DISPUTE SETTLEMENT MECHANISM UNDER WTO VIS-À-VIS INTERNATIONAL INVESTMENT AGREEMENTS: IMPLICATIONS FOR DEVELOPING COUNTRIES

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I. Introduction

As one of the major outcomes of the Uruguay Round, the WTO Dispute Settlement Understanding (DSU) is regarded as one of the central pillars of today's multilateral trading regime. It is expected that this new rule-oriented dispute settlement mechanism (DSM) can replace the GATT's power-based dispute resolution system, thus can bring more equality and protection to developing countries. Some researches support this claim. According to Holmes, Rollo and Young, in the DSM of the WTO, there is no strong evidence of a bias against developing countries either as complainants or respondents.[1] In other words, the new DSM enhances equality between developing member countries and developed ones.

However, there are also suspicious voices questioning whether the DSM can be really impartial. The fact that developing countries usually find themselves in a weaker position in the WTO compared with industrialized members may indicate that the DSM needs to contribute more efforts to improving the equality status of developing countries. Besson and Mehdi, through their empirical research, conclude that the DSU procedure is biased against developing countries.[2] Shaffer points

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1 Peter Holmes, Jim Rollo and Alasdair R. Young, "Emerging Trends in WTO Dispute Settlement: Back to the GATT?" World Bank Policy Research Working Paper 3133, September 2003 referred in Khan, Haider and Liu, Yibei, "Globalization and the WTO Dispute Settlement Mechanism: Making a Rules-based Trading Regime Work" retrieved from http://mpra.ub.unimuenchen.de/7613/1/MPRA_paper_7613.pdf

2 Fabien Besson and Racem Mehdi, "Is WTO Dispute Settlement System Biased Against Developing Countries?: An Empirical Analysis" (paper presented at the International Conference on Policy Modeling, Paris, France, June 30 – July 2, 2004) as referred in Khan, Haider and Liu, Yibei, "Globalization and the WTO Dispute Settlement Mechanism: Making a Rules-based Trading Regime Work" retrieved from http://mpra.ub.uni-muenchen.de/7613/1/MPRA_paper_7613.pdf

out three primary challenges to equality that developing countries have to face in the new DSM, including lack of legal expertise, constrained financial resources and political and economic pressures.[3] Hoekman and Mavroidis also argue that the WTO inherits all of the asymmetries that arise when there are substantial differences in bargaining power, since it rests on decentralized enforcement of international obligations.[4]

The purpose of this paper is to examine whether the new rule-based DSM of the WTO brings about more equitable outcomes among participants, especially, whether the developing members under the new mechanism enjoy more equality and have more power to protect their self-interests. The argument put forward here is that it is true that relative to the GATT mechanism, the DSM better equalizes power disparities between developing and developed countries, the new system is still more favorable to industrialized members than to developing ones, and there are many other obstacles in developing countries' way of pursuing equality.

II. Benefits For Developing Countries

The Uruguay Round reforms have brought great influence on developing countries' participation and performance in the WTO dispute settlement system. The establishment of a single organizational forum for managing disputes with formalized procedures and greater legal transparency certainly has brought about many positive results that improve the equality status of developing countries.

How the new DSM Enhances Equality: On the one hand, the new DSM in the WTO is a multilateral mechanism for dispute resolution,

3 Gregory Shaffer, "The Challenges of WTO Law: Strategies for Developing Country Adaptation," World Trade Review 5, no.2 (2006): 177-198 as referred in Khan, Haider and Liu, Yibei, "Globalization and the WTO Dispute Settlement Mechanism: Making a Rules-based Trading Regime Work" retrieved from http://mpra.ub.uni-muenchen.de/7613/1/MPRA_paper_7613.pdf

4 Bernard M. Hoekman and Petros C. Mavroidis, "WTO Dispute Settlement, Transparency and Surveillance," in Developing Countries and the WTO: A Pro-active Agenda, ed. Bernard Hoekman and Will Martin (Malden, MA: Blackwell Publishers Ltd., 2001), 131-146 as referred in Khan, Haider and Liu, Yibei, "Globalization and the WTO Dispute Settlement Mechanism: Making a Rules-based Trading Regime Work" retrieved from http://mpra.ub.unimuenchen. de/7613/1/MPRA_paper_7613.pdf

which provides developing countries with a more favorable environment than that under the bilateral mechanism. Under the rule-based DSM, all the members, no matter they are weak or strong, have the right to resort to the DSM to seek fair and reasonable resolutions for their trade disputes, which is a law-protected equality. The mechanism reduces the instability arising from countries' unilateral actions. And it also increases the transparency of the dispute settlement procedure thus help enhance the fairness.

