

A Development Reading of India's Cases in the World Trade Organization¹

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ABSTRACT

The World Trade Organization (WTO) agreements contain certain distinct provisions for developing countries called Special and Differential Treatment (S&DT) that allow for increased market access for developing country exports and some protection for their markets. Therefore, the WTO aims to achieve development by these two methods. Indeed, India has been following the same economic policy evident from an analysis of its five year plans.

One of the principal organs of the WTO is the Dispute Settlement Body (DSB). This article mainly looks at the cases involving India as complainant with a focus on the reports issued by the DSB. It analyses the interpretations of the agreements by the DSB in these reports to find out whether and how they correspond with the objectives of the WTO (and of India) including S&DT.

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I. INTRODUCTION

“... [R]elations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development,

... [T]here is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development,...

This is an extract from the Preamble to the Agreement establishing the World Trade Organization (WTO).³ The Preamble sets out the goals of the WTO and also provides a definition of development. The aim of the WTO is to work towards the achievement of the goals stated in the Preamble. For this, the WTO agreements contain some distinct provisions for developing countries⁴ called Special and Differential Treatment (S&DT). These provisions allow for increased market access for developing country exports and some protection for their markets. Therefore, the WTO aims to achieve development by these two methods i.e. by increased market access and protection.

³ Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, http://www.wto.org/english/docs_e/legal_e/04-wto.pdf.

⁴ A country is defined as a developing country based on self-selection.

India has been following the same economic policy which is evident from an analysis of its foreign trade policy (five year plans) from 1947 onwards. This policy is also reflected in India's relations with the WTO.

Since this article looks at India's cases in the WTO, a brief description of the role of the Dispute Settlement System (DSS) follows. The Dispute Settlement Understanding (DSU) has been touted as one of the most significant achievements of the Uruguay Round (UR). The DSS steps in only if the members do not fulfil the obligations they have undertaken in the negotiations. The DSS' role is, therefore, very important because it tries to get the members to implement their commitments regarding market access. The DSS has to interpret the legal provisions in a manner which is consistent with the advancement of goals as defined in the law. Therefore, the DSS has a huge responsibility.

The DSU has resulted in greater legalisation of the dispute settlement (DS) process,⁵ thus leading to the expectation that developing countries could derive more benefit from it. The use of the DSS is greatly dependent on the resources of each member country. Therefore, one would think developing countries do not make much use of this mechanism. But India belies this claim. India is a big developing country member of the WTO and plays an important role in DS not only as a party but also as a third party. The legalisation of the DSS has contributed to India becoming an active litigant. It pursues and defends various kinds of systemic and commercial interests. India has challenged and has been challenged by the most powerful members of the WTO i.e. the United States (US) and the European Communities (EC). Increasingly though, there have been cases involving other developing countries also.

⁵ Gregory Shaffer, How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies, in Victor Mosoti (Ed.), *Towards a Development-Supportive Dispute Settlement System in the WTO*, Sustainable Development and Trade Issues, ICTSD Resource Paper 5, International Centre for Trade and Sustainable Development, Geneva, 1, 9 (2003).

Moreover, there are cases in which India is a joint complainant with other members, including developed and developing country members.

This article examines the issue of development through the lens of DS involving India by analysing how India uses the DSS. The Preamble to the WTO Agreement talks of development so the DSS must help achieve development as must all other organs of the WTO. Consequently, the issue being considered is – to what extent does the DSS fulfil India’s developmental goals through litigation?⁶ This article mainly looks at the cases involving India as complainant though it will also dwell briefly on cases in which India was a respondent. Some cases are pending and some have been settled with the help of a mutually agreed solution. This article examines a number of these cases but the focus is on the reports issued by the panels and Appellate Body (AB). It analyses the interpretations of the agreements by the DSS in these reports to find out how these interpretations correspond with the objectives of the WTO (and of India) including S&DT and whether or not these interpretations further development as mentioned in the Preamble to the WTO Agreement and stated by panels in cases such as the EC – Tariff Preferences case.⁷ In other words, it examines whether the panels and AB in India’s cases have applied the WTO agreements to promote development which is the goal India hopes to achieve. If India has to file cases to get market access commitments enforced and is not always successful, what would be the condition of other less powerful developing countries? Moreover, an examination of India’s arguments illustrates India’s legal strategy in the DSS and the quality of its legal analysis and arguments.

⁶ Of course, as one Delegate from the Indian Mission to the WTO clarified, the DSS is only one of the components to achieve India’s objectives in the WTO.

⁷ WT/DS246 European Communities — Conditions for the Granting of Tariff Preferences to Developing Countries.

