

South Asia and WTO Dispute Settlement

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Acronyms

AB	Appellate Body
ACWL	Advisory Centre on WTO Law
AD	Antidumping
ADA	Antidumping Agreement
AoA	Agreement on Agriculture
ASCM	Agreement on Subsidies and Countervailing Measures
ATC	Agreement on Textiles and Clothing
BoP	Balance of Payment
CDSOA	Continued Dumping and Subsidy Offset Act
CIF	Cost, Insurance and Freight
CKD	Completely Knocked Down
CVD	Countervailing Duty
DFAT	Department of Foreign Affairs and Trade
DGFT	Director General of Foreign Trade
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EBA	Everything But Arms
EC	European Communities
EMRs	Exclusive Marketing Rights
EU	European Union
FOB	Free on Board
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GSP	Generalised System of Preferences
HTS	Harmonised Tariff Schedule
LDC	Least Developed Country
MFN	Most Favoured Nation
MoU	Memorandum of Understanding
NGO	Non-Governmental Organisation
POI	Period of Investigation
QRs	Quantitative Restrictions
ROO	Rules of Origin
RPT	Reasonable Period of Time
S&DT	Special and Differential Treatment
S, G & A	Selling, General and Administrative Expenses
SAIL	Steel Authority of India Ltd.
SIL	Special Import Licence
SKD	Semi Knocked Down
SPS	Sanitary and Phytosanitary
TBT	Technical Barriers to Trade
TED	Turtle Excluder Device
TMB	Textiles Monitoring Body
TPD	Trade Policy Division
TRIMs	Agreement on Trade Related Investment Measures
TRIPS	Agreement on Trade Related Aspects of Intellectual Property Rights
UNCTAD	United Nations Conference on Trade and Development
US	United States
USCIT	US Court of International Trade
USDOC	US Department of Commerce
USTR	United States Trade Representative
WTO	World Trade Organization

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Executive Summary

The Dispute Settlement Understanding (DSU) under the World Trade Organization (WTO) has brought about a paradigm shift in the balance of power in the world trading order. As much is evident from instances of developing countries successfully challenging measures taken by powerful trading nations. The creation of a streamlined dispute resolution process based on the concept of “reverse consensus”, ensuring that the losing parties in a dispute are not able to block a dispute settlement report as was the case before the inception of the WTO, has greatly levelled the playing field in the multilateral trading system. Out of the 335 disputes brought by various Members up to the year 2006, 125 were brought by developing Members.

Though the DSU guarantees security and predictability of the commitments undertaken by Members, and the right to prompt and effective redress of disputes between the parties concerned, the fact that only a few developing countries and no least developed country (LDC) apart from Bangladesh have participated in the new dispute settlement process highlights the inherent inadequacies of the system to address the needs of low income countries.

Pursuing litigation is a costly exercise. Yet, in spite of the resource constraint South Asia faces, its participation and performance in the process is quite remarkable. Compared to the less than 1.9 percent of world merchandise trade it accounts for, the region has been involved in more than 10 percent of the disputes raised at the WTO. India leads South Asian countries in making use of the WTO dispute settlement system. It has effectively challenged measures taken by powerful trading nations or blocs such as the United States (US) and the European Union (EU).

Pakistan and Sri Lanka have also used the system to their advantage, although the number of disputes they have been party to is far less than that of India. In 2004, Bangladesh, in the first dispute involving an LDC as a principal party, sought consultation with India concerning certain antidumping measures imposed by the latter

on lead acid batteries. Though the case did not progress much beyond the consultation stage, as India terminated its measure, the fact remains that, were it not for the DSU, Bangladesh would have hesitated to bring a case against a neighbour on which it is heavily dependent in trade. Nepal and Maldives are yet to be involved in any dispute, either as a complainant or a respondent or as a third party.

There are, however, a number of hurdles that ought to be overcome if all the WTO Members in South Asia are to better utilise the dispute settlement system, which is “rule-oriented”, not “power-oriented” as it was previously. Filing a complaint entails not only significant resource costs but also political costs. In particular, as a number of South Asian countries receive preferential treatment from important markets such as the US and the EU, they may be reluctant to bring cases against the latter, even when they have every reason to.

Likewise, they lack institutional support for analysing the compatibility of trade measures taken by themselves and other Members with WTO agreements. Indeed, the inability of most South Asian countries to identify incidents of violation of WTO agreements is an even more serious concern than the high cost of litigation. They simply do not have a proper mechanism to investigate and assess complaints of violations. Hence, most South Asian countries will have to focus on developing human and institutional capacity for participating effectively in the WTO dispute settlement process. Capacity has to be built at the level of the government as well as the private sector.

Except for India and Pakistan, South Asian countries lack an adequate pool of expertise in WTO law, international law and trade remedy measures. Even in the two countries, the existing pool of lawyers in the private domain has not been effectively tapped. The governments should provide incentives to private lawyers to focus on WTO-related cases. South Asian countries, especially those that lack institutional capability and resources to use the multilateral dispute settlement system

to their advantage, would do well to avail themselves of the training programmes and other technical cooperation services provided by a number of international organisations, including the WTO's Institute for Training and Technical Cooperation, the United Nations Conference on Trade and Development (UNCTAD) and the Advisory Centre on WTO Law (ACWL).

Apart from utilising the existing system to their benefit, South Asian countries can also seek changes in the dispute settlement rules to make them more "development-friendly". An opportunity towards that end is offered

by the Doha Ministerial Declaration 2001, which has mandated negotiations on improving and clarifying the DSU. They would indeed benefit if they could obtain a longer "reasonable period of time" for compliance in the cases that they lose. And regarding the cases that they win, since the lack of an adequate market size often constrains small economies from credibly threatening retaliation for non-compliance, the winning parties should be allowed to seek authorisation of suspending concessions and other obligations in sectors of their choice without being required to go through the process set out in Article 22.3 of the DSU.

Introduction

Dispute settlement is one of the corner stones of the World Trade Organization (WTO) and many refer to it as the “jewel in the crown”. The Dispute Settlement Understanding (DSU), negotiated as part of the Uruguay Round of Trade Negotiations (1986-1994), gives Member countries the confidence that the commitments and obligations contained in the WTO Agreements will be respected. As Article 3.2 of the DSU notes, dispute settlement “is a central element in providing security and predictability to the multilateral trading system”.

Prior to the formation of the WTO, dispute settlement predominantly involved only the United States (US) and the European Communities (EC) (Hudec 1993). The US was a party in over half of the cases brought either as a complainant or as a respondent and the EC participated in at least 35 percent of the cases.

The culmination of the Uruguay Round in 1995 brought about a paradigm shift in the balance of power in the new world trading order. Earlier under the General Agreement on Tariffs and Trade (GATT), bringing a dispute against another country was considered to be an “unfriendly act” and the political realities of the day influenced the lodging and active pursuit of controversial disputes. The possibility of the respondent blocking the formation of the panel or the adoption of the report provided a spectre of uncertainty. However, these worries have dissipated with the coming into being of the WTO DSU. The DSU sought to introduce greater balance and equality in relationship to matters connected to international trade. The feature of “automaticity”,

implying that it will be virtually impossible to block a dispute settlement report, reaffirmed the legal legitimacy of the new dispute settlement system. The DSU guarantees (i) security and predictability of the commitments undertaken by the Members; and (ii) right to prompt and effective redress of disputes between the parties.

The first 12 years of the operation of the WTO dispute settlement system are replete with instances where developing countries or small economies have been able to successfully challenge measures taken by powerful trading nations. Some of the notable cases include: *US- Underwear* (Costa Rica challenging the US), *US- Shirts and Blouses* (India challenging the US), *US- Shrimp Turtle* (India, Pakistan, Thailand and Malaysia challenging the US), *EC- Sardines* (Peru challenging the EC), *EC- Tariff Preferences* (India challenging the European Union), *US- Gambling* (Antigua challenging the US), etc (Matsushita 2005).

Does the attainment of formal equality make any real difference to the position of developing countries and least developed countries (LDCs) under the WTO dispute settlement? This question is crucial in the context of South Asian countries since they continue to remain on the fringes of international trade. Among the South Asian countries, only India and Pakistan have been involved as a direct party in more than one dispute before the dispute settlement body of the WTO. Sri Lanka and Bangladesh have been involved in one dispute each while Nepal and Maldives are yet to be involved in a dispute, either as a complainant or even as a third party. These facts demonstrate

Does the attainment of formal equality make any real difference to the position of developing and least developed countries under the WTO dispute settlement?

the varying extent of participation even amongst countries in this region.

It is often said that one of the successes of the new dispute settlement is the relatively high participation of developing countries. Countries such as India, Brazil, Thailand, Chile and Argentina are as active as any other developed country Member in the WTO dispute settlement system (Abbot 2007). These countries have been exceptional in proactively using the system. But it is important to put a caveat here. Even now, after 12 years, a number of developing countries and LDCs have completely stayed away from panel participation. Apart from Bangladesh, no LDC has ever been either a complainant or a respondent under the new dispute settlement process. It is not as if these countries have not faced any major trade challenges to warrant invocation of the remedies provided for by the WTO dispute settlement mechanism. Their low participation or no participation only points to some of the inherent inadequacies in the system in catering to the needs of low income and marginalised economies.

In the context of the WTO, a Member's participation in the system will, in part, be a function of its ability to process knowledge of past and continuing violations of trade rules, their causes and the feasibility of pursuing the appropriate legal remedy. In a large number of cases, some of the actions of other WTO Members may appear to violate one or many of the provisions of the covered agreement of the WTO. However, it is a long and hard decision for a WTO Member to determine whether such violations should be brought to the Dispute Settlement Body (DSB) or not. The cost of litigation is high. The political costs of pursuing legal remedies could be even higher. In a few cases, a Member might just want to seek consultation on an issue without a genuine desire or the ability to fight the case all the way up to the panel and appellate processes. It is not surprising that out of the approximately 360 consultations requested, only 109 disputes

(as of March 2007) have resulted in full panel proceedings.

Despite efforts at trade-related capacity building, including developing legal expertise at the government level, pursuing a case at the WTO has not become any easier. WTO litigation could put considerable strain on the meagre resources of a relatively small economy. A number of WTO Members face difficulties in initiating a WTO case from various factors, including inability to identify the existence of "winnable" claims, internal bureaucratic hurdles, lack of coordination between nodal ministries, lack of support from home capitals and lack of qualified people. Some of the shortcomings have been addressed in the last few years through comprehensive trade-related capacity building programmes. But it is important to ask whether such capacity building programmes have made any difference. This paper attempts to look at some of such issues faced by the South Asian countries.

Many commentators have already written (Brown and Hoekman 2005) and spoken about these problems in the context of developing countries. Having said this, one should say that such studies in relation to South Asian economies are relatively sparse. This paper examines how the South Asian countries have enforced their rights and in what areas of WTO agreements, including specific difficulties faced by such countries while doing so.

Chapter 2 is an introduction to the main features of the WTO dispute settlement system. In particular, it will briefly explain the three stages of the dispute settlement process: (i) consultations; (ii) panels, or Appellate Body (AB); and (iii) implementation. An explanation of the process of the establishment of panels, the panel process, the legal implications of adoption of panel reports, recourse to the appellate process, setting up of compliance panels and the authorisation of countermeasures whenever compliance is not secured, etc., are briefly provided in this

Apart from Bangladesh, no LDC has ever been either a complainant or a respondent under the new dispute settlement process

chapter. Chapter 3 critically analyses all the major disputes brought before the panels/AB by the South Asian Members and the jurisprudence involved. The experience of the South Asian countries in enforcing favourable outcomes as well as in implementing adverse rulings is explained briefly in this chapter. Chapter 4

examines the specific areas of concern for the South Asian countries while initiating trade disputes and warding off possible challenges to their trade measures. This chapter also provides a few suggestions as to how the South Asian countries can meaningfully participate in the dispute settlement system.

Introduction to the WTO Dispute Settlement System

The most distinguishable feature of the 1995 WTO Agreement was the shift in the character of the world trading system from a “power-oriented” system to a “rule-oriented” system. In a “power-oriented” system what counts is the bargaining power of the parties. During the GATT days, it was indeed difficult to force a powerful trading nation to comply with the recommendation of a panel. Some of the controversial panel rulings that were against the interests of the losing party remained unenforced.¹ In a “rule-oriented” system, however, what counts is the legitimacy of a set of internationally agreed upon rules of trade. A “rule-oriented” system ensures stability, predictability, equity and fairness. A rule-based system, in order to be fair, must benefit every party, small or big.

The adoption of a rule-based system also meant the introduction of a variety of reforms to the GATT system. One of the significant reforms in the area of dispute settlement was the creation of a streamlined dispute resolution process based on the concept of “reverse consensus”. The “reverse consensus” rule ensured that the losing parties in a WTO dispute would not be able to block the adoption of panel or AB reports. The adoption of this concept has introduced “legal legitimacy” as opposed to “political legitimacy” to the whole dispute settlement process.

The new DSU has also incorporated strict procedural time periods that are rarely breached. The automated process ensures

that the WTO panel and appellate processes are completed in a time-bound manner. Another significant achievement of the DSU is its ability to rein in “unilateralism”² by some developed country Members, in particular the US. The US had implemented laws such as Section 301 of the Trade Act of 1974 and the Super 301 provisions of the Omnibus Trade and Competitiveness Act of 1988 during the GATT days. Among the South Asian countries, India was a victim of unilateral trade sanctions consistently during the late 1980s and 1990s. The ability of a WTO Member to resort to unilateralism was severely curtailed by the DSU.³ Article 23 of the DSU requires WTO Members to have recourse to (and abide by) the rules and procedures of the DSU in disputes relating to “covered agreements”.

The “rule-oriented” system does not completely rule out room for diplomacy though (Cameron and Gray 2001). The DSU mandates consultations in good faith. As stated earlier, many disputes have been settled in the consultation stage itself (Busch and Reinhardt 2003). The DSU also provides for good offices, conciliation and mediation, which may be requested by Members if consultations fail to produce an acceptable outcome.⁴ A panel can be set up only if these diplomatic means of settlement fail to resolve the dispute between the parties. The fact that one can expect full-fledged panel proceedings only in one of three consultations underscores the importance of diplomacy even in a “rule-oriented” system.

