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Reform of the WTO Dispute Settlement Understanding: A Critical Juncture for Developing Countries

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1 Introduction

The WTO Dispute Settlement System is one of the most effective mechanisms of inter-state dispute settlement that exists today under international law. A reflection of its success has been its use by states to resolve a large number of disputes.[1] This rich experience has, however, highlighted a number of difficulties that require attention to increase the efficacy and fairness of the system. From the perspective of developing country Members (DCMs), there are a number of changes to the Dispute Settlement Understanding (DSU) that would considerably improve their ability to participate on an equal footing in the system and thereby increase their share of the trade benefits offered by the WTO Agreements. By the same token, there are proposed changes to the DSU that, if implemented, would be likely to have a negative impact on DCMs.

WTO Members have tabled more than 44 formal proposals for DSU reform since March 2002. Due to considerations of relevance and length not all the details of all these proposals are considered in this paper. Instead, it focuses on those proposals – made both by DCMs and developed country Members (DdCMs) – that affect the position of DCMs. It discusses the proposals in the context of the broader issue that has led to their being tabled, and evaluates both the likelihood of particular proposals being adopted and the potential impact the proposals will have on DCMs.

The reform proposals that potentially affect DCMs can be categorised into the following seven general subject areas: the initiation of cases; issues relating to the establishment, membership, composition and procedure of panels; issues relating to the membership and procedure of the Appellate Body; issues relating to the effect of panel and Appellate Body decisions on DCMs and their lack of a development focus; improving the ability of DCMs to use the DSS (cost issues, adequacy of remedies and improving compliance measures); transparency of DSS proceedings; and third party issues that concern DCMs.

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2 The Initiation of Cases under the DSU

There are three main areas that have been the focus of proposal and discussion in the context of DSU reform in relation to the initiation of cases. These are the use of good offices and the initiation of proceedings; the notification and consequences of mutually agreed solutions; and injury suffered by DCMs as a result of measures that are withdrawn before or after the commencement of proceedings.

The Use of Good Offices and the Initiation of Proceedings

Paraguay, Jordan, Haiti and the EC have all made separate proposals regarding the use of good offices and the initiation of dispute settlement proceedings. The first three states have made proposals that relate directly to the position of DCMs, while the EC proposal is more general in nature.[2]

The government of Paraguay proposes that the following main changes be made to Article 5 of the DSU:

> 1. Good offices, conciliation and mediation are procedures that are undertaken voluntarily if the parties to the dispute so agree. *In disputes involving developing country Members, and at the request of any of the parties, such procedures shall be mandatory.*
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> ...
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> 3. Good offices, conciliation or mediation may be requested at any time by any party to a dispute. They may begin at any time and be terminated at any time. *On no account may such procedures exceed a maximum period of 90 days.*
> 4. Once procedures for good offices, conciliation or mediation are terminated, a complaining party may then proceed with a request for the establishment of a panel. *If the parties to a dispute agree, and if one of the parties is a developing country Member, procedures for good offices, conciliation or mediation shall continue while the panel process proceeds.*[3]

The reasons put forward by Paraguay in favour of this type of proposal are that it will contribute to the prompt settlement of disputes and that the costs of pursuing disputes through the dispute settlement system can be prohibitive for DCMs. However, it is not at all clear that such a reform proposal would benefit DCMs, and it should be firmly resisted by other DCMs for three main reasons. First, it is not at all clear that making such procedures compulsory would lead to a more prompt settlement of disputes. In fact, by interposing an additional 90-day maximum period for good offices, conciliation and mediation, the total length of a dispute that goes through to a panel would be likely to increase. In any case, states can already agree at any time after a panel has been established to resolve a dispute by agreement. Second, to require DCMs to conduct simultaneously litigation before a panel or Appellate Body and to continue to

negotiate – as both the Paraguayan and Jordanian proposals do – clearly increases the cost and material demands of such a dispute for a DCM. Third, the advantage of the more rules-based system of the DSU is that DCMs are less subject to political and economic pressures by DdCMs; to move back to a situation where DCMs are *required* to undertake good offices, conciliation and mediation, where the economic power of DdCMs will necessarily exert their influence, seems a retrograde step. The one advantage the proposal may have had is an extension of the time that DCMs may have as a respondent in a case, since they have 90 days extra to prepare their case under the proposed changes to Article 5.1. This is, however, too high a price to pay for making these processes compulsory. In any case, such increased timelines in cases where DCMs are respondents should be a separate negotiating objective and not be attached to any such onerous conditions.

