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 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. This document entitled "World Trade Organization: Dispute Settlement Mechanism" dealt with the substantive and procedural aspects of the WTO dispute resolution mechanism, in the light of the experience gained by the Dispute Settlement Body (DSB), since its establishment.

3. 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.

4. At the 39th and 40th 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.

5. At the 41st Session of AALCO held in Abuja, Nigeria (2002), the Secretariat has reported on the outcome of the Fourth WTO Ministerial Conference held in Doha, which resulted in the Doha Development Round of negotiations. In this Session the Organization had directed the Secretariat to "continue to monitor the review process concerning the WTO Dispute Settlement Understanding"[1] and report to the Organization at its 42nd Session.

6. Pursuant to this mandate, this brief report will cover the ongoing review process of the existing agreements and Doha Round negotiations, especially the Understanding on Rules and Procedures Governing the Settlement of Disputes.

[1] AALCO/LI/ABUJA/2002/RES/41/14

II. IMPLEMENTATION OF THE DOHA MANDATE: A FOLLOW-UP

7. 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, four ministerial conferences have been held: Singapore (1996), Geneva (1998), Seattle (1999) and Doha (2001). The Secretariat has been monitoring and preparing reports to the annual sessions of the Organization on the WTO's conclusions of the Ministerial Conferences.

8. The Secretariat's report to the 41st Session (Abuja, 2002), it may be recalled, focussed on the outcome of the Fourth WTO Ministerial Conference (2001), held at Doha wherein the Ministers 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. Against this backdrop, this part of the report is intended to provide an update on the extent and scope that the negotiations under the Doha mandate have accomplished this far.

1. ORGANIZATION AND MANAGEMENT OF THE NEGOTIATIONS

Negotiating Forum:

9. A Trade Negotiation Committee (TNC) established under the authority of the WTO's General Council supervises the overall conduct of the negotiations arising out of the Doha Mandate. The TNC comprises of all WTO Members and the WTO Director-General is the ex-officio Chairperson.

10. The TNC is entrusted with the establishment of appropriate negotiating mechanisms as required and supervises the progress of the negotiations. In accordance with the decision adopted by the TNC in February 2002, following is the structure for negotiation on issues mandated by the Doha Ministerial Conference: Two new negotiating groups for Market Access and WTO Rules (anti-dumping, subsidies, regional trade agreements) are established. The other issues for negotiation shall be dealt in the respective Council/Committees i.e.:

- Agriculture: in Special Session of the Agriculture Committee;
- Services: in Special Session of the Service Council;
- Geographical indications, a multilateral registration system, in Special Session of the Council for Trade-Related Aspects of Intellectual Property Rights (TRIPS). Other TRIPS issues to be considered on a priority basis in regular TRIPS Council meetings;

- Dispute Settlement Understanding: in Special Sessions of the Dispute Settlement Body (DSB);
- Environment: in Special Session of the Trade and Environment Committee;
- Negotiations on outstanding implementation issues in relevant bodies according to paragraph of the Doha Ministerial Declaration; and
- Review of all special and differential treatment provisions: in Special Session of the Trade and Development Committee.

Timetable:

11. As regards the duration of these negotiations, the Doha Declaration sets out the following timetable:

- The progress on the negotiations as a whole would be reviewed during the Fifth Ministerial Conference (2003);
- The deadline for completion of negotiations as a single undertaking is 1 January 2005;
- A Special Session of Ministerial Conference is contemplated for adopting and implementing the results of these negotiations. However, no date has yet been set for the special sessions;
- Separate deadlines have been established for:

    (a) Dispute Settlement Understanding Negotiations: May 2003
    (b) Negotiations on Registration System for Geographical Indications: Fifth Ministerial Conference (September 2003)

Principles:

12. With the exception of the improvements and clarifications of the Dispute Settlement Understanding, the conduct, conclusion and entry into force of the outcome of the negotiations shall be treated as parts of a single undertaking. However, agreements reached at an early stage may be implemented on a provisional or a definitive basis. The negotiations are open to all WTO Members and to observer governments negotiating or intending to negotiate membership. But only Members can take the decisions on the outcome. Negotiations shall be transparent, shall take into account the special and differential treatment of developing and least-developed country Members and ensures that sustainable development is appropriately reflected.

2. 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. Accordingly, the first phase of the negotiation process began in early 2000. The first phase consisted of Members submitting proposals containing their starting positions for negotiations. By November 2001, 121 Member Governments have submitted a large number of negotiating proposals.

14. In November 2001, the Doha Ministerial Declaration launched new negotiations on a range of subjects, and included the negotiations already underway in agriculture. The Declaration builds on the work already undertaken in the agriculture negotiations, confirms and elaborates the objectives, and sets a timetable. 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.

It was also agreed that special and differential treatment for developing country Members shall be an integral part of all elements of the negotiations and shall be embodied in the Schedules of concessions and commitments and as appropriate in the rules and disciplines to be negotiated, so as to be operationally effective and to enable developing country Members to effectively take account of their developmental needs, including food security and rural development.

15. On 26 March 2002, the Special Session of the Agriculture Committee agreed on a work programme which would set out by 31 March 2003 the key negotiating principles for a final comprehensive farm trade deal. It will set "modalities" for achieving the objectives set out in the Doha Ministerial Declaration. The "modalities" are targets (including numerical targets) for achieving the objectives of the negotiations, as well as issues related to rules. Due to be completed by 31 March 2003, they will set parameters of the final agreement to be reached by 1 January 2005. The "modalities" will be used for Members to produce their first offers or "comprehensive draft commitments".

16. In an overview paper prepared and circulated to Members on 18 December 2002, the Chairperson provides a general assessment of the state of play in the negotiations and identifies key issues, which require immediate attention and work as there is an urgent need for convergence.[2]

17. Based on the work carried out in the Special Sessions of the Agriculture Committee, its Chairman Stuart Harbinson circulated the first draft of modalities for further commitments on 12 February 2003. 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.

18. 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. As expected, the reactions to the draft were mixed.

19. The US was quick to welcome the draft, expressing its appreciation of the call for elimination of export subsidies. The EU Agriculture Commissioner denounced the

[2] TN/AG/6, dated 18 February 2002.

proposals as "unbalanced", since it unfairly sought to crack down on export subsidies while being much more lenient on other forms of farm support. From the point of developing country Members, the Harbinson draft, while recognizing their special needs, is perceived to leaving untouched developing country Members demands on: freedom to impose countervailing import duties to match the huge subsidies provided by OECD countries; greater freedom to protect domestic production of strategic crops crucial to food security and the livelihoods of poor farmers; and more viable special and differential treatment measures.

