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Ensuring the Conformity of Domestic Law With World Trade Organisation Law

India as a case study

Julien Chaisse

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His research interests include the common commercial policy of the European Community, international business law, WTO law and the central question of its enforcement by the Members States. He has been active participant in several seminars and has written and published papers on these diverse areas.

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LIST OF ABBREVIATIONS

AB	Appellate Body of the WTO
AD Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
AFDI	*Annuaire Français de Droit International*
AoA	Agreement on Agriculture
APJoEL	*Asia Pacific Journal of Environmental Law*
BISD	Basic Instruments and Selected Documents, published by GATT
BJIL	Berkeley Journal of International Law Covered Agreements Agreements listed in Appendix 1 to the DSU
DSB	Dispute Settlement Body
DSM	Dispute Settlement Mechanism/Dispute Settlement System of the WTO
DSU	Dispute Settlement Understanding
ECJILTP	*The Estey Centre Journal of International Law and Trade Policy*
EJIL	*European Journal of International Law*
ELR	*European Law Review*
EPW	*Economic and Political Weekly*
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
ICRIER	Indian Council for Research on International Economic Relations
IJIL	*Indian Journal of International Law*
JDI	*Journal du Droit International*
JWT	*Journal of World Trade*
LGDJ	*Librairie Générale de Droit et de Jurisprudence*
MPYoUNL	*Max Planck Yearbook of United Nations Law*
NTB	Non-Tariff Barrier
PCIJ	Permanent Court of International Justice
QR	Quantitative Restriction
RTA	Regional Trade Agreement
SDT	Special and Differential Treatment for Developing Countries
TJWTOS	*Taiwanese Journal of WTO Studies*
TRIPs	Agreement on Trade-Related Aspects of Intellectual Property Rights
Vienna Convention	Vienna Convention on the Law of Treaties, 1969
WT	WTO Document Series
WTO	World Trade Organisation
WTO Agreement	Marrakesh Agreement establishing the World Trade Organization
WTO Agreements	“Covered Agreements”
WTR	*World Trade Review*

FOREWORD

An inescapable consequence of becoming a party to an agreement is subjecting its rights and obligations to the terms of the agreement. The 1994 Marrakesh Agreement Establishing the World Trade Organization (the WTO Agreement), requires each WTO Member to "ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements." It is natural for the issue of WTO conformity to be a subject of much attention if it should arise in the most representative and the only compulsory dispute settlement system in the world. It is this conformity that Mr Julien Chaisse's work deals with.

The author chose to focus on India, the fifth major user of the WTO dispute settlement system, following the US, EC, Canada, and Brazil. He analyzes legal issues that arise in the overall context of WTO conformity of Indian law with India's WTO obligations. The substantive issue that most prominently emerges here is patent protection in the field of pharmaceutical, agricultural and chemical products, together with the issues of legality of acts or omissions of the Indian executive and the competence of WTO panels to decide on them.

It is a truism, perhaps a necessity, including for a rule-based system, that the WTO follows customary practices developed in the GATT era even as it requires all Members to ensure conformity of their laws with their WTO obligations. It is in this context that the doctrine of precedent acquires significance. And it is no surprise that the WTO followed it in *India – Patents* (DS79) while denying in principle its existence in WTO law.

Together with the WTO referring in practice to its earlier jurisprudence, its ruling for its competence to decide on the issues of legality has had far reaching and somewhat disturbing consequences, consequences which many Members, particularly

India had not most certainly anticipated while signing the WTO Agreement. If *India – Patents* (DS50) is germane to the elements of surprise for India, much of the controversy in this regard surrounds *US – Trade Act* (DS152). It is doubtful that the TRIPS Agreement could not at all have afforded the flexibility which India believed developing country Members had in implementing their TRIPS obligations or that the administrative undertakings had altogether removed the "chilling effects" from a statutory language that mandates a WTO-inconsistent recourse.

Mr Chaisse's study is a most useful addition to the growing literature on WTO law and litigation. I am sure it will be of great help to the student, researchers and policy makers and generate many more such studies.

Dr. Ravindra Pratap
21st November 2005
Indraprastha University School of Law, Delhi

INTRODUCTION

The World Trade Organisation (WTO) came into effect on 1st January 1995, replacing the General Agreement on Tariffs and Trade (GATT), under the terms of the Marrakech Agreement. India was an original contracting party to the GATT and became a founding Member of the World Trade Organisation in January 1995[1]. WTO serves as a common institutional framework for Member countries[2] for trade between them, as provided for under this agreement. Its work consists of facilitating "the implementation, administration and operation, and furthers the objectives"[3] of the Marrakech agreements, which concern several fields of international trade such as goods, services, intellectual property rights[4], *etc*. India plays its role in furthering these objectives. As the Indian Government has declared, "India has taken important policy initiatives since July 1991 to emerge as a significant player in an increasingly inter-dependent world economy. The policy reforms provided a free and conducive environment for trade and include various measures which helped to achieve the high export growth rates in some recent years."[5]

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[1] India is a member of all the major multilateral economic *fora*, including the International Monetary Fund, the World Bank and the Asian Development Bank.

[2] Since February 2005, WTO has 148 Member States, whereas the United Nations Organisation has 190 countries in its fold.

[3] Article III:1 of the Agreement Establishing the World Trade Organization.

[4] These WTO Agreements have been published in India in Gupta K. R.: *World Trade Organisation: Text – Volume I*, Atlantic Publishers and Distributors, New Delhi 2000 (338 p.) and *World Trade Organisation: Text – Volume II*, Atlantic Publishers and Distributors, New Delhi 2000 (339-716 pp.).

[5] Trade Policy Review Body, *Trade Policy Review - India - Report by the Government*, WT/TPR/G/33, 30 March 1998, paragraph I. See detailed data in Annex 1.

It also acts as forum for negotiations[6] on any issue pertaining to multilateral trade relations.[7] It is within this framework that the present round of negotiations initiated by the November 2001 Doha Ministerial Conference are taking place. The present round of negotiations should be concluded in Hong Kong in December 2005.[8]

The WTO is thus an association of nations that meet to regulate international trade by laying down rules that must then be applied to all its Members.[9] From the legal point of view, it is an international organization that countries join voluntarily. We must underline that it has no coercive powers and all the countries that have opted to become members have voluntarily accepted its rules. The WTO is therefore a political compromise.

In concrete terms, WTO's main aim is to facilitate international trade by removing or reducing trade barriers. It is generally admitted that it is difficult for a company to export or enter the market of another

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[6] "The WTO shall provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements in the Annexes to this Agreement. The WTO may also provide a forum for further negotiations among its Members concerning their multilateral trade relations, and a framework for the implementation of the results of such negotiations, as may be decided by the Ministerial Conference", Article III: 2 Agreement Establishing the World Trade Organization.

[7] Regarding India's participation in multilateral trade negotiations, see Chakraborty Debashis: *India's Participation in WTO Negotiations: The Changes in Attitude and Emphasis*, TJWTOS 2005, pp. 120-163.

[8] However, the Doha Round negotiations has produced few results so far. So unless Members strike a significant deal over major issues (agricultural protection, industrial tariffs and services, notably telecommunications), there is a considerable risk of failure in Hong Kong.

[9] WTO law, or what we will call international trade law, is thus a branch of international economic law defined by M. Srinivasa Rao as " a science which deals with that body of customs, rules, principles, treaties, covenants, charters, clauses, codifications, declarations, understandings, agreements, protocols, etc. which are binding upon the members of the International community as sovereign States, entities which have been granted international personality, institutions and enterprises in their mutual economic relations relating to international trade and commerce in goods, services, … […] and which are provided by the rules of international customary law or incorporated by the international Organisations established by universal consent or by their organs through conferences and conventions", Myneni Srinivasa Rao: *International Economic Law*, Allahabad Law Agency, Faridabad 2003, pp.1-2.

country unless some minimum legal security is available in matters pertaining to customs duties and the stability of import regulations. This applies as much to Indian companies as to others. The continuous lowering of customs duties since the end of World War II has almost reached its limits. Considering that the main destinations for India's exports[10] are the European Union (23.4%), East Asia (20.7%) and the United States (20.9%), it is important to mention that customs duties in the United States and Japan are on an average about 1.5% while they are about 3% in the European Union. Trade barriers today are more in the nature of non-tariff barriers,[11] e.g. regulations, standards, administrative practices, etc. which are essentially the government's response to demands from trade and industry for protection from competition from imports. On the other hand, unfettered free trade can destabilise an economic sector, a profession or a part of the world. For example, the systematic dumping practised by the Japanese industry during the "glorious thirties" destroyed entire segments of the European industry, e.g. photographic equipment, cameras, hi-fi, motorcycles, etc. Given such practices, a too rapid lowering of customs duty does not allow the industry to adjust to the changes brought about by international competition. International trade can be balanced only if, apart from regulations that disallow unfair practices, the opening of borders to imports goes hand in hand with export flows of a globally equivalent quantity. To that extent, like all economic activities, international trade requires regulations to prevent unfair practices such as discrimination, dumping, massive export subsidies, unstable legal frameworks and so on. Proper regulations alone can stop economic competition from degenerating into a trade war. Such is the purpose of WTO.

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[10] Trade Policy Review Body, *Trade Policy Review - India - Report by the Secretariat*, WT/TPR/S/100, 22 May 2002, paragraph 21 and following paragraphs.

[11] About the impact of non-tariff barriers on Indian exports, see Bhattacharya B. and Mukhopadhaya Somasri: *Barricading Trade Through Non-Tariff Measures – Through the Indian Eyes*, in Dasgupta Amit and Debroy Bibek (Ed.): *Salvaging the WTO's future: Doha and beyond*, Konark Publishers Pvt. Ltd., New Delhi 2002, pp. 157-181 and Bhandari Surendra: *World Trade Organisation (WTO) and Developing Countries: Diplomacy to Rules Based Syste*m, Deep & Deep Publications, New Delhi 2002, pp. 66-91.

Besides, since 1995, the globalisation of trade relations, legally organised by WTO, has increased the interdependence of economies and has highlighted the links between trade and other concerns such as social rights[12], the environment[13] or even food quality and security.[14] Thus the need for regulations, which would constitute not only a requirement for credibility but also for the efficiency of the multilateral trade system in the future, is becoming increasingly evident. The development of trade brings different economic and social systems into direct competition. In such a situation, India has a real advantage, which is however strongly criticized. Indeed, apart from the economic dumping mentioned above, there is social "dumping" (non-compliance with the fundamental rights of workers), environmental "dumping" (non-compliance with environmental law) and even monetary "dumping" (manipulation of money markets and currency rates).[15] Countries acting in this manner allow their companies to sell at rates that are lower than those of countries having social legislation or legislation on environmental protection. Even in a very well-defined sector like trade, new issues often raise questions about global governance. But if these pointed questions are provoked by WTO's actions, it must certainly be because WTO strives to implement its law efficiently.

As a legal system, WTO administers a set of rules that are applied to its subjects, who are essentially its member countries, as in the case of international law. As an illustration, it should not be surprising to read that in the recent past, that is "between 1997 and 1999, the United States successfully invoked the WTO machinery which decided that India must pass a new patents legislation by April 1999

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[12] See Taylor Anie and Tomas Caroline: *Global trade and global social issues*, Routledge, London 1999 (247 p.) and Leary Virginia: *The WTO and the Social Clause: Post-Singapore*, EJIL 1997, Vol. 8 No.1, pp. 118-122.

[13] Anderson T.: *The Cartegena Protocol on Biosafety to the Convention on Biological Diversity: Trade Liberalisation, the WTO, and the Environment*, APJoEL 2002, Vol. 7 No.1, pp. 1-38.

[14] Desta Geboye Melaku: *Food Security and International Trade Law - An Appraisal of the WTO Approach*, JWT 2001, Vol. 35 No.3, pp. 449-468.

[15] Later on, we will also take up fiscal "dumping", which can be seen even in a zone as economically integrated as the European Union: though all things may be equal, economic activities are concentrated in areas where income and social security taxes are the lowest.

under threat of sanctions resulting in the Patents (Second Amendment) Act 2002. The issue for 2005 is whether the Government will convert its December 2004 Patents Ordinance into a statute with or without suitable amendments."[16] However, the implementation of the WTO law, which is similar to international public law, seems to demand important changes in Indian law as well as in many other countries. This is not very common as under international law it is usually the responsibility of the country to enforce these obligations. Unless a treaty is self-executing, each state must convert the treaty provisions into law and then enforce them. Very often, states fail to implement or enforce[17] their treaty obligations. In addition, some states routinely avoid honouring certain treaty provisions that are not to their liking. Both these practices tend to undermine the effective implementation of international law. But it does not seem to be so in the case of WTO. Indeed, the WTO, as the above comment on Indian patent law implies, has the means and tools to ensure that domestic law conform to the WTO Agreements. Because of its massive impact on domestic legal systems and because its influence is greater than that of other international organisations, the issue of conformity of domestic law to WTO law is a systemic issue that goes "to the core and *raisons d'être* of the multilateral trading system".[18]

The hypothesis is then that there should be a specificity of the WTO which ensures to international trade law an obvious effective implementation. These questions are of particular interest to us as we would like to focus on the relationships between WTO and India and, more precisely, between the WTO legal system and Indian law. Little has been written on this subject and it is necessary to identify and assess the burden of the constraints on India. What are these constraints? What is the strength of that constraint? What has been done so far and what

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[16] Dhavan Rajeev: *The President's New Year speech*, The Hindu 7 January 2005.

[17] The term "enforcement" in the context of international environmental law refers to the measures taken to ensure the fulfilment of international legal obligations, or to obtain a ruling by an appropriate international body that obligations are not being fulfilled.

[18] Pratap Ravindra: *India at the WTO – Dispute Settlement System*, Manak Publications, New Delhi 2004, p. 324.

can be done in the future to transform Indian law so that they conform to WTO law? The purpose of this study is to examine why and how WTO law tend to be implemented effectively (as compared to other international law) and to what extent this has changed Indian law. As regards the practical aspect, it aims to give an overview of the recent innovations or changes in Indian law which are presently in force and simultaneously assess India's integration in international trade governance. As for the theoretical aspect, this study aims to identify the characteristics peculiar to WTO that ensure the implementation of its law and oblige India as well as other member countries to comply with international norms.

The conformity of Indian law to WTO law is obligatory for two reasons. Firstly, the Agreement establishing WTO enshrines the obligation for all its Members to ensure such compliance. Hence we will examine the scope and the consequences of this obligation (Part I). Secondly, "unlike the erstwhile GATT, the new institution (WTO) is equipped with legal authority and provisions for enforcement of the rules and the disciplines of the new trading system."[19] One of the most important innovations of WTO is the establishment of a new Dispute Settlement System/Mechanism (DSS/M). This mechanism has already given rise to several observations and in the course of our study we will focus on the very elements of this system that contribute to the conformity of India law to WTO law, i.e. not the structure of the DSM, but the elements that ensure compliance of domestic law (Part II). [20]

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[19] Panchamukhi V. R.: *World Trade Organization and Developing Countries – Challenges and Perspectives*, in Dasgupta Amit and Debroy Bibek (Eds.): *Salvaging the WTO's future: Doha and beyond*, Konark Publishers, New Delhi 2002, pp. 11-32.

[20] A third element could be added to these two elements. According to some authors like M.B. Rao, the Trade Policy Review Mechanism "itself has enforcement characteristics. It enables a collective approach and evaluation of individual trade policies and practices. Besides, it is a compulsory exercise in the sense that a member does not have the option of opting out of the mechanism. Second, the process of the review consists of approbation and disapprobation in terms of a normative framework consisting of legal as well as economic criteria". Rao M. B. and Guru Manjula: *WTO and International Trade*, 2nd Ed., Vikas Publishing House, New Delhi 2003, p. 70. However, even if the TPRM is a part of the general mechanism for for enforcing conformity with WTO law, it is not the most important in terms of strength. We believe, however, that the TPRM will make it possible to assess the forthcoming disputes in WTO, as analysed in Part II, Section II.

PART ONE

Ensuring the Conformity of Domestic Law with WTO Law

Julien Chaisse

INDIA'S SUBJECTION TO THE OBLIGATION TO CONFORM TO WTO LAW

Article XVI:4 of the Agreement establishing WTO states that "Each Member shall ensure the conformity of its law, regulations and administrative procedures with its obligations as provided in the annexed Agreements." This general clause is reaffirmed by special provisions contained in specific agreements whose observance calls for the adaptation of domestic law.[21] However, since the principle expressed by article XVI:4 is included in the Agreement establishing WTO, which forms the very basis of the organisation, it applies to all other WTO agreements, even if these agreements do not refer to it specifically. Furthermore, on the basis of article XVI:3 of the Agreement establishing WTO,[22] it constitutes a rule of superior value.

Inasmuch as the WTO agreements have become effective and India does not benefit from any waiver at any given moment as specified by the procedure defined in article IX: 3,[23] it must amend its legislation to conform to the WTO agreements (Section II). To that extent, the obligation contained in article XVI:4 is of cardinal importance since a violation of any provision in the

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[21] For example, Article 8.2 a) of the Agreement on Import Licensing Procedures states, "Each Member shall ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its law, regulations and administrative procedures with the provisions of this Agreement"; Art. 9.4.1 of the Agreement on Trade in Civil Aircraft states, "Each government accepting or acceding to this Agreement shall ensure, not later than the date of entry into force of this Agreement for it, the conformity of its law, regulations and administrative procedures with the provisions of this Agreement."

[22] "In the event of a conflict between a provision of this Agreement and a provision of any of the Multilateral Trade Agreements, the provision of this Agreement shall prevail to the extent of the conflict."

[23] In fact, Article IX.3 of the Agreement establishing WTO foresees that "In exceptional circumstances, the Ministerial Conference may decide to waive an obligation imposed on a Member by this Agreement or any of the Multilateral Trade Agreements, provided that any such decision shall be taken by three fourths of the Members unless otherwise provided for in this paragraph." Furthermore, any exemption can only be temporary.

agreement automatically leads to a violation of article XVI:4[24] (Section I).

Section I - The Cardinal Obligation of Conformity with WTO Law

Article XVI:4 states quite clearly that all WTO members, and therefore India too, are bound by this constraint. However, the Panel, when called upon to explain the implications of this obligation for the legal systems of member countries, affirmed that legislative amendments were not the only possibility: "Members should enjoy the maximum autonomy to ensure compliance, and if there is more than one legitimate way of doing so, they should have the possibility to choose that which suits them best."[25]

The way the WTO system understands conformity is crucial as it determines the constraint that binds India. Of course, the analysis

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[24] In the Byrd Amendment, the Appellate Body states that "as a consequence of our finding that the United States has acted inconsistently with Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*, we uphold the Panel's finding that the United States has failed to comply with Article 18.4 of the *Anti-Dumping Agreement*, Article 32.5 of the *SCM Agreement* and Article XVI:4 of the *WTO Agreement"*, Report of the Appellate Body, *United States - Continued Dumping and Subsidy Offset Act of 2000*, WT/DS234/AB/R, 16 January 2003, paragraph 302. Or, in the case *Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, the panel concluded that an American law was "inconsistent with Article 9.4 of the AD Agreement, and that therefore the United States has acted inconsistently with its obligations under Article 18.4 of the AD Agreement and Article XVI:4 of the Marrakesh Agreement by failing to bring that provision into conformity with its obligations under the AD Agreement", Report of the Panel, *United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, 28 February 2001, paragraph 8.1.b. Similarly, in *Sunset Reviews Of Anti-dumping Measures On Oil Country Tubular Goods From Argentina*, the panel noted "therefore, a finding by this Panel that the United States has acted inconsistently with any of its obligations under the Anti-Dumping Agreement will necessitate a finding that it has also acted inconsistently with Article 18.4 of the Anti-Dumping Agreement and Article XVI:4 of the WTO Agreement", Report of the Panel, *United States - Sunset Reviews Of Anti-dumping Measures On Oil Country Tubular Goods From Argentina*, WT/DS268/R, 16 July 2004, Annex A, paragraph 313.

[25] Report of the Panel, *United States – Articles 301 to 310 of the 1974 law on external trade*, WT/DS 152/R, 22 December 1999, paragraph 7.102.

and the elements that we will put up as evidence are valid for all Members as some countries are not bound by any special obligation to conform. Conformity is a general requirement, but it remains to be seen if what is required is just appropriateness or total similarity between the two legal systems. We will examine this question by first analysing the nature of conformity (Paragraph I) and the legal consequences of this obligation as defined by the WTO Agreements and clarified by the Dispute Settlement Body (Paragraph II).

Paragraph I - Nature of the Obligation to Conform to WTO Law

To determine the exact nature of the conformity required by WTO, it is necessary to clarify the exact meaning and objectives of this principle (A), and then analyse the different modalities available to India and the other member states for adapting their internal law as required by the WTO agreements (B).

A) Meaning and Objectives of Conformity

1) Meaning

The concept of conformity as mentioned in article XVI:4 of the Agreement establishing the WTO and in the various provisions of other agreements which make WTO a *normative corpus* is not defined anywhere. In a general sense, the obligation to conform implies a “similarity in form or type”.[26] It would thus be a simple matter of WTO Members adapting their domestic law so that they are identical to the provisions contained in WTO agreements. The DSB seems to think that the obligation to conform should be interpreted in this sense.

Indeed, one Panel has compared the measures taken “on the basis of an international directive” to measures “in conformity” with

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[26] “Conformity”: New Oxford Dictionary of English, Oxford University Press, Indian Edition 2002.

these directives,[27] the Appellate Body was opposed to this interpretation. According to the AB, which has based itself on the French Encyclopaedic Dictionary *Larousse*, the term 'in conformity' means "that which corresponds exactly to the standard or the rule" while "on the basis of" something just means that the thing is considered "as a starting point". Thus interpreting the expressions "on the basis of a directive" and "in conformity with" as the panel has done, would transform these directives and recommendations into constraining norms.[28]

We must therefore point out that conformity as defined by the WTO system implies a process in which each Member State has to transform its internal law in accordance with the rules contained in various WTO agreements and that this process is obligatory. So, by ratifying the WTO agreements, each Member State agrees to limit its autonomy and exercise its normative powers only in a particular direction. Consequently, the WTO law imposes limitations on an important right of its Members, viz. the right to govern the social body that it constitutes.[29]

2) Main Objectives: Effectiveness of Rules and Avoiding Conflicts

All WTO Members, and therefore India, are bound by the obligation to adapt their legal systems to WTO law. This obligation must be seen from the point of view of the international organization for two reasons.

The first reason is the willingness to find tools that can ensure that international trade law are enforced effectively on behalf of those who have undertaken to implement them. In this sense, the provision in article XVI:4 does not contain anything original since

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[27] Report of the Appellate Body, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, 16 January 1998, paragraph 163, p. 73.

[28] Report of the Appellate Body, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, 16 January 1998, paragraph 165, p. 73.

[29] Regarding this, see Nouvel Yves: *Aspects généraux de la conformité du droit interne au droit de l'OMC, (General Aspects of Conformity of Domestic Law with WTO Law)*, AFDI 2002, p. 658.

that is the aim of every international organisation or of any entity that lays down rules meant to be enforced by a particular social body. We shall see, however, that the obligation stipulated in the WTO Agreement appears quite unusual as compared to traditional international law in that it presupposes an obligation to conform and not just not take appropriate action, as is generally the case. At the same time, the obligation to conform is justified only insofar as its immediate object is to avoid any risk of conflict between two legal systems (the WTO system and Members' internal systems) as well as serious disputes between various Members of the organization.

B) Conditions for Conformity

In accordance with the principle of the European Community's directive,[30] WTO allows its Members considerable room for manoeuvre as far as the formal conditions of conformity are concerned. In fact, it is not obligatory for WTO members to comply in a determined, homogeneous and formal manner following the enactment of law incorporating these rules in their internal legal systems.[31] In other words, the obligation imposed by Article XVI:4 does not require any fundamental changes in the nature of the law enacted by each member state within the framework of its constitution.[32]

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[30] Within the European Community, the Directives which bind Member States to the objectives to be achieved within a particular time-limit while allowing national governments to choose the form and means to be used. Directives have to be implemented with in the national legal framework in accordance with the procedures laid down by individual member states.

[31] Mengozzi Paolo: *La Cour de justice et l'applicabilité des règles de l'OMC en droit communautaire à la lumière de l'affaire Portugal c. Conseil* (Law Courts and the Applicability of WTO Regulations within the Framework of Community Law, with reference to Portugal v Council), RDUE 2000, No.3, p. 519.

[32] Messaoudi M. A.: *Harmonie et contradictions du droit de l'OMC (Harmony and Contradiction in WTO Law)*, in Ben Achour Rafâa and Laghmani Slim: *Harmonie et contradictions en droit international (Harmony and Contradictions in International Law)*, International Conference held by the Tunis Faculty of Legal, Political and Social Sciences, Seminar on 11-12-13 April 1996, Pédone, Paris 1997, p. 304.

From the theoretical viewpoint, adaptation of law is advisable, but not obligatory. Explaining the basis of this statement, the Panel says, "when evaluating the conformity of national law with WTO obligations in accordance with Article XVI:4 of the WTO Agreement account must be taken of the wide-ranging diversity in the legal systems of the Members. Conformity can be ensured in different ways in different legal systems. […] Only by understanding and respecting the specificities of each Member's legal system, can a correct evaluation of conformity be established."[33] Hence the abrupt statement claiming that "it is the end result that counts, not the manner in which it is achieved".[34] Therefore, WTO is not in a position to impose a standard procedure for conformity and, for example, delegated legislation, which is an essential part of the Indian legislative system, is not in itself an impediment to the obligation to conform.

However, the threshold for compatibility of Indian law with WTO law should be seen not only from the perspective of the material adaptation of the derived Indian law, but also on the basis of harmonisation, which need not be exclusively legislative. In this regard, the Panel was able to state that the 1974 American Law on foreign trade, which predicates the adoption of unilateral sanction measures, albeit contrary in essence to WTO regulations, is found to be consistent insofar as there is a "licit and effective" limitation. The latter can be seen in the administrative measures laid down by the American Congress at the time the Marrakech Agreement was signed. In fact, the American administration can take a decision limiting the discretionary power of the Representative on Trade Issues (who can enact unilateral measures) in order to comply with WTO regulations. Nevertheless, it is necessary that the

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[33] The AB further affirms that "frequently the Legislator itself does not seek to control, through statute, all covered conduct. Instead it delegates to pre-existing or specially created administrative agencies or other public authorities, regulatory and supervisory tasks which are to be administered according to certain criteria and within discretionary limits set out by the Legislator. The discretion can be wide or narrow according to the will of the Legislator". Report of the Panel, *United States - Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, 22 December 1999, paragraph 7.25.

[34] Report of the Panel, *United States - Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, 22 December 1999, paragraph 7.24.

administrative practice be validated,[35] as discussed in *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products.*[36] Consequently, it is possible for India to comply with WTO regulations through legislative or infra-legislative measures, or even through the judicial process.[37]

The logic that drives the relation between the Indian legal system and WTO is therefore based on harmonisation, i.e., bridging the gap between the two legal systems so that their law become more similar while remaining different. Harmonisation tends to make two different systems more compatible on the basis of common principles. This quest leads to the acceptance of differences, but not all differences – not beyond a certain threshold. The obligation

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[35] But it was not so in the case related to *Countervailing Measures Concerning Certain Products from the European Communities*: "The Appellate Body recommends that the Dispute Settlement Body request the United States to bring its measures and administrative practice (the "same person" method), as found in this Report and in the Panel Report as modified by this Report, to be inconsistent with the *SCM Agreement*, into conformity with its obligations under that Agreement", Report by the Appellate Body, *United States - Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/AB/R, 9 December 2002, paragraph 162.

[36] "Thus, it is up to India to decide how to implement its obligations under Article 70.8. We therefore find that the mere fact that India relies on an administrative practice to receive mailbox applications without legislative changes does not in itself constitute a violation of India's obligations under subparagraph (a) of Article 70.8. [...] However, in order to make an objective assessment regarding the consistency of the current Indian mechanism with the TRIPs Agreement, as required under Article 11 of the DSU, we must ask ourselves the following question: can that mechanism achieve the object and purpose of Article 70.8 and thereby protect the legitimate expectations of other WTO Members, by ensuring the preservation of novelty and priority in respect of products which were the subject of mailbox applications?", Report of the Panel, *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/R, 5 September 1997, paragraphs 5.33 and 5.34.

[37] This question has been debated in the European Union to decide if WTO law should have a direct effect. DSB is clear and allows each Member the choice to decide: Report of the Panel, *United States - Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, 22 December 1999. Thus, with regard to note no. 661 of Item 7.72, the panel recognizes that "The fact that WTO institutions have not to date construed any obligations as producing direct effect does not necessarily preclude that in the legal system of any given Member, following internal constitutional principles, some obligations will be found to give rights to individuals. Our statement of fact does not prejudge any decisions by national courts on this issue". For an analysis of ECJ jurisprudence, see Esposito Carlos: *The role of the European Court of Justice in the direct applicability and direct effect of WTO law, with a Dantesque metaphor*, BJIL 1998, Volume 16, pp. 138-152.

of identity is replaced by an obligation of proximity and the decision is controlled by fixing a threshold of compatibility.[38]

Paragraph II - Legal Consequences of the Obligation to Conform to WTO Law

Having affirmed the need to conform to WTO law, we need to assess the seriousness of this requirement. To do so, we will examine the legal consequences of the obligation (A) and its limits (B).

A) Seriousness of the Obligation to Conform to WTO Law

1) More demanding than public international law
In public international law, the implementation of treaties is an obligation under article 26 of the Vienna Convention on the Law of Treaties[39] which insists on the execution of a treaty in good faith and compliance with the classical rule *pacta sunt servanda*. Article 27 clarifies this general obligation to some extent by specifying that "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."[40] Of course, WTO endorses this precision and in the *Anti-Dumping Investigation Regarding Portland Cement* case, the Panel concluded that "the argument that Guatemala could not have initiated the investigation until after it had notified Mexico, pursuant to provisions of its own Constitution and law, does not affect our conclusion in this regard. In acceding to the WTO, Guatemala undertook to be bound by Article 5.5 when initiating anti-dumping investigations. Any failure to respect Article 5.5

[38] See Delmas-Marty Mireille: *La mondialisation du droit : chances et risques (Globalisation of Law: Opportunities and Risks)*, Recueil Dalloz 1999, p. 43.

[39] "Every treaty in force is binding upon the parties to it and must be performed by them in good faith".

[40] Article 46 of the Vienna Convention does contain an exception, but with a very limited application. See Daillier Patrick and Pellet Alain: *Droit international public*, (Public International Law), LGDJ 7th Edition, Paris 2002, p. 224.

may not be justified on the basis of inconsistent provisions of domestic law. Article XVI:4 of the WTO Agreement explicitly states that each Member "shall ensure the conformity of its law, regulations and administrative procedures with its obligations as provided in the annexed Agreements."[41]

The obligation contained in article XVI:4 thus not only insists on these requirements, but goes even further as it imposes a positive adaptation of the domestic norms to WTO law. Indeed, while WTO jurisprudence did not clarify the exact sense of article XVI:4, the European Communities stated in the *Sections 301-310 of the Trade Act of 1974* case[42] that "Article XVI:4 must be interpreted to impose requirements with respect to domestic law additional to the requirements that arise already from the substantive WTO obligations themselves. This is achieved if Article XVI:4 is interpreted to stipulate a "correspondence, likeness or agreement" between domestic law and the relevant WTO obligations".[43] According to the European Communities, "the terms "ensure" and "conformity", taken together in their context, therefore indicate that Article XVI:4 obliges Members not merely to give their executive authorities formally the right to act consistently with WTO law, but to structure their law in a manner that "makes certain" that the objectives of the covered agreements will be achieved."[44] India argued in the same direction

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[41] Report of the Panel, *Guatemala - Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/R, 19 June 1998, paragraph 7.38. Or see, for example, Report of the Panel, *Argentina - Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, 22 April 2003, paragraph 7.108: "We consider that a WTO Member's domestic law does not excuse that Member from fulfilling its obligations under the WTO agreements. In acceding to the WTO, Argentina undertook to be bound by the rules contained in the *AD Agreement*, and our mandate is to review Argentina's compliance with those rules. Any failure to respect Article 5.8 may not be justified on the basis of inconsistent provisions of domestic law".

[42] For an analyse of this case, see Naiki Yoshiko: *The Mandatory Discretionary Doctrine in WTO Law - The US–Section 301 Case and Its Aftermath*, JIEL 2004, vol. 7, No.1, pp. 35-54.