In contrast, a proposal by Haiti that relates to Article 24 and the initiation of a case against least developed country Members (LDCMs) does seem particularly useful and possibly should also be considered in relation to DCMs. The proposal is that Article 24 should be amended by adding the following paragraph 3:

> 24.3. A *developed country* Member *shall not commence a request for the establishment of a panel before fully using the good offices, conciliation and mediation before the Director-General or the Chairman of the DSB. When requesting for the establishment of a panel against a least-developed country* Member, *a developed-country* Member *shall provide the DSB with a written account of how it has exercised due restraint in accordance with paragraph 1. Where the DSB grants the request for the establishment of the panel, the developed country* Member *shall file the written account on due restraint with the panel, which shall make preliminary findings, before proceeding with the case, on the written account, on the basis of the provisions of paragraph 1, and on the existence and adequacy of efforts to reach a mutually agreed solution. Where the panel finds that due restraint has not been exercised or that no efforts or inadequate efforts had been made to reach a mutually agreed solution, it shall refer the matter to the DSB, which shall take those findings into account and make preliminary recommendations and rulings on the matter. In this regard, the DSB shall request the Director-General to provide good offices, conciliation and mediation.*[4]

The dual requirements of this proposal that a DdCM has to provide the DSB with a statement on how it has exercised due restraint because of the least-developed status of the state, as well as providing for a system of panel oversight in relation to the content of this statement, will certainly ensure that the least-developed status of the State is taken seriously by a complainant state. The only difficulty is how to provide a panel with a mandate to review 'the existence and adequacy of efforts to reach a mutually agreed solution'. In practice this will be a difficult task for a panel to fulfil and, more importantly, not a mandate that DdCMs will be keen to confer on a panel. Having said

this, however, it is this type of decision-making power that the panel and Appellate Body have, for example, exercised in the *Shrimp-Turtle* case in deciding on the adequacy of US efforts to negotiate a multilateral agreement on the measure that the USA eventually enacted unilaterally.[5] So there is at least a precedent for a panel being able to exercise this type of power of review, and from the perspective of LDCMs such a requirement would be very useful indeed.

The EC has made two useful proposals that would seem to benefit DCMs. First, that a provision should be added to Article 4 of the DSU to enable a Member to withdraw formally a request for consultations;[6] and, second, that consultations which have not been followed by a request for the establishment of a panel within a certain time frame (e.g. 18 months) should be implicitly considered as having been withdrawn.[7] These proposals would benefit DCMs since they would allow the removal of dormant cases that are still technically open and thus able to be revived by a state at any time against a DCM. The removal of these dormant cases from a list of potential cases is important in order to ensure that they cannot be used as a bargaining tool in trade relations between DdCMs and DCMs.

The Notification and Consequences of Mutually Agreed Solutions

Although the resolution of disputes between Members by mutual agreement is one of the objectives of the DSS, it presents difficulties of a systemic nature. For example: are other Member States aware of the terms of the settlement? And, more importantly, are any benefits being offered as part of the settlement being applied to all Member States pursuant to the most favoured nation obligation[8] contained in Article 1 of the GATT?[9] These problems have the potential to affect DCMs more significantly since they do not have the same degree of WTO representation, and thus information gathering capacity, of most DdCMs. Possibly in response to these difficulties, Cuba, Honduras, India, Jamaica, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe proposed the insertion into Article 3.6 of the DSU a time period by which mutually agreed solutions should be notified to the DSB and other relevant WTO bodies, as well as the insertion of a requirement to specify sufficient details such that other Members have an opportunity to assess the impact of such solutions on their trade. Their proposal to amend Article 3.6 DSU reads as follows:

> 6. *Terms of settlement of* mutually agreed solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements shall be notified *within 60 days from the date of such agreement and in sufficient detail* to the DSB and the relevant Councils and Committees, where any Member may raise any point relating thereto.[10]

Such a proposal would be useful in ensuring that DCMs are able to obtain any benefits that are being offered a complainant state as part of a negotiated settlement.

