

World Trade Dispute Resolution and Developing Countries:
Taking a Development Approach to Fair Adjudication in the
Context of WTO Law

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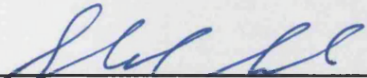


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Shahram Shoraka

Abstract

The founding of the World Trade Organization in 1995, was hailed as a new era in resolving global trade disputes, with many academicians espousing a constitutionalised vision of world trade law. The constitutional evolution of WTO law is founded, not only on the text of the WTO Covered Agreements, but is also buttressed exceedingly by precedence and norms that are generated through adjudication by the panels and the standing WTO Appellate Body. Today, as is with most mature legal systems, international lawyers and academics avidly critique WTO jurisprudence and the interpretive methodology of its adjudicators. However, there is a dearth of scholarship on the implications of WTO law interpretation on developing nations. This thesis fills this void in research by constructing a framework for analysing the jurisprudence of the WTO from the perspective of developing nations. Subsequently, it proceeds to evaluate three agreements which are important for developing nations, i.e., the DSU and due process rights, the TRIPS Agreement, and the Antidumping Agreement. To this end, the framework for analysis is termed “the development approach” to fair adjudication, which is grounded on established legal concepts of legitimacy, justice and ultimately fairness.

The thesis demonstrates that a fair trading regime entails more than seemingly balanced treaty texts, but rather that adjudication of the treaties must include an approach, which recognises and accounts for the effects of interpretation on development. To this end, the adjudicators have to go beyond merely finding the literal meaning of the treaty text, but embrace an approach, which is guided by the context and purpose of WTO provisions. The analysis reveals that the adjudicators of the WTO have failed to recognise the nexus between interpretation and

development and as such, have created a body of case law that harms the development ambitions of third world countries.

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Introduction

The new World Trade Organization (WTO) regime for resolving trade disputes has been hailed as one of the greatest advances in the realm of public international law.¹ Yet, developing nations have been at the forefront of the criticisms lobbied against the functioning of the dispute settlement regime of the WTO. Unlike the original 1947 General Agreement on Tariff and Trade² (GATT), the 1994 Agreement Establishing the World Trade Organization covers a much wider range of trade issues. It extends beyond goods and embraces, *inter alia*, services, intellectual property, investments and agriculture. Moreover, the new trade regime is no longer a collection of *ad hoc* agreements and understandings. Rather, all trade obligations are subsumed under the auspices of the WTO. Under rules established at the Uruguay Round of Multilateral Trade Negotiations (UR), Members must ratify and accept the obligations contained in all the WTO-covered agreements as a “single package.”³

The WTO Agreement also ushers in a new era in decision-making by the parties and in the resolution of disputes. Under the Dispute Settlement Understanding (DSU),⁴ a Dispute Settlement Body (DSB) consisting of panels and an Appellate Body (AB) adjudicates trade disputes between parties. A WTO member may invoke the compulsory

¹ Understanding on Rules and Procedures Governing the Settlement of Disputes, hereinafter DSU, Apr. 15, 1994, WTO Agreement, Annex 2, of the Marrakesh Agreement Establishing the World Trade Organization, hereinafter WTO Agreement, Apr. 15, 1994, in World Trade Organization, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* 4 (1999).

² General Agreement on Tariffs and Trade, Oct. 30, 1947, TIAS No. 1700, 55 UNTS 194.

³ There are plurilateral agreements in the field of civil aircrafts, government procurement, and dairy products, which are only binding on parties that have accepted the terms of these agreements.

⁴ *Supra* at note 1.

jurisdiction of a panel to settle a dispute,⁵ in addition to the automatic right to appeal panel decisions. Cases, which go to the Appellate Body, involve questions of law arising from the WTO agreements, with important implications in relation to international legal and normative issues.⁶

As international relations have become increasingly dominated by economic factors, the WTO system was created to move away from the GATT power-oriented diplomatic approach to trade relations and embrace a more legal-oriented approach to dispute settlement.⁷ In struggling to address the need for fairness in international economic relations, dispute settlement panels and the AB provide a forum for the airing of grievances regardless of a party's economic power. Theoretically, developing countries are given an opportunity to challenge the trade measures of economically strong states that normally dominate international negotiations and multilateral institutions. One of the objectives in installing a rule-based dispute resolution mechanism within the trade regime is to entrench the legitimacy of the regime itself and provide for better incentives to comply with international trade obligations.⁸ The global acceptance of a compulsory dispute settlement system lends credibility to developments in international trade law and elevates the importance of public international law in general. One of the key elements of this thesis is the creation of a framework for fairness so as to evaluate the case law of

⁵ DSU Article 6.

⁶ DSU Article 17.

⁷ Petersmann, E.U., *The GATT/WTO Dispute Settlement System: International Law, International Organizations, and Dispute Settlement*, 1997, (Kluwer Law); Jackson, J.H. *Restructuring the GATT System* (1990), pp. 56-78; Weiler, J.H.H., *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, (Jean Monnet Working Paper No. 9/00) at www.jeanmonnetprogram.org/links/index.html.

⁸ See e.g., Jackson, J.H., *The World Trading System: Law and Policy of International Economic Relations*, (2000); McGinnis, J.O., Movesian, M.L., *The World Trade Constitution*, (2000), 114 Harv. L. Rev. 511; Petersmann, E.U., *supra* at note 7.

the WTO in relation to the agreements most consequential to the economic development of developing Members. This framework is termed the “development approach to fair adjudication.”

The acceptance of the WTO system is inextricable from the Members’ conception of fairness and justice. Fair adjudication is a natural and obvious expectation in any legal regime founded on the rule of law. According to Thomas Franck, fairness entails a certain level of legal legitimacy in addition to a proper allocation of justice.⁹ With regard to developing nations, which have a large stake in the judicialisation of the WTO, legitimacy, justice, and consequently, fairness are crucial.¹⁰ This is due to the fact that international trade norms have become more concrete and constitutional in nature.¹¹ It would be much more difficult to overcome the impediments to export-oriented economic growth of developing nations in a system that is legal in nature, yet lacks the requisite threshold of fairness from their perspective.

The advent of the WTO dispute resolution system and its judicialisation still affords a significant role for diplomacy and non-legal argument in the system. Indeed, one can detect a sense of resentment amongst non-lawyers who participate in the dispute settlement against lawyers, who are introducing legal concepts that are unfamiliar to

⁹ Franck, T., *Fairness in International Law and Institutions*, (Clarendon Press, 1995) pp. 26-32.

¹⁰ It is, however, conceivable to have a legitimate adjudication or law; yet, it is not deemed to be fair under the Franckian theory of fairness. This occurs if the proper allocation of justice is not achieved, thereby rendering the law unfair since justice was not properly taken into account.

¹¹ Cass, D.Z., *The Constitution of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade*, 2001, 12 EJIL 39-78; Jackson, J.H., *The WTO: Constitution and Jurisprudence*, 1998, (Royal Institute of International Affairs, Chatham House); McGinnis, J.O., & Movesian, M.L., *supra* at note 8.

technocrats.¹² However, as John Jackson and others have claimed, the juridical or rule-oriented approach preceded the establishment of the WTO, but has been extended greatly under the new institution.¹³

The DSU furthers the role of legal adjudication in international economic relations by instituting a permanent appellate tribunal. This reflects the need to create neutral arbiters of trade disputes, who base their decisions primarily on interpretations of the WTO law and regulations. As such, fair decisions under the “development approach” to interpretation would facilitate and assist in formulation of solutions that are mutually acceptable to the parties, while remaining consistent with the norms and principles of the WTO and public international law. Disputes under the GATT 1947 necessitated that panels choose one party’s interpretation over others, contingent upon the acceptance of the ruling by the losing party, because consensus was the requirement for the adoption of a decision. This led to a large number of decisions that were never adopted. Hence, panels were likely to be influenced by the objective to reach a mutually accepted solution, constantly searching for the lowest common denominator.¹⁴ The new WTO system was designed to liberate the adjudicators from this bind by mandating negative consensus whereby all parties, including the “winner,” must vote to reject the ruling of the DSB. By providing automatic adoption of reports, it is believed that the parties have “substituted legal legitimacy for political legitimacy” in the dispute settlement

¹² Cameron, J., & Gray, K., *Principles of International Law in the WTO Dispute Settlement Body*, 2001, 50 I.C.L.Q. 248 p. 249.

¹³ Jackson, J.H., *The World Trading System* 1989, MIT Press p. 85. Also see, Hudec, R.E., *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System*, 1993, (Butterworth).

¹⁴ Jackson, J.H., *The Institutional and Jurisdictional Architecture: Reflections on Constitutional Changes to the Global Trading System*, 1996, 72 Chi-Kent L. Rev. 511.

mechanism.¹⁵ Yet, to determine whether developing nations view its legitimacy in the same light, and how that affects the fairness of the system from their perspective, will be a major objective of this thesis.

Over 315 cases have been initiated in the dispute settlement body by late 2004.¹⁶ This is in marked contrast with the number of disputes heard under the GATT 1947 over a period of some 40 years.¹⁷ The creation of the AB, with its standing body of 7 distinguished international judges and legal professionals, increases the sophistication of international trade as it provides a certain level of legal and judicial credibility. As the panel and AB develop a recognisable body of case law, the fairness of the system becomes ever more crucial for developing nations. The fairness of the system lies in both its legitimacy and the manner in which justice is distributed. These two notions together must be commensurate with a notion of law that also takes into account certain socio-political principles related to trade and development. In fact, with respect to developing countries and development as a process, the WTO has indicated that trade and development issues are at the core of the Institution's objectives.¹⁸ The theoretical background to the proposed "development approach" does admit of teleological elements. However, this is justified because it is argued that at a certain point in the deliberation process of the judges, where they must select a particular argument or interpretation in lieu of others, the teleology and conception that the adjudicators hold are

¹⁵ Chua, A., *The Precedential Effect of WTO Panel and Appellate Body Reports*, 1998, 11 L. J. I. L. 45 pp. 46-47.

¹⁶ Statistics found on www.wto.org and www.worldtradelaw.net by 10/11/2004, although there is a slight difference in the calculation between the two sources accounting for panels established but never operated or other consultation-phase settlements which the DSB has not been informed of by the parties.

¹⁷ Statistics found on www.wto.org.

¹⁸ *Marrakesh Agreement Establishing the World Trade Organization*, ratified 1995, Preamble.

greatly influential in the ultimate decision. Thus, even the most textually inclined judges will be making decisions grounded on their teleology of international trade law.

0.1 Origin of the Project

The establishment of the WTO dispute settlement regime had been one of the most important and crucial developments in international trade law and economic relations. The GATT had been deemed obsolete by the late 1980's and early 1990's, and the negotiators at the UR were struggling with achieving a consensus on the procedures and principles of a new dispute settlement regime.¹⁹ The outcome was lauded as a major accomplishment since, for the first time, the WTO procedures created mandatory jurisdiction for Members with a much stronger binding effect. The overarching theoretical justification was that the new regime would create better predictability, effectiveness, and implementation of trade rules globally, which firms in the industrialised nations desire in the long run.²⁰ For developing nations, which had great problems in gaining positive outcomes during the GATT years of dispute settlement due to their power-oriented and consensus-based approach, the new WTO would allow them to bring forward cases and, if victorious, afforded them the opportunity to obtain remedies from Members, such as the US, the EC, and Japan. The legalised and binding nature of the new WTO dispute settlement would inoculate developing countries from the power politics that was rife under the GATT, and in lieu, would herald a new trade

¹⁹ Hudec, R.E. *The Crumbling Edifice of GATT*, 1992, 14 Geo. Wash. J. Int'l L. 23 pp. 27-30.

²⁰ Hudec, R.E., *The New WTO Dispute Settlement Procedure: An Overview of the First Three Years*, 1999, 8 Minn. J. Global Trade 1, pp. 4-9.

regime based on law. Raw power was to be curtailed for the sake of establishing a global framework for the rule of law in the international trade realm.

Seven years after the founding of the WTO, I arranged to interview representatives of 21 developing country Members in order to better appreciate developing countries' perspective on the new dispute resolution regime.²¹ One of the key findings was that many developing nations' WTO delegations were concerned about the jurisprudential direction of the DSB. The following statements are some examples of responses given by the interviewees from those delegations to the question of: "What is your major criticism or concern in relation to the new dispute settlement regime and its adjudication process or methods?"

"It is too legalised and formalistic to the point of being viewed by us as unfair."

"We are worried about the way in which the adjudicators reason their cases."

"The dispute settlement system hasn't been good to our interests."

"The adjudicators in general have little idea about the problems faced by developing countries."

²¹ I interviewed the following representatives of developing nations to the WTO: Argentina, Brazil, Costa Rica, Colombia, Chile, Paraguay, Venezuela, Mexico, Morocco, Egypt, Jordan, Kenya, South Africa, Turkey, Pakistan, Bangladesh, India, Thailand, Malaysia, Philippines and, South Korea. The interviews were held at the Missions or Offices of the national representatives in Geneva, Switzerland from 5/2/2002 to 15/3/2002. The interviews were between 75-105 minutes in duration and a set of core questions were asked from each delegation with discretion to ask other follow-up questions as deemed appropriate. The interviewees were either the Ambassadors of the respective countries to the WTO or International Organizations based in Geneva, legal attachés responsible for representing their countries at the WTO, or carried the title of Representative to the WTO. Some interviews were held in the presence of another official of the respective Mission, though most were done on a one-on-one basis. Due to the confidential nature of the WTO dispute settlement process, none of the interviewees were willing to go on record as to the particular content of the remarks.

“The TRIPS [Agreement on Trade-Related Aspects of Intellectual Property Rights] and Antidumping and Subsidies issues are not handled fairly.”

“The TRIPS should have never been part of the WTO and now that it is, it is more problematic than we thought.”

“They {the panellists and appellate body} are not sure themselves about how to settle disputes especially for antidumping cases in developing countries.”

“Legalisation is good but America and Europe still rule the roost.”

Another 9 interviewees gave similar or “qualitatively” similar responses bringing the total to 18 of 21 Members exhibiting dissatisfaction with the interpretive methodology and jurisprudence of the dispute resolution regime. The underlying perception of these officials was that somehow the new legalised system has not met their expectations and that it is not functioning to protect their countries’ trade interests to the same extent as it protects industrialised Members.²²

The interviews led me to research the doctrinal issues and interpretive methodology at the heart of WTO jurisprudence. What had moulded this negative perception of the adjudicative regime by the highest legal and diplomatic trade officials in light of the

²² In response to the question, “Do you think that the DSB recognises and protects your and other developing nations’ trade interest equivalent to US and EC trade interests?”, 10 out of 21 interviewees explicitly mentioned that their trade and institutional interests are not being addressed vis-à-vis industrialised Members, such as the US, EC, Canada, and to a lesser extent, Japan. Another 5 interviewees gave less explicit responses, but in follow-up questions agreed with the opinion of the others that trade interests of the powerful Members are protected more so than the developing nations. For instance, one interviewee stated: “A representative from {Name of a developing Member} has said in diplomatic circles that ‘America and the Europeans get much more out of the dispute settlements system because they are America and Europe, but we have to fight for every decision that helps us out.’” The interviewee continued, “We have no reason to counter that claim or disagree.” Of the other 6, 4 believed that their interests are treated evenly. The other 2 respondents declined to answer that question.

initial optimism expressed after the founding of the WTO in 1995 by all parties? This negativity went beyond the accepted grievance that developing countries received an imbalanced deal at the Uruguay Round of negotiations. Their grievance had taken for granted the asymmetry in the balance of trade interests in the WTO Covered Agreements. Rather, they claimed that when the adjudicators could “do something to help {developing countries} within acceptable legal norms” they still failed to provide maximum benefit to developing countries’ trade interests whilst they addressed developed nations’ interests.

Aside from the interviews, one can find developing country dissatisfaction in three other avenues of research, i.e., WTO institutional declarations, academic works, and reports of the WTO Dispute Settlement Body, which contain the reasoning of the adjudicators and the claims and arguments of the disputants. Several declarations at the WTO institutional level have asserted that approaches to interpretation taken by the AB and panels have operated against the development objectives of third world Members.²³ These concerns began to permeate in the officialdom of the WTO in 2002 and have since been the topic of discussion and negotiation at the Doha Round of Multilateral Trade Negotiations.²⁴

²³ See, amongst others, (TN/DS/W/15, Sept. 25, 2002) by Kenya on behalf of the African Group that stated: “In their interpretation and application of the provisions, the panels and the Appellate Body have in several instances exceeded their mandate and fundamentally prejudiced the interests and rights of developing-country members as enshrined in the WTO Agreement”; (TN/DS/W/18, Oct. 7, 2002) India on behalf of Cuba, Honduras, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe; (TN/DS/W/17, Oct. 9, 2002). Zambia on behalf of the LDC Group stated: “A careful reading of the accumulated jurisprudence of the DS system thus far reveals that the interests and perceptions of developing countries have not been adequately taken into account.” Also in Qureshi, *Interpreting World Trade Organization Agreements for the Development Objective*, 2003, 37 J.W.T. 5 pp. 847-882.

²⁴ For instance, see (WT/MIN (01)/Dec/W/2, Nov. 14, 2001) concerning the TRIPS Agreement. It holds that the role of the “object and purpose,” as opposed to the strictly textual approach admittedly being taken by the adjudicators, must be given a central role. This statement signalled the dissatisfaction of developing Members due to the excessively textual approach used by the adjudicators, which effectively created circumstances that would reduce access to cheaper medicine. Also in Qureshi at note 23 above.

For the first time, developing Members directly criticised the evolving jurisprudence of the WTO as being devoid of “development-friendly” norms and objectives.²⁵

In relation to academic works, Robert Hudec published an article that attempted to show that the much higher rate of cases brought forth by Members in the new WTO in contrast to the GATT system is not necessarily a signal that the new regime is better or more successful.²⁶ Hudec maintained that one way of testing the success of the new system would be to see whether the weaker Members of the WTO have brought more cases against industrialised Members, as this would be an indication that power relations have been curtailed.²⁷ After comparing the relevant statistics on claims and cases, he argued that the great surge in cases could be explained by the extended coverage of the WTO-covered agreements as opposed to the sole GATT agreement on trade in goods.²⁸ Hudec’s statistical analysis has been extended by other academics using more sophisticated and complex models so as to gauge the success of the regime and to see whether there is a bias against certain Members or sectors.²⁹

Yet, Hudec and other scholars researching this area admit that statistical analysis alone is not sufficient to prove the success or failure of the dispute resolution system; rather, a more legal-doctrinal approach where the cases are analysed in more depth is the most

²⁵ See declaration by Zambia at note 23, stating: “The panels and the Appellate Body have displayed an excessively sanitized concern with legalisms, often to the detriment of the evolution of a development-friendly jurisprudence.” Also, in Qureshi at note 23.

²⁶ Hudec, R.E., *The New WTO Dispute Settlement Procedure: An Overview of the First Three Years, 1999*, 8 Minn. J. Global Trade 1.

²⁷ Ibid. pp. 2-6

²⁸ Ibid. pp. 10-18.

²⁹ Holmes, P., Rollo, J., Young, A.R., *Emerging Trends in WTO Dispute Settlement: Back to the GATT?*, 2003, World Bank Development Research Group, Policy Research Working Paper 3133.

accurate way to decipher the success of the new system.³⁰ The success or failure of the system is related to whether the legalised system creates a more fair or equitable regime vis-à-vis the old power-based GATT system. Other commentators who have analysed and evaluated the process of interpretation have reaffirmed Hudec's claim that the quality of the decisions and interpretations is the best indicator.³¹ However, Hudec and other scholars did not address the issue that success for one type of Member may be perceived as a failure for other Members, or the type of framework for evaluation that should be used when taking a doctrinal approach.

The methods of interpretation have been the subject of consideration for many panel and AB rulings in accordance with rules set forth in the Vienna Convention on the Law of Treaties (VCLT) Articles 31 and 32. The VCLT suggests that the adjudicators must focus on the ordinary meaning of the words, the context of the law, and the object and purpose of the provision. However, developing countries have often criticised the methods used by the adjudicators in interpreting and applying WTO provisions.³²

³⁰ Hudec, R., *supra* at note 26, pp. 2-4.

³¹ See e.g., Footer, M., *Developing Country Practice in the Matter of WTO Dispute Settlement*, 2001 35 *JWT* 1, pp. 55-98; Slotboom, M.M., *Do the Different Treaty Purposes Matter for Treaty Interpretation? The Elimination of Discriminatory Internal Taxes in the EC and the WTO Law*, 2001, *J.I.E.L.* 557-579; Raustiala, K., *Sovereignty and Multilateralism*, 2000, 1 *Chi. J. Int'l. L.* 401; Jackson, J.H., *The Jurisprudence of GATT and WTO: Insights on Treaty Law and Economic Relations*, 2000, (Georgetown Univ. Press); Qureshi, A., *supra* at note 23; Steinberg, R., *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 2004, 98 *Am. J. Int'l. L.* 247.

³² The following cases were frequently cited by delegates of developing countries in the interviews of 2002 (see footnote 21). Each of the cases were cited by at least four interviewees to the question: "Do you have any examples of cases where you feel the panellists or the AB judges interpreted WTO provisions in a manner that is not, in your opinion, standard practice in relation to the Vienna Convention or past WTO practice?" (the full name and citation of cases added author): *European Communities-Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* (WT/DS141/R, adopted Oct. 2000); *US-Import Prohibition of Certain Shrimp and Shrimp Products*, (WT/DS58 & 61/AB/R); *Indonesia-Certain Measures Affecting the Automobile Industry*(WT/DS54/R, adopted July 1998); *Argentina-Footwear Safeguards* (WT/DS21/AB/R, adopted January 2000); *Canada-Certain Measures Affecting the Automotive Industry* (WT/DS139/R adopted Feb. 11, 2000); *Argentina-Measures Affecting the Export of Bovine Hides* (WT/DS155/R, adopted, Dec. 2000); *Brazil-Export Financing Programs for Aircraft* (WT/DS46/AB/R

This dissertation will attempt to take a developing nations' perspective in its evaluation of the WTO dispute settlement regime by first establishing a framework for the evaluation of the case law of the WTO, termed the "development approach to fairness." It then focuses on the case law relating to the two most troublesome and important agreements in the WTO in relation to development, i.e., TRIPS and the Antidumping Agreement (ADA).³³

0.2 Aims and Scope of Thesis

The underlying theme that arises from the research is that the role of adjudication and interpretation as facilitators of development has not been properly addressed by the DSB as reaffirmed by the ongoing debate at the WTO institutional level. As mentioned above, there exists a substantial amount of scholarship that uses either a statistical model or a trade interest-based approach for evaluating the dispute settlement regime from the perspective of developing countries. However, there has been no research of substance that takes a jurisprudential approach to evaluating the WTO system. This thesis does take a jurisprudential approach and grounds its evaluation on legal theories of fairness, justice, and legitimacy.

adopted Sept. 1999); *India-Quantitative Restrictions on Imports of Agricultural, Textiles and Industrial Products* (WT/DS90/R, adopted April 1999); *India-Measures Affecting the Automotive Sector*, (WT/DS146/R, adopted Dec. 2001).

³³ Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Marrakesh Agreement Annex 1C, Agreement on Trade-Related Aspects of Intellectual Property Rights {hereinafter TRIPS or TRIPS Agreement}; Agreement on the Implementation of Article VI of GATT 1994; Agreement on Antidumping {hereinafter Antidumping Agreement, Agreement on Antidumping, or ADA}.

To this end, it will be argued that in order for the system to be fair towards developing nations, the adjudicators are obliged to rule in a manner that will further the development objectives of these countries. The concept of fairness demonstrated under the development approach will assist the adjudicators in their decision-making process so that developing nations are able to achieve their development goals within the framework of WTO law and regulations. These objectives may be categorised as institutional capacity-building at the domestic level and market access to industrialised nations for their exports. In relation to the former, developing countries face major impediments to their economic development due to their lack of institutional and legal capacity. Moreover, WTO obligations encroach heavily on their domestic decision-making capabilities because developing countries' policies must conform to a certain set of international rules and norms, e.g., they cannot provide export subsidies or minimum standards for the protection of intellectual property rights. With regard to access to wealthy markets, the Uruguay Round creates asymmetric market access obligations that impede the export interests of developing countries to the industrialised markets, a situation that is exacerbated by excessive industrialised Members' usage of trade contingency measures such as antidumping.³⁴

The TRIPS Agreement creates implementation problems for developing countries that are caused by their lack of institutional capacity and by their problems in accessing knowledge. The keenness to protect domestic industries from the reduced tariff bindings

³⁴ Arguably, the concessions given to developing countries in their sectors with comparative advantage, i.e., agriculture and textiles, by industrialised countries pale in comparison to the concessions given by developing countries in sectors in which the industrialised countries have an advantage, i.e., services and intellectual property. Moreover, industrialised countries have negotiated the ADA in a manner that allows for purely strategic levying of duties on imports from developing nations.

negotiated in Uruguay has made antidumping measures the strategic weapon of choice in blocking access to the markets of the industrialised Members. Therefore, as the two most problematic agreements for the economic development of developing Members, the TRIPS and the ADA will be the foci of jurisprudential evaluation under the development approach to fairness.

0.3 Organisation of Thesis

The thesis is divided into five chapters in addition to a conclusion. Chapter 1 will begin with a background to the dispute settlement regime and then will proceed to explain the developing countries' participation and interplay in global trade dispute settlement regimes. Furthermore, it will present a theoretical framework and the justifications for that framework, which borrow from the ideas of Thomas Franck, John Rawls, and Ronald Dworkin. This framework will be used throughout the thesis as a tool for evaluating the jurisprudence of the WTO as pertaining to the TRIPS and ADA. Chapter 2 will discuss the procedural rights issues decided by the AB and their effect on developing countries' litigious interests. In deciding the contours of procedural rights, such as burden of proof, third-party submissions, judicial economy, and others, the adjudicators have not properly addressed developing countries' lack of legal resources since the adjudicators rule in a manner that is not legitimate under the development approach.

Chapter 3 will shift the focus on intellectual property disputes pursuant to the TRIPS Agreement. Under the TRIPS Agreement, the main issues of concern for developing

countries are: (1) the implementation of the costly positive obligations of the Agreement and (2) access to knowledge. Thus far, the built-in flexibility of the TRIPS text that grants Members leeway in the methods they may employ for implementing the obligations of the Agreement has not been given full authority in the rulings of the DSB. This flexibility diminishes the costs associated with the implementation of the TRIPS and allows for the promulgation of policies that assist developing nations in accessing knowledge. Due to a dearth of adjudicated cases pertaining to TRIPS provisions, the thesis will present hypothetical cases in order to demonstrate the application of the development approach to TRIPS cases.

Chapter 4 will discuss the economics of antidumping, the WTO Antidumping Agreement, its theoretical underpinnings, and its strategic use as a protectionist weapon. The argument presented attempts to demonstrate that the rise in antidumping measures has little relationship to liberal economic fundamentals, as they are used as a strategic instrument for protecting non-competitive domestic industry from the tariff reductions agreed to in Uruguay. In Chapter 5, the case law of the WTO in relation to antidumping will be analysed using the development approach to fairness. To this end, it is argued that the adjudicators have ruled in a manner that does little to curtail the protectionist impulses of domestic authorities in industrialised countries within the confines of the text of the Antidumping Agreement. In essence, the rulings of the adjudicators in antidumping cases only perpetuate the use of antidumping measures as the optimal instrument for preventing market access in industrialised nations to developing country exports. In the Conclusion, a brief summary of the arguments made throughout the

thesis will be revisited, with the ultimate aim of showing that the new legalised WTO dispute settlement system does not take into account the legitimate trade and development interests of developing countries as a jurisprudential matter leading to unfairness.

Chapter 1

Constructing a Framework for Fairness

A fair system of dispute settlement is the fundamental task and objective of any legal regime founded on the rule of law. One of the underlying goals in the establishment of the new WTO system was the extension of the rule of law into the international trade realm, in contrast to the more diplomatic nature of the old GATT regime. In order for the system to be fair towards developing countries in the context of WTO dispute resolution, the adjudicators are obliged to rule in a manner that will further the development objectives of these countries. The notion of fairness demonstrated in this chapter will assist these nations in achieving their development objectives within the framework of the WTO. These objectives may be categorised as institutional capacity building at the domestic level and market access to industrialised nations. As to the former, developing countries do not have the institutional infrastructures that allow them to play the trade game equally vis-à-vis powerful Members and the WTO obligations encroach heavily on domestic capabilities of Members. With respect to the latter, the Uruguay Round created asymmetric market access obligations that impede the export interests of developing countries to the industrialised markets. In fact, these impediments to trade and development are embodied in two major Agreements within the WTO covered Agreements, i.e., TRIPS and ADA. TRIPS creates implementation problems due to a lack of institutional capacity, whilst the ADA creates obstacles to market access for developing countries' exports to the industrialised nations.

In order to engage in a debate on the fairness of the WTO system, some background description of the current legal, political, and development policies of Members, and a framework for analysis are required. Therefore, this chapter will address the following issues: In the first section, background issues such as indications of development, the identity of developing countries in the WTO, and reasons for their participation in global dispute settlement will be discussed. The discussion will then focus on explaining some of the key elements of the WTO dispute settlement regime and then proceed to justify the use of the TRIPS and ADA as the most problematic of agreements under the WTO. Finally, the chapter will lay forth the theoretical underpinnings and justifications for the use of a development approach to fair adjudication. To this end, the last section will justify the inclusion of the justice elements into the interpretive process and show that the adjudicators inevitably make decisions, which have a strong grounding in teleology and judicial politics. Subsequently, in formulating the development approach to fair adjudication, the work of Thomas Franck on fairness will be utilised, with certain elements being supplemented by Rawls' theory of justice and Dworkin's principled approach to the law.

Global trade negotiations after the Second World War were conducted by and large by industrialised nations for industrialised nations. Developing countries gradually became bigger players in the global trade negotiations due to the confluence of a variety of political and economic realities. They included, amongst others, the demand for ever more export markets by multinational corporations based in the rich world, the intellectual and policy-making traction and inertia created by proponents of free trade, and the subsequent failure of import substitution

industrialisation (ISI) models in the third world. As a result, developing nations, willingly or not, increased their participation. After decades of negotiations and trade dispute settlement under the auspices of the GATT and its subsequent obsolescence, a new and transformed WTO was founded with a dispute resolution mechanism that had greater binding effect. All parties were to benefit from this new system, and developing countries were expected to benefit the most as a more legalised system would inoculate them from the power politics associated with past dispute settlement under the GATT. This new system warrants evaluation from the perspective of developing Members.

1.1 Identifying Developing Countries

The classification of some states as economically developed does not suggest a static standard that once attained remains constant. The notion of economic development is progressive: It provides comparative economic indicators that at any given time may be used to evaluate the level of performance of states. Hence, standards of technology or degrees of affluence that once were high, if maintained during times of technological advancement, may well be considered as indicative of stagnation.¹ Many developing countries have witnessed stagnation in their infrastructure and the services they provide, if not outright regression, in an age of technological advancement.

In the context of the WTO, however, there are four groupings of Members: 1) Industrialised nations, which include the US, EU, Japan, Canada, Australia, New

¹ Bondzi-Simpson, P.E., *Dilemmas of Development Through Law*, 1992, in Bondzi-Simpson, P.E., *The Law and Economic Development in the Third World*, pp.1-21, p. 3.

Zealand, Switzerland, and Norway; 2) Economies in Transition, which are mainly former Eastern Bloc nations with previously command economies 3) Lesser-Developed Nations, which number 32 in total and have been designated as such by the UN. These nations have a per capita GDP under \$1,000 USD. 4) Developing nations, which are all the countries that do not fall within these three categories mentioned and have officially designated themselves as such. This group has the highest membership and includes countries such as India, Brazil, Mexico, Costa Rica, South Africa, and China. The focus of this thesis is the fourth group of Members and their participation in the dispute settlement process.

1.2 Indications of Development

The basic indicators used in evaluating the degree of economic development of states, as prescribed by the World Bank, are, *inter alia*, per capita GDP, annual growth rate of GDP, annual rate of inflation, and life expectancy.² However, the Organization for Economic Cooperation and Development (OECD) uses the GDP Criterion to distinguish different types of developing nations.³ Other economic indicators used by international agencies to compare and categorise states include the degree of industrialisation of a nation and the availability and affordability of social services such as education and health. A brief overview of some of these

² The World Bank in its annual reports called *World Debt Tables: External Debt of Developing Countries* (Washington D.C. IBRD) uses these indicators in its evaluation of developing countries; Handelmann, H. *The Challenge of Third World Development*, 2002, (Prentice Hall) pp. 163-165

³ See, for example, OECD report: *External Debt Statistics: The Debt and Other External Liabilities of Developing, CMEA and Certain Other Countries and Territories*. (1989). Paris p. 5.

indicators that are utilised by relevant international organisations and institutions is as follows:⁴

1. Growth of production: average rate of growth of GDP
2. Structure of production: GDP and the sectoral distribution of GDP
3. Commercial energy: production, consumption, and imports as a percentage of merchandise exports
4. Structure of manufacturing: value added in manufacturing and the distribution of manufacturing value added to agriculture, textiles, equipment chemical produce, and technology
5. Growth of consumption and investment
6. Structure of demand: distribution of GDP on general government consumption, and on private consumption domestic investment
7. Structure of consumption: total share of household consumption on food, rent, fuel, health, education, transport, and communication
8. Growth of merchandise trade: volume of merchandise trade (imports and exports, average annual growth rate of trade)
9. Structure of merchandise imports
10. Structure of merchandise exports
11. Balance of payments and reserves
12. Total external debt: long-term public and private guaranteed debt
13. Health and nutrition
14. Education: level of unskilled, skilled, and highly skilled labour
15. Urbanization: urban population in relation to total population

⁴ For further research, see Wilber, C., & Jameson, K., *The Political Economy of Development and Underdevelopment*, 1995, (McGraw-Hill); Meisarri-Polsi, T., *UNCTAD and Sustainable Development-A Case Study of Difficulties in Large International Organizations*. 1988 in *Perspectives on Sustainable Development* by Stockholm Group of Studies on Natural Resource Management 1989.

The list of indicators mentioned above can lead one to realise where the main differences between the level of development amongst the industrialised and developing countries lie. Industrialised nations are better endowed not only in GDP per capita but also in the other 14 indicators of development. This imbalance is better known as the development gap that the WTO adjudicators must consider at every level of decision-making. These indicators mentioned, can be classified into two main categories of the development process: The first is the general lack of resources and institutional capacity; and the second category of problems within the context and capabilities of the WTO is market access to industrialised nations. The indicators, such as GDP growth, structures of imports and exports, balance of payments, and others, are directly or indirectly related to the access that these nations have for their goods to the developed countries. These two categories of concern for development will be the overarching consideration that the WTO adjudicators must address in their reports and decisions.

Neoclassical economists following Adam Smith advocate a *laissez faire* and free trade system of economics. The promotion of their ideas is the *raison d'être* of the WTO. However, aside from the most marginal of beliefs, it is understood that development comprises more than strictly materialistic, economic, or quantitative considerations.⁵ It is more than the simple accumulation of capital. The pursuit of development by states implies more than a mere quest for improvement in the material conditions of the nation. Developing the appropriate environment that ensures the availability of goods and services and the wherewithal to obtain them is

⁵ See Ray, D., *Development Economics*, 1998, (Princeton Univ. Press) pp. 173-178; Handelman, H. *supra* at note 4, pp. 3-13

only one aspect of development. Economic development must be consistent with the quest for maintaining the integrity and identity of the states that pursue it and the well-being of their citizens. However, the WTO is a focused institution; and even though it considers these non-materialistic objectives of development, it nevertheless concentrates its efforts on economic development through trade. The social dimensions of development are left to the states themselves. At times, these objectives come into conflict with each other, and compromises must be made. The balancing of these different objectives is difficult and is this grey area where the WTO and its adjudicative system often operate.

The inadequacy of resources in developing countries relative to industrialised nations is one that is obvious at first glance. The richer developed world has the money and technological resources to play the trade game at a higher tier vis-à-vis the developing countries. Furthermore, these indicators illustrate that the developing countries lack the infrastructure and institutional sophistication in order to be able to adequately progress in the development of their countries. The indicators, which allude to structural foundations of an economy such as structures of consumption, demand, and manufacturing, all signify a need for infrastructures and institutions for economic development, including those pertaining to trade matters. Also, these institutions could be legal and regulatory in nature as well, which are important especially when issues of implementation of multilateral obligations are concerned. For example the TRIPS Agreement demands a certain level of institutional capacity in order to properly dispense a Member's obligations.

Thus, two major needs of developing countries in the context of the WTO and its different agencies are the building of trade and economic institutions with a certain degree of sophistication, as well as, market access to developed countries. The WTO has a responsibility, and developing nations demand, that it address these two major issues in relation to the adjudication of trade disputes. The next issue that may arise is: Why would weaker countries, which are not on an equal footing with industrialised countries, participate in multilateral trade negotiations and dispute resolution mechanisms in the international arena?

1.3 Developing Countries' Participation in Global Dispute Settlement Regimes

If reaping the benefits associated with free trade is the objective of developing nations, active participation in international institutions that govern trade must be prioritised by their policy-makers.⁶ The WTO and the Uruguay Round of negotiations provided a forum for such participation with other trading partners. There are a variety of viewpoints for and against multilateral trade negotiations and their benefits for developing countries.⁷

Arguments against developing country participation in multilateral trade negotiations include, amongst others; developing countries are not as yet true players in global trade flows; the need for government intervention in economic

⁶ Page, S., *Developing Country Participation in Multilateral Trade Negotiations: Developing Country Perspectives and Negotiating Framework*, 2002 in Qureshi, A., *Perspectives on International Economic Law*, pp. 111-127, p. 111 (Kluwer Law).

⁷ Page, S., *supra* at note 6 pp. 111-112. The pros and cons of global dispute settlement participation by developing nations is extensively presented by Page and will be discussed in this section (1.3). Also see, Coyle, D., *Governing the World Economy*, 2000, (Cambridge University Press)

activity domestically is greater due to their less than optimum level of development; there are greater fixed costs for developing countries as opposed to developed countries in regulating certain sectors of the economy, i.e., implementation of intellectual property rights, sanitary standards; developing countries have less bargaining power vis-à-vis industrialised nations in accepting agreements; the balance of cost and benefit for certain sectors of society is different for developing countries as opposed to developed nations (e.g., intellectual property protection is much greater in industrialised nations as opposed to developing one due to the sophistication of the economy in the latter).⁸

In contrast, arguments in favour of developing country participation in global trade negotiations include: international regulations restrain larger countries or larger firms from pursuing activity that may be detrimental to developing countries; it is more efficient both politically and financially to appeal to international organisations for the settlement of disputes; it is more efficient to mimic international regulations than to create a two-tiered economic policy, one at the national level and the other at the international one.⁹

In many respects, developing countries' importance, especially as a block, to other nations or to the international regime as a whole is sufficiently great to the extent that many industrialised nations feel that it is necessary for them to negotiate.¹⁰

The developing countries are left with little option but to participate, as other political realities will weigh heavily against them if they do not. For example, the

⁸ *ibid.* Also, see for critical assessment of the WTO, Anderson, S., *Views from the South: The Effects of Globalization and the WTO on Third World Countries*, 2000

⁹ Page, S., *supra* at note 6 p. 112.

¹⁰ *Ibid.*

markets of these nations are necessary for developed nations' multinational corporations so as to increase their growth and profit rates. Therefore, international organisations are obliged to include developing nations in the negotiations and to adapt to the reality that weaker and less economically stable Members will participate.¹¹

Now that the participation of the developing nations is deemed inevitable, the next issue that needs to be addressed is the nature of their participation in the dispute resolution system of the WTO. With the backdrop that these poorer countries engage in the international order simply due to economic and political realities that impose certain regulations on them, one can see that the creation of such bodies adds another layer of rigidity to the regulation of domestic and international policy from the perspective of developing countries.¹²

The new WTO dispute settlement procedures is supposed to act as a leveller of the playing field by allowing economically weaker states the chance to win cases against powerful industrialised nations. The conception is that WTO disputes will be resolved based on the rule of law rather than power orientations. However, this optimistic picture will be shown to have been less than successful as this thesis progresses. The legalisation of the trade regime may be deemed to have solidified industrialised countries' already existing system of economic governance at the global level. The rules that have been devised are based on developed countries' experiences, and they oblige less-developed nations to mimic. Such a system does

¹¹ Ibid.

¹² Sornarajah, M., *A Developing Country Perspective of International Economic Law in the Context of Dispute Settlement*, 2002, in Qureshi, A., *Perspectives on International Economic Law*, 2002, pp. 83-110, pp. 85-86.

not take into account the history of development in the 19th and 20th centuries of the industrialised nations, a time when many of these nations were avid practitioners of protectionism and mercantilism.¹³ In fact, one can point to Japan's post-World War II development as an example that protectionist measures can play a big role in development. However, the merits of protectionism and free trade will not be discussed, except to point out that developing nations at times deem certain protectionist policies to be crucial to their development.

The dispute settlement mechanism has not delivered some of the benefits expected from the perspective of developing nations as this thesis will demonstrate. The blame may lie with a variety of actors and factors such as the negotiated treaty provisions and external power-oriented realities, but this thesis will focus on the shortcomings of the adjudicators and the jurisprudential structure that is being moulded by them in the interpretive process. In this regard, the manner in which disputes are settled and the interpretive methodologies which are utilised become a major safety valve for the protection of developing country interests, if disputes are adjudicated under the development approach. Otherwise, the system may be regarded as another weapon in the arsenal of industrialised nations in imposing standards that are only beneficial to their interests at the expense of weaker developing nations.

¹³ For more insight, see Khor, M. *Rethinking Globalization: Critical Issues and Policy Choices*, 2001, Zed Books pp. 16-38.

1.4 The Uruguay Round and Problems for Developing Countries

The Uruguay Round with all the fanfare that was created after its coming into force in 1995, has nonetheless, created major problems for developing countries. The problem is twofold: first, the burden of implementing the obligations is heavy for nations that lack a strong and stable economy. Second, the commitments themselves cause market access problems, which are detrimental to the developing nations. The market access commitments in the WTO Agreements are problematic in that benefits are asymmetrical, i.e., the higher barriers to products most exported by developing nations in relation to the barriers erected for products originating in the industrialised nations.¹⁴ The espousal of free trade and neo-liberal economic theory by the developing countries entails a shift to export-oriented economies and as such, market access to other WTO Members' territory, especially the wealthy markets, becomes crucial. The market access commitments in the WTO Agreement as negotiated during the UR are more advantageous to the industries of the developed world than they are to the industries of the developing nations. The export interests of the industrialised nations are better served, whilst the export interests of the developing nations face many more barriers. For instance, textiles, clothing, and agriculture are subject to high tariffs in developed countries. Nevertheless, as mentioned before, the TRIPS Agreement and the ADA stand out as the most harmful of WTO covered agreements towards the interests of the developing Members.

¹⁴ See, amongst others, Lal Das, B., *The WTO Agreement, Deficiencies, Imbalances and Required Changes*, 1998, Zed Books; Watal, J., *Developing Countries Interests in a "Development Round"*, 2000 in Schott, J., *The WTO After Seattle*, 2000, Institute for International Economics, pp. 71-84.

1.4.1 The TRIPS Agreement

For the first time in GATT/WTO history, the Uruguay Round introduced negotiations on trade-related IP rights. Under fierce pressure from the US and the EU, an agreement on the availability and enforcement of such rights became part of the WTO Covered Agreements.¹⁵ The Agreement is by its coverage the most comprehensive international instrument to protect IP rights. The Agreement establishes minimum standards on copyrights, trademarks, patents, geographical indications, industrial designs, integrated circuits, and trade secrets. The implementation of this Agreement poses great challenges for the trade and economic infrastructure of developing countries.¹⁶

The level of protection negotiated touches upon both the availability of rights as well as enforcement mechanisms for those rights. This means that Members cannot confer a lower level of protection than provided for under the TRIPS, whilst not being obliged to confer a higher level of protection.¹⁷ The provisions on the enforcement of rights are unique, as they oblige Members to abide by certain criteria in their administrative and judicial procedures. These criteria include, amongst others, provisions on presentation of evidence, injunctions, counterfeiting, and penalties in case of infringement.¹⁸

¹⁵ Correa, C. M., *Intellectual Property Rights, the WTO and Developing Countries: The TRIPS Agreement and Policy Options*, 2000 Zed Books pp. 1-5.

¹⁶ Finger J.M., *The Uruguay Round North-South Bargain: Will the WTO Get Over Itself*, 2001, in Hudec, R., *The Political Economy of International Trade Law*, University of Minn. Press

¹⁷ Article 1.1 of TRIPS.

¹⁸ Correa, C.M., *supra* at note 15.

The TRIPS Agreement, counter to the expectations of the developing countries, is not a mere instrument to combat counterfeiting and piracy.¹⁹ Rather, the Agreement was a concerted effort by developed countries to instil a global policy of “technological protectionism.” This policy seeks to protect the innovators and generators of technology, who are most often from industrialised nations, whilst relegating the developing countries to consumers of protected technology.²⁰ This new framework, universalises standards of IP protection that are most suitable to industrialised countries at their particular level of economic progression. In fact, these standards have evolved in the course of many years at the domestic level in the US, EU, and Canada. The abrupt injection of these standards within a few years in countries with weaker economic capabilities is one of many reasons that burden the capacity of developing nations.²¹

The cost associated with implementing the Agreement is great. For instance, in Argentina the TRIPS is estimated to cost over \$425 million a year in the pharmaceutical sector alone.²² A report by the University of Colorado indicates that the biggest winner of the TRIPS is the US with a net profit of \$6 billion a year from foreigners; and of the 29 countries in the study, only six are theoretically made better off by the TRIPS mandated patent reforms.²³

¹⁹ See, amongst others, de Koning, M., *Why the Coercion-Based GATT Approach Is Not the Only Answer to International Piracy in the Asia-Pacific Region*, 1997, EIPR, No. 2.

²⁰ Correa at note 15 pp. 5.

²¹ Correa, C.M., *The TRIPS Agreement and Information Technologies: Implications for Developing Countries*, 1996, 5 *Information and Communications Technology Law* 2 pp. 228-230; Bass, N.A., *Implications of the TRIPS Agreement for Developing Countries: Pharmaceutical Patent Laws in Brazil and South Africa in the 21st Century*, 2002, 34 *Geo. Wash. Int'l L. Rev.* 191, pp. 216-217.

²² Primo Braga, C.A., *Trade Related Intellectual Property Issues: The Uruguay Round Agreement and Its Economic Implications*, 1995, Paper presented at the World Bank Conference on “The Uruguay Round and Developing Economies” Washington D.C., found on www.worldbank.org.

²³ Maskus, K., *The International Regulation of Intellectual Property*, 1997, IESG Conference on “Regulation of International Trade and Investment,” University of Nottingham, found on www.not.ac.uk.

Article 67 of TRIPS recognises the need for assistance to developing countries in order to implement the Agreement. However, the Article does not bind Members to provide assistance simply because of the hortatory nature of the provision. The developing countries accepted bound commitments to implement, but received unbound promises of assistance to do so. Nonetheless, Article 67 does indicate a principle that developing countries need assistance in the building of institutional and trade capacity. The role of the AB in the balancing of the rights of producers and consumers of technology on the one hand, and developing nations' predicament in implementing the agreement in light of their lack of institutional capacity on the other hand, is one of the areas that the "development approach" will try to address.

1.4.2 The ADA

Very broadly, "dumping" is defined as selling a product abroad at a lower price than at the home market, or alternatively selling a product abroad at below production costs. In response, an importing country may levy anti-dumping measures, almost exclusively in the form of an extra tariff. For the developing countries, the idea of a strengthened global trading system included changes to the law governing the dumping of goods. The grounds for this view were that a stronger global regime would be to their advantage. Being poorer and less powerful participants in the multilateral trading system, the developing countries

were inclined to support the creation of a system in which the power and influence of the Members are subject to agreed substantive and procedural laws.²⁴

The main users of anti-dumping laws have been and are the US, the EC, Australia, and Canada.²⁵ However, a growing trend is observed in that many of the larger developing countries such as India, Brazil, Argentina, and Mexico are also engaging in the levying of anti-dumping duties.²⁶ For developing countries, two correlating issues are at the core of their problems with the ADA. First, anti-dumping laws are a sophisticated and complex set of trade instruments. Indeed, they have been termed the “tool of protection of the elite.”²⁷ The framework for anti-dumping regulations in the WTO has become more and more technical and imposes a variety of obligations on Members. Unwarranted levying of anti-dumping duties leads to immediate recourse to dispute settlement procedures, especially where such levying targets powerful companies’ markets abroad.²⁸

Secondly, anti-dumping investigations and duties may have a negative effect on competition, as they divert trade and create uncertainty for exporters. Overall, anti-dumping measures restrict market access to importing nations. For developing countries that export to developed markets, market access is crucial to their economic health. The situation for developing countries is detrimental to their interests as anti-dumping measures are most often used by the industrialised

²⁴ Whalley, J., *Developing Countries and System Strengthening in the Uruguay Round*, in Martin, W. & Winters, L.A. (eds.) *The Uruguay Round and Developing Economies*, 1995, World Bank Discussion Paper 307 p. 309.

²⁵ See Harvard Center for International Development Paper found on www.cid.harvard.edu; and Euro Commerce Position Paper 5 July 2001, found on www.wto.org.

²⁶ Vermulst, E., *Adopting and Implementing Anti-Dumping Laws: Some Suggestions for Developing Countries*, 1997, 31 J. of World Trade 5 pp. 5-7.

²⁷ *Ibid.*

²⁸ Vermulst, E., & Komuro, N., *Anti-Dumping Disputes in the GATT/WTO: Navigating Dire Straits*, 1997, 31 J of World Trade 1 pp. 8-20.

countries. Market access concessions are the core of the multilateral trade negotiating system, as liberal trade theory rests on the proposition that markets will eventually be opened to everyone. Yet, the Antidumping Agreement leaves many issues unresolved, in that it allows for the major trading nations to block imports, a practice that could harm their own domestic industries. For most Members, this is due to lobbying by the so-called “losing” industries from the open competition.²⁹ Chapter 4 will argue that the ADA is being used as a strategic protectionist tool so as to compensate for some of the tariff concessions granted by industrialised nations to developing countries.

Thus, the problems of developing countries exist at two levels: first is the lack of expertise and resources to fight the anti-dumping war fairly, and second is that their market access to developed nations is hindered. It is possible for the adjudicators to address these problems, within the existing framework of the WTO, by either restricting the domestic investigative powers of Members or by recognising the lack of sophistication on the part of developing countries in their pursuit of imposing anti-dumping duties. The former would probably be more in line with free trade ideology and thought, whilst the latter would allow for more trade-related social issues to be taken into account by domestic policy-makers. The ideal would be to balance these two competing interests, and this thesis will present a balancing mechanism under the umbrella of the development approach to fair adjudication. It will attempt to better allow for developing nations to gain

²⁹ Handley B., & Masserlin P., *Antidumping Industrial Policy: Legalized Protection in the WTO and What to Do About it*, 1996 (AEI Publishing) pp. 6-23; Prusa, T.J., *The Economic and Strategic Motives for Antidumping Filings*, 2001 (US National Bureau of Economic Research) found on www.nber.org.

rightful access to industrialised markets, whilst allowing policy-makers to pursue their developmental objectives.

It must be noted that the balancing act is limited to the existing WTO regulations and solely narrowed to the objectives and goals of the developing countries in the context of the dispute settlement regime. The discussion does not pretend to rebalance the WTO negotiations in one fell swoop. Rather, suggestions will be made only to the extent that the panel and AB have the authority and capability to generate the legal norms as they have in the past.

1.5 Dispute Settlement Procedures

The GATT process was very much a diplomatic endeavour. The consensus rule for the adoption of panel reports was seen as a major obstacle in resolving disputes, as the losing party had the right to block the panel's ruling. Under the WTO, the consensus requirement is reversed: Consensus is required to reject the panel's ruling, including the winning party's vote. The Members acting collectively as the DSB officially have the last word; however, in practice, the final say on a matter is the domain of the panel and the AB. The DSU envisages a three- or four-phased process of settlement of disputes. The first phase is the consultations phase, followed by the establishment of a panel, if necessary; an appeal to the AB; and finally, the implementation phase. The following is a brief overview of the process.

1.5.1 Consultations

Dispute settlement begins with a formal request for consultations, though informal negotiations have probably already taken place. Requests for consultations must be in writing and should be copied to the DSB and the relevant committees and councils.³⁰ These committees and councils deal with different substantive and sectoral issues of trade, such as the Council for TRIPS, Trade in Goods or the Committee on Anti-Dumping, and Technical Barriers to Trade.

Members receiving a request for consultations are required to respond to the request for consultations within ten days and must agree to consult within 30 days after the receipt of the request or as otherwise agreed upon by the parties.³¹ Therefore, this phase allows the parties to negotiate “out of court” and also to better understand the legal arguments of the opposition before commencement of the proceedings. It also functions as a discovery phase for the parties, as they may learn of the evidence presented against them.

1.5.2 Establishment of a Panel

If after the consultations phase no agreement has been reached by the parties, the complainant can request the establishment of a panel. At the request of the complainant, a meeting of the DSB shall be convened within 15 days.³² A panel will be established no later than the second meeting after the request for a panel first appears on the DSB’s agenda, unless the DSB decides by consensus not to

³⁰ DSU Art. 4.1-4.3

³¹ DSU At. 4.4-4.8

³² DSU Art. 4&5.

establish a panel.³³ A requesting party might agree not to establish a panel at a particular meeting of a DSB if it feels more consultations may be fruitful.

1.5.3 Composition of Panels

Panels normally are composed of three individuals, with one serving as chair. The parties may agree to have five-Member panels provided they do so within 10 days of the establishment of the panel by the DSB.³⁴ Panellists are present Members or former Members of non-party delegations to the WTO, or trade law academics. They serve in their individual capacity, not as representatives of governments or other organizations. Members are required to allow their officials to serve as panellists without giving them instructions or seeking influence from them.³⁵ When a developing country is involved, one of the panellists must be from a developing country if that Member so requests.³⁶

Panellists are nominated by the Secretariat from the Member delegations and from a roster of governmental and non-governmental individuals who are deemed qualified by virtue of their experiences. Members are directed not to oppose nominees of the Secretariat “except for compelling reasons.”³⁷ If the parties do not agree on panellists within 20 days of the establishment of the panel, either party may request the Director-General of the WTO, in consultation with the Chairman of the DSB and Chairman of the relevant Council or committee, to name the panellists.³⁸ Thus, the establishment of the panel and the composition of the

³³ DSU Art. 6.

³⁴ DSU Art. 8.5.

³⁵ DSU Art. 8.9.

³⁶ DSU Art. 8.10.

³⁷ DSU Art. 8.6.

³⁸ DSU Art. 8.7.

panellists are done by mutual agreement between the parties. However, some doubts remain as to the quality of panellists in these types of situations, as they may not have detailed expertise in some of the areas of trade that they are to adjudicate.

1.5.4 The Appellate Process

The WTO Appellate Body consists of seven Members, three of whom serve on any particular case.³⁹ Its jurisdiction is limited to issues of law covered in a panel report and to legal interpretations devised by the panel.⁴⁰ The AB may uphold, modify, or reverse the legal findings and conclusions of the panel.⁴¹ However, if it modifies or reverses the findings of the panel, it may not remand the matter to the panel for further review.⁴²

Only parties to the dispute, and not third parties, may appeal a panel report. In the event of an appeal, third parties who have notified the DSB of a substantial interest in the matter, pursuant to DSU Article 10.2, may have the right to be heard.

The DSU requires that the AB prepare working procedures in consultation with the Chairman of the DSB and the Director –General.⁴³ These were issued in 1996 and constitute the rules by which the appellate process is conducted. Part I of the rules

³⁹ DSU Art. 17.1.

⁴⁰ DSU Art. 17.6.

⁴¹ DSU Art. 17.3.

⁴² Palmetier, D., & Mavroidis, P.C., *Dispute Settlement in the WTO: Practice and Procedure*, 1999 Kluwer Law pp. 147-152.

⁴³ DSU Art. 17.9.

deals with internal organization of the AB, whilst part II deals with procedural rules.

In its rule, the AB has used the term “division” for the group of three judges who hear each case. The Members constituting a division are selected at random so as to ensure opportunity for all Members to serve regardless of their nationality. Decisions relating to an appeal are taken only by Members of the division hearing an appeal. If a division cannot reach consensus, the decision will be made by majority vote.⁴⁴ The DSU specifies that opinions of the AB shall be anonymous, and it does not discuss the possibility of a dissenting opinion. To further collegiality, all Members of the AB receive all documents filed in all appeals, including those Members not serving on the division deciding the case. All Members also exchange views on each appeal before the division finalizes the appellate report; yet, the division is supposed to retain “full authority and freedom” to adjudicate.⁴⁵

1.6 Teleology and the Development Approach to Fair Adjudication

The arguments for the adjudicators ascribing to a development approach to dispute resolution are grounded on teleological factors. The question that arises is whether an approach founded on teleology is necessary or even justified in an international legal system. Asif Qureshi, in seminal article on the relationship between interpretation and development, has proposed using a teleological approach to adjudication using a “development dimension.” He proposes that adjudicators,

⁴⁴ AB rule III (2).

⁴⁵ AB Rule IV (4).

whether cognisant or not, have brought to the process their own teleology.⁴⁶ He grounds his arguments on the works of Ian Brownlie and Ian Sinclair, amongst others, who believe that in the interpretive process the judges are ultimately making policy choices, particularly, in relation to the VCLT Articles 31 and 32, which are recognised as customary rules of interpretation in international law.

The “development approach” in this thesis assimilates some of the institutional and legal justifications for espousing a teleological method. Qureshi’s arguments are based on established interpretive norms, language of the WTO Agreements themselves, and a refutation of the possibility of truly textual interpretations. The approach suggested by the thesis builds upon those arguments as well as basing the teleology in legal theory and philosophy. The “development approach” arises out of the legal philosophies of Franck, Rawls, and Dworkin to construct the teleology, and then matches them with identifiable trade interests of the developing countries, i.e., institutional and trade infrastructure capacity building, and market access to the industrialised nations.

The “development approach,” in line with Professor Qureshi, suggests that the object and purpose of the WTO treaties are as important as the ordinary meaning of the treaty words. The WTO case law is fraught with references to the ordinary meaning of the words of provisions, constantly seeking help from the dictionary as a signal of its emphasis on literal interpretations.⁴⁷ This emphasis on literal

⁴⁶ Qureshi, A., *Interpreting World Trade Organization Agreements for the Development Objective*, 2003, 37(5) J.W.T. 847.

⁴⁷ Claus-Dieter Ehlermann, a former AB judge, is quoted in his own writing as admitting to a hierarchical approach. After quoting Article 31.1 of the VCLT, he states “...Among these three criteria, the Appellate Body has certainly attached the greatest weight to the first, i.e., ‘the ordinary meaning of the terms of treaty.’ This is easily illustrated by the frequent references in the Appellate

interpretation, which highlights the ordinary meaning of the words, has been claimed to be standard WTO practice by many observers and WTO lawyers. The sequencing or prioritising of the rules of interpretation pursuant to Articles 31 and 32 of VCLT are not justified.⁴⁸ The hierarchy between the ordinary meaning of the text, the context, and lastly, the object and purpose is an artificial one. In this regard, Ian Brownlie holds that deciphering what constitutes a literal meaning of the law is at some point a policy choice.⁴⁹ There is no hierarchy. Rather, Article 31 of VCLT arguably encourages a “holistic” approach to interpretation, and any prioritisation of the three elements is simply a choice made by the interpreter to give more weight to one criterion over the other.⁵⁰

Furthermore, other issues with respect to literal interpretation come to the fore. First, simply citing the dictionary does not mean that the ordinary meaning has been found. A large majority of words in the dictionary have more than one meaning; many of the words have several. Moreover, if the adjudicators were to analyse the context also, one may logically conclude that their selection of the words has been somewhat arbitrary. Why did they choose one definition over the other? How could they truly grasp the context of the words without any reference to the object and purpose of the provisions or the treaty? At some point, the

Body reports to dictionaries... The second criterion, i.e., ‘context’ has less weight than the first, but is certainly more often used and relied upon than the third, i.e., ‘object and purpose....The Appellate Body clearly privileges “literal” interpretation.” See, Ehlermann, C.D., *Six Years on the Bench of the World Trade Court: Some Personal Experiences as Member of the Appellate Body of the World Trade Organization*, 2002, 4 J.W.T. 4, p. 615. Also see Qureshi at note 46, p. 867

⁴⁸ Qureshi, supra at note 46 pp. 867-868.

⁴⁹ Brownlie, I., *Principles of Public International Law*, 1998, (5th ed. Oxford University Press) pp. 632-636.

⁵⁰ See Qureshi supra at note 46, pp. 853-854; Dixon, M., & McCorquodale, R., *Cases and Materials on International Law*, 2003, (Oxford University Press) pp. 85-88; Shankar, D., *The Vienna Convention on the Law of Treaties, The Dispute Settlement System of the WTO and the Doha Declaration on the TRIPS Agreement*, 2002, 36 JWT 4 721-772 pp. 724-727.

objective of the provision at issue has a strong bearing on the context of the provision or the agreement that it embodies.

Second, the literal approach tends to protect and preserve the interests of the immediate winners of the treaty negotiations. The immediate winners of the WTO Covered Agreements have been for the most part the industrialised nations of the EU, the US, Canada, and other developed nations. Although Article 3.2 of the DSU states that the dispute settlement body must not add to or diminish the rights and obligations of Members, it cannot be disputed that the context and purpose of that provision are to simply create limits on the power of the adjudicators and prevent them from “rogue” decisions.⁵¹ Third, some observers claim that the WTO is contractual in nature, and as such, a more textual approach is prudent. However, the WTO and its Covered Agreements are characterised as constitutional in nature, having contractual, legislative, and judicial elements similar to other constitutional or institutionalised legal frameworks such as the EU, the UN, and other deeply rooted legal organisations.⁵² As the law must be responsive to the ever-changing nature of trade relations and global interactions, a dynamic understanding of the law suggests that it takes on a life of its own after promulgation.⁵³

Therefore, the position that literal or textual interpretation is a viable and neutral way of interpretation is open to question, as policy choices are inevitable. The

⁵¹ See Behboodi, R. *Legal Reasoning and the International Law of Trade: The First Steps of the Appellate Body of the WTO*, 1998 J.W.T. 32(4) 55-99 pp. 58-64; Franck, T., *Fairness in International Law and Institutions*, (1995) Clarendon Press; Qureshi *supra* at note 46.

⁵² See amongst others, Jackson, J.H., *The WTO: Constitution and Jurisprudence*, 1998, (Royal Institute of International Affairs, Chatham House); Jackson, J.H., *The World Trading System: Law and Policy of International Economic Relations*, 2000; Cass, D.Z., *The Constitution of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade* (2001), 12 EJIL 3-38; Steinberg, R.H., McGinnis, J.O., & Movesian, M.L., *The World Trade Constitution*, (2000) 114 Harv. L. Rev. 511.

⁵³ Qureshi, at note 46, p. 869.

context, object, and purpose of provisions must also be part and parcel of the interpretation process without hierarchy. Since the literal approach in the final analysis relies on the internal teleology and disposition of judges, it is prudent to identify and recognise the object and purpose of the Agreement in the interpretation process, as it constrains and limits the judges from imposing their own teleology.⁵⁴ There is a long-standing and continuous debate, especially in the Anglo-Saxon common law tradition, about the nature and scope of judicial competency, i.e., the literal or textualists versus the judicial activists.⁵⁵ This dichotomy of thought belies a truth, which is that both sides are making policy decisions.

The judicial activist approach, which is sometimes associated with the more liberal or “left” schools of political and social thinking, believes that the gaps in the law must be filled by judges and that they should be there to illustrate the dynamism of the law and be responsive to the changing nature of society. The textualists dismiss as much as possible insights into the context, object and purpose, or justice of the law and judicial activists’ rulings. Judges are simply there to interpret the law as literally as possible. The policy decision made by these judges is to preserve the status quo. Again, a “lack” of law or rule and its supposed deference to a legislative body belies the adjudicators’ teleology that the law is static. The law tends to benefit the players or entities that had more participation in the law-

⁵⁴ It is not being argued that the development approach leaves no room for the judges’ internal dispositions. What it does, however, is that it forces them to acknowledge and work within the certain framework for adjudication that promotes and assists in the development process.

⁵⁵ See Powers, S.P., & Rothman, S., *The Least Dangerous Branch?: Consequences of Judicial Activism*, 2002, Praeger Publishing; Sunstein, C.R., *Radicals in Robes: Why Extreme Right-Wing Courts are wrong for America*, 2005, Basic Books Pub.; Barak, A., & Bashi, S., *Purposive Interpretation of Law*, 2005, Princeton University Press.

making process.⁵⁶ Or at a minimum, the interests of the non-represented or non-participant entities in the law-making process may not have been properly spelled out in the law, and therefore, their interests must wait until the legislative process corrects it. The judge is left with little scope for justice concerns.

An interesting historical analogy can be made in the English legal system, where the literal approach to the law was so unworkable that equity courts had to be established so as to address justice concerns.⁵⁷ EU law is also known to be “purposive” (looking into the object and purpose of the law) in its application, due to the civil law systems of most EU Member States.⁵⁸ The purposive nature of EU law was accepted and given primacy by the English courts in *Pickstone v. Freemans plc* (1988), although UK courts have a history of being reluctant to go beyond literal interpretations.⁵⁹ In sum, it may be argued that the debate between these two schools of thought is a relative one. Both schools, in modern legal discourse, appreciate that an excessive pull in either direction of the spectrum will marginalise their thought in the mainstream of the legal community. This thesis proposes that no matter where on this legal spectrum of thought a judge falls, his or her teleology should seek to alleviate the two main problems that face the

⁵⁶ Thomas Franck claims, in relation to legitimacy and justice which have indirect relevance to teleology, that the static nature of legitimacy tends to emulate the needs and demands of nations that created the international system, whilst justice is dynamic and promotes reform and changes that may result in benefit to the interests of weaker entities; supra at note 51 pp. 140-158; Qureshi also claims that static understanding of the law only perpetuates the interests of entities that formulated the law without mention of this statement’s indirect relationship with Franckian notions of legitimacy and justice. See Qureshi supra at note 46, pp. 869-871.

⁵⁷ Slapper, G., & Kelly, D., *The English Legal System*, 2001, 5th ed. (Cavendish Publishing) p. 3.

⁵⁸ *Ibid.* pp. 167-168.

⁵⁹ *Pickstone v. Freemans plc* (1988) AC 66. There, the House of Lords held that it was necessary for the court to read words into inadequate domestic legislation in order to give effect to EC law pertaining to equal pay for equal work value. *Ibid.* p. 168. Also, see *Lister v. Forth Dry Dock* (1989) 2 WLR 634 and *Three Rivers District Council v. Bank of England* (no. 2) (1996) 2 All ER 363.

developing countries with the new WTO regulations and international trade in general.

The WTO Covered Agreements and the negotiation history of the UR present a picture that has development through trade as an objective and goal of the institution. Therefore, this thesis seeks to present what a development approach to adjudication should look like and as such has sought to premise this teleology not just from a trade interest perspective but also from a legitimacy, justice, and ultimately, a fairness standpoint. The following sections will justify the use of justice requirements in a rule-based system, and explicate and elaborate more on the theoretical underpinnings of the development approach to fairness.