The “reverse consensus” rule ensures that the losing parties in a WTO dispute are not able to block the adoption of panel or AB reports

2.1 WTO Dispute Settlement Process

2.1.1 Panels

In order to appreciate the effectiveness of the WTO DSU, it is necessary to compare it with its predecessor. Under the GATT, there were no specific clauses providing for the establishment of dispute resolution panels although they were loosely authorised under Articles XXII and XXIII of the GATT. Panels under GATT 1947 were established on an ad hoc basis. Dispute resolution evolved under the GATT as a practical way to administer disputes as opposed to parties engaging in consultations. Alternatively, the WTO dispute settlement adopts a more permanent presence, lending a new stature to the DSB.

As is seen from practice, the Members are keen to use the appellate review process that did not exist under GATT 1947

The DSU provides for a procedure that starts with mandatory consultations. Consultations are more of a diplomatic exercise wherein both parties have to discuss with each other the problem through which differences could be sorted out. At times the parties can even ask the WTO Director General to act as a mediator. If the disputing Members cannot agree to a settlement during these consultations within a certain period or if the defending party does not respond to the consultation request, the complaining Member may request a panel. Panels are composed *ad hoc* and they normally consist of three (or five) specialists who engage in fact finding and apply the relevant WTO provisions to the dispute on hand. The statutory duration of the panel process is six months. The deadline for completion of this process can be extended to nine months, if need be, but the DSU seems to suggest that this period should not be extended any further. There is an opportunity for the disputing Members to appeal the findings of the panel within a period of 60 days. If the panel findings are not appealed within this period, the reports are adopted in a quasi-automatic manner.

The findings of the panel can be challenged before the AB by either or both

the parties. As is seen from practice, the Members are keen to use the appellate review process that did not exist under GATT 1947. It is reported that more than 70 percent of the panel reports released by the DSB are appealed (Leitner and Lester 2007).

2.1.2 Appellate Process

The AB is a standing body composed of seven jurists. Normally three members of the AB hear a particular appeal. The appeal can uphold, modify or reverse the panel's legal findings and conclusions. Usually the appeals should not last more than 60 days but at times they are extendable to a maximum of 90 days. If it is found that a trade measure is in violation of the WTO law, the defendant has to bring the measure into compliance with the covered agreements within a reasonable period of time (RPT), normally not exceeding 15 months. However this 15-month period is a mere guideline, and not an average or standard period. If the prevailing (winning) Member believes that the other Member has not implemented the WTO rulings and recommendations by the end of the compliance period, it may request the other Member to negotiate compensation. If after 20 days they could not agree on compensation then the complaining party may ask the DSB to impose trade sanctions against the other.

Compensation is generally understood to require the defendant to provide additional commitments, typically in the form of reducing other trade barriers of interest to the winning party. The other important remedy is that of retaliation, where the winning party is authorised to withdraw or suspend trade concessions to the non-complying party.⁵ The retaliation is normally done in the same sector. The DSU also permits cross-retaliation, which authorises a party to have recourse to suspension of concessions in sectors outside that of the original dispute. This is primarily done to minimise the chance of actions affecting unrelated sectors but at the same time ensuring that the actions be effective. This

was witnessed in *EC-Bananas*⁶, a dispute relating to the GATT, where Ecuador sought authorisation to retaliate in relation to concessions under the Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement.

As provided under the DSU, the DSB is to authorise the retaliation request within 30 days after the compliance period expires. If the defending Member objects to this, the proposed request for retaliation will be submitted for arbitration and the deadline will be consequently extended till the arbitrator comes out with a report. The arbitration is to be carried out by the original panel, if members are available, or by an arbitrator appointed by the WTO Director General.

The DSU also provides for setting up a compliance panel under Article 21.5 if the disputing parties disagree as to whether the defending Member has implemented the WTO rulings or recommendations or not. Article 21.5 provides a shortened timeframe as opposed to the original panel process to decide the issue of compliance. Once the compliance panel is established, it has to issue the report within 90 days; the report can also be appealed. Since the 30-day period of approving countermeasures does not incorporate Article 21.5 proceedings, a procedural problem referred to as “sequencing”⁷ has arisen, the details of which are not dealt with here.

The incorporation of deadlines at various stages of the panel or appellate stages underscores one of the important features of the WTO DSU, namely, the expeditious redress of disputes. In some straightforward cases, where the parties did not attempt to deliberately delay the proceedings, the whole process, from consultation requests to adoption of reports, has been completed in less than two years (Davey 2005). One may also add another nine months as a reasonable time for implementation.⁸ This is indeed quick and fairly expeditious when compared to other forms of international dispute settlement.

2.1.3 A Few Substantive Issues of WTO Dispute Settlement

While coming to some of the more substantive issues, the dispute settlement panels are often confronted with the issue as to what extent such adjudicating bodies can “second-guess” the decision of a national government agency. Article 11 of the DSU provides the standard of review to be applied by WTO panels “in respect of both the ascertainment of the facts and the legal characterisation of such facts”. As elaborated by the AB, the standard is to “make an assessment of the facts before it, including an objective examination of the facts of the case and the applicability of and conformity with the relevant covered agreements”.⁹ There is also a special standard of review provision under the Antidumping Agreement.¹⁰ That said, there are concerns regarding the applicable standard of review specifically in relation to trade remedy cases (anti-dumping/countervailing duty) and disputes concerning regulatory measures such as technical barriers to trade (TBT) and sanitary and phytosanitary (SPS) measures.

The moot issue is to what extent such panels would or should extend deference to the decisions of the agency. If the degree of deference given to the national agency’s decision is low, it will put excessive strain on the defending party. Observance of certain deference to agency findings could therefore be potentially important for South Asian countries, whose ability to pursue national policies consistent with WTO Agreements has still not been severely tested. Considering the fact that the decision of the panels or AB are binding, with the Member States enjoying very little freedom to modify or revise such findings, it is quite essential that all WTO Members, irrespective of their state of development, are able to implement the provisions of WTO-covered agreements with due care. It is often criticised (Barfield 2001) that the rulings of the panel/AB turn intrusive in matters closely associated with sovereign decision-making, but one could always argue that

The incorporation of deadlines at various stages of the panel or appellate stages underscores one of the important features of the WTO DSU, namely, the expeditious redress of disputes

had greater care and discretion been exercised by national authorities, things could not have led up to the dispute settlement stage.

The WTO panels and AB often carry out complex interpretative exercise of the applicable agreements. In a vast majority of cases, the interpretative outcome might be broadly acceptable to both parties to the disputes, including the losing party. However, in some select cases, it might be argued that the panels/AB exceeded their brief and legislated rules. There is a view that the findings on controversial issues such as “zeroing” in antidumping investigations¹¹ and causation standards in trade remedy cases (particularly the WTO Safeguard Agreement), etc., amounted to surrogate rule-making (Sykes 2003).

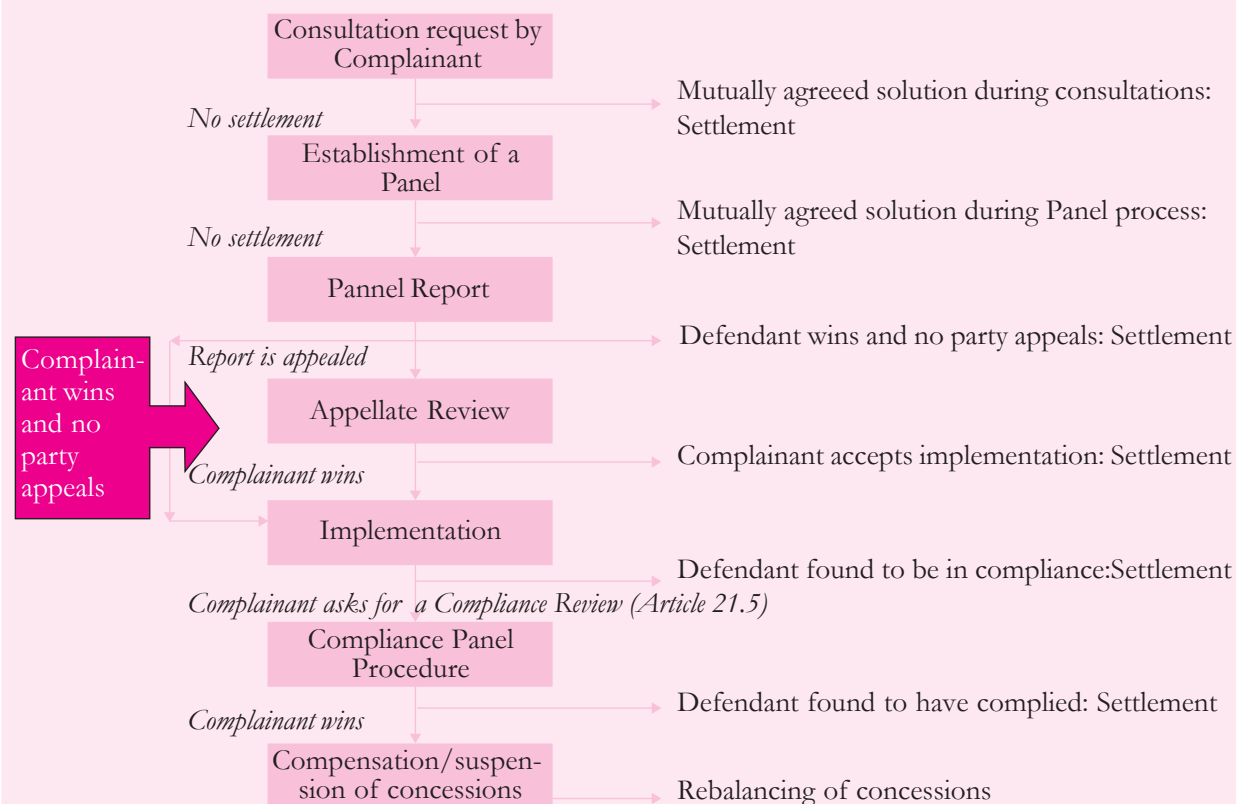
It is a fact that international tribunals, including WTO panels and AB, have limited and specified jurisdiction and cannot create new obligations.¹² Even “gap filling” is potentially risky, since the Members would not have intended to incor-

porate such situations in the WTO treaty. One should also recall that the WTO DSU is not a closed system and the WTO treaty is not beyond ambiguity in many areas.¹³ As clearly provided for by Article 3.2 of the DSU, the principles of customary international law as well as the general principles of law would also apply to WTO dispute settlement and could help clarify the provisions of the various covered agreements.¹⁴ Aspects such as judicial economy, procedural fairness, *stare decisis*, burden of proof, etc., have entered the discourse, enabling the DSB to develop a body of law rather than simply acting as an *ad hoc* arbiter. These concepts are not expressly incorporated in the DSU but have been embedded as part of the WTO law through an interpretive decision in the panel and/or appellate process.

Notwithstanding some of these criticisms—most of which emanate from some of the developed countries who were obviously upset with the losses suffered—the general feeling is that WTO DSB has been able to retain a strong level

Out of the 335 disputes brought by various Members before the WTO up to the year 2006, 125 disputes had been brought by the developing Members

Figure 2.1 The Dispute Settlement Process



of support from WTO Members. Members, especially developing countries, have demonstrated a keen willingness to proactively engage in the system. Statistics indicate that out of the 335 disputes brought by various Members before the WTO up to the year 2006, 125 disputes had been brought by the developing Members.¹⁵

Some of the aspects outlined above were to explain the core features of the WTO dispute settlement system. An outline of

the nature of obligations enjoined by the WTO system on WTO Members will be discussed in the next chapter, which deals with South Asia's experience with the WTO dispute settlement process. Having attempted to summarise some of the procedural and substantive features of the dispute settlement system, it will be useful to understand the various stages involved in the lodging of a case before the WTO. Some of the sequential steps involved in the dispute settlement process are set out in Figure 2.1.

Issues for discussion

- How can deference to the decisions and findings of national agencies by dispute settlement panels help South Asian countries?
- How valid is the argument that panels/AB have at times exceeded their briefs and legislated rules?
- What explains the willingness demonstrated by developing countries in engaging in the WTO dispute settlement system?

Overview of WTO Disputes involving South Asia (1995-2006)

Membership of the WTO entails obligations and responsibilities of a far-reaching nature for a country. Being part of the multilateral trading system enjoins commitments in regard to various WTO Agreements. The three major basic agreements are GATT 1994 and its related agreements and other texts; the General Agreement on Trade in Services (GATS and its annexes); and the TRIPS Agreement. All Members are also signatory to and bound by the DSU and the Trade Policy Review Mechanism.

The rules implemented by the WTO are, in principle, non-discriminatory. The WTO system does not explicitly distinguish between the trade of developing and developed countries. However, to some extent, the particular difficulties of developing countries and LDCs have been recognised in the various covered agreements by way of some flexibilities. Such flexibilities, known as Special and Differential Treatments (S&DTs), manifest in the nature of longer phase-out periods or delayed implementation of obligations as reflected in individual covered agreements. But at a fundamental level, obligations enshrined in WTO Agreements will have to be fully implemented by all Member countries one day or the other, whatever their economic status.

In ordinary parlance, joining the WTO means undertaking a few commitments with respect to tariff bindings under the GATT or the Schedules under GATS or agreeing to implement the terms of the TRIPS Agreement. There is a broader obligation to align one's customs as well as internal laws with the principles set by the WTO Agreements. The principle of

Most Favoured Nation (MFN) treatment lies at the heart of the WTO system. Even a gesture like granting tariff preference to economically less advanced countries could run foul of the MFN obligation unless a set of objectives are met. Domestic regulatory and tax measures need to be in tune with the National Treatment obligations under the WTO. As the case may be, the implementation of WTO commitments can be at the federal, sub-federal and in certain cases at the municipal government level. For instance, India recently faced a WTO challenge with regard to its liquor taxation, which is a subject matter for State-level (sub-federal) legislation in India. Violation of WTO commitments at any of these government levels could arguably lead to a possible dispute. To add to the layer of complexities, various WTO Members have different legal and constitutional systems and the implementation of the WTO commitments may differ from one country to another. Even within South Asia, the constitutional process of implementing WTO commitments differs from one Member to another.

South Asia as a contiguous geographical mass may look similar on a number of parameters such as income levels, overall economic conditions and composition of export and import baskets. However, some countries within the group have a longer association with the WTO or its predecessor, the GATT. India, Pakistan and Sri Lanka have been founding Members of the GATT. Bangladesh joined the GATT after its formation in 1972. Maldives joined the WTO in 1995 whereas Nepal joined the WTO only in 2004.

