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# The Participation of Developing Countries in The World Trade Organization (WTO)

***Abstract***
*The World Trade Organization (WTO) regulates trade between states. Its membership cuts across two major groups of states: developed and developing states, each striving to get as much trade benefit to itself as possible. The relations of developed and developing countries under the WTO and indeed under other platforms, have been complex. Due to obvious reasons, including developing countries' poor finance and the lopsided power balance in favor of developed states, developed states have often had an edge over developing states in their trade dealings. Thus, developing states have been grappling with a system that heavily leans against them. Some of the factors that hindered the effective participation of developing countries in the General Agreement on Tariffs and Trade (GATT) are still present under WTO, and efforts made so far to address the concerns and challenges of developing countries under the WTO have yielded little or no result. Consequently, there is the need to strengthen developing countries' capacities in order to ensure a greater participation by developing under the WTO.*

***Annotasiya***
*Ümumdünya Ticarət Təşkilatı dövlətlərarası ticarəti tənzimləməkdədir. Təşkilatın üzvlüyü hər biri daha çox ticari xeyir əldə etməyə çalışan inkişaf etmiş və inkişaf etməkdə olan dövlətlərdən ibarət iki əsas qrupa bölünür. İnkişaf etmiş və inkişaf etməkdə olan dövlətlərin ÜTT, həmçinin digər platformalar nəzdində münasibətləri həmişə mürəkkəb olmuşdur. İnkişaf etməkdə olan ölkələrin zəif maliyyə vəziyyəti, qüvvələr balansının uyğunsuz şəkildə inkişaf etmiş ölkələrin tərəfində olması kimi aşkar səbəblərə görə inkişaf etmiş ölkələr inkişaf etməkdə olan ölkələrin ticarət münasibətlərin üzərində təsirə malik olmuşdur. Buna görə də, inkişaf etməkdə olan ölkələr özlərinə qarşı olan sistemlə mübarizə aparmaqdadırlar. İnkişaf etməkdə olan ölkələrin Tariflər və Ticarət üzrə Baş Sazişdə effektiv iştirakına maneçilik törədən faktorların bəziləri ÜTT ilə də qalmaqdadır və bu maneələri aradan qaldırmaq üçün həyata keçirilən tədbirlər çox zəif nəticə göstərmiş və ya ümumiyyətlə nəticəsiz qalmışdır. Nəticə etibarilə, inkişaf etməkdə olan ölkələrin ÜTT-də iştirakını təmin etmək üçün onların imkanlarını gücləndirilməsinə ciddi ehtiyac göz önündədir.*

## Introduction

The explosion of the world population has increased the need for international trade and economic development that would cater to the varying needs of the teeming population. The WTO is essentially, or rather theoretically, established to regulate the conduct of trade between states. It is made up of two major groups of states, each striving to get as much trade

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benefit to itself as possible. Developing states, being the weaker of these two groups have been grappling with a trade regime that leans heavily against them. This paper examines the participation of developing countries in the WTO. It explores the difficulties encountered by developing states in their relations with the industrialized nations, and the ways in which the WTO has been able to cater to the needs of developing states.

The paper is divided into four parts. Part 1 offers a general introduction to the work. Part 2 gives a history of the WTO: the period predating General Agreement on Tariffs and Trade (GATT); the GATT period; and then the creation of the WTO. This part also gives a narrative of the obstacles encountered by developing states within these periods. In addition, it explores the role of developing countries in the establishment of both the GATT and the WTO. Part 3 discusses the impact of the current WTO regime on developing states. It is a general discussion on how developing states have related with their developed counterparts under the WTO, and an assessment of the adequacy of the provisions of the WTO agreements that are said to be especially for the interests of developing states. Part 3 also lays bare the problems militating against the participation of developing states in the WTO dispute settlement system. Part 4 renders a conclusion to the work. The paper finds that the problems that militated against a greater participation by developing countries under GATT still exist under the current WTO regime.

# I. The WTO in a Historical Context

## A. The Period before GATT

For a very long time, mercantilism formed the basis of the trade practices of states. This was not generally healthy for international trade as mercantilists leaned towards policies that favored national economies, and ensured that adequate trade controls were put in place in order to boost domestic supply of goods.[1] During this era, states were bent on obtaining a favorable balance of trade at all cost. States' practice of mercantilism was at different levels. For, example, it has been observed that England was less rigorous in its mercantilist position than some of the Continental states, while France exhibited a more rigorous mercantilism.[2] Although some trade liberalization was achieved some time in the 19th century, it was short-lived, leading to a relapse to mercantilism[3], which was characterized by

[1] See S. Javed Maswood, *International Political Economy and Globalization* 21 (2nd ed. 2008), available at http://www.worldscibooks.com/etextbook/6889/6889_chap02.pdf.

[2] Ibid.

[3] Ibid.

protectionism. The foregoing was to herald a series of worldwide financial crises that ultimately resulted in the Great Depression[4] , which was both an American experience and an international one.[5] This and the protectionism produced a convolution that contributed to World War II.

## B. The Period from the Establishment of GATT to the Formation of the WTO

The World War II - partly caused by economic isolationism and protectionism - left a great deal of economic depression on states. And as states strove to extricate themselves from the grips of the economic depression, a lot of economic and trade policies were employed by them, many of which affected trade relationships. There was thus an urgent need to look for a way to repair the broken economic structure. This led to the Bretton Woods Conference in New Hampshire, United States in 1944, which facilitated the establishment of the International Bank for Reconstruction and Development (World Bank) and the International Monetary Fund (IMF).[6] The Bretton Woods Conference was originally aimed at ensuring trade liberalization and multilateral economic cooperation, and was restricted in its scope as it did not discuss the issue of agreement that would regulate international trade. It was not too long before the United States, in 1945, spearheaded the initiatives for the establishment of the International Trade Organization[7], which would have been based on the Havana Charter[8]- a document that was intended to be comprehensive in regulating global trade.[9] Before the Great Depression, the United States had not been at the forefront of international trade matters due to a seeming constitutional constraint.[10] However, the move to establish the ITO was not successful as the United

[4] See John C. Thomure, Jr., *The Uneasy Case for the North American Free Trade Agreement*, 21 Syracuse J. Int'l L. & Com. 181, 185 (1995).

[5] See Darren M. Springer, *Re-imaging the WTO: Applications of the New Deal as a Means of Remedying Emerging Global Issues*, 29 Vt. L. Rev. 1067, 1075 (2005).

[6] See David Palmeter & Petros C. Mavroidis, *Dispute Settlement in the World Trade Organization: Practice and Procedure* 1 (2nd ed. 2004).

[7] Hereinafter ITO.

[8] Havana Charter for International Trade Organization, Mar. 24, 1948.

[9] See Kele Onyejekwe, *GATT, Agriculture, and Developing Countries*, 17 Hamline L. Rev. 77, 83 (1993).

[10] See Susan Ariel Aaronson, *From GATT to WTO: The Evolution of an Obscure Agency to One Perceived as Obstructing Democracy*, available at http://eh.net/encyclopedia/article/aaronson.gatt (stating that this was because under the United States Constitution, the promotion and regulation of commerce is the function of Congress, while the Executive is in charge of foreign policy. Trade policies which presented a hybrid situation were keenly contested between the two branches).

States refused[11] to sign its charter, and other states toed the line of the United States.[12] This brought the demise of the ITO.[13] But within this period, the General Agreement on Tariffs and Trade 1947[14] had already attained some distinct status, and by some default therefore had to regulate some aspects of trade.[15] GATT was originally conceived as a temporary system for the negotiation of tariff until such time the Havana Charter of 1948 would enter into force[16]. Not only has GATT been perceived as a club[17], but also as a rich man's club that was not envisaged to be an organization.[18]. The forgoing explains why GATT lacked mechanisms that would ensure its effective functioning.[19] It was essentially a contractual agreement by the Contracting

[11] In fact, it is thought that President Truman did not submit the Charter to the Senate for ratification because there was little indication that the creation of the ITO had the support of States. See C.O'Neal Taylor, *The Limits of Economic Power: Section 301 and the World Trade Organization Dispute Settlement System*, 30 Vand. J. Transnat'l L. 209, 243 (1997). On the other hand, Feddersen posits that President Truman did actually submit the text of the Charter to both houses of Congress, which failed to ratify the Charter. See Christoph T. Feddersen, *Focusing on Substantive Law in International Economic Relations: The Public Morals of GATT's Article XX(a) and "Conventional" Rules of Interpretation*, 7 Minn. J. Global Trade 75, 80- 81 (1998).

