduction of the mandatory cumulation amendment, Pursa \(^{73}\) find that 75 percent of anti-dumping cases have involved cumulation.

Under GATT and WTO rules anti-dumping actions relate solely to trade in goods. No provision for anti-dumping in services was introduced into GATS. Hoekmen and Leidy examined the possibility of introducing provisions for anti-dumping action in services trade.\(^{74}\) In some respects the changes negotiated in agreements in GATT rounds have made the rules less permissive but they have also broadened the measures to include pricing below average cost, price undertakings and preliminary measures and the have become more permissive in term of cumulation across countries, on balance, these changes to the GATT/WTO rules may have weakened rather than strengthened the discipline on countries taking anti-dumping actions.

K. Are Anti-dumping measures "Fair Trading Law" OR "Competition law"

International trade economists have traditionally taken a very different view of dumping from international trade officials by Viner,\(^{75}\) international trade economists have regarded dumping as a form of price discrimination. The growth of number of models of dumping also give some new explanation of


\(^{75}\) J.Viner, Dumping : A Problem in International Trade (1926).
this behaviour; for example, demand uncertainty or strategic dumping to
discourage firm in the dumped markets from reaching a scale of output that
would make them competitive in the exporting country. The economists
regarded, only the cases of predatory and harmful to the competition process
and to the welfare of the country in which the goods are "dumped".

The international trade economists have long regarded most anti-
dumping action in practice as a form of contingent protection. As voluntary
export restraints and other non-tariff barriers have been curtailed by the GATT
and WTO, anti-dumping action is being used as a substitute form of non-tariff
barrier which is still permissible under the WTO rules. The Market Cyclical
pattern of new anti-dumping actions and the heavy concentration in certain
industries, especially steel and chemical products, support the view that anti-
dumping action in practice is contingent protection rather than against "unfair
trade".

As James put it, "Anti-dumping actions are the current weapon of choice
of protectionists". As an alternative instrument of protection, anti-dumping
has a number of advantages over other instruments. It does not, unlike
safeguard action under Article XIX, require compensation. It is subject to
week discipline. In fact, in some countries it essentially provides protection on
demand. Over the ten years 1987-1997, the proportion of all completed anti-
dumping investigations which resulted in the imposition of definitive measures
was 51 percent for countries reporting to the GATT/WTO. It was 64 percent
for the United States and 62 percent for the EU. In the United States over the
past decade the Department of Commerce has issued only three negative

76 P. J. Lloyd, Anti-Dumping Actions and The GATT System (1971) and J. M. Finger, Anti-
77 J. R. Miranda, A. Torres, and M. Ruiz, The International use of Anti-dumping 32(5) Journal of
78 W. E. James, The Rise of Anti-dumping: Dose Regionalism Promote Administered Protection?, 14
79 J. R. Miranda, A. Torres, and M. Ruiz, The International use of Anti-dumping 32(5) Journal of
World Trade Law 5 (1998); J. M. Finger, F. Ng and S. Manuscript (2000) Table 24.,
determinations of dumping out of almost four hundred determinations. Anti-dumping action can be used when prices are at the bottom of their distribution and therefore the benefit to local producers who are threatened with insolvency or are downside risk-averse is greatest. It can provide protection against the cheapest sources of imports under the guise of unfair competition.”

Indeed, several economists have argued that national legislators introducing legislation proving for anti-dumping, actions and the architects of GATT understood that the action was essentially protections but described it as designed to combat “unfair” trade in order to disguise the intent. If anti-dumping provisions in the WTO and in the legislation of most nations that take anti-dumping actions ignore these interests. Unless the term of trade effect is sufficiently large, an anti-dumping duty will harm the importing country. This is the standard analysis of an ad valorem tariff, based on equal weighting of the welfare losses and gains to buyers and sellers respectively. This conclusion holds a fortiori for a price undertaking as the higher price is received by the foreign supplier rather than the home government or alternatively demand is diverted to higher-cost alternative import sources, both cases resulting in a negative terms of trade. Economists have been widely opposed to government anti-dumping action.

For example, in many cases, buyers are other firms that are buying intermediate goods rather than final consumers. That is, the producer interest of the law is further biased towards the interests of incumbent producers of the competitive goods.

Thus, Anti-dumping action derives from a completely outdated view of dumping. Article VI of GATT 1947 states categorically that “The contracting parties recognize that dumping... 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.” There is no

economic theory or model accepted today that finds that this conduct is always harmful. There is nothing “fair” about these provisions as they ignore the interests of buyers and of the foreign sellers.

Since there is no justification for anti-dumping action in economic theory other than to combat harmful predatory or strategic pricing, it is necessary to view dumping explicitly from a competition perspective. Pricing behavior is appropriately examined under the methods of competition analyzer’s and the principles and procedures of competition law.

