

African Trade Growth or Trade Deficit: GATT/WTO Rules as Trojan Horse on African Trade Development

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ABSTRACT - The principle of Most Favored Nation (MFN) as a GATT rule as annexed to World Trade Organisation (WTO) is viewed as very crucial in the operations of the WTO amongst member countries. Another rule of striking importance is the standard of non-discrimination inserted in the MFN rules. As against the background, this study addresses the routine conviction with respect to the viability of GATT laws and WTO rules in the light of non-discrimination principle and Multifibre Agreement (MFA) and, The National Treatment Principle. The study explores the standards of these rules which are whittled down with concrete exemption clauses. These clauses make the adequacy of unhindered commerce guideline perplexed amongst member nations especially, the Sub-Saharan Africa. The study finds that rules of GATT having been made since 1947 at the time when Africa's economic development was annexed to their colonial masters and therefore, not in contemplation by the progenitors. The realization that Africa ought to be given chance to develop come too late within the GATT rules. The study finds that the current GATT structure cannot advance the promotion of African trade. The study addresses the grouping of African nations with other nations like Asia, India and South America as a misnomer and erroneous as Africa is the least developed in terms of international trade bargaining power among other developing countries. The study after analyzing MFN, MFA, National Treatment principle and Transparency rules of GATT, concludes they are development deficit as against trade promotion. The study further concludes that the difficulties in finding an acceptable definition of the 'like product' by several Dispute Resolution Panels as laid down by GATT makes nonsense of the rule and a lacuna in the definition of Article III (2) and III (4) as they are components of paralysis of non-clarifications.

Index Terms- Most Favoured Nations, General Agreement on Tariffs and Trade, Multifibre Agreement, World Trade Organisation.

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I. INTRODUCTION

In the last twenty years, there has been in existence, an interesting division between from one perspective; a quick creation of laws which ought to regulates commercial operations. On the other hand is the obvious unimportance of fast production of laws regulating international business operations which sometimes sidelined the concerns of some stakeholders?¹ Most interestingly, these stakeholders later became bound by such laws.² In keeping with the objective of Organization for Economic Cooperation and Development (OECD) to figure out which nation is economically poor and which nation is not in financial advancement, a report is produced every year by OECD to monitor the economic development of countries all over the world. Development Assistance Committee, an arm of OECD is responsible for generating the annual report to determine economic outcome of developing countries.

The discussion which led to the establishment of General Agreements on Tariffs and Trade (GATT) was immediately after the WWII. The discussion crystallized between the periods of 1946 – 1948. When WTO was established on January 1, 1995, it was to become the principal organization for rules governing the present international trade. The WTO is the most paramount international organization that governs the world trade. It has over 150 members and some observer regimes (most of which have applied for membership), and members represent over 95% of World trade.³ After the annual report, the World Bank and OECD make recommendations alerting the world of the poorest nations. The report of the OECD is very relevant to donor agencies in deciding which country ought to get economic aid and the specific amount of financial assistance to be given. When African countries were depending on aid, the report also shapes the donors' policy decision towards development in deciding which country gets more attention for economic development.

II. GATT AND THE STRUCTURE OF INTERNATIONAL TRADE

The negotiations which established GATT resulted through the effort of Americans and British. Some views were exchanged in Washington between September and October 1943. In that meeting, certain

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³ L. Sek, "The World Trade Organization: Background and Issues" (2001) Congressional Research Service. The Library of Congress.

agreements on issues of substantive concern were reached and these were formed into policies. The leading problem at the period includes trade restriction, subsidies, export taxes, state trading, discrimination, and basically, tariff reduction on trade. Africa and most of the LDCs had no input in the formation of GATT and hence the affairs of WTO. Other issues such as quantitative restrictions commonly known as quotas were to be prohibited. The only agreed exception was the quotas used to deal with balance of payments emergencies. Export taxes and export subsidies were to be eliminated. State trading enterprises were to be encouraged to behave like private traders. Discrimination had to be outlawed, and tariffs had to be reduced substantially.

The proposals were accepted by the United Nations Economic and Social Council in early 1946 and a "United Nations Conference on Trade and Employment" was officially convened. A Preparatory Committee, consisting of eighteen key governments, was appointed to prepare a draft charter for consideration by the Plenary Conference. Africa was not represented at the time. At the end of the first session of the Preparatory Committee, held in London, the United States extended a formal invitation to the other seventy members of the Committee to meet to negotiate a concrete arrangement for the relaxation of tariff and trade barriers of all types.⁴ The tariff negotiations started in April 1947 and on October 30th of that year, the General Agreement on Tariffs and Trade (GATT) was signed by "contracting parties" of twenty-three countries.⁵ Out of these twenty-three countries, no states from Africa was invited to participate, at least, it is not on record as at the time of this study.⁶ This may account for why African states have been criticized for showing low profile in international trade negotiations.⁷ The participation of Africa in GATT is only a handful country that showed some interest. However, presently in GATT membership, African states constitute some important

group with 28 out of 91 full members, 12 more de-facto members⁸ and one provisional member.⁹ It is to be noted that only 12 African countries are represented among the 69 members of the GATT Council, the main organ of GATT. Only 8 out of the 41 have signed any of the Tokyo Round Agreements of 1979.¹⁰ Ginther¹¹ argued that GATT is a major example of operation of international law in general and the development of international economic law in particular. The existing rules of MFN will never aid the growth of trade in Africa.

It is to be expected therefore, that African states, which so far have largely neglected GATT rules, in future will develop a stronger interest in regional trade and contribute to its progressive development. It is argued that even though the nature of GATT law and its evolution is of particular interest for international law and international economic law in particular, the rules are imbalanced. They were not made in contemplation of the African economic growth through tariff negotiations otherwise the Agreement on Textiles and Cotton and quantities restrictions would have reviewed. In appraising the success of GATT, one could easily detect that GATT, though has been successful in certain areas at the early days of Rounds between 1950s¹² and 1960s,¹³ the industrialised countries adopted its rules and used its mechanism to reduce trade barriers steadily within the period shortly after its formation. Regrettably, GATT has never been uniform in its effect. Member countries have been unwilling to liberalise certain areas of trade and those areas that were allowed have been fettered with exceptions. There is no way a new entrant from Africa would grow in trade at WTO because the fettered rules of GATT.¹⁴

At the point when voting occurred, every nation had one vote and choices were made basically by a greater part. Generally, 66% lion's share of aggregate votes cast, with the greater part involving

⁴The first Session was held in 1947 and the members of the Preparatory Committee had two major assignments before them, to work out a draft charter for consideration and decision by the Havana Conference. They are also to organize the tariff negotiations and revise the Draft Agreement on Tariffs in Trade in existence.

21. With the exception of eight countries (Australia, Belgium, Canada, France, Luxembourg, the Netherlands, the United Kingdom and the United States), the Agreement went into effect on January 1, 1948. In the following months, the remaining countries ratified the Agreement. At the same time, signatory countries were drawing up the "Havana Charter" for the proposed ITO.

⁶ In an effort to give an early boost to trade liberalization after the Second World War - and to begin to correct the large overhang of protectionist measures which remained in place from the early 1930s - tariff negotiations were opened among the 23 founding GATT "contracting parties" in 1946. This first round of negotiations resulted in 45,000 tariff concessions affecting \$10 billion - or about one-fifth - of world trade. It was also agreed that the value of these concessions should be protected by early - and largely "provisional" - acceptance of some of the trade rules in the draft ITO Charter. The tariff concessions and rules together became known as the General Agreement on Tariffs and Trade and entered into force in January 1948.

⁷ W. Benedek, "The Participation of Africa in the General Agreement on Tariffs and Trade (GATT)" (1987) *Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America*, Vol. 20, No. 1 pp. 45-58, Nomos Verlagsgesellschaft mbH. Accessed on the 22nd day of July, 2016 at www.jstor.org/stable/43109626.

⁸De-facto members of GATT in this sense are countries, to the territory of which the GATT rules have been applied before decolonization. Such countries would, after independence, maintain a de facto application of these rules pending a final decision as to their future commercial policy. This status allows the country concerned to benefit from most-favoured-nation treatment, without being itself obliged to enter into any new commitments. The other side to it is that much as they would benefit from the MFN treatment, they are bound by its rules and cannot not exercise an option.

⁹ Ibid.

¹⁰ Ibid.

¹¹ K. Ginther, "The New International Order, African Regionalism and Regional Attempts at Economic Liberation," (1983), in K. Ginther W. Benedek (eds.), *New Perspectives and Conceptions of International Law, An Afro-European Dialogue*. Springer, Vienna, pp. 59 at 61.

¹² The first Trade Rounds of GATT negotiations were in Geneva in 1947, known as the Geneva Tariff Conference. At the conference, 23 original contracting parties participated. Also, the Annecy Round, was held between 1948 -1949, the Torquay Round was between 1950 - 1951, Geneva Round held between 1955 - 1956, the Dillon round and it was between 1960 - 1962.

¹³ Geneva Round held between 1955 - 1956, the Dillon round and it was between 1960 - 1962.

¹⁴A. Oxley "The Achievements of the GATT Uruguay Round" (1994) *Agenda: A Journal of Policy Analysis and Reform*, Vol. 1, No. 1 (), pp. 45-53, ANU Press. Accessed on the September m14, 2016 at www.jstor.org.

more than a large portion of the nations, is required for "waivers." Sometimes between sessions of the contracting parties, the Council of Representatives, made up of agents of all individuals alluded to as "the GATT Council," was approved to follow up on both standard and pressing matters. The body meets once every month. The Major GATT standing advisory groups or boards incorporates the following areas. The underlining philosophy of WTO is its open markets and non-discrimination which are verbalized to be very conducive to the national welfare of all countries. The 'raison d'être of the WTO is to offer a mechanism to regimes of member countries to reduce both their own trade barriers and those in foreign markets. It is however different whether it is achieving this objective. Its primary functions are the focal points for the negotiation of binding objectives to reduce trade barriers and agree on disciplines for policies affecting international trade. WTO is to provide mechanism through which its members can enforce these negotiated commitments.