Injury Suffered by DCMs as a Result of Measures that are Withdrawn Before or After the Commencement of Proceedings

The small size of the economies of most DCMs means that measures restricting their exports, even if for a short duration, causes them serious injury. There have been no adequate remedies for injury suffered as a result of such measures that are withdrawn by a Member either before the commencement of proceedings or after finalisation of the proceedings under the DSU. In relation to the withdrawal of measures before finalisation of the proceedings, there are two reform proposals made by the African Group to Articles 3.6, 21 and 22 of the DSU. The first is that a rule should be adopted which provides that measures withdrawn by Members in the course of consultations shall be notified to the DSB as mutually agreed solutions in accordance with Article 3.6 and, where the mutually agreed solutions are notified, the DSB shall recommend compensation for injury suffered by the Member.[11] The second is that a further rule should require that measures withdrawn without, or prior to the commencement of, any proceedings under the DSU shall entitle a Member to compensation that shall be enforceable under the DSU at the instance of the Members affected.[12] Specifically, the African group usefully propose that Article 3.6 of the DSU should be amended by renaming the current provision as paragraph (a) – as amended – and by adding the following paragraphs:

> *(b) Developed-country Members that adopt measures against developing or least-developed country Members and withdraw them in the course of consultations or 90 days before the commencement of consultations pursuant to Article 4 of this Understanding shall notify them individually or jointly to the DSB within 60 days of their withdrawal. The notification shall, describe the measure and the reason or circumstances for the withdrawal, state whether consultations were held and finalised, and indicate the amount of injury to the developing or least-developed country Member resulting from the measure. Disputes over the amount of injury may be referred to arbitration under Article 25 of this Understanding.*
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> *(c) Where injury has resulted from the withdrawn measure, and if the developing or least-developed country Member so requests, the DSB may recommend monetary and any other appropriate compensation taking into account the nature of injury suffered. The level of compensation shall be determined by arbitration in accordance with Article 25 of this Understanding and shall be implemented mutatis mutandis in accordance with Articles 21 and 22.*
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> *(d) The requests referred to in paragraph (c) may be made at the meeting of the DSB considering the notification of the withdrawn measures or subsequently within a period of 60 days, unless there are exceptional circumstances justifying the consideration of the request at a later date.*[13]

The substance of this provision is absolutely key to ensuring that DCMs are not the subject of 'hit and run' practices by Members who may provide short-term trade protection to various sectors that compete with DCM exports. It is for the same reason that the additional proposal made by the African Group – that takes into account Articles 19.1, 21.8, 22.1 and 22.2 of the DSU – relating to compensation for measures withdrawn after finalisation of proceedings is also crucial. In cases where proceedings have been finalised, the provisions and practice on compensation have not satisfactorily reflected the interests and injury suffered by industries of DCMs, since the key for DCMs is that compensation should be in the form of monetary compensation – as opposed simply to market access – that should be continually paid pending and until the withdrawal of the measures that are in breach of WTO obligations. Such monetary compensation would address the loss suffered as a result of, and for the duration of, the measures in breach of WTO obligations, without being a substitute for the withdrawal of those measures.[14]

3 Panel Issues

There are three main areas that have been the subject of DSU reform proposals and discussion relating to panels. These are the proposed establishment of permanent panellists, the composition of panels and the input of the WTO Secretariat in panel proceedings.

Permanent Panellists

The European Communities (EC) proposed a move from *ad hoc* membership of panels to more permanent panellists.[15] Four arguments have been made in support of this proposal. First, there is a growing quantitative discrepancy between the demand for and availability of *ad hoc* panellists. This has resulted in increased delays in the selection of panellists, and an increasing recourse to the WTO Director-General for the appointments of panellists. The EC clarified in a later communication that it did not mean there are not enough *ad hoc* panellists potentially available, but that it is becoming increasingly difficult to find and agree on them at such short notice.[16] Second, the increased complexity of the cases – both from a procedural and substantive viewpoint – being brought before panels has led to the cases taking more time to handle. The EC refined this point in a later communication when it clarified that *ad hoc* panellists often do not have the experience necessary to deal with procedural matters or have the time to become fully acquainted with WTO case law;[17] and, moreover, that a system of permanent panellists would help in attaining more consistent rulings both procedurally and on substance.[18] The EC also contends – as part of this second point – that moving to a system of permanent panellists would be very likely to result in less reversals of panel reports by the Appellate Body than is currently the case, thereby reducing

the total timeframe of the procedure, the workload of the Appellate Body and the costs for all the parties. The third reason cited in favour of a permanent panel system is that it would enhance the legitimacy and credibility of the panel process in the eyes of the public, since the possibility of conflicts of interests would be eliminated and the independence of the panellists would be protected as is the case in domestic proceedings or in the Appellate Body. Fourthly, it would increase the involvement of DCMs in the panel process.