3. GENERAL AGREEMENT ON TRADE IN SERVICES (GATS)

20. Article XIX of the General Agreement on Trade in Services (GATS) requires WTO Member governments to progressively liberalize trade in services and for this purpose started a new round of negotiations in 2000. Accordingly the Special Session of the Services Council formally launched the new negotiations on 25 February 2000. The negotiations was conducted in two phases: (1) the "rules-making" phase during which Members will negotiate new rules for services on subsidies, safeguards and government procurement; and (2) and the "request and offer" phase[3], where Members will negotiate further market access. It was also decided that the work in the first phase will mostly take place in the existing Services Committees - mostly in the Working Party on GATS rules - market access negotiations will take place in Special Sessions of the Services Council. The Guidelines and Procedures for the Negotiations was adopted by the Council for Trade in Services on 28 March 2001.

21. At the Doha Ministerial Conference, the Ministerial Declaration recognized the work already undertaken as initiated in January 2000 under Article XIX of the GATS, and committed to continue the negotiations on trade in services. The Declaration reaffirmed the Guidelines and Procedures for the Negotiations as the basis for continuing the negotiations. Members are mandated to submit initial requests for specific commitments by 30 June 2002 and Members must respond to the request with initial offers by 31 March 2003. The services negotiations are mandated to be concluded as part of the single undertaking agreement by 1 January 2005.

22. WTO Members are currently tabling proposals regarding both the structure and the contents of the new negotiations.[4] Many negotiating proposals had been submitted by developed country Members and, if somewhat less, by developing country Members. Parallel to this, initial requests have been made by 30 developed and large developing country Members in bilateral market access negotiations. Request has been made for new market access commitments in most of the 12 service sectors including business services,

[3] Countries present their "request lists" to one another, making requests for specific liberalization in specific sectors by the country to which the list is addressed. It is being done with the expectation of getting benefits from liberalization. The requests are considered by the receiving countries and responses are given by them in the form of "offers" for liberalization.

[4] The list of all proposals submitted to the Special Session thus far on services sectors and horizontal issues can be found document no. TN/S/1.

communication, construction, distribution, environmental services, financial services, tourism and transport.

23. In 2002, the Special Session of the Council for Trade in Services held only one formal meeting (19 to 22 March 2002). At this Session, the discussion revolved around the negotiating proposals submitted by Members and the WTO Secretariat note, titled "Possible Elements for Modalities for the Treatment of Autonomous Liberalization".

24. The Special Session of the Council for Trade in Services took a key step on 6 March 2003 towards fulfilling the Doha Development Agenda by adopting "Modalities for Treatment of Liberalization Measures taken unilaterally by WTO Members since the previous multilateral negotiations". The Modalities set out the criteria for assessing the value of autonomous liberalization measures.

25. For the purposes of these modalities, a "liberalizing Member" is a Member seeking credit for an autonomous liberalization measure; and a "trading partner" is a Member from whom credit is being sought.

26. The credit to be sought for autonomous/unilateral liberalization measures may take the form of:-

(a) a liberalization measure to be undertaken by a trading partner in sectors of interest to the liberalizing Member under the GATS:
(b) refraining from pursuing a request addressed to the liberalizing Member; or
(c) any other form which the liberalizing Member and its trading partner may agree upon.

27. It is explicitly provided that these modalities shall be used *inter alia* as a means of promoting the economic growth and development of developing country Members and their increasing participation in trade in services. Thus, in the application of these modalities, the special needs of developing and least developed country Members shall be taken into account.

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

28. 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.

TRIPS Agreement and Public Health

29. The Declaration adopted by the Ministers stressed the importance of the implementation and interpretation of the TRIPS Agreement in a manner supportive of public health, by promoting both access to existing medicines and research and development into new medicines. To that end, Members were to be provided the right to resort to compulsory licensing of the drugs concerned. But, ambiguity remained on the question of defining a medical emergency and on whether a poor country Member without adequate manufacturing capability can obtain compulsory licence to have the drug produced in and imported from another country with the appropriate drug manufacturing capacity. The TRIPS Council was assigned by the Doha Declaration to initiate work on this item and has to report to the General Council on this by the end of 2002.

30. The TRIPS Council began discussions on TRIPS and public health on 5 March 2002. The discussion was oriented towards finding a solution to the problem Members may face in making use of compulsory licensing if they have too little or no pharmaceutical manufacturing capacity.[5] This is related to Article 3 (f), which says production under compulsory licences must be predominantly for the domestic market. Several WTO Members, including a large group of developing country Members[6], have submitted proposals for dealing with compulsory licensing when Members lack domestic production capacity. These proposals have suggested possible solutions to remedy this situation. Some of them are:

- **Amend or delete Art. 31(f) of the TRIPS Agreement**. This would ease or remove the requirement that production under compulsory licenses has to be predominantly for the domestic market. The EU said that amendment under strict conditions was one possible solution. Developing country Members tended to favour deleting the provision, but several speakers noted that amending the agreement would be a lengthy process.
- **Interpret Art.30 (exceptions to patent rights)** so as to allow products made under compulsory licensing to be exported to Members facing public health problems but lacking domestic production capacity. The EU presented this as another possibility, supported by several others, including the group of developing Members.
- **A moratorium on dispute cases** when products made under one Members compulsory licensing are exported to a Member in need but lacking domestic production — subject to clear conditions. This was the US's favoured solution, described as a solution under Art.31.

[5] "Compulsory Licensing" refers to the practice by a government to authorise itself or their parties to use the subject matter of a patent without the authorisation of the right holder for reasons of public policy (Article 31(f), TRIPS Agreement).

[6] African Group, Brazil, Cuba, Dominican Rep, Ecuador, Honduras, India, Indonesia, Jamaica, Malaysia, Sri Lanka and Thailand

- **Incentives for technology transfer** so that Members can build up domestic production capacity. This was emphasized by the developing country group and supported by the group of least-developed country Members.

31. During the deliberation, several contentious points emerged. On the question of whether the solution(s) should apply to all Members or only specifically defined categories, while developing country Members felt that the solutions should apply to all. Developed country Members preferred specifying eligibility, for example small-developed country Members should not be eligible. Further, the developed country Members favoured inclusion of conditions and criteria. Developing country Members feared that if conditions are too strict and detailed, the solution(s) might be difficult to implement.

32. However, no consensus could be reached even after intensive negotiation. Though, a draft Decision was put forward by the Chairman of the TRIPS Council on 16 December 2002, arguing that the solution should apply only to HIV/AIDS, malaria, tuberculosis and other infectious diseases of comparable gravity, the US apposed its adoption. However, the US announced that it would not challenge any WTO Member breaking WTO rules to export drugs produced under compulsory license to a Member in need. Switzerland, Canada and EU joined this moratorium saying that it would remain valid until a multilateral solution was found in the WTO. However, this interim solution covers only HIV/AIDS, malaria, tuberculosis and other infectious epidemics, and will not apply to developed country Members and high-income developing country Members (as classified by the World Bank).

