Dispute Settlement in the WTO: Challenges and Opportunities for the LDCs

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Abstract:

With the establishment of the World Trade Organisation (WTO) in 1995, the Dispute Settlement Understanding (DSU) introduced several new features in the pre-existing GATT 1947 system making it more acceptable in legal terms to the members of the apex trade body. However, it is a matter of close scrutiny as to what extent this regime has been successful for the least developed countries (LDCs) in realising their aspirations to engage in the multilateral trading system in a meaningful way. While the Dispute Settlement Mechanism (DSM) is being extensively used by the developed and developing countries in order to protect their trade and the systemic interests, a number of DSU provisions somewhat inhibit LDC participation in the game. However, there are some windows of opportunity, in the WTO as well as in a number of other arenas, for these marginalised members to become active participants. The objectives of this paper is, thus, are to: (a) present an overview of the WTO-DSM, (b) analyse the current state of play in the Dispute Settlement Body (DSB), (c) highlight the challenges that the LDCs face and the opportunities that exist for them, and (d) put forward a set of strategic proposals that the LDCs might find helpful in strengthening their capacity to benefit from the WTO-DSM.

"Those of us who were colonies yesterday and are still today enduring the consequences of backwardness, poverty and underdevelopment, we are the majority in the organization [WTO]. Every one of us has the right to a vote and no one has the right to veto. We should turn this organization into an instrument of the struggle for a more just and better world. We should also count on those responsible statesmen, sensitive to our realities, who can undoubtedly be found in many developed countries."

— ***Fidel Castro***; May 19, 1998[1]

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[1] Excerpt from the speech delivered by the Cuban President at the World Trade Organisation in Geneva at the 50th anniversary of the Multilateral Trading System.

I. Introduction:

In the present era of globalisation, countries seek strengthened security as regards economic relations vis-à-vis other members of the international system. With the expansion of transborder transactions among countries since early 20th century, members of the international community have found themselves intrinsically involved in more and more trade related disputes with each other. While such disputes can be attributed, on the one hand, to arbitrary exercise of power and dominance by a handful of developed countries, dissatisfaction over the existing rules and procedures governing inter-state economic relations has also contributed to a large extent to aggravate the situation further. Faced with such realities, countries overwhelmingly felt the need of finding a common ground to resolve any such disputes posing threat to destabilise the state of their economic affairs.

A regulatory framework for international trade is the sum of actions taken by the members of the international community with a view to facilitate trading among nations by resolving all conflicts and misunderstandings that may pose threat to jeopardise their economic relations. One of the fundamental impacts of such disputes is the impairment of trade relationship between private parties, private party and state and inter-state trade relationship (ICC-B 2004). The WTO's dispute settlement system is a quite novel international jurisdictional process in this regard. Although the General Agreement on Tariffs and Trade (GATT), the precursor of the WTO, also had this feature, it is the uniqueness of the WTO regime that clearly draws the line of difference between the two regimes.

While the establishment of the WTO, as a result of the Uruguay Round negotiations, epitomises a landmark achievement in designing a set of disciplines and commitments as to enhance trading relations among nations, the adoption of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU)[2] is perhaps the most important of them all. Another significant point of departure from GATT to WTO is that members are no longer *Contracting Parties*[3]; rather they are bound by the unique trait of *Single Undertaking*. The

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[2] A trade dispute brought under the DSU deals with government actions concerning trade rights rather than with private rights, e.g. the TRIPS agreement, *per se*.

[3] Under the GATT system, members were termed Contracting Parties.

WTO evolved as a *rules based* system rather then a *consensus based* one.

With the increasing number of disputes threatening horizontal sustainability of economic relations among the WTO members, the question regarding authoritative power and efficacy of the WTO-DSM haunts the minds of many. Since the establishment of the WTO in 1995, as many as 324 complaints[4] (relating to both trade remedy and non-trade remedy measures) have been brought to the DSB till end-2004. Majority of these complaints were placed by the developed countries with the USA, the EC and Canada being the top three complainants[5]. It is, therefore, of much concern for the developing and least developed members of the WTO to understand the rules of game in the DSM, particularly when their interest is at stake. It may, however, be noted that the LDCs are yet to resort to the DSB in a substantive manner. Bangladesh has so far been the first LDC to file a complaint with the DSB[6].

Before embarking upon the core section which will deal with the state of LDC and developing country interests in the WTO-DSU, a brief overview of the dispute system under both the GATT and WTO will be quite helpful in understanding the nitty-gritty of the matter.

II: Dispute Settlement System under GATT and WTO:

II.1 Dispute Settlement under the GATT System

The provisions for settlement of disputes were laid down in Articles XXII (Consultation) and XXIII (Nullification and Impairment) of the GATT 1947 (*Annex 1*). Nevertheless, the system did take some time to gain its maturity (!). A brief look at the GATT Dispute Settlement System indicates the following administrative phases adopted with a view to settling down any dispute.

- *The Chairman of the Contracting Parties*: The initial investigative responsibility was vested upon the Chairman.
- *Working Party*: The matter, after being dealt with by the Chairman, was referred to a Working Party for detailed examination. Such

4 WTO website: 2004

5 No. of complaints by: US – 81, EC – 64, and Canada – 26

6 The *Lead Acid Battery Case* with respect to India's imposition of Anti-Dumping Measures (DS306)

working parties were responsible for conciliation and compromise; it did not play any adjudicative role. Moreover, over time, scepticism began to grow as regards objectivity and impartiality of the working party. This apprehension, coupled with the increasing complexity of the subjects of disputes, compelled the Contracting Parties to go for the panel system.

- *Panel System*: The panel system fulfilled, to some extent, the need for a *quasi judicial* system. Though the initial practice was to appoint *sessional panels*, appointment of *ad hoc* panels replaced the exercise in 1955. These ad hoc panels consisted of three to five individuals representing countries having no direct interest in the dispute.

It needs to be mentioned here that the GATT provisions, at the initial stage, permitted the contracting parties to engage into bilateral consultations only. Parties, however, increasingly felt the need of going beyond this structure. Subsequently, in 1958, the procedures for consultation under Article XXII were adopted allowing third parties, having substantial interest in the matter, to join the consultations. Nevertheless, one major flaw persisted with the system: *tendency to treat consultations as private affairs* (Narayan 2003).

Though the Contracting Parties aspired for a practical system to bring end to any dispute, reports of both the Working Party and the Panels were treated as *advisory opinions* only. The provision of legal bindings as regards implementation of these reports were completely absent in the GATT provisions.

II.2 WTO Dispute Settlement System

Adoption of the WTO DSU, as was envisaged by the members during the 1994 *Marrakesh Agreement*, would have been an effective mechanism to resolve disagreements/disputes to strengthen the multilateral trading system. However, this did not leave the members free from the apprehension as regards proper functioning of the new regime. It was this nervousness which led the members to agree that a review of the DSM would be held within four years to assess its credibility, particularly in the context of automatic adoption of Panel and Appellate Body reports as such initiatives were never tested before. The Marrakesh Ministerial meeting mandated the Ministerial Conference to complete a full review of the DSU rules and procedures, "within four

years" after entry into force of the WTO (January 1, 1995), and asked the first Ministerial meeting after the completion of the review, to decide whether to continue, modify or terminate the dispute settlement rules and procedures (Narayan 2003). Finally, when the review took place in 1998 at the DSB, there were some suggestions for modifying a number of existing provisions. However, there was neither a hint for terminating the DSU nor even any concern as regards the issue of *negative consensus*. Regrettably, this very review process ended up inconclusive. As a result, the DSB set itself the deadline of July 1999 to complete the review, which wasn't met either.

