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ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION

WTO AS A FRAMEWORK AGREEMENT AND CODE OF CONDUCT FOR THE WORLD TRADE

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WTO AS A FRAMEWORK AGREEMENT AND CODE OF CONDUCT FOR THE WORLD TRADE

I. INTRODUCTION

1. At the Thirty-Fourth Session of the AALCO (1995) held at Doha, Qatar, the item "WTO as a Framework Agreement and Code of Conduct for the World Trade" was for the first time introduced in the Agenda of AALCO. Thereafter, this item continued to remain on the agenda of the Organization and was deliberated upon during the subsequent sessions - Thirty-Fifth Session (1996) to Forty-Sixth Session (2007). At these sessions, the Secretariat was directed to monitor the development related to the WTO, particularly the relevant legal aspects of dispute settlement mechanism.[1]

2. In fulfillment of this mandate, the Secretariat had been preparing reports and presenting it to the Member States for their consideration and deliberation. In furtherance of its work programme, the AALCO in cooperation with the Government of India also convened a two-day seminar on 'Certain Aspects of the functioning of the WTO Dispute Settlement Mechanism and other Allied Matters' at New Delhi (1998). Further, at the Forty-Second Session held in Seoul (2003), the Secretariat presented a Special Study on 'Special and Differential Treatment under WTO Agreements'.

4. At the Forty-Sixth Session held in Cape Town, South Africa (2007), the Secretariat provided an overview of the post Hong Kong Ministerial Conference developments, with special emphasis on the impending issues in the negotiation on Agriculture and Non-Agriculture Market Access (NAMA) and Special and Differential Treatment. The Report also covered the Recommendations of the Task Force on Aid for Trade and progress in the review process of the Understanding on Rules and Procedures Governing the Settlement of Disputes. In that Session, the Organization directed the Secretariat to "continue to monitor and report on the negotiations under the Doha Development Round, as well as, the outcome of the review process concerning the WTO Dispute Settlement Understanding".[2]

5. As mandated, this report provides an updates on the Doha Development Round of Negotiations with focus on the negotiation on Agriculture, Non-Agriculture Market Access (NAMA) and the various proposals submitted for the Review of the Dispute Settlement Understanding.

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[1] Thirty-eight AALCO Member States are Members of WTO. They are: Arab Republic of Egypt, Bahrain, Bangladesh, Brunei Darussalam, Botswana, Cameroon, Cyprus, Gambia, Ghana, India, Indonesia, Japan, Jordan, Kenya, Kuwait, Malaysia, Mauritius, Mongolia, Myanmar, Nepal, Nigeria, Oman, Pakistan, People's Republic of China, Philippines, Qatar, Republic of Korea, Saudi Arabia, Senegal, Sierra Leone, Singapore, South Africa, Sri Lanka, Tanzania, Thailand, Turkey, Uganda, and United Arab Emirates.

[2] AALCO/46/CAPE TOWN/SD/RES.14

II. DEVELOPMENTS IN THE DOHA ROUND OF NEGOTIATIONS

6. It may be recalled that at the Doha Ministerial Conference (2001), the Ministers had agreed to launch a new round of negotiations, including a review of the existing agreements. In the Doha Ministerial Declaration, the Ministers agreed to undertake broad and balanced Work Programme incorporating an expanded negotiating agenda. The Work Programme for negotiation as set out by the Declaration involved a wide range of issues such as agriculture, services, implementation-related issues and concerns, intellectual property rights, environment, market access, clarification of trade rules etc. Added to these are the four 'Singapore Issues'- investment, competition policy, government procurement and trade facilitation, which were finally dropped, except for trade facilitation, from the Doha Agenda at the Cancun Ministerial Conference 2003.

7. The Fifth Ministerial Conference of the WTO held in Cancun in 2003, after intensive negotiations on Agriculture, NAMA, Development issues, and other issues, failed to adopt the Cancun Ministerial Declaration due to differences in interests dividing the developed and developing Members. The major stumbling block was the deadlock in negotiation of Agriculture and NAMA. The major breakthrough after Cancun failure came in the form of 'July 2004 Decision', which among others adopted a framework for the negotiation of agriculture. The 'July 2004 Decision' also adopted 'not so specific' modalities for the negotiation of NAMA. However, the July 2004 Decision only laid down the basic pillars and a 'framework' for conducting future talks, and negotiations on modalities of substance, was left to be determined during the Sixth Ministerial Conference 2005 held in Hong Kong.

8. During the 2005 WTO Ministerial Conference, the most contentious issues before Ministerial Conference were the negotiations on Agriculture and Non-Agriculture Market Access (NAMA). The major outcome of the Ministerial Declaration *inter alia* were: elimination of agriculture export subsidies by 2013 and elimination of cotton export subsidies by 2006; reduce industrial tariff on the basis of a 'Swiss formula,' with an unspecified number of coefficients; duty and quota-free access for at least 97 percent of products originating from the least developed countries by 2008; and Trade Related Intellectual Property Rights (TRIPS) and Public health.

9 Subsequently, the Ministers had to suspend the negotiations at the end of July after an attempt to break the deadlock failed. The Director General reported to the General Council of the WTO that gaps remained too wide and the situation had become very serious. He noted that without the modalities in Agriculture and NAMA, it is not possible to finish the Round at the end of 2006. On 7 February 2007, after much effort, the negotiations were resumed fully across the board.[3]

11 However, even after two years, the Doha Round of Negotiations has not been finalized. Problems still exist in reaching a consensus on negotiation on Agriculture and NAMA. In 6 December 2008, the Chairmen of both the Agriculture and NAMA

[3] Report by the Chairman of the Trade Negotiations Committee, 7 February 2007, WTO General Council.

negotiations circulated revised draft texts of Modalities. The current discussion is based on these negotiating texts.

A. AGRICULTURE NEGOTIATIONS

12. On 6 December 2008, Ambassador Crawford Falconer, chairperson of the agriculture negotiations, circulated his latest revised draft "modalities" text.. This was based on consultations since September, which followed the "July 2008 package" talks to try to agree on "modalities" in agriculture and non-agricultural market access. Although the July meetings ended in deadlock on some issues, gaps were narrowed on several others. The draft "modalities" contain formulas for cutting tariffs and trade-distorting subsidies and related provisions. Previous versions were circulated on 10 July, 19 May and 8 February 2008

13. These in turn were revised from a version circulated in July and August 2007 and the chair's 16 working documents circulated since then. By July 2008, the changes were the result of roughly 240 hours of negotiations organized by the chairperson since September 2007, the most intensive and productive phase in the Doha Round since it began in 2001 and since the agriculture negotiations began in March 2000. Delegations also held lengthy negotiations among themselves.

14. These would have the US cut its overall trade-distorting subsidies by 70 percent, with the EU making cuts of 80 percent,. However, along with other WTO Members, both would be allowed to maintain 'green box' subsidies with no cap or reduction commitments on this category of payments.[4]

15. Developed countries' top-level tariffs (those above 75 percent) would be subject to a 70 percent cut – although numerous opt-out clauses, such as those for developed and developing countries' 'sensitive products', are expected to mean that tariffs on key products such as beef, dairy or sugar are likely to remain high. Developing countries would have to make a 46.7 percent cut in tariffs over 130 percent.

16. The number of 'special products' that developing countries would be allowed to slate for gentler tariff cuts on the basis of food security, livelihood security and rural development criteria also reflect the figures discussed in July. Developing countries would be allowed to select 12 percent of tariff lines as 'special'; up to 5 percent of tariff lines could be exempt from any cuts; and the overall cut for a country's special products should be 11 percent.

17. The revised text and accompanying documents put forward some new suggestions on the 'special safeguard mechanism' (SSM) that developing countries can use to raise tariffs temporarily in the event of import surges and price depressions – the issue widely seen as the main stumbling block to agreement in July. However, they also revisit the issue of the permitted number of 'sensitive products' that countries would be allowed.

[4] Bridges Weekly Trade News Digest, Volume 12, Number 42

18. Despite WTO Director General's Pascal Lamy's suggestion that cotton and the SSM are the two key outstanding agriculture issues, along with sector-specific liberalistion initiatives in the industrial goods talks, many believes acknowledged that the sensitive product issue was also critical.

