

THE DISPUTE SETTLEMENT PROCESS OF THE WTO: A NORMATIVE STRUCTURE TO ACHIEVE UTILITARIAN OBJECTIVES

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I. INTRODUCTION

One of the first dreams of a peaceful world society was outlined in 1795, by Immanuel Kant in *Perpetual Peace: A Philosophical Sketch*.¹ Kant envisaged a shift away from what was then the *status naturalis* of being in a perpetual state of war, to a future based on cooperation between states. Kant's philosophy laid the foundation for future *internationalism*.² The establishment by the Treaty of Versailles of the League of Nations in 1919 realized Kant's dream of a *foedus pacificum*—a league of peace.³

When the World Trade Organization (“WTO”)⁴ was established to regulate trade and reduce trade barriers between its member nations, it seemed like a natural extension of the philosophy of the League of Nations. Supporters of the WTO celebrate it as the natural movement of the globe toward cooperation in trade. Developing nations, however, assert that the WTO is an imbalanced organization that serves to reassert existing power structures. Lack of adequate flexibilities to implement the core WTO agreements is cited as exacerbating the inequality between developed and developing nations. Developing countries assert that the quest of the WTO to promote trade using the utilitarian philosophy has resulted in *asceticism*.⁵

In examining whether the WTO has achieved its goal of cooperative international governance, this article posits that the organization has not efficiently promoted mutually advantageous global relationships. It is the

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¹ IMMANUEL KANT, *PERPETUAL PEACE: A PHILOSOPHICAL SKETCH* (1795), available at <http://www.mtholyoke.edu/acad/intrel/kant/kant1.htm> (detailing Kant's preliminary articles for perpetual peace amongst states).

² *Id.*

³ The Treaty of Peace Between the Allied and Associated Powers and Germany, art. I, June 28, 1919, available at http://avalon.law.yale.edu/subject_menus/versailles_menu.asp. The treaty is also known as the Treaty of Versailles.

⁴ Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125 (1994) [hereinafter Final Act]; see also 4 PAT. L. FUNDAMENTALS § 21:18 (2d ed.) (describing the WTO as “countries that are parties to the Uruguay Round Agreements of the General Agreement on Tariffs and Trade (GATT)”).

⁵ JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* (1781), available at <http://www.utilitarianism.com/jeremy-bentham/index.html> (defining asceticism as the diminution of the happiness of the party whose interest is in question, one of the two principles that are adverse to the norms of utility).

authors' contention that the WTO's failure is largely attributable to the structure and the functioning of the organization's Dispute Settlement Body ("DSB"). The normative structure of the Dispute Settlement Understanding ("DSU") leads to a strict interpretation of the WTO agreements that does not appropriately account for members' national realities.⁶ Also, the DSB's unwillingness or seeming inability to take quick, thorough action to enforce its decisions where powerful nations are judged to be at fault has worked a significant hardship on developing states. Consequently, the overall goals of the organization have been compromised to reinforce existing global power structures rather than promote cooperative governance.

The authors examine two decisions of the DSB—one relating to a contentious issue concerning agricultural subsidies and another concerning compliance with the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS")⁷—to assert their position. These studies are preceded in Part I with an overview of the international trade regime and the TRIPS agreement in the context of the DSU. Part II analyzes the decisions while Part III illustrates how they characterize the flaws of the dispute settlement process. Specifically, Part III demonstrates that the operation of the DSB results in disadvantaging developing states by: (1) reducing the line between domestic issues and market access issues; (2) failing to balance the rights and obligations of members; and (3) allowing powerful nations to avoid WTO rules by simply not adopting them at the national level, thus preserving bargaining imbalances. The article concludes with suggestions that can be incorporated into the settlement process in the future to avoid these undesired outcomes.

II. DISPUTE SETTLEMENT MECHANISM OF THE WORLD TRADE ORGANIZATION

The developed world holds a distinct advantage over the developing world in trade and has long sought to sustain this edge. Sustaining the same level of trade dominance has necessitated creating and capturing new and larger markets. The creation of new markets has meant opening up existing markets by removing trade barriers and fostering uniform global protection for the same subject matter or commodity. The WTO, under which agreements were negotiated to achieve the objective of reducing trade barriers, faced the outstanding question of how these agreements would be implemented. The

⁶ See generally Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Apr. 15, 1994, 33 I.L.M. 1226, reprinted in THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS (1994) [hereinafter DSU].

⁷ Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Apr. 15, 1994, 1869 U.N.T.S. 299, 33 I.L.M. 1197, reprinted in THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 164 (1994) [hereinafter TRIPS].

establishment of an *effective* enforcement mechanism to ensure enactment and compliance was conceived as the solution.⁸

A. The Dispute Settlement Body

The integrated dispute settlement procedure of the WTO borrows its basic features from the General Agreement on Trade and Tariffs (“GATT”).⁹ The WTO incorporated the dispute settlement mechanism outlined in Article XXIII of the 1994 GATT agreement.¹⁰ The judicial nature of the dispute settlement process of the WTO was touted as strengthening the organization in comparison with the GATT mechanism.¹¹ Arguably, the enforcement mechanism forces members to strictly implement WTO obligations.¹² The process of settlement of all multilateral disputes arising under the WTO agreements begins with consultation to enable a mutually acceptable solution.¹³ If the consultation fails, the dispute is arbitrated before a panel of three to five

⁸ Previously, Paris Convention disputes were settled by the International Court of Justice (“ICJ”), whose jurisdiction depended on consent of States. Such a system, of course, caused difficulties in enforcing the judgments. See generally Nicole Telecki, *The Role of Special 301 in the Development of International Protection of Intellectual Property Rights After the Uruguay Round*, 14 B.U. INT’L L.J. 187, 191 (1996); see also Robert Pechman, *Seeking Multilateral Protection for Intellectual Property: The United States “TRIPS” Over Special 301*, 7 MINN. J. GLOBAL TRADE 179, 181–82 (1998) (detailing some members’ choice not to recognize the ICJ’s jurisdiction. Even members recognizing the ICJ tended to ignore unfavorable rulings.). Hence, the WTO system established a dispute settlement mechanism with enforcement powers.

⁹ See General Agreement on Tariffs and Trade, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Apr. 15, 1994, 55 U.N.T.S. 194, 33 I.L.M. 1154, reprinted in THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS (1994) [hereinafter GATT 1994]; see also TRIPS art. 63–64; Adrian Otten & Hannu Wager, *Compliance with TRIPS: The Emerging World View*, 29 VAND. J. TRANSNAT’L 391, 411–13 (1996).

¹⁰ Carrie P. Smith, Comment, *Patenting Life: The Potential and the Pitfalls of Using the WTO to Globalize Intellectual Property Rights*, 26 N.C.J. INT’L L. & COM. REG. 143, 157 (2000).

¹¹ Otten & Wager, *supra* note 9, at 411–12. For example, under GATT, settled disputes required the consent of both parties. Generally, the losing party either delayed or withheld consent. The panel reports and decisions of the DSB will be considered adopted unless there is a consensus against their adoption.

¹² J.H. Reichman, *Universal Minimum Standards of Intellectual Property Protection Under the TRIPs Component of the WTO Agreement*, 29 INT’L LAW. 345 (1995) (discussing how, taken together, the enforcement and dispute-settlement provisions of the TRIPS Agreement put teeth into the pre-existing intellectual property conventions). See also Myles Getlan, *TRIPS and the Future of Section 301: A Comparative Study in Trade Dispute Resolution*, 34 COLUM. J. TRANSNAT’L L. 173, 211 (1995) (arguing that the U.S. should abandon the use of section 301 against GATT members, as use of the dispute resolution mechanism in TRIPS for resolving an IP dispute is more likely to yield similar results with greater benefits).

¹³ See Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2, Apr. 15, 1994, 33 I.L.M. 1125, 1226, 1244, reprinted in THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS, [hereinafter The Understanding]. The “Dispute Prevention and Settlement” provisions relate to preventing and settling IP disputes arising from trade.

experts.¹⁴ The General Council, which consists of all WTO members, acts as the DSB.¹⁵ The DSB has the sole authority to establish panels of experts to evaluate disputes and to accept or reject the findings of the panels or the appellate body.¹⁶ Generally, the panel's findings, unless unanimously rejected, are adopted by the DSB except where either party chooses to appeal the opinion.¹⁷ Appeals from the panel's decisions are heard by an appellate body whose findings, once adopted by the DSB, are final.¹⁸

Within thirty days of the formal adoption of the report, the breaching party must inform the DSB of its compliance plan.¹⁹ Where compliance is not forthcoming, the non-breaching party can request for the matter to be addressed by a compliance panel.²⁰ Additionally, after the expiry of the "reasonable time" for compliance, the non-breaching party gains the right to retaliate in the form of suspended concessions against the non-complying party.²¹ The DSB itself is authorized to take action against a non-complying party.²² Notwithstanding cause, the DSB can authorize "appropriate measure[s]" in retaliation against a non-complying member if they abuse intellectual property ("IP"),²³ restrain international trade,²⁴ or affect international transfer of technology.²⁵ Thus, the DSB can require the non-complying state to compensate (say, by mandating trade concessions) the damaged party, or it can unilaterally permit the complaining state to retaliate by suspending concessions it had previously granted to the offending nation.²⁶ The DSB regularly monitors the implementation of the rulings.²⁷

There are several shortcomings inherent in the DSB process. For instance, the DSB's powers are limited, at least in theory, to addressing issues affecting international trade, and do not extend to those that are primarily national in nature. In practice, however, the DSB has addressed issues that are essentially of national interest. One such example is a dispute between India and the United States which centered on determining the national legal status of

¹⁴ *Id.* Article 6 of the Understanding provides for the establishment of a panel at the instance of the complaining party.

¹⁵ See World Trade Organization, TRIPS: A More Detailed Overview of the TRIPS Agreement, http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm (last visited Jun. 17, 2010).

¹⁶ *Id.*

¹⁷ Otten & Wager, *supra* note 9, at 411-13. See also Smith, *supra* note 10, at 167.