Determination of the WTO members, to properly institutionalise the DSM, was evident when another similar effort was made at the Seattle Ministerial Conference.[7] Once again nothing could be achieved due to the Seattle debacle. Quite pessimistic though, this process of inconclusiveness recurred during the Doha Ministerial, and continues to persist till date. Two major factors can be highlighted as the stumbling blocks in achieving the mandated review. *Firstly*, the rigid position of the USA manifested through blocking any proposal that, as viewed by the USA, would curb its power to exercise unilateral decision, and *secondly*, unwillingness of a number of developed and developing members to accept any technical or procedural amendments to the DSU unless unilateralism is proscribed.

As regards the latest development in this context, the General Council, in its decision of August 1, 2004 (better known as the *July Package*), laid down

the General Council takes note of the report to the TNC by the Special Session of the Dispute Settlement Body and reaffirms Members' commitment to progress in this area of the negotiations in line with the Doha mandate. The Council adopts the TNC's recommendation that work in the Special Session should continue on the basis set out by the Chairman of that body in his report to the TNC[8].

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7 EC, Japan and a number of other countries proposed some amendments to the existing DSU provisions.

8 Doha Work Programme: Decision adopted by the General Council on 1 August 2004 (WT/L/579)

It is in the greater interest of the WTO members that this review process is brought to a meaningful conclusion. It has to be conceded that any amendment in the DSU must be commensurate, in principle, with the interest of the developing members of the WTO. If done successfully, such vicissitudes will undoubtedly give the developing countries a sigh of relief and boost their confidence in the rules-based system. One has to keep in mind that these countries are the ones which have the greater stake in the system.

II.3 Dispute Settlement Proceedings in the WTO

Being the legitimate quasi-judicial authority under the WTO, the DSB performs according to a defined set of rules and procedures. Starting with filing an application for consultation, a member has to go through a series of legal proceedings until the final ruling is implemented. The various phases of WTO DSB proceedings are briefly discussed here:

II.3.1 Consultations

The consultation phase is aimed at bringing about amicable resolution to disputes. As has been laid down in Article 4 of the DSU, a Member to whom a request for consultation is made must response within 10 days and consultations must be entered into within 30 days. Maximum timeframe for reaching an agreement through consultation is 60 days. Failing to this, the complaining party can request for panel. It may, however, be noted that consultations may last for a longer period as the initiative to request for panel establishment lies with the complaining party. Country(ies) having substantial interest in the matter may submit written request to the DSB for joining the consultation as third party(ies).

II.3.2 Panel Request

Establishment of panel, upon the request by a complainant, is guaranteed by the provision of *negative or reverse consensus*. This implies that a panel request can be turned down only if all the DSB members decide so, by consensus. As the complainant itself is a member of the DSB, panel formation is automatic.

II.3.3 Panel Composition

A DSB panel consists of three to five members. The secretariat produces an *indicative list* of qualified governmental and non-

governmental candidates maintained by the secretariat. Parties to the dispute have the right to object to proposed names only for *compelling reasons*. Failing to confirm the names within 20 days of panel establishment, the WTO Director General, upon request by either party, can choose the panel members.

II.3.4 Panel Procedure

A DSB Panel generally takes six months to issue its final Report. During this period, the process consists of written pleadings from both the parties to the dispute and the third party(ies), a first oral hearing at which both parties and third party(ies) are heard, and a second hearing excluding the third party(ies). This process is meant to be over within four months. As for the preparation of a Report by the Panel, it is mandated to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements"[9]. This includes an *interim report* and the *final report*. Either party has the right to appeal against the final panel report.

II.3.5 Adoption of Panel Reports

If not appealed, the Panel Report is to be adopted by the parties within 60 days of it being circulated. Though the option lies for the DSB not to adopt the report by consensus, it is again the *negative or reverse consensus* that guarantees the adoption.

II.3.6 Appeal Procedures

The Appellate Body (AB) is a standing body composed of seven individuals appointed for four year terms by the DSB. Once an appeal is brought the procedures before the AB consist of a written pleading by the appellant, a written response by the appellee and written submission and notification from third parties. An oral hearing by the appellee and written submission by the parties come next. The stipulated time limit for the whole procedure is 60 days (90 days in exceptional circumstances) from the date of filing the appeal to the date the AB report is delivered. The jurisdiction of the AB is limited to "issues of law covered in the panel report and legal interpretations developed by the panel"[10]. The AB report is to be adopted within 30 days of circulation.

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[9] WTO-DSU: Article 11 (Function of Panels)

[10] WTO-DSU: Article 17.6

Such adoption entails adoption of those portions of the panel report not appealed.

II.3.7 Implementations of AB Report

Once adopted, the report is to be "unconditionally accepted by the parties to the dispute". However, an extended timeline may be allowed if the responding party finds it impracticable to comply immediately with the recommendations. Previous examples show that upto 15 months have been allowed to the responding parties to comply with the Panel or AB decisions.

II.3.8 Compensation/Retaliation

In the event of non-compliance, by the responding parties, with the DSB decisions the complaining party has been allowed to go for compensation or resort to retaliation. These, however, are temporary measures. If the disputant parties fail to agree on mutually acceptable compensation, the complaining party may request the DSB for right to retaliate. Retaliation generally takes the form of withdrawal of concessions i.e. imposition of additional customs duties on products originating in the responding country.

II.3.9 Arbitration

Arbitration lies at the bottom of dispute settlement procedure. When a responding party objects to the level of sanctions imposed against it the complaining party, with authorisation from the DSB, may refer the matter to arbitration.

These various phases of the DS procedures, by practice, consume a great deal of time to bring an end to any dispute. Thus one might speculate the causal effects of such time lagging procedures particularly when an LDC is involved in such disputes. One has to understand that trading of good in question remains suspended until a solution is reached upon. Hence, the economic impact of such lengthy procedures can sometimes be more devastating than the loss supposed to be incurred by the complaining party had it not resorted to the DSB.

II. 4 Basic Features of the DSU

Although the two major criteria of the DSU is that the procedures are quite time consuming and causes high expenditure for the disputant parties, there are a number of commendable traits of the regime which gave it more acceptability than the GATT system.

Following are the distinguishing features of the DSU from the GATT 1947 system:

- Explicit time frame for settlement of disputes.
- Right to automatic establishment of panel upon request by complaining party (*negative or reverse consensus*).
- Automatic adoption of Panel Reports (*negative or reverse consensus*).
- Establishment of standing Appellate Body (AB) (to deal with appeals from Panel Reports).
- Stringent rules and procedures for implementation of AB rulings.
- Right to retaliation and specific rules on cross retaliation.

The aforementioned features have given the DSU its current acceptability in terms of providing WTO members not only with expeditious results to cases invoked but also ensuring, *prima facie*, proper implementation of the rulings awarded.