Various WTO Members have different legal and constitutional systems and the implementation of WTO commitments may differ from one country to another

South Asia has three developing¹⁶ and three LDC Members and in terms of overall merchandise trade, South Asia's participation in world trade is far from significant. A recent study indicates that the possibility of encountering disputable trade measures is proportional to the diversity of a country's exports over products and partners, which means that large and more diversified exporters would be expected to bring more complaints than smaller and less diversified exporters (Horn et al. 2005). For instance, if the export base of a WTO Member is characterised by a largely non-contentious single unprocessed commodity, it is improbable to expect such a Member to bring cases under the WTO DSU.

South Asia, which accounts for less than 1.9 percent of the world merchandise trade, has been involved in more than 10 percent of the disputes raised at the WTO

In that context, South Asia, which accounts for less than 1.9 percent of the world merchandise trade, has been involved in more than 10 percent of the disputes raised at the WTO.¹⁷ For a moment, it could be argued that this relatively high involvement could be attributed to the presence of India in the group, which is traditionally an active Member in the WTO. It is worth recalling that apart from India, other countries, including Pakistan and Sri Lanka, have also participated in the process earlier. Pakistan's use of the DSU mechanism in a challenge involving the imposition of transitional safeguard measures in the US on *Cotton Yarn* is widely acknowledged as a triumph of perseverance in making use of the dispute settlement mechanism.¹⁸ Bangladesh initiated dispute settlement proceedings against India in the Antidumping Proceedings on *Lead Acid Batteries*, which marked the willingness of countries in this region to settle trade disputes amongst themselves under this mechanism.

Statistics are indicative, but not conclusive. The crucial question is how some of the South Asian countries perceived the possibility of a 'winnable' dispute and pursued the matter. A striking feature of South Asia's involvement in the process is the contribution it has made in raising certain cases, which eventually served the wider systemic interests of the WTO. The

Shrimp-Turtle dispute was a collaborative effort of major Asian countries in which India and Pakistan were complainants and Sri Lanka was a third party. India's challenge of the "zeroing" practice of the European Union (EU) in the *Bed Linen* dispute heralded the eventual elimination of zeroing practice in antidumping investigations.

In addition to being a direct party, South Asian countries have also actively participated in a number of disputes as third parties. India has participated in 38 disputes as a third party while Pakistan and Sri Lanka have also keenly participated in eight and three disputes respectively, each as a third party. Participation as a third party is helpful in learning the dynamics of international trade litigation and helps Members to gain firsthand experience of the procedures, preparation of submissions, replies and rebuttals, etc.

A significant spurt in WTO litigation has been in the field of trade remedies. India as a complainant has raised eight disputes (out of 17 cases in which it was a complainant) in relation to antidumping and subsidies alone. India has raised another two disputes in relation to transitional safeguard measures under the Agreement on Textiles and Clothing (ATC), while Pakistan too has filed two cases in the field of trade remedies. By the same token, a few complaints were filed against India in relation to certain antidumping investigations initiated by India although such complaints did not lead to full panel proceedings. As far as India is concerned, it has initiated more antidumping cases than any other country in the world during the last three years and has been largely fortunate not to be involved in any drawn-out dispute with any WTO Member. The EC challenged a number of antidumping actions¹⁹ (27 cases in all) taken by India involving EC countries. However, the dispute was not seriously pursued. It is possible that the purpose of the challenge of these measures was not to get favourable rulings as such from the WTO but to put a restraint on future investigations. Other than India, Pakistan is slowly

but surely catching up in this field.²⁰ In short, exposure of trade remedy investigations to dispute settlement proceedings will indeed be a challenge for most of the South Asian countries in the future.

Carrying out a trade remedy investigation in full conformity with the respective WTO agreement will not be an easy task. Conformity with procedural standard and the rigour and objectivity of the underlying determinations will be put

to scrutiny only when the matter goes to a panel. In such a case, a panel would certainly examine whether the facts established by the agency are unbiased and objective and the interpretation of the provisions of the implementing legislation conforms to the customary principles of international law. The familiarity with these principles comes only with experience and practice. To illustrate a case, the two antidumping investigations carried out by Guatemala against Port-

Table 3.1 India as a Complainant

S.N.	Title of the case	Year	Agreement	Status
1	Poland- Automobile (DS 19)	1995	GATT	Not pursued (panel not established).
2	US- Women's and Girl's Wool Coats (DS 32)	1996	ATC	Not pursued (panel not established).
3	US- Wools and Shirts (DS 32)	1996	ATC	Resolved further to AB ruling.
4	Turkey- Textiles(DS 34)	1996	GATT	Resolved further to AB ruling.
5	US- Shrimp (DS 58)	1996	GATT	Resolved further to AB ruling. Article 21.5 panel established and the findings appealed to AB.
6	EC- Rice (DS 134)	1998	AoA, GATT, SPS, TBT, Import Licensing	Not pursued (panel not established).
7	EC- Unbleached Cotton Type Bed Linen (DS 140)	1998	ADA	Not pursued (panel not established).
8	EC- Bed Linen (DS 141)	1998	GATT, ADA	Resolved further to AB ruling. Article 21.5 panel established and the findings appealed to AB.
9	South Africa- Pharmaceuticals (DS 168)	1999	GATT, ADA	Not pursued (panel not established).
10	US- Steel Plate (DS 206)	2000	GATT, ADA	Resolved after panel finding. Report not appealed.
11	US- Byrd Amendment (DS 217)	2001	GATT, ADA, ASCM	AB found against the US authorisation for suspension of concession further to Arbitrator's findings.
12	Brazil- Jute Bags	2001	ADA, GATT	Not pursued (panel not established).
13	Argentina- Pharmaceuticals (DS 233)	2001	GATT, TBT, WTO	Not pursued (panel not established).
14	US- ROO for Textiles (DS 243)	2002	ROO, GATT	Resolved after panel finding.
15	EC- GSP (DS 246)	2002	GATT, Enabling Clause	Resolved further to AB findings.
16	EC- Steel Products (DS 313)	2004	GATT, ADA	Resolved. Measure terminated before panel was established.
17	US- Customs Bond (DS 345)	2005	GATT, ADA	Currently before the panel.

Source: www.wto.org

land Cement from Mexico, which were finally challenged at the WTO, reveal how even fundamental violations could take place in the absence of institutional experience in conducting such actions.²¹ Therefore, the propensity of a country to pursue trade remedy cases would naturally expose it to challenges in WTO and all such Members have to be prepared to defend themselves against such challenges.

3.1 India in WTO Dispute Settlement

Among South Asian countries, India has been the most active participant both as a complainant and a respondent in the WTO dispute settlement system. In the past 12 years, India has brought consultation requests in respect of 17 disputes.

Among South Asian WTO Members, India has been the most active participant both as a complainant and a respondent in the dispute settlement system

The following discussion on India's experience with WTO dispute settlement will elaborate on the jurisprudence involved and their relevance to the WTO system as a whole. Table 3.1 highlights cases brought by India before the DSB as a complainant.

While discussing cases where India has been a respondent, it is interesting that the EU is the main complainant against India, followed by the US. Other than the US and EU, consultations were sought against India by certain other countries in the Balance of Payment (BoP) case and by Bangladesh and Chinese Taipei, each in two separate antidumping investigations but these consultations have not resulted in full-fledged panel proceedings. Table 3.2 provides a summary.

The following section will, *inter alia*, deal with India's experience under the DSU summarising the core facts and substantive findings provided in the adopted panel or AB findings, wherever applicable. It is also seen that a couple of disputes had been referred to the compliance panel (Article 21.5 panel) and the findings of the compliance panel/AB are also summarised.

3.1.1 Disputes where India is a Complainant

A. US- Shirts and Blouses (WT/DS 33)

This is the first WTO dispute to which India was a direct party. The dispute relates to a transitional safeguard mechanism imposed by the US for textile and clothing items (woven wool shirts and blouses). The US requested consultations with India under Article 6 of the ATC in April 1995. The US also furnished Statement of "Serious Damage" along with the request.

Consultations took place between the US and India, but no agreement was reached. In July 1995, the US informed India that a restraint in the form of a quota on imports of woven wool shirts and blouses from India would be applied for a 12-month period. The US notified the WTO Textiles Monitoring Body (TMB) of the restraint pursuant to Article 6.10. The TMB concluded that actual threat of serious damage had been demonstrated and that it could be attributed to imports from India under Article 6 of the ATC. The TMB refused to reconsider the matter despite a request from India.

India challenged the matter before the DSB. The panel found that the US violated Article 6 of the ATC by failing to meet the serious damage and causation requirements while imposing a transitional safeguard measure. The major violation was that the US did not examine the data relevant to the woven wool shirt and blouse industry. The panel also held that the US did not examine the impact factors enlisted in Article 6.3, an examination of which is mandatory.

The dispute has an important place in WTO jurisprudence for its elucidation of the principle of burden of proof. In this regard, the AB stated that it is up to the complainant to present evidence and argument "sufficient to establish a presumption" that the measure is inconsistent with

WTO obligations. It is then up to the respondent Member to “bring evidence and argument to rebut the presumption”. The AB noted that this principle is accepted in most jurisdictions and is an accepted canon of evidence in civil and common law. The essence of the principle is that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence.

Based on the above premise, the AB agreed with India’s proposition that a party arguing the affirmative defence, such as exceptions in GATT Articles XX and XI:2 (c) (i), bear the burden of proof as to that claim. However, Article 6, according to the AB, stands on a different footing. The AB found that Article 6 of ATC

does not constitute such an affirmative defence. In other words, Article 6 stands as a “fundamental part of the rights and obligations of a WTO Member” during the ATC transitional period. This finding effectively overruled the finding of the panel in *US- Underwear*, a case brought by Costa Rica against the US. In *US- Shirt and Blouses*- another case related to ATC - the AB made clear that ATC Article 6 establishes certain rights for importing Members with respect to safeguard actions under the ATC, such that the complaining party who asserts violation of those rights bears the burden of proving such claims.

This case is also an authority for its articulation of the principle of judicial economy. The issue is whether the panel

The AB agreed with India’s proposition that a party arguing the affirmative defence, such as exceptions in GATT Articles XX and XI:2 (c) (i), bear the burden of proof as to that claim

Table 3.2 India as a Respondent

S. N.	Title of the case	Year	Agreement	Status
1	India- Patents- US (DS 50)	1996	TRIPS	Resolved further to AB finding. India made changes to its Patent legislation.
2	India- Patents- EU (DS 79)	1996	TRIPS	Resolved further to AB finding. India made changes to its Patent legislation.
3-9	India- QRs (DS 90, 91, 92, 93, 94, 95 and 96)	1997	GATT, AOA	Resolved further to AB finding. India phased out QRs by 2001.
10	India- Certain Commodities (DS 120)	1998	GATT	Dropped.
11-12	India- Auto (DS 146, 175) (US and EC)	1998	GATT, TRIMs	Resolved. Panel finding was appealed.
13	India- Import Restrictions (EC)- DS149	1998	GATT	Dropped.
14	India- Customs Duties (DS 150)	1998	GATT	Dropped.
15	India- EXIM Policy (DS 279)	2003	GATT	Not pursued.
16	India- Antidumping on Certain Products (DS 304)- (EC)	2003	GATT, ADA	Not pursued.
17	India- Lead Acid Batteries (DS 306)- (Bangladesh)	2004	GATT, ADA	Resolved. India withdrew the antidumping duties against Bangladesh.
18	India- Antidumping Measures (Chinese Taipei)	2004	GATT, ADA	Panel not established, settlement not notified.
19	India- Import Measures on Wines (EC)	2006	GATT	At the consultation stage.
20	India- Additional Duties (US)	2006	GATT	At the consultation stage.

Source: www.wto.org

is required to examine all claims referred to it although a finding on all issues is strictly not required for a proper adjudication of the matter at hand. The AB asserted that nothing in Article 11 of the DSU and nothing in previous GATT practice requires a panel to examine all legal claims. Indeed, it noted that previous GATT panels had often exercised judicial economy and refused to decide certain claims. The panel also observed that previous GATT panels such as those in *Brazil- Coconut* and *US- Gasoline* cases also followed this practice. The AB considered that a requirement to consider all claims would be inconsistent with the general aim of the dispute settlement system as defined in Article 3.7 of the DSU, which is fundamentally to “settle disputes”. The AB, therefore, upheld the panel’s exercise of judicial economy.

The panel and later the AB held that Turkey’s measures were not justified under Article XXIV since Turkey had other alternatives available that would meet the requirements of Article XXIV: 8(a) of the GATT

The recommendations of the DSB were complied with by the US.

B. Turkey- Textiles (WT/DS 34)

This dispute relates to the quantitative restrictions (QRs) imposed by Turkey pursuant to the formation of the Turkey-EC customs union. On 6 March 1995, the Turkey-EC Association Council took Decision 1/95 which was to enter into force on 1 January 1996. This decision set out the modalities for the final phase of the Association between Turkey and the EC which encompassed the adoption of a Common Customs Tariff with the EC and other provisions for the harmonisation of Turkey’s policies and practices in all areas where necessary.

The entry into force of the customs union was notified to the WTO in 1995 and was consequently referred to the examination of the Committee on Regional Trade Agreement. The formation of the customs union called for Turkey’s adoption of the relevant EC Regulations, namely, Council Regulation 3030/93, whereby Turkey was supposed to adopt, for its imports of textiles and clothing, QRs similar to those applied by the EU.

Turkey came up with a standard formula for calculating the levels of QRs on textile and clothing items vis-à-vis third countries, including India. Turkey negotiated agreements for providing for restraints similar to those of the EC with 24 countries (both WTO Members and non-members). As of 1 January 1996, unilateral restrictions or surveillance regimes were applied to imports originating in an additional group of 28 countries (both WTO and non-WTO Members).

As of 1 January 1996, Turkey applied QRs on imports of 19 categories of textile and clothing items from India. Turkey is one of the key destinations of Indian textiles and clothing items, so the restrictions meant significant trade loss to India. India challenged the QRs on the ground that they were inconsistent with GATT Articles XI and XIII and Article 2.4 of the ATC. A panel was established on 13 March 1998.

Turkey had a few justifications for imposing the QRs. First, as provided for under Article XXIV: 8(a) (i), the constituent members of a customs union are required to eliminate “duties and other restrictive regulations of commerce” with respect to “substantially all trade” between them; second, the duties applied by the constituent members after the formation of the customs union “shall not on the whole be higher than the general incidence of duty applied by each before the formation”. Turkey, therefore, contended that it had to impose the QRs to prevent the EC regime on QRs from being circumvented.

