II. THE WORKING OF THE MFA SINCE 1977

The Extent of Controls

19. Virtually all the textiles and clothing exports of Commonwealth ldcs to industrial countries are subject to the regulatory framework established under the GATT Multifibre Arrangement. But there are important exceptions. First, some industrial countries do not operate a system of bilateral agreements. Australia and New Zealand operate non-discriminatory import quotas (and rely heavily on tariffs). Canada operated a non-discriminatory global quota for a while. Norway has had quotas which are part-bilateral and part-global (with discrimination in favour of EFTA and EEC). Switzerland does not impose import restrictions but it is a difficult market to enter even relative to countries operating stringent controls. Second, many ldcs are not MFA signatories, but the most important of these - Taiwan, China, Indonesia and, in the Commonwealth, Mauritius, Malta and Cyprus - have reached bilateral agreements with their major customers on broadly similar principles to MFA agreements. Third, some textiles items are not covered by the MFA - products of jute, flax, sisal, silk and handknotted carpets. Of these, the status of silk and flax is possibly in doubt and the others are affected by a variety of tariff and quota measures. Finally, not all products are subject to control even within a framework of bilateral agreements. Some items for some countries are quota free and others subject to 'trigger' action rather than pre-defined quotas. But all are potentially controlled which is perhaps more important from the point of view of investment decisions.

20. An attempt is made to summarise in Table 16 the most important features of the main sets of bilateral agreements operated by particular members and as they affect Commonwealth suppliers. The main significance of these agreements for suppliers lies not, primarily, in their extent but in their content, and the spirit with which they are implemented: more of this below. But various points need to be made also about their extent. The main MFA importing countries have now achieved almost complete coverage of ldc suppliers. Even flows of apparent triviality (e.g. Sri Lanka's exports to Canada which are 0.05 per cent of Canada's 1979 imports) are subject to quota control and consultative agreements cover potential, currently non-producing, suppliers. The largest Commonwealth suppliers, as yet unaffected by quotas, are the Caribbean islands exporting to the USA but the share of US imports of the most substantial, Barbados,

is no more than 0.2 per cent. These suppliers are, in any event, affected by the US GSP provisions and, potentially the biggest supplier, Jamaica, by a consultation agreement. Moreover, the numbers of bilateral agreements jumped sharply after 1977, from 12 to 20 from the EEC (excluding some reached later - as with Mauritius and Indonesia), from 7 to 10 for Sweden and 5 to 9 for Canada. Only the USA (17 to 13) and Austria (8 to 5) moved in the opposite direction. Although it is virtually impossible to measure the extent of coverage within particular bilateral flows this also increased significantly. However it is the spirit and modus operandi of the agreements which concern us mainly here.

MFA Principles and Derogations

21. The MFA, as originally conceived, represented a balance of competing interests. Those of textile exporting ldcs (and consuming interests in the dcs) were encompassed by the 'basic objective' of the MFA (Article 1:2) to "achieve the expansion of trade, the reduction of barriers to such trade and the progressive liberalisation of world trade in textile products". Those of textile industries in importing countries were to be accommodated by steps to ensure (same Article) the "orderly and equitable development of this trade and avoidance of disruptive effects in individual markets and on individual lines of production in both importing and exporting countries".

22. Ldc textile exporters adhering to the original MFA saw in it a promise of "progressive liberalisation" from a system then characterised both by protection in some dcs and by uncertainty over the direction of trade policy. But in doing so they accepted - with varying degrees of reluctance - derogation from the GATT principle of non-discrimination, accepting that importing countries could seek restrictions on exports of particular products from particular sources under certain circumstances. Further, they accepted one major new principle - 'market disruption' resulting in 'serious damage' - less tautly defined than 'serious injury', proof of which is required under GATT Article XIX 'safeguard' action, (together with various other questionable and new principles such as 'minimum viable production'). By accepting the MFA provisions, exporters also surrendered the right to retaliation provided for under GATT. That they did so was partly due to fear of the possible alternatives but partly because of checks and balances within the MFA: guaranteed minimum levels of growth, and flexibility; a guarantee that bilateral agreements would be more liberal than the minimum standards in the Arrangement; and a framework of multilateral surveillance

under the Textile Surveillance Body (TSB). But it could be argued that the MFA was flawed in conception and that many recent problems faced by ldcs can be traced back to the MFA itself rather than simply to the provision, after 1977, for 'reasonable departures' from it.