A. Improvement in Bargaining Power:

The new DSM improves the bargaining power of developing countries. The system is based on formal legalized rules, thus members are "equal" in front of the law. Even the superpowers need to abide by the regulations. Thus developing countries gain more equality, and hence more power for equal bargaining. Just as Cameron and Campbell argue, resolving disputes through a judicial route is "particularly beneficial for smaller countries, as without the rules and procedures of the DSU and the extensive obligations in the WTO agreements, they would not have the necessary bargaining power vis-à-vis the larger powers."[5] For instance, Brazil had not pursued a complaint against the EU under the GATT system since it knew the complaint would be blocked. However, under the new WTO mechanism, Brazil notified the EU that it would bring the dispute to the DSB for formal consultation, which is the first step of the WTO dispute settlement procedure. A few days later, the EU made concessions that it had previously held as impossible, and the dispute was resolved.[6] Furthermore, while the GATT system might cripple weaker countries' bargaining power by its "positive consensus" rule, the new WTO DSM improves the situation through the "negative consensus" framework, which greatly reduces the possibility of blockage.

5 James Cameron and Karen Campbell, "Dispute Resolution in the WTO" (London: Cameron May, 1998), 57

6 Karen J. Alter, "Resolving or Exacerbating Disputes? The WTO's New Dispute Resolution System," 785-786

B. Independence to Developing Countries:

Second, from the angle of independence, under the power-based GATT system, the independence of developing countries was eroded because of their economic and political "dependence" on developed countries. Sometimes they could hardly express their real attitudes. Under the new WTO DSM, as a contrast, a certain level of independence is guaranteed by the fixed legal regulation system. Thus the rule-based arrangements for dispute resolution tend to produce more equal outcomes, mitigating power/wealth disparities.[7]

C. General Spirit of Compliance with the DSM Result:

The general spirit of compliance with the result of the DSM is another optimistic indicator of improved equality. In this rule-based system, the major powers in international trade have indicated that "they will comply with the mandates of the Dispute Settlement reports when they are finalized and formally adopted."[8] And even the most powerful players cannot defy the final rulings without risking harm to the institution.[9] When developing countries file complaints against developed ones to the DSB, even if the result is negative to the developed side, the recommendations or rulings can still be implemented. This situation tends to "reduce asymmetries in postagreement bargaining power"[10] and enhance developing countries' equality status in the phase of rulings implementation. Besides, countries now get easier access to countermeasures provided through cross-retaliation, which makes developing countries able to impose pressure on developed ones. Thus, as developing members have more assurance as to the implementation situation of the DSM results, their equality status in the system is improved.

7 Don Moon, "Equality and Inequality in the WTO Dispute Settlement (DS) System: Analysis of the GATT/WTO Dispute Data," International Interactions 32, no. 3 (2006): 206

8 John H. Jackson, "Dispute Settlement and the WTO: Emerging Problems," Journal of International Economic Law 1, no.3 (1998): 340

9 James Smith, "Inequality in International Trade? Developing Countries and Institutional Change in WTO Dispute Settlement," Review of International Political Economy 11, no.3 (2004): 546

10 Ibid.

D. Provisions Providing Special Favorable Conditions to Developing Countries:[11]

Considering the concrete DSU provisions, because of the increasing concern on developing countries' particular needs and interests, the DSU provides plenty of provisions offering special favorable conditions to developing countries through the whole dispute settlement procedure. Thus developing countries can enjoy more equality with developed countries. Article 4.10 of the DSU calls for members to pay special attention to the particular problems and interests of developing countries in consultations. Article 12.10 allows for the extension of the consultation time-period. Article 8.10 states that a developing country involved in a dispute can request that the panel includes at least one panelist from a developing member country if the other side is a developed state. And Article 12.11 provides that the panel report must indicate the form in which the special and differential treatment rules of the DSU have been taken into account, if a developing country member involved in a dispute raises such rules. At the stage of implementation, according to Article 21.2 of the DSU, particular attention should be paid to matters affecting developing countries interests.

As to surveillance, Article 21.8 states that if a case is brought by a developing country, the DSB needs to take into consideration not only the trade coverage of the challenged measures, but also their impact on the economy of the developing country concerned. Furthermore Article 27.2 requires the WTO Secretariat to make available legal expertise assistance from the WTO technical cooperation services to any developing member upon its request. And Article 24.1 calls for due restraint in bringing disputes against a least-developed country (LDC) and in asking for compensation or seeking authorization to suspend obligations against a LDC that has lost a dispute.

11 Ibid

III. Obstacles For Developing Countries

Moon's research shows that under the new DSM of the WTO, developing countries now are much more frequently taken to court by developed countries, as the percentage of "developed countries as complaints and developing countries as defendants" increased considerably from 9.5% under the GATT system to 28.1% under the WTO mechanism.23 Reinhardt and Busch find out that "developing countries are one third less likely to file complaints against developed states under the WTO than they were under the post-1989 GATT regime."[12]

A. High Costs and Limited Resource Availability

First, the costs of access of the DSM are very high. And compared with developed states, developing countries actually have fewer resources to invest to defend their WTO rights. It is usually a long process for the WTO to settle a trade dispute through the DSM.