The first three of these arguments possess a degree of cogency, but the fourth argument is questionable, in the light of the past record. The real issue is whether greater DCM participation in a permanent panel system will be written into any DSU reform. This seems an important condition for DCMs to be able to accept this proposal. Under the current system only 35 per cent of the panellists who have served since 1995 came from a DCM, and there is no reason to suppose that this type of figure would in practice increase unless there was an express stipulation in a new DSU provision. This may as such pose an advantage to DCMs who may be able to secure – in return for their support for the proposal – a guarantee that a certain number of appropriately qualified panellists would come from DCMs. This would certainly assist in the development of DCM knowledge of and expertise in the DSS. The fixed membership of the standing Appellate Body provides a good example of how this can be achieved: as at March 2002, 45 of the 47 reports issued by the Appellate Body were issued by a division having at least one member from a DCM, and 24 of the 47 reports were issued by a division having two of its three members from a DCM. An attempt was made at an early stage by the government of India to request clarification on this point when it asked 'Which number of permanent panellists from developing countries would be representative of the WTO Membership?'[19] In response, the EC stated that 'While it is difficult to assess precisely the number of panellists from developing countries without having established the total number of the permanent panellists, it is clear that panellists from DCMs would probably constitute a substantial part of the roster. ... It should be noted that the limited number of *ad hoc* panellists from developing countries [to date] is probably due to the fact that it is difficult for a developing country diplomat to assume the additional duties derived from serving in a panel. This would be corrected under a system of permanent panellists.'[20]

However, the African Group is against the establishment of a standing body of panellists since they argue that there is no case for change. It states that if the system is in need of change, consideration should be given to redefining the functions of the panels to be the following: 'the establishment of the facts and issues, and compilation of concise factual reports'. It proposes that these factual reports of the panel would be forwarded to the Appellate Body for application of the relevant provisions and, accordingly, the Appellate Body could then be renamed – as, for example, 'the WTO Tribunal'.[21] The serious reduction in the judicial role of a panel decision that this

proposal contains cannot be countenanced under any circumstances. The whole point of the present two-tier process is to ensure that Member States have recourse to an Appeal Body in relation to an alleged misapplication or mistake in the law. It would not be prudent to remove this protection inherent in the system that benefits all Members, both developing and developed.

The EC took on board discussions in a DSB special session and modified its own proposal to amend Article 8 that now, in part, reads as follows:

> *1. Panels shall be composed of individuals included on the roster of panellists established by the DSB. The panellists shall be appointed by the DG on a random basis within 5 days from the establishment of the panel.*
>
> *2. Notwithstanding paragraph 1, the parties may agree at the time of the establishment of the panel that panels may include up to two individuals from outside the roster with particular expertise on the subject matter of the dispute. The Chairman of the panel shall always be an individual included on the roster of panellists and will be appointed by the DG on a random basis within 5 days from the establishment of the panel. The parties may agree on the individuals outside the roster to serve on the panel or request the Director-General, in consultation with the parties and the Chairman of the panel to nominate these individuals. If no agreement has been reached on the panellists from outside the roster or no request for their nomination to the DG has been made within 10 days from the establishment of the panel, at the request of a party, those members of the panel shall be drawn from the roster by the DG on a random basis.*
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> *3. The roster shall include a number of persons as determined from time to time by the General Council. The DSB shall include persons on the roster for six-year terms and no person shall be re-appointed. However, the terms for the initial inclusion on the roster shall be either [three, four, five or six years], with an equal number appointed for each period, as determined by lot [and with those appointed for [three or four] years eligible exceptionally for re-appointment to six-year terms]. The roster should comprise persons of recognized authority, with demonstrated expertise in international trade law, economy or policy and the subject matter of the covered agreements generally, and/or past experience as a GATT/WTO panelist. It shall be broadly representative of membership in the WTO. All persons included on the roster shall stay abreast of dispute settlement activities and other relevant activities of the WTO. ...*[22]

However, the remaining difficulty with this proposal is that it does not, from the DCM perspective, specify the proportion of panellists to come from DCMs. All that it says, in the proposed Article 8.3, is that membership 'shall be broadly representative of membership in the WTO'. The decision to include an individual in the roster of permanent panellists being made by the DSB does of course mean that the numerical weight of DCMs in the DSB makes it likely that a number of qualified panellist would

come from DCMs. As such, this EC proposal is more preferable – from the DCM perspective – than the Canadian government's proposal to establish a permanent panel system due to the latter's proposed process of selection of membership. The Canadian government proposes the following method of selecting membership of a roster of permanent panellists (as part of its proposed amendment to Article 8):

> Article 8
>
> ...
>
> 4. ... *Each Member may nominate one individual, who may or may not be a national, for placement on the roster. In nominating an individual, each Member shall provide a statement of qualifications that identifies the nominee's capabilities and capacity to serve as a panelist in reference to the qualifications outlined in paragraph 1. A committee composed of the Chairs of the General Council, the DSB and the Goods, Services and TRIPS councils, will examine the nominations and accompanying qualification statements to verify that the nominees meet the requisite level of expertise to serve as a panelist. On completion of the selection process, the Committee will submit the roster to the General Council for approval.*[23]

The proposed veto power in the Canadian proposal that the Chairs of the General Council, the DSB, and the Goods, Services and TRIPs councils are to possess over proposed nominations is not a desirable institutional mechanism for selecting membership of permanent panellists, and the EC mechanism of decision by the DSB on recommendation by Member State seems far more appropriate as a process of reflecting the will of the WTO membership more generally.

