Dispute Settlement in the WTO: How Friendly Is It for the LDC

Paper 45

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The present paper titled ***Dispute Settlement in the WTO: How Friendly Is It for the LDCs?***
was prepared under the CPD's *Trade Policy Analysis (TPA)* programme. The TPA programme of CPD was initiated in 1999 in response to a felt need to enhance Bangladesh's capacity to more effectively deal with the emerging trade issues in the face of deregulation, liberalisation and globalisation. The successful completion of the Uruguay Round Agreement in 1994 and the establishment of the WTO in 1995 was expected to have crucial implications for the LDCs such as Bangladesh. In the 1990s Bangladesh economy was becoming increasingly open and trade related policy making and trade negotiations were assuming critical importance for Bangladesh's future development.

In view of the emerging challenges in the context of the ongoing process of globalisation, the objective of CPD's *Trade Policy Analysis* programme is to monitor the impact of the evolving trading regime under the WTO on Bangladesh economy with a view to support trade related capacity building process in the country by strengthening CPD's institutional capacity in the areas of (a) trade related research, (b) preparation of policy briefs, (c) organisation of dialogues, (d) organisation of workshop and training, (e) strengthening trade related documentation, and (f) trade related publication and networking.

The present paper on ***Dispute Settlement in the WTO: How Friendly Is It for the LDCs?*** has been prepared by Mr Dennis Browne, Director Emiretus, Centre for Trade Policy and Law, Carleton University, Ottawa, Canada. The paper looks at the possibilities of least developed country (LDC) members of the World Trade Organisation (WTO) to rely upon the dispute settlement provisions of the WTO to gain the benefits they reasonably believe should accrue to them from their participation in the organisation. Part 1 of the paper reviews the evolution of the provisions in the GATT/WTO relating to dispute settlement, with special reference to the incorporation of special and differential treatment in their dispute settlement processes. Part 2 of the paper considers special challenges faced by LDCs in dispute settlement and what might be done about them.

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Dispute Settlement in the WTO: How Friendly Is It for the LDCs?

INTRODUCTION

The objective of this paper is to evaluate the possibilities for least developed country (LDC) Members of the World Trade Organization (WTO) to rely upon the WTO dispute settlement provisions to gain the benefits they reasonably believe should accrue to them from their participation in the WTO.[1]

Economists argue quite persuasively that economic benefits of WTO participation will best accrue to WTO Members as a result of the implementation of their WTO obligations into their domestic economic policies and regulatory structures. Lawyers, however, deal with rights and obligations as they are set out in the WTO agreements with a view to determining whether the actions of one Member have the effect of nullifying or impairing the benefit(s) other Members might reasonably expect to accrue to them.

This latter approach operates on the assumption that a Member's benefits may be increased or diminished by actions of other Members. That is, the benefits that should accrue to Member A may be nullified or impaired if Member B fails to implement its obligations, or implements a trade measure inconsistent with its obligations, or in some other way tilts the conditions of competition in its domestic market in favour of its domestic producers in such manner as to vitiate a concession Member B had extended to other Members, including Member A. In any such case, Member A should then have a right to seek, through the DSU, removal of the injury caused to it by Member B's actions or inaction.

The question for this paper therefore, is whether that right, the right to have the nullification or impairment of its expected benefits ended, is readily available to LDC Members through the dispute settlement mechanisms of the WTO. To address this question, the paper is divided into two parts. The first part sets out a review of the evolution of the provisions in the GATT/WTO relating to dispute settlement, with special reference to their incorporation of special and differential treatment of developing countries and LDCs. The second part highlights special challenges facing LDCs with respect to dispute settlement and considers how they might be overcome.

PART I A REVIEW OF THE EVOLUTION OF PROVISIONS IN THE GATT/WTO RELATING TO DISPUTE SETTLEMENT, WITH SPECIAL REFERENCE TO THE INCORPORATION OF SPECIAL AND DIFFERENTIAL TREATMENT IN DISPUTE SETTLEMENT PROCESSES

(1) The evolution of international trade regulation has increased the importance of dispute resolution

[1] As discussed later in this paper, nullification or impairment of such benefits are the basis from which a dispute may be brought under the WTO *Understanding on Rules and Procedures Governing the Settlement of Disputes*, which is generally referred to as the DSU, or the Dispute Settlement Understanding.

Generally speaking, international trade is conducted by non-government actors within regulatory frameworks created by governments. The sum of actions taken by individual governments to regulate commercial and economic activities within their own jurisdictions or by their own non-governmental actors together create the regulatory framework for international trade.

International trade agreements (ITAs) address the actions of governments as they implement their regulatory frameworks, they do not regulate the actions of business enterprises. Nonetheless, the interests directly affected by a dispute under the WTO will be in the private sector. It is the trade or commercial interests of business enterprises that will be a stake.[2]

ITA obligations bring about adjustments within each party as they are implemented into domestic regulatory frameworks. Such adjustments often present formidable challenges to commercial enterprises as they must adapt to new conditions of competition. Consequently, rule interpretation and rule enforcement become major preoccupations in the administration of international trade agreements, especially as the scope of ITAs is enlarged and the number and diversity of parties to them increases.

When a dispute arises between governments participating in an ITA, it will usually focus on government measures that either go beyond the limits set by an agreement or fall short of fully implementing a government's commitments under the agreement.[3] In rare instances, they may focus on government measures which, while not inconsistent with trade agreement obligations, nonetheless have the effect of nullifying or impairing benefits expected to accrue to another party to the trade agreement.

Obviously, the capacities of parties to an ITA to deal with their differences will vary dramatically as their diversity increases. Having agreed rules backed up by formal, third-party dispute settlement mechanisms will put the parties to a dispute on a more even footing when seeking resolution. Nonetheless, the balance of opportunity to enforce one's rights through dispute settlement will depend upon how the rules are written and will frequently be influenced by the relative economic strengths of the parties to the dispute.

(2) Systems of Dispute Resolution

Dispute settlement procedures are generally based either on the respective power of the disputants *(power based*) or on a set of rules that applies to the subject matter of the dispute between them *(rules based).* Both can include an element of, or even be based upon, *negotiations*.

Power based negotiations are the stuff of traditional diplomacy. In the context of a trade dispute without effective dispute settlement mechanisms, the more powerful disputant may use or threaten withdrawal of foreign aid, market access preferences, 'retaliatory' trade actions or may even undertake military posturing. The outcome will depend largely

[2] While some provisions of the WTO are directed at creating or enforcing private rights, e.g., the TRIPS agreement, a trade dispute brought under the DSU will deal with government actions concerning such rights rather than with the private rights *per se*.

[3] WTO Agreement Article XVI:4 "each member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements".

upon the goodwill of the more powerful party and whether it takes a short- or longer-term view.

Rules based negotiations reduce, but do not eliminate, the importance of relative levels of power. The more powerful party still brings more weight to the table and usually faces the possibility of suffering relatively less loss.

For rules based negotiations to be successful and even handed, it is necessary for the parties to the dispute to believe that, should their negotiations fail to resolve the matter, a third party mechanism that is designed to apply or interpret the rules fairly will take over and resolve the impasse. This may be sufficient inducement for the parties to resolve their dispute at an early stage. If, however, such a mechanism is not in place and available, the negotiations will revert to a power base and the outcome will depend upon the willingness of the more powerful party to play by the rules.

Thus any system of trade rules needs to have at least two procedural mechanisms that work effectively. First, it needs effective procedures to make rules that are acceptable to all parties, i.e., provisions for reasonably balanced negotiations. Second, it needs procedures to effectively apply and implement the rules. Sovereign governments will not adhere to rules that are not acceptable to them. Thus every trade negotiation must result in a win-win outcome. Consequently, trade agreements are characterized by reciprocal undertakings.

But even good rules, based on genuine reciprocity, may present short-term difficulties for individual governments. Inevitably, differences of view will arise with respect to the interpretation of rules, their scope, appropriate exceptions, and so on. There is, therefore, a need to ensure that the agreed rules are consistently followed by both the big and the small players. Readily available and binding dispute settlement procedures can fill this need.

The solutions imposed by the application of binding dispute settlement measures must, however, be consistent with the underlying objectives of the agreement. If the purpose of the agreement is to open markets and a dispute arises over one party's market closing measures, it will be counter-productive to apply a solution that results in the application of additional market closing measures. It would be better for the solution to re-establish reciprocity, preferably by bringing the measure in question fully into compliance with the trade agreement or, as a second best alternative, through compensatory market opening measures.

What's more, the solution should take a longer-term view rather than focus exclusively on resolution of the dispute under consideration. As noted, disputes are most likely to arise when the application of a rule causes domestic difficulties for a party to the agreement. Thus an underlying consideration to the resolution of each dispute should be whether the rule embodies the optimal approach to the issues it seeks to address.

There are basically three different approaches to dispute resolution: i) conflict avoidance; ii) diplomacy; and iii) adjudication. The WTO includes all three.

(i) Conflict avoidance

Transparency, including publication of all measures affecting trade and the right to appeal administrative determinations, is a basic principle of the WTO agreements. The Trade Policy Review Mechanism, as well as numerous notification obligations in various WTO agreements, greatly enhance the transparency of international trade regulation and bring peer pressure to bear on all members to comply with WTO rules.

But transparency goes well beyond simple publication and appeal, both of which happen after the fact. A number of WTO agreements require advance notice of rule making, including obligations to consult and a duty to take account of such consultations when promulgating a new rule.[4] Engagement of those whose interests will be affected by a measure in the process of defining it should significantly reduce the likelihood of conflict when it is applied.

(ii) Diplomatic means of dispute resolution

Formal diplomacy may be applied to the resolution of differences between governments in a number of ways. The following paragraphs set out a sort of ascending scale of diplomacy-based practices used generally in international relations, all of which may be used within the WTO. (Petersmann, 1997)

Negotiation (or consultation) continues to be the basic means of solving disputes peacefully. It serves the purpose of achieving agreed solutions among the parties and is usually distinguished by the absence of a third party who might suggest or impose a solution.

Good offices refers to the involvement of one or more states, or an international organization, in a dispute between other states solely to encourage the disputing states to resume negotiations, and/or to provide them with additional channels of communication.

Mediation refers to a more active participation by the third parties than would be the case in good offices. The mediator is authorized and expected to transmit and interpret each party's proposals to the other and to advance proposals informally on the basis of the information supplied by the parties rather than through independent investigations. Mediation can take place only with the consent of the parties. The mediator's proposals are not binding and the parties retain control of the dispute.

Inquiry uses a disinterested third party to ascertain disputed issues of fact in order to provide the disputing parties with an objective assessment. The parties may agree in advance to accept the findings of fact as binding.

Conciliation differs from mediation in that the third party intervention is put on a formal and institutionalized basis with more formal procedures similar to those used in

[4] See, for example, Annex B of the SPS Agreement; Articles 2-5 and 7-8 of the TBT Agreement; requirements for opportunities for all interested parties to participate in investigations mandated by the agreements on Anti-Dumping, Subsidies and Countervailing Measures, and Safeguards; requirements for enquiry points under the SPS Agreement, the TBT Agreement and the Agreement on Trade in Services.

arbitration. Conciliators are usually asked to establish the facts, examine the claims of both parties, take all other relevant factors into account (including the legal situation), and submit non-binding proposals for possible settlement.

These diplomatic means of dispute settlement are characterized by the flexibility of the procedures, the control over the dispute by the parties, their freedom to accept or reject a proposed settlement, the possibility of avoiding winner-loser situations with their repercussions on the prestige of the parties, the limited influence of legal considerations, and the often larger influence of the current political process in, and relative political weight of, each party.

(iii) Legal means of dispute resolution

When a *legal* solution is sought, the parties to a dispute will usually resort to *arbitration* or *adjudication*, which are generally employed when parties want to obtain rule-oriented, binding decisions in conformity with their mutually agreed long-term obligations and interests (as defined in multilaterally agreed legal rules of a permanent nature) and prefer to avoid the various risks involved in diplomatic means of dispute settlement (such as dependence on the consent and good will of the respondent, or bilateral *ad hoc* solutions possibly reflecting the relative power of the parties rather than the merits of the case, both of which would have a weakening effect on the agreed rules and on their uniform, multilateral interpretation).

Arbitration generally allows parties to the dispute themselves to appoint arbitrators of their own choice and confidence, to define the scope of the dispute and the jurisdiction of the tribunal, and to determine the applicable procedures and substantive rules for the settlement of the dispute (or series of disputes). *Adjudication* involves the reference of a dispute to a national or international standing tribunal. Again, both approaches are available to Members of the WTO.

(3) Dispute resolution under the GATT 1947

The basis for dispute settlement under the GATT 1947 is found in GATT Article XXII *Consultation* and Article XXIII *Nullification or Impairment*. (See Annex 1.)

In the early years of the GATT, disputes were addressed by the plenary semi-annual meetings of the GATT Council. Later, they were brought to an 'inter-sessional committee' of the GATT. Still later, they were delegated to working parties set up to examine either all disputes in a period or a particular dispute. These *committees* and *working parties* consisted of government representatives acting under instructions from their respective governments. Around 1955 it was decided to refer individual disputes to *panels* of three or five trade experts specifically named and acting in their personal capacities. Thus the move from working parties to panels marked the change in GATT dispute resolution from *negotiation* to *arbitration*. (Jackson, 1989)

As experience was gained over the years, resolutions clarifying or codifying elements of dispute settlement procedures were adopted. The first of these was the *Decision of 5 April, 1966 on Procedures under Article XXIII* (14S/18), which set out certain procedures

to be followed in disputes brought by a developing country Member against a developed country Member.[5] [6]

A major codification of GATT dispute settlement procedures came out of the Tokyo Round in the form of the *Understanding on Notification, Consultation, Dispute Settlement and Surveillance of 28 November 1979* (26S/210). In this Understanding, GATT Members agreed to continue what had become the "customary practice of the GATT in the field of dispute settlement" plus the improvements set out in it. The *Understanding* included the following references to special treatment for developing country Members.[7]

- "During consultations, [Members] should give special attention to the particular problems and interests of [developing country Members]". (paragraph 5)
- It reaffirmed the procedures set out for developing country Members in the 1966 decision and noted "that these remain available to [developing country Members] wishing to use them." (paragraph 7)
- "If the unresolved dispute [i.e., following unsuccessful consultations] is one in which a [developing country Member] has brought a complaint against a [developed country Member], the [developing country Member] may request the good offices of the Director-General who, in carrying out his tasks, may consult with the Chairman of the [GATT Council]". (paragraph 8)
- "[Members - the DSB] should take appropriate action on reports of panels . . . within a reasonable time. If the case is one brought by a [developing country Member], such action should be taken at a specially convened meeting, if necessary. In such cases, in considering what appropriate action might be taken the [DSB] shall take into account not only the trade coverage of measures complained of, but also their impact on the economy of the [developing country Members] concerned." (paragraph 21)
- In instances of non-implementation of recommendations within a reasonable period of time, "If the matter is one which has been raised by a [developing country Member], the [DSB] shall consider what further action they might take which would be appropriate in the circumstances." (paragraph 23)
- Additionally, "The technical service of the GATT secretariat shall, at the request of a [developing country Member], assist it in connection with matters dealt with in this understanding." (Paragraph 25)
- Finally, with respect to developing countries, "The practice has been to appoint a [panel] member or members from developing countries when a dispute is between a developed and developing country." (Annex paragraph 6(ii))

It is interesting to note that, at the time of the *1979 Understanding*, precise deadlines had generally not been set for the different phases of dispute settlement procedures and in most cases panels completed their work within three to nine months. (Annex paragraph 6(ix)) The exceptions would be (i) the *Understanding*'s provision that "In cases of

[5] See discussion of the 1966 Decision in section 4:v, below.