Except for the litigation costs, countries initiating disputes in the DSM face income losses from hindered trade during the dispute investigation period.[13] For developing countries, especially those highly relying on their limited exports for national incomes, these potential income and market losses may be more unbearable than the litigation bills.

B. Limited Legal Resources

Except for financial investments, legal resources, especially the legal expertise, are also essential for WTO dispute settlement. Actually, the shortage of special expertise, personnel and information for legal activities is an important reason why developing countries are suffering inequality and unfavorable outcomes in the DSM. Industrialized states such as the US and the EU, also the major players in the WTO, are well equipped with legal experts in the area of the WTO legal system,

12 Amrita Narlikar, The World Trade Organization: A Very Short Introduction, 95

13 Pilar Zejan and Frank L. Bartels, "Be Nice and Get Your Money – An Empirical Analysis of World Trade Organization Trade Disputes and Aid," Journal of World Trade 40, no.6 (2006): 1026

and they have a worldwide network of commercial and diplomatic representation that feeds their systems with relevant data.[14] In contrast, developing countries have limited legal expertise and it is harder for them to collect data and information because of the lack of networks. Many developing countries have only one or two lawyers to address WTO issues.[15]

Inequality Stemming from Power-Based International Relations

The other kind of sources of inequality is about international relations among countries. The WTO is an international organization, the establishment and operation of which are made possible only if member countries are willing to give up a part of their sovereignty to make the institutional contract. This means actions of the WTO may be inevitably influenced by the international political and economic interactions. The DSM is also unexceptional. As what Moon points out, at the law-making stage for establishing the DSM, weaker states have to make concessions to stronger countries for the latter's acceptance of a rule-based system, the result of which is the agreements advantageous to stronger actors.[16]

C. Inadequate Compensation

The WTO retaliation mechanism prescribes that complaints cannot unilaterally take retaliatory actions unless the DSB makes decisions and permits them to, which means that the defendant side is able to violate the WTO laws and hurt the other side's interests during the long time-period, until the WTO recognizes and decides to take action to correct the violations. With economic strength, developed countries can relatively easily affect developing economies even just in a short time. Thus it is possible that before the DSB authorize them to impose

14 Bernard M. Hoekman and Petros C. Mavroidis, "WTO Dispute Settlement, Transparency and Surveillance," in Bernard Hoekman and Will Martin ed. Developing Countries and the WTO: A Proactive Agenda, (Malden:Blackwell Publishers Inc., 2001), 136

15 Gregory Shaffer, "The Challenges of WTO Law: Strategies for Developing Country Adaptation," 182

16 Don Moon, "Equality and Inequality in the WTO Dispute Settlement (DS) System: Analysis of the GATT/WTO Dispute Data," 208

trade sanctions, the developing countries' domestic markets and internal economic capabilities have already been badly harmed. For those small developing states, this situation may be even worse.

Even if a developing country as complaint wins in a dispute, the compensation methods under the DSM are limited. Usually it comes out in the forms that the losing defendant withdraws the measures found inconsistent with WTO law, or the winning complaint gets authorization from the DSB to impose limited trade sanctions. Under the current "retaliation-as-compensation" approach, there is no room for retroactive compensation or punishment measures that can help developing countries make up for its previous economic losses that have been already caused before the decision is made.

Even if the defendant side corrects its action after the dispute, the complaint still has to assume the economic losses generated before the correction. For developing countries particularly, while their economies are generally weak and vulnerable to outside impact, such burden may be too heavy for them to bear.

D. Lack of Enforcement Capability

It is also arguable whether developing countries possess adequate enforcement capability to fully implement the WTO rulings or recommendations even if the results are favorable to them. Under the DSM, the final dispute settlement decisions are supposed to be implemented on a decentralized, bilateral basis. The DSM relies entirely on state power for enforcement of its rulings.[17] It may be hard for a developing country to raise tariff rates on certain products imported from a developed country, even if it is authorized to, since this action may hurt itself in turn at the end. With a relatively weak economy, a developing country may depend on certain imports from developed countries for development; if the products included in the retaliation are actually essential for its own growth, it can hardly be expected that the developing country will really deter or limit the imports. But

17 Pilar Zejan and Frank L. Bartels, "Be Nice and Get Your Money – An Empirical Analysis of World Trade Organization Trade Disputes and Aid," 1027

considering the other side since most developing countries' markets and economic power are relatively small and weak, whether or not they take retaliatory actions to developed countries' products does not bring much difference to the developed economies, unless they retaliate in alliance, which does not usually happen. Thus, while the retaliatory actions taken by developing countries to developed states cannot bring much danger or worries to the latter but may incur negative consequences to the users themselves, developing countries actually do not possess real equality with developed countries because of the asymmetry of enforcement capabilities.