¹⁸ Otten & Wager, *supra* note 9, at 411-13.

¹⁹ DSU art. 21.3.

²⁰ DSU art. 21.5.

²¹ DSU art. 22.2.

²² DSU art. 22.3.

²³ See TRIPS art. 8(2).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ See generally TRIPS: A More Detailed Overview of the TRIPS Agreement, *supra* note 15.

India's Presidential Ordinance.²⁸ Similarly, even where its decisions have a propensity to affect national questions, the DSB is not required to take stock of local social and economic conditions. Consequently, the DSB process is divorced from local socio-political realities faced by governments, which are significant in implementing the decision.²⁹ Also, while parties can seek counter-measures for non-compliance, what specifically constitutes compliance remains unclear.³⁰

Another significant flaw in the DSB mechanism is that it deals with disputes on an unrealistic assumption that all parties are equal. The DSB mechanism creates juridical equality between economically unequal parties. Such treatment by the DSB mechanism particularly disadvantages poorer nations. In theory, the power imbalance between developed and developing nations is recognized by Article 27(2) of the DSU, which provides for special legal assistance for developing nations.³¹ Similarly, Article 24 of the DSU, which urges members to refrain from using dispute settlement procedures against the least developed countries, is showcased as recognizing the power imbalance. But, even those who are not entirely in opposition to the DSB system recognize that the power imbalance, in practice, skews the system in favor the developed countries and to the detriment of developing members.³²

III. DISPUTE SETTLEMENT – CASE STUDIES

The following section outlines case studies which are representative of the problems caused by the current operation of the dispute settlement mechanism.

²⁸ See discussion *infra* Part III, Case Study I (discussing the mailbox dispute). See generally David Tomar, *A Look Into the WTO Pharmaceutical Patent Dispute Between the United States and India*, 17 WIS. INT'L L.J. 579 (1999) (discussing India's resistance to amending patent legislation). See also Nadia Natasha Seeratan, *The Negative Impact of Intellectual Property Patent Rights on Developing Countries: An Examination of the Indian Pharmaceutical Industry*, 3 SCHOLAR 339 (2001).

²⁹ 18 STUDIES IN TRANSNATIONAL ECONOMIC LAW: THE WTO DISPUTE SETTLEMENT SYSTEM: 1995-2003, 422-23 (Federico Ortino & Ernst-Ulrich Petersmann eds., 2004).

³⁰ MITSUO MATSUSHITA ET AL., *THE WORLD TRADE ORGANIZATION: LAW PRACTICE AND POLICY* 30 (2006).

³¹ DSU art. 27.2.

³² Smith, *supra* note 10, at 168 ("Proponents of the DSU mechanism argue that the model balances out the power differential between nations. For example, the monitoring process prevents developed countries from unilaterally imposing sanctions against developing nations for alleged violations of the TRIPS Agreement. The DSU is designed to limit the possibility of bullying maneuvers by developed nations, while enabling countries dependent upon trade with those wealthier nations to assert their rights under the agreement.")..

A. Case Study 1: India - Patent Protection for Pharmaceutical and Agricultural Chemical Products

1. Background

The developed world holds a distinct advantage over the developing world in the field of intellectual property. Through carefully crafted national IP laws, developed nations protect innovations from being copied. The stark boost in international trade and the globalization of the broad economic market, though, necessitated globally harmonized protection regimes.³³ Thus, developed nations sought to establish an international system to strengthen the protection of IP rights.³⁴

Two early attempts to establish international IP rights, the Paris Convention for the Protection of Industrial Property (Paris Convention) and the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention), were largely unsuccessful.³⁵ These initial failures led developed states to push for stronger IP protection at the WTO. The movement to create a new multinational IP system that would afford both minimum standards of protection and effective enforcement procedures was spearheaded by developed nations who had strong economic incentives.³⁶ They were especially interested in bolstering patent protection, as the top ten industrialized nations hold around ninety-four percent of all patents and account for about eighty-five percent of all capital exhausted on research and development.³⁷ Leaders of the charge included the U.S., which in 1989 exported around sixty billion dollars in services and goods of an IP nature³⁸ and whose special interest lobby groups launched a massive campaign calling for a new agreement,³⁹ the European Community, and Japan.⁴⁰ After lobbying for years, the developed countries finally saw IP rights emerge as a main issue at the Uruguay Round of the GATT in 1994.⁴¹

³³ See Evelyn Su, *The Winners and Losers: The Agreement on Trade-Related Aspects of Intellectual Property Rights and Its Effects on Developing Countries*, 23 HOUS. J. INT'L L. 169, 216 (2000). See also PETER NANYENYA-TAKIRAMBUDDE, TECHNOLOGY TRANSFER AND INTERNATIONAL LAW, 60, 61-63 (1980).

³⁴ See Su, *supra* note 33, at 185.

³⁵ See Pechman, *supra* note 8, at 180-81.

³⁶ See Nabila Ansari, *International Patent Rights in a Post-Doha World*, 11 WTR CURRENTS: INT'L TRADE L.J. 57, 59 (2002). See also Pechman, *supra* note 8, at 183.

³⁷ See Ansari, *supra* note 36, at 57.

³⁸ THOMAS O. BAYARD & KIMBERLY ANN ELLIOTT, RECIPROCITY AND RETALIATION IN U.S. TRADE POLICY 191 (1994).

³⁹ *Id.*; see also Susan K. Sell, *Post-Trips Developments: The Tension Between Commercial and Social Agendas in The Context of Intellectual Property*, 14 FLA. J. INT'L L. 193, 194 (2002).

⁴⁰ Su, *supra* note 33, at 185.

⁴¹ L. Danielle Tully, *Prospects for Progress: The TRIPS Agreement and Developing Countries After the DOHA Conference*, 26 B.C. INT'L & COMP. L. REV. 129, 134 (2003).

TRIPS, adopted in Marrakesh, Morocco on April 15, 1994, was one of several agreements reached under the Uruguay Round.⁴² The Agreement currently boasts 153 members (every member of the WTO is also a member of TRIPS), and its purpose is to provide effective and adequate protection of IP rights so as to encourage global competition and to reduce barriers to international trade.⁴³ Developing countries, however, remained reluctant to match the developed country standards relating to patents. Owing to local economic conditions, these nations preferred to prioritize other worthy objectives such as the elimination of poverty and unemployment. Developing nations associated patent protection with higher prices for pharmaceuticals and considered it an infeasible proposition in the light of public health issues.⁴⁴ Developed nations, however, argued that the differences in IP treatment between the rich and the poor countries gave rise to significant trade distortions, and refused to accept the co-relation between level of economic development and patent protection.⁴⁵

Meanwhile, India, a country that had managed to provide access to medication for a majority of its poor population by promoting a generic drug industry, attracted significant attention from pharmaceutical patent owners. In 1994, when India became a signatory, TRIPS embodied a transitional period—until January 1, 2005—for members to move toward the product patent regime.⁴⁶ In exchange for the grace period within which developing countries had to become fully compliant with respect to the TRIPS patent regulations, Article 70.8 of the agreement required members to establish a “mailbox” mechanism during the transition. The mechanism required members to establish a means to file patent applications in areas that would become eligible for protection only after the transition.⁴⁷ The mailbox mechanism was the means by which countries in transition—largely developing countries—were to accept patent applications and assign them priority for the purpose of determining patent eligibility after the transition.⁴⁸ By virtue of Article 70.9, members were required to provide exclusive marketing rights (“EMR”) to patent applications in the mailbox. A patent application filed with a transitioning member would enjoy EMR provided two conditions were met: first, an application was filed in another member state, and second, the application matured into an actual patent.⁴⁹

⁴² See *supra* note 7.

⁴³ *Id.*

⁴⁴ See World Health Organization, Doha Declaration on the TRIPS Agreement and Public Health, http://www.who.int/medicines/areas/policy/doha_declaration/en/index.html (last visited Aug. 8, 2010) (discussing how the concerns of developing countries on the effect of patents on public health resulted in the Doha Declaration).

⁴⁵ See Anthony D. Sabatelli & J.C. Rasser, *Impediments to Global Patent Law Harmonization*, 22 N. KY. L. REV. 579, 618 (1995).

⁴⁶ TRIPS art. 65.

⁴⁷ TRIPS art. 70.8.

⁴⁸ TRIPS art. 70.8.

⁴⁹ TRIPS art. 70.9.

After India became a TRIPS signatory, the President of India promulgated the Patents (Amendment) Ordinance 1994,⁵⁰ which provided for accepting mailbox applications in the area of agricultural and chemical product inventions. The Ordinance detailed application procedures, scope, and enforcement of rights of EMR.⁵¹ However, a decision as to actual patentability would not be made until India's proposed transition on January 1, 2005.⁵² The Ordinance of January 1, 1995 effectively amended the Indian Patents Act 1970, bringing the nation into compliance with TRIPS Articles 70.8 and 70.9.⁵³

The 1994 Ordinance, though, lapsed on March 16, 1995, per the Indian Constitution, when Parliament failed to address the matter within six weeks of reconvening.⁵⁴ In an attempt to permanently implement the contents of the failed Ordinance, the Lower House of Parliament (the Lok Sabha) passed the Patents (Amendment) Bill in March 1995.⁵⁵ But, while a Select Committee of the Upper House (the Rajya Sabha) was still examining the bill, the Upper House of Parliament dissolved on May 10, 1995, causing the bill to lapse.⁵⁶

The Patents Bill lapsed in large part due to the sensitivity of the subject within India, considering its impact on the cost of medication. Compliance with Articles 70.8 and 70.9 of TRIPS was expected to hurt local pharmaceutical producers and diminish the government's ability to ensure low costs for essential medicines.⁵⁷ The burdens from increased administrative costs associated with implementing the necessary TRIPS programs also contributed to the skepticism. The government recognized the need to keep pharmaceuticals affordable⁵⁸—the elected representatives felt the pressure from their electorates to keep medical supplies accessible to the poor at low prices.⁵⁹ Political pressure abounded to prioritize affordability of pharmaceuticals for India's 320 million people who lived below the poverty line as of 1993.⁶⁰ TRIPS lacked the flexibility to achieve

⁵⁰ See The Patents (Amendment) Ordinance, Ord. No. of 2004; INDIA CODE (2004), available at <http://lawmin.nic.in/Patents%20Amendment%20Ordinance%202004.pdf> [hereinafter Amendment]; see generally INDIA CONST. art. 123 § 1 (authorizing the President to legislate when parliament is not in session and the President deems it necessary to take immediate action).