[6] The GATT 1947 seldom differentiated between 'developing' and 'least-developed' countries. Throughout this paper, 'developing countries' refers to both 'developing' and 'least-developed' countries (i.e., developing countries, including the least-developed among them) unless otherwise specified. 'Least-developed' countries or 'LDCs' refers exclusively to least-developed countries.

[7] For consistency and ease of reading, this paper uses the terms, "Member" for "contracting party" and "GATT Council" or simply "GATT", or in some instances, "DSB", for "CONTRACTING PARTIES", similar to the approach taken in GATT 1994 in *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts*, World Trade Organization, Geneva, 1994, see page 22.

urgency the panel would be called upon to deliver its findings within a period normally of three months from the time the panel was established" (paragraph 20), and (ii) the stipulation of the *1966 Decision* that in cases where a complaint is brought by a developing country against a developed country, "the panel shall report within a period of sixty days from the date the matter was referred to it." (paragraph 7)

The *Ministerial Declaration of 29 November 1982, Decision on Dispute Settlement* (29S/13) made several specific improvements in procedures, none of which modified the above-mentioned provisions for developing countries.

The *Decision on Dispute Settlement of 30 November 1984* (31S/9) provided for the maintenance of a roster of non-governmental experts as potential panelists and that the Director-General should continue to propose panels preferably of government representatives, while also drawing as necessary on the approved roster. Panelists were to be appointed within thirty days of the matter being referred to the [DSB]. It also noted that each panel should set precise deadlines for written submissions to it and that such deadlines should be respected.

The final important step in the evolution of dispute settlement practices under the GATT 1947 was taken by the *Decision of 12 April 1989 on Improvements to the GATT Dispute Settlement Rules and Procedures.* (36S/61) One of the general provisions of this *Decision* was that, "All the points set out in this Decision shall be applied without prejudice to any provision on differential and special treatment for [developing country Members] in the existing instruments on dispute settlement including the Decision of 5 April 1966."

The *1989 Decision* set time limits for consultations, for the appointment of panelists, for the work of panels (within which the panel was to set a timetable for the various stages of its work), and for consideration and adoption of the panel report. It also formalized several steps in the overall process.

With respect to the treatment of developing country respondents, the *Decision* provided that parties to a dispute could decide to extend the time limits set for consultations, and, if after the time period has elapsed the parties cannot agree that consultations have been concluded, the Chairman of the [DSB] shall decide whether to extend the period further and for how long. Additionally, the panel shall accord sufficient time for the [developing country Member] to prepare and present its argumentation. (paragraph F.(f)7)
The *Decision* also provided that when a developing country party to a dispute so requests, the "Secretariat shall make available a qualified legal expert within the Technical Co-operation Division." (paragraph H.1)

Finally, for developing country complainants, "the [DSB] shall consider what further action it might take which would be appropriate in the circumstances, in conformity with paragraphs 21 and 23 of the 1979 Understanding." (paragraph I.4) [see discussion of these paragraphs above]

Thus the *1979 Understanding*, as improved by the *1982 Ministerial Declaration* and the *1984 Decision*, and enlarged by the *1989 Decision*, as well as the *1966 Decision* on developing countries, remained in effect until 1 January 2005, when the DSU entered into force. As we shall see, the Uruguay Round transmuted the 1979, 1982, 1984 and

1989 instruments into a more comprehensive DSU, while retaining the *1966 Decision* as an option for developing country complainants.

(4) Dispute resolution under the WTO

(i) Broader scope and new procedures

The WTO *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) further expanded and codified dispute settlement procedures that had been in effect under the GATT 1947 immediately prior to the establishment of the WTO.

A striking change in WTO dispute settlement procedures is their automaticity, which effectively guarantees every member a right to a panel and a right to have panel (or appeal) findings ultimately implemented. In the 'old' GATT dispute settlement practices, key decisions (e.g., whether a panel should be established and whether its report should be adopted or implemented) were taken by consensus. Thus either party to a dispute could block consensus thereby preventing the setting up of a panel or the adoption or implementation of its report. In practice, this put the smaller members in a relatively weak position. Under the new procedures, which require a consensus not to proceed through these key steps, we find that even small, developing countries are able to prevail in complaints brought against even the largest country.

The DSU sets out specific time periods for each phase of dispute settlement, and further elaborates sections on implementation and surveillance. The DSU also establishes a Standing Appellate Body (AB) and permits optional appeals for either complainants or respondents, irrespective of which side 'won' the dispute at the panel phase. The AB is comprised of internationally respected jurists and operates independently of the WTO Secretariat, especially on substantive matters. Its establishment is a major step in the juridification of dispute settlement in international trade regulation as *its reports shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt [a report]*.(Article17:14) The DSU acknowledges *the right of Members to express their views on an Appellate Body report*, (*ibid*) but does not permit the DSB to alter a report and there is no provision for the DSB to provide direction to the AB.[8]

Nonetheless, it is evident that WTO Members wish to retain possibilities for diplomatic resolution of disputes as a principle of the organization and as an alternative to legal adjudication. Article 3, *General Provisions*, of the DSU requires Members, before bringing a case, to exercise their judgment as to whether use of third party dispute resolution would be fruitful. Their aim should be to secure a positive solution that is mutually acceptable to the parties to the dispute and consistent with the WTO agreements. It is to be understood that use of dispute settlement procedures is not to be considered as contentious acts and that Members will engage in them in a good faith effort to resolve the dispute. To this end, the DSU requires parties to a dispute first to engage in consultations. They are not to go to adjudication before diplomatic dispute resolution has been tried and failed.

[8] Members of the DSB expressed considerable dissatisfaction with the actions of the AB in EC - Asbestos concerning procedures to accept submissions from non-Members, but they could do nothing about it. See WT/DSB/M/103, 6 June 2001.

A diplomatic approach to dispute settlement is also encouraged by Article 5 provisions permitting disputing parties to agree to undertake good offices, conciliation and mediation at any stage in the dispute settlement process. Also, the Director General may offer these facilities to disputing parties with a view to assisting them to settle a dispute. LDC Members may also request these facilities from the Director General or the Chairman of the DSB between the consultations and panel stages if consultations have not resolved the matter in dispute. Thus far, these approaches have not been used.

As an option to third party adjudication, Article 25 provides for "expeditious arbitration within the WTO" as an alternative means of dispute settlement to facilitate solutions in cases where the issues are clearly defined by both parties. Like the 'good offices'[9] option, such expedited arbitration has not yet been attempted.

The *Update of WTO Dispute Settlement Cases*, 17 September 2003, shows that mutually agreed solutions have been reached in 68 cases, while panel and/or AB reports have been adopted in 72 cases. There are 25 active panels, and an additional 112 cases are pending completion of consultations, some of them going as far back as 1995. Given that 88 of the 112 pending cases were notified to the DSU more than one year ago and, of those, 82 were notified more than two years ago, we can assume that a considerable majority of these cases is not likely to continue on to adjudication. Hence, diplomacy may still be a viable option.[10]

As noted, dispute resolution is very much engaged in providing an interpretation of the disputing parties' rights and obligations under an agreement. Needless to say, the WTO agreements are more extensive and more complex than was the original GATT.

Annex 1A of the WTO Agreement, for example, defines the "GATT 1994" as including not only the provisions in the GATT 1947, but also, *inter alia*, "the provisions of the legal instruments set forth below that have entered into force under GATT 1947 before the date of entry into force of the WTO Agreement":

1. Protocols and certifications relating to tariff concessions,
2. Protocols of accession
3. Decisions on waivers granted under Article XXV of the GATT 1947 and still in force on the date of entry into force of the WTO Agreement
4. Other decisions of the [Members of] GATT 1947.

The *Uruguay Round Final Act* also includes as part of the treaty text, several understandings, ministerial decisions and declarations, as well as some other documents, all of which become part of the text of the agreement and thus influence the interpretation of the whole. (The inter-relations of these texts is not, however, entirely clear.)

In addition to the above, the DSU applies to twelve multilateral and two plurilateral agreements on trade in goods, as well as to the *General Agreement on Trade in Services* (GATS) and the *Agreement on Trade-Related Aspects of Intellectual Property Rights*

[9] The term used in the WTO agreements is, "good offices, conciliation or mediation". For brevity I use the term 'good offices' in single quotes.

[10] Although we must acknowledge that any number of the unreported consultations may well have concluded that it was simply not worthwhile to pursue the complaint further.

(TRIPS).

Under the DSU (which incorporates GATT Article XXIII), a trade dispute arises when a member considers that a benefit[11] it reasonably expected to accrue to it directly or indirectly under the agreement(s) is being nullified or impaired or the attainment of any objective of the agreement(s) is being impeded[12] as a result of: [a] the failure of another member to carry out its obligations, or [b] the application by another member of any measure, whether or not it conflicts with the provisions of the agreement(s), or [c] the existence of any other situation. Thus we have the possibility of *violation complaints*, *non-violation complaints*, and *situational complaints*[13].
GATT Article XXIII provides that, in these circumstances, the complaining party is first to consult with the other concerned party(ies) and, if no satisfactory adjustment is reached within a reasonable time, the matter may be referred to the [GATT Council]. The *matter* so referred is the *nullification or impairment* of benefits, not the failure of another member to carry out its obligations or the application of a measure, etc. The [GATT Council] "shall promptly investigate any matter so referred to [it] and shall make appropriate recommendations or give a ruling in the matter". The [GATT Council] may also authorize suspension of concessions or obligations.

Thus, under the 'old' GATT rules, three types of remedies were prescribed: (i) the [GATT Council] could "*make appropriate recommendations*" to the disputing parties; (ii) the [GATT Council] could "*give a ruling on the matter, as appropriate*", or (iii) the [GATT Council] could authorize a complaining party to suspend the application to any other party or parties of such concessions or obligations under [the GATT] as they determined to be appropriate in the circumstances.

A 'ruling' is called for only when there is a point of contention on fact or law.

Recommendations would always be appropriate when, in the view of the GATT Council, they would lead to a satisfactory adjustment of the matter, i.e. a return to a state of reciprocal benefits.

The first objective of a recommendation concerning a measure that is inconsistent with the agreement should be to secure appropriate modification to bring the measure into conformity with GATT requirements or withdrawal of the measure. In such a case, the alternative available under the 'old' GATT of providing authority to suspend the application of concessions or obligations (retaliate) for damage suffered should be resorted to only if the immediate withdrawal or appropriate modification of the measure is impracticable and only temporarily pending the withdrawal of the measure which was determined to be inconsistent with the Agreement.

Under the GATT 1947, there was only one instance in which the GATT Council authorized retaliation. That case involved a complaint by the Netherlands that US

[11] It is important to note that the 'benefit reasonably expected to accrue' to a WTO member relates to the *conditions of competition* in a market after all agreed concessions have been put in place. Thus it is not necessary for the complaining member to demonstrate an actual loss of trade or of market share.
[12] No complaint has yet been brought based on an impediment to the attainment of an objective of the Agreement.
[13] No *situational* complaints have yet been brought and DSU Article 26:2 clarifies that a situational complaint may only be brought by a Member alleging nullification or impairment of benefits it expected to receive or that an objective of an Agreement is being impeded by a measure of the named respondent.

measures limiting imports of Dutch dairy products were contrary to the USA's GATT obligations. The authorization, to restrict imports of American grains into the Netherlands, was renewed annually for seven years, but never acted upon.[14] Nor did the USA change its offending measures.

Most recommendations with respect to *violation* complaints under the 'old' GATT were that the inconsistent measure "be brought into conformity with the General Agreement". In exceptional cases, specific actions beyond bringing the inconsistent measure into conformity with the Agreement were recommended. For example, in one instance a panel recommended the granting of a minor waiver and in three other instances panels recommended repayment of anti-dumping or countervailing duties which were found to have been inappropriately collected.

Under the DSU, the scope of the decision will depend upon the nature of the complaint.

Article 19 of the DSU states that, in cases of *violation* complaints, the panel or the Appellate Body *shall recommend that the Member concerned bring the measure into conformity with the Agreement*. It goes on to say that in addition to the recommendation, the panel or AB *may suggest ways in which the Member concerned could implement the recommendations*.

Article 19:2 notes that the panel's or the AB's recommendations *cannot add to or diminish the rights and obligations provided in the covered agreements*.

Article 26 of the DSU states that, in cases of *non-violation* complaints, "there is no obligation to withdraw the measure. However, in such cases the panel or the AB *shall recommend that the Member concerned make a mutually satisfactory adjustment*."

In *non-violation* cases, either party to the dispute may request arbitration to determine the level of benefits which has been nullified or impaired and, possibly, non-binding suggestions of ways and means of reaching a mutually satisfactory adjustment. Compensation may be part of a mutually satisfactory adjustment as the final settlement of the dispute.

(ii) Steps in the panel/appeal process

The steps in the panel/appeal process are as follows. (See a tabular presentation in Annex 2.)

- The complaining government requests consultations with the government whose trade measures (or other policies) are causing a problem. Such consultations are to begin within 30 days of the request.
- If the problem is not resolved within 60 days (or if the other government declines to enter into consultations) the complaining government may request the establishment of a panel.