[43] Report of the *United States - Sections 301-310 of the Trade Act of 1974* Panel, WT/DS152/R, 22 December 1999, paragraph 4.370.

by insisting that a law which mandates behaviour inconsistent with WTO Agreements constitutes a violation irrespective of whether and how the law was or could be applied.[45]

In this case, the European Communities were opposed to the United States which defended a more restrictive approach of article XVI:4 and considered that this article did nothing but confirm the traditional sense of the rule *pacta sunt servanda* ("the contract has to be respected").[46] The panel chose the interpretation of article XVI:4 provided by the Communities since it considered that "Article XVI:4, in contrast, not only precludes pleading conflicting internal law as a justification for WTO inconsistencies, but requires WTO Members actually to ensure the conformity of internal law with its WTO obligations."[47] Moreover, this conformity has to be ensured from the date of entry into force of the agreements. For this reason, India was considered to be in a situation of violation in the *Patent Protection for Pharmaceutical and Agricultural Chemical Products* case. In the first place, "under Indian law, it is necessary to enact legislation in order to grant exclusive marketing

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[44] Report of the *United States - Sections 301-310 of the Trade Act of 1974* Panel, WT/DS152/R, 22 December 1999, paragraph 4.371.

[45] Report of the *United States - Sections 301-310 of the Trade Act of 1974* Panel, WT/DS152/R 22, December 1999, paragraphs 5.221 and 5.222.

[46] "Rather, the obligation in Article XVI:4 is to comply with the obligations of the annexed Agreements", Report of the Panel, *United States - Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, 22 December 1999, paragraph 4.391. See the *Export Credits and Loan Guarantees for Regional Aircraft* case in which United States stated: "The EC is similarly misguided when it describes Article XVI:4 of the *Marrakesh Agreement Establishing the World Trade Organization* as a new, "fundamental" principle that requires Members to "ensure that their law do not specifically allow or envisage WTO inconsistent action." This assertion, aside from requiring dramatic, wholesale changes to Members' law, is simply wrong. Parties to an international agreement have, by becoming parties, committed to implement their agreement obligations in good faith. Accordingly, one cannot assume that authorities will act in bad faith by exercising their discretion under domestic legislation so as to violate international obligations, and the WTO Agreements provide no basis for requiring Members to craft their law in a way that would remove all such discretion". Report of the Panel, *Canada - Export Credits and Loan Guarantees for Regional Aircraft*, WT/DS222/R, 28 January 2002, paragraph 3, p. C-22.

[47] Report of the Panel, *United States - Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, 22 December 1999, paragraph 7.41, note 652.

rights in compliance with the provisions of Article 70.9. This was already implied in the Ordinance, which contained detailed provisions for the grant of exclusive marketing rights in India effective from 1 January 1995. However, with the expiry of the Ordinance on 26 March 1995, no legal basis remained, and with the failure to enact the Patents (Amendment) Bill 1995 due to the dissolution of Parliament on 10 May 1996, no legal basis currently exists, for the grant of exclusive marketing rights in India."[48] Secondly, given India's obligation to implement the provisions of Article 70.9 of the *TRIPs Agreement* effective as from the date of entry into force of the *WTO Agreement* and its admission that "legislation is necessary in order to grant exclusive marketing rights in compliance with Article 70.9 and that it does not currently have such legislation";[49] "India is in violation of Article 70.9 of the *TRIPs Agreement.*"[50]

Article XVI:4 implies two consequences for the relation between Indian law and WTO law: Members cannot invoke their national law in a negative manner to escape an obligation imposed by the international trade law because they are then bound in a positive manner by the obligation to adapt their national law (transformation or creation) that are contrary to WTO law. The ultimate objective is to remove any conflict between the two legal orders.

2) Consequences of non-conforming internal rules

The legal consequences of the inconsistency of internal legal rules with WTO law are significant. Indeed, article 27 of the Vienna Convention prohibits Members from taking advantage of an internal provision to escape international obligations, but it does not hold that an internal provision contrary to international law constitutes a violation *ipso facto*.

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[48] Report of the Appellate Body, *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, 19 December 1997, paragraph 80.

[49] Report of the Appellate Body, *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products,* WT/DS50/AB/R, 19 December 1997, paragraph 81.

[50] Report of the Appellate Body, *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, 19 December 1997, paragraph 84.

However, this is precisely the case with the WTO system: article XVI:4 must be understood as imposing upon Members to take positive measures for adapting their normative system as from the entry into force of WTO agreements. Even before noting a contradiction between the application of an internal rule and a WTO law, the simple absence of conformity constitutes a manifest breach of the engagement contained in article XVI:4. The Panel set up for the *Anti-Dumping Act of 1916* case thus observed that "a Member's anti-dumping legislation must be compatible with the WTO Agreement continuously, whether that legislation is applied or not."[51]

A given law, independently of its application in a precise case (and comparatively without any actual damage), can be incompatible with the WTO law as indicated on several occasions in jurisprudence.[52] This is what the Panel means when it states that article XVI:4 "though not expanding the material obligations under WTO agreements, expands the type of measures made subject to these obligations",[53] without, however, claiming that it does not induce a widening of the range of the obligations.

The reason behind this position is the indirect impact of such a law on economic operators, who may only be indirect recipients but are the ones who are ultimately affected by WTO agreements. "In a treaty, the benefits of which depend in part on the activity of individual operators, the legislation itself may be construed as a

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[51] Report of the Panel, *United States - Anti-Dumping Act of 1916* WT/DS136/R, 31 March 2000, paragraph 5.25.

[52] Report of the Panel, *Argentina - Measures Affecting Imports of Footwear, Textiles, Apparel and other Items,* WT/DS56/R, 25, November 1997, paragraphs 6.45 to 6.47. Regarding the same case, Report of the Appellate Body, *Argentina - Measures Affecting Imports of Footwear, Textiles, Apparel and other items*, WT/DS56/AB/R, 27 March 1998, paragraphs 48 to 55. Also see Report of the Panel, *Canada - Export Credits and Loan Guarantees for Regional Aircraft,* WT/DS222/R, 28 January 2002, paragraphs 9.124 and 9.208, Report of the Panel, *Turkey - Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R, 31 May 1999, paragraph 9.37.

[53] Report of the Panel, *United States - Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, 22 December 1999, paragraph 7.41.

breach, since the mere existence of legislation could have an appreciable "chilling effect" on the economic activities of individuals."[54]

It is quite evident that the majority of complaints that are filed relate not to the application of a national rule, which can be denounced as not being in conformity, but very often just because the complainant believes that the very existence of the rule constitutes a violation of the agreements. In this respect, the adjustment of the national law is taken not as a simple means of the execution of a particular obligation but as the object of a general obligation.

3) Consequences of the Burden of the Proof

The obligation to conform, which binds each Member, is accompanied by the presumption that Members always respect the obligations to which they have subscribed. This was explicitly affirmed in the Hormones case. WTO Members, as sovereign entities, can *be expected* to act in conformity with their obligations within the WTO framework. It is up to the party making a claim to prove that a Member acted *in a manner incompatible* with WTO rules.[55]

This incompatibility can however be based on a rudimentary proof; the burden of proof thus rests initially upon the claimant

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[54] Report of the Panel, *United States - Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, 22 December 1999, paragraph 7.81. The reason is explained later (paragraph 7.84): "The rationale in all types of cases has always been the negative effect on economic operators created by such domestic law. An individual would simply shift his or her trading patterns – buy domestic products, for example, instead of imports – so as to avoid the would-be taxes announced in the legislation or even the mere risk of discriminatory taxation. Such risk or threat, when real, was found to affect the relative competitive opportunities between imported and domestic products because it could, in and of itself, bring about a shift in consumption from imported to domestic products: This shift would be caused by, for example, an increase in the cost of imported products and a negative impact on economic planning and investment to the detriment of those products."

[55] See Report of the Appellate Body, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, 16 January 1998, paragraph 9.

who must establish *prima facie* that the measure is incompatible, as it has been regularly pointed out by the DSB.[56]

But at the same time, this presumption also requires the defendant to provide a strong justification in his own support. Since each Member has to study his normative space and ensure that it is in conformity with WTO law, it is logical that the Member should be easily able to justify the national measures that another Member may denounce as violating the requirements of the international trade law. This prompted a panel to state that "A respondent (the European Communities in the present dispute) should be able to, or may be able to, make a demonstration that the measure is not caught by one or other of the definitions in Article 9.1(a) to (f) of the *Agreement on Agriculture*. The respondent should also be able to demonstrate that the challenged measure is not a "subsidy contingent upon export performance" within the meaning of Article 1(e) of the *Agreement on Agriculture*. The European Communities should be aware of its obligations under the *Agreement on Agriculture* and should also be cognisant of its subsidies programmes. This general principle is recognized also in Article XVI:4 of the *WTO Agreement* which provides that "Each Member shall ensure the conformity of its law, regulations and administrative procedures with its obligations as provided in the annexed Agreements". The requirements of Article 10.3 of the *Agreement on Agriculture* are based on the assumption that Members are aware of the subsidies they provide to their own

[56] "It is, thus, hardly surprising that various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof. Also, it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption. In the context of the GATT 1994 and the WTO Agreement, precisely how much and precisely what kind of evidence will be required to establish such a presumption will necessarily vary from measure to measure, provision to provision, and case to case", Report of the Appellate Body, *United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, 25 April 1997, point IV.

producers. If there are, in fact, no subsidies, the European Communities should be able to make this demonstration."[57]

B) Limits on the Obligation to Conform to WTO Law

1) Waivers under the WTO System (Article IX)
Whatever the legal system in force, a waiver is the permission to "deviate from" a particular law [58]. With reference to the WTO framework, it means not observing the rules stipulated in the agreements, i.e. not adhering to the general obligation of conformity as envisaged in article XVI:4 Agreement establishing WTO.
Undoubtedly this principle should be regarded as a safety valve which allows the WTO system to function while tolerating a few exceptional situations which impede the proper implementation of the prescribed obligations. The idea behind this safety valve is to simultaneously frame the cases of non-application of the agreement and avoid the break-down of the WTO system due to the proliferation of disorderly and uncontrolled behaviour in violation of the rules. From the point of view of our study, the system of granting waivers simultaneously makes it possible to specify the degree of conformity required. However the WTO is very strict about granting waivers. It may be noted that India does not currently benefit from any waivers.

2) Mandatory and Discretionary Legislation
The DSB jurisprudence clearly explains the distinction between mandatory legislation and discretionary legislation. Mandatory law are law that are enforceable on their own and their implementation does not allow the executive authority any room for manoeuvre. Conversely, discretionary law allow the executive authority room for manoeuvre through administrative action. Mandatory law that

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[57] Report of the Panel, *European Communities - Export Subsidies on Sugar*, WT/DS265/R, 15 October 2004, paragraph 7.229.

[58] "To derogate": *New Oxford Dictionary of English*, Oxford University Press, Indian Edition 2002.

do not contain provisions in conformity with WTO law automatically violate the organization's rules. This not the case with discretionary law which leave the authorities room for manoeuvre and enable them to remove from the law provisions that are in conflict with WTO rules and adopt measures totally in conformity with international requirements. Thus these discretionary law do not by themselves constitute a violation of the WTO agreements and they can be called into question only if, at the time of their actual application in a particular case, they violate the terms of the WTO Agreement.[59] But at the same time, "it is not tenable that the question of the WTO-conformity of a domestic law with a Member's WTO obligations may not form a subject matter of that assessment independently of its application."[60]

It is a significant limit imposed on the general principle of the conformity obligation. The origin of this distinction goes back to GATT 1947 and the action of the GATT panels was summarized as follows in the *United States - Tobacco* case: "panels had consistently ruled that legislation which mandated action inconsistent with the General Agreement could be challenged as such, whereas legislation which merely gave the discretion to the executive authority [...] to act inconsistently with the General Agreement could not be challenged as such; only the actual application of such legislation inconsistent with the General Agreement could be subject to challenge" [quotation omitted]."[61] The object of this distinction was to make it possible to determine

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[59] For example, "legislation which merely gives the executive authority the discretion, either through silence or otherwise, to act inconsistently with the Agreement cannot as such be challenged before a Panel, i.e. independent of its actual application in a particular case", Report of the Panel, *United States - Preliminary Determinations with Respect to Certain Softwood Lumber from Canada*, WT/DS236/R, 27 September 2002, paragraph 7.129.

[60] Pratap Ravindra: *India at the WTO – Dispute Settlement System*, Manak Publications, New Delhi 2004, p. 345.

[61] Report of the Panel, *United States - Measures Affecting the Importation, Internal Sale and Use of Tobacco*, BISD 41S/131, 4 October 1994, paragraph 118. For details, see Naiki Yoshiko: *The Mandatory Discretionary Doctrine in WTO Law - The US–Section 301 Case and Its Aftermath*, JIEL 2004, vol. 7, No. 1, pp. 28-32.

"when legislation as such – rather than a specific application of that legislation – was inconsistent with a Contracting Party's GATT 1947 obligations."[62] However, in any event, "the relevant discretion, for purposes of distinguishing between mandatory and discretionary legislation, is a discretion vested in the *executive branch* of government."[63] This statement is fundamental, but it does not exclude national judicial actions from DSB conformity control. Indeed, in *Patent Protection for Pharmaceutical and Agricultural Chemical Products* Indian judicial action was considered as evidence[64] of "whether the statute was mandatory or not. And it was emphasized in *US – Trade Act* that the WTO-inconsistency inherent in the statute might be lawfully removed upon examination of its administrative or institutional elements."[65]

The opening offered by the concept of discretionary legislation however was recently reduced by jurisprudence. Indeed, it was considered that the freedom allowed to national authorities to act in a way incompatible with WTO agreements could amount to a violation of these agreements.[66] This was in

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[62] Report of the Appellate Body, *United States - Anti-Dumping Act of 1916*, WT/DS136/AB/R and WT/DS162/AB/R, 28 August 2000, paragraph 88. This report indicates in the quotation that "the reason it must be possible to find legislation as such to be inconsistent with a Contracting Party's GATT 1947 obligations was explained as follows: [the provisions of the GATT 1947] are not only to protect current trade but also to create the predictability needed to plan future trade. That objective could not be attained if contracting parties could not challenge existing legislation mandating actions at variance with the General Agreement until the administrative acts implementing it had actually been applied to their trade", and refers to another case: Panel Report, *United States – Superfund*, *supra*, footnote 34, paragraph 5.2.2.

[63] Report of the Appellate Body, *United States - Anti-Dumping Act of 1916*, WT/DS136/AB/R and WT/DS162/AB/R, 28 August 2000, paragraph 89.

[64] Report of the Panel, *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/R, 5 September 1997, paragraph 5.37.

[65] Pratap Ravindra: *India at the WTO – Dispute Settlement System*, Manak Publications, New Delhi 2004, p. 363.

[66] Or "in other words, a distinction is maintained between mandatory and discretionary legislation, according to which only the latter requires a WTO-inconsistent application to violate WTO rules", Pratap Ravindra: *India at the WTO – Dispute Settlement System*, Manak Publications, New Delhi 2004, p. 363.

reference to a development regarding an important case that came up in 1999 regarding *Sections 301-310 of the Trade Act of 1974,*[67] in which the panel advanced several arguments that are sometimes considered as indecisive, and this is what led Yoshiko Naiki to comment that "*Impressionist* may be an appropriate description of the panel's way of speaking."[68] In this case, an American law authorized the American authorities, without any obligation on their part, to unilaterally sanction a pled violation of WTO law by another Member. However, the Panel considered that the American law, whether the freedom it allows is exerted or not, constitutes a violation of the WTO agreements. Nevertheless, admitting the compatibility of the American law would have left a permanent doubt about the viability of the dispute settlement mechanism. Also, such a doubt would have implied significant legal risks for economic operators who are the principal actors even though they may not be the immediate recipients of benefits under the WTO law.[69] In any case, the general principle of conformity gains importance when there is concern about the indirect effects of a discretionary legislation on economic operators. This kind of limit imposed by the distinction between mandatory legislation and discretionary legislation is however relative, primarily because it relates to the application and respect of an article of the DSM which determines the settlement of the disputes that the Panel regards as fundamental noting in addition that "the

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[67] Report of the Panel, *United States - Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, 22 December 1999

[68] Naiki Yoshiko: *The Mandatory Discretionary Doctrine in WTO Law - The US–Section 301 Case and Its Aftermath*, JIEL 2004, vol. 7, No.1, p. 36.

[69] "If individual economic operators cannot be confident about the integrity of WTO dispute resolution and may fear unilateral measures outside the guarantees and disciplines which the DSU ensures, their confidence in each and every of the substantive disciplines of the system will be undermined as well. The overall systemic damage and the denial of benefits would be amplified accordingly. The assurances thus given under the DSU may, in our view, be of even greater importance than those provided under substantive WTO provisions", Report of the Panel, *United States - Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, 22 December 1999, paragraph 7. 94.

preservation of the specific guarantees provided for in Article 23 is of added importance given the spill-over effect they have on all material WTO rights and obligations."[70]

Generally speaking, insistence on discretionary legislation despite nonconformity with WTO rules, poses a problem because other Members continue to be exposed to the risk of violation. As Professor Nouvel points out, such a situation undermines the safety and predictability of trade, but it is not easy to reconcile it with the obligation to ensure conformity. When the law leaves room for violation, conformity is not guaranteed and it is not possible to ensure it.[71] Moreover, it should be stressed that there is an increase in the number of cases raising the issue of mandatory/discretionary legislation, undoubtedly because complainants base their arguments on this theory in an attempt to eliminate illegal administrative practices.[72]

But in more precise terms, it should be pointed out that the fact that the discretionary legislation can persist even after the disapproval of measures for its implementation may encourage the use of this legislation as a protectionist tool. As long as it continues, it is an encouragement to enact measures in some specific cases that are contrary to WTO rules. Without calling into question the concept of discretionary legislation, it was proposed by Japan to make an exception to the application of the theory of "discretionary legislation" when the repetition of the same infringement is highly probable: "For instance, when it was evident that a Member had deliberately ignored the recommendation of

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[70] Report of the Panel, *United States - Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, 22 December 1999, paragraph 7. 94.

[71] Nouvel Yves : *Aspects généraux de la conformité du droit interne au droit de l'OMC*, (General Aspects of Conformity of Domestic Law with WTO Law), AFDI 2002 p. 673.

[72] Naiki Yoshiko: *The Mandatory Discretionary Doctrine in WTO Law - The US–Section 301 Case and Its Aftermath*, JIEL 2004, Vol. 7 No.1, p. 63.

the DSB not to apply a particular measure enacted pursuant to the law and applied similar measures subsequently."[73]

Conclusion of Section I

The WTO system imposes very stiff conditions regarding conformity to the international trade law. However, some explanations are necessary. As far as the provisions of the WTO agreements are concerned, it must be pointed out that some of them are of a general nature while others are much more precise. For example, the fundamental obligation of national treatment enshrined in Article III of GATT allows national authorities a wide range of possibilities to conform (from the formal and material point of view). On the other hand, the TRIPs Agreement contains several provisions demanding a very precise line of conduct, notably regarding the enforcement of intellectual property rights (Part III of TRIPs). One example is Article 61 of TRIPs requiring Members to "provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity." This statement of fact does not call into question our statement regarding the WTO-conformity obligation. It should not be concluded that the WTO-conformity has different degrees of severity. This obligation never changes in terms of severity; what can change is only the explicit and precise nature of the norms of reference. Consequently, as we shall see later, when the Dispute Settlement Body (DSB) was called upon to determine the

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[73] Dispute Settlement Body - Special Session - *Minutes of Meeting - Held in the Centre William Rappard on 13 - 15 November 2002*, TN/DS/M/6, 31 March 2003. Moreover, Japan had also suggested that the burden of proof in cases involving "discretionary" law should be shifted to the Member imposing the measure, if there was evidence that repeated violation had taken place. In such situations, the measure would be presumed to be inconsistent with WTO rules, unless proven otherwise.

conformity of Indian law with WTO agreements, the claim of violation of certain TRIPs provisions by India (*India - Patent Protection for Pharmaceutical and Agricultural Chemical Products* case)[74] was not established not because the DSB was more severe or more demanding (i.e. the WTO-conformity obligation was reinforced), but only because the reference norm was very precise.[75]

As it is clearly seen, very few violations are tolerated and when they are permitted, the conditions are very severe. This means that the national law itself must conform to WTO requirements. It therefore follows that the requirement for absolute conformity of the national law with the WTO law is something quite unique in international public law.

Section II - India's Compliance with WTO Law

Since there is such a marked need for conformity with WTO law, India is under a lot of pressure to make substantial changes in its domestic legal system in order to conform to WTO rules. This constraint was accepted by India, precisely because it was negotiated by the national institutions in charge of international trade (Paragraph I), which would ensure the compliance of national law with WTO agreements (Paragraph II).

Paragraph I –Compliance of the Indian Legal System with WTO Agreements

The conformity of WTO law and Indian law is dependent on the Indian constitution (A), but we will examine the place of international agreements in the national legal system (B).

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[74] Report of the Panel, *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/R, 5 September 1997 and Report of the Appellate Body, *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, 19 December 1997.

[75] See below, Part II, Section II, Paragraph I.

A) Formulation and Implementation of India's Trade Policy

Treaty-making is an "executive act" exercised by the President[76] acting on the advice of his Ministers as in the case of the WTO agreements. As underlined by the Supreme Court "making a treaty is an executive act and not a legislative act. Legislation may be and is often required to give effect to the terms of a treaty. Thus, if a treaty, say, provides for payment of a foreign power, legislation may be necessary before the money can be spent; but the treaty is complete without legislation".[77] We will describe the role of the Ministry of Commerce and Industry in the negotiation and administration of agreements (1). As regards implementation, Parliament, as we will see later, has exclusive power (2).

1) Role of the Executive Branch

a) Drawing up India's Trade Policy: The Department of Commerce

The department of Commerce within the Ministry of Commerce and Industry[78] is the main[79] organisation in charge of drawing up India's trade policy and everything related to this policy, especially its relation with trade partners, state trade, promoting exports and developing and regulating industries and products

[76] Article 53.1 of the Constitution. See Basu Durga Das: *Introduction to the Constitution of India*, Wadhwa Nagpur – Wadhwa's Legal Classic 19th Edition, New Delhi 2003, p. 175.

[77] Supreme Court of India, *Union of India v. Manmull Jain*, AIR 1954 SC, Calcutta, p. 615.

[78] Dr. Narayan describes it as an entity which "occupies a privileged and exclusive space in Indian politics, and formulates policy largely in isolation earlier, that is, without consulting other government branches, often taking instructions directly from the Prime Minister", Narayan S.: *Trade Policy Making in India*, for the Workshop on Trade Policy Making in Developing Countries, London School of Economics and Political Science - International Trade Policy Unit, May 25th 2005, p. 7.

[79] The Department of Commerce is the main actor, but not the only one. The Ministry of Finance contributes by deciding all policies concerning customs duties and related matters; the Ministry of Agriculture is involved when a related measure is discussed.

destined for export.[80] "The primary function of the Department of Commerce is to create an appropriate institutional framework and policy environment for facilitation and growth of external trade."[81] Within the framework of external relations, the Department of Commerce engages in trade negotiations and agreements at multilateral, regional and bilateral levels. It is the only Indian official body that can act at this level. It interacts with international agencies such as the WTO, the United Nation Conference on Trade and Development (UNCTAD), the Economic and Social Commission for Asia and Pacific (ESCAP), etc. as well as individual countries or groups of countries on a wide range of issues.

The Commerce Secretary heads the Department of Commerce. He is assisted by the Director General of Foreign Trade who controls the Import-Export Organisation, which is responsible for the application of all the policies of the Indian government pertaining to imports and exports. After the recent amendment to the trade policy, the Director's role consists of promoting exports and facilitating imports.

b) Contributions to the drawing up of India's Trade Policy

The Ministry of Commerce and Industry is also supported by several autonomous and consultative bodies.

The Board of Trade, established in 1989, makes a significant contribution to the definition of the trade policy; among its members are the Reserve Bank Governor, the Secretaries of the Ministries of Commerce, Industry, Finance and Textiles, the Cabinet Secretary of the Prime Minister's Office and the chairpersons of various industrial and commercial associations

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[80] In this task, the main government agency responsible for gathering, compiling and publishing trade statistics is the Directorate General of Commercial Intelligence & Statistics (DGCI&S), see Ministry of Commerce and Industry, Department of Commerce, *Annual Report 2004-2005*, New Delhi 2005, p. 155-158.

[81] Ministry of Commerce and Industry, Department of Commerce, *Annual Report 2004-2005*, New Delhi 2005, p. 9.

as well as experts. The Commerce Minister chairs the Foreign Trade Council and the Director General of Foreign Trade acts as the secretary. It normally meets two or three times in a year.
Besides, the Indian Institute of Foreign Trade (IIFT) is an autonomous body responsible for training and research in foreign trade and marketing. Besides, there are also several other autonomous bodies, especially the Indian Institute of Packaging, the Indian Institute of Diamonds, the Indian Arbitration Council and 20 Export Promotion Councils specialising in various sectors and products.[82]
In addition, there are six offices for statutory products responsible for the production and export of tea, coffee, rubber, spices, tobacco and coconut fibre. The Export Inspection Council is a statutory body responsible for quality control; it is responsible for inspecting goods before the dispatch of exports.
The Commerce Department consults various consultative and review agencies that can be established to meet specific needs as well as academic institutions and industrial associations, such as Federation of Indian Export Organisations (FIED), Confederation of Indian Industry (CII), Federation of Indian Chambers of Commerce and Industry (FICCI) and the Association of Chambers of Commerce (ASSOCHAM). The Chairpersons of FICCI, ASSOCHAM and CII represent the industry's interests in the Foreign Trade Council.

2) Role of the Legislative Branch
Under the Indian Constitution, all matters related to international trade and agreements and international trade organisations and

[82] They include clothing, basic chemical products, pharmaceutical and cosmetic products, cashew nuts, carpets, chemical and related products, cotton textiles, electronic products and computer software, mechanical goods, jewellery, handicrafts, handlooms, silk, leather, construction, plastic and linoleum material, rubber, shellac, sports goods, synthetic and rayon textiles, wool and woollen clothes, development of power looms.

agreements come under the jurisdiction of the Union Parliament.[83] India can be a party to any agreement or treaty,[84] including international trade agreements, which have to be approved and ratified by the Council of Ministers. India deposited its instrument of ratification of the Agreement establishing the WTO on 30 December 1994. Parliament was notified as soon as the Agreement was ratified. In keeping with the British tradition, the international conventions are not submitted for Parliamentary approval. Nonetheless, when India's international obligations necessitate an amendment to existing law or passing a new law, these laws have to be promulgated by Parliament.[85] As pointed out by Kusuma Verma "in this regard, the Constitution gives effect to the British practice. The Privy Council judgement in *Attorney General for Canada v Attorney General for Ontario*, stated that 'making a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action… If the national executive, the government of the day, decide to incur the obligations of a treaty which involve alteration of law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes."[86]

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[83] Parliament consists of the President and two Houses (art. 79), the Rajya Sabha (Upper House) and the Lok Sabha (House of Representatives). The Rajya Sabha, which cannot be dissolved, consists of 238 representatives of the legislatures of the States and Union Territories, in addition to 12 eminent persons from the world of literature, science and social service, nominated by the President. One-third of the Rajya Sabha members are elected every two years. The Rajya Sabha is chaired by the Vice-President. The Lok Sabha consists of a maximum of 535 members elected by the people, where a maximum of 20 represent the Union Territories. The Lok Sabha members are elected for a period of five years unless the house is dissolved by the President before the expiry of this period.

[84] "The Supreme Court in *Ramjawaya Kapur v State of Punjab* [AIR 1955 SC 549], and *Jayantilal v Rana* [AIR 1964 SC 648], as also *Maganbhai* [AIR 1969 SC 807], laid down that for the exercise of executive power (of which treaty-making is one), under article 73, Union legislation is not a prerequisite", Verma Kusuma: *International Law*, in Verma Kusuma (Ed.): *Fifty Years of the Supreme Court of India: Its Grasp and Reach*, Oxford University Press and Indian Law Institute, New Delhi 2000, pp. 630-631.

[85] We will not go into the details of legislative procedure. See: Pylee M. V.: *An Introduction to the Constitution of India*, 3rd Ed., Vikas Publishing House, New Delhi 2003, pp. 191-201.

[86] Verma Kusuma: *International Law*, in Verma Kusuma (Ed.): *Fifty Years of the Supreme Court of India: Its Grasp and Reach*, Oxford University Press and Indian Law Institute, New Delhi 2000, p. 631.

As sectoral legislation is a state subject, drafting and implementing a national policy calls for consultation between the Union Government and the State Governments. Under the circumstances, given the relationship between the Union Parliament and State Legislatures on issues pertaining to the Union List, Parliament has the authority to promulgate or amend any law for the purpose of implementing obligations undertaken by India, even in fields falling under the States' authority.[87]
As regards trade legislation, the Indian Constitution[88] confers exclusive rights upon the Parliament to legislate on any issues pertaining to the Union found in List I of Annexe Seven (called the Union List). State legislative bodies legislate on issues figuring in List II (called the State List)[89] while the Union Parliament and State Legislatures can both legislate on issues appearing in List III (called the Concurrent List).[90] The Union List consists especially of issues related to international trade; imports and exports crossing the country's customs frontier; the definition of the customs frontier (Article 246 41), as well

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[87] "the normal distribution of powers will not stand in the way of Parliament to enact legislation for carrying out its international obligations, even though such legislation may be necessary in relation to a State subject", Basu Durga Das: *Introduction to the Constitution of India*, Wadhwa Nagpur – Wadhwa's Legal Classic 19th Edition, New Delhi 2003, p. 321.

[88] Regarding the distribution of legislative subjects, see Basu Durga Das: *Introduction to the Constitution of India*, Wadhwa Nagpur – Wadhwa's Legal Classic 19th Edition, New Delhi 2003, p. 319.

[89] The Union Parliament can nevertheless promulgate law on issues normally pertaining to the States that are contained in List II, if this is necessary and in the national interest, under the terms of a resolution adopted by the Upper House with a majority of two-thirds (Constitution, Article 249 1).

[90] In case of a conflict between State law and those adopted by the Union Parliament, the latter are to be considered valid in the fields contained in the Concurrent List (Article 251). With regard to the legislation pertaining to international trade relations, the text adopted by the Union Parliament is valid, unless a State law had been approved by the President (Constitution, Article 254).

as trade between the States of the Union (Article 246 42).[91] Therefore, it is the Parliament's responsibility to legislate on matters concerning international trade. But since issues under the State List come under the purview of State Legislatures, the latter have to be consulted before Parliament promulgates an act, in order that its application by the States does not meet with any problems.[92] Parliament's role is important in terms of democratic legitimacy. However, the lacklustre debates in Parliament on the implications of TRIPs in 1994 were very disappointing.

The Commerce Minister introduces in Parliament new law relating to international trade or amendments to existing law. Once these law take effect, the Director General of Foreign Trade can introduce minor changes, for example in matters of duty rates, insofar as these rates do not exceed the consolidated rates on customs and customs tariff fixed by the Act. Parliament must be notified of all such changes.

B) Position of International Conventions in the Indian Judicial System

When it comes to implementation of international conventions, a classic question is generally asked: what is the position of a

[91] Among the other important domains in the Union List, issues relating to national defence, the armed forces, atomic energy, crime prevention on national territory, the high seas and airspace, immigration and citizenship, communications, currency and minting, the Reserve Bank of India, banks, insurance, national standards, labour law and social conflicts regarding Union officials must be mentioned specifically. Domains pertaining to the State List are law and order and the police, public health, issues relating to communications not found in the Union List, agriculture, animal husbandry, water supply system and irrigation, land entitlement, fishery, State industries and registration of companies, their regulation and dissolution, taxes and land and property tax, excise duty, tax on electricity, etc. The Concurrent List includes issues pertaining to penal law and internal security, trade and industrial monopolies, trade unions, disputes between social partners, working conditions and welfare of labour, education, price regulation, trade in certain goods especially foodstuff, fodder, cotton and jute.

[92] For example, any issues regarding agriculture and agricultural prices fall under the jurisdiction of State law. A national law on international and inter-state trade in agricultural produce would therefore apply to the States and would have to be enforced by them.

treaty within the domestic legal system? Every national legal system has its own way of balancing the demands of national and international law, but customarily two options are available: monism and dualism.[93] Monism is an endeavour to internalise international law as an obligation of domestic law. Dualism considers international law and domestic law as two different and distinct entities and requires a mechanism of incorporation in the national law. In India,[94] the principle is that provisions of international conventions (such as WTO agreements) have to be incorporated in the law[95] as international conventions do not automatically become law in India.[96] However, the government does not always display a sense of urgency in giving effect to these conventions.[97]

In the past, when provisions not incorporated in the law have been cited in the courts, the latter have rejected their plea, believing that their powers are limited to the application of national law.[98] Later, some of the High Courts began to apply the conventions directly.[99] Sometimes, Indian courts may take international treaties and conventions into consideration while interpreting an existing

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[93] It is understood that such a distinction is above all a simplification; see Brownlie Ian: *Principles of Public International Law*, 6th Ed. Oxford University Press, New Delhi 2004, p. 53.