The Composition of Panels

In terms of the composition of panels as presently provided for by the DSU, the Least Developed Country Members propose that Article 8.10 should be modified to the effect that in any dispute involving a DCM that there should be at least one panellist from a developing country. As such, they propose that the words 'if a developing-country Member so requests' should be deleted from Article 8.10, and it should be amended to read as follows:

> 10.a. When a dispute is between a developing-country Member and a developed-country Member the panel shall include one panelist from a developing-country Member, and if the developing-country Member so requests, there shall be a second panelist from a developing-country Member.
>
> 10.b. When a dispute is between a least developing-country Member and a developing or 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, there shall be a second panelist from a least-developed country Member.[24]

The likelihood of these proposals being accepted by DdCMs seems remote. Moreover, there is very little, if any, support for this proposal that can be gleaned from the practice of other international court and arbitral tribunals in terms of one of the parties to a dispute being able to appoint two out of three decision-makers. The only way it is envisaged that this proposal of a DCM being able to require the inclusion of two persons from a DCM on a panel would be feasible is if there was a system of permanent panellists in place, and the selection of two such persons was made from among those who were already serving as permanent panellists. However, if the LDCM's proposal goes too far, the proposal of Jordan does not arguably go far enough. Jordan proposes that Article 10.8 be amended to read as follows:

> In disputes involving developing country Members and/or least developed country Members the following shall be applicable:
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> *a. When a dispute is between a developed-country Member and a developing-country Member the panel shall include one panelist from a developing country Member should the latter request same within (85) days from the establishment of the panel.*
> *b. When a dispute is between a least-developed country Member and a developed-country Member the panel shall include one panelist from a least-developed country Member should the latter request same within (5) days from the establishment of the panel.*
> *c. When a dispute is between a developing-country member and a least developed-country Member the panel shall include a panelist from a developing-country Member or a least-developed country Member should either one or both request same within (5) days from the establishment of the panel.*[25]

What is needed here is a *mandatory* requirement that in a case involving a DCM that there shall be a panellist from a DCM. In this respect part of the proposal of Haiti can be commended. Haiti proposes that Article 8.10 should be amended as follows:

> *10. When a dispute is between a developing-country Member and a developed-country Member the panel shall include one panelist from a developing-country Member, and if the developing-country Member so requests, there shall be a second panelist from a developing-country Member.*[26]

The latter part of the Haitian proposal is, however, subject to the same criticism as that made above of the LDCM proposal.

The Input of the Secretariat in Panel Proceedings

It is arguably important that, as a matter of transparency in dispute settlement proceedings and fairness to the parties in a case, any substantive input by the WTO Secretariat to a panel – in terms, for example, of the provision of legal opinions – should

be disclosed to the parties. As such, Cuba, Honduras, India, Jamaica, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe have proposed that any input by the Secretariat to a panel should be disclosed to the parties in a case. They propose, in particular, that the following sentence be inserted as the third sentence of Paragraph 10 of Appendix 3 of the DSU:

> *Any document, notes, information, etc., other than case summaries, submitted by the Secretariat to the panel shall be provided promptly to the parties to the dispute, whose views on such documents, notes, information, etc., shall be taken into consideration by the panel.*[27]

This relatively straightforward proposal is certainly in the interest of all WTO Members, and as such is likely to be adopted.

4 Appellate Body Issues

There are two, relatively straightforward, issues that have arisen in relation to reform of the Appellate Body. These are a proposal to increase the number of Appellate Body members, and a proposal to fix the term of membership of Appellate Body members to six years. The first of these proposals would ensure that the delays in appeal proceedings that have occurred in a number of cases could be avoided;[28] while a fixed term of membership would ensure that Appellate Body members are not dependent on renewal by WTO Member States after only four years of being in office – the implication seeming to be that this guarantees beyond doubt the independence of the Appellate Body in all cases. This proposal was supported by a number of WTO Members, including India, European Communities, Dominican Republic, Egypt, Cuba, Honduras, Jamaica, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe.[29] One of the proposals – all of them in substance being the same – is that Article 17.2 be amended to read as follows:

> *The DSB shall appoint persons to serve on the Appellate Body for a six-year term which shall be non-renewable.*

The only difficulty with this proposal is that six years may be too short a term, especially since the term is non-renewable. It would be far better for the Appellate Body as an institution – and for the cogency and coherence of its jurisprudence – were the term to be for the longer period of, say, eight years. This would attenuate the loss of knowledge and experience that always occurs with changes in membership, and eight years is in any case the present maximum term that an Appellate Body member can serve – two four-year terms – according to Article 17.2.