Reasonable Departures in Principle

23. The 1977 renegotiation - or extension - of the MFA led to an amending Protocol which noted the unsatisfactory situation in world trade and renewed the MFA framework subject to the proviso that bilateral agreements could "include the possibility of jointly agreed reasonable departures from particular elements in particular cases" (Para. 5.3) but that "any such departures would be temporary and that participants concerned shall return in the shortest possible time to the framework of the Arrangement". The history of the terms of the renegotiated protocol have been amply explored elsewhere and need no rehearsal here[1]. Suffice it to say that the issue arose as a result of pressure from the EEC, which considered that a legal reformulation was required to permit a more restrictive renegotiation of bilateral agreements, recognising in advance that proof of market disruption required to obtain a new set of agreements acceptable to suppliers, and to the TSB, would be too onerous and time consuming.

24. We do not intend here to labour the issue of whether particular departures can in any formal sense be held to be "reasonable" or not, rather to review the terms of the main groups of renegotiated bilateral agreements - with the EEC, the US, the Nordics and Canada - and to judge their compatibility with the MFA, both in form and spirit. We do this for several reasons. First, there is no consensus as to what constitute 'departures' let alone 'reasonable' ones and this is reflected in the deliberations of the TSB. It has catalogued variations in the various bilateral agreements but has been able to obtain unanimous agreement only on the point that a 'departure' is involved in cases where there is a reduction of net access. Even in this limited area of consensus there are differences as to whether the departures are "reasonable" and what is implied by the understanding that they should be "temporary" or removed "in the shortest possible time". Second, the concept of 'joint agreement' is open to misinterpretation too. The 'agreement' of a bilateral may simply reflect disproportionate bargaining power and the fear of more severe unilateral action. Thus, formal status is a poor guide, especially when the EEC has declined to accept that the TSB can "put into question the bilateral agreements concluded".[2] Third, the

'reasonable departures' provision was arrived at largely at the behest of the EEC and for the purposes of remedying certain specific concerns of the Community. But other importing countries - the US and the Nordics in particular - have sought to exploit the more restrictive climate too in ways that are damaging to exporters but may not have required prior acceptance of the protocol, as such. Moreover, in some instances, notably with Norway, consuming countries went outside the MFA, even with 'reasonable departures', to achieve more restrictive arrangements. Thus, the 'reasonable departures' concept is not important so much for its legal connotations (though these are not negligible) but as a symbol of more restrictive attitudes generally.

Departures in Practice

25. The scope and detailed provisions of particular importing country arrangements and bilateral agreements are comprehensively described elsewhere (and are summarised in Table 16) so we shall here list the main sources of dissatisfaction of ldcs with current arrangements. Since the points are grouped thematically it should be stressed that not all necessarily apply to all dcs all of the time.

26. To summarise the main features of the post-1977 arrangements which have given most concern, by importing country, they are essentially as follows:

(i) EEC: introduction of 'global' ceilings for sensitive products; cut backs in access for major suppliers: overall growth rate of imports effectively cut; 'basket extractor' for new suppliers; restrictions on small suppliers under global ceilings: treatment of handlooms.

(ii) the US: measures to eliminate 'surges' resulting from use of carryforward and swing provisions; annual revisions of precisely agreed growth rates in line with market conditions; handlooms.

(iii) the Nordics: abuse of 'minimum viable production' to reduce growth and flexibility; treatment of small suppliers; 'global' quotas in Norway; net access reductions.

(iv) Canada: 'reduced' growth with sensitive categories, reduced flexibility; treatment of small suppliers; handlooms.