19. Similarly, decades-long disputes over bananas and sugar still have the potential to derail the talks. While Latin American countries seek faster and deeper liberalisation for these and other tropical products, African, Caribbean and Pacific (ACP) group countries seek the opposite, in a bid to preserve the traditional benefits they have received through trade preferences in importing countries (primarily the EU and US). An introductory note to the text from the chair, Ambassador Crawford Falconer, admits that he is "not privy" to all the understandings between parties in this area, and so the text might not fully reflect the actual state of negotiations.

20. The text is also noteworthy in continuing a tendency towards country- and product- specific exceptions that was already evident in earlier drafts, with new opt-outs for a string of both developed and developing countries. Also striking are new flexibilities for net-food importing developing countries (NFIDCs), and proposed disciplines on export restrictions.

Special safeguard mechanism

21. A working document on the special safeguard mechanism contained Falconer's reflections on the ways forward on this issue, and reflected the progress that has been made in the informal consultations he has held with negotiators since September. The text included new options that might allow exporters and developing country importers to move towards agreement: while the former oppose a far-reaching safeguard mechanism, the latter insist it is a vital component of an eventual Doha deal.

22. Particularly controversial has been the issue of when safeguards might be allowed to exceed pre-Doha ceilings, or the maximum permitted 'bound tariffs' that currently apply. The text builds on an informal proposal circulated by the EU in July that sets out a two-tiered approach for doing so: in the chair's latest text, countries would be allowed to impose heavier safeguard duties when import surges are more than 40 percent greater than average levels in the three years beforehand, and slightly lighter safeguard duties when import volumes are more than 20 percent greater.

23. Surges over 40 percent could be countered with safeguard duties that are half of current bound tariffs, while smaller surges over 20 percent could be addressed using safeguards that are one third of current bound tariffs. Countries would alternatively be allowed to impose safeguard duties that are 12 percentage points above existing bound tariffs in the event of a large surge that is 40 percent above average levels, or 8 percentage points more in the event of a smaller surge that is 20 percent above the average.

24. The safeguard options expressed as a percentage of bound tariffs are more generous than those expressed in percentage point terms, compared to previous texts and proposals, suggesting that the revised draft would provide relatively more flexibility to developing countries with high tariff barriers.

25. The chair's working document also proposed that calculations of average import levels in the three-year base period should exclude past months in which the safeguard was applied, unless import levels were in fact above average during these months – a key exporter demand. Importing countries nonetheless remain sceptical about the value of including this requirement.

26. In another new development, the text proposed various options for addressing perishable seasonable products. Countries such as Uruguay have reportedly expressed concern that safeguards could unfairly block exports of products such as fruit and vegetables. For safeguards that breach pre-Doha bindings, it also sets out various ways to limit consecutive application of the safeguard in a given time period, and to restrict the products on which safeguards are applied to 2.5 percent of tariff lines per year.

Sensitive products

27. While the draft text proposed that countries be allowed to designate 4 percent of farm tariff lines as sensitive, hence slating these for gentler tariff cuts in exchange for expanded import quotas, it also noted that some countries have demanded 6 and 8 percent respectively. Falconer proposed two options for accommodating the Canadian concerns, which would both involve compensating for the larger number of sensitive products by expanding import quotas on various sensitive product tariff lines in different ways.

28. While a special exception for Iceland, Japan, Norway and Switzerland would allow these countries to maintain tariffs at above 100 percent for products that are not designated as sensitive, Falconer's new text would now limit this to 1 percent of such tariff lines. Exporters have expressed concern that their market access gains from the Doha Round could be severely curtailed if importing Members are allowed substantial flexibility on sensitive products.

Tariff simplification

29. Exporters and importers have also fought over the extent to which specific tariffs - expressed as a unit value rather than a percentage – should be converted into ad valorem equivalents, with the former group of countries seeking rapid and complete conversion of all tariff lines to simplified forms. While a methodology for tariff simplification has been agreed, high prices for farm goods have subsequently diminished the potential gains from simplification.

30. Exporters have recently tabled compromise proposals that would allow importers to maintain complex tariffs until price decreases mean that the tariffs charged to

importers would in fact decrease when tariffs are converted to the simpler format. Falconer draws on these proposals in his recent text, which sets out a phased timetable for simplification, and with the possibility of some tariffs being left in their more complex form at the end. The new text also includes an opt-out clause that could allow the EU to convert only 85 percent of tariffs to ad valorem equivalents, compared with 90 percent for all other Members.

In-quota tariffs

31. Developed countries would have to reduce in-quota tariffs by 50 percent, or to a ten percent threshold, on the same time-frame as quota expansions. A new requirement stipulates that the maximum in-quota tariff on day one of the implementation period is 17.5 percent. If tariffs are below 5 percent, they must be reduced to zero by the end of the first year of the implementation period – although Switzerland is granted a special exception to this rule for four particular tariff lines. Developing countries, and those classed as small vulnerable economies or recently-acceded Members, are given special treatment, with gentler cuts on in-quota tariffs and additional flexibilities for special products.

Special Agricultural Safeguard (SSG)

32. The SSG, which has been used primarily by developed countries since the end of the Uruguay Round, will be phased out after seven years. Exporters had wanted it eliminated immediately, but importing countries had insisted that it be maintained. The text proposes that the SSG apply only to one percent of tariff lines during the implementation period, with particular requirements for sensitive products and in-quota tariffs.

Cotton

33. WTO Director-General Pascal Lamy has written to delegates underscoring that progress on cotton is a prerequisite for the planned mini-ministerial meeting. In the absence of counter-proposals, the text still reflects the cuts put forward by the 'cotton 4' African producers (Benin, Burkina Faso, Chad and Mali).

Special and differential treatment

34. The new draft is notable for the number of country-specific exceptions and opt-out clauses it now contains. In addition to the proposed exceptions described above for the EU, Japan, Switzerland and Norway, the draft already includes a country-specific base period for calculating reductions for US 'blue box' subsidies, leading one Member to query whether it effectively provides 'special and differential treatment for developed countries'.

35. However, the draft also provides country-specific exclusions for a number of developing countries as well. The latest revision contains specific arrangements for Cuba,

Suriname and Venezuela, amongst others; exclusions for the latter country, which is allowed to undertake lower tariff cuts if the overall average would otherwise exceed 30 percent, have reportedly provoked concern amongst neighbouring Paraguay and Uruguay, who fear that they may lose market access opportunities as a result.

B. NON-AGRICULTURE MARKET ACCESS (NAMA) NEGOTIATIONS

36. Non-Agriculture Market Access (NAMA) deals with reducing tariffs and non-tariff barriers (NTBs) on industrial and primary products under the General Agreement on Tariffs and Trade (GATT). It covers basically trade in goods which are not food stuffs. The current negotiation was started when Ministers agreed to start negotiations to further liberalize trade in non-agricultural goods and launch tariff-cutting negotiations on all non-agricultural products. To this end, a Negotiating Group on Market Access was created in 2002. The Negotiating Group was to establish full modalities for the Non-Agricultural Market Access (NAMA) negotiations, which covers tariff reductions, non-tariff barriers, special and differential treatment for developing countries and the possible effects of the reduction in tariffs on the development policies of some countries and on their fiscal revenues, etc.

37. So far, substantial work has been undertaken by the Negotiating Group on Market Access and is progressing towards achieving an agreement on negotiating modalities. However, the Negotiating Group has not been able to reach consensus on many issues and there still exist divergences which are too great to bridge. Additional negotiations are required to reach agreement on the specifics of some of these elements. These additional issues relate to the formula, the issues concerning the treatment of unbound tariffs in indent two of paragraph 5, the flexibilities for developing-country participants, the issue of participation in the sectorial tariff component and the preferences.