[14] This case provides a classic example of the futility of a small nation seeking to retaliate in any meaningful way against a large nation. Denying its own consumers access to American grains would be more costly to the Netherlands than the country would gain by removal of US import restraints on Dutch cheese. Furthermore, it would do nothing for the cheese makers.

- The panel will be 'established' no later than at the Dispute Settlement Body (DSB) meeting following that at which the request was made unless there is a consensus not to establish it, i.e. about one month after the request.
- The parties to the dispute have 20 days to agree on the members of the panel. If they fail to agree within this period, the Director General can select the panelists. (A panel usually has three members 'of appropriate background and experience from countries not party to the dispute'.
- There are standard terms of reference for panels, but the parties may agree to special terms within 20 days of its establishment.
- The panel should complete its work within six months or, in cases of urgency, within three months, from the date panelists are appointed and terms of reference are agreed..
- The 'work' of the panel includes: receiving written submissions from the parties to the case; meeting with the parties for them to present the complaint and response; receiving written and oral rebuttals; issuing the descriptive part of their report to the parties and receiving their comments; issuing an interim report, including its findings and conclusions, to the parties; reviewing the interim report if requested to do so by one or both of the parties; issuing the final report to the parties; and circulating it to all members.
- To assist it in its deliberations, a panel may obtain advice from an expert review group. Such expert review groups are to be established under the panel's authority, when required. The panel will determine the group's terms of reference and detailed working procedures.
- Panel reports will be adopted by the DSB within 60 days of their issuance, unless there is a consensus not to adopt or if one of the parties notifies the DSB of its intention to appeal.
- The right to appeal is new under the WTO, and it is limited to issues of law covered in the panel report and legal interpretations developed by the panel.
- The appeal will be heard by a 'division' of three of the seven members of the standing Appellate Body.
- The appeal process will take no longer than 60 days from the time of formal notice by the party that it wishes to appeal and the appeal report will be adopted and unconditionally accepted by the parties within 30 days after it is issued, unless there is a consensus not to adopt it.
- If a panel or the Appellate Body concludes that a measure is inconsistent with a WTO agreement, it shall recommend that the measure be brought into conformity with the relevant agreement. It may also suggest ways in which the member concerned could implement the recommendation.
- In cases of non-violation nullification or impairment, there is no obligation to withdraw the measure in question, however the panel or Appellate Body will, in such cases, recommend that the member whose measure is at issue "make a mutually satisfactory adjustment" (which may or may not include compensation to the member whose benefits have been nullified or impaired).
- At a meeting of the DSB within 30 days of the adoption of the report, the respondent must notify its intention to implement the recommendations or rulings of the report. Such implementation is to take place within a "reasonable period of time", which would generally not exceed 15 months.
- The DSB will monitor implementation of adopted recommendations and rulings. If there is disagreement as to the consistency of measures taken to comply with

the recommendations and rulings with WTO provisions, the matter may be referred back to the original panel, which will have 90 days to circulate its report on the matter.

- In the event of non-implementation, there are rules set out for determining appropriate compensation, based on agreement of the parties to the dispute, or failing such agreement, for the DSB to authorize retaliation.
- In principle, compensation/retaliation should be in the same sector, but if this is not practical or effective, they may be in a different sector, or even under a different agreement.

(iii) Implementation of recommendations

The intention of the WTO DSU is that the resolution of disputes will contribute to the WTO's general goal of promoting more open international trade. Consequently, bringing measures fully into line with the provisions of the covered agreements is the primary objective of dispute settlement.

If a measure cannot be brought into line with the requirements of the WTO agreements within the time frames prescribed in the DSU, compensatory market-opening measures may be taken or, if suitable compensation cannot be agreed, retaliation may be authorized, but either such action is to be temporary, pending the bringing of the measure into compliance with WTO obligations.

In each case, a reasonable time for implementing the recommendations will be set, based on:

(a) the period of time proposed by the respondent and approved by the DSB; or
(b) a period mutually agreed by the parties to the dispute; or
(c) a period determined through binding arbitration.

Such period would generally not exceed 15 months from the date the DSB adopted the panel or Appellate Body (AB) report.

The implementation of panel and AB recommendations is regularly monitored by the DSB. The issue of implementation of the recommendation in each dispute shall be placed on the agenda of the DSB six months following the date of the establishment of the reasonable period of time for implementation and shall remain on the agenda for each meeting of the DSB until the issue is resolved.

Disputes may arise between the parties concerning implementation of the recommendations. The DSU sets out some rather complex, and possibly inconsistent, procedures for dealing with them. These procedures have been the subject of arbitration in a few cases and they are being reviewed in the context of the Doha Round.

(iv) Domestic legal effects

The DSU makes it clear that *no Member may make a unilateral determination* that a violation has occurred, that benefits have been nullified or impaired, or that the attainment of any objective of the covered agreements has been impeded. Instead, Members which consider that any of these situations has occurred must rely on the

procedures set out in the DSU to address them.(Article 23) Thus any domestic legislation empowering a Member government to make such a determination must lead, or allow, the government to seek redress through DSU procedures or be found to be inconsistent with the Member's WTO obligations.

Domestic legislation or regulations found, through dispute settlement procedures, to be inconsistent with WTO obligations will have to be brought into consistency with them. (*WTO Agreement*, Article XVI:4)

Legislation or regulations of sub-national governments may also be the subject of WTO dispute settlement, but sub-national governments are not bound by DSB rulings or recommendations. If sub-national legislation or regulations are found to be inconsistent with a Member's WTO obligations, that Member "*shall take such reasonable measures as may be available to it to ensure observance*" of the provisions of the covered agreements. If it is not possible for the Member government to secure compliance with the agreements at sub-national levels, DSU provisions relating to compensation and the suspension of concessions will apply.[15]

(v) Costs

Dispute settlement proceedings are expensive for all parties to them, including the WTO. The established practice is for each party and the WTO to bear the costs of its own participation. Dispute settlement recommendations do not address the question of costs, nor does the DSU.

The proceedings are also costly to the private sector interests affected by them. Such costs arise in two ways.

1. The costs involved in advising their governments concerning the market effects of the measure in dispute, and
2. The costs incurred as a result of business losses caused by the measure in dispute.

The WTO agreements are silent with respect to these costs, although domestic practices of individual members may provide some financial assistance to individual firms caught up in a dispute.

The compensation referred to in the DSU is intended to re-establish benefits reasonably anticipated from the operation of the agreements from the time the compensatory measures are put in place, i.e., they do not compensate members or firms for the loss of benefits prior to their implementation.

(vi) Developing countries

The DSU contains a number of provisions relating to the needs of developing countries. For example, a developing country bringing a complaint against a developed country may invoke alternative provisions relating to consultations, good offices, panel establishment, and panel procedures, based on the *Decision of 5 April 1966 on Procedures Under Article XXIII* (14S/18). (DSU Article 3:12)

[15] See GATT Article XXIV:12 and the *Understanding on the Interpretation of Article XXIV of the GATT 1994*; GATS Article I:3(a); TRIPS Article 63; and DSU Article 22:9.

Use of the 1966 *Decision*, however, will provide relatively little benefit over the DSU treatment of developing countries, other than a much shorter time frame for panel deliberations, as is demonstrated by the following brief consideration of its main provisions.

- The 1996 *Decision* provides that if Article XXIII:1 consultations about a matter raised by a developing country Member against a developed country Member fail, the developing country Member may refer the matter to the Director General who may use his good offices to facilitate a solution (and he is obliged to do so once the parties have provided "all relevant information"). Under the DSU, the 'good offices' of the Director General may be requested at any time by either party to the dispute, or the Director General may take the initiative to offer his 'good offices' to the parties (Article 5).
- According to the 1966 *Decision*, if the matter is not resolved within a period of another two months, the Director General shall, at the request of one of the concerned Members, submit the matter to the GATT Council which shall forthwith appoint a panel of experts to examine the matter and make recommendations. A similar result would be generated under then DSU, except that the appointment of panelists would take longer (Articles 5 & 8).
- The 1966 *Decision* states that, in its work, the panel is to take due account of all circumstances and considerations relating to the measure in dispute and its impact on the trade and development of affected Members. Similar provisions are found in the DSU (Article 21).
- Under the 1966 *Decision*, the panel is to report to the GATT Council within 60 days, cf., DSU provision of six months for the panel to issue its report on a confidential basis to the parties to the dispute, plus another 3 weeks for translation prior to its circulation to the DSB (Article 12 & Appendix 3). (DSU Article 3:12 provides that the 1966 *Decision's* 60-day period may be extended by the panel with the agreement of the complainant.) If the 60 day time frame is observed, this could be a significant benefit to developing countries whose firms generally do not have sufficient strength to withstand extended applications of measures restricting their exports.

In addition to the above, a number of other provisions of the DSU set out special and differential treatment that is to be provided to developing country parties to a dispute.

- Members are encouraged to give special attention to particular problems and interests of developing county members during the consultation phase (Art. 4:10).
- A developing country party to a dispute with a developed country Member may require at least one member of a panel to be from a developing country (Art. 8:10).
- Developing country participants may obtain extensions of the usual period for consultations and panels may decide to extend the time period allotted for preparation and presentation of arguments (Art. 12:10).
- If there are one or more developing country parties to a dispute, the panel's report must explicitly indicate how the panel took account of special and differential treatment available to developing countries in the covered agreement if such treatment was raised by a developing country in the course of the dispute (Art. 12:11).
- Developing country interests shall be taken into account in the DSB's surveillance of implementation of recommendations and rulings (Art. 21:7).

- The Secretariat may provide legal advice and assistance to developing country Members engaged in disputes and, upon request by a developing country Member, shall make a qualified legal expert from the WTO technical cooperation services available to it (Art. 27:2). While assisting the developing country Member, the expert shall ensure the continued impartiality of the Secretariat.
- Finally, the Secretariat shall conduct special training courses for interested Members (not only developing countries) concerning dispute settlement procedures and practices (Article 27:3).

(vii) Least-developed countries

At all stages of the dispute settlement process, particular consideration *shall be given* to the special situation of least-developed country members. Developed countries *shall exercise due restraint* in raising matters involving a least-developed country and in seeking compensation from or the right to retaliate against a least-developed country (Art. 24).

If consultations do not provide a satisfactory solution to a dispute, the Director-General shall, upon the request of a LDC Member, offer 'good offices' to assist in resolving the dispute, before the complainant may request a panel.

5) Measures presenting difficulties for LDCs

During a meeting of the WTO Sub-Committee on Least-Developed Countries, 25 November 1998, delegates were considering a paper prepared by the secretariat entitled, "Market Access for Exports of Goods and Services of the Least-Developed Countries: Barriers and Constraints". In the course of the meeting, when discussing market access issues,

> The representative of Bangladesh said that the principal barriers to LDC exports did not lie in tariffs but in the non-tariff area. Such barriers were often invisible and were difficult for LDCs to overcome. Various complex standards existed in the areas of labelling, hygiene, environment and social requirements which were not neutral and which constituted real barriers to LDC exports. Preference schemes, rules of origin requirements and quantitative restrictions stifled LDC trade growth as well. The paper claimed that the incidence of non-tariff barriers to LDC exports were three times higher in high-income developing countries than in developed markets. The report also mentioned that sophisticated trade-financing regimes, lack of access to informatics, poor economies of scale and various trade distorting measures including restrictions on the movement of natural persons and outdated skills of the LDC labour force retarded LDC trade. Those were real barriers, which could not quickly be overcome.

Trade Remedies

Three additional trade barriers that the Bangladesh representative did not mention fall into the general category of trade remedies. They are, of course, anti-dumping duties; countervailing duties imposed to offset domestic subsidies in the exporting country; and safeguards. Each of these remedies can have devastating effects on the trade of any

exporter and one could say that the devastation will be greater for smaller exporters, especially from poorer countries. The evil that trade remedies seek to redress is injurious imports, i.e., imports entering a market at below normal prices or suddenly in such unanticipated volumes that they cause injury to domestic producers of like products in the importing market. Conversely, inappropriate applications of trade remedy measures will be unwarranted barriers to trade and could be highly disruptive to the development of international trade.

Anti-dumping duties and countervailing duties address *material injury* caused by so-called unfair trade, while safeguards address *serious injury* caused by fair trade. Thus the former (A-D and C/V duties) are levied only on the unfair traders (the dumpers and subsidizers), whereas the latter (safeguards, which may be duties or quotas) are applied to all foreign suppliers of the product on an MFN basis.

Safeguards

The unanticipated increase in imports that can give rise to a safeguard usually occurs as a result of a concession made by the importing country in the context of a trade negotiation. The theory is that domestic producers have not been able to compete with increased imports following a market-opening measure and require additional time to adjust to the new circumstances of competition in their home market. In such case, the government of the importing country may be permitted to return conditions to what they were before the latest negotiation and then gradually open the market in accordance with its negotiated undertakings over a period of time sufficient to permit domestic producers to adjust to reduced levels of protection. For example, if country A reduced its tariff on widgets from 15% to 8% and this allowed widget manufacturers in Countries B and C to increase their exports to country A much faster than country A's trade negotiators had anticipated, thereby causing serious damage to Country A's widget producers, country A may, after following procedures prescribed in GATT Article XIX and the WTO *Agreement on Safeguards*, raise import duties back up to 15% and then reduce them gradually over, say, four years to 8% – possibly reducing the tariff by 2% at the end of each of years 1, 2, and 3, and 1% at the end of year 4.

Special and differential treatment for developing country Members provides that a safeguard must not be applied against a product originating in a developing country if exporters from that country do not exceed 3% of total imports (of widgets), unless imports from more than one developing country, each supplying less than 3% of imports, collectively account for more than 9% of total imports (of widgets). Thus, in the above example, if countries D,E and F, two developing countries and one LDC, also increased their widget exports to country A (e.g., D by 2.8%, E by 2.2% and F by 1.9%) the safeguard measure would not apply the their products and their widgets would continue to face tariffs of 8% throughout the period the safeguard was in effect.

According to the *Agreement on Safeguards*, an importing Member may apply a safeguard for a maximum of four years, which may be extended once to a maximum of 8 years, and a new safeguard may not be applied to the same product without first allowing a period of non-application which is the length of time the initial safeguard was in place, and, in any event, the period of non-application must be at least two years. A developing country Member applying a safeguard may, however, extend its application up to a total of 10

years and may reapply the safeguard to the same product after a period of non-application equal to one-half of the period the original safeguard was applied, provided the period on non-application is no less than two years.