Taking cue from the above, the underlying objectives of the DSU, as have been stated in Article 3, are

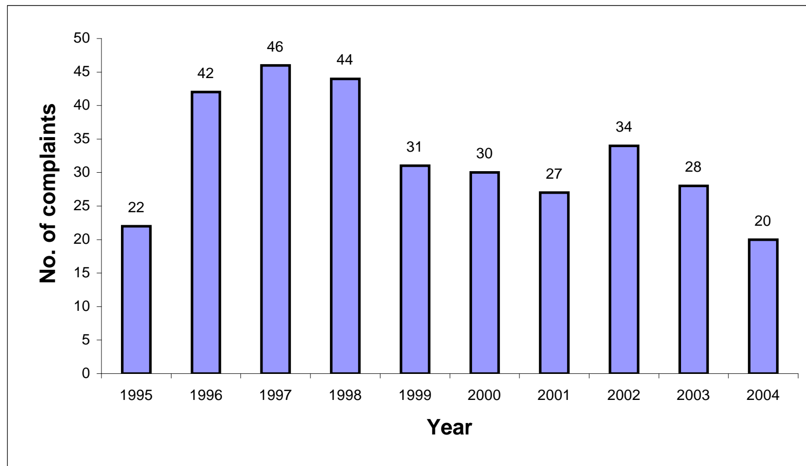
- To provide security and predictability to the multilateral trading system.
- That a prompt settlement of disputes is essential.
- To secure a positive solution to a dispute (Negotiated solution if preferable to litigated decisions).
- Once a violation is determined the aim is to secure the withdrawal of the offending measure.
- Compensation is to be resorted to only if the withdrawal of the measure is impracticable.
- As a last resort, to have suspension of concessions or other obligations ("Retaliation").

Thus, having looked into the distinguishing features and pragmatic objectives of the DSU, it seems that there are enough windows of opportunity for the developing and least developed countries to get their share from any dispute in international trade. After a brief discussion on the present status of DSB proceedings, the paper will extensively deal with issues of LDCs' interests.

II.5 WTO DSU: Current State of Play

In the context of economic governance and multilateralism, the major concern, till date, seems to be the growing discontent among the DCs and LDCs particularly in the context of disparity between trade rules and development needs. Though the DSB is mandated to resolve trade disputes arising between WTO members, one fundamental question remains on how far this mechanism has been able to serve the needs of the DCs and LDCs. As of end 2004, number of requests brought to the DSB was 324. These involved 45 members (including four customs territories viz. Taiwan, Penghu, Kinmen and Matsu)[11] as complainants and 46 members as respondents. Among the 324 cases brought to the DSB so far, about 58 per cent request was placed during the first five years (1995-1999) of the WTO DSB while 42 per cent was brought during the second half of the decade (2000-2004) (Figure 1).

Figure 1
Year-wise Distribution of DSB Cases



Source: WTO Website, 2005

As regards participation of developing countries in the DSB cases, statistics show that 43 per cent of the complaints were brought in by these countries while these form 47 per cent of the respondents. Share of the developed countries in the two instances stands at 57 per cent and 53 per cent respectively (Tables 1.1 & 1.2)

[11] WTO-DS318

Table 1.1

Developed Countries as Complainants

Sl.	**Countries**	**No. of complaints***
1	Australia	7
2	Canada	26
3	EC	67
4	Hungary	5
5	Japan	12
6	New Zealand	6
7	Norway	1
8	Switzerland	3
9	Turkey	2
10	US	81
All Developed Countries		***184***
All Developing Countries		***139***
LDC (Bangladesh)		***1***
Total for all countries		**324**

* 7 requests were brought in jointly by Developed and Developing countries.
Source: WTO website, 2005

Table 1.2

Developed Countries as Respondents

Sl.	**Countries**	**No. of cases***
1	Australia	9
2	Belgium	3
3	Canada	13
4	Denmark	1
5	EC	52
6	France	3
7	Germany	1
8	Greece	1
9	Hungary	2
10	Ireland	3
11	Japan	14
12	Netherlands	1
13	Spain	1
14	Sweden	1
15	Turkey	7
16	UK	2
17	US	88
All Developed Countries		***172***

All Developing Countries	*152*
Total for all countries	**324**

*Note: In one particular case (DS316), 5 developed countries were respondents
Source: WTO website, 2004

The above tables clearly indicate the nearly zero participation of the LDCs in the DSB. Bangladesh, however, jumped as a new kid on the bloc and resorted to the DSB, pioneering LDC participation in the WTO body. Identifying the very reasons holding the LDCs back from seeking DSB assistance in resolving their trade disputes, particularly when it involves an LDC and a developed member, would be a crucial factor to determine future work plans for the LDCs.

Another view to look at the current state of play in the DSB is to analyse the system through the issues which have been invoked in various complaints. Generally, the covered agreements under the WTO fall under two categories: (a) trade remedy measures, and (b) non-trade remedy measures. In the first category, till date, a total of 60 complaints have been brought under the Subsidies and Countervailing Measures (SCMs), followed by 56 in Anti Dumping (AD), and 31 in Safeguard Measures (SG). As for the non-trade remedy measures, majority of the complaints were placed under the Agreement of Agriculture (AoA). This number has been recorded 54 till mid-October, 2004. Next to AoA are Licensing (LIC), Technical Barriers to Trade (TBT), and Sanitary and Phytosanitary Measures (SPS) respectively with 34, 33, and 30 complaints (*Annex 3*).

Looking into various dimensions of trade relations among LDCs and developed countries, and the transitional nature of international trade, one can identify the following three reasons as major factors which are of major concerns for the LDCs:

- LDCs lack adequate expertise to deal with highly professional procedures of the DSB.
- Dispute settlement procedures are sometimes too expensive for an economically weak country to deal with. Apart from the expenditure during the legal procedures, trade in the good under dispute remains suspended during the DSB procedures making these countries economically more vulnerable.

- The fear of jeopardising trade relations with economically superior countries is one of the issues that hold the developing countries back from resorting to the DSB.

III. WTO DSU: What Is in It for the LDCs?

Though the agreement establishing the WTO does include a number of provisions of special and differential treatment for the developing and least developed countries, it is a matter of observation whether these countries have really benefited from the regime. Mention can be made that such provisions were also present in Part VI of GATT 1994 which grants differential and more favourable treatment to developing countries, particularly LDCs, as contained in the *Enabling Clause*. Keeping in mind such treatment for the developing countries and the LDCs, this paper will attempt to focus on the modalities in the WTO related to protecting interests of developing and least developed members in the WTO dispute settlement procedure and will draw a comparative analysis as regards both use and benefits drawn from the system by these countries.

III.1 DSU Provisions Commensurate with LDC Interests

Following is a list of a number of DSU provisions which underlie some scope for the developing and least developed members of the WTO to enhance their participation in the regime.