The panel and later the AB held that Turkey’s measures were not justified under Article XXIV since Turkey had other alternatives available that would meet the requirements of Article XXIV: 8(a) of the GATT. The AB noted that in order to justify measures which are inconsistent with a provision of the GATT, it must be shown that the requirement to form the agreement, as set out in Article XXIV, cannot be met without the measure. The AB concluded that QRs were not necessary for the forma-

tion of the customs union and, accordingly, not justified by Article XXIV. The availability of tools such as rules of origin (ROO) was cited by the AB. The panel, on the other hand, had assumed the existence of the customs union and proceeded to examine the necessity of the measure.

One of the other issues examined in this case was whether dispute settlement panels or the Committee on Regional Trade Agreement should decide whether a measure taken pursuant to a regional trade agreement is justified under GATT Article XXIV.

The panel expressed scepticism that it had the authority to conduct an examination of whether a regional trade agreement meets the requirement of a customs union as defined in Article XXIV. The AB found that not only are the dispute settlement panels permitted to make a determination as to whether a regional trade agreement meets the requirement of a customs union, they are expected to do so while evaluating a defence under Article XXIV.

C. US- Shrimp (WT/DS 58)

This case is often considered as the most profound “constitutional” case of the WTO system that addressed some of the key jurisprudential issues involving the multilateral trading system. It was brought jointly by India, Pakistan, Indonesia and Malaysia.

It involved a challenge against import restrictions on shrimp and shrimp products from countries including India that had not used fishing nets with Turtle Excluder Device (TED) for catching shrimp or a harvesting method similar to that used by the US which did not endanger sea-turtles. The scheme otherwise permitted unrestricted entry into the US of shrimp from any country. This implied that the access to the US market would depend upon the harvesting country having a regulatory programme identical to that of the US, aimed at controlling incidental turtle deaths. When the harvesters used TEDs of the kind required in the

US, they were eligible to export the product to the US.

The complainants argued that the ban was in violation of Article XI of the GATT, a provision which prohibits imposition of QRs. The US did not contest this claim. Of course, it was arguable whether the measure was a border measure under Article XI of the GATT or whether it should be regarded as a means of enforcing a domestic regulatory scheme at the border and therefore be examined under Article III (national treatment provision). This issue is essentially a quintessential one in the context of GATT jurisprudence. It is important to note that the principle of national treatment requires only that the treatment accorded to a domestic product should also be accorded to the imported product. Therefore, if one were to distinguish between shrimp caught by TEDs and shrimp caught by other means based on their process and production methods, the products are arguably different and hence no incidence of discrimination exists. The danger of such an approach is that one could artificially differentiate shrimp along the lines of “turtle-friendly shrimp” and “turtle-unfriendly shrimp”. Of course, the element of “protective intent” of the measures will have to be seen then.

The WTO panel did not even bother to examine whether such a regulatory distinction exists. The panel found the measure as a trade embargo and in violation of Article XI of the GATT. The panel then held that measures such as shrimp embargo were as such outside the beneficial ambit of Article XX by virtue of the general risk they posed to the multilateral trading system. Article XX of the GATT exempts Members from various commitments under the Agreement subject to the Member violating the commitments satisfying certain conditions (*exceptions*) and the measures not constituting arbitrary and unjustifiable discrimination in international trade (*chapeau*). The panel did not even consider whether the measures might fall within the exceptions of (b) or (g) of Article XX in light of the overall purpose and intent dis-

Brought jointly by India, Pakistan, Indonesia and Malaysia, the US-Shrimp case is often considered as the most profound “constitutional” case of the WTO system that addressed some of the key jurisprudential issues involving the multilateral trading system

closed in the chapeau.

The AB held that although the US ban was related to the conservation of natural resources and, therefore, covered by the exception provided under Article XX (g), it could not be justified under Article XX because the ban created an “artificial and unjustifiable” discrimination under the chapeau of Article XX. The AB reasoned, *inter alia*, that in its application, the measure was “unjustifiably” discriminatory because of its intended and coercive effects on specific policy decisions made by foreign governments which are Members of the WTO. The measure also constituted “arbitrary” discrimination because of the rigidity and inflexibility in its application, and the lack of transparency and procedural fairness in the administration of trade regulations.

The AB held that although the US ban was related to the conservation of natural resources and, therefore, covered by the exception provided under Article XX (g), it could not be justified under Article XX because the ban created an “artificial and unjustifiable” discrimination under the chapeau of Article XX

The AB reached the same finding as did the panel, but reversed the panel’s interpretation of Article XX and with respect to proper sequence of steps in analysing Article XX. The AB, in its landmark ruling in *US- Reformulated Gasoline*, had stated that the application of Article XX is a two-step process, involving, first of all, a determination whether the measures fall within a particular exception, and second, whether they meet the criteria in the chapeau. The panel in *US- Shrimp* instead began with the chapeau and never in fact got to the issue whether the measures fell within Article XX (b) or (g). This approach clearly fell short of the requirements in *US- Reformulated Gasoline*, where the AB had distinguished between the first step, the determination of whether a measure falls within a particular exception, and the second step, that of ascertaining whether the manner of application of the measure is reasonable or abusive.

The *US- Shrimp* case also dealt with the issue of accepting *amicus curiae* briefs. Article 13 gives panels the right to “seek information”. Article 12 provides panels with flexibility in creating working procedures for a particular case. The AB, while reversing the panel’s ruling, held that the “panel has the discretion either to ac-

cept and consider or to reject information submitted to it, whether requested by a panel or not” under DSU Articles 12 and 13. In fact, this ruling established the authority—albeit contentious—for accepting amicus briefs in other later cases: *US- Lead Bars* and *EC- Asbestos*.

The finding that the panels have the authority to accept amicus submissions was extremely controversial among the WTO Members although a number of non-governmental organisations (NGOs) supported such an initiative. In *EC- Asbestos*, the AB set out specific procedures for requesting leave to file amicus submissions in that proceeding. This decision was criticised in a special General Council meeting called to discuss the issue. Eventually, the AB did not grant leave to any entity that had requested leave to file an amicus brief.

The US had to comply with the adverse findings and took measures to comply with the findings by negotiating international agreements with the concerned governments. The US noted that it had issued revised guidelines implementing its Shrimp/Turtle law and had undertaken and continued to undertake efforts to initiate negotiations with the governments of the Indian Ocean region on the protection of sea turtles in that region. Malaysia later challenged the US implementation of the DSB recommendations under Article 21.5 proceedings. In this regard, the AB rejected Malaysia’s contention and agreed with the panel that the US only had an obligation to make best efforts to negotiate an international agreement regarding the protection of sea turtles and not an obligation to actually conclude such an agreement.

Neither India nor Pakistan was a direct party to the compliance panel/AB proceedings arising from the compliance panel’s findings.

D. EC- Bed Linen (WT/DS 141)

The dispute arose from the antidumping duties imposed by the EC on imports

of cotton-type bed linen from India. The petition for imposition of duties was filed by *EUROCOTON*, a federation of national producers' association of cotton textile products. On 13 September 1996, the EC published a notice of initiation of an antidumping investigation. The period of investigation (POI) for dumping was from 1 July 1995 till 30 June 1996 and the injury investigation period was from 1992 till 30 June 1996.

The EC conducted its antidumping analysis based on a sample of Indian producers. It also created a reserve sample in case companies in the primary sample refused to cooperate. Only one of the five Indian companies in the sample, namely, Bombay Dyeing, was found to have representative sales in the domestic market, but these sales were found to be outside the ordinary course of trade. Therefore, normal value for all of the investigated Indian producers was calculated on the basis of constructed value.

The ruling in this case will be known for a long time in view of its decision on the practice of “zeroing” in the context of dumping margin calculations. The WTO Antidumping Agreement has prescribed how the margins of dumping should be calculated and the various price comparison methodologies that could be used. To explain, the comparison between export price and normal value has to be based on a weighted average basis²² (W-W) for all transactions during the period

under investigation or on a transaction-to-transaction basis (T-T). An exception to this methodology can be made in situations where targeted dumping is observed, where the investigating agencies can use weighted average to transaction comparison (W-T).

It had been the practice of some Members to calculate dumping margins on the basis of comparing weighted average normal value with individual export price, i.e., W-T. Positive dumping margins were taken as they were. By contrast, negative margins (where export price was higher than normal value) were counted as zero. As a result, the EC did not establish “the existence of margin of dumping” for cotton-type bed linen on the basis of the comparison of the weighted average normal value with weighted average of prices of all export transactions involving all models or types of cotton-type bed linen. As is seen in Table 3.3, the margin without zeroing is nil, whereas with zeroing an inflated margin has been obtained.

The AB condemned the practice of “zeroing”, which was later followed in *US-Soft Lumber*, *US- Zeroing (EC)* and *US- Zeroing (Japan)* although the facts of these cases may differ.

This case also dealt with the issues of constructed cost which is derived by taking into account the cost of production, Selling, General and Administrative ex-

The EC resorted to “zeroing” – took positive dumping margins as they were but counted negative margins (where export price was higher than normal value) as zero

Table 3.3 Calculation of Dumping Margins

S.N.	Domestic sales (weighted average basis)	Export sales (transaction basis)	Margin without zeroing	Margin after zeroing
1	400	600	-200	0
2	400	500	-100	0
3	400	400	0	0
4	400	300	100	100
5	400	200	200	200
Dumping Margin			0	300

Note: Based on author's own calculation

The WTO panel also held that the EC acted inconsistently with Article 3.4 of the Antidumping Agreement, by failing to consider all 15 injury factors which deal with the effects of dumped imports on domestic industries

penses (S, G & A) and a reasonable amount of profit. Article 2.2.2 (ii) of the Antidumping Agreement says that amounts of S, G & A and profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation. The panel concluded that Article 2.2.2 (ii) may be applied not only where there are multiple exporters or producers, but also where there is one other producer or exporter. The AB reversed the finding of the panel. The basis for the reversal was that Article 2.2.2 (ii) refers to the “weighted average” of “amounts” incurred and realised by “other producers or exporters”. The AB considered that the use of the term “weighted average” requires that there be more than one set of data on which to calculate the “weighted average”. Therefore, there must be more than one “exporter or producer”. The use of the plural forms of the terms “amounts” and “exporters or producers” confirmed this interpretation.

The AB also reversed the finding of the panel with regard to the calculation of profits under Article 2.2.2 (ii) of the Antidumping Agreement. The panel held that in calculating the amounts of profits under this provision, a Member may exclude sales by other exporters or producers that are not made in the ordinary course of trade. On this issue, the AB emphasised that Article 2.2.2 (ii) refers to the weighted average of the “actual amounts incurred and realised” by other exporters or producers. Thus, according to the AB, there was no basis for excluding sales that are not in the ordinary course of trade.

The WTO panel also held that the EC acted inconsistently with Article 3.4 of the Antidumping Agreement, by failing to consider all 15 injury factors which deal with the effects of dumped imports on domestic industries.

This case is also known for its exposition of the need to explore the possibilities of “constructive remedies” such as the application of the “lesser duty” (dump-

ing margin or injury margin, whichever is less) and price undertakings before applying antidumping duties against exports from a developing country. The panel also held that the EC acted inconsistently with Article 15 by failing to reply to India’s request to offer price undertakings. But the AB held that there is no obligation to provide such remedies.

After the expiration of the RPT for the implementation in this dispute, India was of the view that the EC had not complied with the DSB’s recommendations. As a result, the matter was referred to the original panel under DSU Article 21.5. The Article 21.5 panel rejected all of India’s claims of violation. On appeal, the AB reversed one of the panel’s findings and found a violation of Articles 3.1 and 3.2 of the Antidumping Agreement since the EC included even the non-dumped imports in the category of “dumped imports” while assessing injury to the Community Industry.

E. US-Steel Plate (WT/ DS 206)

This dispute concerns the US imposition of antidumping measures on imports of certain cut-to-length steel plate from India. On 8 March 1999, the US Department of Commerce (USDOC) initiated an antidumping investigation on imports of steel plate from, *inter alia*, India. The sole Indian respondent was the Steel Authority of India Ltd (SAIL).

The USDOC, in its final determination, held that SAIL had failed to cooperate to the best of its ability while responding to various requests for information in the form of questionnaire responses. The USDOC held that errors and lack of information from SAIL rendered SAIL’s data unreliable and took recourse to “total facts available”. Also, based on its findings that SAIL failed to cooperate, USDOC determined that adverse findings were appropriate and assigned the highest dumping amongst various exporters from the subject countries. SAIL’s dumping margin was 72.49 percent.

SAIL challenged the measure before the US Court of International Trade (USCIT) arguing that the USDOC erred in rejecting the SAIL data in its entirety. SAIL cited the relevant US statute in support of its arguments. The USCIT upheld USDOC's determination of the relevant US statute, but it remanded the case for an explanation of USDOC's decision that SAIL failed to act to its best ability. The USDOC issued its re-determination on remand on 27 September 2001. The USDOC found that the use of adverse inference was appropriate in the case.

India challenged the US authority's resort to "facts available" in the underlying investigation as well as the US authority's practice in the application of "facts available". The WTO panel found that the US acted inconsistently with its obligation in the conduct of the investigation.

The WTO panel's ruling in this case helps clarify the rules and circumstances under which "total facts available" could be resorted to. An interested party may submit information during an antidumping investigation, certain parts of which may be "inadequate" or "incomplete". The moot point is whether the authorities can ignore the entire information and resort to "total facts available". The panel finding appears to mean that investigating authorities may be required to use "partial" facts available in certain circumstances rather than disregarding all submitted information and using "total facts available". In other words, "total facts available" can only be used where even the properly submitted information is rendered "unusable" because of its close inter-linkage with information that was found to be inadequate.

The WTO panel decision in a way curtails the ability of Investigating Authorities to take recourse to "facts available" at will and should be considered as a major victory for countries unfairly targeted by trade remedies. The outcome of this dispute could be particularly helpful to the developing country exporters who often find it difficult to meet the

rigours of replying to the detailed and complex questionnaires issued by concerned trade defence agencies in advanced countries while conducting antidumping (AD) or countervailing duty (CVD) investigations.

