

Dispute Settlement in the WTO and South Asia

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1. INTRODUCTION: RELEVANCE OF THE WTO DISPUTE SETTLEMENT SYSTEM FOR SOUTH ASIA

With 'a more effective and reliable'¹ dispute settlement system, the WTO has put in place the most widely representative multilateral and the only compulsory third party dispute resolution mechanism. Attributed to its rule-based system, this is the outcome of a long debate and reflects the pre-Uruguay Round common belief of developed and developing countries that they needed a more legalistic dispute settlement mechanism. But there were differences too. While developed countries, led by the US, wanted a stronger dispute settlement system to effectively enforce the developing countries' new obligations

such as intellectual property protection, developing countries believed that with such a system they would be better able to enforce developed countries' obligations to secure market access, particularly in the areas of textiles and agriculture. In other words, while developing countries saw in enforceable rules effective safeguards that would 'neutralise the power of larger countries',² developed countries did not believe that the operation of those rules would be independent of their nature, likely interpretations, and the state of international law that the WTO would be called to draw upon.³ Consisting only of developing countries, South Asia shares not only the developing countries' belief but also their experience with the WTO dispute settlement system.⁴

¹ Marrakesh Declaration of 15 April 1994, *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* (Geneva: GATT Secretariat 1994), at iii.

² Robert E. Hudec, *Developing Countries in the GATT Legal System* (London: Gower Press 1987), at 77; Further, see generally, Ernst-Ulrich Petersmann, *The GATT/WTO Dispute Settlement: International Law, International Organizations and Dispute Settlement* (The Hague: Kluwer Law International 1997); James Cameron and Karen Campbell (eds), *Dispute Resolution in the WTO* (London: Cameron May 1998); David Palmetier and Petros C. Mavroidis, *Dispute Settlement in the World Trade Organization: Practice and Procedure* (The Hague: Kluwer Law International 1999); Ravindra Pratap, 'Remedial Jurisprudence of the Multilateral Trading System: A Perspective', 39 *Indian Journal of International Law* (1999), 251–72; William J. Davey, 'The WTO Dispute Settlement System: The First Ten Years', 8 *Journal of International Economic Law* (2005), 17–50.

³ See Pieter J. Kuijper, 'The Law of GATT as a Special Field of International Law', 25 *Netherlands Year Book of International Law* 227 (1994), at 229; Article 3.2 of the DSU, above n 1, at 405; the very first WTO Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, at 17 (for the proposition that the WTO law 'is not to be read in clinical isolation from public international law'); Joost Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?', 95 *American Journal of International Law* 535 (2001), at 538; John H. Jackson, 'International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to "Buy Out"?', 98 *American Journal of International Law* 109 (2004), at 123.

⁴ As of 4 July 2005, of 332 disputes that have been reported to the WTO, developing countries have brought 133 disputes, while 142 have been brought against them. South Asia (Bangladesh, India, Nepal, Pakistan and Sri Lanka) has brought 22, while 19 have been filed against it. Most of South Asia's disputes have involved challenges to trade remedy measures restricting textiles and clothing. Its main targets have been the US and the EC, which in turn have been the main complainants against it.

South Asia first invoked the WTO dispute settlement procedures when, on 28 September 1995, India requested consultations with Poland's preferential treatment of the EC in its tariff scheme on automobiles.

This paper proceeds as follows. Section II recounts South Asia's experience with the WTO dispute settlement system, with a view to evaluating both how South Asia has used it and the operation of DSU rules and procedures. Section III discusses the implications of South Asia's submissions in the ongoing negotiations to improve and clarify the DSU. And, finally, Section IV offers suggestions for making the DSU more workable for South Asia.

2. SOUTH ASIA'S EXPERIENCE WITH THE WTO DISPUTE SETTLEMENT SYSTEM

South Asia first invoked the WTO dispute settlement procedures when, on 28 September 1995, India requested consultations with Poland's preferential treatment of the EC in its tariff scheme on automobiles.⁵ Below we discuss seriatim the experience of Bangladesh, India, Nepal, Pakistan and Sri Lanka, with the WTO dispute settlement system.

BANGLADESH

Bangladesh, designated a least developed country (LDC), is a founder-member of the WTO. With its 28 January 2004 request for consultations with India with respect to the imposition of definitive anti-dumping duties on imports of its lead acid batteries and certain aspects of the anti-dumping investigation, Bangladesh became the first LDC to invoke the WTO dispute settlement system. Bangladesh alleged that India's initiation of the anti-dumping investigation, determination of dumping margin, determination of export price, determination of injury and causation, and examination of the causal link between the imports and the alleged injury, treatment of evidence, and its failure to give public notice violated Articles VI, XXIII:1(a) and XXIII:1(b)

of the GATT 1994 and the Uruguay Round Agreement on Implementation of Article VI of General Agreement on Tariffs and Trade (the Anti-Dumping Agreement).⁶ To date neither a mutually agreed upon solution has been reported nor has a panel request been made. This reinforces the point that consultations have been employed for a much longer period than the 60 days' DSU requirement for a panel request. And, this should be so, when there are asymmetries in capacities between the parties. In other words, there is less inducement to a more capacitated respondent to come to a negotiated settlement within 60 days than to a less capacitated complainant, particularly when the respondent is willing to negotiate beyond 60 days.

INDIA

Also a founder-member of the WTO, India has been the most active South Asian member and the sixth biggest participant in the WTO dispute settlement system, following the US, the EC, Canada, Japan and Brazil. It has been a complainant in just as many disputes as it has been a respondent.⁷ We now turn to issues that emerge from India's experience with DSU rules and procedures.

DSU Provisions and Issues in WTO Dispute Settlement Reports

Article 3.2: Interpretation of the WTO Agreements. The issue of interpretation has been involved in some way in almost all Indian disputes. By customary rules of interpretation of public international law, to which the DSU refers,⁸ reference has been made to Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties, namely, the general rule of interpretation and supplementary means of interpretation.

⁵ Poland—*Import Regime for Automobiles*, WT/DS19/2 (11 September 1996).

⁶ *India – Anti-Dumping Measure on Batteries from Bangladesh*, WT/DS306/1 (2 February 2004).

⁷ 17 each. See generally, Ravindra Pratap, *India at the WTO Dispute Settlement* (Delhi: Manak Publications 2004).

⁸ Article 3.2 of the DSU, above n 1, at 405.

In the complaint India—Patent Protection for Pharmaceutical and Agricultural Chemical Products (India – Patents (US)),⁹ the general rule requirement of ‘good faith’ in treaty interpretation was used to require ‘the protection of legitimate expectations’¹⁰ otherwise excluded *ratione temporis* from protection under the TRIPS Agreement. Later, while in United States – Import Prohibition of Certain Shrimp and Shrimp Products (US – Shrimp),¹¹ the Appellate Body held that the principle of good faith is ‘at once a general principle of law and a general principle of international law, [which] controls the exercise of rights by states’,¹² in European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India (EC – Bed Linen (Article 21.5 – India)),¹³ the Panel held that there is no basis in international law that would require it to conclude that a measure that is consistent with a Member’s WTO obligations could nonetheless be found to be in violation of that provision on the basis of bad faith.¹⁴

In India—Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products (India – QRs),¹⁵ interpreting the terms ‘application of restrictive measures taken for balance-of-payments purposes’, the Panel noted that the use of these words in ‘their ordinary meaning, does not suggest an opposition between the ‘application’ of the measures and their ‘justification’ under Article

XVIII:B.’¹⁶ Later, in United States—Rules of Origin for Textiles and Apparel Products (US – Rules of Origin),¹⁷ while noting that the rules of interpretation were equally applicable to the provisions of the Agreement on Rules of Origin,¹⁸ the Panel did not note that the preamble to the Agreement on Rules of Origin envisages not just the speedy and effective resolution of disputes but also the ‘equitable’ resolution of disputes. As a supplementary means of interpretation, the principle of *in dubio mitius* guided the course of United States—Sections 301–310 of the Trade Act of 1974 (US – Trade Act),¹⁹ but not of India – Patents (US)! While the Appellate Body reiterated in United States—Measure Affecting Imports of Woven Wool Shirts and Blouses (US – Blouses)²⁰ that the Ministerial Conference and the General Council have the ‘exclusive authority’ to adopt interpretations of WTO agreements and that Article 3.2 of the DSU is not meant to encourage either panels or it to ‘make law’ by clarifying existing provisions of WTO agreements ‘outside the context of resolving a particular dispute’,²¹ neither it nor the panels have always advanced reason for deviating from the general rule of interpretation.