E. The DSU Provisions – Inequality behind the Articles

The WTO expanded its coverage to areas such as investment (Agreements on Trade- Related Aspect of Investment Measures, TRIMs), intellectual property rights protection (Agreements on Trade-Related Aspect of Intellectual Property Rights, TRIPs), service trade (General Agreements on Trade in Services, GATS), etc. Because of these agreements, disputes in these areas now can be brought into the DSM. While most of the agreements reflect developed countries' interests, developing countries are actually in an unequal position.

On the other hand, analyzing the special DSU provisions which aim at improving developing countries' status, it is found that they are more declarative than operative.[18]

For instance, the Article 4.10 requires that special attention should be paid to the particular problems and interests of developing countries during consultation phase. But this article does not point out concretely on what specific aspects and to what extent the "special attention" should be paid. Since there is no specific implementation measure, in practice it is hard to evaluate whether member countries have really and adequately complied with this provision. And Article 21.2 has the similar problem.[19]

18 Valentina Delich, "Developing Countries and the WTO Dispute Settlement System," in Development, Trade, and the WTO: A Handbook, ed. Bernard Hoekman, Aaditya Mattoo and Philip English (Washington: The World Bank, 2002), 73

19 Article 21.2 of the DSU states that particular attention should be paid to matters affecting developing countries' interests with respect to measures which have been subject to dispute settlement.

Furthermore, several other provisions regarding special and differential treatment may be difficult to apply, though they seem to be favorable to developing countries. For example, Article 21.7 states that the DSB must consider what further and appropriate action it might take in addition to surveillance and status reports, if a developing country has raised the matter. But it has not been used by any developing country.

IV. Implications Of Dispute Settlement Understanding Concerning India

The impact of DSU can further be understood on the developing countries like India with the help of cases being referred under the substantial issues like most-favourednation treatment, the national treatment, quantitative restrictions, agriculture, textiles and clothing, patent protection, the environment, trade-related investment measures, etc.

A. Most-Favoured-Nation Treatment

Generally, the MFN treatment implies that every time a Member lowers a trade barrier or opens up its market, it has to do so for the like goods or services from all its trading partners.

Indonesia – Auto case: It was argued that even if a particular regulation did not mention a country by name but its effect was to benefit a particular producer or a country, it violated the MFN principle. India found no legal strength in this argument, since, according to it, any automobile manufacturers based in any country could have availed of the specific benefits and subsidization programme introduced by Indonesia, provided they fulfilled the conditions specified in the Indonesian regulation. The fact that none had approached Indonesia in that regard, according to India, could not be construed as an indication that the regulation violated the MFN principle.[20]The Panel found that

20 The Panel set for itself a three-fold test: whether the tax and customs duty benefits were advantages of the types covered by GATT Article I; whether the advantages were offered to all like products; and whether the advantages were offered unconditionally. According to the Panel, for the purpose of the MFN obligation, National Cars and the parts and components thereof imported into Indonesia from Korea were to be considered "like" other similar motor vehicles and parts and components imported from other Members.

under the February 1996 car programme the granting of customs duty benefits to parts and components was conditional on their being used in the assembly in Indonesia of a National Car. The granting of tax benefits was conditional and limited to the Pioneer Company producing National Cars. And there was also a third condition for these benefits: the meeting of certain local content targets." For these reasons, the Panel found Indonesia's Car Programme inconsistent with Article I.

Canada – Auto case: India argued that the Panel would need to determine whether the 1965 Auto Pact between Canada and the US was consistent with the MFN obligation. The important issue in India's view was whether the Auto Pact provided any advantage to imports of automobiles originating in the US and Mexico in relation to imports of like products originating from other Member countries. [21] Thus, the question before the Panel was whether the import duty exemption was consistent with GATT Article 1.1. Here also, the Panel applied a three-fold test as in the abovementioned case. The Panel found that by reserving the import duty exemption to certain importers, Canada accords an advantage to products originating in certain countries which advantage is not accorded immediately and unconditionally to like products originating in the territories of all other WTO Members. Canada was therefore found in violation of the MFN treatment obligation. The Panel clarified that Article XXIV could not justify a measure which granted a WTO-inconsistent duty-free treatment to products originating in third countries not parties to a customs union or free trade area.

B. National Treatment

The national treatment implies that imported goods, once they have cleared customs and border procedures, are to be accorded "treatment no less favourable than that accorded to like products of national origin in respect of all laws, affecting their internal sale."[22] The aim

21 According to India, even though on its face value the tariff exemption provided by the Auto Pact appeared to be non-discriminatory, the Panel would need to examine whether the beneficiaries of the exemption had largely been companies based in the US and Mexico, or whether companies based outside the NAFTA parties had also been able to benefit from what Canada termed as an instrument which had helped transform Canada "from a highly protective market into one of the most open markets in the world for automotive products and investment, both as a matter of law and practice".