Interviews in the WTO revealed that the DSS was not viewed as an instrument of development.⁸ Development primarily meant S&DT provisions and the preambular language was not considered obligatory. One expert, though, felt that the link between market access and the DSS was the latter's ability to compel members to implement commitments undertaken in the negotiations.

There is diverse literature on developing countries (including India) and the WTO (including the DSS).⁹ Most of this literature does not relate to the substantive interpretations of the WTO agreements. In two separate studies for the International Centre for Trade and Sustainable Development (ICTSD), Shaffer and Qureshi explicitly state that the DSS can contribute to development.¹⁰ Shaffer links market access to the DSS thus recognising the latter's role in enforcing market access commitments. His central thesis is the improvement of the DSS in favour of developing countries to get their WTO rights enforced. Hence, it is clear that the WTO DSS has an important role to play in development.

⁸ One expert also stated that market access does not always lead to development even though there is a presumption in the WTO that liberalisation and market access lead to development.

⁹ See for example Julien Chaisse, *Ensuring the Conformity of Domestic Law with World Trade Organisation Law India as a Case Study*, Occasional Paper 13, Centre de Sciences Humaines, New Delhi, 2005; Andrew D. Mitchell, *A legal principle of special and differential treatment for WTO disputes*, 5(3) WORLD TRADE REVIEW 445 (2006); Ravindra Pratap, *WTO Panel Report on Indian Steel Issues of Interpretation*, 38(11) ECONOMIC AND POLITICAL WEEKLY 1021 (2003); Ravindra Pratap, *WTO and Rules of Origin Issues for India*, 38(33) ECONOMIC AND POLITICAL WEEKLY 3454 (2003); Ravindra Pratap, *WTO and Tariff Preferences India Wins Case, EC the Law*, 39(18) ECONOMIC AND POLITICAL WEEKLY 1788 (2004); Ravindra Pratap, *INDIA AT THE WTO DISPUTE SETTLEMENT SYSTEM* (2004); Ravindra Pratap, *India and DSU Reform Negotiations: A Critical Appraisal*, in Koen Byttebier and Kim Van der Borgh (Eds.), *WTO OBLIGATIONS AND OPPORTUNITIES: CHALLENGES OF IMPLEMENTATION* 367-384 (2007); Gregory Shaffer, *The Challenges of WTO Law: Strategies for Developing Country Adaptation*, 5(2) WORLD TRADE REVIEW 177 (2006); Aseema Sinha, *Global Linkages and Domestic Politics: Trade Reform and Institution Building in India in Comparative Perspective*, 40(10) COMPARATIVE POLITICAL STUDIES 1183 (2007).

¹⁰ Gregory Shaffer, *How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies*, in Victor Mosoti (Ed.), *Towards a Development-Supportive Dispute Settlement System in the WTO*, Sustainable Development and Trade Issues, ICTSD Resource Paper 5, International Centre for Trade and Sustainable Development, Geneva, 1 (2003); Asif H. Qureshi, *Interpreting WTO Agreements for the Development Objective*, in Victor Mosoti (Ed.), *Towards a Development-Supportive Dispute Settlement System in the WTO*, Sustainable Development and Trade Issues, ICTSD Resource Paper 5, International Centre for Trade and Sustainable Development, Geneva, 89 (2003).

Thus, some of the literature touches upon DSS and development but it does not do so taking India's cases as a base. The basic premise of the WTO is liberalisation of markets for freer trade i.e. increase in exports especially those from developing countries. As stated above, the DSS must contribute in achieving the goals of the WTO and therefore an analysis of the DSS' contribution to enforcing market access commitments would be useful. Moreover, this would contribute to the study of the efficacy of one of the principal mechanisms of the WTO i.e. the DSS in the case of a large developing country i.e. India.

II. ANALYSIS OF CASES

There have been a number of reports of the panels and AB involving various agreements in cases of market access. An analysis of the findings of the DSS in each case shows that there are instances where the interpretation may not necessarily lead to enhancement of market access or development even though India might have won the case.