[12] See Robert E. Hudec, *The GATT Legal System and World Trade Diplomacy* 38 (2nd ed. 1990); generally, John Jackson, *The World Trading System*, (2nd ed. 1997).

[13] The factor that led to the failure of the ITO has been considered as similar to that which caused the failure of the League of Nations, namely: the refusal of the United States to ratify the Havana Charter. See Timothy Stostad, *Trappings of Legality: Judicialization of Dispute Settlement in the WTO, and Its Impact on Developing Countries*, 39 Cornell Int'l L. J. 811, 815 (2006).

[14] GATT, *Legal Texts: GATT 1947*, available on http://www.wto.org/english/docs_e/legal_e/gatt47.pdf (Hereinafter GATT).

[15] See Daniel C. Chow, *A New Era of Dispute Settlement Under the WTO* , 16 Ohio St. J. on Disp. Resol. 447, 450 (2001); Demeret, *The Metamorphoses of the GATT: From the Havana Charter to the World Trade Organization*, 34 Columbia J. Transnat'l L. 123 (1995), reprinted in Ralph H. Folsom et al, *International Business Transactions: A Problem-Oriented Coursebook* 421, (10th ed. 2009). Zheng sees the creation of GATT as a reaction to the causes of the Great Depression. See Henry R. Zheng, *Defining Relationships and Resolving Conflicts Between Interrelated Multinational Trade Agreements: The Experience of the MFA and the GATT*, 25 Stan. J. Int'l L. 45, 50-51 (1988).

[16] See *Free Trade and Preferential Tariffs: The Evolution of International Trade Regulation in GATT and UNCTAD*, Harv. L. Rev. Ass., 81 Harv. L. Rev. 1806 (1968) (hereinafter Free Trade).

[17] See Aaronson, supra, note 10; Robert E. Hudec, *The New WTO Dispute Settlement Procedure: An Overview of the First Three Years*, 8 Minn. J. Global Trade 1, 5-6 (1999), (describing GATT in its early stage as: "... essentially a small 'club' of like-minded trade officials who had been working together since the ... ITO negotiations").

[18] See Ruth Gordon, *Sub-Saharan Africa and the Brave New World of the WTO Multilateral Trade Regime*, 8 Berkeley J. Afr.-Am. L. & Pol'y 79, 82-85 (2006) (hereinafter, Ruth Gordon, Sub-Saharan Africa).

[19] Ibid. See Thomas J. Dillon, Jr, *The World Trade Organization: A New Legal Order for World*

Parties.

The formation of GATT was mainly the affairs of developed countries[20], with little or no participation by developing states[21]. Third world countries were hampered by colonialism from taking part in establishing GATT, and when GATT was finally formed, it did not adequately address their concerns.[22] In fact, during the cradle of GATT, there were no provisions specifically targeted at the developing countries[23]. It was therefore not surprising that agitations would soon emerge from developing states. Even if developing countries could have influenced the formation of GATT, they would not have done so as they lacked faith in the institutions of GATT. It was a case of apathy. The underlying tenet of GATT was the Most Favored Nation, requiring that a country gives every GATT member the same treatment it would give to its most favored trading partner[24]. For example, any tariff

*Trade?*, 16 Mich. J. Int'l L. 349, 354 (1995), (arguing that from the outset, it was clear that the GATT "was ill-equipped to handle the broader task of regulating world trade relations without some fundamental improvements".).

[20] The original GATT members were: "The Governments of the Commonwealth of Australia, the Kingdom of Belgium, the United States of Brazil, Burma, Canada, Ceylon, the Republic of Chile, the Republic of China, the Republic of Cuba, the Czechoslovak Republic, the French Republic, India, Lebanon, the Grand-Duchy of Luxemburg, the Kingdom of the Netherlands, New Zealand, the Kingdom of Norway, Pakistan, Southern Rhodesia, Syria, the Union of South Africa, the United Kingdom of Great Britain and Northern Ireland, and the United States of America". See Legal Texts: GATT 1947, available at http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm . It has been contended that among these countries, Brazil, Burma, Ceylon, Chile, China, Cuba, India, Lebanon, Pakistan, Rhodesia, and Syria would have been considered developing countries at the formation of GATT although there was no such formal classification. See Constantine Michalopoulos, *Trade and Development in the GATT and WTO: The Role of Special and Differential Treatment for Developing Countries*, Working Draft, Feb. 28, 2000, page 2, available at http://siteresources.worldbank.org/INTARD/825826-1111405593654/20432097/TradeanddevelopmentintheGATTandWTO.pdf.

[21] Although there has been no consensus as to what constitutes a developing country, both under the WTO and elsewhere, there are certain common features which run like a thread through all developing states. Thus developing countries are usually victims of colonization, and are dependent on mineral or primary product exports for survival; they possess weak economies. See Onyejekwe, supra, note 9, at 93-94 . The author also gives other models that have been used to categorize world economies. Ibid, 94-96. Throughout this paper, "developing countries" and "third world countries" are used interchangeably to mean relatively poor countries. The terms also include "least-developed countries" as used under GATT/WTO Agreements.

[22] See Gordon, Sub-Saharan Africa, supra, note 18, at 87, (stating that "of GATT's thirty-five original articles, only one addressed the declared needs of Third World countries, and obtaining this article was not only a struggle, but it's ultimate contents were disappointing").

[23] See Michalopoulos, supra, note 20, at 3.

[24] See Art. I GATT.

concession granted to one party should also be extended to all parties[25]. Closely related to the Most Favored Nation principle is the National Treatment obligation espoused under Article III GATT to the effect that: "the product of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products."[26] These were all geared towards trade liberalization. To developing countries, the purported trade liberalization and other promises by GATT were a mirage, "contradictory, confusing, and possibly inaccurate."[27] For instance, the precept of comparative advantage, one of the tenets of GATT, was not favorable to developing states. This stemmed from the fact that the goods most needed by third world countries and in which they had a comparative advantage, were subject to tariffs and other protections[28]. As a 'rich man's club', GATT did not cater to the needs of developing countries. Article XVIII of GATT[29], which was designed to protect infant industries, could only operate on a consensual basis. This is to say that the contracting parties involved had to come to a mutual agreement before Article XVIII would apply. A developed country could grant a developing country a reduction in tariff only if it could get a reciprocal treatment from the latter. This was unrealizable owing to the poor import markets of the developing countries, which had little or nothing to offer in return[30]. Agriculture had always constituted the mainstay of the economies of developing countries. Despite this, the goods produced by the third world countries did not have impact on the global market, considering their low price and income elasticities of demand, not to mention their insufficiency for large export. These developing states therefore had to fall back on imports - a situation that triggered balance of payment problems.[31] There was also the problem of asymmetry of bargaining power between developed countries and third world countries, which always ensured that the former prevailed in every tariff negotiation.

The principles originally adopted in the GATT system were based on the presumption of equality of states. But the reality of the differences, in wealth and development, between the developed states and developing states had not disappeared. It was felt that developing states needed industrialization,

[25] See Gordon, Sub-Saharan Africa, supra, note 18, at 84.
[26] See Art. III GATT.
[27] See Onyejekwe, supra, note 9, at 129.
[28] Ibid.
[29] See Art XVIII GATT.
[30] See Free Trade, supra, note 16, at 1808.
[31] See Kele Onyejekwe, supra, note 9, at 80- 81.

and that this could not be achieved with liberalization in place.[32] Developing states could not keep quiet and pretend that all was well with them in the GATT system. The agitations for their interests to be protected continued, thus creating a need to strike a balance between two conflicting goals: "1) to promote free trade; and 2) to protect and help developing countries."[33] Developing countries were able to secure, at least in principle, an amendment to Article XVIII, which introduced a provision permitting developing countries to protect their infant industries through increase in tariffs.[34] This provision however, contained a caveat, namely that the developing states should compensate any country harmed in the exercise of this right. It is doubtful, however, if developing countries did apply this provision and that could have owed to the burden placed on them by the compensation requirement.[35] In 1958, a Panel of Experts appointed by GATT, among other conclusions, made findings linking the economic policies of the developed countries to the economic woes of developing countries.[36] Preceding the report was the setting up of three committees charged with different functions, all aimed at improving international trade and addressing the problems of developing countries, such as their difficulty in negotiating tariff reductions with developed states.[37] A proposal of action was submitted to the third committee with a recommendation that developed countries should remove tariffs on tropical and primary products from developing countries, and that tariffs on manufactured and semi-manufactured goods from developing countries be reduced and eliminated.[38] However, the recommendation remained largely on paper, with little or no implementation.[39] By the end of the Kennedy Round of negotiation, much progress had not been achieved regarding the agitations of the developing countries. Third world countries were therefore to await the United Nations Conference on Trade and Development to further voice their dissatisfaction with the GATT regime.[40]

UNCTAD is a product of a coalition of developing states to press for changes in the functioning of the international economic regime in general,

[32] See Michalopoulos, supra, note 20, at 3.