22 GATT Art. III.4

is to prevent domestic tax and regulatory policies from being used as protectionist measures that would defeat the purpose of tariff bindings."[23] The choice of the no-less-favorable standard is to "ensure an effective equality of treatment"[24]. This implies that contracting parties have "an obligation to accord formally different treatment to domestic and imported products".

India – Auto case: The EC and the US claimed that the indigenization obligation was inconsistent with Article III: 4. In order to determine whether the Indian measure was inconsistent with Article III:4, the Panel found it necessary to examine whether imported products and domestic products were like products; whether the measure constituted a "law, regulation or requirement"; whether it affected the internal sale, offering for sale, purchase, transportation, distribution or use; and whether imported products were accorded a less favourable treatment than the treatment accorded to like domestic products.

As regards the first test, the Panel noted that India did not dispute the likeness of the relevant automotive parts and components of domestic or foreign origin for the purposes of Article III:4. With respect to the second test, the Panel enquired and found the indigenization condition constitutes a condition to the granting of an advantage, namely, in this instance, the right to import the restricted kits and components. It therefore constitutes a requirement within the meaning of Article III:4. The Panel next examined whether the Indian measure affected the internal sale, offering for sale, purchase or use of the imported products within the meaning of Article III:4. The Panel found: To meet the indigenization requirement, car manufacturers must purchase Indian parts and components rather than imported goods. This provides an incentive to purchase local products. Such a requirement "modifies the conditions of competition between the domestic and imported products" and therefore affects the internal sale, offering for sale, purchase and use of imported parts and components in the Indian market within the meaning of Article III:4 of the GATT 1994. And, finally, to determine whether imported products were treated less favourably than domestic

23 Ibid

24 Roessler, Diverging Domestic Policies and Multilateral Trade Integration (Cambridge, Mass.: MIT Press. 1996, edition ii, pg. 26)

products, the Panel examined whether the Indian measure modified the conditions of competition in the Indian market to the detriment of imported products. According to the Panel, the very nature of the indigenization requirement generated an incentive to purchase and use domestic products and hence created a disincentive to use like imported products. Such a requirement clearly modified the conditions of competition of domestic and imported parts and components in the Indian market in favour of domestic products. The Panel therefore found that the indigenization condition, as contained in Public Notice No. 60 and in the MOUs, was a violation of Article III: 4.

Applying the same criteria, the Panel found that kits and certain listed components of domestic and foreign origins were like products, that the requirements affected the competitive conditions of the imported product on the Indian market, and that the trade balancing condition accorded a less favorable treatment to the imported products than to like products of domestic origin, within the meaning of Article III: 4.

C. Quantitative Restrictions (QRs) and Agriculture

QRs are those control measures which limit the quantities of goods that may be exported or imported. QRs are to be administered non-discrirninately. The purpose of the Agreement on Agriculture (AoA) is to open up trade in agriculture. The commitments under the AoA can be divided into market access, export competition, and domestic support. All Members were required to make commitments in each of these areas, although the extent of their commitments varies.

Market access - Here, developed and developing countries were to convert all Non tariff barriers (NTBs) into tariffs and bound them. The AoA also enjoins Members from maintaining or reverting to NTBs, which have been converted into customs duties. This however excludes measures, such as QRs maintained under the BOP provisions. It is this provision of the AoA, which underlay India – QRs.

In this case, the US claimed that since processed food, fresh fruits and vegetables and other agricultural products were “consumption goods, which could directly satisfy human needs without further processing”,

India's QRs on imports of consumer goods also served as a form of "agricultural protectionism". Quoting the IMF, that there was no BOP necessity for the QRs, the US concluded that India violated its obligations under Article 4.2 of the AoA. India, on the other hand, argued that footnote 1 to Article 4.2 clarified that it did not extend to measures maintained under the BOP provisions. According to India, the question of the consistency of India's import restrictions with Article 4:2 depended on their consistency with GATT Article XVIII: B and the legal status of India's import restrictions under the AoA was consequently identical to that under GATT. India wanted the Panel to understand that its claim that its import restrictions were consistent with Article XVIII: B included the claim that they were consistent with the AoA.

Having found that India's QRs violated GATT Article XI:1, not justified under Article XVIII:B and also violated GATT Article XVIII:11, the Panel concluded that India's restrictions were "not" measures maintained under balance-of-payments provisions, within the meaning of footnote 1 to Article 4.2 of the Agreement on Agriculture." The issue was not raised in the appellate proceedings. It was mainly due to the "peace clause", the issue of agriculture has so far figured only obliquely in India's experience with the DSS. But the issue remains most contentious. The anticipated gains from the agricultural trade liberalization have thus far escaped developing countries. A number of developed countries have continued to provide high domestic support and export subsidies to their agricultural sectors. Market Access in the developed countries is also hampered by their maintaining high tariffs on products of interest to developing countries.