38. On 8 February 2008, the Chairman of the NAMA negotiating group released the revised draft negotiating text of Modalities to focus further discussions towards modalities in this area of the Doha Development Agenda (DDA). The new text was a product of bilateral and plurilateral consultations of the last few weeks and builds upon the past years of negotiation, his July 2006 text "Towards NAMA modalities", and the Hong Kong Ministerial Declaration. Further, on 6 December 2008, the Chairman circulated a revised draft "modalities" text building on the versions of 10 July, 19 May and 8 February 2008. Brief highlights of the revised text are discussed below.

i. Revised Chairman's draft "modalities" Text on NAMA

39. Ambassador Luzius Wasescha, chairperson of the non-agricultural market access (NAMA) negotiating group, on 6 December 2008, circulated a revised draft "modalities" text building on the versions of 10 July, 19 May and 8 February 2008. The new NAMA modalities text, issued by the Chairman, builds upon the previous three texts and provides

further details and wider options to negotiate a balanced final package for the full modalities.[5] The highlights of the revised text are provided below:

Formula and flexibilities

40. It may be recalled that there was consensus regarding the formula for tariff reductions for industrial products. The consensus was for using a "simple Swiss" formula with separate coefficients for developed or for developing country members. A Swiss formula produces deeper cuts on higher tariffs.[6] As regards the coefficients the Chair's draft modalities proposed coefficients 8 for developed members and 20, 22 and 25 for developing. In other words, the developing countries were given options that will apply according to the scale of the flexibilities they choose to use. The lower the coefficient the higher the flexibilities and vice versa.[7] The use of the different coefficients would depend on three new options:

- A member choosing to apply the lowest coefficient, 20, would be entitled to make smaller or no cuts in 14 percent of its most sensitive industrial tariff lines, provided that these tariff lines do not exceed 16 percent the total value of its NAMA imports. These tariffs would be subject to cuts equal to half of the agreed formula reduction. As an alternative, the member can keep 6,5 percent of its tariff lines unbound or exclude them from tariff cuts, provided they do not exceed 7,5 percent of the total value of its NAMA imports
- A member choosing to apply a coefficient of 22 would be entitled to make smaller or no cuts in a smaller number of products: up to 10 percent of its most sensitive industrial tariff lines from the full effect of the formula, provided that these tariff lines do not exceed 10 percent of the total value of its NAMA imports. These tariffs would be subject to cuts equal to half of the agreed formula reduction. As an alternative, the member can keep 5 percent of its tariff lines unbound or exclude them from tariff cuts, provided they do not exceed 5 percent of the total value of its NAMA imports.
- A member choosing to apply the highest coefficient, 25, will have to apply it on all its products without exceptions.

41. The tariff reductions will be implemented gradually over a period of five years for developed members and ten years for developing members, starting 1 January of the year following the entry into force of the Doha results.

42. The Chairman's draft text also provides for country-specific provisions which give additional flexibilities. For example,

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[5] *Fourth Revision of Draft Modalities for Non-Agricultural Market Access*, WTO Negotiating Group on Market Access TN/MA/W/103/Rev.3, 6 December 2008

[6] The following formula shall apply on a line-by-line basis: $t_1 = \{a \text{ or } (x \text{ or } y \text{ or } z)\} \times t_0 / \{a \text{ or } (x \text{ or } y \text{ or } z)\} + t_0$ where, t_1 = Final bound rate of duty; t_0 = Base rate of duty; a = 8 = Coefficient for developed Members; x = 20, y = 22, z = 25 (to be chosen as provided in paragraph 7) = Coefficients for developing Members.

[7] A higher coefficient, as envisaged for developing members, means lower reductions in tariffs.

- South Africa, Botswana, Lesotho, Namibia and Swaziland, members of the South African Customs Union (SACU). They would have additional flexibilities still to be negotiated
- Argentina, Brazil, Paraguay and Uruguay, concerning the calculation of the value of trade limitation affected by the flexibilities. The total value of Brazil's non-agricultural imports would apply.
- Oman. Because of its status of Recently Acceded Member and membership of the Gulf Cooperation Council, shall not be required to reduce any bound tariff below 5 percent after applying modalities.

43. Recently acceded members (RAMs) such as Albania, Armenia, Cape Verde, The Former Yugoslav Republic of Macedonia, the Kyrgyz Republic Moldova, Mongolia, Saudi Arabia, Tonga, Viet Nam and Ukraine shall not be required to undertake tariff reductions beyond their accession commitments. RAMs such as China, Chinese Taipei, and Croatia subject to the formula would have an extended implementation period of three years to phase in their Doha commitments.

Deeper tariff reduction or elimination for certain Sectors

44. The Chair's text notes that further work is still required in the so-called "sectoral initiative". Some members have been engaged in negotiations which would envisage undertaking deeper tariff reductions in some non-agricultural sectors.[8] The focus is that the tariffs in that particular sector could be reduced or even brought down to zero. However the nature of participation in this initiative is voluntary. There is still no consensus on how and when to define the commitment of members to participate in sectorals without altering the non-mandatory character of these negotiations. Such negotiations would require a "critical mass" of countries joining the initiative for it to take off. After the adoption of the modalities, members choosing to join would have 45 days to indicate their participation in the negotiations if they have not done so by the establishment of modalities.

Special modalities for LDCs and other developing members (around 75)

45. The 32 poorest countries (Least-developed countries or LDCs) are exempt from tariff reductions; there are special provisions for approximately 31 SVEs and for 12 developing countries with low levels of binding.[9] As a result, relatively weaker developing economies will retain higher average tariffs and greater flexibility on how they structure their tariff schedules. But they will nevertheless contribute to the negotiations by significantly increasing the number of bindings and reducing the

[8] There are 14 sectors currently under consideration: Automotive and related parts; Bicycles and related parts; Chemicals; Electronics/Electrical products; Fish and Fish products; Forestry products; Gems and Jewellery products; Raw materials; Sports equipment; Healthcare, pharmaceutical and medical devices; Hand tools; Toys; Textiles, clothing and footwear; and Industrial machinery.

[9] Other weak Members countries are those having a share of less than 0.1 percent of world NAMA trade for the reference period of 1999 to 2001 or best available data as contained in document TN/MA/S/18 may apply the following modality of tariff reduction instead of the formula modality which is contained in paragraphs 5, 6 and 7 above.

difference between bound rates and those actually applied and binding a high number of their tariffs. Solutions are also proposed for members with preferential access to developed country markets who would see their preferences erode because of the overall tariff reductions. In addition, there are provisions for other developing members who do not enjoy preferential access and would be disproportionably affected by such a solution (Bangladesh, Cambodia, Nepal, Pakistan and Sri Lanka).

Non-tariff barriers (NTBs)

46. Initiatives in this area shall aim to reduce or eliminate, as appropriate, NTBs, in particular on products of export interest to developing Members and to enhance market access opportunities achieved through these modalities. NTBs, restrictive measures unrelated to customs tariffs that governments take (such as technical, sanitary and other grounds), are also part of the negotiation. Proposed legal texts have been submitted by members on some of these measures, and are compiled in the Chair's text. The Chair noted that a decision on whether these proposals move forward to a text-based negotiation would need to be taken at the time of final modalities.

III. PROGRESS IN THE REVIEW OF THE DISPUTE SETTLEMENT UNDERSTANDING (DSU)

47. It may be recalled that a review of the DSU was initiated in the Dispute Settlement Body (DSB) of the WTO in 1997,[10] which later become incorporated into the Doha Round of Negotiation during the Fourth Ministerial Conference of the WTO, held in Doha, Qatar from 9 to 14 November 2001. The Ministers agreed that the negotiation process on improvements and clarifications of the DSU shall take place in the Special Session of the DSB and shall complete the review not later than May 2003. The Special Session of the DSB was established and number of formal and informal meetings were held. At these meetings, the work progressed from a general exchange of views to a discussion of conceptual proposals put forward by Members to an issue-by-issue thematic discussion.