33. More recently, a compromise proposal supported by EU and Brazil has been ignored by the US in the February 2003 informal meeting of WTO Ministers in Tokyo. The proposal envisaged a key consultative role for the World Health Organization (WHO) as the agency that would decide whether poor countries themselves had adequate capacity to manufacture life-saving generic drugs when confronted with public health crises. Only if they were found lacking in such capacity would they be permitted to import cheaper drugs from more advanced developing countries.

Decision on LDC Members

34. It may be recalled that the Doha Declaration on 'TRIPS Agreement and Public Health', had agreed to extend the deadline for least-developed country Members to apply provisions on pharmaceutical patents until 1 January 2016. The TRIPS Council approved this decision of extending the transition period on 27 June 2002. Further, the TRIPS Council also approved a waiver that would exempt least-developed country Members from having to provide 'exclusive marketing rights' (article 70.9) for any new drugs in the period when they do not provide patent protection. The decision was approved by the General Council.

Geographical indications

35. **(i) Multilateral System of Registration:** 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. At the Singapore Ministerial Conference in 1996, Ministers added the possibility of expanding this negotiation to include spirits.

36. Though the negotiations on the registration system started in 1997, 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.

37. In the first phase of negotiation, further discussion on the debate that began in the TRIPS Council in February 1997, under Article 23.4 of the TRIPS Agreement, shall be undertaken. In the second phase, which was described as a final negotiating phase, Members would try to work on a single draft based on their various proposals, and to end with consensus. The Proposals submitted by Members adopt two different approaches. One, from the EU and supported by a number of other Members, 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.

38. Providing an update on the progress of work, the Chairman of the Special Session in a report to the Trade Negotiation Committee stated that there are points where some common ground might exist, such as the mechanics of notification, and there are others where the differences are more profound such as opposition, legal effect of negotiation and participation. The Chairman hoped to circulate a negotiating text before the next meeting of the Special Session scheduled for 24-25 April 2003.

39. **(ii) Higher level of protection for products other than wines and spirits:** The Declaration also 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. 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 group of Members supporting the proposal for extending protection (Sri Lanka, Turkey, India, Pakistan, Egypt and Thailand) calls for the TRIPS Council to agree on negotiating modalities for submission to the TNC. On the other hand Members opposing such extension (US, Canada, Colombia, Australia, Guatemala) are of the view that the TRIPS Council should simply report to the TNC on its discussions, without proposing any modalities.

40. The discussion under the TRIPS Council has centred on:

(a) 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;
(b) broader policy issues such as the impact on producers and consumers of any extended protection
(c) administrative costs and burden of the procedures associated with any extended protection and any other impact on governments.

Review of TRIPS provisions

41. Two reviews have been taking place in the TRIPS Council, as required by the TRIPS Agreement:

- a review of article 27.3(b) which deals with patentability or non-patentability of plant and animal inventions, and the protection of plant varieties;
- a review of the entire TRIPS Agreement as required by article 71.1.

42. The Doha Declaration says that work in the TRIPS Council on these reviews should also look at:

- the relationship between the TRIPS Agreement and the UN Convention on Biodiversity;
- the protection of traditional knowledge and folklore;
- other relevant new developments that Member countries raise in the review of the TRIPS Agreement.

43. A substantial number of suggestions for topics to be considered under Article 71.1 review had been made prior to the Doha Ministerial conference, but some of them overlap with other items on the Council's post-Doha agenda. The TRIPS Council's Annual Report for the year 2002 has the following to report on this matter:

> "In considering how to best organize the work, the Council invited, at its March meeting, Members to submit ideas for issues to be taken up under this agenda item by the June meeting, without prejudice to the right of Members to submit ideas at a later stage. To date, no suggestions have been tabled by any Member"[7]

[7] *Annual Report of the TRIPS Council*, 2002, para. 23.

5. TRADE AND ENVIRONMENT

44. It may be noted that at the Doha Ministerial Conference, Ministers *inter alia* agreed to launch negotiation on:

(a) the relationship between existing WTO rules and specific trade obligation set out in multilateral environmental agreements (MEAs);
(b) reduction or elimination of tariff and non-tariff barriers to environmental goods and services (eg., catalytic converters, air filters or consultancy service on waste water management);
(c) clarify and improve WTO rules that apply to fisheries subsidies.

Accordingly, these issues are discussed at the Special Session of the Committee on Trade and Environment, whose first meeting was held on 22 March 2002.

45. As regards the Doha mandate on Multilateral Environment Agreements (MEAs) and WTO, the work of the Special Session is still at an early stage. As regards the conduct of the work within the Special Session, Australia had proposed a three-phased programme:

1. Identify specific trade obligations (STOs) in MEAs;
2. An interactive preview among participants to determine whether implementation issues had risen with respect to those STOs; and
3. Address matters arising from stages (1) and (2)

This proposal is currently being discussed.

46. The preliminary discussion on this aspect include: the scope of the mandate; the ambit and content of the terms "MEA" and "STOs" (Specific Trade Obligations); and the potential outcome of the proposals submitted by Members has been compiled and circulated by the WTO Secretariat. This document entitled "Compilation of submissions under Paragraph 31 (i) of the Doha Declaration,[8] would be periodically updated.

47. As regards the work on "Environmental Goods and Services", participants called for clarification of the concept of environmental goods. Besides proposals submitted by Members, the work of the Organisation for Economic Cooperation and Development (OECD) and the Asia-Pacific Economic Cooperation forum (APEC) have been used as a basis for discussing the definition and identification of "environmental goods". While some participants felt that the OECD and APEC list of environmental goods provided an adequate working basis, others felt that a WTO list should be drawn up in the light of the Doha mandate.

48. The Special Session is due to hold two further meetings prior to the fifth Ministerial Conference on 1-2 May and on 8 July 2003.

[8] TN/TE/S/3

6. SPECIAL AND DIFFERENTIAL TREATMENT

49. It may be recalled that in the Doha Ministerial Declaration, Ministers had agreed that all special and differential treatment provisions in the WTO Agreements shall be reviewed with a view to strengthening them and making them more precise, effective and operational. [9] In this connection, the Ministers endorsed a work programme, which is set out in the Decision on Implementation-Related Issues and Concerns. This Decision mandates the Committee on Trade and Development (CTD):

(i) to identify which special and differential treatment provisions are mandatory and to consider the implications of making mandatory those which are currently non-binding;
(ii) to examine additional ways in which special and differential treatment provisions can be made more effective; and
(iii) to consider, how special and differential treatment may be incorporated into the architecture of WTO rules.[10]

50. Pursuant to this mandate, the Trade Negotiation Committee (TNC) decided to carry out the review in the Special Session of the Committee of Trade and Development. The CTD was mandated to report to the General Council with clear recommendations for a decision by July 2002.