- The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. (*Article 3.2*)
- The prompt settlement of [disputes] is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members. (*Article 3.3*)
- The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with [WTO obligations] is clearly to be preferred. (*Article 3.7*)
- ….. requests for conciliation and the use of the dispute settlement procedures should not be intended or considered as contentious acts …….. all Members will engage in these procedures in good faith in an effort to resolve the dispute …… (*Article 3.10*)
- Members affirm their resolve to strengthen and improve the effectiveness of the consultation procedures employed by Members. (*Article 4.1*)
- In the course of consultations . . . Members should attempt to obtain satisfactory adjustment of the matter. (*Article 4.5*)

- During consultations Members should give special attention to the particular problems and interests of developing country Members. (*Article 4.10*)
- Particular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement. (*Article 21.2*)
- If the matter [relating to implementation] is one which has been raised by a developing country Member, the DSB shall consider what further action it might take which would be appropriate to the circumstances. (*Article 21.7*)
- If the case is one brought by a developing country Member, in considering what appropriate action might be taken, the DSB shall take into account not only the trade coverage of measures complained of, but also their impact on the economy of developing country Members concerned. (*Article 21.8*)
- In all stages . . . of dispute settlement procedures involving a [LDC] Member, particular consideration shall be given to the special situation of [LDC] Members. (*Article 24.1*)
- Members shall exercise due restraint in raising matters under these procedures involving a [LDC] Member. (*ibid*)
- If nullification or impairment is found to result from a measure taken by a [LDC] Member, complaining parties shall exercise due restraint in asking for compensation or seeking authorization to [retaliate]. (*ibid*)
- [if consultations fail to resolve a matter involving a LDC Member] the Director- General or the Chairman of the DSB shall, upon request by a [LDC] Member offer their [‘good offices’] with a view to assisting the parties to settle their dispute, before a request for a panel is made. . . . (*Article 24.2*)
- Expeditious arbitration within the WTO as an alternative means of dispute settlement can facilitate the solution of certain disputes concerning issues that are clearly defined by both parties. (*Article 25.1*)
- ……. the Secretariat shall make available a qualified legal expert from the WTO technical cooperation services to any developing country Member which so requests. This expert shall assist the developing country Member in a manner ensuring the continued impartiality of the Secretariat. (*Article 27.2*)

It is notable that most of the above quoted provisions do provide positive guidance to diplomatic settlement of disputes and, therefore, are relevant in the context of bringing in a mutual and amicable solution to any dispute rising between WTO members.

From the above discussion, it is thus evident that DSU does have some provisions in place to facilitate the LDCs. Till date, Bangladesh has been the lone LDC member to bring in a case to the DSB. However, this does not give us any basis to conclude that there has been no LDC complainant (prior to the Bangladesh case) because measures by other Members have not nullified or impaired benefits reasonably expected to accrue to LDC Members, or that LDC Members are reluctant to resort to WTO DSB because dispute settlement procedures are simply too complex and too expensive for them to use. The correct conclusion would probably fall somewhere between these two extremes and would probably involve a *general lack of experience or confidence* on the part of most LDC Members. Nevertheless, at the end of the day, the overwhelming complexity and cost of dispute settlement, or the prevailing imbalance in the value of potential outcomes to LDCs and developed countries (for instance, only the larger developed countries can successfully use the ultimate weapon of retaliation or other coercive tactics, and then probably only against the smaller developed countries and other developing countries) has to be recognised.

III.2 Issues of Concerns for the LDCs

There is no denying the fact that the LDC party will suffer the most, in terms of trade and economic impact of a measure in dispute, then the developed country party which is likely to be modestly affected. This can be attributed to the understanding that actual trade impact of measures involved in disputes, likely to be brought by or against LDC Members, will almost certainly be small relative to the total trade of a developed country party to the dispute. The Panel/AB procedures of the DSU are both too cumbersome and too costly to warrant their use for small volumes of trade.

What is, therefore, important is to take note of all inconsistencies (from the LDC perspective) existing in the DSU provisions and head away with scrupulous thoughts to bring in necessary amendments in the system. In view of the above, the following discussion might be of particular concern.

III.3 An Outline of Enhanced Dispute Settlement Procedures for LDC Members

It has been discussed earlier that efforts to review the procedural settings of the DSU and bringing about required amendments to existing texts have not been achieved up to the mark of expectation. In light of this difficulty, LDC Members should seek a solution within existing provisions to the fullest extent possible. This objective can be addressed through existing DSU provisions [12]. The LDC members' position will be supported by provisions in Article 3 – *General Provisions*; and 21 – *Surveillance of Implementation of Recommendations and Rulings*.

The LDC Members' objectives will be to obtain agreement to establish a special track for dispute settlement involving them either as complainant or respondent (Browne 2004). LDC members may put forward the following recommendations.

1) Consultations (in accordance with Article 4) shall take place in the LDC Member's capital city. The venue may, however, be changed if the LDC Member proposes so; the location will be agreed between the parties in such cases.
2) If consultations fail to resolve the dispute within the stipulated 60-day timeframe, the Director-General shall provide conciliation pursuant to Article 5. This process shall start with shall provide a comprehensive briefing, by the secretariat, on the legal, historical and procedural aspects of the matter in dispute to the parties and the conciliator. The conciliator, working closely with the parties to the dispute, will establish the facts of the dispute, examine the claims of both parties, clearly define the issues of the dispute and, taking all relevant factors (including special attention to the particular problems of the LDC Member) into account, submit non-binding proposals for a possible settlement to the parties. This whole process should take no longer than 60-days.
3) If the parties are unable to resolve the dispute on the basis of the conciliator's recommendations, the matter shall be arbitrated expeditiously pursuant to Article 25. Standard procedures will be established by the DSB, with a tight timeframe, e.g., maximum 60 days.
4) If the measure in dispute is found to be inconsistent with WTO

12 Articles: 4 (*Consultations*), 5 (G*ood Offices, Conciliation and Mediation),* 24 (*Special Procedures Involving Least-Developed Country Members),* 25 (*Arbitration)* and 27 (*Responsibilities of the Secretaria).*

obligations, the application of the measure shall be suspended [vis-à-vis the complainant] to the extent of its inconsistency within 60 days, pending its withdrawal or its modification to bring it fully into compliance with WTO obligations.

5) If the inconsistent measure was applied against the trade of an LDC Member by a developed country Member, then, in addition to withdrawing the measure, the latter will pay sufficient monetary compensation to revitalise the firms in the LDC Member's territory that suffered severe commercial losses as a result of the measure. Such compensation shall not exceed the value of trade lost as a result of the contested measure. Any disagreement regarding the value of such compensation will be referred to the arbitrator (acting in stage 3) for resolution within 60 days.

III.4 The Need for Enhanced Procedures for LDC Members

In view of the above, it is thus in the greater interest of the LDCs to strive for an enhanced dispute settlement procedure aimed to protect their interest. Having discussed various articles of the DSU, as have been provisioned in the WTO agreement, the following points might be identified:

- Panel process is too complex for LDCs particularly in terms of capacity to address the issues vis-à-vis the developed and developing members.
- Panel process is extensively time consuming for firms in LDCs to survive when their trade has been disrupted by measures in dispute.
- Relief provided by DSU procedures does not recover commercial and economic losses suffered by nullification and impairment of benefits.
- A good number of the S&D provisions for LDC Members are soft law, i.e. lack provision of mandatory compliance by the developed members.
- Panels and the AB will apply hard law criteria to soft law S&D provisions thereby nullifying their potential benefit.
- Arbitrators are more likely to take account of soft law provisions, at least for guidance.
- Consultations, 'good offices' and arbitration can be less complex,

less expensive and briefer than the panel process.

- Developed country Members may have difficulties extending soft law S&D provisions to developing country Members because they are not a homogeneous group, but all LDC Members deserve S&D benefits, if they are to be able to use the dispute settlement system.
- It will be easier to make progress working within existing WTO and DSU provisions than seeking extensive amendments.[13]

III.5 Special and Differential Treatment for the LDCs: Changes Required?

At the Marrakesh Agreement, members agreed to undertake a review of the DSU procedures after four years. Subsequently, in Doha, the Ministerial Meeting did consider the matter but failed to reach any conclusion. Since then, dozens of submissions have been made by developed, developing and least developed countries to bring in necessary amendments in the rules and procedures of the DSU. Though the perception expressed by various groups did differ from one another, it is, however, for the greater interest to take the maximum out of these proposals. Since the aim of the paper is to deal particularly with issues concerning the interest of the LDCs, following is a list of such proposals regarding special and differential treatment for the LDCs:

The following proposals were made with respect to special and differential treatment for LDCs:[14]

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

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

[14] This information has been collated from the WTO website and various discussion papers.

