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ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION

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

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CONTENTS

I. INTRODUCTION

1. At the 34th Session (1995) held at Doha, the AALCO considered a Secretariat study on the then concluded Marrakesh Agreement, entitled, "The New GATT Accord: An Overview with Special Reference to World Trade Organization (WTO), Trade Related Investment Measures (TRIMS), and Trade Related Intellectual Property Rights (TRIPS)." At the 35th Session (1996) held in Manila, the Secretariat presented a comprehensive brief of documents on "WTO as a Framework Agreement and Code of Conduct for the World Trade". At the 36th Session (1997) held at Tehran, the Secretariat brief reported the outcome of the WTO's First Ministerial Meeting held at Singapore between 9-13 December 1996. At that session, the Secretariat was directed "to continue to monitor the development related to the code of conduct for the world trade, particularly the relevant legal aspects of dispute settlement mechanism".

2. In fulfillment of this mandate, the Secretariat study presented to the 37th Session of the AALCO (1998) held in New Delhi provided a comprehensive overview of the 'Understanding on Rules and Procedures Governing the Settlement of Disputes' as reflected in the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations. In furtherance of its work programme, the AALCO in co-operation with the Government of India convened a two-day seminar on 'Certain Aspects of the functioning of the WTO Dispute Settlement Mechanism and other Allied Matters' at New Delhi.

3. At the 39th (2000) and 40th (2001) Session of AALCO, the Secretariat had respectively presented the developments on the outcome of the Third WTO Ministerial Conference held in Seattle; and the follow-up measures undertaken by the WTO after the Seattle set back. At the 41st Session (Abuja, 2002), the Secretariat reported on the outcome of the Fourth WTO Ministerial Conference held in Doha, which resulted in the Doha Development Round of negotiations.

4. At the 42nd Session of AALCO held in Seoul, Korea (2003), the Secretariat reported on the progress in the Doha Development Round of negotiations, with particular emphasis on the Review of the Dispute Settlement Understanding. In this Session the Organization had directed the Secretariat to "continue to monitor and report on the Fifth WTO Ministerial Conference, as well as, the outcome of the review process concerning the WTO Dispute Settlement Understanding"[1]

5. Pursuant to this mandate, this brief report is intended to provide an update on the developments in the Fifth WTO Ministerial Conference held in Cancun and progress in the review process of the Understanding on Rules and Procedures Governing the Settlement of Disputes.

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[1] AALCO/SEOUL/RES/42/S.14

II. THE FIFTH WTO MINISTERIAL CONFERENCE, CANCUN 2003

6. It may be recalled that at the Doha Ministerial Conference (2001), held at Doha, the State of Qatar, 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. The Fifth Ministerial Conference was expected to assess the progress in the negotiations and other efforts under the Doha Development agenda.

7. The Fifth Ministerial Conference of the World Trade Organization was held in Cancun, Mexico, from 10-14 September 2003.[2] At the Cancun Ministerial Conference, intensive negotiations were held among the WTO Members on the following issues: Agriculture, Non-agricultural market access, Development issues, "Singapore" issues and other issues (this includes the TRIPS registry for geographical indications for wines and spirits).[3]

8. The draft text of the Cancun Ministerial Declaration contained six pages of decisions in the areas under negotiation, including agriculture, non-agricultural market access, services, rules, trade- related aspects of intellectual property rights (TRIPs), environment, dispute settlement, special and differential (S&D) treatment for developing countries, implementation issues, the Singapore issues, etc.

9. The draft also included a sectoral initiative on cotton; commodity issues; and coherence; as well as annexes outlining frameworks for modalities in agriculture, non-agricultural market access, S&D and the Singapore issues. Due to differences in interests dividing the developed and developing Members, particularly among the developing Members, the Conference failed to adopt a Ministerial Declaration. In other words, there was no agreement on any of the substantive issues put to Ministers or on procedural questions, such as setting new deadlines for completing work in many sectors lagging months behind the schedule set in Doha two years ago.

10. The only decision that emerged from the Cancun Ministerial Conference was the decision that the General Council shall convene at a senior officials level before 15 December 2003 "to take the action necessary at that stage to enable us to move towards a successful and timely conclusion of the negotiations". A Ministerial Statement issued on 14 September instructed officials to continue working on outstanding issues with a renewed sense of urgency and purpose and taking fully into account all the views that have been expressed in this Conference.

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[2] The WTO's Ministerial Conference is the highest policy-making body within the WTO, which comprises of all Members of the WTO and meets once in every two years. Since the founding of the WTO in 1995, five ministerial conferences have been held: Singapore (1996), Geneva (1998), Seattle (1999), Doha (2001) and Cancun (2003).

[3] A sixth issue, i.e, proposal on cotton from four African countries, was also discussed at the Conference.

11. Further, another decision taken by the Ministers at the Conference was the approval of the membership agreements of Cambodia and Nepal. Cambodia and Nepal will become the WTO's 147th and 148th Members, and the first least-developed countries to join the WTO through a full working party negotiation. They still have to ratify their agreements and inform the WTO, and 30 days after that they will become WTO members.

12. As regards the sixth Ministerial Conference to be held in 2005, the Conference noted that before the General Council meeting in August, Hong Kong, China had offered to host the next meeting. However, no decision in this regard was taken by the Conference. The most likely scenario at the moment is an informal ministerial gathering in Geneva in the latter half of 2004, if progress in negotiations warrants it. The Chairman, in the General Council meeting on 21 October 2003, proposed that the General Council agree on Hong Kong, China as the venue for the Sixth Session of the Ministerial Conference. The General Council agreed to that proposal.[4]

A. AGREEMENT ON AGRICULTURE

13. It may be recalled that Article 20 of the of the Agriculture Agreement committed WTO Members to start negotiation on continuing the reform at the end of 1999 or beginning of 2000.[5] Accordingly, the first phase began in early 2000 and ended with a stocktaking meeting on March 2001.[6] The proposals submitted by the Members at the first phase reflected their starting positions for negotiations. In the second phase, (March 2001- March 2002) the meetings were largely informal.

14. The 2001 Doha Ministerial Declaration sets a new mandate by making the objectives more explicit, building on the work carried out so far, and setting deadlines. The Declaration mandated a comprehensive negotiation aimed at:

- substantial improvements in market access;
- reduction of, with a view to phase out, all forms of export subsidies; and
- substantial reductions in trade-distorting domestic support.

15. The declaration makes special and differential treatment for developing countries integral throughout the negotiations and emphasized that the outcome should be effective in practice and enable developing countries to meet their needs, in particular in food security and rural development.

16. To implement the above mandate, the Special Session on 26 March 2002 decided on a 'modalities' phase deals with one of the most critical stages of the agriculture negotiations, which aims to set modalities or targets (including numerical targets) for achieving the objectives. The 'modalities' will be used for Members to produce their first offers or "comprehensive draft commitments". This stage will

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4 WT/GC/76

5 This article says that WTO members had to negotiate to continue the reform of agricultural trade. Substantial progressive reductions in support and protection resulting in fundamental reform are the objective of these negotiations.

6 Altogether, 126 member governments (89% of the 142 members) submitted 45 proposals and three technical documents. This first phase consisted of countries submitting proposals containing their starting positions for the negotiations.

therefore determine the shape of the negotiations final outcome expected by 1 January 2005. The modalities will be used for members to produce their first offers or comprehensive draft commitments.

17. In 12 February 2003, Chairman Stuart Harbinson circulated a draft of modalities for further commitments. The draft focuses the negotiations on bridging differences - the search for the compromises that are necessary for a final agreement. The broad areas covered by the Harbinson draft include market access, export competition, domestic support and issues relevant to least developed country Members.[7]

18. However, the negotiators failed to produce the modalities by the end of March 2003. After the missed 31 March 2003 deadline, negotiators focused themselves in sorting out a number of important and complex technical issues that are a necessary part of the package.[8] But the negotiators lacked their government's decisions at a political level, which would start the long-awaited move towards a consensus on the main questions.

19. In the eve of the Cancún Ministerial Conference, Members started looking for practical ways to resolve outstanding key issues so that modalities could be finalized. A number of Members started circulating draft "framework" text for negotiations at Cancun. The two drafts which received the most attention were: one that came from a group of about 20 developing Members (the G-20[9])[10] and the other a joint text from EU-US. Most of these papers cover all parts of the framework. A few concentrate more on particular aspects, for example, Kenya focussed on special treatment for developing countries.

20. At the Cancun Ministerial Conference, the US, EU, the Cairns Group and the G-20 developing countries, represented different views on agricultural reforms. Many net food importing developing countries argued for special and differential treatment. Among the key points made by the G-20 were the elimination of the blue box (domestic subsidies linked to production-limiting schemes), setting a cap and strict criteria for the green box (minimally trade-distorting subsidies) as well as ambitious targets for reducing amber box (trade-distorting) subsidies. Comments on all of these draft "frameworks" were included in the draft Ministerial Declaration, which circulated at the Cancun Conference. However, there was no consensus on the draft.

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7 This draft had been the subject of discussion by Ministers from a pivotal group of countries gathered in an informal conclave in Tokyo on 14 February 2003

8 Among them are: the domestic support categories (various boxes), tariffs, tariff quotas (including their administration), export credits, food aid, various provisions for developing countries, provisions for countries that recently joined the WTO, trade preferences, how to measure domestic consumption (a proposed reference for several provisions), and so on.

9 The **Group 20** now consists of Argentina, Bolivia, Brazil, Chile, China, Cuba, Ecuador, Egypt, India, Indonesia, Mexico, Nigeria, Pakistan, Paraguay, the Philippines, South Africa, Thailand and Venezuela. The G-20 comprises more than half of the world's population and nearly two-thirds of its farmers. The alliance emerged in August 2003 as a counterweight to the joint EU-US agriculture framework proposal, which largely inspired the agricultural modalities annex proposed to Ministers in Cancun. The G-20 share the objective of liberalising agricultural trade through creating fair markets for developing countries. It is seeking to ensure that developing countries are not required to cut their tariffs as steeply as industrial countries

10 WTO Document WT/MIN(03)/W6

But because of deadlock on the four Singapore issues, there were no detailed negotiations on this text before the meeting ended.