51. The Special Session of the CTD convened its first meeting on 5 March 2002. By the end of July 2002, more than 80 proposals were submitted to the Special Session of CTD on different aspects of S&D treatment. The proposals submitted by the Members raised a number of systemic and institutional cross-cutting issues.

52. The systemic issues include: issues relating to the principles and objectives of S&D treatment, including the utility of a clearer definition and understanding on these principles; a single or multi-tiered structure of rights and obligations; coherence; bench marking; technical assistance and capacity building; transition periods; trade preferences; utilisation; and universal or differentiated treatment, including graduation.[11]

53. The institutional issues include: Monitoring Mechanism; Annual Special Session of the General Council on LDC Members participation; Facility under the Doha Development Agenda Trust Fund; proposals on technical assistance and training etc., were also raised.

54. However, because of the large number of proposals, the complexity and potential implications of some of the proposals, the need to examine individually the legal and practical implications, wide differences apparent between the responses provided to many

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9 Paragraph 44, *Doha Ministerial Declaration*, WT/MIN(01)/DEC/W/1.
10 Para. 12.1, *Decision on Implementation-Related Issues and Concerns*, WT/MIN(01)/W/10, p.8.
11 *Report of the General Council*, 26 July 2002, TN/CTD/3, para. 4.

proposals, shortage of time, the difference among the Members regarding the *forum*[12] for dealing with agreement-specific proposals, difference of opinion regarding the scope of the Doha mandate[13] etc., prevented the Special Session from being able to engage in more than a preliminary consideration of many of the proposals.

55. This forced the General Council to extend the deadline, and instructed the Special Session to proceed expeditiously to fulfil its mandate and report to the General Council with clear recommendations for decision by 31 December 2002.[14] The 'way forward'[15] on the future course of work, formulated by the Special Session of the CTD, was considered and approved by the General Council. Accordingly, the Agreement-specific proposals were considered in two ways. Firstly, proposals relating to certain Agreements were considered in meetings held as close as possible to the meetings of the respective WTO bodies. This was done in order to utilize the expertise of these bodies. The remaining Agreement-specific proposals were considered in thematic clusters namely (1) provisions aimed at increasing trade opportunities; (2) provisions that require WTO Members to safeguard the interest of the developing country Members; (3) flexibility of commitments; (4) transitional time periods; (5) technical assistance; (6) provisions relating to measures to assist LDC Members other than those already included in clusters 1-5; and (7) Proposals on provisions not included in the previous six clusters.[16]

56. Till date, the Special Session has been able to reach an agreement only on one cross-cutting issue (i.e., the proposal on Monitoring Mechanism) and on twelve Agreement specific proposals.[17] However, there were different views on whether the agreement specific proposals should be harvested now. Some Members considered that this should be done, but others expressed preference for doing so only after progress had

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[12] There is a difference among the Member countries regarding the forum that is best suited for dealing with agreement-specific issues. While some Member, especially developing country, feel that review of all the S&D provisions including the agreement-specific issues should be dealt within the Special Session of the CTD (African Group, LDC), others, especially developed countries, feel that agreement specific issue should fall under the responsibility of specific committees. According to them S&D treatment proposals for which negotiating groups exist should, however, be examined in the first place in those groups, and duplication in any case avoided. See generally *Proposals of Canada* (TN/CTD/W/21), *EC, US*, etc.

[13] Some of the proposal are viewed by some Member countries as affecting the existing balance of rights and obligations and/or went beyond the Doha mandate. While other Members maintained the view that the mandate given by Ministers envisages the possibility of making changes to provisions. *Report to the General Council*, 26 July 2002, TN/CTD/W/25, para. 8.

[14] In the General Council meeting held on 31 July 2002, the WTO Member countries officially agreed to extent the review of special and differential treatment for developing countries until 31 December 2002, TN/CTD/3.

[15] According to "the way forward" the Special Session was instructed to analyse and examine the various Agreement-specific proposals and issues that have been raised in the written submissions and the discussions, and to do so:

(a) on the basis of a possible ordering of these proposals for consideration in appropriate clusters;

(b) utilizing, as appropriate, the expertise available in other WTO bodies and negotiating groups, and facilitating this through requesting and receiving reports from these bodies, and where feasible, through the holding of back-to-back meetings of the Special Session with the meetings of these bodies and groups.

[16] *Report to the General council*, 6 December 2002, TN/CTD/W/25, para. 6.

[17] See TN/CTD/7

been made on the 75 or so remaining agreement specific proposals. The Special Session, in its report to the General Council recommended that the General Council take note of the 12 Agreement-specific proposals on which Members had agreed in principle, but revert to the question of their adoption at a later date.

III. REVIEW OF THE DISPUTE SETTLEMENT UNDERSTANDING (DSU)

57. 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."[18]

58. 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 remained a number of suggestions by Members that had yet to be considered, the General Council had to extend the time for the completion of the review process in 31 July 1999.[19]

59. At the Fourth Ministerial Conference of the WTO, held in Doha, Qatar from 9 to 14 November 2001, the Ministers agreed to negotiate on improvements and clarifications of the Dispute Settlement Understanding.[20] The Ministers agreed that the future negotiations on DSU review "should be based on the work done thus far as well as any additional proposals by Members." The Doha Declaration stipulates that the DSB negotiations shall take place in Special Sessions of the DSB and the review shall be completed 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.

60. Pursuant to the mandate, the Special Session of the DSB was convened in order to conduct negotiations on clarification and improvement of the DSU. Ambassador Peter Balas of Hungary was confirmed as its Chairman. Till date the Special Session of the DSB held eight formal meetings.[21]

61. In its work, the Special Session follows a "two track" approach proposed by the Chairman. Under this approach, a general discussion of the issues and objectives for the negotiation under Track 1 in parallel with a discussion of specific proposals by Members under Track 2, with the focus of the work gradually shifting towards greater emphasis on the discussion of specific proposals under Track 2.[22]

62. A number of negotiating proposals have been presented to the Special Session of the DSB till date and some delegations have indicated that they are working towards submitting additional proposals. This is in addition to the earlier negotiation proposals

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

19 WT/DSB/M/52.

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

21 Apart from the formal meetings, many informal meetings were also held.

22 *Report of the Chairman to the Trade Negotiation Committee*, 23 April 2002, TN/DS/1, para. 2.

submitted by the Members in the Doha Ministerial Conference and the 1999 DSU Review. These proposals cover a broad range of issues relating to all stages of the dispute settlement procedures and reflect a wide range of perspectives.