One of the cases directly relevant to differential market access is the EC – Tariff Preferences case. In this case, the European Generalised System of Preferences (GSP) scheme included five arrangements for granting preferences. The EC granted additional preferences to eleven countries through arrangements meant to combat drug production and trafficking. In 2001, the EC added Pakistan to this list. As a result, India's textiles exports to the EC declined. India tried bilateral consultations but when they failed, it filed a complaint as a last resort because of the important systemic implications of this case. According to an expert from the Advisory Centre on WTO Law (ACWL), the twelve beneficiaries were going against all other developing countries by taking advantage of being on a closed list and India was actually taking into account the interests of all other developing countries. India's argument pre-empted any defence the EC could take because it claimed a violation of the Most Favoured

Nation provision and the exception (Enabling Clause) i.e. India claimed a violation of footnote 3 of the Enabling Clause.¹¹ Even though discrimination is commonly understood to mean unjustified differentiation, India argued that any distinction (even between different categories) was discriminatory. India's argument was counterproductive because it might have greater needs and so require greater preferences but it said that needs were not to be taken into consideration and equal preferential treatment should have been granted to all beneficiaries. The reason for taking this line of argument was that market access benefits had been shifted from India to Pakistan and India had lost its textiles exports to the EC due to additional preferences granted to Pakistan. The AB held that it was possible to include non-discriminatory conditions (as defined in the Agreement establishing the WTO or in international instruments¹²) in GSP schemes as long as identical preferences were granted to similarly-situated beneficiaries.

Because the AB reaffirmed paragraph 3(c) of the Enabling Clause¹³ i.e. the AB stated that it was enforceable, there will now be constraints on conditionalities. India had a sweeping victory at the panel stage because the Panel said that no differentiation was allowed. Compared with this, the AB ruling might not appear that good. But compared with the contention that there are no restrictions on the right of preference givers to include

¹¹ This footnote reads as follows:

“As described in the Decision of the CONTRACTING PARTIES of 25 June 1971, relating to the establishment of "generalized, non-reciprocal and non discriminatory preferences beneficial to the developing countries" (BISD 18S/24),” Differential And More Favourable Treatment Reciprocity And Fuller Participation Of Developing Countries Decision of 28 November 1979 (L/4903).

¹² Paragraph 163, WT/DS246 EC – Tariff Preferences AB Report.

¹³ This paragraph reads as follows:

“Any differential and more favourable treatment provided under this clause:

(c) shall in the case of such treatment accorded by developed contracting parties to developing countries be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries,” Differential And More Favourable Treatment Reciprocity And Fuller Participation Of Developing Countries Decision of 28 November 1979 (L/4903).

conditionalities in their GSP,¹⁴ the AB ruling looks good. Theoretically, India could get preferences based on its specific needs but only on the fulfilment of certain conditions which are AB-legal. If countries are unable to fulfil these conditionalities, they will lose out on additional preferential market access. Therefore, the extent to which the AB's criteria responds to a need (paragraph 3(c) of the Enabling Clause) and enhances market access is a debateable issue. Moreover, the use of international instruments is recognition of the entry of non-trade values in the WTO to which India is opposed as they might hamper market access.

In US - Shrimp,¹⁵ India argued that the respective needs and concerns at different levels of economic development of different countries should be taken into consideration as stated in the Preamble to the WTO Agreement. But, the AB chose to refer to “sustainable development” instead of “respective needs and concerns at different levels of economic development” in the Preamble. It held that the import prohibition on shrimps from the complainant countries was in accordance with article XX(g) of the General Agreement on Tariffs and Trade (GATT) but violated the chapeau of article XX. The US was asked to make the prohibition non-discriminatory. Whether or not the prohibition was non-discriminatory was indeed important for market access in this case.¹⁶ In fact, when the US changed its measure to make it non-discriminatory, the complainant countries could not challenge it any more.

The right to impose trade restrictive measures in accordance with article XX involves a lot of discretion because each country decides the values that are important to it and therefore the

¹⁴ Robert Howse, *India's WTO Challenge to Drug Enforcement Conditions in the European Community Generalized System of Preferences: A Little Known Case with Major Repercussions for "Political" Conditionality in US Trade Policy*, 4(2) CHICAGO JOURNAL OF INTERNATIONAL LAW 385 (2003).

¹⁵ WT/DS58 United States — Import Prohibition of Certain Shrimp and Shrimp Products.

¹⁶ It should be noted that the complainants had claimed a violation of articles I(1), XI(1), and XIII(1) not justified by articles XX(b) and (g) of GATT.

decision is subjective. Can developing countries afford this kind of liberty? Not really.¹⁷ It is obvious that a WTO-compliant measure could actually be used to create obstacles to the achievement of perfectly legitimate goals such as market access. In such a case, much depends on the interpretation of the law by the DSS.¹⁸ Even though the Preamble to the WTO Agreement mentions the importance of sustainable development, it should be remembered that the hundred and fifty-seven members of the WTO¹⁹ are at different levels of development which need to be taken into account while interpreting WTO law. To say that the American measure is justified under article XX(g) means that the AB recognises the extraterritorial exercise of subjective discretion by the US.