[94] To get an overview of other options chosen by other Members, see Matsushita Mitsuo, Mavroidis Petros and Schoenbaum Thomas: *The World Trade Organization - Law, Practice, and Policy*, Oxford University Press, Oxford 2003: United States case, pp. 99-102; European Community case, pp. 103-107; Japan case, pp. 107-110.

[95] Article 253, Indian Constitution.

[96] Regarding the doctrine of incorporation in British and Commonwealth Courts, see Brownlie Ian: *Principles of Public International Law*, 6th Ed. Oxford University Press, New Delhi, 2004, pp. 41-45.

[97] Annoussamy David: *Le droit indien en marche*, Société de Législation comparée, Paris 2001, p. 24.

[98] Annoussamy David: *Le droit indien en marche*, Société de Législation comparée, Paris 2001, p. 24.

[99] Verma Kusuma: *International Law*, in: Verma Kusuma (Ed.): *Fifty Years of the Supreme Court of India: Its Grasp and Reach*, Oxford University Press and Indian Law Institute, New Delhi 2000, pp. 630-634.

Indian law.[100] Duly ratified international conventions can be applicable in the country without any other formality and are to be considered as an integral part of domestic law, if they do not run contrary to the Constitution in "matter and spirit".[101] Indeed, "municipal courts give effect to international law only if it does not conflict with clear and unambiguous municipal law".[102] Therefore, international conventions have slowly become a regular source of legislation in India. This new jurisprudence implies that provisions of international conventions running contrary to a national law or to the Constitution can be annulled by the court which could put the government in an embarrassing situation.

However, the principle remains that "the obligations arising under the agreement or treaties are not by their own force binding upon Indian nationals."[103] In the case of WTO law, the Indian legislature gives effect to the treaties or "in other words, implements enacting legislation".[104] WTO Agreements are not directly applicable and do not benefit by the direct effect theory.[105] Parliament may enact law based on international conventions and only these laws are enforceable. To that extent, the provisions of the WTO treaty are not directly enforceable in India, but the law passed by Parliament giving effect to the WTO treaty (e.g.: amendments to the Patents Act) are enforceable.[106]

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[100] For example, the courts have often referred to the Convention on Elimination of all forms of Discrimination against Women (CEDAW) while deciding cases involving women's rights.

[101] Supreme Court of India, *Vishaka and others*, AIR 1997 SC 241 and Supreme Court of India, *People's Union for Civil Liberties v. Union of India*, AIR 1997 SC 301.

[102] Singh Gurdip: *International Law*, Macmillan India Ltd., New Delhi 2003, p. 71.

[103] See Supreme Court of India, *Maganbhai Ishwarbhai v Union of India,* AIR 1969 SC 783 at 807.

[104] Bhandari Surendra: *World Trade Organisation (WTO) and Developing Countries: Diplomacy to Rules Based Syste*m, Deep & Deep Publications, New Delhi 2002, p. 179.

[105] "Direct effect" means that a treaty provision can create rights which individuals can invoke in domestic courts.

[106] Otherwise, international law only has interpretative value which means that Indian courts will presume that the legislature does not wish to violate international obligations undertaken by the executive.

It is thus an attenuation of or a constraint on the effect of WTO law in India. This does not mean that it calls into question the efficiency of WTO, but it limits its potential influence by insisting on the amendment of the national law by the legislature[107].

Paragraph II –Indian Trade Law Subject to WTO-Conformity

In this paragraph we will describe the part of Indian legislation which is by nature directly subjected to the conformity principle as expressed in Article XVI: 4 establishing WTO. It concerns legislation relating to trade (A) and any changes that may be made in this part of the Indian law (B).

A) Overview of trade-related legislation in India

Indian trade-related legislation is a set of national rules which determine and frame India's foreign trade policy. By its very nature, this set of rules has to conform to WTO requirements as stipulated by Article XVI:4 of the Agreement establishing WTO, provided that the WTO agreements contain the relevant provisions. The contents of Indian trade-related legislation are classic as it consists mainly of customs tariff, antidumping law, sanitary and phytosanitary measures and intellectual property rights.
The principal Indian legislative instrument related to international trade is the 1992 Foreign Trade Act (development and regulations),[108] abrogating the 1947 Import and Export Act. This law provides for the development and regulation of India's foreign

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[107] From this point of view, we may regret as Professor Singh this state of fact. "Admittedly, interests of the international community of sovereign States dictate that international law should be strengthened. Therefore, all international treaties should be treated as self-executing. International treaties should not require specific transformation into municipal law for their enforceability in the municipal courts". Singh Gurdip: *International Law*, Macmillan India Ltd., New Delhi 2003, p. 71.

[108] The *Foreign Trade (Development and Regulation) Act*, 1992, Act No.22 of 1992, dated 7th August, 1992.

trade. The 1962 Customs Act[109] authorises the government to restrict or prohibit the import or trade of any goods through an official notification and it also authorises the government to administer and collect customs duties; it prescribes procedures for import and export of goods, etc. The 1975 Act on customs tariff and the 1977 Regulation govern prescribe the rates of customs duty on import and export of various goods.[110] This act contains two schedules: Schedule 1 which classifies the goods for import and prescribes the rate of import duties and Schedule 2 which classifies the goods for export and prescribes the rate of export duties. In addition, it provides for additional duties, preferential duties, anti-dumping duties, protective duties etc.; the 1988 customs evaluation rules (for determining the value of imported goods)[111] and the amended rules of 1991 are the main texts applicable for customs evaluation. In 1991, Parliament approved the guidelines for foreign investments. Later, these guidelines were incorporated in the amended industrial policy declaration in 1991.

The principal Indian law pertaining to foreign trade are given in Table 1.

Table 1: Indian legislation relating to trade

Area	Law
Customs Tariff	The Customs Act, 1962 empowers the Indian Government to collect and administer the customs tariff. The first schedule of the Indian Customs Tariff Act, 1975, contains India's administered tariff rates.
Customs Valuation	The Customs Act, 1962 and the Customs Valuation (Determination of Imported Goods) Rules, 1988
Countervailing duty	Indian Customs Tariff Act, 1975

[109] The *Customs Act*, 1962, Act No.52 of 1962, dated 13th December, 1962.

[110] Regarding tariff reforms up to the present, see Virmani Arvind: *Customs Tariff Reform*, ICRIER Policy Briefs, Vol. 1 No.1 2004, New Delhi (8 p.).

[111] The central government has the power to make rules in order to carry out the purposes of the Act. Various rules have been framed under these rules such as those Customs Valuation Rules, 1988 for valuation of imported goods for calculating custom duty payable, Customs and Central Excise Duties Drawback Rule, 1971 for calculating rates of duties as drawbacks on exports, etc. However, if there is any conflict between the provisions of the Act and Rules, the provisions of the Act shall prevail.

Import regulations	Section 11 of the Customs Act, 1962 empowers the Central Government to restrict or prohibit trade in any goods by official notification; The Foreign Trade (Development and Regulation) Act, 1992 also gives the Central Government powers to restrict or regulate imports and exports.
Export regulations	Section 11 of the Customs Act, 1962; The Foreign Trade (Development and Regulation) Act, 1992.
Standards	Bureau of Standards Act, 1986; Prevention of Food Adulteration Act, 1954
Sanitary and phytosanitary measures	Drugs and Cosmetics Act, 1940 (last amendment in 1988); Prevention of Food Adulteration Act, 1955 (last amendment in 1994); the Insecticides Act, 1968
Marketing and labelling	Standards of Weights and Measures Packaged Commodity Rules, 1977 (last amended on 26 October 1997)
Government procurement	Governed by provisions of the Indian Sales of Goods Act, 1930 and the Indian Contracts Act, 1972; the Indian Arbitration and Reconciliation Act, 1996. Government departments are guided in their purchases by the Government's General Financial Rules, and by India-specific World Bank Standard bidding documents for World Bank assisted projects.
Anti-dumping, countervailing and safeguard measures	The Indian Customs Tariff Act, 1975.
Pricing and marketing arrangements	No single Central Government legislation; several Central Government Acts provide powers to the Government for pricing and marketing regulations, including the Essential Commodities Act, 1955; the Standards of Weights and Measures packaged Commodity Rules 1997.
Competition Law	The Monopolies and Restrictive Trade Practices Act, 1969 (last amendment in 1991).
Intellectual Property Rights	The Indian Patents Act, 1970; the Indian Copyrights Act, 1957 (amended in 1994); the Trade Marks and Merchandise Act, 1958; the Designs Act 1911.
Foreign Investment	There is no separate law for foreign investment. The Industries (Development and Regulation) Act of 1951 outlines licensing procedures for industries. Foreign investment policy was incorporated in this Act to target industries in which foreign technology and foreign exchange was desirable.

Source: Trade Policy Review Body, Trade Policy Review - India - Report by the Secretariat, WT/TPR/S/33, 5 March 1998.

B) Changes in Indian legislation and the WTO notification requirement

Like all other Members of the WTO, India is required to notify[112] the WTO Secretariat of all changes in national law and measures relating to trade. The purpose of the notification is to serve transparency requirements and any consistency assessment provided for in the Agreement. Notifications will have to be made within a certain time-frame and if this does not happen or if they do not contain the required information, it may lead to litigation.[113] The Decision on Notification Procedures[114] taken at Marrakech in April 1994 contains an illustrative list of twenty types of notifiable measures as follows: tariffs, tariff quotas and surcharges, quantitative restrictions (including voluntary export restraints and orderly marketing arrangements), other non-tariff measures such as licensing and mixing requirements and variable levies, customs valuation, rules of origin, government procurement, technical barriers, safeguard actions, anti-dumping actions, countervailing actions, export taxes, export subsidies, export tax exemptions, concessionary export financing, free-trade zones, export restrictions, any other government assistance, role of state-trading enterprises, foreign exchanges controls related

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[112] For example, Article III:3 of GATS states: "Each Member shall promptly and at least annually inform the Council for Trade in Services of the introduction of any new, or any changes to existing, law, regulations or administrative guidelines which significantly affect trade in services covered by its specific commitments under this Agreement."

[113] In *Definitive Safeguard Measure on Imports of Certain Dairy Products*, the Panel concluded that Korea's definitive safeguard measure was imposed inconsistently with its WTO obligations in that Korea's notifications to the Committee on Safeguards were not timely and therefore were not consistent with the provisions of Article 12.1 of the Agreement on Safeguards. Report of the Panel, *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/R, 21 June 1999, paragraphs 7.114 to 7.145.

[114] "Desiring to improve the operation of notification procedures under the Agreement Establishing the World Trade Organization […] and thereby to contribute to the transparency of Members' trade policies and to the effectiveness of surveillance arrangements established to that end", Uruguay Round Agreement, Ministerial Conference Decision on Notification Procedures.

to imports and exports, government-mandated counter-trade, etc. "In drawing up the list, negotiators have cast a wide net, and few measures could in principle escape it."[115]

However, most of the time changes notified to WTO are only minor changes in national legislation like amendments to the customs valuation rules,[116] conclusion of Free Trade Agreements like the one between Sri Lanka and India[117] or even information reports required by WTO provision such as article XVI.4 of GATT 1994.[118] However, if an important change has to be brought to the notice of the WTO secretariat, other Members will be able to identify a potential problem from the conformity point of view. Indeed, a notified change in legislation does not benefit from any presumption of conformity. Notification is then just a mechanism which allows Members to obtain a precise knowledge of any change in national legislation relating to trade.

The Tables below provide a list of India's major notification requirements vis-à-vis WTO and the current status of these notifications.

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[115] "Notification", Goode Walter: *Dictionary of Trade Policy Terms*, Cambridge University Press, Cambridge 2003, p. 257.

[116] Committee on Customs Valuation - *Notifications under Article 22 of the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 – India*, G/VAL/N/1/IND/3, 15 July 2002.

[117] Committee on Trade and Development - *Free Trade Agreement between India and Sri Lanka*, WT/COMTD/N/16, 27 June 2002.

[118] Committee on Anti-Dumping Practices - *Semi-Annual Report under Article 16.4 of the Agreement – India*, G/ADP/N/126/IND, 13 May 2005.

1) Selected notification requirements vis-à-vis WTO as of February 1998

Table 2: Selected notification requirements vis-à-vis WTO as of February 1998

WTO Agreement	**Description of requirement**	**Periodicity**	**Document No. of most recent notif. (if none, date of scheduled notification)**	**Comments**
Agriculture (Art. 18.2; DS:1+)	Domestic support	Annual, 90 days after end of FY	(end June 1996)	
Agriculture (Art. 18.2; ES:1+)	Export Subsidies	Annual, 90 days after end of FY	(end June 1996)	
Textiles and Clothing (Art. 3.1)	Quantitative Restrictions	Once before1 March 1995	G/TMB/N/72 April 1995 G/TMB/N72/Add.1 June 1996	India maintains import restrictions on consumer goods, including textiles and clothing, under Art. 18, Section B of GATT. Restrictions on fibres, yarns and industrial fabrics listed in this notification were recently lifted.
Textiles and Clothing (Art. 6.1)	Safeguard decisions	Once before 1 March 1995	G/TMB/N/21 March, 1995	India retains the right to use the safeguard provisions of Art. 6.
Textiles and Clothing (Art. 2.6/2.7)	First Integration	Once	G/TMB/N/48 March, 1995 G/TMB/N/48/Add.1 June 1996	Notification of products that account for not less than 16 per cent of India´s imports of products listed in Annex to ATC.

Textiles and Clothing (Art. 2.11)	Second Integration	Once	G/TMB/N/224 February 1997	Notification of products accounting for not less than 17% of India's imports of products listed in Annex to ATC.
Import Licensing (Art. 7.3)	Law and Regulations	Annual	G/LIC/N/3/IND/1 January 1996	Imports into India are regulated by means of a Negative List of goods, which are declared in the Export and Import Policy.
Subsidies (Art.25.1)	Specific subsidies	Annual	G/SCM/N/3/Add.1/Rev.3 January 1997	
Subsidies (Art. 32.6)	Law and regulations	Once by 15 March 1995, then changes	G/SCM/N/1/IND/2/Suppl.1 December 1996	
Subsidies (Art. 25.11)	Countervailing duty actions taken	Twice annually	Referenced in G/SCM/N/19/Add.1 October 1996	No countervailing duty action was taken by India until 30 June 1996.
Anti-dumping (Art. 18.5)	Law and regulations	15 March 1995and subsequent changes	G/ADP/N/1/IND/2/Suppl.1 December 1996	
Anti-dumping (Art. 16.4)	Actions taken	Twice annually	G/ADP/N/16/IND September 1996 G/ADP/N/16/IND/Corr.1 April 1997	Until 30 June 1996, India had initiated 21 anti dumping cases of which 13 cases faced definitive duties.
Safeguards (Art. 12.7)	Pre-existing Article XIX measures	March 1995and subsequent changes	G/SG/N/2/IND-SG/N/3/IND August 1995	India does not maintain any safeguard measures relating to this article.
Safeguards (Art. 12.6)	Law and regulations	Once and then changes	G/SG/N/1/IND/2 January 1998	

Sanitary and Phyto -sanitary measures	Measures taken	Ad hoc	G/SPS/N/IND/1-8	India has notified 8 measures.
Preshipment Inspection (Art. 5)	Law and regulations which put the Agreement into force	Once and then changes	G/PSI/N/1/Add.4 October 1996	
TBT (Art. 15.2)	Law and regulations	Once upon entry into force		
TBT (Art. 2)	Technical Regulations	Ad hoc	India has notified 12 measures in 1995 and 22 in 1996	
TBT (Annex 3(c))	Acceptance of Code	Once and then changes	G/TBT/CS/N/26 January 1996	The Bureau of Indian Standards has accepted the WTO Technical Barriers to Trade Agreement's Code of Good Practice.
Rules of Origin (Annex II, para 4)	Preferential rules of origin	Once and then changes	Referenced in G/RO/N/1 and G/RO/N/1/Add.1	India has preferential rules of origin relating to the GSTP, SAPTA, the Commonwealth preferences system and to Bhutan and Nepal.
GATT 1994 (Art. 17(4)(a))	State Trading Activities	Annual	G/STR/N/1/IND January 1996	11 canalizing agencies granted monopolies on export and import of essential goods. Government may grant licences to private parties to import or export any of the canalized goods.
GATT Council for Trade in GoodsG/L/59	Non-tariff measures	Every two years beginning January 1996	G/MA/NTM/QR/1/Add.2; October 1996	Full notification available in Secretariat.

GATT 1994 (Art. VII)	Customs Valuation (Art. 22.1)	Once and then changes	G/VAL/N/1/IND/2 March 1996	India´s legislation notified under the Tokyo Round Customs Valuation Agreement, remains valid under the WTO Agreement.
GATS (Art. III)	Changes to certain law and regulations	Annual	(January 1996)	
TRIMs (Art. 6.2)	Publications in which TRIMS may be found	Once and then changes	(February 1997)	
TRIMs (Art. 5.1)	Investment Measures	March 1995 and subsequent changes	G/TRIMS/N/1/IND/1/Add.1 January 1996 G/TRIMS/N/1/IND/1/Add.2 May 1996	India maintains TRIMs in the consumer goods sector and in the case of some pharmaceutical products.
TRIPS (Art. 70)	Law and regulations	Within 30 daysof the WTO agreement	IP/N/1/IND/1 March 1995	Notification of a mailbox facility. The notification has however lapsed since it was not approved by the Indian Parliament.

Source: Trade Policy Review Body, Trade Policy Review - India - Report by the Secretariat, WT/TPR/S/33, 5 March 1998.

2) Notifications to WTO, January 1998–March 2002

Table 3: Status of notification requirements vis-à-vis WTO, January 1998–March 2002

WTO Agreement	Description of requirement	Periodicity	Document symbol of most recent notification or number of notifications
Anti-dumping (Art.18.5)	Law and regulations	Once by March 1995, then changes	G/ADP/N/1/IND/2/Suppl.3, 21 August 1999
Anti-dumping (Art. 16.4)	Anti-dumping actions taken	Semi-annual	G/ADP/N/85/IND, 15April 2002
Anti-dumping (Art.16.5)	Notification of domestic procedures and authorities competent to initiate and conduct investigations	Once, then changes	
Agriculture (Art. 10 and 18.2)	Export subsidies (outlays and quantities)	Annual	G/AG/N/IND/3, 1 March 2002
Agriculture (Art. 18.2)	Domestic support	Annual	G/AG/N/IND/1, 17 June 1998
Agriculture (Art. 18.2)	Information on tariff quotas administration (MA:1)	Once, then changes	
Agriculture (Art. 18.2)	Volume of imports under tariff quotas (MA:2)	Annual	

Import Licensing Procedures (Art. 1.4(a) and 8.2(b))	Law and regulations relevant to import licensing	Once, then changes	G/LIC/N/1/IND/2 - G/LIC/N/2/IND/2, 23 September 1999 G/LIC/N/1/IND/3 - G/LIC/N/2/IND/3, 13 December 2000
Import Licensing Procedures (Art. 5.1)	Notification of licensing procedures and changes	Within 60 days of the changes' publication	G/LIC/N/2/IND/1, 18 June 1998 G/LIC/N/1/IND/2 - G/LIC/N/2/IND/2, 23 September 1999 G/LIC/N/1/IND/3 - G/LIC/N/2/IND/3, 13 December 2000 G/LIC/N/1/IND/4 – G/LIC/N/2/IND/4, 27 February 2002
Import Licensing Procedures (Art. 7.3)	Questionnaire; rules and information concerning procedures for the submission of applications	Annual for questionnaire; rules and information, once then changes	G/LIC/N/3/IND/2, 19 April 1999
GATT 1994 (Art. XXVIII:5)	India reserved its right, under the provisions of Art XXVIII, to modify its Schedule and invocation of Art. XXVIII:5		G/MA/7, 11 November 1996 G/MA/7, 21 October 1999
Subsidies and Countervailing Measures (Art. 32.6)	Law and regulations	Once by March 1995, then changes	G/SCM/N/1/IND/2/Suppl.3, 21 August 2001

Subsidies and Countervailing Measures (Art. 25.11)	Countervailing duty actions taken	Semi-annual and when measure taken	G/SCM/N/62/Add.1/Rev.2, 16 October 2001
Subsidies and Countervailing Measures (Art. 27.13)	Privatization programmes	Ad hoc	
Subsidies and Countervailing Measures (Art. 25.1)	Subsidies programmes	Annual	G/SCM/N/71/IND, 19 October 2001
Subsidies and Countervailing Measures (Art. 25.12)	Notification of domestic procedures and authorities competent to initiate and conduct investigations	Once, then changes	
Safeguards (Art. 12.6)	Law and regulations	Once by March 1995, then changes	G/SG/N/1/IND/2, 14 January 1998 G/SG/N/1/IND/2/Suppl.1, 20 August 1999
Safeguards (Art. 12.1(a))	Initiation of investigation relating to serious injury or threat thereof	Ad hoc	G/SG/N/6/IND/1, 12 January 1998 – March 2002
Safeguards (Art. 12.1(b))	Finding of serious injury or threat thereof caused by increased imports	Ad hoc	G/SG/N/8/IND/1 to 6, September 1998 to June 1999 G/SG/N/8/IND/8 to 6, November 1999 to January 2001

Safeguards	Notification of termination of safeguard investigation	Ad hoc	G/SG/N/9/IND/1 to 3, October 1998 - February 2000 G/SG/N/10/IND/1- 6, January 1999 - February 2000
Safeguards (Art. 12.1(c))	Decision to apply or extend a safeguard measure	Ad hoc	G/SG/N/10/IND/5/Suppl.1, 17 December 2001 G/SG/N/10/IND/6/Suppl.1, 14 March 2002
Safeguards (Art. 12.4)	Notification of provisional safeguard measures	Ad hoc	G/SPS/N/IND/7 and G/SPS/N/IND/8, 11 April 2000
Sanitary and Phytosanitary Measures (Art. 6, Annex B)	Notification of emergency measures	Ad hoc	
Sanitary and Phytosanitary Measures (Art. 7, Annex B)	Notification of changes in sanitary and phytosanitary measures	Ad hoc	G/STR/N/7/IND, 8 October 2001
GATT 1994 (Art. XVII:4(a) – Understanding on the Interpretation of Art. XVII)	Notification of products traded by state enterprises	Once, then changes	
Technical Barriers to Trade (Art. 15.2)	Law and regulations	Once, then change	
Technical Barriers to Trade (Art. 10.6)	Information about Technical Regulations, Standards and Conformity Assessment Procedures	Ad hoc	G/TBT/Notif.99.392, 24 August1999

Textiles and Clothing (Art. 2.8 and 2:11)	Notification of programmes of integration	12 months before their coming into effect	G/TMB/N/380, 25 January 2001
Textiles and Clothing (Art. 2:7)	Notification of full details of the actions to be taken pursuant to article 2.6 (concerning the first phase of integration)	Not later than 60 days following the date of entry into force of the WTO Agreement	
TRIMS (Art 6.2)	Publications in which TRIMS may be found	Once, then changes	
TRIMS (Art 5.1)	Investment Measures	Once by March 1995, then changes	
TRIPS (Art. 63.2)	Law and regulations	Once, then changes	IP/N/1/IND/L/1, 11 January 2001; IP/N/1/IND/2, 24 October 2001; IP/N/1/IND/C/1, 25 October 2001; IP/N/I/IND/D/1, 25 October 2001; IP/N/1/IND/G/1, 25 October 2001; IP/N/1/IND/T/1, 25 October 2001; IP/N/3/Rev.5, 6 July 2001; IP/N/3/Rev.6, 1 March 2002
TRIPS (Art. 69)	Contact points	Once, then changes	
TRIPS (Art. 4(d))	Notification of international agreements related to the protection of intellectual property and which entered into force prior to the entry into force of the WTO agreement	Ad hoc	
GATS (Art. III:3)	Changes to law and regulations affecting services	Ad hoc	
GATS (Art. VIII:4)	Monopolies and exclusive providers of services	Ad hoc	

Source: Trade Policy Review Body, *Trade Policy Review - India - Report by the Secretariat*, WT/TPR/S/100, 22 May 2002.

3) Status of notification requirements vis-à-vis WTO, March 2002 - June 2005

For the more recent changes in Indian legislation, we will focus on the trade sectors covered by the three main agreements administered by WTO, i.e. GATT 1994, GATS and TRIPs.

Table 4: Status of notification requirements vis-à-vis WTO concerning GATT, GATS and TRIPs, March 2002-October 2005

WTO Agreement	Description of requirement	Periodicity	Document symbol of most recent notification or number of notifications
TRIPS (Art. 63.2)	Law and regulations	Ad hoc	IP/N/1/IND/L/2, 10 November 2003
TRIPS (Art. 63.2)	Law and regulations	Ad hoc	IP/N/1/IND/G/2, 6 November 2003
TRIPS (Art. 63.2)	Law and regulations	Ad hoc	IP/N/1/IND/T/2, 6 November 2003
GATT 1994 (Art. XXIV: 7)	Free-Trade Area India/Sri Lanka	Ad hoc	WT/COMTD/N/16, 27 June 2002
GATT 1994 article VII (Art. 22.2)	Law and regulations	Ad hoc	G/VAL/N/1/IND/3, 15 July 2002
GATT 1994 (Art. 16.4)	Report of anti-dumping cases	Semi-annual	G/ADP/N/85/IND, 5 April 2002
GATT 1994 (Art. 16.4)	Report of anti-dumping cases	Semi-annual	G/ADP/N/92/IND, 17 October 2002
GATT 1994 (Art. 16.4)	Report of anti-dumping cases	Semi-annual	G/ADP/N/98/IND, 29 April 2003
GATT 1994 (Art. 16.4)	Report of anti-dumping cases	Semi-annual	G/ADP/N/105/IND, 25 September 2003
GATT 1994 (Art. 16.4)	Report of anti-dumping cases	Semi-annual	G/ADP/N/112/IND, 19 April 2004
GATT 1994 (Art. 16.4)	Report of anti-dumping cases	Semi-annual	G/ADP/N/119/IND, 20 October 2004
GATT 1994 (Art. 16.4)	Report of anti-dumping cases	Semi-annual	G/ADP/N/126/IND, 13 May 2005

Source : WTO Central Registry of Notifications

Paragraph III – Adaptation of Indian Law to Comply with WTO Agreements

Now we come to the changes in Indian law rendered compulsory by the principle of conformity enshrined in article XVI:4 of the Agreement establishing WTO.[119]
In the Indian legal system, the primary source of law is the law passed by the Union Parliament and the State Legislatures. In addition to these laws, the President and the Governor have limited powers to issue ordinances when the Parliament or the State Legislatures are not in session.[120] Most law delegate powers to the executive to make rules and regulations for the purposes of the acts. These rules and regulations are periodically tabled in the legislature (Union or State, as the case may be). This subordinate legislation is another source of law. As we have already shown, the conformity of Indian law can be technically ensured by legislative and executive measures[121] as well as administrative actions.
However, from the formal point of view, amendments to trade-related legislation necessary to enable India to honour the undertaking given at the end of the Uruguay Round must be passed by Parliament in order to become an act. Under the circumstances, given the relationship between the Union Parliament and State Legislatures on issues pertaining to the Union List, Parliament has the authority to promulgate or amend any law for the purpose of implementing obligations undertaken by India, even in areas falling under the States' jurisdiction.

[119] We must point out that in case of absence of conformity, any WTO Member will be entitled to draw attention to the violation, and this will the subject of the second part of this study

[120] These ordinances lapse six weeks from the re-assembly of the Parliament or the State Legislature.

[121] The central government has the power to make rules in order to carry out the purposes of the act. However, if there is any conflict between the provisions of the act and Rules, the provisions of the act shall prevail.

India has proceeded to make several changes. The main amendments to the Indian legislation aimed at giving effect to its undertaking to WTO pertain to the 1975 Act on Customs and Customs Tariff and, in particular, Articles 9, 9A and 9B relating to subsidies, countervailing duty and antidumping measures. Anti-dumping and countervailing legislation which became operational in India in 1985 and an anti dumping authority was set up in the Ministry of Commerce in 1986. In July 1997, India introduced Safeguard Rules under the Customs Tariff Act, 1975 with a Director General of Safeguards appointed by the Ministry of Finance. Legislation on anti-dumping, and subsidies and countervailing measures has been amended to bring it into conformity with the results of the Uruguay Round. We will only focus on the Indian rules related to the three multilateral agreements: GATT and GATS (A), TRIPs (B) and consider the other sectors under the last point (C).

A) Concerning Goods and Services

1) Concerning Goods

The General Agreement on Tariffs and Trade (GATT 1994)[122] covers international trade in goods. The GATT prohibits quotas and other measures, notably quantitative restrictions[123] that restrict trade. Quantitative restrictions are "specific limits on the quantity or value of products or value of goods that can be imported (or exported) during a given period." This prohibition is set forth in Article XI of GATT, but is very restrictively

[122] WTO incorporates the provisions of the GATT by reference and refers to this version of the General Agreement as GATT 1994. GATT 1994 is legally distinct from the General Agreement in force since 1948, referred to as GATT 1947. GATT 1994 consists of the General Agreement on Tariffs and Trade, the provisions of certain legal instruments that entered into force under GATT 1947 (including protocols relating to tariff concessions, protocols of accession, and decisions on waivers still in force), the Understandings on certain GATT Articles adopted at Marrakesh, and the Marrakesh Protocol.

[123] "Quantitative restrictions" in Goode Walter: *Dictionary of Trade Policy Terms*, Cambridge University Press, Cambridge 2003, p. 287.

subject to specified exceptions including those listed in Article XX GATT.

a) Lifting of Quantitative Restrictions on Imports

India has gradually liberalised imports by removing the quantitative restrictions in force for the purpose of balance of payments. At the national level, the lifting of restrictions had a considerable impact and national production is in the process of adjusting to the new situation. Quantitative restrictions were lifted on 488 items in 1996, 391 items in 1997, 894 items in 1998, 714 items in 2000, and the remaining restrictions were lifted on 715 items on 31 March 2001.

Measures for lifting restrictions are thus complete for the tariff lines (2,714 items) notified to WTO under the heading of balance of payments. The special import license regime has also been abandoned. The restrictions still in force pertain only to items authorised under the provisions of Articles XX and XXI of the GATT for reasons such as security, health, preventive measures and public morality. India also reviewed the restrictions that were still in force and, in 2002, removed them for about 60 items.

b) Lifting of Quantitative Restrictions on Exports

Exports of basic products have been gradually liberalised. Recently, quantitative restrictions for export prices were removed for cotton thread, butter, pulses, wheat and wheat products, non-basmati rice, coarse grains, groundnut oil, several varieties of agricultural seeds, coir and coir products, hand-woven carpets, woollen carpets, uncut stones, raw leather and skins, jet fuel, high speed diesel and motor gasoline. The regulation that kerosene and LPG had to be exported only through a state-run agency was also removed.[124]

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[124] Trade Policy Review Body, *Trade Policy Review - India - Report by the Government*, WT/TPR/G/100, 22 May 2002, point No.13.

Even if many efforts have been made to remove trade barriers, India continues to maintain a number of them which have been the subject of several disputes before the DSB.[125] It is thus a sector where much remains to be done.

2) Concerning Services

We will take up the different Indian services which are subject to WTO-conformity and examine the telecommunications sector by way of illustration.

a) General aspects

The General Agreement on Trade in Services (GATS) is another WTO agreement that entered into force in January 1995 as a result of the Uruguay Round negotiations.[126] The treaty was created to extend the multilateral trading system to services just as the General Agreement on Tariffs and Trade (GATT) provides such a system for trade in merchandise.[127] All WTO members are signatories to GATS. The basic WTO principle of "most favoured nation" (MFN) applies to GATS as well.

India's scheduled commitments cover a range of services under GATS. They include business services (professional services, research and development services…), communication services (telecommunication services, audiovisual services…), construction and related engineering services (construction of highways, streets, railways, runways, bridges, tunnels, subways, waterways, harbours, dams, pipelines, communication lines, power lines…), financial services (insurance, banking…), health and social services (hospital services) and tourism and travel related services (hotels and other lodging services).[128] MFN exemptions were scheduled for

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[125] See below, Part II, Section II.

[126] Bhandari Surendra: *World Trade Organisation (WTO) and Developing Countries: Diplomacy to Rules Based Syste*m, Deep & Deep Publications, New Delhi 2002, pp. 341-342.