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

1. CONSULTATION

Notification

64. Under the WTO dispute settlement mechanism, once the parties to the dispute have reached solution mutually agreed in the consultation, it shall be notified to the DSB and the relevant Councils and Committees, where any Member may raise any point relating thereto.[23] 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.

65. To remedy this situation, the WTO Members have proposed that any mutually agreed solution reached in consultation should be notified to the DSB within a prescribed time limit, for example, within two months after the amicable settlement has been concluded. It should be made mandatory, not discretionary.[24] Further, it was proposed that a sunset clause could be introduced to the effect that a request for consultations lapses after one year, and if the parties want to peruse the matter again, it could do so by requesting for new consultation.

Time-period for Consultation

66. According to the current provisions of the DSU, consultation is a necessary step before the commencement of the panel proceedings. This means the parties can request the establishment of the panel only if the consultations fail to settle a dispute within 60 days after the date of receipt of the request for consultations (Art. 4.7). However, in practice, this 60 days period is often utilized as an effective tool to delay the settlement of the dispute.[25] Thus, some Members have proposed for shortening this time-period, so that a Member can proceed to the next stage (establishment of the panel) of the dispute settlement process. For this, the time period could be reduced from 60 to 30 days in normal case, with an option for the developing country Members to expand the time-limit upto 30 days (i.e., 60 days maximum for developing countries).[26]

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

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

[25] This issue was highlighted in *EC – Trade Description of Scallops* (WT/DSB/M/6), where Canada requested for the establishment of the panel prior to the expiration of the 60 days consultation period.

[26] WT/MIN(01)/W/6, para. 8.

2. GOOD OFFICES, CONCILIATION AND MEDIATION

67. Resort to Good Offices, Conciliation and Mediation (Article 5), as an alternative dispute settlement methods, were introduced in the DSU taking into consideration the special needs of the developing country Members. However, ever since the inception of the WTO, this alternative has never been put to use either by developing or least-developed Members. The main reason for the disuse of this provision was that it is a non-mandatory obligation. Hence, it was suggested that this provision should be mandatory in disputes involving developing Members and a time limit be fixed for the completion of the process. Besides, it is suggested that the process under Article 5 should be allowed to continue parallel during the panel process.[27]

3. PANEL PROCEEDING

Establishment of the Panel

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

69. To clarify this ambiguity in the language, it is proposed that more time should be provided between the first meeting where the request is made and the second meeting at which the Panel is actually established.[28] This would provide more time towards reaching a mutually acceptable solution. However, some other members felt that panel should be established irrespective of the time difference between the first and the second meeting.[29]

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

70. The request for the establishment of a panel should identify the specific measures at issue and should provide a brief summary of the legal basis of the complaint. However, the approach of the Members differ widely in this regard. While some panel requests provide sufficient details, other requests tend to be highly imprecise. This runs counter to transparency in WTO system and is disadvantageous to respondents, third parties and other WTO Members. The absence of specificity and imprecision results in protracted arguments and counter-arguments which can lead to lengthen the process.

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

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

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

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

the legal basis of the complaint.[30] Japan suggested that there should be a procedure for clarification of the claim of the complainant.[31] Further, the African Group in the WTO felt that the special needs of the developing counties should be reflected in the terms of reference and proposed that it should take into consideration the development perspective.[32]

Composition of the Panel

72. Under the present WTO system, the panel is not a permanent body. The panellists are selected from a roster and indicative lists established by the Secretariat. To improve the current functioning of the panel and provide transparency in the selection process, it is suggested by many Members that there should be a standing Panel Body like the Appellate Body.[33] The European Union suggests that this Body could consist of between 15 and 24 members. However, Members are divided over this proposal. Costa Rica expressed its opinion that the right of the parties to dispute to select members of the panel should be preserved.[34]

4. APPELLATE BODY PROCEEDING

The Number and Term of the Appellate Body

73. There is general feeling among the WTO Members, both developed and developing, that the current seven-member Appellate Body should be expanded.[35] More specifically, Thailand has made a proposal that the members should be increased to fifteen, like that in the International Court of Justice.[36]

74. Further, a group of developing country Members have recommended that the time-period of appointment of the AB members should be increased from the current four-year term (with one reappointed) to a non-renewable fixed term of 6 years.[37]

Functioning of the Appellate Body

75. The US and Chile in a joint proposal have submitted six options aimed at providing parties to the disputes more control over the content of the Appellate Body reports, as well as the course of the dispute settlement proceedings. They are introducing confidential reports to be circulated by the AB to parties prior to issuing the final report;

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30 Australia, India and Japan. See Job. No. 6645, para. 106-112

31 The process should be initiated by the DSB, upon request by either parties to the dispute, facilitated by a representative designed be the DSB and would be completed within a limited time-period. See Job. No. 6645, para.112.

32 TN/DS/W/42

33 EC, Korea and Pakistan, Job. 6645, para. 125, 129 and 131.

34 Ibid. See also proposal by EC (TN/DS/W/38)

35 See *Proposals of Japan* (TN/DS/W/22), *Thailand* (TN/DS/W/2) etc.

36 TN/DS/W/2

37 Cuba, Honduras, India, Jamaica, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe TN/DS/W/18

allowing parties to delete by mutual agreement findings in the report that are not helpful or necessary to resolving the dispute; allowing the DSB to only partially adopt a report; providing parties the right to suspend panel or AB proceedings for further negotiations; and providing some form of additional guidance to WTO "judicial bodies" concerning the application and interpretation of WTO law.[38]

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

Remand Authority and Separate Opinion

77. Presently, the DSU does not permit the Appellate Body to send a case back to the panel for re-trial based upon a different interpretation of the law or in order to correct a procedural mistake (remand). Instead, the Appellate Body has to decide the case itself. Some Members suggest that a possibility of remand authority for the Appellate Body could be considered if it does not unduly delay the procedure as a whole.[39] However, Costa Rica, though recognizes the difficulties that the AB may face in situations where it has no factual and legal conclusions correctly formulated by the panel, feels that this will cause considerable delay in the procedure and the burden of error committed by the panel could be transferred to the complainant, who would suffer injury due to the delay in the decision.[40]

78. Another issue highlighted by the Members is that under the present system, opinions expressed in the Appellate Body report by individuals serving on the Appellate Body should be anonymous. This rules out the possibility of expressing dissenting opinion by any AB Member. In this regard, African Group[41] and LDC Members in the WTO has proposed that the DSU should incorporate provisions for expressing separate and dissenting opinion of AB/panel members.