- Parties to a dispute in which an LDC is a party should always explore the possibilities of holding *consultations in the capital of the LDC party*.
- *'Good offices'* should be automatically offered by the Director General immediately following consultations that did not resolve the matter, with no need for the LDC party to make a request. A developed country complainant shall not request establishment of a panel prior to using 'good offices' procedures in good faith.
- The request by a developed country complainant for the establishment of a panel must include a setting out of due restraint that has been taken by the applicant. A *panel's first task will then be to evaluate the complainant's written account of due restraint* that has been taken and the adequacy of efforts expended to reach a mutually agreed solution. If either is found to be inadequate, the matter will be referred to the DSB to make preliminary recommendations and rulings including further use of 'good offices' to resolve the matter.
- Article 8:10 should read: When a dispute is between a least-developed country Member and a developed country Member the panel shall include *at least one panelist from a least- developed country Member* and, if the least-developed country Member so requests, the panel shall include two panelists from least-developed country Members. [Equivalent wording is to be included for developing country Members.]
- Panels shall always *take full account of special and differential treatment* available to [developing country and] least-developed country Members in all applicable WTO agreements, without a need for a party to request it. To this end, the *standard terms of reference* should be amended to require panels to call for research input of the effects of a negative decision against the LDC [or the developing country] party.
- The secretariat shall give its work regarding the *legal, historical and procedural aspects of the matter in dispute* to any LDC party, including third parties, to provide guidance on their specific rights and obligations relating to the matters in dispute.
- Panelists and members of the Appellate Body shall present individual opinions, except that the majority of them may provide a

joint opinion. *Dissenting opinions* will also be circulated.

- When the DSB is adopting recommendations concerning a case involving a [developing or] least-developed party, it shall consider *further appropriate action*, without need for the [developing country or] least-developed party to raise the matter.
- When *compliance* of a measure is being considered at the panel, AB or arbitration stage, particular attention should be paid to matters affecting the developmental interests of affected LDCs.
- *No compensation or retaliation* will be approved against LDCs. An LDC respondent will simply be required to withdraw the offending measure.
- When determining *appropriate levels of compensation*, account shall be taken of the trade coverage of the inconsistent measure and its impact on the economy and the development prospects of a [developing or] LDC party.
- When determining *compensation for a LDC complainant* against a developed respondent, the DSB shall recommend monetary and other appropriate compensation computed from the date of the adoption of the inconsistent measure by the developed respondent to the date the measure is withdrawn.
- In a case of a LDC complainant and developed country respondent, *universal/collective retaliation* authority shall be granted to all WTO Members, each to the level of nullification or impairment set for the LDC, unless rejected by consensus. Such authority shall only be granted following an arbitral determination of the appropriate level of compensation, taking account of potential impediments to the attainment of the LDC's development objectives. The arbitrator must also consider whether retaliation under a different agreement by the LDC complainant would be effective without harming the LDC's interests.

IV. Technical Assistance for Capacity Building: The LDC Context:

It is, therefore, undisputable that the LDCs do lack the capacity to engage into the WTO dispute settlement procedure. Though the financial ability is of a major concern for these economically restrained countries, both negotiating and legal expertise in dealing with the complex DSU

issues further aggravate the situation. Moreover, there is hardly any academic institute in the LDCs which offer such specialised courses like Trade Policy and Commercial Diplomacy, particularly at the tertiary level, for students, academics and trade experts. It is in this need that WTO members came up with various plans to provide assistance to the LDCs to strengthen their position as regards DSU proceedings. Following is a description of such facilities available for the LDCs:

IV.1 Multilateral Assistance

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

IV.1.1 The WTO Initiatives[15]

The WTO offers a one-week Dispute Settlement Course conducted in English, French and Spanish, open to developing countries, least-developed countries, customs territories and economies in transition which are members or observers of the WTO and also developed countries. Participation in the courses is restricted to government officials nominated by their governments.

Apart from providing the participants extensive knowledge on basic principles of the WTO, it engages them in simulation exercises allowing them to further develop their practical knowledge and sharpen their skills needed to apply at the various stages of dispute settlement.

Another three-week long course titled 'Introduction to the WTO', which focuses on issues related to dispute settlement, is also available for government officials from least-developed countries.

The WTO also offers teach-yourself videos titled, "Case Studies of WTO Dispute Settlement". The video is available on the WTO web site.

Although WTO does provide technical assistance in terms of intellectual capacity building and funding, , these resources are not by themselves sufficient to meet all developing country technical assistance needs despite the fact that there has been remarkable increase in these efforts in recent years. Only through instrumentalising the Integrated Framework and leveraging WTO funds in co-operation with others can technical assistance needs be met.

[15] WTO web site.

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

IV.1.2 Facilities Provided by the UNCTAD [16]

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

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

IV.1.2.1 Regional Workshops

The Project organized regional workshops in Africa, Asia, Latin America, the Caribbean, the Middle East, the Pacific and Central and Eastern Europe, starting in January 2003.

Scope of the workshop

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

Participants

[16] UNCTAD web site.

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

Workshops offered relating to dispute settlement in the WTO:

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

IV.1.2.2 Distance Learning

To complement the regional workshops and as a means to disseminate training to a broad audience, WTO plans to develop a distance learning course.

IV.1.2.3 Training Materials for Independent Use

The Course on Dispute Settlement (so far in English only) consists of 41 modules. Among these 36 are currently available online including 15 modules on WTO. The others are supposed to be available by the end of 2004. Copies may be downloaded free of charge on the understanding that they will be used for teaching or study and not for a commercial purpose. Appropriate acknowledgement of the source is appreciated. This is NOT an online course.

Apart from the abovementioned services, UNCTAD also offers internships, advisory services, and a network of international lawyers specialising in international trade cooperation.

IV.1.2.4 Internships

This highly competitive programme offers placement for graduate students under 30 years of age from developing countries and countries with economies in transition to undertake two-month internships at the secretariat in Geneva. The course outline is designed in a way to expose the interns to the opportunity: i) *To study the Course on Dispute*

Settlement; ii) To meet officials dealing with dispute settlement at WTO and WIPO; iii) to familiarise themselves with the work of UNCTAD in the fields of trade negotiations, commercial diplomacy, investment agreements and competition policy; and *iv) to work in the Project on Dispute Settlement*.

IV.1.2.5 Advisory Services

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

IV.1.2.6 International Lawyers for Multilateral Cooperation

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

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

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

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

IV.2 Bilateral Assistance

The Canadian International Development Agency (CIDA) is an example of development institutions providing such assistance. The certificate course on Trade Policy and Commercial Diplomacy which is funded by CIDA and being implemented by the Centre for Policy and

Law (CTPL), Ottawa, Canada is organised every year during May – July.

IV.3 Institutional Assistance

If the Seattle Ministerial was disappointing in the context of coming up with a declaration, one thing can be viewed as a positive outcome of the event - establishment of the ***Advisory Centre on WTO Law*** (ACWL)[17].

Situated in Geneva, the Centre is member-financed and currently has 33 members, including ten developed countries and 23 developing countries or countries with economies in transition. An additional two developing countries and one developed country are in the process of accession. There are now 40 countries designated as least-developed countries by the United Nations that are Members of the WTO or in the process of accession to the WTO. Hence, once the three countries now in the procession of accession have become members, there will be a total of 65 countries entitled to the services of the Centre.