Article 4: Adequacy of Consultations. In Turkey—Restrictions on Imports of Textile and Clothing Products (Turkey – Textile),²² Turkey argued that it had ‘good reason not to engage in formal consultations in which the EC would not be involved, since the measures

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⁹ Complaint by the US.

¹⁰ WTO Panel Report, *India – Patents (US)*, WT/DS50/R, para 7.18.

¹¹ Complaint by India, Pakistan, Malaysia and Thailand.

¹² WTO Appellate Body Report, *US – Shrimp*, WT/DS58/AB/R, adopted 6 November 1998, para 158 (Emphasis added).

¹³ Complaint by India.

¹⁴ WTO Panel Report, *EC – Bed Linen (Article 21.5 – India)*, WT/DS141/RW, para 6.91. Cf. below, discussion under Article 9 (ii).

¹⁵ Complaint by the US.

¹⁶ WTO Panel Report, *India – QRs*, WT/DS90/R, para 5.58.

¹⁷ Complaint by India.

¹⁸ WTO Panel Report, *US – Rules of Origin*, WT/DS243/R, adopted 21 July 2003, para 6.20.

¹⁹ Complaint by the EC.

²⁰ Complaint by India.

²¹ WTO Appellate Body Report, *US – Blouses*, WT/DS33/AB/R, adopted 23 May 1997, at 19.

²² Complaint by India.

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complained of were a direct consequence of the Turkey-EC customs union.²³ India submitted that the parties to a 'multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if... the modification in question... do[es] not affect the enjoyment by the other parties of their rights under the treaty...'²⁴ The Panel noted that the only function it had as a panel in relation to Turkey's procedural concerns was to ascertain whether consultations were properly requested, that the complainant was ready to consult with the defendant and that the 60-day period had elapsed before the request for the establishment of a panel was made by the complainant.²⁵ The Panel concluded that India had complied with those procedural requirements.

Article 6: Specific Measure at Issue: In India—Measures Affecting the Automotive Sector (India – Auto),²⁶ India argued that the principle of *res judicata* applied to prevent the re-litigation of certain claims decided between it and the US through India – QRs. The Panel pointed out that the consistency of the trade balancing and indigenisation conditions with Article XI:1 was not expressly examined by the India – QRs Panel.²⁷ The Panel therefore concluded that *res judicata* could not apply to the facts of the dispute. Similarly, as regards India's claim that the mutually agreed solution barred Panel consideration of EC claims, the Panel found that there was no express reference in the mutually agreed upon solution to the indigenisation or trade balancing elements of the Memorandum of Understanding (MOU).²⁸ The Panel therefore concluded that the terms of the mutually

agreed EC–India solution did not preclude it from examining the matter before it.²⁹ Clearly, India's invoking of *res judicata* did not reflect a proper understanding of the matter before the Panel. Similarly, its reliance on a prior mutually agreed solution with the EC to oust the Panel's jurisdiction was again the result of India's failure to notice that the measures at issue in the two disputes were distinct and not the same. This is not to undermine India's concern, given the DSU's preference for a mutually agreed upon solution and the WTO's acknowledgement of the problems of developing country members when invoking the DSU.

Article 7: Terms of Reference. A panel may consider only those claims that it has authority to consider under its terms of reference. In India – Patents (US), the Panel was found to have exceeded its jurisdiction by ruling that it was necessary for it to make its findings clear on a claim presented before the end of its first substantive meeting with the parties to avoid 'a legal vacuum' in the event that, upon appeal, the Appellate Body were to reverse its findings.³⁰ India – Auto clarifies that, while a panel is competent to consider measures in existence at the time of its establishment, this power is not necessarily affected because a measure under review may have been subsequently removed or rendered less effective.³¹ Thus, a party's implementing recommendations and rulings of WTO Dispute Settlement Body (DSB) as a matter of internal law neither alters a panel's terms of reference, nor affects the matter before it.

Article 9: (i) Multiple Complainants. In India—Patent Protection for Pharmaceutical

²³ WTO Panel Report, *Turkey – Textile*, WT/DS34/R, para 6.6.

²⁴ *Ibid.*, para 6.7 (italics in the original). Further, see Ravindra Pratap, 'Nuclear Arms Control Treaties and Non-Parties', 39 *Indian Journal of International Law* 626 (1999), at 630–31.

²⁵ *Ibid.*, para 9.24. See also Article 4.7 of the DSU, above n 1, at 408.

²⁶ Complaints by the EC and the US.

²⁷ WTO Panel Report, *India – Auto*, WT/DS146/R, WT/DS175/R, para 7.90.

²⁸ *Ibid.*, para 7.126.

²⁹ In view of this factual finding, the Panel did not rule on the issue 'whether a notified mutually agreed solution can ever operate as a bar to a panel's express mandate from the DSB.' *Ibid.*, para 7.136.

³⁰ WTO Appellate Body Report, *India – Patents (US)*, WT/DS50/AB/R, adopted 16 January 1998, para 92.

³¹ WTO Panel Report, *India – Auto*, above n 27, para 7.26.

and Agricultural Chemical Products (India – Patents (EC)),³² India argued that the same matter had already been the subject of a panel procedure³³ and there were neither legal, procedural nor factual reasons that had prevented the EC and its member states from bringing their complaints jointly with the earlier case initiated by the US, or at least at the same time as the US. The Panel found that Article 9 was not intended to limit the rights of members and that it was not feasible for the DSB to establish a single panel at the time of the US panel request in November 1996 because at that time the EC had not requested the establishment of a panel, and it could not have made such a request, for it was not until 28 April 1997 that the EC requested consultations with India.³⁴ Thus, given the text of the DSU and the facts and circumstances of the case, there was nothing which the Panel could do to the contrary. While the Panel could not find for India, it acknowledged India's concerns.³⁵ Necessary changes are required in the DSU to prevent successive complaints on the same facts and legal claims against a developing country member.

(ii) Issuance of Separate Panel Reports. In *United States—Continued Dumping and Subsidy Offset Act of 2000 (US – Offset Act)*,³⁶ the US submitted that Article 9.2 of the DSU gives members 'an unqualified right' to the issuance of separate panel reports upon request. India submitted that even though Article 9.2 of the DSU sets no deadline for requesting a separate panel report, the principle of good faith requires that the right to a separate panel report has to be exercised in a timely manner.³⁷ Noting that the text of Article 9.2

contains no requirement for the request for a separate panel report to be made 'by a certain time', the Appellate Body observed that the text does not explicitly provide that such a request may be made 'at any time'.³⁸ Clearly, a party may not be allowed to exercise a right in such a way as to deprive the other party of the exercise of its antecedent right.

Articles 11 and 17.6: (i) Standard of Review. In *US – Shrimp*, while reversing the Panel's legal conclusion that the US measure at issue was 'not within the scope of measures permitted under the chapeau of Article XX', the Appellate Body found it necessary to 'complete the legal analysis' to determine whether the measure at issue qualified for justification under Article XX. The Appellate Body did this 'in part' recognising that Article 3.7 of the DSU emphasises that the aim of the dispute settlement mechanism is 'to secure a positive solution to a dispute', and that 'the facts on the record of the panel proceedings' permit it 'to undertake the completion of the analysis to resolve this dispute'.³⁹ We do not suggest that the manner of application of a measure, which has been found an unjustifiable or arbitrary discrimination between the countries where the same conditions prevail, must necessarily be a disguised restriction on international trade, completion of the analysis requires that what has appropriately been found to be an unjustifiable and arbitrary discrimination is not a disguised restriction on international trade. Put differently, if the end of positive solution contributed to the necessity of completing the analysis, judicial economy did not prevent it, and the adequacy of facts enabled it, the end remained unfulfilled if the analysis remained incomplete.