21. Another major issue that was considered at the Cancun Conference was a proposal on cotton from four African countries.[11] They called for a decision at Cancun for the elimination of cotton subsidies worldwide in order to ensure the survival and development of the cotton sector in West and Central Africa (WCA), where cotton accounts for up to 80 percent of export earnings. WTO Director General said the WCA countries were not asking for preferences, but for an end to distortions. However, the Cancun Ministerial failed to deliver any progress in these issues.

22. The favored approach in 2004 is to first tackle the frameworks, and then to complete the modalities. Key actors such as the US, the EC and the G-20 group of developing countries have signalled a renewed commitment to the round and willingness to compromise. The Committee on Agriculture's newly nominated Chair, has set 22-26 March 2004 as the dates for the first post-Cancun agriculture negotiation session, thus formally re-launching the WTO agriculture negotiations that had come to a complete standstill after the Cancun Ministerial conference.

B. THE "SINGAPORE" ISSUES

23. It may be recalled that at the Singapore Ministerial Conference (December 1996), the Ministers had establish three working groups to examine the relationship between trade and investment, interaction between trade and competition policy, including anti-competitive practices, and to conduct a study on transparency in government procurement practices. In the case of trade facilitation, the Singapore declaration, recognizing that the WTO legal framework lacks specific provisions in some areas of trade facilitation, directed the goods council "to undertake exploratory and analytical work - on the simplification of trade procedures in order to assess the scope for WTO rules in this areas." [12]

24. Accordingly, the WTO established three Working Groups i.e., Working Group on Trade and investment,[13] Working Group on Trade and Competition Policy,[14] and

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11 **The Cotton Proposal:** This issue was originally raised in the General Council and Agriculture Committee by Benin, Burkina Faso, Chad and Mali. It describes the damage that the four believe has been caused to them by cotton subsidies in richer countries, calls for the subsidies to be eliminated, and for compensation to be paid to the four while the subsidies are being paid out to cover economic losses caused by the subsidies. The proposal seeks a decision in this Cancún Ministerial Conference (WT/MIN(03)/W/2 and WT/MIN(03)/W/2/Add.1). The proposal received support from Canada, Australia, Argentina, Cameroon, Guinea, South Africa, Bangladesh (for least-developed countries), Senegal and India — either for the whole proposal or key parts such as phasing out subsidies.

12 Because the mandate came from the 1996 Singapore Ministerial Conference, trade and competition policy is sometimes described as one of four "Singapore issues".

13 The working group has focused on clarifying a number of core issues, such as: the definition of the issues and what they cover; transparency; nondiscrimination; ways of dealing with commitments on the entry of foreign investment, based on a list of things members are willing to do rather than general commitments with lists of exceptions (a i. GATS type positive list approaches); development provisions; exceptions and balance-of-payments safeguards; consultation; and dispute settlement.

14 In the period up to the 2003 Cancún Ministerial Conference, as required by the Doha Declaration, the working group has focused on clarifying:

Working Group on Transparency in Government Procurement,[15] in order to identify any areas that may merit further consideration in the WTO framework. The Good Council, had been dealing with trade facilitation at its formal session.[16]

25. At the Doha Ministerial Conference (2001), Ministers had agreed that negotiations on the four "Singapore issues" will take place after the fifth Ministerial Conference in Cancun, on the basis of a decision to be taken, by explicit consensus on modalities of the negotiations.

26. At the Cancun Ministerial Conference, the "Singapore Issue" was the priority item on which negotiations were undertaken.[17] Three positions emerged on the "Singapore" issues:

- A substantial number of countries (developing country Members) said that there was no explicit consensus on any of the four issues and that they should be referred back to the Working Groups in Geneva.
- A second group (developed and developing country Members) wants to launch negotiations on all four issues in Cancún. Some in this group say that the Doha Declaration already mandates the launch of negotiations here in Cancún. They felt that seven years of discussions have clarified the issues, and that delay in negotiations would lead to loss of potential expansion of growth for developing countries
- A number of countries (developing country Members) are prepared to explore possible solutions between these two options. They supported negotiations on two issues: trade facilitation and transparency in government procurement, and felt that that they are more ripe for negotiations in comparison with investment and competition policy.

- core principles including transparency, non-discrimination and procedural fairness, and provisions on in hardcore l. cartels (i.e. groups of companies that secretly fix prices)
- ways of handling voluntary cooperation on competition policy among WTO member governments
- support for progressive reinforcement of competition institutions in developing countries through capacity building.

15 In the working group, members agree that transparency in government procurement is important, and that the WTO should pursue its work in this area. The differences among them are essentially about how this should be done. A number of members argue that after the intensive work of the past six years, the WTO is now in a position to negotiate a transparency agreement in the context of a new round. On the other hand, a number of developing countries are concerned about enforcement rules in this area, including the use of the WTO dispute settlement system. They doubt whether the issue is ripe enough to launch negotiations.

16 The WTO has always dealt with issues related to the facilitation of trade, and WTO rules include a variety of provisions that aim to enhance transparency and set minimum procedural standards. Among them are GATT Articles 5, 8 and 10 which deal with freedom of transit for goods, fees and formalities connected with importation and exportation, and publication and administration of trade regulations. The Ministers instructions to the Goods Council have been translated into a day-to-day work programme, and carried out in the course of six formal sessions between 22 March 2002 and 13 June 2003. The Goods Council specific work programme includes: to review, and as appropriate, clarify and improve GATT Articles 5, 8 and 10 and to identify members trade facilitation needs and priorities, particularly those of developing and least-developed countries.

17 See Fifth WTO Ministerial Conference documents. <www.wto.org/WTO Ministerial conferences - Cancún 5th Ministerial, 2003>

27. Though serious attempt was made by the Chairperson of the Ministerial Conference to avoid a deadlock, the negotiations failed to find a compromise formula which was acceptable to all Member States.[18]

28. After Cancun Ministerial Conference, the WTO General Council meeting held on 15 December 2003, forty four developing country Members of the WTO issued a formal communication titled "Singapore Issues: The Way Forward", calling for all further work on three of the Singapore Issues (Investment, Competition and Transparency in government procurement) to be dropped from the agenda.[19] As regards the fourth issue, trade facilitation, they were of the view that it may continue, but only after the clarification of various aspects of the issue.

C. NON-AGRICULTURE MARKET ACCESS (NAMA)

29. It may be recalled that at the Doha Ministerial Conference (2001), Ministers had agreed to start negotiations to further liberalize trade in non-agricultural goods. The ministers agreed to launch tariff-cutting negotiations on all non-agricultural products. The aim is "to reduce, or as appropriate eliminate tariffs, including the reduction or elimination of tariff peaks, high tariffs, and tariff escalation, as well as non-tariff barriers, in particular on products of export interest to developing countries." To this end, a Negotiating Group on Market Access was created in 2002.

30. By June 2003, the negotiating group had met 17 times, 10 of those formally. Members have submitted more than 40 papers as a contribution to the debate. These proposals deal with the 'modalities' for the negotiations, covering tariff reductions, how to deal with non-tariff barriers, how to give developing countries special and differential treatment, and the possible effects of the reduction in tariffs on the development policies of some countries and on their fiscal revenues, etc.[20] The Ministers at the Fifth Ministerial Conference were expected to assess progress in the negotiations, which are scheduled to be completed by 1 January 2005.

31. At the Cancun Ministerial Conference, differences remain on the formula for tariff reductions (for more or less ambitious reductions) and on sectoral initiatives (whether commitments to eliminate tariffs on all products in a sector should be made by all countries, or whether countries could volunteer to participate). While the EU, US and Canada advocated for significant reduction in industrial tariffs, developing countries strongly opposed in making substantial cuts in their tariffs and harmonizing it. Developing Members wanted provisions allowing it to make smaller reductions, to apply a different coefficient in tariff reduction formulas, and to be allowed to choose whether to join a sectoral initiatives i.e., duty free import of all products within a sector to be protected.

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18 Korea, supported by Japan, insisted on the immediate launch of negotiations on all four topics. The European Union offered to drop investment and competition policy, which were by far the most controversial of the lot. The offer was rejected by a coalition formed in Cancun between three groups of the poorest, largely African, WTO Members.

19 See WTO document no. WR/GC/W/522

20 *See* Draft Elements of Modalities circulated by the Chair, WTO document TN/MA/W/35.

32. In the words of 'facilitator' Henry Tang Ying-yen (Hong Kong China's) the negotiation would be unrealistic in continuing to look for a perfect text and that striking a balance would be "very difficult indeed".

D. DEVELOPMENT ISSUES

33. At the Cancun Ministerial Conference, all developmental issues were categorized into one group and this group covered special and differential treatment (S&D); implementation; technical assistance; least-developed countries; commodity issues; small economies; trade, debt and finance; and trade and technology transfer.

34. While negotiating these issues in the Conference, the Facilitator Mukhisa Kituyi (Kenya) highlighted two issues which require further work: special and differential treatment and implementation. On the issue of special and differential treatment, differences remain among the Members as to whether the current package of 24 agreed proposals is acceptable for now. A number of developing countries believe that there is little economic value in the current package. Other developing countries felt that though there is some value, more should be achieved.

35. As regards implementation, a group of developing countries presented new language for the negotiation text. This text calls for: the negotiating groups to address as a matter of priority implementation issues dealt by them; a negotiating group to address all the remaining outstanding implementation issues; and decisions to be adopted by March 2004. Some developed countries delegations were of the view that they were not ready to establish a negotiating group on implementation. However, nothing concrete was achieved out of the Cancun Ministerial Conference.

E. TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS (TRIPS)

36. It may be recalled that at the Fourth Ministerial Conference held in Doha, the Ministers had agreed to undertake review of various aspects of TRIPS Agreement. The Ministers had also adopted a separate Declaration on 'TRIPS Agreement and Public Health'. The TRIPS Council has started work on a list of issues that Ministers assigned to it. These include specific aspects of TRIPS and public health, multilateral registration system for geographical indications, extending high level of protection to products other than wine and spirits, and the general review of the TRIPS Agreement, and technology transfer.

a. TRIPS Agreement and Public Health

37. In November 2001, Ministerial Conference held at Doha adopted Declaration on TRIPS and Public Health. Member countries agreed that the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health. The declaration recognizes that WTO Members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement and instructed the TRIPS Council to find an expeditious solution to this problem and to report to the General Council before the end of 2002. However, an expeditious solution to this problem could not be achieved due to the deep divisions among Members on the issues such as: which countries should be eligible to use the system,

which diseases should be covered and what the time frame and content should be for negotiating a permanent solution once the waiver is in place.

38. WTO General Council on 30 August 2003,[21] agreed on a legal changes that will make it easier for poorer countries to import cheaper generics made under compulsory licensing[22] if they are unable to manufacture the medicines themselves.[23] According to this decision, any least-developed country Member, and any other Member that has made a notification to the Council for TRIPS of its intention to use the system as an importer, are the eligible importing members. It was decided that a Member may notify at any time that it will use the system in whole or in a limited way, for example only in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use. It is also agreed that some Members[24] will not use the system set out in this Decision as importing Members. Some Members have stated that, if they use the system, it would be in no more than situations of national emergency or other circumstances of extreme urgency.

39. As regards the assessment of manufacturing capacities in the pharmaceutical sector, it was agreed that LDC Members are deemed to have insufficient or no manufacturing capacities in the pharmaceutical sector. For other eligible importing Members insufficient or no manufacturing capacities for the product(s) in question may be established in either of the following ways:

- The Member in question has established that it has no manufacturing capacity in the pharmaceutical sector; or
- Where the Member has some manufacturing capacity in this sector, it has examined this capacity and found that, excluding any capacity owned or controlled by the patent owner, it is currently insufficient for the purposes of meeting its needs. When it is established that such capacity has become sufficient to meet the Member's needs, the system shall no longer apply.

40. Further, paragraph 11 of the Decision instructs the TRIPS Council to initiate work by the end of 2003 on an amendment to the TRIPS Agreement to replace the provisions of the waiver contained in the decision. The amendment should be adopted by the end of June 2004. In a separate statement, the General Council chairperson noted that WTO Members recognizes that the system established by the decision should be used in good faith to protect public health and not to pursue industrial or commercial policy objectives.

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21 *Implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and public health*, Decision of the General Council of 30 August 2003, WT/L/540.

22 It refers to the practice by a government to authorize itself or their parties to use the subject matter of a patent without the authorization of the right holder for reasons of public policy (Article 31(f), TRIPS Agreement)

23 It may be recalled that Article 31(f) of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement says that production under compulsory licensing must be predominantly for the domestic market. This effectively limited the ability of countries that cannot make pharmaceutical products from importing cheaper generics from countries where pharmaceuticals are patented.

24 These countries are Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom and United States of America.

41. Discussions on public health held at the 17-18 November 2003 meeting of the TRIPS Council had little progress in the matter of amendment to the TRIPS Agreement to replace the provisions of the waiver contained in the Decision.

b. Geographical indications

42. Geographical indications are place names used to identify the origin and quality, reputation or other characteristics of products.[25] Two contentious issues are debated under the Doha Mandate: creating a multilateral register for wines and spirits; and extending the higher (Article 23) level of protection beyond wines and spirits.

(i) Multilateral System of Registration

43. Article 23.4 of the TRIPS Agreement provides for negotiations to set up a multilateral system of notification and registration of geographical indications for wines eligible for protection in those Members participating in the system. The Ministers at the Doha Ministerial Conference had agreed to negotiate the establishment of a multilateral system of registration of geographical indications for wines and spirits to be completed by the Fifth Ministerial Conference. On 8 March 2002, WTO members have provided for a two-phase programme for completing negotiations on a multilateral registration system for geographical indications for wines and spirits.

44. The Proposals submitted by Members adopt two different approaches. One, from the EU and supported by a number of other Members,[26] would presume that registered geographical indications are protected in all WTO Members except in those that successfully challenge the terms on the grounds that they are generic in their territories. The other from Canada, Chile, Japan and the US, and supported by a number of other Members, sees the proposed system as a database that would assist Members in deciding whether to protect specific terms in their territories.[27]

45. At the Cancun Ministerial Conference, no decision was taken, as there existed divergence of views among the Members. A few countries wanted the relevant paragraph (8) of the Ministerial Text to include wording on the legal effect of the register and participation (which countries would participate), and also calling for an early deadline for the negotiations to end. Many other countries supported the text as it stands, suggesting a deadline of the Sixth Ministerial Conference.

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25 Protection required under the TRIPS Agreement is defined in two articles. All products are covered by Article 22, which defines a standard level of protection. This says geographical indications have to protection in order to avoid misleading the public and to prevent unfair competition. Article 23 provides a higher or enhanced level of protection for geographical indications for wines and spirits. This means the wines' and spirits' names should, in principle, be protected even if there is no risk of misleading consumers or of unfair competition. A number of countries want to extend this level of protection to a wide range of other products, including food and handicrafts.

26 IP/C/W/107/Rev.1

27 TN/IP/W/6 and TN/IP/W/5

(ii) Higher level of protection for products other than wines and spirits

46. The Doha Declaration agreed to negotiate on issues related to the extension of the protection of geographical indications provided for in Article 23 to products other than wines and spirits will be addressed in the Council for TRIPS. At issue is the question of whether the higher level of protection currently given to geographical indications of wines and spirits (Article 23) should be extended to other products.

47. Some Members say a key point of the debate is migration, particularly to the "New World" (the Americas, Australia, New Zealand, etc) - immigrants brought with them the production of goods identified by geographical indications and they should be allowed to continue to use the names. Other countries question whether this argument is relevant. They say that by limiting the higher level of protection to wines and spirits, the TRIPS Agreement discriminates, creating an imbalance between WTO Members. Members are divided over the issue of extending protection to other products. The discussion under the TRIPS Council has centred on legal issues relating to the difference between the general protection for geographical indications provided for in the TRIPS Agreement and the additional protection for geographical indications for wines and spirits.

48. However, as there were differences among the Members in interpreting paragraph 12 of the Doha Declaration which deals with the implementation issues, no progress was achieved in the TRIPS Council. Many developing and European countries argue that the so-called outstanding implementation issues are already part of the negotiation and its package of results (the "single undertaking"). Others argue that these issues can only become negotiating subjects if the Trade Negotiations Committee decides to include them in the talks — and so far it has not done so. In 2003, this has been the subject of informal consultations chaired by the Director General of the WTO.

49. Those advocating the extension see the higher level of protection as a means of marketing their products, and they object to other countries "usurping" their terms.[28] Those opposing extension argue that the existing (Article 22) level of protection is adequate, and that providing enhanced protection would be expensive. They also reject the "usurping" accusation particularly when migrants have taken the methods of making the products and the names with them to their new homes.

50. At the Cancun Ministerial Conference, the Members were in disagreement on this issue. While some developing countries have signaled a development interest in Geographical Indications (GI) extension, the discussions have largely turned into a North-South dispute. While EC and Switzerland are staunch supporters of GI extension, US and Australia opposed this. The TRIPS Council meeting held on November 2003 did not discuss any of these issues.

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[28] Including Bulgaria, China, the Czech Republic, the EU, Hungary, Liechtenstein, Kenya, Mauritius, Nigeria, Pakistan, the Slovak Republic, Slovenia, Sri Lanka, Switzerland, Thailand and Turkey.

F. PROGRESS IN THE NEGOTIATIONS: POST-CANCUN

51. The WTO General Council at its session in 15-16 December 2003 achieved no more than a tacit agreement to restart meetings of the Doha Round negotiating groups. A number of delegates reiterated their commitment to concluding the negotiations on schedule, however, there remained old divisions regarding substantive issues.

52. At the December 2003 meeting, the General Council Chair drew a tentative conclusion that negotiations might be acceptable on trade facilitation, which is the least controversial of the four Singapore issues. However, nothing has been formally agreed.[29] As of mid-March, negotiations are expected to resume on agriculture, services, non-agricultural market access, special and differential treatment, WTO rules, the environment, and a multilateral registry of geographical indications for wines and spirits.

[29] The General Council also approved Iraq's long-standing request for observer status at the WTO, but put off consideration of a similar request from Iran largely due to continued US opposition.

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

A. BACKGROUND

53. 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."[30]

54. Accordingly, the review of the DSU was initiated in the Dispute Settlement Body (DSB) of the WTO in 1997. The DSB conducted extensive discussion on various issues related to the DSU in informal meetings. However, as there was no agreement and there remain a number of suggestions by Members that have yet to be considered, the General Council had to extend the time for the completion of the review process in 31 July 1999.[31]

55. At the Fourth Ministerial Conference of the WTO, held in Doha, Qatar from 9 to 14 November 2001, the Ministers had agreed to negotiate on improvements and clarifications of the DSU.[32] 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 report of which shall be presented at the fifth Ministerial Conference to be held in Cancun, Mexico on 10-14 September 2003.

56. The Special Session of the DSB was established and till date it has held nine formal meetings.[33] At these meetings, the work progressed from a general exchange of views to a discussion of conceptual proposals put forward by Members and by the second half of 2002 to an issue-by-issue thematic discussion. Since January 2003, the work has focused on discussion of specific draft legal texts proposed by Members.