1.7 The Need for Justice in Adjudication of Disputes

The increase in scope of GATT/WTO law from pre-Uruguay Rounds to the present, with its growing sophistication and legalization, encroaches heavily onto other areas of social and developmental issues. International economic law and WTO law, in particular, affect fundamental decisions about the allocation of social benefits among states and their citizens, including benefits such as economic advantages, preferences, opportunities for obtaining wealth and property, information, and many other social goods. The WTO dispute settlement procedures exist in order to identify and correct improper gains or circumvention of obligations, which are directly related to the social distribution of goods.⁶⁰

⁶⁰ Garcia, F., in *Trade and Justice: Linking the Trade Linkage Debates*, 1998, 19 U. Pa. J. Int'l Econ. L. 394. pp. 404-405.

Naturally, the role of adjudicators becomes more and more significant for Members of the WTO. The AB's role becomes even more crucial as it is the final arbiter of legal questions. Furthermore, as the WTO General Assembly's legislative role becomes stagnant, the norms created by the panels and AB gain more prominence. This is due to the voting mechanism of the WTO, whereby consensus is needed to amend any treaty provisions.⁶¹ Thus, where the law falls short, the adjudicators must fill the gaps. In order to properly discharge their duties so as to resolve disputes in a timely and effective manner, the adjudicators have been obliged to become an "activist court" that creates legal norms through its reasoning and decisions.⁶²

The norms generated by the adjudicators are grounded in their responsibilities as legal interpreters of treaty texts. In instances in which the law is not clear-cut, the adjudicators step in to distinguish the obligations and commitments of the Members. Since, as mentioned, WTO law encroaches on matters of social concern, which are not strictly trade related, the panels and AB should heed calls for justice and fairness rather than simply focus on the black letter of the law. Each decision carries with it norms, which will become part of global trade regulations.⁶³ For developing countries, negotiation of treaties is still a power-oriented game. In addition to the legalization of the process, which brings forth more solidity of rules, the need for justice becomes vital. As these nations progress on building their economic and social infrastructures, realization and

⁶¹ Marrakesh Agreement Establishing the World Trade Organization, Art. X.

⁶² Cass does not specifically term the AB as an activist court, but her claim of judicial norm-generation could, arguably, be considered as judicial activism. See *supra* at note 52.

⁶³ Behboodi, R., *supra* at note 51, pp. 70-78.

understanding of the problems associated with the disparities of wealth and infrastructure between developing and developed societies gain more importance.

Thus, four interrelated matters should oblige the WTO adjudicators to include notions of justice into its decision-making. First, the negotiation of treaties by nature tends to benefit the strong states as opposed to weaker states. Second, the more legalised character of the WTO could solidify these at times “unfair” treaty provisions, thereby creating a system that serves the powerful. Third, the vast amounts of treaty law pertaining to many different areas of trade encroach on matters of important social and developmental policymaking. Fourth, the practically unfeasible amending process of the WTO provisions grants the adjudicators vast authority to promulgate trade norms and influence the constitution of world trade law.

How the two interconnected concepts of justice and fairness should be implemented will be an important element in the development approach to adjudications, as will be discussed later in this chapter. However, it must be noted that the reason for injecting justice into a rule-based system is one that is based on “acceptable social outcomes.” This notion, first introduced by Klaus Scherer, claims that justice is understood as social outcomes justified by recourse to principles accepted by the community and is indispensable for any kind of social association.⁶⁴ A strictly rule-based system may be held to be adhering to a positivist legal approach whereby moral or justice concerns are separate from the formal quality of the law. However, even H.L.A. Hart, who is regarded as one of

⁶⁴ Scherer, K., *Issues in the Study of Justice*, in *Justice: Interdisciplinary Perspectives*, 1992, pp. 3-14. Also, see the works of Garcia, F. *supra* at 60, pp. 408-411.

the key founders of the positivist theory, claims that though morality is separate from the law, nevertheless, justice concerns function as an evaluator of the law.⁶⁵ Moreover, references to justice could be simply deemed as a prudent approach by the decision makers or lawmakers of any legal order because it indicates a certain amount of social acceptability.

Thus, the argument that a strictly rule-based system leaves no room for justice does not pass muster. It could be argued that decisions of the adjudicators should be evaluated through the prism of justice, or that justice is necessary for the adjudicators' decisions to be acceptable according to Scherer, or simply, that they must be just as a matter of prudence. The community must accept the adjudicators' rulings; otherwise, the WTO system could crumble due to a lack of social acceptability or legitimacy. Yet, acceptability in the international order is more than simply just rulings; rather, these rulings can only be acceptable if Members comply. Rulings that provoke frequent non-compliance may be deemed unjust if the rulings by their nature repel compliance. Therefore, we reach a point where the AB must not only rule in a just manner, but also must make sure that the reasoning behind its ruling is acceptable to a point of encouraging compliance even when the short-term interest of a State may be best served by derogating from compliance. However, it is assumed that very infrequent non-compliance may occur in an international setting, but the overall jurisprudence has a strong element of compliance. Therefore, the question becomes how to consolidate the at times conflicting notions of law, justice, and acceptability or legitimacy in the international setting. Thomas Franck has presented a theory that attempts to

⁶⁵ Hart, H.L.A., *The Concept of Law*, 1961, pp. 200-207.

bundle these ideas in order to devise a concept of fairness. However, Franck's theory has gaps that will be filled by the injection of Dworkin's principled approach to the law. The details of these concepts will be analysed in the forthcoming section.

The mentioned concepts of adjudication are underpinned by the interplay and dynamics of political actors in the WTO and the process of judicial lawmaking by the adjudicators. Therefore, a closer look at the judicial politics of the adjudicators is pertinent.

1.8 Judicial Politics of the WTO

Since the establishment of the WTO, the wisdom of replacing the GATT system with the legalised WTO model has been debated extensively.⁶⁶ Most recently, the debate has been extended to allegations of judicial activism by the adjudicators and the way that this activism affects the different types of Members in the WTO.⁶⁷ "Activism" is a term subject to alternative definitions and normative assessments, but the debate usually concerns WTO adjudicators' holdings that domestic regulations contravene WTO law, or the adjudicators' fidelity to a certain posited, deduced, or constructed intent of the negotiators of the UR.

⁶⁶ Goldstein, J., & Martin, L.L., *Legalization, and Domestic Politics: A Cautionary Note*, 2000, 54 Int'l L. Org. 603, 603-632; Hudec, R., *The New WTO Dispute Settlement Procedure: An Overview of the First Three Years*, 1999, 8 Minn. J. Global Trade 1, arguing against the new effectiveness of the new legalised WTO system. For proponents of the legalised system, see, amongst others, Jackson, J.H., *Restructuring the GATT System* 1990, pp. 56-80; Weiler, J.H.H., *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of the WTO Dispute Settlement*, Jean Monnet Working Paper No. 9-00 found on www.jeanmonnetprogram.org; Keohane, R.O., Moravcsik, A., & Slaughter, A., *Legalized Dispute Resolution: Interstate and Transnational*, 2000 54 Int'l L. Org. 457 pp. 458-480.

⁶⁷ Ragosta, J., Joneja, N., & Zeldovich, M., *WTO Dispute Settlement: The System Is Flawed and Must Be Fixed*, 2003, 37 Int'l L. Law 687, pp. 748-751; Steinberg, R., *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 2004, 98 AJIL 247, p.248.

In general, commentators use the term “activism” in order to describe the expansiveness of judicial lawmaking in the WTO. Cass has explained and analysed the activism of the WTO adjudicators in the context of the constitutionalisation of international trade law.⁶⁸ She has explained that the holdings of the adjudicators have contributed and are the “engine” in the constitutionalisation process.⁶⁹ Qureshi, however, has suggested how the judicial lawmaking process needs to respond to developing country needs.⁷⁰ Jackson has explained and described the generative nature of the adjudicators with ambivalence as to how that has affected the Membership and trade constitution.⁷¹ The three ideas mentioned do not purport to be an analysis of the judicial politics of the DSB, but rather provide an analysis of judicial lawmaking and the way that plays out at the institutional and legal level. Richard Steinberg has laid out one of the more interesting explanations of judicial lawmaking and the politics underlying that process in the WTO. He describes the judicial politics of the AB as indirectly beholden to the international political discourse, i.e., the adjudicators are cognisant of the political restraints inherent in their duties as judges. They cannot fill legal gaps and clarify ambiguities without considering the reaction of powerful Members of the WTO.⁷² This constraint should alleviate the US and EU angst in relation to activist judges. He argues that the expansive nature of judicial lawmaking is, as Jackson believes, necessary for a proper functioning institution, but that the holdings can never really infringe on American supremacy of trade

⁶⁸ Cass, D.Z., *supra* at note 52.

⁶⁹ Cass, D.Z., *supra* at note 52, pp. 5-12.

⁷⁰ Qureshi, *supra* at note 46.

⁷¹ Jackson, J.H., *supra* at note 52 and Cass, D.Z. at note 52 on her belief about the ambivalence of Jackson in relation to the manner in which the WTO generates norms.

⁷² Steinberg, R.H., *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 2004, 98 Am. J. Int'l. L. 247, pp. 251-252 and 267.



relations.⁷³ Steinberg does acknowledge that the international legal discourse and the WTO constitution play a role in the “interpretative space”⁷⁴ or discretion that is afforded to the adjudicators; but he suggests that until today, those elements are constrained and shaped by political realities.⁷⁵

US and EC interests are protected despite the constitutional rules that give the adjudicators significant leeway to make law. The interpretations of the adjudicators are discursive and employ an “interpretive stance that is intrinsically elastic, permitting politically functional or dysfunctional judicial lawmaking.”⁷⁶

The UR negotiators did not intend the expansiveness of WTO judicial lawmaking in its current form; however, the Quad and other powerful Members have nothing to fear.⁷⁷ Moreover, AB judges are selected through a process in which powerful Members vet the candidates in a mini version of the US judicial nomination process, whereby ideological positions of the candidate and his or her past court rulings are inspected and scrutinized.⁷⁸ Furthermore, studies of legalised international organs have shown that there is a higher tendency for full-time judicial bodies, backed by the power to issue legal remedies and a relatively large discretion to affect legal norms and constitutions, to engage in strategic political decision-making than an ad hoc group of panellists.⁷⁹

⁷³ Steinberg, R., *ibid.*

⁷⁴ Steinberg uses the term “interpretative space.” This thesis uses this term interchangeably with “interpretive latitude” or “possible range of interpretations,” *supra* at note 72, pp. 250-258.

⁷⁵ Steinberg, R., *supra* at note 72, pp. 249-250.

⁷⁶ Steinberg, R. *ibid.*

⁷⁷ Steinberg, R., *supra* at note 72, pp. 247-248 & 271.

⁷⁸ Steinberg, R., *supra* at note 72, p. 264.

⁷⁹ Keohane, Moravcsik, & Slaughter, *supra* at note 66. It is noteworthy that during the authors’ interviews with WTO delegations of developing countries, 15 out of 21 respondents to the question of whether they prefer the old GATT system or the new WTO legalised adjudication regime, at some point in their responses mentioned that they prefer the WTO system but that the panelists’ holdings were more “fair” or “preferable” than the AB decisions. On follow up of why they have such perception, 12 of the 15 delegates believed that the legal interpretations of the panel are more

The AB acts in the shadow of threats to rewrite DSU rules by the powerful Members that would weaken it, and of possible defiance by powerful Members of its rulings. It is a well-known fact that the power of the US and EC was the insurmountable leverage that forced the developing nations to sign and ratify the WTO as a single package of Covered Agreements, including the TRIPS, during the UR. That same power can be wielded to change DSU rules in their current form and dilute or strengthen the adjudicators' roles as necessary.⁸⁰ Furthermore, the AB has established means of gathering information on the preferences of powerful Members, or their use of "avoidance techniques" so as to avoid major political controversy, though the mechanism is not foolproof. Hudec first coined the term "avoidance techniques" for what he called "wrong cases" in GATT dispute settlement.⁸¹ In the WTO context due to its legalised nature, doctrinal tools such as judicial economy, *in dubio mitius*, and *non liquet* are utilised to avoid politically sensitive questions. Also, in order to avoid political controversy, the AB seeks the input of the EC and the US through their political statements and their participation in disputes as third parties.⁸² An interesting point is that Steinberg in an interview with the WTO Deputy Director-General in 2002 was able to find that senior secretariat officials have met with and advised Members of the AB to show

in line with their view of the nature of WTO law and that the AB engages in extremely formal legal rulings that are causing much concern for developing countries.

⁸⁰ Aside from economic power in the institutional context, one of the major elements of the power of the Quad, and especially the US and EC, is their ability to set the agenda and formulate texts of agreements in the working groups during multilateral trade negotiations; see Blackhurst, R., *Reforming WTO Decision-Making: Lessons from Singapore and Seattle* in Deutsch, K.G., & Spever, B. (eds.), *The World Trade Organization: Freer Trade in the Twenty-First Century*, 2001, p. 295.

⁸¹ Hudec, R., *GATT Dispute Settlement After the Tokyo Round: An Unfinished Business*, 1980, 13 *Cornell Int'l L.J.* 145, pp. 189-190; and Steinberg, *supra* at note 72 pp. 269-27.

⁸² There are no cases in the entire body of over 310 disputes resolved to date that neither the US nor the EC was a third-party participant.

restraint when those officials perceived that AB reports might not be politically acceptable.⁸³

The developing countries' worst-case scenario in the context of WTO dispute settlement may arguably have occurred. Not only are the negotiated substantive rules of the WTO skewed against them, but so, too, are its jurisprudence and dispute settlement regime. There is, moreover, the added burden of having the norm-generating, constitutionalised trade regime that is beholden to power politics legitimised on the altar of international law. The legalised dispute settlement regime of the WTO was supposed to advantage the developing countries, as theoretically a legal system in contrast to a diplomatic regime would empower them to secure remedies against larger, more powerful nations. However, the unintended consequence has been that they do not obtain the legal remedies they expected because the adjudication process does not give them the normative and precedential "victories." The adjudicators are politicking counter to developing countries' interests.

The developing countries and both the US and EC have complained about the perceived activism or expansive lawmaking powers of the DSB.⁸⁴ There is a qualitative and contextual difference between the two. The US and EC are concerned first and foremost with the legal obligations and so-called sovereignty

⁸³ Steinberg, *supra* at note 72, p. 266.

⁸⁴ Davey, W.J., *Has the WTO Dispute Settlement System Exceeded Its Authority?* (2001) 4 J. Int'l Econ. L. 79; Howse, R., *Mainstreaming the Right to Development into International Trade Law and Policy at the WTO*, 2004, UN Doc. E/CN.4/Sub.2/2004/17, found on UN website

rights issues, which are underpinned by their objective to protect their interests.⁸⁵ However, the developing nations are mostly concerned with their trade interests, which are an important aspect in their overall economic development. The developing nations are mostly concerned about first-order economic development for a poorer population, whilst the US and EU are basing their arguments on the protection of their established legal system for commerce. As Steinberg notes, the US and EC should not be so concerned about judicial activism as political forces inhibit expansive lawmaking that is detrimental to powerful Members. But the expansive lawmaking of the DSB is working against the interests of the developing nations in the context of fairness, as this point will be proven throughout the thesis. At the minimum, it can be stated that in their judicial politics, the adjudicators of the WTO do not seek the same political acceptability from developing nations. A much louder uproar must take place by the developing Members in order for the adjudicators to take note. The development approach to fairness expounded in this thesis will restrain the DSB from engaging in expansive judicial lawmaking unless developing countries' interests are considered too. If there is a zero-sum game in the interpretative process that clearly delineates the winners and losers, then the adjudicators must either side with the disadvantaged or make sure that gap-filling actions do not create norms that harm developing nations in the jurisprudential context.

Another layer of inequity that was discussed in the previous section is evidenced by the aforementioned statement of Claus-Dieter Ehlermann, a former AB judge, that the ordinary meaning of the text is the prime tool for WTO treaty

⁸⁵ Steinberg, R., *supra* at 72 and Howse, R., *ibid*.

interpretation so as to immunize the AB from charges of activism. This immunisation is a function of solidifying the political power structure that exists from any potential remedial actions by adjudicators of the WTO. The implicit suggestion in the statement by Ehlermann to the WTO membership is that the AB will restrain the interpretative discretion to a point at which the interests of the powerful Members will remain and their expected benefits from the WTO Agreements will endure intact. Nothing in this statement would imply that the same immunisation is in place for the weaker developing countries, because the policy choice on interpretation serves to implement and internalise institutionally the inequities and imbalances of the WTO covered Agreement negotiated in Uruguay.

1.9 Theoretical Concepts of the Development Approach to Fair Adjudication

As mentioned, fairness under the Franckian theory suggests a two-pronged approach. The two criteria for fairness are legitimacy and justice. The development approach uses this general framework for fairness with some variations on the requirements of achieving legitimacy and justice. The variations are based on the works of both John Rawls and Ronald Dworkin.

1.9.1 Franck

As Franck explains, one major appeal in crafting legally legitimate rulings is its “compliance pull”.⁸⁶ Legitimate rulings are more likely to lead to compliance by sovereign nations in the international arena. Parallel to legitimacy, justice concerns must also be dealt with, as a ruling that is unjust, yet legitimate, remains unfair. Thus, according to Frank, in order to achieve fairness, both legitimacy and justice must be present. This conception of fairness bodes well for developing nations in the WTO, as economic power asymmetries pose many obstacles for their trade interests. The fairness discourse offered by Franck allows for just rulings that have in theory a high likelihood of compliance, which is important where a developing country has won a claim against an industrialised Member. It is evident that a just ruling, which is not likely to be implemented, is of no practical use for smaller or economically weaker Members.

1.9.1.1 Community

Franck believes that any discourse concerning fairness, justice, or legitimacy must be done within the framework of a certain community, which holds certain ideas and values as true and real. One of the reasons for applying the concept of community is to constrain the possible range of interpretations and understandings of the law so as to eliminate very marginal and excessively obscure ideas. The value system of the actors involved recognises certain underlying facts and realities. Nevertheless, a substantial level of indeterminacy exists within any

⁸⁶ Franck, T., *Legitimacy in the International System*, (1988) 82 Am. J. of Int. L. 736.

community. H.L.A. Hart explains that true determinacy is unattainable and in fact, undesirable because humans are “handicapped by relative ignorance” and “linguistic indeterminacy”.⁸⁷ The drafters and negotiators of the WTO Agreement were conscious of this, and one could only conclude that some of the treaty language was left purposely vague because of the nature of multilateral treaty negotiations. Furthermore, the negotiators deliberately confer some discretion on rule interpreters, such as panellists and AB judges, to determine the borderline and difficult cases.⁸⁸

Judicial discretion, ignorance, limitations of language, and conflict of interests amongst Members of the WTO are some of the issues that give rise to problems of interpretation and application of rules.⁸⁹ Yet, these elements also allow for a certain degree of “interpretational latitude”. However, this latitude is not boundless. The constraints of this latitude are imposed by what many theorists, including Franck, call the “interpretive community”. The function of a legitimate adjudicative system can only be served if there are certain assumptions and beliefs that are so established as to be understood as fact.⁹⁰ It is within this “interpretive community” that the adjudicators of the WTO must form their opinions.

The WTO Members’ delegates, trade bureaucracies, trade and international lawyers, and judges are some of the participants in this community, a fact that limits the possible choices available to the adjudicators. At least in a normative

⁸⁷ Hart, H.L.A., *The Concept of Law*, (2nd Edition 1992) pp. 127-128.

⁸⁸ For more insight on certain aspects of judicial discretion, see: Hines, V.G. *Judicial Discretion in Sentencing by Judges and Magistrates* (1982); Golub, J., *Rethinking the Role of National Courts in European Integration: A Political Study of British Judicial Discretion*, (1994) (European University Institute Working Paper); Llewellyn, K., *The Case Law System of America*, 1989.

⁸⁹ Twining, *Jurisprudence*, (Butterworths 1998) pp. 179-180.

⁹⁰ Behboodi, R., *supra* at note 51.

sense, one can evaluate the DSB cases in light of these mentioned constraining factors.⁹¹ One must attempt to make the community as inclusive as possible. In order to do so, there needs to be a tiered notion of community. The first order would include the lawyers, judges, and technocrats mentioned who scrutinize the judges at every level of reasoning in reaching their decisions. The second tier of the community could be thought of as any individual who is affected and has knowledge of the multilateral trading system. However, there may be a lack of cohesiveness in the values that they adhere to, i.e., some may be against globalisation, others prefer a different set of norms and rules for international trade. This second tier is most interested in the results of the cases, which is mainly a distributive justice concern. Also, the interplay between this second-tier community and adjudicators is most salient in the context of the judicial politics of the DSB and the WTO.

1.9.2 Legitimacy Criteria

Franck proposes four elements required in order to achieve legitimate outcomes: determinacy (predictability), adherence to normative hierarchy (security), coherence (consistency), and symbolic validation. However, the development approach within the WTO context uses only the first three criteria, as symbolic validation is not necessary due to the nature of the WTO.

Symbolic validation refers to a general acceptance or credibility of certain institutions by a large proportion of individuals and global actors. The UN and the

⁹¹ For instance, when describing the latitude granted to American judges in state appeals courts, Karl Llewellyn identifies fourteen “major steadying factors” that tend to reduce doubts and limit the range of choice in practice, see Llewellyn, K., *supra* at note 88, p. 102.

International Committee of the Red Cross (ICRC) are two very well-recognized symbolic institutions that can provide legitimacy to actions taken by international entities. These organizations have a pedigree and history that make them reputable within the context of their responsibilities.

The reasons for discharging this requirement are on two levels: Firstly, the arguments that are being presented will assume that the WTO's legal system is self-contained. Its existence is justified through its political legitimacy and its acceptance by an overwhelming majority of nations. It is in effect self-validating, since the WTO is held to be the main forum in which global economic relations, especially trade relations, are regulated and managed. No other international institution dealing with economic relations exists that has the same *gravitas* as the WTO. It is steeped in history, practically on par with the founding of the UN. The developing nations, though sceptical about its results, were participants in the Uruguay Round. The authority of the WTO has been consensually agreed upon. Therefore, it is superfluous to engage in the analysis of symbolic validation in this setting.

Alternatively, notions of symbolic validation, which seek to rely on anthropological, historical rituals, and, pedigree, are deemed suspect by many developing nations. This is due to the fact that many of these Members were colonies of the industrialised nations. Moreover, some nations have been founded and recognised relatively recently. As such, these nations believe that they were not influential in the establishment of these rituals and pedigree, thereby making them at a minimum irrelevant and at a maximum another instrument of

subjugation.⁹² However, for the purposes of this section, the assumption will be that the system is self-validating.

1.9.2.1 Predictability

Determinacy as proposed by Franck equates with the notion of predictability, as both are a function of the clarity of regulations and laws.⁹³ In the context of this discussion, determinacy is relevant to the interpretation and application of the WTO and its covered agreements by the adjudicating body. There needs to be both *ex ante* and *ex post* predictability in order to reach the necessary standard.⁹⁴ *Ex ante* predictability refers to understanding the law before taking action, while *ex post* refers to understanding whether certain behaviour was legal after the act has taken place.

1.9.2.2 Security

According to Franck, the concept of security and adherence (to a normative hierarchy) is the next level of analysis, as merely reaching determinant ends does not afford legitimacy by itself.⁹⁵ The means by which adjudicators reach those ends is vital to the system. The nature of the law is context-specific, and thus, every legal statement conveys a certain normative meaning with respect to

⁹² See Ghosh, P.J., *New International Economic Order: A Third World Perspective*, 1984, chs. 1-4; Nanda, V.P., *Development as an Emerging Right Under International Law*, 1985, 13 *Denv. J. Int'l. L. & Pol'y* 161.

⁹³ For the purposes of this discussion, they will be used interchangeably.

⁹⁴ Franck does not delineate between what Baxter calls "primary" and "secondary" predictability (see Baxter, W., *Choice of Law and the Federal System*, 16 *Stan. L. Rev.* 1 pp. 3-5 1963). However, it is implicit in his explanation of the concept of determinacy. *Supra* at 86.

⁹⁵ Franck, T., *supra* at note 51.

Members' obligations.⁹⁶ Therefore, at every phase of analysis, adjudicators must struggle to convince the "community" that it has grasped the true meaning of the law. This conviction has to take place, taking into account not only legal considerations, but also policy-making ones.⁹⁷

Franck further stipulates that the reasoning of the adjudicators must be interwoven with basic principles of international law. These are principles of reasoning, which have been devised over the years in the international sphere. A clear example of this adherence is the WTO's incorporation of the Vienna Convention on the Law of Treaties when instructing the adjudicators about the standards of interpretation to be employed. However, explicit mandates should not be the sole promoter of adherence. The panellists and Appellate judges must also implicitly adhere to these normative hierarchies, which transcend the WTO. This means that the adjudicators must justify their decisions in line with the prevailing interpretative attitudes, whilst structuring their arguments such that the integrity of the WTO remains intact.

1.9.2.3 Consistency

Predictability and security are interrelated with the concept of coherence (consistency).⁹⁸ Coherence is grounded on the notion that similar cases will result in similar outcomes. Dworkin explains that coherence is the main element in

⁹⁶ Behboodi, R., *supra* at note 51, p. 64.

⁹⁷ Franck, *supra* at 51 pp. 42-43.

⁹⁸ Franck, *supra* at note 86, p. 750.

compelling states to abide by certain rules.⁹⁹ However, these rules must be directly related to certain principles and standards set by the entire system. According to Dworkin, consistency requires that a rule be applied uniformly in every instance, which creates “similar” questions of law. Failure to do so is termed “checker boarding”.¹⁰⁰

However, there are justified and valid forms of checker boarding. Franck mentions the GATT 1947 General System of Preferences (GSP) as an example of justified checker boarding.¹⁰¹ Claiming that although the GSP deviates from the MFN principles of the GATT, it furthers the underlying objective of global trade promotion. The same may be said of the new WTO Agreement, which defines certain extra benefits for developing and lesser-developed countries.¹⁰² Thus, rules become coherent and consistent when applied in such a fashion as to avoid arbitrary checker boarding.

1.10 Legitimate Outcomes with Respect to Developing Nations

Franck has suggested that legitimate outcomes are one major criterion for achieving fairness. Furthermore, he claims that legitimacy provides for procedural justice. However, achieving procedurally just ends does not by itself result in fairness. As will be discussed in chapter 2, the AB has failed to reach legitimate outcomes in certain due process matters. This has led to detrimental effects for

⁹⁹ Dworkin uses the term “integrity” when describing coherence. Found in Dworkin, R., *Law's Empire*, (1986) and pp. 198-218.

¹⁰⁰ *Ibid.*

¹⁰¹ Franck article, *supra* at 86 p. 747.

¹⁰² There are many examples of these benefits, though some might be deemed hortatory. The DSU, TRIPS, General Agreement on Trade in Services (GATS), ADA, Agriculture, and other covered agreements have rules exceptions for developing and less-developed countries.

developing nations litigating matters before the WTO. For instance, with respect to the burden of proof, it has failed, *inter alia*, to provide secure and consistent rulings. This failure has the potential to harm the trade interests of developing countries. The developing nations, already at a disadvantage due to a lack of legal and economic institutional capacity, are confronting even more obstacles when acting as parties to a dispute.

Accordingly, the insufficiency of legitimacy tends to be more detrimental to Members with less economic power and legal resources, as costs are greater in an unpredictable, inconsistent, or insecure legal regime. The outcomes of the cases are also more important to developing nations as an adverse ruling in a key sector could create substantial welfare losses for that Member. The industrialised economies are better able to absorb adverse rulings, which, relative to developing nations, equate to smaller welfare losses. Thus, when legitimacy is compromised by the AB's decisions, it may have negative effects on the chances of developing countries to win cases. As a result, their trade and economic interests are harmed. This could imply a less than optimal allocation of justice. The sub-optimal distribution of justice puts the fairness of the system in question. Furthermore, as the constitutional edifice of the WTO is being continuously moulded with every case, the early protection of developing countries' interests is imperative.

1.11 Description of Justice and Its Relationship to the Normative Concept of Law in the WTO

In order to validly assess whether the system has achieved fairness towards developing nations, one must also establish some form of definitional framework for justice and the conception of law. Franck argues that there is constant tension between legitimacy and justice, and the two must be “managed”. However, no guide as to how these two concepts, at times competing ideas, should be managed is offered. From the perspective of developing countries, the ideal situation would be one in which distributive justice and legitimacy are both present. Yet, there are times when some compromises must be made in a particular case. In these circumstances, the developing nations would prefer to have distributive justice supplant legitimacy.¹⁰³ The reason for this preference becomes clearer when the WTO adjudicators apply a Rawlsian version of distributive justice, coupled with a principled conception of the law. The two concepts, Rawls and justice on the one hand and Dworkin and law on the other could work in parallel with each other. The main argument here is that in order to better achieve the just outcomes outlined by Rawls, one must look through the legal prism espoused by Dworkin, which holds that the law must be based on real socio-political values of the community.¹⁰⁴

¹⁰³ Franck, T., *supra* at note 51 argues that since legitimacy tends to preserve the status quo, and justice tends to promote change and is dynamic, countries that have not been previously participated in the international legal process are likely to benefit more from justice related matters. pp. 147-160.

¹⁰⁴ Dworkin, R., *supra* at 99 pp. 31-44.

1.11.1 Rawls

This section proposes to use John Rawls' work in *A Theory of Justice*.¹⁰⁵ Briefly, Rawls suggests that one of the pillars of justice is to advantage the disadvantaged. Naturally, there may be objections to the idea of using *A Theory of Justice* in the international setting, as Rawls himself has claimed it to be suitable for domestic legal regimes. Nonetheless, as many legal commentators admit, this exemption is somewhat suspect.¹⁰⁶ In order to circumscribe some of the ambiguities associated with the definitional contours of distributive justice, this section focuses on Rawls' suggestion that social and economic inequalities are to be arranged so that they are to the greatest benefit of the least advantaged. In the context of the WTO dispute settlement system, the least advantaged refers to developing and lesser-developed disputants.

1.11.2 Dworkin and Principled Law in Relation to Developing Nations

In order for the Rawlsian approach to be applied in a more desirable manner, the adjudicators should also adhere to a "principled" conception of the law. One of Ronald Dworkin's main ideas is the notion that: "principled" law supersedes

¹⁰⁵ Rawls, J., *A Theory of Justice* (1971).

¹⁰⁶ Many legal commentators have applied Rawls' *A Theory of Justice* to the international setting. They begin their analysis by stipulating that all transnational relations involving inequalities and, indeed, all aspects of transnational relations require justification in terms of domestic political thought. Thus, they focus on domestic political theory for the normative justification of distributive patterns in which the richer and the poorer are individuals considered together as states, and not individuals within a particular state. For more insightful works, see: Mandle, J., *Globalization and Justice*, 570 *Annals Am. Acad. Pol. & Soc. Sci.*, 126 (2000); Pogge, T., *Realizing Rawls* (1989); Richards, D.A.J., *International Distributive Justice* in *Nomos XXIV: Ethics, Economics, and the Law* p. 275 (Pennock, J.R., & Chapman, J.W., eds.).

positive rule-making in so far as it exemplifies the political and societal values.¹⁰⁷

As far as developing nations in the dispute settlement of the WTO are concerned, the principle most beneficial is the right to development and certain subsidiary effects of this right. There is a plethora of literature on this principle with many divergent views on the specific aspects of the right to development; however, the assumed limits of that right will be the protection of market access for developing nations in OECD markets and legal capacity-building via, *inter alia*, the domestic implementation of policy.¹⁰⁸

It can be argued that this right to development may be provided through customary international law and/or by its acknowledgment in many different provisions of the WTO Agreement, including the historical aspects of the GATT's special and preferential regime. In its current form under the WTO, the focus is on the least-developed Members, but there are provisions that grant developing countries special timetables for the implementation of certain obligations. Furthermore, the WTO's many communiqués and programmes, such as Trade Facilitation, cooperation schemes with the World Bank, the founding of the Advisory Centre on WTO Law, and the labelling of the new round of negotiations as the "Development Round," all signify a certain institutional and political value that seeks to assist in levelling the playing field for economically weaker Members.¹⁰⁹ The debate on

¹⁰⁷ Dworkin, R., *The Model of Rules*, 35 U Chicago Law Rev. 14 (1967) reprinted in *Taking Rights Seriously*.

¹⁰⁸ Obviously, this is in addition to health and national security concerns, which have been given "exception" status to all Members if the need for derogation of obligations arises.

¹⁰⁹ For a comprehensive look at the international right to development, please refer to Bedjaoui, M., *Unorthodox Reflection on the Right to Development*, in Snyder, F., & Slinn, P. (eds.) *International Law of Development: Comparative Perspectives*, (1987); Abi-Saab, G., *The Legal Formulation of the Right to Development (subjects and contents)* in *The Right to Development at the International Level* (Workshop held under the auspices of the Hague Academy of International Law and the UN University) (R.J. Dupuy eds. 1980) p. 159; Howse, R., *Mainstreaming the Right to Development into International Trade Law and Policy at the WTO*, 2004, UN Doc. E/CN.4/Sub.2/2004/17, found

whether the right to development is customary international law or merely *opinio juris* is not to be explored here, but this right does indicate a socio-political value. As Dworkin proposes, the value in question does not vanish if it is not applied in a particular case; it is, rather, that it is the instrument to incline judges towards a particular value-based choice.¹¹⁰

The Rawlsian approach to justice may be taken individually, but the addition of a principled approach to law improves and provides an insurance that the adjudicators will reach just and desirable outcomes in relation to developing nations. If taken individually, the Rawlsian idea of justice would incline the panel or AB to rule in a manner that benefits the legal and economic interest of the developing Member in a dispute as opposed to the industrialised Member within the limits of WTO law. The preferred scheme of law and justice, proffered here, would use Rawls and Dworkin together. If one were to combine the two concepts, the result would be that the Rawlsian notion would be more like a rule when addressing the justice of an outcome, whilst Dworkin's approach would be viewed as a "standard of legal adjudication". The combination of the approaches allows a judge to rule in favour of a developing country based on just grounds, whilst obliging a judge to make sure that a ruling against a developing country is clearly justified in light of the community's values and not merely on a strict literal interpretation of the rules. Without the principled approach, it would be

on UN website, Donnelly, J., *In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development*, 15 Calif. W. Int'l L. J. 473 (1985); Schachter, O., *The Evolving Law of International Development*, 15 Colum. J. Trans. L. 1 (1976); Ghosh, P.J., *New International Economic Order, A Third World Perspective* (1984) Chs. 1-4; Nanda, V.P., *Development as an Emerging Right Under International Law*, 13 Denv. J. Int'l. L & Pol'y 161 (1985); Dorsey, J.F., *Preferential Treatment: A New Standard for International Economic Relations*, 18 Har. Int'l L. J. 109 (1977).

¹¹⁰ Dworkin, R., *supra* at note 99, pp. 22-24.

theoretically possible that a judge applies a Rawlsian approach, yet adheres to a strict interpretation of the rules. The addition of the principle of the right to development imposes a more broad-based outlook on the adjudicators.

This approach could be very useful, as sometimes the lines between rules and standards are not clear and do not remain consistent through adjudication over a period of time. With the development approach, the distinctions become clearer. In any setting in which courts refer to *stare decisis*, as does the WTO, the tribunal may suggest a standard in a particular case, and then formulate that standard in later cases until it has the authority of a rule for application.¹¹¹ If these standards were to attain the functionality of rules, then developing nations would be able to achieve what they have not been able to do through negotiations at the Uruguay Round: that is to make the WTO treaties themselves impose obligations on Members to the benefit of their trade and development objectives. Under this scenario, the adjudicators would generate a strict application of a norm, which was not included, though crucial for developing nations, in the Uruguay Round dispute settlement negotiations.¹¹²

Furthermore, as a strategic matter, the developing nations' bargaining power is increased during the consultation phase. These justice entitlements allow the weaker side to bargain from a better position. It could also have consequences during later negotiating rounds as an important bargaining chip. Any proposal by industrialized nations that may be counter to the adjudicative concepts mentioned

¹¹¹ Trachtman, J.P., *International Trade as a Vector in Domestic Regulatory Reform: Discrimination, Cost-Benefit Analysis, and Negotiations*, 24 *Fordham Int'l L. J.* 726 (2000) p. 737.

¹¹² See Cass, D.Z. *supra* at note 52 section on judicial norm generation by the AB.

will have less chances of success. Also, developing countries could propose that they are willing to legislatively curb their justice entitlements in exchange for other concessions from industrialised Members.

Examples to better illustrate that the development approach using Rawls and Dworkin in tandem could function adequately are usually seen in disputes in which a Member challenges another Member's use of safeguard measures.¹¹³ A safeguard case will inevitably entail some form of economic and allocational cost-benefit analysis. There are different forms of cost-benefit analyses, and judges are advised to use them individually or in combination.¹¹⁴ The focus will be on the proportionality of domestic safeguards regulations¹¹⁵ whereby the judge is supposed to decide whether the means selected are proportional to the ends desired. There are two forms of proportionality testing: static and comparative. The static approach, which only concentrates on the regulation at issue, does not seek to analyse the costs and benefits associated with an alternative set of regulations. If a developing nation was disputing an industrialized nation's domestic regulations, then an adjudicator could decide to reason based on a static proportionality test and use a Rawlsian view. This approach would still not be able to advantage the developing Member at an optimal level. For instance, the judge could read the terms of reference or the standard of review in that particular case in such a narrow fashion as to justify a simple static approach. The judge's scrutiny is benefiting the developing nations, yet only in relation to the one narrowly defined

¹¹³ Trachtman, *supra* at note 111 pp. 731-732.

¹¹⁴ Trachtman *supra* at 111, pp. 730-732.

¹¹⁵ These cases are usually based on claims made in relation to Art. III of GATT and the non-discrimination provisions, with respect to Art. XX of GATT, which allow derogations from GATT for certain domestic objectives, or in other less-frequent circumstances as they relate to the safeguards agreement or the TBT agreement.

set of safeguard regulations. The judge is, in essence compelled to act as if the safeguard imposing party has no other options available to it. In contrast, if a jurisprudential standard existed that guided the judges towards applying the right to development, then that judge could be persuaded to analyse alternate policy choices that the industrialised country had at its disposal. This latter approach might not affect the developmental objectives of the weaker nation. The adjudicators could, for instance, interpret the terms of reference and standard of review more broadly and would, therefore, be more open to arguments based on alternative options available to the safeguard imposer put forth by the claimant.

A similar situation could occur during an Article 21.5 implementation dispute in which a “winner” challenges the validity of the implementation by the “losing” party of the recommendations of the adjudicators. A previously victorious industrialised Member would bring forth a claim that the opposing developing nation has not abided by the recommendation of the DSB in implementing their decision. A pure Rawlsian approach could be simply applied by looking at whether the recommendation of the DSB has been strictly adhered to, whilst providing certain advantages during the litigation of the dispute to the developing Member. This could for example, include the understanding by the judges that developing Members are not as capable in providing comprehensive evidence and economic statistics as opposed to the developed litigant. Therefore, the outcome could still be less than optimal for the developing nation. However, if the adjudicators adhered to the principle of the right to development, then other policy alternatives and implementation strategies could be explored so that the implementation of the DSB recommendations may be less burdensome.

Moreover, the developing Members gain a bargaining chip during negotiations for the implementation of DSB recommendations. They would have more alternatives at their disposal when negotiating with an industrialised Member.

The theoretical underpinning of the development approach needs to be applied by the adjudicators to individual cases. Therefore, the application of the development approach to WTO cases is prudent.

1.12 Applying the Development Approach to Fair Adjudication

The analysis now turns to some of the more important procedural issues. The objective of the thesis is to show that the AB has either not promoted legal legitimacy and/or has not reached the correct threshold of distributive justice under the development approach in its holdings. These rulings have functioned to the detriment of developing countries in relation to a range of issues pertaining to due process rights, the TRIPS Agreement, and the ADA. As a result, the rulings have not reached the threshold of fair rulings under the development approach criteria.

The proposed Development Approach, taking account of the theoretical instruments (explained in previous sections), could be summarized as offering a five-pronged guideline that if utilized consistently can produce fair outcomes from the perspective of developing nations. The guidelines suggest that the adjudicators deciding the fates of developing countries should do the following: 1) When deciding disputes involving developing nations, the adjudicators use predictability, adherence, and coherence as the first level of analysis and a window to “fair”

rulings. 2) Once the legitimacy and its subsequent effects have been recognised, they should seek to make sure that they also meet the justice requirements by advantaging the disadvantaged. 3) Subsequently, in order to achieve the optimum level of justice, the adjudicators should apply the principle of the right to development and its defined subsidiary effects in their perception of the law and, as such, their reasonings. 4) If compromises have to be made with respect to legitimacy and justice, then the adjudicators should give priority to the justness of their decision. 5) All holdings must be within the confines of the WTO community described.

1.13 Conclusion

For any particular application, interpretation, or adjudication of a rule of the international trading regime, there is often a choice among equally plausible but different options. In selecting one plausible option, another equally plausible option is excluded. In essence, neutrality of adjudicators is merely a façade that is not a bias towards a certain Member but rather a bias towards certain policies. Furthermore, the adjudicators of the WTO, with the AB at the forefront, have since 1995 developed a set of norms and practices as a result of settling disputes between Members. The manner in which these norms and practices are being promulgated by the DSB is of great importance to the weaker developing countries. These Members expect a fair system of adjudication and norm generation. After the completion of the Uruguay Round, many developing countries were optimistic about the new legal approach to dispute settlement. However, an unintended consequence of the Institution has been that legal gaps have been filled by the

DSB, instead of by the General Council as the WTO Agreement mandates. This consequence has arguably been necessary for the stability of the WTO and its dispute settlement system as the vote of three-fourths of the WTO membership is required in order to clarify interpretations of the provisions in the WTO.

This chapter has attempted to create a set of guidelines based on notions of fairness espoused by Franck whilst complementing his theory with certain aspects of Rawls and Dworkin. The purpose of this exercise has been to illustrate that both the interpretation of provisions and the filling of some legal gaps must be done in a manner that is protective of the interests of developing countries in the dispute settlement mechanism of the WTO. In order to assess and evaluate the legal decisions of the DSB, a framework for fairness is proposed that would be both just and legitimate, whilst being responsive to all Members of the WTO, especially the developing countries.

After identifying developing nations, their developmental needs in the context of international trade, and the reasons why these countries would partake in global trade settlement systems, the discussion set out the different aspects of fairness. The framework consists of using Franck's two-pronged approach towards fairness, which holds that fairness is derived from both legitimacy and justice. Legitimate rulings are those that are predictable, adhere to a normative hierarchy (secure reasoning), are symbolically validated, and are consistent. As the WTO is a Member-driven organization with its own legal system, and at present acts as a recognised institution for the regulation of international trade, the use of symbolic

validation in the fairness framework is somewhat obsolete and irrelevant. Therefore, the other three elements of legitimacy will be the benchmark.

Franck holds that justice is the other prong of fairness. The development approach would use only one of Rawls' elements of distributive justice, i.e., to advantage the disadvantaged. In order to enhance the legal options available to adjudicators, a principled Dworkinian approach to the law is also necessary. Identifying the principles at stake for developing countries could be done by looking at the wording and language of certain provisions in the WTO Covered Agreements. Although some are hortatory, they nevertheless indicate that for developing countries, the objective and goal of membership is the accrual of economic and developmental benefits through international trade. To achieve this objective, the institutional capacity of developing nations and market access for their products in the developed world must be improved and promoted.

In applying the development approach to fairness, the adjudicators must fulfil five criteria that are borne out of the legal theories prescribed by Franck, Rawls, and Dworkin in addition to the wording contained in the different WTO-covered agreements. The legal and jurisprudential concepts offered here are a set of judicial norms that remain committed to the letter and spirit of WTO law. The legal provisions under dispute in a case will be contested by each disputant, and developed and developing countries will have their own separate views as to how the rules must be applied. However, the adjudicators have a duty to protect the developing countries and make sure that their development needs are met. The development approach to fairness provides the normative tools for WTO judges to

make decisions that would better assist developing countries achieve the benefits expected from the Uruguay Round of Multilateral Trade Negotiations.

Chapter 2

Adjudication and Interpretation of Due Process Rights Provisions

The fair administration of due process rights is a vital component in any legal regime. As described in chapter 1, Franckian fairness entails legitimacy and justice. The legitimacy of the system is directly attributable to ensuring due process rights of the parties. In the context of the development approach to fair adjudication and due process matters, justice relates mostly to the litigious interests of the developing countries in the WTO. Under the WTO regime, the substantive trade interests of the developing nations could be negatively affected if “illegitimate” rulings create obstacles to winning a case. Nevertheless, when evaluating due process issues, it is inevitable that the legitimacy of the rulings plays a bigger role: and as such, the justice of the rulings should be viewed in light of the subsequent effects of those holdings. Accordingly, this chapter will focus on whether the AB has achieved the level of fairness as required by the development approach in due process matters.

When evaluating the case law of the DSB pertaining to due process matters under the development approach, justice could be deemed as inadequate if the rulings lack the requisite threshold of legitimacy. This happens for two reasons: first, a system that harms the interests of the weak more so than the strong is not just according to the development approach. Second, the potential losses of cases that may be incurred by developing countries due to harm done to their litigation strategy and capacity have subsidiary effects on their overall trade interests. For example, the rulings by the AB

with regard to burden of proof matters under the Agreement on Sanitary and Phytosanitary Measures (SPS), Agreement on Textiles and Clothing (ATC), and GATT Article XX have been insecure and inconsistent (see section 2.3). This could lead to developing countries losing more cases under the SPS and ATC, which will have great effects on developing country industries with high export potential, i.e., agricultural goods and textiles, and clothing industries.¹

The analysis now turns to some of the more important procedural issues. The objective of the chapter is to show that in its holdings, the AB has not promoted legal legitimacy and/or has not reached the correct threshold of distributive justice concerns. These rulings have functioned to the detriment of developing countries in relation to a range of procedural issues, including: the terms of reference as prescribed by Article 6.2 of the DSU, burden of proof and general rule exceptions, appeals under DSU Article 11, judicial economy, and third party amicus brief submissions. The result is that the rulings have not reached the threshold of fairness under the development approach criteria.

¹ This may not always be the case. For example, the *US-Tax Treatment of "Foreign Sales Corporations"*, WT/DS108/AB/R, (Adopted 20 March 2000) (hereinafter, *US-FSC or FSC*) case involved over four billion USD of trade. In contrast, the *Bananas (European Communities-Regime for the Importation, Sale and Distribution of Bananas)*, WT/DS27/AB/R (Adopted 25 Sept. 1997) {hereinafter *Bananas*} case involved approximately 190 million USD worth of trade. The latter case would not amount to an economically harmful amount of trade for the US or the EC but could be a burdensome amount for developing nations and their industries. This amount of potential harm to the producers of Bananas in either the Africa, Caribbean and Pacific countries, as well as, banana producers in Latin America is very significant.

2.1 Terms of Reference and the “Standard of Clarity” of Article 6.2 of the DSU

Under Article 6.2 of the DSU, all disputes must be initiated through the submission of a “request for the establishment of a panel”(REP). The relevant part of Article 6.2 of the DSU states the following: “ The request for the establishment of a panel shall be made in writing. It shall... identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly....” The text of this Article raises certain questions for Members, in particular, the developing nations. For instance, how comprehensive must the request for the establishment of a panel be, in order to “present the problem clearly?” The standard of clarity is the precision with which this question is addressed in a claimant’s REP. The importance of the fair application of this issue is directly related to developing nations’ ability to devise prudent litigation strategies.

In the *Desiccated Coconuts*² case, the Appellate Body sought to elucidate the importance of the terms of reference and their need for the fulfilment of certain due process objectives. It held: “A panel’s terms of reference are important for two reasons. First, terms of reference fulfil an important due process objective, they give the parties and third parties sufficient information concerning the claims at issue in the dispute in order to allow them an opportunity to respond to the complainant’s case. Second, they establish the jurisdiction of the panel by defining the precise claims at

² *Brazil-Measures Affecting Desiccated Coconuts*, WT/DS22/AB/R (Adopted 20 March 1997){hereinafter, *Coconuts* or *Brazil-Coconuts*}.

issue in the dispute.”³ Furthermore, in *Bananas*⁴ the AB added that Article 6.2 is important because “it often forms the basis of the terms of reference of the panel pursuant to Article 7 of the DSU.”

The panel request and its function in formulating the terms of reference are vital to the proper dispensation of adjudicative obligations under the WTO system. Not satisfying the requirements of Article 6.2 in particular the identification of the measures at issue and a brief summary of the legal foundation of the claim deviates from the object and purpose of this provision. These objectives must be fulfilled at the outset of a dispute because by nature they cannot be modified during the course of the proceedings.⁵

Since the understanding of claims at issue goes to the core of any just legal system, the same applies to the WTO legal regime. The delineation of the appropriate terms of reference for each case is more important for weaker Members as it is a fundamental due process matter, and wealthier Members are better able to overcome due process shortcomings.⁶ First, it is vital for the weaker party to have a firm grasp of the legal issues at stake. If the terms of reference are not clearly stated in the complainant’s request for the establishment of a panel, then the defendant is less able to put forth a more comprehensive defence strategy. Second, as the AB stated in *Bananas*, third

³ Ibid., at section VI.

⁴ *European Communities-Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (Adopted 25 Sept. 1997) {hereinafter *Bananas*}.

⁵ Ibid., para. 143.

⁶ Sypnowich, C., *Some Disquiet about Difference*, Hart, J., & Bauman, R., (eds.) in *Explorations in Difference, Law, Culture, and Politics* (1996) pp. 117-134; Lind, A.E., *Procedural Justice, Disputing, and Reactions to Legal Authority*, in Sarat, A., Constable, M., Engel, D., Haus, V., & Lawrence, S. (eds.) *Every Day Practices and Trouble Cases* (1998); Fitzpatrick, P., *Relational Power and the Limits of the Law*, in Tuori, K., Bankowski, Z., & Uusitalo, J., (eds.) *Law and Power: Critical and Socio-Legal Essays* (1997).

party rights are also at stake. Third party participation is usually the first step that a Member of the WTO takes in order to familiarise itself with the legal environment of the WTO dispute resolution process. Third party participation is crucial because it provides practical experience for lawyers and diplomats of developing countries that have not yet been parties to a formal dispute.⁷

In *Bananas*, the AB approved and endorsed the panel's decision that in this case the complainants had conformed to the standards set in Article 6.2 by "listing the provisions of the specific agreements alleged to have been violated without setting out detailed arguments as to which specific aspects of the measures at issue relate to which specific provisions of those agreements."⁸ This "mere listing" standard does not bode very well for developing country interests. If this standard prevails, developing countries would be disadvantaged as they would not be able to defend themselves properly in every case. It encourages the disputants to be as evasive as possible in drafting their REPs. For instance, they could list superfluous claims amongst valid ones, thereby forcing the opposition to waste time by inspecting for the truly relevant claims. The clarification would have to be done during the consultations phase, yet strict time limits might still prevent a defendant from deciphering between claims that will be germane to the case and claims that may not have an impact. Furthermore, this standard is conducive to the proliferation of creative and digressive litigation techniques, which in effect, tends to benefit Members with well-endowed

⁷ Footer, M., *Developing Country Practice in the Matter of WTO Dispute Settlement*, 2001 35 JWT 1, pp. 55-98 p.70.

⁸ *Bananas* case, supra at note 4, para. 141.

legal resources.⁹ The development of litigation techniques in procedural rules is something that has been shunned by the AB.¹⁰

Giving advantages to parties which lack the resources to overcome due process shortcomings vis-à-vis another party which is more capable, paving access for previously non-participating developing countries in the dispute settlement process, preventing the stronger Members from creative litigation techniques against weaker parties are all elements of justice allocation. The AB has ruled against the interests of developing nations with regard to the dismissal of claims that do not satisfy the provisions of Article 6.2. In fact, with regard to rulings that may stymie third party rights, those rulings would be deemed to be derogating from the development approach, as the institutional capacity building of developing nations would be harmed in that they would have a harder time in their familiarisation of the dispute settlement process.

Subsequently, in the *Korea-Dairy*¹¹ case, the AB attempted to make some clarifications on the subject. It held that a) the “mere listing” standard espoused by *Bananas* is not always sufficient¹²; b) the “standard of clarity” must be examined on a case-by-case basis¹³; c) when an Article establishes not “one single, distinct obligation, but rather multiple obligations. In such a situation, the listing of articles of

⁹ Weissbrodt, D., & Wolfrum, R., (eds.) *The Right to a Fair Trial*, 1998, pp. 33-37; 697-698.

¹⁰ *US-Foreign Sales Corporations* case, supra at note 1, para. 166.

¹¹ *Korea-Definitive Safeguard Measures on Imports of Certain Dairy Products* WT/DS98/AB/R (Adopted 12 Jan. 2000).

¹² *Ibid.*, at para. 128.

¹³ *Ibid.*, at para. 127.

an agreement, in and of itself, may fall short of the standard of Article 6.2”.¹⁴ and d) that in order for the panel to dismiss claims as outside its scope of reference, the defendant must show that it has suffered prejudice for the lack of clarity.¹⁵ This case seems to have shed some light on the matter; yet, a closer inspection will illustrate that in effect, it does nothing of real value in lifting the opaqueness of Article 6.2.

First, it can be argued that this case grants more powers to the panellists in decision-making without providing any road maps as to how this authority should be exercised. The fact that it must be done on a case-by-case basis means that panellists will have more authority to decide whether or not to even scrutinize a counter claim of Article 6.2 by the defendant. Second, declaring that mere listing may or may not be adequate does nothing to make the provision more predictable and coherent. According to the standards of legitimacy outlined, the adjudication on the standard of clarity does nothing to make the rule any more determinate and predictable as the disputants do not know in advance whether their claims made in the REP will be addressed by the panel during the dispute resolution process. Consistency is compromised, as a case-by-case approach judged by a disparate group of panellists will undoubtedly produce inconsistent results even though the circumstances of the case may have been similar.

¹⁴ Ibid.

¹⁵ Ibid.

2.1.1 Prejudice

The AB has injected another uncertainty to Article 6.2 by suggesting that in claims based on provisions which carry more than one obligation, mere listing may not be enough. The AB in this particular case acts in a questionable manner in terms of making a secure decision. It held that the panel should have examined the Korean claim of failure by the EC to abide by Article 6.2, and that Korea is correct in claiming that in this case, mere listing does not suffice. However, the AB decided that the claims should not be dismissed unless the defendant is able to show prejudice.

This extra criterion for the dismissal of claims is excessively onerous. This requirement shifts the objectives of Article 6.2 to that of whether a respondent's rights of due process have been infringed over the course of the proceeding as a result of any shortcomings in the REP. Developing nations already in a resource bind must not only prove that the opposing party has not clarified its claims, it must also prove prejudice. Proving prejudice is a very difficult task in any type of jurisdiction. It entails proving something that is not clearly defined and must necessarily involve the inspection and scrutiny of the parties' litigation strategy. Furthermore, the defendant could be placed in the unenviable position of having to continue its defence of a claim which it perceives to be dismissible, while simultaneously, having to argue that it was prejudiced by not having clear understanding of the claims brought against it. Of

course, this is largely due to the fact that panels have thus far shied away from issuing preliminary rulings on procedural matters before the continuation of the proceedings.

Prejudice suffered by a defendant during the resolution process is irrelevant in light of the object and purpose of Article 6.2, as the function of this provision must be determined at the outset of the proceeding. The standard promoted by the AB in no way produces predictability. What is the definition of prejudice? How can one prove prejudice suffered at the outset of a dispute, whilst continuing to defend itself against the claims of the plaintiff? At a minimum, the AB could have proposed some guidelines as to what, in fact, it means by “prejudice.” With the threshold for dismissal so high, nothing prevents a complainant from merely listing its claims complemented by at most, a very vague indication of the legal grounds with little explanatory notes, thereby causing more legal confusion and expenditure for the defendant as the probability of the claim being dismissed is very slim.

2.1.2 Obligations of an Article Directly Related or Incorporated into Another Article

Another problem that has occurred regards claims of articles which incorporate another article in it.¹⁶ The question is whether the plaintiff must include the related articles in its REP. In *Argentina Footwear*,¹⁷ the issue at stake was whether the determination of serious injury under article 4.2 of the Safeguards agreement was done

¹⁶ There are many examples within the covered agreements of the WTO (i.e., Article 3 into Article 4.2 of the Safeguards Agreement or different schedules attached in annexes; or more obviously, articles which have many paragraphs and each affords a different set of rights and obligations).

¹⁷ *Argentina-Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R (Adopted 12 Jan. 2000).

properly. The complainant (EC) had claimed violation of this provision in its request for the establishment of a panel. However, in its submissions it introduced Article 3 of the Subsidies and Countervailing Measures Agreement (SCM) in order to show that the investigation requirement pursuant to Article 4.2 was not conducted objectively. The panel made its decision taking full account of Article 3. When Argentina appealed under Article 6.2 of DSU, the AB explained that the panel was not only correct in analysing Article 3; in fact, it was obliged to do so.¹⁸

The same sort of reasoning prevailed in *Korea-Frozen Beef*.¹⁹ There, the AB stated that since the Annex and Commitment Schedule (LX) were incorporated into complainants' claims under Articles 3, 6, and 7 of the Agreement on Agriculture, reference to the Annex and Commitment Schedule in the request for the establishment of a panel is not necessary. These two cases, in effect, overturn the *Korea-Dairy* decision in situations where more than one obligation or right exists within an article; as in that case the AB had ruled that in instances where more than one obligation is addressed, mere listing is not sufficient. Thus, the Members are again left in a state of uncertainty as to in which situations mere listing suffices and in which situations more legal indication is necessary, failing to make the provision predictable both in advance and after submitting their REP. If a Member were to draft an REP with a claim which has more than one obligation within a certain Article of a WTO-covered agreement, it will not know in advance whether it meets the requirements of Article 6.2. Once the proceedings have commenced and a defendant makes a counter claim seeking to

¹⁸ Ibid., para. 75.

¹⁹ *Korea-Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161&169/AB/R {hereinafter, *Korea-Beef* or *Korea-Frozen Beef*}.

dismiss a claim based on Article 6.2, the disputants would be uncertain how much weight and attention they should give to a claim during the submission of their arguments. The parties do not know whether the claims at issue will be dismissed or not, as ex ante predictability associated with “easy cases” is greatly diminished.²⁰ This is a situation where both developing and developed nations would be harmed from the unpredictability of the matter, but developing nations would be more harmed as the expenditure of costs associated with illegitimacy of rulings is heavier on the economically weaker party. Thus, these rulings could be deemed unjust, as the advantage has not been afforded to the weaker party.

In its request for the establishment of a panel in the *India-TRIPS* case, the United States made claims against India’s intellectual property regime, and asserted that it was inconsistent with the obligations of the TRIPS Agreement “including but not necessarily limited to Articles 27, 65, and 70.”²¹ During the proceedings the US felt obliged to include in its written and oral submissions India’s lack of “mailbox” notification system in violation of Article 63. Arguably, the new claims could be related to certain provisions of Article 65, and as such the US stated that since it has used the term “necessary but not limited,” and that Article 63 is incorporated into Article 65, then it should be able to have the claims under Article 63 addressed. India claimed violation of Article 6.2 of DSU because the term “including but not

²⁰ Easy cases as opposed to hard cases are those that parties to a dispute are fairly sure of what the judgment of the adjudicators is likely to be. Easy cases tend to facilitate mutually agreed settlements before or soon after the commencement of hearings. For developing countries distinguishing between hard cases and easy cases is important in that they can save costs associated with litigation in the WTO. See Butler, M., & Hauser, H., *The WTO Dispute Settlement System: A First Assessment from an Economic Perspective*, 2000, 16(2) *Journal of Law, Economics and Organizations*, pp.503-533.

²¹ Request for the Establishment of a Panel. *India-Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/4, (Dated 7 Nov. 1996).

necessarily limited” was vague and ambiguous. The panel disagreed, but the AB reversed the panel’s holding insofar as the phrase used by the US in its REP was indeed ambiguous and counter to Article 6.2. Yet, the US claims of Article 63 were still addressed by the AB based on a lack of demonstrated prejudice, but the issue of prejudice was not explicitly addressed by the AB in its report, leaving the reasoning insecure. The question remains whether the US claims would have been inconsistent with Article 6.2 had they simply not used the term “including but not necessarily limited.” The result would have been a mere listing of alleged violations and would have had some relation to an explicitly mentioned claim.

The inconsistency and insecurity of the AB in interpreting Article 6.2 of the DSU and its “standard of clarity” are detrimental to the interests of the developing countries. Furthermore, in instances where future litigation interests of developing countries are concerned, such as third party rights and their educational effect for currently non-participating Members, the AB has ruled counter to the jurisprudential standard for justice under the development approach. As the developing countries’ learning process continues in the dispute settlement realm, the adjudicators must in the same breath devise more legitimate and just rulings for their terms of reference.

Furthermore, the costs associated with compelling claimants to identify and explain the legal basis of their allegations more clearly and precisely are negligible to the costs incurred by developing nations in defending against unclear claims. The “incorporated obligation” standard put forth in *Argentina-Footwear* and *Korea-Beef*

needs to be reformulated so that at a minimum, the *Korea-Dairy* standard for going beyond mere listing when more than one obligation is presented, prevails again. The standard promoted there was that when more than one obligation is presented within an Article, mere listing is not enough; precise indication of the measures alleged to have been in violation plus its relevant legal foundation must be included in the REP.

In sum, the treatment by the AB in relation to the requirements of the REP has been lacking legitimacy and justice. On the issue of what needs to be included in the REP according to Article 6.2, the AB has made rulings which do not afford determinacy or coherence as it is held to be done on a case-by-case basis. On subsidiary matters such as prejudice, which is a requirement in dismissing the claim even when it is held to be lacking the clarity required by Article 6.2, the rulings have been illegitimate since they provide no predictability in the definition of prejudice. Furthermore, the higher cost of litigation caused by these decisions, coupled with the knowledge that developing countries lack the institutional and legal capacity, renders these holdings unjust. This is also true with regard to incorporated Articles. If one were to stipulate that the AB has been consistently ruling that a case-by-case approach is sufficient, then future cases would suffer from ex ante unpredictability with implications for developing countries. With regard to sub-topic issues such as incorporation of obligations, the AB has continued to make inconsistent rulings, as the differences in the holdings between *Argentina-Footwear* and *Korea-Beef* as opposed to *Korea-Dairy* indicate. Thus, the AB has been unfair towards developing nations in its adjudication of Article 6.2 of the

DSU, since the rulings analysed either lack elements of legitimacy and/or justice, as has been established at the outset.

2.2 Appeals under Article 11 of DSU

Article 11 of the DSU requires that panels make an “objective assessment of the facts.” It would be logical to assume that under appeal the AB may examine whether the panel has complied with this obligation. Yet, the AB has taken a very restricted stance in this regard. If one is to assume that the developing nations lack the legal resources to investigate and inspect the evidence presented by an OECD Member, then the AB, with its mandate to function as a legal safety mechanism, would be an appropriate agency to compensate for some of this deficiency by scrutinizing the application of the law by the panel to the evidence presented. Furthermore, it should be able to examine whether the panel during its analysis of the case has correctly distinguished between issues of fact and issues of law. As the AB is the standing body of judges with considerable legal expertise, whilst the panels are headed by a variety of experts who are not necessarily lawyers, the panels possibly show less sensitivity to

legal issues.²² The AB was established as a form of compromise to accepting the binding force of the dispute settlement process during the Uruguay Round.²³

The AB should allow itself some leeway as to when and how it must scrutinise the panel process in particular, the distinctions between issues of fact and law. Since these terms are not very clear and in many cases they overlap, the AB must afford itself some powers in examining whether the panels made an objective assessment and whether this assessment was flawed. However, an inspection of the cases clearly illustrates that the AB has thus far shied away from investigating the panel's assessment of facts and even the panel's assessment of issues that are dual in nature.²⁴

The view of many legal scholars that international tribunals are ill-equipped to examine evidence properly, coupled with the fact that developing nations have difficulties investigating the evidence of the industrialised opposition, provides for an undesirable situation for developing countries.²⁵

²² The relevant part of Articles 8.1 and 8.4 of the DSU shed some light on the compositions of panels: Art. 8.1: "Panels shall be composed of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as representative of a Member or of a contracting party to GATT 1947 or as a representative to the Council of Committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member."; Art. 8.4: "To assist in the selection of panelists, the Secretariat shall maintain an indicative list of governmental and non-governmental individuals possessing the qualifications outlined in paragraph 1, from which panelists may be drawn as appropriate."

²³ Petersmann, E.U., *The GATT/WTO Dispute Settlement System: International, International Organizations and Dispute Settlement* (1997) pp. 186-189

²⁴ The dual nature arises mainly in cases where a determination of "directly competitive or substitutable" and "like" products are necessary or in anti-dumping and countervailing duties cases where much deference is granted to domestic authorities. Basically, these are cases where the distinction between matters of fact and law are not clear-cut. For more analysis look at McNelis, N., *Fact and Law in Pleadings before the WTO Appellate Body*, in Bronckers, M.C.E.J., *A Cross-Section of WTO Law* (2000) pp. 241-255 Cameron May Publishing.

²⁵ McRae, D.M., *The WTO in International Law: Tradition Continued or New Frontier?* (2000) 3 J.I.E.L. 27 pp. 32-33. Also see Thomas, C., *Litigation Process under the GATT Dispute Settlement System: Lessons for the World Trade Organization?* (1996) 30 J World T 53, pp. 69-71.

Assuming that developing nations are not as capable in generating the required evidence whilst the developed Members have stronger capabilities in doing so, then during disputes, the panels are faced with a preponderance of evidence emanating from one party. This shifts the developing nations' litigation strategy into one of constant defence and rebuttal of evidence. At a minimum, the AB should be able to limit the panels' excessive reliance on particular evidence when it sees fit and be able to inspect the assessment process of the panel. Otherwise, the proceedings in and of themselves become unjust. It may be argued that the lack of capability of international tribunals in assessing evidence should discourage allowing more claims to be brought to the AB. However, the AB is a second chance for disputants to find legal grounds that would reverse the incorrect application of the law to the facts or an incorrect distinction between fact and law.

For instance, in subsidies disputes, a common question facing the panels is whether two products are "like." Hypothetically, a developed Member asserts and provides evidence supporting its claim that the product in question is "like." The panel agrees with that assertion though the developing Member disputant disagrees. Later, the panel using the fact that the products are "like" proceeds to analyse another claim. In such circumstances the AB should be able to examine whether in light of the evidence provided, the panel was correct in assuming that the products are "like" based on the meaning of "like" under the SCM Agreement.²⁶ Of course, this does not mean that the

²⁶ In the SCM Agreement in footnote 46 the definition of "like product" is as follows: "Throughout this Agreement the term 'like product' shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product

AB should overstep its obligations and duties as prescribed by the DSU by analysing the validity of the evidence presented, but rather that they have the power to examine whether the evidence provided by the industrialised party was given adequate weight in a finding of “likeness,” or whether the finding of “likeness” is commensurate with precedent.

The examination of this sort of claim in the appellate stage becomes prudent especially with regard to the comparison of two products which are not identical and yet may or may not be considered “like” in the context of the SCM Agreement.²⁷ The AB could ask itself whether the panel truly understood the characteristics of the product in question, whether the comparison of the two products is correct, or whether another similar product should have been the basis of comparison. The developing country disputant would have less chance of winning an appeal based on the SCM Agreement, as the term “like product” is a footnoted, stipulated definition and not an actual provision of the Agreement itself. There are no concrete guidelines in the Agreement to assist in the panel’s decision. Thus, it should be the responsibility of the AB to inspect the panel’s application of the defined term in the Agreement to the evidence presented under Article 11 of DSU.

In the *Australia-Salmon*²⁸ case, the AB provided an interesting elaboration of its stance concerning Article 11. There, it explained that in past cases such as

which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.”

²⁷ Refer to the last sentence of SCM Agreement footnote 46.

²⁸ *Australia-Measures Affecting Importation of Salmon*, WT/DS18/AB/R (Adopted 20 Oct. 1998).