Article 3.7 of the DSU emphasises that the aim of the dispute settlement mechanism is 'to secure a positive solution to a dispute', and that 'the facts on the record of the panel proceedings' permit it 'to undertake the completion of the analysis to resolve this dispute.'

³² Complaint by the EC.

³³ *India – Patents (US)*, above n. 9.

³⁴ WTO Panel Report, *India – Patents (EC)*, WT/DS79/R, adopted 2 September 1998, para 7.16.

³⁵ *Ibid.*, para 7.22.

³⁶ Joint complaint by Australia, Brazil, Chile, the EC, India, Indonesia, Japan, Korea and Thailand, and Canada and Mexico.

³⁷ WTO Appellate Body Report, *US – Offset Act*, WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003, para 96.

³⁸ *Ibid.*, para 310.

³⁹ WTO Appellate Body Report, *US – Shrimp*, above n 12, para 124. Further, see Ravindra Pratap, 'Trade and Environment: Trends in International Dispute Settlement', 42 *Indian Journal of International Law* 451 (2002), at 472–74.

In India – QRs, India submitted that the Panel impermissibly delegated its judicial responsibilities to the International Monetary Fund (IMF) and, therefore, acted inconsistently with Article 11 of the DSU.⁴⁰ The Appellate Body found that the Panel critically assessed IMF views and also considered other data and opinions in reaching its conclusions.⁴¹ While there is little doubt that the Panel was required to accept the factual determination of the IMF, but the Appellate Body was bound to accept neither that determination—unless it had already found for the Panel’s determination of the existence of a *prima facie* case⁴² nor the Panel’s interpretation of the IMF’s statement—unless it was, like weighing and assessing of evidence,⁴³ exclusively a question of fact and hence was necessarily outside the scope of appellate review.

In European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India (EC – Bed Linen),⁴⁴ the Panel found that failure to even mention in the request for the establishment of a panel the treaty Article alleged to have been violated constitutes failure to state a claim at all.⁴⁵ But earlier a ‘mere listing’ of treaty articles was not found to satisfy DSU requirements for a panel request.⁴⁶ In United States – Anti-Dumping and Countervailing Measures on Steel Plate From India (US – Steel Plate),⁴⁷ India argued that the Panel should conduct an active

review of the facts before the US Department of Commerce. The US submitted that a panel may not engage in *de novo* review.⁴⁸ Noting the relationship between Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement, as interpreted by the Appellate Body, the Panel held, ‘we may not engage in *de novo* review.’⁴⁹ Evidently, the Panel’s understanding of the proper standard of review coincides with its US articulation which does not elaborate on ‘active review’, for it also means the ‘examination of pertinent facts’.⁵⁰

In US – Offset Act, India wanted the Appellate Body to disregard the new factual evidence adduced by the US, as it was not raised during the Panel proceedings.⁵¹ The Appellate Body clarified that it had the authority to decide whether such findings that are ‘supported’ by that evidence is an issue of law.⁵² This clarification of DSU Article 17.6, however, falls short of clarifying that the question of ‘support’ drawn from a fact is so different from the question of ‘credibility and weight’ attached to it as to make it an issue admissible in the appellate review.

(ii) Proof of Facts. While holding in US – Blouses that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence,⁵³ the Appellate Body clarified that precisely how much and precisely what kind of evidence will be required to establish

⁴⁰ WTO Appellate Body Report, *India – QRs*, WT/DS90/AB/R, adopted 22 September 1999, para 50.

⁴¹ *Ibid.*, para 149.

⁴² *Ibid.*, paras 79 and 151.

⁴³ *Ibid.*, para 144.

⁴⁴ Complaint by India.

⁴⁵ WTO Panel Report, *EC – Bed Linen*, WT/DS141/R, para 6.15.

⁴⁶ *Korea – Definitive Safeguards Measure on Imports of Certain Dairy Products*, Report of the Appellate Body, WT/DS98/AB/R, adopted 12 January 2000, para 124.

⁴⁷ Complaint by India.

⁴⁸ First Submission of the US to the Panel, *US – Steel Plate*, WT/DS206/R, para 62.

⁴⁹ WTO Panel Report, *US – Steel Plate*, WT/DS206/R, adopted 29 July 2002, para 7.6.

⁵⁰ WTO Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, para 55.

⁵¹ WTO Appellate Body Report, *US – Offset Act*, above, n 37, para 181.

⁵² *Ibid.*, para 220.

⁵³ WTO Appellate Body Report, *US – Blouses*, above n 21, at 14.

such a presumption will 'vary from measure to measure, provision to provision, and case to case.'⁵⁴ In *India – Patents (US)*, while admitting that it is not enough for a panel to enunciate the correct approach to burden of proof, and that it must also apply the burden of proof correctly, the Appellate Body did not find that the Panel had done so in that case. While there is a point that India should have been forthcoming in presenting evidence required of it in *US – Rules of Origin*, the fact remains that of the Panel on *India – QRs* had the authority to seek information from the IMF without first explicitly determining the existence of a *prima facie* case, nothing prevented this Panel from seeking that part of the information from within the WTO, which it held to be decisive of the issue.

(iii) *Judicial Economy*. With respect to the issue of whether a complaining party is entitled to a finding on each of its legal claims, *US – Blouses* clarifies that 'a panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute.'⁵⁵ But having found India's trade balancing condition and the MoU inconsistent with Article XI:1 of the GATT 1994 in *India – Auto*, the Panel separately ruled on the export obligation of the trade balancing condition, reasoning that it was 'not considered in the examination under Article XI:1.'⁵⁶ Although this assertion is not factually disputed, it may however be questioned whether a separate ruling on another element of the measure under another GATT provision was necessary to resolve the dispute.

(iv) *Stare Decisis*. In *India – Patents (EC)*, the EC, on the one hand, sought the Panel to 'extend' to it the findings in an earlier dispute and India,⁵⁷ on the other, argued that

it was entitled to normal dispute settlement procedures, as stipulated in Articles 10.4 and 11 of the DSU.⁵⁸ The Panel noted that the point whether adopted panel reports are *stare decisis*, i.e. binding precedents, has not been discussed in the GATT/WTO. The Panel concluded that it was not bound by previous decisions of panels or the Appellate Body even if the subject matter was the same, but it would appropriately take into account the conclusions and reasoning of the previous panels and Appellate Body reports. However, the Panel felt completely bound by the previous Panel and Appellate Body reports, notwithstanding new facts and evidence submitted by India.

Article 12.10: *Sufficient Time for Developing Country Members*. In *India – QRs*, India requested the Panel for additional time to prepare and present its first written submission. The Panel decided to grant the additional time of ten days to India. The Panel clarified that the original date of the first meeting with the Panel would remain 'unchanged'. It is doubtful that the sufficient time that Article 12.10 of the DSU allows to a developing country member would in no case extend to preparing for its meeting with the Panel. And given the mandatory nature of the provision, it is questionable that it must be interpreted within the overall timeframe of panel proceedings.

Article 13: (i) *Amicus Curiae Submissions*. India and Pakistan submitted that panels 'have no *obligation* to consider unsolicited information, and the US is wrong to argue that they do.'⁵⁹ The fact that the Panel allowed the parties to append non-requested information as part of their submissions proved that the Panel neither rejected the information 'outright'⁶⁰ nor interpreted Article 13 as a

⁵⁴ *Ibid.*, at 14.

⁵⁵ *Ibid.*, at 19.

⁵⁶ WTO Panel Report, *India – Auto*, above n 27, para 7.297.

⁵⁷ WTO Panel Report, *India – Patents (US)*, above n 10, para 3.1.

⁵⁸ *Ibid.*, para 4.7.

⁵⁹ WTO Appellate Body Report, *US – Shrimp*, above n 12, para 29 (emphasis added).

⁶⁰ *Ibid.*, para 109.