F. US- Byrd Amendment (DS 217/DS 234)

The dispute was raised by 11 WTO Members, including India, challenging certain provisions of the Continued Dumping and Subsidy Offset Act, 2000 (CDSOA) as violative of the WTO Antidumping Agreement and the Agreement on Subsidies and Countervailing Measures (ASCM). The controversy surrounding CDSOA, or, commonly known as the "Byrd Amendment", represents in a way the growing discomfort in the US about the merits of free trade and the WTO dispute settlement mechanism (CRS 2005).

The CDSOA provides for the annual distribution of antidumping and countervailing duties to "affected domestic producers" for qualifying expenditures²³ assessed during the previous fiscal year in furtherance of supporting an AD or CVD petition. An "affected domestic producer" is defined as a manufacturer, producer, farmer, rancher, or worker representative that was a petitioner or interested party in support of a petition with respect to which an AD or CVD order was in effect and remained in operation.

The main objection to the CDSOA was that it created an impermissible "specific action" against dumping and subsidisation as provided for by GATT 1994, the AD Agreement and the ASCM. It was further alleged that it provided a financial incentive for domestic producers to file or support AD or CVD petitions, thereby undermining the industry support requirements in the AD Agreement/ASCM. In addition, a claim was raised to the extent that the payments constituted "specific subsidies" as defined in Article 1 of ASCM and resulted in "adverse effects" within the meaning of Article 5 of the ASCM. The statute was challenged "as such".

The outcome of the US-Steel Plate dispute could be particularly helpful to the developing country exporters who often find it difficult to meet the rigours of replying to the detailed and complex questionnaires issued by concerned trade defence agencies in advanced countries while conducting antidumping or countervailing duty investigations

*The repeal of the Byrd
Amendment represents the
triumph of the WTO
dispute settlement
mechanism*

The WTO panel and later the AB concluded that the CDSOA constituted an impermissible “specific action against” dumping and subsidisation because the statute fulfilled two basic elements of the term. First, CDSOA constituted “specific” action because offset payments were found to be “inextricably linked to, and strongly correlated with a determination of dumping... or a determination of a subsidy” or, as alternatively characterised by the AB, the payments can be made only following a determination that the constituent elements of dumping or subsidisation are present. Second, the AB stated that a measure would be considered to be an action “against” dumping or subsidisation if it “has the effect of dissuading the practice of dumping or the practice of subsidisation, or creates an incentive to terminate such practices”. The AB found that given its “design and structure” the CDSOA “effects the transfer of financial resources from the producers/exporters to their domestic competitors” and as a result the requisite incentives are created.

The reports were adopted on 27 January 2003 and the compliance period was subsequently determined by arbitration to expire on 27 December 2003. The arbitrator emphasised in his award published on 13 June 2003 that it is for the US to decide on the manner of implementation, which may be through repeal or the modification of law.

Since the US did not comply within the deadline indicated, eight countries, including India, asked the WTO in January 2004 for authorisation to impose retaliatory measures. Each of the eight Members seeking to retaliate proposed the imposition of additional tariffs on US goods in an amount to be determined each year that is equal to the amount of offset payments attributable to antidumping and countervailing duties collected on the Member’s products. However, a WTO Arbitration panel in August 2004 determined that each of the eight Members could impose countermeasures on an annual basis in an amount equal to 72 per-

cent of the CDSOA disbursements for the most recent year for which US official data is available relating to AD/CVD paid on imports from the Member at that time.

The Byrd Amendment was finally repealed in February 2006. The repeal represents the triumph of the WTO dispute settlement mechanism. It is inconceivable that any other political pressure could have forced the US to repeal this controversial statute.

G. US- Textiles ROO (WT/DS 243)

This dispute involves the ROO applied by the US to textiles and apparel products under Section 334 of the Uruguay Round Agreements Act and the subsequent modifications or amendments effected by Section 405 of the Trade and Development Act of 2000, as well as the implementing customs regulations. These rules had a number of purposes, including gathering of trade statistics, origin marking and administering MFN duties. The focus of this dispute is the administration of the textile quota regime maintained by the US under the ATC. India felt that Section 334 changed the system by identifying specific processing operations under which the criteria that would confer origin vary between similar or closely-related textile products. India considered that the structure, design and the circumstances of changes in the ROO suggest the pursuit of trade policy objectives by the US resulting in altering the conditions of competition of various textile products.

Section 334 and 405 establish ROO for “fabrics and certain made-up non-apparel articles assembled with a single country fabric”. Made-up non-apparel articles, also referred to as “flat goods”, include goods of export interest to India, such as bedding articles (bed linen, quilts, comforters, blankets, etc.) and home furnishing articles (wall hangings, table linens, etc.).

The relevant portion of Section 334 provides that fabrics and made-up non-ap-

parel articles falling under 16 designated HTS 4-digit headings (essentially flat goods) are considered to originate in the country where the fabric is woven, knitted or otherwise formed, regardless of any other finishing operation which may have been performed. In essence, under Section 334, the “fabric formation” was considered to be the most significant operation for conferment of origin.

Two significant exceptions were created by Section 405 to the fabric formation rule of Section 334. First, fabric classified under the relevant HTS heading as of silk, cotton, man-made or vegetable fibre is considered to originate in the country in which the fabric is both dyed and printed when accompanied by two or more designated “finishing operations”. The panel referred to this as “DP2” rule and to the relevant operations as “DP2 operations”. However, the DP2 rule does not apply to wool fabric, which is subject to the fabric formation rule.

The second exception under Section 405 is that made-up non-apparel articles classified under seven of the 16 HTS 4-digit headings specified in Section 334 are also subject to DP2 rule, except where such articles are classified under the relevant headings as of cotton.

India contended that Article 334 sought to confer origin on the basis of criteria which are not related to value addition or change in the nature of the product but basically to protect the US textiles and apparel industry. The concept of “significant economic link” was completely missing from the US ROO provisions. India also contended that Article 405, which is an exception to the fabric formation rule, provided *de facto* advantage to the EC, which had export interest in items such as bed linen, scarves and table linen.

India’s claim focused on Para (b) and (c) and (d) of Article 2 of the Agreement on Rules of Origin. The pertinent parts read as follows:

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

(b) notwithstanding the measure or instrument of commercial policy to which they are linked, their rules of origin are not [to] be used as instruments to pursue trade policy objectives directly or indirectly;

(c) rules of origin shall not themselves create restrictive, distorting or disruptive effects on international trade. They shall not pose unduly strict requirements or require fulfilment of conditions not related to manufacturing or processing, as a prerequisite for the determination of the country of origin.

The panel rejected India’s claim and concluded that India was not able to establish that the US ROO were being administered to pursue trade objectives. The panel noted that India was not able to demonstrate any restrictive, distorting or disruptive effects on trade pursuant to the adoption of Section 334. Although the panel tacitly admitted that the objectives of protecting domestic industry interests against import competition and favouring imports from one Member over the other could be considered as “trade objectives” in pursuit of which ROO may not be used, it did not find the necessary circumstances to conclude such a possibility in the instant case. The panel also rejected India’s claims under Article 2 (c) on the ground that in order to demonstrate a violation, it must be proven that there is a causal link between the challenged ROO itself and the prohibited effects.

India did not appeal the findings of the report.

H. EC- Tariff Preferences (WT/DS 246)

This dispute concerns India’s complaint regarding certain aspects of the EU Scheme of Generalised System of Preferences (GSP) for developing countries in transition from 1 January 2002 till 31

A panel rejected India’s claim that the ROO applied by the US to textile and apparel products were being administered in pursuit of trade policy objectives

December 2004. In particular, India referred to the special arrangements to combat drug production and trafficking (the Drug Arrangements) as provided for in EC Council Regulation of 10 December 2001.

The Regulation provides for five different tariff preference arrangements: (i) the General Arrangements; (ii) the Special Incentive Arrangements for the protection of labour rights; (iii) the Special Incentive Arrangements for the protection of the environment; (iv) the Special Incentive Arrangements for LDCs; and (v) the Special Incentive Arrangements to combat drug production and trafficking, i.e., the Drug Arrangements.

Under the General Arrangements, all countries and territories listed in Annex I of the EC Regulation are eligible to receive tariff preferences. A separate Annex deals with products covered under the Agreement, which includes both non-sensitive and sensitive items. Non-sensitive items will enjoy duty-free access, while sensitive items are subject to reduced tariffs.

On the other hand, the duty benefits under the Drug Arrangements apply only to the following countries: Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Pakistan, Panama, Peru and Venezuela. The tariff reductions available to the 12 countries are greater than the tariff reductions granted under the General Arrangements to other developing countries. For example, in respect of products that are included in the Drug Arrangements but not in the General Arrangements, the 12 beneficiary countries are granted duty-free access to the EC Market, while all other developing countries must pay the full applicable duties. As for products that are included in both the Drug Arrangements and the General Arrangements and that are deemed “sensitive”, the 12 beneficiary countries are granted duty-free access to the EC market, while all other developing countries are entitled only to duty reductions.

Before the panel, India claimed that the Drug Arrangements are “inconsistent with GATT Article I:1 and “are not justified by the Enabling Clause”. The majority of the panel found that the Drug Arrangements are inconsistent with GATT Article I:1 and cannot be justified by Article 2 (a) of the Enabling Clause. The panel also found that the Enabling Clause is “in the nature of an exception” and, therefore, the burden of proof is on the party invoking the Enabling Clause as a defence. And finally, the panel found that the Drug Arrangements are not justified under GATT Article XX (b). The EC appealed the panel’s finding on the relationship between GATT Article I:1 and the Enabling Clause, including the burden of proof, and on whether the Drug Arrangements can be justified under the Enabling Clause.

On appeal, the EC challenged the panel’s finding that the Enabling Clause is an “exception” to Article I:1 and that, therefore, the EC must invoke the Enabling Clause as an “affirmative defence”. Furthermore, it argued that the Enabling Clause exists “side-by-side and on an equal level” with Article I:1 and “applies to the exclusion thereof, rather than an exception thereto”. Thus the EC requested the AB to “refrain from examining the consistency of the Drug Arrangements with the requirements of the Enabling Clause” because India did not bring its claim under the Enabling Clause.

The AB upheld the panel’s finding that the Enabling Clause is an “exception” to GATT Article I:1. In this case, both the panel and the AB were faced with the difficult issue of defining the nature of the “Enabling Clause”. The panel compared the Enabling Clause with various GATT provisions that are generally considered as “exceptions”, such as exceptions under Article XX and XI. Furthermore, the panel noted that the measures to be taken under both the Enabling Clause and these exceptions were “non-obligatory” and that the authorised derogation under all these provisions is “limited”. On this basis, the panel concluded

The AB upheld the panel’s finding that the Enabling Clause is an “exception” to GATT Article I:1

that the Enabling Clause is an “exception” as opposed to a “positive rule establishing legal obligations in itself”.

The AB reached a similar conclusion, albeit through a different reasoning. In this regard, the AB focused on the use of the word “notwithstanding” in the Enabling Clause, as well as the object and purpose of the Enabling Clause and the WTO Agreement, as the basis for finding that the Enabling Clause is a “special exception”. The AB seemed to classify the Enabling Clause as a provision establishing a special right for developed country Members to deviate from GATT obligations for the purpose of promoting economic development of developing countries.

On the issue of burden of proof, the AB noted that the responsibility of the complaining party “is merely to identify those provisions of the Enabling Clause with which the GSP scheme is allegedly inconsistent, without bearing the burden of establishing the facts necessary to support such inconsistency”. The AB, accordingly, noted that India “should reasonably have articulated its claims of inconsistency with specific provisions of the Enabling Clause at the outset of the dispute as part of its responsibility”.

Another key issue decided by the AB was the interpretation of the term “non-discriminatory” under Footnote 3 to Para 2 (a) of the Enabling Clause. In terms of the Enabling Clause, only preferential tariff treatment that is in conformity with the description “generalised, non-reciprocal and non-discriminatory” can be justified. India’s contention was that the term “non-discriminatory” does not allow the developed countries to differentiate between developing countries in the matter of tariff preferences. The AB held that while similarly situated beneficiaries cannot be discriminated, it does not prohibit the developed country Members from granting different tariffs to products originating in different GSP beneficiaries if such schemes are addressed to a particular “development, financial or trade need”

and are made available to all beneficiaries that share that need.

The AB noted that the Drug Arrangements are limited to 12 developing countries and there are no mechanisms under the Regulation to include additional beneficiaries. The list of 12 identified beneficiaries appeared as a “closed list”. Further, it was noted that the Drug Arrangement contained no criteria or objective basis to differentiate beneficiaries under the Drug Arrangements from other GSP beneficiaries. Accordingly, the AB upheld the finding of the panel that EU Drug Arrangements are justified under the Enabling Clause.

To an extent, this finding is in the interest of small economies, which may need special treatment, so long as this flexibility is not misused by preference-granting countries for covert objectives.

3.1.2 Discussion of Disputes where India is a Respondent

A. India- Patents (WT/DS 50)

This is the first substantive dispute to deal with the provisions of the TRIPS Agreement. Article 27 of the TRIPS Agreement, with a few exceptions, obligates WTO Members to make available patents for all inventions that meet certain conditions. Under the transitional arrangement of the TRIPS Agreement, developing countries such as India were given a five-year extended time from the date of entry into force of the WTO Agreement to meet the obligations. An additional period of five years was available to developing countries such as India to provide patent protection for pharmaceutical and agricultural chemical products.

The transition period aside, Article 70 of the TRIPS Agreement establishes certain limited obligations with respect to pharmaceutical and agricultural chemical products with which all countries had to comply as of the date of entry into force of the WTO Agreement. In other words, countries invoking the benefit of transi-

India’s contention was that the term “non-discriminatory” does not allow developed countries to differentiate between developing countries in the matter of tariff preferences

tion period under Article 65 of the TRIPS Agreement were nonetheless required to meet certain obligations mentioned in Article 70. It stipulates that where a Member does not make available patent protection for pharmaceutical and agricultural chemical products as of the date of entry into force of the WTO Agreement, it must establish a system for filing patent applications with regard to those products. This obligation called “mailbox rule” was necessary to provide a legal basis for establishing filing and priority dates, to be used when those products do become patentable.

As of 1 January 1995, when the TRIPS Agreement took effect, the existing Indian legislation did not provide patent protection for pharmaceutical and agricultural chemical products in India. Specifically, Section 5 of Indian Patent Act, 1970 provided that inventions claimed to be substances intended for use, or capable of being used, as a food, medicine or drug or relating to substances prepared or produced by chemical processes are not in themselves patentable, but methods or processes for their manufacture are.