Anti-Dumping and Subsidy Countervail

The application of *anti-dumping* and *subsidy countervailing duties* is regulated by GATT Article VI and the WTO *Anti-Dumping Agreement;*[16] and by GATT Articles VI and XVI and the WTO *Agreement on Subsidies and Countervailing Duties*, respectively.

Dumping occurs when goods are sold into an importing market at less than normal price, i.e., below their price in their domestic market or below their cost of production, plus allowances for transportation and a reasonable margin of profit. Dumping, which itself is condemned by the WTO agreement, is not otherwise contrary to international trade rules. Thus the *Anti-Dumping Agreement* does not address dumping, *per se.* What it actually does is constrain is the reaction of the government of the importing country to injuriously dumped imports. In effect, it says to the government of the importing Member, "You may only take measures to offset the injury caused by dumped imports if you follow certain prescribed procedures to determine the actual amount (or margin) of dumping and that the dumped imports are the actual cause of injury your domestic producers are suffering. Following such findings, you may impose anti-dumping duties on the dumped imports at a rate that is no more than the amount necessary to remove the injurious effects and must not be more than the calculated margin of dumping."

The *Anti-Dumping Agreement* specifies that possibilities of constructive remedies shall be explored before a developed country applies anti-dumping duties against products originating in developing countries where such duties would affect the essential interests of developing country Members. The Panel on *EC C Bed Linens*[17] found that this provision imposes an obligation to actively consider, with an open mind, the possibility of such a remedy prior to the imposition of an anti-dumping measure that would affect the essential interests of a developing country. It also found that imposition of a lesser duty, or a price undertaking would constitute a constructive remedy, but that there is no requirement for the developed country to forego anti-dumping duties altogether.

A ***subsidy*** exists if a benefit is conferred by a government (or government agency) upon a domestic producer through payments of funds, foregone revenues, reduced liabilities, provision of low cost services or goods, etc. Such subsidies are not prohibited by the *Agreement on Subsidies and Countervailing Measures*, but may be countervailed if the effect of the subsidy is to cause or threaten material injury to domestic producers of like goods in a country to which the subsidized goods are exported, e.g., by permitting the manufacturer to export them at lower prices than would otherwise be the case. Similar to the *Anti-Dumping Agreement*, the *Agreement on Subsidies and Countervailing Duties* restrains the reaction of importing Members to material injuries caused by subsidized imports. It requires determinations, based on procedures set out in the Agreement, of rates of subsidy and material injury caused by imports. It then permits the application of

[16] The actual name of the agreement is the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.
[17] WT/DS/141 European Communities' AntiDumping Duties on I ports of Cotton-Type Bed-Linen from India, 12 March 2001

countervailing duties to the extent necessary to remove the injury, provided the duty does not exceed the per-unit value of the subsidy to the manufacturer.

Any *countervailing duty* investigation of a product originating in a developing country shall be terminated as soon as it is determined that the overall level of subsidies for the product in question does not exceed 2% of per unit value of the product, or the volume of subsidized imports accounts for less than 4% of total imports of the product, unless a number of developing country exporters, each representing less than 4%, together account for more than 9% of total imports of the product.

Direct forgiveness of debt and subsidies to cover social costs directly linked to a privatisation program of a developing country may not be countervailed, provided the subsidies are time-limited and the program does result in the privatisation of the enterprise concerned.

In both anti-dumping and subsidy countervail, the special duties may be applied for no more than five years, unless a new investigation confirms that the threat of material injury will recur if the duties are terminated.

There are rules additional to the above which apply to subsidies. *Subsidies* that are conditional upon export of the subsidized product or upon the use of domestic over imported goods are generally prohibited. But the prohibition does not apply to export subsidies given by LDCs and other developing countries had a period of eight years from entry into force of the WTO to phase out their existing export subsidies. Import substitution subsidies were to be phased out over eight years by LDCs and over five years by other developing countries. Prohibited export or import substitution subsidies are addressed through expedited provisions of the DSU and, if a subsidy is found to be prohibited, it must be removed within 90 days from the adoption of the report by the DSB.
The *investigative procedures* set out in each of the trade remedy provisions are very complex, with considerable specificity as to what must be done. As already noted, the objective is to prevent mis-use of trade remedies so that they do not become unwarranted or unjustified barriers to trade.

The DSU applies to each type of trade remedy, although some special dispute settlement provisions apply to anti-dumping and subsidies.

Dispute settlement

In a dispute concerning ***anti-dumping measures***, the general rule is that a panel may only be requested if the relevant authority has taken definitive anti-dumping measures. Nonetheless, if a provisional measure has a significant impact and the complainant considers that it was taken contrary to the procedures set out in the *Anti-Dumping Agreement*, the complainant may request a panel immediately following completion of consultations, even though definitive dumping duties have not yet been applied.

When requesting a panel, the complainant must provide: (a) a written statement setting out how a benefit accruing to it has been nullified and impaired; and (b) the facts made available in conformity with appropriate domestic procedures to the authorities of the

importing Member.

The panel must then determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If those two conditions are met, the panel may not overturn the conclusion, even if the panel might have reached a different conclusion on the same facts.

Similarly, where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

Panels must safeguard all information provided to them in confidence.

In disputes concerning ***prohibited subsidies*** (export subsidies and import substitution subsidies), time periods applicable under the DSU for the various steps in the dispute settlement process are reduced by one-half. If the prohibited subsidy is not withdrawn by the time specified by the panel, the respondent will receive, from the DSB, authorization to take appropriate countermeasures. If the respondent believes the counter-measures are inappropriate, they may be subject to arbitration.

When determining whether a subsidy is prohibited, a panel will usually be assisted by the *Permanent Group of Experts* established under Article 24 of the *Agreement on Subsidies and Countervailing Measures.*

For LDCs, *export subsidies* are not prohibited, but *import substitution subsidies* are, as the 8 year exemption period elapsed 1 January 2003.

There are no special dispute settlement provisions for ***safeguards***. The DSU rules apply.

(6) Consideration of dispute resolution in the context of the Doha Round

The results of the Uruguay Round include a Ministerial Decision taken at Marakesh in April 1994 on the application and review of the DSU calling upon the Ministerial Conference to complete a full review of the DSU within four years of entry into force of the WTO and then to take a decision to continue, modify or terminate its rules and procedures. As the four-year deadline was not met, Ministers agreed at Doha to negotiations on improvements and clarifications of the DSU, with the work to be carried out by the DSB in Special Session. The work was to be done in the context of Doha Round negotiations (with the DSU in Special Session reporting to the Trade Negotiations Committee), but the results of this work would not be included in the single undertaking of the Doha Round. (Paragraph 30 of Ministerial Declaration)

In the course of this work leading up to the Cancun Ministerial, some three dozen formal submissions were made by developed, developing and least-developed country Members to the DSB in Special Session. These submissions dealt with issues that may be grouped under the following headings: a) general improvements in the overall process; b) time

frames for dispute settlement; c) implementation, compensation, retaliation and surveillance; d) Members' control of dispute settlement; e) transparency; f) special and differential treatment for developing countries; and g) special and differential treatment for LDCs.[18]

General improvements

Proposals were made for strengthening the consultations process with a view to greater efforts to resolve matters at this stage. For example, there should be a recognized and accepted obligation on parties to report the results of consultations to the DSB in some detail within specified time limits. Similarly, more use of 'good offices' was proposed in this context as well as in the context of improved provisions on special and differential treatment, as was greater use of expeditious arbitration provided for in Article 15. It was also suggested that, during the course of a dispute, parties should be able to request interpretations of relevant provisions from the General Council in order to guide the work of panels and the AB.

Differing proposals were made with respect to opportunities for complainants or the parties to a case to withdraw requests for consultations or for a panel or to terminate or suspend proceedings. For example, a request for consultations might be withdrawn any time before a panel was requested and a request for a panel any time before the panelists were appointed. Alternatively, the complainant might terminate panel proceedings any time before issuance of the interim report.

A number of references were made to the documentation prepared by the secretariat to assist panelists in their work, such as the negotiating history of relevant provisions, and it was proposed that all such documents should also be provided to principal and third parties.

At least two proposals recommended enabling the AB to remand issues to panels where there was insufficient coverage of agreed facts in the panel report. Detailed procedures were set out.
With respect to panelists and members of the Appellate Body, proposals were made to expand the number of AB members, and to make their appointments full time commitments; to appoint a roster of permanent panelists who would be available to dedicate more time to the work of panels than can serving government officials. Some of these proposals were formally disputed in other submissions. It was also suggested that steps should be taken to ensure that each panel represented a more geographical balance.

At least ten proposals were made with respect to the participation of third parties to disputes. They disagreed about the possibility for third parties to join consultations without first getting agreement of the principal parties. Most of the proposals advocated a greater role for third parties, including such things as receiving all documents and participating in all substantive meetings of panels and the AB, with increased opportunities to submit written briefs and make oral presentations (with some recognition

[18] While the following attempts to faithfully summarize the import of the submissions, I decided it would be too ponderous to seek to attribute each point to Members that made them or to identify specifically the documents in which each was made as there was considerable duplication and overlap. All the submissions can be read in the series TN/DS/W/**, which is available on the WTO web site.

that they should not be privy to commercially confidential information). There was some variance of views as to whether third parties should have "substantial trade interest" or "substantial interest" or a "self-declared interest" and whether the level of such interest should determine the extent of their participation. It was also suggested that developing countries should be entitled to full participation as third parties for capacity development purposes, even if they did not have a substantial interest in the matter in dispute.

Time frames for dispute settlement

Two common and contradictory themes ran through proposals in this area: (i) time frames must be shortened, especially because developing countries have great difficulty withstanding nullification or impairment for any length of time; *versus* (ii) the time allotted for developing country parties to prepare submissions must not be reduced or should be extended.

Specific proposals were made for expedited procedures for trade remedies disputes and for disputes concerning the application of measures previously determined to be inconsistent with WTO obligations (with respect to different parties). In similar vein to the latter, it was proposed that if a non-mandatory law or regulation had been already considered and determined to be inconsistent with WTO obligations, any future measure taken under it should automatically be assumed to be inconsistent so that time would not be lost in re-examining the same issue.

Proposals were also made that panels be established at the meeting when they are first requested, unless the complainant agrees to wait until the next meeting or if the respondent is a developing country. It was also proposed that a complainant requesting the establishment of a panel should submit its first written submission at the time of the request.

Implementation, compensation, retaliation and surveillance

One submission, thinking 'out of the box', proposed that measures be taken during the dispute resolution process to prevent damages that would be difficult to repair, especially for developing countries. For example, a panel might ask the respondent to suspend the measure in dispute for a specified period (while settlement procedures continued) or, if the respondent refused, the complainant could be authorized to take preventative measure concerning such damage. Comment: this approach might work for disputes regarding trade remedies, excessive tariffs, inappropriate use of non-tariff measures, but it could hardly work for SPS or TBT measures as a respondent would have to claim that suspending such a measure would expose its population to unwarranted risk.
Other submissions proposed that any measurement of the extent of nullification or impairment should include, in addition to trade effects, the economic impacts on development. One proposed that in cases with developing country respondents, reports should be obtained from international organizations such as UNCTAD and UNDP so that recommendations and any authorization of compensation or retaliation would be based on terms and conditions that would ensure promotion of the development prospects of concerned developing countries.

Various proposals to reduce the time for implementation centered on when the extent of

nullification and impairment should be determined. One was that it be determined by arbitration beginning as soon as the respondent requests a reasonable period of time to implement the recommendations. Others proposed that the compliance arbitration should also address the amount of nullification and impairment.

Other submissions considered the date from which nullification and impairment should be calculated. One proposed that a process to determine the amount of nullification or impairment should proceed parallel to the panel process so that compensation could be authorized as soon as the report was adopted by the DSB, rather than waiting a reasonable period of time for implementation and then determining non-compliance. Others were that compensation be calculated from the date the measure was imposed (especially for developing country complainants), or the date consultations were requested, or the date of establishment of a panel.

Some submissions proposed that compensation be made more effective in order to reduce the need for retaliation. Others proposed that compensation always be applied on an MFN basis,[19] noting that an inconsistent measure would affect the trade of all foreign suppliers of the product in question, not only the complaining party or parties. Another proposed that MFN application of compensation be suspended for developing country respondents.

A number of submissions noted that trade retaliation is generally ineffective when applied by small economies and usually more damaging to the complainant than to the respondent, especially if the complainant is a developing country. Their proposals offered at least two possible solutions. One was to provide for monetary compensation rather than trade measures, another was to authorize transferable or collective retaliation so that Members whose economies would not suffer unduly from retaliating on behalf of the complainant might do so and, if appropriate, such retaliation would be applied by several Members.

Other submissions proposed that the DSB make it clear that retaliation lists approved by it could not be unilaterally altered by the retaliating Member, except to correct technical matters.

Finally, it was proposed that expedited procedures should be put in place to determine that new measures are compliant so that existing retaliation could be promptly terminated.

Members' control of dispute settlement

Some submissions noted concern that Members collectively have lost control of the dispute settlement system, especially the appeal stage and the DSB's inability to take meaningful decisions concerning recommendations, other than adopting them. One proposal was to introduce an interim report stage in the appeal process so that parties could comment on the analysis. Another was to empower principal parties to delete elements of panel and appeal reports which, in their shared view, were not necessary to reach a satisfactory settlement. Others were to rein in judicial activism so that the AB did

[19] This, of course, refers to contested measure that had been applied on an MFN basis. The suggestion would not apply, for instance, to contested anti-dumping measures.

not fill gaps in the texts; to reduce the application of legal concepts outside of the WTO; to develop rules of interpretation of WTO agreements; and to provide greater definition of the tasks of adjudicative bodies within the dispute settlement process.

It was also proposed that the principal parties to a dispute have the capacity to suspend operations of a panel or the AB at any stage, in order to enable themselves to work on finding a mutually agreeable solution.

Finally, it was proposed that the DSB have the capacity to partially adopt recommendations sufficient to resolve the matter between the parties while not adopting findings, conclusions or recommendations that are not necessary to such resolution.