It must be noted that, while seeking expert opinion is part of fact-finding, nothing in the DSU prevents the Appellate Body from using opinions of experts commissioned by a panel.

blanket prohibition on the acceptance of unsolicited information by panels.⁶¹ The Panel only declined to otherwise accept the *amicus curiae* briefs. The Appellate Body reversed the Panel ruling and stated that panels have the power to accept and consider such briefs. Later, in *EC – Bed Linen*, the Panel did not find it necessary to take an *amicus curiae* submission, received a day before its first meeting with the parties, into account in reaching its decision in the dispute.⁶² And, finally, with respect to two unsolicited submissions by non-governmental organisations received during the proceedings, the Panel on *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia (US – Shrimp (Article 21.5 – Malaysia))*⁶³ included the one which was part of US submissions.⁶⁴

(iii) Expert Evidence. In *US – Shrimp*, the Panel decided to seek scientific and technical advice. The Panel decided not to take into account in its findings any comment or question raised in relation with the consultation of the experts which would not be strictly related to the scientific issues under discussion with the experts. It must be noted that, while seeking expert opinion is part of fact-finding, nothing in the DSU prevents the Appellate Body from using opinions of experts commissioned by a panel.

Article 17: (i) Third Parties. The appellate review brings itself niceties peculiar to itself. Too literal a construction of the DSU and no consideration of ground realities make the appellate process serve only a very few

WTO members. Overall, *United States – Countervailing Measures Concerning Certain Products from the European Communities (US – CVM)*⁶⁵ highlights difficulties that often confront developing country members in meeting time deadlines for filing their third party comments or written submissions.⁶⁶

(ii) Sufficiency of the Notice of Appeal. In *US – Shrimp*, India and Pakistan claimed that the US Notice of Appeal was ‘defective in form and that the action was, therefore, not properly before the Appellate Body.’⁶⁷ Noting that the Notice of Appeal is not designed to be a summary or an outline of the arguments to be made by an appellant,⁶⁸ the Appellate Body found that the Notice of Appeal by the US met the requirements of Rule (Working Procedures for Appellate Review) 20 (2) (d).⁶⁹

Article 21: (i) Developing Country Members. In *EC – Bed Linen (Article 21.5 – India)*, India pointed out that the EC did not pay any particular attention to the Article. The EC argued that a developed country member could not be found to violate Article 21.2 merely because it had chosen to take an implementing measure, which, while being fully consistent with its substantive obligations under a WTO agreement, was less favourable to the ‘interests’ of a developing country member than another measure suggested by the developing country member. While noting that Article 21.2 reflects the concern of members and states ‘an important general policy’, the Panel clarified that ‘nothing in that provision obliges any member actually to

⁶¹ WTO Panel Report, *US – Shrimp*, WT/DS58/R, para 7.8.

⁶² WTO Panel Report, *EC – Bed Linen*, above n 45, footnote 10 to para 6.1 (italics in the original).

⁶³ Complaint by Malaysia.

⁶⁴ See also WTO Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, paras 51–52.

⁶⁵ Complaint by the EC.

⁶⁶ Further, see *United States – Restrictions on Imports of Cotton and Man-Made Fibre Underwear (US – Underwear)*, *Argentina – Certain Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan (US – Yarn)* and *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada (US – Softwood Lumber IV)* appellate proceedings.

⁶⁷ WTO Appellate Body Report, *US – Shrimp*, above n 12, para 92.

⁶⁸ *Ibid.*, para 95.

⁶⁹ *Ibid.*, para 96.

effectuate that general policy, or to do so in any particular way in any particular case.⁷⁰ This was not the only occasion for either a WTO panel to be called upon to apply a special and differential (S&D) treatment provision or for India to see their futility.

(ii) Measure Taken to Comply with DSB Recommendations and Rulings. In *EC – Bed Linen (Article 21.5 – India)*, the Appellate Body noted that ‘if a claim challenges a measure which is not a “measure taken to comply”, that claim cannot properly be raised in Article 21.5 proceedings.’⁷¹ The Appellate Body found that India reasserted in the Article 21.5 proceedings the same claim that it had raised before the original Panel in respect of a component of the implementation measure which was the same as in the original measure. This same claim was dismissed by the original Panel, and India did not appeal that finding. According to the Appellate Body, an ‘unappealed finding included in a panel report that is adopted by the DSB must be treated as a final resolution to a dispute between the parties in respect of the particular claim and the specific component of a measure that is the subject of that claim.’⁷² The Appellate Body noted that India could have appealed the original Panel finding, ‘as the issue was not of an exclusively factual nature.’⁷³

Appendix 2: Objective assessment under Article 11 of the DSU requires panels neither to substitute for, nor to defer to, the

proceedings conducted by national authorities or a WTO body.⁷⁴ Thus, the existence of special or additional rules and procedures makes the task of panels even more critical.⁷⁵

(i) Agreement on Textiles and Clothing (Textiles Monitoring Body). In *US – Blouses*, the Panel rejected India’s claim that, under the Agreement on Textiles and Clothing, a safeguard action can be maintained only if adequately endorsed by the Textiles Monitoring Body.⁷⁶ The Appellate Body also did not find it ‘a legal finding or conclusion’⁷⁷ for India to question the Panel finding that during the review process the Textiles Monitoring Body is not limited to the initial information submitted by the importing member.⁷⁸ Later, in *Turkey – Textile*, the Panel ruled that, since the dispute depends on the Panel’s assessment of Turkey’s defence that its measures were taken in the context of its customs union with the EC, it was not a matter for the Textiles Monitoring Body whose jurisdiction is limited to the examination of measures taken under the Agreement on Textiles and Clothing.⁷⁹

(ii) General Agreement on Tariffs and Trade, 1994:⁸⁰ Committee on Balance-of-Payments Restrictions. In *India – QRs*, the Panel found that, by reviewing the justification of balance-of-payments measures, it did not conclude that panels could substitute themselves for the Committee on Balance-of-Payments Restrictions.⁸¹ The Appellate Body upheld the Panel’s finding that the Panel

Objective assessment under Article 11 of the DSU requires panels neither to substitute for, nor to defer to, the proceedings conducted by national authorities or a WTO body. Thus, the existence of special or additional rules and procedures makes panels’ task even more critical.

⁷⁰ WTO Panel Report, *EC – Bed Linen (Article 21.5 – India)*, para 6.269.

⁷¹ WTO Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, WT/DS141/AB/RW, adopted 24 April 2003, para 78 (italics in the original, footnote omitted).

⁷² *Ibid.*, para 93 (italics in the original).

⁷³ *Ibid.*, para 96.

⁷⁴ See WTO Appellate Body Report, *EC – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, adopted 13 February 1998, para 116.

⁷⁵ See WTO Appellate Body Reports, *Guatemala – Anti-dumping Investigation Regarding Portland Cement From Mexico*, WT/DS60/AB/R, adopted 25 November 1998, paras 64–68; *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non Alloy Steel H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001, para 113–20.

⁷⁶ WTO Panel Report, *US – Blouses*, WT/DS33/R, para 7.57.

⁷⁷ WTO Appellate Body Report, *US – Blouses*, above n 21, at 17.

⁷⁸ WTO Panel Report, *US – Blouses*, above n 76, para 7.20.

⁷⁹ WTO Panel Report, *Turkey – Textile*, above n 23, para 9.16.

⁸⁰ Technically, the GATT 1994 is not one of the agreements included in Appendix 2 to the DSU.

⁸¹ WTO Panel Report, *India – QRs*, above n 16, para 5.114.

was competent to review the justification of India's balance-of-payments restrictions under Article XVIII:B.⁸² It may be noted that the distinction between the justification of restrictions and their application is well established in WTO jurisprudence. In *US – Gasoline*,⁸³ the Appellate Body confirmed that the chapeau of Article XX of the GATT 1994 does not address adoption of the measure at issue, but the manner in which the measure is applied.⁸⁴ Later, in *European Communities – Regime for the Importation, Sale and Distribution of Bananas (EC – Bananas)*,⁸⁵ the Appellate Body made a clear distinction between issues arising from the application of tariff quotas and those arising from the tariff quotas themselves.⁸⁶ All this is not to suggest that the Appellate Body is always and necessarily bound by its own reasoning, in a given case, it must be discernible why the Appellate Body did not find it persuasive.