To meet the obligation of Article 70 of the TRIPS Agreement, an ordinance, namely, Patent Ordinance 1994, was promulgated on 31 December 1995 by the President of India. The Indian Constitution permits the President of India to legislate when Parliament is not in session and it is considered necessary to take immediate legislative action.

The Patents Bill 1995 was introduced in the Lok Sabha (lower house of the Indian Parliament) in March 1995 to make permanent the requirements contained in the 1994 Ordinance. The Lok Sabha passed the Bill and was subsequently introduced in the Rajya Sabha (upper house), where it was referred to a Committee for examination and report. The 1994 Ordinance lapsed in the meantime. The Committee did not complete its work prior to the dissolution of the upper house on 10 May 1996, and the Pat-

ents Bill 1995 was not passed.

Even after the expiry of the Ordinance and at a time where no permanent legislation was in force, the Indian authorities instructed the Indian patent offices to continue to receive the applications and keep them separately for processing. However, there was no evidence of administrative guidelines issued to this effect. Such a decision was also not notified to the TRIPS Council. However, on 2 August 1996, the Minister of Industry, while responding to a question posed in the Lok Sabha, replied that applications in the relevant areas were continuing to be received and that they would be subject to examination after 1 January 2005 as per the WTO Agreement.

The US and the EC challenged India’s measures before the DSB alleging that India had failed to comply with the obligations under Articles 70.8 and 70.9 of the TRIPS Agreement. In short, Article 70.8 must provide for the following: (i) the right to file mailbox applications, (ii) the allocation of filing and priority dates, and (iii) a sound legal basis to preserve novelty and priority as of those dates.

An alternate claim was put by the US that had India in fact met the requirements of these provisions, then too India would have failed to comply with its obligations to publish and to notify them to the TRIPS Council.

The panel found that India was in violation of Article 70.8. In its view, the patent regime based on “administrative practice” created legal insecurity, in large part because a competitor of an applicant filing a mail box application could theoretically seek a judicial order to obtain a rejection of the mail box application under the existing Indian law. The “administrative instructions” sounded too feeble to provide certainty of rights and did not provide a sound legal basis in Indian law.

India appealed the WTO panel’s finding. In particular, India argued that the panel established an additional obligation under

The US and the EC challenged India’s measures before the DSB alleging that India had failed to comply with the obligations under Articles 70.8 and 70.9 of the TRIPS Agreement

this provision, namely, “to create legal certainty that the patent application and the eventual patents based on them will not be rejected or invalidated in the future”.

The AB stated that it was not persuaded that India’s “administrative instructions” for receiving mail box applications would survive legal challenge in India given the seeming contradictions with the Indian Patents Act of 1970 which made it clear that products at issue were not patentable. The “administrative instructions” sounded too feeble to provide certainty of rights, in the AB’s view.

In large part, the decision in this case rested upon the panel’s factual assessment of India’s domestic law relating to the filing of patent applications. India had explained the efficacy of its administrative instructions and that it would continue to implement its patent system in conformity with Article 70 of the TRIPS Agreement. Despite the administrative instructions not to reject these applications, the panel and the AB found that India’s legal system left open the possibility of a challenge, given the mandatory nature of the Indian Patents Act. This possibility led the AB to hold that the Indian system created insecurity for economic operators.

Some critics have questioned the lack of faith expressed by the panel and the AB in the Indian Executive. It was a fact that the life of successive governments in India during the decade of the 90s was quite short-lived with at least three governments changing in a matter of three years (1996-98). The judicial organs of the WTO were not able to appreciate that fact. However, India complied with the recommendations of the DSB by making changes in its Patent Act 1970, inserting a separate provision for filing “mail box” and for granting Exclusive Marketing Rights (EMRs).

B. India- QRs (WT/DS 90)

This dispute concerned a number of import restrictions maintained by India on BoP grounds. At the time of the estab-

lishment of the panel, i.e., on 18 November 1997, India had maintained import restrictions on 2,714 tariff lines within the Harmonised System. India notified these restrictions to the WTO BoP Committee under Article XVIII:B of the GATT. India initially proposed a time period of 10 years for phasing out the restrictions, which was further reduced to seven years. However, no consensus was reached.

The QRs were maintained under the following Indian legislation, in short termed the “Indian Import Regime”:

- I. Section 11 of 1962 Customs Act.
- II. The Foreign Trade (Development and Regulation) Act 1992 and rules framed thereunder.
- III. The Export and Import Policy of 1997-2002.

India regulates imports of goods by means of a “Negative List”. For items in the Negative List, a prospective importer must apply for a licence from the Director General of Foreign Trade (DGFT). The Negative List further classifies all such imports in one of the three categories: prohibited items, restricted items and canalised items. An item classified as restricted may generally be imported under an import licence. “Canalised” items may be imported by a designed canalising agency (government). When the imports require a licence, only the “Actual User” may import it. In addition to the normal licensing procedures, some of the imports may be made by using the special import licence (SIL). The SIL is linked to the net foreign exchange achieved by an exporter.

In 1997, several WTO Members, including the US, requested consultations with India regarding the restrictive aspects of India’s Import Regime. All Members requesting consultation, with the exception of the US, reached agreements with India regarding the phase-out period of the restrictions. The panel held that India’s general ban on import restrictions including the discretionary import licensing system is violative of Article XI:1 of the GATT. The panel found that India’s

India complied with the recommendations of the DSB by making changes in its Patent Act 1970, inserting a separate provision for filing “mail box” and for granting Exclusive Marketing Rights

monetary reserves were adequate and that the BoP measures were not necessary.

India argued before the AB that the panel erred in failing to respect the “institutional balance” reflected in the WTO Agreement. Specifically, India argued that these measures lie within the exclusive competence of the BoP Committee and the General Council. India contended that a decision on the justification of BoP must be left to the decision of the political organs of the WTO rather than the judicial organ, namely, the panels and the AB. The AB, however, after referring to a particular provision of the BoP Understanding, held that a dispute relating to whether BoP measures are justified or not remain within the competence of the dispute settlement panels. Accordingly, the AB upheld the panel finding that India was not entitled to maintain the import restrictions. India implemented the DSB recommendations by phasing out the QRs by April 2001.

The Complaining Parties claimed that the indigenisation and trade balancing requirements were inconsistent with Article III: 4 and XI: 1 of the GATT and Articles 2.1 and 2.2 of the Agreement on Trade Related Investment Measures

C. India- Auto (WT/DS 146, 175)

This case concerns indigenisation and trade balancing requirements imposed by India in the automotive sector. For many years, India imposed import restrictions on a wide range of products, including passenger cars, chassis and bodies thereof. One aspect of the import licensing regime was that licences were used as inducements to require companies to comply with indigenisation and trade balancing requirements. In 1997, the Indian Commerce Ministry adopted Public Notice 60, the auto component licensing policy issued under the Foreign Trade Development and Regulation Act 1992. This Notice requires any passenger car manufacturer wishing to import automotive kits in Semi Knocked Down (SKD) and Completely Knocked Down (CKD) form to sign a Memorandum of Understanding (MoU) with the Director General of Foreign Trade. A car manufacturer that did not sign the MoU or did not perform the conditions assumed in an MoU could be denied an

import licence for CKD/SKD kits.

The Public Notice also required that indigenisation of components should reach a level of 50 percent or more within three years and a level of 70 percent within five years or earlier. Consequently, as and when firms reach a level of 70 percent of the indigenisation, they would go outside the ambit of the MoU automatically. The Public Notice also required broad trade balancing of foreign exchange over the entire period of the MoU in terms of balancing between the actual Cost, Insurance and Freight (CIF) value of imports and CKD/SKD kits/components and the Free on Board (FOB) value of exports of cars and auto components during that period. For the first two years, there is a moratorium in the matter of meeting the obligation and the period of export obligation therefore begins from the third year onwards. However, the imports made during the two-year moratorium period counts towards the firm’s total export obligation under the MoU.

The Complaining Parties claimed that the indigenisation and trade balancing requirements were inconsistent with Article III: 4 and XI: 1 of the GATT and Articles 2.1 and 2.2 of the Agreement on Trade Related Investment Measures (TRIMs). The panel, however, did not address claims relating to the indigenisation requirement on grounds of judicial economy.

India contended that the US was attempting to obtain a new ruling on a matter already decided by the panel and the AB in the *India- QR* case. More specifically, India contended that the consistency of India’s discretionary import licensing system under its Export-Import Policy of 1997-2002 was critically reviewed in the *India- QR* case. The panel, however, explained that neither Public Notice 60 nor the MoUs signed thereunder could have been within the terms of reference of the *India- QR* panel. The panel held that the specific conditions applicable to automotive manufacturers wishing to im-

port restricted kits and components were never envisaged by the *India-QR* panel.

The panel observed that the measures at issue require the indigenisation of parts and components up to a minimum level in order to obtain import licences, which in effect mandates the purchase of Indian goods over imports. Therefore, the measures affect the internal sale, offering for sale, purchase and use of imported parts and components, thereby constituting a violation of GATT Article III:4.

The panel found that India acted inconsistently with Article III and XI of the GATT. India appealed the panel report, but later withdrew the appeal.

3.1.3 Overall Assessment of India's Experience in WTO Dispute Settlement

As a Member attempting to enforce the obligation of others, it can be said that India has been quite successful in using the WTO DSU. India has filed cases mainly against high income and upper middle income countries. The only exception is Turkey, which is a low middle income country. In that context, it could be argued that India used the dispute settlement process to seek remedies against countries which it would not have been necessarily able to do in a power-oriented system. India has used the system effectively to challenge measures taken by powerful trading nations such as the US in *US- Shirts and Blouses*, *US- Shrimp*, *US- Steel* and the EC in *EC- Bed Linen*, *EC- GSP*, etc.

India's experience as a respondent is mixed. It could be seen that most of the cases filed against India are by high income countries. India's compliance record in implementing adverse or partially adverse rulings has been exemplary. India had four adverse or partially adverse rulings involving multiple violations and had complied with all these rulings within an RPT. This is indeed remarkable since it also involved carrying out legislative changes in order to effect compliance in one of the cases. The loss in

the *India- Patent* entailed the introduction of legislative changes and triggered a debate on the extent and impact of WTO obligations on national sovereignty. The loss in the *India-QR* case was not particularly serious, since India had and continued to have strong foreign exchange reserves. But the loss meant that India had to eliminate QRs on 2700 items by 31 March 2001. The other significant loss was the challenge against the localisation and export balancing commitments contained in its automotive policy (*India-Auto*), which also involved issues related to BoP concerns. Both these disputes raised the question of the appropriateness of WTO panels deciding on an issue where the political organs of the WTO such as the BoP Committee and General Council have a specific mandate to examine and find a solution acceptable to all parties. The removal of QRs had also its political overtones and many domestic constituents often highlight these as a price India had to pay for its WTO Membership.

Bangladesh is the only low income country to have filed a case against India. India did not allow this dispute to go to the panel stage and tactically withdrew the measure in question.

India has been a leading initiator of trade remedy actions. When it comes to anti-dumping actions, India has taken more actions than any other country in the year 2006. Although the EC had challenged certain antidumping actions taken by India, the claim was not seriously pursued. Although the antidumping duties imposed by India cover a number of products, the trade affected by the measure is not significant enough in most cases to trigger a WTO dispute. Therefore, the fact that India did not face serious challenges to its antidumping activity does not offer any indication regarding whether the trend will remain the same in the future as well. As India matures into a strong economy and a potentially huge market, the possibilities of challenges to its trade remedy actions would naturally rise.

India has used the system effectively to challenge measures taken by powerful trading nations such as the US in US- Shirts and Blouses, US- Shrimp, US- Steel and the EC in EC- Bed Linen, EC- GSP, etc.

3.2 Pakistan in WTO Dispute Settlement

Pakistan has used the WTO dispute settlement quite effectively. Pakistan's challenge of the US transitional safeguard measure in the *Cotton Yarn* dispute is the most noted one. The dispute arose under the ATC and the success of this case did not matter much in the context of the trade gains since the measure was expected to last only for three years and the compliance came only towards the end of the maintenance of the measure. Pakistan had also challenged the imposition of definitive antidumping duties by Egypt on imports of matches (DS 327). This dispute was, however, resolved through a mutually agreed solution pursuant to the price undertaking agreements between Pakistani exporters and the Egyptian Antidumping Authority.

Besides the above two disputes, Pakistan was also part of the famous dispute in the *US- Shrimp* case. Pakistan along with India and Malaysia brought a complaint against the ban imposed by the US on the importation of certain shrimp and shrimp products which turned out to be one of the most high profile cases ever handled by the dispute settlement system.

Pakistan was a respondent in two cases. One of the cases was filed by the US alleging violation of Articles 27, 65 and 70

of the TRIPS Agreement, for not providing a system to permit the filing of applications for pharmaceutical and agricultural chemical products during the transitional period. The complaint did not lead to the establishment of a panel. Tables 3.4 and 3.5 set out the list of cases where Pakistan was a complainant as well as a respondent.

The key factual and legal issues raised in the *US- Cotton Yarn* dispute are addressed below.

A. *US- Cotton Yarn (WT/DS 192)*

This dispute concerns the transitional safeguard remedy applied by the US on imports of cotton yarn from Pakistan under the ATC. Under the new textile regime, Pakistan became the second largest exporter of combed yarn to the US. Alleging serious damage, an investigation was carried out in 1998 by the Office of Textiles and Apparel within the US Department of Commerce. In March 1999 the US indicated, pursuant to Article 6.10 of the ATC, that the proposed safeguard measure would be applied in the form of QRs.

Discussions took place in the WTO TMB about the proposed safeguard measure. The TMB held that the US had not demonstrated successfully that combed yarn was imported into the US in such large

One of the two cases in which Pakistan was a respondent was filed by the US alleging violation of Articles 27, 65 and 70 of the TRIPS Agreement

Table 3.4 Pakistan as a Complainant

S.N.	Title of the case	Year	Agreement	Status
1	US- Shrimp Turtle (DS 19)	1997	GATT	Resolved further to AB ruling.
2	US- Cotton Yarn (DS 192)	1996	ATC	Matter resolved further to AB ruling.
3	Egypt- Antidumping Duty on Matches		GATT, ADA	Mutually agreed solution before panel was formed.

Source: www.wto.org

Table 3.5 Pakistan as a Respondent

S.N.	Title of the case	Year	Agreement	Status
1	Pakistan- Mail Box (DS 19)	1995	GATT	Not pursued (panel not established).
2	Pakistan- Hides and Skins (DS 107)	1996 ATC	ATC	Not pursued (panel not established).