48. The General Council at its meeting on 24 July 2003, agreed to extend the negotiations from 31 May 2003 to 31 May 2004. The work was not completed because of the failure of the Cancun Ministerial Conference. However, there was an agreement among Members that the Special Session needs more time to complete its work, on the understanding that all the existing proposals would remain under consideration and bearing in mind that these negotiations are outside the single undertaking. Accordingly, it was suggested that action be taken by the Trade Negotiation Committee and/or the General Council as appropriate, for the continuation of work in the Special Session. On 1

[10] It may be recalled that while adopting the 'Understanding on Rules and Procedures Governing the Settlement of Disputes' (hereafter "DSU"), the Ministerial Conference in 1994 had agreed through a Ministerial Decision, for a "complete review of the dispute settlement rules and procedures under the World Trade Organization within four years after the entry into force of the Agreement Establishing the World Trade Organization and to take a decision on the occasion, modify or terminate such dispute settlement rules and procedure."

August 2004, as part of the "July 2004 Decision", the General Council adopted this recommendation.

49. At the Hong Kong Ministerial Declaration, the Ministers took note of the progress made in the Dispute Settlement Understanding negotiations as reflected in the report by the Chairman of the Special Session of the Dispute Settlement Body to the Trade Negotiations Committee (TNC) and direct the Special Session to continue to work towards a rapid conclusion of the negotiations not later than December 2006. Since the Conference, the work in the Special Session of the DSB has continued to be primarily based on the efforts by Members to work among themselves, with a view to presenting improved draft legal text to the Special Session.

50. Some of the major issues highlighted in the proposals submitted by the Member States for the DSU Review are reflected below.

1. CONSULTATION

Notification

51. Under the WTO DSU, once the parties to the dispute have reached solution mutually agreed in the consultation, it shall be notified to the DSB and the relevant Councils and Committees, where any Member may raise any point relating thereto.[11] This is designed to provide Members with relevant information and opportunities for ensuring their rights and benefits may not be adversely affected by any solution or arrangement reached by other Members. However, in practice, it has not been strictly followed.

52. To remedy this situation, the WTO Members have proposed that any mutually agreed solution reached in consultation should be notified to the DSB within a prescribed time limit, for example, within two months after the amicable settlement has been concluded. It should be made mandatory, not discretionary.[12] Further, it was proposed that a sunset clause could be introduced to the effect that a request for consultations lapses after one year, and if the parties want to peruse the matter again, it could do so by requesting for new consultation.

Time-period for Consultation

53. Consultation is a necessary step before the commencement of the panel proceedings. This means the parties can request the establishment of the panel only if the consultations fail to settle a dispute within 60 days after the date of receipt of the request for consultations (Art. 4.7). However, in practice, this 60 days period is often utilized as an

[11] Article 3.6 of the DSU provides that mutually agreed solutions arrived at in the consultation stage shall be notified to the DSB.

[12] EC, HK-China, Japan, Singapore, Switzerland (*Review of the DSU*, Compilation of Comments Submitted by Members–Rev. 3, Job. No. 6645, para.47-50). Cuba, Honduras India, Jamaica, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe, TN/DS/W/18.

effective tool to delay the settlement of the dispute.[13] Thus, some Members have proposed for shortening this time-period, so that a Member can proceed to the next stage (establishment of the panel) of the dispute settlement process. For this, the time period could be reduced from 60 to 30 days in normal case, with an option for the developing country Members to expand the time-limit upto 30 days (i.e., 60 days maximum for developing countries).[14] It was also suggested to include a footnote should be inserted at the end of this paragraph stating that: *Where one or more of the parties is a developing-country Member, the time period established in paragraph 7 of Article 4 shall, if the developing-country Member request, be extended by up to 30 days.*[15]

Litigation Costs

54. Another suggestion made by a Group of developing country Members and the LDC Group at the WTO is the amendment of Article 4, paragraph 10: "During consultations Members *shall* ~~should~~ give special attention to *developing-country Members'* particular problems and interests of ~~developing country Members~~ *in the following manner*:

> *(a) if the complaining party is a developed country Member and if it decides to seek establishment of a panel, it shall explain in the request for establishment of panel as well as in its submissions to panel and the Appellate Body as to how it had taken into account or paid special attention to the particular problems and interests of the developing country Member concerned;*
>
> *(b) if the developed country Member is a defending party, it shall explain in its submissions to the panel as to how it had taken into account or paid special attention to the particular problems and interests of the developing country Member concerned;*
>
> *(c) the Panel, while adjudicating the matter referred to it, shall make a ruling on this issue.*[16]

Amend paragraph 10: During consultations Members should give special attention to the particular problems and interests of developing countries Members *especially those of least-developed country Members"*.[17]

2. GOOD OFFICES, CONCILIATION AND MEDIATION

55. Resort to Good Offices, Conciliation and Mediation (Article 5), as an alternative dispute settlement methods, were introduced in the DSU taking into consideration the special needs of the developing country Members. However, ever since the inception of

[13] This issue was highlighted in *EC – Trade Description of Scallops* (WT/DSB/M/6), where Canada requested for the establishment of the panel prior to the expiration of the 60 days consultation period.
[14] WT/MIN(01)/W/6, para. 8.
[15] *Specific Amendments to the DSU – Drafting inputs from China*, TN/DS/W/51/REV.1, 13 MARCH 2003.
[16] *DSU Proposals: Legal Text, Communication from India on behalf of Cuba, Dominican Republic, Egypt, Honduras, Jamaica and Malaysia* TN/DS/W/47, 11 February 2003.
[17] *Negotiations on the DSU, Proposal by the LDC Group*, TN/DS/W/17, 9 October 2002.

the WTO, this alternative has never been put to use either by developing or least-developed Members. The main reason for the disuse of this provision was that it is a non-mandatory obligation. Hence, it was suggested that this provision should be mandatory in disputes involving developing Members and a time limit be fixed for the completion of the process.[18] Besides, it is suggested that the process under Article 5 should be allowed to continue parallel during the panel process.[19]

3. PANEL PROCEEDING

Establishment of the Panel

56. There is ambiguity as regards the timing of the establishment of the panel in Article 6.1 of DSU. While some Members affirm that it should be interpreted to mean the second DSB meeting at which the panel is established, others maintain that the DSB meeting at which the panel shall be established should not have to follow the first meeting at which the panel request is made.

57. To clarify this ambiguity in the language, it is proposed that more time should be provided between the first meeting where the request is made and the second meeting at which the Panel is actually established.[20] This would provide more time towards reaching a mutually acceptable solution. However, some other members felt that panel should be established irrespective of the time difference between the first and the second meeting.[21] It was also suggested that "*the DSB shall establish a panel* at the meeting at which the request first appears as an item on the DSB's agenda, unless the DSB decides by consensus not to establish a panel".[22]

Terms of Reference (Art. 6.2 and Art. 7)

58. The request for the establishment of a panel should identify the specific measures at issue and should provide a brief summary of the legal basis of the complaint. However, the approaches of the Members differ widely in this regard. While some panel requests provide sufficient details, other requests tend to be highly imprecise. The absence of specificity and imprecision results in protracted arguments and counter-arguments which can lead to lengthen the process.

59. Therefore, it was suggested by some Members that the request should be accompanied by a summary, which could serve to identify the specific measure at issue and

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[18] *Jordan's Contributions Towards the Improvement and clarification of the WTO DSU*, TN/DS/W/43, 28 January 2003.

[19] See *Communication from Paraguay* (TN/DS/W/16), *Thailand* (Job. No.6645, para.78 and 80), and *The Separate Custom Territory of Taiwan, Penghu, Kinmen and Matsu* (TN/DS/W/36)

[20] *Proposed by Japan and Singapore*. See Job.No. 6645, para. 114-118. See also *Proposal by EC*, TN/DS/W/38.