[127] See Schedule of Specific Commitments - India, GATS/SC/42, 15 April 1994.

[128] Trade in Services, *India - Final List of Article II (MFN) Exemptions*, GATS/EL/42, 15 April 1994.

communication services (audiovisual services and telecommunication services); recreational services (waiver on the prohibition of sale of lottery tickets in India), transport services (shipping services) and, to some extent, financial services (favourable treatment in respect of licences for entry and expansion in the form of branches is granted to banks incorporated outside India on the basis of reciprocity).[129]

b) The case of telecommunication services

India signed the Fourth and Fifth Protocols respectively in 1997 and 1998. Under the Fourth Protocol, India[130] scheduled commitments in voice telephony and cellular mobile telephony as well as value-added services such as circuit switched data transmission services, facsimile services and private leased circuit services.[131] India has made some minor exemptions[132] concerning these measures, including the application of different accounting rates for different neighbouring countries covered by Telecommunication Agreements concluded by the Government of India with governments of neighbouring countries (Pakistan, Bangladesh, Nepal and Bhutan).

In general, India's current policy is more liberal than its national schedules[133] and the process of internal liberalisation was undertaken at the same time as international negotiations. To that extent, it has complied with the WTO-conformity obligation. In

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[129] Regarding India's telecommunications sector, see Kathuria Rajat: *Trade in Telecommunication Services: Opportunities and Constraints*, ICRIER Working Papers No.149, November 2004, New Delhi, pp. 16-48.

[130] Schedule of Specific Commitments - Supplement 3, *Trade in Services – India*, GATS/SC/42/Suppl.3, 11 April 1997.

[131] Trade in Services, *India - List of Article II (MFN) Exemptions - Supplement 1*, GATS/EL/42/Suppl.1, 11 April 1997.

[132] Kathuria Rajat: *Trade in Telecommunication Services: Opportunities and Constraints*, ICRIER Working Papers No.149, November 2004, New Delhi, p. 65. By the same author, see the "Comparison of WTO Commitments made by India with the Actual Policy Implemented/under Consideration", pp. 65-69.

[133] WTO document GATS/SC/42/Suppl.3, 11 April 1997.

the case of voice and mobile telephone services, commercial presence can be established through incorporation in India after obtaining a licence from the designated authority; total foreign equity in the company is scheduled not to exceed 25%, although the current policy allows foreign equity ownership up to 49% for these services. India also declared that it would examine the issue of allowing competition from the private sector in international long-distance telecommunication services in 2004.[134]

Under the terms of GATS, India began to review the possibility of introducing competition in national inter-city telephony. The review was carried out in 1999 and the sector was actually opened to competition in August 2000. Today, there is no limit to the number of service providers operating in this sector. India also reviewed the opening of international telephony to competition in 2004, under the terms of GATS. However, open competition in this sector was already announced, effective from April 2002. With the opening of international voice communication, all telecommunications services in the country are open to competition and the private sector can now participate and compete in this sector. In anticipation of competition between private sector players, the Ministry of Telecommunications' job as a service provider was withdrawn from it and a new Ministry of Telecommunication Services was created on 15 October 1999. This was later transformed into a public sector company on 1 October 2000 and is now called Bharat Sanchar Nigam Limited (BSNL); it is the main public sector service provider. Similarly, the Videsh Sanchar Nigam Limited (VSNL) is the public sector service provider for international telecommunications; it was later divested and management control passed into the hands of a private company in February 2002.

A new law was enacted against the backdrop of the rapid convergence of telecommunications, computers, television and

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[134] For a detailed analysis of the legal framework, see Kathuria Rajat: *Trade in Telecommunication Services: Opportunities and Constraints*, ICRIER Working Papers No 149, November 2004, New Delhi, pp. 79 and following pages.

electronics in order to replace the Indian Telegraph Act of 1885.[135] The Indian Telegraph (Amendment) Act, 2003 aims to promote, facilitate and develop in an orderly manner the transmission and content of communications (including radio broadcasting, telecommunications and multimedia), and provides for the creation of an autonomous commission to regulate the transmission of all types of communication and for the setting up of an appellate authority.

B) Concerning Intellectual Property Rights

The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) is an international treaty which sets down minimum standards for most forms of intellectual property regulation[136] within all member countries of the WTO.[137] As we will explain later, TRIPs deals with copyrights and related rights (i.e. rights of performers, producers of sound recordings and broadcasting organisations); geographical indications (including appellations of origin); industrial designs; integrated circuit layout-designs; patents (including the protection of new varieties of plants); trademarks and undisclosed or confidential information (including trade secrets and test data). TRIPs also specifies enforcement procedures, remedies and dispute resolution procedures. Of course, as it is a WTO multilateral agreement, the obligations under TRIPs apply equally to all Member States;

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[135] Moreover, India is a member of the Berne Convention for the Protection of Literary and Artistic Works (since 1928), the Universal Copyright Convention, including the 1971 revision (since 1957) and the Geneva Convention for producers of phonograms. It ratified the Washington Treaty on Integrated Circuits in 1989. India has recently joined the Paris Convention (7 December 1998) and the Patent Cooperation Treaty.

[136] Regarding the relationship between TRIPs and WIPO, see Bhandari Surendra: *World Trade Organisation (WTO) and Developing Countries : Diplomacy to Rules Based Syste*m, Deep & Deep Publications, New Delhi 2002, pp. 24- 48.

[137] A transition period of 5 years (which expired on 1.1.2000) was provided to all developing countries. As per current requirements, member countries, which did not provide product patents in certain areas of technology as on 1.1.1995, can delay the grant of product patents in those areas up to 1.1.2005. India falls under this category since Indian patent law do not provide for the grant of product patents.

however, developing countries, such as India, have been allowed a longer period for implementing the changes applicable to their national law.[138] Under WTO obligations, each member country must provide for a minimum prescribed level of protection to Intellectual Property Rights (IPRs). The idea behind this commitment is to facilitate the cross-border enforcement of such rights.[139] Member countries may provide for higher standards of protection as and when they deem fit. However, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) lays down the minimum standards to be adopted by member countries for protection of IPRs.

1) Adaptation of Indian Intellectual Property Law

Since the entry into force of the WTO Agreement, India has amended the Copyright Act, 1957 to meet the requirements of the TRIPs Agreement, except for performers' rights. Action to amend the Patents Act, 1970 and the Trade and Merchandise Marks Act, 1958 is under way and legislation on geographical indications, plant variety protection and integrated circuits is being drafted. Besides, India has enacted special law relating to certain TRIPs related domains.[140]

a) Trademarks and trade names

India has abrogated the 1958 Act on trademarks,[141] which was

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[138] See Matsushita Mitsuo, Mavroidis Petros and Schoenbaum Thomas: *The World Trade Organization - Law, Practice, and Policy*, Oxford University Press, Oxford 2003, pp. 404-406.

[139] According to authoritative sources, although India has not enacted any legislation, it has found a way through administrative action for filing patents for pharmaceutical products and agriculture related chemical products. According to the decision of a panel (DS50/R) also confirmed by the appellate body (DS50/AB/R), these administrative instructions are not in line with the provisions of Article 70:8 a) of the TRIPs Agreement, in the sense that there is no mechanism to grant exclusive marketing rights from the date the WTO Agreement came into force.

[140] The *Trade and Merchandise Marks Act*, 1958, Act No.43 of 1958, dated 17th October 1958.

[141] The Trade *Marks Act*, 1999, Act No.33 of 1999, dated 30th December 1999.

replaced by the 1999 Act on trademarks[142] and the Trade and Merchandise Rules, 2002. Registration of a trade mark confers on the registered proprietor the exclusive right of use as well as the right to obtain relief in case of infringement. Registration is not compulsory. However, without registration, the owner cannot bring an action for infringement.

The Trade Marks Act provides for the registration of distinctive brands for products and services as well as prohibition of fraudulent marking. It lays down the procedure and duration for registration of brands and the procedure for assignment and transfer of brands. It provides for the protection of collective brands, registered certification marks and well-known brands. A competent appellate authority to settle appeals against the registrar's decision has also been created. This commission will have a fast-track appeal mechanism. Besides, penalties for contravening this law have also been increased. On the whole, WTO obligations require member countries to give equal protection to service marks as to trade marks. Accordingly, the Trade Marks Act, 1999 was passed providing for equal protection to service marks. Indian Trade Mark law conform to WTO requirements.

b) Geographical indications

This issue has been of particular interest to India, especially after a patent was obtained for *basmati* rice in the United States by Ricetec.[143] India has a great interest in this area since there have been reports that Nigerian and Sri Lankan tea-growers have been passing off their tea as Darjeeling Premium Tea (which commands the highest price in the market).

A special law known as the 1999 Geographical Indications Act has been passed for protecting the geographical indications of products (registration and protection), in order to comply with

[142] Balasubramanian D.: *Basmati — identity crisis solved*, The Hindu, May 9, 2002.

[143] The *Designs Act*, 2000, Act No.16 of 2000, dated 12th May 2000.

the requirements of the TRIPs agreement and also to protect products of Indian origin.

The Act provides for the registration of a product from a geographical zone, which owes its distinctive and fundamental characteristics or its reputation and quality to its geographical origin, and this includes all agricultural, natural or manufactured products. A geographical indication may be registered for all goods originating in a definite territory of a country, or a region or locality in that territory (Article 8). Registration of a geographical indication is for ten years with possible renewal for a further ten-year period. Registration for an authorized user is also for ten years or until the date at which the registration of the geographical indications expires, whichever is earlier. An authorized user has the exclusive right to use the geographical indication. Geographical indications, or the authorization to use them, may be removed due to failure to pay fees. In case of infringement, registration gives the proprietor and the authorized user or users the right to obtain the relief specified in the Act. The significant aspects of this Act are the registration of the geographical indications of products, a higher level of protection for notified products and, finally, procedures with regard to violation of the Act and related penalties.

c) Industrial Designs

The 2000 Act on engineering drawings and industrial designs[144] abrogates and substitutes the previous 1911 Act in order to confer much more comprehensive protection to registered engineering drawings and industrial designs. Designs are protected as a copyright for a period of ten years, renewable for a further five years. The registration of a design may be cancelled at any time if the design has been previously registered or published in India,

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[144] The *Locarno* Classification consists of a classification for industrial designs. The *Locarno* Classification is based on a multilateral treaty administered by WIPO. This treaty, called the *Locarno* Agreement Establishing an International Classification for Industrial Designs, was concluded in 1968. This Classification is commonly referred to as the *Locarno* Classification.

or in any other country prior to the date of registration, or if it is not a new or original design, or if it is not a design. Since 1998, 16 designs have been cancelled because they had previously been registered in India or had been published prior to the date of registration. The owner of a design may at any point assign a licence to someone else for the use of the design. India fulfils the requirements under the TRIPs agreement as regards engineering drawings and industrial design.

The salient points of this legislation are as follows: it provides for the identification of non-registrable engineering drawings and industrial designs, it substitutes the Indian classification system with the *Locarno* classification system,[145] followed the world over, and provides for re-registration of lapsed engineering drawings and industrial designs.

d) Protection of undisclosed information

WTO obligations require member countries to protect trade secrets. The WTO obligations require that suitable legislations are put in place as it enables persons to prevent information lawfully within their control from being disclosed to, acquired by or used by others without their consent in a manner contrary to honest commercial practices. In India, there is no separate law for this purpose. Such complaints are dealt with under the Contracts Act. The common law on the subject is constantly evolving and courts have provided relief where allegations of wrongful disclosure have been proven.

e) Copyrights and related rights

In accordance with the long tradition of protecting copyrights in India, the 1957 Indian Copyright Act[146] was promulgated to protect and encourage creativity. This law was revised to accommodate

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[145] The *Copyright Act*, 1957, No.14 of 1957, dated 4th June 1957, as amended up to Act 65 of 1984.

[146] International Copyright Order, 1999.

the challenges that cropped up due to technological innovation. The modernity of India's copyright law is evidenced by fact that it was necessary to make minor changes only in 1999,[147] which consisted of increasing the protection period for performing or recording artists from 25 years to 50 years, for India to comply effectively with its obligations under the TRIPs Agreement.

Copyright is provided to original literary,[148] dramatic, musical and artistic works, cinematographic films and sound recordings; the Act also provides broadcast reproduction rights to broadcasters (Section 37) and performers (Section 38). Copyrights are granted if the work was first published in India or if the author is an Indian citizen; in the case of unpublished works, the author has to be a citizen of India or domiciled in India at the time the work was done; architectural works are protected if located in India. National treatment to foreign works is provided under Articles 40-43 of the Copyright Act where the Government, through an International Copyright Order, extends protection to nationals or organizations of countries that are members of international copyright conventions to which India is also a party (Berne Convention, Universal Copyright Convention, Phonograms Convention, and WTO).[149] The International Copyright Order is amended from time to time to update the list of countries to which it applies; it was most recently updated in 2000.[150]

Copyright protection for published literary, dramatic, musical and artistic works (other than photographs) is for the author's lifetime plus 60 years (Section 22). Anonymous and

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[147] Literary works includes computer programs, tables and compilations including computer data bases (Article 2).

[148] These are the Berne Convention, the Universal Copyright Convention and the Phonograms Convention (International Copyright Order, 24 March 1999 amended by the International Copyright (Amendment Order, 12 December 2000).

[149] The first International Copyright Order was issued and came into force in January 1958.

[150] International Intellectual Property Alliance, *Special 301 Report: India*, 11 February 2005, p. 121.

pseudonymous works are protected for 60 years from the year following their first publication (Section 23), the same protection period is granted for photographs, cinematographic films and records (Section 25-26). A broadcast reproduction right is granted for 25 years from the beginning of the calendar year following the year of the broadcast (Section 37); performers' rights are granted for a period of 50 years (Section 4 of the Copyright (Amendment) Act, 1999).
India is a signatory to the Berne Convention and Indian copyright law conform to all WTO requirements. In fact, Indian copyrights law provide for greater protection to copyrights than is required under WTO obligations in some matters such as period of copyright protection (60 years in India). However, some reservations have to be made as there are efficiency-related problems, notably because piracy is an industrial reality in India. To that extent, "the hurdles to reducing piracy rates in India have not changed significantly over the years; they are police corruption (larger pirates are often protected by the police); reluctance to act *ex officio* in criminal cases outside the largest cities; lack of resources and training; an overburdened and slow court system that prevents conclusion of even the simplest criminal or civil cases, and finally, a lack of real deterrence in the overall enforcement system."[151]

f) Patents

The TRIPs agreement does not give the details of an effective *sui generis* system. It has been left to each member country to define an effective *sui generis* system and to determine its elements.[152] Moreover, a three-stage time-frame (from 1995 to 2005) to comply with IP rights was granted to developing countries and "India chose to take advantage of [this] ten-year transition period, provided

[151] Article 1:1 TRIPs: "Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice."

[152] Puri Mahima and Varma Anjali: *Patents Legislation in India*, ICRIER Working Papers No.158, March 2005, New Delhi, p. 5.

under Article 65(4) of the Agreement."[153] Indeed, in the attempt to achieve conformity and ensure full implementation of the TRIPs agreement under the 1970 Indian Patent Act,[154] two amendments were passed, one in 1999 and the other in 2002. However as regards the conformity of Indian patent law with the TRIPs agreement, we must mention an important case that opposed India to the European Community and the United States. In the *Patent Protection for Pharmaceutical and Agricultural Chemical Products* case,[155] that we will discuss in details later,[156] the Panel found that India has not complied notably with its obligations under Article 70.8(a) or Article 63(1) and (2) of the TRIPs Agreement by failing to establish a mechanism that adequately preserves novelty and priority in respect of applications for product patents for pharmaceutical and agricultural chemical inventions. Indeed, WTO Members who benefit from a transition period in order to enable them to amend their legislative, administrative and regulatory provisions to comply with the stipulations contained in the TRIPs Agreement, are constrained under the terms of Article 70:8 a) to establish a method by which they can register the date of filing patent applications for pharmaceutical products and agricultural chemicals products, allocate dates of filing and priority to these patent applications, as well as provide a solid judicial base to maintain their novelty and

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[153] It should be remembered that "product patents for pharmaceuticals and agro-chemicals had been done away with in the 1970 Indian Patents Act, which provided for process patenting enabling the patented drugs to be developed and marketed in India without fear of infringement action. A healthy indigenous industry, strong in chemistry, developed, and was opposing introduction of product patents that would affect its growth.", Narayan S.: *Trade Policy Making in India*, for the Workshop on Trade Policy Making in Developing Countries, London School of Economics and Political Science - International Trade Policy Unit, May 25th 2005, p. 8.

[154] Report of the Panel, *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/R, 5 September 1997; Report of the Panel, *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS79/R, 24 August 1998; Report of the Appellate Body, *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, 19 December 1997.

[155] See below, Part II, Chapter II.

[156] Report of the Panel, *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/R, 5 September 1997, paragraph 5.41.

priority from the said dates onwards. But the Panel observed that "the lack of legal security in the operation of the mailbox system in India is such that the system cannot adequately achieve the object and purpose of Article 70.8 and protect legitimate expectations contained therein for inventors of pharmaceutical and agricultural chemical products",[157] and did not fail to substantiate its argument by observing that the "Predictability in the intellectual property regime is indeed essential for the nationals of WTO Members when they make trade and investment decisions in the course of their businesses."[158] It is for this reason that the Panel declared that India should abide by the obligation to bring in legislative measures starting 1st January to implement the provisions of Article 70:8 a) of the TRIPs Agreement. In support of this opinion, the Panel argued that the current Indian administrative practice resulted in a certain judicial insecurity,[159] to the extent that it obliged government officials to ignore certain mandatory provisions of the patent law. Toning it down a bit, the Appellate Body confirmed the Panel's recommendations on this point: indeed, Members were not obliged to guarantee that the patent applications filed in the mailbox would not be rejected or invalidated because they were submitted before any legislation came into force, but simply to set up a judicial mechanism based on the mailbox system.[160] This case is very significant because of the fact that India could have ensured conformity with WTO law through an administrative practice,[161] but it was not the case as the legal certainty was not ensured. It does not call into question the fact that in India delegated legislation

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[157] Report of the Panel, *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/R, 5 September 1997, paragraph 5.30.

[158] Report of the Panel, *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/R, 5 September 1997, paragraphs 5.32 to 7.43.

[159] Report of the Appellate Body, *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, 19 December 1997, paragraphs 57-71.

[160] As we have explained earlier: Part I, Section I.

[161] Report of the Panel, *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS79/R, 24 August 1998, paragraph 7.35.

occupies centre stage in rule-making. But clearly, the fact that the Panel found that "the current administrative practice creates a certain degree of legal insecurity in that it requires Indian officials to ignore certain mandatory provisions of the Patents Act"[162] and that "even if Patent Office officials do not examine and reject mailbox applications, a competitor might seek a judicial order to do so in order to obtain rejection of a patent claim."[163]

From the formal point of view, only a legislative adaptation of Indian rules could lead to conformity with international law, which was done by the Union Parliament as we have already pointed out. Recently, in March 2005,[164] a third amendment was passed which has been called TRIPs-plus by a number of commentators[165] because it actually goes beyond WTO requirements.[166] For instance, the new legislation allows a pharmaceutical company to obtain additional patents when one of its already patented drugs is discovered to be of use in combating other illnesses and conditions, thus extending the number of years over which the company will exert proprietary

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[162] Report of the Panel, *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS79/R, 24 August 1998, paragraph 7.35.

[163] Report of the Panel, *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS79/R, 24 August 1998, paragraph 7.37.

[164] For a detailed analysis of the Indian patent regime, see Puri Mahima and Varma Anjali:

Patents Legislation in India, ICRIER Working Papers No.158, March 2005, New Delhi (38 p.).

[165] Ahuja D. P.: *Indian Patents*, World Patent and Trademark News, Volume 5 Issue No.3.

[166] Dr Narayan explains that "the Government, in this strategy, was able to cater to requirements of local industry, and to use the emotions of the critics to push through a legislation that is barely adequate to meet international standards. In fact, some of the clauses of the legislation can be said to be TRIPs non- compliant; but the US has decided against taking the matter up for dispute settlement at the WTO. In effect, not only has India been able to take advantage of all the flexibilities in TRIPs, but has also been able to push the boundaries further than would have been considered possible. In short, the strategy adopted for handling internal dissension, demands of local industry, and its international commitment, can be considered quite clever and effective", Narayan S.: *Trade Policy Making in India*, for the Workshop on Trade Policy Making in Developing Countries, London School of Economics and Political Science - International Trade Policy Unit, May 25th 2005, p. 9.

control over the said drug's production and marketing. Similarly, the new legislation goes beyond TRIPs in the obstacles it places on the path of the Union government while authorizing the production of patented drugs by generic manufacturers to meet public health emergencies.[167]

g) Layout designs of integrated circuits

Basically, WTO obligations in this respect require member countries to comply with the international agreement administered by WIPO (more commonly known as the "Washington Treaty") with some enhancements. WTO obligations require granting protection to IPRs in respect of layout designs which are original in the sense of being the result of their creator's own intellectual efforts.

The law on integrated circuit layout design was passed in 2000, in order to protect the said designs. The law grants exclusive rights to the registered layout design-holder, as well as to licensed users. In case of the infringement of layout designs, it provides for criminal penalties that would act as a deterrent. It also provided for an appellate authority for reviewing the orders passed by the registrar. Registration is for a period of ten years from the date the application was filed or from the date of the first commercial exploitation in India or anywhere else, whichever is earlier. The registration of a layout design gives the registered owner the exclusive right to its use and to obtain relief in case of infringement. No person may institute proceedings to prevent or to recover damages for the infringement of unregistered layout designs (Article 16). India is a signatory to the Washington Treaty and by and large complies with the WTO obligations in this matter.

2) General Protection Regime

As the Paris and Berne Conventions leave enforcement of Intellectual property rights through judicial and administrative

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[167] For a more detailed analysis, see Puri Mahima and Varma Anjali: *Patents Legislation in India*, ICRIER Working Papers No 158, March 2005, New Delhi, (38 p.) or Dhavan Rajeev: *The Patent Controversy,* The Hindu 10 December 2004.

remedies to local decisions, it was a decisive action to include this sector in the WTO field so that if could benefit from WTO's efficiency.[168] As a result, India provides protection to various intellectual property rights and it has the instruments to enforce it by means of special national law as well as through the Civil Procedure Code and the Criminal Procedure Code, which provide for civil remedies and criminal penalties. These laws certainly act as a deterrent to any possible violators of IPRs. Both the criminal and civil prosecution of IPR violators falls under the general jurisdiction of the courts.

To complement the various law enacted to establish the administrative framework required for dealing with the law on intellectual property rights, India has also undertaken to modernize the different intellectual property rights agencies spread across the country. The Copyright Office, Patents Offices, including the Office of Engineering drawings and industrial designs and, finally, the Trademarks Registry are all in the process of being modernised and revamped thanks to the extensive use of information technology, redefinition of work practices and human resources development. A separate Registry for processing geographical indications was created recently.

The Indian government has taken several measures to improve the implementation of intellectual property rights law, especially copyright law. The government has set up an Advisory Board for protecting copyright, which is attached to the Ministry of Human Resources Development (as issues concerning copyright come under the minister's portfolio). The Board consists of representatives from the copyright industry, group administration companies, Directors General of Police of the principal States and representatives of other related ministries of the Indian Government. The Board gives its recommendations on ways to ensure compliance with copyright law and follows up on the actions taken on its recommendations. Since

[168] Matsushita Mitsuo, Mavroidis Petros and Schoenbaum Thomas : *The World Trade Organization - Law, Practice, and Policy*, Oxford University Press, Oxford 2003, p. 404.

the law enforcement in the federal structure is a State subject, the Central Government has asked the State Governments to create special cells under experienced police officers to enforce copyright law. In several States, these cells handle other issues related to the enforcement of IPR law.
It is clear that India now affords suitable protection to IPRs in all matters.A few months ago, we would have mentioned the problems raised by the patent law. India's Intellectual Property Rights legislation is generally strong, but there is still something unsatisfactory about it from the enforcement point of view. Enforcement is often inadequate, especially where piracy in concerned. The major obstacles are lack of resources and an overcrowded and ineffective court system that prevents the conclusion of cases.

In addition, other sectors of trade legislation have also been changed. The law on anti-dumping measures and countervailing duties came into force in India in 1985, and an anti-dumping service[169] was established within the Commerce Ministry in 1986. In July 1997, India promulgated rules for safeguards in the framework of the 1975 Customs Tariff Act and created the post of Director General for protective measures in the Finance Ministry.[170] The law on anti-dumping measures, subsidies and countervailing measures was amended and brought in line with the decisions taken at the Uruguay Round.[171] India's anti-dumping defence seems to be successful as "while the number of anti-dumping investigations up to mid-90s remained in single digit, the number of cases initiated increased to 19 in 1999-2000 and 30 in 2001-02."[172]

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[169] Directorate General of Anti-Dumping and Allied Duties.

[170] Document G/SG/N/1/IND/2, 14 January 1998.

[171] WTO Documents G/ADP/N/1/IND/2, 15 August 1995, G/ADP/N/1/IND/2/Corr.1, 9 January 1996 and G/ADP/N/1/IND/2/Suppl.1, 23 December 1996.

[172] Directorate General of Anti-Dumping and Allied Duties, *Annual Report 2001-2002*, p. 1.

Conclusion of Section II

On the whole, the adaptation of Indian law, whatever the sector concerned, was and is still evident, at least from the formal point of view. Acts do exist, but it must be verified in what measure they are applied, i.e. what are the administrative practices. This can be analysed only by taking into account the disputes in which India is involved in WTO. However, Indian legislative activity complies with the strict requirements enshrined in Article XVI:4 and bears testimony to India's integration in the legal framework represented by WTO.

As we have already mentioned, any violation of a provision of the WTO agreement automatically implies a violation of the cardinal obligation of conformity enshrined in Article XVI:4 of the Agreement establishing WTO.[173] If India does not comply with WTO rules, it may give rise to a dispute. A dispute arises when a member government believes that another member government is violating an agreement or a commitment that it has made to WTO. A violation complaint will succeed when the respondent fails to carry out its obligations under the WTO agreements and this results, directly or indirectly, in nullification or impairment of a benefit accruing to the complainant under these agreements. If it can be established before a Panel and the Appellate Body that these two conditions are satisfied,[174] the defendant will have to change its legislation. The DSM then

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[173] In *Sunset Reviews Of Anti-dumping Measures On Oil Country Tubular Goods From Argentina* the panel notes, "therefore, a finding by this Panel that the United States has acted inconsistently with any of its obligations under the Anti-Dumping Agreement will necessitate a finding that it has also acted inconsistently with Article 18.4 of the Anti-Dumping Agreement and Article XVI:4 of the WTO Agreement", Report of the Panel, *United States - Sunset Reviews Of Anti-dumping Measures On Oil Country Tubular Goods From Argentina*, WT/DS268/R, 16 July 2004, Annex A, paragraph 313.

[174] In practice, the first of these two conditions, viz. violation, plays a much more important role than the second condition, viz. nullification or impairment of a benefit. This is due to the fact that nullification or impairment is "presumed" to exist whenever a violation has been established.

appears as the second element which ensures the conformity of Indian law with WTO prescriptions.

All the commitments made under WTO Agreements must be implemented by the Member States of WTO and the Indian law, like that of any other Member, must conform to WTO provisions. But obviously at the time of the implementation,[175] problems may arise with regard to the violations or simply the interpretation of many clauses. As a result, a central feature of the WTO is its DSM,[176] which has had an enormous impact on the world trade system and trade diplomacy and has principally to deal with questions related to the conformity of domestic law with WTO agreements.[177] The Dispute Settlement Understanding[178] (DSU) is "a central element in providing security and predictability to the multilateral trading system".[179]

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[175] This can be defined as "putting into effect the undertakings made in trade negotiations". "Implementation" in Goode Walter: *Dictionary of Trade Policy Terms*, Cambridge University Press 2003, p. 174.

[176] Regarding the Uruguay Round negotiation on GATT dispute settlement procedure reform, see Rao M. B. and Guru Manjula: *WTO and International Trade*, 2nd Ed. Vikas Publishing House, New Delhi 2003, pp. 266-268. For an analysis of GATT dispute settlement (1948-1990), see Bhandari Surendra: *World Trade Organisation (WTO) and Developing Countries: Diplomacy to Rules Based Syste*m, Deep & Deep Publications, New Delhi 2002, pp. 157-141.

[177] Formally, Members do not systematically plead the breach of Article XVI:4 of the Agreement establishing WTO since, as we have already explained, a breach of any provisions implies a breach of the cardinal obligation contained in article XVI:4, see above: Chapter I.

[178] In full, the Understanding *on Rules and Procedures Governing the Settlement of Disputes*.

[179] Art. 3:2 of DSU.

PART II

INDIA'S COMPLIANCE WITH WTO LAW THROUGH THE SETTLEMENT OF DISPUTE

The WTO/DSM is unique in international law, essentially because it is a judicial and legal system for settling disputes dedicated to the preservation of the rights and obligations of WTO Members.[180] This assessment is based on a comparison with others international judicial systems,[181] but it appears even more relevant in view of the very frequent use of arbitration in international private law. Moreover, and unlike some of the more specialised systems of this type,[182] these attributes are vested in a broad and comprehensive jurisprudence which clarifies and develops the law arising from the Agreements. However, the mechanism retains some elements of diplomacy even though the DSU introduced several new features in the pre-existing GATT 1947 system, which is why rather than being considered as a judicial system, it is most often described as a quasi-judicial mechanism. On the whole, more than any other international organisation, the WTO is really able to ensure the efficiency of its law, a conclusion reinforced by the frequent use of the DSM.[183]

DSB has made a very significant contribution to ensuring the conformity of domestic law to WTO law. Indeed, it must be underlined that the absence of conformity leads the DSB (through

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[180] Art. 3 Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU): "The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements in accordance with customary rules and interpretation of public international law".

[181] For an exhaustive analysis of international judicial systems, see Brownlie Ian: *Principles of Public International Law*, 6th Ed. Oxford University Press, New Delhi, 2004, pp. 671-694.

[182] For a general idea of dispute settlement in international organizations, see Amersinghe C. F.: *Dispute Settlement by International Organizations*, IJIL 2003, Vol. 43 No.3, pp. 409-444.

[183] For statistics regarding the use of DSM, see Annexes 2 and 3.

Panels or the Appellate Body) to specify the contents of the primary obligation by the creation of a derived obligation.[184] This new obligation specifies the content of the primary obligation: such internal rules (for example, India *Patent Protection for Pharmaceutical and Agricultural Chemical Products*) must comply with the provisions of the WTO agreement (in this case, Article 70:8 a) of TRIPs).[185] The report isolates the non-conformity measure and the reasons for its non-conformity. It locates the exact point where the international obligation must apply in the internal legal system. By doing this, the DSB fulfils its mission of clarifying[186] the WTO agreements. That has been done several times as it was alleged by other Members that Indian legislation did not conform to the WTO Agreements.
We will first focus on the technical features of the DSM, which determines the degree of compliance required by WTO (Section I), and then go on to the notion of special and differential treatment in the DSM to asses its impact on India's participation in dispute settlement (Section II).

Section I – An Effective Dispute Settlement Body

The efficiency of the GATT dispute settlement mechanism was limited,[187] since it was necessary to obtain a general consensus

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[184] When "a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement", Art. 19:1 of DSU. In this regard, see Nouvel Yves: *Aspects généraux de la conformité du droit interne au droit de l'OMC* (General Aspects of Conformity of Domestic Law with WTO Law), AFDI 2002, pp. 662-667.

[185] As handled by the DSB: Report of the Panel, *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS79/R, 24 August 1998 and Report of the Appellate Body, *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, 19 December 1997. See our developments on this case: Section II, Paragraph II.

[186] Art. 3:2 of DSU.

[187] To get an overview of the previous GATT Dispute Settlement System (1948-1995), See Petersmann Ernst-Ulrich: *The GATT/WTO Dispute Settlement System International Law, International Organizations and Dispute Settlement*, Nijhoff Law Specials: Volume 23 Kluwer Law International, The Hague 1997, pp. 66-91.

for adopting a report. The foreseeable refusal of the only succumbing party was sufficient to prevent the adoption of the report of a GATT dispute settlement panel. Under WTO, the GATT consensus requirement has been reversed: in WTO, consensus is required to reject (called *"negative consensus"*) rather than to adopt a report. This change has made WTO dispute settlement the most effective area of adjudicative dispute settlement in the entire arena of public international law (paragraph I).[188] However, the analysis of DSU should not be limited to its general provisions. At a later stage, it would be appropriate to examine the differential treatment accorded to developing countries. In fact, it should be remembered that during the GATT era, the economic weakness of developing countries was gradually given cognisance during dispute settlement, but the differential treatment granted to them suffered from a lack of effectiveness (non-mandatory nature of panel reports). DSU has certainly rectified this shortcoming, but it remains to be seen whether developing countries continue to enjoy differential treatment and whether this treatment is really effective (Paragraph II).