Source: www.wto.org

quantities as to cause serious damage, or actual threat thereof, to its domestic industry. It therefore recommended that the US rescind the safeguard measure. Despite the recommendations of the TMB, the US went ahead and imposed transitional safeguard measures in the form of quota restrictions. The restrictions were imposed in 1998. Pakistan brought the dispute against the US before the DSB.

One of the key issues raised in this dispute was the spurious definition of “domestic industry”. The US had defined its domestic industry as the producers of yarn for sale in the merchant market, excluding from the data vertically integrated producers that were producing the yarn as an intermediate product. This definition of the “domestic industry” has a major implication in the matter of determining injury. The US argued that the captive consumed portion of the domestic production is not directly competitive with cotton yarn for sale in the open market, and therefore should not be included in the analysis. The AB, however, held that the yarn produced by the two industry segments is in fact “directly competitive”.

The dispute sheds some light on how authorities should view captive production in the future. The fact that vertically integrated producers, at times, may be forced to buy or sell on the merchant market will be an important consideration. In any case, the finding of the AB makes it difficult for authorities to exclude captive production from the purview of domestic production while defining domestic industry.

While imposing a transitional safeguard measure against another Member, the Member imposing the measure has to ensure that the measure is only aimed to mitigate the proportionate “serious damage” from that Member. In this case the AB found that the US attributed “serious damage” to imports from Pakistan without making a comparative assessment of the imports from Pakistan and Mexico and their respective effects.

The US complied with the recommendations of the DSB by lifting the quota restrictions in November 2001.

3.2.1 Overall Assessment of Pakistan’s Experience in WTO Dispute Settlement

The success in the *Cotton-Yarn* dispute was an outstanding achievement. Pakistan used this dispute to assert its right over a powerful trading partner, namely, the US. The outcome of this case would not have translated into significant gains for Pakistan, but would definitely have put a check on the use of transitional safeguard measures under the ATC. Viewed in this perspective, the dispute would have indirectly helped a number of third country exporters, who rely on the US market.

Pakistan has been one of the initial complainants in the landmark *Shrimp-Turtle* case involving the US. The other cases involving Pakistan have not gone to the panel stage and were either mutually settled between the parties or not seriously pursued.

3.3 Sri Lanka in WTO Dispute Settlement

Sri Lanka has been involved with one of the early cases filed at the WTO, in *Brazil-Desiccated Coconut*. In 1996, Sri Lanka, with certain other countries, requested consultations with Brazil concerning its imposition of countervailing duties on its export of desiccated coconut and coconut milk powder. Sri Lanka alleged that these measures are inconsistent with GATT Articles I, II and VI and Article 13 (a) of the Agriculture Agreement (DS 30).

Despite the consultation request, no panel was established.

3.4 Bangladesh in WTO Dispute Settlement

On 28 January 2004, Bangladesh sought consultation with India concerning certain antidumping measures imposed by India on *Lead Acid Batteries*. This was the first dispute involving an LDC as a prin-

Despite the recommendations of the TMB, the US went ahead and imposed transitional safeguard measures in the form of quota restrictions

principal party. This dispute concerned various aspects of an antidumping investigation including determination of standing, negligibility of imports, determination of injury and causality, etc. This case did not progress much beyond the consultation stage. India terminated the measure which was addressed in the request for consultations (vide Customs Notification No. 1/2005 dated 4 January 2005). But one can confidently say that this case helped Bangladesh to learn the ropes of the elaborate and nuanced field of WTO litigation.

On 20 February 2006, the parties informed the DSB of a mutually satisfactory solution.

But for the DSU, Bangladesh would have hesitated to bring a case against its neighbour, India, on which its trade largely depends.

But for the DSU, Bangladesh would have hesitated to bring a case against its neighbour, India, on which its trade largely depends

3.5 Other South Asian WTO Members in Dispute Settlement

Nepal and Maldives, the other two Members of the WTO, have not hitherto been involved in the WTO dispute settlement either as a complainant or a respondent. These two countries are also yet to be involved as a third party in any of the WTO disputes.

Nepal is a relatively new Member of the WTO and joined the organisation only at the time of the Cancun Ministerial Conference. From a dispute settlement point of view, Nepal will have to examine whether it is able to obtain and maintain market access in other major markets. Given its status as an LDC, the possibility of other countries dragging Nepal into the dispute settlement process is rather remote.

On the whole, the possibility of these other South Asian countries initiating WTO disputes appears to be a distant one at this point in time. A number of countries in this region are dependent on preferential schemes such as the GSP and Everything But Arms (EBA) offered in developed country markets such as the

US and the EU. The GSP scheme operated by EU is fairly selective and substantially more attractive when compared to the US GSP scheme, the latter being more horizontal and broad-based, covering 133 countries. In such a scenario, it is unlikely that some of these South Asian countries will look for the dispute settlement route when other options of redress are available. Looked in that context, it is no accident that EU was never targeted in a WTO dispute by any South Asian country other than India.

3.6 South Asia's Experience with Remedies at the WTO

A favourable outcome in the panel or appellate proceedings does not ensure that the challenged measure is automatically withdrawn. The manner and extent of compliance effected by the concerned WTO Member may be far from desirable. The frequent recourse to compliance (Article 21.5) panels will only underline this systemic issue. WTO statistics indicate that Article 21.5 panels have been established once in every six cases. Further, under the DSU provisions, the existing remedies are only prospective. There is no remedy for past and consummated violations. Consequently, no retrospective damages are to be paid. For instance, in *US- Cotton Yarn*, explained supra, the US maintained the measure for two years and nine months, almost the entire period for which a transitional safeguard measure could apply.²⁴

Some countries use this flexibility to maintain WTO-inconsistent measures owing to pressure from domestic lobbyists knowing fully well that if challenged, these measures could not stand the test of WTO law and practice and therefore have to be rescinded. The US practice with respect to safeguard investigations is a clear example of how illegal measures could be maintained for almost their permitted duration (Davey 2005). In fact, the adoption of such illegal measures with a clear understanding of their WTO non-conformity may be a strategic decision (Lawrence and Stankard 2004). The fact

that the challenged measures remain for many years before they are removed pursuant to the decision of the panel or the AB is indeed worrying, particularly from the point of view of small economies.

Table 3.6 examines the status of implementation of cases where South Asian countries have obtained successful outcomes in the panel and the AB stages. The average time lag between the formal challenge of the measure at the WTO and the time of withdrawal of the measure pursuant to the adoption of the report has been within an RPT.

One can, therefore, see that the record of compliance in cases where South Asian countries were complainants is remarkably good. In a couple of cases mentioned in Table 3.6, *US- Shrimp* and *EC- Bed Linen*, the compliance of the DSB ruling was delayed in view of the Article 21.5 proceedings and the consequent appeals. *US- Byrd Amendment* is one case where the compliance has been quite poor. This case is understandably a politically charged issue and the US Congress was required to change the domestic law to effect compliance.

In cases where South Asian countries are respondents, compliance has been substantially faster. One major compliance problem faced by a losing country in a WTO dispute relates to effecting conformity of national laws to WTO-covered agreements. India had a difficult time in the *India- Patents (Mail Box)* dispute in effecting compliance within an RPT. A number of countries, including the US, face this problem on a routine basis and find it difficult to strike a middle ground between adjusting their national laws to WTO law and in convincing the domestic constituency about the need and rationale for such changes. Other countries in South Asia might not have faced this problem, but it is important to ensure that room for inconsistency is eliminated or reduced, as far as possible.

The best way to avoid challenges against legislation is to ensure that all draft legislation which may overlap WTO commitments are reviewed by WTO experts before implementation. This exercise may be quite complex and requires the participation of domestic legal experts as well as public-interest groups.

The record of compliance in cases where South Asian countries were complainants is remarkably good

S. N.	Title of the case	Date of establishment of panel	Adoption of report	Implementation status
1	US- Shirts and Blouses (DS 33)	17 April 1996	23 May 1997	Implemented within RPT.
2	Turkey- Textiles (DS 34)	13 March 1998	19 November 1999	Implemented within RPT.
3	US- Shrimp (DS 58)	25 February 1997	6 November 1998	Implemented within RPT.
4	EC- Bed Linen	27 October 1999	12 March 2001	Implemented within RPT.
5	US- Cotton Yarn	19 June 2000	5 November 2001	Implemented within RPT.
6	US- Steel Plate	24 July 2001	29 July 2002	Implemented within RPT.
7	US- Byrd Amendment	12 July 2001	27 January 2003	Being implemented.
8	EC- GSP	27 January 2003	20 April 2003	Implemented (RPT allowed 14 months).

Source: www.wto.org

Issues for discussion

- Which WTO agreements are likely to see the maximum number of disputes involving South Asian countries in the future? How prepared are South Asian countries to participate in such disputes?
- Has lack of resources impeded the ability of South Asian countries to effectively participate in WTO disputes? Does the non-participation of South Asian countries other than India and Pakistan in full-fledged WTO litigation point to lack of resources- financial, human, and institutional- in effectively participating in the system? Would such countries be able to change the outcome of any of the disputes mentioned in this chapter if they were better resource-equipped?
- What were the particular difficulties faced by South Asian countries in implementing adverse rulings? Would greater flexibility in implementation help the countries to secure domestic legitimacy and support in enforcing such rulings? What flexibilities under the DSU are required if the enforcement of adverse rulings involves legislative or complex administrative action?

Issues in WTO Dispute Settlement: Lessons for South Asia

Any WTO Member that seeks to pursue a remedy before the DSB should evaluate at least three things before launching a formal dispute: (i) expected gains from the trade action; (ii) political costs of filing; and (iii) resource costs of a dispute.

In this context, there is an incentive only for a large country to participate in the process. If the value of trade affected by the measure is less than US\$10 million, one could argue that it is not worth the effort, unless the country decides to take up the matter to prove a point or establish a principle. It is doubtful whether a small economy would take such a step. It is imperative that the Member proposing to challenge a measure before the WTO performs an economic analysis to determine the “value of trade affected”. Most of the countries need cost-effective mechanisms to identify and prioritise claims in the first place.

The political costs of filing are definitely more important. The “power hypothesis” predicts that countries will file fewer complaints if they are politically weak and dependent on another market. For instance, a number of South Asian countries receive special tariff concessions from key export markets such as the US, the EU and even India, and would hesitate to upset the applecart.

The resource cost of filing a complaint is also significant. The hourly billing charges of some of the Washington- or Brussels-based firms could be prohibitive (Brown and Hoekman 2005). Thanks to the recent efforts in capacity building, the resource cost has come down a bit. The

establishment of the Advisory Centre on WTO Law (ACWL) has been helpful to a number of developing countries. India and Pakistan have utilised ACWL’s expertise. ACWL provides discounted rates at varying levels depending on the levels of economic development and whether the countries are its members. It also provides legal advice on matters not yet subject of a WTO dispute settlement. These services are provided free of charge to LDCs and other developing country Members up to a certain amount of hours. Despite this initiative, many small economies still find it difficult to seriously pursue WTO litigation.

When one evaluates South Asian countries’ participation in dispute settlement in light of the above constraints, one can only say that their involvement has been exceptional. However, most of the countries in this region lack institutional support in analysing the compatibility of home and third country trade measures with the WTO-covered agreements. Although private players are the ultimate stakeholders, the matter of participating in the dispute settlement process is a purely governmental job. Private stakeholders can only persuade and convince the decision-makers to pursue a challenge before the WTO DSB in appropriate cases. Private stakeholders cannot directly participate in the process and, therefore, their involvement will remain marginal to a great extent. Of course, private stakeholders can provide necessary inputs to the government at various stages, both prior to and in the course of the proceedings, and can also contribute to the expenses involved.²⁵ But the expertise has to be, by and large, developed at the governmental level.

When one evaluates South Asian countries’ participation in dispute settlement in light of the constraints they face, one can only say that their involvement has been exceptional

Bringing a case to the WTO DSB is a painstaking process. The major difficulty is, of course, in coming to know about the violations themselves, or as some call it, the matter of “naming and blaming”. Exporters may face trade barriers in various international markets, but in many cases such barriers go unnoticed. It requires a trained mind to figure out whether the alleged violation is a matter dealt with by a WTO-covered agreement and, further, whether the dispute is “justifiable” under the WTO DSU.

Furthermore, pursuing a dispute before the WTO involves an exercise of political judgement. The tenability and the merits of the claims notwithstanding, the government will have to exercise a judgement whether the matter is worth pursuing. It is possible that multiple stakeholders could have brought up disparate claims for attention at the WTO DSB level. It is important for the concerned government to prioritise the claims and exercise judgement as to whether or not to pursue these claims before the WTO DSB.

It is interesting to see how some of the advanced countries have dealt with these issues.

The US and the EC have developed formal and informal legal mechanisms to identify foreign trade barriers, to prioritise them according to their impact, and to mobilise resources for WTO complaints (Shaffer 2003). The 1994 Trade Barriers Legislation enacted by the EU lays down improved procedures at the Community level to ensure that the rights of the Community under international trade rules are effectively exercised. In the case of the US, for instance, the Office of the United States Trade Representative (USTR) provides a mechanism whereby US firms and citizens have the right to formally petition in regard to foreign government’s trade violations, including WTO violations.

Australia is another WTO Member that has set up a structured process to investigate claims of violations of WTO rules.

The Department of Foreign Affairs and Trade (DFAT) has instituted a WTO Disputes Investigation and Enforcement Mechanism to which affected exporters can formally complain.²⁶ Lodging a complaint will set in motion a formal process to examine the legal and factual claims from the affected parties. A preliminary assessment will be made within 30 days and a detailed assessment within 60 days, if there is prima facie merit in the claim. The exporter, then, will be required to file a formal petition to initiate WTO dispute settlement consultations. The Minister for Trade will decide whether to proceed for consultations within 60 days of the exporter’s petition being made. Once this option is exhausted, a final decision to proceed for a formal WTO panel process will be taken within 30 days of the formal petition lodged by the affected parties for this specific purpose. The beauty of this mechanism is that the affected exporters have an opportunity to get a formal response on their petition within a specified timeline. In other words, governments have an obligation to consult with exporters and to properly examine the petition and, most importantly, to indicate its stand at the end of the process. This is also a cost-effective process since there are no direct costs for official’s services.