Transparency

Transparency is evidently a highly contentious matter among WTO Members. The main issues appear to be: a) transparency of various stages in the proceedings; b) public access to documents; and, the most contentious, c) the treatment, if any, of *amicus curiae* briefs.

a) Transparency of various stages of proceedings

There seems to be no disagreement that 'good offices' proceedings should remain private and confidential, but there is disagreement concerning possibilities for public attendance at or observation of other stages. At least two submissions flatly opposed making any of the proceedings public. Others proposed that all substantive stages of panel, appeal and arbitral[20] proceedings should be open to the public, with appropriate safeguards to protect confidential information submitted by the principal and third parties. Another proposed that panels should have procedures to decide whether all or any part of the proceedings will be open to the public.

b) Public access to documents

Most proposals in this area agreed that the documents of the proceedings should be made public, with the secretariat maintaining a public access site. Some stated that final reports should be public as soon as they are issued to the parties to the dispute, although the date of circulation of versions in all official languages would continue to be the reference date for subsequent stages. It was also proposed that non-confidential summaries be made available "as soon as reasonably possible" or "within 15 days of a request for them".

c) Amicus curiae briefs from non-Members

The proposals in this area split between those opposed to acceptance of unsolicited briefs and those seeking some guidelines or rules for accepting them. Opponents note that Article 13, *Right to Seek Information*, gives panels "the right *to seek* information and technical advice from any individual or body which it deems appropriate" (paragraph 1) and to "*seek* information from any relevant source and [to] consult experts to obtain their opinion on certain aspects of the matter."[21] (Paragraph 2) They also note that the ordinary

[20] While it is not clear in the submissions, this probably refers to arbitration concerning the period of time necessary for implementation of DSB recommendations, the amount of trade damage suffered by complainants, and the consistency or inconsistency of new measures with DSB recommendations, but would probably not include expeditious arbitration provided under Article 25.

[21] Emphasis added.

dictionary definition of 'seek' does not include accepting unsolicited information, in fact, 'unsolicited' is the opposite of 'sought'. Additionally, they note that most NGOs are from developed countries and their briefs do not present a development perspective. The inclusion of such briefs therefore increases the work of developing country parties to a dispute as they must study and evaluate them and, possibly, refute the arguments they contain. One submission proposed that unsolicited briefs should never go to panels, but to the principal parties which may or may not wish to incorporate parts or all of such briefs in their own submissions. In this connection, the submission also recommends clarification that the AB is not to accept information inconsistent with its exclusive function to examine issues of law.

Those submissions which favour acceptance of *amicus curiae* briefs recommend rules or guidelines and procedures for their acceptance. This should be balanced, according to one submission, with encouragement to panels to seek information from competent international bodies. Other submissions recommend that arrangements relating to *amicus curiae* briefs should include a fund to compensate developing countries for the additional costs of dealing with them, even if they are attached to a party's submission.

(i) Special and differential treatment for developing countries

At least three submissions note the limitations of the Advisory Centre on WTO Law for developing countries, other than LDCs. It is not a panacea for developing country difficulties in dispute settlement as membership is expensive, as are the admittedly reduced fees charged by the Centre for its services. Instead, three submissions propose establishment of a fund for covering developing countries' legal costs and the cost of technical assistance to develop their own capacities to participate effectively in dispute settlement. An alternative approach proposed by other submissions was that a developing country party, either complainant or respondent, that 'wins' against a developed country should recover all costs related to its participation in the dispute from the 'losing' developed country party.

It was also proposed that there should be established an independent mechanism for general advice and to argue cases, or a pool of experts and lawyers to prepare and conduct developing countries' participation. Another proposal was that the secretariat should prepare a compilation of all applicable law, including past decisions, on the matter at issue for use by the parties and the panelists.

In addition to legal costs, it was proposed that developing country parties to disputes should receive compensation for losses suffered throughout the duration of a developed country measure that was ultimately withdrawn as a result of DSU procedures. Such compensation should also be paid if the developed country unilaterally withdraws the measure before completion of proceedings. The compensation could be monetary.

Some Members proposed that the obligation for panels and arbitrators to take account of developing country interests and the impact of the measures in dispute on their development programs be strengthened by changing "should" to "shall" in the DSU in this context. Such obligation should also extend to the AB. A role should also be given to the DSB so that decisions, as adopted, will not fail to take account of such development matters.

One submission proposed that, as most trade retaliation would be too expensive for developing countries, they should be permitted to retaliate in any sector or agreement without going through the "practical or effective" procedures set out in Article 22:3.[22]

Submissions also proposed greater use of consultations and 'good offices', e.g., by setting reasonable time frames, which might be extended to accommodate needs of developing country parties; by making 'good offices' mandatory following the consultation stage if one or more of the principal parties is a developing country, or mandatory if a developing country party requests 'good offices'. An extension of this thinking is a proposal that, if 'good offices' have not succeeded within the set time frame, they may continue during the panel stage, if both parties agree. Additionally, the WTO should develop a comprehensive mediation system to operate as an alternative to the panel process.

At least two submissions propose increasing the use of developing country panelists so that, if there is a developing country party or a LDC party to a dispute, then the panel would include, respectively, a developing country panelist or a LDC panelist. One of the submissions also proposed that if the developing country or LDC party so requested, the panel would include an additional developing country or LDC panelist.

One large developing country proposed that the "due restraint" that is to be exercised by developed countries in bringing complaints against developing countries should be interpreted to mean that developed countries collectively will not bring more than two disputes against any one developing country within the same calendar year.[23]

(ii) Special and differential treatment for LDCs

The following proposals were made with respect to special and differential treatment for LDCs.[24]

- Include the *Marrakesh Decision on Measures in Favour of LDCs* in Annex 1 so that it is justiciable by the DSU - i.e., LDCs will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs, or their administrative and institutional capabilities.
- So that *legal experts* may be assigned to developing country litigants, the secretariat should maintain a geographically balanced roster of legal experts from which LDCs may select *to fully discharge the functions of counsel* to the LDC party to a dispute, without financial cost to the LDC.
- Parties to a dispute in which an LDC is a party should always explore the possibilities of holding *consultations in the capital of the LDC party*.
- *'Good offices'* should be automatically offered by the Director General immediately

[22] For example, while retaliation in the goods sector may be expensive in terms of denying the private sector a source of imports, retaliation under TRIPS could, theoretically, impose the cost on the holders of the intellectual property rights in the country which is the target of retaliation.
[23] DSU Article 24 requires Members to exercise due restraint in raising matters involving a LDC Member, not a developing country Member. This proposal appears to extend this provision to developing country Members and then to propose a suggested interpretation.
[24] Emphasis added.

following consultations that did not resolve the matter, with no need for the LDC party to make a request. A developed country complainant shall not request establishment of a panel prior to using 'good offices' procedures in good faith.

- The request by a developed country complainant for the establishment of a panel must include a setting out of due restraint that has been taken by the applicant. A *panel's first task will then be to evaluate the complainant's written account of due restraint* that has been taken and the adequacy of efforts expended to reach a mutually agreed solution. If either is found to be inadequate, the matter will be referred to the DSB to make preliminary recommendations and rulings including further use of 'good offices' to resolve the matter.
- Article 8:10 should read: When a dispute is between a least-developed country Member and a developed country Member the panel shall include *at least one panelist from a least- developed country Member* and, if the least-developed country Member so requests, the panel shall include two panelists from least-developed country Members. [Equivalent wording is to be included for developing country Members.]
- Panels shall always *take full account of special and differential treatment* available to [developing country and] least-developed country Members in all applicable WTO agreements, without a need for a party to request it. To this end, the *standard terms of reference* should be amended to require panels to call for research input of the effects of a negative decision against the LDC [or the developing country] party.
- The secretariat shall give its work regarding the *legal, historical and procedural aspects of the matter in dispute* to any LDC party, including third parties, to provide guidance on their specific rights and obligations relating to the matters in dispute.
- Panelists and members of the Appellate Body shall present individual opinions, except that the majority of them may provide a joint opinion. *Dissenting opinions* will also be circulated.
- When the DSB is adopting recommendations concerning a case involving a [developing or] least-developed party, it shall consider *further appropriate action*, without need for the [developing country or] least-developed party to raise the matter.
- When *compliance* of a measure is being considered at the panel, AB or arbitration stage, particular attention should be paid to matters affecting the developmental interests of affected LDCs.
- *No compensation or retaliation* will be approved against LDCs. A LDC respondent will simply be required to withdraw the offending measure.
- When determining *appropriate levels of compensation*, account shall be taken of the trade coverage of the inconsistent measure and its impact on the economy and the development prospects of a [developing or] LDC party.
- When determining *compensation for a LDC complainant* against a developed respondent, the DSB shall recommend monetary and other appropriate compensation computed from the date of the adoption of the inconsistent measure by the developed respondent to the date the measure is withdrawn.
- In a case of a LDC complainant and developed country respondent, *universal/collective retaliation* authority shall be granted to all WTO Members, each to the level of nullification or impairment set for the LDC, unless rejected by consensus. Such authority shall only be granted following an arbitral determination of the appropriate level of compensation, taking account of potential impediments to the attainment of the LDC's development objectives. The arbitrator must also consider whether retaliation under a different agreement by the LDC complainant

would be effective without harming the LDC's interests.

(7) Technical assistance available to LDCs for WTO dispute settlement

(i) Multilateral assistance

Both the WTO and UNCTAD produce training materials and training courses in WTO dispute settlement.

The WTO[25]

The WTO offers a one-week Dispute Settlement Course conducted in English, French and Spanish, open to developing countries, least-developed countries, customs territories and economies in transition which are members or observers of the WTO and also developed countries. The course has been presented seven times in 2003, on a regional basis, on a country basis and, in Geneva, open to a wide range of applicants. Participation in the courses is restricted to government officials nominated by their governments.

The course starts with an introduction to the WTO and its basic principles, before turning to focus on the Dispute Settlement Mechanism. Participants are rapidly engaged in simulation exercises which allow them to further develop their practical knowledge and skills in the various stages of dispute settlement. An update on recent developments in the area of dispute settlement rounds off this week-long training course.

A three-week course, 'Introduction to the WTO', that is preliminary and complementary to the Dispute Settlement Course, is also available for government officials from least-developed countries.

The WTO also offers teach-yourself videos, one of which deals with dispute settlement. It is entitled, "Case Studies of WTO Dispute Settlement", in which the case on environmental standards for gasoline brought by Venezuela and Brazil against the US and the case on sound recordings brought by the US and EC against Japan are taken as examples to explain the WTO dispute settlement process. The video is available on the WTO web site.

Although WTO technical assistance activities and funding have risen greatly in recent years, these resources are not by themselves sufficient to meet all developing country technical assistance needs. For this reason, WTO secretariat officials work very closely with officials from other international organizations in the 'Integrated Framework', with regional banks and organizations and with bilateral Member government donors. Only through leveraging WTO funds in co-operation with others can technical assistance needs be met.

The WTO's partners in the Integrated Framework for Trade-related Technical Assistance for Least Developed Countries are the World Bank, the International Monetary Fund, the UN Conference on Trade and Development, the UN Development Programme and the International Trade Centre.

UNCTAD[26]

[25] The following information is taken from the WTO web site.
[26] The following is taken from the UNCTAD web site.

UNCTAD's Project on Dispute Settlement in International Trade, Investment and Intellectual Property aims to help to build permanent capacity in developing countries - in particular, the least developed countries (LDCs) - and in countries with economies in transition for dispute settlement in international trade, investment and intellectual property. The Project's principal activity is the provision of training on dispute settlement in international trade, investment and intellectual property for the benefit of government officials, academics, attorneys and counsels of business associations in developing countries - in particular the Least Developed Countries (LDCs) - and countries with economies in transition. It will also provide training materials for independent use.

In the development and implementation of the Project UNCTAD cooperates with the WTO, WIPO, ICSID, UNCITRAL and the Advisory Centre on WTO Law.

Regional workshops

The Project organized regional workshops in Africa, Asia, Latin America, the Caribbean, the Middle East, the Pacific and Central and Eastern Europe, starting in January 2003. Three workshops on WTO dispute settlement and one on commercial defence measures were held January to July 2003.

Workshop format

The workshop format is designed to cover activities over a period of two to five working days. The curriculum offers a combination of lectures, case studies and simulation exercises selected and developed to address the specific interests of developing countries as trading and investment partners.

Target audience

Each workshop hosts 30 participants selected from among government officials, academics, practising lawyers and representatives of business associations of developing countries.

Workshops offered relating to dispute settlement in the WTO:

- Introduction to Dispute Settlement
- Introduction to Dispute Settlement at WTO
- WTO Dispute Settlement on Basic Rules of Trade in Goods, Services and Intellectual Property
- WTO Dispute Settlement on Textiles and Agriculture
- WTO Dispute Settlement on Commercial Defence Measures
- WTO Dispute Settlement on SPS and TBT

Distance learning

To complement the regional workshops and as a means to disseminate training to a broad audience, a distance learning course will be developed.

Training materials for independent use

The Course on Dispute Settlement[27] (so far in English only) consists of 41 modules, 15 of which deal with WTO matters and are currently available. The others will be available this year. Copies may be downloaded free of charge on the understanding that they will be used for teaching or study and not for a commercial purpose. Appropriate acknowledgement of the source is appreciated. This is NOT an online course.

The WTO-related modules in this course material are: 1. Overview; 2. Panels; 3. Appellate Review; 4. Implementation and Enforcement; 5. GATT 1994; 6. Anti-dumping Measures; 7. Subsidies and countervailing Measures; 8. Safeguard Measures; 9. Sanitary and Phytosanitary Measures; 10. Technical Barriers to Trade; 11. Textiles and Clothing; 12. Government Procurement; 13. GATS; 14. TRIPS; 15. Agriculture.

In addition to the above, UNCTAD offers internships, advisory services, and a network of international lawyers specializing in international trade cooperation.

Internships

The Project offers placement for graduate students under 30 years of age from developing countries and countries with economies in transition to undertake two-month internships at the secretariat in Geneva. The interns will have opportunities: i) To study the Course on Dispute Settlement; ii) To meet officials dealing with dispute settlement at WTO and WIPO; iii) to familiarize themselves with the work of UNCTAD in the fields of trade negotiations, commercial diplomacy, investment agreements and competition policy; and iv) to work in the Project on Dispute Settlement.

Advisory Services

Upon request, the Project will analyse provisions in regional agreements governing the settlement of disputes, and make recommendations on regional dispute settlement bodies in developing countries.

International lawyers for multilateral cooperation

An important component of the programme involves the creation of a database of international law firms and independent legal experts who will provide legal advice to the governments of least developed countries on issues relating to dispute settlement.

The legal advice may take the form of, inter alia, providing general information on dispute settlement, the selection of the appropriate dispute settlement forum, the procedures to be followed in filing cases, and undertaking a general assessment of disputes.