[21] Interpretation by US, EU and Canada, See Job. No. 6645, para. 114-118

[22] Specific Amendments to the Dispute Settlement Understanding – Drafting inputs from China, TN/DS/W/51/Rev.1, 13 March 2003. See also Proposal of Japan, TN/DS/W/32

the legal basis of the complaint.[23] Japan suggested that there should be a procedure for clarification of the claim of the complainant.[24] Further, the African Group in the WTO felt that the special needs of the developing counties should be reflected in the terms of reference and proposed that it should take into consideration the development perspective.[25]

60. Accordingly as new paragraph 5 was suggested which shall reflect that "the findings of the panels and the Appellate Body, and the recommendations and rulings of the DSB shall fully take into account the development needs of developing and least-developed country Members. The General Council shall review this Understanding every five years in order to consider and adopt appropriate improvements to ensure the achievement of the development objectives of the WTO Agreement."[26] In the cases where a least-developed country Member is party or a third party to any dispute, the panels shall consider and make specific findings on the development implications of the issues raised in the dispute and shall specifically consider any adverse impact that findings may have on the social economic welfare of the least developed country Member. The DSB shall fully take those findings into account in making its recommendations and rulings.[27]

Composition of the Panel

61. Under the present WTO system, the panel is not a permanent body. The panellists are selected from a roster and indicative lists established by the Secretariat. To improve the current functioning of the panel and provide transparency in the selection process, it is suggested by many Members that there should be a standing Panel Body like the Appellate Body.[28] The European Union suggests that this Body could consist of between 15 and 24 members. However, Members are divided over this proposal. Costa Rica expressed its opinion that the right of the parties to dispute to select members of the panel should be preserved.[29] There is also a suggestion for amending paragraph 2 ie, Panel members should be selected with a view to ensuring the independence of the members, *expertise to examine the matter at issue in the dispute*, a sufficiently diverse background and a wide spectrum of experience.[30]

[23] Australia, India and Japan. See Job. No. 6645, para. 106-112
[24] The process should be initiated by the DSB, upon request by either parties to the dispute, facilitated by a representative designed be the DSB and would be completed within a limited time-period. See Job. No. 6645, para.112.
[25] TN/DS/W/42
[26] Kenya, TN/DS/W/42
[27] Haiti, TN/DS/W/37.
[28] EC, Korea and Pakistan, Job. 6645, para. 125, 129 and 131.
[29] Ibid. See also proposal by EC (TN/DS/W/38)

[30] Chile and the US TN/DS/W/89 and W/52; US TN/DS/W/82

4. APPELLATE BODY PROCEEDING

The Number and Term of the Appellate Body

62. There is general feeling among the WTO Members, both developed and developing, that the current seven-member Appellate Body should be expanded.[31] More specifically, Thailand has made a proposal that the members should be increased to fifteen, like that in the International Court of Justice.[32] Further, a group of developing country Members have recommended that the time-period of appointment of the AB members should be increased from the current four-year term (with one reappointed) to a non-renewable fixed term of 6 years.[33]

Functioning of the Appellate Body

63. The US and Chile in a joint proposal have submitted six options aimed at providing parties to the disputes more control over the content of the Appellate Body reports, as well as the course of the dispute settlement proceedings. They are introducing confidential reports to be circulated by the AB to parties prior to issuing the final report; allowing parties to delete by mutual agreement findings in the report that are not helpful or necessary to resolving the dispute; allowing the DSB to only partially adopt a report; providing parties the right to suspend panel or AB proceedings for further negotiations; and providing some form of additional guidance to WTO "judicial bodies" concerning the application and interpretation of WTO law.[34]

64. Malaysia and India have expressed support for this US position. However, Brazil, Canada, the EU, Korea and Switzerland have cautioned that the proposed changes would undermine the independence of the AB, transform the WTO dispute settlement system from litigation towards bilateral settlements, and subvert the predictability and security of the multilateral trading system.

Remand Authority and Separate Opinion

65. Presently, the DSU does not permit the Appellate Body to send a case back to the panel for re-trial based upon a different interpretation of the law or in order to correct a procedural mistake (remand). Instead, the Appellate Body has to decide the case itself. Some Members suggest that a possibility of remand authority for the Appellate Body could be considered if it does not unduly delay the procedure as a whole.[35] However, Costa Rica, though recognizes the difficulties that the AB may face in situations where it has no factual and legal conclusions correctly formulated by the panel, feels that this will cause considerable delay in the procedure and the burden of error committed by the panel

[31] See *Proposals of Japan* (TN/DS/W/22), *Thailand* (TN/DS/W/2) etc.
[32] TN/DS/W/2
[33] Cuba, Honduras, India, Jamaica, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe TN/DS/W/18
[34] TN/DS/W/28
[35] *Proposal of EC, Japan, Norway, Pakistan and Switzerland.* See Job no. 6645, para. 251-255. See also the latest *Proposal by EC* (TN/DS/W/38)

could be transferred to the complainant, who would suffer injury due to the delay in the decision.[36]

66. Another issue highlighted by the Members is that under the present system, opinions expressed in the Appellate Body report by individuals serving on the Appellate Body should be anonymous. This rules out the possibility of expressing dissenting opinion by any AB Member. In this regard, African Group[37] and LDC Members in the WTO has proposed that the DSU should incorporate provisions for expressing separate and dissenting opinion of AB/panel members.

5. IMPLEMENTATION OF THE REPORTS

Determination of reasonable period of time

67. The issue regarding the reasonable period of time (RPT) has centered on the length of the reasonable period of time, determination of the criteria of 'peculiar circumstances' for granting longer RPT, and what is required of a losing party while the reasonable period is underway. A large number of Members, especially developing country Members have proposed various amendment to clarify the ambiguity and some of them relate to provision for consultation during the 'reasonable period of time'; longer reasonable period of time for compliance for developing countries; review of the action taken by the Members in the reasonable period of time is underway etc.[38]

68. A group of Members proposed to amend Article 21 paragraph 2: "It is suggested that the word "should" be replaced by "shall", so as to make this provision mandatory. The utility of the provision could be increased by clarifying the phrase "matters affecting the interests of developing-country Members". It was proposed that:

> (a) this provision, having been placed at the beginning of the long and important Article 21, should be made mandatory, for the panels and Appellate Body to interpret it as an overarching provision in all disputes, involving a developing-country Member as a disputing party;
>
> (b) if the defending party is a developing Member and the complainant, a developed Member,
>
> > (i) RPT: 15 months should be considered as normal RPT and if the measure at issue is change of statutory provisions or change of long held practice/policy (like QRs/BOP), RPT should be two to three years and panels/AB should indicate requirement of more RPT;
> >
> > (ii) 21.5 Procedures: Consultations (i.e., opportunity to defend/explaining actions taken by it to comply or difficulties thereof) should be considered as

[36] *Ibid*, para. 250.
[37] TN/DS/W/42
[38] Bolivia, Canada, Chile, Colombia, Costa Rica, Ecuador, Japan, Korea, New Zealand, Norway, Peru, Switzerland, Uruguay and Venezuela (WT/MIN(01)/W/6).

mandatory; time for completion of 21.5 Panel proceedings should be increased from 90 days to 120 days; and the panel should give all due consideration as any normal panel would give to the particular situation of developing-country Members.

(iii) Filing of status report should be in alternative meetings rather than in every regular meeting.

(c) if the complaint is by a developing Member against a developed Member:

The defending developed-country Member should be given no more than 15 months of RPT in any circumstance; existing 90 days time limit for 21.5 procedures should be observed strictly. In case of delay, it should entail an obligation to compensate for continuing trade losses to the developing-country complainant."[39]

The issue of sequencing between Article 21.5 and Art. 22

69. The problem of conflicting interpretation as regard the relationship between Article 21.5 and Art. 22 procedure ('sequencing problem') was brought out in the *EC – Banana* case. In this case the EC argued that Article 21.5 compliance review should be resorted to before requesting the DSB for suspension of concessions as per Article 22. On the other hand, the US countered that it can request authorisation to suspend concessions within twenty days after the end of the compliance period, without resorting to Article 21.5 compliance review.

70. In order to settle this 'sequencing problem', a large number of WTO Members have individually and jointly proposed that necessary amendments to the relevant articles of the DSU.[40] They also suggested exploring the possibility of introducing a new article, Article 21 *bis* (Determination of Compliance), to address this issue. They propose clarification that compliance panel and appellate proceedings must be complete before the DSB can authorize the 'withdrawal of concessions', which in practice usually amount to the imposition of trade sanctions. At present, this is one of the few issues where all the Members have expressed support.

Compensation (Art. 22.1)

71. A large number of developing country Members have raised the issue of remedies available in case of non-compliance with panel/AB rulings, as the option of compensation is voluntary and retaliation in practice is not available to the developing countries. Jamaica has proposed that compensation, at the request of the successful developing-country Member, should also be available in forms other than increasing tariffs on imported products.[41] Least-developed country Members have suggested that compensation by Members who fail to rectify measures founded to be inconsistent with

[39] Cuba, Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe, TN/DS/W/19.