As regards the objective of the ACWL, Article 2 (Para. 1) of the Agreements establishing the Advisory Centre on WTO Law says "The purpose of the centre is to provide legal training, support and advice on WTO law and dispute settlement procedures to developing countries, in particular to the least developed among them, and to countries with economies in transition". And to achieve this goal, the Centre is mandated to:

- Provide legal advice on WTO law;
- Provide support to parties and third parties in WTO dispute settlement proceedings,
- Train government officials in WTO law through seminars on WTO law and jurisprudence, internships and other appropriate means; and
- Perform any other functions assigned to it by the General Assembly.

The Centre functions essentially as a law office specialised in WTO law, providing legal services and training exclusively to developing country and economy-in-transition ACWL members and to all Least Developed Countries. The ACWL will organises seminars on WTO

[17] For more information on ACWL please see the Agreement Establishing the Advisory Centre on WTO Law, and the ACWL website.

jurisprudence and provide legal advice. Six-month long training (October – March) is available for Geneva-based government officials. The Centre is also mandated to provide support throughout dispute settlement proceedings in the WTO at discounted rates for its members and Least Developed Countries in accordance with the terms set out in annex IV of the Agreement.

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

Service	***Charge (hourly rate)***
Legal advice on WTO law	Free*
Support in WTO dispute settlement proceedings	US$ 25** (i.e. a 90% discount on the hourly basic rate of US$ 205)
Seminars on jurisprudence and other training activities	Free for members
Internships	Subject to sponsorship***

* Subject to a maximum of hours to be determined by the Management Board.

** Charges will be levied by hours or by case. If charge by case, cost estimates would be offered for each phase of the proceedings (i.e., panel phase, appeal phase, etc.).

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

Since July 2001, the Centre has provided legal assistance in as many as 17 WTO dispute settlement cases (including the Bangladesh-India Lead Acid Battery Case) and has provided assistance through hiring external legal counsel in one particular case[18]. As regards providing legal advice to LDCs, the ACWL, to date, has provided advice on the following issues:

- The implications of paragraph 6 of the Doha Ministerial Declaration on the TRIPS Agreement and Public Health;
- The WTO-consistency of certain subsidies;

[18] For Columbia, Ecuador, Peru and Venezuela, in their participation as third parties in EC - Conditions for the granting of Tariff Preferences to Developing Countries

- The viability of initiating a dispute under Article VI of the GATT 1994, and
- The viability of resort to Article XVIII of the GATT 1994.

Another aspect of the ACWL services, which is of critical importance to the LDCs, is the capacity of the Centre in providing legal assistance in dealing with dispute settlement procedures. A number of law firms and individuals who have registered[19] their availability to provide services to LDCs if the Centre cannot provide support through its own lawyers due to conflict of interest are listed below:

Law firms

- Baker & McKenzie
- Clyde & Co.
- King and Spalding
- O'Connor & Company
- Sidley Austin Brown & Wood
- Thomas and Partners
- Vermulst Waer & Verhaeghe
- White & Case

Individuals

- Mr Donald McRae
- Ms Debra Steger

V. Bangladesh in the Dispute Settlement System:

Though Bangladesh has emerged as the first LDC to bring in a complaint to the DSB against anti-dumping duty[20] (ADD) imposed by India on import of lead acid batteries from the former, it is not the first time that Bangladesh has been subject to such measures. Two earlier events where, in both of them, Bangladeshi products were subjected to

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[19] Pursuant to terms and conditions established by the Management Board Decision 2004/3 of March 26, 2004.

[20] Anti-dumping duty, a trade regulating device, is a special extra customs duty, imposed on imported goods found to be sold for export at less than their price in domestic market of the exporter (dumping).

ADD were (a) issuance of ADD order by the US Department of Commerce (DoC), on March 20, 1992 on import of cotton shop towel[21] from Bangladesh, and (b) Brazil's imposition of ADD on September 30, 1992 on imports of sacks and bags of jute from Bangladesh. No countervailing or safeguard measures have been issued against Bangladesh so far.

V.1 Bangladesh-US Trade Dispute[22]

Since March, 1992, cotton shop towels from Bangladesh have been subjected to ADD. The ADD was imposed on the basis of a complaint by Roger Milliken and Co. a giant US manufacturer having a 60% control over the US towel market. The DoC, after the sunset review of 1999 published notice of continuation of the order making it effective from February 17, 2000. This is because the International Trade Commission (ITC) did not receive any response to notices sent to parties in Bangladesh. Accordingly, the dumping margin was set at the following rate: Eagle Star Textile Mills 42.31%, Sonar Cotton Mills 27.2% and all other 4.60%. It needs to be mentioned that the US authority, in their review, found that Bangladesh successfully filled its quota for cotton shop towels upto 100% in 1998 and 87% in 1999. Quite unrealistic though, the US concluded that as Bangladesh was utilising its quota capacity it was turning into a threat for domestic producers in the USA.

V.2 Bangladesh-Brazil Trade Dispute

This particular trade dispute started when on September 30, 1992 the Brazilian Government imposed definitive ADD (49.1% and 58.7%) on imports of sacks and bags of jute from Bangladesh depending on the classification of products. After completion of the first review, the Brazilian authority in September 1998 decided to continue the ADD and the revised duty stood at 64.5%. A second review was initiated on September 11, 2003, the result of which is yet to come out.

V.3 Indo-Bangla Lead Acid Battery Case

The first complaint ever brought in by an LDC to the DSB was that of Bangladesh seeking consultation on definitive ADD imposed by India on import of lead acid battery from Bangladesh. The stipulated time

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[21] Cotton shop towels are absorbent industrial wiping cloths made from loosely woven fabrics.

[22] For detailed information about the dispute see Bhattacharya and Rahman, 2004.

frame of 60 days for consultation is over. Though Bangladesh is now entitled to request for a panel formation, our Geneva Mission is yet to resort to the DSB to initiate the legal proceedings.

Bangladesh became a Member of the WTO on January 01, 1995 by signing the Marrakesh Protocol. Since then, the first anti-dumping measure faced by a Bangladeshi exporter has been the Indian action of imposing anti-dumping duty on lead acid battery (falling under Chapter Sub Heading 8507 of the Customs Tariff Act) from Bangladesh. The accused exporter from Bangladesh was the M/S Rahimafrooz Batteries Limited.

V.3.1 Chronology of events[23]

December 18, 2000: Two Indian petitioners, M/s. Exide Industries Ltd. and M/s. Amara Raja Batteries Ltd., filed their petition to requesting the Indian government to impose antidumping duty on lead acid battery exported from Bangladesh, China, Japan, and Korea.

January 12, 2001: Directorate General of Anti Dumping & Allied Duties of Indian Government issued the initiation notification of antidumping investigation.

February 16, 2001: On behalf of all the manufacturers and exporters of lead acid batteries in Bangladesh (including M/s Rahimafrooz Batteries Ltd.) the Bangladesh Accumulator and Battery Manufacturers Association (BABMA) sent a reply to the Directorate General of Anti Dumping & Allied Duties of the Indian Government.

February 23, 2001: The association sent information regarding export price to the same authority.

March 21, 2001: The Indian Government issued the notification of Preliminary findings of the investigation determining the imports from Bangladesh as *de minimis*[24]. The matter was kept pending for further investigation.