⁵¹ Amendment, *supra* note 50.

⁵² See Panel Report, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, 2.3, WT/DS50/R (Sept. 5, 1997) [hereinafter Patent Protection Panel Report].

⁵³ See Seeratan, *supra* note 28, at 339.

⁵⁴ See Patent Protection Panel Report, *supra* note 52, at 2.5; see also Shishir Mehta & Rajesh Chavada, *The Mailbox Dispute and Implications on Indian Patent Regime*, THE STUDENT ADVOCATE 40, ¶ 7 (1998).

⁵⁵ See Patent Protection Panel Report, *supra* note 52, at 2.5.

⁵⁶ *Id.*

⁵⁷ See Posting of James Love, <http://lists.essential.org/pipermail/ip-health/2005-March/007652.html> (Mar. 22, 2005) [hereinafter Love].

⁵⁸ See Tomar, *supra* note 28, at 581.

⁵⁹ *Id.*

⁶⁰ See *Happy Anniversary?*, THE ECONOMIST (SPECIAL ISSUE), Aug. 16, 1997, at 20.

such an objective. Further, the Indian electorate reasonably feared the loss of pharmaceutical independence that India had enjoyed.⁶¹

The lapsing of the Patents Bill caused the United States, in May of 1996, to add India to its watch-list of countries that did not provide adequate IP patent protection.⁶² Notably, the U.S. had already revoked duty-free treatment under the WTO's Generalized System of Preferences, which resulted in a levy of sixty million dollars, after citing India's failure to protect U.S. patents on drugs.⁶³ India was concerned that the ordeal would lead to formal investigations and feared the imposition of trade sanctions on its exports.

Fearing trade sanctions and intending to avoid a lengthy, expensive battle at the WTO, India's government executives attempted to meet the country's TRIPS obligations by issuing administrative orders.⁶⁴ The administrative orders instructed the Patent Office to receive patent applications for pharmaceutical, agricultural, and chemical products.⁶⁵ A decision on whether to grant EMR would not be made until the applicant actually sought such rights and the issue of patentability would be deferred until the end of the transition period, on January 1, 2005.⁶⁶ From January 1, 1995, to February 15, 1997, India received and stored 1,339 applications under the administrative scheme.⁶⁷ As of late September 1997, no applicant had requested an EMR.⁶⁸

In July 1996 the United States requested consultations with India pursuant to Article 4 of the DSU, read with Article 64 of the TRIPS Agreement, claiming that India was in breach of its TRIPS obligations for not statutorily offering the mailbox mechanism.⁶⁹ When consultations failed, the U.S. requested that a dispute panel be established to review the claim.⁷⁰

⁶¹ See Srividhya Ragavan, *Can't We All Get Along—The Case For a Workable Patent Model*, 35 ARIZ. ST. L. J. 117 (2003) (discussing perspectives on the Indian patent amendment).

⁶² See *U.S. Opens Investigation into Protection of Intellectual Property Rights in India*, 13 INT'L TRADE REP. (BNA) No. 28, at 1117 (July 10, 1996); see also Mehta & Chavda, *supra* note 54, ¶ 11 (discussing the U.S. request for a panel to take up the dispute with India on November 7, 1996). A panel was constituted under the procedures of the WTO on November 20, 1996. *Id.*

⁶³ George K. Foster, *Opposing Forces in a Revolution in International Patent Protection: The U.S. and India in the Uruguay Round and Its Aftermath*, 3 UCLA J. INT'L L. & FOR. AFF. 283, 319 (1998) (detailing that in the May 1996 elections, the Bharatiya Janata Party ("BJP") won 162 seats while the Congress (I) won 140 seats. This election resulted in India being governed by a coalition government consisting of the United Front (coalition of regional parties) and Congress (I)). *Id.* at 317. The U.S. was "extending preferential tariff treatment under the GATT Generalized System of Preferences ("GSP") . . . [and] revoked duty-free treatment under the GSP for India's exports of pharmaceuticals, citing India's poor protection of U.S. patented drugs . . . result[ing] in a levy of \$60 million[.]" thus reducing Indian exports). *Id.*

⁶⁴ *Id.*; see generally Pechman, *supra* note 8, at 196 (discussing how the U.S. subjected countries with inadequate protection of IP rights to special 301 trade sanctions).

⁶⁵ See Patent Protection Panel Report, *supra* note 52, at 2.5.

⁶⁶ *Id.* at 7.3.

⁶⁷ *Id.* at 7.4.

⁶⁸ *Id.* at 7.5.

⁶⁹ *Id.* at 1.1.

⁷⁰ *Id.*

2. Panel's Findings

The panel's findings of September 5, 1997, examined both substantive as well as procedural issues.⁷¹ First, the panel analyzed Article 70.8 under a *context, object, and purpose*-based interpretation.⁷² The panel noted that the Article required members to establish a *means* to facilitate the filing of mailbox applications and *provide a sound legal basis* to preserve the application's novelty and priority.⁷³ The panel determined that India violated Article 70.8 in not establishing a statutory means to establish such a mailbox mechanism.⁷⁴ Additionally, the panel found that India was in breach of Article 70.9 for not having in place a statutory mechanism to grant EMR.⁷⁵

3. Appellate Body Findings

India appealed the panel's decision.⁷⁶ As to the question of interpretation, the appellate body ("AB") determined that TRIPS shall be interpreted in "good faith in accordance with the ordinary meaning to be given to the terms of the *treaty* in their context and in light of its object and purpose,"⁷⁷ based on the directive in GATT *acquis* and Article 31 of the Vienna Convention.⁷⁸ In doing so, the AB utilized a different spectrum for examining the article and reversed the Panel's standard of *context, object, and purpose*-based examination of the individual *article* (i.e., Article 70.8) in question.⁷⁹

Despite using the Vienna Convention's terms to interpret the text, the AB's preferred method of interpretation was on the basis of the legitimate expectations of the parties at the time of signing the treaty (and opposed to an objective-based interpretation of the treaty as required in the Vienna Convention), as detailed below⁸⁰:

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 8.1.

⁷⁵ *Id.*

⁷⁶ See Notification of an Appeal, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/6 (Oct. 16, 1997).

⁷⁷ Vienna Convention on the Law of Treaties, art. 26, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (emphasis added).

⁷⁸ *Id.*; see generally James Thuo Gathii, *The Legal Status of the Doha Declaration on TRIPS and Public Health under the Vienna Convention on the Law of Treaties*, 15 HARV. J.L. & TECH. 291 (2002).

⁷⁹ See Appellate Body Report, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, ¶ 36, WT/DS50/AB/R (Dec. 19, 1997) [hereinafter Patent Protection Appellate Body Report].

⁸⁰ *Id.* ¶ 55.

The legitimate expectations of the parties to a treaty are reflected in the language of the treaty itself. The duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties. This should be done in accordance with the principles of treaty interpretation set out in Article 31 of the Vienna Convention. But these principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended.⁸¹

Arguably, the AB misinterpreted the spirit (not the text) of the Vienna Convention and set a new standard for interpreting international agreements. Traditionally, international agreements are not interpreted like statutes, which tend to be construed more strictly to give deference to the views of the legislature. International agreements are not enforcement mechanisms, but instruments that merely memorialize collective sovereign intentions. The intentions of parties with respect to the international agreements and obligations are generally amenable to local needs, politics, and economic situations, and hence, a more flexible and broader construction is warranted. The Vienna Convention lends an objective-based reading precisely for the reason of accommodating flexibility. The appellate body's interpretation, in stark contradiction of this principle, takes away the flexibility of member states. Unfortunately for India, the strict-constructionist, textualist, and non-traditionalist approach would color the appellate body's treatment of the substantive issues in contention.

Had the appellate body followed a more traditional course of interpretation, it would have examined TRIPS in the light of the goals and objectives espoused in Article 7 and the preamble's deference to developing states on account of prevailing economic conditions. Instead, the appellate body strictly construed Article 70.8⁸² and held that India had an obligation to establish a legally sound mailbox mechanism.⁸³

Having determined the requirements under Article 70.8, the AB proceeded to examine whether India's administrative orders in fact established a legally sound mailbox mechanism. India objected that the AB was unqualified to determine the soundness of a local implementation mechanism on the grounds that Article 1.1 of TRIPS preserved the sovereign right of members to determine the method and mechanism of implementing TRIPS obligations.⁸⁴ India's argument that the DSB cannot interfere with the choice of legal implementation tools chosen by a nation was rejected by the AB,⁸⁵ which found that the "administrative instructions" of India contradicted the provisions of the Indian

⁸¹ *Id.* ¶ 45.

⁸² *Id.* ¶ 56.

⁸³ *Id.* ¶ 58.

⁸⁴ *Id.* ¶ 59.

⁸⁵ See Patent Protection Appellate Body Report, *supra* note 79, ¶ 66.

Patents Act 1970, and hence the assigned priority dates were legally untenable.⁸⁶ That is, India's administrative instructions required the Controller to provide priority dates but defer examinations of mailbox applications until patent amendments were executed.⁸⁷ But Section 15(2) of the Patents Act 1970 mandated that the examiner refuse applications for non-patentable inventions.⁸⁸ The AB felt that examiners would be obligated by the statute to reject *all* applications for protecting pharmaceutical and agricultural chemical products.⁸⁹ The AB was thus not convinced that administrative orders would survive a legal challenge under the Indian Patents statute.⁹⁰ The appellate body rejected India's position that the scheme was legitimate under the jurisprudence developed by the Indian courts.⁹¹ Instead, like the panel,⁹² the AB required precedents *explicitly* showing that a court will uphold the validity of administrative actions where they arguably contradict legislation.⁹³ Thus, the AB refused to defer to a nation's interpretation of its own legislation and held that India violated Article 70.8.