Unfortunately, the modernization theory of development either through international trade or otherwise, did not only concerned itself with economic development as it also took development as a process by which certain "traditional" or "backwards" societies would transform along a horde of dimensions to become "modern." Equally true is the fact that many scholars from a range of disciplines shared the modernization ideas as an interdisciplinary subject which is very fundamental to forming a goal of developing theory for development.¹⁵

It is clear that international trade and factors such as investment and labour productivity are critical to economic growth. Evidently, the provisions of GATT rules as annexed to WTO have not contributed much to the development of African trade. This study posits that Africa and some other Least Developed Countries (LDCs) have not been encouraged by the rules of GATT in terms of market share and trade development. This has not happened for the past sixty-five years of GATT's existence. This is understood on the ground that the General Agreement on Tariffs and Trade (GATT) was not a formal international organization; it was an international treaty to which countries and independent custom territories could become a contracting party. It is a model of 'standalone international institution', independent of the United Nations (UN) system being none of the UN's specialized agencies.¹⁶ Reasoning from the above background, it is surprising that today, the WTO has become very important and a focal point of many of those countries opposing the process of globalization of the world economy. International trade and foreign aid are two main instruments for

generating and reallocating wealth in the world economy to LDCs today. Trade between OECD countries and the developing countries may have increased dramatically since the 1980s, rising in volume from around \$730 billion in 1980 to more than \$3.4 trillion in 2005,¹⁷ the volume of aid flows has been modest in comparison. The question is why is it very difficult for the combination of the two strategies (aid and international trade) to turn around the economies of the developing countries of Africa? The major challenge facing a large number of low-income, predominantly agrarian economies is the problem of how to break out of the vicious circle of low productivity and heavy dependence on a very small number of primary goods.¹⁸ Part of the problems can also be traced to the limited size of the domestic markets available for the goods produced by developing countries

There is an increasing need to divert strategies from dependence on import of intermediate and capital goods from the industrialized nations. For instance, the effect of trade restrictions by Textile and Clothing (T&C) rule in Multifibre Agreement (MFA) of GATT has had negative impacts on African textiles export trading. The MFA has had a strong impact on both importing and exporting countries.¹⁹ Also, in the area of consumer goods, the MFA affects consumers in importing countries by increasing prices of both domestic and imported T&C products. Also, the exporting countries are affected by a reduction in export opportunities. But in all, it has been contended by writers that it is partly offset by the 'quota rent.' Studies have shown that the export revenue of developing countries that is lost as a result of restrictions is substantial.²⁰ The need to expand export capacity, free trade in order to pave way to increase of international competitiveness which is adjudged to be very vital for a rapid growth is a major reason for the existence of WTO.

Africa, in the global dispensation faces challenge of industrialization and improvement of productivity which would lead to international competitiveness. This writer support the argument that Africa is least developed with particular reference to labour intensive products. This is may be due to the existing manufacturing industries established in the context of import substitution strategies. The post-colonial era pursued this course. In modern development features, much of the capacities of such industries are no longer viable due to rapid growth in the policy and national environment. These are keys to issues affecting the parameters of their competitiveness. Africa is presently marginalized in world trade and this is mostly responsible for its inability to sustain a rapid growth.²¹

¹⁵ See Gilman's discussion paper at pp.77-79, which explained interdisciplinary aspects of modernization initiatives at Harvard, Yale, and Chicago. He traced interdisciplinary focus to Talcott Parson's search for a unified theory of social action in which the role of neoclassical economics were said to be limited.

¹⁶ This is in contrast to other specialized intentional organizations such as WIPO, ITU, and UNCTAD. The WTO is the successor to the GATT, which it has since subsumed.

¹⁷ UNCTAD, 2007 Report on development countries' trade exchange.

¹⁸ "The United Nations Conference on Trade and Development Report." (1999) James Currey Ltd.

¹⁹ J. Goto, "The Multifibre Arrangement and Its Effects on Developing Countries." (1989) The World Bank Research Observer, Vol. 4, No. 2, pp. 203-227, Oxford University Press.

²⁰ Ibid.

²¹ Ibid.

A. CRITICAL EXAMINATION OF THE “FAIR AND OPEN PRINCIPLE” OF GATT ON AFRICAN TRADE DEVELOPMENT.

The principle of ‘open and fair’ application of trade barriers is one of the major areas of operation of GATT rule. Tariffs are the most common and visible forms of trade barrier known to international commodity trading under the GATT rules. Hence tariffs were to be “bound” or set at minimum levels, and not to be incremented above the negotiated level. The question is what transpires if one of the WTO Member countries lacks economic power to negotiate tariffs which is quite often the case with Africa? After all, there is an African adage which verbally expresses that, “it is the person who has the money that has the higher trade bargain.” In the light with of the above adage, the principle of MFN as a GATT rule would apply automatically. However, another question is what if where, for instance, this principle applies but does not fall within the economic needs of a particular member country? This engenders a lacuna in the “open and fair” principle of the rules of GATT. It need be said that the rules need urgent review to accommodate developing countries. Tariffs is said to be much more *facile* to identify and to eventually reduced and this is what appraised the option of tariff as against the quantitative restriction option such as quotas rule. Another docile feature of WTO/GATT is that the Dispute Settlement Understanding (DSU)’s decision is not enforceable. The panel report can only carry some force of opinion and encourages countries to work towards an agreeable resolution.²² Contracting parties meets periodically to further negotiate reduction of trade tariffs and other trade barriers. The negotiations are referred to as “rounds.” The sole reason for these negotiations is reduction of trade tariffs by member countries; which is one of the major objectives of GATT.

B. GATT AND PROTECTION OF TRADE THROUGH TARIFFS.

In course of this research, we found the term “protection” does not appear per se in the WTO agreements; it is implicit in the term of ‘non-discrimination.’²³ While there is no operative definition of the term “protection” in WTO’s agreement, it

²² D. Palmeter and P. C. Mavroidis, “The WTO Legal System: Sources of Law.” *The American Journal of International Law*, Vol. 92, No.3, pp. 398 at 413. Assessed on October 13, 2016 at www.jstor.org.

²³ Since the 1980s, tariff rates have been significantly reduced around the world. Within Brazil, average tariffs dropped from nearly fifty percent in 1985 to twelve percent in 1995, and 10.4 percent by the start of 2005. For 2004 figures, see Peter Hakim, “Two Ways to Go Global,” *Foreign Affairs* 148, (Jan.-Feb. 2002). See also P. K. Goldberg and N. Pavcnik, “The response of the informal sector to trade liberalization,” (2003), *72 Journal of Development Economics* 463, 473 (noting that “the average tariff declined from 58.8% in 1987 to 15.4% in 1998 in Brazilian manufacturing.

captures some measures which may be taken primarily to be intended to favour domestic produce over foreign production. With respect to trade in goods, the form of protection available and allowed for domestic products is the tariffs. That is, WTO Members are not allowed nor permitted to use quotas to restrict trade in goods. African trade should have a central role in any “new round” of GATT negotiations. Having mentioned this, starting from the interest of each group, it is difficult to make an all-conclusive statement of what the interests of developed and developing countries in trade liberalization²⁴ in today’s economic reality. This author argues that while the expansion of exports has been constrained by some existing import restrictions as well as the threat of the imposition of restrictions by some countries, the process of diversification in developing countries has permitted the increase of shares in developed countries markets for manufactured goods in an unfavorable African environment²⁵. There is nothing on ground to make one understand that the tariff protection under the WTO had assisted the developing countries in Africa to develop more in terms of industrialization of manufactured goods. In order to ascertain the interests of the wealthy nations in exchange of advancement, when it is contrasted with the developing nations, it is necessary to assess how trade liberalization had affected the volume and the pattern of developing countries’ exports over the years.²⁶ It is a well-known trait that as the only recognized trade organization of the world trade, WTO has also been subjected to critical scrutiny from various legal, political and theoretical persuasions and hypothetical influences over the years of its existence.²⁷

Trade exchange has been an essential element for worldwide social and political development. It is not as though the civil arguments about the effectiveness of the organization have not been examined, it has been scrutinised by individuals and writers. However, no tangible progress has brought changes to African trade as a result of these writings. The existing rules of GATT put a few nations at a more profitable positions than others in exchange dealings. For instance, in the Latin America structuralist reliance writing of the late 1960s and 1970s, there has been in existence of an option; a position that concentrated on the social and political relations of splendid relations among the developed and developing nations.²⁸ Certain measures were brought, amongst other things to create awareness on outcomes of the unequal trade value exchange between states. The fear expressed then

²⁴ B. Bela “Trade Between Developed and Developing Countries: The Decade Ahead.”(1984) *OECD Economic Studies*. Volume 3, at pp. 7-25,. This paper was prepared by the author during his consultancy for the OECD. The author is a Professor of Political Economy at the Johns Hopkins University and Consultant to the World Bank.

²⁵ *Ibid*.

²⁶ *Ibid*.

²⁷ R. Higgott, H. Weber, “GATS in Context: Development, an Evolving lex mercatoria and the Doha Agenda: Review of International Political Economy.” Vol. 12, No. 3 (Aug., 2005), pp. 434-455. Taylor & Francis, Ltd.

²⁸ See Higgott A. Richard , “Political Development Theory” (1983), Published by Kent: Croom Helm Ltd,



is still present today in round negotiations. The reflections of the earlier debates were spatially the construed North-South emphasis on inequality. Disappointingly, the present concerns are about trade and trade agreements which places emphasis on social and ecological considerations and the implications of production processes,²⁹ rather than the social welfare of their member states. Noting this point further, Saurin states that the differences between the orthodox and heterodox approaches to development are to be found in their differing epistemologies and methodologies of evaluating poverty in world politics.³⁰ The concerns for developing countries in evaluation of poverty is always in the news but on the other hand, when it comes to tariff negotiations especially, in agricultural products originating from developing countries (Africa), it is a question of competing priority for the developed countries of protectionism that always come to mind. Conceptualizing trade-development this way does not make WTO an organization that is said to be a *'charge d'affaire'* of the international trading communities, rather, it is a case of hijacking of bubble gum from the mouth of the infants – developing countries.

III. QUESTIONING THE RULE OF NON-DISCRIMINATION (ND) OF GATT.

By definition, the non-discrimination rule means that both imported and locally produced goods should be treated equally. The purport of this provision is to the effect that it does not matter even if the quality of imported product is higher where the cost of production of locally manufactured product is additionally high; the price of the goods are to be treated as identical with the locally produced goods. This provision is believed to have brought inequality of opportunities between the industrial nations and the LDCs; because of subsistence of technological differences and bargaining power between the developed and developing countries. Flowing from the above, one is tempted to question how advantageous or remuneratively lucrative has the provisions of ND of WTO rules has been to the development of the economies of Africa especially, Nigeria as a member of the World Trade Organisation? Furthermore, is it possible for a country which produces its goods at a cost higher than the imported ones which have the same quality, to treat the same goods on equal basis? It is not most likely. It is argued in this study that the domestic goods will lose market based on the given price in the local market at the expense of imported

goods in developing countries but the reverse is the case in developed countries.

