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Research Article

# Special and Differential Treatment: A New Factor Explaining LDC Engagement with the WTO Dispute Settlement System?

**Ronald Cullen Kerr Welsh**
Law Postgraduate Research, Strathclyde University and Lecturer, International Law, Bahrain Polytechnic
Ronald.welsh@polytechnic.bh
Ronald.welsh@strath.ac.uk

## Abstract

The factors explaining the lack of participation and engagement by Least Developed Countries (LDCs) in the World Trade Organization (WTO) dispute settlement mechanism (DSU) have been the subject of much academic discourse. This paper posits the existence of a new factor that will inform and expand this discourse. The paper examines the pursuit of Special and Differential Treatment (S&D) by LDCs during the GATT era, positing that S&D became a key driver of LDC policy during this period. It is argued that during the Uruguay Round of Trade Negotiations, this S&D-driven policy led the LDCs to seek a bespoke LDC dispute settlement system extraneous to, and separate from, the DSU mechanism agreed upon by the vast majority of GATT contracting parties. This paper concludes that the clearly espoused desire of LDCs neither to participate in nor to be associated the DSU, coupled with their clearly expressed requests for a bespoke LDC-only dispute settlement mechanism; together provide a powerful new reason why LDCs have not more actively engaged with the DSU.

**Keywords:** Least Developed Countries; Special and Differential Treatment; GATT; WTO; Uruguay Round; Dispute Settlement Understanding

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مقالة بحثية

# المعاملة الخاصة التفضيلية: عامل جديد لتفسير التزام الدول الأقل تطورًا بنظام تسوية النزاعات لمنظمة التجارة العالمية

**رونالد ويلش**

باحث في القانون، جامعة ستراثكلايد ومحاضر في القانون الدولي، بوليتكنك البحرين
Ronald.welsh@polytechnic.bh
Ronald.welsh@strath.ac.uk

## ملخص

تُعد العوامل التي تفسر عدم مشاركة والتزام الدول الأقل تطورًا في آلية تسوية النزاعات لمنظمة التجارة الدولية موضوع جدل القطاع الأكاديمي. تقدم هذه الدراسة عاملًا جديدًا لتغذية وتوسيع هذا الجدل. كما أنها تقيّم مواصلة هذه الدول للمعاملة الخاصة التفضيلية في زمن الاتفاقية العامة للتعريفات الجمركية والتجارة، باعتبارها أساس سياستها. وخلال جولة أوروغواي لاتفاقيات التجارة، دفعت هذه السياسة الدول الأقل تطورًا للبحث عن نظام موصى عليه لتسوية النزاعات، ومنفصل عن آلية تسوية النزاعات المتفق عليها من قبل أكثرية أطراف الاتفاقية العامة للتعريفات الجمركية والتجارة. وتخلص هذه الدراسة برغبة الدول الأقل تطورًا في عدم المشاركة أو الانضمام إلى آلية تسوية النزاعات، بالإضافة إلى المطالبة بآلية لتسوية النزاعات موصى عليها فقط لهذه الدول، مما يوضح سبب عدم التزام هذه الأخيرة بآلية تسوية النزاعات.

**الكلمات المفتاحية:** الدول الأقل تطورًا، المعاملة الخاصة التفضيلية، الاتفاقية العامة للتعريفات الجمركية والتجارة، منظمة التجارة الدولية، جولة أوروغواي، تفاهم تسوية النزاعات

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## Introduction

The concept of a "Least Developed Country" (LDC) originated in discussions by members of the United Nations[1] (U.N.) that took place during the 1960s and 1970s.[2] These discussions resulted in the creation of LDCs as a separate and distinct U.N. category by the U.N. General Assembly in 1971.[3] Within the General Agreement on Tariffs and Trade (GATT) arena,[4] LDCs were formally recognised by the Tokyo Declaration of 1973,[5] though Hawthorne notes evidence of LDC recognition within the GATT council minutes of 1971.[6]

The economic development of countries relies in part on their ability to trade with each other;[7] the conduct of this international trade has come to be based upon a set of rules, first administered by the GATT and now by its successor the WTO.[8] Under both administrations, disputes between member states about the application of these rules were to be settled through a mutually-agreed dispute settlement system. Under the WTO, this dispute settlement system is known as the Dispute Settlement Understanding (DSU). [9]

For the most part, however, LDCs have failed to fully avail themselves of the DSU.[10] The situation has persisted despite abundant potential disputes involving infringement of LDC trading rights.[11] As a consequence of their failure to seek remediation of these infringements, the ability of LDCs to trade internationally has been impaired and further, their economic development impeded.[12]

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1 For a list of the U.N. member states and their dates of admission, *see* United Nations, *Member States*, http://www.un.org/en/members (last visited 2 March 2016).

2 Helen Hawthorne, Least Developed Countries and the WTO: Special Treatment in Trade 23 (2013); Djalita Fialho, *Altruism but not Quite: The genesis of the least developed country (LDC) category*, 33 Third World Q. 751, 753 (2012).

3 G.A. Res. 2768 (XXVI), Identification of the Least Developed Countries among the Developing Countries (18 Nov. 1971), http://www.un.org/en/development/desa/policy/cdp/ldc2/gares2768xxvi.pdf.

4 The original GATT, which covered international trading in goods, was signed in 1947. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, https://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf [hereinafter, GATT]. In 1994, the GATT was retained, along with amendments made to it over the years, as part of the Uruguay Rounds that also led to the creation of the World Trade Organization. *See* General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT 1994], https://www.wto.org/english/docs_e/legal_e/06-gatt_e.htm; *see also* World Trade Organization, *Understanding the WTO: Basics-The Uruguay Round,* https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm (last visited 28 Nov. 2017) [hereinafter *Understanding the WTO*].

5 General Agreement on Tariffs & Trade, Ministerial Declaration of 14 Sept. 1973, WTO Doc. WT/MIN (73) W/1 at 6 (1973) [hereinafter, 1973 Ministerial Declaration].

6 Hawthorne, *supra* note 2, at 45 (citing GATT Council, Minutes of Meeting, Palais des Nations, Geneva, 9 Nov. 1971, C/M/74, at 12-13(1971) [hereinafter GATT Council Minutes]), https://www.wto.org/gatt_docs/English/SULPDF/90430028.pdf).

7 *See* Ashford C. Chea, *Sub-Saharan Africa and Global Trade: What Sub-Saharan Africa Needs to Do to Maximize the Benefits from Global Trade Integration, Increase Economic Growth and Reduce Poverty*, 2 Int'l J. Acad. Res. in Bus. & Soc. Sci. 360 (2012), http://www.hrmars.com/admin/pics/726.pdf; Michael R. Mullen et al., *The Effects of International Trade on Economic Growth and Meeting Basic Human Needs* 15 J. Global Marketing 31 (2001).

8 *See* discussion *infra* Section 1.2.

9 Understanding on Rules and Procedures Governing the Settlement of Disputes art. 2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, https://www.wto.org/english/docs_e/legal_e/28-dsu.pdf [hereinafter DSU].

10 Ronald Cullen Kerr Welsh, *Frustration through Futility: Least developed countries and the WTO's settlement of disputes,* 2016 Int'l Rev. L. 1, 8, http://www.qscience.com/doi/abs/10.5339/irl.2016.iit.1.

11 Victor Mosoti, *Does Africa Need the WTO Dispute Settlement System?, in* Towards A Development-Supportive Dispute Settlement System in the WTO 67, 79 (Geneva: Int'l Ctr. for Trade & Sustainable Dev., Resource Paper No. 5, March 2003), https://www.ictsd.org/downloads/2008/06/dsu_2003.pdf.

12 *See* Welsh, *supra* note 10, at 8.

An abundance of academic discourse has addressed why LDCs have avoided using the DSU.[1] The traditional view, as expressed by Van den Bossche and Gathii, is that it has resulted from the confluence of complex inter-related barriers which LDCs face, barriers stemming in large part from financial and organisational structural weaknesses endemic to LDCs.[2] Yet, despite the extensive analyses, one key, overarching factor has thus far never been discussed. This factor may necessitate a re-appraisal of the accepted academic discourse.

Primary source materials assessed for this paper provide clear evidence that, during the GATT negotiations that led to the creation of the DSU, the LDCs proposed that a dispute settlement system be created specifically for them. Thus, LDCs collectively sought to opt out of the mainstream dispute settlement system. The materials also show that this proposal was premised upon the norm of Special and Differential Treatment (S&D), an initially limited approach that developed into a strategic policy objective of LDCs. In pursuit of their S&D objectives, LDCs sought to extend the application of S&D into new policy areas through a process of expansion and natural progression, culminating in their opt-out proposal for dispute settlement.

The LDC opt-out proposal has hitherto never been examined within the body of academic discourse seeking to explain LDC non-engagement with the DSU. Using primary source materials, this paper adds a new dimension to this discourse.

## Structure

This paper is comprised of five sections, each of which explores LDC engagement with, and their application of, different facets of S&D.

The first section will discuss what is meant by the term S&D, the causal factors underlying this treatment and the S&D principles adopted during the 19481995- GATT era.

The second section considers how S&D, which was designed primarily to take account of purely economic issues arising during the course of trade negotiations, was progressively expanded into a broader policy tool deployed by LDCs. This tool ultimately became widely used to address an increasing number of non-economic issues unrelated to specific trade negotiations.

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1 *See*, *e.g.*, Mosoti, *supra* note 11, at 69 *et seq.;* Roderick Abbott, *Are Developing Countries Deterred from Using the WTO Dispute Settlement System?: Participation of Developing Countries in the DSM in the years 19952005-,* 1 (ECIPE Working Paper No.1, 2007), http://www.ecipe.org/media/publication_pdfs/are-developing-countries-deterred-from-using-the-wto-dispute-settlement-system.pdf; Amin Alavi, *African Countries and the WTO's Dispute Settlement Mechanism* 25 Dev. Pol'y Rev. 25 (2007), http://onlinelibrary.wiley.com/doi/10.1111/j.1467-7679.2007.00358.x/epdf; Jan Bohanes & Fernanda Garza, *Going Beyond Stereotypes: Participation of Developing Countries in WTO Dispute Settlement*, 4 Trade L. & Rev. 45 (2012), http://heinonlinebackup.com/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/traladpt4&section=7; Marco Bronckers & Freya Baetens, *Reconsidering financial remedies in WTO dispute settlement*, 16 J. Int'l Econ. L. 281 (2013); Marc L. Busch, Eric Reinhardt & Gregory Shaffer, *Does legal capacity matter? A survey of WTO members*, 8 World Trade Rev. 559 (2009); Hunter Nottage, *Developing Countries in the WTO Dispute Settlement System* (Global Econ. Governance Programme, Working Paper 2009/47, Jan. 2009), http://geg-test.nsms.ox.ac.uk/sites/geg/files/Nottage_GEG%20WP%20 2009_47.pdf [hereinafter Nottage, *Developing Countries*]; Hakan Nordström & Gregory Shaffer, *Access to justice in the World Trade Organization: A case for a small claims procedure?*, 7 World Trade Rev. 587 (2008), http://journals.cambridge.org/abstract_S1474745608003996; Gregory Shaffer, *How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies*, *in* Towards A Development-Supportive Dispute Settlement System in the WTO 1 (Geneva: Int'l Ctr. for Trade & Sustainable Dev., Resource Paper No. 5, Mar. 2003), https://www.ictsd.org/downloads/2008/06/dsu_2003.pdf; Asif Qureshi, *Interpreting WTO Agreements for the Development Objective*, *in* Towards A Development-Supportive Dispute Settlement System in the WTO 89 (Geneva: Int'l Ctr. for Trade & Sustainable Dev., Resource Paper No. 5, Mar. 2003), https://www.ictsd.org/downloads/2008/06/dsu_2003.pdf.\\uc0\\u8216{}African Countries and the WTO\\uc0\\u8217{}s Dispute Settlement Mechanism\\uc0\\u8217{} (2007

2 Peter Van den Bossche & James Gathii, *Use of the WTO Dispute Settlement System by LDCs and LICs: Hands-On Introduction and Simulation Exercise* 21 (Trade Pol'y Training Ctr. in Africa Paper, 2013), http://new.trapca.org/wp-content/uploads/2016/04/TWP1304-Use-of-the-WTO-Dispute-Settlement-System-by-LDCs-and-LICs.pdf.

The third section will show how S&D, as one of the key drivers of LDC governmental policy, influenced both negotiating objectives and strategies in the Uruguay Round negotiations, specifically those related to the DSU. It will describe how, when faced with draft DSU proposals that commanded the overwhelming support of WTO members (both developed and developing), LDCs used S&D as the purveyor of their policy to opt out of the DSU.

The fourth section explores the underpinnings of the LDC opt-out proposal, positing that its terms clearly demonstrate that LDCs unanimously rejected the methodology underpinning the DSU. This section demonstrates that the opt-out proposal was the product of a deeply held belief that LDCs should be given and expected to benefit from S&D. Moreover, as a result of the rejection of their S&D-based proposal, LDCs were left with a dispute settlement system they neither wanted nor in a sense agreed to. This result is a powerful, newly recognized reason why LDCs do not engage with the DSU, providing not only a unique perspective on the topic but also a vital contribution to the quest to understand LDC non-engagement.

The fifth section will draw together the preceding sections, providing both an overview and a summary of each. In addition to providing a conclusion to the paper, this section will assess the likelihood of a bespoke dispute settlement system being created specifically for LDCs at some future point and briefly consider the possible options for change.

## 1. The origins and underpinnings of S&D

The central hypothesis of this paper is that S&D became the default negotiation policy pursued by LDCs specifically in relation to the DSU, and it was this policy that underpinned the opt-out proposal. To understand why and how this situation arose, it is necessary to understand not only the origins of S&D but also how its application evolved, changed and was adopted as the default policy doctrine pursued by LDCs during the Uruguay Round negotiations.

The 1979 Tokyo Declaration, "*Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries*"[1] (informally known, and in this article referred to, as the Enabling Clause) gave rise to the abbreviated term for Special and Differential Treatment, S&D. Furthermore, the Enabling Clause formally recognised LDCs as a separate subset of the developing countries[2] and incorporated the term S&D into the multilateral trading system.[3]

### 1.1. The antecedents of S&D

The origins and rationale underpinning S&D considerably pre-date the Tokyo Declaration, perhaps as early as right after the end of World War II. Hudec argues that the 19461948- post-war GATT-

1 General Agreement on Tariffs and Trade, *Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries*; GATT Doc. L/4903 (3 Dec. 1979), at 3, https://docs.wto.org/gattdocs/q/GG/L4999/4903.PDF [hereinafter "the Enabling Clause"]

2 Hawthorne, *supra* note 2, at 45; 1973 Ministerial Declaration, *supra* note 5.

3 *See* Bernard Hoekman, *Operationalizing the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment*, 8 J. Int'l Econ. L. 405, 405 (2005); Tony Heron, Pathways from Preferential Trade: The Politics of Trade Adjustment in Africa, the Caribbean and Pacific 9, 24 (2013); Bernard Hoekman, Constantine Michalopoulos & L. Alan Winter, *Special and Differential Treatment of Developing Countries in the WTO: Moving Forward after Cancún*, 27 The World Econ. 481, 482 (2004), http://onlinelibrary.wiley.com/doi/10.1111/j.0378-5920.2004.00610.x/full; Bernard M. Hoekman & Michel M. Kostecki, The Political Economy of the World Trading System 537 (3d ed. 2009); Constantine Michalopoulos, *The role of special differential treatment for developing countries in GATT and the World Trade Organization* 25, 41 (The World Bank, Pol'y Res. Paper No. WPS 2388, 31 July 2000) [hereinafter Michalopoulos, *Special Differential Treatment*]; Mari Pangestu, *Special and Differential Treatment in the Millennium: Special for Whom and How Different?*, 23 The World Econ. 1285, 1288 (2000), http://onlinelibrary.wiley.com/doi/10.1111/1467-9701.00330/abstract; John Whalley, *Special and Differential Treatment in the Millennium Round*, 22 The World Econ. 1065, 3 (1999) [hereinafter Whalley, *Special and Differential Treatment*]; 1973 Ministerial Declaration, *supra* note 10.