[40] Ibid. see also WT/MIN(99)/8, TN/DS/W/32.

[41] Jamaica suggest that increased market access in agreed sectors of the developed-country Member as an example of this (TN/DS/W/21).

WTO regulations should be made mandatory by the elimination of the phrase "if so required" from Article 22.2.[42]

72. The African Group and the LDC Members in the WTO have also made a strong case for monetary compensation.[43] This is deemed important for developing and least-developed Members, and for any economy that stands to suffer from the time that an offending measure remains in place.

Determination of suspension of concession

73. Suspension of concession is considered as an exceptional, last resort measure as opposed to the withdrawal of the measure found to be inconsistent with a covered agreement (Art. 3.7, DSU). So there is a need to ensure that the level of suspension is strictly equivalent, *in law and in practice*, to the level of the nullification or impairment of the complaining party in a given case. This is essential for maintaining fairness and the credibility of the WTO dispute settlement system. However, the existing mechanism in the current DSU does not allow the DSB to ensure such equivalence.

74. Philippines and Thailand have proposed that Article 21.7 should be amended in such a way that the level of suspension of concessions shall be strictly equivalent, in law and in practice, to the injury suffered by the complainant. Arbitrators should first determine the level of nullification and impairment accrued before determining the level of suspension and the complaining party should submit a list of concessions it intents to suspend.[44]

Collective Action

75. Though the DSU provides for retaliation in case of non-compliance with the panel/AB report, there exists gross inequality between the developed and developing Members in terms of the ability to retaliate.[45] This has taken away the punitive element from this provision, at least from the point of view of developing Members. A large number of developing country Members, including the African Group and the LDC Members in the WTO, have proposed that in cases where developing Members are the complainant and has to get ultimate relief through retaliation against developed Members, there should be joint (collective) action by the entire membership of the WTO.[46]

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[42] TN/DS/W/17; Similar line of suggestion has expressed by Pakistan, Philippines, Japan, Singapore, EC (WT/GC/W/162 and 314; *Review of the DSU*, Compilation of Comments Submitted be Members – Rev. 3, Job No. 6645, para 310, 311; *Review of the DSU*, Discussion Paper from the EC, 28 October 1998) and Ecuador (TN/DS/W/9).

[43] *African Group* (TN/DS/W/42) LDCs (TN/DS/W/17)

[44] WT/MIN(01)/W/3, para. 3;TN/DS/W/3. Australia expresses similar view (TN/DS/W/8, page 18).

[45] For example, the inability of the Equator to retaliate against EU in *EC –Banana* case, even after the DSB authorized it.

[46] *African Group* (TN/DS/W/42); LDCs (TN/DS/W/17; TN/DS/W/37) India, Philippines (Rev. 3, Job. 6645, para.309 and Job. No. 2447).

76. Further, it has also been proposed for an addition of paragraph 6 which would state that: "(b) The following principles and procedures shall apply to requests for collective suspension of concessions under paragraph (c):

> (i) Before making such a request, the developing or least-developed country Member shall refer the matter to arbitration for determination of the level of nullification and impairment, which shall be done taking into account the legitimate expectations of the developing or least-developed country Member. The arbitration shall further take into account any impediment to the attainment of the development objectives of the WTO Agreement as further elaborated by the developing or least-developed country Member.
>
> (ii) The arbitration shall consider whether suspension of concessions or other obligations in other sectors by the developing or least-developed country Member would be appropriate to effectively encourage the withdrawal of the measure found to be inconsistent with a covered Agreement, taking into account possible effects on that developing or least-developed country Member.
>
> (iii) Where the DSB grants authorisation to Members to suspend concessions or other obligations under paragraph (c), the level of suspension for each Member authorized shall be such as to secure, full compensation for the injury to the developing or least-developed country Member, the protection of its development interests, and the timely and effective implementation of the recommendations and rulings.
>
> (c) Where the case is one brought by a developing or least-developed country Member against a developed-country Member and the situation described in paragraph 2 occurs, and in order to promote the timely and effective implementation of recommendations and rulings, the DSB, upon request, shall grant authorization to the developing or least-developed country Member and any other Members to suspend concessions or other obligations within 30 days.
>
> (d) The DSB shall review the operation of paragraph 6 of this Article not later than five years after its implementation with a view to ensuring its effectiveness and in this regard may adopt appropriate measures and amendments to this Understanding.[47]

77. In addition a new paragraph 22.7 *bis* was also proposed according to which the right to suspend concessions or other obligations may be transferred to one or more Member(s). In that case, the Member(s) transferring the right to suspend concessions or other obligations and the Member(s) acquiring such right shall jointly request the DSB that it authorize the latter to suspend concessions or other obligations. In that case, the DSB shall grant each acquiring Member authorization to suspend concessions or other obligations within 30 days of such request, unless the DSB decides by consensus to reject the request. In no case shall the transfer(s) exceed the level of suspension authorized by the DSB.[48]

[47] Kenya, TN/DS/W/42
[48] Mexico, TN/DS/W/40.

6. CROSS-CUTTING ISSUES

Amicus curiae briefs (Art. 13)

78. The issue of *Amicus Curiae* (friend–of–the-court) briefs came to the forefront when the Appellate Body in *Shrimp/Turtle* dispute[49] issued a preliminary ruling accepting an *amicus* brief submitted directly to it.[50] The United States and European Union have proposed explicit recognition of the right of the panels and the AB to accept unsolicited briefs, as they already do on an *ad hoc* basis. However, most developing country Members vigorously oppose this practice. They fear that well-endowed institutions in developed countries, including powerful business associations, would be most likely to be called upon for information and technical advice. Further, they point out that there is a distinction between 'assisting' the court in the public interest, as opposite to assisting a party to 'political tilt' a case in its favour. According to some Members, to allow unsolicited *amicus curiae* submissions would create a situation where Members with the fewest social resources could be put at a disadvantage.[51]

79. The developing Members on their part propose that any acceptance of unsolicited information by the panel or AB should not be permitted unless there is consent of the parties.[52] They further demand an amendment to the word "seek" and calls for clear guidelines to settle this issue. It was proposed that in the footnote to Article 13 of the DSU, it sould be explained that: *"Seek" shall mean any information and technical advice that is sought or asked for, or demanded or requested by a panel. A panel shall not accept unsolicited information.*[53]

Participation of Private Counsels

80. There is no provision in the DSU to deal with the representation of private counsels in the panel/AB proceedings. However, it has become an established practice to allow private counsels to represent individual Members in the adjudication process. Therefore, it was proposed by Members that necessary amendments should be made to the DSU to allow Members to be represented by private counsels. This, according to them, would facilitate effective representation, especially for developing and least-developed Members, which lack expertise in WTO law.[54]

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[49] WT/DS58/AB/R.

[50] The Appellate Body in this case, overruled the Panel ruling, and stated that the right of the Panel 'to seek information' present in DSU Article 13 did not imply a prohibition on a panel's acceptance of unsolicited information. This decision was criticized in the DSB by several Members (WT/DSB/M/50).

[51] TN/DS/W/25

[52] Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (TN/DS/W/25); Cuba, Honduras, India, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe (TN/DS/W/18) Japan, Singapore (Job. No. 6645, para. 167 and 171).

[53] Dispute Settlement Understanding Proposals: Legal Text, Communication from India on behalf of Cuba, Dominican Republic, Egypt, Honduras, Jamaica and Malaysia, TN/DS/W/47, 11 February 2003.

[54] Korea and Norway Job. No. 6645. para. 143-145.