Under National competition laws price discrimination might or might not be judged to be conduct that is anti-competitive. National laws vary considerably in this treatment of price discrimination. For example, in the United States the Robinson-Patman Act prohibits sellers from discriminating in the prices, terms of sale or advertising where competitive injury may result to seller’s competitors or to unfavoured purchasers. In the EU Article 82 covers price discrimination when this is used by a dominant firm to restrict competition. Some other countries with comprehensive competition law did not prohibit price discrimination, For example, Australia which is another frequent user of anti-dumping actions, removed from the Trade Practice Act in 1995 a separate provision relating to price discrimination though price discrimination might still be caught under the more general provision relating to the abuse of dominant power. Several countries prohibit predatory pricing perse for example, in the United States section 2 of the Sherman Act prohibits predatory pricing and other predatory conduct (however, predation has been difficult to prove in mist jurisdictions) competition law typically does not prohibit selling below cost perse although prohibitions on the abuse of a dominant position might catch some below-cost pricing.

The variation in the prohibition of price discrimination reflects the analysis of competition economist. Standards models of price discrimination
show that price discrimination may have a pro-competitive of anti-competitive effect.\textsuperscript{81}

Starting around 1990, economists began to observe that some anti-dumping actions are themselves anti-competitive in effect. The EU is one of the countries or blocs of countries with anti-dumping law in which there is evidence that anti-dumping action has itself had anti-competitive effects in some instances by, for example, reinforcing the position of a domestic cartel.\textsuperscript{82} Similarly, in Australia and Brazil, it had been found that anti-dumping action has sometimes had anti-competitive effects.\textsuperscript{83} Domestic producers sometimes anti-dumping complaints as a means of restricting foreign competition and reinforcing price fixing agreement in the domestic markets. In the Model of Hartigan, the intervention could have reverse effect of inducing competition in a market that was collusive before the intervention by lowering the costs of renegotiation of collusion. This model relates to duopoly situation with a single domestic seller and a single foreign seller who is a monopolist in its home market. This is an uncommon occurrence in dumping cases, if indeed it occurs at all. Typically several domestic producers file a complaint jointly, and increasingly, as noted above, the investigation cumulates production across several exporting countries. In any case if this situation should occur, the preferred intervention is the application of competition law prohibiting collusion outright.

An issue that has not received attention is whether anti-dumping duties or price under competition even if it is true that there is predatory or strategic dumping. In general, the answer is no. Anti-dumping action does not bear

\textsuperscript{81} For example, L. Philips, The Economics of Price DISCRIMINATION (1983).
directly on the firm’s or firms’ competitive behavior. It only raises the price of the dumped good for the duration of the action. The appropriate action would be a prohibition of the practice with appropriate penalties if the offence continues.

These models indicate that anti-dumping action under international trade law is not the instrument or, to use the language of competition law, the remedy to correct business conduct in the form of selling below average cost. If dumping has no effect on competition or has a pro-competitive effect, no anti-dumping action or other action should be taken. If, on the other, price discrimination or selling below average cost does restrict competition the conduct should be prohibited. And it should be prohibited for sellers operating solely in the national market as well as for sellers selling across national borders. Similarly, non-price form of predation and entry deterrence by dominant producers should be prohibited along with price predation.

Thus, at least in the case of two of the biggest users of anti-dumping actions, the substitution of competition law standards for international trade law standards would leads to a substantial tightening in the regulation of anti-dumping actions. The same outcome is likely to hold in other countries that take anti-dumping actions.

L. Possible reforms for Anti-dumping Action under WTO

There are many possible reforms that would reduce the harm done to the welfare of residents of the importing nations that impose the duties and to the exporting nations. To start with, as anti-dumping duties are discretionary, the individual member nations of the WTO that currently take anti-dumping actions could reform their national laws or administration unilaterally to make them less trade-restrictive. The appeal of anti-dumping action as a form of protectionism increases as more discipline is applied to the traditional instrument of protection. Logically, it would be best to eliminate anti-dumping regulation altogether. Another attempt to tighten the law with a view to
reducing the discretion and arbitrariness under the present system would not address the real problems.

To economists, dumping is not an international trade problem. International pricing may be a competition problem and as such it should in principle, be addressed exclusively as a part of national competition laws. Lipstenin,\textsuperscript{84} and Lloyd and Vauties\textsuperscript{85} probably others, have recommended the abolition of anti-dumping provisions in WTO. In the United States and some other countries dumping arose as a part of anti-trust legislation. They remain adamantly opposed to any tightening of the WTO rules relating to anti-dumping action.