Pending Consultations, Mutually Agreed Solutions and Termination of Proceedings

India has found mutually agreed upon solutions with Poland,⁸⁷ Australia,⁸⁸ Canada,⁸⁹ New Zealand,⁹⁰ Switzerland,⁹¹ and the EC⁹². Of the 11 consultations that are pending, five have been requested by India,⁹³ four by the EC,⁹⁴ and one each by Bangladesh⁹⁵ and Chinese Taipei.⁹⁶ In one case, India requested 'termination of further action';⁹⁷ in another, the DSB deferred an EC request for the establishment of a panel.⁹⁸

NEPAL

Nepal acceded to the WTO on 23 April 2004. A land-locked mountainous country, this LDC faces the problems of poverty, weak institutional capacities, and financial constraints. It has not been involved in any WTO dispute.

⁸³ Complaint by Venezuela and Brazil.

⁸⁴ The text of the chapeau very much uses the word 'applied'.

⁸⁵ Complaints by Ecuador, Guatemala, Honduras, Mexico and the US.

⁸⁶ WTO Appellate Body Report, *EC – Bananas*, WT/DS27/AB/R AB, adopted 25 September 1997, paras 197–98.

⁸⁷ *Poland – Import Regime for Automobiles*, WT/DS19/2 (11 September 1996).

⁸⁸ *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS91/8 (11 September 1996).

⁸⁹ *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS92/8 (03 April 1998).

⁹⁰ *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS93/8 (11 December 1998).

⁹¹ *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS94/9 (23 March 1998).

⁹² *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS96/8 (06 May 1998); *European Communities – Anti-Dumping Duties on Certain Flat Rolled Iron or Non-Alloy Steel Products from India*, WT/DS313/2 (27 October 2004).

⁹³ *European Communities – Anti-dumping Investigations Regarding Unbleached Cotton Fabrics from India*, WT/DS140/1 (07 August 1998); *European Communities – Restrictions on Certain Import Duties on Rice*, WT/DS134/1 (08 June 1998); *South Africa Anti-dumping Duties on Certain Pharmaceutical products from India*, WT/DS168/1 (13 April 1999); *Brazil – Anti-dumping Duties on Jute Bags from India*, WT/DS229/1 (17 April 2001); *Argentina – Measures Affecting the Import of Pharmaceutical Products*, WT/DS233/1 (30 May 2001).

⁹⁴ *India – Measures Affecting Customs Duties*, WT/DS150/1 (03 November 1998); *India – Import Restrictions*, WT/DS149/1 (12 November 1998); *India – Import Restrictions Maintained Under the Export and Import Policy 2002–2007*, WT/DS279/1 (9 January 2003); *India – Anti-Dumping Measures on Imports of Certain Products From the European Communities and/or Member States*, WT/DS304/1 (11 December 2003).

⁹⁵ *India – Anti-Dumping Measures on Batteries from Bangladesh*, WT/DS306/1 (2 February 2004).

⁹⁶ *India – Anti-Dumping Measures on Certain Products from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu*, WT/DS318/1 (1 November 2004).

⁹⁷ *United States – Measures Affecting Imports of Women's and Girls' Wool Coats*, WT/DS32/2 (30 April 1996).

⁹⁸ *India – Measures Affecting Export of certain Commodities*, WT/DS120/2 (13 October 2000).

Pakistan is also a founder-member of the WTO. It has been the second biggest South Asian participant in the WTO dispute settlement system.⁹⁹

DSU Provisions and Issues in WTO Dispute Settlement Reports

Article 3: Interpretation of the WTO Agreements.¹⁰⁰ In *US – Yarn*,¹⁰¹ Pakistan opposed the US interpretation of Article 6.2 of the Agreement on Textiles and Clothing that defined its cotton yarn industry as ‘combed cotton yarn for sale industry’, i.e. establishments producing combed cotton yarn for sale in the market. Upholding the Panel finding against the US, the Appellate Body clarified that the definition of the domestic industry must be product-oriented and *not* producer-oriented.¹⁰² Indeed, with already much scope for innovation in a fashion-led area of textiles and clothing, it would be odd if a country is allowed to give a different legal meaning to the domestically produced yarn from that it gives to the imported one.

Article 11: Standard of Review.¹⁰³ In *US – Yarn*, one of the questions before the Appellate Body was whether the Panel exceeded its mandate under Article 11 by considering, in the context of reviewing a determination under Article 6.2 of the Agreement on Textiles and Clothing, evidence relating to facts which predated the determination but which was not in existence at the time the determination was made.¹⁰⁴ The Appellate Body concluded that a panel must not consider evidence that did not exist at the time when the importing member

made its determination under Article 6.2. It was clarified that if a panel were to examine such evidence, the panel would be conducting a *de novo* review.

Article 12: Descriptive Part of the Panel Report. In *US – Yarn*, the US claimed that it was prejudiced by the Descriptive Part of the Report.¹⁰⁵ Among other things, the US complained that large portions of the actual submissions by Pakistan were included while only the summaries of US submissions were included. The US also claimed that the preferred alternative to using the executive summaries would be to go along with the practice of attaching submissions to panel reports. The Panel did not consider this to be a viable approach and recalled DSU Article 12.2 that gives panels sufficient flexibility to ensure high-quality panel reports without unduly delaying the panel process. While the Panel found the US intention of making its submissions public to be ‘the right way’, it did not find that Pakistan was not within its DSU rights by declining a US request for making its arguments public. The Panel pointed out that its findings and conclusions were based on the parties’ full submissions and testimony. The Panel maintained that it had fulfilled the standard of Article 11 of the DSU and disagreed with the US that it had been prejudiced by the Panel’s approach in using the executive summaries.

Article 13: Amicus Curiae Submissions.¹⁰⁶ Article 17: Sufficiency of the Notice of Appeal.¹⁰⁷ Appendix 3 (Working Procedures): Late Submission of Evidence. In *US – Yarn*, the US considered that Pakistan failed to justify its late submission of evidence on the basis of Paragraph 12 of the Working

Upholding the Panel finding against the US, the Appellate Body clarified that it would be odd if a country is allowed to give a different legal meaning to the domestically produced yarn from that it gives to the imported one.

⁹⁹ Five proceedings: thrice a complainant, twice a respondent.

¹⁰⁰ For a background note, see above discussion on *US – Shrimp* under Article 3.2.

¹⁰¹ Complaint by Pakistan.

¹⁰² WTO Appellate Body Report, *US – Yarn*, WT/DS192/AB/R, adopted 5 November 2001, para 86.

¹⁰³ For a background note, see above discussion on *US – Shrimp* under Article 11.

¹⁰⁴ WTO Appellate Body Report, *US – Yarn*, above n 102, para 67.

¹⁰⁵ WTO Panel Report, *US – Yarn*, WT/DS192/R, para 7.5

¹⁰⁶ See above, discussion under Article 13 (i).

¹⁰⁷ See above, discussion under Article 17 (ii).

South Asia has made three formal submissions at the ongoing post-Doha DSU review negotiations. While the first and the second submissions contain, respectively, its proposals on 'systemic issues' and on the S&D treatment, the third submission suggests amendments to the DSU.

Procedures. Pakistan strongly disagreed with the US' claim. The Panel findings did not include a reflection on this point.

Pending Consultations, Mutually Agreed Solutions, Panel Requests

Pakistan found a mutually agreed upon solution with the US in one case,¹⁰⁸ EC-requested consultations are pending in another,¹⁰⁹ and has requested the DSB to establish a panel in yet another case.¹¹⁰

SRI LANKA

Sri Lanka is also a founder-member of the WTO. It has been involved in only one dispute when, on 23 February 1996, it requested consultations with Brazil concerning Brazil's imposition of countervailing duties on its export of desiccated coconut and coconut milk powder. Sri Lanka alleged that those measures are inconsistent with Articles I, II and VI of the GATT 1994 and Article 13 (a) of the Agreement on Agriculture (the so-called peace clause).¹¹¹ To date neither a mutually agreed solution has been reported nor has a panel request been made.

CONCLUSIONS

Of all DSU provisions and issues involved in the WTO dispute settlement reports, the interpretation of the WTO agreements has turned out to be all too determinative of South Asia's WTO rights and obligations.