This cannot produce economic advantage and will eventually lead to economic loss for the home grown industry. This is where the ND rule will never favour a growing economy such as Nigeria. The provision of this “Most favored nation” principle of trading between the industrialized and LDCs cannot help the trade of the developing country like Nigeria because the rules are the result of concession of Europe and America. It is argued that African continent was not in contemplation at the period when the concessions were made. On the other hand, it would be almost, if not impossible for any country in Europe to treat produced goods from Nigeria or any other part of African countries as equivalent with the goods manufactured in Europe for consumption in Europe. The foregoing discussion depicts the developing countries in Africa as sacrificial lamb at the altar of MFN rules. Moreover, even the non-discrimination principle which is severally expressed to be the cornerstone of the GATT’s operations leaves many rooms for doubt. This is because, there are many exception allowed as provisos in the non- discrimination rule. The exceptions are now an appendage to the trade development of African countries which were not privy to the formation of the rules in 1947.

A. The Positive and Negative Effects of “Most Favored Nation and Non –Discrimination” Rules of GATT.

The objective of the multilateral trade created by GATT backed up by its commercial agreements serves as its rules. It is for the provision of industries and enterprises from different countries with stable and predictable environment with which the member countries of WTO can trade with each other. It was hopeful that the open and liberal system is expected to increase a greater investment through trade between countries; provides employment and thus promote economic development for all countries. Over the years of existence of WTO, developing countries have been strong supporters of a non-discriminatory rule-based multilateral system of international trade.³¹ This argument is built on the background that as economically small units, the LDCs would otherwise be subjected to bilateral pressures from larger powers.³² It is a paradox that they have equally been committed to a special-and-differential (S&D) treatment for themselves under GATT rules. This particular rule is itself a deficit in promotion of trade for Africa. At the time, the developing countries were of the view that their problems are special from those of the developed countries; some balances-of-payment problems, which is thought to be prevalent and endemic to low income countries. But this was not the case as the “special and differential treatment” thought achieved, became a Trojan Horse in the economic growth in the continent.

²⁹ Ibid.

³⁰ S. Julian, “Globalization, Poverty and the Promises of Modernity” (1996) Millennium, Journal of International Studies, 25(3): 657-80. 454. See also S. Julian “The global production of trade and social movements: value, regulation, effective demand and needs” (1999) in A. Taylor and C Thomas (eds) Global Trade and Global Social Issues, London: Routledge. M. Philip, “Globalization” (2005) in T. Janoski, R. Alford, A.M. Hicks and M. A. Schwartz (eds.) :A Handbook of Political Sociology: States, Civil Societies and Globalization.” New York: Cambridge University Press.

³¹ J. Whalley, “Non-Discriminatory Discrimination: Special and Differential Treatment under the GATT for Developing Countries” (1990), The Economic Journal, Vol. 100, No. 403 pp. 1318-1328. Wiley on behalf of the Royal Economic Society.

³² Ibid.

The rules of nondiscrimination are embodied in the Most-Favored-Nation rule (MFN). It states amongst other things that trade must not be discriminatory. It further means that where member country grants a tariff to any country or any other benefit, same most immediately be extended to the like - product of all other member countries. Thus, where Country A agrees on trade negotiations with B, to reduce custom duties on import of cocoa from 20 percent to five percent, the reduced rate must be extended to all WTO member countries. This obligation applies to both import and export products. In the same way, where a country levies duties on export of a product to one destination, it must in the same way apply the same rate its exports of all destinations.

B. Some Exceptions to the MFN Rule.

The GATT rules recognized that tariff and other barriers to trade can be reduced where they meet certain criteria. The criteria are referred to as preferential basis by countries under regional arrangement. The duty-free rates available to countries under regional arrangements need to be extended to other countries. Regional preferential arrangement constituted an important exception to the MFN rules. Also, in order to protect the interest of non member countries, the conditions for forming such arrangement are very strict as laid down by GATT. They include the following:³³

- i. That member country of Regional arrangement must remove tariffs and other barriers to trade affecting substantially to all trade between them.³⁴
- ii. That the arrangement should not result in imposition of new barriers to trade with other countries.

The arrangement may take the form of customs unions or free – trade areas. In either of the two areas, trade takes place in duty – free basis among member states while other countries continue to be subject to MFN tariff rates. However, in the case of customs unions, the tariffs of member countries are harmonized and applied to imports from outside countries on a uniform basis. Also, in free-trade areas, member countries continue to use the tariffs without harmonization as set out in their individual national schedules.³⁵ In the Uruguay Round, some wonder why the developing countries shifted their position a bit from their earlier positions of S&D bloc-wide strategy.

The declaration which launches the Round contains a very clear and unequivocal reaffirmation of S&D treatment principle of the trading systems, but it also proposes a possible reform of Article 18 (b) of GATT as this has been raised by the developed countries, and generalized system of preference graduation pressures against developing countries

which had already built-up outside the round.³⁶ However, Article 18 (b) is available only to developing countries, and its provisions are less challenging than those of Article 12³⁷. Consultations must takes place in the Balance-of-Payments Committee every year in the case of countries invoking Article 12, and every two years if Article 18 (b) is involved.³⁸ Developing countries have frequently pointed to the general language in the *Punta del Este* Declaration thus:

*'Developed Contracting Parties shall therefore not seek, neither shall less-developed Contracting Parties be required to make concessions that are inconsistent with the latter's development, financial, and trade needs, as justifying some form of partial or full exemption from at least some of any new disciplines (especially in agriculture).'*³⁹

As stated by Whalley,⁴⁰ 'what exactly has S&D yielded to developing countries in concrete trade policy terms over the years has also been a subject of debate. Since when the idea of S& D became acceptable by the developed countries, it appears that the differences between developing countries (large/small, middle-income, least-developed, industrialized or community exports, agricultural importers and others are said to have grown,⁴¹ but there is not in existence any empirical evidence of the notion. This lack of coherent empirical examination was what led to the grand alliance of coalition of all developing countries in the Uruguay Round in active voice. In recent years, a lot has been said about the proliferation of import restrictions that represent non-tariff barriers to trade in the developed countries.⁴² Balassa mentioned that the long recession of the years 1980-82 has in fact led to the imposition of some protectionist measures in the United States and in the European Economic Community. However, he further mentioned that it was not as the same pervasive restrictions as the international cartels of the 1930s⁴³. At WTO, the principle of non-discrimination has just two

³⁶ In Article 18 (b), and Article 12, are also GATT articles which permits countries to use trade restrictions when foreign exchange reserves are considered to be at unacceptably low levels while emphasis is placed on minimizing the disruption of trade. In Article 12, it is stated that if a full employment policy raises import demand and creates a balance-of-payments problem leading to the imposition of trade restrictions, no case can be made for modifying the policy in order to eliminate the foreign exchange shortage. Similar wording exists in Article 18 (b), referring in this case to development policy.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Supra note 41.

⁴³ Ibid.

³³ GATT, 1994, Article XXXIV
³⁴ GATT, 1994, Article XXXIV: 5.
³⁵ GATT, 1994, Article XXXIV: 8.



components. One is the Most Favored Nation (MFN) rule and the other is national treatment (NT) principle.

The MFN rule is to the effect that a product made in one Member country be treated with no less favour less than a “like” (very similar) product that originates in any other country.⁴⁴ When a country becomes a member of the WTO, it expects that all other member countries will trade with it on the principle of non-discrimination that exists in the form of the most favored nation rule. To be treated without discrimination, certain exceptions are the right of a WTO member country.⁴⁵ The provision assumes the position that ‘national treatment’ requires that foreign products – once they have satisfied whatever border measures are applied and have paid off tickets of entry in a particular market, they must also equally be treated no less favourable than the direct competitive domestic products. While this provision seem very inviting and promising, it sounds very far from reality especially, where it concerns goods emanating from developing countries to developed nations. On paper, it seems to apply to both fiscal and other policy regulations, while the obligation is to provide foreign products favourable than those afforded to their domestic counterpart especially in developing countries like Nigeria. This is the problem to a growing economy of African countries. Furthermore, where any government is free to discriminate in favour of foreign products against domestic products which are the cases in most African countries, subjected to the MFN rules, it therefore means that all foreign products must be given equal treatments in a growing economy like Nigeria. Take the case of vehicle spare parts for instance; the used parts imported from Europe and America are more preferable to the new ones available in LDCs. The used parts are even more expensive compared to the newly manufactured ones in some of these countries. This is an aspect which makes the MFN rules to apply unconditionally and unquestionably to all nations as WTO members non meritorious. Its foundation is very suspicious from inception. Even though some exceptions are made for the formation of free trade areas or customs union, preferential treatment of developing countries is such that upon accession of a new Member, an existing Member may invoke the WTO’s non-application clause⁴⁶. The application of this rule does not result to rapid development in a growing economy like Africa. Furthermore, this writer is of the view that Africa stand to swallow a bitter pill of having to confront these exclusion clauses which is “a free for all existing members” of WTO. For instance, where policy does not discriminate between certain foreign suppliers⁴⁷, importers and consumers will continues to have incentives to source from the

⁴⁴ Article XIII, this provision was at the time reasonable because during the formation of GATT, the membership were only 23 and most of the developing countries are either not industrialized or do not produce enough to export. The circle of membership was within Europe and America.

⁴⁵ P. Ranjan, “Applicable Law in the Dispute Settlement Body of the WTO” (2009) Economic and Political Weekly, Vol. 44, No. 15 (Apr. 11 - 17, pp. 23-27. Economic and Political Weekly.

⁴⁶ See Article VIII of WTO which gives Members certain rights.

⁴⁷ Id, at page 16.

lowest-cost foreign suppliers. It has been argued that non-discrimination is an effective defense against ‘concession erosion’ which could otherwise materialize and give negotiators less incentive to continue liberalizing.⁴⁸ It is however argued in this study that it can only favour the developed countries. This study argues that the provision can only favour the developed countries against the less developed countries.

C. The Politics of MFN Rule

One area of importance in the study of MFN rules of GATT is the political-horse-riding. It offers smaller countries a guarantee, meaning that larger countries will not exploit their market power against them. The rules equally give better treatment to competitors for foreign policy reasons. A striking feature of economic advancement all over the world is trade and product competition. The law which regulates GATT is by mere accession and does not constitute an obligation. This makes it difficult to prevent developed countries from promoting their exports to the developing countries. The developed countries have economic advantages over the developing countries. This advantages span through technology and bargaining power.