Paragraph I – Severe Constraints on India

The DSB enforces the rules and procedures contained in the DSU. As Ravindra Pratap observes, "perhaps no other WTO agreement has generated as much interest as the DSU."[189] Therefore, we will not go into the details of the general

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[188] In this respect, the first case submitted to the WTO/DSM was illustrative since it pitted Venezuela (as plaintiff) against United States of America (as defendant). Such a case would have been unimaginable under GATT47. See Report of the Panel, *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/R WT/DS2/R, 29 January 1996.

[189] Pratap Ravindra: *India at the WTO – Dispute Settlement System*, Manak Publications, New Delhi 2004, p. 35.

mechanism,[190] but we will just concentrate on the necessary elements for our aim is to draw attention to the severe constraints imposed by the DSM and its contribution to ensuring the compliance of domestic law with WTO agreements.

Since its inception in 1995, India has been satisfied with the working of the DSB as it constitutes a major balancing tool in the system, i.e., any defaulter is liable to be punished by the forum, subject to the establishment of its non-compliance with WTO rules. However, the Indian government has pointed out from time to time that there is ample scope for the betterment of the ongoing system that we will explain by describing its main characteristics.[191]

In any case, we will devote this first paragraph to the assessment of the DSM's contribution to the conformity obligation laid down in the WTO Agreements. As long as the DSM's action is based on constraints, the conformity requirement will be a frequent subject of litigation. In this respect, the DSM seems to confirm that the WTO imposes a high degree of constraint in order to ensure a very high degree of conformity from the institutional point of view (A) as well as from the judicial perspective (B).

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[190] For a detailed analysis of the DSM, see Cameron James and Campbell Karen (Eds.):*Dispute Resolution in the WTO*, London, Cameron May, 1998 (421 p.); Canal-Forgues Eric: *Le règlement des différends à l'OMC (Dispute Settlement in WTO)*, Bruylant, Bruxelles 2003 (164 p.); Gallagher Peter: *Guide to Dispute Settlement*, Kluwer Law International 2002 (148 p.); Palmeter David and Mavroidis Petros : *Dispute Settlement in the World Trade Organization – Practice and Procedure*, 2nd edition, Kluwer Law International, The Hague 2004 (330 p.); Pratap Ravindra: *India at the WTO – Dispute Settlement System*, Manak Publications, New Delhi 2004 (499 p.); Weiss Friedl: *Improving WTO Dispute Settlement Procedures: Issues and Lessons from the Practice of other International Courts and Tribunals*, Cameron May, 2000 (430 p.).

[191] See in particular Chaisse Julien and Chakraborty Debashis: *Dispute Resolution in the World Trade Organisation in the Light of Chinese and Indian Involvements*, in Debroy Bibek and Saqib Mohammed (eds.): *Future Negotiation Issues at World Trade Organisation – An India-China Perspective*, Globus Books, New Delhi 2004, pp. 401-409. Also Annexes 5 and 6.

A) Constraints Imposed by the Remarkable Institutional and Procedural Characteristics of the DSM

From the institutional viewpoint, the DSM's constraining power lies in its integrated nature (1) and the perception that this system is exclusive and mandatory (2).

1) Integrated nature of the DSM

a) Affirmation of the DSM's integrated nature

The establishment of an "integrated" or even "single" DSM and an integrated DSS in the WTO framework has replaced the juxtaposition of several dispute settlement mechanisms[192] that existed under the GATT 1947 regime. In fact, since the Uruguay Round covered practically all sectors of global trade, it was imperative that the dispute settlement system should be equipped with a general procedure applicable to all classical and new sectors of global trade.[193] In order to do so, the integrated nature of the new system emanates essentially from the opportunity given to all WTO Members to base their claims on any of the trade agreements included in the annexes of the Agreement establishing the WTO[194] such as Agreements on Trade in Goods, General Agreement on Trade in Services, Agreement on Trade-related Intellectual Property Rights and the multilateral agreements.
The DSU also applies to consultations and settlement of disputes between WTO Members as regards their rights and obligations

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[192] A cause of uncertainty and complexity that weakened the system considerably. See Bhandari Surendra: *World Trade Organisation (WTO) and Developing Countries: Diplomacy to Rules Based Syste*m, Deep & Deep Publications, New Delhi 2002, pp. 132-133.

[193] As outlined in DSU Appendix 1: *Agreements Covered by the Understanding*.

[194] In *Brazil — Desiccated Coconut*, the Appellate Body defined the term "covered agreements" as follows: "The 'covered agreements' include the WTO Agreement, the Agreements in Annexes 1 and 2, as well as any Plurilateral Trade Agreement in Annex 4 where its Committee of signatories has taken a decision to apply the DSU. In a dispute brought to the DSB, a panel may deal with all the relevant provisions of the covered agreements cited by the parties to the dispute in one proceeding". Report of the Appellate Body, *Brazil - Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, 21 February 1997, p. 13.

under the terms of the WTO agreement (therefore for all disputes pertaining to the interpretation and application of the Agreement itself) wherever the WTO agreement does not include procedures for settling disputes.
The main consequence of this system of recourse to a single agreement is to place dispute settlement at the centre of a conventional umbrella of which it is at the same time both the symbol and the reliability test, which has made it efficacious.
But this integrated system has another distinctive feature, viz. a guarantee of judicial safety which makes it beneficial for developing countries.

b) Prohibition of specific dispute settlement mechanisms
Following the Kennedy and Tokyo rounds of multilateral trade negotiations, various codes were adopted, sometimes including mechanisms for settling specific disputes. Thus, under the GATT regime several dispute settlement mechanisms were juxtaposed, which resulted in a certain judicial insecurity arising out of what was called "*forum shopping*".[195] The United States, in particular, was at liberty to choose the procedure of settling disputes and always opted for the one that is most favourable to it.[196]
The enshrinement of the DSS under the WTO as a single system applicable to all agreements has considerably lessened the practice of "*forum shopping*". And this desire can be seen within the provisions of the DSU itself. To that extent, it has been said that "the obligation to use the WTO multilateral dispute settlement mechanism (i.e. as opposed to unilateral or even regional mechanisms) to obtain any determination of WTO

[195] The term "forum shopping" refers to "the practice of introducing a proposal or pursuing a dispute in one forum after another until a favourable outcome has been achieved", in Goode Walter: *Dictionary of Trade Policy Terms*, Cambridge University Press, Cambridge 2003, p.143.

[196] Petersmann Ernst-Ulrich: *The GATT/WTO Dispute Settlement System International Law, International Organizations and Dispute Settlement*, Nijhoff Law Specials: Volume 23 Kluwer Law International, The Hague 1997, p. 178.

compatibility, is a fundamental obligation that finds application throughout the DSU."[197]

To do away with any form of "*forum shopping*", there is a provision that whenever there is a dispute regarding the applicability of special and general rules, the problem must be sorted out in a short period of time (10 days) by the DSB President. In order to do this, Article 1:2 of DSU lays down the general principle that must be adopted by the DSB Chairman regarding the choice of rules and procedures to be applied to the dispute with precedence being given to the special rule over the general rule.

2) Exclusive and mandatory system

Under the terms of Articles 1:1 and 23 of DSU, WTO has exclusive jurisdiction to deal with any litigation between Members of the Organisation pertaining to the application and interpretation of the rules laid down in the different agreements under the WTO. Article 23 constitutes one of the fundamental clauses of the DSU since it lays down that Members are bound to have recourse only to the rules and procedures of the DSU and comply with them when they seek "the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements."[198]

As a result, WTO Members do not have the authority to decide on their own about the existence of a violation and have to stop taking the law into their own hands.[199] A panel recalled that "there is no exception to the fundamental prohibition against unilateral determination of WTO inconsistency of any measure, including a measure adopted to comply with Panel and Appellate Body

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[197] Report of the Panel, *United States - Import Measures on Certain Products from the European Communities*, WT/DS165/R, 17 July 2000, paragraph 6.92.

[198] Art. 23:1 of DSU.

[199] Art. 23:2 of DSU.

recommendations. All such determinations must be made using the DSU as only WTO adjudicating bodies can determine that a measure (or an implementing measure) violates the WTO Agreement."[200] The only penalties possible are those already authorised by the DSB (withdrawal of concessions and other obligations), after examining the dispute and after the expiry of the so-called "reasonable period of time" to implement the recommendations and rulings made, as provided for in the DSU. In other words, recourse to the dispute settlement rules and procedures becomes mandatory in case of litigation between WTO Members.

While the DSU legitimises the possibility of recourse to arbitration,[201] it is, however, envisaged only as a marginal possibility involving "certain disputes that concern issues that are clearly defined by both parties".[202] Moreover, the mutual consent of the parties is mandatory to take recourse to such an action. Therefore, recourse to any other method of settling disputes outside the framework of the WTO is prohibited. Thus, the new system is similar to a mandatory jurisdiction mechanism since the WTO's jurisdiction and its quasi-judicial institutions are binding on all the Member States of the WTO. Therefore, with the new mechanism, legal action can be brought unilaterally and the respondent Member has to submit itself to the jurisdiction of the panel.

The result of the exclusive recognition given to the new DSM is that the rules of general international law pertaining to counter measures are bypassed and the practice of imposing unilateral measures[203] before the process of dispute settlement is also excluded. Thus, Article 23, read along with Article XVI:4 of the

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[200] Report of the Panel, *United States - Import Measures on Certain Products from the European Communities*, WT/DS165/R, 17 July 2000, paragraph 6.127.

[201] Art. 25 of DSU.

[202] Art. 25:1 of DSU.

[203] For example, the United uses unilateral trade sanctions and imposes extra-territorial measures on other countries of the planet, such as the "Helms–Burton" (Cuba) or "Amato-Kennedy" (Iran and Libya) law.

Agreement establishing WTO, results in a firm and absolute rejection of unilateral action with the main beneficiaries being essentially developing countries. The multilateral aspect of the DSM acts as a guarantee of security for WTO members. It prohibits unilateral sanctions and as a result, re-establishes a sort of level playing field between powerful and weak nations.[204] But this factor alone should not be taken as the reason for the renewed interest evinced by WTO Members as regards the new system, for this would mean overlooking the fact that the desirability of the new DSS resides mainly in the fact that the procedure has taken on a judicial nature.

B) Constraints Imposed by the Judicial Nature of the Procedure

Several factors confirm that the WTO dispute settlement procedure has been transformed into a judicial procedure. For this purpose, "quasi-judicial" bodies have been established (1)[205] and the procedure can no longer be blocked and arbitration proceedings have been provided for (2).

1) Establishment of new bodies

WTO's DSU sanctions the establishment of two new bodies in the dispute settlement process: the DSB and the Appellate Body (AB), which have to determine whether a measure conforms to WTO law.

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[204] To that extent, the first case submitted to the WTO/DSM was illustrative since it pitted Venezuela (as plaintiff) against United States of America (as defendant). Such a case would have been unimaginable under GATT47. See Report of the Panel, *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/R, 29 January 1996.

[205] Regarding the panel procedure, see Matsushita Mitsuo, Mavroidis Petros and Schoenbaum Thomas: *The World Trade Organization - Law, Practice, and Policy*, Oxford University Press, Oxford 2003, pp. 28-29.

a) A Plenary Body: The Dispute Settlement Body (DSB)

In the framework of the new system, the administration of the rules and procedures of the DSU governing dispute settlement and of the agreements described in the final Act is entrusted to the WTO. To be more precise, it is the General Council, made up of all the WTO Members, which has to discharge the duty of settling disputes. To do so, the creation of an integrated body was provided for. Consisting of all WTO Members, this body exercises the authority of the General Council and councils and committees described in the agreement in the Final Act. It meets "as often as necessary to carry out its functions within the time-frames provided in this Understanding",[206] it has its own Chairman and lays down its own internal rules, which gives it a certain leeway in its functioning.

Article 2 of DSU entitled "Administration", deals with the functions and rules of jurisdiction vested with this new body: general function of administering dispute settlement rules and procedures, authority to establish panels, adoption of reports from the panels and appellate body, ensure the monitoring of the implementation of rulings and recommendations, authorise the suspension of concessions and other obligations.

The creation of this integrated body for dispute settlement allows the WTO to exercise a real control function over the conventional obligations of the Member States and not just foster the coherence of interpretations resulting from dispute settlement activities. Constraint is then reinforced as the guaranty of conformity of national law with WTO agreements.

b) A Specific Body: The Appellate Body (AB)

The DSU stipulates, "A standing Appellate Body shall be established by the DSB. The Appellate Body shall hear appeals from panel cases."[207] This article, containing fourteen paragraphs,

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[206] Art. 2:3 of DSU.

[207] Art. 17:1 of DSU.

describes in detail the AB's functions. From our viewpoint, its most important function is to "make an objective assessment of the matter before it, including an objective assessment of the facts[208] of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements."[209]

The AB consists of seven persons, but only three among them sit for a particular case. Their mandate is for four years with a possibility of one renewal. Their jurisdiction extends to the possibility of confirming, modifying or reversing the judicial findings of the panel. It should be noted here that an appellate review is restricted to questions of law alone, without the possibility of a reappraisal of the assessment of the facts by the panel. The Appellate Body itself explained the difference: "Findings of fact, as distinguished from legal interpretations or legal conclusions, by a panel are, in principle, not subject to review by the Appellate Body. The determination of whether or not a certain event did occur in time and space is typically a question of fact. […]." It said further, "Determination of credibility and weight properly to be ascribed to (that is, the appreciation of) a given piece of evidence is part and parcel of the fact finding process and is, in principle, left to the discretion of a panel as the trier of the facts. The

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[208] For example, in the *India – Quantitative restrictions on imports of agricultural, textile and industrial products* case, India argued in its appeal that the Panel had acted inconsistently with Article 11 of the DSU because it had delegated to the IMF its duty to make an objective assessment. The Appellate Body stated: "The Panel gave considerable weight to the views expressed by the IMF in its reply to these questions. However, nothing in the Panel Report supports India's argument that the Panel delegated to the IMF its judicial function to make an objective assessment of the matter. A careful reading of the Panel Report makes clear that the Panel did not simply accept the views of the IMF. The Panel critically assessed these views and also considered other data and opinions in reaching its conclusions. […] We conclude that the Panel made an objective assessment of the matter before it. Therefore, we do not agree with India that the Panel acted inconsistently with Article 11 of the DSU." Report of the Appellate Body, *India – Quantitative Restrictions on imports of agricultural, textile and industrial products* case, WT/DS90/AB/R, 23 August 1999, paragraphs 149 and 151.

[209] Art. 11 of DSU.

consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty provision is, however, a legal characterization. It is a legal question."[210] To that extent, the Appellate Body performs "a general function of guaranteeing the proper application and interpretation of the law in case of disputes within the organisation in the interest of all its members."[211]

c) Determination of WTO-conformity

The role of the Panels and the DSB is to determine[212] if the national measure conforms to WTO law. They exercise this control through national measures which have never been analysed by the DSB but by implementing measures which were taken to comply with a previous recommendation.[213]

As we have shown, conformity within the framework of the WTO system imposes on each Member the obligation to

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[210] Report of the Appellate Body, *Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R and WT/DS48/AB/R, 16 January 1998, paragraph 132. Regarding the distinction between facts and law, see Kuyper Pieter-Jan: *The Appellate Body and the Facts*, in Bronckers Marco and Quick Reinhard: *New directions in international economic law – Essays in honour of John H. Jackson*, Kluwer Law International, The Hague 2000 p. 309.

[211] Sacerdoti Giorgio: *Appeal and Judicial Review in International Arbitration and Adjudication: The Case of the WTO Appellate Review*, in Petersmann Ernst-Ulrich: *International Trade Law and the GATT/WTO Dispute Settlement System*, Studies in Transnational Economic Law, Volume 11, Kluwer Law International, The Hague 1997, p. 274. Further, it may be argued that the Appellate Body contributes to a large extent to the legitimization of the Dispute Settlement System. See Tomkiewicz Vincent: *Regards au-delà de la fonction juridictionnelle de l'Organe d'appel de l'OMC: l'apport à la légitimité du mécanisme de règlement des différends*, paper presented at the 2005 Conference of the European Society of International Law (ESIL), Florence 26-28 May 2005. http://www.esil-sedi.org/english/papers.html

[212] "The verb "to determine" means to find out, to ascertain, to establish, or to carry out all those activities necessary to reach a reasoned decision", Report of the Appellate Body, *United States - Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R, 28 November 2002, paragraph 24.

[213] "[…] when an assessment of the WTO compatibility of a measure taken to comply with panel and Appellate Body recommendations (an "implementing measure") is necessary (because parties disagree), such determination can only be made through the WTO dispute settlement procedures", Report of the Panel, *United States - Import Measures on Certain Products from the European Communities*, WT/DS165/R, 17 July 2000, paragraph 6.92.

include in its legal system the rules contained in the WTO agreements, since the process is of an obligatory nature.[214] To that extent, the conformity determination by the DSB is accepted whether the contested measure is consistent or not with WTO law. This may be done through a text-to-text comparison of the domestic legislation with the relevant WTO provisions or through a comparison of the WTO provision with the administrative practice.

But the DSB may face a problem when it has to deal with determinations already made by national governments. To that extent, "the issue of standard of review arises where a panel is examining the domestic law of a Member as interpreted by domestic authorities and tribunals to determine whether the law, or the actions of those authorities and tribunals (including fact-finding), or both are in compliance with provisions of the covered agreements."[215] Unfortunately, WTO Agreements remain silent on the proper standard of review. Classically, the standard of review may be oriented in two opposite directions according to the deference principle[216] or the *de novo* principle.[217] An illustration of the *de novo* approach is the *Thailand – Anti-dumping duties* case in which the Appellate Body held that panels are given a broad authority to investigate whether the anti-dumping authority of a Member did a proper job in fact-finding and suggested that it could examine not only the evidence before

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[214] See above, Part I, Section I.

[215] Howse Robert and Trebilcock Michael: *The Regulation of International Trade*, Routledge 2nd edition, New York 1999, p. 69.

[216] "Under the deference principle, WTO bodies defer to findings of the national authority and do not, in principle, engage in new findings of fact or law unless the findings of the national authority are clearly unreasonable", Matsushita Mitsuo, Mavroidis Petros and Schoenbaum Thomas: *The World Trade Organization - Law, Practice, and Policy*, Oxford University Press, Oxford 2003, p. 41.

[217] "Under the *de novo* principle, WTO bodies take a more active role and use evidence that was not before the national authority", Matsushita Mitsuo, Mavroidis Petros and Schoenbaum Thomas: *The World Trade Organization - Law, Practice, and Policy*, Oxford University Press, Oxford 2003, p. 41.

the anti-dumping authority but also other evidence.[218] However, considering jurisprudence on the whole, it seems that the panels and the Appellate Body have opted for "a middle-of-the-road approach and applied a test which is a mixture of these two principles depending on the particulars of the case concerned."[219] Without going into the discussion on the "constitutional" implications of the standard of review,[220] we would like to underline, for the purpose of our study, that when the WTO provision underlying the control is more precise, the examination by the DSB of the contested national measure is less likely to use the *de novo* approach. Inversely, when the WTO provision is not very precise, the DSB will have to examine the context of the national measure more thoroughly to asses its conformity.

2) Total elimination of stalling of proceedings

WTO's DSS differs from its predecessor since the procedure is now automatic (b) and contained within a stringent time schedule (a). These new factors testify to the judicial nature of the new procedure and also confer on this system a credibility that was lacking under the GATT 1947 regime.

a) Fixing of stringent time schedules

Articles XXII and XXIII of GATT 1947 contained a loophole since they did not stipulate a fixed period within which a dispute had to be settled. It could thus be understood that the settlement of a dispute could be postponed indefinitely. However, the 1979 codification texts did refer to a "reasonable period of time", but

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[218] Report of the Appellate Body, *Thailand - Anti-Dumping Duties on - Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, 12 March 2001, paragraph 107 ss.

[219] Matsushita Mitsuo, Mavroidis Petros and Schoenbaum Thomas: *The World Trade Organization - Law, Practice, and Policy*, Oxford University Press, Oxford 2003, p. 42.

[220] On this point, see Zleptnig Stefan: *The Standard of Review in WTO Law: An Analysis of Law, Legitimacy and the Distribution of Legal and Political Authority*, European Integration online Papers 2002, Volume 6, No. 17. http://eiop.or.at/eiop/texte/2002-017a.htm

this change was still not sufficient to ensure the effectiveness of the dispute settlement mechanism.[221]

Here too, the DSU rectifies a past shortcoming as the flexible nature of the GATT is replaced by a stricter procedure, which is clearly apparent in its establishment of precise, strict and short time schedules. This is another characteristic which strongly contributes to make the DSU unique in international law.[222] The DSU henceforth quantifies these time schedules for each stage of the process. Thus, the consultations that constitute the first mandatory stage of dispute settlement under WTO have to comply with several time schedules determined by article 4 of DSU. When a party makes a request for consultation, the recipient of the request has 10 days to respond to it (unless there is another mutually agreed upon deadline) and has to undertake consultations within 30 days of the receipt of the request.

In case of a non-response or if the consultations prove to be unproductive,[223] it is no longer possible to stall the process, since the DSU provides for minimum time limits (30 days in the first case and 60 days in the second), beyond which it is possible to constitute a panel. The duration of the panel's proceedings is well defined in article 12 of the DSU. Thus, the time frame within which the panel has to conduct its review, from the date of its formation and mandate to the date the final report is handed over to the contending parties, is fixed and it should not in normal circumstances extend beyond six months.[224]

As in the case of consultations, a shorter time frame has been envisaged for urgent cases (3 months). However, to satisfy the purpose of flexibility provided for Article 12:2, if the panel deems

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[221] Rao M. B. and Guru Manjula: *WTO and International Trade*, 2nd Ed., Vikas Publishing House, New Delhi 2003, p. 266.

[222] Pratap Ravindra: *India at the WTO – Dispute Settlement System*, Manak Publications, New Delhi 2004, p. 37.

[223] Cases where India agreed with the "plaintiff" on a mutually agreed solution will be presented later in Section II, Paragraph IV.

[224] Art. 12:8 and art. 20 of DSU.

that it cannot submit its report within 6 months, it has to inform the DSB in writing about the reasons for the delay and indicate the time frame within which it would able to submit its report.[225] However, Article 12:9 finally specifies, "In no case should the period from the establishment of the panel to the circulation of the report to the Members exceed nine months". The panels do have the possibility of suspending their proceedings for a period of 12 months at the request of the complaining party.[226] However, if this time frame is exceeded, the authority vested with the panel at the time of its formation becomes null and void.

Finally, it remains to be said that while the DSU has introduced[227] the possibility of having recourse to an intermediate review phase before the submission of the panel's final report, it should be specified that this phase can in no way extend the time limits described above. Then, the DSB has two months to adopt the report unless there is an appeal (appellate reviews should not exceed 90 days). The time taken between the date the DSB forms the panel and the date it reviews the group's or appellate body's report in order to adopt it must generally not exceed 9 months for cases where there is no appeal for a review of the report and 12 months for cases where there is an appeal.

The only time limit that has not been precisely determined is the period within which the injuring party has to implement the recommendations. The notion of a reasonable period of time is referred to here. Anyhow, the DSU determines the quantification modalities for this time frame, while determining the maximum time allowed: "the time of providing its report, the period from the date of establishment of the panel by the DSB until the date of determination of the reasonable period of time shall not exceed 15 months."[228]

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[225] Art. 12:9 of DSU.

[226] Art. 12:12 of DSU.

[227] Art. 15 of DSU.

[228] Art. 21:4 of DSU.

To conclude, it can take a maximum of two and a half years between the initiation of legal proceedings and the removal of the measures or behaviour complained about. This might seem long, especially when the proceedings, as before, do not entail any suspensive effect. But this is nothing when the current system is compared to the previous one, more so because henceforth the proceedings cannot be stalled by the ill will of the losing party.

b) Introduction of the negative consensus rule

In principle, the consensus rule was a part of the dispute settlement system in the GATT 1947 regime for every stage of the proceedings: formation of the panel, defining the mandate and composition of the panel, adoption of the panel's report and authorisation of suspension of a concession or other obligations in case of faulty implementation. It is well known that the consensus rule had a paralysing effect[229] since it was the main reason behind the impediments in the decision-making process within the GATT framework and, consequently, the main cause for the alienation from the system. While changes were introduced over the years that made the dispute settlement process increasingly automatic as regards the formation of a panel, its mandate and its composition, unfortunately, the adoption of the panel's report and the authorisation for the suspension of concessions were still based on the practice of consensus. Thus, the problem raised by the adoption of the rapport was the main cause for the malfunctioning of the old system, for the consensus principle made it possible for any contracting party (and especially the losing party) to impede adoption by exercising its veto.

Today too, we can see that reference to consensus has not been eradicated within the WTO. However, as regards dispute

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[229] As pointed out by Surendra Bhandari, it granted a "veto power to each and every Contracting Party, who wanted to defeat the panel process and the surveillance process, if it was against the party's will", Bhandari Surendra: *World Trade Organisation (WTO) and Developing Countries: Diplomacy to Rules Based Syste*m, Deep & Deep Publications, New Delhi 2002, p. 148.

settlement, this rule has been reversed; but from being positive, the consensus becomes negative, insofar as it is no longer necessary for adopting the report but only for rejecting it. In other words, a decision is taken if at least one Member votes for it. The result of this reversal can be seen in the quasi-automatic nature of the process. Given the number of DSB members, the possibility of consensus against adoption seems insignificant.[230] Moreover, this negative consensus is also applicable to other stages of the process, viz. formation of panels[231] and authorisation of compensation or suspension of concessions by the DSB.[232] Thus, we can see that the dispute settlement system has indeed been simplified to a large extent: the parties to a dispute can no longer oppose either the initiation of proceedings or the adoption of the report, or the imposition of sanctions.
The negative consensus rule certainly contributes to strengthening the DSS by removing the impediments to the decision-making process under the GATT regime. The real effect of the implementation of the negative consensus rule is the quasi-automatic nature of the adoption of panel reports and, consequently, the almost total removal of one of the most obvious weaknesses of the dispute settlement process. From the procedural perspective too, there is a severe constraint which weighs on the Members.
We must however point out that by instituting the rule that reports cannot be rejected unless a negative consensus is reached, the negotiators have transferred the basic problem of an effective dispute settlement from the adoption stage in GATT to the implementation stage in the DSU.[233] In the new dispute settlement

[230] It needs to be emphasised that recourse to a negative consensus was preferable to the introduction of a voting system in the framework of an economic organisation such as the WTO, where numerous susceptibilities can emerge.

[231] See Art. 6 of DSU: panels are formed unless the DSB is unanimously opposed to such a formation

[232] Art. 22:6 of DSU.

[233] Professor Ruiz-Fabri develops this concept of “implementation dispute” in: Ruiz-Fabri Hélène: *Le contentieux de l’exécution dans le règlement des différends de l’organisation mondiale du commerce,* JDI 2000, N°3, pp. 605-645.

process, the implementation of the reports thus becomes the acid test of the effectiveness of the new system.

The effectiveness of WTO rules is directly related to the way they are enforced by Member countries, i.e. they bring their national law in conformity with WTO provisions. Thus, the rapid and effective settlement of disputes on the application and interpretation of the WTO agreement is also vital for the international trade system in order to ensure the safety and predictability it needs to function smoothly and peacefully. The importance of the safety and predictability of the multilateral trade system was recognised in numerous reports of the panels and the Appellate Body.[234] But the conformity contained in DSB reports calls for even greater compliance than Article XVI:4 of the WTO Agreement. Indeed, Members must henceforth proceed to achieve compliance within a fixed period of time. Although the immediate execution of the obligation is “impracticable”,[235] the treaty demands “prompt compliance”.[236] This time limit includes the time needed for initiating procedures at the national level to modify the rule in question.
Al said and done, the conformity obligation based on a DSB report does not change only the base but also specifies the contents, the time frames and, wherever necessary, the means of execution.

[234] “WTO rules are reliable, comprehensible and enforceable. WTO rules are not so rigid or so inflexible as not to leave room for reasoned judgements in confronting the endless and ever-changing ebb and flow of real facts in real cases in the real world. They will serve the multilateral trading system best if they are interpreted with that in mind. In that way, we will achieve the “security and predictability” sought for the multilateral trading system by the Members of the WTO through the establishment of the dispute settlement system”, Report of the Appellate Body, *Japan - Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/ AB/R and WT/DS11/ AB/R, 4 October 1996, p. 33.

[235] Art. 3:7 of DSU.

[236] Art. 21:1 of DSU.

C) Constraint Imposed by the Binding Nature of DSB Reports

As soon as the DSB has adopted a report, it becomes binding on the disputing parties as a matter of international law (1) and the losing party must bring its legislation in line with the recommendations. At this stage, the priority for the losing "defendant" is to bring its legislation in line with the DSB's rulings or recommendations.[237] The DSU stresses that prompt compliance with the DSB's recommendations or rulings is essential (2).

1) Binding Nature and Authoritative Interpretation

a) Binding Nature

The adopted reports of a panel or the Appellate Body bind the parties to the dispute due to some reason clearly mentioned in the DSU Agreement.[238]

- The first objective of the DSM is usually to secure the withdrawal of the measures concerned and compensation should be resorted to only if immediate withdrawal is impracticable (DSU Article 3.7),[239]
- and the DSU further provides that an appellate body report must be unconditionally accepted by the parties to the dispute (DSU Article 17.14),

[237] DSU Art. 19.1. However, in situations involving "non-violation" complaints, the Member is not required to withdraw the measure. See, Chua Adrian: *Reasonable Expectations and Non-Violation Complaints in GATT/WTO Jurisprudence*, JWT1998, Vol. 32, No.2, pp. 27-50.

[238] Professor John Jackson counts at least 11 clauses, which strongly suggest that "the legal effect of an adopted panel report is the international law obligation to perform the recommendation of the panel report". Jackson John: *The WTO Dispute Settlement Understanding: misunderstandings on the nature of legal obligation*, in: Jackson John: *The Jurisprudence of GATT and the WTO: Insights on Treaty Law and Economic Relations*, Cambridge University Press, Cambridge, United Kingdom, 2000, p. 166.

[239] This basic aim is affirmed elsewhere in the *DSU*. Article 3.4, for example, stipulates: 'Recommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements". This point was raised in the Report of the Appellate Body, *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, 25 April 1997, p. 19.

- the DSU provides that compensation and the suspension of obligations are available only as temporary measures in the event that the recommendations and rulings are not implemented within a reasonable period of time (DSU Article 22.1),
- the DSU provides that only in cases of a non-violation complaint there is no obligation to withdraw the measure challenged (DSU Article 26.1.b.).

However, the reports are not legally binding in subsequent cases. But "such reports constitute evidence of treaty practice, and subsequent dispute settlement panels and the Appellate Body are free to cite them and rely on their reasoning. [...] In fact, panels and the Appellate Body closely examine precedents when dealing with a dispute and try not to deviate from the interpretations established by the precedents."[240]

b) Authoritative Interpretation by Panels and AB

The DSB rulings are not supposed to change the obligations of the countries under the WTO agreement. However, the Panels and Appellate Bodies often seem to overstep their respective mandates and enter the area of 'authoritative interpretation' or 'amendment' reserved only for members as per articles IX and X of the WTO agreement. As a result, India is not happy the way certain unilateral trade measures regarding SPS and environmental concerns were partially upheld by the DSB.[241]

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[240] Matsushita Mitsuo, Mavroidis Petros and Schoenbaum Thomas: *The World Trade Organization - Law, Practice, and Policy*, Oxford University Press, Oxford 2003, p. 25. For details regarding unadopted reports, see Palmeter David and Mavroidis Petros : *Dispute Settlement in the World Trade Organization – Practice and Procedure*, 2nd edition, Kluwer Law International, The Hague 2004, pp. 51-64.

[241] For instance, a number of cases could be cited, e.g. Report of the Appellate Body, *United States – Import Prohibition of Certain Shrimp and Shrimp Products,* WT/DS58/AB/R, 6 November 1998 and Report of the Appellate Body, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, 16 January 1998, as described in the WTO Newsletter, Ministry of Commerce, March 2001, pp. 2. Professor Chimni has also expressed concern in this regard, Chimni B.S: *WTO and Environment: Legitimisation of Unilateral Trade Sanctions*, Economic and Political Weekly, January 12, 2002.