This has also raised the issue of the proper role and function of political and judicial organs of the WTO. Second, while the standard of objective assessment by panels has been less than uniform, panels have been advised against conducting a *de novo* review of the evidence and substituting their decision for that of the competent authority of a WTO member. Third, the lack of elaborated evidentiary rules does not explain their less convincing treatment in some cases. Next, there is little doubt about the existence of *de facto stare decisis* in WTO dispute settlement. Fifth, the standard of prejudice to appellees due to the insufficiency of a Notice of Appeal required for dismissal of an appeal is not clear. And, finally, the rationale behind the application or non-application of judicial economy has also been less than clear. Since decided cases will have an influence on the conduct of members, and hence on dispute prevention, efforts aimed at prevention of disputes are no less laudable for South Asia than the promises of their prompt settlement.

While several disputes have been settled without adjudication, there is little, if any, stipulation in the DSU that actually makes more capable members pay attention to the problems of developing country members.

3. SOUTH ASIA AND DSU REVIEW

South Asia has made three formal submissions at the ongoing post-Doha DSU review negotiations.¹¹² While the first¹¹³ and the second¹¹⁴ submissions contain, respectively, its proposals on 'systemic issues' and on the

¹⁰⁸ *Pakistan – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS36/4 (7 March 1997).

¹⁰⁹ *Pakistan – Export Measures Affecting Hides and Skins*, WT/DS107/1 (20 November 1997).

¹¹⁰ *Egypt – Anti-dumping Duties on Matches from Pakistan*, WT/DS327/2 (10 June 2005).

¹¹¹ *Brazil – Countervailing Duties on Imports of Desiccated Coconut Milk Powder from Sri Lanka*, WT/DS30/1 (5 March 1996).

¹¹² One of the Ministerial Decisions adopted at the end of the Uruguay Round had invited the Ministerial Conference to complete a full review of the DSU by 1 January 1999. The review started in 1997. The deadline was extended to 31 July 1999, but there was no agreement. In November 2001, at the Doha Ministerial Conference, WTO Members agreed to negotiate to improve and clarify the DSU. These negotiations, which have been going on in special sessions of the DSB, could not be concluded by 31 May 2004, as scheduled. Therefore, on 28 May 2004, the deadline was extended to allow the negotiations to proceed alongside the ongoing Doha Round negotiations.

¹¹³ Sponsored, among others, by India, Pakistan and Sri Lanka. WTO Doc. TN/DS/W18 (7 October 2002). Earlier, India had submitted its questions to the proposals by the EC. WTO Docs. TN/DS/W1 (13 March 2002) and WT/DS/W/5 (7 May 2002).

S&D treatment, the third submission¹¹⁵ suggests amendments to the DSU. Systemic issues identified in the proposals encompass mutually agreed solutions, *amicus curiae* briefs, tenure of Appellate Body members, role of the Secretariat, Notice of Appeal, and third party rights. The proposals on the S&D treatment cover consultations, panel procedures, surveillance of implementation of DSB recommendations, suspension of concessions and other obligations, and litigation costs.¹¹⁶ The following is a discussion of the implications of South Asia's submissions.

SYSTEMIC ISSUES

Mutually Agreed Upon Solutions: Contrary to South Asia's noting that the DSU does not specify, as to 'what would happen if parties chose not to [notify a mutually agreed solution],'¹¹⁷ it is specifically provided that '[a]ll solutions... shall not nullify or impair benefits accruing to any Member under those agreements, nor impede the attainment of any objective of those agreements.'¹¹⁸ There is nothing in the DSU to suggest that the expression 'all solutions' necessarily excludes mutually agreed upon solutions. As a matter of fact, the point is moot, since both India and the EC had jointly notified their mutually agreed solution to the DSB in a dispute¹¹⁹

which prompts this proposal. If, indeed, a specific proposal was required to be made on the issue, it should more appropriately have been concerned with the extent to which a prior notified mutually agreed upon solution would bar a subsequent panel request by the parties. Since this is not what the proposal is about, there is no need to further qualify the 'terms' of a mutually agreed solution by 'sufficient detail',¹²⁰ as it implies that full terms are not envisaged while a parallel is drawn to panel 'terms' of reference. However, the proposal that a mutually agreed upon solution must be notified within 60 days is understandable, as it took much longer in India – Auto without any discernible benefit to India.

Amicus Curiae Submissions: The controversy surrounding *amicus curiae* briefs essentially stems from panel discretion to 'seek' information, the inter-governmental character of the WTO and the developing country members' ability to respond to unsolicited information, both in terms of time and financial constraints. While South Asia's position has moved from the prohibition of 'consideration'¹²¹ to the prohibition of 'acceptance'¹²² of unsolicited information, it has yet to come to grips with the more important concern—the need for ensuring effective equality of parties at all stages of adjudication.¹²³

¹¹⁴ Sponsored, among others, by India, Pakistan and Sri Lanka. WTO Doc. TN/DS/W19 (9 October 2002).

¹¹⁵ Sponsored, among others, by India. WTO Doc. TN/DS/W47 (11 February 2003).

¹¹⁶ See generally, Kim Van der Borght, 'The Review of the WTO Understanding on Dispute Settlement: Some Reflections on the Current Debate', 14 *American University International Law Review* (1999), 1223–43; Friedl Weiss, *Improving WTO Dispute Settlement Procedures: Issues and Lessons from the Practice of other International Courts and Tribunals* (London: Cameron May 2000); Ernst-Ulrich Petersmann (ed), *Preparing the Doha Development Round: Improvements and Clarifications of the WTO Dispute Settlement Understanding* (Florence: European University Institute 2002); S. Narayanan, 'Dispute Settlement Understanding of the WTO: Need for Improvement and Clarification', Indian Council for Research on International Economic Relations, Working Paper No. 117 (2003), 1–86; Bryan Mercurio, 'Improving Dispute Settlement in the World Trade Organization: the Dispute Settlement Understanding Review—Making it Work?', 28 *Journal of World Trade* (2004), 795–854.

¹¹⁷ Above n 113, at 2.

¹¹⁸ Article 3.5 of the DSU, above n 1, at 406.

¹¹⁹ See *India – Auto*, above n. 26.

¹²⁰ Above n 115, at 1.

¹²¹ Above n 113, at 4.

¹²² Above n 115, at 1.

¹²³ See *US – Shrimp*, *India – QRs* and *US – Rules of Origin*, above ns 11, 15, and 17, and Ravindra Pratap, 'WTO and Rules of Origin: Issues for India', 38 *Economic and Political Weekly* 3454 (2003), at 3455.

South Asia has sought to make it mandatory for the developed country member to explain in the panel request or in its submissions to the panel as to how it has taken or paid special attention to the particular problems and interests of the developing country member.

Tenure of Appellate Body Members: A WTO victory has mostly entailed for South Asia a perpetual loss for interpretations given by the Appellate Body, a 'standing' body.¹²⁴ While South Asia's proposal on this point has some obvious merits,¹²⁵ it is not clear how a non-renewable six-year term alone would also help address this problem, a problem that has most confronted South Asia.

Role of the Secretariat: South Asia's proposal in this respect is certainly helpful.¹²⁶ It would add to the improvements suggested here in the context of consideration of information by panels.

Notice of Appeal: South Asia suggests that the Appellate Body be requested to lay down guidelines on the nature of Notice of Appeal, while revising the Working Procedures. It is not clear what prevents South Asia from also proposing the necessary amendment or clarification in the DSU text through WTO decision-making.

Third Party Rights: South Asia has very often been a third party. Its experience rightly calls for making third party rights in the appellate proceedings analogous to the panel proceedings. Its proposal in this regard must be pursued vigorously.

SPECIAL AND DIFFERENTIAL TREATMENT

Consultations: South Asia has sought to make it mandatory for the developed country member to explain in the panel request or in its submissions to the panel as to how it has taken or paid special attention to the particular problems and interests of the developing country member. It has made a proposal to extend the overall timeframe involving a developing country member as a defending party. These proposals are quite useful.

Panel Procedures: South Asia has sought that panels give developing country members extra time of at least two weeks for the first submission, one week each for the second submission, the first and second oral presentations and for interim submissions, if any. It has also proposed that panels should be required to give rulings on how a developed country member has taken or paid special attention to the particular problems and interests of the developing country member in the matter. If seen through, the latter proposal would also enhance transparency in the dispute settlement process.

Surveillance of the Implementation of DSB Recommendations: South Asia has rightly suggested the need for making DSU Article 21.2 mandatory, so that particular attention is paid to matters affecting the interests of a developing country member with respect to measures which have been subject of dispute settlement.