The initial legal work will be conducted on a no-fee basis. Participating law firms and independent legal practitioners have committed themselves to providing 40 hours of initially free advice per year to LDCs. They will counsel two LDC government clients, while individual practitioners may offer services to one LDC government client. However, the terms for the provision of continuing or extended legal assistance should be arranged independently between the law firm or independent legal practitioner and the

[27] I have drawn on these materials to prepare and deliver a series of three-day courses on WTO dispute settlement in Central America and found them to be excellent, certainly among the best WTO-related training materials I have read.

LDC client.

UNCTAD's role in the context of this activity would be limited to providing information to LDCs about the law firms and independent legal practitioners that are registered with the project.

Bilateral assistance

While I have not been able to put together a list of bilateral donors providing training in WTO dispute settlement, I know from personal experience that such technical assistance is available. The Canadian International Development Agency certainly provides such assistance.

Institutional assistance

The most positive result (if not the only result other than lessons learned) of the Seattle Ministerial Meeting was the establishment of the ***Advisory Centre on WTO Law***[28] (ACWL), which is situated in Geneva.
The Centre is member-financed and currently has 30 members, including nine developed countries and 21 developing countries or countries with economies in transition. An additional three developing countries and one developed country are in the process of accession. There are now 40 countries designated as least-developed countries by the United Nations that are Members of the WTO or in the process of accession to the WTO. Hence, once the four countries now in the procession of accession have become members, there will be a total of 64 countries entitled to the services of the Centre.

The Centre functions essentially as a law office specialised in WTO law, providing legal services and training exclusively to developing country and economy-in-transition ACWL members and to all Least Developed Countries. Its mandate and modest size (one Executive Director, four experienced lawyers and support staff) require the Centre to stay within its own niche, to avoid overlap and to complement the training and technical co-operation provided by the WTO Secretariat and other relevant institutions. The ACWL will organise seminars on WTO jurisprudence and provide legal advice. Internships will be opened for government officials from developing country members of ACWL and all Least Developed Countries. The Centre will also provide support throughout dispute settlement proceedings in the WTO at discounted rates for its members and Least Developed Countries in accordance with the terms set out in annex IV of the Agreement.

Least-developed countries need not be members of the ACWL in order to participate fully in the its services. The fee schedule for LDCs is as follows:

- Legal advice on WTO law -free
- Support in WTO dispute settlement proceedings -US$25 per hour*
- Seminars on jurisprudence and other training activities -free
- Internships -subject to sponsorship**

  * may pay by the case on the basis of cost estimates provided by the Centre for each phase of the proceedings (i.e., panel phase, appeal phase, etc.)

[28] The following information was obtained from ACWL.

** sponsorships will be arranged by the Centre. Participant's expenses and salary will be paid.

The first year of the Centre's activities were largely organizational, but it got off to a good start providing legal advice and assistance. According to the Centre's Report on Operations, 15 April, 2003, the activities of the Centre from its date of commencing operations, 17 July 2001, to 15 April 2003, the following assistance was provided by the Centre.

Legal advice:

- for LDCs - analysis of:
  - the viability of resort to Article XVIII of the GATT 1994
  - the viability of initiating a dispute under Article VI of the GATT 1994
  - the WTO consistency of certain subsidies
  - the implications of paragraph 6 of the Doha Ministerial Declaration on the TRIPS Agreement and public health
- for Members - analysis of some 26-28 matters analogous to the above.
- plus numerous requests for legal advice on relatively minor issues to which the Centre's staff responded orally.

Assistance in WTO dispute settlement proceedings:

- Legal assistance was provided directly by the Centre to seven developing countries concerning 12 complaints, nine of which were brought by the assisted developing countries against developed countries, two of which were brought by the assisted developing countries against developing countries, and one of which concerned an assisted developing country respondent.
- The Centre engaged external legal counsel to assist four developing countries to participate as third parties in a complaint brought against a developed country.

Training

- The Centre completed its first course on WTO dispute settlement procedures for government officials from developing countries and countries with economies in transition in April 2003. The course took place over a six-month period at the premises of the Centre on Thursdays. The course was well attended by officials from developing country Members of the Centre and from least-developed countries. Twenty-two officials were awarded the Centre's "Certificate of Training", of whom two were from LDCs.
- The second presentation of the course is underway with a total of 37 officials, seven of whom are from LDCs.

Internships

- The Advisory Centre intends to offer paid internships, depending on availability of sponsorships. At present, discussions are being held with potential sponsors.

PART II: SPECIAL CHALLENGES FACING LDC MEMBERS. WHAT MIGHT BE DONE?

(1) Merging diplomatic and legal undertakings – soft law v. hard law

A notable characteristic of the "old" GATT, especially in the early years, was that it was a diplomatic agreement. As is typical of multilateral treaties, it contains a number of provisions that were drafted in a manner that 'papered-over' differences of view of various delegations so that each of them could interpret the provision to conform to its negotiating instructions. In addition to these ambiguities, there are also a number of gaps in the text reflecting issues on which there was no consensus and views diverged too much to paper-over them. Consequently, it was broadly expected that differences of view concerning the actual application of the treaty would be addressed through diplomatic means, i.e., through negotiations between parties interested in the particular issues of the moment.

Article XXII provides for dispute settlement solely on the basis of consultations between the parties to a dispute, which could be augmented by supplementary consultations with the GATT Council. Article XXIII also depends upon consultations as the first approach to dispute settlement. If the consultations proved to be unsuccessful, then the parties to the dispute could refer the matter to the GATT Council and it would investigate the matter and make recommendations or a ruling, as appropriate. Procedures initially adopted by the Council for this purpose took the form of diplomatic consultations within the Council as a whole. As procedures developed further and disputes were referred by the Council to committees or working parties, diplomacy still prevailed as the members of the working parties participated on the basis of instructions from their capitals. It is evident from the text of Article XXIII that the ultimate step of authorizing the suspension of concessions (retaliation) was expected to be used very seldom, if at all, as the Member targeted by such retaliation would automatically be authorised to withdraw from the treaty on sixty days notice.

As noted in Part I above, procedures continued to evolve and, around the mid-1950s, it became the usual practice to refer disputes to panels of officials who participated in their personal capacities. This step is seen to mark the transition from diplomatic to legal dispute resolution, but the process continued to be non-binding unless the respondent agreed to accept the panel's recommendations and to implement them. Either party to a dispute could block the process by denying consensus when the Council was deciding to establish a panel, to accept the panel's report, or to have the recommendations implemented. In practice, GATT dispute settlement, while widely credited as the most successful multilateral system of settling disputes, was ultimately power-based and non-binding: what legal commentators refer to as, "soft" law. Its success was dependent upon political commitments and good faith behaviour by parties to the GATT. Fortunately, many GATT rules helped governments to resist narrow domestic interests that were applying political pressure on them to maintain or implement policies that were economically damaging, as governments could claim that GATT rules, enforced by dispute settlement, denied them the capacity to accommodate the demands being made of them. Conversely, the ultimately non-binding character of GATT dispute settlement allowed Member governments to accommodate such interests if domestic political pressures were irresistible.

The WTO, with its negative consensus rules concerning the key decisions in the dispute

settlement process and the legal complexities of panel procedures and rights to appeal, has made dispute settlement (that goes beyond consultations and 'good offices') legalistic and binding on the parties, i.e., "hard" law. Difficulties with this hard law approach to dispute settlement arise from the reality that the WTO agreements are still largely soft law agreements, with ambiguities and gaps in their provisions. As we have seen, differences of view concerning the scope of special and differential treatment for developing country and LDC Members have been filled in several instances by hortatory provisions that are little more than hollow rhetoric. In effect, almost all obligations of the WTO are being measured against hard law criteria, making many special and differential provisions, which were drafted in soft law terms, not enforceable, but possibly honoured by some Members. (Olivares, 2001)

It is often remarked that LDC Members have never engaged in WTO dispute settlement as either complainant or respondent. There has thus far been only one instance of a LDC Member participating as a third party: Senegal in EC – Bananas III. One World Bank study (Holmes, Rollo and Young, 2003) concluded that, "A country's trade share is a pretty robust indicator of its likelihood to be either a complainant or respondent. The frequently remarked absence of the least developed countries from the dispute settlement system can be explained by their low volume of trade." While this conclusion may be valid concerning LDC Member respondents, I doubt it is valid concerning possible LDC Member complainants. More likely, LDC Members have not yet appeared as complainants because their expectations regarding many of the benefits they believe should accrue to them under the WTO agreements are not enforceable and, for the time being, LDCs generally lack resources to bring a complaint.

(2) Difficulties with existing S&D provisions

The challenges of asserting rights to special and differential treatment may be considered in two separate contexts: i) obtaining S&D treatment under the provisions of various WTO agreements; and ii) utilizing the S&D provisions in the DSU process.

With respect to the possibility of enforcing S&D provisions set out in various WTO agreements, the preambular paragraphs to agreements tend to state what might be desirable in terms of assisting LDCs, but unless they are restated in mandatory terms in the substantive part of the agreements, they are little more than statements of good intentions which may or may not be honoured. In similar vein, a critical examination of the various agreements would show that many, if not most, of the S&D provisions in the GATT and in the newer WTO agreements are not fully enforceable because they are not stated as mandatory. Exceptions would be the *de minimus* threshold provisions relating to anti-dumping and subsidy measures, the right to enter into preferential trade agreements with other developing country and LDC Members, softer requirements concerning LDC regulations and standards relating to indigenous technologies, and the right to limit undertakings to levels compatible with LDC Member's individual development, financial and trade needs, or their administrative and institutional capabilities.

Obtaining S&D treatment under the DSU may also be problematic, as is evident from the many proposals concerning DSU improvements from developing country and LDC Members. As no LDC Member has yet been involved in a dispute settlement case as either a complainant or respondent, there is no established jurisprudence concerning

S&D treatment of them under the DSU. Some indicators may however, be drawn from the experience of developing country Members' participation in dispute settlement.

(i) General provisions

The DSU calls for general S&D treatment of developing country parties in the consultations, panel, and implementation phases of the dispute settlement process.

For the consultations phase, Article 4.10 states: *During consultations Members should give special attention to the particular problems and interests of developing country Members*. This provision is merely hortatory and, in any event, could not be enforced as consultations are confidential with no written record. Thus claims that special attention was or was not paid could only be based upon unsubstantiated allegations of the parties.

Article 12.11 provides that the panel's report *shall explicitly indicate the form in which account has been taken of relevant provisions on differential and more favourable treatment that form a part of the covered agreement raised by the developing country Member in the course of the dispute* . This issue arose in *India – Quantitative Restrictions* where the panel, after referring to Article 12.11, states in its report:

> In this instance, we have noted that Article XVIII:B as a whole, on which our analysis throughout this section is based, embodies the principle of special and differential treatment in relation to measures taken for balance-of-payments purposes. This entire part G therefore reflects our consideration of relevant provisions on special and differential treatment, as does section VII of our report (suggestions for implementation).[29]

Hence, if the question before a panel concerns an S&D-based provision in an agreement, consideration of that provision itself meets the requirements of Article 12.11.

With respect to the implementation phase, Article 21 sets out three broad S&D provisions for developing countries, which refer to arbitration procedures concerning the period of time a Member may have to implement recommendations of the DSB, as well as arbitration concerning the suitability of measures taken to comply with the recommendations. The first provision is set out in paragraph 2: *Particular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement.* Although paragraph 2 is hortatory on its face, at least two arbitrators have taken account of it.

In *Indonesia – Autos (Article 21.3)* the arbitrator allowed Indonesia an extra six months for implementation because:

> Indonesia is not only a developing country; it is a developing country that is currently in a dire economic and financial situation. Indonesia itself states that its economy is 'near collapse'. In these very particular circumstances, I consider it appropriate to give full weight to matters affecting the interests of Indonesia as a developing country pursuant to the provisions of Article 21.2 of the DSU.[30]

[29] India – *Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, complaint by the USA, WT/DSO90/R (6 April 1999).
[30] As quoted in the *WTO Analytical Index: Guide to WTO Law and Practice*, Volume 2, World Trade Organization, Geneva, 2003, at page 1391.

In *Chile – Alcoholic Beverages (Article 21.3)* the Arbitrator states:

> Although cast in quite general terms, because Article 21.2 is in the DSU, it is not simply to be disregarded. As I read it, Article 21.2, whatever else it may signify, usefully enjoins, *inter alia*, an arbitrator functioning under Article 21.3 to be generally mindful of the great difficulties that a developing country Member may, in a particular case, face as it proceeds to implement the recommendations and ruling of the DSB.[31]

An interesting lesson to draw from these two cases is that whereas a hortatory provision is not binding on WTO Members (and developed country Members appear to be quite ready to ignore them in most instances), arbitrators will take account of hortatory provisions specifically directed to them.

Paragraphs 21.7 and 21.8 refer particularly to the DSB. Paragraph 7: *If the matter* [relating to implementation] *is one which has been raised by a developing country Member, the DSB shall consider what further action it might take which would be appropriate in the circumstances.* Paragraph 8: *If the case is one brought by a developing country Member, in considering what appropriate action might be taken, the DSB shall take into account not only the trade coverage of measures complained of, but also their impact on the economy of the developing country Members concerned.* The wording of these two provisions is somewhat ambiguous. Although they may appear to be mandatory – "shall" – what the DSB *shall* do is, "consider" or "take into account", both of which are subjective and incapable of enforcement. Thus far the DSB has taken no specific actions under either paragraph.

(ii) Time frames

A number of proposals for improvements in the DSU submitted during the Doha Round referred to a need for flexibility for developing country Members in dispute settlement time frames, some suggesting that developing countries need more time to prepare their submissions and presentations. There is room in the current dispute settlement procedures for some flexibility in this respect.

With respect to the consultations phase, DSU Article 12.10 provides that if the parties cannot agree that consultations have concluded after the 60 day period has elapsed, *the Chairman of the DSB shall decide, after consultation with the parties, whether to extend the relevant period and, if so, for how long.* Thus far, the Chairman of the DSB has not acted upon this provision. The issue did, however, arise somewhat obliquely in one case[32]. In that case, the complainant (USA) requested the DSB to establish a panel following the expiry of the 60-day consultation period. The respondent (Pakistan) opposed the request as it did not agree that consultations had been concluded. The USA had requested consultations and Pakistan had, within the usual time frame, invited the USA to consultations in Islamabad due to financial difficulties for Pakistan to send a delegation to Geneva and because the relevant officials were engaged in the preparation of the annual budget and in trade policy matters. Nonetheless, the consultations took place in Geneva,[33] during which Pakistan advised the USA that legislation was before its

[31] *Ibid*, pages 1391-1932.
[32] *Pakistan – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, (WT/DS36/3)
[33] An example illustrating the value of the Article 4.10 provision that Members should give special attention to the

parliament to amend relevant laws to bring them fully into compliance with WTO requirements. Three days later the USA proceeded with its request for establishment of a panel.