Major Areas of LDC Concern

(a) Reduction in Access

27. Under no circumstances does the MFA (Annex B para 1) admit the possibility of cuts in yearly quota levels below the level operating in the twelve month period before their imposition. The EEC's agreements with Hong Kong (and also Korea) established 1978 quotas for some items not only below 1977 levels, but below 1976 levels (1976 levels were used as a base for all EEC agreements). This was clearly a departure, and recognised as such, but the EEC claimed justification on the grounds that 1976 figures were artificially inflated by imports being rushed in to beat quotas then being negotiated. It also appears to be the case that the overall Community ceiling in 1978 was cut back below 1976 actual levels for mens' woven shirts and sweaters/pullovers. Reductions in access were also present in Sweden's agreements (1978/79) with Hong Kong - involving a cut of 15 per cent - Korea and Macao, and Finland's with Hong Kong (though the latter cuts were restored in 1980). The US' anti-surge' action in 1979 and 1980 had a similar effect. The Hong Kong authorities have calculated that downward quota revisions in 1980 resulted in a loss of net access equivalent to 31 mn sq. yards.

(b) Growth Rate Provisions

28. The MFA provides for an annual minimum growth rate of 6 per cent for each year of continuing restrictions, for each item restrained (and unrestrained growth for the remainder of items). The MFA does provide for growth below 6 per cent "in exceptional cases where there are clear grounds for holding that the situation of market disruption will recur if the above growth rate is implemented" (there is another exception - the Nordic provision - which we shall deal with separately). The 'exceptional' nature of the sub - 6 per cent provision and the need for 'clear grounds' were clearly incompatible with the declaration of the European Community in 1977 that "they could not live up to the new commitment which would result from the maintenance of a 6 per cent growth rate".[3]

29. The new EEC arrangements give reduced growth rates to those items enjoying relatively high import penetration, grouped in five categories

according to sensitivity. The idea of relating growth rates to import penetration is comprehensible on a narrow interpretation of market disruption. With import penetration at, say 50 per cent, a 6 per cent import growth rate will entail import growth of the equivalent of 3 per cent of the market in that year, while, if market penetration were 5 per cent, relevant encroachment is a barely noticeable 0.3 per cent (but this assumes one has abandoned all ideas of trade performing a positive role in raising efficiency within the textiles and clothing industries through specialisation and competition).

30. The ldc grievance primarily concerns the total impact of the EEC measures. This effectively confines overall ldc import growth to well below a 6 per cent growth rate overall since the sensitive Category I, - which has a 'global' ceiling (i.e. maximum overall) growth rate of 0.25 per cent p.a. for cotton yarn, 1.5 per cent for cotton fabrics, 1 to 2 per cent for most other items and a maximum of 4.1 per cent (for sweaters) - accounts for 60 per cent of total 'low cost' imports by weight, while Category II items which have growth rates of 2 to 4 per cent account for half the remainder. It is merely disingenuous of the Community to argue that it is possible to achieve a 6 per cent growth rate by diversification into currently unrestrained categories. Even for non-sensitive items there is a trigger mechanism threatening the possibility of quotas on any supplier of any product which exceeds 3 to 5 per cent of extra EEC imports in the previous year, and, within that, another trigger mechanism (or 'exit from the basket') when an individual Community member can initiate procedures for quotas unilaterally, based on shares of its own national market. Even if these obstacles did not exist, it is improbable that ldcs could achieve exceptionally high growth rates in items for which they currently have no trade, no installed capacity and no comparative advantage.

31. What is true of the general is true also of the particular. Under the post-1977 bilaterals Hong Kong had 32 items with under 6 per cent growth and 5 of 1 per cent or under; India had 12 of under 6 per cent of which 3 are 1 per cent or less; Malaysia has respectively 10 and 2; Singapore 10 and 2; Sri Lanka 3 and 1. What is particularly galling for suppliers is that in the distribution of growth rates it is, according to GATT, "not possible to discern a rational pattern".[4] Korea for example has been given higher growth in some sensitive items than minor suppliers like Sri Lanka (1.3 per cent against 1 per cent for Group 7).

32. Cuts in aggregate rates below the 6 per cent minimum have also been feature of many of the agreements of the smaller importers. The Nordics invoked 'minimum viable production' criteria. Sweden incorporated virtually no growth in its 1978/79 agreement with Hong Kong (and Korea), and its agreements with India, Sri Lanka, Singapore and others provided for less than 6 per cent. Finland's agreements with Hong Kong, India, Malaysia and most other suppliers incorporated growth of under 6 per cent. Austria is allowed only 3 per cent growth in its three product agreements with India and in some other bilaterals including that with Hong Kong (though Austria appears to have tried to justify its action in terms of the exceptional market circumstances envisaged by the MFA). Canadian quotas vary in their growth provision as between items of varying sensitivity and incorporate sub-6 per cent growth in its agreements with Hong Kong, Malaysia and other suppliers (though the Canadian situation is difficult to evaluate because pre-1978 quotas were 'global' under GATT's Article XIX).