ITO negotiations cast the future of international trade policy,[1] with the rules governing that policy being premised exclusively upon there being a single set of rules that were to be applied to all countries, developing or otherwise.[2] But Hawthorne notes that the antecedents of S&D are to be found within these original GATT negotiations and in the S&D provisions contained within the ill-fated International Trade Organisation (ITO) Charter,[3] which never came into force.[4]

The demise of the ITO thus left the GATT as the primary regulatory mechanism governing world trade.[5] Nevertheless, some of the S&D provisions of the ITO[6] were incorporated into GATT Article XVIII.[7] As Hudec acknowledges, the GATT included the principle that the conditions faced by developing countries meant they should be accorded a degree of latitude and special dispensation from the GATT legal discipline.[8] In other words, developing countries merited some form of S&D, an idea that Ansong has identified as the "primordial" roots of S&D .[9]

### 1.2. The GATT Review Session 1955-1954

The next major milestone in the development of S&D was the GATT 19541955- Review Session (the GATT Review),[10] the outcome of which many writers[11] cite as representing the genesis of S&D.[12] At this meeting, there was a "general consensus" that the GATT should be formalised into an organisation promoting global trade rules.[13] Moreover, "the special problems of countries in

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1 Robert E Hudec, Developing Countries in the GATT Legal System 27 (2014) (Reissued first edition with a new Introduction by J. Michael Finger).

2 Id. at 28.

3 Hawthorne, *supra* note 2, at 40.

4 Hudec, *supra* note 18, at 33; T.N. Srinivasan, Developing Countries and the Multilateral Trading System: From the GATT to the Uruguay Round and the Future 11 (2000); Alex Ansong, Special and Differential Treatment of Developing Countries in the GATT/WTO: Past, Present, Future 9 (2012); Peter Van den Bossche & Werner Zdouc, The Law and Policy of the World Trade Organization 78 (3d ed. 2013).{\\i{}The Law and Policy of the World Trade Organization} (Cambridge University Press 2013

5 Hawthorne, *supra* note 2, at 40.

6 U.N. Conference on Trade and Employment, *Final Act and Related Documents*, 21, U.N. Doc. E/Conf. 2/78 (12 Nov. 1947 - 24 Mar. 1948), https://www.wto.org/english/docs_e/legal_e/havana_e.pdf.

7 Srinivasan, *supra* note 21, at 23.Colo.","number-of-pages":"160","edition":"New edition edition","source":"Amazon", "event-place":"Boulder, Colo.","abstract":"In this work, T.N. Srinivasan evaluates the interaction between developing countries and the multilateral trading system since World War II and describes the achievements and failures of the Uruguay Round of the Multilateral Trade Negotiations in that context. Among other issues, the author addresses possible linkages between trade policies and environmental and labor standards, the opportunities and threats regionalism poses to a global trading system, and the consequences of cooperation between the World Trade Organization (WTO

8 Hawthorne, *supra* note 2, at 41; Hudec, *supra* note 188, at 33.

9 Ansong, *supra* note 21, at 10.

10 General Agreement on Tariffs & Trade, *The Ninth Session of the Contracting Parties and the Review of the GATT*, GATT Doc. MGT/27/54 (25 Oct. 1954).

11 *See, e.g.*, Michalopoulos, *Special Differential Treatment*, *supra* note 17, at 4; Ansong, *supra* note 21, at 25; WTO Law and Developing Countries 17 (George A. Bermann & Petros C. Mavroidis eds., Columbia Studies in WTO Law & Pol'y 2007) [hereinafter WTO Law]; Constantine Michalopoulos, Developing Countries in the WTO 25 (2001); Hunter Nottage, *Trade and Competition in the WTO: Pondering the Applicability of Special and Differential Treatment*, 6 J. Int'l Econ. L. 23, 25 (2003) [hereinafter Nottage, *Trade and Competition*]; Juliana Peixoto Batista, *Flexibilities for Developing Countries in the DOHA Round as* À La Carte *Special and Differential Treatment; Retracing the Uruguay Steps?*, 1 Cadernos PROLAM/USP 164, 169 (2010), http://www.revistas.usp.br/prolam/article/download/82411/85389.

12 Note: Whalley argues that S&D did not evolve until the 1960s, with the GATT Review being simply an attempt to incorporate the concerns of developing countries into the GATT system. *See* Whalley, *Special and Differential Treatment*, *supra* note 17, at 3.

13 Press Release, Information Centre, European Office of the United Nations, Geneva, GATT Intersessional Committee: Meeting Concluded, GATT Doc. GATT/162 (4 Aug. 1954), at 1, https://docs.wto.org/gattdocs/q/GG/GATT/162.PDF.

less advanced stages of development were acknowledged as one of the most important elements in the Review Session."[1]

At time of the GATT Review, LDCs *per se* had not been formally defined as a group. Nevertheless, careful analysis of the GATT documents has made it possible to identify those countries that subsequently were defined as LDCs, as well as the part they played in the review process. Therefore, to promote clarity, the term LDCs will be used throughout the discussion.

Through the documents relating to the GATT Review, the voices and concerns of LDCs can be clearly heard. For example, Burma (now the LDC Myanmar) argued *inter alia* that if the GATT was not modified to take account of their special circumstances this would harm and be prejudicial to their economic development.[2]

The Haitian representative was somewhat more forthright about the inclusion of formal S&D provisions into the GATT, stating that "concrete facts point to the conclusion that it is right to give special consideration to the particular situation of countries in course of development."[3]

In relation to S&D, the key outcomes of the GATT Review were (a) the acceptance of S&D for developing countries as a legal principle within the GATT,[4] and (b) the "fuller and now almost enthusiastic endorsement of the idea"[5] that the provision of legal freedoms within GATT was beneficial to developing countries.[6] By virtue of these developments, LDCs had acquired the legal freedom to effectively deviate from or opt out of the mainstream GATT rules relating to sectorial state assistance.[7]

As part of the GATT Review, the principle of there being full reciprocity between parties negotiating tariffs was relaxed.[8] Clause 3 of the newly inserted Article XXIX ("Tariff Negotiations") states that tariff negotiations involving LDCs should be carried out in a flexible manner reflective of (a) tariff usage to assist economic development,[9] and (b) tariff usage as a revenue source.[10] From these aspects, it can be inferred that during trade negotiations, developed countries are not to press for full reciprocity from LDCs;[11] thus, the principle of reciprocity need not necessarily be applied.[12] By allowing LDCs to opt out of reciprocity, the contracting parties had thus extended the scope of

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1 Id.

2 Delegation Release, Speech by U Aung Soe (Burma) Delivered in Plenary Session on 10 November 1954, GATT Doc. MGT/54/54 (10 Nov. 1954), at 1, https://docs.wto.org/gattdocs/q/GG/MGT/54-54.PDF.

3 Press Release, Speech by Mr. A Dominique, (Haiti) Delivered in Plenary Session on 10 November 1954, GATT Doc. GATT/199 (10 Nov. 1954), at 2.
https://docs.wto.org/gattdocs/q/GG/GATT/199.PDF

4 Ansong, *supra* note 21, at 25.

5 Hudec, *supra* note 18, at 42-43.

6 Hawthorne, *supra* note 2, at 41; Hudec, *supra* note 18, at 43.

7 GATT 1994, *supra* note 9, art. XVIII(4)(a) (Governmental Assistance to Economic Development), https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art18_e.pdf.

8 Hudec, *supra* note 18, at 42.

9 General Agreement on Tariffs and Trade, Review Working Party II on Tariffs, Schedules and Customs Administration, *Report to the Contracting Parties*, GATT Doc. L/329 (24 Feb. 1955), art. XXIX, ¶¶ 3 & 3(ii), https://www.wto.org/gatt_docs/English/SULPDF/90680411.pdf [hereinafter *Working Party Review*]; Nottage, *Trade and Competition*, *supra* note 28, at 25.

10 Id. ¶ 3(ii).

11 Hudec, *supra* note 18, at 42; Batista, *supra* note 28, at 169; Edwini Kessie, *The Legal status of Special and Differential Treatment Provisions under the WTO Agreements*, *in* WTO Law, *supra* note 28, at 17.

12 Heron, *supra* note 17, at 16.

S&D provisions.[1] Furthermore, as Heron notes, while the GATT Review *per se* was not noteworthy in terms of substantive reforms, it appeared to create an environment and understanding that the development of S&D was to be mirrored by a decline in the legal enforcement of GATT principles as applied to developing countries.[2]

It is clear that the principle that developing countries should benefit from S&D, referenced at the inception of the GATT, was enshrined in the GATT body of law during the mid-1950s GATT review. Additionally, the GATT review widened not only the scope of S&D but also and for the first time, proffered opt-outs to developing countries and began the process of differentiating the S&D treatment that should be offered to the LDCs.

### 1.3. Grounding S&D - the Haberler Report & the GATT, Part IV

Citing Tussie[3] and Evans,[4] Hawthorne describes the 1958 Haberler report (*Trends in International Trade*)[5] as a pivotal point in the relations between developed and developing countries.[6] Analysts agree that there was virtually no implementation of the primary recommendations of the report[7] and that it did not lead to significant changes in GATT policies.[8] Nevertheless, Heron hails it as a "milestone" that marked a change in the orientation of developing country concerns.[9] Lanoszka[10] argues specifically that the emphasis placed by the Haberler report on the special considerations required for developing countries[11] formed the basis upon which S&D for LDCs was developed.[12]

A further shift came in 1965, a protocol amended the GATT and introduced a new Part IV.[13] The protocol, while recognising that positive efforts were needed to ensure that LDCs achieved growth in trade, contained no legally definable obligations regarding that concern.[14] But Article XXVII, at paragraph 8, does state that developed countries, "do not expect reciprocity for commitments made in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties."[15] This, Hawthorne argues, is evidence that the contracting parties had agreed to override the norm of reciprocity for the first time in an official GATT document.[16]

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1 *Working Party Review, supra* note 39.

2 Heron, *supra* note 17, at 16.

3 Diana Tussie, The Less Developed Countries and the World Trading System: A Challenge to the Gatt 4 (Studies in Int'l Political Econ. No. 1 1987).

4 John W. Evans, The Kennedy Round in American Trade Policy: The Twilight of the G.A.T.T.? 120 (1971).

5 Note, Executive Secretary, *Trends in International Trade (Preliminary Version)*, GATT Doc. MGT/80/58 (Aug. 1958) [hereinafter *Trends*], https://docs.wto.org/gattdocs/q/GG/MGT/58-80.PDF.

6 Hawthorne, *supra* note 2, at 41.

7 Michael Hart & Bill Dymond, *Special and Differential Treatment and the Doha "Development" Round*, 37 J. World Trade 395, 400 (2003); Rorden Wilkinson & James Scott, *Developing Country Participation in the GATT: A Reassessment*, 7 World Trade Rev. 473, 490 (2008), file:///C:/Users/Owner/Downloads/wilkinsonandscottworldtradereview.pdf.

8 Heron, *supra* note 17, at 17.

9 Id.

10 Anna Lanoszka, The World Trade Organization: Changing Dynamics in the Global Political Economy (2009).

11 *Trends*, *supra* note 47.

12 Lanoszka, *supra* note 52, at 201; Hawthorne, *supra* note 2, at 42.

13 *Protocol Amending the GATT to introduce Part IV on Trade and Development* (12 Feb. 1965), GATT Doc. L/2355 [hereinafter *Protocol*]. https://docs.wto.org/gattdocs/q/GG/L2799/2355.PDF.

14 Hudec, *supra* note 18, at 64.

15 *Protocol*, *supra* note 55.

16 Hawthorne, *supra* note 2, at 43.

### 1.4. The Tokyo Declaration 1973

As noted above, until the 1970s the GATT only recognised developed countries and less-developed countries. There was no stratification or differentiation between the least developed and developing countries.

While, as noted above, Hawthorne has offered evidence of LDC recognition within the GATT council minutes of 1971,[1] LDCs were not formally recognised[2] as a defined group[3] within the GATT trade arena until the Tokyo Round of 1973 and its Enabling Clause.[4] The declaration followed a Ministerial meeting in that city[5] where the Ministers stated that special attention and special treatment should be paid to "the least developed among the developing countries."[6] Not only were LDCs recognised as a special group, the Enabling Clause also conceptually grounded S&D for LDCs at the centre of the GATT legal system.[7] This grounding is clearly illustrated in Paragraph 6 of the Enabling Clause, which, *inter alia*, stated that during trade negotiations with LDCs, "developed countries shall exercise the utmost restraint in seeking . . . and the least-developed countries shall not be expected to make concessions or contributions that are inconsistent with the recognition of their particular situation and problems."[8]

The Enabling Clause also provided that LDCs were to be afforded "special treatment…in the context of any general or specific measures in favour of developing countries."[9] The provisions of the Enabling Clause allowed LDCs to seek the application of S&D to all concessions made by developed countries to developing countries and this became one of the core elements of a work programme of a separate LDC sub-committee[10] (which will be discussed in section 2).

## 2. The expansion and development of S&D

Following the conclusion of the Tokyo Round in 1979 and the negotiations that accompanied it, a work programme was initiated to "ensure that the results of the negotiations are effectively implemented."[11] To this end, a Committee on Trade and Development was created,[12] part of whose role was defined as providing "special attention to the special problems of least developed countries."[13]

Concerning this role, the committee opined that its primary responsibility was to oversee and supervise

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1 Hawthorne, *supra* note 2, at 45; GATT Council Minutes, *supra* note 6.

2 Hawthorne, *supra* note 2, at 45; GATT Council Minutes, *supra* note 6.

3 Note: the possibility of defining LDCs was considered in 1964, but the idea was deferred. General Agreement on Tariffs and Trade, Committee on the Legal and Institutional Framework of GATT in relation to Less-Developed Countries, *Report of Committee (Revision)*, GATT Doc. L/2195/Rev.1 (13 Apr. 1964), at 3, https://docs.wto.org/gattdocs/q/GG/L2799/2195R1.PDF.

4 1973 Ministerial Declaration, *supra* note 5, at 5.