*Hormones*²⁹ and *EC-Poultry*³⁰ it had followed the line that determining the “credibility” to be afforded to certain facts is the mandate of the panel, and it is not the duty of the AB to “second guess” the panel’s findings.³¹ It said that it could only reverse the panel’s findings if the panel’s assessment of facts was so flawed as to render an objective assessment impossible.³² It also held that the panel could only violate Article 11 in the most extreme cases where it committed a truly “egregious error, so serious that it would call into question the panel’s good faith.” It utilised language such as “wilful distortion or misrepresentation of the evidence.”³³ In essence, the AB has set the threshold for establishing failure to abide by Article 11 of DSU so high that it is next to impossible to prove such occurrence.

The “wilful error” standard is one that is extreme. Though it can harm any Member’s interests, it is more detrimental to the weaker developing nations. It requires the appellants to allege that the panellists were, in essence, lacking the necessary aptitude. In the diplomatic and international setting, this is an allegation that is rarely appropriate, especially since the panellists are in many instances diplomats themselves, in constant contact with the parties of the dispute on issues other than trade.³⁴ These allegations, if made by a party, would be counter to diplomatic comity and may have spillover effects. Thus, the parties to a dispute under this standard set by the AB are for all intents and purposes unable to claim Article 11 violations. It

²⁹ *EC-Measures Concerning Meat and Meat Products*, WT/DS26/AB/R para. 122-125.

³⁰ *EC-Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R (Adopted 23 July 1998).

³¹ *Supra* at note 28, para. 265-267.

³² *Ibid.* at para.267.

³³ *Ibid.* at para. 266.

³⁴ Based on interviews with the Thai, Philippines and Costa Rican delegations on February 14th, 16th and 22nd 2002 in Geneva, Switzerland.

might be further argued that this diminishes the rights of Members negotiated under the multilateral agreements in contravention of Article 3.2 of the DSU, as it prevents a Member from invoking rights that have been guaranteed under the WTO Agreement.

The AB would be fulfilling its duties insufficiently by affirming an error of fact where that error was crucial in the resolution of the dispute. These types of panel judgments should be open to evaluation by the AB, and they should be corrected under Article 11. To allow clear errors stand undermines the legitimacy of the system. It gives way to the possibility that similar cases will not result in similar outcomes because the latitude granted to the panels to assess the facts, application of law to the facts, and matters of dual nature is excessively broad. The panellist selection process of the WTO exacerbates this possibility due to its lack of a standing body. Furthermore, if coherence is compromised, it can easily lead to an insecurity in ruling because the manner in which the facts are assessed might not have adhered to a normative principle of international law under the development approach.

Arguably, the AB has been correct in allowing such latitude to the panels. They cite Article 17.6 of the DSU, which states, “An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.” This argument seems sound, though not valid in this context. First, it can be argued that the AB has decided on questions of facts in many instances, and this is due to its arguable lack of remand authority.³⁵ Examples of such decisions are the *US-Reformulated*

³⁵ Palmeter, D., and Mavroidis, P.C., *Dispute Settlement in the World Trade Organization: Practice and Procedure* (1999) Kluwer Law Publishing, pp. 84-95.

Gasoline, EC-Poultry, Canada-Periodicals, and India-Patent Protection of Pharmaceuticals cases,³⁶ where the AB either “completed the analysis” or reversed and modified the panels’ decisions, and made *de novo* findings.³⁷ Second, in cases which involve the application of the law to the facts (they may also be dual-natured issues of law and fact)³⁸ the AB under Article 17.6 is obliged to scrutinise the examination process of the panel. Therefore, such a high standard for reversing the panel’s holding under the “objective assessment of facts” provision is unnecessary as a matter of law and detrimental as an institutional matter for developing Members.

As raising the threshold of valid claims under DSU Article 11 is more harmful to weaker developing nations, the AB should be more lenient in its interpretation of the Article as a matter of justice. The legitimacy of the cases involving claims of Article 11 has thus far met the required criteria, and as such they have not been focused upon in this section. However, the weaker Members have not been advantaged by the AB’s interpretation. Thus, from the perspective of developing nations the matter of appeals under Article 11 of DSU has been handled in an unjust and thus, unfair manner. This is an issue whereby it is prudent to adjust Franck’s “management” of legitimacy and justice, with the fourth criterion of the Development Approach, i.e., that where compromises have to be made with regard to justice and legitimacy, justice should be prioritised. Many aspects of WTO law involve the application of legal standards to a

³⁶ *US-Standards for Reformulated Conventional and Gasoline*, WT/DS2/AB/R (Adopted 20 May 1996); *Canada-Certain Measures Concerning Periodicals*, WT/DS31/AB/R (Adopted 30 July 1997); *India-Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R (Adopted 16 Jan. 1998).

³⁷ For a more complete discussion on the AB lack of remand authority and its inspections of factual issues, see Palmetier and Mavroidis, *supra* at note 35, pp. 147-152.

³⁸ Examples are given in footnote 36.

particular set of facts. Proper assessment of determinations of injury, causality, “like” products and a plethora of similar issues is vital to developing countries’ interests in the dispute settlement regime. A less restrictive view of this issue will insure that the application of law to the facts will be done more prudently, as failure to do so will only exclude an important portion of WTO law from the AB’s review.

2.3 Burden of Proof

As the WTO dispute settlement regime grows more complex and juridical, the question of burden of proof has become increasingly contentious. In fact, nearly a third of all cases either directly or indirectly deal with placing the burden of proof on the appropriate party as explained in the DSB reports. The WTO, as with many other international tribunals, adheres to the principle of *actori incumbit probatio*, that the party asserting a fact is responsible for providing the proof of the fact.³⁹ The AB in *US-Wool Shirts* explicitly reaffirmed the WTO’s adherence to this principle.⁴⁰

However, some confusion still exists with matters that are known as “General Rule Exception” (GRE) and affirmative defence. A GRE is an exception to a WTO principle included in the provisions of WTO Covered Agreements, most often in the form of a safeguard measure. One example is rules which allow derogation from Most-Favoured-Nation principle (MFN) or national treatment principles due to

³⁹ See, amongst others, Martha, R.S.J., *Presumptions and Burden of Proof in World Trade Law*, 14 *Journal of International Arbitration* 1, at 67-68, and Kazazi, M., *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals* (1996), pp. 175-180, Kluwer Law Publishing.

⁴⁰ *United States-Measures Affecting Imports of Woven Wool Shirts and Blouses from India* WT/DS33/AB/R (Adopted 23 May 1997). p. 16 {hereinafter, *US-Wool Shirts or India-Blouses*}.

environmental or health and safety reasons. When a defendant claims that its measures, although contrary to WTO principles, are nonetheless allowed under a certain provision, the burden of proof shifts from the claimant to the Member taking the safeguard measure. An affirmative defence, which is not an established international legal norm, merely accepts the claim of exception by the defendant but does not shift the burden of proof to it; rather the claimant must prove that the measure is not consistent with the WTO provision. An analysis of the case law will illustrate that the AB's interpretation of GREs and affirmative defence has been predictable and coherent but lacks security and an adherence to international legal norms. Furthermore, the rulings on burden of proof have led to a situation whereby claims against protectionist measures levied on developing country exports are raised to a point that grants excessive deference to industrialised Members' domestic authorities to levy non-tariff barriers. As due process is thought to function as a leveller of power and stature in the eyes of the law, developing countries have a strong litigious interest in the clarification of the burden of proof.⁴¹ This section will show that the adjudicators' reasoning lacks adherence to international legal norms or security under the development approach. This lack of security lies in the misconstruction of the term "burden of proof," as the AB has failed to distinguish it from the notion of "burden of evidence." This failure will be assessed after an examination of the cases and the demonstration of the AB's view towards the burden of proof. A second-best approach will also be developed that will suggest that even if the AB believes that Articles 3.3 of SPS, 6 of ATC, and Article 27.4 of the SCM are not GREs, but rather

⁴¹ Gaskins, R.H., *Burden of Proof in Modern Discourse* (1993 Yale Univ. Press) p. 83-86

that they are affirmative defences, they could have allowed the shifting of the burden of evidence whilst retaining the burden of proof on the claimant.

The *EC-Beef Hormones*⁴² case can be characterized as the benchmark decision with regard to the burden of proof and GRE. There, the AB held that “merely characterizing a treaty provision as an “exception” does not by itself justify a “stricter” or “narrower” interpretation of that provision than would be warranted by examination of the ordinary meaning of the actual treaty words, viewed in the context and in the light of the treaty’s object and purpose, or, in other words, by applying the normal rules of treaty interpretation.”⁴³ It basically took a very literal approach in interpreting the exceptions, and limited Members to only a few GREs, i.e., Articles XX and XI (2)(c) of GATT.

In that case, the panel had ruled that Article 3.3 of the SPS Agreement is a GRE, and thus, is incumbent on the party invoking this exception to defend its actions.⁴⁴ The AB reversed the panel’s ruling, claiming that the panel made an interpretational error and should not have classified this provision as a GRE. SPS Article 3.3 allows Members, on the basis of scientific justification or appropriate risk assessment, to impose a higher level of sanitary and phytosanitary measures than international norms in accordance with, *inter alia*, SPS Article 5. The panel’s decision would have been advantageous to developing countries, as their agricultural exports would have been harder to block by developed nations. Industrialised countries often impose higher

⁴² *EC-Measures Concerning Meat and Meat Products*, WT/DS48/AB/R (Adopted 13 Feb. 1998).

⁴³ *Ibid.*, at para. 104.

⁴⁴ Agreement on Sanitary and Phytosanitary Measures, part of the WTO Covered Agreements.

standards than the international norm for environmental and health considerations.⁴⁵ The impact on developing countries is negative, as developing country exports usually bear the brunt of those higher standards. The risk assessment requirements mandated by Article 5 of the SPS are easier to satisfy for industrialised nations, as the scientific studies and evidence needed to impose higher levels of SPS are better conducted by richer nations. Under the current situation, once a Member raises the SPS standards in supposed conformity with its obligations, it forces the other party to prove that its risk assessment studies were not reliable or valid. This is a great hurdle for developing nations to overcome, in a sector that is crucial to their export interests. It seems that only Members such as the US or EU can fight these battles equitably. This is particularly true since developing countries tend not to raise their sanitary standards more than required, for example to comply with international standards, as the cost to their domestic food and agricultural industry would be dear.

The *actori incumbit probatio* principle has been well established and functions quite predictably and consistently. The only point of contention seems to be issues relating to GRE and what the AB has coined as “affirmative defence.” Until now, the adjudicators have held that Article XX and XI:(2)(c)(i) of GATT are limited exceptions from general principles of the WTO, and thus, the respondent party invoking them has the burden of proving their conformity with their obligations.⁴⁶

⁴⁵ Wilson, S. & Otsuki, T., *Global Trade and Food Safety, Winners and Losers in a Fragmented System*, 2001, World Bank Policy Paper no. 2698

⁴⁶ *India-Blouses*, Supra at 40, para.14.

Yet, the AB has taken a stricter approach in categorising other exceptions similar to GATT Article XX and XI:(2)(c)(i). Aside from SPS Article 3.3, Article 6 of the ATC allowing the imposition of quantitative restrictions under certain circumstances, and Article 27.4 of the SCM allowing for certain export subsidies by developing countries are other examples of GREs. In *US-Wool Shirts, Argentina-Footwear*, and *US-Cotton Underwear*⁴⁷ the AB affirmed that Article 6 of the ATC is not a General Rule Exception; rather it illustrates a delicately balanced agreement, which was negotiated by the Members during the Uruguay Round. It further held that tinkering with this fine balance would alter the landscape of all the agreements covered by the WTO.⁴⁸

Although the AB has provided a consistent and predictable approach on this matter, nevertheless, it has caused some consternation from the developing nations. As textiles and clothing are two of the major exports of developing countries, the ATC is of great importance. Article 6 is a large obstacle for these nations, as importing countries can apply quantitative restrictions. If this Article were held to be a GRE, it would make it much more difficult for developed nations, as evidenced by the mentioned cases, to block exports from the third world.⁴⁹

As major exporters of textiles and agriculture, developing countries are at a disadvantage, as they are not able to effectively challenge the domestic authorities of

⁴⁷ *United States-Restrictions on Imports of Cotton and Man-Made Fibre Underwear from Costa Rica*, WT/DS24/AB/R (Adopted 25 Feb. 1997).

⁴⁸ *India-Blouses* supra at note 40; *Argentina-Footwear* supra at note 17.

⁴⁹ Although the Multi-Fiber Agreement has expired as of January 1, 2005, Article 6 of ATC still is applicable. The importance of this provision may have been diminished, but the underlying concepts of burden of proof and GRE are, nevertheless, relevant.

industrialised Members. They lack the information necessary to fully comprehend the manner in which the domestic authorities appraised the evidence to justify the levying of a non-tariff barrier, such as quantitative restrictions; whereas the industrialised Members would not be in an opposite position as they are in general importers or avid protectionists of agricultural and textile products. Developing countries can attempt to alleviate this problem by requesting a more thorough examination by the panels of the respondent's domestic authorities' investigations justifying their imposition of quantitative restrictions.⁵⁰ But, with the AB's reluctance to review panellist conduct under Article 11 and the existing panellist selection process, this strategy may not be effective.⁵¹

To the benefit of developing countries, the AB kept the same line of reasoning in the *Brazil-Export Financing*⁵² case. There, Canada claimed that Article 27.4 of the SCM, which allows developing nations to provide subsidies, derogates from SCM Article 3, and is therefore, a GRE.⁵³ The panel with AB affirmation disagreed and held that Article 27.4 does not deserve a shifting of the burden of proof. However, this provision is different from ATC Article 6 and SPS Article 3.3 in that it has made a specific reference to developing nations. It is explicit; and the balancing of rights which the AB and panels have alluded to is built-in and self-evident. Most importantly, SCM Article 27.4 requires consulting the Committee on Subsidies and

⁵⁰ Though the Agreement affords much deference to national authorities and does not allow adjudicators to make *de novo* review of their decision, nevertheless, the panels can instill limitations on the contours of this deference by scrutinizing the objectivity of those national authorities' decision.

⁵¹ See Article 8 of the DSU on the panelist selection process and its ad hoc approach to selecting panelists from a large roster of diplomats, academics, economists and lawyers submitted by Member States.

⁵² *Brazil-Export Financing Programme for Aircraft*, WT/DS46/AB/R (Adopted 20 Aug. 1999).

⁵³ Agreement on Subsidies and Countervailing Measures.

Countervailing Measures, mandating approval by the Committee; otherwise the measures must be withdrawn. This requirement sets the provision apart from the other provisions, as the determination of the validity of the exception is in the first instance made by a WTO Committee and not by the domestic authorities of a Member.

The AB refuses to allow any other GREs than the already established provisions. The ruling on Article 27.4 of SCM, which seems to have been beneficial to developing nations, was mandated by the Agreement itself in very explicit terms. However, in other areas, which an explicit preferential treatment has not been proffered by the text of the treaty, the AB has consistently ruled on the issue of GREs and burden of proof in a manner that harms the developing nations' exports.

The category of GREs should include, at a minimum, ATC Article 6 and SPS Article 3.3. Instead, the AB has selected to grant these provisions “affirmative defence” status. The reasoning of the AB delineating the differences between the two concepts is not convincing. In this regard, the AB in the *Gasoline* case, when discussing Article XX and GREs, implicitly signals that a GRE is a type of affirmative defence that if held valid would basically be counter to the spirit and fundamentals of the WTO.⁵⁴ There seems to be no practical distinction between GREs and affirmative defences in the reasoning of the AB in *Gasoline*.

⁵⁴ Supra at 36, *Gasoline*, section VI.

2.3.1 Insecure Reasoning

In all the cases discussed, the AB has reiterated that once a party asserts a fact and provides the proof for that assertion, the burden shifts to the respondent to rebut the claimant's assertions. This is the approach taken by common law jurisdictions, as these jurisdictions have two levels of burden of proof.⁵⁵ The first level is the substantive aspect of the burden of proof, which holds that the plaintiff has the duty to persuade the adjudicator by the end of the case of the truth of its pleadings and assertions.⁵⁶ The second level, which could be called "burden of evidence," is a procedural matter which can shift from party to party during the trial and signals the timing and process by which assertions must be defended by evidence.⁵⁷ The fact that a party has discharged its burden of evidence does not mean that it has also discharged its overall burden of proof though there are many overlaps between the two concepts.⁵⁸

Therefore, the AB by not making this distinction has acted in an insecure manner in that it has not abided by international adjudicative norms. In international tribunals the most utilized approach is that used by civil law jurisdictions.⁵⁹ There the parties make their arguments, present their evidence and must wait until the end of the trial when the judge or judges makes their final determination of whether the burden of

⁵⁵ In civil law jurisdictions there is only one level of burden of proof, and that is the final burden of persuading the adjudicator of one's truthfulness in claims. Refer to Sandifer, D.V., *Evidence Before International Tribunals*, (1975) pp. 125-127.

⁵⁶ Heydon, J.D., *Cases and Materials on Evidence* (1975) p. 13.

⁵⁷ Kazazi, M., *Burden of Proof and Related Issues: A Study of Evidence Before International Tribunals*, (1996) p. 25; Cross, T. & Wilkins, *Outline of the Law of Evidence*, 5th ed. (1980) p. 27.

⁵⁸ *Ibid.*, pp. 33-34.

⁵⁹ Mani, V.S., *International Adjudication: Procedural Aspects*, (1980) pp. 202-206.

proof has been discharged. However, the AB has taken the common law approach by ruling that the burden shifts during the proceedings. This is suitable as long as the GREs and affirmative defences are categorised accordingly.

2.3.2 Affirmative Defence, Burden of Evidence and an Alternative Approach

If the AB continues to treat GREs and affirmative defences as distinct concepts, then an alternative approach exists which would make the application of the burden of proof more fair. Article 3.3 of SPS states that members must provide scientific justification for imposing higher standards. Furthermore, the justifications could be read in accordance with Article 5 of SPS, which provides guidelines for the assessment of risks and the appropriate level of SPS protection. The wording of Article 5 is directed at the party imposing those higher standards. Article 6 of the ATC uses stronger language in that it states that the members imposing safeguard measures must “demonstrate” that the product in question is being imported at excessive quantities.⁶⁰ The AB has correctly placed the overall substantive burden of proof on the claimant, but it has incorrectly placed the burden of evidence on the party seeking to reverse protectionist measures. The AB should have allowed the safeguard provisions of the SPS and ATC to be deemed as GREs, and as such, accorded the overall burden of proof on the exception-imposing party.

Instead, it created a new distinction in international law, i.e., between affirmative defence and general rule exception. The result is that in the future if there are any

⁶⁰ ATC Article 6.2.

provisions providing exceptions to the general principles of the WTO, the claimant must pass two burdens: one of evidence and one of proof. The reasoning of the AB in this matter has not adhered to international norms of evidence and burden of proof, as tribunals either adhere to the civil law approach or, if not, they distinguish between the two levels of burden.⁶¹

The inclusion of the concept of affirmative defences could have functioned as a second-best approach, if the AB had held that affirmative defences are pleadings that shift the burden of evidence on the party invoking the protectionist measure according to the criteria set in the SPS or ATC; nevertheless, the overall burden of proof of the case remains with the claimant. In order to claim exceptions, the SPS and ATC agreements have mandated an extensive evaluation of economic and scientific data. With regard to the ATC, the economic data necessary for the authorities of the protection-imposing Member are overwhelmingly domestic in nature. The same is true to a lesser extent in regard to the SPS exceptions criteria, as the scientific research required to impose the safeguards are mostly available in industrialised countries. The domestic agencies of Members are not required to present all the data that led them to their safeguard measure. Thus, the developing nations, in particular, are powerless in gathering evidence so as to prove that the imposition of protectionist measures does not meet WTO requirements. Furthermore, if these Articles were held to be GREs or that affirmative defences carry the burden of evidence, they could have promoted more cooperation amongst the parties to share their data at the consultations phase

⁶¹ Kazazi, *Supra* at note 57, pp. 86-90.

promoting more settlement during that phase, and/or allowed better preparations by the parties during the litigation.

If the AB had ruled to include these provisions as GREs, or at least ruled that affirmative defences place the burden of evidence on the responding party, it would have acted more or less consistently, predictably and securely. Some experts argue that the AB has abided by the customary rules of interpretation as set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. They claim that these rules do not afford grounds for preferring one portion of the text to another, by construing one provision more broadly than the other.⁶² However, the due process considerations as expounded in this section outweigh the argument that literal interpretation is the best path. In fact, the development approach's principle of capacity building and access to industrialised markets would have persuaded the adjudicators to be less literal and textual in their interpretations. Article 3.2 demands that adjudication should not add or diminish Members' rights and that the dispute settlement of the WTO should provide security and predictability. The implementation and application of these obligations in the provision would be sacrificed if one were to read Articles 3.3 of SPS and 6 of the ATC in a strictly literal manner. Moreover, Article XX and Article XI: 2 of GATT are not worded much more narrowly than the exception-creating clauses mentioned above (Article 6 ATC and Article 3.3 SPS) to justify the exclusion of those clauses from the list of GREs, or at least to shift the burden in instances of affirmative defence. In addition, ATC Article 6, SPS Article 3.3 and other similar provisions are clear exceptions to the general

⁶² Palmeter, D., & Mavroidis, P., *Supra* at note 35, pp. 84-85.

principles of the WTO; as such, the allocation of the burden of proof or even the burden of evidence should not be different from the established GREs of Articles XX and XI:(2)(c)(i).

2.4 Judicial Economy

The concept of judicial economy in WTO law is outlined as a panel's need to "address those claims, which must be addressed in order to resolve the matter at issue."⁶³

According to the AB in *US-Wool Shirts*, the panel is not obliged to rule on all claims put forth by the disputants. However, in a legal order such as the WTO, this judicial discretion should be utilized with more caution when developing nations are parties to a dispute. It is not proposed that in every case the adjudicators should rule on all claims, but it should at a minimum understand the disadvantages faced by economically weaker parties in a dispute. Limiting the use of judicial economy in disputes involving developing countries is beneficial in that problems associated with the implementation of the rulings may be alleviated if the parties have more legal guidelines to refer to during negotiations on remedies. Less reliance on judicial economy by panels would increase predictability and accordingly the fairness of the system by providing clearer guidelines for states as to how to implement DSB decisions.

Due to economic developmental needs and a lack of well-functioning trade and legal infrastructure, implementation of DSB recommendations is quite problematic for

⁶³ *India-Wool Shirts* Supra at 40, p.19.

developing nations.⁶⁴ The defeated developing country needs to be directed as to how to proceed and recognise the exact WTO inconsistencies it must address with regard to its trade measures. Overuse of judicial economy hinders the ability of developing states to correct trade restrictive behaviour. Likewise, when a developing nation has won a case, it would prefer a more legally accurate and comprehensive guide as to how the loser of the dispute must modify its measures into conformity. This is particularly important as the asymmetry in economic power between developing and industrialised nations is a huge obstacle to a truly equitable remedy regime.⁶⁵ Of course, if the ruling of the adjudicators will clearly determine and settle the course of implementation, then the invocation of judicial economy might be prudent. It must be able to afford any reasonable person skilled in international law and economics the understanding of its ruling and its intentions with regard to implementation. This implies that it should be absolutely clear when the measure has to be fully withdrawn, and it should indicate when minor reforms of the measure would be insufficient.

The jurisprudence of the WTO illustrates that the panels and AB have overused judicial economy and have done so unpredictably. Thus, indirectly leading to less certainty in implementation. Initially, in *Gasoline* and *Japan-Taxes*,⁶⁶ the panel and

⁶⁴ For more insight into the problems of developing nations in the implementation of rulings in the WTO remedy regime, see, amongst others, Horn, H., & Mavroidis, P., *Remedies in the WTO Dispute Settlement System and Developing Country Interests*, paper for World Bank (11 April 1999) pp. 20-30 found on www.worldbank.org; Hoekman, B., & Mavroidis, P., *Enforcing Multilateral Commitments: Dispute Settlement and Developing Countries* (Sept. 1999) paper prepared for the WTO/World Bank Conference on Developing Countries in a Millennium Round, found at www.worldbank.com; Lal Das, B., *The WTO Agreements: Deficiencies, Imbalances, and Required Changes* (1998) Zed Books, pp. 9-23; Footer, M., *Developing Country Practice in the Matter of WTO Dispute Settlement* (2001) 35 J. World Trade 55 pp. 69-75.

⁶⁵ See Horn and Mavroidis, *Ibid.*, pp. 4-17.

⁶⁶ *Japan-Taxes on Alcoholic Beverages*, WT/DS10&11/AB/R

AB implicitly indicated that they would address all claims.⁶⁷ Later, the AB clarified its stance in *India-Shirts*, stating that Article 11 of DSU does not force the adjudicators to respond to every claim. In *Australia-Salmon*, the AB held: “To provide only a partial resolution of the matter at issue would be false judicial economy.” It reversed the decision of the panel because of not addressing the SPS violations that were claimed by Canada concerning farmed salmon and non-ocean caught Pacific salmon.

The panel had held that Australia was in violation of Article 5.1(b), 5.5 and 5.6 of the SPS Agreement with regard to ocean-caught pacific salmon and in violation of Article 5.1(b) pertaining to other salmon products. It declined to rule on Canada’s claim of violation of 5.5 and 5.6 of SPS for the non ocean-caught pacific salmon based on judicial economy concerns. It further stated that the parties, in particular the claimant, had focused their evidence and arguments on the ocean-caught pacific salmon.

The error, rectified by the AB, was that the panel should have decided on all those claims because the terms of reference of the panel included all types of salmon. The panel could then have simply held that Canada did not make a prima facie case or that the evidence provided was not convincing. If this dispute involved a developing nation as claimant, at the implementation stage, it would be in far worse position to protect its interests than Canada.⁶⁸ Products such as smoked, cured or farmed salmon

⁶⁷ Cameron, J., & Grey, K., *Principles of International Law in the WTO Dispute Settlement Body* (2001) 50 Int. & Comp. Law Quarterly 248, p. 282.

⁶⁸ In fact, India participated as a third party. It had an interest in the fish exporting industry, which is important for India. India sided with Canada on the issue of judicial economy.

would still be blocked from entering Australia because those measures would not have been in violation of SPS 5.5 and 5.6.

An example where the panel and AB arguably exercised better use of judicial economy is in the *Canada-Car Industry*⁶⁹ case. The EC had made an “alternative claim” (under Article 3.1(a) of the SCM Agreement) aside from its core claims of violation of Articles III: 4 of GATT and XVII of GATS. The panel again, simply ignored those claims and was appropriately reprimanded by the AB for the oversight. However, the panel did correctly set aside EC arguments that certain (CVA) requirements by Canadian authorities are subsidies based on export performance under SCM 3.1(a), though the panel found Canada to be in violation of 3.1(a) for other reasons. This is one case where the recommendation of the DSB would, in effect, withdraw the measure completely. The panel had already ruled in favour of the EC based on WTO provisions that any “good faith” remedial action would entail almost full withdrawal of the measure.

Another circumstance where the adjudicators tend to utilize judicial economy is when certain legal questions may be potentially controversial and politically sensitive. Unlike the concept of “political question doctrine” in US jurisdiction, which allows the court to reject hearing the case if the dispute is deemed to be a political matter,⁷⁰ in

⁶⁹ *Canada-Certain Measures Affecting the Car Industry*, WT/DS139/R & 142/AB/R.

⁷⁰ In fact, the Supreme Court of the US may refuse to grant a *writ of certiorari* in any case in which less than four of the nine justices decide that, irrespective of the matter being political in nature or not, the case should not be brought to the high court. However, lower courts may only refuse the hearing of a case for political issues. Most of the political issues that are not allowed a court hearing have to do with decisions and actions relating to foreign affairs and the executive branch.

international law and many municipal jurisdictions the judge or tribunal is forbidden from failing to reach a decision on a dispute in its entirety (*non liquet*).⁷¹ This is particularly true for the WTO, as Article 3.2 demands that the dispute be resolved in a positive manner.

Under these circumstances the panels and AB try to avoid these tinderboxes, which might have institutionally destabilizing effects. The *Turkey-Textile*⁷² case and *Korea-Beef* case are two examples. In the former, the panel stated that it is “arguable” whether they are competent to scrutinize a trade arrangement between the EU and Turkey under Article XXIV:8(a) and 5(a).⁷³ They decided that the case could be resolved without causing a political row, which would very likely ensue were they to rule that the arrangement was WTO-inconsistent. The fact that neither party raised this issue on appeal could be viewed as affirmation of this view. In *Korea-Beef*, the panel held that it did not need to rule on the claim of Article XX GATT violation, as this is an environmental issue with the potential of causing much consternation from environmental lobbies worldwide. In both these cases the panel and AB had plenty of other claims to adjudicate, with determinate resolutions within reach without causing institutional controversy. This may be deemed an appropriate use of judicial economy. However, if the cases were such that the core claims involved potentially

⁷¹ Thirlway, H.W.A., *Evidence Before International Courts and Tribunals*, in Bernhardt, R. (eds.), *Encyclopedia of Public International Law*, Vol. 1 (1981) p. 59; Cheng, B., *General Principles of Law as Applied by International Courts and Tribunals*, reprinted (1987), pp. 334-340.

⁷² *Turkey-Restrictions on Imports of Textiles and Clothing Products*, WT/DS34/AB/R (Adopted 19 Nov. 1999).

⁷³ *Ibid.*, para. 60.

controversial decisions, the adjudicators must not avoid them by ruling on other narrow legal issues that might be tangential to the main legal matters.

These cases must be contrasted with *Bananas* and *Shrimp/Turtle* in order to highlight the line which must be drawn in potentially controversial political cases as they relate to judicial economy. In *Bananas* and *Shrimp/Turtle*, the central elements of the dispute were the EU's banana regime for African, Caribbean and Pacific (ACP) countries and the environmental effects of fishing nets used for catching shrimp, respectively. Though there were a variety of claims under different agreements in both cases, nevertheless, they were all fruits of the core trade restrictive tree, i.e., the banana regime of the EU and the banning of shrimp imports caught by turtle harming nets. In comparison, the *Turkey-Textiles* case had at its core measures restricting textiles from India, with the most relevant claims coming under the ATC Agreement and not GATT Article XXIV:8(a) and 5(a). Also, the core issue in the *Korea-Beef* dispute related directly to the Agricultural Agreement and the importation of frozen beef products. The invocation of Article XX by Korea was not the central element of the case. Both cases resulted in the full withdrawal of the measures.

Some of the problems associated with the notion of using judicial economy in a more predictable manner stems from the absence of lucid and clear procedural rules in the DSU. First, when a panel disposes of a matter based on judicial economy, it is possible that the AB will reverse that decision and then it must rule on that matter *de*

novo, as evidenced in *Salmon and Poultry*,⁷⁴ because it arguably does not have remand authority.⁷⁵ This allows for imperfect rulings, as the AB does not have the authority to review the factual findings of the panel, and also it deprives the Members of their right to appeal. Remand authority is debatable, as some believe that there is nothing that prevents the AB from requesting the original panel to rehear the case based on AB instructions, whilst others believe that the AB has no such authority.⁷⁶ Nevertheless, past practice indicates that the AB holds the latter view. Second, the panel and AB do not provide preliminary rulings dismissing the claim for lack of prima facie evidence or relevance. If they did, it would be possible for the adjudicators to rule on all claims which were deemed to be prima facie true, and thus avoid many of the problems associated with judicial economy. Dismissal of claims could function as a guide in that it illustrates that the circumstances of that particular case do not warrant examinations based on the allegations presented. The implementation phase will be more certain, since the dismissed claims will assist the negotiation of the parties by clarifying what actions may or may not be taken in bringing the losing party's measures into conformity. It will immunize the losing party after it has taken steps to conform to the ruling from future identical claims by other Members. Whereas under the current situation, there is nothing that would prevent another Member, or even the Member which won the case, from lodging the same claims against a measure that was not addressed by the panel due to judicial economy concerns. Also, it has precedential

⁷⁴ It may be argued that *US-Gasoline* (WT/DS2/AB/R Adopted 29 April 1996) and *Canada-Periodicals* (WT/DS31/AB/R) were similar in that the AB took up claims which were not ruled upon at the panel stage though the AB did not explicitly mention the concept of judicial economy.

⁷⁵ See Bourgeois, J.H.J., *Some Reflections on the WTO Dispute Settlement System*, Journal of Int. Economic Law (2001), p. 152.

⁷⁶ *Ibid.* Bourgeois believes that the AB has that authority, while Palmetier and Mavroidis disagree.

value in that future claims could be more focused in scope, as Members will know what claims apply to which circumstances. The AB in *Bananas* recommended just such a procedure in the footnote of its report.

Claims based on inaccurate use of judicial economy are almost always grounded in the wording of Articles 11 and 7.2 of the DSU. These claimants believe that the panel has not made “an objective assessment of the matter *before it*” and/or has not “addressed the *relevant* provisions in any covered agreement or agreements *cited* by the parties to the dispute.”⁷⁷ If they have made a prima facie case, then that is surely before the panel, cited by the parties, and relevant to the case. In fact, using the reasoning in *Australia Salmon* by the AB, one can assert that since all products in the terms of reference of a panel must be addressed, the same should be true for the legal claims associated with those products. In order to clarify the nexus between judicial economy and the aforementioned DSU provisions, the panel should be able to make preliminary decisions during the initial phases of the process and dismiss superfluous claims. This will elucidate the relevant claims, satisfying the text of Article 7.2. Also, the dismissed claims may function as guidelines for Members involved in future similar disputes, avoiding redundancy of claims that the DSB has already indicated to be extraneous.

Opponents of this proposal counter that to have preliminary rulings will model the WTO system more like a common law regime. The dispute settlement system of the WTO is more inquisitorial and investigative similar to civil law systems. However,

⁷⁷ Articles 11 and 7.2 of the DSU, respectively.

firstly, the WTO has borrowed legal principles from different legal jurisdictions and, as such, there is no reason why this procedure should not be added.⁷⁸ Secondly, if the party has made a prima facie case, then the inspection continues; however, if a party has not made a prima facie case or panellists are in doubt as to whether it has been made, then the possibility exists that further inspection into that claim could have the effect of making the case for the claimant. This would be counter to basic principles of international law, as the adjudicators' neutrality prevents them from assisting claimants in their litigation efforts. The panel should have the right and obligation to inquire and investigate into the claims that have already been held to be prima facie true.

The concept of judicial economy has been mentioned and ruled upon both explicitly or indirectly in approximately 64% cases.⁷⁹ The prevalence of contention on this procedural issue in WTO disputes illustrates that the Members do not have full understanding of the system's use of this concept. The decisions made by the AB and the panels indicate a systematic lack of predictability and transparency with regard to judicial economy. The developing nations more than the wealthy Members need the predictability with respect to adjudicators' use of judicial economy as it could have repercussions into the implementation phase of the dispute settlement regime. This failure to meet a necessary legitimacy element has led to unfairness from the

⁷⁸ Cass, D.Z., *The Constitutionalization of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade*, 12 E.J.I.L. 3-38 (2001), specifically the discussion on Constitutional Doctrine Amalgamation.

⁷⁹ The calculations were made until April 15, 2004. Also, indirectly, the percentage indicates instances where the panel has simply ignored to rule on certain claims. However, no objections on record were made by the parties either on appeal or in the DSB meeting after the ending of the case.

viewpoint of developing nations, as it has injurious effects on these Members' interest in the implementation phase.

2.5 Amicus Curiae Submissions by Non-governmental Organizations

The creation and evolution of the WTO as the governing pillar of the multilateral trading system has provoked non-governmental organizations to demand more participation in the dispute settlement process. To this end, they have submitted amicus curiae (friends of the court) briefs to WTO panel and AB proceedings. The acceptance by the WTO adjudicators of amicus curiae briefs has aggravated many developing country Members who claim that their acceptance puts them in a disadvantageous position vis-à-vis industrialized Members.⁸⁰ This section will explore three issues. First, that the legal arguments and interpretations put forth by the AB are not convincing, and therefore, do not assist in building a legitimate system. Second, as a practical matter, the acceptance of the amicus briefs have negative consequences for developing Members' institutional interests, which signify the unfairness of the AB's treatment of the matter. Third, the guidelines enumerated in the *Asbestos*⁸¹ case do not assuage the concerns of developing nations even if they are assumed to be procedurally adequate.

⁸⁰ See WT/DSB/M/50, Minutes of Meeting Held in the Centre William Rappard on 6 Nov. 1998 (14 December 1998); furthermore, 18 out of the 21 delegates interviewed for qualitative research held the view that the inclusion of third party briefs into the dispute settlement process is of great detriment to their litigation strategies. Of the other 3 delegates, 2 believed it to be of no importance, and one believed that it is a good idea to have third party submissions but the way the AB used its judicial authority instead of it being done at the General Council was erroneous.

⁸¹ *EC-Measures Affecting the Prohibition of Asbestos Products*, WT/DS135/AB/R.

The legal arguments against the use of amicus briefs include the following:

1. Article V of the Marrakesh Agreement Establishing the WTO states: “The General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO.” The Appellate Body does not have the authority to decide the WTO’s relationship with NGOs.
2. The balance of rights and obligations as emphasized by Article 3.2 of the DSU is altered by amicus brief submissions.

Other subsidiary arguments may also be made which pertain solely to the AB’s lack of authority in accepting amicus briefs, in addition to points (1) and (2) above. They include:

1. Article 13 refers only to the panel and may not be held to be pertinent to the AB.
2. DSU Article 17.4, which only allows parties and third parties involved in a dispute to make submissions, is being violated.
3. The AB Working Procedures devised by the AB itself affirms that only parties and third parties to a dispute may participate in the proceedings.

The amicus issue first arose at the panel level in the *Shrimp/Turtle*⁸² case. There, the panellists interpreted Article 13 in a literal manner in accord with past WTO

⁸² *US-Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R & WT/DS58/AB/R (Adopted 6 Nov. 1998).

practice.⁸³ The panel held that “accepting non-requested information from non-governmental sources would be, in our opinion, incompatible with the provisions of the DSU as currently applied.”⁸⁴ The word “seek” in the panellists' view meant information that is actively solicited by the panel. Thus, the panel refused consideration of two amicus briefs proffered by environmental NGOs. At the appellate stage, the Centre for International Environmental Law (CIEL) submitted an amicus brief to the AB. The AB in a letter addressed to the parties stated that it would consider the “pertinent” legal arguments of this brief.⁸⁵ Both parties objected to the AB’s ruling, asserting that the AB must abide by rule 16(1) of the Appellate Body Working Procedures, which provides for gap-filling authority on a one-off basis in a particular case. However, no mention of this procedure was made in the AB report.⁸⁶

The AB rejected this argument and held that Article 13 affords much broader authority to the panellists. Most importantly, the AB found that the right to “seek information” includes the right to accept non-requested submissions. Here, the AB sought no guidance from any legal or literary dictionary, as it has on many previous occasions, for ascertaining the meaning of the word “seek.” Instead, it relied on its own literal definition of the word.

⁸³ The WTO adjudicators in particular, the AB has been interpreting the WTO provisions in a textual manner. This is evidenced by the extensive use of different literary and legal dictionaries in a great amount of cases. Some examples are, *inter alia*, *Reformulated Gasoline*, *Bed-linen*, *India-Pharmaceuticals*, *Thailand-H-Beams from Poland*, *Japan- Photographic Paper* and many other similar cases. Also, see Jackson, J.H., *The Jurisprudence of GATT and the WTO* (2000) Cambridge University Press, pp. 133-194, for indications of textual interpretations. Furthermore, see Petersmann, E.U., *The GATT Dispute Settlement System: International Law, International Organizations and Dispute Settlement* (1997) Kluwer Law Publishing, pp. 107-117.

⁸⁴ Shrimp/Turtle case, *Supra* at 82, para. 7.8 (panel report)

⁸⁵ Shrimp/Turtle *Supra* at 82, WT/DS58/AB/R, para. 83-84.

⁸⁶ Appleton, A.E., *Amicus Curiae Submissions in the Carbon Steel Case*, 4 J.I.E.L. 691(2000) p. 693.

The next case involving amicus submissions was the *Australia-Salmon Recourse to Article 21.5 by Canada*⁸⁷ case. The panel cited Article 13 of DSU and the AB's holding in *Shrimp/Turtle* to accept a non-requested brief from the Concerned Fisherman and Processors of South Australia.⁸⁸ This case set the stage for amicus curiae to be accepted at every level of dispute settlement-panel, Appellate, and recourse to Article 21.5 disputes.

The AB's authority to accept amicus briefs arose once again in the *Carbon Steel*⁸⁹ case. There, the AB decided to elaborate on its reasoning behind the acceptance of amicus briefs, as it had not done so in *Shrimp/Turtle*. The AB noted that the DSU and its Working Procedures are silent with regard to this issue. However, Article 17.9 of the DSU grants them the power to devise working procedures, and the procedures that have been promulgated indicate, under rule 16(1), that "where a procedural question arises that is not covered by these Rules, a division may adopt an appropriate procedure for the purposes of that appeal only, provided that it is not inconsistent with the DSU, the other covered agreements and these Rules."

⁸⁷ *Australia-Measures Affecting Importation of Salmon-Recourse to Article 21.5 by Canada*, WT/DS18/RW (Adopted 18 Feb. 2000).

⁸⁸ *Ibid.*, at para. 7.8.

⁸⁹ *US-Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R (Adopted 7 June 2000).

2.5.1 Article V of Marrakesh

Article V of the Marrakesh Agreement, though arguably not part of the “covered” agreements, does shed some light as to the dynamics of the relationship between NGOs and the WTO.⁹⁰ It provides for the General Council, which resembles a legislative body, to devise rules to coordinate the interaction of the WTO with NGOs. This provision illustrates, at a minimum, the “spirit of the law” and at a maximum, a clear mandate that the WTO adjudicators be precluded from accepting amicus briefs.

The wording of the Article should be understood to indicate that the Members have made a decision to protect the institutional balance of rights that they possess in the WTO. The Article also illustrates that the Members acknowledged the political role of the WTO as an international institution and that only Members via the General Council have the prerogative to devise working relationships with other international non-governmental agencies. This is the overall policy of the WTO with regard to its external relations. The DSB and its agencies, i.e., the panel and AB, may have limited rights to make rules for improving the functioning of the dispute settlement regime, but the scope of that power is limited to internally oriented matters of the WTO. The responsibility for external relationships of the institution is solely under the purview of the General Council.

⁹⁰ Article V of the Marrakesh Agreement states the following: “1. The General Council shall make appropriate arrangements for effective cooperation with other intergovernmental organizations that have responsibilities related to those of the WTO. 2. The General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO.”

2.5.2 Article 3.2 of the DSU and the Balance of Rights Contained in Other Provisions

Another aspect of amicus briefs that will conflict with provisions of the DSU pertains to Members' rights under Article 3.2. This Article prevents rulings which "add to or diminish" Members' rights. The AB in *Carbon Steel*, struggled to avert such criticism by stating that the only rights that parties and third parties have under Article 3.2 is the right to make submissions and have them heard.⁹¹ This is a very narrow view of the Article's scope.⁹² Articles 17.4 and Rules 21,22, and 28.1 of the Working Procedures for Appellate Review only allow parties and third parties to a dispute—not external entities—to make submissions. Also, the fact that an accepted amicus brief must be responded to by the parties further convolutes the balance of rights. Article 17.4 of DSU states that the parties have the right to only respond to the claims made by the Members which are party to a dispute. This can also be adduced from the DSU in general, because the language of the DSU in Article 1.1 indicates that the settlement regime is for Members.⁹³ Thus, at a minimum, the parties have the right not to respond to amicus briefs without prejudice to their case and that no negative inference may be made by the adjudicators. However, this is not the optimal situation, as once the submission is reviewed, it is difficult to reverse the effects of that submission on the minds of the adjudicator.

Moreover, allowing NGO briefs tips the scale in favour of the NGOs over the Members in cases where a developing country does not have sufficient interest to

⁹¹ Appleton, *Supra* at 86, pp.697-698.

⁹² *Ibid.*

⁹³ Article 1.1 of the DSU. See Annex 1.

achieve standing but wishes to participate. An NGO has the opportunity to submit its brief even after proceedings have been initiated. This is an important point, as many developing countries test the DSB waters by participating as third parties before becoming actual parties to a dispute. Third-party participation, aside from serving certain trade interests, functions as a learning experience in the dispute settlement regime. Rather, the time restrictions set in the DSU are not necessarily applicable to the NGOs. If a Member has not abided by these time restrictions, its standing in a dispute becomes questionable; but the same is not true for NGOs.⁹⁴

Article 4 of the DSU grants parties the right to consultations before the panel proceeding begins. The object is to settle the dispute more amicably by negotiations before initiating legal proceedings. It also allows the parties to have a better understanding of the claims and counterclaims involved in the dispute. It is, in a sense, similar to the “discovery” requirements in many common law jurisdictions, which mandate that both parties share the evidence at their disposal before trial commences so as to avoid “surprise attacks” from either side. The consultation phase clarifies some of the arguments of the parties beforehand and provides for parties to better prepare their cases. Accepting amicus briefs impugns the parties’ right to consultations. This is a crucial point for developing countries as third-party briefs potentially exposes them to surprise “arguments” and expends more resources, thereby, denying them one of the benefits of Article 4.

⁹⁴ Though the *Asbestos* case provided guidelines for NGO submissions with time restrictions as one criterion, nevertheless, *they* are according to Rule 16(1) of the Working Procedures for Appellate Review a one-off set of rules. There is no guarantee that the next time they use amicus briefs, the same restrictions will apply.

2.5.3 Amicus Briefs and the International Legal Arena

Proponents of the use of amicus briefs rely on examples of other jurisdictions and tribunals which allow amicus briefs.⁹⁵ However, there are many international tribunals that do not allow such briefs (i.e., International Court of Justice (ICJ) contentious cases, International Tribunal on the Law of the Sea, and Association of Southeast Asian Nations (ASEAN) Protocol on Dispute Settlement). One reason given for their use is that it allows for non-party interests to participate in the resolution of the dispute because it could have future consequences for them. However, the AB in the *US-FSC*⁹⁶ held that the adjudicators of the WTO could not make their rulings, constantly taking into account all future repercussions of their decisions. They are bound to resolving the dispute at hand.⁹⁷ Additionally, the WTO dispute settlement regime is clearly for Members' use. Consequences that affect Members may need to be addressed, not consequences of decisions for certain interest groups.

Also, it is argued that the AB has full authority to consider past panel and AB decisions, as well as academic writings and judgments of other international tribunals such as the ICJ, and that amicus briefs are similar to them.⁹⁸ However, these are

⁹⁵ Marceau, G. & Stilwell, M., *Practical Suggestions for Amicus Curiae Briefs Before WTO Adjudicating Bodies*, 4 J.I.E.L. 155-187 (2001), and see also *Editors Note* countering to some extent Dr. Appleton's arguments in essay at supra at 86.

⁹⁶ *US-Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R (Adopted 20 March 2000).

⁹⁷ *Ibid.*

⁹⁸ Marceau, & Stilwell, *Supra* at 95, pp. 159-162; and *Editors Note* pp. 705-706 4 JIEL (2000).

established secondary and tertiary sources of international law accepted by the international legal community. There is a certain understanding of objectivity and relevance associated with these legal sources. Amicus briefs are not comparable as their allegiance to a certain cause or interest group is unclear.

2.5.4 Gap-Filling Authority of the Appellate Body

The AB struggled to alleviate concerns of procedural fairness associated with the acceptance of amicus briefs in the *Asbestos* case. At the panel phase the panellists considered two briefs by NGOs. The issue at stake was the manner in which the AB was to treat amicus brief submissions in light of its lack of detailed reasoning in *Carbon Steel*. It promulgated a set of criteria which must be met by NGOs in order for the AB to accept their submission.⁹⁹ It understood that if it were to alter the AB's general Working Procedures to include amicus brief procedures permanently, it must go through a burdensome process of consulting with the DSB Chairman and the Director-General. They are political appointees and as such, are aware of the lack of support from Members for amicus briefs. Therefore, they selected to craft the criteria by invoking Rule 16(1) of the Working Procedures. This rule allows them to "fill gaps" in procedure for a particular case only. Nevertheless, amicus brief submission is very significant, and the procedures for accepting them should not be relegated to mere "gap filling" techniques of the AB. A noteworthy point is that their report explicitly mentioned their consultation with all seven members of the AB when

⁹⁹ *Asbestos* case, Supra at 81, para. 52.

adopting the additional procedures. This could be an indication that these rules will apply in other appellate cases.¹⁰⁰

The criteria for submitting amicus briefs pursuant to *Asbestos*, aside from procedural matters (such as timing and format restrictions), include substantive requirements relating to the nature and character of the amici, its sources of funding, and their relations with parties to the dispute.¹⁰¹ However, there is still much room for non-Member entities to abuse the procedures so as to influence the trial. Assuming that the AB has the fact-finding authority to ascertain the nature of the amici, it lacks the resources and time needed to verify them. This problem may be compounded in cases where many organizations submit briefs. In the said case, the AB granted itself 8 working days, to review the character of at least 17 different organizations,¹⁰² making for a very shallow review of the requirements. Furthermore, there is a real possibility that organizations will misrepresent themselves in order to meet the criteria necessary for the acceptance of their briefs.

2.5.5 Resource and Power Imbalances and the Prospects for Abuse

NGOs which tend to participate in the WTO system are based in developed nations, mostly as syndicates and associations protecting and promoting certain industries'

¹⁰⁰ It is obvious that the AB division hearing a case may consult other judges and that the non-hearing AB judges may participate in the hearings as they have done many times in the past. It is well within their rights to do so and is thought to provide more coherence amongst the AB judges. However, participation by non-selected judges is not explicitly noted in the reports.

¹⁰¹ *Asbestos*, Supra at 81 para. 52.

¹⁰² *Asbestos* Supra at 81 para. 52, 53 and 55.

interests. A count of the NGOs which participate in the Ministerial Conferences illustrates that approximately 80% of them originate in OECD countries and that 70% of those are actual industry syndicates.¹⁰³ Also, the NGOs in developing nations are usually not as organizationally sophisticated and well funded as the NGOs in the industrialised world. This presents an equality problem which the *Asbestos* guidelines do not resolve. Furthermore, if the guidelines are not scrutinised extensively, then there is the potential that in a particular case an organization with many vested interests is able to abuse the system and make submissions. On the other hand, if the guidelines are to be strictly scrutinized, then that has the potential of locking out many NGOs from the developing nations, as their sources of finance, legal status, and links to a party to a dispute might not be clearly distinguished due to a lack of institutional and legal capacity faced by their home country.

In the *Thailand-H-Beams* case, the Thai authorities were able to thwart an attempted abuse of amicus curiae privileges. There, before the AB had the opportunity to devise requirements for amicus briefs, it was demonstrated that an industry syndicate which was created simultaneous to the establishment of the panel (most likely for the sole purpose of submitting a brief) had violated confidentiality provisions of the DSU. This was done via the leaking of information by the private counsel appointed by Poland (the claimant), which also happened to represent the said “NGO.” The *Asbestos* criteria would not have prevented this. Had it not been for an inadvertent reference in the amicus brief to the arguments of Thailand (which was to be held

¹⁰³ This stat is based on Ministerial Conferences, including the Doha Round, found on the NGO list of participants as stated on the WTO web site www.wto.org.

confidential), there would have been no way of discovering the abuse. If the practice of accepting amicus briefs becomes prevalent and the AB devises Asbestos-type requirements, then the developing countries will have much to worry about; as not only the legal issues, but also the potential for improper functioning of the procedures will put them at a clear disadvantage.

The acceptance of amicus briefs is meant to alleviate some of the transparency and “democratic deficit” issues associated with the WTO system.¹⁰⁴ In an inter-governmental organization the Members are thought to be accountable to their citizenry; however, this is not the case for NGOs. Their accountability is not transparent, and the *Asbestos* requirements cannot shed any real light on their character. Thus, the democratic deficit that the AB is trying to resolve is being replaced by procedures which offer privileges to undemocratic entities, analogous to the adage of “borrowing from Peter to pay Paul.” Moreover, amicus briefs would forever change the institutional landscape of the WTO as an inter-governmental organization, which in and of itself could alter the balance of rights and obligations that was negotiated at the Uruguay Round.

The AB sought to open the dispute settlement process of the WTO to civil society. In the process, it overstepped its authority imprudently in order to achieve that goal. It is one thing to be judicially active in interpretation and application of laws in order to

¹⁰⁴ Gaffney, J.P., *Due Process in the World Trade Organization: The Need for Procedural Justice in the Dispute Settlement System*, (1999) 14 Am. Univ. Int’L. Rev. 1173 at 1192-1193, and also, Charnovitz, S., *Participation of Nongovernmental Organizations in the World Trade Organization* (1996) 17 U Pa J Intl Econ L 331 at 340-341.

resolve a dispute or fill legal gaps. Yet, it is another to alter the nature of an institution from a member-driven body to a judicial-driven organization. The action, if carried over to other matters, would result in the transformation of the nature of the WTO. Furthermore, judicial activism may arguably be necessary at times for the protection of institutional integrity or the benefit of weaker parties, but the amicus curiae adjudication has achieved neither. It has justified the use of amicus briefs based on unconvincing and insecure legal interpretations of Articles V of Marrakesh Agreement, Article 13 and 3.2 of the DSU. It has also failed in the correct distribution of justice, as the developing nations have been put at a clear disadvantage as opposed to the stronger industrialised members. The acceptance of amicus briefs under these circumstances is unfair from the perspective of developing nations.

2.6 Conclusion

The foregoing discussion attempted to explore some of the more important procedural issues facing the developing nations when litigating cases in the WTO. Based on the premise that developing countries so often lack adequate resources to effectively maximize their use of the DSB, emphasis was given to the resolution of issues relating to “standard of clarity” of claims, burden of proof, appeals of Article 11 of DSU, judicial economy and amicus brief submissions. As consistency, predictability and security of the dispute resolution regime act as benchmarks of a legitimate legal system, the chapter discovered that the adjudicators have not met developing countries’ expectations in this regard. As a corresponding effect, the justness of the

adjudication is called into question, since the interpretation of the said issues has harmed the developing nations more so than industrialised Members. It became apparent that the panels and AB must be more rigorous in their protection of the rights and interests of the developing nations, without harming the integrity of the institution.

Article 6.2 of the DSU relating to the standard of clarity associated with the making of claims in the REP is to be decided on a case-by-case basis. The case law in this regard illustrates that the reason for this holding stems from the fact that the adjudicators do not have a consistent and coherent understanding of this standard. In order to avoid frequent dismissal of claims, the AB vacillates between accepting a “mere listing” test (*Bananas*) and mandating a matching of claims with legal references when more than one obligation is encompassed in a provision (*Korea-Dairy*). Furthermore, the AB judges have raised the threshold of dismissal under Article 6.2 to instances where a party has been prejudiced. The evolution of this issue has been fraught with unpredictability and inconsistency. The case-by-case standard puts the weaker nations at a disadvantage in that no clear guidelines are evident before the case goes to the panel. In fact, the rulings have undermined the objective and purpose of Article 6.2 because its characteristic demands that the standard of clarity and its other related issues be outlined before the commencement of pleadings and argumentation.

The practical impossibility attached to making appeals under DSU Article 11, as ruled by the AB, is of detriment to the WTO legal system and more so to developing nations. The “objective assessment of facts” standard of the panel is of utmost

importance to the Members. The AB has explicitly ruled that it will not consider Article 11 appeals unless the panellists have engaged in wilful and egregious error, showing a lack of good faith. This is too high a hurdle to overcome, as proving such ineptness by diplomats and academics sitting on panels is highly unlikely. This harms developing nations in sectors crucial to their export interest in relation to trade contingent remedies, e.g., anti-dumping and SCM, in addition to safeguards under the SPS Agreement. The AB should be able to scrutinize the manner in which the panel applied the law to the facts and matters where the distinction between law and fact is not very clear. This would not be out of line with past AB practice in that it has on several occasions “completed the analysis” of the panels or ruled *de novo* on an issue.

The principle of burden of proof in WTO law has been matched, correctly so, with other international tribunals, i.e., *actori incumbit probatio* (the party making a claim carries the burden of proof). However, on the one hand, controversy arises when dealing with the distinctions between “General Rule Exception” and affirmative defence; and on the other hand, between substantive or overall burden of proof in a case and the burden of evidence during the settlement process. Under the current situation, the difference amongst GREs and affirmative defence is vital, as the overall burden of proof will shift to the defendant in GRE claims, whereas it remains with the claimant in provisions recognized as affirmative defences.

Provisions held to be affirmative defences by the AB most often involve action taken by domestic authorities of importers (e.g., ADA, SPS, Safeguards and SCM), which

affords them a great deal of deference. The sectors most important to developing countries' exports are more often the target of such action by domestic authorities in industrialised nations. Coupled with legal and organizational inadequacies faced by developing nations, this greatly hinders their export interests because they would not be able to successfully bring cases against industrialised Members. The just course of action would be to interpret some of these provisions as GREs in the same spirit as Articles XX and XI (2)(c) of GATT. There should be no distinction made between the concept of GREs and affirmative defence if they both derogate from the general rules of the WTO. The legal justifications are also valid in that the wording of Articles XX and XI (2)(c) is not narrower than the likes of Article 6 of ATC and Article 3.3 of the SPS. Furthermore, these regulations are, in fact, derogations from fundamental principles (General Rules) of the WTO, i.e., MFN and national treatment.

Yet, if the AB continues to refuse the addition of other forms of general rule exceptions, another alternative exists which has been proposed in this chapter. The second-best choice relates to the distinction between substantive or overall burden of proof and the burden of evidence during the hearing. The AB could hold that provisions such as Article 6 of ATC and Article 3.3 of SPS are affirmative defences, and that the overall substantive burden of proof remains with the claimant; however, the burden of evidence shifts to the respondent. The respondent must put forth the evidence that justifies the actions of its domestic authority in prescribing the safeguard and selected trade contingent remedy measures. However, in order for the claimant to win the case, it must bear the burden of proving its case in totality. The evidence of

the defendant presented is just one element in the overall resolution of the dispute. This allows for evidence that is usually at the sole disposal of the defendant that has taken the safeguard action to be presented in the dispute, so that the panel and the opposing party may see the validity of the trade-restricting measure. The first scenario where there is no true distinction between GREs and affirmative defence is optimal since the developing Members' interests are better protected. However, if the AB decides to make such distinction, then it should levy the burden of evidence on the party invoking the affirmative defence plea, whilst maintaining the substantive burden of proof on the claimant.

The claims and counterclaims that adjudicators select to consider have a tangible effect on the parties to a dispute. This section endeavoured to illustrate that at times the utilization of judicial economy has been confusing and inappropriate, as evidenced in *Australia-Salmon* and *EC-Poultry*. The *Australia-Salmon* panel lacked true understanding of the concept and provoked reversal by the AB. In order to have a more effective implementation stage, the WTO panels and AB should attempt to respond to as many relevant claims as possible—in particular, cases involving developing nations. Limited use of judicial economy would make more transparent the possible remedies afforded to the winning party and, consequently, produce less controversy with regard to conformity to DSB recommendations. It would also assist in streamlining the negotiations between parties at the implementation stage. Developing nations have a large interest in improving the effectiveness of

implementation as the retaliatory remedy system of the WTO inherently disadvantages them vis-à-vis the developed Members.

The acceptance of amicus briefs is a huge diversion from that path. The legal arguments in favour of amicus briefs are not very convincing as compared to the legal arguments opposing their submission. The acceptance of amicus briefs violates Articles 3.2, 13, and 17.4 of the DSU, Article V of the Marrakesh Agreement, and Rules 21,22, and 28 of the Working Procedures for Appellate Review. Furthermore, as an organizational matter, it runs counter to the notion of the WTO as an inter-governmental institution. It alters the political, legal and consequently, economic landscape of the WTO as envisaged at Uruguay. The AB disregarded some fundamental issues in its quest for the inclusion of civil society in the WTO. It did not adequately address legitimacy and justice—thereby, creating an unfair situation for developing countries.

With the judicialisation and consequent constitutionalisation of WTO law, fairness is vital in the protection of economically weaker developing nations. The DSU has introduced some very prudent instruments of due process to the dispute settlement regime. However, their application and interpretation by the arbiters and judges regarding due process matters have been unsatisfactory for developing country Members. To better protect the interests of developing nations, more legitimate, just and consequently fair holdings must begin to disseminate from the DSB since rectifying common practices of the dispute settlement regime becomes more arduous

as the constitutional norms and instruments become evermore pervasive, and its contours evermore structured in the WTO.

Chapter 3

The Development Approach to Fair Interpretation in Relation to the TRIPS

The UR brought to the fore the merger of international trade law and intellectual property rights. Previously, most disputes and concessions between nations were done on a bilateral basis; however, developing nations were very sceptical of the inclusion of an intellectual property agreement that went beyond anti-pirating obligations in the WTO. But due to US and EU political and economic pressure and the “single package” requirement of the UR negotiations, developing countries were thwarted in their efforts to excise an intellectual property agreement from the new trade body. Developing countries, similar to other Member States, seek large-scale economic growth, which is offered by neo-liberal and other economic theories.¹ Yet historically, developing countries have been largely disappointed in achieving such growth. A lack of institutional capacity and pedigree in free trade economic structures as a result of past import substitution economic models is the main reason for the developing nations’ lack of growth stemming from intellectual property rights.

Developing countries embarked on the neo-liberal economic path in the 1980’s and early 1990’s, and their increased pro-active participation in the UR is a testimony to that fact. The process of industrialization, as perceived by developing nations in the context of IP rights, entails the free flow of technology and lower prices for consumers of technology, so as to create a domestic technological base. These attributes are the building blocks for the founding of more solid and capacious

¹ Gana, R.L., *Prospects for Developing Countries Under the TRIPS Agreement*, 1996, 29 Vand. J. Transnat’l L. 735, p. 736.

economic and legal institutions necessary for sustaining growth and industrialization. Developing countries were concerned that entering into an international agreement such as the TRIPS would hinder the free flow of technology and increase prices for technology. Moreover, the costs associated with implementing the obligations of the TRIPS were deemed very high, due largely to the positive or affirmative nature of TRIPS obligations, which mandate state action vis-à-vis private behaviour.

In general, the developing countries want to be able to access technology from industrialised nations, whilst producing a domestic technology base. Furthermore, they seek to attract more foreign direct investment (FDI) from abroad, which is an important element in overall economic development. Many of these countries believe that an excessively stringent global IP regime will hinder their economic growth, especially in the short to medium term. In contrast, many industrialised nations believe that the only way to transfer technology and attract FDI is by having strong IP protection regimes in order to persuade firms to operate in the developing world.² Strong IP regimes are supposed to protect these firms from the theft of knowledge and reproduction in third countries. The impact and benefit of strong IP regimes as a matter of theory is debatable but the fact that the “knowledge and technology gap”

² Callan, B., *Pirates on the High Seas: Why We Care About Global Intellectual Property Rights and What We Can Do About Them*, 1996, Council on Foreign Relations, NY found on www.cfr.org; Chamarik, S., & Goonatillake, S. (eds.), *Technological Independence: The Asian Experience*, 1994 (UN Univ., Tokyo), which highlights and counters some of the arguments put forward by policy makers and industrial organizations in the rich world; Hagerdoorn, J., & Schakenraad, J., *The Internationalization of the Economy, Global Strategies and Strategic Technology Alliances*, 1994, in *The European Community and the Globalization of Technology and the Economy*, (Brussels) found on www.eu.europa.int archives; Kumar, N., *Intellectual Property Protection, Market Orientation and Location of Overseas R&D Activities by Multinational Enterprises*, 1996, 24 *World Development* 4; Maskus, K., *The Role of Intellectual Property Rights in Encouraging Foreign Direct Investment and Technology Transfer*, 1997 conference paper in “Public-Private Initiatives After TRIPS: Designing a Global Agenda” found on www.colorado.edu/econdp makes a statistical argument that stronger IP does induce a limited amount of FDI and technology transfer.

between the industrialised and developing countries has increased since the implementation of stronger IP regimes is less debatable and more obvious.³

During the negotiations at the UR, the developing nations were able to secure some flexibility in the implementation of the Agreement. The TRIPS agreement sets minimum standards for IP protection. However, many issues remain unresolved, and the adjudicators of the WTO have a responsibility to alleviate some of the more problematic issues for developing countries within the framework of the Agreement and the concept of fair adjudication. The institution itself has through the Doha Declaration attempted to assuage developing Members' concerns over pharmaceutical patents and compulsory licensing; however, its potential efficacy is unclear and inadequate. In contrast, the impact of panel and AB decisions is much more tangible in the short to medium term.

This chapter argues that the WTO adjudicators should interpret the positive obligations of the TRIPS Agreement in a manner that allows developing countries the most flexibility in implementing the Agreement and addressing their socio-economic development. In order to do so, the development approach to fairness is suggested as the legal tool that will balance the needs of the developing countries with the obligations of the TRIPS. The chapter will evaluate some of the more pressing issues for developing countries and complement the analysis by evaluating some of the decisions of the DSB under the TRIPS Agreement. Moreover, it will address some of the potential problems facing developing countries since the expiry of the grace period for bringing non-violation and situation complaints. As outlined

³ Seeratan, N., *The Negative Impact of Intellectual Property Patent Rights on Developing Countries: An Examination of the Indian Pharmaceutical Industry*, 2001, 3 Scholar 339, p. 360; also see Correa, C.M., *Intellectual Property Rights, The WTO and Developing Countries: The TRIPS Agreement and Policy Options*, 1998 Zed Books, p. 5.

in the first chapter, the development approach to fairness entails having regard to the legitimacy and the justice of the rulings, as they are the two elements required for achieving fairness. Legitimacy can be achieved if the rulings are predictable, secure (adhere to normative rules of international law), and consistent or coherent. Justice involves the advantaging of the disadvantaged and having a principled view towards the law. The principle at stake here is the building and strengthening of institutional capacity in developing countries and gaining market access to the developed world.

A desirable outcome may be achieved if the DSB implements the concept of fairness espoused in this thesis under the “development approach.” By adjudicating disputes under this approach, it is proposed that developing countries could attain more flexibility in the implementation of the TRIPS Agreement, whilst being able to overcome some of the obstacles that exist in the accessing of technology (both price-based and strategic access), as the Agreement leaves some room for developing countries to promulgate domestic laws which may conform to specific national concerns, thereby utilizing the TRIPS Agreement to foster economic development. As a norm-producing body, the WTO can through its dispute settlement mechanism, in the context of the TRIPS Agreement, promote the institutional capacity building efforts of developing nations by interpreting the built-in flexibility that benefit the developing nations.⁴

This chapter will begin by presenting some of the fundamental issues relating to intellectual property rights, such as its definition, the concerns of developing countries as reflected in the drafting process of the TRIPS, the Agreement’s

⁴ Cass, D.Z., *The “Constitutionalization” of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade*, 2001, *European J. of Int’l. Law* 39-75, pp. 48-71 on judicial norm generation by the AB.

substantive provisions, and the nature of TRIPS obligations. The Doha Declaration, which was created in order to alleviate some of the concerns of the developing countries, will be analysed, and shown to be of little significance as it pertains to this thesis. The discussion will then focus on some of the core substantive issues in the context of dispute settlement that are critical for the economies of the developing nations such as, the contours and limits of patent and copyright law implementation and subsidiary issues such as exceptions to exclusive rights, compulsory licenses, and scope of patentability. Patents will be given most attention, as they tend to be of greater importance to the industrial and technological base of developing countries. However, copyrights and to a lesser extent trademarks will also be discussed in this chapter. As there has not been a significant body of case law with respect to the more important issues in the TRIPS Agreement, this section will at times use hypothetical cases in order to explain more clearly. Finally, the discussion will focus on the possibilities of developing countries being exposed to non-violation and situation complaints since the transitional period afforded under the Agreement has expired.