The post-Tokyo round came as a result of the underpinning of the developing countries trade which was not given the chance to compete with the Americas and the European tariffs on such goods which tariffs remained somewhat higher than the overall average. The United States was 9 and 7 percent; Europe was 7 and 6 percent while Japan was 7 and 5 percent. Comparing the above with the tariffs on the developed countries import from the developing countries, it appears there is no such comparison as to what obtains in the developing countries. The explanation is that there are higher tariffs on goods imported from developing countries than all the manufactured imports. For instance, the United States has the tariffs of 10 percent or the application of 20 percent higher on their overall manufactured imports.⁴⁹ Equally, in European Economic Community, the figure is 12 and 6 percent while the figures are 18 and 13 percent for Japan.⁵⁰ Balassa⁵¹ further argues that the decline of imports from developing countries can be attributed to the decline in GNP growth rates in the developed countries rather than increased protection. This writer does not agree with the above contention because there is

⁴⁸ Ibid.

⁴⁹ B. Riley, “Tariff Reform Needed to Boost the U.S. Economy” (2013). Available at http://s3.amazonaws.com/thf_media/2013/pdf/bg2792.pdf. Accessed on August 23, 2016.

⁵⁰ C. R. William, “Exports of Manufactures from Developing Countries: Performance and Prospects.” (1984) OECD’, and The impact of the Newly-industrializing Countries on Production and Trade in Manufacture 1979.

⁵¹ B.C. Balassa “Industrial Protection in the Developed Countries” (1984), The World Economy, vol. 7, no. pp. 179-96, A Quarterly Journal published by the Trade Policy Research Centre, London., C. R. William (1984b), Exports of Manufactures from Developing Countries: Performance and Prospects Access. Report from the Commission to the Council on the State of the Shipbuilding.

nothing to show as evidence that the explanation by Balassa may be the case.

The view of this writer is that the bates for growth of trade of developing countries is in the 'Rounds of negotiations' with bulk of them negotiated ages ago before the developing countries came into the lime light of membership of WTO and *a fortiori*, trading negotiation. It became too late for the developing countries to queue- in especially when tariffs in the framework of the Kennedy and the Tokyo rounds of negotiations, were basically the reduction of tariffs across board. Products of sensitive items of interest to developed countries like steel were made exception while developing countries' textiles and foot wares were excluded. Again the tariffs have been very small on manufactured goods imported from the developing countries. Although, it was further argued that the extent of tariff escalation has been reduced, processing activities in the developing countries continue to suffer discrimination; tariffs are generally not based on unprocessed goods but rise with the degree of fabrication on processed goods especially from developing countries. The argument is, whenever tariffs on output exceeds that of the nominal rate and the nominal rate is higher than the tariff on the inputs, it would record a relatively certain output tariffs which may give rise to high effective rates on protection of the processing activity⁵² of the home country.

At the Uruguay 'Rounds,' the developing countries puts up their argument for the unequal trade between the developed and the developing countries, their arguments were not treated on the basis of tariffs within the developing countries which are so small compared to their counterpart in the developed nations. This means there will never be equal trade benefit and trade bargain between the two sides. The foregoing goes to buttress the argument canvassed by Trachtman,⁵³ who argues in his paper that WTO trade rules which came into existence are the result of years of hard negotiations and it involved huge economic and political bargains. This statement is only correct to the extent that the bargains were done by the developed countries to the exclusion of the developing countries which presently suffers from such hard negotiations. He noted further that if the delicate balance, if disturbed, will result in damaging consequences for the overall multilateral trade system, especially for developing countries and lease developed countries. Many objections raised by the developed nations which economic power is higher than those less developed nations do not presently board well for an effective negotiation for African countries.

Additionally, it is trite to state that the present MFN rule does not benefit developing countries like Nigeria for simple reason that Nigeria does not have the political power and the wealth to force through rounds of negotiations. There is need to fashion a different way out in WTO for developing countries. The rules can be amended to incorporate the economic

needs of Africa especially, the Sub-Saharan countries of Africa like Nigeria. For instance, the Doha round deadlock is premised on disagreement based on agricultural tariffs which the developing countries were not allowed by the developed countries to shoot up. This disagreement is far from conclusion. The developed nations were asking to push Intellectual property and services tariffs through. Despite the negative opposition by the developing countries, it sealed through but the demands of the LDCs on reduction of tariffs on Agriculture did not seal through. This is a power-based as against the rule-based negotiation. Where is equity in trade bargain for Africa?

One is tempted to ask why powerful entities like the EC5 and the United States would support a consensus decision-making rule in an organization like the GATT/WTO, which generates hard law?⁵⁴ In WTO/GATT rule, soft law is often considered to be inconsequential. This simply means that modifying the existing laws of the organization to accommodating new developments from developing countries are not currently in the purview of GATT big wigs member countries who calls the shot.

It was clear from inception, the GATT agreement had no clear provisions for trade and development for developing countries of Africa⁵⁵ It is argued that GATT is another club of rich nations. It was established to suit the economic interests of industrial powers and manipulate the weaker economic nations. For example, at the Havana Conference for International Trade Organization, the United States was opposed to the provisions that catered for economic development of any developing country. But the developing countries, understandably, had other ideas.⁵⁶ Thus, the developing countries' wide range of proposals did not see the light of day during the Rounds negotiations. They called for positive transfers of resources. They also made demands in the field of trade policy which was indeed focused on securing liberation from the Charter's obligations. It was their hope to protect infant industries with certain measures which was not otherwise permitted. They sought to be permitted to receive new tariff preferences from other developed or developing countries. They wanted the right to benefit from developed-country tariff concessions without having to offer equivalent tariff concessions of their own.⁵⁷ This proposal raises dust at the Round and hence the negotiations ended in several deadlock.

D. Special and Differential Treatment. The Banana Case of Latin America (LA) V. Africa, Caribbean and Pacific Countries ACP).

⁵⁴R. H. Steinberg, "In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO" (2002) International Organization, Vol. 56, No. 2 pp. 339-374.. The MIT Press.

⁵⁵ It is true that GATT Article XVIII has an exception for developing countries, but its operation was difficult. It was also discriminatory since it was harder to evoke this article than GATT Article XII which grants exceptions more likely to be used by developed countries.

⁵⁶ K. Onyejekwe, "GATT, Agriculture, and Developing Countries" (1993) Hamline Law Review, 17, Available at www.NationalAgLawCenter. Accessed on 5/9/2016.

⁵⁷ Ibid.

⁵² Supra note 44 at page 58.

⁵³ P. Joel. Trachtman, "Jurisdiction in WTO Dispute Settlement" (2004) in Rufus Yerxa and Bruce Wilson (éd.), Key Issues in WTO Dispute Settlement: The First Ten Years (Cam- bridge: Cambridge University Press), pp. 132-43, (part b).



The term Special and Differential Treatment 'S & D' contains both an access component and a right-to-bulwark component. In GATT, developing countries are given special treatment. The term 'S & D' contains both a right of entry constituent and a right-to-protect component. This is contained under Articles 8, (28) (3), in Part IV, and the 1979 Framework Agreement known as the enabling clause. Article 18⁵⁸ was GATT's first endeavor to abide developing country concerns. It is embedded with three components. Article 18 (a) sanctions developing countries to renegotiate tariff bindings in order to promote the establishment of a particular industry. A developing country utilizing this provision would be expected to offer compensation or face retaliation. Article 18 (b) is on the balance-of-payments escape clause for developing countries. The 18(b) is to the effect that criteria for imposing such restrictions are less onerous than the criteria which apply to developed countries under Article 12 of GATT. Article 18 (c) sanctions a developing country to apply quantitative import restrictions for the purposes of infant industry. Article 18(a) is on tariff renegotiations while Article 18 (c) provides for compensation or retaliation in the absence of a negotiated agreement. One case analyses this provision. The case of *Latin America v. African, Caribbean and Pacific* countries in differential treatment which was treated as follows.

The Latin American case is a test case under the umbrella of non-discrimination (ND), and 'Special and Differential Treatment' (SDT) under GATT rules. Complaints were brought to GATT by the Latin American countries comprising of Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela (the LA countries) requesting a panel to examine the 1993 EEC regulation on the common organization of the market in bananas; composition of the panel which consist of the participation of other contracting parties. Their concerns were that since 1988, the EEC has been the world's most sizably voluminous importer of bananas; 16% of EEC imports were supplied by Africa, Caribbean and Pacific (ACP) countries; description of the five titles of the EEC regulation; under title IV, a certain quota of "traditional" ACP banana imports from other countries are duty free, whereas all other banana imports are subject to a tariff and these includes bananas from the LA countries.

On January 8 1993, Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela requested the European Economic Community ("EEC) to hold consultations pursuant to Article 23 (1) of the General In the EEC's view, this discussion could not be considered as measure under Articles 22 (1) or 23 (1) of the General Agreement (GA) sanctioning for formal consultations under one of these provisions (DS/38/4). On February

19, 1993, the LA countries requested the EEC to hold consultations pursuant to Article .1 of the General Acquiescent concerning Council Regulation (EEC) No 404/93 on the mundane organization of the market in bananas, adopted by the EEC Council of Ministers at its session from 9 to 13 February 1993. Consultations were held between 22 March and 19 April 1993. The consultation did not result into a mutually copacetic solution of the matter, Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela, in a communication dated 28 April 1993, requested that in accordance with the provisions of Article 23 (2) of the General Agreement; in sub paragraphs (a) and (b) thereof, a panel be established to examine the matter.⁵⁹

A panel was established by the Counsel on June 16, 1993 pursuant to paragraph F (a) of the Decision of the contracting parties of April 12, 1989 authorising the Chairman of the Council to designate the Chairman and the Members of the Panel. The Panel would have standard terms of reference unless, the parties to the dispute concurred otherwise within twenty working days of the establishment of the Panel. Thus, on July 16, 1993, the Director-General of the governing council announced the composition of the Panel with Mr. Kesavapany as Chairman, Mr. Thomas Cottier and Mr. U Petereman as Members. The terms of reference of the Panel is to examine, in the light of the pertinent provisions of the GA, the matter referred to the contracting parties by Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela in document DS38/6 and to make such findings as will assist the contracting parties in making the commendations or in giving the rulings provided for in Article XXIII (2).