57. The Chairman of the Special Session, on 28 May 2003,[34] circulated a draft legal text under his own responsibility. The text contained Members proposals on a number of issues, including: enhancing third-party rights; introducing an interim review and remanding at the appeals stage; clarifying and improving the sequence of procedures at the implementation stage; enhancing compensation; strengthening notification requirements for mutually-agreed solutions; and strengthening special and differential treatment for developing countries at various stages of the proceedings.

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30 Ministerial Conference *'Decision on the Application and Review of the Dispute Settlement Understanding on Rules and Procedures Governing the Settlement of Disputes'*, 1994.

31 WT/DSB/M/52.

32 Para. 30, *Doha Ministerial Declaration*, WT/MIN(01)/DEC/W/1, page 6.

33 Apart from this many informal meetings were also held.

34 This annex reproduces the text contained in Job(03)/91/Rev.1, issued on 28 May, and incorporates the technical rectifications included in the corrigendum Job(03)/91/Rev.1/Corr.1, issued on 6 June.

58. However, the Chairman's Text did not reflect a number of other proposals by Members due to the absence of a sufficiently high level of support. These proposals covered issues such as accelerated procedures for certain disputes; improved panel selection procedures; increased control by Members on the panel and Appellate Body reports; clarification of the treatment of *amicus curiae* briefs; and modified procedures for retaliation, including collective retaliation or enhanced surveillance of retaliation.

59. As there were disagreement regarding the Chairman's Text, the General Council at its meeting on 24 July 2003, agreed to extend the negotiations from 31 May 2003 to 31 May 2004. The Cancun Ministerial Conference, which was supposed to review the progress in the negotiations in the Special Sessions of the DSB, failed to do so, as there was no consensus among the Members.

B. THE CHAIRMAN'S TEXT: AN OVERVIEW OF THE PROPOSED AMENDMENTS TO THE DSU

60. This report presents an analysis of some of the important proposals incorporated in the Chairman's text.[35]

ARTICLE 3 – GENERAL PROVISIONS

Paragraph 6

61. Under Article 3 (6) of the DSU, once the parties to the dispute have reached a solution mutually agreed in the consultation, it shall be notified to the DSB and the relevant Councils and Committees. 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.[36]

62. In order to make this provision mandatory in practice, many WTO Members had suggested to the Special Session that mutually agreed solutions in consultation should mandatorily be notified, for example, within two months.[37] Therefore, the Chairman's Text on this point was intended to address two issues relating to the notification:

- notification of mutually agreed solution at the time of Consultation within 60 days and
- notification to contain sufficient information.

63. The proposed amendment reads as follows:

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35 The **bolded** part of the draft text of Chairman's Text reproduced in the report highlights the changes that have been made by the Chairman to the present text of the articles in the DSU.

36 Article 3(6): Mutually agreed solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements shall be notified to the DSB and the relevant Councils and Committees, where any Member may raise any point relating thereto.

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

> ***Each party to a mutually agreed solution to a matter*** *formally raised under the consultation and dispute settlement provisions of the covered agreements shall,* ***within 60 days after the date at which the solution was reached, notify the terms of that solution*** *to the DSB and the relevant Councils and Committees, where any Member may raise any point relating thereto.* ***Such notification shall contain sufficient information relevant to the covered agreements to enable other Members to understand the mutually agreed solution.***

ARTICLE 4 – CONSULTATIONS

Paragraph 10

> *During consultations, Members* ***shall*** *give special attention to the particular problems and interests of developing country Members****. When the party complained against is a least-developed country Member, the possibility of holding consultations in the capital of that Member shall always be considered.***

64. Article 4(10) is a provision of the DSU concerning the special and differential treatment for the developing countries in the process of consultation.

65. This proposal is in line with the proposal made by many developing countries which argued that this substitution is necessary to make the provision mandatory, effective, operational and of value to the developing countries. The substitution of the word "should" to "shall" was proposed so as to make this special and differential treatment provision mandatory.[38] However, no precise definition of the term 'shall give special attention' is provided for in the provision and this ambiguity is not rectified by the Chairman's Text.[39]

66. Further, the addition of the sentence to Article 4 (10) provides the LDC with an option to hold consultation in its capitals. This was intended to accommodate the view of the LDC's that the consultation process, which is usually conducted in Geneva, is a very costly affair for them and, a provision for consultation to be held in LDC's capitals would give them opportunity to effectively utilize the dispute settlement mechanism.[40]

Paragraph 10 *bis* (new paragraph)

67. Apart from the modification of Article 4 (10), the Chairman's Text proposed to add a new paragraph 10*bis* to the Article 10, which provides:

> *In the context of consultations involving a measure taken by a developing country Member, the parties may agree to extend the periods established in paragraphs 7 and 8 of Article 4. If* ***the parties have not agreed on such extension, the developing country Member concerned may, prior to the expiry of the relevant period, request the Chairman of the DSB to extend the relevant period. After consultations with the parties, the Chairman of the DSB shall decide*** *whether to extend the relevant period and if so, for how long.* ***[A guideline for the Chairman of the DSB shall be***

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38 This proposal is in line with the proposal of many Members. See TN/DS/W/18.

39 See *India's and African Group's* proposal to the Special Session of the DSB.

40 *Proposal of LDC (Haiti),* TN/DS/W/37

that such extension should normally not exceed 15 days from the date of expiry of the relevant period.][41]

68. This new paragraph 10*bis* is a paraphrased and modified version of paragraph 10 of Article 12 of the DSU. This provision provides the developing Members an option to extent the period of consultation. Though the current DSU provision (art. 12.10) is considered as mandatory, it is the discretion of the DSB Chairman whether to extent the consultation period and if so, for how long. A group of developing Members had been proposing in the Special Sessions of the DSB that there is a need to give guidance to the DSB Chairman in the extension of the consultation. The above proposal is in reflection of this concern and limits the discretion of the Chairman of the DSB to decide the period of extension to a maximum of 15 days from the date of expiry of the relevant period.[42]

Paragraph 11

Whenever a Member other than the consulting Members considers that it has a substantial trade interest in consultations being held pursuant to paragraph 1 of Article XXII of GATT 1994, paragraph 1 of Article XXII of GATS, or the corresponding provisions in other covered agreements, such Member may notify the consulting Members and the DSB, within 10 days after the date of the circulation of the request for consultations under said Article, of its desire to be joined in the consultations, ***indicating the reasons for its claim of substantial trade interest.*** *Such Member shall be joined in the consultations,* ***unless the Member to which the request for consultations was addressed disagrees with the claim of substantial trade interest and notifies the DSB of the reasons for consultations. If the Member to which the request for consultations is addressed agrees that the request to be joined in these consultations is well-founded, it shall so inform the DSB.***

69. In the original paragraph 11 of article 4, any Member who considers that it has a 'substantial trade interest' could join a consultation process without the consent of the other Members who initiated the consultation process and also there was no need to prove 'substantial trade interest'. The amendments made in the paragraph 11 was intended:

- to make the Member interested in joining consultation to indicate reasons for its claim of substantial trade interest;
- to transfer the discretion of admitting a Member to a consultation from the Member interested to join consultation, to the Parties to the Consultation. Both the parties must be convinced that there is indeed 'substantive trade interest'.

ARTICLE 6 – ESTABLISHMENT OF PANELS

Paragraph 1

The DSB shall establish a panel at the meeting at the request of the complaining party*, the request first appears as an item on the DSB's agenda, unless the DSB decides by consensus not to establish a panel.*

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41 The non-bolded part of this paragraph is currently contained in paragraph 10 of Article 12.

42 *Proposal by Cuba, Dominican Republic, Egypt, Honduras, India, Indonesia, Kenya, Mauritius, Pakistan, Sri Lanka, Tanzania and Zimbabwe*, TN/CTD/W/2, TN/DS/W/9

Where the Member complained against is a developing country Member, the establishment of a panel shall be postponed, if that Member so requests, to the next DSB meeting at which, at the request of the complaining party, the request appears as an item on the DSB's agenda. In such cases, the panel shall be established at that meeting unless the DSB decides by consensus not to establish it.

70. This is a modification of paragraph 1 of Article 6, relating to the establishment of a panel were one of the disputing party is a developing Member. The modification gives the choice to postpone the establishment of the panel by one more meeting of the DSB. This is proposed to accommodate the views of many developing Members that a provision for more intervening time between the two DSB meetings could be utilized for amicably settling the dispute with the developed Members.

ARTICLE 8 – COMPOSITION OF THE PANELS

Paragraph 10

When a dispute is between a developing country Member and a developed country Member the panel shall, include ***a*** *panelist from a developing country Member,* ***unless the developing country Member agrees otherwise****.*

When the party complained against is a least-developed country Member, the panel shall include a panelist from a least-developed country Member, unless the least-developed country Member agrees otherwise. Alternatively, if that Member so request, the panel shall include a panelist from a developing country Member pursuant to the first sentence of this paragraph.

71. Paragraph 10 of Article 8 relates to the composition of a panel. In the current article 8.10 of DSU, if a dispute is between a developing country Member against a developed country Member, it is not mandatory to have a developing country Panelist unless specifically requested by the developing Member. The proposed amendment intends to make it a general rule that at least one of the panelist must be from a developing country, unless otherwise agreed by the developing country Member. The LDC's are given an additional benefit of option for a Panelist from a least-developed country Member.