D. Textiles and Clothing

A key area of export interest to India, international trade in textiles and clothing has for long been subject to a most restrictive regime. Before the coming into existence of the WTO, international trade in textiles and clothing was regulated through the MFA. The ATC oversee a ten-year phase out of the MFA and it was proposed that from 1 January 2005, trade in textiles and clothing to be governed by regular GATT disciplines.

US–Underwear Case: India recalled that imports from Costa Rica, which had been almost entirely from US components supplied by the US industry producing underwear and mostly produced in Costa Rica by units established by US underwear manufacturers, could not have contributed to serious damage or actual threat thereof to the same US industry which engaged voluntarily in such co-production activities.[25] The US action, India concluded, actually sought to protect the US industry producing fabrics for underwear and not the industry producing underwear and this was inconsistent with Article 6.

The Panel therefore concluded that the US "failed to demonstrate adequately in the March Statement that its domestic industry suffered serious damage that could be attributed to Costa Rican imports and thus, by imposing import restrictions on imports of Costa Rican underwear, the United States failed to comply with its obligations under Article 6.2 and 6.4 of the ATC." The Panel clarified that a finding on "serious damage" required the party taking action to demonstrate that damage had already occurred, whereas a finding on actual threat of "serious damage" required it to demonstrate that, unless action was taken, damage would most likely occur in the near future. The Panel found that the March Statement contained no elements of such a prospective analysis.

US–Blouses: India argued that the ATC required demonstration that the increase in imports was causing serious damage or actual threat thereof. India claimed that the US had failed, and did not even attempt, to demonstrate any causal link between the rising imports and declining production. India submitted, "to impose burdens on particular exporters not because they engaged in dumping or benefited from subsidies but merely because they were more efficient than others was contrary to the basic purpose of the multilateral trading order."

25 India submitted that the US did not have the option of claiming a situation of actual threat of serious damage in July 1995, after having determined in March 1995 that there was a situation of serious damage and having requested consultations from Costa Rica on that basis. India argued that all the data necessary to be provided to Costa Rica in terms of the provisions of Article 6 of the ATC had not been provided by the US. The data available did not indicate that there had been either a situation of serious damage or actual threat of serious damage to the US domestic industry, attributable to imports.

The US, on the other hand, argued that the ATC did not prescribe any specific methodology for collecting data and that its demonstration was reasonable with respect to causation and serious damage or actual threat thereof. The Panel said that the importing Member remained free to choose the method of assessing whether the state of its domestic industry was caused by such other factors as technological changes or changes in consumer preferences, but it must demonstrate that it had addressed the issue. The Panel therefore concluded that the US determination did not respect the requirements of Article 6 of the ATC.

E. Patent Protection

The scope for protection of Intellectual property rights in the WTO and its implications for developing countries have not only been variedly viewed, but continue to invite attention.

India -Patents (US): What constitutes a "means" for the filing of patent applications and entails the grant of exclusive marketing rights were the main issues in this case, the first occasion for the DSS to interpret and apply the TRIPS Agreement.

The US claimed that India had failed to implement its obligation under Article 70.8 of the TRIPS Agreement to establish a "means" to preserve the novelty of applications for pharmaceutical and agricultural chemical products during the transition period available to developing countries under the TRIPS Agreement. Such a means, according to the US, must ensure that persons, who filed or would have filed applications, had a 'means" been in place on time and maintained, could file such applications and received the filing date they would have received.

At the time of establishment of the Panel, the Indian Patents Act, 1970, did not provide patent protection for pharmaceutical and agricultural chemical products. The Act also stated that if it appeared to the Controller General of Patents, Designs and Trademarks that the invention was not patentable under the Act the application should be refused. India therefore submitted that it had provided a means for the filing of patent applications for pharmaceutical and agricultural chemical products consistently with Article 70.8.

The Panel was of the view that potential patent applicants were influenced by the legal insecurity created by the continued existence of the Act which required rejection of product patent applications. The Panel therefore found India in violation of Article 70.8, for it was not clear to it that a court would uphold the validity of administrative actions which apparently contradicted mandatory legislation.

F. The Environment

The emergence of trade-relatedness has not only brought the environment from the periphery of GATT to the mainstream of the WTO, but has also given rise to some of the most contentious disputes ever since. Two important environment protection issues faced by India were of sanitary and phytosanitary protection and conservation of exhaustible natural resources.