3.1 Definition of Intellectual Property Rights

Intellectual property rights may be defined as protection of private or in some instances public innovations of creativity.⁵ Intellectual property law should protect “original ideas, creative forms of expression, new discoveries, inventions, and trade secrets.”⁶ The basic forms of intellectual property rights include patents, copyrights,

⁵ Sherwood, R.M., *Intellectual Property Rights and Economic Development*, 1990, pp. 11-12.

⁶ Garcia, G., *Economic Development and the Course of Intellectual Property Protection in Mexico*, 27 *Tex. Int'l L.J.* 701, p. 707.

and trademarks. Although there are other subsidiary forms of IP rights, nevertheless, these are the more general and widely used ones.

Patents are granted to inventors of novel inventions and give the inventor the right to exclude others from using and profiting from his or her invention for a certain period of time.⁷ Copyright is the temporary right of an author or artist to have sole and exclusive privilege of multiplying copies of his/her work and to publish and market them.⁸ Trademark is a distinctive mark or word through which the products of a particular enterprise can be recognizable from another.⁹ Each form of IP right has its own distinctive procedures and standards, which govern the subject matter protected and the process involved in attaining protection. Also, they have their own system of protection, remedy, and infringement.¹⁰ The underlying feature of the various forms of IP protection is to grant exclusive rights to IP owners for the use and exploitation of the products, processes, or signs.

3.2.1 The Emergence of the TRIPS Agreement

3.2.1.1 The Effects of the Technological Revolution on International Trade Relations

During the last three decades, the leading industrialized industrialised countries, seeing their prosperity threatened by the technological advancements, sought avenues in which to maintain their dominance. The Quad Nations saw their national

⁷ Sherwood, *supra* at note 5, p. 12.

⁸ Garcia, *supra* at note 6, pp. 708-710.

⁹ Garcia, *supra* at note 6, *ibid*.

¹⁰ Su, E., *The Winners and Losers: The Agreement on Trade-Related Intellectual Property Rights and Its Effects on Developing Countries*, 2000, 23 *Hous. J. Int'l L.* 169, p. 173.

incomes eroded by proficient counterfeiters in some developing nations, using high-tech instruments to produce mass quantities of imitated goods bearing a valuable intellectual property component.¹¹ The necessity to combat counterfeiting and piracy became all the more important as the level of research and development (R&D) needed to develop new products increased, particularly in the high-tech sector.¹² Yet, this was the sector most prone to counterfeiting at profitable rates.¹³ Therefore, there was a perception that counterfeiting could dangerously threaten not only the industrialised nations' future investments and innovation, but also, their financial and commercial domination of the international economic order.¹⁴

In support of increased intellectual property protection, the major producers of technology began to hold the view that counterfeiting and piracy distorted international trade by diminishing national revenue and discouraging expansion into foreign markets.¹⁵ In contrast, the call for more protection of IP rights by importers of technology in the developing world was no more than a ploy by the rich nations'

¹¹ The decline in the national revenue of the US was the most pronounced relative to the other industrialised countries. During the 1980's, it became a debtor nation for the first time since the end of post-WWII reconstruction. The negative impact of counterfeiting on the balance of trade is best reflected in the estimate of the US International Trade Commission (ITC) in 1986, which projected that the worldwide losses to all of the US industries ranged from \$43 billion to \$61 billion, a figure representing approximately 15% of the country's trade deficit. See, US ITC *Foreign Protection of Intellectual Property Rights and the Effects on US Industry and Trade* (Feb. 1988) US ITC Publication 2065. In another estimate by the International Intellectual Property Alliance (IIPA) in 1994 pertaining to copyrighting industries alone estimated that the losses to the US would amount to \$15-\$18 billion. (IIPA Report 26 July, 1994, found on the IIPA website.) These statistics must be read with a certain degree of skepticism as measuring these losses are less than scientific, because they take the form of lost revenue opportunities and not actual losses. However, these and other similar data collection feed the perception that US firms are being victims of intellectual property theft, thereby, greatly contributing to loss of revenue and huge trade deficits. The EC has not conducted such data collection, but the perception remains the same.

¹² GATT *Focus* "The Uruguay Round File: Trade in Counterfeit Goods and Other Trade-Related Aspects of Intellectual Property Rights" Pts. 1&2 (No. 48 July/August 1987).

¹³ Correa, C.M., *supra* at note 3, p. 12-15.

¹⁴ Abbot, F.M., *Protecting First World Assets in the Third World: Intellectual Property Negotiations in the GATT Multilateral Framework*, (1989) 22 Vand. J. Trans. Law 689, pp. 691-740 & Chang, K.Y., *Super 301 and Taiwan: A Case of Protecting United States Intellectual Property in Foreign Countries* (1994).

¹⁵ Alford, W., *How Theory Does-And Does Not-Matter: American Approaches to Intellectual Property Law in East Asia* (1994) 13 U.C.L.A. Pacific Basin Law Journal 8, p. 9.

multinational firms to extract higher royalties on the pretext of an international legal regime.¹⁶ The policies of most developing nations reflected a development strategy based on making technology available to the domestic industry at the lowest price in the short to medium term. To this end, many developing countries permitted relatively free use of IP-protected goods for their domestic industries.¹⁷

3.2.1.2 *The Linkage of Intellectual Property to GATT/WTO*

The leading developing countries challenged the inclusion of IP rights into the UR negotiations.¹⁸ Prior to the TRIPS Agreement, the subject matter of intellectual property had been seen as a discrete area of law associated with intangible property and not directly related to trade in goods. The World Intellectual Property Organization (WIPO), an agency of the UN, had sole responsibility for the administration of the Berne, Paris, and other IP-related Conventions.¹⁹ Politically, the balance of power within WIPO reflected the interests of the majority of developing post-colonial countries.²⁰ As a result, the industrialised countries had found their efforts to reform the international IP regime commensurate with their interests futile.

¹⁶ Cornish, W.R., *Intellectual Property: Patents, Copyrights, Trademarks and Allied Rights* (1989) Sweet & Maxwell Publishers, pp. 14-15.

¹⁷ Evans, G.E., *Lawmaking under the Trade Constitution: A Study in Legislating by the World Trade Organization*, 2000, (Kluwer Law Publishing) p. 110; Nogues, J., *Patents and Pharmaceutical Drugs: Understanding the Pressures on Developing Countries*, 1990, 24 J.W.T Law 81; Reichman, J.H., *Implications of the Draft TRIPS Agreement for Developing Countries as Competitors in an Integrated World Market*, 1993, UNCTAD Discussion Paper, no. 73 UNCTAD/OSG/DP/73 Nov. 1993.

¹⁸ Stewart, TP (ed.), *The GATT Uruguay Round: A Negotiating History (1986-1992)*, Vol. II, 1993, (Kluwer Law and Taxation Publishers) pp. 2280-2295.

¹⁹ Paris Convention for the Protection of Industrial Property-(1967), Berne Convention for the Protection of Literary and Artistic Works (1971), the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961), Treaty on Intellectual Property in Respect of Integrated Circuits (1989), amongst others.

²⁰ Evans, *Supra* at note 17, p. 112.

On the other hand, for the industrialised countries determined to maintain their superiority as producers of technology, the GATT presented a negotiating advantage of cross-sectoral leverage coupled with consensus requirements.²¹ In defence of their interests a group of 10 developing nations spearheaded by India and Brazil challenged the legal competence of the GATT to deal with commercial counterfeiting. These arguments mainly centred on sovereignty rights and a supranational organization mandating systemic legal reforms in Member States, and conflict of laws with the WIPO.²² The Group of Ten rejected both the connection between trade and intellectual property rights, and more fundamentally, objected to GATT involvement in IP rights since WIPO was the institution with authority in the field. This view was opposed by the major exporters of technology who argued that the effects of counterfeiting on their trade balances was compelling evidence that IP is a commercial asset and as such has relevance as a trade matter. The divergence of positions in this regard was so entrenched that it delayed the completion of the UR by two years. However, the power of the major producers was to hold sway, and the matter remained on the negotiating agenda with the US and EC solidifying their positions, which extended much further than an anti-counterfeiting agreement.

3.2.1.3 The Construction of the Agreement

From the outset, the parties disagreed over the content and form of any IP agreement. With respect to content, the rich nations demanded a comprehensive approach to IP protection with the objective of ratifying an agreement which would address all areas

²¹ Ragavan, C., *Recolonization: GATT, The Uruguay Round and the Third World*, (1990) Zed Books p. 60, arguing that the consensus approach put the developing nations in an even weaker position, as these nations have a much more difficult time creating collective positions for bargaining.

²² Simmonds, K.R., & Hill, B., *Law and Practice Under the GATT*, 1987 (Oceania Publications, NY), Ministerial Declaration in GATT 29th Supp BISD 9,19 1983.

of intellectual property, including copyrights, patents, trademarks, geographical indications, industrial designs, and trade secrets. They demanded that the GATT principles of MFN and national treatment must extend to IP rights as well.²³ Furthermore, they were able to extract agreement on a system of minimum standards instead of harmonization and an incorporation of the treaties under WIPO authority into the new GATT. This meant that nations that were not parties to the WIPO Agreements were to adhere to those conventions. The new platform at the UR for the negotiations of an IP regime was a major victory for the powerful economies.

3.2.1.4 *Developing Nations Resist Minimum Standards*

The proposal to establish minimum standards met a fierce challenge by the “Group of Ten” developing nations spearheaded by India and Brazil. The developing nations perceived the call for tighter IP controls as a digression from the necessary measures needed to redress the balance of interests in international trade, as they sought measures that would benefit and assist their economic development and welfare.²⁴ The “Group of Ten” was obliged to take a defensive strategy at the negotiations, trying to limit any IP agreement to counterfeiting and a narrow range of IP matters that affect trade.²⁵ The developing Members were opposed to substantive standards and the subsuming of the WIPO Conventions into the GATT. Brazil and India were

²³ Guidelines Proposed by the European Community for the Negotiations on Trade-Related Aspects of Intellectual Property Rights, MTN.GNG/NG/NG11/W/16 (20 Nov. 1987).

²⁴ Otten, A. & Wager, H., *Compliance with TRIPS: The Emerging World View*, 1996, 29 Vand. J. Transnat'l L. 391; Gutterman, A.S., *The North-South Debate Regarding the Protection of Intellectual Property Rights*, 1993, 28 Wake Forest Law Review 89; Oddi, S., *TRIPS-Natural Rights and a “Polite Form of Imperialism,”* 1996 29 Vanderbilt J. Trans. Law 415; Abbot F.M., & Gerber, D.J. (eds.), *Public Policy and Global Technological Integration*, 1997 (Kluwer Law); Stewart, G.R., & Tawfik, M.J., & Irish, M., (eds.) *International Trade and Intellectual Property: The Search for a Balanced System*, 1994 (Westview Press) Chs. 9 and 10; Dessler, D., *China's Intellectual Property Protection: Prospects for Achieving International Standards*, 1995, 19 Fordham Int'l Law J. 181.

²⁵ Reinbothe, J., & Howard, A., *the State of Play in the Negotiations on TRIPS(GATT/Uruguay Round)*, 1991, 13 European Intellectual Property Review, p. 158.

adamant that no international agreement should interfere with their ability to control the creation and enforcement of intellectual property rights, which would curtail their capabilities to regulate the use of foreign patents and trademarks. They believed that the provision and enforcement of minimum standards would be a surrender of their sovereignty to set developmental policies that would help their capacity-building by denying them free or cheap access to technology needed.

Nowhere was these nations' concern more pronounced than in the area of patent protection. Developing countries compromised to allow the proposed IP agreement to extend to copyrights, trademarks, and certain areas of trade secrets. They vehemently opposed an agreement dealing with patents because it would focus mainly on the right holders' monopoly rights while ignoring the enormous differences in the levels of industrialisation and technological development between North and South.²⁶ Patent protection, it was argued, needed to be more equitable in scope, focusing on both the obligations and rights of patent holders and their consumers. They contended that patents were not simply granted to enable a right holder to enjoy monopoly rights for importing the patented product or to resort to restrictive or anti-competitive practices.²⁷ For instance, India believed that developing countries should be allowed concessions under patent and trademark regulations that would give them the discretion to exclude key sectors such as pharmaceuticals and agrochemicals, and an overall reduction of the scope of protection.²⁸ Furthermore, compulsory licenses should be a means of preventing patent owners from abusing their rights.

²⁶ Sabatelli, A.D., & Rasser, J.C., *Impediments to Global Patent Law Harmonization*, 1995, 22 N. Kentucky Law Rev. 579-620.

²⁷ Evans, *Supra* at note 17 p. 121.

²⁸ Kosy, S., *The Effect of TRIPS on Indian Patent Law: A Pharmaceutical Industry Perspective*, 1995, 1 Boston Univ. J. of Science and Tech. 4-18.

With respect to implementing the minimum standards, the EC proposed that they must be enacted within the national laws of Member States, with the effect that every Member would have to change its laws accordingly.²⁹ The enactment of these standards went above and beyond rules and standards devised under other trade agreements, i.e., they included obligations to build legal and administrative institutions. They required change in the legal structures of many developing country Members and heavy costs associated with the training of judges, lawyers, civil servants, and policing authorities. To this end, the South Korean delegation proposed that the national treatment requirements be more formal in nature so as to account for the differences in national IP protection systems of Member States.³⁰

3.2.1.5 The Extension of Non-Violation and Situation Complaints to TRIPS Dispute Settlement³¹

During the UR negotiations, many parties hesitated in including the non-violation and situation causes of action pursuant to GATT Article XXIII: 1(b) and XXIII: 1(c) to TRIPS disputes.³² Non-violation and situation complaints are concepts unique to the GATT/WTO system. Non-violation complaints are those, which allow a Member to bring forth a complaint based on an assertion that the negotiated balance of concessions has been disturbed because of a measure implemented by another Member, notwithstanding whether it has actually violated the provisions of an

²⁹ Evans, G.E. *supra* at note 17, pp. 112-118.

³⁰ Song, S.H., & Kim, S.K., *The Impact of Multilateral Trade Negotiations on Intellectual Property Laws in Korea*, 13 U.C.L.A. Pacific Basin Law Journal 118 pp.118-123.

³¹ Cottier, T. & Schefer, K.N., *Non-Violation Complaints in WTO/GATT Dispute Settlement: Past, Present and Future*, and Roessler, F., *The Concept of Nullification and Impairment in the Legal System of the World Trade Organization*, in Petersmann, E.U., *International Trade Law and the GATT/WTO Dispute Settlement System*, 1997, at 145, p.161 & at 123, pp. 138-141 respectively.

³² Abbot, F.M., *TRIPS in Seattle: The Not-So-Surprising Failure and the Future of the TRIPS Agenda*, 2000, 18 Berkeley J. Int.'l L. 165, pp. 169-170.

agreement. Pursuant to Article XXIII: 1(c) of GATT, a Member has the right to bring a complaint, even when WTO rules have not been breached by another Member, provided that the complainant's accumulated benefits under the WTO-covered Agreements have been nullified or impaired due to a lack of action or prevailing circumstances in the defending Member State, without any remedial action within its powers to correct the situation.

EC negotiators were concerned that the US would seek to challenge its film and sound industry's market access restrictions under the GATT non-violation clause.³³ Many developing countries were concerned that the industrialised Members would attempt to use non-violation as a pretext to expand the scope of coverage and language of the TRIPS to accommodate the multinational firms' objectives and expectations.³⁴ Developing nations viewed the inclusion of non-violations complaints as a market access instrument with a multitude of avenues for punishing them in a variety of different areas of IP rights and issues, including parallel imports, compulsory licenses, and inexpediency in building the necessary court and policing structures domestically.³⁵

3.2.1.6 *General Results of the Negotiations*

The momentum of the UR negotiations carried the industrialised nations well beyond their initial objective of countering counterfeiting. Instead, the single package nature

³³ For comprehensive negotiating history of the Uruguay Round see, Stewart, TP (ed.), *The GATT Uruguay Round: A Negotiating History (1986-1992)*, 1993, (Kluwer Law and Taxation Publishers), section on TRIPS .

³⁴ Evans, G.E., *supra* at note 17, pp. 122-125.

³⁵ Drahos, P., *Negotiating Intellectual Property Rights: Between Coercion and Dialogue*, in Drahos, P., & Mayne, R., *Global Intellectual Property Rights: Knowledge, Access and Development*, 2002, Palgrave Macmillan pp. 161-181, p. 165-169.

of the negotiations and political economic forces gave the rich nations fodder to impose a comprehensive set of standards that go further than minimum standards in the classic sense. Rather, they are an expression of the standards and laws governing IP rights, which the Quad Members could agree to amongst themselves.³⁶ These high substantive standards are coupled with new procedural standards demanding minimum levels of enforcement in all Member States.³⁷

There were however, some small concessions made to the developing countries, such as, transition periods for the protection of patents in areas not previously patentable in Member States and for non-violation and situations complaints under GATT Article XXIII (b) and XXIII(c). Furthermore, the language of the provisions covering exceptions to exclusive rights and compulsory licensing were “loosened.” Neither of these concessions was of satisfactory proportions. Additionally, issues relating to the scope of protection of patents and the limits of exclusive rights granted to IP owners illustrated the extent of the imposition by industrialized Members on developing countries’ sovereignty. However, the most important element of this agreement for the developing nations was the flexibility in the language of the Agreement. The justification was that the flexibilities would enable developing countries to pursue their development policies more independently. This flexibility is the only legal avenue that exists for developing countries in limiting the harm of these obligations on their development strategies and capacity building, in particular.

³⁶ Reichman, J.H., *Securing Compliance with the TRIPS Agreement After US v. India*, 1998, 1 J.I.E.L. 4, p. 585.

³⁷ To illustrate the level of interference into the working of developing country governments and the imposition of these procedures can only be a reflection of standards already in place for decades in the developed world, Reichman presents the following analogy. “Imagine, for example, how the Congress might have reacted in the past if other countries had tried to tell the United States when injunctions were to be made available in intellectual property cases, what scope of US discovery and appellate review procedures should be, what actions to criminalize, and how US Customs agents should treat cultural and manufactured goods at the point of entry to this country. Yet, that is precisely what the TRIPS Agreement does in considerable detail...” See *ibid*.

The language of Article 7 and 8 of TRIPS reaffirm this flexibility, which highlights the objectives, and principles of the Agreement, respectively. These provisions allude to the necessity of transfers of technology and development of innovation, which are in themselves important developmental goals for the third world nations, and, also to the necessity of allowing Members to pursue the protection of public health and sectors of vital importance without the undue interference by the mandates of the Agreement.

3.3 An Overview of the TRIPS Agreement

Previous to the establishment of the WTO, international protection of intellectual property rights was under the auspices of the WIPO the organisation which administered the Paris and Berne Conventions and other IP-related treaties. The Paris Convention protects against trademark and patent infringement,³⁸ whilst, the Berne Convention protects against copyright infringement.³⁹ The object of the Paris Convention is to provide “protection of industrial property.... The protection of industrial property has as its object patents, utility models, industrial designs, trademarks, trade names, service marks, indications of source or appellations of origin, and the repression of unfair competition.”⁴⁰ Furthermore, it mandates national treatment amongst the signatories.⁴¹ The problem for industrialised nations with the Paris convention is that it does not set minimum standards of protection and that disputes are to be settled by the ICJ. These created problems in that national

³⁸ Paris Convention for the Protection of Industrial Property, 20 March 1883, last revised on 14 July 1967.

³⁹ Berne Convention for the Protection of Literary and Artistic Works, 9 September 1886 last revised 24 July, 1971.

⁴⁰ Paris Convention Art. 1.

⁴¹ Paris Convention Art. 2.

authorities could set the standards as low or as high as they decided as long as the national treatment principle was respected. Moreover, some countries do not recognize the ICJ's jurisdiction.⁴²

The Berne Convention was the first multilateral copyright treaty. Like the Paris Convention, the principle of national treatment is also enshrined in the Berne Convention.⁴³ However, unlike the Paris Convention, the Berne Convention sets minimum standards of protection. Yet, it fails to provide clearly defined remedies for copyright holders, and it does not provide any form of punishment for violating countries.⁴⁴

The TRIPS Agreement as part of the covered agreements of the WTO subsumes the Paris and Berne Conventions but mandates higher requirements and obligations. It attempts to remedy the flaws of the Paris and Berne Conventions from the perspective of nations that demanded the inclusion of an international intellectual property regime, i.e., the US, EU, and Japan. The purpose of the TRIPS is to afford adequate protection for intellectual property rights in order to reduce impediments to international trade and competition.⁴⁵ It covers copyright and related rights, patents, trademarks, industrial design, layout design of integrated circuits, and trade secrets.

The TRIPS Agreement is divided into three major parts, standards, enforcement and dispute settlement. Sections I and II outline the principles of the Agreement, which

⁴² Pechman, R. J., *Seeking Multilateral Protection for Intellectual Property: The United States "TRIPS" Over Special 301*, 1998, 7 Minn. J. Global Trade 179, pp. 181-182.

⁴³ Berne Convention Art. 5.

⁴⁴ Romano, F., *Global Trademark and Copyright 1998: Protecting Intellectual Property Rights in the International Marketplace*, in *International Conventions and Treaties*, Practising Law Institute, 545 p. 557.

⁴⁵ The TRIPS Agreement Preamble.

are minimum standards, national treatment, and most-favoured-nation; while Section III sets forth general obligations with respect to enforcement procedures.

Articles 7 and 8 of TRIPS, which describe the “objectives” and “principles” of the Agreement, sets the framework for interpretation and implementation of the IP rights.⁴⁶ According to article 7, the protection of IP rights is intended to promote “technological innovation” and most importantly for developing countries, the “transfer and disseminations of technology.” It is argued that this article is meant to explain that IP protection is not a means in itself, but rather that the TRIPS Agreement is a document which allows Member States to achieve a balance between the rights and interests of IP owners and users of technology.⁴⁷ The achievement of this balance affords developing countries the opportunity to increase welfare and spur economic growth.⁴⁸

Article 8 states that Members are allowed to take into account the protection of public health and nutrition and to promote sectors of vital importance to their social, economic, and technological development when promulgating laws and regulations domestically.⁴⁹ This provision also holds that Members may take measures in order to eliminate impediments to transfer of technology or practices that adversely affect international trade.⁵⁰

⁴⁶ Correa, at note 3, p. 6.

⁴⁷ Correa *ibid.*

⁴⁸ Correa, C. et al., *Options for Implementing the TRIPS Agreement in Developing Countries*, 1997, Report of the Expert Group panel convened by the Third World Network, July 1997 in Geneva, found on www.twinside.org.sg or a revised version in Correa, C., *supra* at note 3, Annex.

⁴⁹ TRIPS Art. 8.1.

⁵⁰ TRIPS Art. 8.2.

The significance of the provisions lies in their ability to afford developing countries more flexibility to solve public health, nutrition, and transfer of technology and to a certain extent FDI-related problems. The Articles also allow the adjudicators to take account of a Member's difficulties and lack of resources in a TRIPS dispute involving a developing party.

The enforcement procedures of the TRIPS use both internal and external mechanisms. The internal mechanism guarantees that private actions may be taken in domestic courts. Private entities both foreign and domestic must have the opportunity to take action in national civil and/or criminal courts.⁵¹ Articles 42-49 of the Agreement prescribe the standard of evidence, damages and remedies, injunctions, and other enforcement procedures. The external mechanism is the WTO institutional regime, which allows for trade sanctions if Members do not comply with their obligations. The use of sanctions is legitimised only through institutional bodies of the WTO with the most important being the Dispute Settlement Body.⁵²

Articles 65 and 66 of the Agreement provide transitional arrangements for developing countries to implement the TRIPS Agreement. Developing nations, transitional economies, and centrally planned economies had until January 1, 2000, to implement their TRIPS obligations, whilst products which were not previously covered by patents have until 2005 to be protected under national laws. However, the provisions of Articles 3-5 of the TRIPS, which cover national treatment and MFN obligations, had to be implemented from January 1, 1996.

⁵¹ TRIPS Art. 41.

⁵² TRIPS Art. 64.

3.3.1 Main Substantive Provisions in the Area of Patents, Copyrights, and Trademarks

3.3.1.1. Patents

Patents are to be granted and the rights are to be exercised without discrimination as to the place of invention, the field of technology, or local content requirements.⁵³

The main substantive provisions pertaining to patents, includes standards relating to patentability, exceptions, compulsory licensing, and 20-year duration for protection.

Furthermore, the TRIPS contains minimum standards with respect to the following issues:

- Patents shall be granted for any invention whether product or process, provided that they are novel, involve an inventive step, and are capable of industrial application.
- Patents must be granted in all fields of technology.
- Diagnostic, surgical, or therapeutic medical processes for humans or animals, as well as plant and biological process, may be excluded from patentability.
- Plant varieties shall be patented or protected under a *sui generis* regime.
- The scope of exclusive rights under the patent regime is defined.
- Exceptions to exclusive rights are enumerated, and requirements for granting compulsory licenses are outlined.
- Reversal of the burden of proof in civil proceedings relating to infringement is to be established in certain cases.

⁵³ Correa, Supra at note 3, pp.16-17.

3.3.1.2 Copyrights

In the field of copyrights and related rights, the TRIPS Agreement enhanced the market position of the software, database, and phonograph industries, in which US and European firms have dominance.⁵⁴ In general, the copyrights section of the TRIPS protects works covered by the Berne Convention with the exception of moral rights, mathematical concepts, and methods of operation. It also recognises computer programs as literary works and requires that data compilations be protected under copyright laws. The TRIPS also limits the exception to exclusive rights to special cases, which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder. There is also a 50-year minimum term for works owned by persons or performers and phonogram producers. The TRIPS also recognizes the rights of broadcasting organizations and sets requirements, amongst others, on licensing and protection of recorded material.

3.3.1.3. Trademarks

The protection of trademarks under the TRIPS was enhanced by defining what constitutes a trademark and by treating trademarks and service marks as equals. Trademark owners also benefit from requirements of the TRIPS that allow for counterfeits to be confiscated at the border.

The TRIPS stipulates that the definition of a protectable trademark is a sign, which should be capable of distinguishing the goods or services of one undertaking from those of other undertakings. A major achievement of the TRIPS was also the

⁵⁴ Correa, *Supra* at note 3, p. 12.

granting of protection to “well-known” trademarks as it broadens the scope of protection. These are marks, which are known through publicity and not by usage of the trademark in a particular country. These trademarks are to be recognised and protected as long as a significant amount of promotion has taken place, and usage in the territory is no longer a requirement. Furthermore, the term of protection shall be seven years renewable indefinitely.

3.4 Affirmative or Positive Obligations of the TRIPS

The TRIPS Agreement requires Member States to fulfil obligations known as positive or affirmative, i.e., demanding that governments take certain actions in order to protect IP rights. There are two forms of positive obligations under the TRIPS. One form obliges state institutions and administrative bodies to implement certain provisions, for instance, granting seizure orders, injunctions, judicial reviews, and enactment of regulations. The other form is obligations directly related to private non-state behaviour, such as the investigating and prosecuting of counterfeiters, making of generic drugs without a license, or playing music and movies in local establishments.

Unlike trade in goods, trade in intellectual property requires governments to regulate in order to protect IP rights. For example, the TRIPS Agreement commands states to regulate to protect the monopoly rights of innovators and authors. These affirmative or positive obligations require state action in contrast to GATT’s negative obligations or passive obligations to deregulate trade in goods, or to try to eliminate tariffs. Therefore, the TRIPS cuts deep into national sovereignty at a great cost to nations which have not had previously protected IP rights. Whereas, trade barriers to goods

typically involve active prevention or delay entry into a market, and trade barriers for copyrighted or patented goods involve a lack of government action, that is, inadequate protection that permits free riding or lower profits for foreign IP rights holders. Thus, TRIPS unlike the GATT, requires more governmental action to prevent undesirable private action. As mentioned, these proactive positive actions by the state incur great costs, particularly to those nations which do not have the necessary institutional infrastructure and a history and culture of intellectual property protection.⁵⁵

Developing nations have problems both in formulating a regulatory framework that promotes economic development and in effectively enforcing the TRIPS obligations. With respect to the regulatory framework, many developing nations as mentioned before, believe the obligation of creating the regulations as required by the TRIPS, hinders access to affordable knowledge. On the other hand, effective enforcement incurs great costs as it must control non-state conduct pursuant to the affirmative obligations under the TRIPS.⁵⁶ The executive branch of most Members of the WTO sets tariffs on goods. Therefore, lowering them would be an easier task than creating judicial bodies and enacting new laws and regulations, which involve the more fractious legislative branches of most governments. Furthermore, achieving effective IP protection requires policing non-state action, which is more difficult to monitor. Abiding by the GATT requires simply lowering tariff instruments directly

⁵⁵ These costs could be monetary, opportunity or allocational ones.

⁵⁶ Samahon, T., *TRIPS Copyright Dispute Settlement After the Transition and Moratorium: Non-violation and Situation Complaints Against Developing Countries*, 2000, 31 *Law & Pol'y Int'l. Bus.* 1051, pp. 1053-1066.

under the control of the executive, whereas TRIPS obligations require action against private and third-party pirates.⁵⁷

Furthermore, there are entities and activities that developing nations may want to promote, such as research and development activities, which they may not be able to overlook under the TRIPS. These are actions the state in most developing countries either does not have the resources to control or considers them harmful to economic development and capacity-building. Unlike borders where states usually have a better presence internal enforcement may lack effective state presence.

The institutional and regulatory demands the TRIPS makes are also costly and difficult to satisfy.⁵⁸ Not only as mentioned before, do these judicial and institutional reforms cost a great deal of money and training, they also cost a great amount of governmental politicking and manoeuvring.⁵⁹ The political cost in some countries is sometimes difficult to overcome, taken that many developing countries suffer from political instability or at least political fractiousness. The adjudicators should be aware of these problems and to the extent that they are able to satisfy the spirit of the TRIPS, defer much authority to Member States in meeting responsibility. The following case analysis will illustrate how the AB did not achieve fairness with respect to India's obligation to provide for a "mailbox" system of patent filing.

⁵⁷ Otten, A., & Wager, H., *Compliance with TRIPS: The Emerging World View*, 1996, 29 Vand. J. Transnat'l L. 391, pp. 404-406.

⁵⁸ Vandana, S., *Protect or Plunder?: Understanding Intellectual Property Rights*, 2001, Zed Books, pp. 15-18.

⁵⁹ *Ibid.*

3.4.1 *The India-Pharmaceutical Patents Case (Mail Box Case)*⁶⁰

The first TRIPS case to reach the DSB involved India and the US. This case is an interesting enforcement case which may shed some light on the differing perceptions of the AB and developing countries. The holding of the adjudicators, in contrast to how the development approach would have functioned, illustrates that the needs and difficulties developing countries face in relation to “on the ground” enforcement of the TRIPS are not being addressed. Furthermore, it shows that the AB had a different understanding of the provisions at issue from that of India and other developing countries. Finally, it will show that the deference to national authorities required in TRIPS matters was not given to the Indian government.

3.4.1.1 *Facts of the Case*

The issue in the *India-Patents* case was whether India had established a mechanism that adequately preserved novelty and priority with respect to patent applications for pharmaceutical and agrochemicals inventions; given that in India these products were not patentable.⁶¹ Article 70.8 imposes the obligation that Members must establish “a means” by which applications for pharmaceutical and agricultural products can be filed.⁶² This filing mechanism is called a “mailbox” system. It also provides that exclusive marketing rights must be granted where a product is the

⁶⁰ *India-Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R (Dec. 19, 1997) (hereinafter, *India-Patents* or *India-Mail Box*).

⁶¹ India Patents Act of 1970, Section 5.

⁶² TRIPS Agreement Article 70.8 states: “Where a member does not make available as of the date of entry into force of the WTO Agreement patent protection for pharmaceutical and agricultural chemical products commensurate with its obligation under Article 27, that Member shall... notwithstanding the provisions of Part VI, provide as from the date of entry into force of the WTO Agreement a means by which applications for such inventions can be filed.”

subject of a patent application.⁶³ These provisions should be read in light of Article 65 of the TRIPS Agreement, granting developing countries a transitional period to protect patents in areas that were not patentable before the entry into force of the WTO Agreement.

At the end of 1994, the president of India enacted via an executive ordinance, the Patents Ordinance of 1994. This was done because of parliamentary quorum requirements which could not be met at the time. The ordinance was valid for six weeks after the reassembly and quorum of the parliament. This ordinance created the mailbox system required by Article 70.8 of TRIPS. Parliament reassembled in 1995 but the ordinance was never enacted and thus, expired after the six weeks.⁶⁴

The US claimed India had derogated from its obligations because there is no mailbox system available. Consequently, the exclusive marketing rights granted by Article 70.9 for a period of five years, is being violated. The government of India contended that the executive branch had given “administrative instructions” to the relevant agencies to provide for the filing of patents and the granting of exclusive marketing rights as per Articles 70.8 and 70.9 of the TRIPS.⁶⁵ India maintained that the purpose of Article 70.8 is to ensure Members receive patent applications from January 1, 1995, and record them on the basis that patent protection may be granted in 2005, the year the patent provisions of the TRIPS Agreement enter into force for India. Therefore, novelty and priority pertaining to patent applications for

⁶³ TRIPS Article 70.9 states: “Where a product is the subject of a patent application in a Member in accordance with paragraph 8(a), exclusive marketing rights shall be granted ... for a period of five years after obtaining market approval in that Member or until a product patent is granted or rejected in that Member, whichever period is shorter, provided that subsequent to the entry into force of the WTO Agreement, a patent application has been filed and a patent granted for that product in another Member and marketing approval obtained in such other Member.”

⁶⁴ The insight into Indian legislative process is taken from the AB report itself, *India-Patents* para. 62.

⁶⁵ *India-Patents* para. 58-60.

pharmaceutical and agrochemical products are preserved.⁶⁶ India argued that the TRIPS does not mandate legal certainty as to whether patent applications will be rejected or accepted in the future.⁶⁷ Furthermore, the exclusive marketing rights provision of Article 70.9 is to enable developing countries to postpone legislative reforms.⁶⁸

The US claimed Article 70.8 provides for assurances that the mailbox system will be properly in place and the marketing rights under Article 70.9 are effective as of January 1, 1995, and not in 2005. The WTO panel and AB sided with the US in finding India in violation of Articles 70.8 and 70.9. However, the AB modified the ruling of the panel but the outcome remained the same.

3.4.1.2 Reasoning of the Panel and AB

The panel ruled in favour of the US based on the notion of “legitimate expectations” holding that: when interpreting the text of the TRIPS Agreement, the legitimate expectations of the WTO Members concerning the TRIPS Agreement must be taken into account, as well as standards of interpretation developed in past panel reports in the GATT framework in particular, those laying the principle of the protection of conditions of competition flowing from multilateral trade agreements.⁶⁹ The panel’s rationale was based on past GATT practice, interpretation under the Vienna

⁶⁶ Ibid. para. 5-6.

⁶⁷ Ibid. para. 5-6.

⁶⁸ Ibid. para. 12.

⁶⁹ *India-Patents* (panel report) para. 33.

Convention on the Law of Treaties Article 31, and the object and purpose of the TRIPS Agreement.⁷⁰

The AB reversed the panel with respect to the non-violation matter. First, it held the panel had confused two different concepts emanating from the GATT practice. It stated the protection of expectations of contracting parties as to the competitive relationship between their products and imported ones are developed within the context of violation complaints under GATT Article III (national treatment) and Article XI. Whereas, the protection of reasonable expectations of contracting parties relating to market access is developed in the context of GATT Article XXIII (b) complaints, i.e., non-violation complaints and at times, situation complaints.⁷¹ Since Article 64.2 of the TRIPS Agreement has allowed for a five-year moratorium for the filing of non-violation and situation complaints under the TRIPS Agreement, the panel has erred in its reasoning.

Moreover, the AB criticized the panel with respect to its reliance on the VCLT Article 31 for its “legitimate expectation” interpretation. The AB reasoned that the “legitimate expectations” of the parties could be found in the text of the TRIPS itself.⁷² The AB cited DSU Articles 3.2 and 19.2 to reaffirm that the adjudicators cannot “add to or diminish the rights and obligations provided in the covered agreements.”⁷³ In the view of the AB, the panel had overstepped its authority by

⁷⁰ However, the panel did not put the object and purpose of the Agreement in the context of Articles 7 and 8 of the TRIPS. Furthermore, the legitimate expectation concept is derived from Article XXIII(b) and (c) of GATT pertaining to non-violation complaints. This point was addressed by the AB, ejecting the inclusion of the legitimate expectations through the interpretation of VCLT Article 31.

⁷¹ *India-Patents* (AB report) para. 36-42.

⁷² *Ibid.* para. 43-45.

⁷³ *Ibid.* para. 46.

importing concepts and principles, which do not exist in the treaty itself and as such, is not appropriate course of action by the Panel.⁷⁴

3.4.1.3 Analysis of the Holding

The panel concluded that in accordance with customary rules of interpretation of international law, the TRIPS Agreement gave rise to the protection of “legitimate expectations” of rights holders. The AB rejected the panel’s reasoning holding that legitimate expectations cannot be read into the language of the TRIPS. It held that India was in violation of Article 70.8 and 70.9 due to circumstances and lack of proper enforcement as evidenced by inadequate legislation in this regard. This would have been a good chance for the AB to affirm the objectives of the TRIPS Agreement as stated in Article 7, and interpreted the provisions in the same light. As Article 31 of the VCLT states, the treaty must be interpreted in light of a) the ordinary meaning of the text b) the context and, c) its object and purpose. Article 7 would have been a clear indication of the objectives of the TRIPS and as such would have been a clear guide for the AB.

An alternative interpretation was open to the panel and AB based on Article 7 in particular, but also drawing on the language of the Preamble. The context of the TRIPS is mentioned in the Preamble, which states that development via the transfer of and access to technology and the protection of intellectual property rights as a tool to achieve this goal is the reason for the inclusion of TRIPS into the WTO Agreement. Furthermore, the last sentence of Article 7 states protection of IP rights should be “in a manner conducive to social and economic welfare and to a balance of

⁷⁴ Ibid. para. 44-45.

rights and obligations.” This is deemed a reference to the concept of the “intellectual property bargain.”⁷⁵ The bargain is the balancing of rights between consumers and producers at both the international level and domestic level. That means that the actors in this “bargain” are the citizens and most firms of the developing countries on the one side, and the multinationals of the developed world on the other.

Assuming that the “bargain” is accepted then the vagueness and ambiguity of the text of Article 7 and 8 must be decided by the adjudicators, in particular, the AB. The development approach would require the AB to rule in a manner that when faced with such interpretational questions of the TRIPS the settlement of the true meaning of the words be done in a manner that advantages the disadvantaged in the context of the “bargain.” However, not only did the AB in this case ignore the guidelines of Article 7 or 8, it proceeded to interpret Article 70.8 in a manner that harms the interests of the developing countries.

According to the AB the question at issue was “what precisely is the ‘means’ for filing mailbox applications that is contemplated and required by Article 70.8(a)?”⁷⁶ In attempting to interpret the “means” described by the provision the AB set a standard that gives no deference to national authorities to decide those means, as prescribed by Article 1.1 of the TRIPS which allows Members “to determine the appropriate method of implementing the provisions of the TRIPS within their own legal system and practice.” The Indian government decided that at the end of 1994 the most appropriate means was a Presidential Ordinance, whilst later it felt the “administrative instruction” was the best manner to do so. The AB explained that the

⁷⁵ Abdulqawi, Y.A. & Correa, C.M., *Intellectual Property and International Trade: The TRIPS Agreement*, 1998, Kluwer Law International, p.12.

⁷⁶ *India-Patents*, (AB report) para. 54.

Indian “administrative instructions” lacks the required legal security, hence, the Indian government is in breach of its obligations.⁷⁷ This reasoning is counter to the development approach because it lacks the requisite security element of the legitimacy test. The AB should interpret in accordance with VCLT Article 31, by reading into the object and purpose of the TRIPS, yet it made no explicit or implicit reference to Article 7 and 8.

Furthermore, the principles underlying the development approach have been overlooked, as the lack of deference to national authorities in relation to an affirmative obligation imposing great costs is not in conformity with the principle of capacity building for third-world countries. Also, justice has not been adequately addressed because the ruling does not advantage the disadvantaged, instead it has advantaged the producers of pharmaceutical and agrochemical products that are overwhelmingly manufactured by rich multinationals in the US and the EU. The AB could have interpreted the provision in a manner that gives India the full period of transitional time allotted to developing countries for pharmaceuticals by allowing the Indians to proceed with regulations as they deem necessary.

In contrast, the development approach would not have precluded any decision with regard to Article 70.8 and 70.9. If the US was able to show a systematic lack of enforcement or a systematic lack of adherence to the “administrative instructions” within a time period of approximately 2 to 3 years, then they would be able to show that the “administrative instructions” are not being respected. Moreover, they should provide evidence that their firms have tried on many different occasions for many different products, to file a mailbox application but have failed and as such, the US

⁷⁷ *ibid.* para. 63-64.

firms have not been able to preserve novelty and priority of products in India. This would be the burden necessary for industrialized nations to meet with regard to issues relating to developing countries, enforcement and the moratorium granted on certain matters.

A development approach would suggest that deference should be given to national authorities in developing countries to exercise regulatory and judicial discretion. The principle of building institutional capacity for developing countries under the development approach entails allowing these nations to act in accordance with unique circumstances in relation to the TRIPS so as to allow the least amount of cost and harm to their economies.

3.5 Problems and Prospects for Patent Protection in Developing Countries

Prior to the signing of the TRIPS Agreement, the patent protection system under the Paris Convention was fraught with procedural mechanisms that allowed many developing countries to implement a “weak” protection regime.⁷⁸ However, after the coming to force of the TRIPS, developing nations must implement and perform obligations which are unfavourable to their interests.⁷⁹ The restrictions and conditions developing countries attached to patent protection have been curtailed extensively.

There are some important issues for developing countries with regard to international patent protection. They pertain to the subject matter of protection, compulsory

⁷⁸ Gana, *Supra* at note 1, p. 745.

⁷⁹ Gutterman, A.S., *The North-South Debate Regarding the Protection of Intellectual Property Rights*, 1993, 28 Wake Forest L. Rev. 89, p.93-97.

licensing and exceptions to exclusive rights. New subjects such as traditional knowledge and biotechnology patents are at the forefront of the debate between developed and developing countries. Nevertheless, these matters are still not clarified to a satisfactory level from the perspective of developing nations by the adjudicative process or through negotiations at the WTO.⁸⁰ Certain intellectual property subjects have been adjudicated by the DSB and as such the reasoning and holding of the cases will be analysed in this chapter whereas, hypothetical scenarios will be used for unchallenged matters.

3.5.1 Subject Matter and Scope of Protection

Unlike the Paris Convention which allowed the subject matter of protection to be deferred to domestic authorities, the TRIPS mandates the subject matter that must be protected. It states patents must be granted in all fields of technology, to inventions which are new, involve an inventive step, and are capable of industrial application.⁸¹ These requirements are identical to patent regulations of the US and the EU.⁸² US law uses the terms “non-obvious” and “utility” which the TRIPS Agreement has held as being equivalent in meaning within the language of Article 1 of TRIPS.

The ambiguous language of certain treaty provisions can pose some problems for developing countries, especially if judicial interpretations restrict the built-in flexibility of the Agreement. The TRIPS requires new standards in IP protection which must be implemented in a short period of time. Second and more

⁸⁰ Fowler, B., *Preventing Counterfeit Craft Design*, in Finger, J.M., & Schuler, P., *Poor People's Knowledge: Promoting Intellectual Property in Developing Countries*, 2004, World Bank Publication, pp113-132 p. 124-127.

⁸¹ TRIPS Art. 1.

⁸² Gana, *Supra* at 1, p. 748.

troublesome, is the fact that these countries do not have the legal and administrative experience necessary to clearly define the contours of these terms. In the US for example, there are many state and federal cases that have dealt for instance, with questions such as the criteria for “non-obviousness” and “utility.”⁸³ A very extensive jurisprudential body of law has been established in developed nations for over a hundred years.

The lack of jurisprudential guidance is due to the colonial history of many developing nations or because they have had tumultuous political-legal systems that have gone through many transformations. Secondly, under their pre-free trade models of development, such as import substitution industrialization regimes, patent protection either did not exist or was very elementary. The patent system had little or no influence on the jurisprudence of these nations, which give rise to a lack of knowledgeable judges and legal practitioners. Thirdly, the patent regulations of developing countries are mostly the result of ratification of international agreements and not a self-developed paradigm or model of intellectual property rights with its own individual characteristics and with its own mechanism for balancing consumer and business interests.⁸⁴

Thus, the present regime of patent protection raises many questions, for instance, where do developing countries look to when faced with definitional problems? Do they seek the advice of developed nations and their jurisprudence on matters or do they attempt to create their own version and will that derogate from the TRIPS? For instance, may a national court in South Africa refuse an application for patenting

⁸³ See 35 U.S.C. sec. 103 1994; for the criteria of non-obviousness the case of *Graham v. John Deere Co.*, 383 U.S. 1 (1966).

⁸⁴ Gana, *Supra* at note 1 p. 749.

glaucoma-curing medicine by a multinational firm based on that fact that there are native botanical medicines and thereby the invention is not new? These are questions that necessitate long-term and extensive empirical research, proper economic management, and basic trial and error in order to devise effective regulations defining the contours of patent protection. Without such experiences developing countries are not able to select the intellectual property paradigm that best serves their interests. For example, a Chinese applicant may be refused patent for a traditional Chinese medicine in the US based on the principle of prior public use.⁸⁵ On the other hand, it is possible that a US firm can manipulate Chinese traditional medicine in order to extract certain effective components of the plant so as to meet the patentability criteria of the US. This is a very important issue as one of the areas which developing countries in Asia, Africa and Latin America have a comparative advantage is traditional knowledge.⁸⁶ However, the current IP regime potentially allows this form of free riding by Western pharmaceuticals. This is an area that the WTO adjudicators could interpret and implement the TRIPS language in such a manner to prevent this form of abuse.

More questions abound, may a developing country patent an invention that satisfies the “inventive step” requirement but is it a “petty” invention? And how is the term “novel” supposed to be interpreted? “Petty” patents and low-level inventions are very important for developing nations as they tend to stimulate local economic

⁸⁵ US Patent Act section 102; see the Hodosh v. Block Drug Co., 786 F.2d 1136, 1142-1143 (Fed. Cir. 1986).

⁸⁶ Dutfield, G., *Legal and Economic Aspects of Traditional Knowledge* in Maskus, K., & Reichman, J., *International Public Goods and Transfer of Technology under a Globalized Intellectual Property Regime*, 2005, Cambridge Univ. Press, pp. 495-520 p.505-506. and Cottier, T., & Panizonn, M., *Legal Perspectives on Traditional Knowledge: The Case for Intellectual Property Protection* in Maskus, K., & Reichman, J., *ibid*, pp. 565-594, p. 569-572.

development.⁸⁷ The promotion of local inventions is crucial in the current situation because imitating technology from the developed countries is no longer feasible, as the Japanese were able to do in the past. A combination of international treaties, political and economic pressure from the Quad and the evermore-sophisticated nature of technology has made imitating inventions as a form of long-term development obsolete.⁸⁸ Nonetheless, some utility remains in imitating certain inventions for third-world businesses but long term effects of that strategy are not productive.

Adjusting novelty standards is a prudent way to stimulate local economies and technological advancement.⁸⁹ The language of the TRIPS is permissive of that approach and the interpretations of the AB and panel of TRIPS provisions in this regard, is crucial for the long-term use of this strategy by developing countries. Arguably a lower standard for novelty will allow Western multinationals to patent petty inventions in developing countries and therefore, hinder the promotion of technology in these countries.⁹⁰ However, multinationals will be deterred by the transaction costs associated with patenting a product in a foreign country that cannot be patented in the rich markets. Developing countries must be allowed to set a lower standard of novelty under the TRIPS agreement in order to stimulate the local economy.

⁸⁷ Petty patents are currently not available in the US and the EU as the inventive step threshold is much higher in these jurisdictions, however, under the TRIPS, at first glance it would seem that developing countries could allow for the patenting of petty inventions. See Gana at 1 p. 751.

⁸⁸ Saggi, K., *International Technology Transfer and Economic Development*, 2000, in Hoekman, B., & Mattoo, A., & English, P., *Development, Trade, and the WTO: a Handbook*, 2002, (IBRD/World Bank), p. 351-359, p. 352-353.

⁸⁹ McDonald, S. *Exploring the Hidden Costs of Patents* in Drahos, P., & Mayne, R., *supra* at note 35, pp.13-39, pp.15-17.

⁹⁰ Correa, C., *supra* at note 3 p. 122-125.

The ambiguity of the “novelty” requirement is also a point of concern in developing nations in particular, in the field of biotechnology and traditional knowledge. Cultural or traditional knowledge is known to be a stimulator of domestic inventiveness and subsequently, economic development.⁹¹ Different plants and potions used by people in Latin America, China, and Africa have been known to cure or remedy many illnesses. Certain types of hot pepper and bitter gourd vegetables are examples of traditional biological medicine that exist in these regions. The TRIPS Agreement in its current state, does not provide protection for traditional knowledge per se, which is a great contribution to human inventiveness and a great source of economic development.⁹²

In fact, the definition of novelty as prescribed in the US and the EU would most likely exclude such medicine from patent protection. However, if one were to extract the active chemical of these plants then protection could be granted. For instance, Andean Indians of Central and South America have been using a plant called cinchona as an anti-malaria potion. In the early 1800s a French doctor, Pierre Pelletier, extracted the chemical quinine from the cinchona, the active ingredient in combating malaria. Under the present IP regime Dr. Pelletier would be the sole owner of the patent rights to the drug. This system heavily favours the firms in industrialized countries, as they are able to obtain knowledge cheaply and then use sophisticated technology to reach the threshold of novelty required by their domestic regulations and be in conformity with the TRIPS. In essence, it is a form of reverse engineering in the medical field. The true owners of the knowledge for example, the indigenous people, do not gain any benefits from the system.

⁹¹ Arora, A., Fosfuri, A., & Gambadella, A., *Markets for Technology, Intellectual Property Rights, and Development*, in Maskus, K., & Reichman, J., supra at note 86, pp. 321-336.

⁹² Cottier, T. & Panizonn, M., supra at note 86.

The TRIPS Agreement significantly extends the scope of patent protection. It requires patents be granted in “all fields of technology” including process patents and biotechnology patents.⁹³ Biotechnology was not patentable in many developing nations such as Brazil, India, and Argentina. Developing nations are very sceptical about granting patents in the biotechnology area. Their concerns are ethical, legal and economic in scope.⁹⁴ There is a high level of uncertainty amongst WTO Members as to what constitutes “new” with regard to plant and animal processes. The balance between the rights of farmers in connection to seed variety and organic pesticides vis-à-vis the multinationals and their GM products that tend to lower consumer prices, is at the core of the issue.⁹⁵

Access to cheap pharmaceutical and agrochemicals was a major concern for developing Members during the Uruguay Round. They are extremely reluctant to grant patents to firms which are usually foreign multinationals, for pharmaceutical and agrochemical products. Larger developing nations such as India, Brazil, and South Africa have a very efficient generic drug industry that afforded their citizens cheap drugs.⁹⁶ These nations must now disband generic drug companies over a certain period in order to meet the requirements of the TRIPS. The problem of providing affordable drugs is at the core of some of the most controversial disputes between developing and developed nations regarding patents and IP protection at the political level, though there are still no official WTO disputes.

⁹³ TRIPS Agreement Article 1-3

⁹⁴ Khor, M., *Rethinking Globalization: Critical Issues and Policy Choices*, 2001, Zed Books pp. 130-136.

⁹⁵ Vandana, S., *supra* at note 58, pp. 53-54

⁹⁶ Lal Das, *The WTO Agreement, Deficiencies, Imbalances, and Required Changes*, 1998, Zed Books. Sec. TRIPS Agreement.

The TRIPS Agreement requires that patent applications must disclose the invention appropriately. The Agreement, at first glance, seems to help technology consumers as the information is disseminated on how the patented product is created. However, this will only benefit developing countries if they adopt a narrow and restricted requirement for claims. When an inventor applies for a patent the claims in the patent application for a product or process define the limits of the patent. The more narrow the claims the more narrow the scope of the IP rights become. The patent holder has less power to control improvements or similar inventions by another party. In fact, broad claims could work as a way of excluding improvements on patents from IP protection. The process of local adaptations on inventions is a very important mechanism for developing nations to improve their technological basis.⁹⁷

Under the “development approach” the adjudicators must allow developing countries to formulate strict claims regulations at the domestic level. The developing countries themselves should devise regulations that limit the scope of claims made by patent applicants. The courts of developing countries should also limit the concept of equivalence unlike in US and EU jurisdictions. The doctrine of equivalence holds that products that essentially perform the same function or equivalent function as a product previously patented should not be protected. The adjudicators’ role would be to confirm this strategy for developing Members. They should not prevent developing countries from allowing local applicants from patenting improvement or adapted products and processes. The restriction of claims coupled with the principle of national treatment will not allow foreign multinationals the opportunity to patent even more products. As mentioned before, the transaction costs of patenting products in other countries is usually too high for multinationals, therefore only the

⁹⁷ Reichman, *supra* at 17, p. 6.

more significant of inventions will deserve protection. The restriction of claims will only give local entities the opportunity to invent and patent products and processes.

3.5.2 Hypothetical Case On Scope of Patent Protection (Inventiveness/ Non-Obviousness)

Zelda Labs has created a new pharmaceutical drug for the treatment of Spinitis. The drug uses compounds that bind to magnesium. It is patented in Zelda's home country of Whelmia and in Devistan. Devistan is a developing country that is a WTO Member and has adopted patent laws conforming to its international obligations under the TRIPS Agreement. A Devistan firm sells the same drug with the same formula with only one exception: it uses manganese instead of magnesium. Zelda Labs exhausted local remedies by suing the Devistanian company to no avail. The court in Devistan found that before Zelda Labs put this drug into the market it was common knowledge that Spinitis sufferers were having problems with absorption of metals; therefore, this new compound is not really sufficiently inventive to obtain protection. Furthermore, In Zelda Labs' patent application it stated that the binding compound is an "alkaline earth metal bond" and manganese does not fall into this category, thus the product does not violate Zelda's patent.

Whelmia alleges that Devistan violated article 27.1 of the TRIPS Agreement by raising the threshold of "inventive step" to the point that it is not providing adequate protection of inventions. Furthermore, in Whelmia's Request for the Establishment of a panel under Article 6 of the DSU, it alleges Devistan also violated Article 28.1 of the TRIPS in that it allowed others to use Zelda Labs' knowledge without its authorization. Devistan contends that its courts applied established principles of

Devistan law in a non-discriminatory manner without consideration to nationality. It is simply that the definition of “inventive step” or “nonobviousness” and infringements carry a heavy burden in Devistan.

3.5.2.1. Possible Approaches to Adjudication

One possible approach the adjudicators of the WTO can pursue is a US modelled one. It is possible that a court in the US would take the following approach: it would first decide whether the identification of a metals problem in Spinitis sufferers was part of the art in existence prior to Zelda’s invention. It would then ascertain how many possible systems of metal absorption exist. If there are many such systems then Zelda’s invention is patentable since an ordinary person skilled in the art may not have found this system easily.⁹⁸ Basically, the US courts would ask whether it would be obvious to the ordinary artisan to substitute manganese for magnesium. If not, the product is patentable, if so, then it is not.⁹⁹

However, the US approach tends to insure its own interests not just domestically but also at the international level. This approach if implemented globally, will only place US and EU firms already technologically endowed in an even better position to make profits. This approach would make the cost of technology more expensive for consumers of technology as it allows patents for even more products. It broadens the

⁹⁸ It is known that a patent is supposed to be awarded for an invention not simply for an improvement that would be obvious to a person skilled in the art. Whether the obviousness of trying renders an invention unpatentable depends on a combination of factors, such as options available and whether there are writings in the art that state preference for one alternative over another. See Novo Industri v. Travenol Lab, Inc., 677F.2d 1202, 1208 (7th Cir. 1982). Furthermore see Dreyfuss, R.C., & Lowenfeld, A.F., *Two Achievements of the Uruguay Round: Putting TRIPS and Dispute Settlement Together*, 1997, 37 Va. J. Int’l. L. 275.

⁹⁹ Dreyfuss, R.C., & Lowenfeld, A.F., *ibid.*, p. 299-302.

scope of patentability, which naturally benefits states that have a more advanced technology and research base.

The development approach in this case would interpret Article 27.1 in a manner which allows for flexibility in defining the inventive step and obviousness. To express the implications of such an approach in practical terms and to illustrate that developing countries need more leeway in the implementation of the TRIPS Agreement, the following description is instructive.

Since Devistan is a developing country it is allowed a transition period before it is required to extend patent protection to such products. However, in this case Devistan has implemented the TRIPS requirement before the expiry of the transition period.¹⁰⁰ This could be an indication that Devistan is trying to promote local innovation and research. A research and development industry needs a highly skilled work force, hence, an effective way of training unskilled workers would be to employ people in laboratories and other R & D projects. In order to properly train the work force there needs to be real and meaningful work options for them to pursue. Producing alternatives to foreign medicine is an obvious and beneficial option. It not only creates a knowledge base but could also help in the promotion of social health.

Devistan could argue that in developed societies a less stringent interpretation may be necessary to spur a highly trained work force to look through different alternatives, amongst many so as to find the right choice, in this case different metals

¹⁰⁰ It is true that the transition period for many products has expired for developing countries, however, in this example it is valid to state that the period has not expired in order to illustrate the difficult issues facing developing countries in enacting legislation in conformity with the TRIPS. Furthermore, it is assumed that the period has not expired only as an indication that developing countries are trying to play the intellectual property game.

and metal absorption systems could be tested to find the best alternative. However, in Devistan and other developing countries there is no need to incentivise the promotion of finding different alternatives to the production of a particular drug or product. The labour force struggles with unemployment and low wages. Devistan should give monopoly rights to innovators that confer truly unique inventions with major social benefits. Denying the sort of patents that Zelda Labs of Whelmia is seeking to obtain in Devistan can effectively and efficiently do this. Zelda Labs' product can and should be perceived as an advance on prior art and not an entirely new and innovative product. Therefore, Devistan has not violated Article 27.1 of the TRIPS and consequently, is not in breach of Article 28.1. Allowing Devistan to produce variations on Zelda Labs' product is an effective and tangible way for it to develop the skills it needs to take advantage of the supposed benefits that the TRIPS Agreement provides.¹⁰¹

A scenario whereby this example of adjudication may be rejected is if Devistan somehow violated the national treatment or most-favoured-nation principle vis-à-vis Whelmia. In that case, the decision should go against Devistan as it has violated a major principle of both the TRIPS Agreement and the WTO.¹⁰² A systematic failure to protect innovations is another example of a clear TRIPS violation, in order to prove such a case a pattern of violation of Article 28 of the TRIPS must be claimed and evidenced. In this hypothetical case, however, the Devistan firm had not counterfeited the product or engaged in systematic failure to protect IP: in fact it created an alternative. Zelda Labs' product could still go on the market and could

¹⁰¹ Adelman, M.J., & Baldia, S., *Prospects and Limits of the Patent Provision in the TRIPS Agreement: The Case of India*, 29 Vand. J. Transnat'l. L. 507, 525-534.

¹⁰² Article 3 and 4 of the TRIPS Agreement mirror GATT Articles 3 and 1 pertaining to national treatment and most-favored-nation principles, respectively.

not be feasibly priced out of it as the Devistan firm must have invested in research to create the alternative and that cost will be reflected in the price of the drug.

3.6 Copyrights and Developing Countries

Bringing IP protection under the auspices of the WTO was an attempt to give incentive or coerce trading nations to enforce intellectual property rights by wielding the threat of trade sanctions against violators. The general concern of developing countries with respect to copyrights is similar to patents that is the accessibility to knowledge, in particular with regard to education and literacy. Again, the interests of developed and developing nations at times, conflict in another form of IP rights. Publishers, broadcasters, software writers, artists and the like in developed countries seek to protect and thus, maximize profit from their artistic works. For developing countries, not only is the access to knowledge under the TRIPS cumbersome and costly, but in many of these countries a knowledge culture that is anathema to some of the western notions of IP also exists.¹⁰³

The granting of exclusive rights to copyright holders puts forth the question of the limits and scope of that right. Therefore, developing countries are most concerned with the costs associated with obtaining knowledge and how they can strike a balance between the producers and consumers of knowledge within the framework of the TRIPS. Again, the issue of interpretation and language of the Agreement presents both problems and opportunities. The AB should to the extent its authority allows, decide in a fair manner. Using the “development approach” to achieve

¹⁰³ Leaffer, M.A. *Protecting United States Intellectual Property Abroad: Toward a New Multilateralism*, 1991, 76 Iowa L. Rev. 273 p. 283-4.

fairness will diminish problems and increase opportunities for economic growth in developing countries in relation to intellectual property rights.

For example, the TRIPS Agreement copyrights provisions,¹⁰⁴ allows for exceptions to exclusive rights in situations where the grant would not conflict with the “normal exploitation” of the work and does not “unreasonably prejudice the legitimate interests of the right holder.”¹⁰⁵ However, the terms “normal exploitation” and “legitimate interests” are vague and interpretation at both the domestic and WTO level has the potential to significantly influence access to copyrighted material in developing countries. As these terms are directly pulled from the Berne Convention (Art. 9.2) a look at its application may indicate these terms refer to actions such as massive photocopying or small scale viewing of movies in local film houses.¹⁰⁶ Moreover, the concept of “legitimate interests” is not a uniform one. In European countries a moral right is attached to the term, yet the TRIPS is silent on that issue.¹⁰⁷ Therefore, interpretation of these terms is crucial for the proper functioning of the TRIPS.

The concern of developing countries is that access to copyrightable works could be beyond reach as costs of obtaining licenses will be more expensive. Article 11 of the TRIPS pertaining to rental rights has given rights holders much more control over software and cinematographic works. The article stipulates that Members are to “provide authors and their successors in title the right to authorize and prohibit the commercial rental to the public of originals or copies of the copyrighted works.”

¹⁰⁴ TRIPS Art. 9-14.

¹⁰⁵ TRIPS Art. 13.

¹⁰⁶ Ricketson, S., *The Berne Convention for the Protection of Literary and Artistic Works 1886-1987*, 1987, p. 482-483.

¹⁰⁷ *ibid.*

This added control for rights holders does not bode well for developing countries. The right holder could limit rentals of its work in a particular country.¹⁰⁸ In developing countries rental is usually the most accessible way of obtaining works as rental is cheaper than purchasing. Therefore, the right holder has full control on how and when it desires to disseminate its work to the extent that it could inflict too heavy a cost on developing economies. Also under this provision right holders are easily able to pass on all the transaction costs for rental enterprises to the consumer.

With regard to computer programs the access problem presented by Article 11 is exacerbated by the fact that these works are deemed as literary ones.¹⁰⁹ Thus, copyright laws of the TRIPS protect them. During the Uruguay Round the US pushed to have computer programs protected by copyright laws because this was the cheapest form of IP protection, as it does not have the same disclosure requirements as patents.¹¹⁰ Furthermore, the length of protection and its universality of protection from the date of creation afford a stronger protection mechanism. However, categorizing computer programs as literary works is contradictory to the conceptual dichotomy that exists with regard to copyrightable products, that is, expression of idea versus the idea itself.¹¹¹ The TRIPS Agreement Article 9.2 protects the expression of the idea.

To this end, the production of an identical work of a program is illegal if it is based on the pre-existing program. There is no infringement if an identical program is independently created. Likewise, there is no infringement if the program performs

¹⁰⁸ Kennes, W., *Small Developing Countries and Global Markets: Competing in the Big League*, 2002, Palgrave MacMillan, pp.23-24.

¹⁰⁹ Fong, M., *Information Technology for Knowledge Management in China*, in Dadashzadeh, M., *Information Technology Management in Developing Countries*, 2002, Irm Press pp. 294-304 pp. 297

¹¹⁰ Correa, *Supra* at note 3.

¹¹¹ *Supra* at note 96, pp. 103.

the same functions but its expression is different than the copyrighted work. This is important because many computer programs are developed incrementally by amending, adapting and improving previous forms of programs. The fact that computer programs are copyright protected and rental rights are expansive makes developing countries access to this technology very arduous and expensive. Furthermore, it hinders the creation and production of software programs of their own, as access to previous programs is hindered.¹¹²

There are other issues of concern for developing countries under the TRIPS agreement. They include Article 11(bis) and 12 of the Berne Convention, which is incorporated into the TRIPS and translation rights under Article 2 of the TRIPS. In general, the overall problem that developing countries have with regard to copyrights is the accessibility and cost of the works needed for their own economic development. This is at the core of issues that the adjudicators must address in decision-making and the “development approach” is the route that will assist them in achieving that objective.

3.7 Trademarks and Developing Countries

Patent and copyrights laws have attracted the most attention globally in the context of IP protection, yet trademarks are inclined to become even more concern for developing countries. The dissatisfaction with patent and copyright protection in

¹¹² Of course it could be said that India and to a certain extent, China, Malaysia, and Thailand are doing quite well under this regime as they have become evermore proficient at software manufacturing. However, the overwhelming majority of developing countries have not been able to gain access effectively. It can also be said that India and China had weak protection levels and therefore were able to benefit from imitated copies, though illegal ones. Arguably, it is possible that these countries would be in an even better position to manufacture computer programs had they been protected under another regime such as patents with strict disclosure requirements.

developing countries is probably the main reason behind the pressure inflicted by industrialized Members of the WTO to include the TRIPS Agreement in the Uruguay Round.¹¹³ Nevertheless, in the era of globalised markets trademark law is beginning to exert its importance on national authorities of Member States. Developing countries are sceptical of this trend, however, less than what they perceive as threats from stronger international patent and copyright laws.

Developing countries for the most part have conflicting perceptions about trademarks and their enforcement.¹¹⁴ First, they believe trademarks to be of less importance in the overall economic development and consequently, strict enforcement an improper allocation of administrative resources.¹¹⁵ As with other aspects of IP protection they seem to enforce only when pressured by countries such as the US and the EU. Policy-makers in the developing world believe that the pressing issues facing the respective nations in the context of IP rights are for instance, cheap and easy access to patented products such as medicine and copyrighted computer programs. These countries realize that to a certain extent IP ownership is the domain of the developed countries with a huge amount of trademarked products. Developing country politicians are hard-pressed justifying spending resources on protecting the marks and signs of large multinational American and European firms in their own markets. This mentality is even more perceptible when it comes to trademarks.¹¹⁶

¹¹³ Correa, C., *supra* at note 3 p. 12-18.

¹¹⁴ Fink, C., & Smarzynska, B., *Trademarks, Geographical Indications, and Developing Countries*, in Mattoo, A., & English, P., at note 86. pp. 403-412, and Yang, D., & Sonmez, M., *TRIPS Compliance in Developing Countries: The Impact of China's Trademark System* in Katrak, H., & Strange, R., *The WTO and Developing Countries*, 2002, Oxford Press.

¹¹⁵ Leaffer, M.A., *The New World of International Trademark Law*, 1998, 2 Marq. Intel. Prop. L. Rev. 1 p. 3-5.

¹¹⁶ *ibid.*

Secondly, these Members have not whole-heartedly accepted that trademarks can be a valid and sound form of consumer protection against counterfeiting. In some of the larger developing countries such as India, China, and Brazil, which also have a less centralized governmental system, local protection of manufacturers is a key issue. Local protection refers to the local or regional authorities of a country which have the responsibility of protecting trademarks and to ignore enforcement of the owners' rights in order to protect its local industry. For example, a textiles manufacturer in a small town in one of the lesser-developed regions of China is producing counterfeited Nike sportswear. This manufacturer employs most of the work force in this town. Shutting down and confiscating the operation of this producer has major implications for the citizens of this locality. Therefore, the Chinese authorities of the province will be very reluctant to enforce the trademark rights of a rich multinational such as Nike.