Similarly, applying a line of analysis that treated Article 70.9 as operating in tandem with Article 70.8, the AB held that India violated Article 70.9 by not establishing a system for granting EMR after the lapse of the President's Ordinance.⁹⁴ India's argument that a violation of the Article does not occur until an applicant makes an actual demand on the government of India for a grant of an EMR was rejected.⁹⁵ The appellate body report of December 19, 1997, which concluded that India had a legally unsound mailbox mechanism, was adopted by the DSB in January 1998.⁹⁶ Following the report, India agreed to act on the recommendations to comply with TRIPS by April 19, 1999.⁹⁷

⁸⁶ *Id.* ¶ 70.

⁸⁷ *Id.* ¶ 69.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 70.

⁹¹ India offered case laws in support of its assertion. India cited the two Supreme Court cases to confirm the Indian position that its reliance on an administrative practice regarding the handling of pharmaceutical and agricultural chemical product patent applications is not unconstitutional, *see* *State of Haryana v. Mahendra Singh & Others*, A.I.R. 1988 S.C. 1681. *See also* *Union of India v. H.R. Patankar & Ors.* A.I.R. 1984 S.C. 1587 (holding that statutory rules cannot be amended by Executive instructions but "if the rules are silent" on any particular point, the Government can fill up the gaps by issuing executive instructions, in conformity with the existing rules). *See generally* INDIA CONST. art. 73 § 1.

⁹² *See* Patent Protection Panel Report, *supra* note 52, at 7.37.

⁹³ *Id.*

⁹⁴ "Article 70.9 refers to Article 70.8, and they operate in tandem to provide a package of rights and obligations that apply during the transitional periods contemplated in Article 65. It is obvious, therefore, that both Article 70.8(a) and Article 70.9 are intended to apply as from the date of entry into force of the WTO Agreement." Patent Protection Appellate Body Report, *supra* note 79, ¶ 81.

⁹⁵ *See* Patent Protection Appellate Body Report, *supra* note 79, ¶ 97.

⁹⁶ *See* Dispute Settlement Appellate Body Report, *India-Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/9 (Jan. 27, 1998). *See also* Patent Protection Appellate Body Report, *supra* note 79.

⁹⁷ Tomar, *supra* note 28, at 590.

Consequently, the Indian Parliament passed the Patents (Amendment) Act of 1999.⁹⁸

B. United States—Upland Cotton

1. Background

As mentioned in the previous section, the agreements of the WTO represent the end-product of different compromises made by member nations. The compromise of the developing countries in embracing IP protection by becoming a TRIPS signatory was the developed world's promise to reduce tariffs on agriculture and textiles. Agricultural support, like intellectual property, has long been a highly contentious issue in world trade. But unlike intellectual property, where developing nations are accused of creating trade barriers by providing inadequate protection, in the case of agricultural trade, developed nations stand accused of creating trade barriers by providing agricultural support. Developing nations have long asserted that distortions in agricultural trade owing to the agricultural support enjoyed by farmers in developed nations forms a major portion of the distortion paradigm affecting their counterparts in poorer nations.⁹⁹ Thus, of the WTO obligations, reducing barriers to agricultural trade by addressing national agricultural support programs is unique in requiring substantial efforts from the developed world.

“Agricultural support” essentially refers to different forms of subsidies that a government pays to its farmers to protect them from market forces. Subsidies tend to be fashioned in the lines of government support programs, typically extended by national governments, and are designed to cushion local farmers from market risks. Subsidies affect international trade by artificially altering the price of subsidized commodities in the global market.

In order to reduce the trade distortions from subsidies, two significant agreements were adopted at the Uruguay Round to restrict agricultural subsidies.¹⁰⁰ The first, Agreement on Subsidies and Countervailing Measures (hereinafter SCM Agreement),¹⁰¹ applies to subsidies in every economic sector and forbids export subsidies, as well as any other subsidy that is proven to be

⁹⁸ See Status Report by India, Addendum, *India-Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/10/Add.4 WT/DS79/6 (Apr. 15, 1999). See also The Patents (Amendment) Act, No. 17 of 1999; INDIA CODE (1999).

⁹⁹ See Srividhya Ragavan, *To Sow or Not To Sow: Dilemmas in Creating Rights in Food*, in AGRICULTURAL BIOTECHNOLOGY AND INTELLECTUAL PROPERTY: SEEDS OF CHANGE 320, 336-37 (J. Kesan ed., 2007).

¹⁰⁰ See Matthew C. Porterfield, *U.S. Farm Subsidies and Expiration of the WTO's Peace Clause*, 27 U.P.A. J. INT'L ECON. L. 1002, 1005 (2006).

¹⁰¹ Agreement on Subsidies and Countervailing Measures, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Apr. 15, 1994, 33 I.L.M. 1125, reprinted in THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 164 (1994) [hereinafter SCM Agreement].

trade-distorting.¹⁰² It defines the constituents of a subsidy, regulates the use of these subsidies, and recommends policy responses to nations affected by other countries' subsidies.¹⁰³ Additionally, the agreement focuses on countervailing duties, which are duties imposed on imports to offset the advantage that producers from subsidy-offering countries enjoy.¹⁰⁴

The second most important agriculture-related agreement, the Agreement on Agriculture, in line with the broad objective of the WTO, aims at "substantial progressive reduction" of farm subsidies that distort trade.¹⁰⁵ The agreement designates several obligations in areas like domestic support, market access, safeguards, and export subsidies.¹⁰⁶ One provision, the Peace Clause,¹⁰⁷ allowed states to continue using certain agricultural subsidies despite their trade-distorting effect (which member states would otherwise be able to challenge under the SCM Agreement), for nine years from the inception of the Agreement on Agriculture.¹⁰⁸

Subsidy negotiations continue to remain at the heart of the WTO agenda for various reasons. Some of the most vehement subsidies disputes have revolved around cotton. Criticisms emanating from the developing world include developed nations' insistence on subsidizing the local cotton industry while demanding that other states open up their markets. Being the largest exporter of cotton in the world, the United States makes up a quarter of the global cotton trade.¹⁰⁹ Cash receipts attributable to cotton production by the U.S. have averaged around \$4.7 billion per year over recent years.¹¹⁰ Every year 8.2 billion pounds are harvested, processed, and then handled in the U.S., making for a retail

¹⁰² See Porterfield, *supra* note 100, at 1005-06.

¹⁰³ See MATSUSHITA, *supra* note 30, at 262-63.

¹⁰⁴ *Id.* at 296.

¹⁰⁵ Agreement on Agriculture, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Apr. 15, 1994, 1867 U.N.T.S. 410, *reprinted in* THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 43 (1999) [hereinafter Agreement on Agriculture].

¹⁰⁶ *Id.* Preamble.

¹⁰⁷ *Id.* art. 13.

¹⁰⁸ See Porterfield, *supra* note 100, at 1006. The Peace Clause expired on December 31, 2003.

With that, the subsidies of all nations become actionable under the Agreement on Subsidies and Countervailing Measures. In effect, taking into account other considerations like the level of subsidies and its effect on the affected nation, etc., the expiry of the Peace Clause creates opportunities for the developing states to challenge the large agricultural subsidies doled out in the United States and Europe. For more on the Peace Clause and the effects of its expiration, see Third World Network, *The Peace Clause in the WTO's Agriculture Agreement*, <http://www.twinside.org.sg/title/twninfo84.htm> (last visited Aug. 8, 2010); see also K. Subramanian, *Life in WTO after the Peace Clause*, THE HINDU BUSINESS LINE, June 11, 2004, <http://www.thehindubusinessline.com/2004/06/11/stories/2004061100081100.htm>.

¹⁰⁹ Nora L. Brooks, *Characteristics and Production Costs of U.S. Cotton Farms*, Economic Research Service, SB9742 USDA, 2 (2001) available at <http://www.ers.usda.gov/publications/sb974-2/sb974-2.pdf>.

¹¹⁰ See *Cotton Counts*, NAT'L COTTON WOMENS' COMM., available at <http://www.cotton.org/pubs/cottoncounts/upload/Cotton-Counts.pdf>.

value of near \$120 billion per year.¹¹¹ Upward of forty percent of raw American cotton is scheduled to be exported.¹¹² Despite its longstanding stranglehold on the industry, the labor costs in the U.S.—key in an industry that remains labor intensive despite advances in technology—has resulted in a framework of subsidy support for cotton farmers.¹¹³ Estimates indicate that American cotton subsidies depress the average global cotton price by at least ten percent.¹¹⁴

The dispute relating to upland cotton began in September of 2002 when Brazil requested consultations with the United States to seek relief from damage it alleged was caused to its upland cotton industry by the U.S. Farm Bill of 2002 and by U.S. commodity programs from 1999 to 2002.¹¹⁵ When the consultations failed, in February of 2003, Brazil requested that a DSB panel be constituted to resolve the dispute.¹¹⁶

2. Panel and Appellate Body Report

The panel and appellate body considered five distinct claims made by Brazil with regard to the U.S. programs.¹¹⁷ The panel ruled overwhelmingly in Brazil's favor on almost every issue, with the appellate body upholding the ruling on appeal.¹¹⁸ Significantly, both ruled that domestic support subsidies provided by the U.S. to upland cotton producers from 1999 to 2002 violated the SCM Agreement, and were not protected under the Agreement on Agriculture's Peace Clause due to the fact that the level of support in those years was higher than the agreed levels of 1992.¹¹⁹ In addition, the panel held, and the appellate body affirmed, that four separate price-contingent cotton subsidy programs led to significant price suppression in the global upland cotton market, thereby violating the SCM Agreement.¹²⁰ The largess of the subsidies¹²¹ and the

¹¹¹ *Id.*

¹¹² See Brooks, *supra* note 109, at 2.