[33] See Jeremy B. Rosen, *China, Emerging Economies, and the World Trade Order*, 46 Duke L. J. 1519, 1527 (1997).

[34] See Free Trade, supra, note 16, at 1809; Rosen, supra, note 33, at 1528.

[35] Ibid, Free Trade.

[36] See Onyejekwe, supra, note 9, at100-101.

[37] Ibid.

[38] The recommendation also called for the elimination of quotas and discriminatory internal taxes on the exports of developing countries. See Free Trade, supra, note 16, at 1809-1810.

[39] Ibid.

[40] Hereinafter UNCTAD. See Gordon, Sub-Saharan Africa, supra, note 18, at 89.

and the GATT system in particular.[41] It was part of the campaign for a New International Economic Order and a Charter of Economic Rights and Duties of States.[42] Some of the areas of interests of the developing states which GATT had not addressed were restrictive business practices, agreements relating to commodities; and foreign investment and preferential trading systems. With the arrival of UNCTAD between 1964 and 1965, the GATT provisions were increased with the addition of three Articles to cater to the needs of developing countries. Article XXXVI noted the existence of much disparity in the standards of living of developing states and industrialized states,[43] and that GATT members may place at the disposal of developing states special measures that would promote their trade and development.[44] Article XXXVI therefore called on developed states to not demand reciprocal tariff reduction from developing states in the course of trade negotiations.[45] Article XXXVII, entitled "Commitments", called on developed countries to as far as practicable, reduce and eliminate all barriers to the exports of developing countries, be they in the form of tariff, non-tariff, or fiscal measures.[46] Article XXXVIII called for concerted action among contracting parties to achieve the objectives enumerated in Article XXXVI.[47] These provisions seemed to be mere aspirations, and, considering the way in which they were couched, were largely laudatory.[48] By the end of the Kennedy Round in 1967, the tariff model adopted in respect of industrial goodsfavored developed states more than developing states, to the extent that while developed states got an average tariff reduction of 36 percent on exports, developing states could boast of only an average of 26 percent tariff reduction on goods that were of export interest to them.[49] A similar disparity followed the Tokyo Round, with developed states having a 36 percent tax reduction against the 26 percent given to

[41] See The UNCTAD secretariat, *UNCTAD: A Brief Historical Overview*, available on http://www.unctad.org/en/docs/gds20061_en.pdf.

[42] See Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201, Supp. No. 1, at 3, U.N. Doc A/9559 (1974); Charter of Economic Rights and Duties of States, G.A. Res. 3281, Supp. No. 31, at 50, U.N. Doc. A/9631 (1974);

[43] See Art. XXXVI:I (c) GATT.

[44] See Art. XXXVI:I (f) GATT.

[45] Art. XXXVI:I (8) provided that: "The developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties". See Art. XXXVI:I (8) GATT. This Article also called for cooperation between GATT members and intergovernmental bodies and United Nations organs to assist developing states. See Art. XXXVI:I (7) GATT.

[46] See Art. XXXVII, GATT.

[47] See Art XXXVIII, GATT.

[48] See Onyejekwe, supra, note 9, at 88.

[49] See Michalopoulos, supra, note 20, at 7.

developing states.[50] Developing states still looked forward to more beneficial provisions under the GATT system.

In 1972, the Generalized System of Preferences[51], which allowed developed states to grant non-reciprocal preferences to third world countries, was adopted.[52] Under the GSP, developed countries could remove all tariffs on the importation of certain products from developing countries. It meant a modification of the Most Favored Nation Principle since developed states were free to treat the goods originating from developing states more favorably than like goods of other contracting states.[53] It is doubtful if the GSP had meaningful impact on developing countries. The benefits of the GSP to developing states may have been exaggerated considering its implications. One, the GSP was a voluntary scheme, rather than a contractual one. Second, many of the goods that were of export value to developing countries, for example textiles, were either excluded from the scope of GSP, or to a large extent restricted.[54] GSP appeared to have benefited only the developed states by giving their manufacturing firms access to cheaper parts.[55] In this context, the GSP provisions have been viewed as inadequate and unacceptable.[56]

Developing states were not favorably disposed to the dispute settlement system of GATT owing to the nature of the system itself, which was mainly rudimentary, lacking in definite rules, and was considered to be of weak legal character.[57] Resolution of disputes under GATT lacked any formal mechanism, and largely rested on conciliation, the aim of which was to reach a consensus among parties to comply with the agreements, rather than to impose sanctions for non-compliance.[58] It meant that, and did happen that,

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[50] Ibid.

[51] See GATT Decision Establishing the Generalized System of Preferences, Jun. 25, 1971, GATT B.I.S.D, 18th Supp., at 24 (1972) (hereinafter GSP).

[52] See Ruth Gordon, *Contemplating the WTO from the Margins*, 17 Berkeley La Raza L. J. 95, 99 (2006) (hereinafter Gordon, Margins), (observing that the GSP is still retained under the WTO regime, and that other preferences, alongside the GSP are no more than "soft law", that cannot be enforced by developing states).

[53] See Rosen, supra, note 33, at 1528-1529.

[54] See Constantine Michalopoulos, supra, note 20, at 10.

[55] See Gordon, Sub-Saharan Africa, supra, note 18, at 91, citing D. Robert Webster & Christopher P. Bussert, *The Revised Generalized System of Preferences: "Instant Replay" or a Real Change?*, 6 Nw. J. Int'l L. & Bus. 1035, 1048 (1985).

[56] Ibid.

[57] See Feddersen, supra, note 11, at 82. It is further observed that the GATT dispute resolution system did not mention the words "dispute settlement". See Ernst-Urich Petersmann, *The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement* 70 (1997).

[58] See Alban Freneau, *WTO Dispute Settlement System and Implementation of Decisions: A Developing Country Perspective*, 5, being a thesis submitted to the University of Manchester

power play was the dominant feature of the GATT dispute settlement system. Thus, developing states were at the receiving end of GATT consultation procedure due to their weak bargaining power. The system was characterized by a display of raw power.[59] The fate of developing countries in the dispute settlement system of GATT has been captured in the following words:

Regarding the specific situation of developing countries, it is self-evident that the GATT 1947 procedure did not serve their interests: the economic weight of the parties to the disputes had a significant bearing on the negotiation process. This emphasis on negotiation was likely to lead economically strong members of the GATT to use- or abuse of- their political and economic strength to take advantage of developing countries. This resulted in a lack of trust of developing members in the GATT DSM and, as K. O. Kufuor notes, they filed only ten out of fifty-eight complaints from 1948-1966.[60]

Dispute settlement under GATT revolved around Articles XXII and XXIII, which provided for consultation, and nullification or impairment respectively. The first layer of the procedure involved the disputing parties only. It was in situations where consultation proved ineffective that disputes could be referred to the Contracting Parties for consideration through investigation and recommendation or ruling.[61] This formed the second layer, and usually involved serious issues, such as disputes or complaints involving a nullification or impairment of a benefit arising directly or indirectly from the GATT. The duty to investigate and make recommendations was originally entrusted to a working party, then to a standing panel of experts[62], and then to a panel chosen on a case-by-case basis. Under certain circumstances, the Contracting Parties, in their recommendations, could rule that the complaining party withdraw or suspend tariff concessions or other benefits to the party being complained about, especially where the conduct of such party was inconsistent with GATT obligations. A major problem that dominated the GATT dispute settlement was that the system was based on the consensus principle which required that a decision reached in any dispute could be adopted as binding only with the consent of the parties to the dispute. This implied that a party could always block the adoption of a decision that was

for the degree of LLM in International Business Law 2000- 2001, available at http://lafrique.free.fr/memoires/pdf/200107AF.pdf.

59 See Gordon, Margins, supra, note 52, at 97.

60 ibid Alban Freneau.

61 Art. XXIII:2, GATT; Amelia Porges, *The New Dispute Settlement: From the GATT to the WTO*,1075 PLI/Corp 1095, 1098 (1998).