ARTICLE 10 – THIRD PARTIES

Paragraph 2

Any Member having a substantial interest in a matter before a panel ***shall notify*** *its interest to the DSB* ***no later than 10 days after the establishment of the panel (such Member is*** *referred to in this Understanding as a "third party").* ***The panel shall give third parties the opportunity to be present at the substantive meetings of the panel with the parties to the dispute preceding the issuance of the interim report to the parties, except for portions of such meetings when [privileged] information designated as such by the party that submitted it is discussed. Third parties shall also have an opportunity to*** *be heard by the panel.*

72. Article 10 lays down the rights of the third parties.[43] The amendments in this paragraph are intended to give more right to the 'third parties' to a dispute. The third party rights available in the current article 10.2 is limited only to the submission of an oral or written statement to the panel in a panel meeting designated for this purpose. The proposed amendment above seeks to provide the third parties, the rights to be present at the substantive meetings of the panel, preceding the issuance of the interim report, except for portions of such meetings when confidential information are involved. This amendment is intended to provide a more active role for the third parties in the WTO adjudication process.

ARTICLE 12 – PANEL PROCEDURE

Paragraph 10

> ***Where the party complained against is a developing country Member, the panel shall, in determining its timetable, take due account of any particular problems faced by that Member, and afford it sufficient time to present its written submissions, normally no less than 15 additional days for the first submission and 10 additional days for the rebuttal submissions.[44] The time-frames provided for in paragraph 1 of Article 20 and paragraph 4 of Article 21 may be extended as necessary to apply this provision.]***

73. The current article 12.10 of the DSU provides that the panel shall afford 'sufficient time' for the developing Member to prepare and present its arguments before the panel.[45] Though this is a mandatory provision, it does not provide a guideline for the panel as to how much additional time should be given. Many developing Members, in its submission to the DSB Special Session had argued that at least two weeks should be provided for the first submission and an extra one week for rebuttal submissions.[46]

74. The proposed amendment seeks to bring in more clarity by fixing the additional days that may be granted to a developing Member by the panel i.e, 15 additional days for the first submission and 10 additional days for the rebuttal submissions.

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43 Article 10 (2): Any Member having a substantial interest in a matter before a panel and having notified its interest to the DSB (referred to in this Understanding as a "third party") shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report.

44 (original footnote) The application of this provision shall be without prejudice to the simultaneity of submissions as provided for in paragraph 6 of this Article.

45 Article 12 (10): In the context of consultations involving a measure taken by a developing country Member, the parties may agree to extend the periods established in paragraphs 7 and 8 of Article 4. If, after the relevant period has elapsed, the consulting parties cannot agree that the consultations have concluded, the Chairman of the DSB shall decide, after consultation with the parties, whether to extend the relevant period and, if so, for how long. In addition, in 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. The provisions of paragraph 1 of Article 20 and paragraph 4 of Article 21 are not affected by any action pursuant to this paragraph.

46 *Joint proposal by Cuba, Dominican Republic, Egypt, Honduras, India, Indonesia, Kenya, Mauritius, Pakistan, Sri Lanka, Tanzania and Zimbabwe*, TN/CTD/W2.

Paragraph 11

Where one or more of the parties is a developing country Member:

(a) a developing country Member wishing to avail itself of any provisions on differential and more favourable treatment for developing country Members that form part of the covered agreements should raise arguments on these provisions as early as possible in the course of the procedure;

(b) the submissions of any other party to the dispute, that is not a developing country Member, should address any such arguments which have been raised by a developing country Member party to the dispute;

(c) the panel's report shall explicitly take into account and reflect the consideration given to any provisions on differential and more favourable treatment for developing country Members that form part of the covered agreements which have been raised by a developing country Member party to the dispute.

75. The amendment to the article 12.11 is intended to bring in more clarity to this S&D provision, which require panel to explicitly address the S&D issues raised by the developing country Member. The proposed amendment requires:

- the developing country Member to avail itself of any S&D provision as early as possible;
- the other party to the dispute (developed country Member) to specifically address the S&D issue raised by the developing country Member in their oral and written submissions; and
- the panel to explicitly consider and reflect in the panel report as to how the S&D issue raised by the developing country Member has been considered.

ARTICLE 17 – APPELLATE BODY – STANDING APPELLATE BODY

Paragraph 1

A standing Appellate Body shall be established by the DSB. The Appellate Body shall hear appeals from panel cases. It shall be composed of ***at least*** *seven persons, three of whom shall serve on any one case.* ***The total number of Appellate Body members may be modified by the DSB, after consultation of the General Council on any potential budgetary implications of the proposed modification.*** *Persons serving on the Appellate Body shall serve in rotation. Such rotation shall be determined in the working procedures of the Appellate Body.*

76. The amendment is proposed to accommodate the general feeling among the WTO Members, both developed and developing, that the current seven members Appellate Body should be expanded.[47] However, the Chairman proposal, rather than proposing an increase in the total number of AB members, had given the authority on the Dispute Settlement Body (DSB) to modify (increase) the number of AB members, after consultation with the WTO General Council on any potential budgetary implication of the proposed modification.

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[47] *Proposal from Thailand and Japan*, TN/DS/W/2, TN/DS/W/22

Paragraph 5

> ***(a) A notification of appeal pursuant to paragraph 4 of Article 16 shall identify the relevant issues of law covered in the panel report and legal interpretations developed by the panel in sufficient detail to present the issues under appeal clearly.***
>
> ***…***
>
> ***[(c) Following the consideration of submissions and oral arguments, the Appellate Body shall issue an interim report to the parties, including both the descriptive sections and the Appellate Body's findings and conclusions. Within a period of time set by the Appellate Body, a party may submit a written request for the Appellate Body to review precise aspects of the interim report prior to circulation of the final report to the Members. At the joint request of the parties, the Appellate Body shall hold a further meeting with the parties on the issues identified in the written comments. If no comments are received within the comment period, the interim report shall be considered the final report and circulated promptly to the Members. The final Appellate Body report shall include a discussion of the arguments made at the interim review stage.]***

77. This proposed amendment in article 17.5 of the DSU is procedural in nature and is intended to bring in more clarity to the functioning of the Appellate Body. Firstly, the proposed amendment require the party appealing to identify the relevant issues of law and legal interpretation developed by the panel *in sufficient detail* to present the issue under appeal clearly. Secondly, the time period allotted for the completion of the AB proceeding has been increased from 60 to 90 days and a maximum of 120 days (currently 90 days) if the AB feels so.

78. Thirdly, the amendment seeks to bring in an 'interim report' stage to the AB proceedings, wherein the disputing parties may submit a written request to the AB to review precise aspects of the interim report, which will be included in the final report of the AB.

Paragraph 12

> *The Appellate Body shall address each of the issues raised in accordance with paragraph 6 during the appellate proceeding.*
>
> ***Where, due to insufficient factual findings in the panel report[48] or undisputed facts on the record of the panel proceedings, the Appellate Body is unable to fully address an issue, it shall indicate it in its report and explain in detail the specific insufficiencies in the factual findings and undisputed facts on the record. In such case, within 30 days from the adoption of the Appellate Body report by the DSB, the complaining party may request the DSB to remand that issue to the original panel, pursuant to the provisions of Article 17bis.***
>
> ***Where, on the basis of the factual findings of the panel or undisputed facts on the record of the panel proceedings, the Appellate Body is unable to establish whether a measure in respect of which an issue was raised on appeal is inconsistent with a covered agreement, it shall indicate it in its report. [In such a case, the Appellate***

[48] (Original footnote) This expression shall be understood to include reports by a compliance or remand panel.

Body shall not make a recommendation pursuant to paragraph 1 of Article 19 that the measure be brought into conformity with the covered Agreements.]

The remand procedure is without prejudice to the adoption of the relevant recommendations and rulings in relation to findings which were not appealed and issues on which the Appellate Body was able to fully address the issues under appeal. [The remand procedure shall not prevent the adoption of relevant recommendations and rulings in respect of measures found to be inconsistent with a covered Agreement on the basis of findings not affected by the situation giving rise to remand.]

79. 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 law or in order to correct a procedural mistake (remand). Instead, the Appellate Body has to decide the case on its own. The proposed amendment above is consistent with the suggestions made by many WTO Members that a possibility of remand authority for the Appellate Body could be considered if it does not unduly delay the procedure as a whole.[49]

80. According to this proposal, if the Appellate Body is unable to fully address an issue because of specific insufficiencies in the factual findings and undisputed facts on the record, it shall indicate so it in its final report. In such case, within 30 days from the adoption of the Appellate Body report by the DSB, the complaining party may request the DSB to remand that issue to the original panel. Further, if because of the insufficiency in the panel report, the Appellate Body is unable to arrive at a conclusion, it shall not make any recommendation to the DSB**.**

81. The proposed amendment also make it clear that other relevant recommendations and rulings which are not affected by the situation giving rise to remand, shall be adopted by the DSB.

[ARTICLE 17*BIS*] – COMPLIANCE PANEL

[1. When, pursuant to paragraph 12 of Article 17, a party to the dispute requests a remand, the DSB shall establish a remand panel at the meeting, at which the request for a remand appears as an item on the DSB's agenda, unless the DSB decides by consensus not to establish the panel[50]. The remand panel shall be composed of the members of the original panel[51].

2. The terms of reference of the remand panel shall be:

"To examine, in the light of the relevant provisions in (name of the covered agreement(s) indicated by the AB in its report) the matter referred to the DSB under paragraph 12 of Article 17 in document ….. and to make such

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49 *Proposal from EC, Japan, Norway, Pakistan and Switzerland*, Job 6645, Rev.3, para. 251-255 and TN/DS/W/42. *Proposal from Costa Rica*[49] feel that this would cause delay and the burden of error committed by the panel can be transferred to the complainant. Job 6645, Rev.3, para. 250

50 (original footnote) If the complaining party so requests, a meeting of the DSB shall be convened for this purpose **within 15 days of the request, provided that at least 10 days' advance notice of the meeting is given.**

51 (original footnote) If any member of the original panel is not available, a replacement shall be appointed by the Director General within 7 days after the date of establishment of the panel, after consulting the parties to the dispute.

findings, in accordance with the indications given by the Appellate Body in its report, as will assist the DSB in making the recommendations or in giving the rulings provided in that/those agreement(s)".