Preserving the basic concept and principles of existing WTO law retains the dual tests of dumping and injury. Yet, this still leaves a number of options for reform, some countries have put forward proposed reforms in the traditional areas of stricter standards and improved administration as well as new issues such as anti-circumvention rules, special and differential treatment for developing countries. Other reforms are also possible. These will be considered in the form of an agenda for reform of WTO law on dumping and anti-dumping actions in the forthcoming Round.

One simple reform would be to require all the countries to report to the WTO all dumping margins and the ad valorem equivalent of the duties imposed and of the price undertaking. This would make the extent of the protection more transparent.

The negotiations should reconsider the aspect of the definition of dumping dealing with sales below the average cost of production. The rules set out in the Uruguay Round Agreement to determine when the exporter’s cost of production may be used in place of the actual home market price and to govern

\textsuperscript{84} R. Lipstein, It’s Time to Dump the Dumping Law, International Economic Insights, (November/December 1993).
\textsuperscript{85} P.J. Lloyd and K.M. Vautier, Promoting Competition in Global Markets, 168(1999).
the calculation of the constructed price have proven quite inadequate and allowed a substantial extension of the application of anti-dumping actions.

Similarly, the rules introduced in the Uruguay Round Agreement relating to cumulation across countries need to be tightened considerably. This rule has made it much easier to prove injury to the domestic industry.

Another substantial reform within the present definition of anti-dumping would be the amendment of Article VI to supplement the (producer) injury test by a national economic welfare test. The interests of consumers are ignored in Article VI and the Uruguay Round Agreement on the Implementation of Article VI and the definition of domestic industry is in terms of domestic producers of the like products, which does not include the downstream industry users of the products. This additional test would obligate countries investigating alleged dumping to offset gains from dumping to downstream producers and/or consumers against incumbent producer losses. Such a reform could go a long way to reducing the use of anti-dumping action as a form of contingent protection.

Hoekman and Kostecki suggested that allegations of dumping be investigated by the competition authority of the exporter's home country, assuming it had one, and a finding of anti-competitive behavior be required before anti-dumping duties are imposed by the importing country. In effect, this would add a competition test to the existing dumping and injury tests. This would make an anti-dumping action consistent with competition law of the exporting country. Alternatively, the alleged dumping could be investigated by the competition authority of the importing country, assuming it had one. Messerline and Tharakan suggest a "two-tier" approach in order to weed out complaints that did not involve predation. In the first tier, the investigation

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would confirm that the seller accused of dumping has sufficient market power to be able to recoup losses.

Under both of these proposals anti-dumping action would vary with the competition standards applied by the competition authority in the exporting country, assuming that one existed. As consistency of standards across importing countries is desirable, there would have to be WTO negotiations to adopt a common competition standard for all members.

Any amendment of the test of injury or the addition of a third test might be considered to breach the undertaking in the Doha Ministerial Declaration that the negotiations preserve the concepts and principles of the Uruguay Round Agreement on the Implementation of Article VI. For example, if it were required that any allegation pass a third test relating to nation would mean in some cases that anti-dumping action could not be taken, even though the case satisfied the requirements relating to the proof of dumping and the proof of injury. On the other hand, the Doha Ministerial Declaration also agreed that negotiations will take place on the interaction between trade and competition policy. While this does not provide a mandate for the introduction of a competition standard in anti-dumping actions taken under Article VI, it explicitly “recognizes the case for a multilateral framework to enhance the contribution of competition policy to international trade and development”. There is a tension in the Declaration between the desire to improve the discipline on anti-dumping action on the one hand and the intention of preserving the principles and concepts of the existing agreements on the other that will have to be resolved.

The study of international law of anti-dumping is the study regulation of unfair trade practice. Anti-dumping action as a remedy for cross-border price discrimination and selling below average cost is a fundamentally mistaken policy. Dumping is not usually harmful to the importing country. Moreover, anti-dumping action itself is normally harmful to both the importing and the
exporting country. The rules have led to the use of anti-dumping action as a form of back-door protection that is discriminatory and has become a major source of bilateral and systemic frictions in the world trading system.

The adoption of a competition approach to dumping focuses on the true costs and benefit of this form of business conduct and it suggests possible reforms that will align government interventions more closely to the true costs of harmful predation of price discrimination. The point of view that dumping should be regarded as a competition problem has not yet penetrated the consciousness of the national or WTO negotiators.

Major reform of the WTO rules relating to anti-dumping is limited by the words chosen in the Doha Ministerial Declaration. There is unlikely to be much support among developed countries for changing anti-dumping provisions from the WTO in a substantial way. The U.S Government in particular remains adamantly opposed to any tightening of the WTO rules relating to anti-dumping action. On the other hand, the Declaration itself recognizes the need to improve the discipline on anti-dumping actions. This conflict is the challenged on the next round.