62 These panels were predominantly diplomats, and were therefore, not skilled in law. They were concerned with reaching a consensual resolution between the parties, and not arriving at a decision over a legal dispute. See DAVID Palmeter & Mavroidis, supra, note 6, at 7.

not in its favor by withholding its consent.[63] The above procedure clearly depicts a system in which the success of a party depended much on its negotiation power. Accordingly, developing states could not grapple with such a procedure that was heavily tilted against them. This explains their low participation in the dispute settlement procedure of GATT. For example, during the GATT period, South Africa was the only African Country that was a principal party in a trade dispute.[64]

It was under the foregoing state of affairs that the developing states continued to mount pressures and to press home their point that the entire GATT system was unfair to them. A series of forums and Negotiation Rounds were held with a view to improving the GATT system and perhaps making it accessible to developing states. The last of these efforts was the Uruguay Round[65], which culminated in the birth of the WTO in 1994 under the Marrakesh Agreement Establishing the World Trade Organization.[66] The new agreement brought in new provisions, and retained majority of the provisions of GATT 1947.[67]

### c. Developing States' Role in the Evolution of WTO

The discussion so far has shown that as the days of GATT went by, the

[63] See Chow, supra, note 15, 452.

[64] *Canada, Sale of Gold Coins*. In that dispute, South Africa, brought a complaint against Canada following the latter's amendment to its provincial Retail Sales Tax Act, which amendment sought to exempt from the tax "Maple Leaf Gold Coins struck by the Canadian Mint and such other gold coins as are prescribed by regulation". The amendment also led to the removal of the retail sales tax on Maple Leaf gold coins in Ontario, which had stood at 7 percent. The new law did not affect any other gold coins, whether produced in Canada or abroad. South Africa contended that this violated Articles II and III of GATT which provided for Schedules of Concessions and National Treatment Principle respectively. It further argued that the action of Canada had nullified or impaired or nullified the benefits that accrued to it under Articles II and III. Canada's defense was based on Article XXIV: 12 GATT. The panel upheld the contention of South Africa, and held Canada to be in breach of Articles II and III GATT. Canada was asked to offer South Africa compensation. See *Canada, Measures Affecting the Sale of Gold Coins,* Report of the Panel (GATT Doc. L/5863), Sept. 17, 1985, available at http://www.worldtradelaw.net/reports/gattpanels/goldcoins.pdf ; Victor Mosoti, *Africa in the First Decade of WTO Dispute Settlement,* 9 J. In'l Econ. L. 427, 433 (2006).

[65] See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Dec. 15, 1993, Part II, ann. 1A, para. 1, GATT Doc. No. MTN/FA, U.S.T._, 33 I.L.M 1130, 1145 (1994)

[66] See Agreement Establishing the World Trade Organization, available at http://www.wto.org/english/docs_e/legal_e/legal_e.htm#finalact.

[67] Even though the WTO emerged out of the need to improve GATT, it has been considered not to be a successor to GATT. See Andrew S. Bishop, *The Second Legal Revolution in International Trade Law: Ecuador Goes Ape in Banana Trade War With European Union*¸ 12 Int'l Legal Persp. 1,8 (2001/2002).

agitations of developing countries increased. Thus, while the early stage of GATT did not witness significant participation by developing countries, this was to change during the period leading to the creation of the WTO. Developing countries made important contributions to the formation of the WTO. The participation of developing countries in the creation of the WTO has a connection to their independence. It is argued that at the birth of the WTO, many developing countries that were hitherto under colonization had become self-governing and were thus found worthy to sit at the negotiation table where the issue of the creation of the WTO was discussed.[68] It should be noted however that developing states were not quick at welcoming and accepting to participate in the Uruguay Round. They were skeptical about the Round, especially regarding United States' bid for negotiation in services- a move they feared would not pay attention to their unresolved issues.[69] Perhaps, their fears were somehow allayed when the Uruguay Round program came out with its subjects for negotiation, which included the interests of developing countries, some of which had not been previously discussed under GATT.[70] It was thus imperative for them to take part in the Round. A wide range of issues was debated, for example whether developing countries would continue to be entitled to the GSP or to revert to MFN for purposes of the Uruguay negotiation.[71] Even in the preparatory work to the Uruguay negotiation, developing states had demanded for improvements in the dispute resolution system. For instance, Jamaica proposed that third parties to a dispute be granted the right of full participation in the panel process. Hong Kong called for a new dispute settlement body, while Australia pressed for the non-involvement of parties to a dispute in the decision of

[68] See Gordon, Sub-Saharan Africa, supra, note 18, at 93. The author however, notes that the actual participation and influence of developing countries in the Uruguay Round, and in the entire WTO system has been enmeshed in doubts. Ibid.

[69] See Onyejekwe, supra, note 9, at 133.

[70] The subjects included tariffs, non tariff measures, tropical products, natural resource-based products, textile and clothing, agriculture, GATT Articles, safeguards, MTN agreements and arrangements, subsidies and countervailing measures, dispute settlement, trade related aspects of intellectual property rights, including trade in counterfeit goods; and trade-related investment measures. See Ministerial Declaration on the Uruguay Round, Declaration of September 20 1986, available at http://www.jus.uio.no/lm/wto.gatt.ministerial.declaration.uruguay.round.1986/ (hereinafter Ministerial Declaration); Onyejekwe, ibid. Among these subjects, agriculture and textile and clothing were not within the purview of GATT in the period preceding the Uruguay Round. See Hakan Nordstrom, *Participation of Developing Countries in the WTO: New Evidence Based on the 2003 Official Records*, 2, National Board of Trade, Stockholm, Sweden, available at http://www.noits.org/noits06/Final_Pap/Hakan_Nordstrom.pdf.

[71] Id, 138-141.

whether or not the ruling of the panel should be adopted.[72] Brazil, speaking the mind of developing countries, later reinforced the call for third party participation in the dispute settlement procedure, alongside a suggestion that developing states should be given preferential treatment in the scheme of things.[73] It was during the Uruguay Round that the Voluntary Export Restraint, which had not been in the interest of developing states, was removed by virtue of the Agreement on Safeguards.[74] This gave developing countries more market access. Moreover, the tariff negotiations achieved under this Round is reported to have, on the average, led to a 34 percent reduction in tariffs on industrial imports from developing countries.[75] In the area of tropical products, developing countries, amidst the opposition of developed countries, agitated for complete liberalization of trade.[76] It is doubtful if the compromise finally reached by the developed and developing countries in this regard favored the latter. The gains of the Uruguay Round seemed to have accrued to the Latin American and East Asian countries, with little or nothing going in the way of the African countries. This has been hinged on the fact that the African countries allowed less trade liberalization.[77] On the other hand, there is a view that despite the extent of the involvement of developing countries in the Uruguay negotiation, the agreements reached under the Round were generally in favor of developed states, and the implementation of those agreements was lopsided against developing countries.[78]

India, however, did not take active participation in the Uruguay Round although it was one of the architects of the GATT in 1947.[79] India was tricked into accepting trade liberalization in preference to its preexisting economic policy, which was dominated by regulation. India was still grappling with this

[72] See Kendall W. Stiles, *The New WTO Regime: The Victory of Pragmatism*, 4 J. Int'l L. & Prac. 3, 15 (1995).

[73] Id, 20.

[74] See Michalopoulos, supra, note 20, at 13.

[75] Ibid.

[76] In fact this featured in the Ministerial Declaration when it stated that: "Negotiations shall aim at the fullest liberalization of trade in tropical products, including in their processed and semi-processed forms and shall cover both tariff and all non- tariff measures affecting trade in these products. The CONTRACTING PARTIES recognize the importance of trade in tropical products to a large number of less-developed contracting parties and agree that negotiations in this area shall receive special attention..." See Ministerial Declaration, Part 1(D), supra, note 70.

[77] Michalopoulos, supra, note 20, at 13.

[78] See Hansel T. Pham, *Developing Countries and the WTO: The Need for More Mediation in the DSU*, 9 Harv. Negot. L. Rev. 331, 336 (2004).

[79] See Dongsheng Zang, *Divided by Common Language: 'Capture' Theories in GATT/WTO and the Communicative Impasse*, 32 Hastings Int'l & Comp. L. Rev. 423, 461- 462 (2009).

adjustment and trying to understand the working of the prescriptions of the Uruguay Round, and had to wait for the next Round: Doha.[80] On the whole, compared to the extent of their participation in the formation of GATT, developing states had a greater involvement in the talks that led to the emergence of the WTO.