5 1973 Ministerial Declaration, *supra* note 5.

6 Id. at 4.

7 *See* Kessie, *supra* note 41, at 18; Hawthorne, *supra* note 2, at 45; Nottage, *Trade and Competition*, *supra* note 28, at 27; Pangestu, *supra* note 17, at 1288; John Whalley, *Non-Discriminatory Discrimination: Special and Differential Treatment Under the GATT for Developing Countries*, 100 The Econ. J. 1318, 1321 (1990).

8 GATT, *supra* note 4, at 3.

9 Id. at 2.

10 General Agreement on Tariffs and Trade, Sub-Committee on Trade of Least-Developed Countries, *Proceedings of First Meeting*, GATT Doc. COM.TD/LLDC/1 (12 Jan. 1981), at 6, https://www.wto.org/gatt_docs/English/SULPDF/90560165.pdf [hereinafter, Sub-Committee, *Proceedings*].

11 Proposal by the Director-General, *GATT Work Programme*, GATT Doc. C/W/334(22 Nov. 1979).

12 Id. at 3.

13 Id.

the implementation of the Enabling Clause, particularly in relations to LDCs;[1] it also pondered the creation of a separate body for LDCs.[2]

In March 1980 the Committee on Trade and Development again discussed the creation of a separate body specifically for LDCs. The proposal met with fierce opposition from some developed countries and this opposition in turn evoked an angry response from some of the eleven LDC members of the committee.[3] The LDC members stated that very little had been achieved in terms of ameliorating their trade problems and they feared that "in the absence of specific machinery to focus on their problems, their interests once more might not get the attention required."[4]

Despite the objections, in July 1980, following discussions held by the Director General,[5] a Sub-Committee on Trade of Least Developed Countries was created.[6] Thus, at last, LDCs now not only had a means to articulate their views but also the ability to focus on specific LDC problems within the GATT.[7] Further, as will be shown, they now had a way to broaden the scope and nature of S&D.

### 2.1. The progressive development of S&D

At the inaugural meeting of the new sub-committee in 1981, LDCs began to flesh out their ideas and policy stances: they called for (a) special measures including duty-free access for all LDC exports to developed countries,[8] (b) the review of developments in world trade[9] to be extended to include payments and finance,[10] (c) the extension of S&D to the provision of technical assistance and training by the secretariat[11] and (d) the provision of special financial assistance to assist LDCs in maximising the effectiveness of the S&D provisions provided for under the Tokyo Round Agreements.[12]

The first meeting also proposed extending the remit of the review of developments in international trade to include such matters as commercial policy[13] as well as the activities of other GATT bodies[14] and other international bodies.[15] In other words, the range and scope of S&D were being extended.

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1 General Agreement on Tariffs and Trade, Committee on Trade & Development, *Work Programme of the Committee on Trade and Development*, GATT Doc. COM.TD/W/305 (19 Feb. 1980), at 6, https://www.wto.org/gatt_docs/English/SULPDF/90540100.pdf.

2 Id.

3 General Agreement on Tariffs and Trade, Committee on Trade and Development, *Membership of the Committee on Trade and Development*, GATT Doc. COM.TD/75/Rev.ll (12 June 1980), https://docs.wto.org/gattdocs/q/GG/COMTD/75R11.PDF.

4 General Agreement on Tariffs and Trade, Committee on Trade and Development, *Proceedings of the Fortieth Session*, GATT Doc. COM.TD/104 (14 Apr. 1980), at 20, https://docs.wto.org/gattdocs/q/GG/COMTD/104.PDF.

5 General Agreement on Tariffs and Trade, Committee on Trade and Development, *Proceedings of the Forty-First Session*, GATT Doc. COM.TD/105 (7 Aug. 1980), at 15, https://docs.wto.org/gattdocs/q/GG/COMTD/105.PDF.

6 Id.

7 Hawthorne, *supra* note 2, at 47.

8 Sub-Committee, *Proceedings*, *supra* note 68.

9 Id. at 1.

10 Id. at 3.

11 Id. at 4.

12 Id.

13 Id. at 6.

14 Id.

15 Id.

For the 1982 Ministerial meeting,[1] the sub-committee submitted six proposals.[2] Three of these proposals were (i) the provision of more flexible rules of origin for LDC products,[3] (ii) a call for greater flexibility for the participation of LDCs in MTN (Multilateral Trade Negotiation) agreements[4] and (iii) the strengthening of technical assistance for LDCs.[5] Once again, proposals sought to broaden and extend the scope of S&D beyond simply that of asymmetrical reciprocity and unilateral preferences in trade negotiations. All the proposals were approved at the Ministerial Meeting.[6]

### 2.2. The evolution of S&D as a driver for LDC trade policy

The combination of the Enabling Clause and the subsequent creation of the sub-committee not only gave the LDCs a platform from which they could articulate their views and focus on specific LDC problems within the GATT, it also heralded a sea change in the policy stances of many LDCs. By the early 1960s there were signs that LDCs were beginning both to embrace the concept of S&D and to incorporate it into their trade policies. By that decade, too, some countries were already proposing both "traditional" S&D measures[7] and S&D measures designed to provide access to industrialised markets for exports deemed to be "of vital interest to the less-developed countries."[8]

Further evidence of this palpable LDC policy shift in favour of the pursuit of S&D and moreover, the aggressiveness with which the policy was pursued can be found in the statements made by LDCs at the 1982 ministerial meeting. The permanent representative of Madagascar was perhaps the most blunt and outspoken of the LDCs. In a scathing rebuke to the GATT contracting parties, he stated:

With great condescension, the rich accepted the idea that the poor *must be given differential and preferential treatment* on the world market, but Part IV, which they kindly agreed to include in the General Agreement for that purpose, has still not been put into effect after fifteen years.[9]

Madagascar plainly viewed S&D and its implementation to be a central part of its overall GATT policy.

Demonstrating that S&D also represented a significant policy driver for Uganda within the multilateral trade arena, Uganda's Minister of Commerce spoke similarly about the lack of

1 General Agreement on Tariffs and Trade, Ministerial Declaration, *GATT Contracting Parties, Thirty-Eighth Session*, W.38/4 (29 Nov. 1982), https://docs.wto.org/gattdocs/q/GG/W/38-4.PDF [hereinafter Ministerial Declaration, 38th Sess.].

2 General Agreement on Tariffs and Trade, Sub-Committee on Trade of Least-Developed Countries, *Note on Proceedings of Third Meeting*, GATT Doc. COM.TD/LLDC/3 (30 June 1982), at 7-8, https://docs.wto.org/gattdocs/q/GG/COMTD/LLDC3.PDF.

3 Id. at 7.

4 Id.

5 Id.

6 Ministerial Declaration, 38th Sess., *supra* note 87.

7 General Agreement on Tariffs and Trade, Press Release, *Meeting of Ministers 1621- May 1963: Statement made by Mr Suminwa, Counsellor of Embassy at Brussels, Congo (Leopoldville)*, GATT Doc. GATT/784 (16 May 1963), at 2, https://docs.wto.org/gattdocs/q/GG/GATT/784.PDF.

8 General Agreement on Tariffs and Trade, Committee on the Legal and Institutional Framework of the GATT in Relation to the Less-Developed Countries, *Statement by the Representative of the Central African Republic*, GATT Doc. Spec(63)282 (24 Oct. 1963), at 3, https://docs.wto.org/gattdocs/q/GG/SPEC/63-282.pdf.

9 General Agreement on Tariffs and Trade, Ministerial Meeting (24-27 Nov. 1982) [hereinafter 1982 Ministerial Meeting], *Statement by Mr. Maurice Ramarozka, Minister Plenipotentiary, Permanent Representative Al of Madagascar*, GATT Doc. Spec (82) 142 (24-27 Nov. 1982), at 3 (emphasis added), https://docs.wto.org/gattdocs/q/GG/SPEC/82-142.pdf.

commitment evinced by developed countries.[1] He threatened to block proposals that Trade in Services be incorporated into the GATT.

Bangladesh, another of the LDCs, formulated a set of proposals, predicated upon the S&D principle, that was presented at the meeting by its Minister for Industries and Commerce. The proposals called for a number of non-reciprocal special measures to permit (i) duty-free access to the exports of LDCs,[2] (ii) the introduction of flexible rules of origin for LDC exports,[3] and (iii) the elimination of non-tariff export barriers in respect of LDCs.[4]

The LDC activities at the 1982 ministerial meeting demonstrate the degree to which S&D had permeated their trade policies. Moreover, the threats to block the proposal to incorporate Trade in Services into the GATT regime[5] highlight both the importance of S&D within the trade policies of the LDCs and the aggressiveness with which they were prepared to pursue their S&D policies.

As far as the author can determine, academic writers, including Hawthorne[6] in her seminal work on LDCs and Special Treatment in Trade, have all failed to explore the linkage of S&D to the trade policies pursued by the LDCs. Most writers take an "applied" approach to S&D in terms of its use in gaining leverage in negotiations,[7] or as a negotiated concession,[8] or as a series of exemptions,[9] but not as a particular policy or programme.[10] Gibbs refers to S&D as being" the product of the coordinated political efforts of developing countries."[11] However, this statement falls some way short of describing S&D as a policy driver for LDCs. In contrast, the author's research establishes a link between S&D and the trade policies of LDCs; it thus represents an addition to the extant body of academic knowledge. Viewing LDC actions through the prism of S&D as the core policy driver forces a complete reappraisal and reassessment of S&D and its application by LDCs.

## 3. S&D as a key policy driver in the Uruguay Round

During the Uruguay Round of 19861994-, S&D continued to drive LDC policy in terms of negotiation objectives and strategies. More specifically, their S&D-driven objectives and strategies manifested themselves in the proposals made by LDCs during the negotiations that resulted in the formulation and drafting of the terms of the DSU. Furthermore, when faced with the final draft of the DSU, which had the overwhelming support of WTO members (both developed and developing), LDCs instead proposed an "opt out," using S&D.

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1 1982 Ministerial Meeting, *supra* note 95, *Statement by the Hon. Joel M Aliro-Omara, MP, Minister of Commerce of Uganda*, GATT Doc. Spec (82) 143, at 1, https://docs.wto.org/gattdocs/q/GG/SPEC/82-143.pdf.

2 1982 Ministerial Meeting, *supra* note 95, *Statement by the Minister for Industries and Commerce, Government of the People's Republic of Bangladesh*, GATT Doc. Spec (82) 99, at 2. https://docs.wto.org/gattdocs/q/GG/SPEC/82-99.pdf.

3 Id.

4 Id.

5 Id.; 1982 Ministerial Meeting, *supra* note 95, *Statement by the Minister for Trade of the United Republic of Tanzania*, GATT Doc. Spec (82) 131, https://docs.wto.org/gattdocs/q/GG/SPEC/82-142.pdf

6 Hawthorne, *supra* note 2.

7 Kessie, *supra* note 41, at 17-18.

8 Stefan De Vylder, The Least Developed Countries and World Trade 97 (2d ed., Sida Studies, 2007).

9 Paola Conconi & Carlo Perroni, *Special and Differential Treatment of Developing Countries in the WTO*, 14 World Trade Rev. 67, 68 (2015).

10 De Vylder, *supra* note 103, at 95.

11 Murray Gibbs, UNCTAD, Note presented to the G15 Symposium on Special and Differential Treatment in the WTO Agreements: Special and Differential Treatment in the Context of Globalization (New Delhi, 10 Dec. 1998), https://www.wto.org/english/tratop_e/devel_e/sem01_e/gibbs_e.doc.

The GATT contracting parties initiated the Uruguay Round at a Ministerial Meeting in September 1986 in Punta Del Este, Uruguay. The Round's trade negotiations, not concluded until 1994, are regarded as the largest, most comprehensive set of trade negotiations ever undertaken.[1] Among its key outcomes were the creation of the WTO and the adoption of the Understanding on Rules and Procedures Governing the Settlement of Disputes (known as the DSU),[2] which was enshrined into trade law. Key indicators that S&D represented a core policy objective of the LDCs in the Uruguay Round are to be found in the addresses of the LDC representatives at Punta Del Este, where they clearly outlined their countries' policy aims *vis-a-vis* the negotiations.

The representative for Bangladesh set out a list of key S&D areas that his delegation "consider[ed] vitally important"[3] for the negotiations. The broad ranging coverage of the list included (i) strict adherence to, and the expansion of, S&D in all areas;[4] (ii) complete duty-free access to all LDC exports;[5] (iii) the elimination of all types of non-tariff measures, restrictions, and measures affecting LDC producers;[6] (iv) flexible rules of origin for LDC exports;[7] (v) preferential treatment for the LDCs in the application of safeguards, dispute settlement, MTN agreements, and all other relevant matters;[8] and (vi) the expansion of technical assistance.[9]

The expansive nature of the foregoing "vitally important" list reveals S&D as a pivotal part of the Bangladesh policy. Further, throughout the representative's text, there were clear calls for the expansion of S&D. For example, the representative called for the elimination of *all* types of non-tariff measures. Similarly, Bangladesh sought preferential treatment in the areas of safeguards, dispute settlement and *all* "other relevant matters in which . . . [LDCs] . . . are at a disadvantage."[10]

Intuitively, given that LDCs are, by their very nature, always at a disadvantage, the term "other relevant matters" signalled the intention of Bangladesh to broaden the application of S&D beyond that of asymmetrical reciprocity and unilateral preferences into all facets of the Uruguay Round. It is also of note that Bangladesh explicitly singled out dispute settlement as an area where it intended to seek "preferential treatment." The ramifications of that strategy are discussed in detail below.

Other LDCs made proposals along similar lines. Tanzania's Minister for Industries and Trade[11] set out the Tanzanian policy objectives. Strikingly, the first objective—a clear indication of its importance and fundamental role—was that priority must be given to the "effective and meaningful implementation of . . . provisions on differential and more favourable treatment . . . paying special attention to the least

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1 Note: The negotiations involved 123 countries and spanned virtually every aspect of trade. *See* Understanding the WTO, *supra* note 4.

2 DSU, *supra* note 9.

3 General Agreement on Tariffs and Trade, *Bangladesh: Statement at the Meeting of the GATT Contracting Parties at Ministerial Level, 1519- September, Punta Del Este, Uruguay*, GATT Doc. MIN(86)/ST/9 (16 Sept. 1986), at 3, https://www.wto.org/gatt_docs/English/SULPDF/91240021.pdf.

4 Id. at 4.

5 Id.

6 Id.

7 Id.

8 Id.

9 Id.

10 Id.

11 General Agreement on Tariffs and Trade, *Tanzania: Statement by Hon BP Mramba, Minister for Industries and Trade, at the meeting of the GATT Contracting Parties at Ministerial Level, 1519- September, Punta Del Este, Uruguay*, GATT Doc. MIN(86)/ST/50 (18 Sept. 1986) at 1, https://www.wto.org/gatt_docs/English/SULPDF/91240063.pdf.

developed." [1] Indicating similar embedding and significance of S&D in his country's strategies, the Burmese representative[2] stated, *inter alia*, that Burma attached "great importance to a substantial improvement"[3] in the treatment of developing countries. Finally, the Congo submitted a proposal on behalf, *inter alia*, of itself, the LDC Senegal, and Tanzania,[4] to strengthen the S&D provisions.[5] Thus, at the Uruguay Round, LDC policy in general was to a greater or lesser degree predicated upon, or driven by, S&D.