81. Costa Rica, on the other hand, cautions that this idea needs to be examined carefully, since it presents a number of problems, particularly in the light of the importance of maintaining the intergovernmental character of the procedure. Costa Rica thinks that rather than promoting the idea of private law firms representing the national interests of developing country Members, the WTO should concentrate its effort on identifying mechanisms aimed at strengthening the institutional framework of those Members, in particular by promoting the technical development of their human resources.[55]

Confidentiality (Art. 14.1)

82. The Panel and Appellate Body deliberations are confidential in nature. Only parties to the dispute can participate in the deliberations. However, some of the Members feel that, in order to enhance Members and the public confidence in the WTO dispute settlement process, there is a need for greater transparency, especially with respect to the legal process in the panel and Appellate Body proceedings. The US and the EU have submitted proposals arguing this point. However, Members like Japan and most developing country Members have been reiterating that the present system of strict confidentiality of panel deliberations should be maintained.[56] They view that confidentiality of the panel deliberations is imperative with a view to securing fair, impartial, objective and expeditious deliberations of a panel.

Third Party Rights

83. Third party rights refer to rights of Members not party to a particular dispute to make submissions to the panel/AB. A number of articles in the DSU address the third party rights at the various stages of dispute settlement. However, most Members agree that third party rights are not sufficiently addressed in the DSU and that the issue of enhancing third party rights deserves serious exploration. Fear has also been expressed that any extension of such rights might make the procedures more complex and would result in a third party having undue influence on panel and AB decisions.[57]

84. A number of amendments have been proposed by Members to enhance the third parties' access to information and knowledge of the dispute settlement system: the interested Members should be allowed to become third party without discrimination, rights of third parties in consultation to be given the right as co-complainant without asking for its own consultation, more procedural rights for third parties and information about the implementation of the recommendations of the panel/AB etc. for third parties.[58]

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[55] Job. No. 6645, para. 140-142.
[56] Job. No. 6645, para. 172 and 188
[57] for proposals on third party rights see documents: TN/DS/W/36
[58] Cuba, Honduras, India, Jamaica, Malaysia, Pakistan, Sri Lanka, Tanzania Zimbabwe (TN/DS/W/18); Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (TN/DS/W/25); the African Group in the WTO (TN/DS/W/42); Australia, Costa Rica, EC, Japan, Norway, Pakistan and Singapore (Job. No. 6645, para. 226-240) EC and Korea (Job. No. 6645, para. 119-120); and HK-China (Job. No. 6645, para. 91.)

Special Treatment for Developing Countries

85. The developing country Members in the course of the review of DSU in 1998-99 and later have been suggesting ways to improve the provisions in DSU dealing with developing country Members (Special and Differential Treatment provisions). The major problems highlighted by the proposals are that these provisions of the DSU are not articulated in specific terms and that this needed to be corrected. Even though the words "shall" and "should" have been used, it is pointed out that there is no way to ensure that such treatment is accorded to developing country Members in practice. Thus, views have been expressed that there is a need for developing a monitoring mechanism to check whether such requirements are adhered to. It was also suggested that there is also a need to strengthen the language of, for example Article 4.10 and Article 21.2 (for detail discussion see below), by replacing the word "should" by "shall". Additionally, it has been suggested that specific guidelines need to be evolved to ensure rigorous implementation of provisions in favour of developing country Members.[59] Some of the major proposals submitted by the developing country Members in the Special Sessions of the DSB and CTD are highlighted below.

(i) Special Treatment in Consultation

86. The DSU (Article 4.10) provides that in consultation developed countries 'should give special attention' to the particular problems and interests of the developing country Members. However, there is no clear indication as to how this provision is implemented. To make this S&D provision mandatory, effective, and operational it was proposed that the word "should" be replaced by "shall"; consultation requests of the developing and LDC Members shall always be accepted; and the term "should give special attention", should mean:

1. if the complaining party is a developed Member, it should explain in the panel request as well as in its submissions to the panel as to how it had taken or paid special attention to the particular problems and interests of the responding developing Member;
2. if the developed Member is a defending party, it should explain in its submissions to the panel as to how it had addressed or paid special attention to the particular problems and interests of the complaining developing Member;
3. the Panel, while adjudicating the matter referred to it, should give ruling on this matter as well.[60]

[59] Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions, *Note by Secretariat*, 25 October 2000, WT/COMTD/W/77, p. 70.

[60] *Proposal of India*, para. 12, TN/CTD/W/6; This proposal has also been endorsed by Cuba, Dominican Republic, Egypt, Honduras, Indonesia, Kenya, Mauritius, Pakistan, Sri Lanka, Tanzania and Zimbabwe also. See *Proposals on DSU by Cuba, Dominican Republic, Egypt, Honduras, India, Indonesia, Kenya, Mauritius, Pakistan, Sri Lanka, Tanzania and Zimbabwe*, 9 October 2002, TN/DS/W/19. The African Group has also made a similar proposal. *Proposal of the African Group in the WTO*, TN/CTD/W/3/Rev.1, para. 84.

87. **Article 12.10** of the DSU provides for extending the consultation period for the benefit of the developing country Members. The second part of this Article directs the panel to give "sufficient time" for the developing Member to prepare and present its argumentation before the panel. Though this provision is considered as mandatory,[61] it is the discretion of the DSB Chairman whether to extend the consultation period and if so, for how long. As regards the second part of Article 12.10 the panel has no discretion because it "shall allow sufficient time". However, the Article does not provide any guidance either to the DSB Chair or to the panel as to how much additional time should be given.[62] This has made this Article inoperable or of limited use for the developing country Members.[63] To clarify this, a group of developing Members in their joint communication proposed that the DSB Chair shall grand extension in the consultation period for not less than 30 days in normal circumstances and for not less than 15 days, in cases of urgency. Similarly, in the case of written submission not less than two weeks extra should be given in normal circumstance.[64]

(ii) Special Treatment in Panel/AB Proceedings

88. **Article 21.2** of the DSU provides that "particular attention should be paid to *matters affecting the interests of developing country Members* with respect to measures which have been subject of dispute settlement" (emphasis added).[65] This provision is part of an Article that requires the Dispute Settlement Body (DSB) to keep under surveillance, the implementation of its rulings, following the adoption of the panel/Appellate Body reports and is placed at the beginning of the long and important Article 21.[66] However, there is no clear indication as to how this provision has been carried out.[67]

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[61] Art. 10.1 is a mandatory provision as per the WTO Secretariat, Note from the Secretariat, 4 February 2002, WT/COMTD/W/77/Rev.1/Add.1/Corr.1.

[62] In a dispute, a developing country defendant contended that the process raised a number of questions in relation to the DSU such as (i) the real difficulties faced by developing country Members on the insistence by a developed country Members that consultations be held only in Geneva; (ii) the meaning and significance of the consultations stage; (iii) whether a Member could decide unilaterally that consultations had been concluded in particular since Article 12.10 of the DSU provided that "In the context of consultations involving a measure taken by a developing country Member, the parties may agree to extend the period established in paragraphs 7 and 8 of Article 4." WT/DSB/M/2, p. 4. See also WT/COMTD/W/77, p. 71.

[63] The first was never been used by the developing country Members and the second part was invoked only one by India in *India – Quantitative Restrictions* (QR) case (DS90) and got ten extra days for preparation of its first written statement.

[64] Ibid.

[65] Art. 10.1 is a non-mandatory provision as per the WTO Secretariat, Note from the Secretariat, 4 February 2002, WT/COMTD/W/77/Rev.1/Add.1/Corr.1.

[66] The Article also provides for determination of reasonable period of time for compliance of the DSB rulings; in case of disagreement, for initiation of further dispute settlement proceedings to determine whether the defendant Member has complied with DSB rulings; and for receiving status reports on implementation of DSB rulings at every regular DSB meeting six months after adoption of the panel/AB reports.