## II. Developing States and the Current Regime of WTO

### A. Trade Relations with Developed Countries

One would have expected that with the consistency of the developing countries in their demand for a reform in global trade, they would have achieved a favorable trading climate in their relations with industrialized nations. However, an assessment of the fate of developing countries in the current WTO seems to give the lie to that thinking, even with the portions of WTO agreements meant to serve the interest of third world states. There are provisions in the various agreements that constitute the WTO calling for special and differential treatment of the developing states.[81] Even the Agreement that establishes the WTO and other constituent agreements contain preambular statements recognizing the special needs of developing countries in the WTO regime.[82] The rationales for these provisions are no different from those given in support of the special provisions for developing states under GATT.[83] The Agreement on Trade-Related Investment Measures (TRIMs)[84] was created to prevent non-tariff barriers to

[80] Ibid.

[81] There are about One Hundred and Forty Five of such provisions in the WTO agreements, Understandings, and GATT provisions. See WTO, Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions — Note by Secretariat, WTO Doc. WT/COMTD/W/77 (25 October 2000).

[82] For example, the preamble to the Agreement on Agriculture, in part provides that :"*Having agreed* that in implementing their commitments on market access, developed country Members would take fully into account the particular needs and conditions of developing country Members by providing for a greater improvement of opportunities and terms of access for agricultural products of particular interest to these Members, including the fullest liberalization of trade in tropical agricultural products as agreed at the Mid-Term Review, and for products of particular importance to the diversification of production from the growing of illicit narcotic crops". See Preamble to the Agreement on Agriculture, Uruguay Round Agreement, available at http://www.wto.org/english/docs_e/legal_e/14-ag_01_e.htm The preamble to the Agreement on Import Licensing Procedure takes "into account the particular trade, development and financial needs of developing country Members...". See Preamble to the Agreement on Import Licensing Procedure, Uruguay Round Agreement, available at http://www.wto.org/english/docs_e/legal_e/23-lic_e.htm.

[83] For the justifications for these special treatment, see Michalopoulos, supra, note 20, at 15.

[84] Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Agreement Establishing

trade, for example domestic local content requirement laws which require foreign investors in a host state to purchase a prescribed quantity of goods manufactured in the host state. An aspect of the special treatment given to developing states under the TRIMs is that, while developed states had two years from the coming into force of WTO within which to eliminate all TRIMs, developing states had up to five years to do same, and may temporarily deviate from the requirement.[85] However, TRIMs has the effect of limiting the power of the host nation to regulate foreign investments. This is by virtue of the fact that TRIMs is based on the national treatment principle requiring every country to give the same treatment to both foreign capital and local capital.[86] This may not be in the interest of developing states.

In the same vein, the General Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) purports to have accorded developing countries some preferential treatment, in that under its provision developing states had a period of four years from the creation of WTO within which to implement the Agreement[87], and additional five years to implement the rules on product patents.[88] Under TRIPs, there are minimum standards for the protection of intellectual property, but the espoused protections do not benefit many developing states owing to the fact that some of the products that are of importance to developing countries are not covered by the Agreement.[89] TRIPS has generated a lot of health issues since its inception. Given the inadequate access developing countries have to pharmaceuticals, the question has been to what extent developing countries can strive to protect the health of their citizens without violating their forced commitments under TRIMs Agreement which require the patent protection of pharmaceuticals. The TRIPs Agreement tends to repose too much protection on patent in the area of pharmaceuticals. This has a negative impact on the access of developing states to life saving medicine. A case has been made for a flexible interpretation of the TRIPs Agreement to cater to the health needs of developing countries, especially in light of the prevalence of HIV-AIDS and other diseases in developing countries.[90] The South African

the World Trade Organization, supra, note 66.

[85] See Rosen, supra, note 33, at 1530.

[86] See Gordon, Sub-Saharan Africa, supra, note 18, at 97, (arguing that TRIMs was introduced by developed countries).

[87] See Art. 65(2) Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Agreement Establishing the World Trade Organization, supra, note 66.

[88] Art. 65(4) TRIPs.

[89] See Gordon, Sub-Saharan Africa, supra, note 18, at 98.

[90] See James Thuo Gathii, *The High Stakes of WTO Reform*, 104 Mich. L. Rev. 1361,1372-1373 (2006).

case is instructive on the implications of the TRIPS Agreements on the health needs of developing countries. In 1997 the South African government enacted the Medicines and Related Substances Control Amendment Act, which, inter alia, allowed drugs that could be manufactured at cheaper cost abroad to be imported into South Africa. The law was a reaction to the Human Immune Virus (HIV) scourge, and the need to provide antiretroviral drugs to people suffering from Acquired Immuno Deficiency Syndrome (AIDS). The South African Pharmaceutical Manufacturers Association instituted a suit against the Government of South Africa alleging that the Act contravened the TRIPS Agreement, as well as the South African Constitution. The suit could not proceed to judgment stage following its withdrawal by the plaintiff.[91] The The issue of public health was top in the agenda of the Doha Round.[92]

The Agreement on Safeguards[93] is also part of the current regime of WTO. It seeks to provide a kind of 'shock absorber' to specific domestic industries by the use of temporary and limited safeguards. Thus, a member country can employ some measures to protect a particular industry that may be prone to unfavorable foreign competition. Under Article 9(1), developing countries may impose a safeguard measure for up to two years, while developed states may not impose a safeguard measure against products originating from developing countries, without first complying with certain requirements, and may only impose such safeguard for not more than 200 days.[94] The exemption from safeguards of imports originating in a developing country is limited to situations where the volume of such imports is not more than three percent, "provided that developing country members with less than 3 per cent import share collectively account for not more than 9 per cent of total imports of the product concerned". This limitation has been criticized as too tight.[95]

The inclusion of the General Agreement on Trade in Services (GATS)[96]

[91] See Detlev F. Vagts et al, *Transactional Business Problems* 367-368 (4th ed. 2008), citing also the complaint filed by the United States against Brazil before the WTO Dispute Settlement Body alleging that Brazil's industrial property law of 1996 was in violation of the TRIPS Agreement- a complaint that was later withdrawn by the United States.

[92] Id, 269.

[93] Agreement on Safeguards, Apr. 15, 1994, Agreement Establishing the World Trade Organization, supra, note 66.

[94] See Arts. 6, 9 (2) Agreement on Safeguards ibid; Rosen, supra, note 33, at 1532.

[95] See Yong-Shik Lee, *Facilitating Development in the World Trade Organization: A Proposal for the Council for Trade and Development and the Agreement on Development Facilitation (ADF)*, 6 Asper Rev. Int'l Bus. & Trade L. 177, 185 (2006).

[96] General Agreement on Trade in Services, Apr. 15, 1994, Agreement Establishing the World Trade Organization, supra, note 66.

into the WTO jurisprudence was championed by developed states against the wishes of developing states, and when it did come, it touted liberalization, and is likely to continue the dominance of western corporations over developing countries.[97] GATS has added internationally traded services under the purview of WTO, an area that was absent under GATT 1947. A seeming special provision for developing countries under GATS is that couched as aspirational, calling on developed countries to recognize the "needs of … developing country members, for flexibility in this area."[98] In addition, there is no duty on the part of developing states to open as many services sectors to competition as developed countries[99].

There are other provisions that harp on the need for developed states to offer technical assistance to developing states[100], and to implement the agreements in ways that are beneficial or least damaging to developing countries. These implementation concessions may be in the form of a general aspiration, or explicit provisions directing how developing states are to be given more favorable treatment.[101]

These special provisions for the benefits of developing states under the WTO agreements are merely aspirational, and do not create enforceable positive obligations. Perhaps, this explains why developed states have not adhered to their commitments in this regard. They are inadequate, and as stated elsewhere, they do not give significant protection to developing countries in trade areas that are of utmost concern to them. The claim is that the provisions that grant developing countries longer transitional time frame within which to comply with the various WTO agreements would help in strengthening their institutions to enable them implement the agreements.[102] This argument is not convincing when it is obvious that the longer transitional periods given as a preference to developing states would expire, assuming they have not expired, while the developmental need for such preferential treatments would remain. Even in cases of permanent exemption, only few developing countries qualify for such treatment.[103] Take

[97] See Gordon, Sub-Saharan Africa, supra, note 18, at 96.

[98] See Art XV(1) GATS.

[99] See Art. XIX(2) GATS, which provides that: "There shall be appropriate flexibility for individual developing country Members for opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access in line with their development situation...". See Rosen, supra, note 33, at 1534.

[100] See generally, Committee on Trade and Development, A Description of the Provisions Relating to Developing Countries in the Uruguay Round Agreements, Legal Instruments and Ministerial Decisions, COM.TD/W/10 (Nov. 2, 1994).