5 Issues Common to Both Panel and Appellate Body Decisions

There are a number of issues that are controversial from the perspective of DCMs that are common to both panel and Appellate Body decisions and that have been raised in the DSU reform proposals. These include the proposals to regulate *amicus curiae* submissions, the effect of decisions on DCMs and LDCMs and the evolution of WTO law in favour of development.

The Regulation of Amicus Curiae *Submissions*

The EC and the USA separately make the proposal that it may be useful to provide a framework – including the preconditions – for the submission of *amicus curiae* briefs to panels and the Appellate Body. The EC, for example, states that such briefs should be directly relevant to the factual and legal issues under consideration by the panel, or the legal issues raised in the appeal, and that the acceptance of such briefs should not lead to a delay in the proceedings or create substantial additional burden for DCMs.[30]

A number of DCMs, led by India, vigorously opposed the concept of *amicus curiae* briefs as part of the WTO DSS. It has been thought necessary to reproduce verbatim sections of the exchange on this issue in order to illustrate the extent to which DCMs consider this issue important. India, in response to the EC proposal, formally asked the question: 'Would the EC agree that if *amicus curiae* briefs are permitted then the present disadvantages suffered by developing-country Members in international trade would get further accentuated as very few entities in the developing countries would be in a position to make *amicus curiae* submissions, while on the other hand, developing-country Members would have to assume the added burden of defending themselves against any arguments which such submissions might contain?'[31] The EC responded to this in the following terms: 'The EC's proposal expressly stresses that the acceptance of *amicus briefs* should not create substantial additional burdens for the developing Members. While it is true that some entities with the capacities to make *amicus curiae* submissions may at present exist more in developed countries than in developing ones, this does not mean that such entities will always take positions in favour of the interests of developed countries. Indeed, recent experience shows the opposite: on various issues (e.g. access to medicines), non-governmental organisations in developed countries have frequently taken positions radically different from those adopted by their governments.'[32] This statement reflects a perception among DCMs that NGOs who wish to submit *amicus curiae* briefs in cases will generally support the position of the DdCMs where they are often headquartered.[33] However, this is questionable, not least because many of the NGOs in question consider that they are operating to serve the interests of those in developing countries.

However the substantive debate – and the concern of DCMs – is not so much about NGOs as about private corporations and industry bodies being able to use *amicus*

curiae briefs to support a Member's case where it has implications for a large corporation or an industry. This concern is revealed in the following additional statement made by the Indian government which argued that '[t]he proposal of the EC regarding submission and consideration of *amicus curiae* briefs amounts to changing the intergovernmental character of the WTO. For one, ultimate compliance is to be done by governments, not by others. Furthermore, governmental position in disputes is arrived at after consultations with all domestic stakeholders. If governments know that their non-governmental agencies have a further chance to influence the dispute settlement mechanism, then they would pay less attention to finalising their positions and even worse, there may be implications for compliance by the governments themselves.'[34] An almost identical concern was expressed by Cuba, Honduras, India, Jamaica, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe in a joint proposal that argues against the submission of *amicus* briefs, contending that it would undermine the intergovernmental character of the WTO and that it would add to the obligations on Member governments participating in DSU proceedings, making it particularly burdensome to DCMs having regard to the prescribed time limits involved.[35] As such, India, Cuba, Dominican Republic, Egypt, Honduras, Jamaica and Malaysia propose that the following footnote be added to Article 13 of the DSU in an attempt to limit considerably the acceptance of *amicus* briefs by a panel:

> 'Seek' shall mean any information and technical advice that is sought or asked for, or demanded or requested by a panel. A panel shall not accept unsolicited information.[36]

Moreover, the same group of Members propose the following footnote to Article 17.6 of the DSU in order to exclude *amicus* briefs being submitted to the Appellate Body:

> The Appellate Body shall neither seek nor accept information from anyone other than the parties and third parties to a dispute.[37]