5. COMPLIANCE AND ENFORCEMENT

Determination of reasonable period of time

79. The issue regarding the reasonable period of time (RPT) has centered on the length of the reasonable period of time, determination of the criteria of 'peculiar circumstances' for granting longer RPT, and what is required of a losing party while the reasonable period is underway. A large number of Members, especially developing country Members have proposed various amendment to clarify the ambiguity and some

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38 TN/DS/W/28

39 *Proposal of EC, Japan, Norway, Pakistan and Switzerland*. See Job no. 6645, para. 251-255. See also the latest *Proposal by EC* (TN/DS/W/38)

40 *Ibid*, para. 250.

41 TN/DS/W/42

of them relate to provision for consultation during the 'reasonable period of time'; longer reasonable period of time for compliance for developing countries; review of the action taken by the Members in the reasonable period of time is underway etc.[42]

The issue of sequencing between Article 21.5 and Art. 22

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

81. In order to settle this 'sequencing problem', a large number of WTO Members have individually and jointly proposed that necessary amendments to the relevant articles of the DSU.[43] They also suggested exploring the possibility of introducing a new article, Article 21 *bis* (Determination of Compliance), to address this issue. They propose clarification that compliance panel and appellate proceedings must be complete before the DSB can authorize the 'withdrawal of concessions', which in practice usually amount to the imposition of trade sanctions. At present, this is one of the few issues where all the Members have expressed support.

Compensation (Art. 22.1)

82. A large number of developing country Members have raised the issue of remedies available in case of non-compliance with panel/AB rulings, as the option of compensation is voluntary and retaliation in practice is not available to the developing countries. Jamaica has proposed that compensation, at the request of the successful developing-country Member, should also be available in forms other than increasing tariffs on imported products.[44] Least-developed country Members have suggested that compensation by Members who fail to rectify measures founded to be inconsistent with WTO regulations should be made mandatory by the elimination of the phrase "if so required" from Article 22.2.[45]

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[42] Bolivia, Canada, Chile, Colombia, Costa Rica, Ecuador, Japan, Korea, New Zealand, Norway, Peru, Switzerland, Uruguay and Venezuela (WT/MIN(01)/W/6).

[43] Bolivia, Canada, Chile, Colombia, Costa Rica, Ecuador, Japan, Korea, New Zealand, Norway, Peru, Switzerland, Uruguay and Venezuela (WT/MIN(01)/W/6); see also WT/MIN(99)/8, TN/DS/W/32.

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

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

83. The African Group and the LDC Members in the WTO have also made a strong case for monetary compensation.[46] This is deemed important for developing and least-developed Members, and for any economy that stands to suffer from the time that an offending measure remains in place.

Determination of suspension of concession

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

85. Philippines and Thailand have proposed that Article 21.7 should be amended in such a way that the level of suspension of concessions shall be strictly equivalent, in law and in practice, to the injury suffered by the complainant. Arbitrators should first determine the level of nullification and impairment accrued before determining the level of suspension and the complaining party should submit a list of concessions it intents to suspend.[47]

Collective Action

86. Though the DSU provides for retaliation in case of non-compliance with the panel/AB report, there exist gross inequality between the developed and developing Members in terms of the ability to retaliate.[48] This has taken away the punitive element from this provision, at least from the point of view of developing Members. A large number of developing country Members, including the African Group and the LDC Members in the WTO, have proposed that in cases where developing Members are the complainant and has to get ultimate relief through retaliation against developed Members, there should be joint (collective) action by the entire membership of the WTO.[49]

6. CROSS-CUTTING ISSUES

A. *Amicus curiae* briefs (Art. 13)

87. The issue of *Amicus Curiae* (friend–of–the-court) briefs came to the forefront when the Appellate Body in *Shrimp/Turtle* dispute[50] issued a preliminary ruling accepting an

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46 *African Group* (TN/DS/W/42) LDCs (TN/DS/W/17)

47 WT/MIN(01)/W/3, para. 3;TN/DS/W/3. Australia expresses similar view (TN/DS/W/8, page 21).

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

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

50 WT/DS58/AB/R

amicus brief submitted directly to it.[51] The United States and European Union have proposed explicit recognition of the right of the panels and the AB to accept unsolicited briefs, as they already do on an *ad hoc* basis. However, most developing country Members vigorously oppose this practice. They fear that well-endowed institutions in developed countries, including powerful business associations, would be most likely to be called upon for information and technical advice. Further, they point out that there is a distinction between 'assisting' the court in the public interest, as opposite to assisting a party to 'political tilt' a case in its favour. According to some Members, to allow unsolicited *amicus curiae* submissions would create a situation where Members with the fewest social resources could be put at a disadvantage.[52]

88. The developing Members on their part propose that any acceptance of unsolicited information by the panel or AB should not be permitted unless there is consent of the parties.[53] They further demand an amendment to the word "seek" and calls for clear guidelines to settle this issue.

Participation of Private Counsels

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

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

Confidentiality (Art. 14.1)

91. The Panel and Appellate Body deliberations are confidential in nature. Only parties to the dispute can participate in the deliberations. However, some of the Members

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

[52] TN/DS/W/25

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

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

[55] Job. No. 6645, para. 140-142.

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

Third Party Rights

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

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

Special Treatment for Developing Countries

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

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[56] Job. No. 6645, para. 172 and 188

[57] for proposals on third party rights see documents: TN/DS/W/36

[58] Cuba, Honduras, India, Jamaica, Malaysia, Pakistan, Sri Lanka, Tanzania Zimbabwe (TN/DS/W/18); Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (TN/DS/W/25); the African Group in the WTO (TN/DS/W/42); Australia, Costa Rica, EC, Japan, Norway, Pakistan and Singapore (Job. No. 6645, para. 226-240) EC and Korea (Job. No. 6645, para. 119-120); and HK-China (Job. No. 6645, para. 91.)

implementation of provisions in favour of developing country Members.[59] Some of the major proposals submitted by the developing country Members in the Special Sessions of the DSB and CTD are highlighted below.

(i) Special Treatment in Consultation

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

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

96. **Article 12.10** of the DSU provides for extending the consultation period for the benefit of the developing country Members. The second part of this Article directs the panel to give "sufficient time" for the developing Member to prepare and present its argumentation before the panel. Though this provision is considered as mandatory,[61] it is the discretion of the DSB Chairman whether to extend the consultation period and if so, for how long. As regards the second part of Article 12.10 the panel has no discretion because it "shall allow sufficient time". However, the Article does not provide any guidance either to the DSB Chair or to the panel as to how much additional time should be given.[62] This has made this Article inoperable or of limited use for the developing

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

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

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

[62] In a dispute, a developing country defendant contended that the process raised a number of questions in relation to the DSU such as (i) the real difficulties faced by developing country Members on the insistence by a developed country Members that consultations be held only in Geneva; (ii) the meaning and significance of the consultations stage; (iii) whether a Member could decide unilaterally that consultations had been concluded in particular since Article 12.10 of the DSU provided that "In the context

country Members.[63] To clarify this, a group of developing Members in their joint communication proposed that the DSB Chair shall grand extension in the consultation period for not less than 30 days in normal circumstances and for not less than 15 days, in cases of urgency. Similarly, in the case of written submission not less than two weeks extra should be given in normal circumstance.[64]

(ii) Special Treatment in Panel/AB Proceedings

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

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

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of consultations involving a measure taken by a developing country Member, the parties may agree to extend the period established in paragraphs 7 and 8 of Article 4." WT/DSB/M/2, p. 4. See also WT/COMTD/W/77, p. 71.