[101] See Michalopoulos, supra, note 20, at 17.

[102] See Michalopoulos, supra, note 20, at 21.

[103] See Lee, note 95, at 185.

as an illustration the TRIPS Agreement; it is clear that although the Agreement affords developing countries a larger time frame for compliance, but at the expiration of the period, these countries must fully implement the Agreement.[104] The special provisions are at most commitments that are made on paper without a follow-up structure for implementation.[105]

Developing states have therefore not discarded their belief that the trade regime is essentially that of the rich industrialized countries such as the United States, the European Union, and Japan.[106] It is this attitude that developing states displayed at the failed Ministerial Meeting in Seattle - another forum for them to demonstrate "their conviction that the WTO system was inequitable and steadily becoming more unfair and irrelevant to their development needs."[107] It may be tempting to confuse the actions of the developing countries in Seattle with participation. Rather than constituting participation, it was a protest to show their lack of involvement in the decision-making of WTO. The complaints of developing states were both procedural and substantive. They felt their participation in the WTO affairs had been from the margin, and that the trade agenda had focused on the concerns of advanced countries. Developing states were therefore not prepared for a forum that would be no different from the extant regime.[108] They wanted to actually participate in the decision- making of the WTO. The unity and resoluteness with which developing states opposed the Seattle proceedings could not escape the attention of the then WTO Director-General, Supachai Panitchpakdi.[109] The events of Seattle were unprecedented, and have been described as the "most visible and memorable manifestation of popular discontent" exhibited toward the WTO.[110] There was a permutation that the resistance would somehow shape the Fourth Ministerial Conference at the Doha Round, and bring greater democracy to the WTO.[111]

The Doha Round kicked off in November 2001 in Doha, Qatar, with a recognition that "the majority of WTO members are developing countries...", and a promise to "seek to place their needs and interests at the heart of the

[104] See Gathii, supra, note 90, at 1373.
[105] Michalopoulos, supra, note 20, at 23.
[106] See Pham, supra, note 335.
[107] See Gordon, Sub-Saharan Africa supra, note 18, at 104.
[108] See Gordon, Sub-Saharan Africa supra, note 18, at 105.
[109] See H.E. Dr. Supachai Panitchpakdi, *Keynote Address: The Evolving Multilateral Trade System in the New Millennium*, 33 Geo. Wash. Int'l L. Rev. 419, 429 (2001), cited in Pham, supra, note 78, at 337.
[110] Pham, ibid, 334-335.
[111] See B. S. Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15 Eur. J. Int'l L. I, 20, 2004).

Work Programme adopted in this Declaration."[112] The Conference was tentatively intended to terminate in January 2005- an ambition that was not achieved, leading to the adjustment of the time line, which also met similar fate.[113] The Round saw the passive involvement of the developing countries, after they were lured into the agenda by promises to be contained in the Declaration. These promises by the developed states were made to the third world countries during an all night meeting, after the departure of some developing countries' delegations.[114] Because of these promises, the Round, at the beginning, appeared to have paid more attention to the development needs of developing countries, presumably because the West did not want a repeat of the Seattle debacle. Hence the wide range of issues embraced by the Declaration. For instance, there was a promise to remedy the disparities that had existed between developed countries and developing countries under the Uruguay Round agreements which had agitated the minds of developing countries. Included in the Doha agenda were other concerns of developing countries such as special and differential treatment in the area of agriculture and as contained in other WTO agreements;[115] negotiations of trade in services in a manner that would benefit developing countries;[116] the provision of market access for non-agricultural products;[117] intellectual property right and access to medicine;[118] enhanced support for technical assistance and capacity building;[119] trade and competition policy;[120] trade facilitation;[121] WTO rules;[122] environment; trade and environment;[123] debt

[112] See Paragraph 2, World Trade Organization, Doha Ministerial Declaration, Nov. 20, 2001, WT/MIN(01)/DEC/1 available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm (hereinafter Doha Ministerial Declaration).

[113] See Sungjoon Cho, *The Demise of Development in the Doha Round Negotiations*, 45 Tex. Int'l L.J. 573, 577, 580 (2010).

[114] See Gathii, supra, note 90, at 1361, 1365.

[115] Paragraph 13, in part, provided that : "special and differential treatment for developing countries shall be an integral part of all elements of the negotiations and shall be embodied in the schedules of concessions and commitments and as appropriate in the rules and disciplines to be negotiated, so as to be operationally effective and to enable developing countries to effectively take account of their development needs, including food security and rural development" See Para 13, Doha Ministerial Declaration, supra, note112. See also Para. 44.

[116] Id, Para. 15.

[117] Id, Para. 16.

[118] Id, Para. 17.

[119] Id, Para. 21.

[120] Id, Para. 25.

[121] Id, Para 27.

[122] Paragraph 28 contained the agreement of members "...to negotiations aimed at clarifying and improving disciplines under the Agreements on Implementation of Article VI of the

and finance;[124] and technical co-operation and capacity building.[125] There were also provisions for the "least-developed countries."[126] The lofty aspirations contained in the Declaration earned the Round the name: "Doha Development Round."[127] However, negotiations during the Ministerial Conference were filled with little transparency, with heavy manipulations by the developed states, to the extent that only a handful of developing countries took active part in the process.[128]

In subsequent years, developed countries almost forgot the original philosophy of the Round and abandoned its objectives. The promises, which attracted the developing states to the negotiations, faded away, leaving the same lopsided structure that had long existed. This triggered other factors that led to the failure of the Doha Round. An example of this would be the unwillingness of the bigger countries to grant a reduction of subsidies to developing states, except on reciprocal basis - a position that developing countries were not eager to take.[129] The above demonstrates that in fact, developed states and the third world countries had conflicting agenda at the Fourth Ministerial Conference in Doha. The mercantilist inclination of the developed states sat uneasily with the development bids of third world countries.[130]

Interestingly, the then Commissioner of European Communities, Pascal Lamy, would seem to have agreed that the Doha Ministerial Conference did not succeed in addressing the concerns of developing countries.[131] In the view of India, represented by its trade official, Bhagirath Lal Das:

For several years, the developing countries have been drawing attention to the severe imbalances and inequities in the WTO agreements. The

GATT1994 and on Subsidies and Countervailing Measures, while preserving the basic concepts, principles and effectiveness of these Agreements and their instruments and objectives, and taking into account the needs of developing and least-developed participants." See Ibid, Para. 28.

[123] Id, Paras. 32-33.

[124] Id, Para. 36.

[125] Id, Para. 38.

[126] Id, Paras. 42- 43.

[127] See Gordon, Sub-Saharan Africa, supra, note 18, at 107.

[128] See Chimni, supra, note 111, at 20 (highlighting the experiences of developing countries at the Doha Ministerial Conference).

[129] See Cho, supra, note 113, at 583- 584 ( stating that "... the United States conditioned the reduction of its farm subsidies firmly on other members' concessions, not only on the EU's reduction of farm tariffs but also on developing countries' (such as China and India) disarmament of special protection for their crops …).

[130] Ibid.

[131] See European Communities Commission Statement by Mr Pascal Lamy, Commissioner for Trade, WT/MIN(01)/ST3, Nov. 10, 2001).

[Declaration], instead of eliminating the imbalance, has in fact enhanced it by giving special treatment to the areas of interest to the major developed countries and ignoring the areas of interest to the developing countries. [132]

The failure of a scheme that enumerated ambitious assistance programs for third world countries, without matching them with provisions on how they would be funded[133], was certain. In recent years, it has been argued that developing countries are losing their homogeneity, and are now singing discordant tones in matters of trade. Their needs seem now to vary since some are poorer than others. This comes at a time when the industrialized states are pulling themselves together and acting as a cohesive force.[134] This is sure to affect the already jeopardized position of developing states in world trade. The view that developing states have wittingly relinquished their economic, political, and social relevance to international organizations, such as the WTO, is evidence of developing states' lack of effective participation under the WTO.[135]

With the failure of the Doha Round negotiation, it was almost certain that the Cancun Ministerial Conference would not be successful. At the Conference, convened with a view to implementing the Doha agenda, the ension that had formed part of the Doha Round was still in place. A seeming concession given to developingcountries by developed states, especially the United States, which concession was to allow developing states that did not have the capacity to manufacture medicine to import cheaper generics at cheaper prices, turned out to have a negative impact on other compromise at the Conference.[136] At the Cancun Conference, four cotton- producing states from the West and Central Africa: Benin, Burkina Faso, Chad, and Mali, pressed for Sectoral Initiative in Favor of Cotton[137] calling on developed states, especially the United States to eliminate subsidies on cotton. The Sectoral Initiative also demanded that due compensation be paid these West and Central African countries to offset their lost income occasioned by the subsidies.[138] One of the pros of the Initiative was that the elimination of

[132] See Bhagirath lal Das, *WTO: The DOHA Agenda- The New Negotiations on World Trade* 3-4 (2003).