The EC and USA, in response to this opposition, seem to have withdrawn their proposals on this issue. All that remains is the statement by the USA that it 'notes with interest the procedures proposed by the European Communities for handling *amicus curiae* submissions (TN/DS/W/1) and looks forward to working with the European Communities and other Members on this issue. The United States does not believe that an amendment to the Dispute Settlement Understanding is necessary for this purpose'.[38] Rather surprisingly, in the light of this history, Jordan in a later proposal supported the regulation of the submission of *amicus* briefs and went on to propose the establishment of a fund that would remit all costs and expenses that may be incurred by DCMs or LDCMs in reviewing, analysing and responding to issues raised in an unsolicited *amicus curiae* brief in a dispute before the panel or the Appellate Body.[39] The chances of this proposal being adopted are very low indeed based on the more general opposition of DCMs and the dropping by the USA and EC of their proposals in this area.

The Effect of Decisions on DCMs and LDCMs

The DSU contains a number of provisions on special and differential treatment that are to supposed to confer advantages on DCMs. It is well known, however, that these provisions have been largely ineffective in practice. In an attempt to provide more practical import to these SDT provisions, a number of DCMs have made proposals to bolster the substance of these provisions – in particular Articles 4.10, 7, 12.11 and 22 of the DSU.

Article 4.10 provides that 'During consultations Members should give special attention to the particular problems and interests of developing country Members'. India, Cuba, Dominican Republic, Egypt, Honduras, Jamaica and Malaysia propose that the word 'should' in Article 4.10 be replaced with the word 'shall' to require Members in consultations to take account of the particular problems and interests of DCMs; moreover, they propose that the phrase 'give special attention' be defined in such a way that the proposed amended Article 4.10 would read as follows:

> Article 4.10.
> During consultations Members *shall* give special attention to developing country Members' particular problems and interests *in the following manner:*
> (a) *if the complaining party is a developed country* Member *and if it decides to seek establishment of a panel, it shall explain in the request for establishment of panel as well as in its submissions to panel and the* Appellate Body *as to how it had taken into account or paid special attention to the particular problems and interests of the developing country* Member *concerned;*
> (b) *if the developed country* Member *is a defending party, it shall explain in its submissions to the panel as to how it had taken into account or paid special attention to the particular problems and interests of the developing country* Member *concerned;*
> (c) *the panel, while adjudicating the matter referred to it, shall make a ruling on this issue.*[40]

The LDCMs have not, to date, used the DSS to resolve a trade dispute. The reason for this, according to them, is due to the structural and other difficulties the system poses for them.[41] As such, the LDCM Group propose that Article 4.10 should be amended to read as follows:

> 10. During consultation Members should give special attention to the particular problems and interests of developing country Members, *especially those of least-developed country* Members.

The LDCMs state that the severe resource constraints they are under require them to be treated differently even from other DCMs. For example, their severe resource constraints mean that they are unable usually to carry out consultations with other Members in Geneva, and as such due consideration should be given to the possibility of

holding such consultations and other meetings in the capitals of LDCMs.[42] Haiti makes the very useful specific proposal in this context that Article 4.10 be amended to read as follows:

> *10. During consultations Members shall take into account the particular problems and interests of developing country Members especially those of least developed country Members. Possibilities of holding consultations in the capitals of least developed country Members shall always be explored and a joint note to this effect made, which shall be considered in the event of the request for a panel and any proceedings.*[43]

Although this proposal is useful and may even be adopted due to the importance that all Members place on being seen to try and involve LDCMs even in dispute settlement, the impact of such a change is not likely to be important in practice. Requiring consultations to take place at a location convenient to the LDCM is certainly helpful, but it is unlikely to change the reality that these countries will not in general be able to afford to participate in WTO cases. It is for this reason that the establishment of a fund, considered below in Section 6, to assist participation by LDCMs in the DSS is of particular importance.

One of the most far-reaching – but potentially effective – proposals made by DCMs concerns Article 7. This provision sets out the terms of reference of a panel in a case unless the parties to a dispute agree otherwise. The African Group proposes that Article 7 should be amended by adding paragraphs 4 and 5 as follows:

> *4. Where a developing or least developed country Member is a party to any dispute under this Understanding, the panels, in consultation with relevant development institutions where necessary, shall consider and make specific findings on the development implications of the issues raised in the dispute and shall specifically consider any adverse impact that findings may have on the social and economic welfare of the developing or least developed country Member. The DSB shall fully take those findings into account in making its recommendations and rulings.*
>
> *5. This Understanding is an important mechanism for achieving the development objectives of the WTO Agreement. Accordingly, the findings of the panels and the Appellate Body, and the recommendations and rulings of the DSB shall fully take into account the development needs of developing and least developed country Members. The General Council shall review this Understanding every five years in order to consider and adopt appropriate improvements to ensure the achievement of the development objectives of the WTO Agreement.*[44]