¹¹³ *Id.* at 5.

¹¹⁴ See THE WTO, DEVELOPING COUNTRIES AND THE DOHA AGENDA: PROSPECTS AND CHALLENGES FOR TRADE-LED GROWTH 17-18 (Basudeb Guha-Khasnobis ed., 2004). See also Michael J. Shumaker, *Tearing the Fabric of the World Trade Organization: United States—Subsidies on Upland Cotton*, 32 N.C.J. INT'L L. & COM. REG. 547, 580 (2007).

¹¹⁵ See Request for Consultations by Brazil, *United States—Subsidies on Upland Cotton*, WT/DS267/1 (Sept. 27, 2002) [hereinafter Request for Consultations by Brazil].

¹¹⁶ Dispute Settlement: DS 267, United States—Subsidies on Upland Cotton, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds267_e.htm (last visited June 12, 2010) [hereinafter Dispute Settlement: DS 267].

¹¹⁷ *Id.*

¹¹⁸ Appellate Body Report, *United States—Subsidies on Upland Cotton*, ¶ 763, WT/DS267/AB/R (Mar. 3, 2005) [hereinafter Upland Cotton Appellate Body Report].

¹¹⁹ Panel Report, *United States—Subsidies on Upland Cotton*, ¶ 447, WT/DS267/R (Mar. 21, 2005) [hereinafter Upland Cotton Panel Report]; See also Upland Cotton Appellate Body Report, *supra* note 118, ¶ 763(b)(ii).

¹²⁰ See Upland Cotton Appellate Body Report, *supra* note 118, ¶ 94 (discussing how the four price-contingent subsidy programs—marketing loan program payments, counter-cyclical payments, market-loss assistance payments and Step 2 payments—were illegal).

subsidies' effect on global upland cotton prices¹²² led to a finding of serious prejudice. The appellate body report, adopted in March 2005, required the U.S. to withdraw its illegal support programs extended to cotton exporters and domestic cotton producers by July 1, 2005.¹²³ Further, the AB required the U.S. to make statutory and regulatory amendments remedying the serious prejudice caused by subsidies that prevailed between 1999 and 2002.¹²⁴ The AB recommended that the U.S. cut or at least curtail its price-driven "amber box" subsidy payments.¹²⁵ Significant changes by the U.S. would not be forthcoming because, despite the DSB ruling, Congressional approval could not be secured. Brazil would be proved reasonable in its fear that the U.S. would be slow to initiate change, despite the assurance of compliance to the DSB.¹²⁶

3. Upland Cotton: Non-compliance by the U.S.

The developed world wanted a dispute settlement system that would force members to act on a DSB ruling that a national law or program is inconsistent with a WTO agreement in order to avoid trade sanctions. But a chief supporter of that system, the U.S. Congress, has been loath to effect the amendments called for by the DSB.¹²⁷ The Uruguay Round Agreements Act ("URAA"), adopted in 1994 by Congress to implement the WTO, required prior congressional action to effect compliance: "[N]o provision of the Uruguay Round Agreements . . . that is inconsistent with any law of the United States shall have effect"¹²⁸

Further, no part of the URAA "shall be construed . . . to amend or modify any law of the United States . . . or . . . to limit any authority conferred under any law of the United States . . . unless specifically provided for in this act."¹²⁹

In an attempt to become at least partially compliant, in July 2005, the U.S. Secretary of Agriculture proposed statutory reforms for Congress that would have repealed an illegal cotton subsidy program, end an Intermediate Export Credit Guarantee Program, and change the Department of Agriculture's fee

¹²¹ Upland Cotton Panel Report, *supra* note 119, ¶ 448(iv).

¹²² *Id.* ¶ 3.2.

¹²³ Upland Cotton Panel Report, *supra* note 119, ¶ 8.3 and ¶ 7.150.

¹²⁴ *Id.* ¶ 449.

¹²⁵ *Id.* ¶ 173.

¹²⁶ *See* Dispute Settlement: DS 267, *supra* note 116.

¹²⁷ *See* H.R. REP. NO. 103-826, pt.1, at 25 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3791-92 (discussing the Committee hearings held on June 10, 1994 on the World Trade Organization and its implications for U.S. sovereignty); *See also* H.R. REP. NO. 103-826, pt. 2, (1994), *reprinted in* 1994 U.S.C.C.A.N. 4013 (discussing the Bill for the Uruguay Round Agreements Act, H.R. 5110, 103rd Cong. (1994)); *See also* The President's Statement of Administrative Actions, *reprinted in* 1994 U.S.C.C.A.N. 4040. *See* Charles Tiefer, *The GATT Agreement on Government Procurement Theory and Practice*, 26 U. BALT. L. REV. 31, 38-39 (1997).

¹²⁸ 19 U.S.C. § 3512 (a)(1) (2000).

¹²⁹ *Id.* §(a)(2).

structure for certain credit programs.¹³⁰ Some of the proposals were adopted as part of the U.S. Deficit Reduction Act of 2005, which came into effect in February 2006.¹³¹ Though the legislation did eliminate subsidies that were *per se* prohibited by the appellate body, (e.g., U.S. Step-2 Cotton Program), the new law did not address the issue of comprehensive aggregate commodity support, which the appellate body report had raised but had failed to explicitly or decisively state how the U.S. could comply effectively.¹³² The unresolved issue centered around what exactly the WTO would classify as actionable amber box subsidies.¹³³ The U.S. agriculture community decried the DSB ruling as flawed and vague.¹³⁴

The lack of proper implementation of the ruling frustrated Brazil and other developing countries, especially the least-developed cotton-producing African states.¹³⁵ Brazil formally requested (twice) that the matter be returned to the Panel under Article 21.5 of the DSU to consider retaliatory measures for non-compliance.¹³⁶ Brazil claimed around four billion dollars in damages and sought permission to take retaliatory measures.¹³⁷ In September 2006, the original panel of the DSB considered whether the U.S. had sufficiently complied.¹³⁸

4. The Second Panel Finding

The much delayed report of the panel, circulated in December 2007, found that the marketing loan and counter-cyclical payments provided to U.S. upland cotton producers, pursuant to the Farm Security and Rural Investment Act of 2002, resulted in price suppression in the world market for upland cotton within the meaning of Article 6.3(c) of the SCM Agreement.¹³⁹ The payments under the enactment seriously prejudiced Brazilian interests under Article 5(c) of the SCM Agreement.¹⁴⁰ The United States, in not taking steps to rectify the adverse effects of the subsidy program, failed to comply with its obligation under Article 7.8 of the SCM Agreement.¹⁴¹ Further, the panel held that export

¹³⁰ Press Release, US Department of Agriculture Proposes Legislative Changes to Cotton and Export Credit Programs to Comply with WTO Findings (July 5, 2005), *available at* <http://www.usda.gov>.

¹³¹ Deficit Reduction Act of 2005, Pub. L. No. 109-171, §1103, 120 Stat. (2006).

¹³² *Id.*

¹³³ See Dispute Settlement: DS 267, *supra* note 116.

¹³⁴ Mark Lange, National Cotton Council, Brazil Cotton Case and the WTO (2005), <http://www.cotton.org/issues/2005/langereptica.cfm>.

¹³⁵ See RANDY SCHNEPF, CRS REPORT FOR CONGRESS, U.S. AGRICULTURAL POLICY RESPONSE TO WTO COTTON DECISION (Sep. 8, 2006), <http://fpc.state.gov/documents/organization/75266.pdf>.

¹³⁶ See Request for the Establishment of a Panel by Brazil, *United States—Subsidies on Upland Cotton*, WT/DS267/30 (Aug. 21, 2006).

¹³⁷ *Brazil to Ask for WTO Cotton Compliance Panel in September*, INSIDE U.S. TRADE, Aug. 18, 2006, at 33.

¹³⁸ Dispute Settlement DS 267, *supra* note 116.

¹³⁹ See Upland Cotton Appellate Body Report, *supra* note 118, at 5.

¹⁴⁰ See *id.* at 5.

¹⁴¹ See *id.* at 6.

subsidies granted under the Intermediate Export Credit Guarantee Program (GSM-102) issued after July 2005, circumvented U.S. export subsidy commitments, violating Article 8 of the Agreement on Agriculture.¹⁴² The export subsidies supported unscheduled products and provided above-commitment-level support to scheduled products, thereby violating Articles 3.1(a) and 3.2 of the SCM Agreement and the earlier DSB ruling. Both parties appealed the decision.¹⁴³ The Appellate Body's report of June 2, 2008 upheld the compliance panel's finding that the GSM 102 export credit guarantees issued after July 1, 2005 constituted an "export subsidy"¹⁴⁴ and that the effect of the marketing loan and counter-cyclical payments provided to upland cotton producers resulted in significant price suppression, causing "present" serious prejudice to Brazil's interests.¹⁴⁵ The Appellate Body also found that the United States had failed to comply with the DSB's recommendations to remove the adverse effects of the subsidy.¹⁴⁶

In August 2008, Brazil requested resumption of a previously discontinued arbitration proceeding that had originally commenced in response to the lack of implementation by the U.S. with respect to the requirements of the first report from July 2005. A second arbitration proceeding was commenced when Brazil requested authorization to suspend concessions or other obligations under Article 7.9 of the SCM Agreement and Article 22.2 of the DSU, when the reasonable period of time to rectify issues relating to actionable subsidies expired in September 2005. Both these arbitration proceedings had been originally stalled pending the second panel report on the question of non-compliance by the U.S. In October 2008, both countries replaced arbitrators, further slowing the course of events.¹⁴⁷ With damage continuing to be done, Brazil pressured the U.S. government to at least modify its programs; the U.S. did not budge.¹⁴⁸ Far from ending its damaging programs, the U.S. continued its attempts to scale back commitments made under applicable rules concerning subsidies for agriculture, while also continuing to seek greater concessions from WTO members so as to increase its market access.¹⁴⁹

Finally, the arbitration decision that was rendered on August 31, 2009, considered three issues.¹⁵⁰ First, with respect to the Step 2 program, Brazil's

¹⁴² See *id.* at 3.