Once again, it seems that the DSM goes beyond Article XVI: 4. In this respect, the terms used indicate that the Member is no longer free to decide how he should act following the collective ruling against him. Indeed, if the obligation resulting from the treaty expects that the member "shall ensure the conformity"[242] of his domestic law, the obligation resulting from the report requires the Member to "bring the measure into conformity"[243] with the WTO law. Thus "The spontaneous execution becomes a directed execution of the treaty."[244]

2) Bringing National Law into Conformity with WTO Provisions

a) Implementation of recommendations

When a panel (or the Appellate Body) concludes that "a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement."[245]

Moreover this article states that "the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations." This provision has been interpreted by the panel according to which "Article 19.1 appears to envision suggestions regarding what could be done to a measure to bring it into conformity or, in case of a recommendation under Article 4.7 of the *SCM Agreement*, what could be done to 'withdraw' the prohibited subsidy. It is not clear if Article 19.1 also addresses issues of surveillance of those steps. That said, any agreement that WTO Members might reach among

[242] Art. XVI:4 of the WTO Agreement.

[243] Art. 19:1 of DSU.

[244] « On passe d'une exécution spontanée à une exécution dirigée du traité », Nouvel Yves : *Aspects généraux de la conformité du droit interne au droit de l'OMC* (General Aspects of the Conformity of Domestic Law with WTO Law), AFDI 2002, p. 664.

[245] DSU Art. 19.1. Moreover, the panel may suggest a precise way to bring the measure into conformity with that agreement. See for example, Report of the Panel, *United States - Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/R, WT/DS234/R, 16 September 2002, point no.8.6.

themselves to improve transparency regarding the implementation of WTO obligations can only be encouraged."[246]

Thus, the Panel in *Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*[247] suggested to India and the United States that they should negotiate a phase-out period for the offending restrictions.[248] In another case, the United States requested that the Panel suggest to India that it should implement its obligation in the same way as Pakistan had implemented its obligation under TRIPs by establishing a mechanism to protect patent applications during a transitional period.[249] The Panel formally declined this demand by saying that "it would impair India's right to choose how to implement",[250] but discretely added that "India should take into account the interests of those persons who would have filed patent applications had an appropriate mechanism been maintained."[251]

In a sense, this provision reinforces once again the requirement of conformity. But with a strong reservation that, in any event, suggestions are not part of the report and are therefore not binding on the affected Member.[252] Finally it should be added that the

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[246] Report of the Panel, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/RW, 9 May 2000, paragraph 7.3.

[247] Report of the Panel, *India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/R, 6 April 1999.

[248] Report of the Panel, *India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/R, 6 April 1999, paragraph 7.7.

[249] Report of the Panel, *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/R, 5 September 1997, paragraph 7.65.

[250] Report of the Panel, *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/R, 5 September 1997, paragraph 7.65.

[251] Report of the Panel, *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/R, 5 September 1997, paragraph 8.2. critics

[252] "However, should the Member concerned follow a suggestion of a Panel or the Appellate Body, it would be seen that, de facto, its action would be found to be in compliance with any provision of article 21:5 reviewed by that tribunal", Palmeter David and Mavroidis Petros: *Dispute Settlement in the World Trade Organization – Practice and Procedure*, 2nd edition, Kluwer Law International, The Hague 2004, p. 299.

panels and the Appellate Body "have shown reluctance to suggest ways in which their recommendations could be implemented."[253]

b) Time frame for the implementation of recommendations

If the Member state that is the target of the complaint loses, it must follow the recommendations of the panel report or the appeals report, which after their adoption become those of the DSB itself. The Member State must communicate its intention to do so at a DSB meeting held within 30 days of the report's adoption.[254] If immediate compliance with the recommendation proves impractical, the member will be given a "reasonable period of time" to do so.[255]

Till June 2005, India was involved in 4 cases as defendant[256] where reports were adopted. In each case, India lost and reiteratively expressed reservations on certain portions of the Panel report and/or the Appellate Body report, but above all required an additional period of time to ensure compliance of its law with the critical reports (See below Table 5).

[253] Palmeter David and Mavroidis Petros: *Dispute Settlement in the World Trade Organization – Practice and Procedure*, 2nd edition, Kluwer Law International, The Hague 2004, p. 295.

[254] DSU Art. 21.3.

[255] On the question of what is a "reasonable period of time", See Stoll Peter-Tobias and Steinmann Arthur: *WTO Dispute Settlement: The Implementation Stage*, MPYoUNL 1999, Vol. 3.

[256] For analysis, see below: Part II, Section II.

Table 5: Implementation of DSB Recommendations

Disputes	Adoption of Panel/ Appellate Body Reports	Notification of Intentions in respect of Implementation of DSB Recommendations (Within 30 days after the date of adoption of the panel/ Appellate Body report)	Date of Determination of Reasonable Period of Time	Reasonable Period of Time pursuant to Article 21.3 of the DSU	Surveillance of implementation by the DSB pursuant toArticle 21.6 of the DSU
1. India - Patent Protection for Pharmaceutical and Agricultural Chemical Products	16.01.98 WT/DS50/9	13.02.98 WT/DSB/M/42	21.04.98 WT/DSB/M/45	16.01.98 – 19.04.99 (15 months)	WT/DS50/10 and Add.1 to Add.4
2. India - Patent Protection for Pharmaceutical and Agricultural Chemical Products	22.09.98 WT/DS79/5 and Corr.1	21.10.98 WT/DSB/M/49	24.11.98 WT/DSB/M/51	until 19.04.99	WT/DS79/6
3. India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products	22.09.99 WT/DS90/14	14.10.99 WT/DSB/M/69	28.12.99 WT/DS90/15	Until 01.04.00 and 01.04.01	WT/DS90/16 and Add.1 to Add.7
4. India - Measures Affecting the Automotive Sector	05.04.02 WT/DS146/11 WT/DS175/11	02.05.02 WT/DS146/12 WT/DS175/12	18.07.02 WT/DS146/13 WT/DS175/13	05.04.02 – 05.09.02 (5 months)	At the DSB meeting on 11.11.02 India announced that it had complied with the DSB's recommendations WT/DSB/M/136

Source: WTO

In determining the reasonable period of time, the Arbitrator in the *EC – Hormones* case defined such a period as the "shortest period possible within the legal system of the Member to implement the recommendations and rulings of the DSB." The Arbitrator held, *inter alia*, that "when implementation can be effected by administrative means, the reasonable period of time should be considerably shorter than 15 months." Further, "The ordinary meaning of the terms of Article 21.3(c) indicates that 15 months is a 'guideline for the arbitrator', and not a rule. This guideline is stated expressly to be that 'the reasonable period of time ... should not exceed 15 months from the date of adoption of a panel or Appellate Body report' (emphasis added). In other words, the 15-month guideline is an outer limit or a maximum in the usual case. For example, when implementation can be effected by administrative means, the reasonable period of time should be considerably shorter than 15 months. However, the reasonable period of time could be shorter or longer, depending upon the particular circumstances, as specified in Article 21.3(c).
Article 21.3(c) also should be interpreted in its context and in light of the object and purpose of the DSU. Relevant considerations in this respect include other provisions of the DSU, including, in particular, Articles 21.1 and 3.3. Article 21.1 stipulates that: 'Prompt compliance with recommendations and rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members'. Article 3.3 states: 'The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members (emphasis added). The Concise Oxford Dictionary defines the word, 'prompt', as meaning 'a. acting with alacrity; ready. b. made, done, etc. readily or at once'. Read in context, it is clear that the reasonable period of time, as determined under Article 21.3(c), should be the shortest period possible within the legal system of the Member

to implement the recommendations and rulings of the DSB. In the usual case, this should not be greater than 15 months, but could also be less."[257]

In *Patent Protection for Pharmaceutical and Agricultural Chemical Products,*[258] this request was contested by the United States. Indeed, the United States pointed out that "the Appellate Body had found that India's Government had the power, pursuant to Article 123 of the Indian Constitution, to promulgate an ordinance when Parliament was not in session. This procedure had been used in 1995 when the Indian executive branch had sought to comply with India's obligations under Article 70.8 and 70.9 of the TRIPs Agreement. Therefore, there was no reason why India could not use such a procedure to comply immediately with the DSB's recommendations. The temporary legislation could subsequently be made permanent by the legislature."[259] However, even if such an affirmation is true from the technical point of view, it is for India alone to determine the manner in which these obligations would be fulfilled. Since there was no agreement on the acceptable period of time between the United Stated and India, a period of time mutually agreed under bilateral consultations had to be decided within 45 days[260] after the date of adoption of the recommendations, which was done and a reasonable time of 15 months was agreed to enable India to implement the DSB's recommendations.[261] On the expiry of this

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[257] Award of the Arbitrator, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/15, WT/DS48/13, 29 May 1998, paragraphs 25-26.

[258] Report of the Panel, *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/R, 5 September 1997; Report of the Appellate Body, *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, 19 December 1997.

[259] Dispute Settlement Body, *Minutes of Meeting - Held in the Centre William Rappard-13 February 1998*, WT/DSB/M/42, 16 March 1998, p. 3.

[260] In accordance with Article 21.3(b) DSU.

[261] See Dispute Settlement Body, *Minutes of Meeting - Held in the Centre William Rappard on 22 April 1998*, WT/DSB/M/45, 10 June 1998, p. 17.

period of time, India indicated that the report had been implemented in such a way that the Indian law were now in conformity with WTO's requirements.[262]

In the *Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products* case,[263] the situation was simpler as the Panel recognized the need for granting India a period longer than fifteen months in order to comply with the DSB's recommendations and rulings. Furthermore, the Panel itself recommended that in establishing a reasonable period of time, "the DSB should take into account not only the well-established practice of IMF, BOP Committee and GATT/WTO panels granting a gradual phase out period for elimination of BOP restrictions, but also India's position as a developing country Member." [264] As a result, the US and Indian Governments reached a mutual agreement with respect to the "reasonable period of time" for India's implementation of the DSB rulings and recommendations.[265]

Finally, in *Measures Affecting the Automotive Sector*,[266] the United States, the European Communities and India agreed that the

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[262] The "Government of India had introduced a Bill in the Indian Parliament to effect certain Amendments to the Patents Act, 1970. These Amendments to the Patents Act, 1970, as passed by both Houses of Parliament, have been approved by the President of India and notified in the Gazette of India on 26 March 1999 as the Patents (Amendment) Act, 1999", Status Report by India, *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/10/Add.4 and WT/DS79/6, 16 April 1999, p. 1.

[263] Report of the Panel, *India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/R, 6 April 1999; Report of the Appellate Body, *India – Quantitative Restrictions on imports of agricultural, textile and industrial products case*, WT/DS90/AB/R, 23 August 1999.

[264] Dispute Settlement Body, *Minutes of Meeting - Held in the Centre William Rappard on 14 October 1999*, WT/DSB/M/69, 28 October 1999, p. 4.

[265] See Agreement under Article 21.3.b of the DSU, *India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/15, 17 January 2000.

[266] Report of the Panel, *India - Measures Affecting the Automotive Sector*, WT/DS146/R and WT/DS175/R, 21 December 2001; Report of the Appellate Body, *India - Measures Affecting the Automotive*, WT/DS146/AB/R and WT/DS175/AB/R, 19 March 2002.

reasonable period of time to implement the recommendations and rulings of the DSB should be five months.[267]

However, it has been noticed in a couple of cases that the losing side did not implement any change in its WTO-incompatible policy during the reasonable period of time, thereby causing continued economic losses to the winner. India has experienced this twice, in its disputes against Turkey (*textile and clothing products*) and the EC (*bed linen*).[268] There was a similar experience in the *EU-import regime for banana* case, although India was not a disputing party. However, the DSB does not have the power to force the defaulter to implement these provisions at an early date.
Besides, the obligation to conform is so severe that it becomes necessary to resort to dispute settlement to assess the "consistency with a covered agreement of measures taken to comply with the recommendations and rulings." [269]

c) Entering into negotiations
If the losing member state fails to act within this period, it has to enter into negotiations with the complaining country (or countries) in order to determine mutually acceptable compensation: for instance, tariff reductions in areas of particular interest to the complaining side.[270] But any compensation agreed

[267] Agreement under Article 21.3(b) of the DSU, *India - Measures Affecting the Automotive Sector*, WT/DS146/13 and WT/DS175/13, 24 July 2002.

[268] While India ultimately won the case against EU after a long tussle, it was noticed that the biggest exporter firm to EU had stopped exporting as the transitory phase was too long. The incident reinforces the urgency of incorporating the necessary provisions at the earliest.

[269] Art. 21:5 of DSU.

[270] It may be pointed out that "because it is trade-liberalizing rather than trade-restricting, compensation is to be preferred (from an economic perspective) to suspension of concessions or other obligations", Palmeter David and Mavroidis Petros: *Dispute Settlement in the World Trade Organization – Practice and Procedure*, 2nd edition, Kluwer Law International, The Hague 2004, p. 266.

upon must conform to the requirements of the covered agreements, which includes the most-favoured-nation requirements of the agreements.[271]

If, after twenty days, no satisfactory compensation is agreed upon, the complaining side may request the DSB for permission to impose limited trade sanctions ("suspend concessions or obligations") against the other side. But if the sanction, in case of non-fulfilment, includes procedures for counter measures, the amount of trade sanctions must be authorized and open to arbitration. Actually these procedures are really the subject of a new dispute relating to enforcement. The DSB should grant this authorization within 30 days of the expiry of the "reasonable period of time" unless there is a consensus against this action.

In case of suspension of benefits, the WTO allows the winner party to suspend favourable treatment, or, in simple words, retaliate in case the loser party does not comply with its obligation even at the end of the 'reasonable period of time'. Till now, India has never been subjected to retaliation.[272]

The extent of retaliation depends on the level of estimated trade loss due to the continued application of WTO-incompatible measures. In *EC – Hormones (US),*[273] the Arbitrators stated that the minimum requirements attached to a request to suspend concessions or other obligations are: "the request must set out a specific level of suspension, i.e. a level equivalent to the nullification and impairment caused by the WTO-inconsistent measure, pursuant to Article 22.4; and (2) the request must specify the agreement and sector(s) under which concessions or other obligations would be suspended, pursuant to Article 22.3."

As regards compliance, countermeasures seem to be the last chance to comply. In the event of failure to comply with the initial

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[271] DSU Art. 22.1

[272] Till June 2005, the United States have been subjected to retaliation 10 times, the European Community 4 times and Canada and Brazil once.

[273] Decision by the Arbitrators, *EC – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/ARB, 12 July 1999, paragraph 16.

obligations of conformity, despite all reminders and negotiations, the defaulting member will, as a last resort, become the target of a countermeasure, because "non-compliance is the very event justifying the adoption of countermeasures."[274] It is only when the illicit fact is noted that the faculty to react to it can be granted to the injured member since "authorization by the DSB of the suspension of concessions or other obligations presupposes the existence of a failure to comply with the recommendations or rulings contained in panel and/or Appellate Body reports as adopted by the DSB."[275] This gives the right to temporarily desist from respecting the conformity of its national law to the WTO agreement, *vis-à-vis* the defaulting member. However, "One of the recognized purposes of countermeasures is to induce the defaulting party to comply with DSB recommendations."[276] Until the adoption of countermeasures, everything in the WTO Dispute Settlement process converges in just one direction viz. ensuring the execution of the WTO Agreement and, consequently, the compliance of the national law.

However, this tool has been widely criticised as developing countries are not adequately equipped to impose such a policy measure on their developed counterparts.[277] The proposed policy could be helpful to developing countries only if all other nations, or at least the majority of WTO members, jointly suspend concessions to the defaulter. For instance, it is highly unlikely that India would be able extract tangible access to a market by

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[274] Decision by the Arbitrators, *Canada - Export Credits and Loan Guarantees for Regional Aircraft*, WT/DS222/ARB, 17 February 2003, paragraph 3.103.

[275] Decision by the Arbitrators, *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/ARB, 9 April 1999, paragraph 4.4.

[276] Decision by the Arbitrators, *Canada - Export Credits and Loan Guarantees for Regional Aircraft*, WT/DS222/ARB, 17 February 2003, paragraph 3.47.

[277] It a systemic problem, but "The problem is particularly acute if a developing country has to retaliate against a developed country", Narayan S.: *Dispute Settlement Understanding of the WTO: Need for Improvement and Clarification*, ICRIER Working Papers No.117, December 2003, New Delhi, p. 60.

adopting a retaliatory strategy against the EC or the US. In addition, there are no clear guidelines indicating the procedure to determine such compensation or suspension of concessions. India strongly believes that this issue should not be left entirely to negotiations between unequal trade partners[278] and proper guidelines should be laid down in this regard. However, it does not call into question the fact that in case of non-conformity, India would, as a last resort, have to face countermeasures which would be costly and there would then be no more incentive to comply with WTO law.

It must be pointed out that while setting up the DSM, the WTO has made every effort to make the system multilateral and of a judicial nature. As a matter of fact, it is now comparable to a "quasi-judicial" system. The dispute settlement process is entrusted to independent bodies similar to courts of justice (panels that hear cases as primary courts following an arbitral model and the Appellate Body, the final court of appeal, which hears appeals pertaining to judgements delivered by the panels). And the determination to rectify the deviations in the system is quite evident, especially by specifying time limits in a stringent manner and also by strengthening the credibility of the process itself in terms of expertise, competence and impartiality. All these elements tend to end up in a very high level of compliance as required by DSB, which added to article XVI: 4, tends to make WTO's compliance requirement as very severe.

But there is one snag. The obligation to conform on the basis of a DSB report does not invalidate the conformity-obligation in the agreement. However, even though the primary rule remains valid, only the "compliance *ex nunc* as of the expiry of the reasonable period of time for compliance with the

[278] The real power of retaliation of smaller countries even if the Dispute Settlement Body passes a ruling in their favour remains a moot question. For instance, what retaliatory measures could Mali take against the United States if it won its case on cotton subsidies, without damaging its own interests?

recommendations and rulings adopted by the DSB" [279] is required. It seems that the failure of the initial obligation is invalidated by the execution of the treaty and there is no attempt to examine the reasons for its nonfulfillment. In other words, only the suspension of the illicit act is essential. As the Arbitrators have said, "language used throughout the DSU demonstrates that when a Member's measure has been found to be inconsistent with a WTO Agreement, the Member's obligation extends only to providing prospective relief, and not to remedying past transgressions." [280] In a strict sense, the Member does not have to answer for the breach of the obligation but is only expected to put an end to it. The action of the defaulting State cannot be punished. In this regard, the Arbitrators have said that "a countermeasure becomes punitive when it is not only intended to ensure that the State in breach of its obligations bring its conduct into conformity with its international obligations, but contains an additional dimension meant to sanction the action of that State."

However, as pointed out by Professor Nouvel,[281] according to the treaty, the lack of conformity is supposed to be responsible for the damage.[282] In spite of that, DSB does not take into account the damage already caused and gives more importance

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[279] Decision by the Arbitrators, *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/ARB, 9 April 1999, paragraph 5.45.

[280] Report of the Panel, *United States - Section 129(c)(1) of the Uruguay Round Agreements Act*, WT/DS221/R, 15 July 2002, paragraph 3.87. And further "for example, under Article 19.1 of the DSU, when it has found a measure to be inconsistent with a Member's WTO obligations a panel or the Appellate Body "shall recommend that the Member concerned *bring the measure into conformity with that Agreement*." The ordinary meaning of the term "bring" is to "produce as a consequence," or "cause to become." These definitions give a clear indication of future action, supporting the conclusion that the obligation of a Member whose measure has been found inconsistent with a WTO agreement is to ensure that the measure is removed or altered in a prospective manner, not to provide retroactive relief".

[281] Nouvel Yves : *Aspects généraux de la conformité du droit interne au droit de l'OMC,* (General Aspects of Conformity of Domestic Law with WTO Law), AFDI 2002, p. 665.

[282] "In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment", Art. 3:8 of DSU.

to the future execution of the treaty. The non-observance of the primary obligation does not entail a secondary obligation to remedy the failure to act, but to a secondary obligation in the form of a reminder to comply with the primary obligation. The defaulting Member is thus asked to fulfil his initial obligation without being held responsible for remedying the consequences of his illegal action. He is only expected to do what he was initially supposed to but not at the time when it should have been done in the first place, which is a principle of both domestic law and international law.[283] As stated by the International Court of Juctice in the *Chorzow Factory* case, since "the essential principle contained in the actual notion of an illegal act (a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals) is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."[284]

By imparting a multilateral and judicial nature to the dispute settlement process, the WTO has shown that it is determined to ensure equality between its Members by putting all the member countries on a judicially equal footing and, for the first time in the history of trade, it has given the Davids an opportunity to stand up against the Goliaths. Also, the practices followed by WTO's since 1995 reveal that there is an increasing use of the DSM by developing countries, which seems to testify to the latter's confidence in the new system.[285] We can certainly confirm

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[283] Regarding the forms and functions of reparation see Brownlie Ian: *Principles of Public International Law*, 6th Ed. Oxford University Press, New Delhi, 2004, pp. 441-449.

[284] Permanent Court of International Justice, *Chorzow Factory*, Ser. A, No.17, p. 47.

[285] The WTO nonetheless remains an organisation that first imposes its law through negotiations, thus underlining the DSB's special role. See Ehlermann Claus-Dieter: *Tensions between the dispute settlement process and the diplomatic and treaty-making activities of the WTO*, WTR 2002, Vol. 1 No.3, pp. 301-308.

that they are the main beneficiaries of the effectiveness infused into the new DSS since a binding system has taken the place of the old system whose effectiveness was dependant on the economic might of the litigant countries.

Given the fact that dispute settlement proceedings are extremely expensive and developing and least developed countries do not have the requisite legal expertise to handle such cases, they are at a disadvantage as compared to their developed counterparts.[286] Considering this, there is an urgent need to protect the interests of the developing countries so as not to allow developed countries to use the DSB as an instrument for harassing developing countries and LDCs. In the DSB, the burden of proof rests on the respondent. Hence, a developed country should not be allowed to initiate a case against a developing country unless it is able to demonstrate that the alleged violation of an agreement by the former causes economic losses to it above *de minimus* level.

It was considered appropriate to first analyse the various improvements brought about by the DSU in the area of dispute settlement, improvements that would henceforth enable the DSS to be "effective" and would lead to the establishment of a degree of equality between WTO Members. The next step is to see how developing countries fare during the dispute settlement process. In fact, while the text of the DSU gives rise to the assumption that it is determined to ensure equality between all WTO members in the DSM, it remains to be seen if in actual practice this determination will be allowed to succeed. To sum up, it is a question of determining the effectiveness of the differential treatment meted out to developing countries in the case of dispute settlement.

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[286] For instance, in the *EC-banana* case, one Latin American Country could not participate in the case due to the high legal cost, although the outcome of the debate was of enormous interest.

Paragraph II – Is it Possible to Attenuate Constraint through Special and Differential Treatment?

Appendix 2 to the DSU lists a number of special and additional rules and procedures contained in specific covered agreements that apply when the provisions of those agreements are at issue. Among them are several provisions on Special and Differential Treatment (SDT) applicable to disputes involving developing countries such as India[287]. What we would like to know is whether the DSM would henceforth help in re-establishing the balance of economic power between developing countries and developed countries. It is particularly important because according to Article 1:2 of the DSU if "there is a difference between the provisions of the DSU and any of these special rules, the special rules prevail."[288]

SDT in dispute settlement allows developing countries not to be subjected to the general discipline. Generally, SDT consists of measures to compensate developing countries for the structural asymmetries existing between them and developed countries. These are expressed mainly in reduced access to technology and finance and deficiencies in human resources and infrastructure and result in the low systemic competitiveness of these countries. SDT compensates for such asymmetries so as to ensure more equitable participation in international trade.[289] To that extent, the continuance

[287] For an overview of the SDT, see: Das Dilip K.: *The Doha Round of Multilateral Trade Negotiations and the Developing Economies*, The Estey Centre Journal of International Law and Trade Policy 2005, Volume 6 Number 2, pp. 121 ss.

[288] Palmeter David and Mavroidis Petros: *Dispute Settlement in the World Trade Organization – Practice and Procedure*, 2nd edition, Kluwer Law International, The Hague 2004, p. 171.

[289] Keck Alexander and Low Patrick: *Special and Differential Treatment in the WTO: Why, When and How?* WTO Working Papers No: ERSD-2004-03, January 2004 (37 p.). Notably, the authors distinguish five arguments that are advanced in favour of SDT: special and differential treatment is an acquired political right; developing countries should enjoy privileged access to the markets of their trading partners, particularly the developed countries; developing countries should have the right to restrict imports to a greater degree than developed countries; developing countries should be allowed additional freedom to subsidize exports; developing countries should be allowed flexibility in respect of the application of certain WTO rules, or to postpone the application of rules.

of differential treatment in dispute settlement is something to cheer about. In fact, the DSU includes certain provisions that are specifically intended for the conditions prevailing in developing countries, but also more particularly for the conditions prevailing in the least developed countries (A). These clauses provide that "particular attention" be given throughout the proceedings to protect the interests of these countries. One could then be led to believe that the WTO's new DSM, given the judicial nature of its functioning and the granting of differential treatment to developing countries, has re-established a level playing field between members in the same "economic sphere". But that is not the case (B).

A) Affirmation of Special and Differential Treatment in favour of developing countries

1) DSU Provisions granting SDT

Several provisions of the DSU grant Special and Differential Treatment to developing countries. Some of them have come down from the GATT era (a) while many others were introduced with the DSU (b).

a) Revival of the GATT legacy

Paragraph 12 of Article 3 of the DSU deals with a special situation, in which a complaint is "brought by a developing country Member against a developed country Member." But the specific intention of this provision is to confirm that the special regime established by the 1966 decision regarding the application of procedures for dispute settlement between developing countries and developed countries[290] still prevails. Thus, some of the provisions of this decision can be invoked[291] by a developing country that lodges a complaint, with the result that it is possible to discard a certain

[290] Decision of 5 April 1966 on *procedures under Article XXIII*, (BISD 14S/18).

[291] For more details, see Palmeter David and Mavroidis Petros: *Dispute Settlement in the World Trade Organization – Practice and Procedure*, 2nd edition, Kluwer Law International, The Hague 2004, pp. 172-174.

set of clauses in the DSU regarding consultations,[292] good offices, mediation and conciliation,[293] the establishment of panels[294] and panel procedure.[295]

b) General provisions introduced by the DSU

SDT of developing countries is taken into account through six provisions. They are general provisions in the sense that they do not sub-divide developing countries.[296]

- Article 4:10 provides for particular attention to be paid to developing countries at the consultation stage,
- Article 8:10 provides for panels consisting of at least one person from developing Member countries, in cases where the litigation is between a developed country and a developing country,
- Article 12:10 provides for a change in the time frame for consultation and presentation of arguments in favour of developing countries.
- Article 12:11 states that when dealing with such cases, the panel has a special obligation to take cognisance of all differential and more preferential treatments in favour of developing Member countries.
- Paragraphs 2, 7 and 8 of Article 21 also take cognisance of the special conditions of developing countries, but with regard to the implementation mechanism.

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[292] Art. 4 of DSU.

[293] Art. 5 of DSU.

[294] Art. 6 of DSU.

[295] Art. 12 of DSU.

[296] For the first time in the history of trade relations, DSU has established a sub-division between developing countries and least developed countries following the 1979 Memorandum. Two provisions are exclusively created for the latter. - Article 24§1 calls for mandatory moderation as regards these countries, both with regard to the outcome of proceedings, if initiated, or their possible consequences. See Luff David: *Le droit de l'Organisation Mondiale du Commerce – Analyse critique*, (World Trade Organisation Law – A Critical Analysis) Bruylant, Brussels 2004, pp. 971-972. - Article 24:2 provides that in case consultations fail, the good offices, mediation and reconciliation of the Director General or the DSB Chairman are available on the request of a least developed Member country, and this can be done before a request is made for the formation of a panel.

- Article 27:2 grants developing countries special technical assistance for dispute settlement.

However, merely quoting the provisions conferring SDT to developing countries is not sufficient to assess the situation of these countries under the DSS.

2) Extent of application of SDT during the different phases of the procedure

While the DSU contains a number of provisions reiterating the determination to adapt the dispute settlement procedure, the analysis of this differential treatment reveals two shortcomings. On the one hand, a number of these provisions simply reproduce the legacy of the past and do not introduce any real innovation (a). And on the other hand, the new differential treatment still contains a number of shortcomings that raise doubts about its effectiveness (b).

a) Limited innovations

Looking at the development of the DSM, one would have thought that the DSU's efforts to make the system effective would go hand in hand with a change in the Special and Differential Treatment. But, on analysing the latter, one is struck by the lack of innovation. In fact, most of the new differential treatment measures are no more than a replication of previous provisions. In fact, a number of provisions in the new DSU simply repeat previous provisions:

- Article 4§10 of the DSU, which calls for special attention to be paid to developing countries during the consultation phase, is nothing but a reproduction of the 1979 DS Understanding.[297]
- The technical assistance granted by the WTO Secretariat (Article 27:2) is not new either, since the need to give special assistance to developing countries was already recognised in 1979.

[297] Regarding this point, see Luff David: *Le droit de l'Organisation Mondiale du Commerce – Analyse critique*, (World Trade Organisation Law – A Critical Analysis) Bruylant – LGDJ, Brussels 2004, 969.

- Article 3§12 of the DSU legitimises the reference to past provisions since it allows a partial replication of the provisions of the 1966 Decision. It must be pointed out that very few provisions of this Decision are in the interest of developing countries. In fact, the possibility of invoking Paragraphs 4 and 5 of this Decision is of little consequence for developing countries, for on the one hand, the time periods specifically granted to developing countries in 1966 are the same in the current normal procedures,[298] and on the other hand, their right to set up a Panel (Paragraph 5 of the 1966 Decision) has little influence today given the negative consensus that makes the formation of panels quasi-automatic.
- Finally, the possibility of recourse to the good offices of the WTO Director General (Articles 24:2 and 3:12) is a replication of Paragraph 1 of the 1966 Decision and Item 8 of the 1979 DSU.

It may be seen that the DSU is far from innovative as regards differential treatment, but even more controversial is its rollback as compared to the previous system. Fortunately, this rollback does not apply to the whole procedure and only two provisions are affected by it: Article 8:10 and Article 3:12. Of course, the rollback is not significant in terms of proportion, but it is necessary to draw attention to it because it testifies to the weak mandatory nature of differential treatment in the new system. In fact, Paragraph 10 of Article 8 admits the possibility of including a representative from a developing country while forming a panel on the latter's request when the litigation is between a developed country and a developing country. But, the 1979 text had already recognised the appropriateness of including a representative from a developing country in the composition of Panels in favour of developing countries (in the Annexe to the 1979 Memorandum), and was also more ambitious in scope. On the one hand, several (rather than just one) representatives of developing countries

[298] See Article 7:4 of DSU.

could be included in the Panels, and on the other hand, a request from the developing country concerned was not required – it was automatically granted to developing countries as it was recognised as being a part of the usual practices of the GATT.
Another manifestation of the rollback on differential treatment can be found in Article 3:12. In fact, while the latter confers upon developing Member countries the possibility of invoking the 1966 Decisions, this reference is not integral in nature. The only provisions of this decision that developing countries can still invoke are those pertaining to the consultation and conciliation phases. Consequently, Paragraph 8 of the 1966 Decision is excluded although this paragraph provided definite judicial security to developing countries at the implementation stage, since it established a stringent quantification of a "reasonable" time frame for the latter (90 days). Although today, DSU does in a large measure provide for a quantification of this "reasonable" time frame, it is still regrettable that it did not maintain it specifically for developing countries, which could have provided additional judicial security to them.

The only two real innovations as regards differential treatment are in Paragraph 10, and in Paragraph 11 of Article 12.
India made use of Article 12:10 (according sufficient time for the developing country Member to prepare and present its arguments) in the *Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products* case.[299] And the interest it aroused was more than modest. Indeed, India requested the panel for additional time to prepare and present its first written submission and its request was granted. It based its demand on the fact that "the case was of a systemic importance and covered a wide range of issues" and that this case "occurred at a time when a new government had recently assumed office. The post of Attorney General, associated with disputes of this type, had

[299] Report of the Panel, *India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/R, 6 April 1999.

not yet been filled and other administrative difficulties made it virtually impossible for India to adhere to the time-limit originally set for India to present its first submission." The Panel admitted "the administrative reorganization taking place in India as a result of the recent change in government"[300] and granted an additional time of 10 days, considered as "sufficient time".