Another important point in this case was the acceptance of amicus curiae briefs by the AB in complete disregard of the DSU. India had opposed this, stating that this would allow powerful business interests to participate in the DSS. Also, countries have to respond to amicus curiae submissions which create additional obligations for them. The creation of these additional obligations is not a function of the DSS. Developing countries do not have the resources to indulge in this sort of activity, especially when these briefs emanate from developed country non-governmental organisations supporting social causes the protection of which may be achieved in a different way in developing countries.²⁰ Thus, the DSS has to keep in mind the interest of all parties to the dispute.

¹⁷ See WT/DS332 Brazil — Measures Affecting Imports of Retreaded Tyres in which the EC successfully challenged Brazil's environmental measures affecting European exports to Brazil.

¹⁸ Developed countries have the resources to implement such measures. Therefore, the panels and AB have an even greater responsibility to take into account the viewpoints of other members while interpreting the law.

¹⁹ Members and Observers, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.

²⁰ Badri Narayanan G, *Questions on Textile Industry Competitiveness*, 40(9) ECONOMIC AND POLITICAL WEEKLY, 905 (2005). Also, India stated that turtles were well protected in India due to the Indian culture of harmony between man and nature.

What is worse is that shrimps were targeted once again by the US in another case i.e. US - Customs Bond Directive.²¹ In this case, India claimed a violation of the GATT, the Anti-dumping Agreement (ADA) and the Agreement on Subsidies and Countervailing Measures. According to the AB, the application of the Enhanced Continuous Bond Directive by the US was illegal in this case due to lack of requisite evidence. Even though the AB set forth strict criteria for its application, the US could bring sufficient evidence in the future and thus block further imports. Therefore, this ruling does not have a favourable impact on prospective market access.

In these cases, India may have won the case but not the interpretation. In fact, India itself was inconsistent in its approach claiming in US - Shrimp that needs of members should be considered and claiming otherwise in EC – Tariff Preferences.

One of the most important export industries in India is the textiles industry. Its exports have been targeted by different kinds of measures. India has challenged restrictive measures on its textiles exports under the GATT, the Rules of Origin Agreement (ROA), the Agreement on Textiles and Clothing (ATC), and the ADA.

In Turkey – Textiles,²² India claimed a violation of articles XI(1) and XIII(1) of the GATT²³ and article 2(4) of the ATC²⁴ not justified by article XXIV of GATT.²⁵ Fortunately, India got a

²¹ WT/DS345 United States — Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties.

²² WT/DS34 Turkey — Restrictions on Imports of Textile and Clothing Products.

²³ These articles read as follows:

XI(1) “No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.”

XIII(1) “No prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation of any product destined for the territory of any other contracting party, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted.”

ruling in its favour from both the Panel and the AB. In fact, Turkey, before imposing the impugned measure, had suggested negotiations which India refused stating that quantitative restrictions (QRs) were contrary to WTO law.

What is noticeable is that in Turkey – Textiles, US – Shrimp, and EC – Tariff Preferences cases, India claimed a violation of the law not justified by the exception. This was probably done to prevent the respondent from relying on the exception as a defence. This reflects the sophistication of the Indian legal technique.

In US – Textiles Rules of Origin,²⁶ the complaint was that the US Rules of Origin (RO) were commercial barriers to trade. India claimed that the US wanted to protect its industry and favour imports from the EC. The case was about the use of RO with respect to textile quotas which, the US conceded, aimed to protect its domestic industry during the transition period.²⁷ The Panel made it clear that members had a lot of liberty regarding RO during the ten year transition period.²⁸ While interpreting article 334 of the US Uruguay Round Agreements Act which India had challenged, the Panel stated that the fact of using RO to make quotas all the more tight was not unjustified as it aimed to enhance the efficiency of US

²⁴ Relevant parts of article 2 read as follows:

“1. All quantitative restrictions within bilateral agreements maintained under Article 4 or notified under Article 7 or 8 of the MFA in force on the day before the entry into force of the WTO Agreement shall, within 60 days following such entry into force, be notified in detail, including the restraint levels, growth rates and flexibility provisions, by the Members maintaining such restrictions to the Textiles Monitoring Body provided for in Article 8 (referred to in this Agreement as the "TMB"). Members agree that as of the date of entry into force of the WTO Agreement, all such restrictions maintained between GATT 1947 contracting parties, and in place on the day before such entry into force, shall be governed by the provisions of this Agreement...

4. The restrictions notified under paragraph 1 shall be deemed to constitute the totality of such restrictions applied by the respective Members on the day before the entry into force of the WTO Agreement. No new restrictions in terms of products or Members shall be introduced except under the provisions of this Agreement or relevant GATT 1994 provisions. Restrictions not notified within 60 days of the date of entry into force of the WTO Agreement shall be terminated forthwith.”