### 3.1. S&D and the DSU negotiations

Having discussed the broad LDC policy objectives and strategies, this paper will now consider the way in which these objectives manifested themselves within the LDC proposals made during the Uruguay Round.

The Punta del Este ministerial declaration[6] provided, *inter alia*, that the overall programme of negotiations was to be facilitated through the creation of a Trade Negotiations Committee.[7] Separate negotiation groups, which would report to the Trade Negotiations Committee,[8] were to be created for the negotiations on Goods[9] and on Services.[10] Four LDCs[11] became members of the Trade Negotiations Committee[12] and each of the two negotiation groups.[13]

As mentioned above, LDCs had been active participants in a sub-committee of the Committee on Trade and Development. While this committee did not directly participate in the Uruguay negotiations *per se*, it did have an "important role in keeping under review the progress of negotiations from the point of view of developing countries."[14] In the early part of the Uruguay Round negotiations, there had been no meetings of the sub-committee.[15] But at the sixty-first

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1 *Id.* at 2.

2 General Agreement on Tariffs and Trade, *Burma: Statement by H.E. U Tin Tun, Permanent Representative, at the meeting of the GATT Contracting Parties at Ministerial Level, 1519- September, Punta Del Este, Uruguay*, GATT Doc. MIN (86)/ST/69 (19 Sept. 1986), https://www.wto.org/gatt_docs/English/SULPDF/91240086.pdf.

3 Id. at 2.

4 General Agreement on Tariffs and Trade, Contracting Parties, Session at Ministerial Level, September 1986, *Communication from the Congo* GATT Doc. MIN(86)/W/18 (19 Sept. 1986), https://docs.wto.org/gattdocs/q/UR/TNCMIN86/ST19.PDF.

5 Id. ¶ 2.

6 General Agreement on Tariffs and Trade, Multilateral Trade Negotiations, The Uruguay Round, *Ministerial Declaration on the Uruguay Round*, GATT Doc. MIN.DEC (20 Sept. 1986), https://www.wto.org/gatt_docs/English/SULPDF/91240152.pdf [hereinafter *Ministerial Declaration on the Uruguay Round*].

7 Id. at 1.

8 Id. at 9, 10.

9 Id. at 9.

10 Id. at 10.

11 The four LDCs were Bangladesh, Burma, Senegal, and Tanzania. *See* General Agreement on Tariffs and Trade, Multilateral Trade Negotiation, The Uruguay Round, *List of Representatives*, GATT Doc. MTN.TNC/INF/1-MTN.GNG/INF/1-MTN.GNS/INF/1 (27 Oct. 1986), at 2-3, 21, & 23, https://docs.wto.org/gattdocs/q/UR/GNG/INF1.PDF (listing representatives on the Trade Negotiations Committee, the Group of Negotiations of Goods, and the Group of Negotiation on Services) [hereinafter *1986 List of Representatives*].

12 General Agreement on Tariffs and Trade, Trade Negotiations Committee, *Meeting of 27 October 1986*, GATT Doc. MTN.TNC/1 (17 Nov. 1986), https://docs.wto.org/gattdocs/q/UR/TNC/1.PDF.

13 *See List of Representatives*, *supra* note 128, at 2-3, 21, & 23.

14 General Agreement on Tariffs and Trade, Committee on Trade and Development, Sixty-First Session, 11-12 June 1987, *Annotated Provisional Agenda*, GATT Doc. COM.TD/W/448 (12 May 1987), at 1, https://docs.wto.org/gattdocs/q/GG/COMTD/W448.PDF.

15 Hawthorne, *supra* note 2, at 50.

meeting of the Committee on Trade and Development in 1987, LDCs successfully proposed that the sub-committee be re-activated.[1]

The restoration of the sub-committee[2] gave LDCs a forum where they could review the Uruguay negotiations from an LDC perspective,[3] discuss proposals that had been submitted by LDCs to the negotiation groups[4] and formulate and discuss the submission of future proposals.[5] This sub-committee became, in effect, both a clearing-house for S&D-driven proposals and a pressure group to highlight LDC interests in the wider Uruguay Round negotiations.[6] The significance of the influence of this sub-committee on the negotiations surrounding the DSU will be discussed below.

Returning to the Trade Negotiations Committee tasks, part I of *The Ministerial Declaration on the Uruguay Round* provided, *inter alia*, that Dispute Settlement was one of the subjects for negotiation.[7] These negotiations would form part of the workload of the Group of Negotiations on Goods,[8] whose members, as noted above, included LDC representatives.[9] The Group of Negotiations on Goods decided, in turn, that further sub-negotiation groups be established, spanning either one area or multiple areas of the negotiations.[10] One of them, the Negotiating Group on Dispute Settlement was established in February 1987[11] and held its inaugural meeting on the 10th of April 1987.[12] This sub-committee included three LDC representatives: Bangladesh,[13] Madagascar,[14] and Tanzania.[15]

By November 1987 in the Negotiating Group on Dispute Settlement, there had been some twelve

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1 General Agreement on Tariffs and Trade Committee on Trade and Development, Sixty-First Session, 22 June 1987, *Proceedings of the Sixty-First Session*, GATT Doc. COM.TD/126 (18 Aug. 1987), at 6, https://www.wto.org/gatt_docs/English/SULPDF/91290169.pdf [hereinafter *Sixty-First Proceedings*]; Hawthorne, *supra* note 2, at 50.

2 *Sixty-First Proceedings*, *supra* note 133, at 7.

3 Hawthorne, *supra* note 2, at 50.

4 General Agreement on Tariffs and Trade, Sub-Committee on Trade of Least-Developed Countries, Ninth Meeting, 11 February 1988, *Review of Developments in the Uruguay Round of Interest to the Least-Developed Countries*, GATT Doc. COM.TD/LLDC/W/32, (21 Jan.1988), at 4, https://docs.wto.org/gattdocs/q/GG/COMTD/LLDCW32.PDF.

5 *See* General Agreement on Tariffs and Trade, Sub-Committee on Trade of Least-Developed Countries, 28 September 1989, *Note of Proceedings of the Eleventh Meeting, Revision*, GATT Doc. COM.TD/LLDC/12/Rev. 1 (27 Nov. 1989), https://docs.wto.org/gattdocs/q/GG/COMTD/LLDC12R1.PDF [hereinafter *Note of LDC Sub-Comm. Proceedings*].

6 Hawthorne, *supra* note 2, at 50.

7 *Ministerial Declaration on the Uruguay Round*, *supra* note 123.

8 Id. at 9.

9 *See 1986 List of Representatives*, *supra* note 128.

10 General Agreement on Tariffs and Trade, Group of Negotiations on Goods, *Second meeting: 7 and 12 November 1986*, GATT Doc. MTN.GNG/2 (26 Nov. 1986), at 1, https://www.wto.org/gatt_docs/English/SULPDF/92020013.pdf.

11 General Agreement on Tariffs and Trade, Group of Negotiations on Goods, *Fifth Meeting of the Group of Negotiations on Goods: Record of Decisions Taken*, GATT Doc. MTN.GNG/5 (9 Feb. 1987), at 3, https://www.wto.org/gatt_docs/English/SULPDF/92020026.pdf.

12 General Agreement on Tariffs and Trade, Negotiating Group on Dispute Settlement, *Meeting of 6th April 1987*, GATT Doc. MTN.GNG/NG13/1 (10 Apr. 1987), http://www.worldtradelaw.net/document.php?id=history/urdsu/1.pdf.

13 General Agreement on Tariffs and Trade, Negotiating Group on Dispute Settlement, *List of Representatives*, GATT Doc. MTN.GNG/NG13/INF/1 (21 Sept. 1987), at 2, https://www.wto.org/gatt_docs/English/SULPDF/92030003.pdf.

14 Id. at 7.

15 Id. at 11.

substantive proposals[1] submitted by some sixteen different countries, as well as contributions from the Nordic states[2] and the European Community.[3] Two background papers had been provided by the GATT secretariat.[4] Significantly, there appear to have been no proposals from any of the LDCs to this date.

Given the absence of specific proposals it is difficult, if not impossible, to ascertain the degree of participation and activism of LDCs within the Negotiating Group on Dispute Settlement. The minutes of the meetings were formally written and typically did not identify the member or delegation concerned in a given matter. For example, on the 11th of July 1988, the sub-committee members were debating the note prepared by the Secretariat dealing with S&D in the GATT Dispute Settlement System.[5] Representative minute entries include the phrases "Many delegations," "representatives of a number of countries," "other delegations" and "one delegation."[6] From such entries, it is impossible to determine the nationality of any particular delegation or representative.

Evidence supporting the participation of LDCs in the negotiations can be found further along, however, in the Negotiating Group on Dispute Settlement minutes of 4 October 1988.[7] Concerning the Secretarial note referenced above, the minutes state "a number of less-developed contracting parties...called on developed contracting parties to offer their views on the specific proposals for differential and more favourable treatment."[8] This intervention not only indicates activism of the LDCs within the negotiating group but also reinforces the earlier points about LDC policy being driven by S&D.

By mid-October 1988, in the apparent absence of substantive proposals from the LDCs, the Negotiating Group on Dispute Settlement began to finalise its proposals for the DSU.[9] The Group Chairman was tasked with formulating a comprehensive proposal, which was to be accompanied by recommendations that the resolution be approved at the Mid-Term Ministerial Review and that a trial implementation commence on 1 January 1989.[10]

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1 General Agreement on Tariffs and Trade, Negotiating Group on Dispute Settlement, *Meeting of 9th November 1987, Note by the Secretariat*, GATT Doc. MTN.GNG/NG13/4 (18 Nov. 1987), https://docs.wto.org/gattdocs/q/UR/GNGNG13/4.PDF. The substantive proposals were from Mexico (MTN.GNG/NG13/W/1), New Zealand (MTN.GNG/NG13/W/2), the United States (MTN.GNG/NG13/W/3 and 6), Jamaica (MTN.GNG/NG13/W/5), Japan (MTN.GNG/NG13/W/7 and 9), Switzerland (MTN.GNG/NG13/W/8), Australia (MTN.GNG/NG13/W/11), Canada (MTN.GNC/NG13/W/13) and Nicaragua (MTN.GNG/NG13/W(15); Argentina, Canada, Hong Kong, Hungary, Mexico and Uruguay (MTN.GNG/NG13/W/16); and Argentina (MTN.GNG/NG13/W/17) and Hungary (MTN.GNG/NG13/W/18).

2 Id. (MTN.GNG/NG13/W/10).

3 Id. (MTN.GNG/NG13/W/12).

4 Id. (MTN.GNG/NG13/W/4 and 14).

5 General Agreement on Tariffs and Trade, Negotiating Group on Dispute Settlement, *Differential and More Favourable Treatment of Developing Countries in the GATT Dispute Settlement System, Note by the Secretariat*, GATT Doc. MTN.GNG/NGI3/W/27 (30 June 1988), https://www.wto.org/gatt_docs/English/SULPDF/92050090.pdf; *Revision*, MTN.GNG/NG13/W/27/Rev.1 (22 Aug. 1988), https://www.wto.org/gatt_docs/English/SULPDF/92050172.pdf).

6 General Agreement on Tariffs and Trade, Negotiating Group on Dispute Settlement, *Meeting on 11 July 1988,* GATT Doc. MTN.GNG/NG13/9 (21 July 1988), at 2, https://www.wto.org/gatt_docs/English/SULPDF/92050144.pdf.

7 General Agreement on Tariffs and Trade, Negotiating Group on Dispute Settlement, *Meeting on 6 and 7 September 1988,* GATT Doc. MTN.GNG/NG13/10 (4 Oct. 1988), https://www.wto.org/gatt_docs/English/SULPDF/92060017.pdf.

8 Id. at 2.

9 General Agreement on Tariffs and Trade, Negotiating Group on Dispute Settlement, *Meeting of 1012- October 1988,* GATT Doc. MTN.GNG/NG13/11 (24 Oct. 1988), https://www.wto.org/gatt_docs/English/SULPDF/92060062.pdf.

10 Id. at 1.

The reference to the chairman's task was subsequently removed from the official minutes of the October meeting. [1] Nevertheless, by the 15 November 1988 meeting,[2] the Negotiating Group on Dispute Settlement discussed drafts of (i) the Chairman's report to the Group of Negotiations on Goods [3] and (ii) a Chairman's Paper containing a proposal for "improvements to existing GATT dispute settlement rules and procedures, for adoption by Ministers at the Mid-Term Review and for trial application as of January 1989."[4] The group further agreed to continue with informal talks to seek final agreement on the Chairman's report, due to be submitted to the Group of Negotiations on Goods, whose mid-term review was to begin on 16 November.[5]

The Chairman's report to the Group of Negotiations on Goods, the tenor of the minutes, and the lack of any substantive complaints suggests broad agreement within the Negotiating Group on Dispute Settlement as to the revisions that were to be made to dispute settlement. It appears that by the middle of November 1988 the Negotiating Group on Dispute Settlement, having discussed all the proposals previously submitted to them, gave no indication of feeling a need for further discussion. Indeed, the negotiating group did not meet again until 12 May 1989,[6] nearly six months later.

What the Negotiating Group on Dispute Settlement appears to have been unaware of, however, is that Bangladesh was preparing to submit some radical proposals on behalf of the LDCs. At a meeting of the Sub-Committee on Trade of Least-Developed Countries (LDC Trade sub-committee) on 28 September 1989,[7] Bangladesh noted that the Uruguay Round negotiations had reached a "crucial phase"[8] where the positions of all parties in relation to various issues and proposals in each of the negotiating groups had to be finalized.[9] To this end, Bangladesh, *inter alia*, outlined specific proposals respecting Dispute Settlement that were to be submitted to the Negotiating Group on Dispute Settlement "in the coming weeks."[10]

These proposals satisfied what one representative of the LDC Trade sub-committee described as "the need for more simplified procedures in dispute settlement involving least-developed countries."[11] Of the four substantive proposals,[12] some were subsequently "taken on board, though not to the full extent desired."[13] But the same could not be said for what was the most radical of these proposals, which sought:

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1 General Agreement on Tariffs and Trade, Negotiating Group on Dispute Settlement, *Meeting of 1012- October 1988, Corrigendum* GATT Doc. MTN.GNG/NGl3/ll/Corr.l. (15 Nov. 1988), https://docs.wto.org/gattdocs/q/UR/GNGNG13/11C1.PDF.

2 General Agreement on Tariffs and Trade, Negotiating Group on Dispute Settlement, *Meeting of 15 November 1988,* GATT Doc. MTN.GNG/NG13/13 (24 Nov. 1988), https://www.wto.org/gatt_docs/English/SULPDF/92060140.pdf.