Thirdly, many developing countries claim that local consumers are exploited by the pervasive use of brand names as a tool of advertisement. They contend that trademarks abuse the illiterate and largely uninformed populations of these countries by enticing them to make choices that are irrational.¹¹⁷ Fourth, businesses in developing countries are overwhelmingly small to medium sized and thus perceive trademarks as threats to their interests. Large firms have the resources and legal staff to file trademark claims around the globe. These firms are able to take advantage of trademarks more effectively and expeditiously, leaving the smaller firms behind in the race.

¹¹⁷ Leaffer, *supra* at note 103, p. 283-4.

However, as developing countries firms and consumers become more acquainted with the principles of trademarks there can be some tangible benefits from better enforcement of trademarks. The protection of consumers against counterfeit and low quality products is a well-known benefit. As e-commerce becomes more and more available to consumers in the developing world trademarks can be a good way to protect the consumer against fraud. Furthermore, from the perspective of companies in developing countries, once a certain level of sophistication has been achieved they can tailor services and products to local preferences in their geographic regions. This may be an advantage that they can exploit over the large multinationals.

Since the UR three ministerial summits have been held in which the problems in the TRIPS Agreement for developing countries has been discussed. The latest being the Doha Ministerial, formulated a declaration reflecting the results of the Members' negotiations in the upcoming new round of trade negotiations. Thus, a closer inspection of the Doha Ministerial Declaration on the TRIPS is prudent.

3.8 The Doha Ministerial Declaration

In November 2001 in Doha Qatar, the WTO's Fourth Ministerial Conference was held. After the failure of the Seattle Conference in 1999 the agenda of the WTO needed to respond to the demands of civil society and developing Members in a more tangible and proactive way. One of the key issues to be resolved was the status of IP rights and developing Members' urgent public health problems. There was a very public controversy between South Africa and Brazil on one side and multinational pharmaceuticals on the other with regard to access to HIV/AIDS drugs. The

pharmaceutical companies had bowed to public pressure after resisting calls for parallel importation or granting of compulsory license to provide for cheap generic retroviral drugs. Furthermore, developing nations were rightfully claiming that the objectives of transfer and access to technology and foreign direct investments which were expected under the TRIPS Agreement had not come to fruition.

At the conference, a proposal was submitted by a group of developing countries to the secretariat.¹¹⁸ The focus of the proposal was a rebalancing of rights and obligations in favour of public interest matters. It highlighted the fact that expected gains from the TRIPS have not been obtained. In order to achieve the objectives of the TRIPS Agreement greater leeway must be allowed for granting compulsory licenses without the prior attempts to obtain authorization from the rights holder in cases of national emergency.¹¹⁹ It also demanded that industrialized Members should not levy trade sanctions on developing and LDC Members when they implement national policy that promotes public health.¹²⁰ Furthermore, the proposal asked for another five-year extension of article 65.4 pertaining to patenting products that had not been previously protected under national law.¹²¹

However, at first glance, one of the most important aspects of the proposal was contained in its preamble which reaffirmed the language of Articles 7 and 8 of the TRIPS, i.e., the objectives and principles clause. The failure of developed countries to engage actively in promoting the transfer and advancement of technology in the

¹¹⁸ See Council for Trade-Related Aspects of Intellectual Property Rights: Proposal by the African Group, Bangladesh, Barbados, Bolivia, Brazil, Cuba, Dominican Republic, Ecuador, Haiti, Honduras, India, Indonesia, Jamaica, Pakistan, Paraguay, Philippines, Peru, Sri Lanka, Thailand and Venezuela, IP/C/W/312, 4/10/2001.

¹¹⁹ *Ibid.* para. 4.

¹²⁰ *ibid.* para. 10.

¹²¹ *ibid.* para. 13.

developing world had been strongly rebuked. Thus, developing Members felt that a declaration, which makes Articles 7 and 8 relevant to all provisions of the TRIPS necessary. The proposal offered read that “the mere existence and exercise of IPRs, such as patents, do not necessarily result in the fulfilment of the objectives of the Agreement.”¹²²

The Ministerial Declaration that has become the framework for negotiations at Doha is far short of the necessary reforms needed to achieve the proper allocation of rights and obligations under the TRIPS. The Declaration recognizes the gravity of the health problems facing developing countries but in no way does it provide additional options for developing nations to combat this problem other than the options already available under the TRIPS itself. It seems redundant and superfluous to give such high accolades for a Declaration that merely repeats what the TRIPS Agreement had always contained. The only explanation may be that the WTO needed a public relations boost by making an announcement that would alleviate some of the credibility problems it faced vis-à-vis the public at large and especially, some of the more reputable anti-globalisation organizations.

The legal status of the Declaration reinforces the effectiveness of the declaration is in limbo. It is not yet clear what legal consequences this Declaration will have as legislative interpretation and amending of any provision of the WTO has to meet the strict requirements set forth by the Marrakech Agreement, stipulating that interpretations by a 3/4 majority and amending by unanimity of the General Council is necessary.¹²³ Ministerial Declarations can and should only be deemed as political

¹²² Developing Country Group’s Paper, TRIPS Council IP/C/W/296, June 20 2001.

¹²³ Marrakesh Agreement Article 10

declarations not legal ones.¹²⁴ Thus, even if the assumption was that the Declaration somehow goes beyond what the TRIPS Agreement allows the legal status of the Declaration is suspect.

Furthermore, the Declaration only pertains to matters of public health and to only a few diseases. It also supposedly relaxes the requirements for granting compulsory licenses or parallel importing with regard to public health matters. Yet, the developing countries concerns over TRIPS go beyond public health matters. As mentioned, the accessibility to technology and infrastructure for enforcement of IP rights is necessary. The Declaration does not address these issues. Furthermore, with respect to parallel importation it merely restates Article 6 of the TRIPS Agreement, which reflects the ambivalence of the Agreement toward the issue. The only benefit to come from the declaration is that the US has signed on, because if the developing nations were to interpret the TRIPS provisions dealing with parallel importation and compulsory licenses in a way that the US opposed they could then be punished by the US unilaterally. US law allows for unilateral trade sanctions if the US Trade Representative believes that a country is distorting free trade.¹²⁵

However, in the context of this thesis, the Doha Declaration does not have much effect. This is because the “Development Approach” to fair adjudication goes beyond what is in the Declaration. The “Development Approach” clearly promotes the full extent of flexibility built into the TRIPS. Public health, access to technology, and capacity building would become the issues that adjudicators must at all times, consider when deciding cases involving developing countries. It would read Article 7 and 8 of the TRIPS relevant to the whole Agreement. In fact, these two provisions

¹²⁴ Charnovitz, S, *The Legal Status of the Doha Declarations*, 2002, *JIEL* 5(1) p. 207-209

¹²⁵ US Section 301 of the UCT.

almost mirror the overall general direction of the allocation of justice elements of the “development approach.” Therefore, in this chapter the effects of the Doha Declaration are very limited and will not be emphasized.

3.9 Exceptions to Exclusive Rights (Article 30 of TRIPS)

The TRIPS Agreement has laid out exceptions to exclusive patent rights in two separate provisions, i.e., Article 30 titled exceptions to exclusive rights and Article 31 titled Compulsory Licenses. Pursuant to Article 30 of the TRIPS Agreement, there are exceptions to exclusive rights granted to the patentee. The provision provides that in order to grant exceptions three conditions must exist: they must be limited, they should not unreasonably conflict with the normal exploitation of the patent and exceptions should not unreasonably prejudice the legitimate interests of the patent owner.¹²⁶ Carlos Correa argues that due to the vagueness of the provision, national authorities may allow for exceptions in the following areas: private acts on a non-commercial scale, use of invention for research, experiments made or the purpose of seeking regulatory approval immediately after the term of patent expires (Bolar Exception), and importation of a patented product that has been marketed in another country without the consent of the patent owner (parallel importation).¹²⁷

Article 31 of the TRIPS contains a detailed set of requirements for dealing with compulsory licenses. Compulsory licensing is the granting of rights to entities other than the patent holder, without its consent, to utilize a patented product or process. Under the Agreement there are five specific grounds for granting a compulsory license, namely the refusal to deal by the patent holder, emergency or extreme

¹²⁶ TRIPS Art. 30.

¹²⁷ Correa, *Supra* at note 3, p. 75-78.

urgency, anti-competitive behaviour, non-commercial use and dependent patents. It is arguable whether this provision sets the ceiling on compulsory licensing or if it is in fact, a minimum standard. For example, can environmental concerns be grounds for a compulsory license? Although the US is one of the major users of compulsory licenses, it nevertheless, confines itself mostly to federal agencies working on pharmaceutical experimentation or defence industry products without commercial use.¹²⁸ The US and the EU do not desire a broader application of compulsory licensing, whereas the developing countries would like to see the requirements set forth as only minimum standards for compulsory licenses. For instance, a “public interest” grounds would benefit developing countries, as it would allow them more flexibility in granting compulsory licenses.¹²⁹

Furthermore, Article 31 not only sets forth certain legitimate uses of the compulsory licenses but also describes the conditions under which a grant of compulsory license can be made. They include case-by-case evaluation by domestic authorities, prior negotiation with patent holder for a voluntary license, scope and duration of license, non-exclusivity, non-assignability, remuneration and administrative or judicial review of the grant. The cohesion or reasons for the separation of Articles 30 and 31 is unclear, as article 30 provides for general exceptions to exclusive rights whilst Article 31 allows for “other uses” of a patent grant, however, with a list of uses which are proper. These provisions define the limits of patent rights that developing countries could look to when formulating national intellectual property regulations.

¹²⁸ Scherer, F., *The Patent System and Innovation in Pharmaceuticals*, 1999, in Crop Science Society of America, American Society of Agronomy, *Intellectual Property Rights Associated with Plants*, ASA Publication No. 52.

¹²⁹ Adede, A.O., *The Political Economy of the TRIPS Agreement: Origins and History of Negotiations*, 2001, pp. 26-29, paper presented at the International Centre for Trade and Development in collaboration with the Quaker United Nations Office (QUNO) found on ICTSD website. www.ictsd.org.

As mentioned above, one of the main elements of interest within the TRIPS Agreement for developing countries could be the exception to exclusive rights under Article 30. The scope of this provision defines to a certain extent, the contours of the flexibility to implement the Agreement for these nations. This provision allows Members to exclude certain rights from the IP holder. This exclusion is most often used for research and experimentation in the field of pharmaceuticals. Exceptions relating to research can be an important tool to create favourable grounds for innovation. It can allow for researchers to find more information about the product and its possible alternative uses.

Another important exception deals with the use of an invention relating to pharmaceuticals to conduct tests and obtain approval from the health authorities of a Member before the expiry of the patent in order to market the generic form as soon as possible afterward. This can play a very important role for developing countries' health policy as generic drugs reach the consumer at the earliest possibility without any delay due to regularity requirements. Developing countries should be given maximum leeway in allowing exceptions to exclusive rights in most fields of technology but especially with regard to pharmaceuticals. The development approach would encourage the use of these exceptions so as to secure a desirable level of health in these countries. The desired level will be deferred to national authorities and would stay within the bounds set by the language of Article 30 of TRIPS. The DSB has resolved one major case to date in relation to Article 30.

3.9.1 Canada-Pharmaceuticals¹³⁰ and Exceptions to Exclusive Rights Pursuant to Article 30

The *Canada-Pharmaceuticals* case is the first and only case directly dealing with Article 30 of the TRIPS and as such will be analysed in order to better understand how the adjudicators of the WTO have decided this issue and how it may or may not adhere to the development approach to fair adjudication. Although the parties were not developing Members many participated as third parties because they deemed it of great interest as a matter of practice and precedent.

3.9.1.1 Facts of the Case

In the *Canada-Pharmaceuticals* case the panel decided on two forms of exception: 1) known as the “regulatory review provision” of Canada, which permits generic manufacturers to complete the regulatory approval process before the patent term is expired, and 2) the “stockpiling” provision of Canadian law which allowed generic manufacturers to produce the patented product and put them in inventory until the exact day the patent expires thereby accessing the market immediately after the expiry. The panel decided to uphold the first Canadian provision whilst rejecting the second, based on Article 30 of TRIPS.

The Canadian regulatory review provision allows the generic manufacturer to produce samples of the patented product for use during the review process.¹³¹ If the generic manufacturer is able to get approval for its product it is able to begin selling it immediately upon expiration of the patent, instead of beginning the process at that

¹³⁰ *Canada-Patent Protection of Pharmaceutical Products* (WT/DS114/R adopted April 7, 2000).

¹³¹ Canada Patent Act Section 55.2(1).

time which would take up to 30 months for approval. Furthermore, Canadian “stockpiling” law allowed generic manufacturers to make the drug and begin stockpiling six months prior to the expiration of the patent.¹³² This provision is available only if the regulatory review provision had been invoked.

The EC contended the Canadian Patent Act is in violation of Article 28.1 of the TRIPS which stipulates that: A patent shall confer on its owner the following exclusive rights: a) where the subject-matter of a patent is a product, to prevent third parties not having the owner’s consent from the acts of making, using, offering for sale, selling or importing for these purposes that product. The Canadians did not dispute the fact that these two provisions violate Article 28.1 but they claimed that they are justified to do so under the exception granted by Article 30 of the TRIPS.

3.9.1.2 Reasoning and Holding

3.9.1.2.1 The Stockpiling Provision

The panel ruled against Canada’s stockpiling provision, arguing that Canada violates Article 28.1 but is not able to justify this violation in accordance with Article 30.¹³³ It stated that Article 28.1 grants five legal rights to IP holder, i.e., making, using, offering for sale, selling an importing. The stockpiling provision clearly violates the making and using elements of that right. On the other hand, Article 30 which sets out the exceptions to the obligations of Article 28.1, creates three requirements that must be met before the exceptions can be invoked: a) the exception must be limited; b) they must not unreasonably conflict with the normal exploitation of the patent; and

¹³² Canada Patent Act Section 55.2(2).

¹³³ *Canada-Patents* para. 7.17.

c) the exception must not prejudice the legitimate interests of the patent owner or of third parties.¹³⁴

Canada correctly invokes Articles 7 and 8 of the TRIPS. Article 7 in part, stipulates technology must be used “to the mutual advantage of producers and users in a manner conducive to social and economic welfare and to a balance of rights and obligations.” Article 8 states that the “Members may adopt or amend the laws in order to protect health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development... .”¹³⁵

Canada believed these provisions allow adjudicators to interpret the conditions of Article 30 in a flexible manner so that governments have the necessary policy instruments to maintain a balance between the rights of users and producers of technology. The panel rejected this argument, holding that Articles 7 and 8 give “context” to the TRIPS provisions and not a renegotiation of rights granted under the Agreement.¹³⁶

The panel then went on to apply the conditions of Article 30. It only did so for the first requirement that the exception be limited, and since it found Canada to be in violation of this condition, citing judicial economy, it found it unnecessary to continue the analysis. In particular, the panel found there is a “corollary right to a short period of extended market exclusivity after the patent expires.” Furthermore, there is no limit to how much the generic manufacturer can produce.¹³⁷ Therefore, it

¹³⁴ *ibid.* para. 7.19-7.20.

¹³⁵ *ibid.* para. 7.23.

¹³⁶ *ibid.* para. 7.24-7.25.

¹³⁷ *ibid.* para. 7.34-7.37.

found the stockpiling provision violates the “limited exception” requirement of Article 30.

3.9.1.2.2 The Regulatory Review Process

The panel found that Canada had not violated Article 30 because the regulatory review process meets all three criteria of the provision. With regard to the “limited exceptions” criteria it held that “as long as the exception is confined to conduct needed to comply with the requirements of the regulatory review process the extent of the acts unauthorized by the right holder that are permitted by it will be small and narrowly bounded.”¹³⁸

With regard to the second criteria of Article 30 that prohibits exceptions, which “unreasonably conflict with a normal exploitation of the patent,” the panel rejected Canada’s view that post-expiration market exclusivity can never be deemed normal exploitation, arguing that it is not “abnormal.” However, it did agree with Canada in that if the post-expiry market exclusivity is a result of governmental regulations then it does fall outside the lines of “normal exploitation.”¹³⁹

Finally, it decided on the third criteria, i.e., that the exception must not “unreasonably prejudice the legitimate interests of the patent owner...” The panel focused on whether patent owners can claim a “legitimate interest” in the economic benefits that can be derived from an additional period of post-expiry exclusivity and whether the regulatory review process prejudices that interest.¹⁴⁰ The panel, in ruling

¹³⁸ *ibid.* para. 7.45.

¹³⁹ *ibid.* para. 7.54-7.57.

¹⁴⁰ *ibid.* para. 7.60-7.61.

in favour of Canada, based its decision on the legal definition of the word “legitimate” and also on the negotiating history of the Berne Convention Article 9.2. Thus, Canada was justified in having a provision which allows generic drug manufacturers to use and make a patented drug in order to have regulatory requirements met as soon as the patent has expired on the original product.

3.9.1.3 Analysis of the Holding

3.9.1.3.1 Regulatory Review Process

The ruling that the regulatory review provision is a justified exception to Article 28.1 under Article 30 is a desired outcome under the development approach. As developing countries try to improve the research and development base the time saving mechanism to market the products is very important. The biggest beneficiary at the moment will be the larger developing countries such as India and Brazil, which have a very active and efficient generic drug-manufacturing base. They would be able to market the products soon after the expiry of the patent. This is true for both importing and exporting of the generic products.

If the patented product from a large multinational drug firm is being sold in India for instance (assuming India has a regulatory review process), the Indian generic firm can market its product more expeditiously as it will be able to obtain the regulatory verifications necessary to sell its products, thereby providing the Indian people with cheaper drugs faster. Moreover, it is an incentive to develop the generic drugs industry which will in turn, promote more R&D by obtaining the knowledge earlier, and increase its profits. On the other hand, if the Indian firm is trying to sell its products in the industrialized markets of the US or the EU, then it is able to access

that market faster. In this sense, it abides by both of the elements contained within the principle of development through trade, i.e., market access to the industrialized countries, and the capacity-building of developing countries.

The ruling is also legitimate according to the development approach. It is predictable because it clearly holds that regulatory review processes fall under the guise of the exception to exclusive rights under Article 30. Future regulatory schemes could be based on the analysis proffered by this case. It also affords a little more insight into some of the ambiguities of Article 30, that is, the meaning of the term “limited” in the first sentence of Article 30, or what could be “normal exploitation” and “legitimate interests.” The reasoning is secure, as it has adhered to internationally accepted devices for interpretation of treaties. The panellists at the outset stipulate that VCLT Articles 31 and 32 apply and will be used and they will seek insight into the negotiating history of the TRIPS including the incorporation of the Berne Convention.¹⁴¹

However, one can argue that the consistency of the ruling is somewhat inadequate. The panellists held that the post-expiry right of a patent holder is part and parcel of that right, however, the differentiation that they have made between the post-expiry times associated with the regulatory review process does not jibe with the analysis of the post-expiry time pertaining to stockpiling. The manner in which they justified the post-expiry of the regulatory review should also be applied to the stockpiling provision in order to justify that also. The ruling is still deemed fair as the development approach allows the trumping of legitimacy when justice concerns are

¹⁴¹ *ibid.* para. 7.13-7.15.

met and the elements that are illegitimate are not so blatant and extreme as to promote non-compliance.

3.9.1.3.2 Stockpiling

The ruling and reasoning with regard to the stockpiling issue, however, does not reach the threshold of fairness. The ruling lacks the requisite justice and consistency that the development approach demands. The panel's ruling that stockpiling is a violation of Article 28.1 and not justified under Article 30 is harmful to developing countries because it allows the patent holder to profit after the expiry of the patent. The panel ruled the extra period of time is a legitimate interest and part of the normal exploitation of the patent.

However, nowhere can such an interest be expected or deemed legitimate. There is no international standard for such an expectation. The EU and the US do not have such expectations in their regulations or laws. The panel sought no guidance from other national jurisdictions or WIPO to inquire whether stockpiling is deemed illegal. Within the context of the TRIPS it would be quite useful to investigate US and EU IP laws as the protection and language of the agreement is very similar to their IP regulations. This provision truly harms the interests of developing countries with a generic drug-manufacturing base because they must wait even longer than the patent term to market their product. The extra time afforded to the pharmaceutical firms only slows the process of achieving a better R&D base in developing countries. This practice is not in line with the goal of capacity building and tends to delay market access. Thus, the justice of the ruling is inadequate.

The panel made a distinction between the “limited use” in stockpiling and in the regulatory review process. It is not clear why doing clinical trials, expansive pharmaceutical and chemical experiments, producing small quantities, writing reports and researching the efficacy of a drug is any more limited in the scope of exploiting the patent than the mere mass production of the drug as occurs when stockpiling. If the nature of the product makes the mass production and then stockpiling less limited of an exception, the panel in its over 320-page report, failed to mention such inherent differentiation between the limitedness of stockpiling as opposed to undergoing the regulatory review process.

The legitimacy of the ruling is further diminished by the differentiation proposed by the panel in relation to the exclusive rights of a patent holder and its exceptions. The panel argument that the regulatory review provision is a valid form of exception has at its core, a time element. The generic manufacturers should not have to spend one or two years after the expiry of the patent to be able to market their product. Yet, the stockpiling provision is also based on timing concerns. The differentiation of the timing elements between the two provisions is an arbitrary one. It is basically the panellists themselves deciding that one post-expiry time is acceptable whereas another post-expiry time is not, due to its length. Stockpiling these drugs as defined under Article 28.1 is only violating the making and using elements of the right to exclusivity, but so is the regulatory review provision. The stockpiled products are not sold or marketed before the patent is expired. Therefore, the reasoning based on timing lacks consistency.

The predictability of the ruling is also suspect because many practical questions have not been addressed. What if the product was not a pharmaceutical and thus the regulatory review provision was not so long? For example, what if Brazil had a 3-

month review process for making prosthetics while stockpiling a significant amount took more than 3 months? What if a Member such as the US enacts regulations that state that the regulatory review for generic drug manufacturers can only begin one year before the expiry of the patent and the review takes about 3 years thereby protecting its firms against cheap generic drugs. Would the two year extra period be a legitimate interest or normal exploitation of the patent in the US? It would probably take less than two years to stockpile a significant amount of the drug. In fact, such a rule would in most cases, make stockpiling unfeasible because unless the firm is willing to risk making the drug before the review is finished without assurance of its approval by the governmental agency. The manner in which the panel ruled in this case makes the provisions of Article 30 even more unpredictable and vague. This could become even more of a problem if non-pharmaceutical products must go through a review process.

Therefore, the ruling that stockpiling is not allowed is unfair according to the development approach. It lacks the justice concerns that demand better capacity building for developing countries and market access to developed markets. Moreover, the ruling lacks legitimacy, as it is both unpredictable and inconsistent.

3.9.2 Compulsory Licenses

Article 31 of the TRIPS Agreement on “other use without the authorization of the right holder” contains the requirements and conditions for granting compulsory licenses. The five conditions in which compulsory licenses may be granted are: refusal to deal by the rights holder, emergency and extreme urgency in the consumer country, anti-competitive behaviour, non-commercial use and dependent patents. All

these conditions are important for developing nations as they relate directly to a proper functioning of an economic development regime. Furthermore, the process of granting compulsory licenses must adhere to the following:

- Case-by-case evaluation
- Prior request for a voluntary license
- A properly formulated grant which sets the limits and duration of the license
- Non-exclusivity and non-assignability of the grants
- Remuneration
- Administrative or judicial review opportunity

The role of the adjudicators under the “development approach” should be they evaluate developing country disputes with clear reference to Articles 7 and 8 of the Agreement, which will assist in the proper allocation of justice, and to a legitimate decision.

Rights holders refusing to deal with entities in developing countries are a common problem. The right holder either is reluctant to grant a license because it is concerned about IP theft or is simply not extracting the price it desires. As long as a developing country has implemented a viable IP protection regime the fear that the knowledge would be stolen is unwarranted. Every WTO Member has signed on to the TRIPS Agreement and therefore, the assumption must be that it is abiding by that Agreement until systematic failure to protect or bad faith is witnessed. A streamlined and predictable criteria set by developing Member policy-makers in this regard would create more certainty and allow domestic firms to obtain knowledge without having to succumb to the demands of intransigent multinationals.

The issue of low prices for multinationals can be solved much the same way as evaluations on costs done in anti-dumping cases with the exception that adjudicators could calculate a fair price in lieu of national agencies, if domestic authorities' decision on compensation is a claim in the dispute. If rights holders refuse to deal because the price they demanded was not satisfactory and a developing country grants a compulsory license and is brought to the DSB to defend its action, the AB or the panel can evaluate by retaining experts or even construct a fair price for that license. In fact, since the compulsory licensing government must pay remunerations for the grant it is natural that the fair price can be constructed by the adjudicators as the appropriate compensation to the right holder is also determined. However, the fair price should be one that covers costs plus a margin of profit that is less than what a developed country Member would be expected to pay. This is in line with the "development approach" and its adherence to advantaging the disadvantaged that is taken from Rawls.

With regard to emergency and extreme urgency situations the adjudicators should defer much authority to domestic developing country authorities. The Doha Declaration has made it clear that in such situations the right of Members to grant compulsory licenses will not be hindered. This Declaration is in line with rights that had already been granted to Members under the TRIPS. It is nothing new or profound. The threshold of what is an emergency or urgent situation should be lowered for developing countries. Obviously, matters of public health are one category, but there are other situations that can be envisaged which would demand the granting of compulsory licenses.

The definition of emergency and extreme urgency could be deemed to be only public health issues, war or national security for industrialised nations but, should also include economic emergencies for developing countries. Again, this is in line with the concept of advantaging the disadvantaged and upholding the principle of WTO law with regard to fostering economic development as espoused by the “development approach.” The principle of promoting development through trade is affirmed if adjudicators allow economic emergencies to be grounds for compulsory licenses. Furthermore, the disadvantaged is benefiting by giving them more flexibility than may be afforded to industrialized countries in achieving economic stability. The crisis in Southeast Asia in 1997 and the Argentine crisis in 2001-2002 are prime examples of situations whereby compulsory licenses could be granted.

Protection from anti-competitive behaviour is important for developing countries, as the spectre of abuse of exclusive rights casts a threat to their vital economic interests. The developing countries that possess competition laws have their right to prevent anti-competitive behaviour established under their own system. The developing countries that do not have a proper competition policy may use this provision of the TRIPS to defend against such market abuse behaviour by foreign multinationals. However, the adjudicators must reach a balance. This balance is between actually preventing anti-competitive behaviour by a right holder on the one hand, and preventing trade distortion by frivolous use of compulsory licenses by a Member on the other. Simply because a developing nation does not have competition policy on the books does not mean that it can search selectively to find an excuse for trade distortion. Summary decisions and expedited executive orders without justifications are some examples of possible trade distortion mechanisms that must be scrutinized a little more in detail.

The adjudicators in this instance may use a competition regulations system of another country as a model in order to decide whether the granting of a compulsory license is justified. In this case the proper model should be the relevant regulations of a country that is most similar in economic development and legislative systems. Furthermore, if the adjudicators decide the case based on their own concept of anti-competitive behaviour then they should make sure to address the myriad of problems faced by developing countries. The non-commercial use requirement for granting compulsory licenses is one that is extensively used by the US governmental agencies and by many European national authorities.¹⁴² Developing countries will be well served to take advantage of this requirement in order to expand their research and development base. The non-commercial use clause has allowed the US Food and Drug Administration to experiment with patented drugs that are new to the market. They are able to evaluate the efficacy of the drug and also obtain the necessary knowledge with regard to making the drug.¹⁴³ As pharmaceutical knowledge although not to the extent of computer programs, is a cumulative venture, it provides states with a tool to improve and even develop drugs that are very useful.

The non-commercial use requirement should expand far beyond pharmaceutical products and into process patents and manufacturing goods. It is true that most of these R&D endeavours would be too costly for developing countries to pursue, nevertheless, developing members could engage in specific narrowly defined areas of R&D by obtaining compulsory licenses for non-commercial use. For instance, the

¹⁴² See amongst others, Coggio, B., & Cerrito, F., *Immunity for Drug Approval Process*, 1997, 52 *Food and Drug Law Journal* 4, pp. 345-355, p. 347-350; Love, J., *A Free Trade Area for The Americas: A Consumers Perspective as they Relate to Rules on Intellectual Property*, 1997, paper presented at Third Trade Ministerial and Americas Business Forum, May 1997 found on cotech.org/pharma.

¹⁴³ Coggio & Cerrito, *ibid*

US Department of Defence has granted compulsory licenses for many experiments in the field of weaponry and other technology related but not specific to the weapons industry.¹⁴⁴ In the same light developing countries should be able to grant compulsory licenses in other areas of technology which would help their overall development.

The dependent patent condition for granting compulsory licenses is also very important for developing countries. An effective way to broaden the base of research and development in poorer countries is to begin by improvements and adaptations of already patented or even copyrighted products (in the case of computer programs where copyright protection is required). Also, dependent patents may become a huge obstacle to inventiveness. The strict protection of dependent patents gives too much control to the right holder. If a right holder is allowed to protect its product from being used in another product that in essence, has a different function and outcome, it should not be able to hold other inventions hostage to its demands. For instance, if a right holder to textile processing system refuses to allow an inventor of a new mechanism for producing an agricultural seed dispersal machine from using its process in a totally unrelated industry or function, the granting of compulsory licenses should be allowed. This is especially true for developing nations, as their knowledge base is not as wide and not as well funded as industrialized countries. Even if in developed countries the crude example above would not qualify for a compulsory license, the AB should interpret the dependent patent provision such that developing countries would be allowed such generous use of compulsory licenses.

¹⁴⁴ See statement by the European Commission "Under US Law (28 US Code Sec. 1498) a patent owner may not enjoin or recover damages on the basis of his patent for infringement due to the manufacture or use of goods by or for the US Government Authorities. This practice is particularly frequent in the activities of the Department of Defence but is also extremely widespread in practically all government departments." European Commission Report 1997 *Report on United States Barriers to Trade and Investment*, para. 34-35. found on www.europa.eu

The viability of a compulsory license in developing countries is contingent upon the possession of adequate infrastructure and resources. There are no benefits in granting a compulsory license to produce medicine or to develop agricultural processing machines if the necessary resources are not adequately available. This is the dilemma faced by many developing countries with regard to compulsory licensing. There is and has been much debate whether the WTO rules allow for the granting of a compulsory license to a foreign entity or a subsidiary thereof in order to import the product. This is a crucial issue because a compulsory license is worthless if it is not workable. The TRIPS agreement and the Doha Declaration are silent on the issue. However, the EU and the US have voiced great reservations about allowing the granting of compulsory licenses in order to import the product from abroad. This view is unjust, since it gives the developed countries a huge advantage in so far as they have the ability to produce the compulsory licensed goods. The developing countries in general, do not have the same capabilities and it would be just were they to benefit from the provision of the TRIPS as much as developed countries.

The AB should allow interpretations of the TRIPS in light of Articles 7 and 8, in conjunction with the overall development approach to jurisprudence in order to allow the granting of compulsory licenses for importation to the third world. Under the development approach the AB would be justified to do so because of the justice requirements of the guidelines to adjudication i.e. the advantaging of the disadvantaged. In practical terms they would actually be simply equalising the advantage that first world countries hold. In fact, it is arguable whether importing products is as cost effective as producing them locally. At a minimum the advantage

of gaining knowledge is lessened when products are imported. Furthermore, the Dworkinian aspect of the development approach stipulates that the reading of the law or regulations of the WTO should be in line with the principle of promoting and encouraging development in poor countries. A decision to allow compulsory licenses on imported goods would satisfy that requirement also.

3.10 Non-Violation and Situation Complaints Against Developing Countries

As of January 2001, a five-year transition period for developing countries to enforce intellectual property rights expired. Most important as a matter of dispute settlement is the moratorium on non-violation and situation complaints.¹⁴⁵ As a result, inadequate substantive intellectual property protection or inadequate enforcement will become actionable before the DSB even if no violation has occurred. This issue could pose many problems for developing countries, as they have enacted laws that comply with the requirements of the TRIPS but at times lack the necessary capacity and legal infrastructure to enforce them.

The main question to be asked when claims of TRIPS violations are brought forth is at what point can adjudicators decide whether national authorities have neglected or derogated from their obligation to control private conduct.¹⁴⁶ The threshold for triggering TRIPS complaints is not spelled out in the Agreement itself. Most countries are unlikely to bring a claim based on a single or few instances, rather they would negotiate bilaterally to reach an agreement. This is so because the TRIPS

¹⁴⁵ TRIPS Art. 64.2.

¹⁴⁶ Abbott, F.M., *WTO Dispute Settlement and the Agreement on Trade-Related Aspects of Intellectual Property Rights*, in Petersmann, E.U. *International Trade Law and the GATT/WTO Dispute Settlement System*, 1997, *supra* at note 31, p. 413-416.

Agreement is to provide for overall IP protection at the national and international levels.¹⁴⁷

3.10.1 Non-violation Complaints

In contrast to violation cases, non-violation cases do not require any literal breach of a TRIPS provision. Article XXIII (1)(b) of GATT, which is applicable to the TRIPS, stipulates that non-violation is that which nullifies or impairs TRIPS objectives resulting from the “application by another contracting party of any measure, whether it conflicts with the provisions of this Agreement” or not. It is argued that the broad scope and reach of this provision was the cause behind the Indian and European push to include Article 64.2 and 64.4 of the TRIPS, which grants the five-year transition period.¹⁴⁸ Non-violation complaints require: 1) affirmative governmental action, such as an offending Member states’ measures to offset trade benefits it has conceded; 2) the complaining Member states’ valid expectation that the offending measure will not be applied or would not exist; and 3) Injury.¹⁴⁹ Furthermore, when claiming that the offending state applied a nullifying or impairing measure the injured state must: 1) clearly indicate the measure at issue; 2) the application of the measure must not have been “reasonably anticipated at the time the specific rights and obligations of market access were negotiated.”¹⁵⁰

¹⁴⁷ *ibid.*

¹⁴⁸ Lee, K.D., & von Lewinski, S., *The Settlement of International Disputes in the Field of Intellectual Property* in Beier, F.K., & Schriker, G., *From GATT to TRIPS-The Agreement on Trade Related Intellectual Property Rights*, 1996, p. 289.

¹⁴⁹ Samahon, *Supra* at note 56, p. 1061; Dreyfuss & Lowenfeld *supra* at note 98, p. 283-285.

¹⁵⁰ Cottier, T. & Schefer, K.N., *Non-Violation Complaints in WTO/GATT Dispute Settlement: Past, Present and Future*, in Petersmann, E.U. *supra* at note 31, at 145, p. 161.

The following hypothetical situation will illustrate better how adjudicators should decide non-violation cases under the “development approach”:

In Devistan, a developing country judges have never ordered pirated goods to be seized or destroyed under Article 46 of the TRIPS. The judges have never sentenced anyone to prison or at minimum, convicted him or her under criminal code of Devistan as prescribed by Article 61 of the TRIPS. Devistan domestic law allows for criminal prosecution and seizure of counterfeited goods in compliance with the TRIPS, yet as a matter of discretion they have not ordered any injunctions or criminal remedies of any kind. The EC Trade representative brings a case to the DSB claiming that Devistan has not enforced copyrights laws as validly expected by the EC and as such, injury has occurred. In this case it has actually failed to take appropriate action thereby nullifying or impairing EC’s benefits, although Devistan has enacted laws complying with the letter of the TRIPS. According to the EC REP this is a clear example of a non-violation complaint.

TRIPS Article 43.2 and 46 which deal with injunctions and judicial remedies uses discretionary language such as judges “may” grant the remedies requested by the EC. There is no mandatory requirement to do so. Devistan claims it cannot order its judges to rule in a manner which satisfies the EC’s demand. The executive branch is separate from its judiciary. Furthermore, Devistan rightfully claims that by doing so it would have changed the balance of rights and obligations negotiated at the Uruguay Round, as it would create a mandatory requirement for the granting of injunctions and criminal proceedings.¹⁵¹

¹⁵¹ This is somewhat different from the mandatory/discretionary principle of WTO whereby, discretionary authority in the regulations or laws of a Member which allows that Member’s authorities to use the discretion in a manner that may not conform to WTO law as legal under WTO law.

The non-violation complaint in this case would be very hard to prove under the development approach as clear bad faith and/or systematic lack of enforcement must be shown on the part of Devistan. The justice elements of this hypothetical ruling demands deference be given to national authorities which are strapped for resources, qualified judges, and administrators. Benefiting the disadvantaged and appreciating the lack of capacity in developing countries would suggest that Devistan can not burden the cost of creating the judicial and legal environment which would allow non-violation claims to be accepted for infrequent and isolated circumstances. The enactment of regulations demanded by the TRIPS is not simultaneous to proper effective enforcement immediately. In particular, for violations that are not expressly written in the treaty.

3.10.2 Situation Complaints

The rarest sort of claim in the WTO jurisprudence is a situation complaint. Similar to non-violation complaints, situation complaints require no literal derogation from the text of the TRIPS or any other WTO covered Agreement. A situation complaint under Article XXIII (1)(c) of the GATT, may be brought when circumstances spelled out in Article XXIII: 1(b) and (c) do not exist, but the “existence of any other situation” nullifies or impairs any benefit accruing under the WTO Agreements or that hinders the achievement of any objective of any of the WTO covered Agreements. There has never been a case in the GATT/WTO history of a situation

However, a domestic law that mandates action or inaction that clearly is in violation of WTO must be stricken from that Members regulation and brought into WTO conformity. Here, the non-violation clause of GATT Article XXIII:1(b) is different in that there needs to be no formal regulation or law in order to come under the catchments of the non-violation provision as long as a Members expected benefits have been nullified or impaired.

complaint but one could be contemplated under the TRIPS as this agreement seeks to enforce affirmative obligations on Members and also, strives to create an overall general regime of rights protection globally. It is more prone to having developed countries seemingly frustrated at the efforts of developing countries to protect their rights holders, to allege a situation complaint in order to force a developing country to protect “on the ground” the rights of its firms in a way that is desirable for the multinational.

A situation complaint is one where a defendant WTO Member has the capability to correct the situation and the claimant has offered specific and clear evidence for its case, although the letter of the law has not been violated.¹⁵² Therefore, a situation complaint only applies if the situation in question arises from a WTO Member not applying measures which it was not obliged to do under the WTO covered Agreements.¹⁵³ A reasonable standard for situation complaints could be that the panel or AB must decide whether the Member could reasonably expect for that situation not to occur and also that the defendant had the means to intervene and prevent such a situation.¹⁵⁴ This standard would limit the scope of situation complaints such that events outside of the contemplation the parties to a TRIPS dispute could be addressed whilst, preventing Members acting in bad faith from failing to correct situations within their power.¹⁵⁵

For example, the Devistanian courts’ system is inefficient or unsatisfactory in its operation and timeliness. It has a very limited budget and a lack of qualified judges.

¹⁵² Roessler, F., *The Concept of Nullification and Impairment in the Legal System of the World Trade Organization*, in Petersmann, E.U. Supra at note 31, p. 138-141.

¹⁵³ Samahon, Supra at note 56, p. 1066.

¹⁵⁴ Roessler, F., Supra at note 152.

¹⁵⁵ Samahon supra at note 56, p. 1067.

It has literally interpreted Article 41.5 of the TRIPS Agreement advising that the creation of new courts is not mandatory. Due to the inadequacy of Devistan's judicial administration prosecution of IP rights is slow and inadequate. There are no specialized IP courts and like any other court action they are very protracted.

The US alleges a situation complaint exists as the inadequate functioning of Devistan's courts is nullifying or impairing the interests of the US. The failure of Devistan to provide adequate judicial mechanisms to enforce IP laws presents a situation where Devistan could rectify. It is within the powers of Devistan to correct the inadequacies of its courts system with regard to IP protection. The US claims it reasonably expected Devistan to fix its courts system when it signed the WTO Agreement.

However, Devistan contends that Article 41.5 of the TRIPS does not guarantee IP protection to have priority over other rights and obligations in Devistan domestic law. Article 41.5 stipulates that TRIPS enforcement does not create any obligation to devise a judicial system solely for the proper enforcement of IP rights. Furthermore, it states, "nothing...creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general." Devistan claims that it does not have to create IP courts and does not have to allocate its resources in a special manner for the protection of IP rights as it does for any other rights provided for in Devistan.

Under the Development Approach the adjudicators should heed the claims of Devistan as it is developing and lacks the necessary resources to properly implement the TRIPS Agreement enforcement requirement in a way that is satisfactory for

industrialized nations. It is not appropriate for an international organization to expect that the obligations created under its treaties should be given priority over Devsitan's domestic laws. The legitimacy of rulings pertaining to situation complaints is very difficult to grasp as legitimacy seeks to affirm the status quo and in international or even domestic law situation complaints similar to the GATT are very rare, if not nonexistent. Thus, legitimacy of the ruling would have to be done in a way that seeks to establish a precedent of sorts or to basically lay the first foundations for legitimacy. Predictability of their ruling could be established if they would decide in a way that is clear and concise in its reading, concentrating on ex-post predictability to clarify issues for future reference. The security and coherence of the rulings will have to be established through case law and over time.

The justice aspect of the ruling would be proper as cases involving situation complaints will have to decide whether the defendant has the capacity and power to intervene and correct the matter. As developing countries lack the level of resources that industrialized countries do, it can be deduced that developing countries will be given more consideration in this respect. They will naturally be less able to enforce obligations in the same way as an industrialized country would be able to do. Assuming that developing countries do not perceive such strict IP protection as desirable is in a way, advantaging the disadvantaged.

One way for the US in this case to prevail would be if Devistan had acted in bad faith. For instance, if it somehow meddled with its judiciary so as to prolong IP cases coming to trial, or if it in practice, allocated IP protection cases to certain courts which are less efficient, although its judicial code does not explicitly separate dockets by type of claim. It could also prevail were it to somehow show a systematic

lack of protection by using the inefficient court system as an excuse. For instance, if the Devistanian government advised its companies to negotiate in bad faith with an IP holder, or that they should use delay tactics in negotiations so that every case is taken to trial in order to deprive the IP holder of the remedies it seeks.

3.11. Conclusion

The development approach to fair adjudication in relation to the TRIPS Agreement has been the focus of this chapter. The main problems areas are patents and exceptions to exclusive rights, non-violation and situation complaints, and to a lesser extent, certain issues with respect to copyrights and trademarks. The main arguments presented are the adjudicators need to decide cases under the development approach in order to help develop to fruition, the objectives of the agreement for developing countries. The development approach is in line with the objectives and principles of Agreement as stated in Articles 7 and 8. Although the development approach is more concerned with justice, these two Articles provides explicit legal instrument that should be used to achieve fairness. The overarching theme throughout this chapter has been that development approach to fairness suggests that the flexibility in the language of the Agreement should be used to the full extent. This includes amongst others, a great amount of deference to national authorities in implementing, interpreting and enforcing the provisions of the TRIPS due to the positive nature of its obligations. The chapter used hypothetical cases and situations in order to better explain how adjudicators must decide cases under the development approach and also used actual cases to illustrate how the adjudicators have been unable to achieve fairness in their holdings from the perspective of developing nations.

Firstly, the discussion analysed and described the landscape of intellectual property protection globally under the TRIPS and from the perspective of developing countries. It explained the developing world after buying into the arguments of liberal free traders and the pressure of the industrialized countries, have as of yet to achieve the TRIPS' promise of flourishing local technology and better access to knowledge or an increase in FDI, which are all key elements in the capacity-building process. Whether the future holds better fortunes is speculative and dubious at best. In contrast, the TRIPS Agreement imposes affirmative obligations on Members that are very costly and burdensome to meet such as training of judges, enforcement measures against private actions, creation of administrative bodies, etc. These obligations tend to harm local industry in favour of foreign multinationals in the short to medium term.

During the Doha Ministerial Conference, the Members promulgated a declaration aimed at assuaging some of the legitimate concerns of developing countries. However, the Doha Declaration simply reiterated the text and the spirit of the TRIPS Agreement by paraphrasing some of the stated objectives and principles of the TRIPS as embodied in Articles 7 and 8. Moreover, the Doha Declaration limited its scope to mainly pharmaceutical products for treatment of HIV/AIDS, TB, and Malaria. Also, it allowed for more deference to Member States in determining situations that constitute an emergency and/or urgent situation thereby, justifying the withholding of the exclusive rights of the IP holder. The Doha Declaration has little or no effect in comparison to the development approach. The development approach goes beyond what is suggested in the Declaration. Furthermore, the legal value of the Declaration itself is suspect as the declaration is not an interpretation of the

agreement that must be accepted by $\frac{3}{4}$ of the WTO Members. Also, the development approach would want to broaden the scope of the covered sectors to other industrial and non-pharmaceutical areas.

Another area of concern for developing countries is the scope of patent protection that must be implemented domestically. The developing nations want to limit the scope of protection as much as possible. The language of the TRIPS Agreement allows for domestic authorities to enact laws and regulations that compared to industrialized countries, restrict the scope of protection. For example, defining terms such as novelty, industrial application, and “inventive step” is left to domestic authorities. The adjudicators’ role in this regard is to be flexible in how developing countries’ courts and institutions define these terms. The developing countries should also retain the authority to restrict the patenting of products associated with indigenous and traditional knowledge so as to prevent multinational firms from patenting these products without proper royalties and compensation. A hypothetical case was presented that illustrated how adjudicators should allow the flexibility in the language of TRIPS to promote product improvements and adaptations without the threat or potential for violation of the original IP holders patent.

The dispute in the *India-Pharmaceuticals* case was mainly in the context of implementing the positive obligations of the TRIPS and deferring the manner of implementation to national authorities. The AB held that simple administrative instructions were not adequate in fulfilling the obligation to provide a “mailbox” system of patent registry. Although the TRIPS has deferred the manner in which that obligation must be met to Members, nevertheless, the AB reasoned that an unpublished administrative instruction does not pass WTO threshold of acceptability.

This ruling is not in line with the tenets of the development approach to fairness as it has created a higher legislative burden on India. In essence, it seems that the AB does not trust the bureaucracy of India to fulfil its obligation. India, the largest democracy in the world with a fractious legislative branch, would be hard pressed to enact laws in such a short period of time. Fairness would demand that the Indian authorities be monitored to see whether the administrative instructions did in fact work properly or not. This is especially prudent since, as mentioned before, the manner an obligation is satisfied is up to the Member state itself, pursuant to Article 1 TRIPS.

An important issue for developing nations is also the exceptions to exclusive rights that are granted under Articles 30 and 31 of the TRIPS. Developing countries have an opportunity to lessen the shock and harm to their economies of TRIPS implementation by taking advantage of these exceptions. Again, the adjudicators have a responsibility to use the flexibility in the language of the provisions to allow developing nations to take the maximum use of these exceptions. The *Canada-Pharmaceuticals* case was analysed as an example of how the panel erred in its interpretation of the Article 30. In that case the issues were whether regulatory review proceedings and stockpiling is a correct use of the exceptions granted by Article 30. The panel thought that the regulatory review proceedings can be used as an exception by generic drug firms to test and make the drug before the expiry of the patent so as to get the approval of governmental health agencies, thereby, allowing generic production soon after the patent expires. Yet, the stockpiling of products before the expiry of the patent was deemed a violation that is not justified under Article 30. Although the disputants were not developing countries the precedent of

this case does not bode well for developing nations. The development approach would also allow stockpiling of products so that the product is marketed as soon as the patent expires. This would be of great benefit to the larger developing nations, which have a strong or burgeoning generic drug making sector, such as India, China, Brazil and even countries like Egypt and Mexico.

Article 31 sets out the conditions and criteria for Members to grant compulsory licenses. Again, in this regard the development approach to fairness suggests that adjudicators interpret the conditions under which compulsory licenses maybe given, flexibly. The Doha Declaration, if deemed to be legally valuable, has stated that Members have full authority to decide extreme emergency and urgent circumstances in health crises. However, the development approach would go further by giving the same authority to Member State government for economic crises. The Argentine crisis of 2000-2001 and the Southeast Asian crisis of 1997 are two examples whereby Members should be allowed to declare state of emergencies and grant compulsory licenses to not only pharmaceutical products but also any other product or process deemed necessary.

Other conditions such as refusal to deal, non-commercial use and dependent patents, are all very important for developing countries. Many developing nations' firms are not granted licenses because IP holders prefer to import the product leaving firms and labour in these countries behind in the R&D race, as they will not be able to gain the necessary knowledge. This is also true for non-commercial use. The adjudicators should interpret the term broadly so that firms, governmental agencies, and scientists in developing countries make full use of this exception. Dependant patents sometimes prohibit the smaller and less advanced corporate entities from

developing new or improved products and processes as the costs and lack of knowledge prevents them from doing so. Developing country firms are very prone to such obstacles since improving or adapting products is a good way to promote local innovation. The adjudicators of the WTO have the responsibility to diminish legal hurdles to the full extent allowed under the TRIPS.

The issue of exceptions to exclusive rights arises also in the area of copyrights. The language of Article 13 of TRIPS provides that exceptions to exclusive rights may be granted if it does not conflict with the normal exploitation of the work, and does not unreasonably prejudice the legitimate interests of the rights holder. The terms normal exploitation and legitimate interests must be defined narrowly so as to afford developing countries the opportunity to obtain the knowledge desired. This is especially true since copyright laws cover computer programs. A narrow interpretation of Article 13 relating to rental rights would assist in the affordable access to computer programs and other knowledge material. Under the TRIPS the copyright holder has full control of rental rights; however, developing countries could use the exceptions to the exclusive rights clause to provide easier rental opportunities for their firms.

The area of trademarks has generally not been of great concern to most developing countries. Nevertheless, international pressure on countries such as China and India to better enforce trademark violators is slowly bringing the issue to the fore. Counterfeiting of trademarked goods is still the most outstanding area of concern, and this involves enforcement on the ground. As the importance of trademarks has not been widely recognized in the developing countries this issue has not been given much attention in this chapter, but the developing countries must be able to protect

their interest on the one hand, against demands for excessive granting of well known trademarks that have not been used in their jurisdiction, and ensuring consumer protection against local counterfeits on the other.¹⁵⁶

As of January 2001, the five-year moratorium on bringing non-violation and situation complaints against developing countries has elapsed and although these claims are very rare in the GATT/WTO history, it is nevertheless, potentially a matter of grave concern. The TRIPS Agreement's affirmative obligations come at a great cost to the developing countries' economy and administration, since industrialized nations could potentially bring forth many complaints under Article XXIII: 1 (b) and (c) of the GATT as it relates to the TRIPS. The adjudicators must be very cautious and tread carefully when a non-violation or situation complaint involves a developing country. The complainant Member must carry a greater burden of proof than it would if the non-violation or situation claim concerned another WTO covered agreement without affirmative obligations. The affirmative obligations of the TRIPS, the lack of adequate institutions-judiciary and executive-in developing countries, and the relatively short period of time to implement the TRIPS Agreement are some of the reasons why the panel and AB must rarely favour non-violation and situation claims against developing countries. For non-violation and situation complaints, the complainant must prove beyond the requirements of Article XXIII, that the developing nation acted in bad faith; systematically infringing on IP rights and that it can feasibly correct the matter without economic harm to the defendant.

¹⁵⁶ The WTO has only adjudicated one case- *The Havana Club*. However, the issue in that case was mainly expropriation and national treatment matters.

Chapter 4

Developing Countries and the Nature of the WTO Antidumping Regime

The strengthening of the world trading system was one of the basic objectives of developing countries participating in the Uruguay Round. For developing countries one of the most important aspects of this system strengthening was the law and regulations of antidumping. They believed a more effective international legal regime would be to their advantage as being poorer and less advantaged made them easier prey in the international power-oriented political system. Furthermore, antidumping measures had become and are still a very prevalent mechanism for protectionism in the industrialized world. Since market access to the rich world is one of the main tenets behind liberal trade and development theories, the antidumping regime found even more focus and attention during negotiations.

The traditional economic rationale for antidumping measures has been the threat of international predation, a very legitimate and necessary objective. However, a more empirical and pragmatic look at the current situation leads to a different assessment. With the great increase in transnational commerce, domestic economic policies, laws, and business practices have obtained a new and more urgent extra-territorial impact. In light of a lack of international harmonized rules governing which domestic business practices and policies constitute trade distortion, antidumping laws have evolved as the strategic tool of choice to counteract the effects of domestic structural differences and other non-tariff barriers between Member States of the WTO. While antidumping

actions may be deemed to protect Member States' crucial economic interests, in reality antidumping laws block entry of many otherwise reasonably priced imports from exporters incapable of predation.

Developing countries have traditionally been the targets of this strategic protectionist tool, and although many more developing countries are implementing antidumping laws and initiating investigations, the overall structure of the system is still harmful to trade interests.¹ The laws of asymmetric economic power also create a structural disadvantage to these Member States. Developing countries imposing antidumping duties on products from industrialized nations could be inflicting harm to themselves as their financially-challenged consumers must pay higher prices. Also, due to a less advanced industrial base than developed countries, most imported products will probably be used by their own industries as input goods thereby creating a domino effect of higher prices. Nevertheless, antidumping measures remain ever present and developing countries saw no other option but to negotiate a new Antidumping Agreement negotiated during the Uruguay Round which would lessen harm to trade and also promote more predictability and transparency for exporters.

Therefore, this chapter will discuss some fundamental elements of dumping and antidumping measures from the perspective of developing countries. It will serve as a prelude to the next chapter which evaluates the case law of the WTO pertaining to

¹ Harvard Center for International Development, Debate Over the Use of Anti-Dumping Measures, 2002, found on www.cid.harvard.edu; Hudec, R., *The New WTO Dispute Settlement Procedure: An Overview of the First Three Years*, 1999, 8 *Minn. J. Global Trade* 1 explaining the overall increase in the initiation of dispute settlement cases in the WTO;

antidumping and developing countries under the development approach to fairness. Hence, this section will explain the economics of dumping, including, among others, its relationship with competition law, then proceed to describe the current WTO regime under the new Antidumping Agreement. Also, developing countries negotiation positions with regard to certain aspects of the antidumping rules will be presented in order to gain perspective of the demands and concerns of these countries. However, it will not be exhaustive as some matters such as injury determination and causality have always been problematic and no tangible change has occurred in the negotiation rounds to date. Finally, this chapter will analyse the relationship of the Antidumping Agreement with the “development approach to fairness.”

The outcome is that although the new Antidumping Agreement has been amended, the overall strategic nature of its use has not changed and in order to protect developing countries from protectionism in industrialized countries the adjudicators must use the development approach so as to lessen the harm done to third-world exporters.

4.1 Economics of Dumping

Economists have traditionally defined dumping as transnational price discrimination where prices vary between national markets, that is, domestic vis-à-vis foreign markets.² Although some object in principle, they now accept that dumping may also be defined as a transnational sale below cost. In fact, the two definitions are both

² Jackson, J. & Vermulst, E. (eds.) *Antidumping Law and Practice* 1990, New York: Harvester Wheateleaf.

equally the centre of many antidumping disputes in recent years. Sales below cost “has gradually acquired the elevated status of an alternative definition.”³ However, there is no direct correlation between price discrimination and sales below cost as sales below cost may occur with or without price discrimination.⁴ The following will address both types of dumping definitions and reasons firms may engage in such activity.

4.1.1 Traditional Definition of Dumping

Price discrimination occurs when different units of the same commodity are sold at different prices for reasons not associated with differences in costs or when different units of the same commodity are sold at the same price where costs are different. Dumping refers to a situation where prices in the importing market are lower than in the domestic market of the exporter. The assumption is two distinct markets exist and are separated by geographical, social or cultural elements, or that one market is less competitive than the other (i.e., the elasticity of demand and supply must differ between the two markets).⁵

There are many reasons why a firm may want to maintain a price discriminating scheme for a certain period. First, when a firm with market power in the exporting

³ Deardorf, A., *Economic Perspectives in Antidumping Law* 1990, in Jackson & Vermulst, *ibid*.

⁴ Marceau, G., *Antidumping and Anti-trust issues in Free Trade Areas*, 1994, Clarendon Press, p.11.

⁵ For Analysis of Antidumping regulations and economics see: Snyder, F., *Antidumping in WTO Law*, 2003, in Lewis, D., *China and the WTO: Trade Law and Policy* (Hong Kong University Press) at p.51; Handley, B., & Messerlin, P., *Antidumping Industrial Policy: Legalized Protection in the WTO and What to Do About It*, 1996 (AEI Publishing) pp. 6-24 & 52-69; Arnold, B.G., *Antidumping Actions in the US and Around the World: An Analysis of International Data*, 1998 (Congressional Budget Office) found on CBO website.

country enters a new market separated by tariffs, technical standards or other factors, it may maintain lower prices in the new and more competitive market at a profitable level, without any predatory desire to eliminate competition.⁶ Second, in order to achieve economies of scale for promotional reasons or to test a new product, a producer may need to expand into a new geographical market.⁷ If government in the first market controls prices, the reduction of price caused by increased output may only take place in the importing market. Third, in a period of recession or of excess capacity, a producer active in two or more markets may be able to lower its prices in one market if cartels or government in one of the markets regulates prices.⁸ Fourth and most concerning, is international predation. A firm with market power may price discriminate and cross-subsidize a low price market with profits from a high price market to eliminate competition in the low price market and eventually reap monopolistic profits.

In the first three scenarios the producer may have the intention of raising its price rapidly when regular or normal production or market circumstances begin. The producer may not have the capacity to predate. However, it must be noted that much controversy and ambiguity in identifying true predators as opposed to normal business practice remains. Aside from predatory situations, the problem does not lie in the

⁶ Ruttely, P., *Antidumping Regulations and Practices*, 2004, pp. 107-124, p. 112 in Reuvid, J., *A Handbook of World Trade: A Strategic Guide to Trading Internationally* (Kogan Pages ICC);

⁷ Prusa, T.J., *The Economic and Strategic Motives for Antidumping Filings*, 2001 (US National Bureau of Economic Research) found on www.nber.org;

⁸ Ruttely, P., *supra* at note 6, p. 113

lower priced market or the one where price discrimination exists, rather the higher priced market is to blame for any market distortions or problems.⁹

4.1.2 Alternative Definition of Dumping

Dumping can also be defined as the pricing of exports below some definition of costs. The argument in favour of this approach is that exports below costs must be subsidized with sales at a much higher price, usually in the home market, constituting evidence of price discrimination. Sales below cost may also signal future price hikes after predation is completed.

Three main types of costs are usually referred to when looking at sales below costs: average total cost, average variable costs, and marginal costs. Calculating true marginal costs is very difficult as it refers to the extra costs required to produce an extra unit of good. Variable costs are those which vary with the level of output while fixed are those which do not change.

Structure and allocation of costs also vary within different countries, management models, accounting methods, social institutions, regulatory requirements and culture. Furthermore, in a multinational, multi-product enterprise the identification of different types of costs becomes very difficult and at times arbitrary. In any international setting reference to a particular type of cost must include recognition of national structural and business environment differences. Also, the proper price level to cover

⁹ See Ruttley, P pp. 114-115 supra at note 6 and Prusa, T.J., pp. 10-13, supra at note 7.

costs is at times arbitrary. Economically, the use of sales below marginal costs or allocated costs depends entirely on the actual circumstances of the market and its competitive structure.

4.1.3 Justifications for Businesses Selling Below Cost

In a market economy the primary objective of firms is to maximize profits in the long term. In accounting terms, producing an extra good should yield at least the extra costs of producing that extra good: marginal costs of production. As long as marginal costs are covered, producing at a price where at least some of the fixed costs are recovered can therefore be considered rational and reliable business. For a company to continue producing without recouping its full costs is reasonable when, for example:¹⁰

1. The testing and promotion of new products may warrant sales below total average costs and even below marginal costs for a certain period of time. At times, firms entering a market prefer to price the product as low as possible so as to ensure viability due to uncertainty of the market situation and a high price at the beginning of entry could hinder and block marketing and promotion of the good as consumers are turned away from the new higher priced product.

¹⁰ For more discussion on why firms may dump see, among others, Besanko, D., & Dranove, D., & Shanley, M., *The Economics of Strategy*, 2000 (2nd ed.) Part 2-3; Brander, J., & Krugman, P., *A Reciprocal Dumping Model of International Trade*, 1983, *J Int'l. Econ.* 313; Low, P., *Trading Free: The GATT and US Trade Policy*, 1993; Anderson, K., *Antidumping Laws in the United States: Use and Welfare Consequences*, 1993, *J. World Trade* 99

2. The market is slow or depressed or an excess capacity exists, therefore an enterprise with high fixed costs may decide to sell below cost in order to minimize losses.
3. A new entrant into a competitive market may forgo some profits by selling below total variable costs for a short while in order to make itself known and market itself better in the new environment. Of course, the assumption is that after its recognition prices will increase to cover any previous losses.
4. An enterprise may want to maximize sales over profit without any intention of eliminating competitors. This is objectionable to competitors because excess supply will depress prices though, consumers will gain. Many Japanese firms have implemented, and some still use in this form of business strategy. However, some critics claim overproduction is a form of predation.¹¹ In fact, the *Alcoa* case in the US has held that overproduction is a form of predation.¹²
5. The uncertainty about new markets leads producers to make decisions on price in contracts before export costs are fully known. Prices may end up not covering marginal costs or even variable costs. However, this situation represents a wrongful evaluation of the costs rather than a decision not to cover marginal costs.

There seems to be rational business justifications for selling below costs or to price-discriminate. According to liberal economists, selling below cost or discriminating on prices serves only to benefit the importing country in the long run. The only exception is predation which often, is difficult to prove.

¹¹Williamson, O., *Predatory Pricing: A Strategic and Welfare Analysis* 1977, Yale L.J. 187 p. 194.

¹² *United States v. Aluminum Co. of America*, 148 F.2d 416 (1945).

4.1.4 Overview of Welfare Impact and Categories of Dumping

Dumping was traditionally classified according to its duration because of its allegedly different welfare impacts. Dumping was considered to be sporadic, short-run and intermittent, or long run and continuous.¹³ In the early years of dumping analysis, economists such as Viner believed that short run dumping should be prohibited as “it could induce a maladjustment in the use of productive resources of the importing country”¹⁴ Whereas, sporadic dumping was of insufficient duration to affect investment and employment decisions.¹⁵ Long run dumping causes a shift in the allocation of resources, but was reasonable because of continued low price imports. Thus, for Viner, time was of material importance in evaluating the effects of dumping. However, this categorization of dumping seemed elementary since the true impact of dumping is more nuanced and complex.¹⁶

In more recent works on dumping’s impact, it is suggested that both predatory dumping and all forms of strategic dumping are detrimental for the global economy. Robert Willig identifies five types of dumping practices in reference to different circumstances where dumping has negative welfare effects:¹⁷

¹³ Viner, J., *Dumping*, 1923, University of Chicago Press, p. 139-141.

¹⁴ Viner *ibid.*

¹⁵ Marceau, *supra* at note 4, p.12.

¹⁶ Marceau, *supra* at note 4, p. 15.

¹⁷ Willig, R., *Framework of US Antidumping Regulations*, 1980, US Congressional Report found www.libraryofcongress.gov.us.

1. **Market Expansion dumping:** the exporting firm can profitably charge a lower mark up in the importing market since it faces a higher elasticity of demand with respect to price.
2. **Cyclical Dumping:** the motivation arises from the unusually low marginal costs or opportunity costs of production coupled with substantial excess capacity with little or no use apart from the manufacture of the particular good.
3. **State-Trading Dumping:** the main motivation here is the acquisition of hard currency. Developing countries are almost always the culprits in this form of dumping simply for acquiring hard currency.
4. **Strategic Dumping:** This term describes exports that injure rival firms in the importing country through an overall strategy of the exporting nation that encompasses both the pricing of the exports as well as restraints foreclosing the exporter's home market. If each exporter's share of its home market is of significance then a benefit from a significant cost advantage over any foreign rivals occurs.
5. **Predatory Dumping:** Dumping that falls under the authority of most Members' competition or antitrust regulations. Here, the exporter is trying to eliminate competition by lowering prices in order to reap higher profits later.

Yet, this categorisation does not seem to resolve any of the ambiguities associated with the origin of dumping. Dumping at its core is due to the existence of different national laws and economic models between two different markets. National differences are normal and in many instances necessary for competition and exploitation of the comparative advantages states may have.

In fact, many economists believe dumping is not so harmful to importing countries, except when predatory or strategic intentions are involved.¹⁸ Consumers in the importing country benefit from lower prices. The importing country as a whole benefits to the extent that it acquires access to imported goods at a lower price than if dumping were not taking place. This is true because the importing country is naturally a net demander of dumped products since its domestic firms competing with the dumped goods are being harmed.¹⁹ In economic terms, charging extra duties to counter the price discrimination caused by the dumping firm is serving only a narrow interest domestically and not the economy and the citizens as a whole.²⁰ For the importing country, the effects of imposing antidumping duties or countervailing duties (CVD) has a ripple effect on prices charged by other businesses domestically. Not only must consumers pay a higher price for the dumped goods but also higher prices for domestically produced like goods, as the domestic producers are able to charge more and still remain competitive.²¹ Furthermore, if the product in question is an input product the prices of other complementary products will inevitably be higher.

However, antidumping measures have been on the rise in the past two or three decades mostly because national authorities are unwilling to recognize and work within the

¹⁸ Deardorf, A.V., *Economic Perspectives on Antidumping Law*, 1993, in Stern R.M., (ed.) *The Multilateral Trading System: Analysis and Options for Change* 135 pp. 136-142.

¹⁹ Deardorf, *ibid.* p. 139.

²⁰ Bhala, R., *Rethinking Antidumping Law*, 1995, 29 *Geo. Wash. J. Int'l. L. & Econ.* 1 p13. Also See, Fraedrich, L., *the Japanese Minivan Antidumping Case: How American Manufacturers Lost the Legal Battles but Won the War*, 1994, 2 *Geo Mason U.L. Rev.* 107, p. 120-124.

²¹ Jackson, J.H. (ed), *The Jurisprudence of GATT and WTO: Insights on Treaty Law and Economic Relations*, 2000, pp.87-98 For a more detailed discussion on the economic and legal merits of countervailing duties.

existing national economic and regulatory differences, or to make long-term, purely economic decisions. Therefore, it must be assumed that antidumping measures will continue and that economic considerations, though superficially adhered to, are not the overarching reasons for the levying of antidumping measures. Rather, they are imposed in an overall majority of cases for political reasons and/or short-term fixes to assist certain domestic industries.

4.2 Antidumping Measures as a Tool for Protectionist Tendencies

International use of antidumping rules was formalized at Bretton Woods in 1947, where the contracting parties drafted Article VI of the GATT Agreement. Later, in order to facilitate better administration of the antidumping measures that proliferated, an antidumping code at the Kennedy Round of multilateral negotiations in 1967 was devised. The Antidumping Code was significantly amended during the Tokyo Round of negotiations in 1979. The WTO Antidumping Agreement was promulgated to replace the Tokyo Round negotiations and is presently the Agreement that attempts to deal with international antidumping measures.

Antidumping complaints have emerged as the most effective weapon in the protectionist arsenal of national authorities. At times the mere filing of an antidumping complaint has “chilling effects” on competition at the price and volume levels. The complex set of rules and the costs that antidumping investigations pose is detrimental to exporters and importers. This “chilling effect” is highlighted within the

export sector of developing nations as an investigation by US or EU authorities puts these firms in a disadvantageous situation with regard to issues of competition, domestic and foreign, and other corollary problems such as financing, obtaining bank loans, and adjustments in the allocation of resources.