Apart from the LA Countries which requested for the Panel, at the meeting of the Council dated July 1993, other countries' representatives - Antigua and Barbuda, Barbados, Belize, Cameroon, Cote d'Ivoire, Dominica, Dominican Republic, Ghana, Jamaica, Madagascar, Senegal, St Lucia, St Vincent and the Grenadines, Suriname, Tanzania, Trinidad and Tobago and Uganda expressed their respective government's wish to participate in the work of the Panel. While the Council took note of these statements, there was no consensus on such participation. There were six African countries which request to participate. In the interest of transparency among the contracting parties having a substantial interest in the trade of bananas, the Council decided that it was reasonable to invite such countries to meetings of the panel and these countries were consequently invited to the meeting. Arguments were taken from both sides, the LA countries argue that the EEC regulation contravenes the most favored-nation principle (MFN) as importation of fresh bananas from African, Caribbean and the Pacific (ACP) countries were obligation -free; while bananas from the Latin American (LA) countries are not treated the same

⁵⁸ This provision is tagged, government assistant to development. It provides that LDC contracting parties are permitted under certain circumstances to impose quantitative restrictions in furtherance of their economic development programs or in response to foreign exchange problems attributable to their development status. LDCs are also allowed to withdraw from or modify a tariff binding or apply import quotas to establish or protect an "infant industry.

⁵⁹ Ibid at page 7.

way. The LA countries argue that the EEC regulation impairs the security and predictability of subsisting tariff concession. The LA countries argued that the EEC regulation contravenes the most-favored-nation principle.⁶⁰

In the EEC's view, none of the previous panel reports referred to by the complainants could be interpreted in the way suggested by the complainants or had any relevance to the facts of this case. Arguing further, EEC states that several of the panel reports mentioned by the LA referred to measures "other than duties, taxes or other charges" whereas in this case it was a matter of tariffs, i.e. duties. Concerning the alleged non-conformity of the licensing system, the EEC was of the view that the drafting history of Article X (1) confirmed that it banned prohibitions or restrictions on imports. It did not prohibit licenses, although if the prohibition (or restriction) was effected through quotas or licenses, it was subject to the rules of Article X (155). Moreover, two previous panel reports had clearly established that automatic licensing did not constitute a restriction within the meaning of Article XI (1). Furthermore, the EEC contended that the tariff preferences accorded to bananas from ACP countries, even if inconsistent with Article 1 (1) of the General Agreement, were justified under Article 24, read in the light of Part IV of the General Agreement. The EEC further explained that nearly all of the countries which were currently parties to the Lome Convention were earlier dependent territories of EEC member states. It was for this reason that France and the United Kingdom, who were original members of the General Agreement in 1947, obtained the recognition of the existing preferences in Article 1 (2) and Annexes to the General Agreement. Moreover, Article 24 (9) of the GA specifically provided that these preferences could be maintained also in a situation where the contracting party having granted the preference became a party to a customs union or a free trade agreement in accordance with Article 24(9). The above case is just one out of many panel reports of fights on differentials treatment of countries under GATT operations; under the "most – favored nation" principle on Article 1 of the GATT.⁶¹

E. The Quantitative Restrictions Rule of GATT: Tuna and Tuna Products Case⁶²

The first rule is built around the recognition of members to follow open and liberal trade policies; and the need to protect domestic production from stiff foreign competition. Subject to elongating such protection is only through tariffs which must be kept at low levels. Countries are disallowed from employing quantitative restrictions. The only exception is in certain designated areas. The quantitative restriction rules were further reinforced in the Uruguay Round.⁶³ Thus in the case of Tuna and Tuna products between the United States and Canada, which fact is the Canada's seizure of 19 U.S. Tuna boats which were caught fishing inside Canada's 200-mile fisheries zone. The United States retaliated by prohibiting the importation of all types of tuna and tuna products from Canada pursuant to Section 205 of the Fishery Conservation and Management Act of 1976. These events were a component of a broader disagreement between Canada and the United States of America relating to jurisdiction over Pacific fisheries. The matter was brought to GATT Dispute Settlement Body (DSB). The first issue to be resolved by the Panel was whether the U.S. import ban of all Tuna and Tuna products from Canada constitutes a quantitative "proscription" for purposes of the general prescriptions against quantitative trade measures in GATT as provided in Article X (1).⁶⁴ The panel determined that the proscription did not fall under the exception in Article XI: 2 (c)⁶⁵ for limits on agricultural and fisheries imports in connection with domestic production restrictions. This,

⁶³ N. S. Fieleke. "The Uruguay Round of Trade Negotiations: An Overview" (1995) *New England Economic Review*, Vol 7. Available at <https://www.bostonfed.org/-/media/Documents/neer/neer395a.pdf>. Accessed on October 18, 2016.

⁶⁴ Article 10 (1) provides that all trade measures of Members should be published and therefore transparent. Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefore, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them. Agreements affecting international trade policy which are in force between the government or a governmental agency of any contracting party and the government or governmental agency of any other contracting party shall also be published. The provisions of this paragraph shall not require any contracting party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.

⁶⁵ Article 11, The provisions of paragraph 1 of this Article shall not extend to the following: 11 (2) (c) Import restrictions on any agricultural or fisheries product, imported in any form,* necessary to the enforcement of governmental measures which operates:-

(i) to restrict the quantities of the like domestic product permitted to be marketed or produced, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted; or (ii) to remove a temporary surplus of the like domestic product, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted, by making the surplus available to certain groups of domestic consumers free of charge or at prices below the current market level; or (iii) to restrict the quantities permitted to be produced of any animal product the production of which is directly dependent, wholly or mainly, on the imported commodity, if the domestic production of that commodity is relatively negligible.

⁶⁵ Any contracting party applying restrictions on the importation of any product pursuant to subparagraph (c) of this paragraph shall give public

⁶⁰ Commodity Agreements, Art. XX (h). See also, Article XI and Article XIII, Article XXIV and Part IV, Article III, National treatment on Taxation and Regulations, Preferential Treatment, Elimination of Quantitative Restrictions and non discrimination of administration of quantitative restrictions.

⁶¹ Article 1 of GATT states that any advantage given by a contracting party to a product of another country must be extended unconditionally to a like product of all other contracting parties. However, it is observed that the definition of the term like product had over the years of rules of gate poses a lot of problems among member countries.

⁶² U.S. and Canada complaints) [WT/DS26/AB/R & WT/DS48/AB/R, 16 January 1998. See also the case of [WT/DS48/R/CAN, 18 August 1997], http://www.wto.org/english/tratop_e/dispu_e/horm2.wp5. The meat and meat product case.

notwithstanding that the United States had circumscribed the catch by U.S. boats of some species of tuna, (e.g., Pacific and Atlantic yellow fin, and Atlantic bluefin and big eye). The panel concluded that the exception did not apply because the reasons below:

- (i) The ban applied to the catch of species (e.g., albacore and skipjack) whose domestic production the United States had not limited;
- (ii) The ban was continued even after the limitation on the domestic catch of Pacific yellow fin tuna was ended; and (iii) While Article XI: 2 (a) (quantitative measures to relieve food shortages) and Article XI: 2 (b) (quantitative measures for grading and classification) cover both "prohibitions" and "restrictions," Article XI:2(c) extends only to "restrictions." The U.S. ban was a prohibition.

The Panel considers the claim of the United States to ascertain the measure it took in respect to prohibition of Tuna and Tuna products' importation from Canada. The Panel stated that the measure fell within the general exception in Article XX (g)⁶⁶ for measures relating to the conservation of natural resources. The panel first admits to the limitations in Article XX and further noted that the United States "might not necessarily" have discriminated against Canada in an arbitrary or unjustifiable manner since it had taken similar actions for similar reasons against Costa Rica, Ecuador, Mexico, and Peru. Furthermore, according to the panel, the U.S. action did not constitute a "disguised restriction on international trade" because it "had been taken as a trade measure and publicly announced as such. It need be stated that this is another advantage of the founders of GATT before other developing member countries joined the WTO.

It is simply done, just as Steinberg puts it. "Sovereign equality decision-making rules persist at the WTO because invisible weighting assures that legislative outcomes reflect underlying power, and the rules help generate a valuable information flow to negotiators from powerful states."⁶⁷ This decision under Article XX is quite unfortunate because, it is a clear case of retaliation by the

notice of the total quantity or value of the product permitted to be imported during a specified future period and of any change in such quantity or value. Moreover, any restrictions applied under (i) above shall not be such as will reduce the total of imports relative to the total of domestic production, as compared with the proportion which might reasonably be expected to rule between the two in the absence of restrictions. In determining this proportion, the contracting party shall pay due regard to the proportion prevailing during a previous representative period and to any special factors* which may have affected or may be affecting the trade in the product concerned.

⁶⁶ Article XX provides that subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: Article XX (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

⁶⁷ Steinberg, Supra note 53

United States to Canada. It matters not that such actions were previously taken by the US against these countries mentioned by the Panel. When US took such measures against the countries, it was not a case before the Panel and therefore, each case ought to have been decided on its own merit.

The second rule of GATT is the provision for reduction and administration of tariffs and other barriers to trade through multilateral negotiations. Most times the reduced tariffs are displayed on tariff line basis on the schedule of each country's concessions. The given rates in the schedules are also known as bound rates. The obligation of every member countries not to increase tariffs above the bounded rates shown is usually contained in their schedules. This is a domination of power show by the founding fathers of GATT/WTO. The particular rule was already in existence when Sub-Saharan Africa was not in contemplation of its trade development. We believe this is a trade growth minus for an emerging economy this region. The developing countries in Sub-Saharan Africa are incapable of facing stiff competition with developed economies.

It is more worrisome that no single nation or a combination can change GATT/WTO rules, not now and the future hope of changing it is very dim too. It is even more worrisome that the available literatures are replete with the views that developing countries⁶⁸ should applaud and participate in the WTO trade system.⁶⁹ They argue that this should mean prosperity for all countries by *laissez-faire* economic principles but neglect and forget that fact that GATT rules as set up in 1947 is a actually a wed of commercial which disfavours African development through trade at the world trade organization because all the rules of GATT are annexed to WTO and functional commercial agreement.

Practically, notion of growth by *laissez-faire* has not been the case with WTO as the expectations from the developing countries will never be met by the structure of its governing rules. It is crucial to understand how law-based bargaining power works in the GATT legislative context. The starting point is the procedural rules employed by the developed country members. In most of the plenary meetings of sovereign equality organizations, GATT inclusive, diplomats entirely respect the right of any member state to attend; intervene; make a motion; take initiatives (raise issues); introduce, withdraw, or reintroduce a proposal or amendment; and block the consensus of unanimous support required for action. With this in mind, one is tempted to ask where laid the economic power of developing countries with economic power for weighted vote in order to nullify unanimous

⁶⁸ The meaning of the word "developing countries," "less developed countries," and "Third World," etc., are often used interchangeably but the term "developing countries" is used for consistency only meaning developing nations.