²⁵ This article deals with Customs Unions and Free-trade Areas.

²⁶ WT/DS243 United States — Rules of Origin for Textiles and Apparel Products.

²⁷ Paragraph 6.8, WT/DS243 US – Textiles Rules of Origin Panel Report.

²⁸ Paragraph 6.25, WT/DS243 US – Textiles Rules of Origin Panel Report.

commercial policy.²⁹ But, quotas, by nature restrictive, if tightened will lead to a greater decline in imports. Additionally, according to the Preamble to the ROA, RO are supposed to facilitate international trade instead of creating unnecessary obstacles to it.

The US stated that article 405 of the US Trade and Development Act³⁰ had been introduced to solve a dispute with the EC but the Panel stated that it was not possible to hold a law illegal simply because it favoured one member. However, this is not required by the law of the WTO. What is required is a loss of advantage to the complainant. Moreover, the Panel even stated that the fact of creating exceptions in favour of products from the EC did not prove that these exceptions aimed to favour imports from the EC as compared with those from other members.³¹ Additionally, the Panel asked India to prove that the US had favoured the EC by means of article 405. The Panel was, in a way, asking India to prove the intention of the US to favour EC. Clearly, it is impossible to access markets in such a case. Under WTO law, the complainant is not required to prove the respondent's intentions; it is only required to prove a violation of WTO law. The AB in US – Offset Act (Byrd Amendment)³² said that the Panel was not supposed to refer to intentions of the legislator. India could have taken this argument had it appealed in the RO case.

The RO were same for India and EC for products not important to the EC but important to India and quotas were to apply to these products. Products important for EC had different RO and were not subject to quotas. India said that these rules modified the conditions of competition for India's products at the point of entry into the US. It proved the trade effects (distortion of conditions of competition) of the US measure. Even the RO determination favoured EC. The US measure was indeed WTO-inconsistent because it gave better access to

²⁹ Paragraphs 6.84, 6.85, and 6.90, WT/DS243 US – Textiles Rules of Origin Panel Report.

³⁰ Section 405 amended section 334 to create certain exceptions to the general rules on determining origin for fabrics and made-up articles.

³¹ Paragraph 6.112, WT/DS243 US – Textiles Rules of Origin Panel Report.

³² WT/DS217 United States — Continued Dumping and Subsidy Offset Act of 2000.

EC products even though Indian products were like products. The Panel was not convinced by India's arguments even when it did provide proof. The Panel also enunciated a "same" products standard which India could have appealed. Had India appealed and lost, it would, in a way, have reinforced the US law potentially causing other members to refrain from challenging it.

The Preamble to the ROA aims at increased liberalisation and expansion of world trade, but the Panel achieved the opposite in this case. In fact, the Preamble has noble "intentions" as it proclaims that clear, transparent, and neutral RO would not infringe members' rights under the GATT. But, it is up to the adjudicating bodies to interpret the ROA in the light of its Preamble.

An interesting point in this case was India's stand on article 2(d) of the ROA.³³ Regarding the concept of discrimination, it stated that there must be unjustifiable differential treatment of goods from different countries. However, it completely changed its stand in the EC - Tariff Preferences case.

As regards the ATC, the US has made use of the safeguard clause indiscriminately as a pressure mechanism against developing countries. It imposed safeguard measures thrice against India and withdrew them when India decided to take the US to the DSS. In US – Wool Shirts and Blouses,³⁴ the Panel held in India's favour. Given that the textiles industry

³³ This article reads as follows:

"2. Until the work programme for the harmonization of rules of origin set out in Part IV is completed, Members shall ensure that:...

(d) the rules of origin that they apply to imports and exports are not more stringent than the rules of origin they apply to determine whether or not a good is domestic and shall not discriminate between other Members, irrespective of the affiliation of the manufacturers of the good concerned..."

³⁴ WT/DS33 United States — Measures Affecting Imports of Woven Wool Shirts and Blouses from India.

employs millions of people in India and contributes heavily to the export earnings,³⁵ these interpretations of the panels and AB are more than welcome from the point of view of development. In fact, the US safeguard measures were also held to be illegal in two other cases brought by Costa Rica³⁶ and Pakistan³⁷ in which India was a third party.