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[23] Source: Bangladesh Tariff Commission (BTC). BTC is designated by law to deal with anti-dumping and countervailing measures for and on behalf of Bangladesh (BTC 2004).

[24] A legal term for an amount that is small enough to be ignored, too small to be taken seriously. Used to restrict legal provisions, including laws regarding international trade, to amounts of activity or trade that is not trivially small. In

May 28, 2001: On behalf of M/s Rahimafrooz Batteries Ltd., BABMA sent additional information to the Indian Antidumping Authority.

May 31, 2001: The Indian antidumping Authority sent a letter to the Commercial Counsellor of Bangladesh High Commission in New Delhi requesting that the exporters from Bangladesh might once again be advised to furnish information in the prescribed format.

July 19, 2001: The Indian antidumping Authority sent a letter to BABMA to furnish additional information and seeked permission for a verification visit at the premise of M/s Rahimafrooz Batteries Ltd. BABMA replied to the letter on August 2, 2001 and turned down the request for the proposed verification visit. The decision was based on the fact that the Indian authority did not inform the Bangladesh government of the intended visit.

August 21, 2001: Directorate General of Anti Dumping & Allied Duties of the Indian Government sent a letter to M/s Rahimafrooz Batteries Ltd. based on the company's reply to the authority and expressed disagreement to the points raised by the company.

November 12, 2001: The Indian antidumping Authority published the General Disclosure and stated that SAPTA provision (Article 14 on Safeguard Measures was invoked by BABMA) is not applicable in the dumping case and imports of lead acid battery from Bangladesh was above the *de minimis* volume.

November 22, 2001: BABMA sent its views on the General Disclosure and other matters to the Indian antidumping Authority.

December 7, 2001: Directorate General of Anti Dumping & Allied Duties of the Indian Government issued the notification of *final* findings of the antidumping investigation determining the export of lead acid battery from Bangladesh was above *de minimis* level and was being dumped, and levied ADD on lead acid battery from Bangladesh. The duty was levied against all exporters of Bangladesh and it was in effect from January 2, 2002. Amount of imposed anti-dumping duty was \$3.192 per kg for industrial battery and \$2.532, \$2.121 & \$3.930 per kg for automotive NMF (other than maintenance-free dry batteries),

India-Bangladesh case, this share is 3% of the global import of lead acid battery by India.

automotive MF (maintenance-free dry batteries) & Motorcycle automotive battery respectively. These duties were imposed on batteries weighing between 7 kg and 30 kg a piece.

January 20-22, 2002: A team from Bangladesh visited India to appeal to the Central Excise and Gold Control (Appellate) Tribunal (CEGAT), Ministry of Finance, Government of India against the imposition of antidumping duty. Unfortunately, the result of the appeal was not in favour of Bangladeshi exporters. After that Bangladesh started preparation to seek remedy under the dispute settlement mechanism of the WTO for the improper investigation by the Indian anti-dumping authority that was based on an erroneous petition.

January 28, 2004: Bangladesh Mission in Geneva requested the Indian Mission in Geneva to start the consultation. Bangladesh raised 17 points for consultation. Though the consultation did take place, it did not bring any conclusive result.

February 2, 2004: The request for consultation[25] was circulated among the WTO Members in accordance with Article 4.4 of DSU. Later on, the European Commission (EC) has expressed interest to join the consultation as a Third Party[26]. India, however, rejected[27] the EC request to attend the consultations.

March 18, 2004: The Indian Authority initiated a review of the case on a petition of an Indian importer to initiate such a review. The result of the review is still pending. Bangladesh now has the opportunity to ask the WTO's Dispute Settlement Body to form a panel under the dispute settlement mechanism to proceed with the case. The final finding of the review is yet to be disclosed.

A state of stagnation evolved after this phase and both the parties stood strong on their positions. Nevertheless, the government of Bangladesh had made several attempts to pursue the Indian authority on a number of occasions. The Bangladesh Mission in Geneva was also preparing to place a request to the DSB for panel formation. However, things changed at a later stage and turned into a favourable conclusion by the beginning of 2005.

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[25] see WT/DS306/1; G/L/669; G/ADP/D52/1.

[26] see WT/DS306/2; Request to join consultations.

[27] see http://trade-info.cec.eu.int/wtodispute/show.

January 04, 2005: The Department of Revenue under the Ministry of Finance of India issued a notification, saying there was no export from Bangladesh during the period of investigation and the dumping margin could not be established.

It may be noted that the ACWL has been providing direct assistance to Bangladesh in the WTO dispute settlement proceedings.

It has been said earlier that economic impact of dispute settlement procedures may sometimes cause irreparable damage to a country. Although Bangladesh has not yet been subject to such severe condition, estimates show the approximate business loss[28] incurred by Bangladesh, due to the aforementioned trade remedy measures imposed, is US$ 50.37 million or Tk. 300 crore (till June, 2004).

Bangladesh is also an exporter of *Plastic and Rubber Articles*, *Machinery and Mechanical Appliances and Electrical Equipment*, and *Textile Articles*. Statistics show that there have so far been 178, 121, and 109 anti-dumping measures imposed respectively on these items worldwide. Besides, post-December 2004 period is going to be very crucial for Bangladesh as the quota system for world wide apparels export will be abolished from January 01, 2005. This, undoubtedly, will increase competition among the potential exporters. Thus, the risk of imposition of trade remedy measures is likely to go high with the phase-out of the Multi Fibre Arrangement (MFA).

VI. Some Strategic Proposals for LDCs in the Context of WTO-DSU

In view of the above discussion, it is understandable that the major stumbling blocks hindering efficient participation of developing and LDC Members in the WTO DSB are (a) *lack of institutional and legal capacity in dealing with the issues of dispute settlement procedure*, (b) *financial inability to bear the expenses of lengthy and expensive legal procedures*, and (c) *the fear of deteriorating trade relationship with the developed Members*. It is this reality which should be taken into account to realise the opportunities available for overcoming any such hurdles and getting the right share from the apex trade regime. A number of possible strategies in this regard are stated below:

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[28] Source: BTC.

i. Pursue for consultation venues to be set up in the capital of the developing/LDC Member involved in the dispute whether as complainant or respondent

ii. Strongly urging for good offices to be offered by the Director General in the event of failure in consultation. It should be ensured that a developed Member, party to a dispute, should not request panel formation unless the efforts by good offices fail in that matter.

iii. Article 8:10 should read: When a dispute is between a least-developed country Member and a developed country Member the panel shall include *at least one panelist from a least- developed country Member* and, if the least-developed country Member so requests, the panel shall include two panelists from least-developed country Members. [Equivalent wording is to be included for developing country Members.]

iv. *Amicus curie* (friends of the court) briefs (written submissions by various civil society organisations, pressure groups etc.) should be dealt with due importance and taken into congnisance in preparing panel or AB reports.

v. DSB must incorporate the provision to ensure that compensation to the developing/LDC party be provided by the developed party irrespective of the former's status as complainant or respondent. The DSB must strictly adhere to the commitment.

vi. The LDC Members should make effective use of all the capacity building opportunities and assistances extended to them multilaterally, bilaterally, or institutionally. It may be mentioned here that amongst the 37 LDCs entitled to the services of the ACWL, Bangladesh has the largest share (0.9%) of WTO contribution to the centre, followed by Angola (0.7%). The remaining 35 LDCs are entitled to 0.3% each. Hence, pragmatic measures have to be undertaken for proper utilisation of such facilities.

vii. Adding to the context of capacity building, governments of the LDCs should monitor and explore every opportunity to enhance their institutional capacity by nominating more and more competent individuals for courses offered by the WTO, UNCTAD, ACWL and any other organisation offering such courses on trade policy and law.

viii. It is a hard fact that educational institutions in most of developing and least developed countries do not provide any special course on trade law or commercial law. Steps can be taken for incorporation of such policy oriented and practical subjects particularly at the tertiary level. This will create awareness among the young scholars of these countries regarding various legal and regulatory issues existing in international trade.

ix. In the context of ever growing competition in international trade where comparative advantage is the key to success, LDCs should look for trade diversification, and high priority should be given to search potential markets of new products. This will minimise the concentration on one particular market for a single product; and, in effect, will minimise the risk of being subject to trade remedy measures by importing countries.

x. LDCs must act together as a forum to advance their interest in the ongoing negotiations in the WTO. These countries have to come up with concrete suggestions and pursue the developed and developing members to accept and incorporate the suggestions for necessary amendments in the rules and procedures of the DSU to bring those more in line with LDC interest.