115 J. Whalley, "The Uruguay Round And Beyond" (1989); T. Takase, "The Role of Concessions in the GA TT Trading System and Their Implications for Developing Countries", See also, J. WORLD TRADE 67 (1988) *Journal of Economic Literature*. Vol. 26, No. 2, pp. 916-925. [American Economic Association](http://www.aeaweb.org). Accessed on September 30, 2016 at jstor.org.

decisions of the rich nations on rounds negotiations? Another area is how does this work with the principle of “when a country becomes a member of the GATT/WTO, it expects that all other member countries will trade with it on the principle of non-discrimination existing in form of the MFN rule? It is our understanding and belief that there need to address some certain lacunas in the operative principles of GATT.

The revenues of developing countries which are disoriented as a result of restrictions are quite substantial.⁷⁰ The organ which oversees the Arrangement is the General Agreement on Trade and Tariffs (GATT). The MFN rules have been renewed three times since inception. The current agreement-MFN Article IV runs through July 1991.⁷¹ The general contention is that the MFN rules contribute more to the economic development of unrestricted or less restricted developing countries. The other side of this argument is that the restricted developing countries that are major Textile and Cotton (T&C) exporters. However, it has been argued that the MFA additionally affects trade patterns of developing countries of Africa because of the difficulties in negotiating new tariffs by developing countries at the WTO negotiating rounds table.

MFN consists of discriminatory quotas. This assertion is based on the fact that it can divert trade from more restricted to less restricted countries.⁷² This practice often lead to a steady trade diversion and such trade diversion occurs in favour of the exports goods from industrial countries because the MFN rule of restrictions is only applied to developing countries. Such diversion may occur among developing countries. Although, they are not restricted equally,⁷³ such restrictions are more exposed to developing countries.⁷⁴ It is virtually infeasible for a country like Nigeria to develop its trade under the MFN rule because of the above enumerated reasons.

The rule which provides that members are to be treated without discrimination has certain exceptions. Such exceptions are said to be the right of a WTO member country.⁷⁵ For instance, in international trade operations, the rules have never transmuted from tagging Africa as traditional, rural convivial structures, high population magnification; and widespread penuriousness. We must differentiate the calibers of economic development of LDCs. (Citation)

Ali and Yusuf⁷⁶ opined that that despite poverty of the country-side and urban shanty-towns of developing nations, the ruling elites of most world –over are opulent.

What Ali and Yusuf did not mentioned in their study is that if few people are wealth in a country where tons of hundreds of thousands are living below \$1 dollar per day; the few affluent people are additionally poor by implication restiveness of the poor people. The question is how has GATT contributed to develop the least developing countries ‘trade through its laws? The GATT rules which govern the trade relationship between the developed and least developing countries are presently unfavourable to Africa. The conditions in Asia, Africa, Oceania and Latin America are previously linked to inclusion of the least developed countries of Africa by international capitalist economy. The situation is not the same today in terms of development

F. Transparency Doctrine of GATT.

Transparency is a legal obligation. As a matter of rule, WTO members are thus required to publish their trade regulations. Members are enjoined to establish and maintain institutions sanctioning for the review of administrative decisions affecting trade. The reason for the above is to enable them to respond to requests for information by other members and to also notify changes in trade policies at the organization (WTO), at all times. Presently, there are over 300 notification requisites embodied in the sundry WTO agreements and its decisions. These internal transparency requisites are supplemented by multilateral surveillance of trade policies by WTO Members. It is facilitated by periodic country specific reports.⁷⁷ Additionally, the body takes the issue of transparency very earnest because it is vital in terms of ownership of WTO as an institution in case citizens do not know what the organization does.⁷⁸ In WTO, the trade policy reviews contains series of useful information which may be used by civil society.⁷⁹

Transparency is prima facie taken to reduce trade policy-related uncertainty as it puts an investor on the knowledge of the country of it e intends to invest. Even though the doctrine of transparency is expressed to be active in WTO, it is argued that the consensus process shows that the rules quite often generates informative on state preferences with makes it possible for the formulation of legislative packages which favor intrigues of economically potent states. Taking these rules into consideration, it signifies that the participating states as a matter of rule must accept and generally considered the rules legitimate. This rule is not a fair deal to incipient economic members of WTO. The unfair deal as stated made the GATT consensus decision-making process an organized hypocrisy if viewed from the procedural

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Ibid.

⁷³ D. B. Keesing, and M. H. Wolf. Textile Quotas against Developing Countries” (1980) London: Trade Policy Research Center.

⁷⁴ Ibid.

⁷⁵P. Ranjan, “Applicable Law in the Dispute Settlement Body of the WTO” (2009), Economic and Political Weekly, Vol. 44, No. 15pp. 23-27. Economic and Political Weekly.

⁷⁶ M. Ali and I. Yusuf, “Bretton Wood Institutions and the third World: Impact of the World Bank and the IMF on The Economy of Nigeria. (citation is needed).

⁷⁷ These reports are referred to as Trade Policy Reviews in most Member Countries prepared by WTO’s Secretariat and discussed in the WTO Council referred as the Policy Review Mechanism. .

⁷⁸ In essence the word transparency in the context of the WTO is used to signify one of the fundamental principles of its agreements: the aim to achieve a greater degree of clarity, predictability and information about trade policies, rules and regulations of Members. In order to ensure that this concept works, all Members use notifications. For instance, under the [Agreement on Agriculture](#), notifications are used to follow the implementation of commitments, inter alia, in the areas of subsidies and market access, while under the SPS Agreement; notifications are used to inform other Members about new or changed regulations that affect their trading partners.

⁷⁹ Id.



context.⁸⁰ It is noted, in some rounds, GATT/WTO employs legislative decision making as primary law-based related but others have additionally been primarily power-based. As observed by Steinberg, since the Dillon Round, some trade rounds have been launched through law-based bargaining which has yielded equitable, *pare to-improving contracts*;⁸¹ designing the topics to be addressed. However, he verbally expresses that, to varying degrees, rounds have been concluded through power-predicated bargaining that has yielded asymmetrical contracts favoring the machinations of potent economic states.

The agenda-setting process (the formulation of proposals that are arduous to amend, which takes place between launch and conclusion, has been dominated by advanced economic countries. The ascendance of members depends on a larger degree to which potent countries have orchestrated to utilize their politics to conclude the rounds. The utilization of power as mentioned above is centered on hard negotiations which most of the developing countries are not able to compete with the advanced countries in terms of technical know-how knowledge based institutions and currency power. Another angle to this discourse is the procedural fictions of consensus and the sovereign parity of states. These have over the years accommodated as an external display to domestic audience to help legitimize WTO outcomes. This is lamentable. The utilization of raw power that demonstrates the Uruguay Round has exposed WTO's existence as jeopardizing the legitimacy of its discussion outcomes. The economically impotent countries cannot impose an alternative rule but stick to rules of GATT annexed to WTO even when such rules are to the disadvantages of their state's economy.

The World Trade Organization was established to fill the lacuna found in GATT. The lacuna is simply that GATT lacked an institutional structure in the early years of its operation because it did not exist as an entity. It became relevant when formal meeting of the contracting parties were held. WTO became prominent in today's relevance because of the institution design that GATT had formerly put in place through the art of "*learning by doing process*." Part of the preambles of the GATT 1947, amongst other thing includes raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods. Noting from the above is the question of whose goods do the phrase; '*expanding the production and exchange of goods*' refers.

We posit that in effect, WTO agreement is a single undertaking – as all its provisions apply to all its members at its formation. Of notable progress is the major difference in the dispute settlement area. It is observed from the study that the only notable difference between the 1947 GATT and the present GATT is the dispute settlement approach. Under the WTO in 1947, it is almost impossible to prevent the formation of dispute

settlement panels, and the adoption of panel reports and the authorization to retaliate, but this is presently possible in GATT.

Noting further, under GATT, there is stronger policy of WTO's mandate to pursue transparency and surveillance functions in part through the Trade Policy Review Mechanism. The literatures available on WTO describes it as both a mechanism for exchange or trading, trade policy commitments, and agreeing on a code of conduct which regulates members. WTO comprises negotiated sets of specific legal obligations which regulate trade policies of member states as contained in GATT-1994. The WTO does not seek to control trade flows or trade outcomes but its functions are relevant in other areas. The understanding which is yet to be explained is how the WTO assisted the LDCs in economic development since its establishment. The LDCs of Africa continuous in abject poverty wallow in certain specific economic disabilities which have thoroughly distinguish them from LDCs.⁸² Most LDCs in Africa cannot establish a sound economic growth because of the several economic constraints.⁸³

The growth recorded in LDCs is very disappointing especially in Africa. In the past three decades, no meaningful development has been achieved through GATT rules. The non-performance in the economic sector has presented a challenge which calls for unquestionable immediate attention for readjustment of the some GATT rules. For instance, the per capita income in low-income Africa stagnated at only 0.1% annually between 1980 and 1985 and 1.1% between 1986 and 1990, compared with growth rates of 2.0% and 2.6% representing low-income Asia and of 2.6% and 3.3% in developing countries in general.⁸⁴ The saving potentials in LDCs are not achievable because of the limited growth due mostly to the pursuit of wrong targets and often misplaced priorities. The above factors are attributed to GATT rules but lack of political will and misplaced priorities. These reduce the impact of capital accumulation and investment strategies.⁸⁵

The role of Africa in WTO is questionable. Reason being that, before and after its membership, there has been no known notable economic success recorded. At least, conventional wisdom holds that WTO is a system which evolved from a power-based to a rule-based regime⁸⁶. Africa was not in the least thought of at the point of decision-making in the formative stage. Pauwelyn argues that at the creation of WTO, was a bundle of unidirectional process of legalization where trade law has gradually replaced trade politics.⁸⁷ In

⁸² See U. Ezenwe, "The Development of the Least Developed Countries of Africa: A Challenge to the International Economic System". (1983) Africa Development / Afrique et Développement, Vol. 8, No. 2, pp. 5-16. CODESRIA. Accessed on July 14, 2016 at www.jstor.org.

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ J. Pawley, "The Transformation of World Trade." (2005) Michigan Law Review, Vol. 104, No. 1, pp. 1-65. The Michigan Law Review Association. Accessed on August 16, 2016 at www.jstor.org.

⁸⁷ Supra note 28. See also J. Goldstein et al., "Introduction: Legalization and World Politics," (1982) 54 INT'L ORG. 385, 389 (referring to a victory for trade "legalists" over trade "pragmatists"); Miguel Monteria i Mora, A GATT with Teeth: Law Wins over Politics in the Resolution

⁸⁰ Steinberg, supra note 52 at page 24.