At the DSB meeting (WT/DSB/M/21) the representative of Pakistan expressed disappointment that the United States had decided to request the establishment of a panel and questioned whether this was the most fruitful recourse to the DSU procedures.

> This experience raised important questions in relation to the DSU such as: (i) the real difficulties faced by developing countries on the insistence of a developed country that consultations be held only in Geneva; (ii) the meaning and significance of the consultations phase; (iii) whether a Member could decide unilaterally that consultations had been concluded [here followed reference to DSU Article 12.10] For all these reasons Pakistan could not agree to the establishment of a panel . . . . His delegation hoped that the United States would reconsider and explore the consultations further.

In response, the US delegate stated his expectation that a panel would be established at the next meeting of the DSB. In the event however, the two Members did resume consultations and notified the DSB some seven months later that they had reached a mutually agreed solution. (WT/DSB/M/29)[34]

For panel proceedings, Article 12.10 also provides that when a panel is examining a complaint against a developing country Member, *the panel shall accord sufficient time for the developing country Member to prepare and present its argumentation.*

At least one panel has provided additional time to a developing country party to prepare a submission. In *India – Quantitative Restrictions*, India was granted an additional ten days to prepare its initial submission, notwithstanding the complainant's (USA) opposition based upon the DSU's strict deadlines. The panel's decision to grant this extra time was based upon consideration of the administrative reorganization taking place in India as a result of a recent change in government. (Footer 2001)

There are no specific S&D provisions relating to the appeal phase of dispute settlement in the DSU or in the *Working Procedures for Appellate Review*[35], but rule 16 of the latter provides that, *In exceptional circumstances, where strict adherence to a time period set out in these Rules would result in a manifest unfairness*, the AB, on request of one of the parties, may provide more time for submission of documents or for preparations for the oral hearing. In *European Union – Bananas*, Jamaica asked the AB to postpone the date of the oral hearing, but the AB declined to do so as it was not persuaded that there were exceptional circumstances resulting in manifest unfairness to either Jamaica or any other participant. (Lacarte-Muro and Petina Gappah, 2000)

(iii) Complexity and high cost of dispute settlement

Irrespective of possible S&D treatment, the DSU is simply too complex and expensive

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particular problems of developing country Members during the consultations phase.

[34] The terms of the agreement were later circulated as WT/DS36/4.

[35] WT/AB/WP/3, 28 February 1997

for developing countries, especially LDCs

> In the context of dispute settlement, many developing countries perceive the system to be weighted against them due to the costs of bringing complaints, or defending actions from other Members, the weakness of available remedies and the limited observance of special and differential treatment provisions in disputes involving developing country Members. One suggestion is that the most frequent users of the dispute settlement system, the Quad Group, have extensive human and financial resources on which to draw on bringing and defending complaints. They can draw on good legal talent in government (and occasionally from private law firms), they are well briefed by export interest groups and their commercial and diplomatic representation is global, allowing for extensive contacts within and outside the Geneva circuit. By contrast many developing country Members and LDCs, particularly those in sub-Saharan Africa are operating at the margins, or not at all when it comes to WTO participation. (Footer, 2001, page 88)

The difficulties facing developing countries in getting a satisfactory solution to disputes brought by them are well illustrated in Ecuador's experience in *European Communities – Regime for the importation, sale and distribution of bananas*, recourse to Article 22.2 of the DSU by Ecuador.[36] In that case, Ecuador noted that the EC had maintained a banana import regime inconsistent with its GATT/WTO obligations for seven years, causing serious injury to Ecuador's trade in bananas, its principal export product. Three separate panel reports and the AB had confirmed that the EC regime was discriminatory. Authority to withdraw concessions had been granted. Nonetheless, eleven months later, the regime continued and had even been unilaterally extended. Since joining the WTO in 1996, Ecuador had directed its meager trade resources to resolving this issue with the EC. Having completed all the steps set out in the DSU, Ecuador was now requesting authority to suspend concessions under GATT 1994, TRIPS and GATS to match the nullification or impairment of benefits accruing to Ecuador amounting to US$450 million per year. To reduce the potentially very heavy cost on Ecuador of suspending concessions in goods trade, Ecuador sought authority to suspend concessions relating to copyright; protection of performers and producers of sound recording and broadcasting organizations; geographical indications; industrial designs; and wholesale distribution services. The representative of Ecuador claimed that the value of the concessions to be suspended would be well below the value of the nullification or impairment of Ecuador's benefits. In reply, the EC objected to the level of suspension and alleged that the procedures set out in Article 22.7 of the DSU relating to suspension of benefits under other sectors or agreements[37] had not been followed. The EC representative therefore requested that each of these matters should be subject to arbitration.

Representatives of Honduras, Guatemala and Panama spoke in support of Ecuador noting the very high costs to developing country complainants, not only from the nullification or

[36] The following is drawn from the minutes of the meeting of the DSB 19 November 1999, (WT/DSB/M/71)

[37] Article 22 states that a retaliating Member should first seek to retaliate in the sector subject to the dispute – if that is not practical or effective, the Member may seek to retaliate in other sectors under the same agreement – if that is not practical or effective, the Member may seek to retaliate under another agreement. In applying these principles, the Member is to take account of the importance of the trade in the sector subject of the dispute and the broader economic consequences of such retaliation. When requesting authority to retaliate either in other sectors or under another agreement, the Member must state its reasons for the request. "Sector" is defined as follows: for goods, all goods; for services, a principal sector as defined in the "Services sectoral Classification List"; for IPRs, each of the categories of IPRs covered in TRIPS.

impairment of benefits, but also in the high costs of participating in dispute settlement procedures. They also implied that the functioning of the WTO system was being undermined by the EC's delaying tactics and its indifference to its obligations.

The DSB took note of the statements and agreed that the matters be sent to arbitration. Article 22.6 allows 60 days for arbitration and, if the arbitrator finds that the procedures of Article 22.3 (selecting agreements and sectors for retaliation) have not been followed, the complainant must implement those procedures before again requesting authority to suspend concessions. Thus in this instance, the EC gained a minimum of 60 days of additional delay, possibly lengthened by another 30-60 days if Ecuador was required formally to apply the procedures of Article 22.3 and report back to another meeting of the DSB.
Article 20 states that the period from the date a panel is established until the date the panel or AB report is considered for adoption by the DSB should generally not exceed nine to twelve months. But the nullification or impairment of a benefit begins the date the measure in question is applied. In all likelihood, the complaining party will need a few weeks to evaluate the measure and its impact. The complainant will then request consultations, which will take 60 days, and then request establishment of a panel, which will take at least one month as the request will be blocked by the respondent at the first DSB meeting. The work of the panel may take up to 12 months, and the AB may take an additional three months. Following consideration and adoption of the report, the respondent will be given a "reasonable period of time", possibly 15 months, to implement the DSB's recommendations. If the implementation is challenged by the complainant, an additional 90 days is allowed for arbitration as to the suitability of implementation. This arbitral step may be repeated each time the respondent makes a new effort to implement the recommendations. If the implementation is found to be inconsistent with the DSB recommendation, another 30 days may be allowed to arbitrate the level of nullification or impairment and the sectors in which retaliation may take place. Meanwhile, the developing country producers/exporters of the goods or services affected by the measure are suffering commercial losses and the developing country itself is incurring economic damage. Very few small producers could withstand losses inflicted over such a long period of time, nor could large producers/exporters if they are under-capitalized or marginal players in the market. In light of all this, can we challenge the statement that, "What the process of dispute settlement essentially does is little more than stretch the time frame for [a developed country to comply] with removal of the restraint but this is not to the benefit of the developing country Member . . . whose interests are best served by its immediate removal."? (Footer, 2001, page 77)

Hence the proposals for monetary compensation by developed country Members to producers/exporters in developing countries and LDCs for the losses suffered by them as a result of developed country measures that are inconsistent with WTO obligations.[38]

(3) Existing special procedures for LDC members

Article 24 requires all Members to give particular consideration to the special situation of LDC Members; to exercise due restraint on bringing complaints against LDC Members; and, should a measure of an LDC Member be found to nullify or impair benefits of another Member, to exercise due restraint in seeking compensation from or the right to

[38] See developing country and LDC proposals for DSU improvements above at pages 36-39.

suspend concessions *vis-à-vis* LDC Members. As no complaints have been brought against an LDC Member, we may conclude either that due restraint has been exercised or that measures implemented by LDC Members have not nullified or impaired benefits reasonably expected to accrue to other Members. Either conclusion would explain the absence of any LDC respondents. But have we any basis to conclude that there has been no LDC complainant because measures by other Members have not nullified or impaired benefits reasonably expected to accrue to LDC Members? Or should we conclude that no complaints have been brought by LDC Members because dispute settlement procedures are simply too complex and too expensive for them to use? The correct conclusion would probably fall somewhere between these two extremes and would probably involve a general lack of experience or confidence on the part of most LDC Members. Whatever we conclude, we cannot fail to recognize the overwhelming complexity and cost of dispute settlement, or the prevailing imbalance in the value of potential outcomes to LDCs and developed countries (for instance, only the larger developed countries can successfully use the ultimate weapon of retaliation or other coercive tactics, and then probably only against the smaller developed countries and other developing countries).

(4) Have WTO members given up effective control of dispute settlement?

The diplomatic ambiguities of the GATT 1947 allowed it to evolve over the years and to develop processes and understandings to deal with difficulties through decisions, waivers and formal interpretations. The smaller membership and collegial atmosphere of the 'old' GATT, along with the marginalization of many members, made consensus easier to reach than may be the case in future within the WTO.

As professor John Jackson has noted[39]:

> One of the geniuses of the GATT and its history was its ability to evolve partly through trial and error and practice. Indeed the Dispute Settlement under GATT evolved over four decades quite dramatically – with such concepts as 'prima facie nullification', or the use of panels instead of working parties, becoming gradually embedded in the process – and under the Tokyo Round Understanding on Dispute Settlement became 'definitive' by consensus action of the Contracting Parties.
>
> But the language of the DSU (as well as the WTO 'charter') seems to constrain greatly some of this approach compared to the GATT. [by requiring a level of consensus decisions approaching unanimity by the DSB and for amendments to the DSU] Thus the opportunity to evolve by experiment and trial and error, plus practice over time, seems considerably more constrained under the WTO than was the case under the very loose and ambiguous language of the GATT, with its minimalist institutional language.

Under the GATT 1947, the GATT Council maintained control of the dispute settlement process by requiring a positive consensus for each step. The perceived disadvantage of this was that a party to a dispute could block progress at any decision point by denying consensus. The DSU overcame this disadvantage by providing that the process would move forward at each decision point unless there is a negative consensus to block

[39] "Dispute Settlement and the WTO: Emerging Problems", *Journal of International Economic Law* (1998) page 347, Oxford University Press

movement. The perceived advantage is that the resulting automaticity guarantees a hearing and a resolution for even the smallest Member bringing a complaint against even the largest Member. But automaticity, especially at the appeals level, has removed the DSB's substantive oversight of the process.

Article 17 establishes the Appellate Body consisting of seven independent individuals to uphold, modify or reverse the legal findings and conclusions of panels. The AB is to receive the appropriate administrative and legal support it requires. In practice, the secretariat serving the AB operates quite separately from the WTO secretariat. The AB draws up its own working procedures, in consultation with the Chairman of the DSB and the Director-General of the WTO. Such working procedures are communicated to Members for their information. If a situation should arise that is not covered by the working procedures, the AB may adopt appropriate procedures to deal with it. Finally, in the absence of a negative consensus, its reports shall be adopted by the DSB and unconditionally accepted by the parties to the dispute. The considerable powers of the AB, and the orientation and experience of its members, will ensure that hard law disciplines are applied to every provision brought before it, thereby negating all soft law provisions, if they are challenged.

The limitation on the AB is that it cannot add to or diminish the rights and obligations of Members. Presumably this limitation could be enforced either by a consensus at the DSB to refuse to adopt a report that breaches it, or by a formal interpretation, adopted by the Ministerial Conference/General Council, of the provision in question opposite to that made by the AB. If such consensus cannot be reached at the DSB or at the Ministerial Conference/General Council, a formal interpretation can be adopted by a very stringent voting requirement of three-fourths of total membership. (*WTO Agreement* Article IX.2) As a quarter of the Members are often not present at key meetings, formal interpretations could be exceedingly difficult to achieve. (Jackson 1998)

In light of this new context, there may be temptations to use the dispute settlement process as a means of removing ambiguities or filling gaps in WTO agreements. As has been alleged in the preliminaries to at least one dispute, individual Members may seek to gain through dispute settlement what they could not get through negotiation.[40] Whether this result emerges or not, it is critically important for LDC members to secure access to effective dispute settlement procedures that meet their needs, taking full account of their particular circumstances.

(5) Enhanced dispute settlement procedures for LDC Members

(i) The need for enhanced procedures for LDC Members

In my view, the following factors, all discussed above, should shape the negotiating position of LDC members in the review of the DSU.

- The panel process is too complex for LDCs to address issues on an even footing

[40] See comments made by the Canadian Minister of International Trade concerning softwood lumber disputes between Canada and the USA.

against developed countries or the more advanced developing countries.
- The panel process is too long for firms in LDCs to survive when their trade has been disrupted by measures in dispute.
- Relief provided by DSU procedures will not recover commercial and economic losses suffered by nullification and impairment of benefits.
- Many, if not most, of the S&D provisions for LDC Members are soft law.
- Panels and the AB will apply hard law criteria to soft law S&D provisions thereby nullifying their potential benefit.
- Arbitrators are more likely to take account of soft law provisions, at least for guidance.
- Consultations, 'good offices' and arbitration can be less complex, less expensive and briefer than the panel process.
- Developed country Members may have difficulties extending soft law S&D provisions to developing country Members because they are not a homogeneous group, but all LDC Members are deserving of S&D benefits, if they are to be able to use the dispute settlement system.
- It will be easier to make progress working within existing WTO and DSU provisions than seeking extensive amendments.[41]

(ii) A possible shape of enhanced dispute settlement procedures for LDC Members

In light of the difficulty in getting amendments to existing texts LDC Members should seek a solution within existing provisions to the fullest extent possible.