In another case, EC – Bed Linen,³⁸ the EC practice of zeroing to calculate anti-dumping (AD) duties on Indian linen was struck down. It is significant that the EC then challenged the US for the use of this methodology against EC exports in US – Zeroing (EC)³⁹ and US – Continued Zeroing⁴⁰ wherein it was held illegal. The Panel in EC – Bed Linen also held that the EC failed to explore the possibilities of constructive remedies thus violating article 15 of the ADA.⁴¹ The EC did not even appeal this finding because article 15 creates no concrete obligations. Moreover, it is not clear how a favourable article 15 ruling can be implemented. In EC – Unbleached Cotton Fabrics,⁴² immediately preceding EC – Bed Linen, India highlighted the back to back dumping investigations and the fact that the EC did not establish dumping and injury from Indian imports. However, no panel was established in this

³⁵ P.K. Ganguly, *Textile and Clothing Industry in India and Phasing out of the MFA*, 28(44) PEOPLE'S DEMOCRACY, (2004), http://pd.cpim.org/2004/1031/10312004_ganguly.htm.

³⁶ WT/DS24 United States — Restrictions on Imports of Cotton and Man-Made Fibre Underwear.

³⁷ WT/DS192 United States — Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan.

³⁸ WT/DS141 European Communities — Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India.

³⁹ WT/DS294 United States — Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing).

⁴⁰ WT/DS350 United States — Continued Existence and Application of Zeroing Methodology.

⁴¹ This article reads as follows:

“It is recognized that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement. Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members.”

⁴² WT/DS140 European Communities — Anti-Dumping Investigations Regarding Unbleached Cotton Fabrics from India.

case and according to Davey, India did not pursue the case because the EC did not impose AD duties.⁴³ Evidently, the barriers in these cases were wilful.

The most frequently-used barrier to India's exports is the imposition of AD duties. We have already seen its use by the EC in the textile industry and by the US in the shrimps industry. The US has also made use of it in the form of a law applicable generally. In US – Offset Act (Byrd Amendment), the AB disagreed with the Panel's opinion that the Continued Dumping and Subsidy Offset Act (CDSOA) encouraged producers to file complaints as it would amount to giving too large an interpretation to the word "against" in article 18(1) of the ADA.⁴⁴ But this analysis ignores the reality because the CDSOA, by making foreign producers finance their American competitors, made them stop dumping on the US market (thus effectively blocking India's access to the US market) and encouraged American producers to file complaints. This is just another example of the textual approach. In fact, the AB agreed that the encouragement to file complaints was indeed a consequence of the CDSOA but said that it was not to be taken into consideration. In this case, the US law was struck down. But if the US law had been held to be WTO-legal, the AB's observations would have severely impacted exporters because they would have had to continue to pay AD duties which would be used to finance their competitors. In such a case, the exporters would stop exporting to the US. Additionally, the US was using CDSOA to protect its market. Users of imports were compelled to use domestic products so that the CDSOA also functioned as a local content condition.

⁴³ William J. Davey, *Implementation of the Results of WTO Trade Remedy Cases*, in Mitsuo Matsushita, Dukgeun Ahn and Tain-Jy Chen (Eds.), *THE WTO TRADE REMEDY SYSTEM: EAST ASIAN PERSPECTIVE*, 33-61(2006).

⁴⁴ This article reads as follows:

"No specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement."

Moreover, when India, along with Indonesia, invoked article 15, the Panel, adopting a textual approach, rejected their argument that the CDSOA discouraged price undertakings. Article 15 is not a very effective provision; its effectiveness depends all the more on its interpretation. According to the Congressional Budget Office, price undertakings protect producers whereas the CDOSA protects and compensates them.⁴⁵ Given this choice of the best amongst the worst, it is clear that the Panel's interpretation has important consequences for India's access to US markets. The US continued to disburse compensation to its producers and also claimed that it had complied with the AB ruling. A Delegate from the Indian Mission to the WTO stated that the real problem is that small countries cannot retaliate against big countries, which shows the imbalance in the WTO system.

The ADA does not prohibit but instead regulates dumping. Certain members overstep the bounds of the ADA. Can the DSS really regulate this improper use of WTO agreements?

In US – Steel Plate,⁴⁶ the Panel stated that neither the US administrative practice nor the US customs law obliged the US to violate its WTO commitments. It also stated that an administrative practice was not a measure that could be challenged. This stance ignores the effects of the operation of the practice or law. However, it is these effects that actually impact market access. India argued that the US should not have rejected all the information supplied by Steel Authority of India Limited (SAIL) simply because some of it was defective. The Panel stated that the domestic authorities had no obligation to examine each piece of information separately. Moreover, these different elements of information were frequently connected so that the absence of any one element could have consequences for the entire investigative process. It even held that elements of information which would satisfy

⁴⁵ Congressional Budget Office, *Snipings Economic Analysis of the Continued Dumping and Subsidy Offset Act of 2000*, 3(2) WORLD TRADE REVIEW 267 (2004).