1. Sanitary and phytosanitary protection: In Australia -Salmon, India emphasized that Members must ensure that these measures were applied in an equitable manner and did not constitute a disguised restriction on international trade. India pointed out that the sanitary measure had to be applied "only to the extent necessary to protect human, animal or plant health or life, and had to be based on scientific principles and not maintained without sufficient scientific evidence." India therefore identified the requirement of risk assessment and the prohibition of discrimination or disguised restriction on international trade in the application of sanitary and phytosanitaty measures. ". The Panel noted that if a sanitary measure was not based on a risk assessment, as required in paragraphs 1 and 2 of Article 5, the measure could be presumed not to be based on scientific principles or to be maintained without sufficient scientific evidence and concluded that Australia acted inconsistently not only with Article 5.1 but also with Article 2.2 of the SPS Agreement.

2. Conservation of exhaustible natural resources: The WTO allows Members to adopt measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption." However, these measures may not be "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."

As one of the four complainants in US - Shrimp, India did not accept the US assertion that the use of TEDs (a technique) was the only way to keep sea turtles species found in India's territorial waters from becoming extinct. While India shared the US concern over the plight of sea turtles and considered it important to ensure their survival, the importance of this goal did not justify the US taking unilateral actions that infringed upon India's sovereign right to formulate i t s own environmental and conservation policies. The US argued that, since sea turtles were a shared global resource, efforts by one nation to protect sea turtles would not succeed unless other nations in whose waters these species also occurred took comparable measures. Since none of the evidence cited by the US demonstrated that sea turtles found in the US areas subject to the TED requirement migrated to Indian territorial seas or beaches, India concluded that significant numbers of sea turtles would appear to migrate regionally but not globally. The US submitted that the very attempt by the complainants to characterize certain sea turtles as "under their jurisdiction" was inaccurate both as a matter of fact and of international law. India termed this approach as incorrect. India, along with Pakistan and Thailand, maintained that the purpose of the US shrimp embargo was to dictate an environmental policy that was to be followed by other Members with respect to all shrimp caught within their jurisdiction if they wished to export any shrimp to the US India claimed that the discriminatory effects of the embargo imposed by the US had led to a dramatic decline in India's shrimp exports to the US. India pointed out that the socio-economic condition of the coastal community in India was closely linked with fishing and the embargo had adversely affected their livelihood. The Panel held that "the environmental issues at stake in this case should be evaluated to a large degree in light of local and regional conditions" and that "conservation measures should be adapted, inter alia, to the environmental, social and economic conditions prevailing where they are to be applied. The Panel further told that it did not impose on members specific methods of conservation such as TEDs.

But the US afterwards appealed the Panel ruling, and rejecting the Panel's approach, the AB held that "A requirement that a country adopt a regulatory program requiring the use of TEDs by commercial shrimp trawling vessels, in areas where there is a likelihood of intercepting sea turtles is directly connected with the policy of conservation of sea turtles."

There is neither evidence nor projection that emerging environmental policies and requirements would not adversely affect developing countries' market access. While India's merchandise trade continues to suffer from ever-newer forms of protectionism, proposals have been made on environmental services, an area where developed countries are the major suppliers. The initiation of the ongoing antidumping case in the US against select shrimp exporters, including India, soon after the enforcement of the US Public Health Security and Bio-terrorism Preparedness Act, 2002, has made the matters worse for the beleaguered industry.

G. Trade-Related Investment Measures

The TRIMs Agreement applies to investment measures taken by Members relating to trade in goods. It identifies five investment measures as inconsistent with GATT Articles III and XI.

Indonesia – Auto: It was alleged that measures taken by Indonesia violated Article 2 of the TRIMs Agreement. In India's view, since the emphasis was on the application by Members of a measure which could be said to be a trade-related investment measure, it was "evident that we need to ab initio be clear whether the said measures taken by Indonesia come within the ambit of being trade related investment measures or not."[26] India submitted that the TRIMs Agreement did not add any new obligations to Members, since it merely stated that a measure which was a trade-related investment measure should not violate Article III or XI.[27]

The Panel set for itself a two-fold task: the determination of whether the measures at issue were "investment measures", whether they were "trade-related", and found that the measures applied by Indonesia were investment measures, and they were also "trade-related"

26 Referring to the drafting of the TRIMs Agreement, India pointed out that the TRIMs Agreement was basically designed to provide a level playing field for foreign investment in third countries. It was evident, India added, that any measure taken by a country relating to its internal taxes or subsidies, as Indonesia had done, could not be construed to be trade-related investment measure.

27 India argued that, since the measures taken by Indonesia were in the form of subsidies, the measures should be governed solely by the SCM Agreement. To India, "just as investment measures cannot be presumed to be a form of subsidization, subsidies too cannot be presumed to be trade-related investment measures."

V. Concluding Remarks Regarding India

India has been an active participant in the system, and the following details are well indication of this fact-

A. India as Complainant

India has been a complainant in 17 cases. It has brought four GATT cases - one against Poland alleging discriminatory treatment of Indian autos (settled); one against Turkey in respect of textile quotas (won in important panel/AB report on GATT Article XXIV); one against the US restrictions on shrimp (won in important AB report on Article XX) and one against the EC's GSP program (won in an important AB report).