33. The United States also differentiates between products. There is, however, a difference from the EEC and Nordic agreements in that, in the US,6 per cent growth is provided for in overall aggregate ceilings permitted to each exporter, though the rate may vary at the second tier of broad product groups, and the third group of specific quotas. Nonetheless some ldcs feel that by holding down growth rates on fashion items, the 6 per cent growth rate will be frustrated. Under 1980 revisions of bilateral agreements, growth rates were adjusted (and are subsequently to be adjusted annually) on the basis of the "estimated rate of growth of the domestic market". In the case of Hong Kong, which has over 30 specific quotas, many of them with around 3 per cent growth, the restriction is of particular concern.

(c) Flexibility Provisions and Quota Administration

34. One of the more technical, but crucial, features of MFA is incorporated in the provisions relating to swing between product categories, carryover from year to year, transferability between fibres and other elements of administrative flexibility. In addition to a general invocation to 'substantial flexibility' (Article 4:3) there are specific provisions within the MFA for swing (up to 7 per cent and a minimum of 5 per cent even in exceptional circumstances) and carryover (of 10 per cent with a maximum of 5 per cent carried forward). These allowances are to ensure maximum quota utilisation when there are inevitably unpredictable variations in demand because of fashion changes.

35. TSB has noted the lack of flexibility in a large and growing number of agreements referred to it, in particular the results of US 'anti-surge' negotiations. Reopening the five year agreements with the three major suppliers, the US has imposed successive cut backs in this way. In its 1980 renegotiation Hong Kong was prevailed upon to give up the carryover and carryforward provisions in ten major clothing categories, and to limit swing to 5 per cent. One commentator has observed that these revised agreements "may prove as momentous a development as the European Community's policy shift of 1977".[5]

36. Other deviations are too numerous to mention but those involving Commonwealth exporters and identified by the TSB include no swing (Finland/India, Sweden/India, Sri Lanka and Singapore, Canada/Singapore and Canada/Malaysia); swing nominal or significantly below 5 per cent for some products (Finland/Hong Kong; Sweden/Hong Kong; EEC/Hong Kong; Canada/Hong Kong); absence of carryover and carryforward (Sweden/India, Singapore and Sri Lanka); provision less liberal than in the MFA (Sweden/Hong Kong).

37. There are however many other ways in which administrative flexibility can be impeded. Although the system of member state quotas in the EEC is not unique to textiles (it operates in the GSP arrangements), or to the revised, MFA II, textile arrangements, it is a significant factor in promoting underutilisation of quotas. Since quotas of 'sensitive' items are allocated to member states on a fixed pre-determined percentage basis, regardless of the distribution of market demand within the EEC, there is a fair probability that demand will be unmet in some EEC countries but quotas unused in others. When it comes to allocating quotas in this way to the smaller member states, especially for small suppliers like Sri Lanka, the quota is often so derisory as to be scarcely worth the inconvenience of filling. Unsurprisingly, tiny Ireland's member state quotas are the most underutilised of any member state (Table 17). Ireland has a member state quota of 1 per cent of total Community imports, and can under certain circumstances invoke basket extractor action when shipments exceed 0.0002 per cent of extra-EEC imports. It was recently allocated a separate national quota on one item from the Philippines of 3 tons (sic). In principle the Community permits transfers but it acknowledges that it "has been able to agree to only some of the many requests made for transfers". The Commission itself deplores this, noting that quite apart from the effect on

suppliers there is also a "danger of a new fragmentation of the Community market".[6]

(d) Minimum Viable Production

38. Traditionally, the Scandinavian countries have been regarded as exceptionally liberal on trade matters, relative to some EEC countries or the USA, and, as a consequence, import penetration is high. But after 1977, there has been a strong reaction. The Nordic countries have justified their efforts to obtain more restrictive quotas, in respect of growth and flexibility, with reference to the clause in the MFA which states "in the case of those countries having small markets, an exceptionally high level of imports and a correspondingly low level of domestic production, account should be taken of the avoidance of damage to those countries' minimum viable production of textiles". However in one of its most explicit criticisms of a member state the GATT Textile Committee has taken Sweden to task for abusing the MVP clause, in conjunction with the 'reasonable departures' provision, saying that it "could not be invoked as a general waiver of particular obligations under the Arrangement".[7]