Most of the above factors can be addressed through existing DSU provisions, specifically Articles 4 - *Consultations*; 5 – *Good Offices, Conciliation and Mediation*; 24 – *Special Procedures Involving Least-Developed Country Members*; 25 – *Arbitration*; and 27 – *Responsibilities of the Secretariat*. The LDC members' position will be supported by provisions in Article 3 – *General Provisions*; and 21 – *Surveillance of Implementation of Recommendations and Rulings*.

The LDC Members' objective will be to obtain agreement to establish a special track for dispute settlement involving them either as complainant or respondent. The special track might well run through the following stages.

1) Consultations in accordance with Article 4, on the understanding that consultations shall take place in the LDC Member's capital city, unless the LDC Member proposes a different location, in which case the location will be agreed between the parties.
2) If the consultations do not resolve the dispute within the 60-day timeframe, the Director-General shall provide conciliation under Article 5. At the beginning of the conciliation, the secretariat shall provide a comprehensive briefing on the legal, historical and procedural aspects of the matter in dispute to the parties and the conciliator. The conciliator, working closely with the parties to the dispute, will establish the facts of the dispute, examine the claims of both parties, clearly define the issues of the dispute and, taking all relevant factors (including special

[41] This comment is not to suggest that the following proposal will be easy to negotiate, simply that negotiations would be even more difficult if LDC goals were seen to be completely outside of the present system.

attention to the particular problems of the LDC Member) into account, submit non-binding proposals for a possible settlement to the parties. Conciliation shall be completed within the 60-day timeframe of Article 5.

3) If the parties are unable to resolve the dispute on the basis of the conciliator's recommendations [within 15 days], the matter shall be arbitrated expeditiously in accordance with Article 25. Standard procedures will be established by the DSB, with a tight timeframe, e.g., maximum 60 days.
4) If the measure in dispute is found to be inconsistent with WTO obligations, the application of the measure shall be suspended [vis-à-vis the complainant] to the extent of its inconsistency within 60 days, pending its withdrawal or its modification to bring it fully into compliance with WTO obligations.
5) If the inconsistent measure was applied against the trade of an LDC Member by a developed country Member, then, in addition to withdrawing the measure, the latter will pay sufficient monetary compensation to revitalize the firms in the LDC Member's territory that suffered severe commercial losses as a result of the measure. Such compensation shall not exceed the value of trade lost as a result of the contested measure. Any disagreement regarding the value of such compensation will be referred to the arbitrator who acted in stage 3 for resolution within 60 days.

Stage one is fully consistent with Article 4, with the additional provision concerning the location of consultations. In practice, consultations have generally taken place in Geneva, but the WTO contains no provision concerning their location, however paragraph 10 of Article 4 does say that members should give special attention to the particular problems of developing countries and LDC Members do not have large missions in Geneva. And it is much more challenging for them to send a delegation to Geneva than it would be for a developed country Member to send a delegation to the LDC's capital city.

Stage two strengthens Article 5, paragraphs 1 and 6 by making conciliation mandatory, and ignores references to possible recourse to a panel in paragraphs 3 and 4. It also places an obligation on the secretariat to provide briefing materials and confirms the 60-day timeframe for 'good offices' set out in paragraph 4. The secretariat would maintain a roster of conciliators with qualifications now sought in panelists, plus a firm understanding of the special economic, commercial and institutional challenges facing LDCs. Article 5 provides that use of its provisions is to be "voluntary if the parties to the dispute so agree". A decision by the DSU or General Council to implement the proposed stage two would amount to voluntary agreement in advance by all WTO Members, thereby meeting this requirement of Article 5.

Stage three strengthens Article 25 by making expeditious arbitration mandatory rather than subject to mutual agreement and requires the secretariat to establish standard procedures. The secretariat would maintain a roster of qualified arbitrators with experience now sought in panelists, plus a firm understanding of the special economic, commercial and institutional challenges facing LDCs. Again, a decision to implement this proposal would meet Article 25's requirement for mutual agreement to arbitration and to agreed procedures for arbitration. The conciliator's definition of the issues in dispute in stage two would solve the requirement of Article 25.1 that the issues be "clearly defined by both parties".

Stage four replaces Articles 21 and 22, to some extent. Paragraphs 3 and 4 of Article 21 deal with suitable timeframes for compliance. So long as the application of an offending measure is suspended vis-à-vis the LDC complainant, agreeing on the time to be taken to actually remove the measure or bring it into full compliance within the maximum 15-month timeframe of Article 22 should be relatively straightforward.

Stage five is new and will be controversial. It could however, be supported by the reality that the trade impacts of inappropriately applied measures could devastate a business sector in an LDC while having relatively little effect on a developed country. Developed countries have considerable capacity to support their firms injured by inappropriate trade measures, but LDCs do not. The compensation provided by the DSU may rebalance rights and obligations after the fact, but such rebalancing is of no value to an LDC if the relevant sector of its economy has been driven into bankruptcy. In any event, traditional compensation or retaliation does nothing for the firms directly affected as they are always directed to trade in other products. Furthermore, retaliation denies valuable imports to the retaliator, thereby imposing additional losses on the economy of the 'winning' party, losses which LDCs cannot be expected to withstand.

(iii) DSU provisions in support of enhanced procedures

The enhanced procedures suggested above would contribute to the fulfillment of the following 14 provisions of the DSU.

Article 3.2 The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system.

Article 3.3 The prompt settlement of [disputes] is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.

Article 3.7 The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with [WTO obligations] is clearly to be preferred.

Article 3.10 Requests for conciliation and the use of the dispute settlement procedures should not be intended or considered as contentious acts all Members will engage in these procedures in good faith in an effort to resolve the dispute..

Article 4.1 Members affirm their resolve to strengthen and improve the effectiveness of the consultation procedures employed by Members.

Article 4.5 In the course of consultations Members should attempt to obtain satisfactory adjustment of the matter.

Article 4.10 During consultations Members should give special attention to the particular problems and interests of developing country Members.

Article 21.2 Particular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement.

Article 21.7 If the matter [relating to implementation] is one which has been raised by a developing country Member, the DSB shall consider what further action it might take which would be appropriate to the circumstances.

Article 21.8 If the case is one brought by a developing country Member, in considering what appropriate action might be taken, the DSB shall take into account not only the trade coverage of measures complained of, but also their impact on the economy of developing country Members concerned.

Article 24.1 In all stages of dispute settlement procedures involving a [LDC] Member, particular consideration shall be given to the special situation of [LDC] Members.

Ibid Members shall exercise due restraint in raising matters under these procedures involving a [LDC] Member.

Ibid If nullification or impairment is found to result from a measure taken by a [LDC] Member, complaining parties shall exercise due restraint in asking for compensation or seeking authorization to [retaliate].

Article 24.2 [if consultations fail to resolve a matter involving a LDC Member] the Director- General or the Chairman of the DSB shall, upon request by a [LDC] Member offer their ['good offices'] with a view to assisting the parties to settle their dispute, before a request for a panel is made.

Article 25.1 Expeditious arbitration within the WTO as an alternative means of dispute settlement can facilitate the solution of certain disputes concerning issues that are clearly defined by both parties.

Article 27.2 The Secretariat shall make available a qualified legal expert from the WTO technical cooperation services to any developing country Member which so requests. This expert shall assist the developing country Member in a manner ensuring the continued impartiality of the Secretariat.

Although most of the above quoted provisions are hortatory, they do provide positive guidance to diplomatic settlement of disputes and therefore are relevant to the proposed enhanced procedures as the primary objective of the enhanced procedures is to reach a mutually agreed resolution of a matter in dispute.

Part one of this paper argued in favour of third party arbitration or adjudication rather than reliance on diplomatic means of dispute settlement because diplomatic processes are too easily influenced by the relative economic size and strengths of the parties. It did however, note that the existence of third party arbitration that would apply if negotiations were to fail would induce parties to resolve their differences at an early stage. Furthermore, the considerable amount of jurisprudence that has already been developed under the DSU should provide ample assistance to the parties to anticipate what the outcome of arbitration will likely be.

(iv) The proposed improvements and extensions in consultations are

desirable

Some commentators have noted that some Members are using the consultation process as a sort of pre-trial discovery mechanism. A former Director of the WTO Legal Affairs Division advocates resistance to such use of consultations.

> The consultation process is a political process and should be divorced from the more legalistic panel and appeals process. Indeed, if there are improvements to be made in respect of consultations, they should be in the direction of improving the possibility of mediation by a third-party during the consultations in order to promote settlements.[42]

Consultations are the least adversarial approach to dispute settlement and, if a solution is found, they may well improve bilateral relations between the consulting Members rather than straining them as could be the case in adversarial proceedings. Consultations are confidential, engaging neither the secretariat nor the DSB. They may serve a multiplicity of functions, such as "[encouraging] extended co-operation among all WTO Members in seeking a positive resolution of their disputes, through mutual agreement, in a manner which can be less time-consuming, cheaper and more satisfactory for long-term bilateral trade relations than subjecting each and every issue to the scrutiny of hard law." (Footer 2000, p.63)

The 'good offices' provisions of the DSU and GATT 1947 have been very much underused. First use under the GATT 1947 was in 1977, and the facility was invoked a further four times between 1997 and 1993. (Ibid) In two of the cases consultations failed and panels were established. The facility has not been used under the WTO.

(v) The scope of damages by or to LDC Members does not warrant complex procedures

The trade and economic impact of a measure in dispute will certainly be important, possibly devastating, to the LDC party, but modest for the developed country party as the actual trade impact of measures involved in disputes likely to be brought by or against LDC Members will almost certainly be small relative to the total trade of a developed country party to the dispute. The panel/AB procedures of the DSU are both too cumbersome and too costly to warrant their use for small volumes of trade.

One commentator (Footer 2000) has proposed 'small claims" proceedings for developing country Members so that cases involving less than US$1 million of exports would follow a 'light' procedure engaging a single panelist who would complete the work in three months (presumably in addition to the usual 60-day consultation period and a suitable period of time for implementation).

India has proposed the adoption of *de minimus* levels to justify a complaint by a developed country Member against a developing country Member:

> In cases, where a developed country is the complainant and a developing country is the respondent, the developed country should acquire the right to initiate

[42] "The WTO Dispute Settlement System", William J. Davey, *Journal of International Economic Law* (2002) pages 15-18.

> dispute settlement action against the developing country, only if it is able to demonstrate that the alleged violation of a provision of a covered agreement by a developing country causes, to the developed country, trade impairment or trade loss above a threshold or *de minimus* level. . . . By adopting this approach it would be possible to ensure that developed countries do not raise disputes against developing countries unless the measure taken by the developing country is demonstrated to have a significant impact on the trade of the developed country.[43]

Such a *de minimus* level would not, of course, apply to disputes raised by LDC Members. LDC Members' use of the enhanced procedures for disputes affecting any amount of trade would be important for the LDC complainant and reliance on the procedures would be much less costly for the parties to the dispute as well as to the WTO, and would not add to what are already considerable pressures on the DSU system, in particular on the panelists and members of the AB.

[43] WT/GC/W/108 13 November 1998, Concerns Regarding Implementation of Provisions Relating to Differential and More Favourable Treatment of Developing and Least-developed Countries in Various WTO Agreements, Communication from India

Annex 1

Article XXII - *Consultation*

1. Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement.

2. The CONTRACTING PARTIES may, at the request of a contracting party, consult with any contracting party or parties in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1.

Article XXIII - *Nullification or Impairment*

1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of

(a) the failure of another contracting party to carry out its obligations under this Agreement, or
(b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or
(c) the existence of any other situation,

the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.

2. If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the difficulty is of the type described in paragraph 1(c) of this Article, the matter may be referred to the CONTRACTING PARTIES. The CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate. The CONTRACTING PARTIES may consult with contracting parties, with the Economic and Social Council of the United Nations and with any appropriate inter-governmental organization in cases where they consider such consultation necessary. If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances. If the application to any contracting party of any concession or other obligation is in fact suspended, that contracting party shall then be free, not later than sixty days after such action is taken, to give written notice to the Executive Secretary to the Contracting Parties of its intention to withdraw from this Agreement and such withdrawal shall take effect upon the sixtieth day following the day on which such notice is received by him.

Annex 2 -- The WTO Panel Process

The various stages a dispute can go through in the WTO. At all stages, Members in dispute are encouraged to consult each other in order to settle “out of court”. At all stages, the WTO Director General is available to offer his good offices, to mediate or to help achieve a conciliation.

Note: some specified times are maximums, some are minimums, some are binding, some not.

60 days	**Consultations** Art. 4	**During all stages** good offices, conciliation or mediation (Art.5)	
by 2nd DSB mee	**Panel established** by DSB (Art.6)		
0-20 days 20 days (+ 10 if asked to pick pa	**Terms of reference** (Art.7) **Composition** (Art.8)	Note: panelists may be selected (panel composed) up to about 30 days after DSB's decision to establish a panel	
	Panel examination Meetings with parties (Art.12) and third parties (Art.10)	**Expert review group** Art.13; Appendix 4)	
	Interim review stage Descriptive part of report sent to parties for comment (Art.15.1) Interim report sent to parties for comment (Art.15.2)	**Review meeting with panel** (Upon request) (Art.15.2)	
6 mos. from pan composition 3 months if urge	**Panel report** issued to parties (Art.12.8; Appendix 3 par 12(j))		
up to 9 mos from panel's establishment	**Panel report** circulated to DSB (Art.12.9; Appendix 3 par 12(k))	**Appellate review** if requested (Art.16.4 & 17)	max 90 days
60 days for panel report, unless appealed	**DSB adopts panel/AB report(s)*** including any changes to panel report made by appellate report, (Art.16.1, 16.4 & 17.14)	. . 30 days for appellate report	
"Reasonable period of time" determined by: member proposes, DSB agrees; or parties in	**Implementation** report by losing party of proposed implementation within reasonable period of time (Art.21.3)	**Dispute over implementation:** p (Art. 21.5)	90 days

dispute agree; or arbitrator (approx 15 months if by arbitrator)

In cases of non-implementation
parties negotiate compensation pending full implementation (Art.22.2)

30 days after "reasonable per expires

Retaliation
if no agreement on compensation, DSB authorizes retaliation pending full implementation (Art.22)
Cross-retaliation: same sector, other sector, other agreement (Art.22.3)

Possibility of arbitration on level of suspension procedures and principles of retaliation (ART.22.6 & 22.7)

* Note: Total time for adoption is usually up to 9 months (no appeal) or 12 months (with appeal) following establishment of panel (Art.20).

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