4.2.1 The Tendency to Litigate Dumping Measures

As countries are required to lower tariffs and phase out other NTBs in order to comply with WTO rules, Members will naturally look to the ADA more often. Historically, the US, the EU, Canada, and Australia have been the primary users of antidumping law, accounting for over 60 percent of the antidumping cases initiated between 1990 and 1995,²² (Including those at the WTO). These statistics do not show the real accounting of antidumping measures because it does not address the plethora of “administrative reviews” initiated by the US pursuant to a Draconian System of retroactive dumping assessments. The US uses many of these reviews in a given year and at times, more than it initiates new investigations.²³

Developing countries have also commenced on the path of utilizing dumping measures so as to counter their proliferation by industrialized countries. Developing countries have been filing antidumping actions not only against the traditional users but also

²² Between the years 1990 and 1995 the US initiated 299 antidumping cases, Australia initiated 265, the EU 186, and Canada initiated 117. *The Committee on Antidumping Practices, Reports of the Committee presented to the Contracting Parties GATT BISD 1991-1996.*

²³ The periodic retroactive “administrative reviews” analyze whether imports in the previous year, entered under a pre-existing antidumping order, were dumped using the same rigorous data collection procedures as in the initial dumping investigation. For more info see the Import Trade Administration’s web site at www.ita.doc.gov/import.

against other developing Members with increased frequency to the consternation of developed nations.²⁴ A striking number of countries with no prior antidumping laws have adopted regulatory regimes for antidumping. In 1994 only 25 countries had joined the GATT Antidumping Code and implemented antidumping legislation.²⁵ However, by 2003 due to the “single package” nature of the WTO Agreement there are now 147 members which in some manner, must have antidumping regulatory schemes. Therefore, the institutional framework itself encourages the proliferation of antidumping measures.

A sharp rise in the number of antidumping actions initiated since the establishment of the WTO has occurred.²⁶ The number of cases will fluctuate from year to year depending on the economic cycle and global economic health of certain sectors; nonetheless, the trend seems to be unmistakable. Antidumping measures are the most effective way to counter the lowering of tariffs offered by Members States in the Uruguay Round negotiations, in particular, for the most established and traditional users of these actions.

The growing frequency of antidumping actions has resulted and will most likely continue to result in an increase in the number of antidumping decisions challenged before the WTO DSB. The WTO established new binding procedures, under which a

²⁴ Report by US General Accounting Office stating that the spread of antidumping measures: “Fearing possible abuse of these laws, countries with established procedures have expressed concern over their adoption and use by newly industrialized countries such as Mexico, South Korea, and Brazil” See *United States General Accounting Office, 1990, Report to Congressional Requestors.*

²⁵ Ruggiero, R., *The State of World Trade, Trade Policy and the WTO*, 1996 FOCUS, p. 8.

²⁶ See amongst others Hudec, R., *Supra* at note 1; Harvard Center for International Development study *supra* at note 1; and WTO statistics up to April 2005, indicating on average a 15% increase in Antidumping cases year-on-year, found on www.wto.org.

complainant may request a panel review of the decisions taken by the authorities of another Member in order to ensure its conformity with obligations under the ADA.²⁷ The WTO sets forth rules for resolving disputes involving antidumping measures. In theory, developing countries should be encouraged to use this system as it gives them more meaningful remedies than the old GATT regime. Yet, this chapter and the next will illustrate that so-called improvements in the system have led to other problems for developing countries with regard to antidumping measures, thereby, diminishing any real gains for these Members. Nevertheless, one can expect greater numbers of antidumping disputes involving developing countries as the ADA is the most effective of the three import protection agreements, the other two being the Safeguards Agreement and the Subsidies and Countervailing Measures Agreement in the WTO.

4.3 Relationship Between Antidumping and Competition Policy

As antidumping regulations claim to prevent predatory behaviour by firms or to strategically prevent foreign competition, understanding the overlap between the concepts of antidumping measures and competition policy is prudent. The crux of the issue is the difference between the policy objectives of the two concepts. Competition laws, *inter alia*, strive to deter and prevent abuses of market power, exclusionary practices, cartels, and to provide guidance on mergers and acquisitions. The core objective of competition policies is to preserve and protect the process of competition

²⁷ DSU, Art. 4 and 16.

but not necessarily individual competitors, so as to maximize economic efficiency.²⁸

This is reflected in efficient prices, better quality goods and innovation. Competition policy focuses on the rules of the game over the behaviour and actions by market participants, as such it tends to be neutral in design as opposed to proactive. Through its deterrent effects, when legislation is effectively enforced, increases in competition, market discipline and a more competitive environment can be expected.

Trade policies on the other hand, have traditionally focused on facilitating access to markets, through reduction of tariffs and other non-tariff trade barriers, so as to increase output, efficiency and to realize the associated benefits of free trade, whilst maintaining some level of protection for domestic industries. The arguments supporting the protective components have been varied, but most often they have been based on the need or desire to shelter nascent domestic industries from more advanced and efficient foreign competitors, or as the antidumping system illustrates, are based on political pressures from interest groups.²⁹

In practice, trade policy tends to be more proactive, in that it can involve subsidies of one form or another that target or favour some domestic sectors or regions and erect barriers to foreign competition. As a result, trade policy can either significantly promote or substantially impede the economic goals of competition policy. Yet, there is also a natural affinity and opportunity for convergence between trade and

²⁸ Victor, P., *Antidumping and Antitrust: Can the Two be Resolved?* (1983), 15 *Journal of International Law and Politics* 1.

²⁹ Guasch, J.L., & Rajapatirana, S., *Total Strangers or Soul Mates? Antidumping and Competition Policies in Latin America and the Caribbean*, (1998) IBRD 433/1958 p. 3-8.

competition policy. An example of this is seen in the protection of the market from predatory pricing or when import competition breaks the hold of domestic oligopolies.³⁰ Moreover, trade policy instruments are designed to deter anticompetitive practices by foreign firms which are similar to competition policy although they have a more domestic focus.

In its current form, antidumping regulations have become tools of protectionism, which inherently strives to reduce competition. The only economic justifications under liberal free trade theory for antidumping measures are in predatory situations. However, with the opening up of markets as mandated by the WTO, the monopoly rents expected by predatory behaviour is rendered unfeasible. Predatory dumping loses its effectiveness because competition from other firms that have the same market entry rights as the predator will diminish any future monopolistic position.

Therefore, one can see that the objectives of competition policy and antidumping policy could converge and work to increase competition, whilst at times, depending on the true intent of the domestic authorities of the importer, antidumping policy could have the exact opposite effect and close the market to competitors. This is because the core objectives and policy goals of these two concepts are not really commensurate.

³⁰ Hoeckman B.M., & Mavroidis, P.C., *Antitrust Based Remedies and Dumping in International Trade* (1994) Center for Economic Policy Research, Paper 1010 August 1994.

4.4 Other Agreements on Import Protection and Their Significance Vis-à-vis the ADA

The WTO Agreement encompasses several multilateral agreements on trade contingency remedies. Aside from the ADA which relates only to trade in goods, the other two agreements of importance are the Safeguards and the SCM Agreements. The Safeguards and SCM Agreements are of far less importance than the ADA because the prevailing economic realities of developing countries, the stricter requirements for injury determinations, and the lower level of countervailing duties that importing Members are allowed to levy make them a less appealing option for protecting domestic industry than antidumping measures. Thus, the ADA will be the focus of this chapter and the next.

4.4.1 Subsidies and Countervailing Measures Agreement

One of the import protection mechanisms permitted under the WTO is the antisubsidy scheme. Similar to the Safeguards Measures, anti-subsidy measures are noteworthy but of less significance than antidumping measures. Under the WTO SCM Agreement, importing nations may take antisubsidy measures against products benefiting from certain types of subsidies in the exporting country. The Agreement defines subsidies as financial contributions or other governmental measures such as

price supports or tax breaks that “confer a benefit”³¹ and are “specific”³² to a particular industry or industries. The revisions of the old GATT agreement on subsidies, coupled with other international economic developments, have decreased the importance of antisubsidy measures.³³

Antisubsidy measures imposed under the authority of the SCM and the GATT have had a relatively small impact on trade as compared to antidumping actions.³⁴ This excludes agricultural subsidies that fall under the Agreement on Agriculture and has its own separate regime. The US has been the predominate user of antisubsidy measures most in the form of levying countervailing duties (CVD) rather than demanding the withdrawal of the subsidies.³⁵

The most frequent target of the US CVD measures has been the large Latin American nations of Argentina, Brazil and Mexico, along with the EU.³⁶ These countries have recently embarked on a wave of privatisation of state industries thereby eliminating most of the justifications for US CVDs. Furthermore, the new SCM makes it harder for importers to levy CVDs, as it requires an injury test that was not required during

³¹ SCM Agreement Art. 1.1: defining financial contributions and Art. 14 defining benefits

³² SCM Art. 2.

³³ Corr, C., *Trade Protection in the New Millennium: The Ascendancy of Antidumping Measures*, 1997, 18 Nw. J. Int'l L. & Bus. 49 p. 68.

³⁴ *ibid.*

³⁵ Vermulst, E., *Subsidy and Countervailing Measures*, 2003, UNCTAD course on Dispute Settlement in International Trade, Investment and Intellectual Property, p.5-9 found on www.unctad.org.

³⁶ Finger, J.M., & Nogues, J.J., *Safeguards and Antidumping in Latin American Trade Liberalization: Fighting Fire with Fire*, 2006, p. 6-9, Palgrave MacMillan Publishing.

the GATT. Probably most significant is the lower level of protection proffered by SCM CVDs as opposed to antidumping measures.³⁷

The SCM rules allowing for certain subsidies known as “Green Light Subsidies” will also contribute in diminishing the relevance of the SCM in comparison to the ADA due to the fact that these subsidies have been deemed legal. Previously, the legality of certain subsidy measures was unclear and could be determined by the importing nations’ authorities. Moreover, as most Members have privatised or are in the process of privatising more industries, the use of SCM CVDs will likely be curbed or at a minimum, have a small effect on the prices of these products, as the CVDs will be less. However, it must be noted that there are still certain industries which will come under scrutiny due to continued governmental support mostly due to “national champions” sectors in the industrialized countries such as airlines and automotives.

4.4.2 Safeguards Agreement

Article XIX of the GATT 1994 Agreement allows members of the WTO to impose temporary protection for domestic industries encountering increased import competition. Procedures for implementing this article are laid out in detail in the Safeguards Agreement annexed to the WTO Agreement. The objective of the

³⁷ For example, in the US SCM CVDs are usually below 10% whilst, antidumping duties are usually above 10%. Compare the cases of Freshwater Tail Meat from China 62 Fed. Reg. 48218 (1997) with a 91.5% margin; Vector supercomputers from Japan 62 Fed. Reg. 55392 (1997) with a margin of 173% to 454% with, on the other hand, SCM CVDs on Oil Country Tubular Goods 60 Fed. Reg. 40822 (1995) from Italy with an ad-valorem rate of 1.43% and Pasta from Italy 61 Fed. Reg. 38544 (1996) ranging from 0% to 11.23%. Also see Corr, C., supra at note 33.

negotiators in respect to this agreement is to afford a grace period for domestic firms to enhance market positions or shift resources into a different field.³⁸

The SCM authorises Members to restrict imports when they are in “surging” quantities, and causing or threatening to cause serious injury to a domestic industry.³⁹

The SCM specifies that measures may only be taken in respect to an increase in imports both in absolute terms and relative to domestic production.⁴⁰ The definition of serious injury is stipulated as “a significant overall impairment to its position.”⁴¹ The intention of the drafters of the Agreement pertaining to the injury test is arguably, to set a higher threshold than the injury test in the Antidumping Agreement.⁴²

The main remedies under the Safeguards Agreement are quantitative restrictions and higher import duties.⁴³ However, when Members apply quantitative restrictions they must normally limit the measure to prohibit only injurious imports, that is, those that exceed the average quantity or value of imports over a three-year “representative

³⁸ The WTO has other safeguard mechanisms, notably, Articles XII and XVIII:B of GATT 1994 which permit import restrictions in order to protect the Members’ external finances and balance of payments in extraordinary circumstances. Also, Article XX allows for protection of public morals, health, exhaustible natural resources, and Article XXI allows for protection of national security are other examples of safeguard provisions in the WTO. Aside from Article XX which has been elaborated and detailed through the procedures laid out in the SPS Agreement and has been invoked in many disputes, the other provisions have very rare usage and as of yet, have not played a significant role in the jurisprudence of the WTO.

³⁹ Safeguards Agreement Art. 2.1.

⁴⁰ *ibid.*

⁴¹ Safeguards Agreement Art. 4.1.

⁴² Corr, C. *Supra* at 33 p. 61.

⁴³ Safeguards Agreement Art. 5.1 and Art. 6. According to Art. 6 if there is a finding of critical circumstances, in which delay would cause considerable damage, a Member may impose provisional safeguards after making a preliminary determination. Provisional measures may be granted for up to 200 days while the investigation is conducted and should take the form of tariff hikes.

period.”⁴⁴ This is different than the ADA which allows national authorities more discretion in the products they may wish to target. Furthermore, the safeguard measures must be phased out in proportion to the recovery of the domestic industry.⁴⁵ Article XIX requires governments to suspend obligations on a non-discriminatory or MFN basis so that restrictions are applied to all imports. Quota shares normally must be allocated proportionately among different Members on the basis of relative import levels during the representative period.⁴⁶ This requirement is stricter than the leeway granted national authorities in targeting dumped imports, as the ADA does not require such limitations.

The duration of safeguard measures is limited to a maximum of eight years (initial phase of 4 years with the possibility of extension for another 4 years) whereas antidumping measures could last much longer making them more attractive to protectionist impulses. Another significant difference is the Safeguards Agreement has included so-called grey area measures in its purview. Grey area measures are usually trade distortive non-tariff barriers devised through “voluntary” participation of exporters, such as voluntary export restraints, orderly marketing arrangements, and export price or import price monitoring systems.⁴⁷ The measures are explicitly prohibited under the Safeguards Agreement.⁴⁸

⁴⁴ Safeguards Agreement Art. 5.1.

⁴⁵ Safeguards Agreement Art. 7.1.

⁴⁶ Safeguards Agreement Art. 5.2(a).

⁴⁷ Hizon, E.M., *The Safeguard Measure/VER Dilemma: The Jekyll and Hyde of Trade Protection*, 1994, 15 NW. J. Int'l. L. & Bus. 105-106.

⁴⁸ Safeguards Agreement Art. 11.1.

Although many of the WTO Members have implemented new domestic safeguards legislation, it is unlikely there will be a significant increase in safeguard actions due to the limitations of the safeguard remedies in contrast to the remedies available under the ADA. The Safeguards Agreements' prohibition on grey area measures is most likely to lead to an increase in antidumping actions as the most attractive alternative for protection. Antidumping actions permit the targeting of specific countries, and the imposition of protective measures of indeterminate duration, without any compensation requirements.⁴⁹ A more detailed look at the WTO Antidumping regime will reaffirm the greater significance of these measures vis-à-vis the Safeguards and Subsidies Agreements.

4.5 General Overview of WTO Antidumping Regime

The advantages and availability of antidumping relief relative to other import protective measures demonstrates why the antidumping regime is and will continue to be the most important and popular international import protection measure. Antidumping actions are effective because it is relatively easy to file a complaint and directly target specific competitors, impose duties that have a direct and sustained price effect on specific products, and will most likely act as market barrier.

⁴⁹ Antidumping measures may incorporate grey area measures. VER in the form of quantitative restrictions and tariff rate quotas arguably are permissible, as long as they comply with the ADA. For example, Article 11.1(C) of the Safeguards Agreement states that the prohibition on grey area measures does not apply to measures "sought taken or maintained" under the authority of other WTO covered Agreements.

4.5.1 The WTO Agreement

The fundamental principles of the antidumping regime were set out in Article VI of the GATT 1947, as detailed in an antidumping code that was periodically revised at various GATT negotiating sessions. After the entry into force of the WTO Agreement all previous antidumping agreements were superseded by the new Agreement on the implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (ADA).

The ADA requires Members to adhere to core substantive and procedural requirements, to achieve a certain level of uniformity in the international antidumping regime, yet much flexibility is built into the Agreement as national authorities are given a high level of discretion in implementing its obligations. The legal framework is particularly important for developing countries since a vast majority of them did not have antidumping schemes in the domestic regulations. The WTO has devised a model antidumping law for Members to implement should they so wish, however, the model may not be applicable to many developing countries as their legal and economic systems vary greatly.

4.5.2 Antidumping Proceedings under the ADA

The Antidumping proceedings mandated by the ADA consist of three major stages; petition by domestic industry, dumping investigation, and material injury and

causation examination. An antidumping proceeding begins after the national authority accepts a petition from a complaining domestic industry (or an appropriate representative) alleging that a designated type of merchandise imported from one or more countries is a) being sold at dumped rates and b) those sales are materially injuring or are threatening to materially injure the specific domestic industry.⁵⁰ The national authority may only initiate antidumping investigation if the petitioner has shown a prima facie case supporting its allegations and has notified the government of the targeted Member.⁵¹

After the initiation of the investigation the national authority must evaluate whether the domestic industry has been materially injured or threatened with injury by reason of the targeted merchandise, that is, whether the cause of the injury is actually the dumped product or other economic and business factors.⁵² In a separate investigation it must also decide whether dumping has actually occurred.⁵³ The ADA sets out a time frame for provisional measures and final determinations of dumping and injury, as well as rules for public disclosure of these determinations.

The national authority has broad discretion in conducting the investigation. It will select the exporters which are to be targeted.⁵⁴ It will request targeted companies fill out questionnaires pertaining to sales and cost systems for the “investigation period”

⁵⁰ The Antidumping Agreement applies only to trade in goods and not services, which is covered under the GATS Agreement. Also see ADA Art. 5 for requirements of antidumping proceedings.

⁵¹ ADA Art. 5.

⁵² ADA Art. 3.

⁵³ ADA Art. 2.

⁵⁴ ADA Art. 6.10.

preceding initiation (usually one year for dumping).⁵⁵ After the questionnaires have been collected the national authorities may send auditors to conduct on the spot verification of the exporter's submitted information.⁵⁶ If the national authorities are unsatisfied with the responses of the exporter they may decide to proceed with the investigation based on "facts available" i.e., that it will ignore some or all of the submitted data and instead, use alternative information which is most likely to be detrimental to the exporter.⁵⁷

If both the dumping and injury investigations result in an affirmative determination the national authority may impose a definitive antidumping duty. Virtually all Members except the EC and the US, use a prospective system under which the authority imposes final or "definitive" duties on imports. The US, however, uses a retroactive system under which importers are responsible to pay a deposit in advance and then collect the differences at the end of the year if warranted. The ADA permits national authorities to settle antidumping complaints through "price undertakings" in which the exporter normally agrees to comply with minimum export prices in exchange for the suspension or termination of the antidumping action.⁵⁸

⁵⁵ ADA Art. 6.1.

⁵⁶ ADA Art. 6.7. Also Annex I "Procedures for On The Spot Investigations Pursuant to paragraph 7 of Article 6.

⁵⁷ ADA Art. 6.8. Also Annex II "Best Information Available in Terms of paragraph 8 of Article 6).

⁵⁸ ADA Art. 8.

4.5.3 Antidumping Methodology

4.5.3.1 Comparison

The national authority determines whether dumping is occurring by comparing the export price of the product with the “normal value” of the merchandise (the exporters’ home market, third country price, or a constructed price).⁵⁹ In order to achieve an equitable comparison, the ADA mandates a comparison of ex-factory starting price for sales of the same or like product to the first unrelated customers in the export market and the comparison market during the investigation period.⁶⁰ This requires the national authority to adjust prices by deducting transportation and selling costs and if necessary, differences in physical characteristics between products and trade levels.⁶¹ Selling costs are normally distinguished between direct ones such as commissions and credit expenses, and indirect ones such as fixed expenses, salaries and warranties. Direct expenses are applied precisely on a sale-by-sale basis for all sales in the investigation period, whereas indirect expenses normally are allocated over revenue and then applied as an average. These complex sets of rules and transactions are usually not a part of normal business accounting practice, and as such the numbers could be open to a variety of interpretations. This numbers game tend to result in domestic authorities selecting interpretations that inflate dumping margins. This is especially true for developing country exporters as their business records and practices are less sophisticated and elaborate than those required by the national authorities, or in comparison with the more sophisticated level of record keeping by most firms in the

⁵⁹ ADA Art. 2.2.

⁶⁰ ADA Art. 2.3 &2.4.

⁶¹ *ibid.*

industrialized countries.⁶² Therefore, the scope for discretion is increased because of systematic differences between the ADA evaluation of pricing and normal business accounting practice.

4.5.3.2 Export Price

The export price is the targeted exporting firm's price to an unaffiliated customer for consumption in the domestic market of the importing country. The export price may be the sales price to a purchasing agent or trading company in the exporting country for transport to the importing country, but usually a price to a buyer in the importing country. Since the customer has to be unaffiliated, the export price may be based on the resale price of the exporter's sales subsidiary in the importing country, rather than the exporter's price to one of its subsidiaries. Sales through subsidiaries are deemed "constructed export price" transactions because all of the expenses of the subsidiary including any further manufacturing and profit must be deducted from its resale price in order to "construct" an ex-factory starting price.⁶³

4.5.3.3 Normal Value

The benchmark to which the export price is compared is called "normal value" and may be derived in a variety of ways. The primary option under the ADA is to select comparable sales in the exporting firm's domestic market. This market can only be

⁶² Wright, R., *Validity of Antidumping Remedies: Some Thoughts* 1989, in Jackson, J.H., & Vermulst, E., *Antidumping Law and Practice: A Comparative Study*, at 425. p. 451.

⁶³ ADA Art. 2.3 & 2.4.

used if there are sufficient sales to constitute at least five percent of the amount sold to the importing country of the “like” product.⁶⁴ The domestic authorities may investigate whether home market sales are made below the cost of producing the goods. Sales below cost in substantial quantities may be rejected as a basis for comparison.⁶⁵ If the home market cannot be used as the benchmark price, the national authorities may use export sales to third countries or, calculate a constructed value for the exported good. In the case of “non-market economies” countries in which domestic market prices and costs are deemed unreliable, authorities may use special “surrogate values.”⁶⁶

4.5.3.4 *Cost of Production or Constructed Value*

If domestic market prices cannot be used, the normal value may be constructed from the cost of production sold to the importing country plus the profit earned in selling the good.⁶⁷ Cost of production is the total of the manufacturing cost⁶⁸ plus selling, general and administrative expenses.⁶⁹ Net prices in the exporter’s home market are measured against this constructed cost benchmark.

⁶⁴ ADA Art. 2.2. “Like Product” is defined by the ADA as, “Product which is identical i.e., alike in all respect to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.” ADA Art. 2.6.

⁶⁵ ADA Art. 2.2.1.

⁶⁶ Snyder, F., *The Origins of “Non-Market Economies”: Ideas, Pluralism and Power in EC Antidumping Law About China*, 2001, *European Law Journal* 7,4, pp. 369-424, pp.389-391.

⁶⁷ ADA Art. 2.2.2.

⁶⁸ These include the actual cost of material, labor and overhead incurred in producing the merchandise sold in the comparison market.

⁶⁹ ADA Art. 2.2.1.

National authorities usually require actual product-specific costs and profit, and generally will not accept standards or budgeted amounts. As many manufacturers use a process cost accounting system and do not derive actual per product costs, this requirement often means that a company must make a burdensome recalculation of product costs for antidumping purposes. Moreover, the Agreement's requirement of full production costs, rather than variable margin costs, may create higher dumping margins as normal business practice usually calculates costs based on variable margin costs. Domestic administrators have much discretion in adjusting an exporter's full costs, especially, where the exporter is forced to depart from its normal accounting system to derive a per product cost analysis. These adjustments can have a significant effect on the antidumping margins calculated, particularly for firms in countries with less means for accounting expenses.⁷⁰ For example, when calculating sales, general and administrative costs plus a profit margin, the investigators have a certain degree of discretion in how to calculate such a value. Also, due to the fact that normal value can be based on home market price or constructed price the exporter could still be found guilty even if its export price is not only above domestic market price but also if its export price is above production costs.

4.5.3.5 Calculating Dumping Margins

The calculation of dumping margins is the next step in Member States' investigation of dumping allegations. Export sales are compared to normal value, on a weighted

⁷⁰ Wright, *Supra* at note 62 p. 449, "It may be unrealistic to expect an economically rational cost of production/constructed value analysis for what has become, in essence, a subtle web of import protection decisions."

average or transaction specific basis.⁷¹ The foreign denominated normal value is then converted to the currency of the export price using the exchange rate in effect on the date of the export sale.⁷²

Average unit export prices generally are subtracted from average unit normal value, on a product-by-product basis, to measure the dumping margin. When the net export price for a product is less than the normal value, a quantity-weighted dumping margin is usually calculated. The margin for sales of all product types is tallied to derive a total dumping margin. This margin serves as the basis for the antidumping duty, although the methodology for imposing the duty varies amongst Members. The ADA mandates that separate margin rates be derived for each exporting company where possible, but the investigating authority has discretion to sample selected exporters when it cannot examine them all.⁷³ For those exporters in the targeted country that were not specifically investigated, an “all others” duty is applied.⁷⁴

The national authority has discretion not to impose an antidumping duty, or to reduce the amount calculated, if it deems such measures appropriate.⁷⁵ The ADA encourages national authorities to impose lesser duties than the full dumping rate when a lesser

⁷¹ ADA Art. 2.4.2.

⁷² ADA Art. 2.4.1.

⁷³ ADA Arts. 6.10 & 9.2.

⁷⁴ ADA Art. 9.4.

⁷⁵ ADA Art. 9.1. While the authority has discretion to reduce the duty, it cannot impose a duty higher than the dumping margin calculated. This provision could at times, create discriminatory effects as there is no regulation, which requires that “discounts” be given to all products and exporters. The selective nature of the deference given to national authorities is arguably counter to the WTO MFN principle. In fact, authorities could select exporters’ “discounts” strategically, so as to soften the burden on some exporters which compete, with exporters most competitive with the importing nations domestic firms.

amount is sufficient to offset the injurious effects. For instance, Article 15 of the ADA stipulates that “special regard” be given to developing countries before applying antidumping duties, when duties would effect their “essential interests,” however, there is no precedence in which this article has been given appropriate effect.⁷⁶

The ADA also allows national authorities to consider the interests of the consumer and the public in setting its antidumping amount. This consideration can potentially be an important part of the antidumping proceedings in Member States such as the EU.⁷⁷

The calculation of dumping margins is very much a practice in hypothetical scenarios, without much basis in the reality of whether there is truly dumping by exporters. The comparison of constructed prices and costs can create dumping margins where none otherwise exist. Since developing country exporters are most often targets of value construction by the US, Canada, and the EU, it is easy to understand the difficulties they face in exporting goods to these lucrative markets.⁷⁸

⁷⁶ In *European Communities-Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R (March 1, 2001) {hereinafter, *Bed Linen*}, the disputants accepted the obligation in Article 15 to seek constructive remedies. However, in the appellate stage, the AB held that Article 15 is a non-obligatory provision.

⁷⁷ The EU antidumping regulations require the consideration of the “community interest.” Council Regulation 384/96 of 22 Dec. 1995 on Protection Against Dumped Imports from Countries not Member of the EU, Article 21, 1996 O.J. (L356) 1, 18. Also see, Wellhausen, M., *The Community Interest Test in Antidumping Proceedings of the European Union*, 2001, 16 Am. U. Int’l. L. Rev. 1027.

⁷⁸ Lima-Campos, A., & Vito, A., *Abuse and Discretion: The Impact of Anti-dumping and Countervailing Duty Proceedings on Brazilian Exports to the United States*, 2004, 38 J.W.T. 37 p. 39-40.

4.5.3.6 *Injury Analysis*

Under the ADA, the national authority must assess the impact of dumping on the domestic industry by examining both the volume of targeted dumped imports and, the effect of these imports on domestic prices and producers.⁷⁹ The national authority must examine the absolute and relative volume of subject imports as compared to domestic production or consumption. Where the import volume is negligible the investigation must be terminated as to that country, unless there are a significant number of negligible countries.⁸⁰ In analysing the price effect the authorities must address a number of issues such as, price undercutting and underselling by dumped imports. The factors for considering the effect of dumped imports on domestic producers include trends in sales, market share, capacity use, and profits, as well as employment and investment levels.⁸¹

After assessing these factors, the national authority must determine whether the domestic industry is materially injured, threatened with injury, or is materially retarded in its establishment.⁸² Threat in the ADA is defined as a situation where injury is “clearly foreseen and imminent” and not merely “conjecture or remote possibility.”⁸³ The concept of “material retardation” is very suspect as it is not even defined in the ADA. It is more ambiguous than the “threat” standard because it does

⁷⁹ ADA Art. 3.

⁸⁰ ADA Art. 5.8.

⁸¹ ADA Art. 3.4.

⁸² ADA Art. 3.

⁸³ ADA Art. 3.6.

not require that a domestic industry exist as a condition to analyse affirmative injury finding.

In addition to analysing the injury to the domestic industry, the investigation must assess whether dumped imports are the actual cause of that injury. In order to make a definitive injury determination, the national authorities must show the causal relationship “between the dumped imports and the injury to the domestic industry.”⁸⁴ For a proper assessment of the causality of the dumped imports, the domestic authorities must also examine “any known factors other than the dumped imports” which may also be the cause of the injury, such as non-dumped import volumes and lower demand in the import market. Furthermore, according to article 6.2 of the ADA, authorities must allow individuals or representatives of industry and consumer organizations to provide information regarding injury and causality.

The new ADA has a high degree of built-in formalism but leaves much room for protectionist abuses by domestic investigating authorities. The aim of the UR negotiators to build a more predictable and economically justifiable system of antidumping regulation by promulgating rules has only created a different set of loopholes and opportunity for protecting domestic industry from the tariff bindings negotiated in Uruguay. Developing countries were not able to convince the industrialized nations to agree to a system grounded more on sound free trade economics, so as to secure better access to rich markets for their exports.

⁸⁴ ADA Art. 3.5.

4.6 The ADA Negotiations and Developing Countries

Antidumping laws and investigations can have a negative impact on the competitive positions of firms and businesses.⁸⁵ For instance, antidumping laws increase uncertainty in world trading conditions for exporting firms by reducing competition. In addition, they can cause foreign producers to relocate their production sites and also cause trade diversion.⁸⁶ In general, a determination that a firm is dumping in an export market results in application of antidumping duties (ADD) to all producers in the targeted country, yet the culpability of individual firms is not considered. Consequently, rival firms from third countries are able to take advantage of the ADDs levied against products of competitors.⁸⁷ These are merely a few examples of the effects antidumping rules may have on business practice. The effects on business behaviour coupled with the developing countries reliance on the markets of the industrialized members made them keen on addressing this issue in the Uruguay Round, more so than in any other GATT rounds of trade negotiation.⁸⁸

4.6.1 Background to Uruguay Round Negotiation

At the 1979 Tokyo Round of Multilateral Trade Negotiations, an Antidumping Code was devised, however, the main negotiators were the industrialized countries whilst

⁸⁵ Hoekman, B.M., & Leidy, M.P., *Dumping, Antidumping, and Emergency Protection* 1989, 23 *JWT* 5 p. 27-35.

⁸⁶ *ibid.*

⁸⁷ Lima-Campos, A., & Vito, A., *supra* at note 78.

⁸⁸ Stewart, T.P., *The GATT Uruguay Round: A Negotiating History: Antidumping*, 1993 (Kluwer Law Pub.) pp. 102-118; Kufour, K.O., *Developing Countries and the Shaping of the GATT/WTO Antidumping Law*, 1998, 32 *JWT* 6 p. 167-196, p.168.

the developing nations played a marginal role.⁸⁹ Nonetheless, in recognition of the fact that evaluating normal or home market price was not always feasible or proper and also because of economic structural differences, a Joint GATT Decision was declared pertaining to the relationship between developed and developing countries in antidumping matters.⁹⁰ The substance of the decision was that it recognized the role of government in the functioning of the economies of the developing countries and as such, export prices could differ from domestic prices as a result of governmental intervention, but it was not to be construed as an intention to dump goods.⁹¹ More importantly, the GATT Committee on Antidumping Practices⁹² (CAP) was permitted to waive certain obligations on a case-by-case basis with regard to developing countries if they were able to show necessity. This was a recognition that developing countries lack the institutional capacity to properly implement the Antidumping rules and these members need assistance in gaining market access to the rich world.⁹³

This was an important occurrence as previously in other GATT trade negotiations developed countries refused to accept the idea that home market prices were difficult or impossible to calculate under the economic structures prevailing in developing countries. The reason for this change by developed countries is an accumulation of different factors. As developing countries were becoming more involved in the multilateral trading system in line with new adherence to liberal economics, developed

⁸⁹ Masserlin, P. *Antidumping Laws and Developing Countries*, 1988, Policy Research Paper, The World Bank, Paper #16, p.5.

⁹⁰ Decision May 5, 1980 ADP/2 27 BISD p.5.

⁹¹ *ibid.* p.16-17.

⁹² The Committee on Antidumping Practices was established under the Tokyo Round Code.

⁹³ Another issue which was underlying the negotiations, was the restructuring of the developing countries' economic systems from an import substitution regime to a liberal economic system.

countries were struggling with new competition from manufacturers and commodity exporters from developing countries and were tightening the rules on dumping.⁹⁴ Therefore, developing countries understood the necessity for full participation in the upcoming Uruguay Round on antidumping matters.

4.6.2 Uruguay Round Negotiations and Some Aspects of Developing Countries' Proposals

The main argument put forth by developing countries during the Uruguay Round was antidumping duties are an obstacle for access to industrialized markets and, therefore, suggested limiting use and scope, in addition to requiring predictable and streamlined investigations by domestic authorities.⁹⁵ For instance, the representative for Hong Kong claimed antidumping actions were supposed to be used with a high degree of restraint and only in situations where need was clearly evident and based on real tangible economic and social evidence.⁹⁶ The submission goes on to argue that antidumping should be perceived as a narrow exception to the MFN and National Treatment principles of the GATT and benefits from trade may only be realized when rules are transparent and predictable.⁹⁷ This submission was supported by a majority of participants in the Working Group set up for antidumping negotiations.

⁹⁴ Kufour, K.O., *Supra* at note 88, p. 177.

⁹⁵ Kufour, K.O., *Supra* at note 88, p. 178.

⁹⁶ *Principles and Purposes of Antidumping Provisions*, 3 July 1989, Communication from Hong Kong, MTN.GNG/NG8/W/46, p.3.

⁹⁷ *ibid.*

In accordance with the notion of a narrowly defined and predictable set of rules for antidumping measures, developing countries made proposals pertaining to different aspects of antidumping regulations. They included amongst many other submissions, proposals for a public interest clause, cost calculations, especially sales below costs, and standard of review. Developing countries also expressed concerns with regard to the requirements for the initiation of investigations, dumping determination, injury and causality.⁹⁸ However, the nature of those issues has and will always be problematic and the negotiation history does not indicate any common ground amongst developing nations.

4.6.2.1 *Public Interest Clause*

The developing countries wanted the new AD Agreement to include a public interest clause which would mandate dumping investigations in the interests of consumers to be addressed. Developing countries believed inclusion of a public interest clause would achieve three objectives. First, consumers could be protected against the lobby of import-competing industries, and next, the adverse effects on the economy of the importing country, especially for the industries which demand cheap imports for input products would be able to neutralize the protectionist lobbying of industrialized governments.⁹⁹ Last, it would decrease frivolous petitions by the domestic industry, which creates extra costs and diminishes exporters' competitiveness.

⁹⁸ Darling & Nicely, *Understanding the WTO Antidumping Agreement: Negotiating History and Subsequent Interpretations*, 2002 (Cameron May) pp. 122-139.

⁹⁹ Singapore Delegation to the Uruguay Round, *Proposed Elements for a Framework for Negotiations Principles and Objectives for Antidumping Rules*, (Oct. 13 1989) Found on www.worldtradelaw.net

In all likelihood the developing countries believed such a requirement would decrease the amount of dumping and antidumping duty margins that the industrialized countries would impose, as it would more than likely focus public attention on many of the antidumping investigations conducted by the national authorities of these countries. The effect would be an alliance could be built between the exporters that are targets of investigation and the firms in importing countries which demand cheaper products. It would enhance the ability of developing country exporters targeted for antidumping measures in defending their competitiveness vis-à-vis the protectionist commercial interests of the industrialised Members.¹⁰⁰

However, a required public interest clause did not become part of the new ADA mainly because of US vehemence against it.¹⁰¹ It held that public interest clauses should be the domain of national authorities and such a requirement would be both costly and too vague to be truly effective.¹⁰² In essence, arguing that aside from the vagueness of the term, public choice and the interplay of different lobby groups should be acted out at the national level without the creation of lobbying forums at the institutional level, in contrast to the lobbying that occurs at the European Commission in Brussels. The EC, nonetheless, has unilaterally implemented a public interest requirement in its antidumping investigations. Yet, even though the Member States did not agree on including this notion in the agreement, it does not prevent the adjudicators of the WTO from including some of the elements that such a requirement

¹⁰⁰ Kufour, K.O., *supra* at note 88.

¹⁰¹ Stewart, T.P. *supra* at note 88.

¹⁰² Kufour, K.O., *supra* at note 88 p.179.

may impose in the decision-making process. Nothing in the ADA would prevent the adjudicators from assessing the economic effects of antidumping measures against a developing country. For instance, a public interest examination may be deemed as a necessary element in determining the “conditions of competition” as required in injury determination analysis of ADA Article 3. Hence, the judges may examine issues such as production, degree of concentration and competitiveness of firms in developing countries as well as interests of consumers in those nations.¹⁰³

4.6.2.2 Initiation of an Investigation

Related to the issue above are the criteria for initiating an investigation. This issue is very important for developing countries as a mere threat of an antidumping investigation by developed Members such as the US and the EU, creates a chilling effect for exporter products.

The chilling effect comes from the importer’s perception that, in the majority of cases, the outcome of the investigation will be contrary to its interest, and the duties levied will increase the final costs of the imported product, causing loss of competitiveness and market share.¹⁰⁴ In these circumstances the importer is unable to plan its business strategy with confidence. Two options available to the importer are cancelling the orders or substituting the original supplier country. The effect is that high usage of

¹⁰³ These were some of the elements for consideration in the Public Interest Clause negotiations during the Uruguay Round. See, Delegation of the Republic of Korea in *Submission by the Republic of Korea on the Antidumping Code*, (Dec. 20 1989) found on www.worldtradelaw.net.

¹⁰⁴ Lima-Campos, A., & Vito, A., *supra* at note 78, p. 41.

anti-dumping proceedings tends to benefit third countries that have been excluded in the investigation.¹⁰⁵

On the other hand, the developing country exporter has to bear the costs of the investigation, which in many cases is unfeasible and would thereby force it to leave the market or take a large loss. The process of replying to questionnaires, possibly attending hearings in the country *sur place*, and related tasks involve large costs and manpower.¹⁰⁶ In any case, the exporter cannot avoid the losses that will follow since the importation of its products will decrease. Many times even if an investigation is not initiated, the mere suggestion or rumour of one will cause a drop in exports for the firm.¹⁰⁷

From the perspective of the importing country's producer of like products, filing antidumping petitions is a good way of gaining a competitive advantage. The loss of market share can sometimes be the only motivation for a company in the US or the EU to file a petition as the market share loss may cause opportunities for expansion in the local market. The existence of antidumping measures and trade restrictive effects are sometimes the basis for frivolous petitions.¹⁰⁸ There are also strategic effects as the antidumping investigations especially in the US, are tailored in a way that promotes

¹⁰⁵ Prusa, T., *The Trade Effects of US Antidumping Actions*, 1996, Working Paper no. 5440, National Bureau of Economic Research.

¹⁰⁶ Vermulst, E., *Anti-dumping and Anti-subsidy concerns for Developing Countries in the Millennium Round: Key Areas of Reform*, 1999, in UNCTAD, *Positive Agenda and Future Trade Negotiations*, 2000, (UN Publication) p. 287-308 p. 293.

¹⁰⁷ Lima-Campos, and Vito *supra* at 78, p. 39.

¹⁰⁸ Staiger, R. W., & Wolak, F.A., *The Trade Effects of Antidumping Law: Theory and Evidence in* Deardorf, A., & Stern, R. (eds.) *Analytical and Negotiating Issues in the Global Trading System*, 1994, (University of Michigan Press) p. 232-233.

collusion amongst local producers not only to restrict foreign competition but also, to increase prices and profits during the investigation.¹⁰⁹

Furthermore, within an industrial sector, exporters who are not mentioned in an antidumping investigation by a developed Member try to avoid sales in that market when competitors have been targeted. The rationale is that it is only a matter of time before its products are also targeted.¹¹⁰

The chilling effect on businesses in developing countries when faced with the prospect of an investigation by the US or the EU for example, lends credence to the need for a streamlined, transparent and narrow set of criteria for the initiation and termination of an investigation. The new ADA does not deal with this issue effectively as the requirements and standing criteria for companies to file petitions is simple and easy to fulfil. Unfortunately, as will be discussed in the next chapter, the interpretations and decisions of the adjudicators have not been able to achieve this objective even in situations where they had the jurisprudential opportunity to do so.

4.6.2.3 *Cost Calculation*

Another important issue for developing countries during the Uruguay Round was that of cost calculations. Within this category, constructed values and sales below cost are arguably the most troublesome and problematic. These aspects of the antidumping

¹⁰⁹ Ibid. Staiger, p. 246.

¹¹⁰ Lee, S.Y., & Jun, S.H., *On the Investigation Effects of the US Antidumping Petitions: a Psychological Approach*, 2002, (Dept. of International Trade, Chung-Ang University) p. 4-12.

code at the time (the Tokyo Code) were up for negotiation and developing countries held that the regime must be reformed so as to prevent protectionist forces in the developed Member States from abusing the cost calculation system to their advantage.¹¹¹ The Tokyo Code allowed for normal value to be calculated based on elements besides the market price in the exporting country, when no sales of the like products are in the ordinary course of trade or when such sales do not permit proper comparison. The developing countries wanted a more uniform approach in this regard, by regulating and defining terms such as “ordinary course of trade” and sales which do not allow proper comparison.¹¹² On the other hand, the US, the EU, Canada, and Australia, believed that sales below costs should be excluded when determining the foreign market value of a product, since they should be deemed as outside the ordinary course of trade.¹¹³ As described in the last section on the ADA principles, it is clear that most of the demands of the Quad countries and Australia were met over the demands of the developing countries.

Singapore submitted a proposal pertaining to cost calculations and normal value which was rejected by US and EU negotiators. The proposal asked if normal value is to be constructed then the investigation should consider the full extent of the economic and business conditions of the exporting Member State.¹¹⁴ They wanted the importing national authorities to consider the prevailing practice in the exporting country with regard to actual production costs, and generally accepted profit margins in the

¹¹¹ Kufour, K.O., *World Trade Governance and Developing Countries: The GATT/WTO Code Committee System* (Chatham House Papers), 2004, pp. 29-30, Blackwell Publishing.

¹¹² Ibid.

¹¹³ Kufour, K.O., *supra* at note 88.

¹¹⁴ *Supra* note 99, Singapore delegation.

exporting country. This last consideration was very important for developing countries in Southeast Asia as their business philosophy in many sectors was based on high production and low profit margins.¹¹⁵ Singapore's proposal would allow the adjudicators to demand national authorities of importing countries to scrutinize whether they have taken into account the prevailing local business standards. This allows developing countries to tailor development according to local needs and the business environment, instead of being forced to accept practices of other developed nations. It also forces the hand of the protectionists in the industrialized nations which try to eliminate competition from developing countries. As market access to the developed nations is one of the main principles under the development approach, had Singapore's recommendation been accepted, adjudicators would have a better tool for reaching the threshold of fairness required by the "development approach" in their decisions.

Yet, even without this explicit provision being included in the ADA, the adjudicators could still make decisions by using some of the ideas set forth by Singapore, as first the ADA does not prohibit them from doing so, and second, it could be justified by the existence of an underlying WTO principle of development through trade.

The determination of a hierarchy between the alternative forms of calculating normal value bases was considered during both the Tokyo Round and UR, that is, normal value based on third country exports or based on constructed value.¹¹⁶ Developing

¹¹⁵ Ibid.

¹¹⁶ Darling & Nicely, *supra* at 98, p. 26.

countries argued for a hierarchy whereby, third country export prices would be used before an investigating authority could calculate a constructed value.¹¹⁷ The new ADA does not suggest an explicit hierarchy nor does it prevent a hierarchical approach.¹¹⁸ The US and the EU do not normally use export prices to third countries as an alternative base because the use of this base would lead to lower dumping margins than the one obtained with constructed values. Constructed values are usually derived downstream in the domestic distribution network and are thus, higher. In contrast, third country prices are normally export prices to an appropriate third country. Since they are usually ex-factory prices of goods intended for export, normally minus the domestic distribution costs, and are therefore lower.¹¹⁹

The constructed cost methodology has been subjected to a bit more discipline without tangible effects under the new ADA. Yet, there are still many more problems associated with the current methodology that hinder the market access of developing countries to the rich world. The next chapter will look into the case law of dumping determination and cost calculations, in particular, price comparison and “zeroing,” and overhead costs (sales, general and administrative plus profits), evaluating their treatment by the adjudicators of the WTO and consequences for developing countries.

¹¹⁷ During the Tokyo Round members considered the export price to a third country used as alternative basis is more than likely the highest price whilst being representative. However, if it is the highest price then it is also very likely that it is not representative. See Kufour, K.O., *supra* at note 111.

¹¹⁸ In *US-Imposition of Anti-dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, GATT Panel Report Adopted on 27/4/1994 (ADP/87), the panel rejected Norway’s claim that the US was obliged to use third country prices before construction of prices.

¹¹⁹ Vermulst, E., *supra* at note 106.

4.6.2.5 Standard of Review

Article 17.6 of the Antidumping Agreement is believed to be a compromise between the industrialized countries that wanted national authorities to have greater discretion in interpreting the Agreement in developing countries and other smaller Members who wanted that discretion to reside with the judges and adjudicators of the WTO.¹²⁰ Under this provision the panel and AB are obliged to defer to the factual decisions reached by the national authorities as long as the establishment of the facts were done in a proper and acceptable manner. This provision stipulates that panels should interpret the relevant provision according to customary rules of international law, and if more than one interpretation is possible then the one that the domestic authorities of the importing nation devised, if “permissible,” must be allowed to stand. This is termed the standard of review.

This can have potentially adverse effects for developing countries as the industrialized members were unwilling to cede any more discretion to the new DSB. In general, any provision that affords Members who are the frequent users of antidumping measures more authority, and in light of the protectionist lobbies that influence these national authorities, developing countries tend to be the ones most harmed. Although many commentators believe that until now this provision has not had much effect.¹²¹ The following chapter will illustrate how the jurisprudence of this issue to date, does create

¹²⁰ Crowley, S.P., & Jackson, J.H., *WTO Dispute Procedures, Standard of Review, and Deference to National governments*, (1996) 90 Am. J. of Int. 'l Law 193, p. 199-202.

¹²¹ See, amongst others, Palmeter, D., *A commentary on the WTO Antidumping Code*, (1996) 30 J.W.T. 4 p. 62-64. and Tarullo, D.K., *The Hidden Costs of International Dispute Settlement: WTO Review of Domestic Anti-dumping Decisions*, 2002, 34 Law & Pol'y Int. 'l Bus. 109.

legal hurdles, and actual and potential harm to developing countries due to the prevailing legal interpretations whereby a wide margin of discretion is granted to the investigating authorities.

4.6.2.6 *Injury Determination*

Article 3 of the UR basically reproduces the corresponding provisions of the Tokyo Code with some additional details on the injury effects of dumped products, causality and injury. It also has a new provision on cumulation of injury (Article 3.3). During the UR, many Members proposed strengthening the injury provisions of the ADA. However, most of the demands of the developing countries were not addressed in the negotiations.¹²²

Injury determinations are usually the main points of contention in antidumping disputes. The language of the ADA leaves much room for investigating authorities to find injury. One matter of contention for the developing countries in the UR was the issue of cumulation, whereby a group of exporters could be lumped together in order to find injury to the domestic industry. There are *de minimus* requirements and an

¹²² In a submission by Hong Kong supported by some developing countries, the issue of injury determination was a main cause of concern. The communication stated the following problems must be resolved in order to bring balance and reason to situation where procedures and methodologies are tilted against the exporting countries with antidumping working as a form of selective safeguard: the injury determination lacks a causal relationship between dumped imports and injury, obscure determination of the issue of “cumulation,” absence of distinction between price undercutting as an indication of injury due to dumping, and price adjustment to meet the prevailing market prices. Causality was added to the new ADA, whilst cumulation with only a small requirement of addressing the “conditions of competition” was included. Price undercutting still involves a methodology that creates bias in favor of finding higher dumping margins. See, Submission of Hong Kong, doc. MTN.GNG/N8/W/46 found on www.worldtradelaw.net and, p. 15-16, and Stewart, *Supra* at note 88.

evaluation of the “conditions of competition” of the product added to the text but, the *de minimus* threshold is very low and “conditions of competition” evaluation are still very vague.

At Uruguay, the Nordic delegation with the support of 10 developing countries, opposed automatic cumulation even if the imports are more than *de minimus*, therefore, they proposed an obligation to examine the injurious effect of dumped imports from each source in relation to dumped imports from other sources be included in the Agreement.¹²³ Canada also proposed a similar obligation whereby, if there is no injury caused those exporters should be excluded in the evaluation.¹²⁴ There was a compromise on this issue whereby, cumulation was accepted yet, in light of the conditions of competition. Nonetheless, the language of Article 3.3 does not prevent the Member States’ investigating authorities or even the adjudicators from taking the approach proposed by the Nordics and Canadians. The language leaves much room for interpretation. Unfortunately to date, there has been no cases in the WTO which has rejected the cumulation of a Member State’s investigating agency.

Other contentious points remain with regard to injury determination. Developing countries have problems with the manner in which investigating authorities delineate “factors other than dumped imports causing injury,” “other factors” which may negatively influence the status of the complaining industry, non-attribution of injurious blame to dumped imports and, the methodology for calculating injury

¹²³ Darling & Nicely, *supra* at note 96, p. 40-44.

¹²⁴ Kufour, *supra* at note 88.

margins (in particular, price undercutting calculation). These issues, similar to the cumulation problem, are methodological in nature. The crux of the problem faced by developing countries is how investigating authorities evaluate the economic data and market structures, given the vague and broad text of the ADA.

4.7 Fairness and the Antidumping Agreement

Since it is recognized that antidumping measures are a huge obstacle to access developed markets and have historically been used as a protectionist measure, it is essential that the adjudicators of the WTO to scrutinise the national authorities of developed Member States thoroughly. This includes making sure that market access to developed countries is guaranteed to the extent the WTO ADA allows. As with all international treaties the ADA has left many issues unanswered and vague. However, it does not equate to having national authorities fill gaps and ambiguities of the Agreement with little or no judicial scrutiny at the WTO level.

The deference to national authorities granted under Article 17.6 of the ADA is not absolute.¹²⁵ The acceptance of possible interpretations is still the domain of the adjudicators. These possible interpretations must be examined in light of the principles, context, and object and purpose of the ADA, as well as the WTO institutionally. In fact, as with issues relating to the TRIPS Agreement and due process discussed in this thesis, the AB has often filled the gaps and ambiguities of the

¹²⁵ Article 17.6 can be restrained by narrowing the scope of possible interpretations devised by national authorities pertaining to the ADA.

WTO covered agreements. Furthermore, as Jackson and Cass have argued, the DSB in general, and the AB in particular, have become a quasi-legislative or even a norm generating, constitution-promulgating body of the WTO.¹²⁶ The responsibility of an organ such as the DSB is to ensure that the principles and objectives of the WTO are safeguarded, including the principle that developing countries are to advance their economies via trade and in particular, with developed countries. Hence, protecting market access to developed countries is a principle that the adjudicators must uphold and not allow the protectionist lobbies of developed nations to prosper at the expense of developing countries. The adjudicators must consistently and predictably fill the gaps of the Agreement with a view toward protecting the vulnerable Members. It must also, as a general rule, be consistent and predictable in its interpretative fundamentals. It should not decide to narrowly define in a very textual manner, one provision of an agreement and then play an activist role with regard to another matter. If it is to engage in such behaviour then it must be aware of the interests of the weaker parties.

Similar to Articles 7 and 8 of the TRIPS Agreement discussed in the previous chapter, Article 15 of the ADA gives context and guidance on the principles and goals of the Agreement in relation to developing countries. Article 15 is in line with the development approach to adjudication as it acknowledges the need to give developing countries better treatment when faced with the prospect of ADDs levied by the rich

¹²⁶ Cass, D.Z., *The "Constitutionalization" of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade*, 2001, *European J. of Int'l. Law* 39-75, p. 48-71; Jackson, J.H., *supra* at note 17.

Members. It must be noted that Article 15 does not encompass all elements of the development approach. The development approach includes judgments that must also be legitimate, whereas article 15 only deals with certain aspects of justice, i.e., advantaging the disadvantaged by easing the harm done to their vital economic interests. Furthermore, it only involves the notion of finding “constructive remedies” and “exploring possibilities” other than CVDs. Whereas, the development approach is all encompassing in that it strives for fairness in all aspects of WTO law and its adjudication. Therefore, it can be argued that Article 15 also is a legal compass, *inter alia*, for the justification of the development approach to fairness as espoused in this thesis.

However, some legal analysts, and the AB in *EC-Bed Linen*, contend that Article 15 provides for no real obligation for developed countries, as the language is vague and non-obligatory. As will be addressed in the next chapter the AB has consistently interpreted this provision as non-obligatory. Yet, interestingly, in the *EC-Bed Linen* case, the defendant, the EC, accepted India’s assertion that certain parts of the Article do in fact, create obligations for developed countries. The development approach would interpret this proviso as one that entails an obligation on the part of developed countries. Accepting Article 15 as a norm that obligates developed countries to “explore possibilities” other than CVD’s and other “constructive remedies,” would enhance the strength and effectiveness of the development approach and spell out its contours more clearly in relation to the Antidumping Agreement. The limits and

definition of these terms would be clarified through future case law and interpretations.

4.8 Conclusion

In the post-world war international trading regime, antidumping has been and will be a contentious issue, particularly for developing countries. The new WTO entails the most comprehensive set of regulations with regard to antidumping measures. Liberal trade theory has at its core, the promotion of exports as the main avenue for economic development. However, developing countries in the process of tailoring their economies toward an export driven one are faced with protectionism in the form of antidumping measures by industrialized WTO Members. This chapter has explained the certain economic aspects of dumping, the new WTO antidumping regime, the needs of developing countries pertaining to international antidumping, and has sought to outline the development approach to fair adjudication in antidumping matters. These issues are covered in order to provide better understanding of the evaluation of antidumping case law of the WTO, which will be addressed in detail in chapter 5.

The economics of dumping starts with the different definitions assigned to dumping i.e., export prices below domestic prices, and sales below costs. Then, different types of dumping and their economic impact have been explained. According, to liberal free trade theorists, levying antidumping duties are most justifiable when predation or strategic dumping is the intent of the exporter. Other economists have also included

intermittent dumping as worthy of ADDs as they create confusion and thereby, misallocation of resources for the exporter. However, in respect to developing countries one economic axiom inherent in the global power structure is obvious, i.e., that economic asymmetry makes levying duties on dumped industrialized country products less attractive and in some cases, harmful to the economy of the importing developing country. Whereas, the economic might of the industrialized nations makes levying antidumping duties on developing country goods very effective in the altering of exporter behaviour.

The history of antidumping measures reveals that the most likely reason for the use of and increase in antidumping measures stems from protectionist lobbies and industrial groups in the domestic markets of importers. The Quad countries have been the main users of antidumping duties and it is arguably due to stronger and more influential lobbying schemes that exist in their political arena. In fact, antidumping duties are used as another form of escaping the tariff bindings set during the Uruguay Round of negotiations.

This leads to the next section, and the question of why it is possible to use antidumping measures today as a form of protectionism if the new WTO ADA is so comprehensive and detailed as no other international antidumping rules has ever been? The simple answer is that although the ADA has at first glance formalistic and rigorous criteria, which must be met in order to allow importing nations to levy duties, nevertheless, the Agreement is still fraught with legal loopholes and ambiguity. In

addition, the domestic authorities of the Member States still have a large level of discretion in interpreting and implementing the ADA obligations. For instance, the construction of prices when sales below costs and domestic price calculations are deemed unreliable is one of many problematic issues for developing countries. Whether these prices are reliable or not is the discretion of domestic authorities prone to industrial lobbying and protectionism. In fact, under the current ADA it is possible that an exporter is neither selling below cost or below domestic prices and yet be guilty of dumping.

Since the issue of dumping is vital for developing country trade interests this chapter also delved into some of the negotiating history of these Members in this regard. This provides for better appreciation of the needs and demands of these Members in the international trade realm. Issues such as the requirements for the filing of petitions for the initiation of investigations, dumping determination and cost construction and evaluation, injury determination and causality, and the standard of review in settling antidumping disputes are some of the more outstanding concerns of developing countries during multilateral trade negotiations. Of course, there are other areas of concern which the new antidumping agreement raises also, such as injury determination and causality. It is important to know their demands, as the adjudicators should be aware and address developing country concerns in resolving disputes.

Article 15 sheds light on the fact that members states acknowledge the difficulties of developing countries in dumping matters, and requests that industrialized nations seek

“constructive remedies” and “explore” other possibilities in lieu of levying full CVDs. Although the language of the provision may not create the obligation to force the hands of the industrialized nations, nevertheless, the provision informs on the spirit and principles behind the WTO antidumping system specifically, and the WTO legal structure in general. Article 15 in conjunction with other broadly worded provision of the WTO which indicate the acceptance of developing countries as Members in need of special treatment and consideration, can be used to justify and implement the guidelines set forth by the development approach to fair adjudication by the judges of the WTO.

The new Antidumping Agreement of the WTO has sought to clarify and streamline the international antidumping regime. However, in trying to do so, new and more troubling problems have emerged for developing countries. The tariff-bindings negotiated under the Uruguay Round have been supplanted by antidumping measures in the form of countervailing duties. The more legalistic nature of the process has put developing countries in a bind since their legal and trade infrastructure is not as advanced as the industrialized nations. This new form of protectionism is seriously harming the developing countries' trade interests. Therefore, it is incumbent upon the adjudicators to protect the interests of the weaker Members by keeping to the spirit and principles of the WTO, by applying the development approach to fair interpretation.

Chapter 5

Antidumping Disputes and Developing Countries

The previous chapter explained some of the theoretical issues involved in dumping and antidumping measures. Furthermore, it expressed some of the problems and concerns the developing countries have with the international antidumping regime. It sought to explain these problems by looking at some of their negotiation positions during the UR and the Antidumping Agreement itself. One of the main objectives of developing countries within the world trade system is market access to the industrialised countries. Their shift toward export-oriented economies and liberal economic systems demands they reap some of the promised benefits of the world trade regime. Market access to the developed world is part and parcel of the constant struggle for economic and institutional development.

The WTO has established a set of rules that must be adhered to by Members investigating authorities of the WTO. Most of these rules are premised on building a more transparent, cohesive and fair system, whereby national authorities of Members that conduct investigations into whether dumping has occurred have less opportunity to capitulate to interest group pressure or to simply dissuade them from making protectionist choices and decisions. As mentioned in Chapter 4, antidumping is a protectionist tool and its ever-increasing prominence is an indication of how the formalistic rules of the ADA are still the easiest way for Members to counter foreign

competition and to circumvent the binding tariff reductions negotiated under the GATT Agreement at the UR.

Similar to chapter 3 that discussed the TRIPS Agreement, the focus of this chapter is how adjudicators are developing norms via their rulings, are treating developing countries in antidumping matters. The norms that are being generated with regard to the ADA standard of review pursuant to Article 17.6(ii), the evidentiary threshold for the initiation of investigations, injury determinations, dumping investigations and cost calculations will be assessed in relation to the development approach to fairness. The aim is to elucidate the teleology of adjudicators and show how unfairness exists that harms the trade and development interest of the developing countries. This unfairness or imbalance is a jurisprudential one that goes beyond the axiomatic power-oriented treaty-writing nature of the WTO Agreement. This systematic unfairness is a step-by-step, norm-by-norm incremental process. Each case discussed may not on its own, indicate unfairness, but all cases together show a common thread: the process and substance of the antidumping dispute settlement system and its jurisprudence is unfair and has not achieved its stated and implicit goals.

This chapter first discusses the application and views of the AB on the ADA's standard of review under Article 17.6(ii).¹ It is argued the AB has diminished the effectiveness of this unique standard of review and its objective of allowing national

¹ Article 17.6(ii) states: the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

authorities to engage in “permissible” interpretation of the provisions of the ADA. Developing countries should be content with this approach, as it would theoretically curb the protectionist impulses of national authorities in industrialised nations. However, the next sections on substantive issues demonstrate the expected benefits have not come to fruition. In the second section, a procedural issue of importance, i.e., the evidentiary threshold for the initiation of an investigation will be explored. The initiation of an investigation has a great chilling effect on the developing country exporters because fighting an investigation is very costly and time consuming, plus it opens them up to provisional duties. As such, the amount and quality of evidence the domestic industry must provide their investigating authority to justify an inquiry is crucial to the interests of these exporters. The substantive issues that will be addressed in the third and final sections pertain to cost calculations and injury determinations. Finally, a brief overview of the possible justifications that may exist for the manner in which the adjudicators have ruled will be addressed. The possible justifications are adherence to textual interpretations, promotion of methodical investigations, free trade, and political considerations. In brief, the chapter draws the conclusion that although there are some disjointed jurisprudential battles being won by the developing countries the long-term systematic war, nevertheless, is being won by the rich nations.

5.1 Standard of Review Pursuant to Article 17.6(ii) of the ADA

Article 17 of the ADA, which provides for settlement of antidumping disputes by application of the WTO's DSU, contains one of the Agreements most controversial

provisions, the standard of review contained in Article 17.6(ii). Any evaluation of the interpretations presented by the adjudicators of the WTO must analyse the Agreements' own prescriptions for interpretation. At the heart of the debate is the deference to national authorities that this standard of review affords. The UR was fraught with controversy over the issue of how much authority and deference should be allotted to Members with regard to antidumping investigations and measures. This pits the US view for more deference against developing countries that wanted less deference given to Members' national authorities to prevent them from restricting access for developing country goods to the rich markets. In the end, the US prevailed but the interpretation of the standard by the DSB has for the most part, rendered Article 17.6(ii) less consequential than initially thought.

Article 17.6(i), requires panels to defer to the factual conclusions reached by the domestic authorities "if the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion." This standard is rightfully designed to prevent *de novo* reviews by the panels of the domestic authorities' findings. Panels have limited fact-finding resources, and apart from demonstrated bias or lack of objectivity, could reasonably be expected to defer factual findings to domestic authorities even if this provision was not included. Most disagreements brought to panels do not concern disagreements over facts; rather they concern disagreements over the legal relevance and consequences of stipulated and acknowledged facts.²

² Palmetier, D., *A Commentary of the WTO Antidumping Code*, 3J.I.E.L.172 p.177.

Article 17.6(ii) provides panels shall interpret the ADA provisions in accordance with customary rules of interpretation of public international law. Where the Panel finds that a provision allows for more than one permissible interpretation, the Panel shall find the authorities' measure to be in conformity with the ADA if it rests upon one of those permissible interpretations. Critics note the second sentence of Article 17.6(ii) is inconsistent with the first.³ This is because the first sentence refers to Article 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT) and these two articles do not seem to foresee the possibility of co-existing permissible interpretations, but rather envisage a single preferred interpretation, to be arrived at on the basis of the interpretational rules. On the other hand, some legal commentators such as Ian Sinclair hold the view that although the VCLT made significant advances in treaty interpretation by establishing a clear set of "guidelines," they are nevertheless, merely guidelines.⁴ He stated further that, "Review of recent international case law on treaty interpretation reveals only too clearly that widely differing results can still be achieved even if a conscious effort is being made to apply the Convention rules."⁵ He concluded the inherent general ambiguity in international treaty law will inevitably result in "serious divisions of opinion" relating to treaty interpretation.⁶ In furtherance of that view, Ian Brownlie has noted the textual approach of the VCLT "in practice often leaves the decision-maker with a choice of possible meanings and in exercising

³ See, amongst others, Vermulst, E., & Graafsma, F., *WTO Dispute Settlement with Respect to Trade Contingency Measures*, 2001, 35 J.W.T. 209-228 p. 211, and Horlick, G., & Clarke, *Standards for Panels Reviewing Anti-Dumping Determinations under the GATT and the WTO*, in Petersmann (ed.) *International Trade Law and the GATT/WTO Dispute Settlement System*, 1997, p. 6.

⁴ Sinclair, I., *The Vienna Convention on the Law of Treaties* (2nd ed. 1984) p.153.

⁵ *ibid.* p. 153.

⁶ *ibid.* p. 154.

that choice it is impossible to keep considerations of policy out of account.”⁷ Since the DSU has referred to the VCLT and has included the supplemental tools of interpretation of Article 17.6(ii), and in light of the negotiating history of the ADA, it is appropriate to assume that the drafters felt VCLT Article 31 and 32 allows for the possibility of multiple interpretational choices. Therefore, it is natural that the adjudicators of the WTO in the final analysis make a policy decision and rule with policy in mind.

5.1.1 Application of Article 17.6(ii)

To date, there have been 11 cases decided by the DSB, which involved the application of Article 17.6(ii), and another two more are pending.⁸ The exporting country challenging the imposition of antidumping duties by other countries have prevailed in every case in at least one of their claims effectively leading to withdrawal of the antidumping measure. However, this fact is not very informative as to the prevalence of violation of the ADA. It may be that only the most egregious violations are challenged in the DSB and/or those national authorities under political or lobbyist pressure violate the ADA frequently and therefore, are broadly vulnerable to challenges from exporters.⁹ Thus, in order to evaluate the performance of the DSB it is necessary to assess reports looking into their legal interpretation in light of the development approach to fairness.

⁷ Brownlie, I., *Principles of Public International Law*, 1990, p. 632.

⁸ See www.worldtradelaw.net statistics and tables on specific claims under Article 17.6(ii) and also WTO Dispute Settlement Index found on www.wto.org date 3/1/2005.

⁹ Tarullo, D.K., *The Hidden Costs of International Dispute Settlement: WTO Review of Domestic Anti-dumping Decisions*, 2002, 34 *Law & Pol’y Int.’l Bus.* 109, p. 114-115.

Examinations of the WTO cases indicate Article 17.6(ii) has not had the effect expected by some of the delegates in the UR. Developing countries reluctantly accepted the text of Article 17.6(ii) in exchange for a transparent, streamlined and economically rational process. Nonetheless, future references and precedence on the issue could play a large role in how antidumping measures are evaluated and decided. For example, China's recent accession to the WTO will test the robustness of the ADA and the limits of the DSB's ability to resolve antidumping disputes amongst major trading nations. Thus, the interpretative methodology regarding Article 17.6(ii) employed by the adjudicators an important component in the overall functioning of the dispute settlement regime.

As the following section will illustrate, the standard of review itself is not mentioned often in the reports and reasoning of the adjudicators in antidumping cases. Instead, the panel or the AB has usually found one single unambiguous meaning for provisions of the Agreement that seem quite susceptible to multiple interpretations. It seems the adjudicators have been making decisions based on the belief that only one true meaning exists, though according to Brownlie's conception of treaty interpretation, it seems they are ultimately making policy decisions, yet couching reports as if multiple "permissible" interpretations do not exist.