¹⁴³ See *id.* at 4.

¹⁴⁴ See Upland Cotton Appellate Body Report, *supra* note 118 (holding that the subsidies were prohibited as export subsidies because the guarantee was extended for a premium that would be inadequate to cover the long-term operating costs and losses of the GSM-102 program).

¹⁴⁵ *Id.* At its meeting on June 20, 2008, the DSB adopted the Appellate Body report.

¹⁴⁶ *Id.*

¹⁴⁷ Dispute Settlement: DS 267, *supra* note 116.

¹⁴⁸ *Id.*

¹⁴⁹ See Porterfield, *supra* note 100, at 1000.

¹⁵⁰ Recourse to Arbitration by the United States, *United States—Subsidies On Upland Cotton* WT/DS267/ARB/1 3.3 (Aug. 31, 2009) [hereinafter Upland Arbitration] (highlighting that the compliance panel also did not make any findings on the Step 2 measures).

request for a "one-time" countermeasure (to the tune of \$350 million) for the failure of the U.S. to withdraw the subsidies between July 1, 2005 and July 31, 2006 was denied considering that the Step 2 program was terminated (as of August 2006).¹⁵¹ Countermeasures were defined as a temporary remedy available to induce compliance, with full implementation being preferable to the suspension of concessions or other obligations.¹⁵²

Second, Brazil sought permission to impose countermeasures pursuant to Article 4.10 of the SCM Agreement for the U.S. export subsidy programs (GSM-102, GSM-103, and SCGP) at an amount equivalent to the total exports for the most recently concluded fiscal year.¹⁵³ After considering a variety of factors impacting the trade of the complaining member, the arbitrators authorized a countermeasure¹⁵⁴ and agreed to Brazil's request for an annually varying countermeasure based on trade displaced, to be determined using a well-defined, predictable formula.¹⁵⁵

Third, with respect to prohibited subsidies, Brazil felt that it neither practicable nor effective to suspend concessions only on imports of U.S. goods as a countermeasure.¹⁵⁶ Since the circumstances were serious enough to justify the suspension of concession or obligations under other covered agreements, Brazil proposed suspension of obligations under GATT 1994, GATS, and the TRIPS Agreement.¹⁵⁷

The arbitrators determined that Brazil was unable to demonstrate that it is not practicable to suspend concessions or other obligations in trade in goods alone based on the level of trade displaced in the fiscal year 2006 and Brazil's imports of consumer goods in the year 2007.¹⁵⁸ Should the level of Brazil's

¹⁵¹ *Id.*

¹⁵² *Id.* at 4.42 (opining that such a definition is consistent with public international law definitions as reflected in the International Labour Conventions Articles ("ILC") on State Responsibility).

¹⁵³ In that request, Brazil estimated the value of this amount, together with the amount for Step 2 payment, at a total of three billion U.S. dollars, using fiscal year 2004 as reference. *Id.* at 4.1.

¹⁵⁴ *Id.* at 4.278; *see also id.* at Annex 3 for detailed calculations. The arbitrators considered a variety of factors including the prohibited nature of the subsidy and failure to withdraw the subsidy. Brazil requested a countermeasure approximating U.S. \$1.22 billion, but the arbitrators authorized a total of U.S. \$147.4 million.

¹⁵⁵ *Id.* at 4.278; *see also id.* at Annex 4 for the formula to calculate annual countermeasures. Brazil demonstrated the U.S. GSM-supported exports displaced domestic production as well as third-country exports. Termed as "additionality," Brazil estimated the additional export sales obtained by U.S. exporters as a result of these discounts (reflecting a measure of the market volume loss to other producers and exporters). *Id.*

¹⁵⁶ *See Upland Cotton Appellate Body Report, supra* note 118, at 51-52.

¹⁵⁷ *See id.* at 5.1.

¹⁵⁸ *Id.* at 5.201. Brazil was required to follow the principles under Article 22.3 of the DSU in determining that it was not practicable or effective to seek to suspend concessions or other obligations in trade in goods alone and that the circumstances were serious enough. Given the volume and composition of Brazil's imports of consumer goods in the year 2007, the arbitrators determined that there was at least U.S. \$409.7 million worth of Brazil's imports of consumer goods from the United States that could be the subject of countermeasures (or "threshold"). *Id.*

countermeasures entitlement increase in a given year,¹⁵⁹ the arbitrators were willing to conclude that suspension of concessions or obligations applied to trade in goods alone would not be "practicable or effective" within the meaning of Article 22.3(c) of the DSU with respect to any amount of permissible countermeasures applied in excess of the threshold identified.¹⁶⁰ That is, the arbitration decision left the possibility of suspending concessions or obligations in trade in services or in intellectual property rights provided a member state is able to demonstrate that it is not practicable to suspend trade in goods alone. However, Brazil was not allowed at that time to impose countermeasures as it was unable to make such a demonstration.

In the following months, however, a change in trade volume between the two parties pushed Brazil over the threshold, leading it to seek permission to suspend certain trade obligations with respect to the U.S. On November 6, 2009, Brazil formally requested the DSB to authorize retaliation under Article 22.7 of the DSU per the Arbitrators' Decisions.¹⁶¹ When the DSB granted Brazil's request on December 19, 2009, Brazil increased the levy of import duties on certain products from the United States, effective April 7, 2010.¹⁶² Further, Brazil notified the DSB that it intended to suspend concessions resulting in lifting the intellectual property protections established under TRIPS and/or GATS on \$829 million worth of U.S. goods.¹⁶³

But retaliatory action was postponed while the parties attempted to reach a mutually agreeable settlement. On April 21, 2010, the parties announced the conclusion of a Memorandum of Understanding under which Brazil agreed to hold off on the authorized countermeasures for at least sixty days in return for a U.S. package of support designed to aid Brazil's upland cotton farmers.¹⁶⁴ The agreement established a fund amounting to \$147.3 million per annum on a pro-rata basis, designated to provide technical assistance.¹⁶⁵ The fund will continue until either the passage of the next Farm Bill or the establishment of a mutually negotiated solution.¹⁶⁶ On June 17, 2010, just a few days before the expiration of the negotiated sixty-day grace period, Brazil accepted a Framework proposed by

¹⁵⁹ *Id.* The countermeasure entitlement—termed as “threshold”—amounting to U.S. \$409.7 million worth of Brazil's imports of consumer goods from the United States, takes into account the volume and composition of Brazil's imports of consumer goods in the year 2007.

¹⁶⁰ *Id.* at 6.5; *See also id.* at 5.230-5.236.

¹⁶¹ *See* The World Trade Organization, United States—Subsidies on Upland Cotton: Summary of the Dispute to Date, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds267_e.htm (last visited Aug. 8, 2010).

¹⁶² *Id.*

¹⁶³ *Id.* *See also* Raymond Colitt & JoAnne Allen, *UPDATE 1—Brazil suspends retaliation after US concession*, REUTERS, Apr. 20, 2010, <http://www.reuters.com/article/idUSN2013181920100421>.

¹⁶⁴ *See* Press Release, Office of the United States Trade Representative, U.S., Brazil Agree on Memorandum of Understanding as Part of Path Forward Toward Resolution of Cotton Dispute (April 21, 2010), *available at* <http://www.ustr.gov/about-us/press-office/press-releases/2010/april/us-brazil-agree-memorandum-understanding-part-path-f>.

¹⁶⁵ *See* Colitt & Allen, *supra* note 163.

¹⁶⁶ *Id.*

the U.S. and agreed to refrain from taking retaliatory measures.¹⁶⁷ Through the Framework, the United States promised to provide a platform for negotiating the dispute and promised to limit trade-distorting cotton subsidies and to make adjustments to its damaging GSM-102 program.¹⁶⁸ The Office of the U.S. Trade Representative has made clear, however, that the issue far from resolved: “[t]he Framework is still not a permanent solution to the Cotton dispute but is merely an interim step for continued discussions on the programs to reach a solution.”¹⁶⁹

III. THE IMPLICATIONS

This section examines the DSU’s decisions and demonstrates that the body is normative in its approach. The section highlights how the strict constructionist interpretation of the WTO agreements by the DSB has set harmful precedents resulting in three distinct effects, namely: (1) reducing the line between domestic issues and market access issues; (2) failing to balance the rights and obligations of members; and (3) allowing powerful nations to avoid WTO rules by simply not adopting them at the national level and thus preserving bargaining imbalances.

Implication 1: DSB decisions have reduced the line between domestic issues and market access issues

The WTO agreements distinguish between domestic regulation and market access restrictions.¹⁷⁰ The agreements prohibit members from creating market access restrictions that discriminate unfairly against imports, but provide extensive regulatory autonomy as far as domestic regulations are concerned.¹⁷¹ Article 2 of the Agreement establishing the WTO agreement clarifies the demarcation by stating that the “WTO shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement.”¹⁷²

Unfortunately, the demarcation standards between domestic regulation and market access restrictions remains unclear, especially in questions relating to enforcement of the agreements. That is, in any given dispute, the DSB’s sole

¹⁶⁷ See Press Release, Office of the United States Trade Representative, U.S., Brazil Agree on Framework Regarding WTO Cotton Dispute (June 17, 2010), *available at* <http://www.ustr.gov/about-us/press-office/press-releases/2010/june/us-brazil-agree-framework-regarding-wto-cotton-disput>.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ Joost Pauwelyn, *Rien Ne Va Plus? Distinguishing Domestic Regulation from Market Access in GATT and GATS* 132 (Duke Law School, Legal Studies Paper No. 85), *available at* <http://ssrn.com/abstract=638303>.

¹⁷¹ *Id.* at 32.