Article 12:11 is more meaningful as it brings about a real improvement in the SDT by imposing a justification clause on panels: "The panel's report shall explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favourable treatment for developing country Members." This factor is beyond any doubt a source of judicial security for developing countries, inasmuch as it gives their SDT a sort of "binding effect". Nevertheless, till date, none of the developing countries has used this provision to contest the manner in which the panel had taken account of the "relevant provisions on differential and more favourable treatment".

b) "Soft law" Nature of SDT Provisions

In law, the use of the future tense of the indicative mood is used to denote obligation, contrary to the use of the conditional mode in everyday usage. But, on reading the provisions of the DSU conferring differential treatment in favour of developing countries, an extensive usage of the conditional mode can be observed, which leads to the assumption of good intentions rather than a binding obligation.[301] Let us take, for example, Article 4:10, which stipulates the following: "During consultations Members should give special attention to the particular problems and interests of developing country Members", or Paragraph 2 of Article 21: "Particular attention should be paid to matters affecting the interests of developing country Members…"

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[300] Report of the Panel, *India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/R, 6 April 1999, paragraph 5.8.

[301] See Luff David: *Le droit de l'Organisation Mondiale du Commerce – Analyse critique*, (World Trade Organisation Law – A Critical Analysis) Bruylant – LGDJ, Brussels 2004, pp. 970-971.

Notwithstanding the use of a particular tense, the terminology of the provisions specific to developing countries is itself infused with such generality that it becomes impossible to strictly define the obligation described therein. That is the case with the "particular attention" mentioned in Paragraph 2 of Article 21 as well as the "further action it [DSB] might take which would be appropriate to the circumstances."[302] Yet, in *Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India (article 21:5)*,[303] India argued that this provision is mandatory.[304] Of course, that was not what the European Communities claimed. The Panel did not "consider that Article 21.2 is devoid of meaning. It clearly reflects the concern of Members with ensuring that appropriate attention is given to the interests of developing Members, and thus states an important general policy."[305] The Panel further states that there is "nothing in that provision which explicitly requires a Member to take any particular action in any case. Nor has India pointed to any contextual element which would suggest that the hortatory word "should" must nonetheless be understood, in Article 21.2 of the DSU, to have the mandatory meaning of "shall"."[306] Similarly, the mandatory "restraint" recommended in Paragraph 1 of Article 24 to the advantage of developing countries is left entirely to the discretion of the members, since it has not been defined!

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[302] Art. 21:7 of DSU.

[303] Report of the Panel, *European Communities - Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India (article 21.5)*, WT/DS141/RW, 29 November 2002.

[304] Report of the Panel, European Communities - Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India (article 21.5), WT/DS141/RW, 29 November 2002, paragraph 6.262.

[305] Report of the Panel, European Communities - Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India (article 21.5), WT/DS141/RW, 29 November 2002, paragraph 6.269.

[306] Report of the Panel, *European Communities - Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India (article 21.5)*, WT/DS141/RW, 29 November 2002, paragraph 6.267.

Like other developing countries, India also believes that the presence of the words “shall” and “should” in a number of relevant clauses to protect their interest often fail to do so. Developing countries should not have to rely on the benevolence of developed countries. Instead the responsibility should be made legally binding. India believes that, “There is however no way to ensure that such treatment is accorded to these countries in practice. Therefore, there seems to be a need for developing a screening process to check whether such requirements are adhered to.”[307]

On the basis of these reflections, we can state without any doubts that the SDT conferred by the DSU, leaves a lot of space for “soft law”,[308] whose insignificance in international law, and more so in matters of economic relations between nations, is well known. We can only agree with G. Olivares that it “is paradoxical that while the entire GATT legal regime of “soft law” rules has been upgraded to “hard law” status, by virtue of the creation of a legally enforceable mechanism, […] the set of GATT “soft” legal provisions granting benefits to developing countries and LDCs has not been upgraded.”[309]

B) Shortcomings of Special and Differential Treatment

1) The appellate phase

We have already referred to the novelty and importance of the establishment of the appellate phase in the WTO DSS. Unfortunately, though this innovation testifies to the judicial nature of the new procedure, it has to be emphatically stated that

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[307] WTO Newsletter, Ministry of Commerce, April 1999, pp. 6.

[308] “Community soft law concerns the rules of conduct which find themselves on the legally nonbinding level (in the sense of enforceable and sanctionable) but which according to their drafters have to be awarded a legal scope”, Wellens K. C. and Borchardt G. M.: *Soft Law in European Community Law*, ELR 1989, October, p.267.

[309] Olivares G.: *The case for giving effectiveness to GATT/WTO rules on developing countries and LDCs*, JWT 20001, Vol. 35, pp. 550.

none of the three articles of the DSU devoted to this phase (Articles 17, 18 and 19) lays down specific provisions for developing or least developed Member countries.
It is therefore regrettable that the innovation brought about by the DSU did not go all the way by incorporating specific provisions for the weakest nations; even if they had come with strings attached, they would at least have been created.

2) Persistence of economic domination
As we have already observed, the establishment of multilateral monitoring, the quantification of the reasonable time frame for implementation, the quasi-automatic authorisation of counter-measures and the possibility of recourse to cross-retaliation testify to an improvement in implementation. However, it remains to be seen whether this improvement is sufficient in itself to ensure the effective settlement of disputes for the poorest nations. It seems obvious that the sanctions applied when reports are not implemented are simply not adapted to developing countries. While WTO's dispute settlement process has improved by taking on a judicial nature, it is to be emphatically stated that the latter does not go all the way. The implementation of the DSB's decisions bear witness to the persistence of relationships of economic domination as regards dispute settlement.

In the first place, the lack of a suspensive effect in the DSS is by and large injurious to the economically weakest countries. It should also be noted that in a system where the obligation of conformity exists only for the future and can be penalised only by a fresh recourse to the dispute settlement procedure, in principle nothing prevents a member from substituting one measure with another, the latter also illegal, and wait for a request for the formation of a new panel, until this one too declares the non-compliance of the new measure. Of course, in a case where the party against whom there is a complaint does not comply with the DSB's rulings and recommendations, the sanction to take counter-measures in the form of withholding of concessions

is henceforth automatic. But this possibility is surely not expedient for developing countries. In fact, what impact would the withholding of concessions by a country with an emerging economy have on an industrialised nation? And while DSU has established the right to cross-retaliation measures, recourse to these is governed by a strict order and is possible only in sufficiently serious situations. Thus, for a developing country the effective right to cross-retaliation remains largely a mirage. Besides, in many cases such an action would not benefit the industry affected directly by this violation.
One solution demanded by developing countries was the recourse to collective cross-retaliation against a developed nation found guilty, but DSU did not uphold this solution. In a way, we are witnessing a return to the *status quo ante* – condemnation for the failure to respect a multilateral trade system is indeed possible today, but the effectiveness of implementation is more than aleatory when the plaintiff is a developing country. In areas where differential treatment in favour of developing countries is indispensable, the DSU circumvents it and submits developing countries to a general process that can be effective only when the plaintiff is a member of the "privileged" club.

As a conclusion, we must underline the absence of any consequence of SDT provisions within the framework of the dispute settlement system. The requirement of compliance, as we have described it, is not questioned by these provisions. Ravindra Pratap has rightly condemned the futility of SDT provisions from a legal perspective,[310] as their effect amounts to no more than simple "moral suasion".[311] India was right to declare "that it is very important to find real solutions to the implementation problems raised by developing countries, which [notably] have to do with

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[310] Pratap Ravindra: *India at the WTO – Dispute Settlement System*, Manak Publications, New Delhi 2004, p. 395.

[311] Keck Alexander and Low Patrick: *Special and Differential Treatment in the WTO: Why, When and How?* WTO Working Papers No: ERSD-2004-03, January 2004, p. 8.

[…] the non-functioning and non-binding character of provisions pertaining to special and differential treatment" and "expressed its desire that outstanding issues should be resolved in a satisfactory manner within the time frame determined by the Doha Ministerial Declaration and in the Decision pertaining to issues and concerns related to implementation."[312] The Doha Decision on Implementation-Related Decisions and Concerns calls upon Members "to identify those special and differential treatment provisions that are […] non-binding in character, to consider the legal and practical implications […] of converting [them] into mandatory provisions, [and] to identify those that Members consider should be made mandatory."[313]

However, few proposals have been made and "it remains far from clear whether a significant number of best-endeavour provisions will be converted into meaningful mandatory S&D obligations as a result of the exercise."[314] As a consequence, there is no reason to tone down, either now or in the near future, the conclusions we have reached on the contribution of the DSS to the conformity obligation that India has to respect.

Conclusion of Section I

As we have seen, the system is less demanding than it appeared when it was first analysed, i.e. when we examined the WTO-conformity obligation enshrined in Article XVI:4 of the WTO Agreement. Indeed, the WTO Dispute Settlement System does not seek either absolute conformity with WTO law or to even remedy the absence of compliance. It only seeks to ensure that national law do not continue to impede the execution of WTO

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[312] Trade Policy Review Body, *Trade Policy Review - India - Report by the Government*, WT/TPR/G/100, 22 May 2002, paragraph 73.

[313] Ministerial Conference, *Doha WTO Ministerial 2001, Implementation-related issues and concerns*, WT/MIN(01)/17, 20 November 2001.

[314] Keck Alexander and Low Patrick: *Special and Differential Treatment in the WTO: Why, When and How?* WTO Working Papers No: ERSD-2004-03, January 2004, p. 8.

rules. Simultaneously, the SDT granted to developing countries does not have any significance for India and its position in the settlement of disputes. It should therefore be concluded that the DSM, by adopting a pragmatic approach, tones down the severity of the WTO-conformity obligation. Paradoxically, it is the only way to ensure the efficient functioning of the system.

Besides, mention must be made of the ongoing negotiations on DSU reform. At the Doha Ministerial Meeting in November 2001, the Ministers agreed to include the DSU as one of the subjects of the Doha Work Programme and to negotiate these improvements. In this respect, paragraph 30 of the Doha Ministerial Declaration states, "We agree to negotiations on improvements and clarifications of the DSU. The negotiations should be based on the work done thus far as well as any additional proposals by Members, and aim to agree on improvements and clarifications not later than May 2003, at which time we will take steps to ensure that the results enter into force as soon as possible thereafter."[315] As pointed out by Dr. S. Narayan "the idea is not to rewrite DSU or to bring about a fundamental change. Only improvements and clarifications are envisaged."[316]

But from the beginning, negotiations have not produced the desired results, especially since a 1994 Ministerial Decision provided that

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[315] Ministerial Declaration, adopted on 14 November 2001, WTO Document WT/MIN(01)/DEC/1.

Paragraph 30 of the Doha Ministerial Declaration has several significant elements:
- It recognizes that the DSU is in need of improvement and clarification;
- Paragraph 30 provides that negotiations for reform are to take place, based on work done as well as new proposals;
- It establishes what appeared to be a deadline, May 2003, to complete negotiations on DSU reform;
- It does not contain a guarantee that improvements and clarifications will enter into effect before the end of the negotiations.
- Paragraph 30's final sentence leaves open the possibility that the "single undertaking" principle of agreeing to the results of the negotiations as a package, thereby eliminating the possibility to "pick and choose" the agreements to sign, may be applied to DSU reform,
- Nevertheless, Paragraph 47 of the Ministerial Declaration leaves open the possibility that DSU reform will be outside the single undertaking.

[316] Narayan S.: *Dispute Settlement Understanding of the WTO: Need for Improvement and Clarification*, ICRIER Working Papers No.117, December 2003, New Delhi, p. 3.

dispute settlement rules should be reviewed by 1st January 1999. The review was started in the DSB in 1997. Later, the deadline was extended to 31st July 1999,[317] but there was no agreement.[318] The Doha Declaration did not produce a new agreement. All members, however, expressed their readiness to continue to work beyond 31st May 2003 towards an agreement. Accordingly, at its meeting on 24 and 25 July 2003,[319] before the Cancun Summit, the General Council agreed to extend negotiations from 31 May 2003 to 31 May 2004. The process of reviewing the DSU is still going on[320] and DSU reform will have implications for developing countries. However, it is probable that negotiations concerning other agreements (e.g., Intellectual Property, Textiles and Agriculture) will be given more importance. Yet, as the developing countries participate more actively in international trade and the DSS, the direct implications of the DSU will increase. The growing use of the DSU by India and other developing countries is a case in point. This means that it is in India's long-term interest to follow DSU reform and also participate simultaneously in negotiations concerning other areas.

For the time being, dispute settlement is the "gate keeper" of India's compliance with WTO rules, which we will discuss in the next section.

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[317] General Council - *Minutes of Meeting - Held in the Centre William Rappard on 9-11 and 18 December 1998*, WT/GC/M/32, 9 February 1999, p. 52.

[318] For a recapitulation of the arguments advanced during the debate, see General Council - *Minutes of Meeting - Held in the Centre William Rappard on 6 October 1999*, WT/GC/M/48, 27/10/1999, point 7.

[319] General Council - *Minutes of Meeting - Held in the Centre William Rappard on 24 - 25 July 2003*, WT/GC/M/81 28 August 2003, p. 20, paragraph 75.

[320] See, for example, Dispute Settlement Body, *Proposed agenda - Meeting of 25 and 26 November 2004*, TN/DS/W/71, 23 November 2004.

Section II –Overview of Trade Disputes against India

As we are studying India's involvement in dispute settlement with the aim of showing the impact of this mechanism on the transformation in Indian law, we will only consider cases in which India was involved as a defendant.[321] By definition, this situation covers all the allegations made against India regarding the violation of provisions of the WTO agreements. In other words, we will deal with all the cases which may lead to an adaptation of Indian law, thus showing how the DSM contributes to the conformity of Indian law with WTO agreements. As India is getting more and more involved in international trade, Indian procedures related to imports may come under fire with reference to their WTO-compatibility. We may mention in particular the increased use of anti-dumping measures regarding imports in recent years.[322]

In any event, 17 cases (not all of them have yet been settled) have been filed against India. This figure is significant, even though not very important, when compared with EU and US. Of course, it can be explained by the limitations of India's domestic market, but to some extent because India's trade policy is becoming increasingly WTO-compatible as indicated by Table 6.

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[321] As a plaintiff, India's situation is very interesting since the volume of India's external trade has increased quite steadily over the years since the inception of WTO in 1995. However, at the same time, increased trade enhances the possibility of a rise in trade disputes. Indian products might face barriers in other markets more often. For instance, Indian products have been subject to frequent anti-dumping and countervailing measures in the recent period in various destinations involving several developing and developed nations.

[322] The WTO Trade Policy Review, *India* (2002) notes that, 'While import licensing and tariff restrictions are generally declining, there appears to have been an increase in other import measures. India has become one of the major users of anti-dumping measures, with some 250 cases initiated since 1995.'

Table 5: Cases against India

(Updated up to 1st October 2005)

No	Case	Year	Complainant	Dispute	Result
1	DS 50	9 July'96	US	Patent protection for pharmaceutical & agricultural chemical products	Lost
2	DS 79	6 May'97	EC	Patent protection for pharmaceutical & agricultural chemical products	Lost
3	DS 90	22 Jul'97	US	Quantitative restrictions on imports of agricultural, textile and industrial products	Lost
4	DS 91	22 Jul'97	Australia	Do	Amicably Settled
5	DS 92	22 Jul'97	Canada	Do	Amicably Settled
6	DS 93	22 Jul'97	New Zealand	Do	Amicably Settled
7	DS 94	23 Jul'97	Switzerland	Do	Amicably Settled
8	DS 96	24 Jul'97	EC	Do	Amicably Settled
9	DS 120	23 Mar'98	EC	Measures affecting export of certain commodities	Continuing
10	DS 146	12 Oct'98	EC	Measures affecting the automotive sector	Lost
11	DS 149	12 Nov'98	EC	Import restrictions maintained by India for reasons other than Articles XVIII B of GATT 1994	Continuing
12	DS 150	3 Nov'98	EC	Measures affecting customs duties	Continuing
13	DS 175	7 Jun'99	US	Measures relating to trade & investment in the motor vehicle sector	Lost
14	DS 279	9 Jan'03	EC	Import restrictions maintained under the export and import policy, 2002-2007	Continuing

15	DS 304	11 Dec'03	EC	Anti-dumping measures on imports of certain products from the European Communities and/or Member States	Request for consultation just made
16	DS 306	2 Feb'004	Bangladesh	Anti-dumping / Article VI GATT94	Request for consultation just made
16	DS 318	28 Oct'04	Customs Territory of Taiwan, Penghu, Kinmen & Matsu	Anti-dumping / Article VI GATT94	Request for consultation just made

Source: Compiled from WTO documents

While increased association with WTO policies is the underlying reason, it is to be highly commendable. Besides, the subjectwise distribution of cases is also of some importance. The cases against India centre on two broad issues, viz. import restrictions and the patent regime.

We will devote a paragraph, in chronological order, to each case that has been settled by the DSB. There are 3 cases and India systematically considered it impracticable to comply immediately with the recommendations and rulings, the reason why India was granted a reasonable period of time to comply.[323] Finally, we will devote a paragraph to the other disputes which have not yet been settled by DSB (because mutually agreed solutions were not found or because the dispute is still under consultation).

Paragraph 1 – Patent Protection for Pharmaceutical and Agricultural Chemical Products

The *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products* case is the first litigation on

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[323] See above, Part II Section I.

intellectual property settled within the WTO framework.[324] It was referred to the DSB because there were complaints from American companies that India had failed to meet its obligations under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs).

It was claimed that the violations of the TRIPs Agreement came under Articles 27, 65 and 70 as India had failed to establish a mechanism that adequately[325] preserves novelty and priority in respect of applications of product patents for pharmaceutical and agricultural chemical inventions, and was also not in compliance with Article 70.9 of the TRIPs Agreement by failing to establish a system for the grant of exclusive marketing rights. In substance, the DSB found that India has not complied with its obligations under Article 70:8(a) and (70:9) of the TRIPs Agreement. In addition, this case is of great interest to international lawyers because the decision sheds light on certain aspects of public international law including the role expectations play in the interpretation of treaties under Article 31 of the Vienna Convention.

A) Interpretation of TRIPs

The interpretation of the TRIPs rules was the first task before the panel, which was in favour of using the notion of the "legitimate expectations" of WTO members in the context of interpreting provisions of the TRIPs agreement. To substantiate this solution, the Group initially advanced the argument that "good faith interpretation requires the protection of legitimate expectations

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[324] As Panel Report WT/DS79/R (European Community's complaint) contains conclusions and recommendations that are fundamentally similar to those of Panel Report WT/DS50/R (United States' complaint), the analyses of substantive law issues will bear only on the Report of the Panel, *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/R, 5 September 1997.

[325] "…appropriate patent protection (or, more precisely, to pave the way for eventual patent protection) for pharmaceutical and agricultural chemical products" was alleged deficient, Brown Eric: *TRIPS: India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, EJIL 1998, Vol. 9 No.1, pp. 183.

derived from the protection of intellectual property rights provided for in the Agreement."[326] But in the second phase, the Group asserted that the "protection of legitimate expectations of Members regarding the conditions of competition is a well-established GATT principle, which derives in part from Article XXIII, the basic dispute settlement provisions of GATT (and the WTO)."[327]

These arguments, as well as the solution they connoted, were unfailingly astonishing. Indeed, by tying in the principle of the "protection of legitimate expectations" very cleverly with the principle of interpretation in good faith,[328] the Panel claimed to be using the notion of "legitimate expectations" to interpret the TRIPs Agreement. But, unlike certain national law,[329] general international law does not recognise the principle of the protection of legitimate expectations. The interpreter's job is to examine the terms of a treaty in depth in order to determine the intentions of the parties and what the terms of a treaty establish are the joint intentions of the parties. Consequently, the "legitimate expectations" of one or the other party to an agreement (which, by definition, are unilaterally determined) cannot be used to interpret the joint intentions of parties on the basis of the treaty's text itself.[330]

That is why the Appellate Body condemned the recourse to the notion of the "legitimate expectations" of members adopted by

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[326] Report of the Panel, *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/R, 5 September 1997, paragraph 5.18.

[327] Report of the Panel, *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/R, 5 September 1997, paragraph 5.20.

[328] The latter indisputably being applicable to the interpretation of all WTO or international

law, see Sharma Aryal Ravi: *Interpretation of Treaties – Law and Practice*, Deep and Deep Pub., New Delhi 2003, pp. 29-34.

[329] Where this principle is known as the principle of legitimate confidence.

[330] "In other words, whatever legitimate expectations exist are to be found in the text of the treaty provisions, and are not to be looked for elsewhere", Ruessmann Laurent: *The place of legitimate expectations in the general interpretation of the WTO Agreements*, Institute for International Law, Faculty of Law of Leuven (Belgium), Working Paper No. 36, December 2002, pp. 6-7.

the panel[331] to substantiate its interpretation of the TRIPs agreement.[332] The Appellate Body uncovered two errors induced by the confusion between the concept of protecting the contracting parties' expectations and the concept of protecting the reasonable expectations of contracting parties. However, the AB ultimately affirmed the Panel's conclusion that the Indian system was invalid. Because the AB confirmed the ultimate findings of the Panel on other grounds, the AB's findings regarding the use of the notion of "legitimate expectations" did not have a material effect on the settlement of that dispute.

B) Indian administrative practice (Article 70:8 of TRIPs)

India, like the other WTO Members who benefit from a transition period in order to enable them to amend their legislative, administrative and regulatory provisions to comply with the stipulations contained in the TRIPs Agreement, is constrained under the terms of Article 70:8 a)[333] of Part VI (Transitional Arrangements) to establish a method by which it can register the date of filing patent applications for pharmaceutical products and agricultural chemicals products, allocate dates of filing and

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[331] The rules in Article 31 of the *Vienna Convention* "must be respected and applied in interpreting the *TRIPS Agreement* or any other covered agreement. The Panel in this case has created its own interpretative principle, which is consistent with neither the customary rules of interpretation of public international law nor established GATT/ WTO practice", Report of the Appellate Body, *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, 19 December 1997, paragraph 46.

[332] However certain authors like Laurent Ruessman regret this position. "Unfortunately, however, the Appellate Body, in *EC – LAN*, confirmed and expanded this unsatisfactory treatment of the general customary rule", Ruessmann Laurent : *The place of legitimate expectations in the general interpretation of the WTO Agreements*, Institute for International Law, Faculty of Law of Leuven (Belgium), Working Paper No. 36, December 2002, p. 7.

[333] Art. 70: 8: "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 obligations under Article 27, that Member shall: (a) 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 patents for such inventions can be filed".

priority to these patent applications, as well as provide a solid judicial base to maintain their novelty and priority from the said dates onwards. But the Panel observed that "the lack of legal security in the operation of the mailbox system in India is such that the system cannot adequately achieve the object and purpose of Article 70.8 and protect legitimate expectations contained therein for inventors of pharmaceutical and agricultural chemical products",[334] and did not fail to substantiate its argument by observing that the "predictability in the intellectual property regime is indeed essential for the nationals of WTO Members when they make trade and investment decisions in the course of their businesses."[335]

It is for this reason that the Panel declared that India should abide by the obligation to bring in legislative measures starting 1st January to implement the provisions of Article 70:8 a) of the TRIPs Agreement. In support of this opinion, the Panel argued that the current Indian administrative practice resulted in a certain judicial insecurity[336] to the extent that it obliged government officials to ignore certain mandatory provisions of the patent law.

Toning them down slightly, the Appellate Body confirmed the Panel's recommendations on this point. Indeed, Members were not obliged to guarantee that the patent applications filed in the mailbox would not be rejected or invalidated because they were submitted before any legislation came into force, but simply to set up a judicial mechanism based on the mailbox system.[337]

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[334] Report of the Panel, *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/R, 5 September 1997, paragraph 5.41.

[335] Report of the Panel, *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/R, 5 September 1997, paragraph 5.30.

[336] Report of the Panel, *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/R, 5 September 1997, paragraphs 5.32 to 7.43.

[337] Report of the Appellate Body, *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, 19 December 1997, paragraphs 57-71.

C) Should a mechanism be set up (and when) for the grant of exclusive marketing rights (Article 70:9 of TRIPs)?

The United States' claim that there was an obligation to establish an exclusive marketing rights system finally came up on 1st January 1995. The United States asserted that "since India has failed to provide for an exclusive marketing rights system in its legislation, it is currently not in compliance with Article 70.9."[338] India replied by stating that "since there has not been any request for the grant of exclusive marketing rights in India so far, India has not failed to implement its obligations under Article 70.9 and that India is not obligated to make exclusive marketing rights generally available before all the events specified in Article 70.9 have occurred."[339] As a matter of fact, there was an obligation for India to legislate on this point. This is actually an application of the conclusion we reached when we said that the conformity obligation enshrined in article XVI:4 goes beyond the general international law as it imposes a positive adaptation of domestic standards to WTO law. As Ravindra Pratap points out, "India's emphasis on prior fulfilment of Article 70.9 conditions for the existence of its obligation with respect to the grant of exclusive marketing rights appears to have been premised on the fact that a finding of inconsistency in the absence thereof would inevitably and impermissibly be a non-violation finding. But its admission of the necessity of legislation for the grant of exclusive marketing rights removed all doubts about prior existence of its obligation."[340]

Asked when a mechanism should be set up for the grant of exclusive marketing rights, the Panel expressed its belief that under the terms of the provisions of Article 70:9 of TRIPs, "it is the obligation of

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[338] Report of the Panel, *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/R, 5 September 1997, paragraph 5.52.

[339] Report of the Panel, *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/R, 5 September 1997, paragraph 5.52.

[340]Pratap Ravindra: *India at the WTO – Dispute Settlement System*, Manak Publications, New Delhi 2004, p. 327.

Members to establish a system for the grant of exclusive marketing rights to be available at any time after entry into force of the WTO Agreement",[341] implying thereby that India has failed to implement its obligations under Article 70.9.

On this point, the Appellate Body confirmed the Panel's conclusions and recommendations,[342] associating itself with the analysis according to which the enforcement of the provisions of Article 70:9 in India had to coincide with the coming into force of the WTO Agreement, notably because of Article XVI:4 establishing the WTO.[343]

As a result, India had to bring its legal regime for patent protection of pharmaceutical and agricultural chemical products into conformity with its obligations under Articles 70.8 and 70.9 of the TRIPs Agreement. This was done when the Government of India introduced a bill in the Union Parliament to effect certain Amendments to the Patents Act, 1970. These Amendments, as passed by both Houses of Parliament, have been approved by the President of India and notified in the Gazette of India on 26 March 1999 as the Patents (Amendment) Act, 1999[344] which was duly notified to the WTO.[345]

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[341] Report of the Panel, *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/R, 5 September 1997, paragraph 5.63.

[342] Report of the Appellate Body, *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, 19 December 1997, paragraph 84.

[343] Report of the Appellate Body, *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, 19 December 1997, paragraphs 79 to 82.

[344] The *Patents (Amendment) Act*, 1999, dated 26th March, 1999. Besides, the Patents (Amendment) Act 1999 was made law retrospectively with effect from 1st January, 1995.

[345] Status Report by India, *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/10/Add.4 and WT/DS79/6, 16 April 1999.

Paragraph 2 - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products

In the *Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products* case,[346] the US alleged that quantitative restrictions maintained by India on the import of a large number of agricultural, textile and industrial products[347] were inconsistent with India's obligations under Articles XI:1 and XVIII:11 of GATT 1994, Article 4.2 of the Agreement on Agriculture, and Article 3 of the Agreement on Import Licensing Procedures. India claimed balance of payments justifications under Article XVIII:B of GATT 1994.
The panel found that the measures at issue were inconsistent with India's obligations and also found the measures to be nullifying or impairing benefits accruing to the United States, notably under GATT 1994. India appealed against this decision on the grounds that the Panel had violated the basic rules and procedure to be followed in the case, but the Appellate Body fully confirmed the findings of the panel in this regard.

A) Institutional relations between the WTO and the IMF (Article 13 of DSU)

An interesting issue in this case is the institutional relations between the WTO and the IMF.
India alleged that the panel had failed to make an objective assessment of the matter pursuant to Article 11 of the DSU because it delegated its duty to do so to the IMF.[348] However, Article 13 of the DSU permits the panel to seek information from

[346] Report of the Panel, *India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/R, 6 April 1999 and Report of the Appellate Body, *India – Quantitative Restrictions on imports of agricultural, textile and industrial products case*, WT/DS90/AB/R, 23 August 1999.

[347] Quantitative restrictions imposed by India on agricultural, textile and industrial products in 2,714 tariff lines covering one-fourth of all its tariff lines.

[348] Report of the Appellate Body, *India – Quantitative Restrictions on imports of agricultural, textile and industrial products case*, WT/DS90/AB/R, 23 August 1999, paragraph 146.

any source and Article XV:2 of GATT 1994 calls for full consultation with the IMF on such matters.
The Appellate Body found that "nothing in the Panel Report supports India's argument that the Panel delegated to the IMF its judicial function to make an objective assessment of the matter. A careful reading of the Panel Report makes it clear that the Panel did not blindly accept the views of the IMF. The Panel critically assessed these views and also considered other data and opinions before reaching its conclusions."[349] Therefore, the Appellate Body concluded that the panel made an objective assessment of the matter.

B) Interpretation of the proviso (Article XVIII GATT 1994)

In fact, India alleged that the Panel had committed two errors in law. On the one hand, it had questioned the ruling on temporal conditions for the purpose of quantitative restrictions on the basis of Article XVIII, and on the other hand, it had invoked the enforcement of the proviso of the same Article XVIII.
According to Article XVIII, the prohibition of quantitative restriction measures adopted for the sake of balance of payments should not lead the WTO to constrain a member to amend its development policies. The idea is to protect the sovereignty of non-industrialised nations with regard to the most important factor of their policies, viz. development.
In this case, the IMF Report concludes[350] that it was possible for India to avoid taking recourse to any quantitative restrictions by employing other macroeconomic instruments.[351] According to the

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[349] Report of the Appellate Body, *India – Quantitative Restrictions on imports of agricultural, textile and industrial products case*, WT/DS90/AB/R, 23 August 1999, paragraph 149.

[350] Report of the Panel, *India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/R, 6 April 1999, paragraph 3.367.

[351] The IMF, in an official statement to the BOP Committee, stated that India would be able to phase out its restrictions within two years. In January 1997, the BOP Committee took note of the IMF's statement that India's current monetary reserves were not inadequate and that there was no threat of a serious decline in India's monetary reserves. These facts serve as a predicate for the application of restrictions under Article XVIII:B.

Indian delegation, the Panel had concluded that the enforced measures were not consistent with Article XVIII of the General Agreement. Therefore India contended that due to this decision, it was bound to amend its development policy,[352] which was not consistent with the provisions of the same Article XVIII.

Confirming this point of view, the Appellate Body replied that the quantitative restrictions were not consistent with Article XVIII due to the default of the temporal condition. Therefore, it found that India was not a victim of disequilibrium in the balance of payments as laid down in Article XVIII of the General Agreement. There was no reason, therefore, to question the way the Indian administration tried to restore the balance. On this point, one cannot but approve the decision of the Appellate Body, like that of the Panel: if the balance of payments of a Member State is not unbalanced, the concerned State cannot invoke a text whose sole aim is to enable it to restore the balance without converting its application.

What we see here is a tension between international governance and national political choice. As India later commented, the Panel's interpretation, which was upheld by the Appellate Body, "removed the powers and functions that legitimately belonged to the BOP Committee and the General Council. The Panel assigned unto itself the competence to look into overall justification of BOP measures rather than the application of each individual BOP measure. The Panel's ruling, as upheld by the Appellate Body would have the effect of curtailing the scope of the substantive rights of developing countries under Article XVIII:B."[353]

Additionally, the Appellate Body found that, although the Panel had constrained India to employ other macroeconomic instruments,

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[352] Report of the Appellate Body, *India – Quantitative Restrictions on imports of agricultural, textile and industrial products case*, WT/DS90/AB/R, 23 August 1999, paragraph 121.

[353] Dispute Settlement Body, *Minutes of Meeting - Held in the Centre William Rappard on 14 October 1999*, WT/DSB/M/69, 28 October 1999, p. 4.

it could in no way be understood as prescribing an amendment to its development policies[354] since India had, on several occasions, taken recourse to such instruments. This argument may be somewhat excessive, but it does make it possible to define the difference between development policies and the use of other macroeconomic instruments. According to the Appellate Body, the other macroeconomic instruments referred to were not fundamental to India's development. It was not a really a matter of policy selection but of strictly monetary procedures.