⁴⁶ WT/DS206 United States — Anti-Dumping and Countervailing Measures on Steel Plate from India.

paragraph 3 of Annex II of ADA⁴⁷ if considered separately could be rejected if other elements did not satisfy paragraph 3. In this case, the Panel favoured India stating that the US had illegally rejected sales price information. However, what is important is the reasoning behind it. Even though there is no stare decisis in WTO law, panels and AB frequently quote and rely on previous reports adopted by the Dispute Settlement Body (DSB). This proves the importance of development-friendly interpretations.

This case also provides a glimpse of the hollowness of S&DT. India claimed a violation of article 15 of the ADA because the US had not taken into consideration the particular situation of SAIL, an enterprise from a developing country. According to the Panel, article 15 refers to developing country members and not their enterprises. However, SAIL being a public company through which the Indian Government operates, represents India. Therefore, the utility of article 15 will only be theoretical if it is not applied to such companies. The Panel also stated that the first sentence of article 15 did not impose any obligation on members. But, in fact, it does impose an obligation to take into account the special situation of developing members. Of course, it is an ambiguous obligation.

India also claimed that the US had not explored possibilities of constructive remedies. The Panel recalled that the EC – Bed Linen Panel had said that the idea of exploring did not really mean arriving at a particular result. This demonstrated the futility of S&DT. The present Panel did conclude by saying that the developed country should actively and openly explore possibilities to arrive at a positive result. But it did not interpret article 15 in favour

⁴⁷ This paragraph reads as follows:

“All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, which is supplied in a timely fashion, and, where applicable, which is supplied in a medium or computer language requested by the authorities, should be taken into account when determinations are made. If a party does not respond in the preferred medium or computer language but the authorities find that the circumstances set out in paragraph 2 have been satisfied, the failure to respond in the preferred medium or computer language should not be considered to significantly impede the investigation.”

of development when it was time to do so. Again, it is obvious that the effectiveness of article 15 depends on its interpretation.

Even though this article does not analyse in great detail all the cases in which India was a respondent, a look at the interpretations of the adjudicating bodies in some of these cases leads to some significant findings. Developed countries achieved their current levels of economic development by protecting their markets.⁴⁸ Even if protection is not the principal means of achieving development, it is certainly one of them. Morally and historically speaking, India has the right to protect its markets because the industrialised countries did it. The fact that the WTO lets developing countries protect their markets (for example, by granting them longer transition periods) proves that the WTO believes in the moral force of the argument that developing countries should be allowed to shield their markets like developed countries did while pursuing their development. However, India has not won any of the cases in which it was the respondent. Given that the application of the provisions regarding protection has been overturned by the DSS, one could say that S&DT relating to protection is not entirely effective. Despite the WTO agreements allowing protection, the DSS is not very favourable to it when India invokes the provisions pertaining to protection. Protection was granted for limited purposes where developed countries felt it would not disadvantage them⁴⁹ and India is unable to make use of it even for those limited purposes.

India's cases as respondent mainly involve the GATT (articles XI and XVIII⁵⁰) and the TRIPS. In *India – Quantitative Restrictions*,⁵¹ India maintained QRs for balance of payments (BoP)

⁴⁸ Mehdi Shafaeddin, *How did Developed Countries Industrialize? The History of Trade and Industrial Policy: The Cases of Great Britain and the USA*, UNCTAD Discussion Paper No. 139, December 1998, UNCTAD/OSG/DP/139, p. 1.

⁴⁹ For example, the ten years transition period granted for product patents in pharmaceuticals was subject to the mailbox and exclusive marketing rights exceptions as defined in articles 70(8) and 70(9) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

⁵⁰ This article deals with Governmental Assistance to Economic Development.

⁵¹ WT/DS90 India — Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products.

reasons. The Panel held that these restrictions violated the GATT and the Agreement on Agriculture. The AB went further and said that the QRs were not necessary for stabilising the BoP. India found this interpretation too strict. According to Flory and Ligneul, developing countries should not be allowed to take the defence of article XVIII to avoid fulfilment of their obligations.⁵² Given the strict surveillance exercised by developed countries, it is difficult to imagine a developing country like India avoiding fulfilment of its obligations.

In another case, *India – Autos*,⁵³ the Panel went much further than the textual interpretation of a law, resulting in a finding against India. Because the Indian law stated that importers should have equivalent exports and a maximum limit on exports existed in practice, the Panel saw it as restriction on imports. A comparison of this case with *US – Offset Act (Byrd Amendment)*, where the AB refused to consider the fact that the Byrd Amendment led to a higher number of complaints because it did not oblige the manufacturers to complain, brings out the inconsistency in the technique of interpretation. The adjudicators did not apply the textual approach in the former case but did so in the latter.