Suspension of Concessions and Other Obligations: South Asia has also rightly proposed that a developing country member should be exempted from proving the DSU requirements that it was not 'practicable or effective' to suspend concessions in the same sector or agreement where the violation was found and the 'circumstances are serious enough' to seek suspension of concessions under the agreements other than those in which violation was found to exist, and that it should be permitted to seek authorisation for suspending concessions and other obligations in sectors of its choice.

Litigation Costs: It is not understandable that no useful distinction could be made between costs of obtaining necessary DSB recommendations and rulings and costs of litigating their non-compliance, so much so

¹²⁴ See *US – Shrimp, India – QRs, US – Offset Act, EC – Bed Linen, US – Steel Plate; European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246 (Complaint by India), above ns 11, 15, 36, 44 and 47, and Ravindra Pratap, 'WTO Panel Report on Indian Steel Plate, Issues of Interpretation', 38 *Economic and Political Weekly* 1021 (2003), at 1022 and 'WTO and Tariff Preferences: India Wins case, EC the law', 39 *Economic and Political Weekly* 1788 (2004), at 1789.

¹²⁵ See Narayanan, above n 116, at 57.

¹²⁶ Above n 115, at 2.

that 'litigation costs' which South Asia has treated as a matter of the S&D treatment could not at once encompass a systemic issue—notwithstanding the fact that it was India which had expressed its 'strong systemic interests' when participating as a third party in a case that concerned a unilateral determination of non-compliance.¹²⁷ This implies that non-compliance is a systemic issue for a developing country member where it confronts a developed country member, but it becomes a matter of the S&D treatment when it occurs between developing and developed country member!

4. CONCLUSION: SUGGESTIONS TO MAKE THE DSU MORE FEASIBLE AND WORKABLE FOR SOUTH ASIA

What should South Asia's approach be when negotiations to improve and clarify the DSU have advanced? It is not unlikely that the backdrop of 'shock and awe' should revive the Uruguay Round context of DSU negotiations,¹²⁸ but it would be a mistake if it should also influence DSU reforms, when the 'shocker' is negotiating them long after fulfilment of the conditions for considering its retreat.¹²⁹ The need of the hour is to see how far we can go in doing away with DSU shortcomings, not doing a Uruguay Round.

For instance, it is not clear why no proposals should be made on the principle of institutional balance between adjudicative and deliberative bodies in the WTO, a principle germane to a dispute in which India lost, due mainly to its inappreciation in one case,¹³⁰ but which was maintained in another.¹³¹ If the needful could not be proposed in the text of the DSU, where would we appropriately suggest it, if pursuant only to the DSU, where two identical provisions have been interpreted for and against the existence of the institutional balance in the WTO?¹³²

South Asia should sponsor the proposal that seeks a 90-day mandatory recourse to good offices, mediation and conciliation, upon a modification, so that it is also applicable when only one of the disputants is a developing country member.¹³³ While the Balás text¹³⁴ makes reference to 'terms' of a mutually agreed solution that would need to be notified, South Asia needs to ensure that there is an explicit mention of the specific measure covered by the mutually agreed solution to enable other members to fully understand it and to guard against the possibility of its becoming the subject matter of a new panel request against a developing country member. The Brazilian concern over the necessity for a member to litigate a case *de novo*, even if the measure nullifying or impairing its benefits

South Asia should sponsor the proposal that seeks a 90-day mandatory recourse to good offices, mediation and conciliation, upon a modification, so that it is also applicable when only one of the disputants is a developing country member.

¹²⁷ WTO Panel Report, *United States – Import Measures on Certain Products from the European Communities*, WT/DS165/R/Add. 1, at 128.

¹²⁸ See Muchkund Dubey, *An Unequal Treaty: World Trading Order After GATT* (New Delhi: New Age 1996), at 8. Further, see Ravindra Pratap, 'WTO: The Cancún Ministerial', 43 *Indian Journal of International Law* 758 (2003), at 764.

¹²⁹ It may be recalled that the US had threatened withdrawal from the WTO in the event of three consecutive adverse findings by its dispute settlement system. The DSB did in fact adopt more than three consecutive rulings against the US. See *US – Gasoline*, above ns 3 and 83; WT/DS24, *US – Underwear, Complaint by Costa Rica*, above n 66, adopted 25 February 1997; WT/DS33, *US – Blouses*, above n 20; *US – Shrimp*, above n 11; WT/DS99, *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMs) of One Megabit or Above from Korea, Complaint by Korea*, adopted 19 March 1999. Further see, the US proposals dated 17 December 2002. WTO Doc. TN/DS/W/28 (23 December 2002).

¹³⁰ *India – QRs*, above n 15.

¹³¹ *Turkey – Textile*, above n 22.

¹³² See footnote 1 to the 1994 Understanding on the Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade, and para 12 of the 1994 Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade, above n 1, at 27 and 34, respectively. For the argument that judicial activism would not adversely affect the interests of powerful States, see Richard H. Steinberg, 'Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints', 98 *American Journal of International Law* 246 (2004), at 263–67; Further, see Lorand Bartels, 'The Separation of Powers in the WTO: How to Avoid Judicial Activism', 53 *International and Comparative Law Quarterly* (2004), 861–95.

¹³³ Communication from Paraguay, WTO Doc. TN/DS/W/16 (25 September 2002).

¹³⁴ *Report by the Chairman, Ambassador Péter Balás, to the Trade Negotiations Committee*, WT/TN/9 (6 June 2003), at 3.

has already been found inconsistent with a previous WTO panel or appeal proceedings initiated by another member,¹³⁵ deserves the support of South Asia.

Canada's proposed amendment to the DSU, which concerns the qualifications of panelists, and its proposal on transparency also merits support.¹³⁶ South Asia may also support the Thai proposal that aims at addressing the problem of finding a sufficient number of suitable panelists without a DSU amendment.¹³⁷ It is necessary to see whether deficiencies in the functioning of panels or the Appellate Body are also attributable to the lack of professional qualifications of their members, as it is not enough to have sufficient developing country representatives to serve on WTO bodies unless only the professionally trained could be given representation.

South Asia should utilise DSU Article 3.9 for a proposal to restrict the interpretational competence of the Appellate Body, as the latter is most unlikely to be made an *ad hoc* tribunal constituted on the case-by-case basis from a roster analogous to the EC suggested roster of panelists. The possibility of an advisory opinion from the International Court of Justice (ICJ) is worth exploring.¹³⁸ South Asia should propose that where the majority¹³⁹ of members at a DSB meeting convened to consider a report objects to a legal interpretation given by the Appellate Body, the matter shall be referred to the Ministerial

Conference or the General Council, which shall by a two-third majority¹⁴⁰ either adopt an authoritative interpretation or seek an authorisation to request the ICJ for the same. However, this should not bar adoption of the rest of the report.

It remains to be seen whether and how South Asia would react to the EC's remand proposal¹⁴¹ and to the Balás text. If anything, the Balás text is cumbersome for an otherwise widely felt need for the Appellate Body. It is neither possible nor desirable to envisage all that may properly require a remand or resolve a dispute without it.¹⁴² However, the US emphasis on the need for additional guidance to panels and the Appellate Body as regards their DSU mandate, particularly as to the application of judicial economy and the rules of interpretation, affords South Asia some commonality for working together.

South Asia's proposal on the Notice of Appeal should be made at two levels: first, at the DSU and, second, at the level of the Rules. In the DSU it must be stated that an issue not clearly identified in the notice of appeal shall not be opposable to the party appealed against.¹⁴³ And, it must be appended to Rule 22 (1) that in the case of a developing country appellee, 25 days shall run as from the filing of an appellant's submission.¹⁴⁴

Instead of a more rigid negotiating stance on *amicus curiae* submissions, a proposal for clarification is required to be made in the text

¹³⁵ WTO Doc. TN/DS/W/45 (11 February 2003).

¹³⁶ WTO Doc. TN/DS/W/41 (24 January 2003).

¹³⁷ WTO Doc. TN/DS/W/31 (22 January 2003).

¹³⁸ Proposals by Kenya on behalf of the African Group, WTO Doc. TN/DS/W15 (25 September 2002), at 5.