In the case of South Asian countries, the availability of formal procedures for looking into violations of WTO rules is still at an early stage. In India, a separate division, namely, the Trade Policy Division (TPD) of the Department of Commerce, specifically looks after WTO-related matters, but is yet to set up a formal arrangement for stakeholders to bring up violations of WTO rules for necessary follow-up action. In Pakistan, the Tariff Commission is responsible for identifying and following up complaints regarding violations of WTO rules. But it appears that a formal mechanism to process and investigate complaints of violations of WTO rules is still not in place.

Another difficulty is the lack of resources in the Missions at Geneva. Most of the

In the case of South Asian countries, the availability of formal procedures for looking into violations of WTO rules is still at an early stage

South Asian delegations to the WTO have only a few staff members. The larger countries in the group, namely, India and Pakistan, have a relatively sizeable presence. India has nine staff in addition to the Ambassador whereas Pakistan has five staff in addition to the Ambassador.²⁷ However smaller countries such as Sri Lanka and Nepal have only one staff in addition to the Ambassador. It will be highly burdensome for small missions to devote enough time to dispute settlement activities given the pressure of work in terms of attending the routine meetings. The work pressure could be acute if one were to take into account the demands of the current Doha Round of trade negotiations as well. Further, it is not known how many delegations from this region have qualified legal staff who could examine the various trade barriers from a legal point of view.

The absence of trained personnel in their own home countries could be another issue. Of course, countries such as India and Pakistan cannot complain of inadequate legal talent. But the issue is whether the available talent is used properly. Private lawyers in these countries often find it difficult to specialise in this area mainly on account of absence of sufficient work. It would make little sense to specialise wholly in this field given the declining number of disputes which are currently brought before the DSB. On an average, there are not more than one full-fledged panel proceedings in a single year even for a key player such as India. For instance, India has brought only two disputes between 2003 and 2006. Obviously, this trend may change.

How can South Asian countries nurture legal and analytical skills in this field? In countries such as India, there is sufficient expertise in trade defence matters. But fighting a WTO case is a different ball game. It requires specialised skills in the field of public international law in addition to exposure to trade remedy issues. It is not easy to find specialists with a mix of both. It will be advantageous if private lawyers and government staff work

together to develop a blend of these skills. In India, the TPD used to conduct brainstorming sessions with practitioners and interested parties on WTO cases during the weekends till 2005. But, it seems that these sessions have become either too infrequent or discontinued.

Although a number of lawyers graduating with specialisation in trade matters from the US and European law schools have returned to these South Asian countries, they tend to drift to other areas. It is important that governments encourage private lawyers to contribute to the discourse on trade law-related matters. Awarding small consultancies on trade law-related work on the basis of open bidding can provide an incentive for local lawyers to invest their time and resources in this field. A proposal to set up a panel or a roster of paid experts can be a good idea. The other option is to set up a mechanism whereby third country trade barriers could be identified on a timely basis and necessary follow-up action taken. Such a mechanism will generate some work and could go a long way in helping improve Indian exporters' access in other countries. If such a mechanism is available, at least a handful of lawyers will be attracted to focus exclusively on WTO related jurisprudence. Otherwise, it can lead to local talent not being utilised properly. Further, unless such skill sets are developed from a wide pool, these countries will have to increasingly depend upon multinational law firms, whose prohibitive costs may discourage deserving matters from being raised before the DSB.

Technical cooperation in the field of dispute settlement has been impressive. The Institute for Training and Technical Cooperation of the WTO has been carrying out technical cooperation and capacity building activities in developing countries and LDCs. In fact, streamlined courses on dispute settlement issues can help government officials and private lawyers to gain sufficient knowledge and familiarity with the current issues. A number of inter-governmental organisations are pro-

It is important that governments encourage private lawyers to contribute to the discourse on trade law-related matters

viding support in such matters. The WTO, the United Nations Conference on Trade and the Development (UNCTAD) and the ACWL are now providing training programmes in WTO dispute settlement. These training programmes have been highly successful in imparting training to the government officials and other stakeholders from the Member countries.

These efforts are still inadequate. It is useful to study how certain countries such as Brazil have enhanced capacity building in WTO litigation matters (Shaffer 2006). Brazil has developed a “three-pillar” structure involving a special WTO dispute settlement division in its capital Brasilia with coordination on WTO legal matters between Brazil’s Geneva mission and this unit, and an organised relationship with the private sector. As part of its third pillar, the Brazilian government has helped facilitate the training of young lawyers in Brazilian law firms in WTO dispute settlement in the hope that they can supplement government resources. This model is worth emulating for some South Asian countries.

The Doha Ministerial Declaration has mandated negotiations on improving and clarifying the DSU

4.1 South Asian countries and Doha DSU Negotiations

South Asian countries may feel that in a rule-based system, their special situation or extenuating circumstances may not influence the panel decision. In that context, the best solution is to seek changes in the dispute settlement rules to make them more “development-friendly”. The Doha Ministerial Declaration, adopted in 2001, has mandated negotiations on improving and clarifying the DSU. This presents an important opportunity to effect the much-needed changes.

The DSU Review remains outside the “single undertaking”, but is undeniably part of the Doha Round. Improvement of the DSU is a systemic issue and South Asian countries have a strong interest in ensuring that the international trading system is open, equitable and enforceable.

The main issues currently on the negoti-

ating table can be broadly classified into three categories: (i) proposals aimed at primarily streamlining the existing process and other housekeeping issues; (ii) proposals that fill in the gaps or deal with inconsistencies of the DSU provisions; and, (iii) proposals which are more fundamental and touch upon the substantive character of the dispute settlement system.

A key issue for South Asian countries from the perspective of dispute settlement is compliance/enforcement of DSB recommendations. In the cases that they lose, South Asian countries would indeed benefit if they could obtain a longer RPT for compliance. Likewise in cases that they win, the availability of advantageous trade remedies could improve their situation. Trade retaliation for non-compliance is one of the remedies being provided by the WTO. However, even in the event of winning a case at the WTO, the lack of an adequate market size often constrains small economies from credibly threatening retaliation for non-compliance. The reasons are obvious. Suspension of concessions by these small economies would be tantamount to shooting oneself in the foot. One of the solutions to this problem is to allow the winning party to seek authorisation for suspending concessions and other obligations in sectors of their choice, which in fact, is permissible under the DSU. However, they should not be required to go through the process set out in Article 22.3 which requires them to prove that it was not “practicable or effective” to suspend concessions in the same sector or agreement where the violation was found.

Some prominent thinkers such as the late Bob Hudec feel that retaliatory provisions are not useful in any case beyond a point and that normative condemnation of the challenged measure is more than enough to induce compliance (Hudec 2002). One of the suggestions made was to provide a mechanism whereby developing countries and LDCs could seek financial compensation from the other country in the event of non-compliance. Another remedy suggested was to provide tradable

remedies whereby the winning country can transfer its right to another country in exchange for trade concessions or monetary compensation (Bagwell et al. 2003).

Issues for discussion

- Does the lack of export diversification dissuade some South Asian countries from raising disputes against key importing countries at the WTO?
- What steps have been taken by South Asian Members to strengthen institutional and individual capacity in dealing with WTO litigation?
- Can South Asian countries highlight at least one or two issues under the DSU on which successful reforms under the ongoing WTO DSU negotiation could significantly advance their interests?

Conclusion and Recommendations

As a regional bloc, South Asia's participation in international trade till date has not been significant. South Asia's share in international trade still hovers below 2 percent. But it is not the size or volume of trade that determines a country's ability to make use of the WTO processes. South Asia is an active participant in the WTO negotiation process and its involvement with the dispute settlement process is even stellar. India, Pakistan, Sri Lanka and Bangladesh have all made use of the system to their advantage. One may have to recall that out of 151 WTO Members, only 30 Members have requested panels and only another 23 Members have been involved as respondents.

Among South Asian countries, India is an exception on almost all fronts given its pre-eminent role in the WTO negotiation and dispute settlement process. However, there are a couple of lessons the other South Asian countries can learn from India. The outcome in the *Mail Box* dispute was particularly controversial and India was required to make changes in its patent legislation. While implementing WTO commitments, particularly in areas such as TRIPS, it is of paramount importance that the underlying legislation conforms to the WTO provisions. This cannot be done unless there is proper legal scrutiny of key implementing legislation.

Trade remedy investigations will occupy the centre stage at WTO consultation/litigation for a long time to come unless new commitments are enjoined by the Doha Round, which seems highly unlikely at this time. The WTO Agreements impose on Members substantial obligations in terms of the process leading to, and

the rigour underlying, those investigations. This is an area where India and Pakistan will have to be a bit more cautious. India is one of the leading users of antidumping in the world, but is yet to be tested in a serious antidumping challenge. But if other WTO Members lose significant market share further to such action, it is natural to expect serious challenges. Even new users have to gain substantial expertise before employing these trade remedy actions. Such challenges could even come from countries within the same geographical groupings. For instance, Bangladesh's case against India in respect of *Lead Acid Batteries*.

Most of the South Asian countries will have to focus on developing human and institutional capacity in participating effectively in the WTO dispute settlement process. It is often said that it is the cost of WTO litigation that impedes small economies from challenging third Member's actions. This is true but need not be the most worrying factor. The biggest concern seems to be that most of the countries in the region lack the ability to identify incidents of violation of WTO rules. Such capacity has to be developed within respective government agencies and the private players and, to some extent, NGOs. Although WTO litigation is a government-to-government matter, without the interaction of private players and other interested parties, it is inconceivable that WTO litigation could be successfully pursued or defended. The experience of Pakistan in the *Cotton Yarn* dispute with the US and that of India in the *Bed Linen* case against the EU highlight the involvement of the private sector in working alongside the government. NGOs have

Trade remedy investigations are likely to occupy the centre stage at WTO consultation/litigation for a long time to come

also a fairly important role to play in shaping the behaviour of the Member countries. The role of consumer organisations in cases such as *EC- Sardines* and *US- Shrimp* highlights the role NGOs can play in the system.

Most of the South Asian countries do not have a proper mechanism to investigate and assess complaints of violation of WTO rules

Most of the South Asian countries also do not have a proper mechanism to investigate and assess complaints of violation of WTO rules. If one looks at the experience of advanced countries, most of the WTO cases are brought up by affected exporters, rather than the government conducting an investigation of third country violations on its own. However, most advanced countries carry out such an exercise to identify third country market-access barriers. It will be helpful for some of the South Asian countries to establish a mechanism along the lines of the WTO Disputes Investigation and Enforcement Mechanism set up by Australia

(discussed supra) to examine such matters.

WTO litigation is more accessible these days courtesy of the role of international agencies such as ACWL. However, if violations of WTO rules are to be identified in good time and taken up, it is essential that local expertise is developed so that private firms and national governments can tap such resources without additional financial burden. NGOs and other think tanks can also support trade related capacity building related to WTO litigation and help small economies engage in the system. It, therefore, means that capacity building involving government, private players, academic institutions and other NGOs is absolutely vital to strengthening the ability of South Asian countries to proactively participate in the WTO dispute settlement system.

Endnotes

- ¹ United States- Restrictions on Imports of Tuna (1991) 30 I.L.M. 1594.
- ² Unilateral trade actions involve imposition of trade penalty by a trading nation on another for the reason that the latter's trade practices are "unfair".
- ³ The EC challenged Section 301 before a WTO panel. The panel held that although the existence of Section 301 was not a violation in itself of the DSU, it could be violative of the DSU depending on the manner in which it is applied. See *United States- Section 301 of the Trade Act, 1974*, WT/DS 152/R, 27 January 2000.
- ⁴ Article 5 of the DSU.
- ⁵ Cases in which retaliations were authorised include: *EC – Bananas III (at the request of the US and Ecuador)*, *EC – Hormones (at the request of the US and Canada)*, *Canada – Aircraft Credits and Guarantees (at the request of Brazil)*, *Brazil – Aircraft (at the request of Canada)*, *US – 1916 Act (at the request of the EC)*, *US – FSC (at the request of the EC)*, and *US – Offset Act (Byrd Amendment) (at the request of Brazil, Canada, Chile, EC, India, Japan, Korea and Mexico)*.
- ⁶ WT/DS 27/R and WT/DS/27/AB/R.
- ⁷ The current DSU permits a Member to request authorisation to suspend concessions under Article 22.6 while lack of compliance under Article 21.5 has not yet been established.
- ⁸ There are quite a few exceptions to this timeframe. Examples included the *EC- Bananas case*, *US- Byrd Amendment*, *Canada- Dairy*, *Australia- Salmon*, etc.
- ⁹ Appellate Body Report on *EC – Hormones*, para 118.
- ¹⁰ Article 17.6 of the Antidumping Agreement.
- ¹¹ Appellate Body Report, *European Communities - Antidumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R (Adopted March 12, 2001) ("Bed Linen"); Appellate Body Report, *United States - Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, (Adopted 31 Aug 2004) ("Softwood Lumber V").
- ¹² Article 3.2 of the DSU.
- ¹³ *US- Standards for Reformulated and Conventional Gasoline*, WT/DS 2/AB/R.
- ¹⁴ See *Korea- Measures Affecting Government Procurement*, WT/DS 163/R, adopted on 19 June 2000.
- ¹⁵ WT/DS/OV/25.
- ¹⁶ The Classification made here is based on the Agreement Establishing the Advisory Centre on WTO Law (www.acwl.ch).
- ¹⁷ International Trade Statistics published by the WTO (www.wto.org).
- ¹⁸ Pakistan had to engage in proceedings before the Textile Monitoring Body before the dispute was actually taken to the panel and thereafter to the AB.
- ¹⁹ *India- Antidumping Measures on Imports of Certain Products from European Communities*, WT/DS 304, filed on 8 December 2003.
- ²⁰ Pakistan's Tariff Commission (www.ntc.pk/adint).
- ²¹ *Guatemala- Antidumping Investigation on Portland Cement from Mexico (I)*, WT/DS 60/AB/R and *Guatemala- Antidumping Investigation on Portland Cement from Mexico (II)*, WT/DS 156/R.
- ²² The weighted average price is determined by multiplying each adjusted normal value and export price by its corresponding weights or quantity.
- ²³ There are about 10 qualifying expenditures such as research and development (R&D), personal training, health care benefits, etc. See 19 U.S.C 1675c(b) (4).
- ²⁴ Article 6.12 of the ATC.
- ²⁵ In many cases, private companies and trade associations can pay for a private law firm that will support and work with the government in preparing a WTO case.
- ²⁶ www.dfat.gov.au
- ²⁷ Collected from the Address Book released by the WTO Secretariat.

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