39. Although the Swedish and Finnish renegotiated agreements have both made extensive use of the MVP principle, the greatest difficulties have risen with Norway. Its attempts to renegotiate more restrictive arrangements after 1977 were frustrated by the unwillingness of Hong Kong to accept cutbacks in terms of access, though India and several ASEAN countries had settled. Norway then resorted to GATT Article XIX action, using global quotas outside the MFA. Hong Kong has now (early 1981) reached a bilateral agreement - with cutbacks - and a return to bilateral agreements is possible.

(e) 'Globalisation' of 'Low Cost' Imports

40. One of the more important departures in the new set of textile agreements is rejection of the previous, clearly understood, provisions of the MFA that market 'disruption' related to "particular products from particular sources" (Annex A) and that action should be similarly specified. The EEC has gone furthest in departing from this principle through the introduction of the concept of 'cumulative market disruption' to justify global quotas on all 'low cost' imports of 'sensitive' (Group I) items. This is offensive to ldcs for several reasons. First it removes from the

importing country the onus of demonstrating 'disruption'. Second, the 'global' quotas are discriminatory against ldcs as a category, since imports from 'developed' countries are not included within the global ceilings, however large or 'disruptive' they may be in contrast to ldc suppliers. This is a breach of the spirit of MFA principle that importing countries should "provide more favourable terms (for ldcs) with regard to such restrictions .... than for other countries" (but, since there are no restrictions on dcs except occasionally on Japan a sophist could argue that the clause is still honoured in law). Third, it tends in practice to squeeze out new and small suppliers, since if ceilings are placed near current actual levels and if importing countries honour their obligations not to cause "undue prejudice to the interests of established suppliers" (Article 6:1) there will be little room left for newcomers. The small supplier problem arises also in other contexts and we shall deal with it below.

41. 'Globalism', the tendency for importing countries to try to get away from the particular to the general in dealing with 'low cost' suppliers, appears in a different way in other sets of agreements. Norway and (for a while) Canada have resorted to global restrictions under GATT Article XIX because of an inability to reach bilateral agreements quickly enough. In the USA 'globalism' operates in different way. There are no global ceilings for groups of ldcs but ceilings for broad product categories. Thus, even if a supplier fails to encounter specific quotas imposed to prevent particular cases of market disruption, it can still be restricted if it exceeds ceilings for broad product categories or for textiles and clothing as a whole. 'Globalism' (in the EEC sense) is also a major feature of lobby demands in the US at present.

(f) Small and New Suppliers

42. Article 6:2 specified that the criterion of past performance "shall not be applied in the establishment of quotas for exports of products from those textile sectors in respect of which they are new entrants....and a higher growth rate shall be accorded to such exports", and also that "restraints on exports from participating countries whose total volume of textile exports is small in comparison with the total volume of exports of other countries should normally be avoided...." (Article 6:3). The first provision is important for established suppliers seeking to diversify into new sectors and the second for countries which are new to textile exporting, though in practice "new entrants" may also be "small suppliers". Monitoring of these

provisions is however made difficult by the absence of any agreed definition of "small".

43. The EEC's agreements now include restrictions on some categories with "small" suppliers having, in 1978, well below 1 per cent of EEC textile and clothing imports, notably Sri Lanka (0.1 per cent), Indonesia (0.15 per cent), Colombia (0.25 per cent), Mexico (0.20 per cent) and Peru (0.25 per cent). There are also 'consultation agreements' with, inter alia, Bangladesh (0.00 per cent). In addition, as a result of the so called 'basket extractor' mechanism, action can be initiated once imports from a "new" supplier exceed a predefined threshold. This can be as low as 0.2 per cent of extra - EEC imports in Group 1 products. The threshold limitation can be applied by individual community members as well as to the whole. Despite assurances that the basket extractor would be used 'sparingly' there were 66 new quantitative limits imposed by EEC members in the first half of the five year period of the MFA II bilaterals. Most of these were by individual community members, notably the UK (19), Benelux (16) and France (12). Many others were slow to be reported to the EEC; by the end of 1980, the UK had accumulated 40 quotas . The thresholds on the "new" suppliers have in practice fallen mainly on low income countries with a large unrealised comparative advantage which are seeking to diversify their range of products; examples are the Philippines, Thailand and India (which between them have attracted over 40 per cent of such quotas so far) - see Table 18.