The DSB seemingly favours fewer restrictions on market access and mistrusts the domestic authorities levying antidumping duties. In the *Japan-Steel* case¹⁰ which

¹⁰ *United States-Antidumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R (July 24, 2001).

provides one of the more detailed explications of Article 17.6(ii), the report discusses the relationship between Article 17.6 of the ADA and the general standard of review pursuant to Article 11 of the DSU. There, the AB sought to answer whether Article 17 of ADA and Article 11 of the DSU are complementary or in conflict with each other. The conclusion reached was that these standards are complementary yet somewhat different in application. The AB evaluated the language that distinguishes the two provisions, noting the second sentence of Article 17.6 “presupposes that application of the rules of treaty interpretation in Articles 31 and 32 of the Vienna Convention could give rise to at least two interpretations of some provisions of the Anti-dumping Agreement, which under that Convention, would both be ‘permissible interpretations’.”¹¹

Having acknowledged the WTO ADA is unique in its standard of review, it went on to reduce its significance by referring to the language of Article 11 of the DSU, noting “nothing in Article 17.6(ii) of the Anti-Dumping Agreement suggests panels examining claims under the Agreement should not conduct an ‘objective assessment’ of the legal provisions of the Agreement, their applicability to the dispute, and the conformity of the measures at issue with the Agreement.”¹² In its final analysis the AB stated, “Article 17.6(ii) simply adds” to the normal Article 11 approach the proviso that a panel shall uphold a national anti-dumping measure “if it rests upon one permissible interpretation” of the Agreement.¹³ This reasoning is mirrored in the language of Article 17.6(i), which is the standard of review for factual questions, and

¹¹ *ibid.* para. 59.

¹² *ibid.* para. 62.

¹³ *ibid.*

holds panels are forbidden from overturning determinations if the establishment of the objective was unbiased “even though the panel might have reached a different conclusion.”

The AB’s reasoning seems to have diminished the effectiveness of Article 17.6(ii), which would be a victory for developing countries. During the UR many developing countries objected to the inclusion of Article 17.6(ii) but were rebuffed by US pressure to include it. A closer look at how cases are decided is warranted as the inconsistent “one interpretation” approach taken by the AB throughout the existence of the WTO, has had little effect on how the Agreement is being applied by adjudicators with regard to antidumping measures in light of the development approach to fairness.

5.1.1.1 Inference of the Application of Article 17.6 in DSB Reports

In the *Japan-Steel* case, one issue was the manner in which national authorities can invoke the “facts available” proviso when faced with the absence of information. There, the US Department of Commerce (DOC) held a Japanese steel exporter had not cooperated with the investigation because the company had not made “every effort” to obtain certain cost and price information from its joint venture partner. Under US law the DOC is allowed to use “adverse” facts available concerning prices and costs in determining the dumping margin.¹⁴ Japan contested the finding that its exporter had not cooperated, but not the use of “facts available.”¹⁵

¹⁴ 19 U.S.C. sec. 1677e(b) (2000).

¹⁵ *Japan-Steel* supra at note 10, para. 19.

Thus, the issue was whether non-cooperation justified using “adverse” facts available. The AB upheld the panel’s ruling that the DOC was not justified in finding a lack of cooperation, despite US insistence that this is a question of fact, not law. Interestingly, the AB did not cite Article 17.6 (ii) in its reasoning, in its stead it focused on the VCLT Article 31, whilst examining the relevant text of the Agreement in Annex 2 paragraph 7 which deals with the issue at hand. It then proceeded to define the term “cooperate” trying to find its “ordinary meaning” by referring to the Oxford Dictionary.

Afterward, the AB commenced on interpreting paragraph 7 in the context of VCLT Article 31. The AB found other provisions of the Agreement indicate a certain level of reprieve from investigations. Paragraph 5 of Annex 2 prohibits authorities from disregarding information that “may not be ideal in all respects” if an interested party “has acted to the best of its ability.” Paragraph 2 of annex 2 allows authorities to require submission of information in a particular medium such as computer programs but not if “the interested party does not maintain its accounts on computer and if presenting the response as requested, would result in an unreasonable extra burden on the interested party, e.g., it would entail unreasonable additional costs and trouble.” Finally, Article 6.13 of the ADA requires the authorities to take “due account of any difficulties experienced by interested parties, in particular, small companies, in supplying information requested, and shall provide any assistance practicable.”

From the first two provisions, the AB concluded the Agreement reflects “a careful balance between the interests of investigating authorities and exporters.”¹⁶ The AB read Paragraph 2, “As another detailed expression of the principle of good faith...that informs the provisions of the Anti-dumping Agreement.”¹⁷ Investigating authorities “are not entitled to insist upon absolute standards or impose unreasonable burdens” upon exporters.¹⁸ The AB in effect, seconded the panel’s ruling that the Japanese exporter (KSC) had cooperated to a reasonable extent. Specifically, the adjudicators found the insistence of the US DOC that KSC must invoke its rights under a shareholders’ agreement to force its joint venture partner to produce the relevant information, to be an unreasonable burden on the exporter.

However, the Panel in its report barely mentions Article 17.6(ii) and the AB struggles to address the standard of review by merely stating, “In effect, the Panel held that the US DOC’s conclusion that KSC had failed to ‘cooperate’ in the investigation did not rest on a permissible interpretation of that word.”¹⁹ The use of the term “in effect” could be construed as an implicit admission by the AB that the Panel did not really follow the standard of review required. Yet, the AB’s own interpretation of “cooperate” is hardly compelling. Insofar as Paragraph 2 of Annex II imposes constraint upon requests for information in one particular circumstance, where computerized data is involved, the absence of such a qualification in other provisions of Annex II and the Agreement itself might fairly be read as indicating the absence of

¹⁶ *Japan-Steel* supra at note 10, para. 102.

¹⁷ *Japan-Steel* supra at note 10, para. 101.

¹⁸ *Japan-Steel* supra at note 10, para. 102.

¹⁹ *Japan-Steel* supra at note 10, para. 109.

constraint. More to the point, the AB nowhere answers the question why “cooperate” in paragraph 7 might not permissibly be read to mean in the case under discussion, “cooperate through the use of all legal means available to the exporter.” The discussion of the AB similar to the Panel’s seems like a determination of the best interpretation of the provision and not whether the term is unambiguous in its context or susceptible to more than one “permissible” interpretation.

Under the legitimacy requirements of the development approach this selective use of dictionary definitions of a particular word is insecure or according to Thomas Franck, lacks adherence to international norms of interpretation. If one definition of the word benefits one party while another definition of the same word benefits the other disputant then the selection of one definition over the other must be explained and reasoned.

A similar approach and outcome can be seen in the *Bed Linen* case.²⁰ Here, the issue involved a challenge to the imposition of dumping duties on bed linen from India, due to the EC’s methodology for calculating dumping margins. The EC used a method known as “zeroing” of “negative” margins for some product types. In short, national authorities in the EC categorised different types of bed linen and instead of finding different dumping margins for each adjusted for quantity, they averaged the dumping margins of all the different types of bed linen into one uniform margin for all types of bed linen. This method by itself is not illegal per se. However, the problem arises

²⁰ *European Communities-Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R (March 1, 2001) {hereinafter, *Bed Linen*}.

when the EC found certain types of bed linen being sold at higher prices in Europe than in India for the same type of linen, thereby creating a negative margin of dumping. The EC would use zero as the dumping margin instead of the negative dumping margin. Thus, it created a higher average dumping margin for all bed linen types.

The crux of the matter revolved around Article 2.1 and 2.4.2 of the ADA, which required that all comparable export transactions be considered. Specifically, the meaning of the word “comparable” determined whether zeroing would satisfy requirements of Article 2.4.2. In specifying the ordinary meaning of the word “comparable,” the AB then cited the Oxford Dictionary definition “able to be compared.”²¹ From this definition and a strained reference to the context of other parts of Article 2.4, the AB concluded the EC’s methodology impermissibly excluded some export transactions by zeroing negative margins for discrete types, “All types or models falling within the scope of a ‘like’ product must necessarily be ‘comparable’.”²²

The significance of this norm is highlighted when assessing the negotiation history of the WTO. The word “comparable” was the only change made to this provision between publication of the Draft Final Act and the text as adopted. In fact, the panel in *Korea-Steel* found the inclusion of the word comparable “was not merely incidental but reflected careful consideration by the drafters.”²³ Moreover, the reference to the

²¹ Bed Linen para. 57.

²² *Bed Linen* AB report, para. 58.

²³ *US-Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea* (Dec. 22, 2000) WT/DS179/R, para. 6.111.

dictionary meaning of “comparable” is very selective. The AB chose one of the four meanings for “comparable” that may be deduced by the dictionary definition of comparable and its verb form “compare.”²⁴ The meaning of the term may well be susceptible to many interpretations but the AB in a very casual and cursory manner, selected this definition without admitting the possibility that other meanings of the word could be permissible.

The outcome of the case adequately addresses justice concerns from a developing country perspective, i.e., India. Yet the reasoning is flawed and as such, is likely to create confusion in the future. The justice of the outcome is based on the fact that zeroing is obviously a protective instrument. It has nothing to do with the averaging of different types of linen, nor is the nomination of zero for a negative number a real indication of whether dumping has occurred and at what real margin. It simply invites more and more categorization of types of products then zeroed until desired margins are produced.

The AB did mention 17.6(ii) at the end of its analysis, a response to the European claim that the panel had ignored the ADA standard of review. However, the AB ruled

²⁴ The definition of comparable in the Oxford dictionary is “able or fit to be compared.” The next step for the AB should be to seek the definition of compare in the dictionary. The Oxford Dictionary lists the following definitions for compare: 1. (usually followed by “to”) express similarities in; liken. 2. (often followed by “to” or “with”) estimate the similarity of. 3. (often followed by “with”) bear comparison. 4. form comparative and superlative degrees of comparison. Furthermore, the Dictionary under the heading “usage” states: In current use, “to” and “with” are generally interchangeable, but “with” often implies a greater element of formal analysis. The AB did not explain why it did not seek the definition for compare. In fact, under the AB’s method the term “able to be compared” leaves them full discretion on deciding what “compare” means. There would be no reason to seek the assistance of the Oxford Dictionary as the suffix “able” clearly indicates an adjective of the verb “compare” and thus, the meaning is self-evident.

the emphatic nature of the panel's findings in essence, rendered the interpretation of the EC impermissible.²⁵ It is somewhat incongruous that the AB would reject the EC's standard of review claim by reference to the panel report when the AB itself had significantly modified the panel's reasoning. With this line of reasoning the AB has minimized the effects of Article 17.6(ii) of the ADA in the jurisprudence of the WTO.

India's victory at first glance may seem like a victory for developing nations. However, the methodology of the EU seems almost intuitively erroneous and counter to simple mathematical rules for averaging. Furthermore, the manner in which the AB treated Article 17.6(ii) is the same as *Japan-Steel*, i.e., selectively choosing one definition from a variety of possible definitions yet claiming that definition to be the sole permissible meaning of the provision. The AB did not properly engage in a contextual or economic debate about the merits of the methodology and its permissibility.

5.1.1.2 Consideration of Alternative Interpretations

Another issue in the *Japan-Steel* case that was treated more in accordance with Article 17.6(ii) was a challenge to the US DOC practice of excluding from its calculation of "normal value" in the home market, any sales by the exporter to an affiliated entity unless the prices of those sales are on average, at least 99.5 percent of the prices charged to unaffiliated customers. The US justified this practice by invoking Article 2.1 of the ADA, which states dumping exists where the export price is "less than the

²⁵ *Bed Linen* AB report, para. 65.

comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.” The panel rejected the US argument on the grounds that the “arm’s length” test applied by the US “does not in fact test for differences in prices of sales to affiliated customers... but only test whether prices to affiliated customers are lower, on average, than prices to unaffiliated customers.”²⁶

The AB affirmed the ruling on slightly different grounds. The AB stipulated transactions between affiliated parties “might not be in the ordinary course of trade,”²⁷ and the ADA did not provide a methodology for determining when such a circumstance occurred.²⁸ The AB further concluded the US has every right to implement a rule that delineates sales in the “ordinary course of trade”; however, this discretion is not limitless and must conform to certain notions of fairness and even-handedness. Its main argument was that if the US wanted to have a bright line for lower than average sales it must also have one for higher price sales also.

Although neither the panel nor the AB explicitly cited the ADA’s standard of review, it did state that US practice does not rest on “permissible” interpretations of “sales in the ordinary course of trade.”²⁹ Both sets of adjudicators addressed and rejected the US interpretation that nothing in the ADA compelled the use of the same test for determining whether artificially high and low prices to affiliated parties were outside

²⁶ *Japan-Steel* Panel Report, supra at note 10 Para. 7.110.

²⁷ *Japan-Steel*, AB Report, supra at note 10, Para. 141.

²⁸ *Japan-Steel*, AB Report, para. 147.

²⁹ *Japan-Steel* Panel Report. Para. 7.112.

the ordinary course of trade. Instead, the AB based a large part of its arguments on notions of fairness and even-handedness.

Other anti-dumping cases contain similar reasonings on questions of legal interpretation. The issue at stake in the unappealed *Korea-Steel* panel report was decided against the importing country, after consideration and rejection as “impermissible,” of alternative interpretations offered by the respondent US. The issue involved the use of two separate “averaging periods” by the DOC in its calculation of margins. The two periods were divided due to the financial crisis that struck Korea and other Asian nations in November 1997. The value of the Korean currency (Won) declined by over forty percent in two months. The US justified this methodology premised on Article 2.4 which states that price comparisons should be “in respect of sales made at as nearly as possible the same time,” and that the depreciation of the Won during the investigation period created a situation where prices could not be compared under the language of Article 2.4.2.³⁰

The panel did not use the usual dictionary definition approach to interpret the words “comparable.” The panel acknowledged that Article 2.4 made the timing of sales a relevant issue in deciding the comparability of export and home market transactions.³¹ However, the panel held the fact that Article 2.4.2 mentions averaging means there are circumstances that sales made at different times are still comparable. Furthermore, it held, “The requirement that a comparison be made between sales made at as nearly as

³⁰ *Korea-Steel* report para. 6.107-6.108.

³¹ *ibid.* para. 6.120.

possible the same times requires as a general matter, the periods on the basis of which the weighted average normal value and the weighted average export price are calculated, must be the same.”³² The panel admitted to the ambiguity of Article 2.4 and yet it rejected the US argument.³³ The US argument was valid and their interpretation of the provision could feasibly be in conformity with Article 17.6(ii).

In *US-Steel Plates from India*,³⁴ the panel rejected a US interpretation in a case involving an Indian claim against the legality of US anti-dumping and countervailing duties on steel plates. The issue in the case revolved around the use of data, which relied on the “facts available.” DOC had disregarded all information submitted by the Indian exporter and based its determination exclusively on facts available. The US believed it had permission to do so under Article 6.8 as long as any “essential” element of the requested information was not provided in a timely manner. The panel held this is a stringent requirement and the US interpretation is not in conformity with paragraph 3 of Annex II to the Agreement (which elaborates on the obligations of Article 6.8), that “all information” that are submitted appropriately and according to prescribed time constraints, shall be taken into account by the investigating authorities.³⁵ After citing Article 17.6(ii) standard at the beginning of its report it did not actually apply the standard. Instead, it simply reasoned the US interpretation was not a valid or “permissible” one.³⁶

³² *ibid.* para. 6.121.

³³ *Japan-Steel* panel report, para. 7.27-7.29.

³⁴ *US-Anti-Dumping and countervailing Measures on Steel Plate from India*, WT/DS206/R (June 28, 2002).

³⁵ *ibid.* para. 7.57.

³⁶ *ibid.* para. 7.7 and also, para. 7.59-7.62.

Finally, in a case between two developing countries, Egypt and Turkey, a panel rejected Egypt's contention that an importing country is never required by Article 2.4 of the Agreement to make a price adjustment for credit costs where constructed value is the basis for comparison with export prices.³⁷ Egypt claimed that, because a constructed value is a "notional price," its level "cannot be influenced by any conditions and terms of the relevant sales."³⁸ Egypt's submission to the panel explicitly argued that its reading was a "permissible interpretation" of Article 2.4.³⁹ The panel prudently addressed Egypt's claims but still found that such a reading was not "possible."⁴⁰ The panel mentions that Article 2.4 mandates a "fact-based, case-by-case analysis of differences that affect price comparability."⁴¹ For emphasis, the panel repeated the wording of the provision which states that "due allowance shall be made in each case, on its merits" for differences, as well as other clauses of Article 2.4, indicating that case-by-case consideration of possible adjustments is necessary.⁴²

Under the development approach to fairness, the legitimacy of the rulings are in doubt, however, the outcome of most of the cases analysed do benefit developing countries. When the AB made inferences to Article 17.6(ii) (first claim in *Japan-Steel* and the *Bed-Linen* case), the reasoning lacks any security or adherence to international norms because it selectively used dictionary definitions that best suite the judges' disposition

³⁷ *Egypt-Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WT/DS211/R (August 8, 2002).

³⁸ *ibid.* para. 46 and annex 2.

³⁹ *ibid.*

⁴⁰ *ibid.* para. 7.351.

⁴¹ *ibid.* para. 7.352.

⁴² Although Egypt lost on this legal point, it was able to win on the issue because the Turkish authorities had failed to raise this matter before Egyptian national authorities.

of the case. They did not make a thorough economic or contextual analysis of the text at issue.

In instances where the adjudicators actually addressed the issue by explicitly applying Article 17.6(ii), the reasoning is more legitimate under the development approach. In *Japan-Steel* the claim regarding sales to affiliates and the US 99.5% rule for sales below costs, the panel had a sounder argument than the AB. The panel ruled that price effects of all sales made in the ordinary course of trade must be evaluated and the US law does not do that. The Panel's verdict was based on both economics and the context of the ADA. Whereas, the AB based its decision on concepts of fairness-that the US should have also looked at the sales to affiliates that were above export prices and made rules for them, too. These concepts are ambiguous as neither the AB nor the General Council has made any declarations about what is meant by fairness, e.g., are they based on equity, justice or principles of non-discrimination? So for instance, if the US had eliminated from calculation sales above cost that were 100.5% of normal value then the AB should rule in favour of the US. But the ruling did not address whether its understanding of fairness mandates a numerically symmetric formula. What if instead of 100.5% the US had chosen 102%? Or would the US be abiding by notions of non-discrimination if it had chosen a narrow range such as 99.8% to 100.1% of sales below or above costs? The AB did not predictably answer these questions.

In *Bed-Linen*, the references to the dictionary were continued, with the word “comparable” being the focus of definitional gymnastics. The selection of the definition suitable to the taste of the adjudicators was one, which diminished the efficacy of the targeted word, a word that was the sole addition to the language of the old Tokyo Code of Anti-dumping during the UR. It lacks predictability, as one does not know whether other forms of “comparison” will be acceptable to the judges and panellists. Again, the selective nature of defining words of the Agreement induces insecurity by not really abiding by rules of interpretation that would satisfy most observers. In fact, the almost random way in which terms are defined with the help of a dictionary only indicates the AB must be making a policy choice. In this case they could have looked into the negotiation history of the UR or at least addressed the fact that the only difference between Article 2.4 and its equivalent in the old Anti-dumping code is the word comparable.

Ostensibly, there is an inclination by the adjudicators to decrease the deference to investigating authorities but it is done by reasoning that is not cohesive, predictable or substantive. The arguments of the Panel and AB do touch upon some economic concepts but the ultimate decision is made by a cursory mention of Article 17.6(ii) and some mathematical logic interspersed with mentioning of certain antidumping regulations of the WTO. Nowhere in the reasoning can one find the substantive legal and economic reasons for the decision. It merely says the investigating authorities were wrong to calculate negative margins as zero, however, it is rationally possible

that zeroing could be allowed based on the wording of Article 2.4 if one were to read the provision without insight into its context and purpose.

Likewise, nowhere in the case law does the AB make a solid or foundational statement about the nature of Article 17.6 and its application. If the adjudicators simply want to prevent arbitrary or creative methodology by investigating authorities they need to be clearer on the limits of the discretion. It is possible the AB is trying to strike a balance between what the language of the Agreement states and what may be the limits of Members' acceptance of the reasoning. As mentioned in the first chapter there is such a tendency, and the asymmetrical nature of the WTO obligations tilted against developing nations may incline them to see this theoretically, as welcome judicial activism.

However, this activism has to help the weaker Members, not on a case-by-case basis but rather a systematic approach is preferred. The problem with a case-by-case approach, although inevitable in some situations, does not streamline the process nor promote a predictable regime. This is because protectionism can be achieved by national governments by using investigating techniques that fall into the loopholes of the ADA. The chilling effects on the industry of the developing countries when the EU or the US is the importers are great and costly. Very few, if any developing country firms have the resources to counteract antidumping duties by the US over the two to three years it takes for a case to be settled under the WTO system.

Two issues arise for developing countries on the matter. First, there are indications that the AB has more trust and deference for investigating authorities of the EU and the US over other developing country members. The decreasing of the investigating authorities' powers equates to decreased possibility of reciprocal investigations by developing countries on exporters from the developed nations. Second, the adjudicators may not agree with the version of free trade espoused by the AB. The developing countries' version of free trade indicates some observance to the trade and development paradigms stated in various sections of the WTO covered Agreements (further discussed in the next section).

Also, as the scope of permissible interpretations are being diminished and single interpretation inclination being advanced, the policy choices adjudicators make in the final step of the interpretation process is central to developing Members' interests. Moreover, as will be discussed in the next part of this chapter, the lack of requisite fairness to developing countries on substantive issues by the judges adds another layer of ambivalence for these members and the ADA standard of review.

Thus, although at first glance the diminishing of the credence given to the AD standard of review seems to be beneficial to the developing Members, in actuality it does nothing systematic to benefit these nations. The only hope is that in certain cases on a patchy basis, the adjudicators find the protectionist impulses of the investigating authorities of industrialized nations has crossed the threshold of what is acceptable.

The discussion will now focus on the procedural provision of Article 5 and the evidentiary threshold for the initiation of the investigation. After some of the key substantive provisions of the ADA Articles 2 and 3 will be covered.

5.2 The Threshold for the Initiation of Investigations

The threshold for initiating an antidumping investigation has a considerable effect on the number of investigations a nation conducts as well as the number of complaints filed by members of the WTO. The threshold question is very important for developing countries, as any threat of an investigation by a developed Member tends to have chilling effects on the industry of the exporting third-world country. As mentioned in chapter 4, many developing country firms decide to withdraw from the developed market as the lesser of two evils, instead of challenging an investigation from a developed Member. The developing countries that challenge the investigation must do so at a great cost, as these investigations are fact and evidence-intensive, as well as requiring alterations in their standard business practices, accounting procedures and pricing mechanisms.

Clearly, if there were no minimum requirements the protectionist impulses of national authorities would create a stifling amount of investigations resulting in the erosion of any benefits gained from the tariff reduction negotiations of the UR.⁴³ On the other hand, a very high threshold that would effectively require conclusive proof of dumping makes little sense. The balancing act that must be performed should take

⁴³ Bhala, R., *Rethinking Antidumping Law*, (1995) Geo Wash. J. Int'l. L. & Econ. 1, p. 56.

into account both standing and evidentiary threshold for the initiation of the investigation. To date, there has not been a truly benchmark case that would shed light on the standing issue. Standing was a big point of contention during the Uruguay and Tokyo Rounds of Multilateral negotiations.⁴⁴ Standing may be defined as “the standards that the government uses in determining who is entitled to initiate and prosecute an antidumping investigation.”⁴⁵ Since the adjudicators have not addressed standing in-depth, the section will focus on the issue of initiation of investigations.

The breakdown of positions with respect to the issue of initiation of investigations tends to depend on whether the Member is mainly an importing or exporting Member or alternatively, whether antidumping measures are an established and practiced form of trade protection.⁴⁶ Although developing countries have begun to enact more antidumping measures they as a group, prefer a higher threshold as a buffer against measures levied against them by developed countries.⁴⁷

With regard to the evidentiary burden to initiate an investigation, a request for an investigation must include sufficient evidence of dumping, a clear injury to domestic industry pursuant to Article VI of GATT, and a causal link between the dumping and

⁴⁴ Stewart, T.P. (ed.), *The GATT Uruguay Round: A Negotiating History(1986-1992)*, (1993) p. 1577.

⁴⁵ Cass, R.A. & Narkin, S.J., *Antidumping Duty and Countervailing Duty Law: The US and the GATT*, in Boltuck, R., & Litan, R.E. eds. *Down in the Dumps: Administration of the Unfair Trade Laws*, (1991) at 200, p. 229.

⁴⁶ Stewart at note 44.

⁴⁷ An interesting point is that during the Guatemala-Cement case, the US acting as a third party, submitted that the Mexican position which would elevate the threshold as spelled out in Article 5.2 and 5.3 of the ADA, is the proper threshold. The US tries to strike a balance between being subjected to investigations by developing countries with less than adequate evidence on the one hand, and a threshold that would compel its firms from producing more evidence than they currently do, on the other.

injury.⁴⁸ The Agreement also mandates specific standing requirements including: 1) prior to an investigation, the authorities must determine the petition has been put forth by or on behalf of the domestic industry;⁴⁹ 2) it must be supported by domestic producers who account for at least 25% of the domestic production;⁵⁰ 3) authorities may use sampling in the case of fragmented industries;⁵¹ 4) producers who are related to foreign producers subject to investigation, and producers who are themselves importers, may be excluded from the standing determination;⁵² 5) workers are considered as interested parties;⁵³ 6) silence on the part of particular industry members does not expressly count for or against an initiation.⁵⁴ The criteria set forth are very broad and as such, are fairly easy to meet the standing threshold.

5.2.1 Case Law in Relation to the Evidentiary Threshold

Two cases best demonstrate the WTO adjudicators' attitude toward the evidentiary burden in initiation of investigation. They are the *Portland Cement II*⁵⁵ (hereinafter *Cement II*) and the *Soft Wood Lumber*⁵⁶ cases. The *Portland Cement I*⁵⁷ case was the first antidumping dispute to be considered by the DSB. Despite the ruling of the AB that the matter was not properly before it, the outcome of the panel decision provides

⁴⁸ ADA Articles 5.2 and 5.4.

⁴⁹ ADA Article 5.4.

⁵⁰ ADA Article 5.1.

⁵¹ ADA Article 5.4 footnote 13.

⁵² ADA Article 4.1(i).

⁵³ ADA Article 5.4 footnote 14.

⁵⁴ ADA Article 5.4.

⁵⁵ *Guatemala - Definitive Anti-dumping Measures on Grey Portland Cement from Mexico* WT/DS156/AB& R, (adopted 24/10/2000).

⁵⁶ *United States - Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/R (adopted 13/4/2004)

⁵⁷ *Guatemala - Anti-Dumping Investigation Regarding Portland Cement from Mexico* WT/DS60/AB (adopted 02/11/1998).

considerable insight, as later in the retrial of *Cement I (Cement II)* and in the *Softwood Lumber* case the main elements of that decision were generally affirmed.

5.2.1.1 AD Agreement Article 5.3 and the Issue of Sufficient Evidence

An important finding by the panel in *Cement II* is the requirement that investigating authorities take into account relevant substantive dumping and injury factors contained in other provisions of the ADA when determining whether “sufficient evidence” exists to initiate an antidumping investigation.⁵⁸ Specifically, ADA Article 5.3 requires an investigating authority determine the sufficiency of the evidence regarding dumping, injury and causality before initiation. The Panel held that in reaching that determination, investigating authorities are required to consider the factors contained in Article 2 and Article 3.⁵⁹ At minimum, this requirement means making obvious price comparison adjustments, examining volumes and price effects, and considering factors that indicate injurious impact or threat of injury.

In effect, the panel stated Article 5.2, which describes the content requirements of the petition, and Article 5.3, which requires investigating authorities to check the adequacy, accuracy and its sufficiency, are distinct yet mutually necessary obligations that must be met to initiate an investigation.

⁵⁸ *Cement II* para. 8.59-8.62.

⁵⁹ *Cement II* para. 8.60-8.61.

The standard set in the *Softwood Lumber* case states that in order to determine the sufficiency of the evidence the panel must ask whether an “unbiased and objective investigating authority have concluded the application contained accurate and adequate evidence sufficient to justify the initiation of the antidumping investigation.”⁶⁰ Then the panel addressed the nature of the obligation contained in Article 5.3. In this regard, the Panel stated that while the information contained in the application under Article 5.2 forms the foundation for the determination of the sufficiency of the evidence for purposes of the initiation of the investigation under Article 5.3, the authorities are not precluded from gathering information on their own though they are not obligated to do so.⁶¹ Hypothetically, the domestic industries can now provide a minimal amount of evidence, relying on the investigating authorities to complete the evidentiary requirements in accordance with this ruling.

According to the development approach, the requirement that some of the factors outlined in Articles 2 and 3 of the ADA must be addressed in an application for the initiation of an investigation under Article 5.2 and 5.3 of the ADA could be considered fair. However, the adjudicators took one step back in the *Soft Wood Lumber* case and injected unpredictability and a less than optimal distribution of justice. The fact that under this precedent investigating authorities are allowed to gather their own evidence is problematic. This is due to the fact there are no time restrictions and deadlines in the initiation stage of the investigation, which leads to uncertainty on the part of exporters and domestic users of the imported product, in addition to allowing

⁶⁰ *Cement II* para. 8.60.

⁶¹ *Cement II* para. 8.61-8.62.

investigations in perpetuity. When the application for the initiation of an investigation is filed the investigation in essence, commences. The investigators look at the evidence in the application and decide whether the investigating authorities could find more evidence in support of the domestic industries' application. The initial application by representatives of the complainant industry is not close-ended. As the next section will illustrate the termination of an investigation, according to the rules that have been disseminated by case law, is not clearly established by the text and as such they are at the discretion of the investigating authorities.

The investigating authorities of the importing country with protectionist tendencies are supporting the industries, with their responsibility to be "unbiased and objective" tainted by the fact that they are now essentially working to find sufficient evidence to justify the investigation. This creates unpredictability as the responsibilities and interests of the domestic industries and the civil servants becomes intertwined, allowing greater discretion to find dumping determinations. The legitimacy of the ruling is diminished due to this unpredictability whilst the greater discretion afforded to the investigators tends to harm the developing countries, thereby compromising justice. As such, the decision to allow the investigating authorities a high degree of discretion in relation to Articles 5.2 and 5.3, whereby they can wittingly or not, and assist in the collection of evidence, is unfair.

5.2.2 Article 5.8 and the Rejection of Applications by Investigating Authorities

Article 5.8 of the ADA requires an investigating authority reject an application and/or terminate an investigation “promptly,” as soon as the authorities concerned are satisfied there is insufficient evidence of dumping or injury. The correct use of this provision is important for developing countries, as merely the initiation of an investigation targeting their products is enough to harm the interests of the developing country exporter. The requirement to terminate an investigation if there is not enough evidence, could expedite the recovery of the harmed developing country exporter.

The issue here is when and how must the rejection of the application occur. In *Cement II* the decision was straightforward, as the panel effectively suggested the Guatemalan investigation was shoddy at best, and found violation of Article 5.3, due to the fact the application by the Guatemalan cement company lacked any substantive evidence. Article 5.8 was violated since Guatemala should have rejected the application as soon as it was found to be lacking evidence. Guatemala claimed Article 5.8 pertains to the post-initiation period but the panel disagreed and held it relates to both the pre and post-initiation periods.

A contradiction occurs in light of the decisions made related to article 5.2 and 5.3 as mentioned in the previous section. If Article 5.8 pertains to both pre and post-initiation periods and investigating authorities can gather evidence it would signal the domestic industries application lacked “sufficient” evidence and therefore, the

investigation should be terminated. This contradiction or inconsistency signifies a lack of legitimacy with regard to Article 5 of the ADA and the initiation of investigations.

Previously in the *Mexico-HFCS*⁶² case, the panel had held Article 5.8 does not create obligations beyond Article 5.3. The panel in *Cement II*, citing *Mexico-HFCS*, held there is an additional obligation if, as in this case, a Member has been found to be in violation of 5.3.⁶³ This is a strange argument as there is nothing in the ADA that implies such a position. If Article 5.3 and 5.8 are related by the necessity to provide sufficient evidence, then one cannot be exclusive of the other. If a Member is in conformity with 5.3 then it would be in compliance with 5.8 also and vice-versa. The panel in *Cement II* actually rejected the *Mexico-HFCS* ruling by stating there is an added obligation.⁶⁴ However, as these panels are in contradiction ex-ante predictability on this issue is suspect.

Later, in the *Soft Wood Lumber* case the panel sought to clarify its position on the issue in particular, with regard to post-initiation. There, Canada claimed that midway through the US investigation process, information was given to the US authorities, which would have exonerated Canadian firms from dumping. The Canadians expected the US to terminate the investigation.

⁶² *Mexico-Anti-dumping Investigation of High-Fructose Corn Syrup (HFCS) from the US*, WT/DS132/R (Adopted 8/05/1998) {hereinafter, *Mexico-HFCS*}.

⁶³ *Cement II* para. 8.72-8.75.

⁶⁴ *Cement II* para. 8.73.

The panel rejected the argument stating, “When examining the plain meaning of the relevant text of Article 5.8 we note that it states that ‘an investigation shall be terminated as soon as the authorities concerned are satisfied there is not sufficient evidence of dumping.’” Moreover, it held there is no continuing obligation to terminate once the investigation has commenced and that only after a situation where the investigators have been “satisfied” of the insufficiency can termination take place. In effect, the panel ruling raises the bar of sufficiency of Article 5 in post-initiation circumstances to a point where only a factual finding can terminate the initiation. Thus, if exculpatory evidence is given to the investigators they do not have to acknowledge it as such until after the investigation period has lapsed, or at minimum, it leaves the decision of whether to review new evidence found post-initiation and its evaluation at the discretion of investigating authorities.

The developing countries would want the obligation to terminate an investigation in light of insufficient evidence to be continual, because their exporters have much more difficulty in obtaining evidence in a timely manner. Thus, they will be suffering from the provisional duties levied against them for the duration of the investigation even if some or all the exporters may not be even *prima facie* guilty of dumping.

As demonstrated, the reasoning and holding that have emerged are not consistent and predictable. The panel in *Cement II* acknowledged its digression from the *HFCS* case but used a spurious argument to justify it. Then, the ruling in that case acknowledged

both a pre and post-initiation obligation with regard to Article 5.8.⁶⁵ However, later in *Soft Wood Lumber* the panel in effect, diminished the authority of Article 5.8 by allowing investigators to dodge assessing important information until after the investigation finished and factual findings were made. Thus, the legitimacy of the ruling under the development approach is lacking.

Furthermore, justice concerns have not been met as developing nations are put at a greater risk of harm due to the ongoing investigations by national authorities. The *Cement II* case involved a shoddy investigation by Guatemala, which is indefensible under the development approach. Were the exporters in the *Soft Wood Lumber* case from developing countries it would be easy to recognize the harmful effects of the limits promulgated by the panel pertaining to Article 5.8. As mentioned, the harmful effects of continuing investigations is more pronounced for developing countries as the provisional duties attached to investigations reduces the competitiveness in industrialised markets.

5.3 “Zeroing” Revisited as a Substantive Issue

The practice of “zeroing” was discussed in the previous section in the context of the application of the standard of review of Article 17.6(ii). There, the issue centred on how the AB applied Article 17.6(ii) to the methodology prescribed pursuant to Article 2.4 of the ADA. In this section the discussion will focus on “zeroing” as a substantive matter and also, how the practice of “zeroing” can take place in other areas of antidumping investigations aside from Article 2.4.

⁶⁵ *Cement II* para. 8.73-8.74.

In the *Bed Linen* case, the investigating authorities of the EC had divided Bed linens into various “models” and calculated dumping margins for each one. By using this methodology, the EC was able to inflate the overall dumping margin by treating any negative dumping margin-situations where the export price was actually higher than the normal value-as zero, rather than their full negative value, when combining the margins for each “model.”⁶⁶ The AB recognised the inherent “unfairness” in this approach and held it is a violation of Article 2.4.2, which requires “all” transactions must be compared.⁶⁷ Furthermore, it stated zeroing does not provide for a “fair comparison” between export price and normal value, as required by Article 2.4.⁶⁸

Zeroing can occur in other ways as well within the context of Article 2 of the ADA and price comparisons. During the UR, zeroing was discussed in the context of price comparison based on transaction or weighted average methods.⁶⁹ It has been the practice of some Members to calculate dumping margins on the basis of comparing weighted-average normal value to individual export prices. Under this approach, the difference between normal value and export price would be calculated for each export transaction. Positive margins were taken as is, whilst negative margins (where export price was higher than normal value) were nominated as zero. Thus, countries applying

⁶⁶ *Bed Linen* (AB) para. 49-53.

⁶⁷ *ibid.*

⁶⁸ *ibid.* para. 55.

⁶⁹ *Drafting Proposals of the Nordic Countries Regarding Amendments of the Anti-dumping Code*, MYN.GNG/NG8/W/76, 11 April 1990; *Amendments to the Anti-dumping Code-Communication from the Delegation of Hong Kong-Addendum*, MTN.GNG/NG8/W/51/Add.2; *Submission of Japan on the Amendments to the Anti-dumping Code*, MTN.GNG/NG8/W/48 3 Aug. 1989.

antidumping duties were sometimes able to find dumping existed even when prices were the same in both the home and export markets.

To address this issue, the UR negotiators placed certain limits on the use of average-to-transaction comparisons. Specifically, the second sentence of Article 2.4.2 provides that:

A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly, among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of weighted average-to-weighted average or transaction-to-transaction comparison.

This provision was included to ensure that except in special situations where targeted dumping may exist, margin calculations would be made on a consistent basis.⁷⁰ While this type of zeroing has now been superficially constrained by the ADA, other examples of zeroing exist, for instance in the *Korea-Steel* case. Due to exchange rate fluctuations over the period of investigation, the Department of Commerce (DOC) divided the period of investigation into two sub-periods.⁷¹ When one of the periods turned out to have a negative margin, the DOC treated this margin as zero. Korea unfortunately, did not challenge the practice of zeroing, only that the US was not

⁷⁰ Kim, J.B. *Fair Price Comparison in the WTO Anti-dumping Agreement: Recent WTO Panel Decisions Against the "Zeroing" Method*, 2002 36 J.W.T. 39-56 p.40-43.

⁷¹ *Korea-Steel* para. 6.44-6.45.

allowed to use two different averages. Yet, the AB in the later *Bed-Linen* case has made it clear that it deems the practice of zeroing as inherently unfair, stating, “we are also of the view that a comparison between export price and normal value that does not take fully into account the prices of all comparable export transactions-such as the practice of 'zeroing' at issue in this dispute- is not a fair comparison....as required by Article 2.4 and Article 2.4.2.”(FN) It would seem that any form of zeroing after this case would be a violation of the AD Agreement. However, that is not the case.

The latest dispute was between the US and Canada in the *US-Softwood Lumber* case.⁷² This case exemplified the two different concepts of dumping at the heart of the discussion. On the one hand are the opponents of “zeroing” who believe the practice is one of the most blatant examples of biased protectionist thinking by domestic authorities that only want to inflate dumping margins.⁷³ On the other side are those who see the “zeroing” ruling as judicial activism whereby an established domestic methodology has been declared in violation of the WTO rules.⁷⁴ In fact, the split between the two schools of thinking is evident by the fact that in this case one of the panellists dissented, something that has rarely occurred in WTO dispute settlement.

The main focus of the debate in both the *Bed Linen* and *Softwood Lumber* cases is the meaning of the term “all comparable export transactions.” The zeroing opponents point to the requirement that margins must be based on “all” comparable export transactions. The use of the word “all” they say, means one cannot ignore some

⁷² *United States-Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/R (adopted April 13, 2004).

⁷³ *Supra* at note 70.

⁷⁴ See analysis on www.worldtradelaw.net on *Softwood Lumber* case.

transactions by nominating them as zero. If an investigating authority restates margins for certain transactions as zero, the margins have not been “established on the basis of” these transactions, and “all” transactions have not been taken into account. The argument that the use of the term “all” means you cannot restate some margins, as zero is very strong. If some of the actual calculated figures are ignored, it is difficult to see how “all” transactions have provided the basis for establishing dumping margins. The panel majority relied for the most part, on this rationale in its conclusion that “zeroing” violates Article 2.4.2.⁷⁵

The opponents of “zeroing” also claim the problem with allowing this practice is that it appears to make dumping margin calculations subject to almost unlimited discretion. If an investigating authority can restate negative margins for some product types as zero as part of the aggregation process, there is nothing to prevent it from for instance, trebling the positive margins because the weighting of averages demands such action due to the nature of the product and its distribution. This would seem fundamentally unfair. Allowing this amount of discretion to investigating authorities could lead to interpretation of other provisions such that the ADA becomes “toothless.”

The dissenting opinion in this case tried to argue the ADA does not include explicit language that prohibits “zeroing.”⁷⁶ Furthermore, the dissenter claimed the second dumping margin calculation methodology provided for in Article 2.4.2, “transaction-to-transaction” comparisons, does not use the word “all.” Thus, if the word “all” is

⁷⁵ *Softwood Lumber* para. 7.203-7.204 and 7.215-7.216.

⁷⁶ *Softwood Lumber* para. 9.2-9.7.

interpreted in the way “zeroing” opponents suggest, “zeroing” would be allowed for “transaction-to-transaction” comparisons, but not for “weighted average-to-weighted average” comparisons. Such a result, said the dissenter, would be “odd.”⁷⁷ Moreover, the dissenter argues that notions of fairness in the abstract are a subjective exercise that could result in unpredictable interpretations.⁷⁸

In response, arguably, the word “all” could be read to include the “transaction-to-transaction” section of Article 2.4.2 and would be grammatically correct. Also, the “oddity” the dissenter indicates does not go away by allowing “zeroing.” The result of such a view is Members would not be allowed to use negative margins if they so wish, because the word “all” is irrelevant. This would seem “odd.” Finally, notions of fairness although in the abstract, is difficult to pinpoint, it nevertheless, cannot be brushed aside as merely a philosophical understanding. The dissenter is more than likely trying to respond to his/her understanding of judicial activism by judges, however, gap-filling and norm generation is a practice that cannot be detached from adjudication in particular, with regard to international law, as treaties are most often less concrete than domestic laws. In addition, as mentioned before in this thesis, the AB and panels have been judicially activist in almost all cases. The AB’s practice of “completing the analysis” (see chapter 2) is one that is highly activist. An interesting

⁷⁷ *Softwood Lumber* para. 9.10.

⁷⁸ *Soft Wood Lumber* para. 9.16.

point is the dissenter when discussing “multiple averaging,” claims it is one of the most “fair” ways of comparing prices when many different product types exist.⁷⁹

5.3.1 “Zeroing” and the Development Approach

In general, any action or norm generated by the adjudicators, which limits the arbitrariness of finding dumping margins, is beneficial to developing countries. This is supported by the developing countries’ stance during the UR which tried to eliminate the practice and thought they may have done so by adding that comparisons must be fair and done on a weighted average-to- weighted average or transaction-to-transaction basis.

There are however, predictability and consistency problems with this decision. Although the *Bed- Linen* case seemed the final word on the zeroing issue with regard to Article 2.4, in the *Softwood Lumber* case a dissenting opinion was expressed which was explicitly counter to the AB’s previous decisions. Although one can argue the panellists’ decision is a unique occurrence, it does, however, give an opening to future panels. This case has been appealed by the US claiming zeroing is a legal practice. Furthermore, the AB has not ruled whether all forms of zeroing under article 2.4.2 is prohibited. In *Bed Linen* the EU had divided *Bed-Linen* and then averaged all the dumping margins, whilst in the *Soft Wood Lumber* case the US had divided the lumber into different categories and then after finding the averages for each, aggregated them

⁷⁹ An interesting point is the dissenter when discussing “multiple averaging” claims it is one of the most “fair” ways of comparing prices when many different product types exist. See, *Soft Wood Lumber* para. 9.3.

with zero values for negative dumping. This slight difference in categorisation was one reason the dissenter in *Softwood Lumber* provided to distinguish it from *Bed-Linen*. The question still remains whether the AB and future panels will accept nuanced differentiation in methodology. Also, as will be discussed in the next section, zeroing can happen in relation to other provisions of the ADA.

5.3.2 Zeroing in the Dumping Margin Calculation and Price Undercutting Contexts

In *EC-Pipe Fittings* case, at the panel level the issue of zeroing was addressed pursuant to two different provisions of the ADA, i.e., Article 2.4.2 and Article 3.2. Since these holdings of the panel were not appealed the ruling of this case has precedential value. The panel ruled in favour of Brazil basing its decision on the *Bed-Linen* precedent, which banned the use of zeroing under Article 2.4.2. Brazil had also argued the EC violated ADA Articles 3.1 and 3.2 when it calculated the “price undertaking” margin based on an “unwarranted selection” of transactions where it found undercutting, while at the same time zeroing, and therefore, disregarding any negative undercutting margins.⁸⁰

In the context of price undercutting the panel found zeroing is permitted, given the specific language of Article 3.2.⁸¹ Whereas ADA Article 2.4.2 refers to a comparison of “all comparable export transactions,” Article 3.2 does not make similar mention of

⁸⁰ *European Communities-Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil* (WT/DS219/AB/R) (Adopted: August 18, 2003) {hereinafter *EC-Pipe Fittings* or *Pipe Fittings*} panel report para. 7.268.

⁸¹ *EC-Pipe Fittings*, panel report, para. 7.277-7.278.

“all” transactions. Thus, according to the panel, there is no requirement “to take each and every transaction involving the dumped imports into account, nor that the dumped imports examined under Article 3.2 are limited to those precise transactions subject to the dumping determination.”⁸² The panel continued stating, “The fact that certain sales may not have occurred at non-underselling prices does not eradicate the effects in the importing market of sales that were made at underselling prices,”⁸³ and by requiring the investigating authorities to compensate in their methodology for over-selling prices would in effect, hide underselling prices which may harm the domestic industry.⁸⁴

The panel in this case decided it would make its finding based on the narrow and literal interpretation of Article 3.2 and disregard the fact that the AB had ruled zeroing to be inherently unfair. Brazil argued in line with previous AB rulings on the issue by claiming that zeroing is inconsistent with “basic principles of good faith and fairness” in violation of Article 3.1 of the ADA.

Furthermore, it could be argued that price discrimination within a single market is not an unwarranted business practice.⁸⁵ Undercutting and over cutting of prices must be evaluated over a sensible period of time. There are many reasons why price undercutting occurs and at minimum, the reasons for such behaviour must be addressed in investigations under Article 3 and the causation provisions of the ADA.

⁸² *ibid.*, para. 7.276.

⁸³ *ibid.*, para. 7.277.

⁸⁴ *ibid.*, para. 7.278.

⁸⁵ Vermulst, E., *Anti-Dumping and Countervailing Measures*, (2000) in UNCTAD, *Positive Agenda and Future Trade Negotiations* (UN No. 3661) p. 290.

For developing countries the justice of decisions in the WTO are directly related to these kinds of issues. Short-term price undercutting if done for reasons of market access, excess inventory, and other such business, market-adjustments should be allowed in developing nations as their market access and other managerial issues are very volatile in these nations.⁸⁶ The overall pricing scheme has to be evaluated at least during the whole of the targeted period of investigation. However, such undercutting over a long period of time can be said to fall under unfair business practices.

Furthermore, in the *EC-Pipe Fittings* case Brazil rightly argued that zeroing is counter to “basic principles of good faith and fairness” in violation of article 3.1 of the ADA.⁸⁷ Unfortunately, Brazil failed to show mathematically or statistically why it is so. Brazil’s argument at its core is in line with the development approach as it does seek to recognize fundamentals underlying the international antidumping regime while also being both legitimate and just. Antidumping calculations seek to approximate as closely as possible the “real” price of the product either based on the home market price or a constructed price. The average-to-average comparison can be given a statistical interpretation. It can be a calculation method by which the unknown dumping margin (or the difference between the normal price and export price) is estimated.⁸⁸ The true dumping margin could be regarded as an unknown statistical parameter and the calculated dumping margin as the estimate.⁸⁹ The antidumping duty

⁸⁶ UNCTAD, *Impact of Anti-Dumping and Countervailing Duty Actions*, 2000, background note by the UNCTAD Secretariat.

⁸⁷ *EC-Pipe Fittings*, panel report, para. 7.275-7.276.

⁸⁸ Kim, J.B., *Fair Price Comparison in the WTO Anti-dumping Agreement: Recent WTO Panel Decisions against the “Zeroing” Method*, 2002 36 J.W.T. 39-56 p.54.

⁸⁹ See amongst others, Mann, P.S., *Statistics for Business and Economics* (1994 Wiley) p. 88-100; Judd, K.L., *Numerical Methods in Economics* (1998 MIT Press).

would be based on this estimate. By zeroing a certain amount of data points are being eliminated i.e., the ones that show a negative dumping margin. The exclusion of certain data points as entailed by zeroing creates a statistical bias in the calculation of the dumping margin.⁹⁰

Another problem with the calculation is the quantitative effects of the EC methodology are not dismissed when the price has been zeroed. As the panel stated, the price undercutting analysis includes a quantitative evaluation of the sales at undercut prices.⁹¹ Then a margin of undercutting is calculated. The calculation is problematic because firstly, the quantitative or volume of under cut prices is not taken out of the calculation when zeroing the prices. This results in an overestimation of the effects of undercutting. Similarly, zeroing inflates the undercutting margin thereby causing the investigators to overestimate the effects of undercutting.⁹²

In addition, when estimating an unknown dumping parameter the more data points used the more likely it is the estimate is closer to the unknown dumping parameter. Therefore, the estimate that uses all the transaction data in the period of investigation is more likely to be accurate than other estimates that exclude certain data points from the estimation.⁹³ For these reasons it can be argued that zeroing does not achieve the objective of finding the most approximate price at any time. The statistical arguments

⁹⁰ Judd, K.L. *ibid.*

⁹¹ *EC-Pipe Fittings* panel report, para. 7.277-7.278.

⁹² According to the holding by the panel, the undercutting margin unlike zeroing for calculating overall dumping margins, is only one element in the evaluation if the injury done to the domestic industry. Nonetheless, zeroing undercutting margins still create an overestimation of its effects.

⁹³ Harnett, D.L., *Introduction to Statistical Methods*, (1975) second ed. (Addison-Wesley) p. 247-248.

proved by the panel in the *Bed-Linen* case are quite comprehensive, but these statistical justifications were not extended to other provisions of the ADA by the panel in *Pipe-Fittings*. The implicit holding in this case that the process of understanding the harm done to the domestic industry does not necessarily require finding the most approximate price because price-approximation is not an explicit objective of the ADA, is spurious. Understanding the harm suffered because of foreign price undercutting can only happen when we can grasp the true price, or in the case of undercutting, the true margin of undercutting of the foreign product.

As a result, the panel in *Pipe-Fitting* has granted investigating authorities expansive leeway to examine only selected transactions in determining whether “price undercutting” exists.⁹⁴ Therefore, the interests of developing countries are harmed as they are most often targeted for constructed calculations more than the developed country firms, and the investigating authorities are granted ever more discretion to find higher dumping margins. As such, a just outcome has not been reached for developing countries in relation to the norm that has been established which permits zeroing outside of Article 2.4.

5.4 Constructed Normal Value: The Calculation of SG&A Plus Profits

Article 2.2 states in part, “When there are no sales of like products in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of

⁹⁴ In the aftermath of this ruling an interesting decision at the panel level was reported in the US-Lamb case, where a split panel decided against another form of zeroing in the context of Article 2.4.2 but the dissenting panellist in essence, ruled counter to previous AB decisions on this matter.

the exporting country, such sales do not permit a proper comparison.” The provision holds that dumping margin is to be determined either through a third country comparison or by constructing a normal value based on cost of production, SG&A (general sales and administrative) costs and profits “shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product, by the exporter or producer under investigation.” Moreover, Article 2.2.2 seeks to guide investigating authorities on how the determinations of the SG&A/profits are to be made. It provides that the amounts for SG&A/profits “shall be based on actual data” for sales in the ordinary course of trade from the producer in question. If such data is not appropriate then it lists three other possibilities for making a determination: (i) “The actual amounts incurred and realised” by the targeted firm in relation to products sold at home in the same category of products; (ii) “the weighted average of the actual amounts incurred and realised by other exporters and producers subject to investigation” in relation to sales of like products in the home market; and (iii) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realised by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin.”

In the *Bed-Linen* panel one of the issues was whether there is a hierarchy amongst Article 2.2.2's three sub-paragraphs. India claimed there was a preference implicit in the provision that demanded using these three provisions in order. India believed the EC should have resorted to Article 2.2.2(i) for calculating profit instead of resorting to

Article 2.2.2 (ii), because the sequence in which these two options are listed reflects a hierarchical preference.⁹⁵ The panel rejected this argument and held that there is no implicit preference in the language of this provision, rather that the Members are free to decide which one of the three methods for calculating SG&A/profits suits the domestic industry best. This issue was not appealed therefore, the precedent is considered applicable.⁹⁶

However, later in the *Thai-Poland H-beams* case, the same issue arose at the panel stage. The holding there was somewhat different in that the panel report implied there is a hierarchy of preference. There, the issue related to Article 2.2.2(i) and the analysis of the term “category of products.” The panel noted the text of Article 2.2.2(i) does not provide any elaboration as to the meaning of “the same general category of products.”⁹⁷ Yet, the panel found guidance in other aspects of Article 2.2, particularly its chapeau and “overall structure.” The panel ruled these provisions set a preference for use of the actual profit data and provided instructions as to how to achieve an appropriate proxy when actual data cannot be used.⁹⁸ In this way, the intention of the provisions is “to obtain results that approximate as closely as possible, the price of the like product in the ordinary course of trade in the domestic market of the exporting country.” In the panel’s view, this objective points toward use of a narrower category than a broader one.⁹⁹

⁹⁵ *Bed Linen* panel report, para. 6.54.

⁹⁶ *ibid.*, para. 6.58-6.62.

⁹⁷ *Thailand-Anti-Dumping Duties on Angels, Shapes, and Sections of Iron or Non-Alloy Steel and H-Beams from Poland* (WT/DS122/AB/R) (Adopted: April 5, 2001) {hereinafter *Thai-Poland* or *Thai-Steel*} panel report para. 7.111-112.

⁹⁸ *ibid.*, para. 7.111-7.113.

⁹⁹ *ibid.*, para. 7.114.

The fact that the *Thai-Poland* panel decided to look at the provision in context and stated the purpose of the provision is to find the most approximate price possible shows the provision implicitly suggests a hierarchy of preferences. To affirm this point Article 2.2.2(iii) states other reasonable methods can be used, further expressing a desire for reasonability and close approximation. The panels in both *Bed Linen* and *Thai-Poland* rejected a general reasonability test requirement for Article 2.2.2, stating the first two paragraphs i.e., 2.2.2(i) and 2.2.2(ii) naturally provide reasonable results. The panellists, by making this holding in essence, relegated Article 2.2.2(iii) to an inferior option. The first two provisions are in themselves, reasonable whereas the third provisions reasonability is open to question. If the purpose is to approximate as closely as possible then the first two options are more preferable as reasonability is presumed.¹⁰⁰ If that is true, then it is difficult to think that Article 2.2.2's first two provisions are not preferentially ordered but the third proviso is so. It can only be deduced from the ruling in *Thai-Poland* that a preferential order exists.

Developing countries are often the targets of constructed normal values due to their lack of accounting and data sophistication both at the firm level and at the national economic level.¹⁰¹ There is simply less definitive statistics, data and transparency when it comes to cost and production data, or that developed countries deem the data

¹⁰⁰ Logically, reasonable is preferable by the fact that reasonability is considered a requirement and it is not subject to review. Essentially, the first two options are automatically reasonable and if a Member is seen to be in compliance with them then they are in conformity with WTO law. However, a reasonability test can be required if a Member selects the third option and an exporting Member could challenge the reasonability of the methods employed by the investigating member.

¹⁰¹ Wint, A.G., *Corporate Management in Developing Countries*, 1995, (Quorum Books) p. 157.

unreliable because it does not conform to their own methods of data collection.¹⁰² Therefore, the developing countries want a more streamlined and methodical system of SG&A/profits calculation. They would prefer a system that mandates investigating authorities to try to find the most approximate values for SG&A/profits. To this end, they would want a preferential order for Article 2.2.2 especially since the third proviso grants investigating authorities a very high level of discretion in the price calculations.

The decisions of the *Bed Linen* and *Thai-Poland* cases are not predictable and consistent. The former ruled against a preferential order whilst the latter implicitly ruled in favour of one. The members are left uncertain as to how SG&A/profits in constructing normal values are to be treated. This has an effect on their gathering and presentation of evidence in future dispute settlement proceedings. Although the ruling in *Thai-Poland* would be the desirable outcome, nonetheless, they are not sure whether the next panel or the AB will accept the preferential order. Therefore, the lack of predictability and the inconsistency between the rulings of the two cases creates a norm that does not pass the legitimacy requirements of the development approach.

If the ruling in *Bed Linen* is upheld in future disputes then justice had not been properly served as the weaker developing country members are more prone to inflated dumping margins in relation to constructed normal values. If the preferential order is reaffirmed then at least the investigating authorities have to justify their use of less

¹⁰² Jones, K., *Export Restraints and the New Protectionism: The Political Economy of Discriminatory Trade Restrictions*, (Michigan Press 1994) p. 101-110.

optimal options in the context of Article 2.2.2 and as such, they would be more open to review by the adjudicators and less deference is given to them on an issue which is open to protectionist abuse.

5.4.1 Low Volume Sales

Another aspect of Article 2.2.2, which has risen lately in WTO jurisprudence, is the inclusion of low volume sales in the calculation of SG&A/profits. The AB in the *EC-Pipe Fittings* case provided the most guidance on the issue, yet its interpretation does not fulfil the requirements of the development approach to fairness. The EC in its calculation of normal value had excluded low volume sales according to Article 2.2. Yet, invoking Article 2.2.2, the EC included the low volume sales in its determination of SG&A/profits. Brazil claimed since the low volume sales were not included in the calculation of normal value then the SG&A/profit calculation based on data about low volume sales should also be eliminated.¹⁰³ The panel and AB ruled against the Brazilian claim holding that in Article 2.2, the language explicitly requires the elimination of low volume sales and sales not made in the ordinary course of trade, whilst the language in 2.2.2 only excludes sales outside the ordinary course of trade for the calculation of SG&A/profits, thus the EC practice is consistent with its ADA obligations.¹⁰⁴

¹⁰³ *EC-Pipe Fittings* AB report para. 91-93.

¹⁰⁴ *EC-Pipe Fittings* AB report para. 95-99.

The adjudicators' decision based on such a narrow and technical reading of the provisions is not convincing. Firstly, Article 2.2 clearly states that "proper comparison" is needed and therefore, low volume sales should not be included in the calculation of overall price. One can infer that low volume sales are somehow different than other forms of sales. Article 2.2 sets out the three different approaches that can be taken in order to determine whether dumping has occurred. The third option is to evaluate the "cost of production in the country of origin plus a reasonable amount for administrative, selling, general costs, and for profits." Moreover, Article 2.2 clearly states that when there are no sales in the ordinary course of trade in the domestic market, or when there are low volumes of sales in the domestic market, these situations do not allow a proper comparison. The comparison at issue is price-based, which should extend to the calculation of SG&A/profits. Therefore, when determining SG&A/profits, based on Article 2.2, a proper price comparison cannot be made when there are low volumes of sales.¹⁰⁵ The inability to make a proper comparison extends to both the cost of production and the SG&A/profits. Article 2.2 does not make such an explicit dichotomy. Simply because Article 2.2.2, which details with more specificity, the manner in which SG&A/profits are to be calculated, does not detach itself from the supra-paragraph of Article 2.2.

The very technical and literal interpretation, which entails the adjudicators struggling to find the intention of the provision based on the elimination of certain terms, does not justify dismissing other relevant parts of the Article. If a contextual evaluation or

¹⁰⁵ See amongst others, Saffran, B., *Price Theory and its Application*, (Cheltenham 1998) section on Low Volume Sales.

one based on a reading of the object and purpose of the Article and the ADA in general had been made, then achieving “proper comparison” would have been the focus of the adjudicators. Consequently, they would have ruled in favour of Brazil and deemed it appropriate to eliminate low volume sales. In many instances, the calculation of SG&A/profits includes certain fixed costs which would lower the per unit cost of the product when sold in higher volumes and increase the per unit cost sold at lower volumes thereby affecting the dumping margins. The panel and AB refused to delve into the nature of the market or at least qualify its ruling based on market circumstances. For example, if a producer in the EC was selling thick ski jackets the calculation of the SG&A/profits would most likely have to be conducted based on its sales to mostly northern European countries and other potentially cold regions, and not on its SG&A/profits in Malta. In sum, the SG&A/profits are directly linked to the cost of production and overall price and as such, if low volumes sales are eliminated from the cost of production calculations then it should also be eliminated in the SG&A/profits calculation.

Furthermore, the AB did not in any way, require that if certain low volume sales indicated a lower margin for SG&A/profits then investigating authorities are required to include them in the calculations. The authorities are granted the discretion to selectively choose the instances where low volume SG&A/profit calculations could be included. For example, a producer may not want to sell low volumes of a product at high profit margins, as this may be work against them in antidumping investigations. Another interesting point is Brazil during the proceedings, presented a hypothetical

scenario whereby, the interpretation of the panel (upheld by the AB) implies that the chapeau of Article 2.2.2 would allow a constructed value to be identical to a normal value that is based upon low volume sales under Article 2.2.¹⁰⁶ The possibility of such a situation should be additional guidance to adjudicators that low volume sales can be read into Article 2.2.2. The AB rejected Brazil's argument holding that "we are of the view that the possibility of the outcome suggested by Brazil, based on a certain set of circumstances, cannot overcome the specific text of the chapeau of Article 2.2.2."¹⁰⁷ However, there is no specific text that says anything about low volume sales in Article 2.2.2, rather the adjudicators read low volume sales implicitly.

The reasoning of the AB on this issue does not do justice to developing nations. These nations are most often being targeted and the calculations by the investigating authorities of the developed world are being done by constructed value. Investigators have much discretion to inflate margins. The lack of institutional and corporate sophistication puts developing countries at a disadvantage in relation to the data and evidence they must present to the investigating authorities of developed nations, which require data and evidence to be as sophisticated as their own industries. The SG&A/profits amounts is a very fluid and instable amount as market situations, corporate marketing strategies, and geographical requirements are just some of the possible reasons why the SG&A/profit for low volume sales distort overall general amounts that are pervasive in the domestic market.¹⁰⁸ In *EC-Pipe Fittings*, if one of the targeted Brazilian firms due to managerial or other bureaucratic reasons, started

¹⁰⁶ *EC-Pipe Fittings* AB report para. 90-92.

¹⁰⁷ *EC-Pipe Fittings* AB report para. 99-101.

¹⁰⁸ Wint, A.G., *supra* at note 99, pp. 161-163.

selling to a buyer which would require less administrative and profits due to ease of sale for a short period of time, should that low level of SG&A/profits for a low volume of sales be used to inflate dumping margins? The answer is that those prices would not be indicative prices or even the closest approximate price, because as mentioned, low volume, low SG&A/profit data is not required to be addressed.

Developing country firms seek to reduce the discretion of investigating authorities where margin inflation is possible and they usually want to be accountable for the price that is most approximate to the general pervasive price of a product. The economic and corporate structures of developing countries creates many instances where prices of products become more unstable and volatile, and allowing low volume sales in calculation of SG&A/profits which is already an amorphous and vague exercise, only harms them by allowing more margin inflation. Thus, the justice of this ruling is lacking as the disadvantaged members are put in a position of greater harm than developed Members.

5.5 Injury Determination and Causation

As mentioned in the previous chapter, one of the main problems facing the developing countries is the manner in which AD law is being interpreted and implemented by national authorities of importing countries. Article 3.1 sets a general criterion under GATT Article VI of GATT for any injury determination in an anti-dumping case, i.e., that the determination be based on “positive evidence and involve an objective

examination” of three factors. They are: 1) the volume of dumped imports; 2) the effect of dumped imports on prices in the importing country of like product; 3) the impact of dumped imports on producers of like products in the importing country. The subsequent provisions elaborate on these general criteria. Article 3.2 deals with the first two factors, which are volume and prices. Article 3.4 and 3.5 deals with the impact of dumped imports (third factor) and causation, respectively.¹⁰⁹ This section will evaluate three of the more important cases, which involved the issue of injury and causation. They are the *Thai-Poland*,¹¹⁰ *Japan-Steel*,¹¹¹ and *EC-Pipe Fittings*¹¹² cases.

¹⁰⁹ These provisions state:

Article 3.1- A determination of injury for the purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.

Article 3.2- With regard to the volume of the dumped imports, the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member. With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several factors can necessarily give decisive guidance...

Article 3.4-The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments or utilization of capacity, factors affecting domestic prices, the magnitude of the margin of dumping, actual and potential negative effects on cash flow, inventories, employment, wages, growth, and ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

Article 3.5- It must be demonstrated that the dumped imports are through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before authorities. The authorities shall also examine any known factors other than the dumped imports, which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, inter alia, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

¹¹⁰ *Thailand-Anti-Dumping Duties on Angels, Shapes, and Sections of Iron or Non-Alloy Steel and H-Beams from Poland* (WT/DS122/AB/R) (Adopted: April 5, 2001) {hereinafter *Thai-Poland* or *Thai-Steel*}

5.5.1. Article 3.1 and the “Objective Examination” of “Positive Evidence”

In the *Thai-Poland* case the panel was required to interpret Article 3.1. Poland claimed Thailand violated Article 3.1 of the ADA, in that Thailand failed to make its material injury determination based on an “objective examination” of “positive evidence.” In other words, the investigating authorities were not unbiased and objective in their assessment. This was because Thailand had stated that its assessment was based on certain confidential evidence that could not be shared with the Poles, as it would undermine Thailand’s industry secrets. The Panel, however, did not accept the Thai argument and agreed with the Poles. The Panel in general terms held that Article 3.1 requires the investigating authorities of Members must support their reasoning based on evidence and documents on record, and interested parties have been given access to those evidence. Also, the factual basis underlying the authorities’ decision must be “discernable” from those documents.¹¹³ Therefore, the Panel refused to examine confidential documents that had not been shared with the interested parties upon which the Thai authority claimed to have relied in reaching its injury determination.

Thailand appealed the Panel’s interpretation of the ADA Article 3.1. The AB began by first examining the wording of Article 3.1 and noting that Article 3 as a whole,

¹¹¹ *Japan-Steel* case at note 10.

¹¹² *European Communities-Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil* (WT/DS219/AB/R) (Adopted: August 18, 2003) {hereinafter *EC-Pipe Fittings* or *Pipe Fittings*}.

¹¹³ *Thai Steel* AB report, para. 112.

contained obligations Members must follow with respect to injury determinations and that Article 3.1 contains fundamental obligations that inform the more detailed obligations contained in the succeeding paragraphs.¹¹⁴

The AB overturned the Panel's interpretation as to the scope of the evidence, which can be examined in the context of Article 3.1. First, the AB pointed out anti-dumping investigations delve into the commercial behaviour of firms and in this way, involve the collection and analysis of both confidential and non-confidential information. As contextual support, the AB referred to the mandate in ADA Article 3.7 that injury findings be "based on facts and not merely allegation, conjecture or remote possibility" observing, based on this provision, that the key issue with respect to the evidence that serves as the basis of an investigating authority's injury determination is the "nature" of the evidence underlying the determination, and not whether that evidence is confidential or disclosed.¹¹⁵

The AB found additional support for its position in other areas of the ADA. It noted procedural and due process obligations are contained in Article 6 of the ADA which ensure certain evidence is disclosed to parties, that parties have full opportunity for defence, and that parties are informed of all essential facts that form the basis of the investigating authority's decision. The AB could find no justification for reading these types of procedural and due process obligations into the substantive injury

¹¹⁴ *ibid.* para. 106.