3 Id. at 1.

4 Id.

5 Id.

6 Multilateral Trade Negotiations, The Uruguay Round, Negotiating Group on Dispute Settlement, *Meeting of 12 May 1989, Note by the Secretariat*, GATT Doc. MTN.GNG/NG13/14 (2 June 1989), https://www.wto.org/gatt_docs/English/SULPDF/92070056.pdf [hereinafter *Dispute Settlement Group May 1989 Mtg.*]

7 *Note of LDC Sub-Comm. Proceedings*, *supra* note 137.

8 Id. at 2.

9 Id.

10 Id.

11 Id. at 3.

12 Id. at 14.

13 General Agreement on Tariffs and Trade, Sub-Committee on Trade of Least-Developed Countries, *Draft Note of Proceedings of the of the Twelfth Meeting*, GATT Doc. Spec (90) 43 (26 Nov. 1990), at 3, https://docs.wto.org/gattdocs/q/GG/SPEC/90-43.pdf [hereinafter *Draft Note of Proceedings*].

Establishment of a separate body (e.g. Group of Five) comprising of the Chairmen of the CONTRACTING PARTIES, Council, Committee on Trade and Development, Sub-Committee on the Trade of the Least-Developed Countries and the Director-General of GATT, should be explored with the objective of settling disputes involving the least-developed countries.[1]

This proposal, which received the "wholehearted support" of all the other LDC Trade sub-committee representatives,[2] specifically called for LDCs to be given S&D in dispute settlement through the creation of a specific body outside of the existing GATT dispute structure to deal specifically with disputes involving LDCs.

In other words, the LDCs wholeheartedly wanted to opt out of both the existing GATT dispute settlement regimen and its successor, the DSU.

The proposals were communicated by Bangladesh, on behalf of the LDCs, to the Group of Negotiations on Goods,[3] of which the Negotiating Group on Dispute Settlement was a sub-committee, on the 14th of November 1989. As there was no mention of this development in the minutes of the Negotiating Group Dispute Settlement on the 15th of November 1989,[4] it can be surmised that the contents of the Bangladesh proposal were not conveyed to that group (though given the incomplete nature of the minutes of these meetings, this cannot be absolutely verified).

Indeed, in the November 1989 Ministerial Level Report provided by the Group of Negotiations on Goods for the December meeting of the Trades Negotiations Committee[5] (which had overall responsibility for the conduct of the Uruguay negotiations) there is no mention of the Bangladesh proposal. In relation to Dispute Settlement, the report opined that while there were certain issues that required consideration, nevertheless the group conducting the negotiations on dispute settlement felt that they were "in a position to make a comprehensive proposal for consideration and approval...and for trial application as of January 1989 until the close of the Uruguay Round."[6] Moreover, the report laid out at length in a two-column format those areas where consensus had been reached and those where consideration by Ministers were required.[7] Once again, there is no reference throughout to the proposals by Bangladesh.

The only reference to further proposals is contained in a letter from the Chairman of the Sub-committee on the Trade of LDCs to the Chairman of the Group of Negotiations on Goods intimating, *inter alia,* that further proposals from the LDCs would be forthcoming and requesting that this be brought to the attention of the Montreal review meeting.[8]

The mid-term review was conducted in two parts, the first being in Montreal from the fifth

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1 *Note of LDC Sub-Comm. Proceedings*, *supra* note 137, at 14.

2 Id. at 3.

3 Multilateral Trade Negotiations, The Uruguay Round, Group of Negotiations on Goods (GATT), Negotiating Group on Dispute Settlement, Proposals on Behalf of the Least-developed Countries, *Communication from Bangladesh*, MTN.GNG/NGI3/W34 (14 Nov. 1989), https://docs.wto.org/gattdocs/q/UR/GNGNG13/W34.PDF [hereinafter *Communication from Bangladesh*].

4 *Multilateral Trade Negotiations, The Uruguay Round, Negotiating Group on Dispute Settlement, Meeting of 15 November 1988,* MTN.GNG/NG13/13 (24 Nov. 1988), https://docs.wto.org/gattdocs/q/UR/GNGNG13/13.PDF.

5 Group of Negotiation on Goods, *Report to the Trade Negotiations Committee meeting at Ministerial level, Montreal, December 1988*, GATT Doc. MTN.GNG/13 (22 Nov. 1988), https://docs.wto.org/gattdocs/q/UR/GNG/13.PDF [hereinafter *Report to the Trade Negotiations Comm.*].

6 Id. at 31.

7 Id. at 54-67.

8 *See* Multilateral Trade negotiations, The Uruguay Round, Group of Negotiations on Goods (GATT), *Communication from the Chairman of the Sub-Committee of Trade of Least-Developed Countries,* GATT Doc. MTNGNG/W/15 (7 Nov. 1988), at 1-2, https://docs.wto.org/gattdocs/q/UR/GNG/W15.PDF; *Report to the Trade Negotiations Comm., supra* note 175.

through the ninth of December 1988 and the second part being held in Geneva from the fifth through the eighth of April 1989.[1] From the consolidated Ministerial Decisions at these meetings, the proposals contained in the report to the Trade Negotiations Committee, together with the proposal for a trial period, were approved at the mid-term Ministerial review.[2] Moreover the Ministers provided an agreed text in relation to those areas where Ministerial guidance was requested.[3] Nowhere in the combined text is there any reference to the LDC proposals, which again highlights the degree to which consensus had been largely reached on the framework of the DSU. That said, there was still work to be done.

The next meeting of the Negotiating Group on Dispute Settlement was convened on the 12th of May 1989.[4] Bangladesh agreed to present the LDC proposals in detail at the July meeting.[5] At the July meeting the Negotiating Group on Dispute Settlement postponed the discussion of the proposal due to the absence of a Bangladeshi representative.[6] At the next meeting of the Negotiating Group on Dispute Settlement in September 1989, the Chairman agreed to a request from Bangladesh to postpone its presentation of its detailed proposals to a future meeting.[7] It should be noted that during this period, the Negotiating Group on Dispute Settlement was making significant strides toward the finalization of agreed text, as discussed below.

On 7 December 1989 the proposals submitted by Bangladesh on behalf of the LDCs were discussed.[8] Explaining the proposals, Bangladesh emphasised that the LDCs were "less equal among contracting parties."[9] Moreover, Bangladesh stressed that the proposals were not merely seeking *ad hoc* S&D measures "but . . . the permanent institutionalization"[10] of S&D measures in favour of LDCs.

As previously noted, the Bangladesh proposals included a call for the creation of a separate and distinct dispute resolution system, which would operate outside the normal GATT dispute framework. This proposal was both premised upon and justified by S&D,[11] which clearly indicates the degree to which S&D systemically framed and permeated LDC policy.

Some delegations supported the proposals on the basis that S&D should be applied to LDCs. Others voiced various concerns and one developing member stated that it would be "neither feasible nor appropriate to set up special procedures" for LDCs.[12] The Chairman at this point intervened, suggesting the matter be deferred to a future meeting.[13]

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1 Multilateral Trade Negotiations, The Uruguay Round, Trade Negotiations Committee, *Mid-Term Meeting*, GATT Doc. MTN. TNC/11 (21 Apr. 1989), https://docs.wto.org/gattdocs/q/UR/TNC/11.PDF.

2 Id. at 24.

3 Id. at 24-31.

4 *See Dispute Settlement Group May 1989 Mtg.*, *supra* note 163.

5 *Id.* at 2.

6 Multilateral Trade Negotiations, The Uruguay Round, Negotiating Group on Dispute Settlement, *Meeting of 20 July 1989,* GATT Doc. MTN.GNG/NG13/15 (26 July 1989), https://docs.wto.org/gattdocs/q/UR/GNGNG13/15.PDF.

7 Multilateral Trade Negotiations, The Uruguay Round, Negotiating Group on Dispute Settlement, *Meeting of 28 September 1989,* GATT Doc. MTN.GNG/NG13/16 (13 Nov. 1989), at 7, https://docs.wto.org/gattdocs/q/UR/GNGNG13/16.PDF.

8 Multilateral Trade Negotiations, The Uruguay Round, Negotiating Group on Dispute Settlement, *Meeting of 7 December 1989,* GATT Doc. MTN.GNG/NG13/17 (15 Dec. 1989), https://docs.wto.org/gattdocs/q/UR/GNGNG13/17.PDF.

9 Id. at 1.

10 Id.

11 Id.

12 Id.

13 Id.

A further meeting was held in February 1990 where, the minutes record, "No comments were made"[1] concerning the LDC proposals. Later, the Chairman cautioned that "time was running out," reminding the group members that proposals should be circulated prior to the next meeting so that substantive negotiations could begin.[2] It is unclear from this missive whether this caution was intended as a spur to the LDC representatives. However, in light of the fact that the phrase "no comments were made" was recorded concerning the first item on the agenda—the proposals by the LDCs—this would not be an unreasonable assumption.

The next meeting was held in April 1990, where again there was no further comment regarding the LDC proposals, with the chairman pointedly adding that there had been no discussion whatsoever since December 1989.[3] Moreover, the Chairman called upon the Secretariat to focus on consolidating the existing GATT procedures into a single cohesive text.[4]

By mid-July 1990, the Chairman of the Trade Negotiations Committee reported that the "remaining issues in [the dispute settlement] area have been identified"[5] and that the final draft text should be ready by September 1990.[6]At the meeting of the Negotiating Group on Dispute Settlement on 19 July 1990, Bangladesh had requested that the group should give further consideration to its proposals and it was agreed that this item should appear on the agenda of the next meeting.[7]

The following meeting of the Negotiating Group on Dispute Settlement took place between the 24th of September and the 11th of October 1990.[8] This was the final meeting of the Negotiating Group on Dispute Settlement. At this session of the group there is no mention of the LDC proposal; indeed, it was not even on the agenda.[9] Moreover, the note of the session confirmed that the chairman had submitted an informal text on Dispute Settlement to the Chairman of the Trade Negotiations Committee.[10] In other words, the committee had agreed upon a final text of what was to become the GATT DSU.

As noted above, elements of some of the proposals put forward by Bangladesh on behalf of the LDC were eventually included in the final text of what was to become the DSU.[11] However, their most radical proposal, that of creating a separate dispute body exclusively for LDCs, appears to have been rejected. This rejection met with disapproval from the LDCs, who stated that

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1 Multilateral Trade Negotiations, The Uruguay Round, Negotiating Group on Dispute Settlement, *Meeting of 7 February 1990*, GATT Doc. MTN.GNG/NG13/18 (21 Mar. 1990), https://docs.wto.org/gattdocs/q/UR/GNGNG13/18.PDF.

2 Id. at 5.

3 Multilateral Trade Negotiations, The Uruguay Round, Negotiating Group on Dispute Settlement, *Meeting of 5 April 1990,* GATT Doc. MTN.GNG/NG13/19 (28 May 1990), https://docs.wto.org/gattdocs/q/UR/GNGNG13/19.PDF.

4 *Id.* at 6.

5 Multilateral Trade Negotiations, The Uruguay Round, Trade Negotiations Committee, *Chairman's summing-up at meeting of 26 July 1990*, GATT Doc. MTN.TNC/15 (30 July 1990), at 4, https://docs.wto.org/gattdocs/q/UR/TNC/15.PDF.

6 Id.

7 Multilateral Trade Negotiations, The Uruguay Round, Negotiating Group on Dispute Settlement, *Meeting of 12 July 1990,* GATT Doc. MTN.GNG/NG13/21 (19 July 1990), https://docs.wto.org/gattdocs/q/UR/GNGNG13/21.PDF.

8 Multilateral Trade Negotiations, The Uruguay Round, Negotiating Group on Dispute Settlement, *Meeting of 24 September to 11 October 1990,* GATT Doc. MTN.GNG/NG13/23 (24 Oct. 1990), https://docs.wto.org/gattdocs/q/UR/GNGNG13/23.PDF [hereinafter *Dispute Settlement Group Fall 1990 Mtg.*].

9 Untitled Memorandum from A. Dunkel, Subject: Uruguay Round Negotiating Group on Dispute Settlement, GATT Doc. GATT/AIR/3095 (19 Sept. 1990), https://docs.wto.org/gattdocs/q/GG/GATTAIR/3095.pdf (memorandum setting out agenda for Uruguay Round Negotiating Group on Dispute Settlement meeting).

10 *Dispute Settlement Group Fall 1990 Mtg., supra* note 199, at 1.

11 *Draft Note of Proceedings*, *supra* note 170.

although some of their concerns had been dealt with, it was "not to the full extent that would be desirable."[1]

The proposal and the unanimity of the support amongst the LDCs clearly signals that LDCs, as a collective, supported the concept that a separate and distinct LDC-only dispute settlement system should be put in place. The terms of the proposal clearly show that LDCs fundamentally rejected the methodology underpinning the proposed DSU and distanced themselves from it.

## 4. The "opt out" underpinnings and outcomes

Aside from offering the opt-out proposal, the LDCs provided no information as to how their proposed system would function or otherwise be institutionalised. The author opines that any attempt to define or describe how such a system would function or be incorporated into the WTO framework would be a somewhat pointless exercise in supposition and speculation. That said, the author would also argue that the structure and wording of the proposal do give a strong indication as to the rationale underpinning the proposal.

The proposal directed that the settlement of disputes involving LDCs should be determined by a so-called Group of Five comprised of four chairmen drawn from various GATT committees and bodies plus the Director General.[2] This approach is indicative of the fact that the LDCs had adopted what Jackson describes as "a 'negotiation' or 'diplomacy' oriented approach"[3] where disputes are settled through a process of negotiation and compromise.[4] By eschewing the detailed "legalistic" provisions of the DSU and favouring, instead, a looser framework, the LDCs exhibited what Hudec describes as an "antilegalist" viewpoint:[5] recourse to dispute resolution by formal adjudication is supplanted by "more loosely structured consultation procedures in which governments seek to resolve conflicts through negotiation."[6]

At the macro level, the fact that the LDCs unanimously sought the creation of a more relaxed and informal bespoke LDC dispute resolution process is in itself strongly reflective of the inculcated and long-espoused S&D policy pursued by the LDCs.

Against this backdrop, the final draft of the DSU, with its clearly-defined, legalistic rules and procedures, is effectively the antithesis of the collective wishes of the LDCs. Thus, with the adoption of the DSU, the LDCs were left with a dispute system that they neither wanted nor, in a sense, agreed to. This, the author argues, is a powerful reason why LDCs do not engage with the DSU.

As noted above, there has been much academic debate and discourse[7] regarding the underlying reasons as to why the LDCs have failed to fully use the DSU. This dialogue has produced a bewildering array of diverse, yet inter-related and multi-dimensional explanations for what seems an intractable problem.[8] The author contends that in light of the new reason narrated within this paper, these academic

1 Multilateral Trade Negotiations, The Uruguay Round, Group of Negotiations on Goods, *Eighteenth meeting:12 November 1990*, GATT Doc. MTN.GNG/25 (19 Nov. 1990), at 3, https://docs.wto.org/gattdocs/q/UR/GNG/25.PDF.

2 *See Communication from Bangladesh*, *supra* note 173.

3 John H Jackson, *Dispute Settlement in the WTO: Policy and Jurisprudential Considerations* 1 (Res. Seminar in Int'l Econ., Univ. Michigan, Discussion Paper No. 419, 9 Feb. 1998), http://fordschool.umich.edu/rsie/workingpapers/Papers401-425/r419.pdf.