[67] The Arbitrator in *Indonesia – Autos (21.3 Arbitration Report)*, while taking into account Indonesia's status as a developing country in determining the "reasonable period of time" that "although the language of this provision is rather general and does not provide a great deal of guidance, it is a provision that forms part of the context for Article 21.3(c) of the DSU…." (Indonesia was giver six months additional period of time to implement the report). The Arbitrator added that the time was granted to Indonesia because it "is a

89. India suggested that clarifying the phrase “matters affecting the interests of developing country Members” could increase the utility of the provision and suggests firstly, to replace the word "should" with "shall", so as to make this provision mandatory and Secondly, this provision should be made mandatory for the panel and AB to interpret it as an overarching provision in all disputes involving a developing country Member as a disputing party and more specifically:

> 1. if the defending party is a developing Member and the complainant, a developed member, 15 months should be considered as normal reasonable period of time.
> 2. in 21.5 procedures, the time for completion of 21.5 panel proceedings should be increased from 90 days to 120 days; and the panel should give all due consideration as any normal panel would give to the particular situation of developing country Members.
> 3. if the complaint is by a developing Member against a developed Member, the defending developed Member should be given no more than 15 months of reasonable period of time in any circumstance and existing 90 days time limit for 21.5 procedures should be observed strictly. In case of delay, it should entail an obligation to compensate for continuing trade losses to the developing Member complainant.[68]

90. The African Group suggested that these phrases should be understood to mean, in relation to the enforcement of DSB reports, monitory compensation or making some other forms of compensation to the developing country Member, and DSB authorized collective suspension of obligation by all WTO Member country Members.[69]

91. As to make the remedies available under **Article 22** more effective, a group of developing country Members has proposed that a complaining developing country Member should be permitted to seek authorisation for suspending concessions and other obligations in sectors of their choice. They should not be required to go through the process of proving that, (1) it was not "practicable or effective" to suspend concession in the same sector or agreement where the violation was found; and (2) the "circumstances are serious enough" to seek suspension of concessions under the agreements other than those in which violation was found exist.” This according to them can be made through incorporating a new paragraph 3*bis*, to Article 22.[70]

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developing country that is currently in a dire economic and financial situation” and “its economy is 'near collapse'.” However, the Arbitrator concluded “in a 'normal situation', a measure such as the one required to implement the recommendations and rulings of the DSB in this case would become effective on the date of issuance.” It is interesting to point out here that this S&D provision has been introduced to give developing countries special treatment in “normal situations”. See also *Chile – Alcoholic Beverages*, 21.3 Arbitration Report, para. 45

[68] *Proposal of India*, para. 16, TN/CTD/W/6.

[69] *Proposal of African Group in the WTO*, TN/CTD/W/3/Rev.1, para. 88.

[70] Cuba, Dominican Republic, Honduras, India, Indonesia, Kenya, Pakistan, Sri Lanka, Tanzania and Zimbabwe, WT/DS/W/9, p. 1-2.

(iii) Technical Assistance (Article 27.2)

92. Although technical assistance is currently provided for by the WTO, such assistance has proven to be inadequate in assisting developing country members to take advantage of the dispute settlement mechanism. In the review process, Jamaica had suggested that the budget of the secretariat needs to be further supplemented to enable the secretariat to hire full time consultants, as part-time basis consultant has proven to be problematic for developing country members.[71] Although the independent WTO law advisory center has been established to assist developing-country members, the cost of membership still prohibits some developing country members from accessing its facilities. Additional independent mechanisms need to be developed to ensure that developing country members not only obtain general legal advice, but can also obtain assistance in arguing their case before a panel at a cost, which these countries can afford."[72]

93. It has also been stated that the concept of 'neutrality' of the WTO secretariat needs to be more clearly defined and perhaps more loosely implemented as a strict implementation of 'neutrality' limits the nature and scope of legal services made available to the developing country members and prevents legal advisors of the WTO from effectively helping developing country members in defending or pleading a case.[73] in this regard, African Group suggested that the phrase 'continued impartiality of the secretariat' in paragraph 2 of article 27 of the DSU shall be understood to mean that the qualified legal expert made available to assist a developing country member in a case shall assist the member for the duration of the case and not continue to be counsel for the member after the case.[74] Another suggestion was to establish a trust fund to finance strategic alliances with lawyers' offices or private firms to expand the scope of consultancy and advisory services. As regards the appointment of private lawyers, Jamaica wishes to see the right of countries to constitute their delegations according to their wishes, both in panel and appellate proceedings, recognized in the DSU text.[75]

(d) Least-developed Country Members

94. The African Group suggested that the provision (Article 24) should be understood to mean that the panels shall before proceeding with the case first determine whether the Member bringing the case has given particular consideration to the special situation of the least-developed country Member. In this regard, the panel shall take into account all relevant factors including, the value of any alleged nullification or impairment, the possible harm to the economy and resources of the least-developed country Member that

[71] *Proposal of Jamaica*, TN/DS/W/21. See also WT/COMTD/W/77, p. 73
[72] *Proposal of Jamaica,* TN/DS/W/21. A similar proposal was put forward by the African Group, TN/CTD/W/3/Rev.1, para. 90 (a).
[73] Ibid.
[74] *Proposal of African Group in the WTO,* TN/CTD/W/3/Rev.1, para. 90 (b).
[75] *Proposal of Jamaica,* TN/DS/W/21. Jamaica also welcomes the decision of the Appellate Body in the *Bananas* case to allow the participation of private lawyers.

could result from the case, and the capacity in the circumstances of the least-developed country Member to effectively deal with the case.[76]

95. It was also proposed to include a new article, *Article 24bis: Special and Differential Treatments to Developing Countries*

> *Special and Differential Treatment to Developing Countries*
>
> *1. Developed-country Members shall exercise due restraint in cases against developing-country Members. Developed-country Members shall not bring more than two cases to the WTO Dispute Settlement Body against a particular developing-country Member in one calendar year.*
>
> *2. Where a developed-country Member brings a case against a developing-country Member, if the final rulings of a panel or the Appellate Body show that the developing-country Member does not violate its obligations under the WTO Agreements, the legal costs of the developing-country Member shall be borne by the developed-country Member initiating the dispute settlement proceedings.*[77]

96. Finally, the African Group also proposed the establishment of a Fund on Dispute Settlement by introducing a new Article 28. The WTO Fund on Dispute Settlement would facilitate the effective utilisation by developing and least-developed country Members of this Understanding in the settlement of disputes arising from the covered agreements. The fund established under paragraph 1 of this Article shall be financed from the regular WTO budget. To ensure its adequacy, the fund may additionally be funded from extra-budgetary sources, which may include voluntary contributions from Members. The General Council shall review annually the adequacy and utilization of the fund with a view to improving its effectiveness and in this regard may adopt appropriate measures and amendments to this Understanding.[78]

IV. COMMENTS AND OBSERVATIONS OF THE AALCO SECRETARIAT

97. The 2009 G8 communiqué expressed their commitment to reaching an ambitious and balanced conclusion to the Doha Development Round, which is urgently needed. To achieve this they committed to building on the progress already made, including with regard to modalities. It also explicitly prioritises the needs of developing countries and addresses the imbalances already present in the rules of the global trading regime. The Director General Pascal Lamy, said that the best contribution to reviving economic growth is to conclude the Doha Development Agenda, which is one of the most appropriate collective stimulus packages. He also said that "completing the DDA is the surest way we have of safeguarding our individual trade interests and the multilateral trading system against the threat of an outbreak of protectionism". However, the G20 and the Director General did not provide any date for conclusion of the round or call for a ministerial conference this year.

[76] WT/CTD/W/3/Rev.1, para. 89.
[77] China, TN/DS/W/51.
[78] African Group, TN/DS/W/92

98. Since the Hong Kong Ministerial Declaration 2005, the Members have been trying to achieve the degree of convergence required to cement a final deal. However, there remained a number of issues where consensus was required. The Negotiations on Agriculture and NAMA remains central to the success of the negotiations.

99. Since last year much effort has been made by the Member States and three revised draft text of modalities on Agriculture and NAMA were circulated in 2007 and 2008. However, the success of the agriculture negotiation depends on the extent the developed countries, particularly the US and the EU are ready to give away their protectionist measures. Regarding NAMA, unlike previous drafts, which contained ranges of numbers, the new text includes specific formulae and figures for determining countries' future tariff levels. However, there remain several issues to be settled, including participation in sectoral liberalisation initiatives on industrial goods, as well as preference erosion and exemptions from general tariff cut disciplines.

100. The AALCO Secretariat urges AALCO Member States to actively participate in the Doha Round of Negotiations and make meaningful contributions for its successful conclusion. The Secretariat believes that consensus could be realized in all negotiating issues and the Members would be able to adopt the Doha Round results by this year end if momentum is kept.