3. The remand panel shall circulate its report to the Members within 90 days from the request. When the remand panel considers that it cannot issue its report within such timeframe, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will issue its report. In no case should the period from the establishment of the remand panel to the circulation of the report to the Members exceed six months[52].

4. No later than 10 days after the date of circulation of the report of the remand panel, any party to the remand panel proceeding may request a meeting of the DSB to adopt the report. The DSB shall meet no later than 10 days after such a request unless the party requesting the meeting requests that the meeting be held at a later date. At that meeting, the remand panel report shall be adopted by the DSB unless a party to the remand panel proceeding formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report. If a party has notified its decision to appeal, the report of the remand panel shall not be considered for adoption by the DSB until after completion of the appeal. This adoption procedure is without prejudice to the right of Members to express their views on a remand panel report.

5. If the report of the remand panel is appealed, the Appellate Body proceedings, as well as the adoption of the Appellate Body report, shall be conducted in accordance with Article 17.]

82. This proposed new article 17*bis*, is incorporated to give an institutional character to the proposed amendment in 17.12. It provides for the setting up of a remand panel and lays down the procedures to be followed by the remand panel. The Remand Panel shall be established by the DSB with specific term of reference, which is paraphrased in article 17*bis*.2. It shall be composed of the members of the original panel. The remand panel shall complete it work in 90 days and is subject to appeal to the Appellate Body.

ARTICLE 21 – SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS AND RULINGS

Paragraph 2

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

83. Article 21.2 is part of a long and important article that requires the DSB to keep under surveillance, the implementation of its rulings, following the adoption for the Panel/Appellate Body reports. However, there is no clear indication as to how this S&D provision has been implemented. In this regard a number of proposals had been

[52] The DSB may adopt guidelines on the working procedures to be followed by remand panels and compliance panels.

put forward by many developing Member countries to bring in more clarity and make this provision mandatory.[53]

84. However, the only proposal of the developing country Members that is reflected in the Chairman's Text is the substitution of the word "should" to "shall" thereby making the provision mandatory, without indicating the way in which this mandatory provision could be operationalized.

Paragraph 3 (c)

> ***(c) Any party to the dispute may refer the matter to arbitration at any point in time after 30 days from the date of the adoption by the DSB of the recommendations and rulings. If the parties cannot agree on an arbitrator[54] within 10 days after referring the matter to arbitration, at the request of either party, the Director-General shall appoint the arbitrator, after consulting the parties[55]. The arbitrator shall issue its award to the parties within 50 days from the date of the appointment of the arbitrator.*** *In such arbitration, a guideline for the arbitrator[56] should be that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances.* ***If the Member concerned is a developing country Member, the arbitrator shall take due account of any particular problems which may affect the time within which that Member can implement the DSB recommendations and rulings. In addition, if the Member concerned is a least-developed country Member, due consideration shall be given to the special situation faced by such countries.***

85. Some of the issues regarding the 'reasonable period of time' where the DSB Special Session had been receiving suggestions from the Members are on: the length of the reasonable period of time; determination of criteria of 'peculiar circumstances' for granting longer 'reasonable period of time'; what is required of a losing party while the reasonable period is underway; the time period for arriving at the arbitral award; and the special treatment for developing Members etc.

86. However, the proposals in the Chairman's Text reflect only very limited issues addressed in the Members proposals. The Chairman's proposed amendment seeks to reduce the time period for seeking the appointment of the arbitration from 90 to 30 days. Further, the arbitrator shall issue the arbitral award to the parties within 50 days from the date of the appointment of the arbitrator. Furthermore, the arbitrator shall, if the Member concerned is a developing Member, take in to account the particular problem of that developing Member in implementing the report, while determining the reasonable period of time.

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53 See *Proposals of India and African Group* where they have proposed that the panel/AB should interpret this provision as an overarching provision in all dispute involving developing Members as a disputing party. TN/CTD/W/6

54 The expression "arbitrator" shall be interpreted as referring either to an individual or a group.

55 (original footnote) The Director-General shall appoint the arbitrator within 7 days, unless the parties agree otherwise.

56 The expression "arbitrator" shall be interpreted as referring either to an individual or a group.

Paragraph 6

> ***(b) The Member concerned shall report on the status of implementation of the recommendations and rulings of the DSB at each DSB meeting where any Member may raise any point pertaining thereto. The Member concerned shall start to report under this provision from the midpoint of the length of the reasonable period of time or 6 months after the date of adoption of the recommendations and rulings of the DSB, whichever is the earlier, and continue until the parties to the dispute have mutually agreed that the issue is resolved.***[57] *At least 10 days prior to each such DSB meeting, the Member concerned shall provide the DSB with a* ***detailed written*** *status report* ***concerning*** *its progress in the implementation of the recommendations and rulings****, [including any specific measures taken by the Member concerned since the last report]. The final status report prior to the expiry of the reasonable period of time shall include any measures that the Member concerned has taken to comply and any measures that it expects to have taken by the expiry of the reasonable period of time. The Director-General will issue [every six months][once a year] a public report on the status of implementation of DSB recommendations and rulings.***

87. Article 21.6 of the DSU provides for the reporting on the status of implementation of the recommendations and rulings of the DSB at each DSB meeting. According to the Chairman's proposal this paragraph has been divided into three subparagraphs. No change has been made in the first two sentences of the article 21.6 which forms the subparagraph (a). [58]

88. The new subparagraph (b) states that the implementing Member shall start to report from the *midpoint of the length of the reasonable period of time* or 6 months after the date of adoption of the recommendations and rulings of the DSB, whichever is the earlier. This change has been made to accommodate the situation where the reasonable period of time is less than six month. The new subparagraph (c) provides for periodical written notifications that need to be submitted to the DSB, as regards the implementation measures taken by a Member.

ARTICLE 21BIS – DETERMINATION OF COMPLIANCE (NEW ARTICLE)

> ***Paragraph 1: Where there is disagreement between the complaining party and the Member concerned as to the existence or consistency with one or more covered agreement of measures taken to comply with the recommendations and rulings of the DSB, such disagreement shall be resolved through recourse to the dispute settlement procedures provided for in this Article. [***[59]***]***

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57 (Original footnote) The obligation to report on the status of implementation shall be suspended from the date of establishment of a compliance panel under Article 21*bis* until the adoption by the DSB of the panel report on compliance and, where relevant, the Appellate Body report on compliance.

58 (a) The DSB shall keep under surveillance the implementation of adopted recommendations or rulings. The issue of implementation of the recommendations or rulings may be raised at the DSB by any Member at any time following their adoption.

59 [This is without prejudice to the right of a party or the parties to have recourse to other dispute settlement procedures under this Understanding, including the procedures under Article 5 or Article 25.]

<u>Paragraph 2</u>: The complaining party may request [A: consultations under this Article][B: the establishment of a compliance panel] at any time after:

> ***(i) the Member concerned has indicated that it does not need a reasonable period of time for implementation pursuant to paragraph 3 of Article 21; or***
> ***(ii) the Member concerned has submitted a notification of compliance pursuant to paragraph 6(c) (i) of Article 21; or***
> ***(iii) [A: 20 days before] the date of expiry of the reasonable period of time;***

whichever is the earlier. Such request shall be made in writing.

[The complaining party may also request [A: consultations under this Article][B: the establishment of a compliance panel] at any time if it considers that the Member concerned has taken a measure to comply with the recommendations and rulings of the DSB which is inconsistent with the covered agreements.]

[A: The Member to which the request is made shall, unless it has been otherwise agreed with the complaining party, reply to the request within 10 days after the date of its receipt and shall enter into consultations in good faith within 20 days from the date of circulation of the request.]

<u>Paragraph 3</u>: [A: At any time 20 days after the circulation of the request for consultations, the complaining party may request the establishment of a compliance panel.]
The compliance panel shall be composed of the members of the original panel.[60]

<u>Paragraph 4</u>: In its request for the establishment of a compliance panel, the complaining party shall identify the specific measures at issue and provide a brief summary of the legal basis of the complaint, sufficient to present the problem clearly. If the complainant party requests the establishment of a panel with other than standard terms of reference, the written request shall included the proposed text of special terms of reference. Unless the parties to the compliance panel proceedings agree on special terms of reference within 5 days from the establishment of the compliance panel, the compliance panel shall have standard terms of reference in accordance with Article 7.

…

<u>Paragraph 8</u>: Where the report of the compliance panel is appealed, the appellate review proceedings, as well as the adoption of the Appellate Body report on compliance, shall be conducted in accordance with Article 17.

<u>Paragraph 9:</u> Where the compliance panel or the Appellate Body concludes that the Member concerned has failed to bring the measure found to be inconsistent with one or more of the covered agreements into conformity therewith or otherwise comply with the recommendations and rulings of the DSB within the reasonable period of time, the Member concerned shall not be entitled to any further period of time for implementation following adoption by the DSB of its recommendations and rulings.
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60 If any member of the original panel is not available, the Director-General shall appoint a replacement within 7 days after the date of establishment of the compliance panel, after consulting with the parties to the arbitration, unless the Director-General has been requested not to do so by the parties to the compliance panel procedure.

89. To remedy the problem of conflicting interpretation as regard the relationship between Article 21.5 and 22 of the DSU ('sequencing problem'), which was brought out in the *EC – Banana* case, this new article was proposed. 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 authorization to suspend concessions within twenty days after the end of the compliance period, without resorting to Article 21.5 compliance review.

90. A large number of WTO Members have individually and jointly proposed that necessary amendments to the relevant articles of the DSU should be carried out and should also explore the possibility of introducing a new article, Article 21 *bis* (Determination of Compliance) to address the issue.[61] This was one of the few issues were all Members had expressed support.