¹⁷² See Final Act, art 2.

responsibility is merely to determine whether a market access restriction exists in the member state in question.¹⁷³ While general wisdom favors removal of all market access restrictions, justifiable exceptions can be found in almost any country for several reasons, including political, social, and/or market-oriented ones. Further, a blanket recommendation from the DSB to remove the market access restriction without fully appreciating the broader national, regional, or even global effects of such removal would be myopic.

Additionally, unlike the limited role of the DSB, member governments have a larger task to accomplish as far as national markets are concerned. Trade regulations are only one part of the paradigm for national governments. Member governments' resources (which can presumably be used for removing a market access restriction) are limited in the sense that they demand allocation toward conflicting or directly competing goals. For instance, should a country prioritize providing patent protection to allow foreign investment in the future, or should it take care of an existing public health crisis by providing generic drugs? Deference has traditionally been given to states to act as they see fit on issues that go to the political and social heart of a state's sovereignty, like health care issues.¹⁷⁴ In acknowledgement of this established approach, the WTO treaty envisages latitude for states to act to address issues of a primarily national nature precisely to give states the flexibility to act in light of the complex set of local issues that each country faces—issues that can interfere with or impede trade agreements.¹⁷⁵ All things considered, at a minimum the DSB should carefully consider the likely effects of the removal or a market access restriction, weighing it against the cost to international trade *as well as to the member*, before making recommendations.

Instead, in determining whether a country has created a market access restriction, the DSB has tended to interfere in domestic issues wholly outside the scope of its original charge. A clear example is the DSB's opinion on whether the legality of India's administrative orders interferes with India's sovereign right to choose the most appropriate legal tools for its domestic regulation.¹⁷⁶ In this

¹⁷³ See World Trade Organization, Understanding on rules and Procedures Governing the settlement of disputes arts. 3.3, 3.4, http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm. The article specifies that “[r]ecommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement . . . in accordance with the rights and obligations under this Understanding and under the covered agreements.” *Id.* art. 3.4. Further, Article 3.7 highlights that “the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements.” *Id.* art. 3.7. Thus, the DSU does not concern itself with the larger question of the effect of a market access restriction on domestic issues. See also Marie-Christine Le Bret & Arlène Alpha, Factsheet 4—The Application of Rules: Cotton, <http://www.gret.org/publications/ouvrages/infoomc/en/F04en.html> (last visited July 14, 2010) (highlighting that the DSB's role is limited to enforcing existing rules).

¹⁷⁴ Pauwelyn, *supra* note 170, at 135.

¹⁷⁵ *Id.* at 133.

¹⁷⁶ See Patent Protection Panel Report, *supra* note 52.

case, the tools India chose provided for the requirements under the relevant articles.¹⁷⁷ That is, it is arguable that the Indian mailbox system, as it was then instituted, was open to all patent applicants—foreign and domestic. All patent applications were to be treated exactly the same, irrespective of nationality. Further, the Indian government was willing to verify the legality of the tool.¹⁷⁸

Given this, it is not the DSB's place to recommend a different legal mechanism to establish the same system. The DSB, then, should have ended its analysis upon a finding that India had, in fact, instituted a program that did provide for priority of applications and would grant EMR if an applicant applied for such status.¹⁷⁹ Instead, the DSB, in failing to defer to India's interpretation of its own law, forced India to tailor an expensive, ill-fitting system that did not cater to the country's interest.¹⁸⁰ The system that India finally reluctantly embraced resulted in the creation of a costly, incredibly unpopular program designed to provide exclusive marketing rights.¹⁸¹

The program's biggest disadvantage was the grant of EMR (which could span up to five or more years approximately, based on several factors) to patent applicants on the basis of patents issued elsewhere in the world, denying India the right to determine patentability on its own terms. The DSB did not even consider that when the EMR period expired, applications that are denied patent protection would have enjoyed exclusive marketing rights up until that decision, thereby carving out private rights from potentially public property. Nor did the DSB weigh the cost with the benefit of establishing the recommended temporary transition system. Clearly, establishing exclusive marketing rights based on patents issued abroad should be a domestic sovereign decision that carefully weighs the cost and benefits to the consumers in the light of local economic conditions. In failing to consider local burdens and the potential effects of its recommendation, the DSB opinion remains legally flawed. The mailbox precedent thus highlights the dispute settlement body's intrusion into domestic sovereign rights in order to establish market access on its own terms; terms that have proven to be in conflict with both precedent and the common good.

The flaws in the opinions are perhaps owed to the DSB's misconstruction of its charge under the DSU. The DSB is an arbiter of international law and cannot act like a local national judicial body which interprets statutes. While statutes may be construed strictly to give deference to the legislature's views, normative interpretative techniques are rarely used to interpret international agreements. International agreements memorialize collective sovereign intentions, and hence, are susceptible to realities on the ground, such as local needs, political conditions, and economic situations. The Vienna Convention on the Law of Treaties, for instance, lends an objective-based

¹⁷⁷ See *supra* notes 62-66 and accompanying text.

¹⁷⁸ See *supra* note 82 and accompanying text.

¹⁷⁹ See *supra* notes 69-73 and accompanying text.

¹⁸⁰ See *supra* notes 69-73 and accompanying text.

¹⁸¹ See *supra* note 96 and accompanying text.

reading for international instruments precisely for the purpose of accommodating flexibility.¹⁸² A more inclusive undertaking, of the sort required by Article 31 of the Vienna Convention, for instance, would have required the DSB to appreciate the broader aims of TRIPS outlined as Article 7's goal of creating mutually advantageous relationships.¹⁸³ That is, a more sensible and traditional course of interpretation would have required the body to examine TRIPS in the light of the goals espoused in Article 7 as objectives along with the preamble's deference to developing countries, and not in light of the text of Article 70.8.¹⁸⁴ Instead, the appellate body's decision in the mailbox dispute preferred a strict-constructionist and textualist approach to understanding the terms of the TRIPS agreement. The decision lacuna in understanding ground realities perhaps resulted in events that ultimately necessitated a clarification (to include flexibility) in the future, in the form of the Doha Declaration.¹⁸⁵

Implication 2: The DSB Decisions have upset the balance between rights and obligations of parties

The balancing of rights and obligations remains integral to the WTO framework. Such a balance is critical for members to perform trade-related obligations without compromising other national welfare, socio-political interests. Without this balance, there exists the danger of member states unduly prioritizing trade interests to the detriment of worthy national issues.

Notably, even the preamble of the Agreement Establishing the WTO recognizes that member states should pursue trade and economic endeavors "in a manner consistent with their respective needs and concerns at different levels of economic development."¹⁸⁶ The preamble recommends positive efforts to ensure that poorer countries "secure a share in the growth in international trade" commensurate with the needs of their economic development.¹⁸⁷ Sensitivity to local economic concerns is a right for which member states bargained and acquired during the WTO negotiations in return for embracing the obligations inherent in becoming a WTO member.

Furthermore, Article 7 of TRIPS, which highlights the objectives of the agreement, likewise expresses the importance of balancing rights with obligations.¹⁸⁸ The article details that the protection and enforcement of intellectual property rights should contribute to the twin objectives of promotion

¹⁸² See Susy Frankel, *The WTO's Application of the Customary Rules of Interpretation of Public International Law to Intellectual Property*, 46 *VIR. J. INT'L LAW* 1, 14-17 (2005).

¹⁸³ See *supra* note 7.

¹⁸⁴ *Id.* at 19.

¹⁸⁵ WTO Fourth Ministerial Conference, *Declaration on TRIPS Agreement and Public Health at Qatar*, WT/MIN(01)/DEC/1 (01-5859) (Nov. 2001) [hereinafter Doha Declaration].

¹⁸⁶ See DSU Preamble.

¹⁸⁷ *Id.*

¹⁸⁸ See *supra* note 7.

of innovation and the transfer of technology, but makes clear that such objectives are subject to three conditions: (1) conducting trade to the mutual advantage of producers and users of technology; (2) in a manner conducive to social and economic welfare; and (3) toward a balance of rights and obligations.¹⁸⁹

The DSB decisions have not reflected a sensitivity to maintain the imminent balance outlined in the preamble and in Article 7 of TRIPS, which reflect the intent of the parties to the WTO system.¹⁹⁰ The outstanding question, then, is what exactly are the tenets of the “balance” and how can its constituents be determined? The reference to a balance in the preamble and in Article 7 of the TRIPS agreement can be construed in a number of ways, as detailed below.¹⁹¹

The reference to balance in the WTO Agreement can be construed as a reference to an *internal* balance—that is, any obligation that a member country seeks to fulfill under TRIPS (or any other WTO agreement) must be balanced with the rights of the members, meaning it should be commensurate with the country’s economic development. That is, costs incurred by members in fulfilling an obligation, say TRIPS implementation, must be balanced against the “rights” (the right to exercise the obligation flexibly) afforded under the treaty. Put differently, the detriment to a state from a WTO obligation should be roughly in line with the benefit it receives—a mere promise of trade and investment in the future does not constitute a “benefit”—and it should not be unduly burdensome given the economic status of the member.

Such a reading would require the dispute settlement mechanism to give greater deference to members’ national priorities in light of their obligations, which the DSU clearly failed to do in the mailbox dispute. In determining India’s compliance, the potential costs and benefits for the member nations were not given due consideration. The country’s sovereign right to construct and implement a scheme that would bring it into compliance with TRIPS was ignored. The mailbox decision swung the pendulum toward obligations and disturbingly away from the rights of the member state.

Alternately, the balance referred to in the preamble and in Article 7 of TRIPS can be construed as an *overall* balance. That is, a balance between the various rights and obligations members have chosen to embrace. For example, some scholars contend that the developing states sought concessions on other matters (such as textiles and agriculture) and agreed to TRIPS obligations on intellectual property rights with the understanding that it would indeed harm them in that regard, but saw it as the consideration they must pay for those concessions.¹⁹² That is, the “balance” referred to in Article 7 could mean that

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ See Agreement on Agriculture, *supra* note 105, art. 13.