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

64 Ibid.

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

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

67 The Arbitrator in *Indonesia – Autos (21.3 Arbitration Report)*, while taking into account Indonesia's status as a developing country in determining the "reasonable period of time" that "although the language of this provision is rather general and does not provide a great deal of guidance, it is a provision that forms part of the context for Article 21.3(c) of the DSU…." (Indonesia was giver six months additional period of time to implement the report). The Arbitrator added that the time was granted to Indonesia because it "is a developing country that is currently in a dire economic and financial situation" and "its economy is 'near collapse'." However, the Arbitrator concluded "in a 'normal situation', a measure such as the one required to implement the recommendations and rulings of the DSB in this case would become effective on the date of issuance." It is interesting to point out here that this S&D provision has been introduced to give developing countries special treatment in "normal situations". See also *Chile – Alcoholic Beverages*, 21.3 Arbitration Report, para. 45

1. if the defending party is a developing Member and the complainant, a developed member, 15 months should be considered as normal reasonable period of time.

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

3. if the complaint is by a developing Member against a developed Member, the defending developed Member should be given no more than 15 months of reasonable period of time in any circumstance and existing 90 days time limit for 21.5 procedures should be observed strictly. In case of delay, it should entail an obligation to compensate for continuing trade losses to the developing Member complainant.[68]

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

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

(iii) Technical Assistance (Article 27.2)

101. Although technical assistance is currently provided for by the WTO, such assistance has proven to be inadequate in assisting developing country Members to take advantage of the Dispute Settlement Mechanism. In the review process, Jamaica had suggested that the budget of the Secretariat needs to be further supplemented to enable the Secretariat to hire full time consultants, as part-time basis consultant has proven to be problematic for developing country Members.[71] Although the independent WTO Law Advisory Center has been established to assist developing-country Members, the cost of membership still prohibits some developing country Members from accessing its facilities. Additional independent mechanisms need to be developed to ensure that developing country Members not only obtain general legal advice, but can also obtain

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

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

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

71 *Proposal of Jamaica*, TN/DS/W/21. See also WT/COMTD/W/77, p. 73

assistance in arguing their case before a panel at a cost, which these countries can afford."[72]

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

(d) Least-developed Country Members

103. The African Group suggested that the provision (Article 24) should be understood to mean that the panels shall before proceeding with the case first determine whether the Member bringing the case has given particular consideration to the special situation of the least-developed country Member. In this regard, the panel shall take into account all relevant factors including, the value of any alleged nullification or impairment, the possible harm to the economy and resources of the least-developed country Member that could result from the case, and the capacity in the circumstances of the least-developed country Member to effectively deal with the case.[76]

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[72] *Proposal of Jamaica,* TN/DS/W/21. A similar proposal was put forward by the African Group, TN/CTD/W/3/Rev.1, para. 90 (a).

[73] Ibid.

[74] *Proposal of African Group in the WTO,* TN/CTD/W/3/Rev.1, para. 90 (b).

[75] *Proposal of Jamaica,* TN/DS/W/21. Jamaica also welcomes the decision of the Appellate Body in the *Bananas* case to allow the participation of private lawyers.

[76] WT/CTD/W/3/Rev.1, para. 89.

IV. OBSERVATIONS

104. The establishment of the Trade Negotiation Committee and the start of negotiations within the respective subsidiary bodies have set in motion a process that would, by the year 2005, culminate in the adoption of newly negotiated commitments.

105. The comprehensiveness of the Doha Mandate and the stipulation that the results of the negotiations would form part of a "single undertaking" has evidently led to Members adopting a more cautious and a 'wait-and-watch' approach, thus slowing down the pace of the ongoing negotiations. The inherently conflicting perceptions between developed-developing country Members; the cross-cutting nature of certain issues; and the multiplicity of negotiating bodies are other factors that influence the pace and direction of the current negotiations.

106. It may be noted that the Fifth Ministerial Conference scheduled to be held at Cancun, Mexico from 10 to 14 September this year would be a forum for stock-taking of the progress made over the Doha mandate. Therefore, the AALCO Secretariat wishes to present the following preliminary assessment of the state of negotiations on the Doha mandate.

107. Lack of agreement within the set time-limits on certain important issues, particularly of interest to developing countries, seems to offer a grim warning of things to come. Negotiations in the WTO were expected to deliver on three key issues for developing country Members by the end of 2002: (a) essential medicines for Members lacking capacity to manufacture such things indigenously; (b) special and differential treatment for developing country Members; and (c) resolving implementation issues. Failure in all these areas is a matter of concern.

108. In the area of essential medicines, the obduracy of some developed country members in introducing conditions seeking to re-define the Doha mandate and render any emerging solution unworkable is a case in point.

109. On the issue of special and differential treatment for developing country Members, two deadlines: July 2002 and December 2002 have been missed without reaching any agreement. As against developing country Members demands for review and operationalisation of all S&D provisions, developed country Members have chosen to focus only on secondary issues such as enhanced time frame, technical assistance and monitoring mechanism on the use of S&D provisions.

110. Similarly, on implementation question, there has been little progress over 75 odd implementation issues identified in Doha for redress.

111. In agriculture, the EU's persistent refusal to reform its Common Agriculture Policy threatens to become the major round-stopper. And, in services, it is unlikely that there would be significant progress without breakthrough elsewhere, particularly in agriculture.

112. While developed country Members aim to restrict the scope of Doha mandate that are of interest to developing country Members, they have sought to promote and widen the scope of those areas of interest to them, namely, Investment, Competition and Government Procurement.

113. Admittedly, negotiating positions within the WTO would not be based in the simplistic logic of developed-developing country Members interests. At a second level, polarisation among developing country Members based on their individual development level and perceived national economic interests would ultimately determine the outcome of the ongoing negotiations. Therefore, the assessment offered above is merely intended to provide a general and indicative picture as to the direction things are moving.

114. In the view of the AALCO Secretariat, efforts need to be expended by both developed and developing country Members to resolve as many issues as possible before going into the Fifth Ministerial Conference. An overloaded agenda with unresolved issues would have serious consequences as witnessed in Seattle.