4 Id.

5 Robert E. Hudec, *GATT Dispute Settlement after the Tokyo Round: An Unfinished Business*, 13 Cornell Int'l L.J. 145, 151 (1980), http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1080&context=cilj.

6 Id.

7 *See generally* sources cited in note 13, *supra*; Mosoti, *supra* note 11.

8 Welsh, *supra* note 10, at 9.

arguments need to be re-visited and re-appraised. While brevity does not permit a comprehensive analysis to be performed here, this paper will nevertheless seek to briefly re-examine these existing explanations, while overlaying this new reason. The author aspires to demonstrate that this approach results in revised arguments that collectively produce a comprehensive answer as to why LDCs do not engage with the DSU.

The academic arguments will be grouped as follows:

i. **Economic** - Due to the small and undiversified nature of LDC economies, they have a limited share of world trade and, therefore, disputes are unlikely to arise;
ii. **Complexity** - The complexity of the DSU, coupled with a lack legal resources, means the LDCs do not have the capacity to effectively engage with the DSU;
iii. **Competence** - The LDCs are unable to recognise when a violation of WTO law has occurred;
iv. **Institutional** - Structural institutional weaknesses prevent the LDCs from acquiring and assimilating the evidence required to support a dispute claim;
v. **Reprisals** - A fear of reprisals from potential respondents chills pursuit of dispute claims;
vi. **Costs** - The high costs of engaging external legal counsel to conduct a dispute on the behalf of an LDC prevents pursuit of claims;
vii. **Enforcement** - The perceived inability of an LDC to enforce a respondent's compliance with a favourable ruling discourages pursuit of claims;
viii. **Facilitation** - The lack of LDC representation in Geneva, as well as linguistic and communication difficulties, discourages pursuit of claims.

### 4.1. Economic Factors contributing to LDC non-participation

The economic arguments are premised on the facts that the LDCs have low-income economies with acute structural weaknesses;[1] in particular, they lack diversity in products exported and are predominantly primary producers.[2] Consequently, the LDCs' collective share of world trade was less than 1 percent of all exports in 2015.[3] As a further consequence, very few disputes arise, which explains the minimal use of the DSU by LDCs.[4] That said, the limited size and diversity of LDC economies neither fully explain the limited use of the DSU by LDCs[5] nor render them immune to the imposition of WTO inconsistent measures. [6] Moreover, statistically, LDCs should have initiated more disputes,[7] and there appear to be no shortage of prospective cases. [8]

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1 *See* U.N. Dev. Pol'y & Analysis Div., *Creation of the LDC Category and Timeline of Changes to LDC Membership and Criteria*, https://www.un.org/development/desa/dpad/least-developed-country-category/creation-of-the-ldc-category-and-timeline-of-changes-to-ldc-membership-and-criteria.html (last visited 11 Jan. 2018).

2 *See generally* Joan Apecu, *The Level of African Engagement at the World Trade Organization from 1995 to 2010*, 4.2 Int'l Dev. Pol'y | Revue internationale de politique de développement 29 (2013), https://poldev.revues.org/1492; Z. Ntozintle Jobodwana, *Participation of African member states in the World Trade Organisation (WTO) multilateral trading system*, 1 Intl J. African Renaissance Stud. -- Multi-, Inter- & Transdisciplinarity 244, 253 (2006), http://www.tandfonline.com/doi/abs/10.1080/18186870608529720.

3 Hubert Escaith & Andreas Maurer, *World Trade Organisation International Trade Statistics 2016* 52 (2016), https://www.wto.org/english/res_e/statis_e/wts2016_e/wts2016_e.pdf.

4 Van den Bossche & Gathii, *supra* note 14, at 21; Joseph F. Francois, Henrik Horn & Niklas Kaunitz, *Trading Profiles and Developing Country Participation in the WTO Dispute Settlement System* 8 (Res. Inst. Indus. Econ. [IFN] Working Paper No. 730, 1 Oct. 2007), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1534766.

5 Van den Bossche & Gathii, *supra* note 14, at 22.

6 Bohanes & Garza, *supra* note 13, at 67.

7 Francois, Horn & Kaunitz, *supra* note 214, at 47.

8 Mosoti, *supra* note 11, at 79; Int'l Trade Ctr., *Rwanda: Company Perspectives* (ITC Series on Non-Tariff Measures, Doc. No. MAR-14-242E, 2014), http://www.intracen.org/uploadedFiles/intracenorg/Content/Publications/NTM%20-%20Rwanda%20Company%20Perspectives_low%20res1.pdf [hereinafter, Int'l Trade Ctr.].

From this brief summary, it is clear that *in solus* the economic argument does not fully explain why LDCs avoid using the DSU to defend their trade rights. If, however, one considers the concept that LDCs also have an aversion to the DSU, created by a dispute resolution system they neither wanted nor actually agreed to, then the argument, as a whole, is significantly more robust. This argument accords precisely with the new information in this paper.

### 4.2. The complexity of the DSU mechanism

The WTO is a rules-based organisation.[1] Those rules are enshrined in technically complex, lengthy[2] and legally binding agreements such as the DSU, the mechanism that enforces rights.[3] The DSU employs complex, specialized legal argument, which can include highly detailed and technical scientific and economic data.[4] In addition to the elaborate set of procedural rules within the DSU itself, there is an extensive and continually expanding body of case law.[5]

Clearly therefore, so the argument goes, in order to pursue a dispute, specialized legal advocacy skills[6] are required, along with experts to present and explain any requisite economic, technical, and scientific data.[7] It is argued that LDC non-engagement with the DSU is the product of a lack of indigenous legal and specialist resources.[8] This combination limits LDCs from raising trade disputes.[9] Busch *et al* argue that this lack of capacity is, in fact, "the main constraint limiting their access to dispute settlement."[10]

While LDCs may lack specialist "in-house" legal capacity within the trade arena, the DSU contains measures to bridge the capacity deficit faced by LDCs[11] and offers training courses to build capacity.[12] Capacity-building courses, seminars and traineeships, specifically designed to address this issue, were and continue to be offered by external agencies such as UNCTAD[13] and the ACWL.[14] The foregoing demonstrates that the LDCs can access training to acquire the requisite legal capacity, It does not fully explain why, with 22 years since the WTO came into existence, LDCs still lack in-house capacity.

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1 World Trade Organization, The WTO, https://www.wto.org/english/thewto_e/thewto_e.htm (last visited 11 Jan. 2018).

2 Van den Bossche & Gathii, *supra* note 14, at 22.

3 World Trade Organization, *Understanding the WTO: Settling Disputes--A Unique Contribution*, https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (last visited 11 Jan. 2018).

4 Van den Bossche & Gathii, *supra* note 14, at 23.

5 Bohanes & Garza, *supra* note 13, at 70.

6 These skills not only require a detailed working knowledge of the rules of WTO agreements, but also those of the DSU. They also require a detailed understanding of a growing body of case law resulting from the 535 disputes filed to date. *See* World Trade Organization, *Dispute Settlement: The Disputes—Find Disputes Cases*, <https://www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm?year=any&subject=none&agreement=none&member1=none&member2=none&complainant1=true&complainant2=true&respondent1=true&respondent2=true&thirdparty1=false&thirdparty2=false#results (last visited 11 Jan. 2018).

7 Van den Bossche & Gathii, supra note 14, at 323.

8 Bohanes & Garza, *supra* note 13, at 71.

9 Van den Bossche & Gathii, *supra* note 14, at 23.

10 Busch, Reinhardt & Shaffer, *supra* note 13, at 576.

*11* DSU, *supra* note 19, art. 27.2.

12 Id. art. 27.3.

13 Gregory Shaffer, *The challenges of WTO law: Strategies for developing country adaptation*, 5 World Trade Rev. 177, 183 (2006) [hereinafter Shaffer, *Challenges*].

14 *Training*, ACWL [Advisory Centre on WTO Law], http://www.acwl.ch/training-introduction (last visited 19 March 2016); Abbott, *supra* note 13, at 12.

Alavi has argued that, for African countries, the DSU rules are "of little or no value…and in fact have alienated them from the organisation." [1] A representative of Bangladesh has spoken of "underlying problems in the system,"[2] while Bohanes has opined that LDCs would not provide the resources to acquire unwanted legal expertise that would never be used.[3]

At face value, the academic literature does not provide a satisfactory answer to the core question as to why LDCs have not, in the period from 1995 to date, taken it upon themselves to acquire the legal capacity required to protect their trade rights.

If, however, the various statements are viewed in light of the LDCs having openly disavowed themselves of the DSU, then the answer become self-evident. LDCs lack "in-house" capacity simply because there is no need to invest in acquiring legal capacity for a system they will not use.

### 4.3. LDCs' inability to recognise a violation of WTO law

The basis of this argument is that before instigating a DSU dispute, the aggrieved party must (i) recognise that its trade rights have been infringed,[4] (ii) legally assess the merits of any potential complaint,[5] and (iii) prepare initial submissions—all of which LDCs lack the capacity to do.[6]

The academic literature has thoroughly described the challenges that LDCs face in each of these areas. Notwithstanding this litany, LDCs have, in fact, identified both potential infractions and breaches of WTO law.[7] But only one LDC has chosen to pursue and protect its trade rights under WTO law.[8] Moreover, LDCs who lack either the capacity or the resources to identify potential infringements of their trade rights can access assistance from a variety of sources such as the ACWL, NGOs, or private companies, resources that "have largely remained underutilised."[9]

It has been argued that LDCs are constrained in terms of their capability to amass, understand and explain the requisite technical, scientific and economic data[10] that may be required to successfully pursue or defend a complaint. But the academic literature has also suggested that

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1 Alavi, *supra* note 13, at 38.

2 World Trade Organization, *Special Session of the Dispute Settlement Body, 1314- Nov. 2003--Minutes of Meeting*, TN/DS/M/14 (20 Apr. 2004), at 7.

3 Jan Bohanes, *WTO Dispute Settlement and Industrial Policy* 71 (Think Piece, E15 Expert Group on Invigorating Manufacturing: New Industrial Policy and the Trade System, Apr. 2015), https://www.ictsd.org/sites/default/files/research/E15_NewIndustrialPolicy_Bohanes_FINAL.pdf.

4 Nottage, *Developing Countries*, *supra* note 13, at 11.

5 Abbott, *supra* note 13, at 12-13; Alavi, *supra* note 13, at 32.

6 Bohanes & Garza, *supra* note 13, at 79; Alavi, *supra* note 13, at 32; James Smith, *Inequality in International Trade? Developing Countries and Institutional Change in WTO Dispute Settlement*' 11 Rev. Int'l Pol. Econ. 542, 543 (2004)."plainCitation":"Bohanes and Garza (n 18

7 Mosoti, *supra* note 11, at 79; Int'l Trade Ctr., *supra* note 218.

8 World Trade Organization, *India-Antidumping Measure on Batteries from Bangladesh, Request for Consultations by Bangladesh*, WT/DS306/1 (2 Feb. 2004), https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=56006&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True [hereinafter *India-Antidumping Measure*].

9 Jumoke Oduwole, *Nothing Ventured, Nothing Gained? A Case Study of Africa's Participation in WTO Dispute Settlement*' (2009) 2 Int'l J. Priv. L. 358, 367 (2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2119853.

10 Andrea M. Ewart, *Small Developing States in the WTO: A Procedural Approach to Special and Differential Treatment through Reforms to Dispute Settlement* 35 Syracuse J. Int'l L. & Com. 27, 40 (2007).

this lack of resources is primarily driven by governments preferring to allocate resources in other areas,[1] such as domestic issues.[2]

It is apparent that LDCs do have resource issues, though some LDCs have demonstrated that they can identify WTO non-compliant measures and provide the resources needed to enforce their trade rights.[3] Other LDCs have opted not to allocate the requisite resources in this area, and many LDCs appear unwilling to avail themselves of the assistance and support that are freely available. These findings are entirely consistent with the contention here that LDCs have adopted a policy that eschews the use of the DSU.

### 4.4. Institutional weaknesses & the acquisition of evidence

WTO cases are becoming increasingly complicated,[4] and WTO members are increasingly reliant on economic experts who can correctly frame and emphasize the facts of a given case.[5] Ewart argues that most developing countries lack the funds and systems to even collect the data required to substantiate a WTO complaint.[6]

This argument is premised on the fact that LDCs lack the institutional, financial, administrative and human resources to acquire and subsequently present economic and scientific data necessary to formulate and sustain a successful complaint.

While there can be little doubt that LDCs do suffer from these maladies, several factors should be borne in mind. First, as was noted above under the discussion of economic factors, the range and diversity of LDC exports are very limited and mostly comprise primary products. Therefore, the range and depth of expert knowledge that may be required will be equally limited. Consequently, it would be highly improbable that any case involving an LDC would be anywhere near as complex as, for example, *EC – Approval and Marketing of Biotech Products* (2006),[7] a case that, according to Van den Bossche and Gathii, involved over thirty scientific specialisations.

There could, however, still be a scenario where expertise unavailable in an LDC could be needed and would have to be tracked down and funded. Article 27.1 of the DSU[8] tasks the Secretariat with providing secretarial and technical support.[9] While the literature is somewhat unclear as to the mechanics of providing such support, Bown argues that the support should extend to the

1 Shaffer, *Challenges*, *supra* note 231, at 185.

2 Luke Olson, Note, *Incentivizing Access to the WTO's Dispute System for the Least-Developed Countries: Legal Flaws in Brazil's Upland Cotton Decision*, 23 Minn. J. Int'l L. 101, 123 (2014).

3 Note: The author will, show, *infra*, that even in the case of *India-Antidumping Measure on Batteries from Bangladesh*, the affected industry struggled to force Bangladesh to take any action in the first instance and agreed to underwrite the total costs of the dispute.

4 In European Community, *Approval and Marketing of Biotech Products, European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R; WT/DS292/R; WT/DS293/R (2006) over thirty different scientific specialisations were referred to by the European Union. *See also* Van den Bossche & Gathii, *supra* note 17, at 23 [hereinafter *EC Biotech Products*].

5 C.A. Thomas, *Of Facts and Phantoms: Economics, Epistemic Legitimacy, and WTO Dispute Settlement*, 14 J. Int'l Econ. L. 295, 323-24 (2011).

6 Ewart, *supra* note 242, at 40.

7 *See EC Biotech Products*, *supra* note 246.

8 DSU, *supra* note 9, at 372.

9 Id.

provision of technical economic support, [1] while Thomas notes that the Secretariat may be a potential source of economic information and advice to the parties.[2]

Furthermore, LDCs could access and acquire the required skills and technical expertise from other non-governmental agencies and bodies, whose submissions, sought by the panels, have been used in some 19 disputes.[3] Thus NGOs and other organisations, if such bodies are prepared to provide assistance, could be a rich source of the requisite technical and scientific expertise.