⁸¹ Ibid.



particular, the creation of the World Trade Organization ("WTO"),⁸⁸ twenty years ago is commonly seen as a constitutional moment when the stability of the rule of law finally was eclipsed in the caprices of politics and diplomacy⁸⁹ campaign. WTO maintains certain legal obligations at its formation in adherence to WTO, there are three legal areas which can be assumed.

G. Does GATT Rules Promote African Trade Development?

The World Trade Organization was established to fill the lacuna found in GATT. The lacuna is simply that GATT lacked an institutional structure in the early years of its operation because it did not exist as an entity. It became relevant when formal meeting of the contracting parties were held. WTO became prominent in today's relevance because of the institution design that GATT had formerly put in place through the art of "learning by doing process." Part of the preambles of the GATT 1947, amongst other thing includes raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods. Noting from the above is the question of whose goods do the phrase; 'expanding the production and exchange of goods' refers.

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H. Definition Difficulties of "Likeness Products."

The first issue which would be discussed under this heading is the tariff cases which emerged at the early period of GATT rules due to arduousness in relegation of products of homogeneous nature. It was in context

⁹⁰ See U. Ezenwe, "The Development of the Least Developed Countries of Africa: A Challenge to the International Economic System". (1983) Africa Development / Afrique et Développement, Vol. 8, No. 2, pp. 5-16. CODESRIA. Accessed on July 14, 2016 at www.jstor.org.

⁹¹ Ibid.

⁹² Ibid.

⁹³ Ibid.

⁹⁴ J. Pawley, "The Transformation of World Trade." (2005) Michigan Law Review, Vol. 104, No. 1, pp. 1-65. The Michigan Law Review Association. Accessed on August 16, 2016 at www.jstor.org.

⁹⁵ Supra note 28. See also J. Goldstein et al., "Introduction: Legalization and World Politics," (1982) 54 INT'L ORG. 385, 389 (referring to a victory for trade "legalists" over trade "pragmatists"); Miguel Monteria' i Mora, A GATT with Teeth: Law Wins over Politics in the Resolution of International Trade Disputes, 31 COLUM. J. TRANSNAT'L L. 103 (1993); Arie Reich, From Diplomacy to Law: The Jurisdiction of International Trade Relations, 17 Nw. J. INT'L L. & Bus. 775, 777 (1996-97).

⁹⁶ Pawley, Supra at page 42. See Marrakesh Agreement establishing the World Trade Organization, Apr. 15, 1994, 08 State.4809, 1867 U.N.T.S. 14.

⁹⁷ Id.

of International Trade Disputes, 31 COLUM. J. TRANSNAT'L L. 103 (1993); Arie Reich, From Diplomacy to Law: The Jurisdiction of International Trade Relations, 17 Nw. J. INT'L L. & Bus. 775, 777 (1996-97).

⁸⁸ Pawley, Supra at page 42. See Marrakesh Agreement establishing the World Trade Organization, Apr. 15, 1994, 08 State.4809, 1867 U.N.T.S. 14.

⁸⁹ Id.



that it is almost impossible for anyone to apply the concept of “likeness” without specifying the characteristics by which likeness is to be measured⁹⁸; in law, it was argued that it is difficult to tell whether one apple is “like” another apple without specifying whether or not; characteristics such as edible quality, taste, color, size or other features are relevant.⁹⁹ In fact, however, it is quite mundane to compare different definitions of “like product” according to what looks akin to a single scale of “likeness. In the course of this study, the term “likeness product” was not defined in GATT but from difference cases, its meaning can only be inferred which is still subject to controversy.

Notwithstanding the lack precise definition, there may be indefinable and describable difference in the policy context of sundry GATT Articles in which the terms has been utilized. This study takes the stand; there is a lack of fundamental distinctions between the given names in meaning to the ‘like product’ concept as presently provided in the GATT rule. The provision under Articles I and III is unnecessary given the terms in which they are put to utilize especially where cases arose for settlement. This study argues that in Article I.(1), the term ‘like product’¹⁰⁰ ought to be interpreted in such a way as to give a refined distinction between products especially when it is applied to agreements backed up by tariffs. Hudec argues that it is quite prevalent to compare difference definitions of “like product” according to what looks homogeneous to a single scale of “likeness.” He gave an example two licit rulings, where one ruling verbalized that the only product “like” an apple is another apple, and the other ruling verbalizes that any edible fruit is “like” an apple.¹⁰¹ It can be argued that where this type of decisions are in issue, there is no arduousness in saying that the standard applied in the former decision requires a more preponderant degree of homogeneousness than the standard applied in the latter meaning. However, this is not always the case with the cases of GATT rule of “likeness product.”

As stated in paragraphs 2 and 4 of Article III,¹⁰² paragraph 1 of Article III provides that Regimes should

not employ “internal” measures, denoting internal taxes or internal regulations to give auspice to domestic industry. This rule is to the effect that internal measures must not give less propitious treatment to “like” foreign products, will only achieve this protection goal if “like [foreign] products” is defined to mean competitive peregrine products. Some few examples of legal pronouncement on GATT rule will lay credence to whether the legal meaning is identically tantamount or authentically reflect the ‘likeness of products’ with reverence to tariffs as contained in the rules.¹⁰³

H. The Coffee Case under “Likeness Product” Rule.

The GATT Panel committee on dispute resolution on the ‘likeness product,’ right from the 1976 had difficulties in defining and ruling on “like products” issue. For instance they commence their analysis by quoting a comment which apart from yielding any of the subject matter “likeness products,” only suggests the term “like or similar products” from a 1970 report of a Working Party on Border Taxes. After noting that the term appears sixteen times in the 1947 GATT agreement, the suggestion could not help to further the much desired definition of ‘like product.’

The working panel given the task concluded that the term caused dubiousness, needed amelioration, and should be interpreted on a case-by-case substructure. This is without given any fine-tuned criteria categorical enough to be capable of governing its application in the long run. After rummaging through the provisions and rules of GATT, the working party went on to verbalize that in recent pasts, some criteria were only suggested for determining, on a case-by-case substratum. They did not verbally express whether a product is “similar”, the product’s end-uses in a given market, consumers’ tastes and habits, which transmutation from country to country would have been useful. They verbally expressed further that the product’s properties, nature and quality would be the guiding principle. This is an ambiguous decision which can easily be swayed by power and politics of the sizably voluminous economy of the developed nation. The outcome of this decision was a subject of critique by developing countries.

The rules and workings of WTO are geared towards the economies of the underdeveloped counties to the needs of industrialized countries which initiated the WTO/GATT. The resultant effect is that only a few economic activities such as cultivation of plantation crops and mining are left in the region of Africa. Furthermore, the prices of the products of these developing countries are usually determined by large buyers in the

⁹⁸ R. E. Hudec, “Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law” (2000), University of Michigan Press. pp. 101-123. See for further readings on definition of like products, Berg, Dividing the Like-Product: Economics, the Law and the International Trade Commission, (1997) 20 World Competition Law and Economic Review, Vol. 73; Berg, An Economic Interpretation of “Like Product,” (1996); 30 Journal of World Trade E 195, Steen, Economically Meaningful Markets: An Alternative Approach to Defining “Like Product” and “Domestic Industry” under the Trade Agreements Act of 1979” (1987), 73 Virginia Law Review, 1459; Langer, “The Concepts of Like Product and Domestic Industry under the Trade Agreements Act of 1979” (1983), 17 George Washington Journal of International Law and Economics, 524.

⁹⁹ Ibid. See also the meat and meat product case. Available at [WT/DS48/R/CAN, 18 August 1997], http://www.wto.org/english/tratop_e/dispu_e/horm2.wp5. Accessed on October 27, 2016.

¹⁰¹ Ibid.

¹⁰² Paragraph 2, Article III: The products 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. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported

or domestic products in a manner contrary to the principles set forth in paragraph 1.

Paragraph 4, Article III: The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

¹⁰³ Ibid.

economically dominant countries of the West, and trade with the West provides almost all the LDCs' income. For this reason, it is difficult to measure growth in LDCs through GATT rules as aiding development of trade in Africa. For the last three decades, it has been difficult ensuring equality and a balance of trading system between the developing and developed nations due to domination of the West and the rest of Europe against Africa.

Most conferences which had been held in reverence of development problems of LDCs are essentially built on academic approach. Despite the academic debate, the coalescence of the developing countries is hard to relegate as they are better described as hypothetical mainly from the conference platforms. Besides many approach, both in theory and practical that have been applied to the peregrine avail, the quandary of development in LDCs remain unresolved. It's doubtful if the real interest of the West is genuinely developing of the economies Africa amongst other LDCs with which they are in somewhat competition. For instance, when the United Nations Conference on Trade and Development (UNCTAD) held its meeting in New Delhi in 1971, it was agreed between the developed nations that the industrial nations contribute at least 1 percent of their Gross National Input to the development of the LDCs.

It is on record that contribution of that 1 percent has never been thoroughly made by most of the development nations.¹⁰⁴ The intention is for maximization of liberation of commerce and navigation in international trade between develop and the developing countries. The object of developing the LDCs could have been easily achieved with straightforward legal contrivances, such as treaty clauses with reference to certain products between the developed and developing countries. It is contested that whatever economic development which has occurred in the LDCs could not have been distributed fairly between nations or among population groupings within the nations of Africa. Presently, many LDCs are located in Africa, few in Latin America and Asia. For instance, there was no treaty clause providing for the 'most – favored nations or national treatment regarding the markets from the LDCs.¹⁰⁵ This is a deliberate omission. It is indispensable to draw attention to the whole of this chaotic picture in order to understand the multifaceted problem of international economic development of Africa. International development is confronted with issues which had been discussed over several decades.

Another area of difficulty of the rules applied in like product is how the interest of developing countries would be protected in WTO in the case of countries of having the like product. Is there a possibility of structure and complementary interest from the angle of the 'standard of national treatment' applicable in such circumstance? One wonders if there is a provision for

standard parity, model equality between nationals and foreigners. This provision under international economic law in the wake of WTO is deficit on the part of LDCs in Africa. For instance, commenting on Agricultural Trade restrictions from Africa by GATT rules, the tacit position taken by the United States is amazing. From the position of the US, one may easily arrive at a position that there can never be equality of treating the 'nationals and foreign goods' in the application of WTO rules? Another shocking example of how the US had indeed dwarfed African trade through restriction is the case of consumable goods by some citizens of African citizens living in the United States. The US made a law which prevents African delicacies, such as dried fish and 'bush meats' exported from Africa from entering its shores because it law protect the killing of these animal even when it is not from its territory. These sorts of goods are source of foreign exchange earnings for some countries in Africa and they are prohibited under the protection of Animal Rights Act of the United States.