91. This article provides that if there is disagreement between the complaining party and the Member concerned as to the existence or consistency with one or more covered agreement of measures taken to comply with the recommendations and rulings of the DSB, such disagreement shall be resolved through recourse to the dispute settlement procedures provided for in this Article. The compliance panel so constituted shall be composed of the members of the original panel.[62]

92. In its request for the establishment of a compliance panel, the complaining party shall identify the specific measures at issue and provide a brief summary of the legal basis of the complaint. The compliance panel shall circulate its report within 90 days from the date of its establishment and the report is subject to appeal. If the Compliance panel or the Appellate Body concludes that the Member concerned has failed to bring the measure found to be inconsistent, the Member concerned shall not be entitled to any further period of time for implementation.

ARTICLE 22 – COMPENSATION AND THE SUSPENSION OF CONCESSIONS

Paragraph 1*bis*

> ***At any point of time after the adoption by the DSB of its recommendations and rulings and before the submission of the request for authorization for suspension of concessions or other obligations referred to in paragraph 2 of this Article, the parties may agree to refer to arbitration the determination of the level of nullification or impairment caused by measures found to be inconsistent with one or more covered agreements.***
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> …

93. In case of suspension of concessions, which is an exceptional and last resort measure, there is a need to ensure that the level of suspension is strictly equivalent, in

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61 *Proposal from Bolivia, Canada, Chile, Colombia, Costa Rica, Ecuador, Japan, Korea, New Zealand, Norway, Peru, Switzerland, Uruguay and Venezuela*, Job 6645, Rev.3.

62 If any member of the original panel is not available, the Director-General shall appoint a replacement within 7 days after the date of establishment of the compliance panel, after consulting with the parties to the arbitration, unless the Director-General has been requested not to do so by the parties to the compliance panel procedure.

law and in practice, to the level of nullification or impairment suffered by the complainant. However, the existing mechanism in the current DSU does not allow DSB to ensure such equivalence. It was suggested by many countries that arbitrators should first determine the level of nullification and impairment accrued before determining the level of suspension.[63]

94. A new paragraph 1*bis* incorporated in article 22 is to bring in an arbitration proceeding for the determination of the level of nullification or impairment caused by measures found to be inconsistent with one or more covered agreements. It states that from the adoption of the report by the DSB, and before the submission of the request for authorization for suspension of concessions, the parties may agree to refer to arbitration for the determination of the level of nullification or impairment. The arbitrator shall circulate the award within 45 days after the date of the request.

Paragraph 2

> ***(a) The complaining party may either request the Member concerned to enter into consultations with a view to agreeing on a mutually acceptable trade or other compensation, or request an authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements in accordance with paragraph 6 of this Article,***
>
> ***…***
>
> ***(b) The procedures in paragraph 2bis shall apply to compensation.***
>
> ***[(c) Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendation and rulings, proceedings shall be undertaken under Article 21* bis *before recourse may be had to this paragraph.]***

95. The developing country Members had 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. Many developing Members, especially African Group and LDC's, have made a strong case for monetary compensation.[64] This is important for developing and least-developed Members, and for any economy that stands to suffer the time that an offending measure remains in place.

96. Accordingly, the Chairman's Text seeks to replace the current text of article 22.2 by the text above. This newly inserted text provides that parties to the dispute can firstly, agree upon mutually acceptable trade or *other* compensation, or secondly, requests an authorization from the DSB to suspend concession. However, the second option of suspension of concession can only be requested after the compliance panel procedure (Article 21 *bis*) is completed.[65]

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63 *Proposal from Philippines and Thailand See* WT/MIN(01)/W/3, para 3; TN/DS/W/3.

64 *Proposal of African Group*. TN/DS/W/42; *Proposal of LDC's*, TN/DS/W/17.

65 *Proposal from Bolivia, Canada, Chile, Colombia, Costa Rica, Ecuador, Japan, Korea, New Zealand, Norway, Peru, Switzerland, Uruguay and Venezuela*, Job 6645, Rev.3,

97. It may be noted that the word '*other* compensation' has been added to this provision. This leeway is intended to accommodate the issue raised by a large number of developing countries that an option for monetary compensation should be available. However, the option for monetary compensation as included in the Chairman's Text is not mandatory and depends on the mutual agreement between the parties to the dispute.

Paragraph 2*bis*

(a) The Member concerned shall, if so requested by the complaining party, enter into consultations with a view to agreeing on a mutually acceptable trade or other compensation at any point in time after any of the situations referred to in sub-paragraphs i), ii) or iii) of paragraph 2 occurs. Where the complaining party has requested consultations under this paragraph, it may not request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements in the 30 day period following the request for consultations.

(b) Within [A: 30][B: 20] days from the request, the Member concerned [shall][should] submit to the other Member a proposal for mutually acceptable trade or other compensation, taking into account any prior request put forward by the complaining party during these consultations. [B: If the Member concerned does not submit such a proposal within 20 days from the request, the complaining Member may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements, notwithstanding the provisions of subparagraph (a).]

(c) Where the complaining party is a developing country Member, the proposal should take into account all relevant circumstances and considerations relating to the application of the measure and its impact on the trade of that developing country Member. In such cases, the suitable form of compensation should also be an important consideration. Where the complaining party is a least developed country Member, special consideration shall be given to the specific constraints that may be faced by such countries in finding effective means of action through the possible withdrawal of concessions or other obligations.

(d) If the parties to the dispute reach an agreement on mutually acceptable trade or other compensation, they shall notify the text of such agreement to the DSB. The Member concerned shall notify to the DSB the measures it has taken in application of the compensation agreement.

98. This new paragraph concerns the intervening period when the complaining party cannot request for authorization for suspension of concession. Paragraph 2*bis* of Article 22 provides that no request for authorization from the DSB to suspend concessions or other obligations shall be made by the complaining party for 30-day period following the request for consultations. If the other Member does not respond to the request within 20 days, the complaining Member may request authorization for suspension, notwithstanding the restriction of 30 day period stated above.

99. Where the complaining party is a developing country Member, the proposal should take into account all relevant circumstances and considerations relating to the application of the measure and its impact on the trade of that developing country Member. In such cases, the suitable form of compensation should also be an

important consideration. Where the complaining party is a least developed country Member, special consideration shall be given to the specific constraints that may be faced by such countries in finding effective means of action through the possible withdrawal of concessions or other obligations.

Paragraph 7

> ***(b) At any time after the circulation of the award of the arbitrator, the complaining party may submit a request to the DSB for an authorization to suspend concessions or other obligations. [It shall also submit, at the same time, an indicative list of those concessions and other obligations that it proposes to suspend [66]]. The DSB shall grant authorization to suspend concessions or other obligations where the request is consistent with the determinations made by the arbitrator, unless the DSB decides by consensus to reject the request.***

100. The proposed subparagraph 7 (b) states that the complaining party while requesting the suspension of concession from the DSB shall submit an indicative list of those concessions and other obligations that it proposes to suspend. This is in line with suggestions made by many countries that the complaining party should submit a list of concessions it intent to suspend.[67] A determinate list of concessions that a Member intends to suspend will reduce the practice adopted by some of the WTO Members (USA) of the use of carousal method of retaliation (rotation of the list of products selected for suspension of concession).

Paragraph 9 (to be created)

> ***(a) After the DSB has authorized the suspension of concessions or other obligations pursuant to paragraph 6 or 7 of this Article, the Member concerned may request the withdrawal of such authorization on the grounds that it has implemented the recommendations and rulings of the DSB [and eliminated the inconsistency or the nullification or impairment of benefits under the covered agreements identified in the recommendations and rulings of the DSB]. … The DSB shall withdraw the authorization for suspension of concessions and other obligations unless the complaining party [notifies the DSB of its decision to request] the establishment of a compliance panel under Article 21bis or the DSB decides by consensus not to withdraw the authorization.[68]***
>
> ***(b) If the complaining party has requested the establishment of a compliance panel, the provisions of Article 21bis shall apply to the establishment of such panel and to its proceedings. If the measures at issue are found not to be inconsistent with one or more covered agreements and to comply with the recommendations and rulings of the DSB in the dispute, the Member concerned may request a meeting of the DSB to terminate the authorization for the suspension of concessions or other obligations at any time after the adoption of the compliance panel report and, where relevant, of the Appellate Body report on compliance. The DSB shall meet***

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66 (Original footnote) [This list shall be without prejudice to the determination by that Member of the specific concessions or other obligations that it may ultimately suspend.]

67 See WT/MIN(01)/W/3, para 3; TN/DS/W/3.

68 (Original footnote) If the Member concerned so requests, a meeting of the DSB shall be convened for this purpose within 15 days of the request for a meeting, provided that at least 10 days' advance notice of the meeting is given.

at no later than 15 days[69] after such a request unless the Member concerned requests that the meeting be held at a later date. At such meeting the DSB shall withdraw the authorization for suspension of concessions and other obligations unless the DSB decides by consensus not to do so.[70]

(c) The complaining party shall not maintain the suspension of concessions and other obligations after the DSB has withdrawn the authorization.

(d) If as a result of recourse to the dispute settlement procedures provided for in Article 21bis, the measures taken to comply by the Member concerned are found not to be consistent with a covered agreement or not to comply with the recommendations and rulings of the DSB in the dispute, any party to the dispute may, at any time after the adoption of the compliance panel report and, where relevant, the Appellate Body report on compliance, request an arbitration to determine the level of nullification or impairment caused by the measures at issue. Article 22.6 shall apply mutatis mutandis to such arbitration. If the level of nullification and impairment determined by the arbitrator under this paragraph differs from the level of suspension of concessions or other obligations previously authorized by the DSB, any party to the dispute may request a meeting of the DSB to modify the authorization for the suspension of concessions or other obligations. The DSB shall meet [10 days after such a request] unless the request indicates that the meeting is to be held at a later date. At such meeting, the DSB shall modify the authorization for suspension of concessions or other obligations according to the decision of the arbitrator, unless the DSB decides by consensus not to do so. The complaining party shall bring the suspension of concessions and other obligations into conformity with the authorization of the DSB.