Additionally, LDCs could access the ACWL Technical Expertise Fund,[4] which can be used to assist in the acquisition of scientific, economic and other non-legal technical input.[5] As Nottage aptly states, "The commonly-identified cost and resource constraints, while relevant once, appear to have been largely addressed."[6]

In summary, while LDCs may have difficulty in acquiring the technical information to support a potential dispute, whether through a lack of in-house resources or the inability to fund external experts, nonetheless there are avenues and channels by which this acquisition may be facilitated. That LDCs have not done so is, once again, supportive of the argument that LDCs are quite simply not interested in using the DSU.

### 4.5. Fear of reprisals by potential respondents

This argument is grounded upon fears that reprisals by a potential respondent to a dispute dissuade LDCs from engaging with the DSU. There are two strands to the argument: first, LDCs may rely on aid and assistance provided by a potential respondent, which may be compromised by raising a trade dispute,[7] and second, that initiating a dispute may cause a respondent to deny preferential access for LDC exports.[8]

Van den Bossche and Gathii have noted that while Article 3.10 explicitly states that the use of the DSU should not be contentious,[9] the political reality is that commencing a trade dispute would not be regarded as a "friendly act."[10] Cho has observed that threats of reprisal are not overt, positing that they may be veiled and un-published: there is anecdotal information demonstrating the "subtle warnings conveyed through diplomatic channels."[11] Mosoti has argued

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1 The Law, Economics and Politics of Retaliation in WTO Dispute Settlement 392 (Chad P. Bown & Joost Pauwelyn, eds., 2010).

2 Thomas, *supra* note 247, at 317.

3 *See* Gabrielle Z. Marceau & Jennifer K Hawkins, *Experts in WTO Dispute Settlement*, 3 J. Int'l Disp. Settlement 493, 494-95 (2012), https://academic.oup.com/jids/article-lookup/doi/10.1093/jnlids/ids014.

4 *Technical Expertise Fund*, ACWL [Advisory Centre on WTO Law], http://www.acwl.ch/technical-expertise-fund (last visited 21 March 2016).

5 Nottage, *Developing Countries*, *supra* note 13, at 6.

6 Id.

7 Chad P. Bown & Bernard M Hoekman, *WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector*, 8 J. Int'l Econ. L. 861, 863 (2005); Christina L. Davis & Sarah Blodgett Bermeo, *Who Files? Developing Country Participation in GATT/WTO Adjudication* 71 J. Pol. 1033, 1035 (2009); Manfred Elsig & Philipp Stucki, *Low-income developing countries and WTO litigation: Why wake up the sleeping dog?*, 19 Rev. Int'l Pol. Econ. 292, 299 (2012).

8 Van den Bossche & Gathii, *supra* note 14, at 26; Davis & Bermeo, *supra* note 258, at 1035; Kevin Watkins, *Cultivating Poverty: The Impact of US Cotton Subsidies on Africa*, *in* 2 Oxfam Policy and Practice: Agriculture, Food and Land 82, 86 (2002), http://www.ingentaconnect.com/content/oxpp/oppafl/2002/00000002/00000001/art00004;

9 DSU, *supra* note 9, art. 3.10.

10 Van den Bossche & Gathii, *supra* note 14, at 26.

11 Sungjoon Cho, *Beyond Doha's Promises: Administrative Barriers as an Obstruction to Development*, 25 Berkeley J. Int'l L. 395, 413 (2007), http://scholarship.law.berkeley.edu/bjil/vol25/iss3/2.

that subtly threatening to withdraw aid (a tactic which, Mosoti opines, has been effectively used in negotiations) acts as an effective barrier to a poor country filing a dispute.[1]

Substantiating these arguments is, by the nature of the arguments themselves, somewhat difficult. They are largely premised upon unrecorded, unwritten oral statements, comments and innuendo, all of which makes evaluation of these arguments, at best, subjective—if not simply irrelevant. Illustrating this point in relation to the *U.S.-Upland Cotton*[2] dispute, Gross has argued, on the one hand, that there is no evidence of "any threat of reprisal—overt or implicit—by the US"[3] but has conceded, on the other hand, the possibility that the absence of this evidence may be due to the "behind closed doors" nature of trade diplomacy.[4] Davis and Bermeo have noted that fears of potential diplomatic repercussions proved to be baseless in *US Underwear*.[5] While acknowledging that these fears exist, Elsig and Stig cite in counterpoint the case of Chad, whose U.S. foreign aid increased despite being a third party in *US-Upland Cotton*.[6] The fear of retaliation was a factor considered by Bangladesh before initiating its DSU complaint against India.[7] The ministry of commerce assessed the likely risks of retaliation and ended up dismissing the risk.[8]

While there may be a perception of retaliation risk, in practice there would appear to be little evidence of it. Guzman and Simmons provide the strongest rebuttal of these arguments, arguing that despite the inequalities between WTO members, "the main problem does not appear to be the coercive tactic by the powerful."[9] In any event, Van den Bossche and Gathii have argued that the threat of retaliation provides an inadequate explanation for LDC non-engagement with the DSU.[10]

With no evidence proving either (a) reprisals resulting from initiating or threatening to initiate a WTO dispute or (b) concrete examples of threats of reprisals being made either explicitly or overtly and with the concept as a whole being effectively discounted by writers,[11] this whole line of argument is, quite simply, without foundation.

If one views these arguments through the lens of LDCs actively seeking to avoid engagement with the DSU, then a simple construct would be that LDC governments deliberately deploy the reprisals argument as part of what Taslim describes as "internal bureaucratic resistance"[12] in order to further a wider policy-driven agenda of non-engagement with the DSU.

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1 Mosoti, *supra* note 11, at 80.

2 World Trade Organization, *United States - Subsidies on Upland Cotton; Notification of a Mutually Agreed Solution*, WT/DS267/46 (23 Oct. 2014), file:///D:/Downloads/267-46.pdf [hereinafter *U.S.-Upland Cotton*].

3 Adam Gross, *Can Sub-Saharan African Countries Defend their Trade and Development Interests Effectively in the WTO? The Case of Cotton*, 18 Eur. J. Developmental Res. 368, 378 (2006).

4 Id.

5 World Trade Organization, Appellate Body, *United States - Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, WT/DS24/AB/R (10 Feb. 1997).

6 Elsig & Stucki, *supra* note 258, at 310; *U.S.-Upland Cotton, supra* note 267.

7 *See India-Antidumping Measure, supra* note 240.

8 Mohammad Ali Taslim, *How the DSU worked for Bangladesh: the first least developed country to bring a WTO Claim*, *in* Dispute Settlement at the WTO: The Developing Country Experience 230, 244 (Gregory C. Shaffer & Ricardo Meléndez-Ortiz eds., 2010).

9 Andrew T. Guzman & Beth A. Simmons, *Power Plays and Capacity Constraints: The Selection of Defendants in World Trade Organization Disputes*, 34 J. Legal Stud. 557, 592 (2005), https://dash.harvard.edu/bitstream/handle/1/3153319/simmons_powerplays.pdf?sequence=2.

10 Van den Bossche & Gathii, *supra* note 14, at 28.

11 Guzman & Simmons, *supra* note 271.

12 Taslim, *supra* note 270, at 240.

### 4.6. Costs – the high costs of engaging external legal counsel

Until 1997 parties involved in DSU disputes used their own "in-house" lawyers to argue their case. In *EC-Bananas III*[1] the Appellate Body directed that parties to a dispute could choose their own counsel, such as outside counsel, to represent them, in order to "participate fully in dispute settlement proceedings."[2]

At first glance, by allowing countries to engage suitably qualified legal counsel, the Appellate Body seems to have removed a potential barrier to LDC engagement: the LDCs' lack of "in-house" with the necessary advocacy skills. This removal, however, created two further perceived barriers, first, that LDCs could not afford to hire external counsel,[3] and second, that even if the funding could be found, the quantum of the claim and the economic benefits that might flow from winning a dispute might total less than the costs of conducting the dispute in the first place.[4]

Again, at face value, these arguments appear to be both strong and robust. However, as Van den Bossche and Gathii acknowledge, while the practice is not generally publicised, legal fees for a complainant party to a dispute are often borne by the industry directly interested in pursuing the dispute, as opposed to being paid by the concerned government itself.[5] They point out, though, that private funding of legal costs may be inappropriate if the wider political interests and policies of the state and those of the industry are misaligned.[6] Furthermore, they note that in LDCs, a domestic industry "obviously does not have the resources available"[7] to fund a case.

While, for LDCs, funding by a domestic industry may be not in all instances be a practical possibility,[8] the numbers would shift were the LDC to avail itself of the services of the ACWL. Where the ACWL is used to provide legal support and representation to an LDC, the LDC pays only 10% of the full cost of the dispute. Estimates as to legal costs vary considerably amongst academic writers, with Nordstrom and Shaffer suggesting costs of $321,250 for a simple case and up to $882,500 for a complex case.[9] Bohanes and Garza suggest that a challenging case including

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1 World Trade Organization, Appellate Body Report, *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (9 Sept. 1997), https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=24066&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True.

2 Id. ¶ 12.

3 Richard L Bernal, *Participation of Small Developing Economies in the Governance of the Multilateral Trading System* 26 (Centre for International Governance Innovation [CIGI] Working Paper No. 44, Dec. 2009), https://www.cigionline.org/sites/default/files/participation_of_sde_in_the_governance_of_the_multilateral_trading_system.pdf [hereinafter Bernal, *Participation*]; Abbott, *supra* note 13, at 11; Bohanes & Garza, *supra* note 13, at 71.

4 Bruce A. Blonigen & Chad P. Bown, *Antidumping and Retaliation Threats*, 60 J. Int'l Econ. 249, 253 (2003); Marco Bronckers & Naboth van den Broek, *Financial Compensation in the WTO: Improving the Remedies of WTO Dispute Settlement*, 8 Journal of International Economic Law 101, 106 (2005); Busch, Reinhardt & Shaffer, *supra* note 18, at 10; Cho, *supra* note 381, at 412 (citing The World Bank, *Global Economic Prospects 2004: Realizing the Development Promise of the DOHA Agenda* 116 (2003), http://siteresources.worldbank.org/INTRGEP2004/Resources/gep2004fulltext.pdf); Anne-Célia Disdier & Lionel Fontagné, *Trade impact of European measures on GMOs condemned by the WTO panel*, 146 Rev. World Econ. 495, 22 (2010); Bown & Hoekman, *supra* note 258, at 863, 865.

5 Van den Bossche & Gathii, *supra* note 14, at 24.

6 Id. at 24-25. Note: If one expands this point to include a scenario where an LDC was pursuing a policy of DSU non-engagement, then even in the unlikely event of the domestic industry being able to fund an action, this funding would probably be declined.

7 Id. at 24.

8 Taslim, *supra* note 270, at 242.

9 Nordström & Shaffer, *supra* note 13, at 600.

an appeal would cost in the region of $1 million,[1] and Shaffer notes that a firm quoted $200,000 for a small case conducted through the panel stage of the DSU.[2] Taslim notes that Bangladesh was advised that the cost of an anti-dumping trade dispute would total $150,000, which meant that if it engaged the services of the ACWL, the Bangladesh government would only expect to pay 10% thereof, i.e., $15,000,[3] despite already having received an undertaking from the domestic producer to bear all financial costs of the DSU process.[4]

In summary, neither access to legal representation nor its cost should, in practice, act as a barrier to LDC engagement with the DSU. There are no financial barriers to obtaining an initial assessment of a potential case: the ACWL provides legal opinions for free.[5] The obstacle imposed by the high legal costs of pursuing a dispute have largely been "overcome" by the existence of the ACWL.[6] LDCs can also address legal capacity concerns by drawing on the ACWL.[7] Scholars have cautioned, though, that while the ACWL provides legal capacity, governments must nevertheless engage with the ACWL and there is, as a study has shown, a lack of continuity in this regard.[8]

The academic literature demonstrates that LDCs could access the ACWL, which offers them qualified legal counsel to conduct a trade dispute from inception to conclusion for as little as $15,000.[9] Notwithstanding this paltry sum, the literature has shown that certain African countries would not even *consider* engaging with the DSU unless legal services were provided completely free of charge.[10] This counterintuitive position can only be rationally explained by the wider narrative of LDCs refusing to accept or be associated with the DSU. In this light, any litigation costs, no matter how insignificant, would be objectionable and, consequently, used to re-enforce a policy of non-engagement with the DSU.

### 4.7. LDC enforcement of a favourable ruling

Article 19 of the DSU states that when a measure is inconsistent with a covered agreement, the member responsible will bring the measure into conformity with the covered agreement.[11] In the event of non-compliance with Article 19, the complainant may take retaliatory measures[12] equivalent to the economic harm and loss in trade benefits caused.[13]

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1 Bohanes & Garza, *supra* note 13, at 71.

2 Gregory Shaffer, *How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies* 16 (International Centre for Trade and Sustainable Development [ICTSD)] 2003), <http://mercury.ethz.ch/serviceengine/Files/ISN/92860/ichaptersection_singledocument/6fc9b1ec-ade2-4df3-9862-2a7516fefad4/en/No_05_chapter_1_+Towards_a_Development_.pdf> accessed 26 March 2016.

3 For an exception to this *see* Taslim, *supra* note 270, at 242.

4 Id.

5 Bohanes & Garza, *supra* note 13, at 71.

6 Chad P. Bown & Rachel McCulloch, *Developing Countries, Dispute Settlement, and the Advisory Centre on WTO Law*, 19 J. Int'l Trade & Econ. Dev. 33, 36 (2010), http://www.tandfonline.com/doi/full/10.1080/09638190903327468?scroll=top&needAccess=true.

7 Elsig & Stucki, *supra* note 377, at 297; Mosoti, *supra* note 15, at 79.

8 Busch, Reinhardt and Shaffer, supra note 13, at 574.

9 Taslim, *supra* note 270, at 242.

10 Edwini Kessie & Kofi Addo, African Countries and the WTO Negotiations on the Dispute Settlement Understanding 20 (Int'l Ctr. for Trade & Sustainable Dev. [ICTSD] 2007), http://www.ictsd.org/downloads/2008/05/african-countries-and-the-wto-negotiations-on-the-dispute-settlement-understanding.pdf.

11 DSU, *supra* note 9, art. 19.1.

12 Note: These must be approved by the DSB. *Id.*, art. 22.4.

13 Id.

Anderson argues that LDCs lack the capacity to retaliate, speaking of the "inherent injustice of retaliation,"[1] and Apecu argues that African countries have neither the leverage nor a sufficiently wide product base to give them viable "alternatives for retaliation."[2] Bartels, Bown and Hoekman argue that the ineffective nature of retaliatory measures may cause certain countries simply not to initiate disputes in the first instance.[3]

While the literature has stressed that enforcement issues are a concern, there are very high compliance rates within the wider context of the DSU as a whole. Davey has suggested a compliance rate of 83%.[4] The literature has also shown that in almost all WTO disputes where a violation has occurred, the respondent country brings itself into compliance.[5] Meagher has gone further, arguing that, given the infrequent use of counter-measures, the extent to which enforcement problems affect DSU participation is questionable.[6] Moreover, in the only case to date brought by an LDC,[7] the disputants reached a mutually agreeable solution.[8]

Academics have explored the influence of "soft law" within the context of enforcement: the phenomenon that an adverse ruling places economic and political pressure on a government to comply, making it easier for governments to settle their disputes. [9] In this vein, Van den Bossche and Gathii have suggested that LDCs should harness the potential of naming and shaming violators.[10]

The analysis here could suggest that if LDCs were faced with a recalcitrant and obstinate respondent, they could face difficulties enforcing a decision. However, that argument must be analysed against a backdrop of (i) the high levels of respondent compliancy, (ii) the fact that recourse to the use of reprisals has been very limited and (iii) the availability of "soft law" as a useful alternative strategy that LDCs could employ. With the addition of the evidence in this paper that LDCs have an intrinsic antagonism towards engaging with the DSU, the argument that LDC non-engagement with the DSU results from their inability to enforce a favourable ruling crumbles. In fact, the new rationale advanced in this paper may indeed be the pre-eminent factor explaining LDC non-engagement with the DSU.