The MFN rule provides a prevalent ground for the meeting of both developed and developing countries in terms of Agricultural and industrial economies; the equalitarian functions of this standard correspond to one of the permanent interest of sovereign states. This study described it as goose pimples outside the pristine context of the authentic purport of international economic cognations. Schwarzenberger¹⁰⁶ argues that since the criterion of the equal treatment is of a foreign state, it is compatible with discrimination between foreigners and nationals and this breeds protectionist and nationalist periods, not exposed to the remonstrance which may militate against the standard of national treatment.¹⁰⁷

One good example of trade deficit of LDCs of Africa is the arrangement of textile and clothing (T&C) industry of LDCs. Fortunately, T&C products are "typically among the first items produced and exported by newly industrializing economy as it began to diversify away from primary production."¹⁰⁸ Exporting countries are affected by a reduction in export opportunity bridged by advanced countries. Although this is partly offset by the "quota rent," studies have shown that the export The MFA¹⁰⁹ provides that importing countries can take unilateral or bilaterally agreed restrictive measures to avoid "disruptive effects in individual markets and on individual lines of production."¹¹⁰ During MFA, many unilateral measures were taken after unsuccessful consultations; recently almost all restrictions have been made under bilateral agreements between the importing and exporting countries. Although consumers in importing countries incur huge cost from MFA quotas, the number of domestic jobs saved or created by the quotas is relatively small. MFA quotas are therefore, a

¹⁰⁴ Ibid.

¹⁰⁵ G, Schwarzenberger, "The Province and Standards of International Economic Law" *The International Law Quarterly*, Vol. 2, No.3 1994 at page 402-420. Cambridge University Press on behalf of the British Institute of International and Comparative Law.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ J. Goto, 'The Multi-fibre Arrangement and Its Effects on Developing Countries' (1989), *The World Bank Research Observer*, Vol. 4, No. 2, pp. 203-227. Oxford University Press.

¹⁰⁹ See MFA, Articles 3 and 4.

¹¹⁰ Article 3of the MFN rules provide for measures taken when market disruption occurs, and article 4 provides for measures when there is only the risk of disruption.

poor way to protect workers from foreign competition.¹¹¹ During MFA, many unilateral measures were taken after unsuccessful consultations; recently virtually all restrictions have been made under bilateral agreements between the importing and exporting countries. Consumers in importing countries incur astronomically immense cost from MFA quotas; the number of domestic jobs preserved by the quotas is relatively minute. MFA quotas are therefore, a poor way to protect workers from foreign competition.

IV. ARTICLE III (2) (4) OF GATT IS A PARALYSIS OF MANY INTERPRETATIONS.

Mirroring the provisions of Article III (2) (4) of GATT, it would appear that there is a policy intentment therein rather than application of law. While paragraphs 2 and 4 of Article III is fairly uncomplicated, the commencement point is pristinely policy-predicated as contained in Paragraph 1 of Article III: The provision is to the effect that governments should not employ "internal" measures such as internal taxes or internal regulations -- to give protection to domestic industry. It is simply a rule which clearly states that internal measures must not give less favorable treatment to "like" foreign products. This anti-protection goal would only be achieved if "like foreign products" is defined to mean competitive foreign products advantage. This is presently not the case.

Querying this provision further is on whether the application of these rules is authentically applying to both developed and developing countries in view of the impasse of the Uruguay Rounds of tariffs discussion which end in a partial deadlocked? The argument that less favourable treatment will tends to protect domestic products; especially, where it imposes a commercial disadvantage (obligations) on those foreign products with which the domestic product compete for sales is quite unclear. The stake is that "Competitiveness" in this sense is best quantified by the substitutability of the foreign products – the extent to which consumers are disposed to choose the foreign product in supersession for the domestic product.¹¹²

Furthering this discussion, one optically discerns that the provision is just on paper as its inhibitions outweigh the usefulness to the promotion of developing trade. There is no clarity in the provision of Article III paragraphs 2 and 4. There is no clear-cut wherein to draw the line between "like and competitive." As suggested by Hudec, foreign products are numerous which would fall at least some negative competitive impact from being taxed or regulated more heavily than a particular domestic product; could be fairly wide.¹¹³

The difficulty in explicating Article III (2) of GATT is that its paragraph 4 is the only pivotal rule of Article III. It deals with internal non-tax regulations and it is not constructed in the same way as paragraph 2. Furthermore, paragraph 4 of the provision does not contain a second stanza proscribing deferential treatment of not-like-but directly-competitive products. Thus, there seems to be conflicts between paragraphs 2 and 4 of Article III of GATT. The internal regulation rule is nothing short of verbally expressing that less favourable treatment must not be given to "like" foreign products – if the foreign product concern is not "like" the germane domestic product, the government may treat it less propitiously; even if such differential regulation has a protective outcome.

Hudec suggested two ways of resolving the conflict. The impression given from the wordings of Article 1 (1) appears to apply the same MFN principle to each of the above discussed subject areas; that is, when it is defined in terms of what appears to be identically equivalent principle to each of the different subject areas of "like product" concept.¹¹⁴ The fact that the provision covers so many different measures customarily ought to raise the possibility that the content of the MFN rule may not be identically equal for each area. Analytically, the different policies applicable to different subject areas will quite often call for different type of MFN rule, expressed by a different definition of "like product" for at least some of the different subject areas.

With regard to the non-discrimination policy of MFN rule of GATT in Article 1 (1), it is predicated on economic perspective. This should be quite similar to the protection policy in view of the National Treatment rule of Article III. It is argued that in terms of its legal effects, "discrimination" (less auspicious treatment of goods from one foreign country vis- a-vis the goods of another foreign country" is no different than breach of the National Treatment obligation (less auspicious treatment of foreign goods vis-a-vis domestic goods). It is notable that the legal effect of discrimination is to "protect" the goods of the advantaged country from competition with the goods of the disadvantaged country; it is equally just as denial of national treatment to protects local goods against all foreign goods. The protection equally distorts the allocation of resources, and thus, the promotion of wealth creation through trade.¹¹⁵ The rule of MFN has not promoted Nigeria or any other Sub-Saharan trade since its creation. There is no empirical proof. The study finds that under the International Economic Order, the Geneva agreement operates within the wider international framework of the Amalgamated Nations. The exhibition of standard is minimal in scope by the overriding requisites of the international economic law. In accordance with the provision of Article I of the Agreement, the most-favored-nation standard in its

¹¹¹ Supra note 64 at page 24.

¹¹² Ibid. In order to make the provision clearer, there would be need to avoid undue interference with the tax and regulatory policy of the importing country. It is therefore necessary that there is need to draw a line of demarcation separating those foreign products that suffers or a likely to suffer a major competitive disadvantage from those upon whom the negative effect will be milder. This was omitted in the provision of the GATT rules.

¹¹³ Ibid.

¹¹⁴ Decision by the Arbitrators (U.S. complaint) [WT/DS26/ARB, 12 July 1999]

http://www.wto.org/english/tratop_e/dispu_e/26arb.pdf, Accessed on the 18th day of October, 2016 and Decision by the Arbitrators (Canada complaint) [WT/DS48/ARB, 12 July 1999,

http://www.wto.org/english/tratop_e/dispu_e/48arb.pdf, Accessed on October 27, 2016.

¹¹⁵ Ibid.

unconditional form applies to customs obligations and charges imposed in connection with importation or exportation of goods or on the international transfer of payment for imports or export and to methods and formalities in connection with importation and exportation.¹¹⁶

As noted by Schwarzenberger,¹¹⁷ the more preponderant the number of parties to a multilateral agreement adopting the most-favored-nation standard, the more frivolous the standard becomes. In essence, it signifies that in absence of treaties with the non-party states, the MFN standard may remain inoperative in the Geneva Agreement.

Africa is the worst hit of the GATT arrangement because in most of the rounds, negotiations are done by the industrialized nations with little contribution from the least developing countries. Some of the rules regulating GATT support the reasons why Lester Thurow's declaration that "GATT is dead" is gathered dust by crystallizing the dissenting positions in the trade and industrial policy debate.¹¹⁸

VI. FINDINGS/CONCLUSION.

This study finds that the most dangerous and misleading notion about the GATT trade principles is the inequitable trade fallacy. Countries that have relatively open trading systems are being inequitably exploited by countries that are relatively restrictive. This leads to demands for increment of domestic replication to foreign protection, a perverse form of reciprocity.¹¹⁹ The reservations expressed by most African countries as to fairness of the conduct of free trade by developed countries are not farfetched. The difficulties experienced by most of the developing countries from Africa are because WTO agreements are concerned with only goods, services and intellectual property.¹²⁰ There have been so many bottlenecks in implementing free trade in consonance with the provisions of the GATT Charter. The developed countries merely paid lip service not accompanied with serious action. These rules are pristinely politically motivated by the industrialized nations to keep African trade more impotent perpetually subjugated to the economies of the advance countries. There existed so many bottlenecks in implementing free trade in consonance with the provisions of the GATT Charter. The developed countries merely paid lip service as these rules are purely politically motivated by the powerful industrialized nations to keep the weaker nations perpetually subjugated.

The study further discovers that it is important for the developing countries to integrate with the world economy, but they need to function more in region trade.

The barriers to trade ought to have been eliminated in all strata through trade negotiations but this can never be a reality as long as the developed nations are unwilling to amend some of the rules of GATT. It is practically impossible pushing for the amendment of MFN rule and other rules of GATT. Africa needs to create its own regional trade arrangement to rival WTO as way forward to their economic growth. This would ascertain the giving of fair competitive opportunity to the African trade area of MFA, Agricultural tariffs, and Textile and clothing (T&C) growth consideration. The study recommends that the only way out for Africa is to fall back to regional trade for certainty of trade acceleration and ceding concessions in block arrangement. This will ascertain a boundary to the perpetual subjugation by the non-ground-shifting position of the developed nations under the present rules of GATT; which were made ages before most African countries had their independence. It is unacceptable that the interest of African countries were annexed to their colonial masters when in fact they stand as sovereign nations.

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- [5] Art. VIII of WTO which gives Members certain rights.
- [6] Art. X (1)
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¹¹⁶ Article if 'GATT. In other words, the most-favored-nation standard is used in connection with matter of internal taxation and regulation I and III while freedom of transit is Article V(5).

¹¹⁷ Supra note 132 at page 53.

¹¹⁸ B. Bethune. "Is There a Future for the GATT in the New world Economic Order." (1992) *Business Economics*, Vol. 27, No.4, pp. 51 -56. Palgrave Macmillan Journal.

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