[(e) If the level of nullification or impairment has changed as a result of measures taken to comply by the Member concerned, and where there is no disagreement between the parties on the consistency of these measures, any party to the dispute may refer the matter to arbitration in accordance with Article 22.7 in order to determine the modified level of nullification or impairment. At any time after the circulation of award of the arbitrator, any party to the dispute may request the DSB to modify the authorization in order to adjust to this change.]

101. There has been a constant demand from most of the Member countries that the WTO DSU does not provide for a procedure for withdrawal of the authorization of suspension of concession.[71] This proposed paragraph provides for the procedure for withdrawing the measure to suspend concession. It provides that the Member against whom a suspension of concession has been authorized by DSB, may request the withdrawal of such authorization on the grounds that it has implemented the recommendations and rulings of the DSB. The authorization of suspension of concession shall be withdrawn by the DSB unless the complaining party requests the DSB to set up a compliance panel (article 21*bis*).

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69 In the case of an appeal, the DSB shall meet for this purpose on or after the date of the adoption of the Appellate Body report pursuant to Article 17.14.

70 The DSB shall not consider the request for the withdrawal of the authorization to suspend concessions or other obligations until after it has adopted the report of the compliance panel or the Appellate Body.

71 Bolivia, Canada, Chile, Colombia, Costa Rica, Ecuador, Japan, Korea, New Zealand, Norway, Peru, Switzerland, Uruguay and Venezuela, Job 6645, Rev.3.

102. The DSB shall, depending on the finding of the compliance panel, authorize the termination or retention of the authorization for the suspension of concessions or other obligations at any time after the adoption of the compliance panel report. If the level of nullification and impairment determined by the arbitrator differs from the level of suspension of concessions or other obligations previously authorized by the DSB, any party to the dispute may request a meeting of the DSB to modify the authorization for the suspension of concessions or other obligations.

103. If any time after the authorisation of suspension of concession by the DSB, the level of nullification or impairment has changed due to the measures taken to comply by the Member concerned, any party to the dispute may refer the matter to arbitration in order to determine the modified level of nullification or impairment. At any time after the circulation of award of the arbitrator, any party to the dispute may request the DSB to modify the authorization in order to adjust to this change.

ARTICLE 27 – RESPONSIBILITIES OF THE SECRETARIAT

Paragraph 2

> *While the Secretariat assists Members in respect of dispute settlement at their request, there may also be a need to provide additional legal advice and assistance in respect of dispute settlement to developing country Members. To this end,* ***the Secretariat shall maintain a roster of qualified legal experts, from which an expert shall be made available to any developing country Member which so requests.*** *These experts shall assist the developing country Member in a manner ensuring the continued impartiality of the Secretariat.*

104. Though the WTO Secretariat currently provides technical assistance, such assistance proves to be inadequate in assisting developing country Members to take full advantage of the Dispute Settlement mechanism. Though the developing country Members had tabled many proposals in this regard, none of these is reflected in the above paragraph 2.[72] The only addition to this paragraph is that the Secretariat shall maintain a roster of qualified legal experts, from which an expert shall be made available to any developing country Member which so requests.

ARTICLE 28 – LITIGATION COSTS (NEW ARTICLE)

> ***[Members shall bear their own costs in procedures brought under this Understanding. However, a panel or the Appellate Body may decide to award, at the request of [the parties][one of the parties] to a dispute, an amount for litigation costs, taking into account the specific circumstances of the case, the respective conditions of the parties concerned and special and differential treatment to developing country Members. Where a panel or the Appellate Body decides to grant such costs, it shall be guided by principles to be determined in a decision by the DSB.]***

105. The cost of litigation had been one of the major concerns of the developing and least-developed Members in the WTO. Most of the developing countries refrain from approaching the adjudicatory mechanism in the WTO due to the huge cost involved at varies stages of the Dispute Settlement process.

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[72] TN/DS/W/17; TN/DS/W/21

106. The Chairman's Text, taking due consideration of this fact, has proposed a new Article 28. This article provides that, taking into account the specific circumstances of the case, the respective conditions of the parties concerned and special and differential treatment to developing country Members, a panel or the Appellate Body may decide to award, at the request of one of the parties to a dispute, an amount for litigation costs. The principle basis on which the cost will be awarded shall be determined by the DSB through its decision.

IV. DELIBERATIONS AT THE 42ND SESSION OF AALCO

107. At the 42nd Session of AALCO held in Seoul, South Korea from 16-21 June 2003, Dr. Li Zhenhua, Deputy Secretary-General of AALCO, introduced the item of the 'WTO as a Framework Agreement and Code of Conduct for World Trade.' He summarized the progress of the implementation of the Doha mandate, and highlighted three issues of concern to developing countries. He expressed regret that little progress has been made on reaching understanding on these issues, despite the proactive approach by developing and least-developed countries.

108. Delegations from India, Kenya, Malaysia, Republic of Korea and Pakistan spoke on this topic. Many delegations expressed disappointment with the lack of progress on such areas as dispute settlement, implementation-related issues, the Agricultural Agreement, the TRIPS Agreement, special and differentiated treatment, and the Trade and Services Agreement. Delegations expressed the desire to see balanced negotiations, reflecting the interests of both developed and developing countries.

V. OBSERVATIONS

109. The fifth WTO Ministerial Conference, which was expected to assess the progress in the trade negotiations, failed and ended without adopting a Ministerial Declaration. The Conference failed primarily due to acute differences in interests dividing developed and developing country Members. This is the second time in the history of the WTO that a Ministerial Conference ended without taking any decision. Though the Members had limited expectations on the outcome of the Cancun conference, the failure is indeed not a sign in the right direction.

The Cancun Ministerial Conference failed because of many reasons.

110. Firstly, the Doha Development Agenda was an overloaded one, which led to missed deadlines and postponement of decisions and there was lack of political will on the part of the developed country Members especially, US and EU, to fulfil the promises made at Doha in letter and spirit. In the case of TRIPS and Public Health, there was considerable delay in arriving at a decision, which was reached only few days before Cancun, caused delay in work on other issues. Many Members felt that the last minute General Council Decision on Public Health was unsatisfactory from the point of view of public health.

111. Further, the deadlines for the completion of the work on special and differential treatment for developing country Members and implementation issues, which are key issues for the developing country Members, were missed. On implementation question, there has been little progress over 75 odd implementation issues identified in Doha for redress.

112. Secondly, 'Singapore' issues also frustrated the adoption of the Declaration. The developing Members expressed strong opposition on the section on Singapore issues, which had totally disregarded their views, especially the formal proposals presented by 70 developing countries to continue the clarification process and not to launch negotiations.

113. At the Conference, the developing country Members stood firmly against the developed country Members (especially the United States and European Union) proposal for an agreement on the "Singapore Issues". The developing countries were of the position that a negotiation on Singapore issues would divert scarce human and negotiating resources from directly trade issues such as agriculture and industrial products and agreement on these issues will have serious implications on their economy and development prospects.

114. The third major factor was the Agriculture Negotiation. The deadline for the completion of 'modalities' for Agriculture negotiations was missed because of Common Agriculture Policy (CAP) reform process in EU and the adoption of CAP by EU which gave minimal relief to developing countries. Further, the EU-US joint framework proposal, which was a necessary condition for advancing talk on subsidies, came very late in the process, and did not address developing countries concerns.

115. At the Ministerial Meeting, the developing country Members, especially G 21, opposed the Ministerial text on agriculture, as it did not address their concerns, and

proposed a radical alternative to the official negotiating text demanding serious reduction in subsidies and market access commitments. The developing country Members felt that it is impossible for many countries to adopt a Ministerial text without further revisions. The developing Members were also critical of the approach taken by the developed countries towards the cotton proposal by four African countries, which otherwise received wide support.

116. Finally, the draft text of the Ministerial Declaration, which was issued by the Chairman of the General Council and revised and reissued by the Chairman of the Conference, rather than reducing the polarization among the Members, had an opposite effect. The Conference also witnessed efforts by the developed country Members to restrict the scope of Doha mandate that are of interest to developing country Members, and attempt to promote and widen the scope of those areas of interest to them, namely, Investment, Competition and Government Procurement.

117. The stalemate among the Members on the above issues led to the premature ending of the negotiations. The only decision that emerged at the Conference was a brief and simple Ministerial Statement, which simply notes that Members will bring into the new phase all the valuable work that has been done at this conference and in areas where a high level of convergence on texts has been reached, undertakes to maintain this convergence while working for an acceptable overall outcome. The Ministerial statement is not clear as regards areas where there is no convergence. Moreover, the Ministerial Statement in itself is ambiguous and open to several interpretations, legal and political.

118. A significant and positive development witnessed at the Cancun Conference was the consolidation of the positions taken by developing Members through formation of groups such as Group 21+ (led by Brazil, China, India and South Africa), which joined hands to defend the interests of developing countries in multilateral negotiations, especially in the negotiation on agriculture and Singapore issues.

119. The future of the Doha Development round of negotiation is grim, and no Member feels that the Doha round could be completed by 2005 as scheduled.

120. As regards the review of the DSU, Chairman of the Special Session has achieved no further progress in the negotiations even after the circulation of negotiating text of proposals. The Chairman's Text, as seen in Part III of this report, has proposed very minor procedural improvements to the DSU. While an attempt has been made by the Chairman to make some of the S&D provisions mandatory, no explanation as to how these provisions will be implemented and operationalized has been brought out by the text.

121. In the view of the AALCO Secretariat, efforts, even political will, are needed by both developed and developing country Members to redefine their priorities and focus their attention on developing country Members concerns before taking further action on each agenda items. An overloaded agenda without focus would not only have serious consequences on the outcome of the Doha Development Round, but also impinges on the credibility of the World Trade Organisation.