This analysis resulted in a restriction of the field of conditional enforcement of Article XVIII. Its scope could not yet be correctly evaluated since the macroeconomic instruments referred to were not defined in the decision and, in any case, the Appellate Body did not have to give a ruling on this issue. From the substantive point of view, the Appellate Body finally recommended that the DSB request that India bring its balance of payments restrictions into conformity with its obligations under these agreements. India implemented the recommendations and rulings of the DSB by removing progressively and with the agreement of the United Stated,[355] the contested quantitative restrictions.[356]

Paragraph 3 - Measures Affecting the Automotive Sector

In - *Measures Affecting the Automotive Sector*,[357] the United States and the European Community alleged that India had violated its

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[354] Report of the Appellate Body, *India – Quantitative Restrictions on imports of agricultural, textile and industrial products case*, WT/DS90/AB/R, 23 August 1999, paragraph 126.

[355] Agreement under Article 21.3.b of the DSU, *India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/15, 17 January 2000.

[356] Status Report by India, *India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/16/Add.7, 26 March 2001, p. 1.

[357] Report of the Panel, *India - Measures Affecting the Automotive Sector*, WT/DS146/R and WT/DS175/R, 21 December 2001 and Report of the Appellate Body, *India - Measures Affecting the Automotive*, WT/DS146/AB/R and WT/DS175/AB/R, 19 March 2002.

obligations under Articles III and XI of GATT 1994. According to Public Notice No. 60 issued by the Indian Ministry of Commerce, a car manufacturer who wished to import automotive kits was required to sign a Memorandum of Understanding (MoU) with the Indian Director General of Foreign Trade. This Memorandum imposed on the manufacturer an "indigenization condition" and a "trade-balancing condition." The former required the manufacturer to use a minimum amount of local parts and components, whereas the latter imposed the requirement that the exports of a firm be equal to its imports over a certain period of time. These measures were contested by US and EC.

On 15 May 2000, the US requested the establishment of a panel and it was done on 27 July 2000. Later, the EC also requested the establishment of a panel. Since a panel had already been established with a similar mandate in the framework of case WT/DS175, the DSB decided to join the panel with the one already established for that case pursuant to Article 9.1 of the DSU.

According to the Panel,[358] India acted inconsistently with its obligations under Article III:4 of GATT 1994 which lays down that "the products of the territory of any [Member] imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all law, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation distribution or use." To that extent, imposing on automotive manufacturers the obligation to use a certain proportion of local parts and components in the manufacture of cars and automotive vehicles (the "indigenization" condition) is clearly a discriminatory measure as "the very nature of the indigenization requirement generates an incentive to purchase and use domestic products and hence creates a disincentive to use like imported products."[359]

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[358] As regards the procedural issues related to the Panel's terms of reference raised by India, see Pratap Ravindra: *India at the WTO – Dispute Settlement System*, Manak Publications, New Delhi 2004, p. 79.

[359] Report of the Panel, *India - Measures Affecting the Automotive Sector*, WT/DS146/R and WT/DS175/R, 21 December 2001

Moreover, the obligation to balance the import of certain kits and components with exports of equivalent value (the "trade balancing" condition) is similarly contrary to WTO rules, even though India may have enacted some amendments to the concerned regime during the course of the proceedings.[360] In fact, these new measures were taken after the beginning of panel proceedings and consequently were not included in its terms of reference.[361] This solution is logical and conforms to the old GATT practice.[362] As a result, the Indian rule on this point constitutes an obvious discrimination as "by requiring that the purchaser of an imported kit or component take on an additional obligation to export cars or components of equal value when such domestic purchases occur, the trade balancing requirement creates a disincentive to the purchase of these products, and consequently makes them more difficult to dispose of on the internal market."[363]

The Panel therefore recommended that India should bring its measures into conformity with its obligations under the WTO Agreements. To begin with, India appealed against the Panel Report, but a little later it withdrew the appeal[364] in accordance with Article 30:1 of the *Working Procedures for Appellate Body Review*.[365] Actually, India had already dismantled the quantitative restrictions from April 1, 2001. Consequently, from the formal

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[360] Report of the Panel, *India - Measures Affecting the Automotive Sector*, WT/DS146/R and WT/DS175/R, 21 December 2001, paragraph 8.61.

[361] Report of the Panel, *India - Measures Affecting the Automotive Sector*, WT/DS146/R and WT/DS175/R, 21 December 2001, paragraph 8.20.

[362] Palmeter David and Mavroidis Petros: *Dispute Settlement in the World Trade Organization – Practice and Procedure*, 2nd edition, Kluwer Law International, The Hague 2004, pp. 24-26.

[363] Report of the Panel, *India - Measures Affecting the Automotive Sector*, WT/DS146/R and WT/DS175/R, 21 December 2001, paragraph 7.308.

[364] Report of the Appellate Body, *India - Measures Affecting the Automotive*, WT/DS146/AB/R and WT/DS175/AB/R, 19 March 2002, paragraph 17 and 18.

[365] Withdrawal is possible any time during the appeal; the Appellate Body then regards its work as completed.

point of view, India complied with the Panel's recommendations by taking a policy decision to terminate the indigenization requirement as well as the trade balancing obligation. Accordingly, the indigenization and accrued export obligations under the MoUs signed by the automobile manufacturers pursuant to Public Notice No. 60 were terminated and these obligations were no longer enforceable against them.[366]

Paragraph 4 – India and Disputes Pending Settlement before the DSB

Finally, we will take a look at consultations involving India, that is to say cases where there is a request to join consultations, but no request for the establishment of a Panel. In this respect, it should be remembered that the purpose of consultations is to enable the parties to gather relevant and correct information.[367] Once again, while looking at the adaptation of Indian law to WTO agreements, we will take up for analysis only the cases where India has been requested to join in the consultations.

Following the consultations, the parties may either be asked to reach a mutually agreed solution or, failing that, to present accurate information to the panel. Consequently, we will make a distinction between the cases where India reached an agreement (A) with another Member and cases where such an agreement has not been reached, but there is as yet no request for setting up a panel, that is to say, where consultations are pending (B).

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[366] See Dispute Settlement Body, *Minutes of Meeting - Held in the Centre William Rappard on 11 November 2002*, WT/DSB/M/136, 31 January 2003, p. 7.

[367] It must underlined here that Article 4.6 of the DSU requires that consultations be confidential and provides that they are without prejudice to the rights of a Member in any further proceedings. "Thus, a Member's offer of compromise or adjustment of a particular measure would not constitute an admission that the measure is inconsistent with its WTO obligations", Palmeter David and Mavroidis Petros: *Dispute Settlement in the World Trade Organization – Practice and Procedure*, 2nd edition, Kluwer Law International, The Hague 2004, p. 87.

A) Mutually Agreed Solutions

Five times India has found itself in a situation where it has joined consultations without requesting the setting up of a Panel in order to reach a mutually agreed solution with the other parties.[368] A perusal of the DSU indicates that this is the preferred way of resolving disputes in WTO. Indeed, Article 3:7 of the DSU indicates that "in the absence of a mutually agreed solution, the first objective of the DSM 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." So far, India has been able to avoid the setting up of a panel five times. The cases concerned involved Australia,[369] Canada,[370] New Zealand,[371] Switzerland[372] and the EC[373] and were duly notified to WTO.[374]

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[368] We will not consider *Measures Affecting Export of Certain Commodities* as this case seems to have been abandoned; though a request was made for the establishment of a panel, it was deferred by the DSB. Since then, the EC has not made a fresh request for the establishment of a panel. *India – Measures Affecting Export of Certain Commodities*, WT/DS120/1, 23 March 1998. For details, see Rao M. B. and Guru Manjula: *WTO and International Trade*, 2nd Ed. New Delhi, Vikas Publishing House Pvt. Ltd. 2003, p. 288.

[369] Notification of Mutually Agreed Solution, *India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS91/8, 23 April 1998.

[370] Notification of Mutually Agreed Solution, *India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS92/8, 3 April 1998.

[371] Notification of Mutually Agreed Solution, *India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS93/8, 11 December 1998.

[372] Notification of Mutually Agreed Solution, *India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS94/9, 23 March 1998.

[373] Notification of Mutually Agreed Solution, *India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS96/8, 6 May 1998.

[374] Notification of the mutually agreed solution is sometimes not made or is incomplete; this can be damaging if the solution is likely to have an adverse impact on other countries. This is what happened to India when EC and US avoided notifying their mutual agreement on rules of origin. For this reason, India proposed that mutually agreed solutions should be notified within sixty days from the date of such agreement and that the notification should contain sufficient details. However as argued by Dr. Narayan "it may be appropriate to propose, in addition to what is already on the table, that failure to comply with this obligation should have the effect of disabling the parties from invoking dispute settlement procedures in respect of that matter. Hopefully such a stipulation will ensure that mutually agreed solutions will get notified and also get notified in time i.e. within the proposed time limit of 60 days", Narayan S.: *Dispute Settlement Understanding of the WTO: Need for Improvement and Clarification*, ICRIER Working Papers No.117, December 2003, New Delhi, p. 55.

What is common to all these consultations is that they took place in connection with the *Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products* case launched by the US. The allegations made by these five Members regarding India's quantitative restrictions were similar to those made by the US. As a result, India anticipated the development of the case against the US and progressively removed the contested quantitative restrictions according to a determined schedule acceptable to the different parties.

Moreover, there is a possibility that a mutually agreed solution may contain WTO-inconsistent components. However, under Article 3:5 of the DSU, all solutions should be consistent with WTO rules and Article 3:6 makes it possible for any Member to question the legality of such a settlement. If this happens, the settlement might be the beginning of a new dispute, not the end. But that was not the case in these consultations.

B) Pending Consultations

At present, India is involved in consultations of more or less recent origin concerning five cases. In all these five cases, no request has been made so far for the establishment of a panel. All these import-related cases concern alleged violations of GATT 1994. As the consultations are confidential, it is not possible to foresee their future development. However, none of them seems to be of much importance from the economic point of view. Legally speaking, since they concern measures taken by India to "protect" its market, it is necessary to make two points: firstly, measures of this kind are still used by many countries,[375] and secondly, this shows how keen both developed and developing countries are to gain access to the Indian domestic market.

[375] The US and EU face a growing number of anti-dumping disputes.

In *Measures Affecting Customs Duties*,[376] the European Communities requested consultations on a series of increases in customs duties allegedly implemented by India. The EC stated that the measures in question relate to Schedule 1 of the 1975 Customs Tariff Act, the Special Customs Duty and the Special Additional Duty. The EC contended that under these measures, the aggregate value of tariffs resulting from the addition of the different duties applied by India exceed India's WTO-bound rates under a series of tariff headings. The EC alleged violations of Articles II:1(b) and III:2 of GATT 1994.

In *Import Restrictions Maintained under the Export and Import Policy 2002–2007*,[377] the European Communities, later joined by the US, requested consultations on import restrictions maintained by India under its Export and Import Policy 2002-2007. The European Communities considered that these import restrictions may constitute an infringement of Articles III, X and XI of GATT 1994, Article 4.2 of the Agreement on Agriculture, Articles 1, 2 and 3 of the Agreement on Import Licensing Procedures, Articles 2, 3, 5, 7 and 8 of the Agreement on Sanitary and Phytosanitary Measures and Article 2 of the Agreement on Technical Barriers to Trade.

In *Anti–Dumping Measures on Imports of Certain Products from the European Communities*,[378] the EC, later joined by Turkey and Chinese Taipei, requested consultations on certain anti-dumping measures against imports of products originating in the

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[376] Request for Consultations by the European Communities, *India - Measures Affecting Customs Duties*, WT/DS150/1, 3 November 1998.

[377] Request for Consultations by the European Communities, *India - Import Restrictions Maintained under the Export and Import Policy 2002-2007*, WT/DS279/1, 9 January 2003.

[378] Request for Consultations by the European Communities, *India - Anti-dumping Measures on Imports of Certain Products from the European Communities and/or Member States*, WT/DS304/1, 11 December 2003.

EC. The EC alleged violations of Article VI:1 of GATT 1994, Articles 1, 3.1, 3.2, 3.5, 6.6, 6.8 (including Annex II), 6.9 and 12.2 of the Anti Dumping Agreement. Especially since the assessment of the effect of the dumped imports on prices did not seem to be based on positive evidence and on an objective examination, the Indian investigating authority could not demonstrate that the dumped imports were causing the alleged injury and failed to examine other known factors and ensure that injury caused by those other factors was not attributed to dumping; the Indian investigating authority did not properly inform interested parties of the relevant essential facts under consideration, which formed the basis for the decision to apply the anti-dumping measures and in sufficient time for those parties to defend their interests; the Indian investigating authority did not properly inform interested parties of the reasons why it did not accept evidence or information they had submitted within the investigation procedure; the public notice of information concluding the investigation did not contain all relevant information on the matters of fact and law and reasons which led to the imposition of the anti-dumping measures.

In *Anti–Dumping Measure on Batteries from Bangladesh*,[379] Bangladesh,[380] together with the EC, requested consultations on a certain anti-dumping measure imposed by India on the import of lead acid batteries from Bangladesh. The "plaintiff" is concerned about several aspects of the investigation by the Indian authority leading to the imposition of the definitive anti-dumping duties: initiation of the investigation, notwithstanding the unsubstantiated claim of the applicants that the application was "by or on behalf of the domestic industry" and failure to immediately terminate the investigation, notwithstanding the negligible volume of imports from

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[379] Request for Consultations by Bangladesh, *India - Anti-Dumping Measure on Batteries from Bangladesh*, WT/DS306/1, 2 April 2004.

[380] It must be underlined that this is the first dispute involving an LDC Member as a principal party to a dispute.

Bangladesh; determination of margin (determination of normal value, apparent adoption of constructed value, determination of export price and comparison between normal value and export price); determination of injury and causation (examination of import volume, the effect on prices and the impact on domestic producers of like products; inclusion of imports from Bangladesh in the assessment of the effects of imports; evaluation and examination of relevant factors and examination of the causal link between the imports and the alleged injury); treatment of evidence (failure to consider information submitted by the interested parties from Bangladesh; treatment of information submitted by the applicants as confidential; failure to disclose to the interested parties the "essential facts under consideration which form the basis for the decision to apply definitive measures" and other relevant information) and failure to provide the parties and give public notice of "all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures."
Bangladesh considers that the foregoing Indian measure is inconsistent with: Article VI of GATT 1994, including Articles VI:1, VI:2 and VI:6(a); Articles 1, 2.1, 2.2, 2.4, 3.1, 3.2, 3.3, 3.4, 3.5, 3.7, 5.4, 5.8, 6.2, 6.4, 6.5, 6.8 (including para. 3 of Annex II), 6.9 and 12.2 of the Anti-Dumping Agreement. Furthermore, Bangladesh considers that, as a result of the imposition of the anti-dumping duties, India may be acting inconsistently with its obligations under Articles I:1 and II:1 of GATT 1994. Bangladesh also considers that the benefits accruing to it directly or indirectly under the WTO Agreement are being nullified or impaired pursuant to Articles XXIII:1(a) and XXIII:1(b), respectively, of GATT 1994.

In *Anti-Dumping Measures on Certain Products from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu*,[381] Chinese Taipei requested consultations on the provisional and definitive anti-

[381] Request for Consultations by the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, *India - Anti-dumping Measures on Certain Products from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu*, WT/DS318/1, 1 November 2004.

dumping measures imposed on: acrylic fibres, Analgin, potassium permanganate, paracetamol, sodium nitrite, caustic soda and green veneer tape. According to the request for consultations from Chinese Taipei, India violates its WTO obligations in a number of ways, notably: the rejection of the information provided by exporters without providing reasons and the lack of satisfaction as to the accuracy and reliability of the information provided by the domestic industry; the initiation of the investigations and imposition of the anti-dumping duties, despite no imports of the product concerned from Chinese Taipei into India during the period of investigation and despite the insufficiently substantiated petitions for the initiation on the existence of dumping and injury; the lack of demonstration that the dumped imports were causing the alleged injury and the failure to ensure that alleged injury caused by other factors was not attributed to dumping; the notice of initiation of investigations lacking in all the grounds that support dumping and injury and the notice of definitive findings lacking in all relevant information of facts and law and reasons which led to the imposition of the anti dumping measures.

Chinese Taipei considers that these Indian measures are inconsistent with, *inter alia*: Article VI:1 and VI:2 of GATT 1994, and Articles 1, 2, 3.1, 3.2, 3.3, 3.4, 3.5, 3.7, 3.8, 4, 5, 6 (including Annex II), 7.4, 12.1 and 12.2 of the ADA.

Conclusion of Section II

The future trends of India's participation in the proceedings of DSB in the coming years can be estimated on the basis of the trade policy review reports.[382] There are two WTO Trade Policy Reviews on India published respectively in 1998 and 2002. A

[382] Trade policy reviews consist of regular reviews of individual countries' trade policies. India is reviewed every four years and recent reviews were conducted in 1998 and 2002. See: CHAISSE J., CHAKRABORTY D., *"Trade Policy Review Mechanism and Dispute Settlement System: A Cross-Country Analysis of Enforcing WTO Rules between Negotiations and Sanctions"*, in: DEBROY B., SAQIB M. (eds.), *"World Trade Organisation at Ten, Looking Back to Look Beyond - Volume I Development Through Trade"*, Konark Publishers, New Delhi 2005, pp. 210-278.

comparative analysis of the two reports is provided in Annex 4. While the earlier review (1998) has been critical of India on various accounts like tariff reform, import restriction procedures, absence of full compliance with TRIPs, non-liberalisation of domestic service sectors etc., the later review (2002) has words of high praise for the reform measures. A comparison between Annex 4 and Table 4 reveals the close correlation between the unfinished reform agenda and the filing of a case at WTO. As noted earlier, the non-notification of any case against India at DSB for a long time (June 1999 – January 2003) signifies the increasing WTO-compatibility of India's domestic legal system. The concerns raised about India's unfinished agenda in the 2002 report are too few in number, and a great upsurge in cases involving India as respondent is therefore not expected. Moreover Indian legislation and trade policy do not contain any controversial norms or attitudes such as those that led to so many complaints against the EU and US (sanitary norms, subsidies for export, trade preferences…). It seems that contingency measures, and anti-dumping measures in particular, are going to play a major role in India's association with WTO and its participation in DSB proceedings. The concern expressed by the Trade Policy Review (2002) on the increasing trend towards anti-dumping measures and the EC's request for consultations on the imposition of antidumping measures by India on 27 commodities[383] are indicative of this fact.

[383] The details of the consultation are to be found in WT/DS304/1, Dated 11 December 2003.

GENERAL CONCLUSION

In conclusion, we would first like to underline the originality of the system created by WTO. In general terms, WTO's contribution to the reinforcement of international law is quite obvious. By instituting the compliance obligation, WTO has been able to enforce its rules to a level that has not been reached by other world organisations.

Secondly, the conformity of national law with WTO agreements is based on two key provisions: Members' obligation to ensure the conformity of their domestic law and prohibition to assess the proper execution of this obligation by other Members (by bringing in the DSB). But these two elements are inter-dependant: though Article XVI:4 is the basis of the control exerted by the DSB, it is not possible to enforce the WTO-conformity obligation without the DSB. As we have shown, the WTO system makes severe demands in terms of conformity to the international trade law. Simultaneously, it puts India under a great deal of pressure, something that has produced profound changes in its legal system and will continue to do so in the future in order to fully conform to WTO rules. However, the Organisation's preoccupation with ensuring conformity with the recommendations of the DSB tends to reduce the significance of the first conclusion by linking it with the DSB, which does not consider the damage already caused but gives more importance to the future implementation of the treaty. The non-observance of the primary obligation does not imply a secondary obligation to remedy the absence of compliance, but a simple obligation arising from the primary obligation serving only as a reminder and a clarification. Hence, from the theoretical point of view, the WTO-conformity requirement is not so severe. But in actual practice, it seems to be quite efficient. This is certainly a special trait of trade law, which must always be very pragmatic in its development in addition to being very innovative.

Thirdly, faced by this fact, India has made considerable efforts to comply with WTO rules and has thus demonstrated its willingness to integrate as much as possible with global trade. A few complaints have been lodged against it. But with respect to the present

agreements, there are not likely to be many new complaints against India. However, foreign companies are bound to come up against protectionist measures that are still employed by many countries and this may become a steady cause of litigation for India, though on a reduced scale. Moreover, as the Indian domestic market becomes more attractive, the Indian government will be more tempted to introduce protectionist measures. This is particularly true as the major trading partners have at their disposal efficient and sophisticated tools to access the Indian market. For example, the EC adopted a measure called Trade Barriers Regulation,[384] which is a legal instrument giving the private sector (Community enterprises and industries) the right to lodge a complaint, which obliges the European Commission to investigate and assess whether there is evidence of violation of international trade rules resulting in adverse trade effects. The immediate consequence may be to have recourse to the WTO dispute settlement system.[385] This collaboration between the private sector and the "executive branch" is highly efficient and takes the utmost advantage of the WTO-conformity obligation to open up foreign markets.

Finally, all these elements must reinforce the Members' will to obtain the best results possible during the present negotiations.[386] Any new agreement will benefit from the WTO-conformity principle. In this respect, with the TRIPs agreement serving as a lesson, each new engagement should be considered in the light of the changes it implies for Indian domestic law. These changes have consequences for the economic sector and also have social repercussions which should be the country's main preoccupation.

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[384] Council Regulation (EC) No. 3286/94 of 22 December 1994 *laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization.*

[385] List of cases presently examined:http://europa.eu.int/comm/trade/issues/respectrules/tbr/cases/index_en.htm

[386] For details about these negotiations, see Ministry of Commerce and Industry, Department of Commerce, *Annual Report 2004-2005*, New Delhi 2005, pp. 115-117. For an official update of the negotiations, see http://www.wto.org/english/tratop_e/dda_e/dda_e.htm

ANNEXES

Table Annex 1 : India's Trade Profile within the WTO Framework

India

BASIC INDICATORS	
Population (thousands, 2003)	1 064 399
GDP (million current US$, 2003)	598 966
GDP (million current PPP US$, 2003)	3 096 239
Current account balance (million US$, 2002)	5 816
Trade per capita (US$, 2000-2002)	139
Trade to GDP ratio (2000-2002)	29.8

Rank in world trade, 2003	Exports	Imports
Merchandise	31	24
Commercial services	20	18
Merchandise excluding intra-EU trade	21	16
Commercial serv. excl. intra-EU trade	10	8

	2003	*Annual percentage change* 1995-2003	2002	2003
Real GDP (95 prices, 1995=100)	157	6	5	8
Exports of goods and services (95 prices, 1995=100)	240	12	22	7
Imports of goods and services (95 prices, 1995=100)	195	9	8	14

TRADE POLICY		
WTO accession date	1 January 1995	
Trade Policy Review date	19, 21 June 2002	
Tariff binding coverage (%, 2005)	73.8	
MFN tariffs	Final bound	Applied 2002
Simple average of *ad-valorem* duties		
All goods	49.8	29.0
Agricultural goods (AOA)	114.5	36.9
Non-agricultural goods	34.3	27.7
Non *ad-valorem* duties (% of total tariff lines)	7.2	5.3
MFN duty free imports		
Share in total imports, 2001		2.1

Contribution to WTO budget (%, 2005)	0.922
Import duties collected:	
in total tax revenue, 2000-2002	21.8
to total merchandise imports, 2000-2002	18.2
Number of:	
GATS services sectors with commitments	37
Dispute rulings (complainant - defendant)	8 - 5
Notifications outstanding (CRN)	17
Number of contingency measures in force:	
Anti-dumping (30 June 2004)	216
Countervailing duties (30 June 2004)	...
Safeguards (18 October 2004)	8

MERCHANDISE TRADE	*Value*			
	2003	*Annual percentage change*		
Merchandise *exports*, f.o.b. (million US$)	57 085	1995-2003	2002	2003
Merchandise *imports*, c.i.f. (million US$)	71 238	8	14	16
		9	12	26
	2003			2003
Share in world total exports	0.8	**Share in world total imports**		0.9
Breakdown in economy's total exports		**Breakdown in economy's total imports**		
By main commodity group (ITS)		By main commodity group (ITS)		
Agricultural products	12.6	Agricultural products		8.3
Mining products	10.2	Mining products		32.9
Manufactures	76.1	Manufactures		49.7
By main destination		By main origin		
1. European Union (15)	21.8	1. European Union (15)		18.8
2. United States	18.0	2. United States		6.4
3. United Arab Emirates	8.0	3. China		5.2
4. Hong Kong, China	5.1	4. Switzerland		4.2
5. China	4.6	5. Korea, Republic of		3.6
Unspecified destinations	0.3	Unspecified origins		26.6

COMMERCIAL SERVICES TRADE	***Value***			
	2003	*Annual percentage change*		
Commercial services *exports* (million US$)	28 026	1995-2003	2002	2003
Commercial services *imports* (million US$)	27 834	19	12	20
		14	-2	25

	2003		2003
Share in world total exports	1.6	**Share in world total imports**	1.6
Breakdown in economy's total exports		**Breakdown in economy's total imports**	
By principal services item		By principal services item	
Transportation	11.2	Transportation	30.0
Travel	13.1	Travel	12.4
Other commercial services	75.8	Other commercial services	57.6

INDUSTRIAL PROPERTY	**Total**	**Residents**	**Non-residents**		**Total**	**Residents**	**Non-residents**
Patents granted, 1999	2 160	633	1 527	Marks registered, 1999	8 010	6 747	1 263

(updated up to April 2005)

Source: WTO Website, WTO Statistics Database

http://www.wto.org/english/thewto_e/countries_e/india_e.htm

Table Annex 2: Analysis of Complaints by Developed/ Developing Members

1) Complaints by Developed country members	
Respondents –Developed	127
Respondents – Developing	75
2) Complaints by Developing country members	
Respondents –Developed	70
Respondents – Developing	51
3) Complaints by Developed and Developing country members	
Respondents –Developed	6
Respondents – Developing	0

Source: WTO Dispute Settlement Cases, New Developments since Last Update (from 2 October 2004 Until 31 March 2005), WT/DS/OV/23, 7 April 2005.

Table Annex 3: Statistical Overview of WTO Dispute Settlement Cases

	Complaints notified to the WTO[1]	Active Panels[2]	Appellate Body and Panel Reports Adopted[3]	Mutually Agreed Solutions	Other Settled or Inactive[4] Disputes
Reporting period/ date	since 1st January 1995	on reporting date	since 1st January 1995	since 1st January 1995	since 1st January 1995
Number	329	25	84	45	27

EXPLANATORY NOTES:

[1] This category encompasses all requests for consultations notified to the WTO, including those requests which have led to panel and appellate review proceedings.

[2] This category encompasses pending or suspended panel proceedings or appellate review proceedings, with the exception of proceedings pursuant to Article 21.5 of the DSU.

[3] This category does not include reports resulting from proceedings pursuant to Article 21.5 of the DSU.

[4] This category includes cases where the contested measure has been terminated, a panel request was withdrawn, etc.

Source: WTO Dispute Settlement Cases, New Developments since Last Update (from 2 October 2004 Until 31 March 2005), WT/DS/OV/23, 7 April 2005.

Table Annex 4: A comparative Analysis of India's Trade Policy Reviews

Trade Policy Review (1998)	
Policies Praised	**Policies where Further Reform Advocated**
• Rapid reform in tariff rates over 1993-94 to 1997-98. • Overall economic reform measures. • Amendment in Copyright law in line with TRIPS.	• Complex structure of tariff regime and tariff escalation. • Import restriction on consumer goods. • Restrictive import licenses and other procedural hassles on imports. • Presence of indirect subsidies, export subsidies and other incentives. • Unfinished compliance with TRIPS. • Reform in case of agricultural products. • Transparency in decision making. • Reform in services.
Trade Policy Review (2002)	
Policies Praised	**Policies where Further** Reform Advocated
• Simplification of tariff structure. • Complete elimination of quantitative restrictions. • Reduction in export restrictions. • Review of FDI policy. • Move towards full conformity with TRIPS. • Significant reform in certain key service sectors e.g. - telecommunication, financial services and to some extent in infrastructural services.	• Increase in use of contingency measures on imports. • Wide range of price and distribution controls in agriculture. • Existence of certain commodity specific entry restrictions.

Source: Compared on the basis of the two reviews.

Table Annex 5: India's Position (A)

Clause	**Current/Proposed positions**	**Developing country proposals**
Mutually Agreed Solutions	Article 3.6 of DSU requires any mutually agreed solutions among the disputing parties to notify to the WTO. However, no time period has been specified.	The terms of settlement should be notified in sufficient details to DSB and other relevant councils within 60 days of such agreement.
Amicus Curiae Briefs	EC and US has proposed modification in Article 13 of DSU, and argued in favour of defining the framework and conditions for allowing *Amicus Curiae* briefs in potentially all cases.	No need to make provisions for accepting *Amicus Curiae* briefs. The purpose could be served by clarifying the meaning of the word 'seek' in Article 13 of DSU.
Terms of Appointment of Appellate Body Members	Currently the system provides for reappointment of Appellate Body members, for a second-year term.	The practice is not in line with the high dignity of the office. The future appointments of the Appellate Body members should be for a non-renewable fixed term of six years.
Inputs provided by the Secretariat	WTO does not have an official negotiating history, and the Secretariat provides notes to Panels as one in certain disputes, which are not passed to the parties even.	It is necessary to ensure that the parties to the dispute promptly receive all the documents, notes, information etc. available to the Secretariat once a panel is established and appendix 3 of paragraph 10 should be amended accordingly.
Sufficiency of notice of appeal	The parties deserve a right to appeal against adoption of the panel report. The notices of appeal normally identify the nature of appeal, and the issues of law in it. However, in a couple of cases, the issues are unclearly stated and the other party, especially developing ones, loses valuable time in responding.	The appellate Body was requested to lay down guidelines on the nature of Notice of appeals, while revising the working procedures.
Third party rights in appeal procedures	The provisions in Article 17.4 give discretion to the Appellate Body to hear or not hear from the third parties.	In order to ensure internal transparency and to enhance the right of the members to participate in the DS process, article 17.4 should be modified along the lines of Article 10.2.

Source: The draft submitted to WTO dated 23rd September 2002 (TN/DS/W/18).

Table Annex 6: India's Position (B)

Clause	Current/Proposed positions	Developing country proposals
Suspension of Concessions and other Obligations	The developed countries, losing side in a dispute, often do not cooperate with their developing counterparts. However, the only feasible option left with them, i.e., withdrawal of concessions, given the level of dependence is associated with high economic cost.	Cross-retaliation is most effective to tackle a problem in these cases. The complaining developing country should be permitted to seek authorization for suspending concessions and other obligations in the sectors of their choice, bypassing the lengthy process of proving a loss first.
Litigation costs	The litigating parties have to finance their case.	The increasing cost of legal battles is a major barrier and financial responsibility on developing countries. Therefore, the legal cost to the developing countries, if they win the case against their developed counterpart in violation with the WTO-principle, should be reimbursed by it.
Article 4.10	The Article requires, "During consultations members should give special attention to developing country Members' particular problems and interests."	The word 'should' needs to be replaced by 'shall' and specific attention has to be given according to the status of the developing country. Then the provisions would be mandatory and effective.
Article 12.10	The provision relates to the situation when a developing country is the defending party, while the other party is not necessarily a developed one. The provisions deal with consultation phase and panel proceeding.	The proposal suggested modification in the agreement and seeks to extend the overall, as well as individual, time frame for disputes involving developing countries as defending parties.
Article 21.2	The consideration to developing country interest as a litigant has been described as 'Particular attention should be paid to …"	The word 'should' needs to be replaced by 'shall' and specific attention has to be given according to the status of the developing country. Then the provisions would be mandatory and effective.

Source: The draft submitted to WTO dated 9th October 2002 (TN/DS/W/19)

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Ensuring the Conformity of Domestic Law With World Trade Organisation Law

India as a case study

Summary

The World Trade Organisation (WTO), established in 1995, provides a contractual framework within which Member States undertake to implement law and regulations regarding foreign trade in a wide range of sectors. The purpose of this study is to examine why and how WTO rules are actually implemented and to what extent they have changed Indian law.

The conformity of Indian law to WTO regulations is compulsory for two reasons. Firstly, by declaring that, "each Member shall ensure the conformity of its law, regulations and administrative procedures with its obligations as provided in the annexed Agreements", the Agreement establishing WTO affirms the obligation for all the Members to ensure such compliance. The legal consequences of this obligation are discussed with regard to the effective adaptation of Indian domestic law. Secondly, WTO has set up a new dispute settlement mechanism to monitor the compliance of domestic law with WTO regulations. The contribution of this mechanism in ensuring conformity to WTO rules has been assessed with reference to India's involvement in disputes.

On the theoretical side, this study identifies the characteristics peculiar to WTO that ensure the implementation of its regulations and oblige India as well as other Members to comply with international norms. On the practical side, it gives an overview of the recent innovations or changes in Indian law that are presently applicable and simultaneously assesses India's integration in international trade governance.

Keywords

World Trade Organisation (WTO), International Trade Law, India, Conformity.

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