It has brought eight cases against various trade remedies - under the ATC: US Coats and US Shirts & Blouses (in both of which, the measure was not extended); and under the antidumping agreement: EC Cotton Fabrics (no measure imposed); EC Bed Linen (won in panel/AB proceeding; limited use of "zeroing"); South Africa Pharmaceuticals (not pursued); US Steel Plate (won in panel); US Byrd Amendment (won in panel/AB report); and Brazil Jute (not pursued).

The other three cases involved EC Rice Duties (not pursued); US Textile Origin Rules (lost in panel) and Argentina Pharmaceutical Products (not pursued).

B. India as Respondent

India has also been a respondent in 17 cases. The cases have involved its failure to enact a mail-box mechanism under the TRIPS Agreement (lost in panel/AB reports); its unjustified reliance on the balance-of-payments exception (lost in panel/AB reports); its automotive regime (lost in panel report). The US and the EC were the complainants in these three matters.

Of the remaining cases, five involve EC challenges to various Indian export and import restrictions and its antidumping duties on certain

products. Except for the last, which is recent, the others were partially resolved. The remaining case is a recent challenge by Bangladesh to Indian antidumping duties on batteries, which was brought in 2004.

C. India as third party

As a third party, India has been acting in 46 cases.

D. Overall Assessment

India has been involved in a number of major cases - with mixed results. The loss in the Patents case was difficult to implement, although the loss in the balance-ofpayments case was not particularly serious since India had and continued to have through the Asian financial crisis quite strong reserves. It has won some significant cases, as well - Turkey Textiles; US Shrimp; EC Bed Linen.

It is interesting that the EC is the main complainant against India, followed by the US. Indeed, except for the BOP case, no one else requested consultations with India except the US and the EC, until the 2004 request by Bangladesh. On the other side, India has brought cases against a number of countries, but again, mainly against the US and the EC.

VI. Conclusion

The DSM of the WTO is a multilateral rule-oriented mechanism. Although many problems still exist, with its recently acknowledged special concern about developing countries' particular needs and interests, it has brought about many positive and favorable changes to developing member countries' status. From the perspective of equality, weaker states now possess a relatively better environment and more power to defend their WTO interests through this new dispute settlement system.

However, developing countries still do not enjoy a really neutral playing field where they can really trade equitably and efficiently

with developed states. Though the DSU provisions are not biased literally, developing countries are not able to fully take advantage of the DSM in practice, even if certain provisions are supposed to favor them in principle. The analysis of the experiences of developing nations throughout the evolution of the dispute settlement procedure demonstrates the particular challenges developing nations have faced under the GATT procedure and then under the WTO DSM. Since the large increase in their GATT membership in the 1960s, developing nations have supported a strong dispute settlement procedure to ensure a better level of compliance by all nations. Their participation in the dispute settlement process has gradually changed from fairly insurmountable difficulties in bringing claims and enforcing rulings (through lack of economic and political influence) to a situation where confidence in the renovated system is apparent through increased use and reliance on a structure of legal and procedural disciplines ensuring a degree of certainty.

Since they do not have adequate financial and legal expertise resources, they can hardly bear the high costs of settling disputes through the DSM. Because of the unevenness of political power between developed states and developing countries, the latter group is in a disadvantageous position in the DSM given the political pressures they may suffer outside the WTO. The developing countries' lower status is also due to their inadequate capability to enforce the dispute settlement results, even if the outcomes are favorable to them. Furthermore, the real practical effects of the DSU provisions regarding developing countries also need further examination. Thus, in the practice of the DSM, developing countries are not enjoying a really equal status as developed states do.

In sum, it can be said that the goal of developing countries in the evolution of the dispute settlement is no different from that of the developed nations: a better level of compliance with obligations.

Still there remains much to be done. Perhaps the greatest challenge now facing the WTO is the further integration of developing countries into the multilateral trading system. With the erosion of tariffs and the greater use of non-tariff barriers to trade– product standards, investment requirements, environmental and social standards, and competition

policies–there will be a need to ensure that countries' interests can be pursued and protected.

US experience demonstrates how vital the dispute settlement system is for opening up markets and warding off protectionist measures. Developing countries will need to be prepared to face the coming challenges, from an institutional and substantive standpoint. Several of them are already well placed to improve their ability to meet these challenges directly.

The WTO may need to work closely with other agencies in the international community to provide the necessary support to those who cannot by themselves acquire specialist legal or other technical services. Useful initiatives and proposals in this regard are already underway. All WTO members should lend their support to such endeavors. Tighter time limits must be included so as provide relief faster. there should be provided more effective remedies, so as to improve prompt implementation. A permanent panel body should be constituted which could allow significant time savings. There is a need for increased transparency, expanded third party rights and remand power for the Appellate Body.