VII. Concluding Remarks:

While the WTO has been formed with the view to enhance trade and economic relations among the Members of the organisation, it has been facing difficulties in a consistent manner to come up with proper solution to incorporate all the issues important to preserve the interest of all its members. Though the Cancun Ministerial was an effort that could not be successful due to disagreements over issues of LDC interests, Members commitment towards reaching a more manageable position was evident in the July 31 draft adopted in Geneva in 2004, although with some criticism.

In order to make the WTO DSU more LDC friendly, there must be a range of concerted efforts by all the members. Developed Members should reposition themselves in a more flexible manner as to feel the urge of the LDCs considering the latters' economic capacity to deal with the complex issues of dispute settlement procedures. This needs to be done at the earliest as the DSU is the most crucial component of the WTO framework, which will ultimately determine the success of global level playing field through establishment a global mechanism of justice in the trade arena (Bhattacharya *et. al* 2003). The WTO will only then become the proper institution to serve the interests of all its members in bringing stability to international trading system.

Annex 1

Article XXII - *Consultation*

1. Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party

with respect to any matter affecting the operation of this Agreement.

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

Article XXIII - *Nullification or Impairment*

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

   (a) the failure of another contracting party to carry out its obligations under this Agreement, or

   (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or

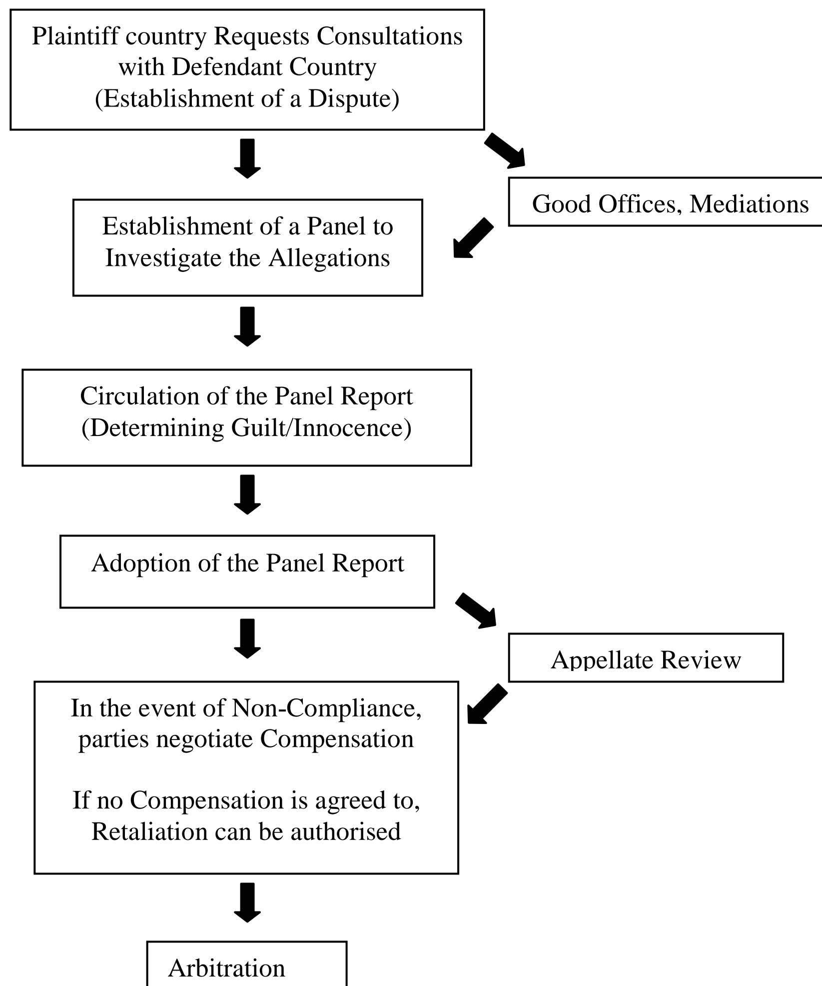
   (c) the existence of any other situation, the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic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

2. If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the difficulty is of the type described in paragraph 1(c) of this Article, the matter may be referred to the CONTRACTING PARTIES. The CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate. The CONTRACTING PARTIES may consult with contracting parties, with the Economic and Social Council of the United Nations and with any appropriate inter-governmental organization in cases where they consider such consultation necessary. If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances. If the application

to any contracting party of any concession or other obligation is in fact suspended, that contracting party shall then be free, not later than sixty days after such action is taken, to give written notice to the Executive Secretary to the Contracting Parties of its intention to withdraw from this Agreement and such withdrawal shall take effect upon the sixtieth day following the day on which such notice is received by him.

Annex 2

The Basic Elements of the WTO Dispute Settlement Process



Source: Derived from Petersmann (1997. p. 184)

Annex 3

Dispute Settlement in the WTO (1995 - October, 2004)

Year	**No. of Complaints**	**Requests placed under***														
		Trade Remedy Measures			**Non-Trade Remedy Measures**											
		AD	SCMs	SG	SPS	TBT	TRIPS	TRIMS	LIC	RoO	GPA	AoA	ATC	CV	GATT	GATS
1995	22	1	-	-	5	8	-	-	2	-	-	4	1	3	24	1
1996	42	3	7	-	3	5	6	6	1	-	-	5	6	1	25	3
1997	46	3	10	2	3	4	5	5	13	2	3	13	2	-	33	2
1998	44	6	11	2	5	5	4	3	5	1	-	5	1	1	24	3
1999	31	8	3	5	-	-	5	1	4	-	1	6	1	1	19	1
2000	30	11	7	3	2	2	3	1	1	-	-	5	4	3	23	2
2001	27	6	4	7	1	3	1	1	2	-	-	2	-	1	19	1
2002	34	7	7	11	5	2		2	4	1	-	7	-	-	34	1
2003	28	6	6	1	6	4	1		1	-	-	6	1	1	23	1
2004	13	5	5	-	-	-	-	-	1	-	-	1	-	-	6	1
Total	***317***	***56***	***60***	***31***	***30***	***33***	***25***	***19***	***34***	***4***	***4***	***54***	***16***	***11***	***230***	***16***

*Many complaints involve more than one agreement. Therefore, adding up the total number of complaints under each agreement will result in a total that is greater than the current number of complaints i.e. 317. However, the updated number of disputes till end-2004 is 324.

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