[133] See Sungjoon Cho, *A Bridge Too Far: The Fall of the Fifth WTO Ministerial Conference in Cancún and the Future of Trade Constitution*, 7 J. Int'l Econ. L. 219, 226 (2004) (hereinafter Cho, Bridge).

[134] See Ruth Gordon, Sub-Saharan Africa, supra, note 18, at 109, 118.

[135] See Chimni, supra, note 111, at 25.

[136] See Cho, Bridge supra, note 133, at 226.

[137] See WTO, Committee on Agriculture, Special Session, WTO Negotiations on Agriculture, Poverty Reduction: Sectoral Initiative in Favour of Cotton, Joint Proposal by Benin, Burkina Faso, Chad, and Mali, TN/AG/GEN/4 (May 16, 2003) (hereinafter Sectoral Initiative).

[138] See Cho, Bridge, supra, note 133, at 230; Ruth Gordon, Sub-Saharan Africa, supra, note

subsidies on cotton would lead to a reduction of poverty as cotton production would be raised.[139] However, there was no consensus as to the acceptance of the Initiative. The United States opposed the Initiative, and rather called on the affected countries to diversify their production areas so that they could benefit from the United States' African Growth and Opportunity Act.[140] It is commendable that the then WTO Director-General Supachai, identified with the Initiative.[141]

A group of developing states like Brazil, India, and China, spoke with a united voice against developed states on trade areas such as agriculture. These states were able to win the heart of other third world countries with whom they formed the "G-21" alliance. This gave them a common front to challenge the policies of the United States and the EU and to demand for the removal of all export subsidies on agriculture.[142] The coalition was strong enough to check the economic excesses of the developed states.

At the Sixth Ministerial Conference in Hong Kong, which opened in July, 2005, the problems confronting developing states remained largely unattended. This was also the case with the tension between the North and the South, and the lack of commitment on the part of developed states toward the development concerns of third world countries. The fate of developing countries under the WTO is largely uncertain.

## B. Developing States and WTO Dispute Settlement System

There has been much literature on the functioning of the WTO dispute settlement system, a great deal of which suggests that the system has a lot of merits. For example, it is seen as a new development in international economic relations in which law, more than power, might reign.[143] Dillon

18, at 113-114.

[139] ibid Ruth Gordon, Sub-Saharan Africa.

[140] ibid Cho, Bridge supra, note 138.

[141] Ibid.

[142] See Gordon, Sub-Saharan Africa, supra, note 18, at 111-112.

[143] See Gregory Shaffer, *How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Countries Strategies*, 5, ICTSD Resource Paper No. 5 (2003), citing Julio Lacarte-Muro & Petina Gappah, *Developing Countries and the WTO Legal and Dispute Settlement System: A View from the Bench*, 4 J. Int'l Econ. L. 395, 401 (2001). For a similar view, see Hunter Nottage, *Developing Countries in the World Trade Organization Dispute Settlement System*, GEG Working Paper, 2009/47 (2009), available at http://www.globaleconomicgovernance.org/wp-content/uploads/nottage-working-paper-final1.pdf (stating that " One of the most noteworthy achievements of the establishment of the WTO in 1995 was the introduction of its binding dispute settlement system. Building upon GATT dispute settlement practice, the Understanding on the Rules and Procedures Governing the Settlement of Disputes ('DSU') contains innovations that resulted in a paradigm shift from a system based on economic power and politics to one based on the

has identified three major areas in respect of which the WTO dispute settlement system constitutes an improvement on GATT's system of resolving disputes.[144] The Dispute Settlement Understanding (DSU) is a hybrid of the codification of early measures on dispute settlement, institutional reform and new stipulation, which ensure that the interest of developing states are given attention to.[145] As noted earlier, the GATT dispute settlement system was mainly formal and lacked a detailed procedure. So with the establishment of the DSU under the WTO Agreement, it was thought that it had created a unified system of dispute settlement, with a stronger judicial nature.[146] With some evidence[147] that developing countries' use of the dispute settlement process has increased since the creation of the DSU it would appear that the system has brought some gains to developing countries. However, there is counter index showing that developing countries' relative participation in the international trade dispute settlement system in complaints against developed countries has declined since the advent of the WTO.[148] One thing that is clear is that despite the perceived merits of the WTO dispute settlement system, there is a concern that the system has created some unresolved problems for developing countries.[149] This is due to the general implication of the DSU, as it has been observed thus:

By adding 26,000 pages of new treaty text, not to mention a rapidly

rule of law").

[144] The first is that, the DSU has a unified dispute settlement system, which has solved the problem of uncertainty in the determination of the particular procedure that should apply. The second improvement is the creation of the Appellate Body, which was absent from the GATT. The third is that the system ensures the establishment of the the Panel and the Appellate Body and the adoption of their rulings. See Dillon, supra, note 19, at 373.

[145] See Freneau, supra, note 58, at 22.

[146] See Pham, supra, note 78, at 346 (stating that "As opposed to much of the more fluid diplomatic forms of GATT dispute settlement, the DSU prescribed a more rigid and systematic procedure for handling trade disputes, and established 'stricter time limits, automatic establishment of panels, automatic adoption of panel reports, appellate review,limits on unilateral action, automatic authorization for suspension of concessions, and separate treatment of non- violation complaints'").

[147] See Pham, supra, note 78, at 349- 350 (supplying some statistical information on the trend of developing countries' participation in the WTO dispute settlement system); There is a record that "A cursory analysis of the WTO Secretariat data for the first ten years of dispute settlement activity provides a relatively positive picture. 127 of the 335 consultations requests made during that period were from developing countries, 40 of the 96 panel proceedings completed involved developing-country complainants, and 33 of the 56 appearances before the Appellate Body in 2007 were from developing countries". See Nottage, supra, note 143.

[148] See Shaffer, supra, note 143, at 14.

[149] Ibid.

burgeoning **c**ase law; by imposing several new stages of legal activity per dispute, such as appeals, compliance reviews, and compensation arbitration; by judicializing proceedings and thus putting a premium on sophisticated legal argumentation as opposed to informal negotiation; and by adding a potential two years or more to defendants' legally permissible delays in complying with adverse rulings, the WTO reforms have raised the hurdles facing [developing countries] contemplating litigation.[150]

Some specific factors have been identified as affecting the participation of developing countries in the WTO dispute settlement system. First, developing states do not possess sufficient resources, in terms of both finance and personnel to maximize the use of the dispute settlement system. The importance of cost as a major factor militating against developing states' participation in the WTO dispute settlement system should not be underestimated.[151] The cost of litigation before the dispute settlement body is expensive and therefore cannot be afforded by many developing states.[152] Thus developing countries exercise some restraint in bringing complaints before the DSU, to the extent that they miss the opportunity to litigate cases beneficial to them. Moreover, developing states lack trained personnel that are versed in the procedure of the dispute settlement system. It is almost axiomatic that developed states enjoy an advantage or edge over developing states in terms of legal personnel and expertise. This disparity continues to affect the number of cases developing states bring against developed states under the dispute settlement system. Even though the DSU contains certain provisions designed to address the problems of developing states identified here,[153] the provisions have not been particularly helpful to developing states. This may be because the assistance offered by these provisions is largely limited. For instance, the experts may only assist in respect of disputes that have already been initiated, and may not provide legal

[150] See Freneau, supra, note 58, at 10, citing Marc Busch & Eric Reinhardt, *Testing International Trade Law: Empirical Studies of GATT/WTO Dispute Settlement*, in Daniel Kennedy & James Southwick, eds, *The Political Economy of International Trade Law: Essays in Honor of Robert E. Hudec* 457, 467 (2002).

[151] See Freneau, supra, note 58, at 31.

[152] See Pham supra, note 78, at 354. For instance, representation of a party before the panel proceedings
can cost more than US$10 Million. See Nottage supra, note 143.