¹⁹² See, e.g., DANIEL C.K. CHOW & EDWARD LEE, INTERNATIONAL INTELLECTUAL PROPERTY: PROBLEMS, CASES AND MATERIALS 284 -85 (2006) (highlighting the bargain the Notes and Questions).

any damage done to the poor nations under TRIPS is automatically balanced by gains from concessions in other areas, such as textiles and agriculture.

If that was the case, the DSB in the mailbox dispute should have taken cognizance of the cross-obligations. The DSB should have read the ambiguities in Article 70 (8) and (9) in favor of resolving obligations of parties in comparable timelines. The DSB could have sought a commitment from India to fully implement TRIPS at the end of the transitional period, subject to the pending resolution on agriculture. Indeed, the transitional period for the TRIPS agreement and the Peace Clause on the agreement on agriculture expired around the same period.¹⁹³ Instead, the opinion of the DSB forced developing countries to fulfill international obligations at the cost of national issues while not forcing reciprocity from the developed countries.

Lastly, the balance struck in Article 7 could be construed as a *global* balance—that the obligations of members will be balanced by an increase in global welfare.¹⁹⁴ The issue then is whether the consideration of global welfare provides an adequate “balance” for countries to fulfill their international obligations, often to their own detriment. Would populations and their elected leaders be willing to jeopardize their own national economic welfare in the quest for global economic welfare (the sum of the welfare effects on all nations)? This seems unlikely, leading to the conclusion that this is not at all what the developing states had in mind when signing on to the agreement. Moreover, in international agreements, sovereigns typically represent the sentiments of their citizens. It is a fantasy to assume that citizens of developing nations would choose obligations that result in immediate life-affecting losses (like loss of access to medication) in favor of a greater global benefit.

Further, there appears to be a distinct lack of economic justification in expecting poor nations to vote for global welfare at the cost of national welfare. Free trade, the central aim of TRIPS, is well couched on Adam Smith’s observations that “what is prudence in the conduct of every private family can scarce be folly in that of a great kingdom.”¹⁹⁵ Accordingly, what is prudence in the context of national economics cannot be a folly in the context of international economics. The world is comprised of more developing than developed nations.¹⁹⁶ Economically there seems to be no logic in arguing that the national welfare of some 136 developing nations can be compromised to lead to a “global” welfare, the benefits of which will be reflected in a mere handful of nations. For these reasons, it is unlikely that the “balance of rights” in the preamble is a reference to global welfare. In order to achieve the objectives of the WTO agreements, it is imperative that DSB decisions takes into consideration the envisaged and critical balance between rights and obligations of members.

¹⁹³ See Agreement on Agriculture, *supra* note 105, art. 13.

¹⁹⁴ *Id.*

¹⁹⁵ See 4 ADAM SMITH, WEALTH OF NATIONS ch. 2 (1776).

¹⁹⁶ 10th International Conference on Clean Energy, 2009 List of Developing Countries, <http://www.icce2010.org/docs/developingCountries.pdf> (last visited June 12, 2010).

Implication 3: The DSB allows powerful nations to avoid WTO rules by simply not adopting them at the national level and thus serves to preserve bargaining imbalances

While the DSB takes a normative approach in interpreting the WTO agreements, the body is seemingly unable to achieve the agreements' objectives with powerful countries that are unwilling to comply with the DSB's decisions. To that extent, the failure of the DSB is the exact opposite of the failures of the earlier intellectual property law conventions. In the cases of the Paris and Berne Conventions, more often than not, securing the compliance of the poorer signatories to the international obligations was the difficult task.¹⁹⁷ However, in the case of the WTO agreements, the developing and least developed countries either complied or have found legally viable options to seek exceptions (e.g., Doha Declaration).¹⁹⁸ But, as the upland cotton dispute demonstrates, the developed world has shown a propensity to renege on its international obligations.

Unfortunately, when powerful nations renege on their obligations, the body seems indecisive, powerless and lacking in appropriate implementation tools. The DSB system is designed to punish non-compliant poor nations by authorizing trade sanctions but seems to lack ammunition to enforce agreements or decisions where rich nations are unwilling to comply. For instance, in the Upland Cotton dispute, the panel refused to act decisively on Brazil's claims regarding non-compliance.¹⁹⁹ Had the panel deciding the compliance issue originally granted Brazil permission to impose countermeasures and/or levy cross-sanctions (by suspending intellectual property rights), it would have set the tone for compliance by all members. Perhaps the U.S. would have been forced to change at least the most odious of its amber box subsidies at a much earlier time, thereby reducing the damage it caused to world cotton prices. By letting the U.S. drag its feet with only the excuse of the domestic political process for not complying with the appellate body's report, the DSB was disappointingly ineffective with a powerful non-complying party. Brazil had to take the long-drawn and expensive route of seeking arbitration in order to achieve its end.²⁰⁰ Nearly eight years after Brazil first formally voiced its concerns with the WTO, whether the matter will ever be adequately put to rest remains unclear. Such failures of the DSB to act decisively allow powerful nations to avoid the rules of the WTO by simply refusing to take adequate actions, offering only the excuse of the domestic political process.

¹⁹⁷ See Pechman, *supra* note 8.

¹⁹⁸ See Doha Declaration, *supra* note 185.

¹⁹⁹ See Upland Cotton Appellate Body Report, *supra* note 118.

²⁰⁰ *Id.*

As mentioned earlier, developing country members of the WTO act on a DSB ruling when a national law or program is inconsistent with a WTO agreement to avoid trade sanctions (the enactment of the patent amendments in India being an example). The U.S. Congress, instead, adopted the Uruguay Round Agreements Act, limiting the reach of the WTO mechanism into its domestic matters.²⁰¹ The DSB, which ruled on the legality of India's internal legal systems, did very little to secure compliance from the United States.

The DSB could have approached the issue from a less normative and a more objective perspective from the outset in interpreting the agreements in question in the upland cotton dispute. Such a reading would have showcased the objective of the WTO system in light of the bargains made by the parties and the overall objectives of the system and paved the way for compliance by more powerful countries.

Consequently, the DSB mechanism has frustrated poorer nations, affecting their ability to use the WTO dispute settlement mechanism effectively.²⁰² Decisions like the upland cotton dispute that showcase the vulnerability of the DSB serve to increase the developing nations' lack of confidence in the body and leave them unable to fully exploit the DSB system to their rightful benefit.²⁰³ Notably, failures of the DSB to provide the same level of treatment have in turn helped preserve the bargaining inequalities between rich and poor states, as discussed below. That is, the panel's failure to act, pursuant to Article 22.3 of the DSU, and to swiftly order the U.S. to either compensate Brazil or authorize retaliation, has in effect left Brazil without a solution.²⁰⁴ While the Framework it recently agreed to with the U.S. may be a step in the right direction, it comes much too late and the U.S. itself has acknowledged that the conflict is not yet settled. The affair leaves the impression that a developed country was allowed to circumvent the rules and manipulate world cotton trade. Clearly, the upland cotton dispute highlights the detriment to developing countries like Brazil resulting from the inherent bargaining inequity of the system. An enforcement mechanism that fails to expeditiously and thoroughly enforce its rulings clearly benefits the rich.

If the tables were reversed and Brazil had been the victor and the U.S. the loser, the U.S. would simply have relied on its economic superiority and forced Brazil into compliance through non-WTO channels. Instead, Brazil has been unable, despite its strongest protestations and political maneuvering, to bring the U.S. anywhere close to full compliance. While negotiations have been for the most part in vain, the U.S. has continued to maintain the economic and

²⁰¹ See 19 U.S.C. § 3612(a)(1) (2006). See also *supra* note 127.

²⁰² Cecilia Oh, *Developing Countries Call for Action on TRIPS at Doha WTO Ministerial Conference*, THIRD WORLD NETWORK, available at <http://www.twinside.org.sg/title/twr131d.htm> (last visited June 12, 2005). See also Lebrét & Alpha, *supra* note 177 (highlighting the issues that poorer countries face).

²⁰³ Smith, *supra* note 10, at 168 (outlining that developed nations exclusively use the DSB).

²⁰⁴ See DSU Annex 2.

political clout to do next to nothing for the better part of a decade. For weaker states, the WTO is the only forum in which they have a legitimate chance of edging the rich.

By not timely authorizing retaliation or ordering the U.S. to pay, the DSB has taken away one of the few advantages the developing world thought it had gained under the WTO—an objective enforcement mechanism that took no account of wealth or status and would vindicate those who had been harmed in contravention of WTO law. Instead, the functioning of the DSB has only served to preserve the maladies of *status quo*. That is, the inability of the DSB to enforce compliance from powerful states has contributed to the preservation of already-existing bargaining balances. It has taken away the one tool the developing states had hoped would shape a more just world order.

As with the mailbox dispute, a more inclusive consideration of all relevant circumstances would have served the WTO well in the upland cotton dispute. In recognizing the dire position of the developing world in an industry as important as that of cotton, and in acknowledging that short of the help of the WTO the developing states will not be able to force compliance by the rich, the DSB would better serve the goal of the trading system. In the future, the DSB should give due consideration to the fact that rich states will avoid the rules by simply not passing their own domestic laws that would ensure compliance, and it should be conscious of the fact that inaction preserves and ratifies bargaining imbalances. This will inform the DSB's approach to disputes and, in cases like the upland cotton dispute, inspire quick and thorough action to enforce its rulings. This approach would level the playing field, bringing the WTO closer to the utilitarian system envisioned by its founders and the overwhelming majority of its members.

IV. CONCLUSION

The DSU's lack of any explicit requirement to consider local social and economic conditions in determining compliance under WTO agreements and the DSB's failure to glean such an obligation from relevant texts and apply it accordingly have severely damaged developing states. By interpreting the normative DSU in a way that fails to account for local realities and disregards the broader aims of the trading regime, and by failing to take quick action to thoroughly enforce its rulings, the DSB has proved incapable of achieving the utilitarian objectives of the WTO system. The case studies discussed above are representative of the problems caused by the current operation of dispute settlement under the DSU. The DSB's neglect of consideration of issues beyond the text of the WTO agreements has not served the goals of the trading regime.