44. The United States has been somewhat kinder to "small" suppliers, actually getting rid of some previous small quotas. Nonetheless, there are restrictions on products from some small suppliers having, in 1979, less than 1 per cent of the volume of US textile and clothing imports; Malaysia (0.65 per cent), Sri Lanka (0.55 per cent) and, via a consultation agreement, Jamaica (0.16 per cent). The US agreements are less satisfactory for "new" products from established suppliers, there being a 'trigger' mechanism to bring quotas into play based on "consultation" levels.

45. The problem of "small" suppliers is perhaps worst in the smaller importing countries since here absolute amounts can be very small and there is a major disincentive to enter a market for which sales are going to be very limited. Austria for example has agreements with India (0.48 per cent of 1978 imports); Finland with Malaysia (0.06 per cent) Singapore

(0.05 per cent) and India (0.98 per cent); Sweden with Sri Lanka (0.27 per cent); and Canada with Sri Lanka (0.05 per cent) Singapore (0.22 per cent) and Malaysia (0.35 per cent).

(g) Handlooms

46. The MFA quite specifically exempts "exports of handloom fabrics of the cottage industry or handmade cottage industry products made of such handloom fabrics, or...traditional folklore handicraft textile products, provided such products are properly certified under arrangements established..." In practice most handloom products are now subject to quota control in the EEC, the US and Canada as a result of the inability or unwillingness of these countries to accept (mainly Indian) classification and certification of handmade items. The technical issues here are complex and are dealt with separately in an appendix I.

(h) Cotton Textiles

47. The MFA recognises (Preamble) "the special importance of trade in textile products of cotton for many ldcs" and (Article 6) urges that "special consideration will be given to the importance of this trade". It is difficult to see any evidence in MFA II that importing countries have done so. In the EEC's quota system, two cotton items, yarn and the fabric, attract the lowest permitted growth rates and there is no evidence of any special consideration for cotton textile exporters generally (Hong Kong and India within the Commonwealth).

(i) Order and the Fixity of Agreements

48. One of the reasons why ldcs have accepted an MFA framework is that bilaterally agreed quotas, even if restrictive, seemed preferable to the uncertainty, even anarchy, of unilateral measures which has invariably been posited as the likely alternative. Agreed quotas can represent minimum as well as maximum market access. There has however been a drift towards more unilateralism and arbitrary action, even under the MFA, leaving aside those measures taken outside it, like Norway's. First, the use of 'threshold', or trigger mechanisms as in the EEC's 'basket extractor' introduces a major element of uncertainty as to whether, and if so when, quotas will be sought. Second, and potentially much more serious, the breaking by the USA of prior agreements (as in 1979 and 1980), in an effort

to demand more concessions from exporters, removes much of the stability and predictability - and tenuous legal status - which these agreements had.

The Effects

49. The cumulative effects of these various measures can, in principle, be measured quantitatively, though we only have one or two year's data so far on which to make judgements. The real significance may, moreover, become apparent after a period of years when the confidence and disincentive effects on potential exporters have worked their way through. The statistical evidence, such as it is, has been already introduced in Section I and will be pursued in other sections but two points can be made at this stage. First there is overwhelming evidence that as a result of more restrictive measures the growth rate for ldc exports has slowed significantly. Figures for the EEC show that annual volume growth of imports of ldc origin in the period 1976-79 was 4.0 per cent and 2.4 per cent for imports under bilateral agreements (Table 7). Ldc exports to the US moved erratically in the 1976-79 period (Table 8) but the total shipped from ldcs was less in 1979 than in 1976, with a substantial drop for major suppliers. Second there has been a clear trend towards trade diversion with imports from ldc (and other 'low cost') MFA suppliers being supplanted by goods from elsewhere, mainly dcs, but also by non-members. This is most evident in the EEC, where the growth of uncontrolled US imports is well documented, but a similar process seems to have occurred more generally, except in the USA.