[153] Article 27.1 DSU provides that "The Secretariat shall have the responsibility of assisting panels,
especially on the legal, historical and procedural aspects of the matters dealt with, and of providing
secretarial and technical support". Section 27.2 calls for "additional legal advice and assistance in respect of dispute settlement to developing country Members".

assistance prior to the initiation of complaints.[154] In order to ensure the continued impartiality of the Secretariat, as is required under the provision,[155] the Secretariat cannot act as an advocate in a dispute. Even if developing countries decide to use outside legal personnel, the cost implication is still much, and as it has been rightly observed, this solves only the legal personnel problem, and does not resolve the issue of financial resources.[156]

Another obstacle that stands in the way of developing countries' use of the WTO dispute settlement system is the problem of enforcing the rulings of the Panel and the Appellate body. Notwithstanding the judicial nature of the dispute settlement procedure, the rules do not ensure certainty in implementing the decisions of the dispute settlement body. In other words, the system lacks a mechanism that can compel a losing party to comply with the outcome of a dispute. This has made the implementation to be dependent on the willingness of the unsuccessful party.[157] This negatively impacts developing countries. Although it appears the major objective of the WTO dispute settlement is to ensure that the offending party complies with the ruling of the Dispute Settlement Body (DSB) and remove the measure that is in violation of its WTO obligations, in practice the remedy that is immediately available to the complaining party, which has obtained a favorable decision from the DSB, is retaliation through suspension of concessions as the Panel or Appellate Body cannot compel the offending party to remove the inconsistent measure or to compensate the prevailing party. Retaliation is not a satisfactory measure since it does not remove the trade barrier suffered by the complaining party. Moreover, the remedy of retaliation may prove elusive to developing countries, which may have little or no trade areas that can provide retaliatory countermeasures against developed states. Even where there exist such countermeasures in terms of export restriction, they would be counterproductive on developing countries, considering the small nature of their economies,[158] as they cannot sustain the impact created on them by a suspension of trade with a developed country. The result is that a developed state has the capacity of absorbing any trade retaliation from a developing country, and may continue in the breach of its obligation under WTO agreements. This has made the WTO retaliation rules to be

[154] See Hunter Nottage supra, note 143.

[155] Article 27.2 DSU in part provides that: "...This expert shall assist the developing country Member in a manner ensuring the continued impartiality of the Secretariat".

[156] See Pham supra, note 78, at 356.

[157] See Frenean supra, note 58, at 35.

[158] See Proposal by the African Group, Negotiations on the Dispute Settlement Understanding, TN/DS/W/15, 2, Sept. 25, 2002.

meaningless.[159] It is on the basis of this observation that it is advocated that monetary compensation be adopted as a better remedy for a violation of a WTO obligation. This will encourage developing states to participate fully in the dispute settlement system.

The more adjudicatory trappings possessed by the WTO dispute settlement procedure have an impact on the power structure of the WTO. While not calling for a return to the GATT days of dispute settlement, developing states tend to prefer more use of Alternative Dispute Resolution (ADR). There have been calls, especially from developing countries, for the strengthening of the ADR mechanisms in the DSU. For example, during the Doha Round, Jamaica urged members to honor their commitment to strengthen the consultation stage as provided for in Article 4.1 DSU.[160] Some developing countries[161], alongside the European Communities,[162] emphasized the use of good offices, conciliation, and mediation to mutually resolve disputes between states. Paraguay,[163] Haiti,[164] Jordan,[165] and the Least Developed Countries Group[166] made a proposal that mediation should be made mandatory in disputes involving developing or least developed countries. At the moment, good offices, conciliation and mediation are rarely utilized in the WTO dispute settlement system. A negotiated or mediated settlement, being mutual in nature, would enhance the voluntary enforcement of agreements between the parties. This would remove the difficulties encountered by developing

[159] See Nottage supra, note 143, citing M. Footer, *Developing Country Practice in the Matter of WTO Dispute Settlement*, 35(1)Journal of World Trade 55, 94 (2001).

[160] See Communication from Jamaica, Contribution by Jamaica to the Doha Mandated Review of the Dispute Settlement Understanding ("DSU"), TN/DS/W/21, 2 (Oct. 10, 2002) (hereinafter Jamaica Proposal).

[161] See Communication from Haiti, Text for LDC Proposal on Dispute Settlement Understanding Negotiations, TN/DS/W/37, 4 (hereinafter Haiti Proposal); Proposal by the LDC Group, Negotiations on the Dispute Settlement Understanding, TN/DS/W/17, 4 (Sept. 19, 2002) (hereinafter LDC Proposal); Jamaica Proposal, supra, note 160, at 1; Communication from Paraguay, Negotiations on Improvements on Clarifications of the Dispute Settlement Understanding, TN/DS/W/16, 2 (Sept. 25, 2002) (hereinafter Paraguay Proposal).

[162] Communication from the European Communities, Contribution of the European Communities and Its Members States to the Improvement of the WTO Dispute Settlement Understanding, TN/DS/W/1, 4 (Mar. 13, 2002) (hereinafter European Communities Proposal).

[163] See Paraguay Proposal, supra, note 161, at 2.

[164] Haiti Proposal, supra, note 161, at 4.

[165] See Communication from Jordan, Jordan's Contribution Towards the Improvement and Clarification of the WTO Dispute Settlement Understanding, TN/DS/W/43, 2 (Jan. 28, 2003) (hereinafter Jordan Proposal).

[166] LDC Proposal, supra, note 161, at 4.

countries to enforce panel and appellate decisions. The increased use of ADR in the DSU would be favorable to the developing countries, which lack the resources to effectively take part in the WTO dispute settlement process. Legal disputes, dealt with through adjudication are won and lost, and not settled, leading to notions of "victory" and "defeat."[167]

The use by developing countries of the WTO dispute settlement system is also marked by fear of threat of retaliation by the advanced countries. The possibility, or rather reality, that developed states would withdraw trade concessions they had given a developing state greatly curtails the number of complaints a developing state may initiate against developed states.[168]

## Conclusion

At this stage, it remains to evaluate what the WTO really holds for developing countries. It took about 47 years for the original GATT to metamorphose into the WTO, and it is up to two decades since this metamorphosis took place. It is doubtful if in the real sense, the participation of developing countries under the WTO regime is different from what it was at the GATT period. The fact that the agitations of developing countries under the two regimes of international trade have remained the same seems to confirm this doubt. Developing countries may have increased in number, and one might have envisaged that this would give them more voice in the trade regime. However, this permutation has not turned out to be real. Rather, the voice of developing countries is asphyxiated in a system of WTO that is power-based. Thus, the success of developing countries in the WTO lies not in their number, but in the impact their voice would exert on the trade system. There is almost the temptation to argue that the WTO agreements have sufficiently addressed the concerns of developing states through the inclusion of many provisions that are specifically targeted at these countries. And perhaps, many academic writings have fallen into this temptation. As stated elsewhere, these provisions do not give rise to any obligations on the part of developed states. This much has even been corroborated by one of the decision- making bodies of the WTO. As an illustration, Articles 4.10, 12.11, and 21.2 DSU call for "special attention to the particular problems and interests of developing country Members" in consultations, panel reports, and in the surveillance of implementation of recommendations and rulings, respectively. However, in *EC - Bed Linen*, a request by India to the European Communities to put into consideration a provision requiring that the peculiar

[167] See J.H.H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of the WTO Dispute Settlement* 7 (2000).

[168] See Nottage supra, note 143.

situation of developing countries should be accorded recognition in the application of anti-dumping measures, was disregarded. The Panel held that the provision does not impose any obligation to provide or accept any constructive remedy that may be identified and or offered. In effect, the so called special provisions are merely hortatory. Thus, developing countries continue to be affected by the asymmetry in their trade relations with developed states. This imbalance has to be addressed for the system to be able to serve the needs of both developed and developing members. It should be observed that the power play that resides in the WTO is just an aspect of the disparity that exists in the larger international relations. It is found in international investment relations, where the developed states virtually dictate what is to be included in the investment treaties they conclude with developing states. It is also not absent in international financial institutions.

Developing states may also be contributing to the fate which they face in the WTO. With some of their original common interests now diverging, it may be difficult for them to make consistent claims from their developed states counterparts.

This paper suggests that more efforts be geared toward strengthening the institutional capacities of developing states. In addition, the special provisions for developing countries should be couched in a way that would make them enforceable by the acclaimed beneficiaries- the developing states. This entails a greater commitment from the developed states. Some of the provisions have become inoperative due to effluxion of time; for instance, the ones providing a longer time within which developing countries are to implement WTO agreements. These provisions have to be reviewed. One hopes that developed states would relax some of their dominating tendencies under the trade system. Only time would tell.