### 4.8. Lack of a mission in Geneva & linguistic difficulties

It has been argued that having a diplomatic mission in Geneva is of key importance to the pursuit of a country's national interest at the WTO.[11] Many small countries either do not have a permanent

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1 Kym Anderson, *Peculiarities of retaliation in WTO dispute settlement*, 1 World Trade Rev. 123, 129 (2002), https://digital.library.adelaide.edu.au/dspace/bitstream/2440/2287/1/Anderson_2287.pdf.

2 Apecu, *supra* note 212, at 26.

3 Lorand Bartels, *Making WTO Dispute Settlement Work for African Countries: An Evaluation of Current Proposals for Reforming the DSU*, 6 L. & Dev. Rev. 47, 49 (2013); Bown & Hoekman, supra note 377, at 863.

4 William J. Davey, *The WTO dispute settlement system: The first ten* years, 8 J. Int'l Econ. L. 17, 47 (2005).

5 Bruce Wilson, *Compliance by WTO Members with Adverse WTO Dispute Settlement Rulings: The Record to Date*, 10 J. Int'l Econ. L. 397, 399 (2007), http://jiel.oxfordjournals.org/content/10/2/397.

6 Niall Meagher, *Representing Developing Countries in WTO Dispute Settlement Proceedings, in* WTO Law, *supra* note 42, at 223.

7 *See India-Antidumping Measure, supra* note 240.

8 World Trade Organization, *India-Antidumping Measure on Batteries from Bangladesh, Notification of Mutually Satisfactory Solution*, WT/DS306/3 G/L/669/Add1 G/ADP/D52/2 (23 Feb. 2006), file:///D:/Downloads/D52-2.pdf.

9 Rachel Brewster, *The Remedy Gap: Institutional Design, Retaliation, and Trade Law Enforcement* 80 Geo. Wash. L. Rev. 102, 154 (2011-12), http://www.gwlr.org/wp-content/uploads/2012/06/80-1-Brewster.pdf.

10 Van den Bossche & Gathii, *supra* note 14, at 29.

11 Richard Blackhurst, Bill Lyakurwa & Ademola Oyejide, *Options for Improving Africa's Participation in the WTO*, 23 World Econ. 491, 493 (2000).

diplomatic mission to the WTO in Geneva,[1] or they have a mission staffed by diplomats rather than specialist personnel who understand the DSU. Aspects of this situation may explain, in part, LDC non-engagement with the DSU, but the picture is more complex than it appears.[2]

Concerning the presence of missions in Geneva, Apecu has noted that in 1995 only one half of all African countries had permanent representatives at the WTO.[3] This number rose steadily over the years: 68% by 2001, 80% by 2005 and over 92% by 2010.[4] By 2014, more than 91% of the LDC members of the WTO had permanent missions in Geneva, with only Gambia, Malawi and Vanuatu lacking one.

However, despite the increase in the number of missions and, therefore, staff, LDC engagement with the DSU has remained low.[5] The composition of the missions in terms of staffing by experienced legal personnel is not clear. There is evidence to suggest that for many African countries the primary areas of focus for their WTO missions are trade facilitation and commerce,[6] leaving dispute resolution and the associated need for trained and experienced personnel as, at best, tertiary considerations. This evidence as to non-juridical focus again accords with the argument that LDCs inherently have little or no interest in the DSU.

Another argument posits that LDC personnel within missions lack the language skills needed to deal with dispute panels and an appellate body whose proceedings are in English,[7] as well as panellists whose common language is usually English.[8] Because the WTO offers technical training support in language skills to members,[9] and certified translation services are also widely available,[10] LDCs could ameliorate these difficulties.

A third argument proposes that wider engagement by LDCs has been hampered by a combination of a lack of support from and poor internal communication between, national governments, governmental departments, and key government officials and their respective WTO missions.[11] In this regard, the literature demonstrates that communications difficulties are not *per se* an issue that exclusively affects LDCs. The literature talks about the ineffective and incoherent written communications and a lack of clear guidance from capitals.[12] The literature also suggests that poor levels of communication were not universally an issue for all LDCs, some of whom had "tight Geneva-capital coordination and support."[13]

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1 Richard L. Bernal, Small Developing Economies in the World Trade Organization, 13 Paper Presented at World Bank Conference "Leveraging Trade, Global Market Integration and the New WTO Negotiations for Development," Washington, D.C. (July 23-24, 2001).

2 Gross, *supra* note 384, at 371; Bernard M. Hoekman & Petros C. Mavroidis, *WTO Dispute Settlement, Transparency and Surveillance*, 23 World Econ. 527, 535 (2000).

3 Apecu, *supra* note 212, at 6.

4 Id. at 40.

5 Id. at 6.

6 Id. at 7.

7 Abbott, *supra* note 13, at 11.

8 Id. at 18.

9 'World Trade Organization, *TRTA: Trade-Related Technical Assistance--Technical assistance and training courses for 2016-2017*, https://www.wto.org/english/tratop_e/devel_e/train_e/course_details_e.htm (last visited 11 Jan. 2018).

10 *See, e.g.*, *Certified Translation*, Morningside Translations, https://www.morningtrans.com/services/translations/certified-translations (last visited 26 Oct. 2017).

11 Apecu, *supra* note 212, at 7.

12 Busch, Reinhardt and Shaffer, *supra* note 13, at 573.

13 Apecu, *supra* note 212, at 29.

The academic literature relating to these issues paints a mixed and somewhat incoherent picture, one from which it is difficult to draw any firm conclusions as to the limiting effect they may have on the ability of LDCs to successfully pursue a trade dispute. However, an example may enable an evaluation of the significance and effect of having a properly staffed, fully resourced, permanent mission on a country's ability to use the DSU to successfully initiate and conduct trade litigation.

In *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*,[1] neither Antigua nor Barbuda had a mission in Geneva,[2] but they nonetheless successfully initiated[3] and won a trade dispute against the United States in a case that involved not only panel,[4] arbitral[5] and Appellate Body proceedings,[6] but also compliance proceedings.[7] This simple illustration shows that the lack of a fully staffed, permanent mission does not preclude a WTO member from pursuing a trade dispute. If LDCs so desired, they could fully engage with the DSU with or without the need for representation in Geneva. This lack of desire is, as with so many of the non-engagement situations addressed in this paper, driven by the fact that LDCs have chosen simply to ignore the DSU as a means for protecting or enforcing their trade rights.

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1 World Trade Organization, Dispute Settlement, *DS285: United States--Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm (last visited 11 Jan. 2018); *see also* Douglas A. Irwin & Joseph Weiler, *Measures Affecting the Cross-Border Supply of Gambling and Betting Services (DS 285)* 7 World Trade Rev. 71 (2008).

2 World Trade Organization, Development: Geneva Week, *WTO organizes "Geneva Weeks" for non-resident delegations*, https://www.wto.org/english/tratop_e/devel_e/genwk_e.htm (last visited 11 Jan. 2018).

3 World Trade Organization, *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services, Request for Consultations by Antigua and Barbuda*, WT/DS285/1 (27 March 2003) - https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=1639&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True.

4 Id. *Report of the Panel*, WT/DS285/R (10 Nov. 2004), https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=73463&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True.

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6 Id. *Report of the Appellate Body,* WT/DS285/AB/R (7 Apr. 2005), https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=47161&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True; *Corrigendum*, https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=77750,57247&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True.

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## Conclusion

The first section of this paper critically analysed the term S&D and the factors underpinning the same, and explored how the S&D principles evolved and were embedded into the legal framework of the GATT.

In the second section, the paper considered how S&D evolved from a mechanism designed to take account of purely economic issues arising out of trade negotiations. The section evinced how S&D expanded into a broader policy tool adopted and deployed by LDCs to address an ever-expanding set of non-economic issues. Moreover, the analysis showed that S&D came to be the dominant force that drove LDC trade policies within the GATT, an aspect which has thus far not been discussed within the academic literature.

The third section focused upon the Uruguay Round and specifically on the negotiations the led up to the creation of the DSU. It demonstrated the fact that S&D was a key driver not only in terms of LDC policies, but also in terms of LDC negotiation objectives and strategies. The section illustrated how the LDCs strove for and secured a platform within the GATT from which they could formulate and share S&D policy objectives, draft and agree upon S&D-driven proposals and, as a pressure group, advance their S&D objectives with the other GATT bodies and negotiating groups.

The third section explored the role played by the LDCs in the formulation of what was to become the DSU. In these negotiations, LDCs again pursued, with some limited success, their S&D policies through the aegis of specific proposals. As these negotiations were reaching a critical phase, when the key Negotiating Group was beginning to focus on agreeing on a draft text, the LDCs submitted a radical proposal, supported by and premised upon S&D. This proposal provided, *inter alia*, for the creation of a separate, distinct and bespoke dispute settlement system, which would sit outside of the GATT Dispute Settlement regime. This opt-out proposal has hitherto never been examined by academic writers and thus represents a further contribution to the body of academic knowledge.

The fourth section explored the underpinnings of the opt-out proposal, positing that the rejection of their S&D-based proposal left the LDCs with an unwanted dispute settlement system. This rejection has led LDCs to distance themselves from engagement with the DSU. This, the author argues, provides a powerful and compelling explanation for LDC non-engagement with the DSU.

The fourth section then proceeded to apply this new reason to the existing academic arguments demonstrating that this new explanation not only represents a unique perspective on the topic but may also provide a particularly powerful reason why LDCs have not more actively engaged with the DSU. In the opinion of the author, these findings not only add to the general debate as to why LDCs do not engage with the DSU, but also mean that the existing academic arguments, reasons, and rationale require a full re-evaluation.

Turning now to look to the future, it is difficult to envisage a situation where the WTO membership would look favourably at any attempt by the LDCs to resurrect their proposal for the creation of a bespoke LDC-only dispute settlement system.

The DSU, which incorporated what were at the time "state of the art" provisions,[1] has received widespread acclaim, often being described as the crown jewel of the WTO system.[2] Additionally, in his highly-regarded report,[3] Peter Sutherland opined that when considering reform of the DSU, "an important underlying concern is…not 'to do any harm' to the existing system since it has so many attributes."[4]

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1 Susan Esserman & Robert Howse, *WTO on Trial*, 82 Foreign Aff. 130, 131 (2003).

2 Id.; Adam Gross, *Can Sub-Saharan African Countries Defend Their Trade and Development Interests Effectively in the WTO? The Case of Cotton*, 18 Eur. J. Development Res. 368, 369, 386 (2006).

3 Report by the Consultative Board to the Director-General Supachai Panitchpakdi, *The Future of the WTO: Addressing Institutional Challenges in the New Millennium* (2004) (Peter Sutherland, Chair), https://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.pdf.

4 Id.

Against this backdrop it is hardly surprising that attempts to reform the DSU have been painfully slow. In 2001 at Doha, ministers agreed "to negotiations on improvements and clarifications of the Dispute Settlement Understanding,"[1] and created a body[2] tasked with formulating changes to the dispute settlement regime.[3] Jo and Namgung note that the DSU reform process has largely failed to make significant progress since it was established.[4] In its most recent report[5] while the Chairman was convinced that results would be forthcoming,[6] he conceded that this outlook was predicated upon members being "prepared to be realistic; concentrate on what is doable; and be open to delivering results through incremental steps."[7]

In practical terms, the creation of an LDC-only, parallel dispute settlement system would be a substantial undertaking, fraught with difficulties. Given the paucity of information given by the LDCs as to how such a system was originally intended to function, considerable time and effort would have to be expended just to formalise the procedural aspects alone. Whether this would be either realistic or doable is open to significant doubt. Moreover, each member country, as well as the WTO secretariat, would have to retrain personnel and/or engage new personnel who are familiar with the detailed workings of the DSU in order to engage with a new system. All of this would involve considerable expenditure that in today's straitened economic times may again be neither realistic nor doable.

Even this brief analysis demonstrates the quantum of the work that would be required simply to begin the process of designing and operating a bespoke dispute settlement system. Given the harmful and disruptive effects as well as the difficulties relating to the implementation of even the most rudimentary procedural aspects of an alternative DSU, resurrecting the LDC proposal would, in addition to running contrary to the Sutherland report, be neither realistic nor doable.

The DSU is recognized as an efficient and generally effective method for settling a variety of international trade disputes,[8] though one scarcely used by LDC's. While the failure of LDCs to seek remediation of infringements through engagement with the DSU affects their ability to trade internationally and thus their economic development,[9] the purpose of this paper is not to seek answers as to how this situation can be remedied. The author has previously recognised that "[t]here is no 'silver bullet' that would, at a stroke, correct all of these problems."[10] While this may well be true, the author contends that solving the conundrum of LDC engagement with the DSU will only be possible when there is a clear understanding of all the contributory causal factors that lie at the root of the non-engagement conundrum.

The identification in this paper of a hitherto unknown causal factor is a crucial missing link in our understanding of LDC non-engagement with the DSU. The author offers this new factor to complete our understanding of this conundrum and in the hope that, now, solutions will be found and implemented.

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1 William J. Davey, *Reforming WTO Dispute Settlement* 9 (Ill. Pub. L. & Legal Theory Res. Papers Series, Draft Research Paper No. 04-01, 29 Jan. 2004), http://www.peacepalacelibrary.nl/ebooks/files/DAVEY_Reforming-WTO-Dispute-Settlement.pdf (last visited 11 Jan. 2018).

2 Note: This body is called the "Special Session of the Dispute Settlement Body."

3 Bernal, *Participation*, *supra* note 277, at 10–11.

4 Hyeran Jo & Hyun Namgung, *Dispute Settlement Mechanisms in Preferential Trade Agreements: Democracy, Boilerplates, and the Multilateral Trade Regime*, 56 J. Conflict Resol. 1041, 1049 (2012).

5 World Trade Organization, Special Session of the Dispute Settlement Body, *Report by the Chairman, Ambassador Dr Stephen Ndungu Karau, to the Trade Negotiations Committee*, TN/DS/29 (2 May 2017).

6 Id. at 7.

7 Id.

8 Dan Sarooshi, *The Future of the WTO and Its Dispute Settlement System*, 2 Int'l Orgs. L. Rev. 129, 129 (2005).

9 *See* Welsh, *supra* note 10, at 8.

10 Id. at 46.

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