¹¹⁵ *ibid.* para. 108.

provisions of Article 3.¹¹⁶ Similar to the obligations in Article 6 of the ADA, the AB noted that Article 12 establishes “a framework of procedural and due process obligations concerning notably, the contents of a final determination.” Yet again, the AB found no reason to read these obligations into the injury standards in Article 3.¹¹⁷

Even though the investigating authority in this case was Thailand, a developing country, nonetheless, the ruling on confidential information is not conducive to gaining access to industrialised markets in the end. The panel’s decision is more in line with fundamentals of due process. The AB’s decision, in contrast, denies the exporters the opportunity to cross-examine and counter the investigators’ evidence. What is not clear is whether the panellists’ examination of the confidential material and their subsequent ruling is sufficient, as they are not equipped with the detailed knowledge and data that is needed to assess the evidence.

The AB believed that understanding the nature of the evidence is vital to make a judgement on the validity of the claimant’s arguments. In this case, the exporter has no input as to what it believes is the nature of the investigators’ evidence and therefore, is precluded from the opportunity of a proper rebuttal. This ruling encourages Members to devise sophisticated and complex confidentiality regulations so as to protect its firms from divulging undesirable data. The Quad Members already have complex and highly protective rules on confidentiality.¹¹⁸ Developing countries on the

¹¹⁶ *ibid.* para. 109.

¹¹⁷ *ibid.* para. 110.

¹¹⁸ Regulations could be devised that make data and information protection more comprehensive and strict, solely in antidumping investigations. Members would be hard pressed to challenge these

other hand, have less strict and protective confidentiality laws. It is quite possible that crucial evidence is being asymmetrically disseminated and the rules spelled out in Article 6 and 12 do nothing to alleviate the problem.

The AB's reliance on Article 6 and 12, which demand information be factual and set forth standards for the dissemination of evidence to opposing parties, is simply based on good faith application of those provisions. But there may be no effective way of validating the good faith of investigating authorities. The nature of antidumping measures as a protectionist tool makes reliance on the proper interpretation and application of antidumping rules by national authorities doubtful.

Another scenario resulting from the ruling is in obvious or easy cases where the nature of evidence is clear, the adjudicators could rule whether the information is admissible or addressable. However, in hard cases, the assumption will be the investigating authorities have the power to decide how they want to use the supposed confidential material. The AB has tilted the balance in favour of the importing country on this matter. This does not bode well for the developing countries, as they will be hard pressed to fight cases where confidential materials are used. The systematic benefits

regulations under the current WTO laws pursuant to the ADA, TRIPS and its trade secrets provisions, and Article III of the GATT national treatment principle. Neither the ADA nor the TRIPS prevent Members from such regulations. The national treatment provisions of the WTO relate to any differential treatment given to products of foreign firms within the importing countries territories. This cannot apply to confidential material of the domestic firms. The same regulations would apply to the foreign firm or product but they do not have standing in relation to the antidumping investigations. The only remote possibility would be a challenge under Article XXIII and the non-violation clause of the GATT. The possibilities of success is slim as the burden of proof is much higher for these claims and also, there are not any rulings on this provisions in the WTO or even GATT jurisprudence.

of this ruling are unjust to developing nations, as a lack of legal and institutional resources puts them at an even bigger disadvantage vis-à-vis developed countries.

With respect to Article 3.4 and 3.5 of the ADA, the ruling is sound. However, it does not go far enough and as later cases indicate, the AB refuses to continue a line that separates other factors of injury from the injury caused by dumped goods. The AB ruling that the 15 factors must be examined and separately analysed is a good starting point. This could make the process more transparent and asks that the investigating authorities conduct a more comprehensive investigation. But how and to what extent should those 15 factors be given weight is a question that was not answered by the AB. Thus, this victory is not so important because it does not go far enough. It does make the investigating authorities work harder and allows the panels to get a better picture of the state of the domestic industry of the importing Member, but it does nothing more substantial. In fact, in the next case we will see that the AB will not allow any more scrutiny of investigating authorities in this regard.

5.5.2 Cumulative Assessment of the Effects of Dumping

In the *EC-Pipe Fittings* case, Brazil claimed the EC acted inconsistently with ADA Articles 3.2¹¹⁹ and 3.3¹²⁰ by “cumulatively assessing the effects of dumped imports

¹¹⁹ Article 3.2: With regard to the volume of the dumped imports, the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member. With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant

from several countries, including Brazil, without analysing the volume and prices of dumped imports from Brazil individually, pursuant to Article 3.2.” The panel rejected this claim concluding the conditions identified in Article 3.3 are the “sole” conditions that apply in order to partake of a cumulative assessment of the effect of dumped imports.¹²¹

As stated by the AB, “The issue before us is whether an investigating authority must first analyse the volumes and prices of dumped imports on a country-by-country basis under Article 3.2 as a pre-condition to cumulatively assessing the effects of the dumped imports under Article 3.3.” In addressing the issue, the AB first considered the text of Article 3.3, which expressly identifies three specific conditions to be met before a cumulative assessment can be carried out. By contrast, the AB saw no basis in Article 3.3 for an additional requirement that a “country-specific analysis” be treated as a “pre-condition” for a cumulative assessment. Nor, it said, was such a requirement contained in Article 3.2.¹²² The AB noted its agreement with the Panel in that “it is possible for the analyses of volume and prices envisaged under Article 3.2 to be done on a cumulative basis, as opposed to an individual country basis, when dumped imports originate from more than one country.”¹²³

degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

¹²⁰ Article 3.3: Where imports of a product from more than one country are simultaneously subject to anti-dumping investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that (a) the margin of dumping established in relation to the imports from each country is more than *de minimis* as defined in paragraph 8 of Article 5 and the volume of imports from each country is not negligible and (b) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.

¹²¹ *EC-Pipe Fittings* AB report, para. 103-104.

¹²² *ibid.* para. 110-111.

¹²³ *ibid.* para. 113.

Finally, the AB stated, “the apparent rationale behind the practice of cumulation confirms our interpretation that both volume and prices qualify as ‘effects’ that may be cumulatively assessed under Article 3.3.” It further held, “A cumulative analysis logically is premised on a recognition that the domestic industry faces the impact of the ‘dumped imports’ as a whole and that it may be injured by the total impact of the dumped imports, even though those imports originate from various countries.” Moreover, “by expressly providing for cumulation in Article 3.3 of the Anti-Dumping Agreement, the negotiators appear to recognize that a domestic industry confronted with dumped imports originating from several countries, may be injured by the cumulated effects of those imports, and that those effects may be adequately taken into account in a country-specific analysis of the injurious effects of dumped imports.”¹²⁴ The AB also reaffirmed the Panel’s belief that Brazil’s interpretation would render cumulation ineffective.¹²⁵

The argument that the Article 3.3 stands on its own and does not mandate a country-by-country evaluation before making a cumulative one is spurious and counterintuitive. Firstly, the text of Article 3.3(a) requires that each country’s dumping margins be assessed individually. True, it does not ask for the same with regard to injury determination, but it is odd that one of the main criteria for justifying antidumping measures could be eliminated simply because more than one country is involved in the investigation. If one were to understand Article 3.3 as allowing Members to be grouped together (collective burden) then it is possible, as Brazil argued, Members

¹²⁴ *ibid.* para. 116.

¹²⁵ *ibid.* para. 117.

could be punished although they do not meet the requisite criteria for dumping determination, i.e., that a member whose goods had not caused injury to the domestic industry be levied antidumping duties. In order for this reasoning to be justified, the overarching assumption in every case that involves more than one Member is that there is some form of coordination between exporting firms in different Members.¹²⁶

Secondly, Brazil linked Article 3.3 to the requirements of Article 3.2, which asks that during the investigation into injury determinations, each country is supposed to be assessed on volume and price. The volume and price examination is part and parcel of the overall injury determination that is to take place. It is inconsistent that on one level, volume and price which are crucial to injury determinations take place on a country by country basis but when more than one Member is involved and injury is to be cumulated there is a differentiation in the examination. This differentiation creates a situation where it is possible that a Member has satisfied Article 3.2 but could still be found guilty. Therefore, not only can a Member who is not injurious to domestic industry be charged with dumping by association but also even if they are not undercutting prices or have not had surges in imports from that particular Member they can still be punished. This is counter to Article VI of the GATT and incongruous with the last sentence of Article 3.2, which says, “No one or several of these factors can necessarily give decisive guidance.” This leaves the door ajar for gap filling by

¹²⁶ It is also possible the market conditions are such that dumping is more likely but that could be due to regulatory and competitive nature of the importing nation. It does not justify grouping non-injurious exporters with injurious firms. The importing nation could also seek other forms of legal trade protection covered by other agreements of the WTO depending on the type of product.

the AB in order to rectify the apparent conflict between principles of antidumping regulations and a specific discrepancy caused by the language of Articles 3.2 and 3.3.

The AB and panel should have linked the two articles or at least acknowledged that under these provisions, the possibility exists that a non-injurious firm or firms from a particular Member are being punished and as such, should be exempted from antidumping duties (ADD). The language of the Articles would certainly allow the adjudicators to make such a ruling. It is understood that the purpose of interpreting Article 3.3 in this way may have been that the firm is dumping and the importer is being harmed due to the fact that many firms in different countries are causing this harm. However, if there are some firms that are injurious while others are not though dumping has been determined, then the only proper way would be for those that meet all the criteria for antidumping measures to be found guilty. The non-injurious firms should not have to reimburse for the harm caused by other exporters.

5.5.3 Article 3.4 and Implicit Analysis of Factors

In the panel phase of *EC-Pipe-Fittings*, Brazil claimed Europeans had not “explicitly” addressed “growth,” one of the injury factors listed in Article 3.4. In reply, the EC argued, “While no separate record was made of its evaluation of ‘growth’ its consideration of this factor is implicit in its analysis of the other factors.” The panel rejected the Brazilian claim, noting that Article 3.4 requires “substantive, rather than purely formal, compliance,” such that an “implicit” analysis of this factor is sufficient.

Here, the panel stated the record illustrated the implicit consideration of the “growth” factor by the EC. Brazil appealed claiming both Article 3.1 and 3.4 require explicit analysis of each injury factor.¹²⁷

On appeal, the AB held that Article 3.4 calls for an “evaluation” of the relevant factors but does not address the “manner” in which the results of the investigating authority’s analysis are to be set out in the published reports. Similarly, the requirements of “positive evidence” and “objective examination” in Article 3.1 do not regulate this “manner” either.¹²⁸ During the AB hearing Brazil claimed that if it is sufficient to deduce implicit satisfaction of factors by merely addressing some of them, then the requirement that all 15 factors must be met is rendered ineffective. However, the AB disagreed and stated, “The obligation to evaluate all fifteen factors is distinct from the manner in which the evaluation is to be set out in the published documents.” It continued, “That when the analysis of a factor is implicit in the analyses of other factors does not necessarily lead to the conclusion that such a factor was not evaluated.” Therefore, “Because Articles 3.1 and 3.4 do not regulate the manner in which the results of the analysis of each injury factor are to be set out in the published documents, we share the panel’s conclusion that it is not required that in every anti-dumping investigation a separate record be made of the evaluation of each of the injury factors listed in Article 3.4.”¹²⁹ Then after an assessment of the facts of the case it upheld the Panel’s decision that the evaluations conducted by the EC met all the 15 factors mandated by Article 3.4.

¹²⁷ *EC-Pipe Fittings* AB report, para.152-154.

¹²⁸ *ibid.* para.157-159.

¹²⁹ *ibid.* para. 160-161.

The AB's upholding of the Panel's decision in the context of Article 3.4 and the EC's contention of an "implicit" evaluation "growth" is an unpredictable and arbitrary holding. After having ruled that the 15 factors associated with injury determination must be done completely, the AB diminished the effectiveness of that ruling by holding that investigating authorities have the discretion to select the manner in which the factor is set out in the published documents.

This is in contrast to its decisions pertaining to the Safeguards Agreement. In the *US-Wheat Gluten Safeguards*¹³⁰ and *US-Line Pipe Safeguards*¹³¹ cases, the AB held that in order to comply with the requirements of the Safeguards Agreement's "parallelism" clause explicit mention of the evaluation by the national authorities is required. Again, in the *US-Line Pipe Safeguards* case it held the non-attribution clause of Article 4.2 (b) must be established explicitly with its relevant reasoning and explanations.¹³²

The ADA and the Safeguards Agreement relate to a different set of obligations but do share similarities in that they are trade contingent remedy agreements and as such, instruments to increase barriers to trade. Furthermore, the AB has accepted that there are "considerable similarities" in the non-attribution clause of the two agreements. Both demand the injury caused to a domestic industry by factors other than imports

¹³⁰ *US-Definitive Safeguards measures on Imports of Wheat Gluten from European Communities*, WT/DS166/AB/R (adopted Jan. 19, 2001) para. 98.

¹³¹ *US-Definitive Safeguards Measures on Imports of Steel Wire Rod and Circular Welded Quality Line Pipes* WT/DS202/AB/R (adopted Mar. 8, 2002) para. 181-198.

¹³² *ibid.* para 216-220.

not to be confused with injury caused by imports.¹³³ The AB has not helped in the transparency of the investigation process with this result and therefore, only tends to harm developing nations, since they have less opportunity to challenge injury determinations due to their disadvantage vis-à-vis industrialised Members in data and evidence collection.

The distinction between the factors for investigation and the manner in which they are addressed and conveyed is a specious one as transparency was one of the main objectives of promulgating an anti-dumping agreement. Brazil's argument that the ruling negates the AB's previous ruling of mandating all 15 factors to be addressed is sound because the ruling also diminishes transparency of process.

Procedurally, for the AB to be able to establish whether an implicit consideration of factors has taken place either it has to defer completely to the Panel or it must actually make a factual finding on this matter. The latter is prohibited by the DSU, although frequently overlooked by the AB in its reasoning. In the former scenario, the Panel would have to be the arbiter of whether there was an objective assessment under both Articles 11 of the DSU and 3.1 of the ADA. As discussed in Chapter 2 on due process rights, the AB has set the bar for violations of Article 11 DSU so high as to accommodate only situations of grave error, ill will and those bordering on criminality by panellists. Thus, invoking this provision is impractical in the cordial diplomatic setting of Geneva. Yet if one were to invoke the objective assessment provision of

¹³³ *Japan-Steel* AB report para. 228-231. Article 4.2(b) of the Safeguards Agreement states: when factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports.

Article 3.1 in a situation where non-written, verbal or implicit analysis is tendered, the effectiveness of Article 3.1 is diminished. The claimant is denied knowledge on the true nature of the implicit arguments of another Member by preventing them from knowing the evidence before the hearings commence. If the implicit conclusions made by the defendant or investigating authority are not the same conclusion as the claimant or third parties to a dispute perceive, the challenger or the exporting nation is at a disadvantage. Furthermore, if a claimant were to appeal the Panel's ruling pursuant to 3.1 on an implicit finding by national authorities then the adjudicators are presented with another problem. Either the AB must make factual findings, or it must accept the Panel's findings, which were adjudicated based on verbal non-recorded statements and arguments of the national authority. The due process of the challenger is violated even more.

Arguably, the AB and the Panel simply did not want the Brazilians to evade sanctions because of a technicality in this case. However, that argument does not pass muster since the AB could have made such a ruling and could have stated that this case is a special circumstance or as in other cases, it states litigation techniques cannot be advanced over substantive and legitimate issues of disputes. However, the AB did not do this, instead it made a general and broad statement with precedential consequences, distinguishing between addressing ones obligations and the manner in which they convey them, even though there are principles of due process and transparency at stake. Paradoxically, the AB encourages detailed investigations on the one hand, yet

shows a willingness to accept implicit reasoning in relation to the substance of the factors under investigation.

5.5.4 Article 3.5-Causation and Non-Attribution

The panel in this case found the “relatively higher cost of production of the EC’s domestic industry did not constitute a ‘known factor other than dumped imports’ under Article 3.5.”¹³⁴ Furthermore, it found the “European Commission’s methodology in this investigation of analysing causal factors other than dumped imports on an individual basis, without consideration of the collective effects these factors, did not result in the attribution to dumped imports of injuries caused by other causal factors.”¹³⁵ Brazil appealed both these findings.

With regard to the first claim, the AB in contrast to the Panel held relative higher costs of production could be deemed as other known factors. However, it believed the EC had conducted such an assessment and found no real difference between the costs of production that would break the causal link between the injury suffered by EC firms and the dumped imports.

On the non-attribution requirement, under which injury from known factors other than dumped imports must not be attributed to dumped imports, the Panel had concluded the EC properly “analysed individually the causal factors concerned and identified the

¹³⁴ *EC-Pipe Fittings*, AB report, para. 164-166.

¹³⁵ *ibid.* para. 167.

individual effects of each of these causal factors.” The Panel rejected Brazil’s argument that these factors should have also been evaluated collectively. The Panel believed and later affirmed by the AB, that nowhere in Article 3.5 does it require Members to collectively assess the causal factors.

The AB after repeating the wording of Article 3.5, stated, “...we do not read Article 3.5 as requiring, in each case, an examination of the collective effects of other causal factors in addition to examining those factors’ individual effects.” Referring to its decision in *US-Hot Rolled Steel*, the AB said that while the non-attribution language of the ADA “necessarily requires that an investigating authority separate and distinguish the effects of other causal factors from the effects of dumped imports,” an examination of collective effects is not necessarily required. The AB continued by ruling that addressing collective effects is not compulsory in every case, rather there might be instances where such collective assessment is necessary. The domestic authorities are not bound to do so in every case; however, if such an evaluation is necessary due to specific factual circumstances in a particular case, then it must be performed.¹³⁶ The AB stated, “An investigating authority is not required to examine collectively all other causal factors, provided that under specific factual circumstances of the case, it fulfils its obligation not to attribute to dumped imports the injuries caused by other causal factors.”¹³⁷

¹³⁶ *ibid.* para. 190-193.

¹³⁷ *ibid.* para. 192.

The case-by-case holding pertaining to Article 3.5 and the non-attribution clause, is perplexing and harmful to countries with weaker economic development. The reason stems from the fact that the AB has only convoluted the ambiguities of the provision even more. It said that at times an investigating authority must examine the individual effects of causal factors, whilst there are situations where a collective approach to effects of causal factors must be done. The point according to the AB, is the authorities must abide by the provision in that they must make sure they simply do not attribute other factors causing harm from the effects of the dumped goods. However, this again becomes an exercise in numerical gymnastics. If it is to the benefit of the importing country then they could examine them individually, if not then collectively. How and what amount of blame must be attributed to other factors? What if the 20 different factors each had 2% percent of the blame when dumped goods carry a total of 20% blame to injured domestic firms? Should the authorities collectively examine the effects of other factors or will individual assessments suffice? What is the threshold of injury from each factor before a decision of collective or individual attribution is justified? Nothing in this ruling ameliorates the legal gaps of the provision. The only thing that the AB has done is to ask for a cursory review of non-attribution without any tangible effects on the investigation.

It would be prudent and logical to interpret the sentence, "...and the injuries caused by these other factors must not be attributed to the dumped imports," as making a collective statement. It would be grammatically sound to say that since "these" and "other" indicate a plural statement, that collection of these factors would be

appropriate. Numbers and factors are grouped in many different areas of math including statistics especially in parametrics.¹³⁸ It is also logical to think that all other factors could be evaluated vis-à-vis dumped goods so that the dumped goods have a higher responsibility. The problem here is that there is no concept or notion of what the threshold level of attribution must be. The AB diminishes the relevance or effectiveness of Article 3.5 and defers to the devices of the investigators. As a result, it has indicated to the investigators that Article 3.5 applies in situations where dumped goods are very clearly and with overwhelming evidence, not the cause of the injury. But if bad management, domestic market circumstances, natural disasters, structural financial problems, etc., are collectively the major causes for domestic industry troubles, then it is unacceptable the importing country makes foreign competitors who may combine for a smaller proportion of the overall cause to create “rent-seeking” circumstances for the domestic industry. The “rent-seeking” happens indirectly in form of current provisional or future permanent countervailing duties, which will be easier to apply with the adjudicators’ ruling on non-attribution. The justice, both in legal and economic terms of this conception espoused by the adjudicators, is spurious.

5.5.5 Captive Production and Article 3.5 (Japan-Hot Rolled Steel Case Revisited)

The application of the causation and non-attribution clause pursuant to Article 3.5 in relation to captive production was another matter of dispute in the *Japan-Steel* case. Japan had taken issue with the International Trade Commission of the US with regard to its determination of injury and “captive production” evaluation. “Captive

¹³⁸ Mann, P.S, supra at note 89.

production” refers to internal transfers of a like product, transfers within different parts of a business enterprise of a product that is like the merchandise subject to the AD investigation.¹³⁹ Captive production does not enter the open market. These transfers are distinct from “merchant market” into which a like product is sold to independent purchasers. The most common example of captive production is where a producer and consumer of the product are vertically integrated. The manufacturer produces downstream products such as finished products, a derivative or a more improved one. The problem with captive production arises during injury determinations because the domestic producers do not compete directly with importers. Usually, captive consumers do not need to buy from importers since their affiliate is producing the goods themselves.

US AD law pertaining to captive production states the ITC should “focus primarily” on the merchant market segment of the domestic industry, rather than both merchant market and captive production, when “determining market share and the factors affecting financial performance” of the industry.¹⁴⁰ However, this statute sets out certain conditions.¹⁴¹ Since the ITC claimed imports constituted a small amount of total production of hot-rolled steel made in the US, the law is designed to avoid this

¹³⁹ Bhala, R., *New WTO Antidumping Precedents Part Two: Causation, Injury Determinations, and Penalties*, (2002) 6 SINGJICL 980 p.985.

¹⁴⁰ Tariff Act of 1930 section 771(7)(C)(iv).

¹⁴¹ The conditions are: If domestic producers internally transfer significant production of the domestic like product for the production of a downstream article and sell significant production of the domestic like product in the merchant market, and the Commission finds that: 1. The domestic like product produced that is internally transferred for processing into that downstream article does not enter the merchant market for the domestic like product; 2. The domestic like product is the predominant material input in the production of that downstream article, and 3. the production of the domestic like product sold in the merchant market is not generally used in the production of that downstream article. Then the Commission must in determining market share and the factors affecting financial performance set forth in clause (iii) of 19 U.S.C. Section 1677(C)(iii), evaluate “all relevant economic factors” impacting the state of the domestic industry and lists a man examples of what they could be.

kind of evaluation by ordering the segmentation of the industry in certain cases. Here, the ITC based its affirmative determination on only 30 percent of the domestic sales of American steel producers, and ignored the larger and more profitable segment of the market whereby producers consume hot-rolled steel internally to manufacture other products.¹⁴² The indication is they must not only protect the industry as a whole, but smaller segments, at least those segments competing on the market.

Japan's claim in brief, was that the statutory instruction to the ITC to focus primarily on the merchant market "prevents a balanced assessment of the situation of the domestic industry as a whole and ignores the fact that a significant part of the domestic industry, captive production, is shielded or protected from the effects of the allegedly dumped imports."¹⁴³ Japan was asking how could an injury determination focus only on a segment of an industry whilst the larger segment of that industry, which is protected from foreign competition, be left out? As a result Japan claimed the US violated the ADA Article 3.1 and 3.4 by not making an "objective examination" and to evaluate "all relevant economic factors... having a bearing on the domestic industry," respectively. The Panel rejected Japan's claim and found in favour of the US.

The AB reversed the panel's decision in that it held the manner in which the US ITC applied US antidumping laws in this case was not consistent with the ADA. However, it did not hold the US AD laws were per se inconsistent with the WTO ADA. The AB

¹⁴² Pruzin, D., "*Japan Hot-Rolled Steel Dispute*" (Jan. 25, 2001) 18 Int'l. Trade Rep. 145.

¹⁴³ *Japan Steel AB Report*, para. 182.

in essence, read into Article 3.1 and its phrase “objective examination,” a good faith requirement. Its ruling affirmed the US law is in conformity with the ADA but its application to *Hot-Rolled Steel* was not performed objectively. The ITC failed in its responsibility by not using its discretion afforded to it by the statute on captive production in an objective way, because it focused exclusively on the captive production market instead of focusing primarily on it.

5.5.5.1 Japan’s Causation Claim Under Article 3.5

Japan was basing its claim on the non-attribution clause of Article 3.5, which calls upon investigating authorities to avoid attributing cause for injury from dumped imports when in fact, other factors are to blame. Japan believed the ITC did not evaluate other factors that were harming US industry aside from dumped imports, and it failed to ensure injury caused by other factors were not attributed to Japanese imports. Japan claimed the US failed to look into other factors such as the general strike by General Motors’ employees, a decline in demand, and an increase in smaller steel mills across the US. The Panel rejected this argument holding that the key issue with the non-attribution clause is not that the investigating authorities must demonstrate that dumped imports alone, caused injury, rather that these other factors do not break the causal link between dumped imports and the injury to domestic firms.

It relied on precedents established in other cases.¹⁴⁴ The Panel concluded the non-attribution clause of Article 3.5 does not call for isolating each of the other potential independent variables or for a finding that dumped imports alone was capable of causing the injury. Rather, the clause required clarity and avoidance of confusion of every other factor with the dumped imports.

The AB on appeal overruled the Panel in a nuanced way. It held the Panel was in error by not mandating the investigating authorities to separate and to distinguish the injurious effects of other known causal factors from the damage done by dumped goods. After a thorough response to Japan's claim the AB promulgated a five-step process pertaining to causation. The investigating authorities of Members must: 1) identify factors that could be injurious; 2) make sure these factors exist simultaneously; 3) examine all these factors ensuring they are in actuality, causing injurious effects; 4) distinguish between two categories of known factors and the injurious effects of all other known factors, and 5) ensure damage done by other factors is not attributed to the dumped imports.

With regard to the first claim by Japan and the lack of consideration by the US of the captive production, Japan's arguments prevailed. However, the precedent set here is anything but assuring. After the Panel sided completely with the US, the AB merely used a nuanced approach by citing that the US in essence, did not apply its laws properly. Although the law itself is consistent with WTO regulations, the manner in

¹⁴⁴ These cases include, *US- Atlantic Salmon Anti-Dumping Duties* GATT (B.I.S.D.) 41st Supp., vol. 1 1994 (adopted by Committee on Antidumping Practices Apr. 27, 1994), and *US-Wheat Gluten* (WT/DS166/AB/R) (adopted Jan. 19, 2001) cases.

which the law was applied was counter to the “objective assessment” criteria under Articles 3.1 and 3.4 of the ADA.

Before this case, it had been well-established in panel reports that some kind of market sector analysis is permitted under AD Agreement Article 3. In fact, one might argue that in certain cases a sectoral analysis might be required as a "relevant factor" under Article 3.4. The *Mexico - HFCS*¹⁴⁵ case made clear, however, that investigating authorities should not base an injury determination on data pertaining to only one sector of a domestic industry. Rather, pursuant to Articles 3 and 4, injury determinations must always be made on the basis of the domestic industry "as a whole." There, Mexico completely ignored the situation of the sector of the domestic industry that sold sugar to the household sector in its injury analysis, and therefore, the panel found a violation.

This case added a different twist to the issue. Here, in the context of the underlying investigation, the ITC under the U.S. captive production provision, examined data concerning the merchant market sector for *Hot-Rolled Steel* and data regarding the domestic industry "as a whole" but it did not examine separately the captive production sector. The Appellate Body found this application of the captive production provision violated Article 3. Specifically, because the ITC examined data for the merchant market sector in isolation, it also should have examined data for the captive production sector.

¹⁴⁵ *Mexico-Anti-Dumping Investigation on High Fructose Corn Syrup from the United States*, WT/DS132/R, (adopted Feb. 24, 2000).

The panel and Appellate Body in *US-Cotton Yarn*¹⁴⁶ also considered the issue of captive production. There, the Appellate Body upheld the Panel's conclusion that the United States violated Article 6.2 of the Agreement on Textiles and Clothing by excluding “captively” produced combed cotton yarn from the scope of the domestic industry in a safeguard investigation.

The issue of captive production and merchant market is cause for concern for developing countries. They face much more sophisticated and elaborate corporate structures with vertical integration at many levels in the developed countries that produce goods, which can compete with their firms. Therefore, captive production if eliminated from injury determinations, will allow for domestic authorities to be ever more selective in the manner in which they categorize and analyse domestic markets. This is because there is nothing that would prevent investigating authorities from including a captive market when they see benefits in doing so. The only condition is that one cannot look at one segment in isolation and not look at the other. In addition, there must be some semblance that the proviso in Article 3, which states the “domestic industry as a whole,” must be evaluated. Under the current rule, it can segment based on different competitive relationships. This, coupled with the inherent ambiguity of “like” product analysis can only enhance the discretion of investigating authorities to the detriment of exporter, especially the Members with less resources and sophistication in their own industries to fight such allegations.

¹⁴⁶ *US-Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R (adopted Nov. 5, 2001).

Furthermore, Article 3 issues can cause problems with the approach taken by the AB, i.e., that concentration on captive production could be acceptable, as long as some form of consideration for “domestic market as a whole” is made. First, Antidumping law as mentioned before does not focus solely on competition, even though the competitive relationship of products is crucial in antidumping investigations. Issues such as employment, national champions, products’ physical characteristics in “like” product analysis, and general political and interest group consideration play a large role. So, a purely competition approach is not always justified. Second, captive production is an ambiguous term. Steel or input commodities may be easier to isolate as one captive product but what about more complex goods? For example, can a motor that has its component parts produced by other firms, sold to a down stream firm for use in refrigerators, be considered a captive production? Most likely not, but under the AB’s approach that would be entirely up to the investigators. These loose ends to the AB’s analysis premised on objectivity of investigation authorities is essentially dodging the issue at stake, which is the manner and extent to which the investigators segment their market.

Another example could be secondary competitors (in the example above, motor parts makers) that may change their corporate structure or cyclical issues such as demand, may be considered as other factors in injury determination but will be precluded from the evaluation, as more often they tend to exonerate exporters from causation. Third, the AB’s report only encourages nuanced approaches to defining domestic market. It

serves to create categories of products and sectors that may function as changing the contours of the domestic market. Of course, this kind of categorization has existed in the realm of competition law and antidumping regulation since their founding, but the AB's ruling does nothing to clarify and streamline Article 3 of the ADA.

Moreover, the elimination of captive production from the analysis is difficult to justify. Firstly, there is nothing in the ADA or other trade contingency Agreements of the WTO to indicate domestic markets may be segmented in this manner. Article 4 of the ADA speaks about the definition of domestic market. The definition presented there is related to how a Member may define domestic markets but it does not indicate how that domestic market may be segmented. The only requirement is that a significant proportion of production of a good may be constitutive of domestic market.

5.6 Possible Justifications for the Adjudicators Disposition and Their Rebuttal

Many commentators have claimed that many of the doctrinal problems in their decisions are due to their objective of trying to streamline the antidumping process or because of political considerations. The four most common justifications provided by these commentators are that the adjudicators are trying to: a) adhere strictly to a textual interpretation; b) promotion of free trade objectives; c) promote methodical investigations; and d) take into account the institutional politics of the WTO.¹⁴⁷ The

¹⁴⁷ Vermulst, E., Mavroidis, P.C., & Waer, P. *The Functioning of the Appellate Body after Four Years-Towards Rule Integrity*, 1999, 33 J. W. T. 2, p. 1-50 for adherence to textual interpretations. Tarullo, D.K. *supra* at note 10 p. 119-127 (explaining all four elements); Steinberg, R.H., *Judicial Lawmaking at*

first two points have been discussed throughout the chapter by demonstrating the problems associated with overly textual interpretations and also the impediments to developing country exports by granting excessive discretion to investigating authorities. This section will briefly discuss the latter two justifications that may exist for the manner and methods of interpretation conducted by the adjudicators. The underlying point is that in practice, the adjudicators have also failed to achieve their objectives of promoting methodical investigations and taking institutional politics into account. To this end, they may have ignited more controversy, and have only weakened the positions of the developing countries by generating norms that systematically erode any expected gains negotiated in the UR.

5.6.1. Promotion of Methodical Investigations

One of the goals of the AB is described as curbing shoddy investigations in the hope of encouraging Members to be more methodical. In order to do so, the ability of investigators to play with numbers so as to obtain the dumping margins they would like should be curtailed. The adjudicators have not been able to do so, both with regard to finding dumping margins by constructing values or by their rulings on injury determination. The rulings that allowed SG&A/profits and zeroing under Article 3.2 for price undercutting only grant more discretion. The text of the agreement would have allowed them to limit the national investigators discretion without compromising

the WTO: Discursive, Constitutional, and Political Constraints, (2004) 98 Am. J. Int'l. Law 247 (explaining that judicial politics is a crucial element in the WTO dispute settlement process).

the legitimacy or justice of their ruling. With regard to Article 3 and injury determinations they also failed to promote methodical investigations.

The AB in *Japan-Steel* held that delineating among the injurious effects of known factors is required by the investigating authorities of importing Members pursuant to the wording of Article 3.5 and its non-attribution clause. The five-step process mentioned earlier, however, does not solidify a particular process. Rather, the AB left open other approaches and methodologies. The specification and separation of known factors and a distinct analysis of each requirement in connection to the dumped imports seeks to clarify some of the elements of Article 3.5. Yet, this is not sufficient or productive in curbing protectionist interests and the authorities' discretion in injury determination. The reason is that many questions remain unanswered and a torturing of numbers is still very possible.

Later, in *EC-Pipe Fittings*, the AB created more confusion by allowing investigating authorities to avoid calculating the collective injury caused by reasons other than dumped imports. It went even further, it said some cases might require a collective approach while other situations may not need such an approach. The result of the rulings on Article 3.5 is that one must look at individual causes other than dumped imports, but what the investigating authorities do with the data after that it is at their discretion. The crucial step in determining injury is again left to the devices of these national agencies.

The AB did not say anything about the extent of causation of each of the known factors. Is it permissible to aggregate all “other known factors” and weigh them against dumped imports? What if dumped imports are not the most important cause of injury? What if they are equally important causes other than the ones listed? Most intriguing, what is the threshold level of causation of dumped imports, more than 50%? These unresolved and persistent questions nullify any clarification the AB may have sought for investigations. These questions allow enough discretion in the hands of investigating authorities to make the numbers and data provided admit to their protectionist impulses. The argument that the AB would be considered an activist one were it to go so far is not sound as the judicial activism of the AB has been documented by a plethora of academics and lawyers.¹⁴⁸ What is stopping them from doing so may only be a self-described adherence to judicial restraint or political considerations.

The issue here pursuant to the development approach is that the reasoning lacks the requisite predictability that leave many questions unanswered. They insist on basing decisions on the adherence of investigating authorities on vague concepts of “objective” assessments, domestic industry “as a whole,” positive evidence” (*Thai-Poland* dispute). Granted, justification for this approach is based on rules of deference to sovereigns but as mentioned before, this is done patchily as they are at times, quite

¹⁴⁸ See amongst others, Davey, W.J., *Has the WTO Dispute Settlement System Exceeded Its Authority?* (2001) 4 J. Int'l. Econ. L. 79; Barfield, C., *Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization*(2001); Raustiala, K., *Sovereignty and Multilateralism*, (2000) 1 Chi. J. Int'l. L. 401(discussing the norm generating nature of the WTO regime and its self-contained and inward-looking approach to international trade regulations); Ragosta, J., Joneja, N., & Zeldovich, M., *WTO Dispute Settlement: The System is Flawed and Must Be Fixed* (2003) 37 Int'l. Law 687, pp.691-93; Steinberg, R.H., *supra* at note 145.

activist in their approach. Furthermore, they have exempted themselves from such justifications because in their reasoning they do not often refer to or address Article 17.6. As mentioned, they have diminished the deference to Members that was conveyed in the standard of review. The case-by-case approach lends itself to inconsistency with few substantive guidelines. This has the potential of creating different outcomes in similar cases. The “collective” and “cumulation” interpretations under Articles 3.3 and 3.5 indicate such incoherence.

The justice of the rulings is inadequate for developing countries, as they desire a more predictable, coherent and methodical international system of dumping investigations. The fact that the adjudicators have done nothing to achieve this goal puts them at a disadvantage vis-à-vis the industrialized Members who seek to erect trade barriers to imports from developing countries.

5.6.2. Political Considerations

The decisions of the Adjudicators in injury determination matters seem to have some political considerations in mind. The desire and effort to curb disharmonious antidumping investigations has merely brought forth another set of loopholes and ambiguities. The AB judges in particular, are aware of the institutional dynamics of the WTO and how their decisions permeate into the political and diplomatic interplay amongst the Membership. The balance the AB is seemingly trying to achieve is one where they try to clarify and “harmonise” certain evidentiary and analytical issues that

national investigators should address although admittedly normative in nature, while they do not want to be criticised as activist judges over stepping their authority as was the case with regard to amicus briefs (See chapter 2). But this balancing act is a tenuous one that cannot be sustained without harm being done to the institutional legitimacy of the WTO. The first issue is that the reasoning is inconsistent and unpredictable. This was evident in the decisions on Article 17.6(ii), 3.2, 3.3, 3.5 of the ADA in the six cases discussed above. These at times, inconsistent and unpredictable rulings, nevertheless, play a major role in the norms that are being generated by the AB.

Precedent and *stare decisis* although not *de jure* sources of WTO law, have been accepted as *de facto* sources.¹⁴⁹ This is exemplified in the extensive use of case law in every panel and AB decision in the past. Therefore, a vicious circle of institutional illegitimacy is created. In order to achieve the balance between law and diplomacy the AB sometimes undergoes tortuous reasoning that is not very convincing for the WTO community at large, then when expedient, relies on those precedents to give legitimacy to its rulings or to obtain the outcome intuitively made. This system is also indicative of a particular teleology by the AB, institutional fidelity, not fidelity to WTO law. Their motto seems to be we will settle disputes with limited controversy, making sure the dispute settlement regime remains intact. That inevitably plays into the power game that was the hallmark of the GATT system. It may be understandable for panellists who are mostly diplomats, civil servant in Members to bring forth a

¹⁴⁹ Bhala, R. *The Myth About Stare Decisis and International Trade Law (Part One of a Trilogy)* (1999) 14 Am. U. Int'l. L. Rev. 845; Bhala, R., *The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (Part Two of a Trilogy)*(1999) 9 Fla. St. J. Transnat'l L. & Pol'y 1; Chua, A., *The Precedential Effect of WTO Panel and Appellate Body Reports*, 1998, 11 L. J. I. L. 45 p.46-47.

political orientation to the decision-making process but the AB is supposed to be the protector and arbiter of WTO law.

5.7 Conclusion

Four important aspects of the ADA and application in the dispute settlement process of the WTO have been the focal point of this chapter. The conclusion reached is that the adjudicators have not met the requisite level of fairness espoused by the development approach. Therefore, developing countries' interests in the WTO have been harmed. One main reason for this sort of reasoning relates to the disposition of the adjudicators pertaining to the nature and also the text of the ADA.

Furthermore, some of the reasons why the DSB decisions were made in this manner were discussed, and shown that aside from the frame of mind of the adjudicators, political considerations were probably another element in the decision-making process. In order to prove these points the chapter evaluated and analysed some of the major cases that have ruled on issues that increase the discretion of the investigating authorities in finding dumping, injury and inflating of dumping margins.

The norms that have been generated through case law, which provide greater discretion to national investigating authorities, impede the market access of developing countries to the developed world. This is so because their exporting firms are most often targeted for constructed values that are prone to finding inflated

dumping margins. Furthermore, the interpretations on injury determinations and causation, which are fact and evidence intensive, again grant investigating authorities greater leeway. Developing country firms are generally less able and sophisticated to provide or obtain the technical data, evidence and accounting practices that would allow them to fight the investigating authorities of industrialised states on a level playing field.

The ADA has its own special standard of review, which is arguably a restatement of the VCLT Article 31 and 32. Experts have debated whether using the customary rules of interpretation of international law as codified by the VCLT allows for only one possible interpretation or whether more than one possible interpretation is possible. It seems that during the UR the United States' insistence on the inclusion of the unique standard of review of Article 17.6(ii) that allows for the possibility of more than one permissible interpretation, was a direct challenge to the sole interpretation concept. Pragmatically, the US wanted to give its national authorities more deference in antidumping matters. The AB's holdings on this matter are inconsistent and unpredictable. The manner in which it has applied Article 17.6(ii) is a Janus-faced one. On the one hand it has simply dismissed interpretations by domestic authorities that could very well be considered permissible and valid, opting for the interpretation that it believes to be the optimal one. It has done so by deciding that the national authorities' interpretation was simply not permissible. On the other hand, throughout its reasonings in different cases, it claims a multiple interpretation approach is the law and norm in the context of the ADA.

The AB's decisions are not legitimate as they are inconsistent and unpredictable. They do not provide for clear guidance in future cases. The permissibility of interpretations is not done on a consistent basis. The adjudicators seem to want to limit what they perceive as excessive deference to national authorities but believe that they are not allowed to by the wording of the ADA and its subsequent political effects. They have restricted the spectrum of permissible interpretations but members do not understand how that restricted spectrum of permissible interpretations plays out in relation to different provisions of the ADA.

On the surface, developing countries should benefit from the restrictions imposed by the AB on the national authorities, thereby, making their rulings more just. However, that is only true if they rule with a de facto one-interpretation disposition in a manner that is in accordance with the development approach. Additionally, when the tables are reversed and the developing country is the investigating exporters from the developed countries, the one interpretation approach could function to the detriment of developing countries if their interests are not considered.

The initiation of an investigation against developing country firms creates a chilling effect that is of great harm to the growth and profitability of these exporters. The threat of an investigation alone by the US or the EU authorities causes in many instances, for the firm to negotiate a price undertaking though no dumping has occurred, or to stop exporting to these markets altogether, as the costs of fighting the allegations is too great. Therefore, stopping an investigation before it starts or

terminating one soon afterward is very important for developing countries' exporters. Article 5, which lays the requirements for the initiation of an investigation demands representatives of a large proportion of the domestic industry producers must provide sufficient evidence to the domestic authorities before an investigation can commence. The ruling pertaining to Article 5.3 and the sufficient evidence clause are counter to the interests of developing countries, as it does not really provide for an effective means of preventing the chilling effects of an investigation when there is little evidence to support it.

Article 5.8 provides the investigators must terminate investigation as soon as authorities are satisfied there is not enough evidence to support an investigation. The *Soft Wood Lumber* and *Mexico-HFCS* holdings stated there is not a continuing obligation to terminate an investigation in Article 5.8, therefore, if exculpatory evidence is presented that would demonstrate dumping has not occurred or there is no injury, the investigators are not obliged to terminate the investigation. Aside from the chilling effects, the provisional antidumping duties which can be levied, are also detrimental to exporters especially one from the developing Members. The ruling on this issue lacked the requisite level of legitimacy under the development approach as they create unpredictability in the manner, format and timing of the investigation. Furthermore, these holdings provide for greater discretion to the investigators, which tends to harm the exporters of the developing nations vis-à-vis rich nation exporters.

With regard to Article 2 and its provisions on dumping determinations two major issues were discussed, i.e., “zeroing” dumping margins under Article 2.4.2 and SG&A/profits calculations under Article 2.2.2. The adjudicators in *Bed Linen* and in subsequent cases declared, “zeroing” of dumping margins in multiple average calculations to be prohibited by the text of Article 2.4.2. At first glance this is a beneficial and good ruling for developing countries, as it tends to deflate dumping margins. However, the reasoning of the adjudicators does not guarantee the continuation of this ban on zeroing. The reasoning of the AB in *Bed Linen* was based on fundamental issues of fairness as it relates to the term “fair comparison” prescribed by Article 2.4.2. They did not clearly reason that there are statistical and mathematical justifications also that assist in the understanding of the concept of fairness.

Furthermore, they did not mention whether categorization of products in other ways that are slightly different than what the EC did in *Bed Linen* would be deemed prohibited. In fact, later in the *Soft Wood Lumber* case, which ruled against US zeroing methodology, there was a dissenting opinion amongst the panellists. That dissenter used the slightly different manner in which the US authorities had categorised *Soft Wood Lumber* as the justification to deviate from the *Bed Linen* decision. The US has appealed the decision of the panel only on the grounds that zeroing is legal. Therefore, the zeroing issue has not been resolved. Zeroing also happens in other aspects of antidumping investigations.

In *EC-Pipe Fittings*, the panel ruled zeroing is legal in the evaluation of the effects of price undercutting under Articles 3.1 and 3.2. The prevailing norm is zeroing is only prohibited under Article 2.4.2 and price comparisons, and not under any other methodology or calculation. This is counter to the interests of developing nations, as margin inflation is much easier to calculate and injury determinations, much easier to obtain. Furthermore, the underlying objective of antidumping investigations and regulations is to determine the most approximate price for products before making comparisons or understanding the effects of the dumped goods. This involves and is based on statistical rules and mathematical principles. Thus, under the development approach the reasoning would go above and beyond literal interpretation by looking into the context and object and purpose of the agreement in order to create norms that are fair and assist in the development of poorer Members.

Determining whether the dumped products are the source of injury for the domestic industry is another problematic area covered in this chapter. The issues relate to the availability of evidence, the examination of factors that may cause injury to the domestic industry other than the dumped goods, cumulative assessment of injury when several firms from different Members states are concerned, and causation and non-attribution of injury to the imported dumped products.

In the *Thai-Poland* case, the AB decided investigating authorities may without the opportunity of cross-examination given to the exporter, use confidential material. The AB reversed panel on this issue and by doing so gave free reign to investigating

authorities to prevent evidence from being disseminated. The good faith of the investigating authorities is all that protects exporters from dubious evidence being used to levy dumping duties. The procedural rights of the exporter are diminished, as it has no idea on the nature of evidence. It cannot adequately counter the claims made by the investigators. This leaves room for the formulation of tailor-made rules of confidentiality at the domestic level with regard to antidumping investigations.

Also, in *Thai-Poland* the AB ruled on how the 15 factors spelled out in Articles 3.4 and 3.5 of the ADA must be addressed in order to assess whether factors other than dumping were causing harm to the domestic firms. There, the AB took a step forward by holding the investigators must separately address all 15 factors. However, it did not go far enough in its ruling because the manner and weight given to each of these factors is unclear and as such, creates unpredictability and gives more power to the investigators to charge antidumping duties. The inadequacy of this ruling was reaffirmed in the *EC Pipe-Fittings* case, which ruled that mere implicit analysis of these 15 factors is enough and the ruling in *Thai-Poland* does not inform on the “manner” they must be addressed. The effectiveness of these provisions has been greatly diminished by allowing less transparent means of assessing evidence.

The *EC-Pipe Fittings* case also ruled on how cumulative assessments can be conducted. Unfortunately, the AB ruled that even though Article 3.3(a) demands each country’s dumping margin be assessed individually, the injury determination can be done cumulatively. The wording of the text does not explicitly address this issue,

however, the principles of the ADA require antidumping duties may be levied if there is dumping, injury and causation. Therefore, exporters of a Member State cannot be held accountable if it does not meet one of those three requirements. Simply because more than one Member is involved it seems intuitively inappropriate that all exporters from different Members should be grouped together and levied duties. In essence, if some Members' products are not causing injury they must be penalised for the wrongdoing of other exporters outside of their country.¹⁵⁰ As mentioned, there is a high level of discretion afforded to the investigators in relation to dumping determinations. This could lead to investigators targeting certain exporters that are competitive because of factors other than dumping to be responsible for antidumping duties due to the fact that a third country satisfies the requirements for levying antidumping duties.

The issue of how captive production must be addressed by investigators under the injury determination provisions of the ADA is another cause for concern for developing countries. Manufacturers that have a captive production base are concentrated in the developed world, as it demands a large vertically integrated and sophisticated organisation. The AB ruled the captive production sector must be evaluated, but it did not mention what effects that should have or how much weight should be given to each market. It still allows investigators to make cursory reviews of the captive production market. The issue is part of the larger issue of market segmentation and the manner in which it may be done. The precedent in *Japan-Steel*,

¹⁵⁰ They must be over the *de minimus* level as set forth by Article 3.3.

as has been the case in other matters, superficially restricts investigators' discretion but it does nothing of substance to limit the protectionist tendencies.

In general, the jurisprudence of the WTO on antidumping has not been fair to the developing countries. The reasoning is either illegitimate, unjust or both under the development approach. On the surface, it would seem the adjudicators are struggling to limit the protectionism of domestic authorities but the true consequences of that has been to give them greater discretion. The way in which they write the holdings generate norms that, over time, will only harm the weaker Members' objective to gain market access to the developed countries. The insistence of the adjudicators to interpret WTO law by reading the ordinary meaning of the word has created reasonings that are inconsistent, unpredictable, not adhering to international norms of interpretation, and unjust. Their reluctance to use a contextual and/or objective-oriented approach to interpretation is based on the apprehension to be labelled as activist judges, yet they have failed in inoculating themselves from such criticism.¹⁵¹ Furthermore, it is near impossible to find the ordinary meaning of the words in the antidumping provisions without any context or insight into the purpose of the provisions. Therefore, the judicial disposition of the adjudicators becomes a problem for the developing countries.

As mentioned, the political considerations of the adjudicators which may incline them to make decisions which would cause the least controversy institutionally, is both

¹⁵¹ See supra at note 146, all commentators mentioned have criticised the activism of the WTO adjudication process in some form.

fruitless and unfair to the developing countries. Controversy is rampant in response to the rulings by both the developed and developing Members. Moreover, they are guising political considerations as legal ones and as such, solidifying norms at the institutional level, which systematically puts the developing nations at a disadvantage.

Conclusion

This thesis has demonstrated that the adjudicators of the WTO have abdicated from their role in addressing the link between interpretation and the facilitation of development. As a result, the evolving jurisprudence and constitution of the WTO has not fostered fairness towards developing countries. This unfairness goes beyond the standard criticism that WTO law, as negotiated at the Uruguay Round, is biased in favour of the wealthy nations' trade interest. In the first chapter, the thesis constructs a framework for taking a development approach to fair adjudication. Subsequently, it evaluated the adjudication of due process rights under the DSU, the TRIPS and the Antidumping Agreements. The fairness framework for analysing the jurisprudence of the WTO under the development approach, borrows from the works of Thomas Franck, John Rawls, and Ronald Dworkin. Thus, the development approach is founded on established legal doctrines of legitimacy, justice, and ultimately fairness.

In 1995, the WTO replaced the old GATT as the pillar of regulating international trade and economic relations. One of the main characteristics of this new organization is the existence of detailed rules and procedures for the resolution of trade disputes between Members. The GATT system had become obsolete, as the settlement of disputes was fraught with political and diplomatic manoeuvring by an ever-growing membership. The system was based on consensus and conciliation, as unanimity was required before the adoption of a ruling by the adjudicating panels. Over time this system proved ineffective as disputes were dragged out for several years before a settlement

was reached. Consequently, GATT panellists were in constant search for the lowest common denominator in their decision-making as both the establishment of panels and the adoption of the rulings had to placate the “losing” party or risk having the panellists’ decisions rendered unenforceable. The GATT consensus approach was also deemed unmanageable as the UR negotiators under pressure from the major economic powers such as the US, EC and Canada were to extend the coverage of the international trade regime from goods to other areas of trade.

A major achievement of the UR was deemed to be the new dispute settlement regime spelled out in the DSU. The DSU created mandatory jurisdiction for Members to bring claims as well as affording the rulings of adjudicators’ binding force based on “negative consensus.”¹ Negotiators believed that this system would promote the rule of law and diminish the power politics prevalent under the GATT regime. Members with less economic and political might can bring cases against Members such as, the US and EC with the expectation of obtaining tangible remedies. However, the optimism of the developing countries soon gave way to trepidation regarding the manner in which the panels and the newly established AB reasoned and resolved disputes. This concern was evident in both academic writings and in the responses by developing country delegates to the WTO given in interviews conducted by the author of this thesis. Assuming that the UR negotiations have created asymmetric obligations in favour of industrialised Members, the developing nations believe that the evolving jurisprudence and constitutionalisation process is further deepening the harm to their

¹ Negative consensus demands that all parties including the “winning” party must reject the ruling of the DSB for the adoption to fail.

trade interests and economic development. Their concern has been compounded by the fact that the DSB generates norms and constitutional instruments that function to solidify the existing benefits to industrialised Members without consideration for the relationship between interpretation and development.

Hence, according to this thesis fairness can only be achieved if judicial rulings entail a major economic development component grounded on legal concepts of legitimacy and justice. To this end, chapter one formulated a framework for fairness termed the “development approach,” for evaluating the case law of the WTO. Franck’s theory of fairness is the skeletal basis for the development approach, which claims that fairness is achieved through legitimacy and justice. Three factors are necessary for achieving legitimate results, i.e., predictability, consistency and adherence to normative standards of public international law (security).² Justice under the development approach is borrowed from the Rawlsian concept of distributive justice, which mandates advantaging the disadvantaged. Furthermore, the adjudication should address certain socio-political principles that are prevalent in the community. In the context of the WTO’s adherence to achieving economic development through trade, institutional capacity building and market access to wealthy nations are core principles. Under the development approach the adjudicators are obliged to rule in a manner that satisfies all criteria of legitimacy, justice and the principle of capacity building and access to developed markets.

² Under Franck’s legitimacy test a fourth requirement of symbolic validation also exists however the development approach in the context of the WTO deems this requirement to be of little relevance.

After establishing the criteria for fairness, the analysis turns to three agreements of major importance for economic development in the context of the WTO and dispute resolution, i.e., the DSU, the TRIPS Agreement, and the Antidumping Agreement.

1. Due Process Rights and the DSU

The formulation of a new dispute settlement regime, resulted in the deepening of due process rights. Due process rights, as a leveller of power in WTO litigation, are very important to the weaker developing nations. However, the AB of the WTO has generated a body of jurisprudence that harms developing countries' litigious interests with potential harm extended to their overall trade interests. This is due to the fact that the rulings have lacked the requisite threshold of legitimacy and, as a consequence but to a lesser extent, justice under the development approach. For instance, with regards to the terms of reference pursuant to DSU Article 6.2, which clarifies and distinguishes claims made by plaintiffs, the rulings have lacked the consistency amongst cases and predictability as to how claims should be made in the "Requests for the Establishment of a Panel."³ This unpredictability and inconsistency creates extra costs and potential losses for developing countries, exacerbating their inadequate legal resources and capacity.

With regards to the allocation of the burden of proof, the AB has inappropriately created norms that harm developing countries, ruling in a manner that is counter to

³ The Request for the Establishment of a Panel is the formal WTO document, which outlines the terms of reference of the panel based on the complainants' claims and allegations.

norms of international tribunals in allocating the burden of proof. Furthermore, the AB has deviated from rules governing the burden of proof in relation to general rule exceptions in the WTO. General rule exceptions are provisions that allow derogation from fundamental WTO principles such as, MFN and national treatment, which shift the burden of proof onto the party invoking the exception. Also, the AB has used judicial economy excessively, which creates unpredictability at the implementation stage of dispute resolution to the detriment of developing nations faced with the inherent bias against their ability to obtain favourable remedies from wealthy nations.⁴ Finally, the AB's ruling accepting third party submissions in the settlement process is a brazen example of its lack of concern for developing countries' due process rights. Acceptance of third party briefs expends more costs and resources for developing countries and is counter to WTO provisions that implicitly touch on the issue. As such, the AB has contradicted the element of advantaging the disadvantaged, clearly ruling in favour of industrialised nations' litigious interests, since most NGOs participating in the WTO process are industry and trade groups in the US and the EC.

2. The TRIPS Agreement

The incorporation of intellectual property rights into the WTO system was one of the most contentious issues at Uruguay, with developing nations' refusal pitted against industrialised countries' insistence on its inclusion. However, due to international political realities developing nations had to submit to accepting the TRIPS Agreement.

⁴ Judicial economy is a concept that adjudicators use, which leaves certain questions and claims, not addressed. Adjudicator invoke this concept when they believe that responding to a certain claim may be irrelevant, controversial, or is not influential in the overall outcome of a case.

The TRIPS Agreement magnifies the developing nations' lack of institutional capacity to equitably participate in the international trade game. The positive nature of TRIPS' obligations makes implementation excessively costly. The Agreement obliges Members to devise domestic enforcement regulations that encroach on national courts and governmental agencies' powers to make policy and regulate their IPR regimes.⁵ Furthermore, the TRIPS Agreement is costly for developing Members due to requirements that make access to knowledge and R & D based goods, especially medicine, more expensive. The negotiations on intellectual property rights at Uruguay were very divisive along North-South lines. As a compromise, but with heavy US political pressure, the language and text of the Agreement was written with much built-in flexibility so as to obtain the acceptance of the TRIPS objectors. This flexibility was perceived by developing nations as a way to reduce the cost of implementation and application of the provisions. The development approach encourages maximum benefit for developing nations in light of this built-in flexibility, allowing each Member the ability to implement the provisions of the TRIPS according to their own conditions and circumstances.

There is a dearth of TRIPS related case law, yet, the existing body of jurisprudence indicates that the adjudicators have not allowed the developing nations to utilise the flexibility in the Agreement.⁶ In *India-Pharmaceuticals*, the panel and AB both ruled that India did not adequately provide a means for patent holders to file their claims (a

⁵ These encroachments include for instance, requirements to have injunction orders available for IP violations at the domestic level, seizure orders and other mechanisms such as "mail box" for filing of applications.

⁶ One of the major cases discussed, *Canada-Pharmaceuticals*, did not involve a developing nation, however the precedent set forth in the case is not beneficial to developing nations.

mail box system) so as to have priority when the five year grace period granted to Members for extending the scope of patent protection expires.⁷ Previous to the UR, India did not grant patents for pharmaceutical and agrochemical goods. Article 1.1 of the TRIPS allows Member States to select the means of implementing the Agreements' obligations. Due to political circumstances, India had selected to give an administrative instruction to its agencies for mailbox applications. However, the adjudicators found this to be in derogation of the TRIPS, as the administrative instructions were considered an inadequate means of implementation. The development approach would require the adjudicators to accept India's manner of implementation unless there is evidence that there is a systematic derogation from TRIPS obligations. For instance, the US should have demonstrated that many of its firms have had their "mail box" applications rejected. Furthermore, the US, with panel and AB approval, claimed that the exclusive marketing rights of the patent holder must remain intact, whereas Indian authorities had not ruled on the validity of the merits of the patent applications. This ruling clearly favoured the multinational pharmaceutical firms in the industrialised countries over Indian generic drug manufacturers as well as generic drug importers to India.

In the *Canada-Pharmaceuticals* case, the panel was faced with deciding whether Canada's regulatory review procedures and stockpiling provisions constituted an appropriate exception to exclusive rights pursuant to TRIPS Article 30. The purpose of these provisions was to allow generic drug makers the opportunity to test, and make

⁷ The five-year grace period pursuant to Article 65 is for extending patent protection to products previously not patentable in a Member.

patented drugs before the expiry of the patent in order to get the clinical trials and regulatory review procedures completed. This would afford generic drug makers the opportunity to market the drug soon after the patent expiry. Moreover, the stockpiling provisions allowed for production storing of the drug without putting it on the market before the expiry of the patent. The panel ruled in favour of Canada with regards to the regulatory review procedures but rejected its stockpiling provision. The panel relied on spurious arguments concerning the patent holders legitimate expectation to reap exclusivity for a short period after the expiry of the patent. The precedent set in this case is extremely harmful for developing countries as they are prevented from allowing generic drug makers to stockpile cheaper drug and market them as soon as the patent has expired, resulting in delayed access to cheaper drugs.

Chapter 3 also introduced hypothetical cases illustrating how the development approach would grapple with the scope of protection in Members, and the use of non-violation and situation complaints. The adjudicators should allow Members to devise regulations that limit the scope of protection especially in the context of the inventiveness required for granting patents.⁸ They should affirm regulations that raise the inventiveness requirement to a level where truly beneficial innovations are deemed worthy of patents and prevent firms that slightly manipulate a compound or product from gaining a patent for the good.

⁸ Patents must be granted for products and processes, which are new, involve an inventive step (non-obviousness in US jurisdiction) and are capable of industrial application.

In light of the expiry of the five-year grace period for bringing non-violation and situation complaints, the adjudicators should relegate such claims to systematic and purposeful derogations of IP protection. Hence, the potential use of non-violation and situation complaints against developing countries as a tool for extracting higher profits for multinational firms is significantly curtailed. Only the wilful and systematic lack of enforcement, rather than a lack of adequate protection should be the benchmark for accepting non-violation and situation complaints. Although, certain developing countries may have the means to protect IPR's more strictly, nevertheless, these complaints should be examined in light of nations' more pressing priorities pertaining to resource allocation.

The development approach would ask the adjudicators to interpret the TRIPS Agreement in the context of their lack of institutional capacity to implement its obligations. This can best be done by recognising that the text of the TRIPS Agreement is flexible so as to allow each Member to implement its obligations according to its own domestic socio-political realities. Inadequate institutional capacity is one of the main elements under the development approach, which is directly related to the obligations of the TRIPS. The second element involved in fair adjudication is sustaining access to industrialised Members' markets which is greatly affected by the interpretation of the provisions of the Antidumping Agreement.

3. The Antidumping Agreement

Chapters 4 and 5 explained the economic and strategic nature of antidumping and then proceeded to analyse the antidumping case law of the WTO pursuant to the development approach, respectively. Antidumping measures are justified under free trade theory in predatory circumstances, with exceptions for vital infant industries and to counter intermittent strategic dumping. However, the antidumping measures as levied by industrialised countries have vastly strayed away from this principle and instead have functioned as a strategic tool for selected interest groups in their attempts to protect their market shares from more competitive foreign firms. Although, certain developing nations have recently become effective users of antidumping measures, it is only in response to industrialised nations' antidumping actions. The negative welfare effects of levying antidumping measures are more pronounced for developing nations, as this tends to raise consumer prices.

Gaining market access through tariff reductions was a major objective for developing countries at the UR. Industrialised countries reduced their overall tariffs by 40% according to some estimates, however, a slew of protectionist mechanisms have been used since then to protect certain industries. Antidumping measures are by far the most effective and least cumbersome of all the trade contingent remedies that exist under the WTO system. Hence, industrialised nations have used antidumping measures as a strategic weapon in their protectionist arsenal so as to counteract against the reduced tariff-bindings negotiated in Uruguay. Developing nations fought to

narrow the use and scope of such antidumping measures during the negotiations for the promulgation of the ADA. They argued that a regulatory regime, which espouses sound economic justifications for levying antidumping duties and creates a predictable, transparent and streamlined process is necessary to protect their market access gains. The development approach to fairness would oblige the adjudicators to reduce the discretion of domestic authorities in antidumping investigations by espousing a more economically sound and procedurally streamlined mechanism, based on the language of the ADA and in the context of basic WTO principles.

Chapter 5 illustrated that a vast amount of cases brought to the DSB have not reached the threshold level of fairness under the development approach. The adjudicators have generated norms with regards to the ADA's standard of review, the evidentiary threshold for the initiation of investigations, cost calculations and injury determinations that have or potentially might harm developing nations' market access to wealthy countries. Their interpretive methodology has been inconsistent, insecure and unjust, leading to unfairness from a developing Member perspective. With regards to the standard of review the adjudicators have, to a limited extent, curbed domestic investigators' discretion by reducing the scope of permissible interpretations.⁹ They have implicitly adopted a single possible interpretation approach, which may be deemed as diminishing the discretion of investigators. This can only be seen as an illusive victory for developing nations, as such a single possible

⁹ Article 17.6 (ii) provides that panels shall interpret the ADA provisions in accordance with customary rules of interpretation of public international law. Where the panel finds that a provision allows for more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the ADA if it rests upon one of those permissible interpretations. See Chapter 5 section 5.1.

interpretation should consider the facilitation of development; however an examination into other substantive issues as presented in chapter 5 established the adjudicators' unresponsiveness to development.

The threshold level of evidence for the initiation of an antidumping investigation is important for the facilitation of development because even rumours of a potential investigation by the authorities in the US or the EC have chilling effects on the targeted industry, and not just the targeted firm, in developing nations. The high costs of defending allegations of antidumping and the high rate of investigations leading to provisional and permanent antidumping duties are some of the causes that create the chilling effect. Therefore, developing country firms want investigations not only to be initiated based on clear evidentiary requirements, but also to adhere to strict time limits and requirements for the initiation and termination of investigations. However, the adjudicators in *Portland Cement I & II*, and *Softwood Lumber*, have granted the investigators more discretion in this regard by loosening the restrictions on the presentation of evidence by the domestic firms against foreign entities, and by not interpreting Article 5.8 so as to require the termination of investigations immediately after finding a lack of sufficient evidence.

In relation to constructed values for normal value and SG&A/profits the adjudicators have again increased the discretion of the domestic authorities by not requiring better methods for finding the most approximate price of the targeted goods. In *Bed-linen* and *Thai-Poland*, the panels and AB had the opportunity to require more transparent

methodology for constructed values based on statistical models and mathematical concepts. Instead, they derogated from promoting transparent investigation by making it easier for investigators to manipulate numbers and findings of inflated dumping margins.

Another example of the adjudicators' lack of adherence to statistical and mathematical concepts can be found in their ruling on zeroing in *EC-Pipe Fittings*. Previously, in the *Bed-Linen* case, in relation to the "fair comparison" requirement of Article 2.4 ADA for the construction of values, the investigating authorities of the EC had divided bed linens into various "models" and calculated dumping margins for each one. By doing so, the EC was able to inflate the overall dumping margin by treating any negative dumping margin-situations as zero, where the export price was actually higher than the normal value, rather than their actual negative value, when combining the margins for each "model." The adjudicators in *Bed-linen* decided, rightfully so, that this does not provide for a fair comparison of prices. However, in *EC-Pipe Fittings*, the prohibition of zeroing was not extended to the examination of price undercuttings. The adjudicators did not go far enough in their banning of zeroing completely, as a statistically sound approach would have required. This method has the potential of inflating dumping margins and making the finding of injury easier.

Another area where the adjudicators tried but failed to promote methodical investigation, concerns the manner in which investigators examine and collect data at the injury and causation stage of investigations. Injury determinations entail

investigators' examination of a variety of economic data, searching for a nexus between the harm to the industry and the dumped goods. However, the adjudicators either inadequately addressed the issue (*Japan-Steel* and captive production, *EC-Pipe Fittings* and the factors that need to be examined, and the *Thai-Poland* case pertaining to the sufficient evidence requirement of ADA Article 3.1 or made it easier for domestic investigators to target and levy duties on exporters.¹⁰ With regards to the former the adjudicators, in particular the AB, has asked that more detailed examinations are required for factors associated with injury determinations, however, these "extra" suggestion does nothing to curb the real and potential inflation of dumping margins. With regards to cumulation, the AB should have set a precedent that would make it more difficult to bring non-injurious exporters into the calculation to find injury and inflated margins.

These assessed cases may not individually indicate bias against developing countries, but the overall jurisprudence admits of a certain creeping unfairness towards their trade interests. Case-by-case, norm-by-norm, the market access gains extracted in Uruguay by developing countries are being eroded. As a consequence, some developing countries devise and levy more antidumping measures as a form of retaliation.

To conclude, this thesis has demonstrated that there is a nexus between the interpretation of WTO provisions and development objectives of third world nations. The preamble of the WTO admits of the underlying conviction that development

¹⁰ See ruling on cumulation in *EC-Pipe Fittings*. Chapter 5 section 5.6.2.

should be promoted through trade. This conviction has to go beyond mere hortatory and superficial declarations, rather it must be woven into the fabric of WTO law and practice. In fact, industrialised economies will also benefit from consumers with purchasing power in the developing world in the long-run and a strengthened international trade regime.

Facilitating development has to go beyond the treaty negotiating realm, as international agreements are dynamic and take on a life of their own after coming into force. The WTO's unique and vibrant dispute settlement system makes it incumbent upon the adjudicators to respond to the needs of developing countries. Rather than making the policy choice to wait on the sidelines for the formulation of development friendly provisions by an ever-expanding membership, the adjudicators, as engines of constitutional development, must extend their lawmaking function to generating norms that are commensurate with the economic ambitions of developing Members. Otherwise, trade rows may become unmanageable if developing Members lose faith in the regime and the DSB is perceived as the facilitator of a crumbling WTO edifice in the future.

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