ANNEX I

SUMMARY OF THE DELIBERATIONS AT THE 41ST SESSION

The agenda item **WTO as a Framework Agreement and Code of conduct for World Trade,** was taken into consideration at the Sixth General Meeting of the AALCOs 41st Session.

The **Delegate of the Republic of Korea** expressed full support for the ongoing negotiations in WTO and noted that given the numerous issues on the agenda there is not much time before the 2005 deadline.

The **Delegate of Kenya,** while partly agreeing with the Secretariat's view that WTO topics such as agriculture, textiles, goods, services, intellectual property, etc. are of a politico–economic policy orientation and as such do not in themselves amount to legal issues, the delegate pointed out that the breach occasioned by non-compliance with the WTO agreements would invite legal issues to be addressed. Further, the delegate stressed that the new round of negotiation was not the in the most favourable position from the perspective of Kenya and other developing/least-developed States. In order to have negotiations that would be fair, balanced, relevant and workable, focus should be had in development of technical capacity in the following areas:

(a) Legislative, institutional and human resource empowerment to improve participation of developing countries at WTO programmes and ensure compliance with the WTO agreements.
(b) Identification of new trading opportunities aimed at increasing the volume, value and export baskets of developing and least developing countries.
(c) Harmonization of national laws to conform to WTO provisions.
(d) Training of professional negotiating teams to ensure effective participation in negotiations.
(e) Training experts and establishment of institutions capable of handling complex procedural requirements for application of WTO anti-dumping and subsidies and countervailing measures.

The Delegate was of the view that the AALCO Secretariat needs to be encouraged by Member States to closely monitor activities related to the development of capacity of the States to comply with the WTO agreements. To address the Secretariat's resource constraint, he said, voluntary contributions in this area should be encouraged. The Delegate also expressed support for the proposed AALCO work programme to examine relevant legal elements relating to "relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements", and "relevance of a multilateral framework for investments, in the context of 'developmental' priorities of developing countries". The possibility of organizing regional workshops/seminars, on selective themes relating to the new round of negotiations to be launched, should be explored further.

The **Delegate of the People's Republic of China** said that the WTO Agreements are not fair or justified towards developing countries in some aspects. Particularly he cited the lop-sided nature of GATS, TRIPS and TRIMS. Therefore, the WTO Agreements need further modification to ensure the balance of interests of both developing countries and developed countries. In the future negotiations, China will try its best to work together with other developing countries for a more fair and equitable multilateral trade system.

The **Delegate of Tanzania**, at the outset expressed his appreciation to the Government of India for the position it took during the Doha Ministerial Conference and also other AALCO Member States for their common stand in support of India. While welcoming the establishment of the Global Trust Fund for assisting developing countries in capacity-building and technical assistance, he urged the AALCO Secretariat to continue monitoring the ongoing negotiations within WTO. He called for establishment of a data bank on WTO dispute Settlement Panel decisions.

The delegate drew attention to the different trends of development within the Member States in the area of patented inventions of medicinal innovations. These innovations are of great importance to other less developed jurisdictions within the region and elsewhere. Hence he urged developed countries to exercise flexibility in their legal regimes so as to allow the less developed countries and under privileged to benefit from such patents.

The **Delegate of India** noted that WTO, as a global trade body presents many opportunities for the Asian and African countries. The delegate noted that there are many areas of concern for developing countries. Foremost among them, the Uruguay Round Agreements have not resulted in greater market access for the exports of developing countries on account of the phenomenon of tariff escalation, and the use of non-tariff barriers, in respect of products of export interest to the developing countries. The Special and Differential (S&D) provisions are mostly in form and not in substance. These provisions should be made contractually binding and must be operationalized and made enforceable. They should not stay merely as "best endeavor clauses". The TRIPS Agreement should be interpreted and harmonized with the UN Convention on Biological Diversity so as to ensure appropriate returns to traditional communities located mostly in developing countries of Asia and Africa.

It was the view of the Indian delegate that the Doha Declaration on TRIPs and Public Health sets the right tone for the further negotiations. It is also a fact that the expertise on WTO in developing countries is slowly gearing up to meet the future challenges. The work programme of AALCO should complement this effort. Since the review of DSU is going on, it is a good idea to examine the problems relating to WTO Dispute Settlement Understanding, with special focus on the concerns of the developing countries. Within the WTO itself, no doubt, efforts are being made by certain developed countries to enhance and provide technical assistance in these matters. The delegate welcomed the recommendation made by the Secretariat for further examination of these problems through conduct of specialized seminars etc.

The Government of **Malaysia** expressed support for the work of the AALCO Secretariat on WTO in its comments sent to the 41st Session. As regards DSU Review, Malaysia supports the proposal to have more panel and Appellate Body members and that they be constituted on a permanent basis instead of the present ad hoc basis. Malaysia also agrees that the sequencing issue between Art.21.5 and 22 of the DSU needs to be resolved. As regards other lacunas in the DSU, Malaysia views that there should be clarification on the powers of the panel and Appellate Body in relation to *amicus curiae* briefs, the powers of subsequent panels and Appellate Body's to depart from previous decisions of the Appellate Body (i.e. whether the Doctrine of *Stare Decisis* applies to DSB rulings and recommendations).

As regards AALCO Work Programme, Malaysia supports the proposal by the Secretariat at paragraph 26 of its Report for the AALCO to undertake an examination of the following aspects of the WTO Dispute Settlement Process – Interpretative clarifications emanating from disputes involving various WTO agreements e.g. agriculture, IPRs, anti-dumping, services, etc.; Procedural and evidentiary aspects of the DSU; and Survey of the operationalisation of "special and differential treatment" for developing countries in the context of the WTO Dispute Settlement Process.

Further, Malaysia supports the proposal by the Secretariat at paragraph 27 of its Report that the AALCO provide a forum for its Member States to coordinate their positions on issues relating to the new round of negotiations as agreed at the Doha Ministerial Conference. Malaysia further expressed support for the proposal at paragraph 27 that the Secretariat's work programme also examine the relevant legal elements related to the "Relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements" and "relevance of a multilateral framework for investments, in the context of "developmental" priorities of developing countries, Malaysia agrees on the need for such a study and has no objection to either or both of the 2 methods proposed to carry out the study, i.e., For the Secretariat to undertake the new areas of study in co-operation with other international and inter-governmental bodies such as the WTO, UNCTAD and the Advisory Centre on WTO Law; or for the Secretariat to organize regional workshops/seminars on selective themes related to the new round of negotiations to be launched. It is also proposed that, depending on the views expressed by other AALCO Member States, Malaysia may consider supporting a further resolution that the Secretariat monitor the developments in these matters.