¹³⁹ Alternatively, a two-third majority, failing which, a three-fourth majority, but no further, and certainly not by consensus. The idea is to see to it that there is provision in the DSU to prevent Appellate Body interpretations, widely perceived as particularly onerous for developing country Members, from becoming binding without approval by the competent organs of the WTO.

¹⁴⁰ Instead of a three-fourth majority, as presently provided for in Article II.2 of the WTO Agreement and in Article IX:2, above n 1, at 11.

¹⁴¹ The EC has proposed that the 'Appellate Body shall address each of the claims and issues raised in accordance with paragraph 6 during the appellate proceeding...' WTO Doc. TN/DS/W/38 (23 January 2003), at 6 (emphasis added).

¹⁴² See, in particular, WTO Appellate Body Report, *US – Shrimp*, n. 12, paras 122–24; WTO Appellate Body Report, *US – Softwood Lumber IV*, above n 66, WT/DS257/AB/R, adopted 17 February 2004.

¹⁴³ The existing DSU provision states: 'An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.' Article 17.6 of the DSU, above n 1, at 418.

¹⁴⁴ WT/AB/WP/3 (28 February 1997), at 8. Further, see WTO Doc. WT/AB/WP/8 (8 April 2004).

of Article 13 of the DSU, to the effect that a panel shall not consider such information unless it ensures at all times effective equality of parties before it.¹⁴⁵ This would also address some of our concerns arising from inputs provided by the Secretariat. South Asia needs to support the proposal for a fund for meeting the expenses of making rebuttals of information admitted under Article 13.¹⁴⁶ It also needs to oppose the tendency of the panels to appoint individual experts against the DSU preference for expert review groups.

The issue of transparency is not limited to the issue of *amicus curiae* submissions. Neither can the concern be the same as that which arises from the demands for greater transparency in the functioning of political and judicial bodies, if only there should be differences in their decision-making.¹⁴⁷ South Asia needs to propose that Panel and Appellate Body proceedings shall be open to public, unless parties request that they be held in camera. While no interventions may be allowed by the general public, there should be no restrictions on the reporting of proceedings that are open to public. Opinions expressed by individual members in the Panel or Appellate Body reports need not be anonymous.¹⁴⁸ And the same member shall not head a compliance panel if any other member of the original panel is available. We must utilise the available support of developing country members to not only ensure provision for a separate opinion by the Panel and Appellate Body members, but to have the option of a second panellist upon request from a member of a developing or least developed country.¹⁴⁹

‘Shall’ in place of ‘should’ in the existing S&D treatment provisions is necessary for their meaningful formulation, but it is not sufficient to transform their proposed elaborations into means that can adequately improve matters for South Asia. Instead of insistence on the S&D treatment for costs of litigating non-compliance, South Asia must seize the opportunity and rally the support of developing countries to strengthen its case rather than weaken their common cause. Its position that ‘the award of litigation costs is binding on the parties and not subject to appeal’¹⁵⁰ eats into its own rationale for the proposal.¹⁵¹ The Balás text on litigation costs leaves much to be desired, much from developing country members.

Given the extent of South Asia’s third party participation, the issue of third party rights requires serious attention. While the Balás text is a considerable improvement on the DSU text, there is nothing in it to discourage developed country members from bringing successive cases on the same facts and legal bases against a developing country member. A proposal may be considered in DSU Article 10.4, to the effect that a third party may have recourse to normal dispute settlement procedures upon a final disposal of the original dispute. This would help prevent similar complaints by more capable members, lessen the number of panel requests, strengthen and improve the effectiveness of the consultation procedure generally, and benefit less capable members in particular. The expression ‘upon final disposal of’ may be substituted with ‘at the end of reasonable period of time to

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¹⁴⁵ A footnote may be added to the effect that the provision would equally apply to appellate proceedings. Here, South Asia may prefer the US approach to that of the EC. See WTO Doc. TN/DS/W/46 (11 February 2003).

¹⁴⁶ Proposals by Jordan, WTO Doc. TN/DS/W/43 (28 January 2003).

¹⁴⁷ For a background note, see Pratap, above n 7, ch. V, s. 6, at 424–25; Mercurio, above n. 116, at 808–10; cf., Narayanan, above n. 116, at 52–54.

¹⁴⁸ See *Turkey – Textile and US – Import Measures*, above ns 22 and 127, respectively.

¹⁴⁹ Further, see Proposals by Haiti and Zambia on behalf of the LDC countries, WTO Doc. TN/DS/W/16 (25 September 2003) and WTO Doc. TN/DS/W/17 (9 October 2002), respectively.

¹⁵⁰ Above n 115, footnote 1.

¹⁵¹ South Asia should note that China seeks litigation costs where a developed country has ‘failed’ to make its case against a developing country. WTO Doc. TN/DS/W/51/Rev.1 (13 March 2003), at 3.

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implement recommendations and rulings of the DSB in' to add to third party rights and beat back resistance from the obvious quarters. The Costa Rican proposal on third party rights affords South Asia a counterpoise to the move that seeks to expand the rights of non-member 'stakeholders' in the WTO, principally on the ground of transparency.¹⁵² The Australian proposal for compensation for third parties may be supported if a developing country member is exempted from providing it.¹⁵³

Securing compliance from developed countries continues to be an arduous task for every developing country member. South Asia may well require faster agreement on a reasonable period of time, as proposed by Korea,¹⁵⁴ but experience hardly allows us to bind to a shorter reasonable period of time in every case.¹⁵⁵ Similarly, Japan's proposal on compliance is supportive, insofar as it seeks to expedite compliance, but it has nothing in it to address the widespread concerns of developing countries.¹⁵⁶ Further, it is unrealistic to believe that an agreement would always be reached between the parties on the 'sequencing' question.¹⁵⁷ Hence the need for an explicit DSU provision for prior completion of the Article 21.5 procedure, and for maintaining the requirement of consultation before allowing a compliance panel request. The Balás text on this point is an advance over the DSU text, but much remains to be done. Next, the proposals for compensation in the absence of immediate

compliance and for the possibility of a DSB authorisation for a collective retaliation supplement South Asia's proposed paragraph 3 *bis* of DSU Article 22, frontloading of the determination of the level of nullification or impairment¹⁵⁸ and the need for ensuring the equivalence of the level of suspension of concessions and other obligations to the level of the nullification or impairment¹⁵⁹ would help meet one of our key compliance concerns. South Asia needs to work towards the availability of pecuniary compensation as a matter of right in the absence of immediate compliance, but it must not be allowed to become an alternative to the withdrawal of a WTO-inconsistent measure.

While South Asia has used the Advisory Centre on WTO Law, established to provide assistance to developing country members in WTO matters, non-recourse to S&D treatment provisions by developing countries proves the point that 'the use of the dispute settlement procedures is not possible without technical assistance'.¹⁶⁰ 'Harnessing skill and developing human capital in trade-related law and litigation, needs to be given high priority when designing technical assistance programmes.'¹⁶¹ But, again, the Balás text is a disappointment. Thus, while it is necessary for South Asia to press for greater and effective technical support by the WTO, it cannot be a substitute for developing its own expertise and keeping regular contact between its member countries.

¹⁵² WTO Doc. TN/DS/W/12/Rev.1 (6 March 2003).

¹⁵³ Draft Article 5*bis*, WTO Doc. TN/DS/W/49 (17 February), at 4.

¹⁵⁴ WTO Doc. TN/DS/W/35 (22 January 2003).

¹⁵⁵ See *India – Patents (US)*, above, n 10.

¹⁵⁶ See WTO Doc. TN/DS/W/32 (22 January 2003).

¹⁵⁷ For instance, India–EC agreement of 13 September 2001 in *EC – Bed Linen (Article 21.5 – India)*, above n 13.

¹⁵⁸ Proposals by Mexico, WTO Doc. TN/DS/W/40 (27 January 2003).

¹⁵⁹ Proposals by Philippines and Thailand, WTO Doc. TN/DS/W/3 (21 March 2002), at 1.

¹⁶⁰ WT/TPR/S/128 (4 February 2004), at 20, para 18.

¹⁶¹ Trade Policy Review of Bangladesh, WT/TPR/S/68 (3 April 2000), at 29.