After losing these cases, India found new means to achieve its aim of protecting its markets. In April 1998, the Directorate General of Anti-Dumping and Allied Duties was constituted within the Department of Commerce in India to initiate inquiries and give necessary relief and protection to domestic producers against dumping of goods and articles from other parts of the world.⁵⁴ According to one WTO expert, despite not having the resources to conduct AD enquiries, the absence of the possibilities to increase tariffs after the UR or impose QRs after losing the QRs case made India impose AD measures in order to protect its markets.

⁵² Thiébaud Flory and Nicolas Ligneul, *Chronique du règlement des litiges de l'OMC (1^{er} juillet 1999-31 décembre 1999)*, 442 REVUE DU MARCHÉ COMMUN ET DE L'UNION EUROPÉENNE 609 (2000).

⁵³ WT/DS146 *India – Measures Affecting the Automotive Sector*.

⁵⁴ Prakash Narayanan, *Anti-dumping in India - Present State and Future Prospects*, 40(6) JOURNAL OF WORLD TRADE, 1086 (2006).

This led to three complaints against India by the EC,⁵⁵ Chinese Taipei,⁵⁶ and Bangladesh,⁵⁷ the last one of which was settled with the help of a mutually agreed solution.

III. CONCLUSION

Looking at these interpretations, one wonders how developing countries with their meagre resources⁵⁸ are supposed to fight powerful trading partners. One cannot help but think of Shaffer's argument that the interpretations of the panels and AB have been shaped by economic powers because they have the resources to convince the panellists and AB members.⁵⁹

Nevertheless, there have been instances where the panels and AB have upheld the interests of developing members. One could say there is a mixed bag of findings in cases in which India is a complainant because it does, at times, achieve market access or favourable interpretations. However, it never achieves protection as a respondent even though some of it has been legalised through S&DT.

The main problem with the DSS is that it cannot compel compliance by developed members. Also, the technicalities of the WTO agreements including the DSU are difficult for developing countries to handle. These countries are still trying to adapt to a legalised DSS and India is in the same position. It is dependent on expensive lawyers, law firms, and the

⁵⁵ WT/DS304 India — Anti-Dumping Measures on Imports of Certain Products from the European Communities.

⁵⁶ WT/DS318 India — Anti-Dumping Measures on Certain Products from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu.

⁵⁷ WT/DS306 India — Anti-Dumping Measure on Batteries from Bangladesh.

⁵⁸ *Supra* note 5, at 59.

⁵⁹ *Supra* note 5.

ACWL. Moreover, India is not able to fully defend its development interests in the WTO DSS. The fact that India is still learning in DS impacts the achievement of its goals.

Apart from the interpretations themselves, an analysis of these reports leads to certain subsidiary findings:

1. India has to handle a diversity of cases involving different WTO agreements.
2. India is an active user of the DSS and a supporter of the rules-based system. This has been stated by India in DSB meetings and its frequent use of the DSS is proof of the same.
3. India's legal strategy is consistent or inconsistent depending on the goals it wants to achieve in the cases. But it is quite consistent in invoking S&DT whether as complainant or respondent. According to a WTO expert, this is more to make a political point but according to a Delegate from the Indian Mission to the WTO, developed countries should understand why developing countries need S&DT.

A pertinent question that arises is whether India always aims to achieve protection in cases in which it is a respondent. The goal of protection depends on each case and the measures and obligations at issue. According to an ACWL lawyer, a government may use QRs even when it is trying to liberalise the economy because they are needed. Also, some feel that the TRIPS cases were not really about protection.⁶⁰ Sometimes there is genuine disagreement and the respondent sincerely thinks it is not protecting its market. Furthermore, one could protect markets, consumers or the environment to give a few examples.

Two striking conclusions are also obvious from India's cases:

1. The sheer number of cases proves that there are numerous obstacles in accessing other countries' markets.

⁶⁰ Interview with a Professor and an ACWL lawyer in Geneva.

2. The sheer diversity of the agreements⁶¹ involved proves that countries use different methods to target exports from the same industry especially when it is a competitive industry.

This leads to the conclusion that DSS interpretations need to be made more development-friendly. Thus, it is important to strike a balance between the interpretation of the WTO agreements and the special position of developing countries. WTO agreements should be interpreted by the DSS to promote the aims and objectives defined in those agreements and in the Agreement establishing the WTO. These aims include market access and protection for developing countries whether through general provisions or through provisions on S&DT.

⁶¹ However, a large number of cases relate to AD measures.