These proposals would, if adopted, contribute considerably to the injection of the development agenda into the WTO DSS. It is largely for this reason that they are likely to be resisted by a number of states. The proposals are closely linked to the other

proposal in this area made by DCMs, that Article 22 of the DSU should include a rule that requires the DSB – before adopting panel and Appellate Body findings and recommendations and before authorising the suspension of concessions – to fully take into account reports to be prepared by relevant international organisations such as UNCTAD and the United Nations Development Programme (UNDP) on the development implication of the implementation of the findings and recommendations.[45] The objective of this proposal, according to its sponsors, is to ensure that the adoption and authorisation is done on appropriate terms and conditions that will ensure the promotion of the development prospects of DCMs.[46] It should be said that the likelihood of these ambitious proposals being adopted is not promising. In addition to resistance from WTO Members on an individual basis, the approach also raises an institutional problem. It does not seem likely that the DSB will agree in effect to follow the decision of separate international organisations such as UNCTAD and the UNDP.

The considerably more useful proposal made by LDCMs is that panel reports should explicitly indicate the form in which account has been taken of the relevant provisions on differential and more favourable treatment for DCMs and LDCMs contained in the covered agreements.[47] Moreover, the additional useful proposal is made that the phrase 'which have been raised by the developing country Member in the course of the dispute settlement proceedings' should be deleted from Article 12.11,[48] since the current requirement in Article 12.11 that the DCM needs to highlight any provisions on differential and more favourable treatment in the course of the dispute settlement procedures place an unnecessary additional legal burden on them and falls foul of the legal principle that the judge or court is supposed to know the law. This approach is taken further in Haiti's proposal that Article 12.11 should be amended to read as follows:

> *11. Where one or more of the parties is a developing or least developed country Member, the panel's report shall explicitly take into account the provisions on differential and more favourable treatment for developing or least developed country Members that form part of the covered agreements.*[49]

This proposal is reasonable since the panel or Appellate Body is already vested in a case with the authority to invoke all applicable legal principles, and it is also useful from the perspective of DCMs since it will encourage panels and the Appellate Body to develop a body of rules on how *they* should apply the SDT provisions. As such, these would seem to be proposals that all DCMs should usefully support.

The Evolution of the Law in Favour of Development

Some commentators identify particular decisions of the dispute settlement bodies – the panels or the Appellate Body – as taking interpretative stances which run counter to the interests of DCMs. For example, Bhagirath Lal Das (the former Indian Ambas-

sador and Permanent Representative to GATT) identifies cases which in his view give emphasis to DdCMs environmental policies over DCMs trade interests (e.g. the *Shrimp-Turtle* case).[50] A strong emphasis on environmental protection measures, on this analysis, poses difficulties for DCMs as they are ill-equipped to comply with onerous environmental protection requirements.[51] As a reflection of this view, LDCMs argue for the need for dissenting opinions in panel reports. This is necessary, the LDCMs argue, in part to enhance the evolution of a 'development-friendly jurisprudence' by avoiding the 'excessively sanitised concern with legalisms' that the panels and the Appellate Body have displayed, 'often to the detriment of the evolution of a development-friendly jurisprudence'.[52] The LDCMs contend that dissenting judgments should be allowed in the DSS through a rule that the members of the panel or Appellate Body should each deliver a judgment and the final decision be taken on the basis of a majority as, for example, is the practice adopted by the International Court of Justice (ICJ) and certain national court systems.

There is, however, a flawed logic in this approach. WTO panels and the Appellate Body are very different from that of the International Court of Justice and national court systems for two main reasons: First, the ICJ and national courts are clearly judicial organs *per se* and have the accompanying authority that goes with this status. This means that their decisions are complied with to a very considerable degree. Panels and the Appellate Body are purposely not called courts, and a process of majority decision-making may detract from the authority of a decision in a case leading to problems of implementation by a losing party. Second, the number of members of the panels and the Appellate Body are very considerably less than, for example, the International Court, which is composed of 15 judges.[53] This means that when ICJ judges give dissenting opinions there are often still a large number of judges who will align themselves with the majority opinion of the court, thus conferring a large degree of authority on the court's decision. This would be notably lacking in the case of the much smaller panels and Appellate Body.

6 Improving the Ability of DCMs to Use the DSS

DCM Resource Constraints

One of the most problematic issues for DCMs who seek to use the DSS is that of resource constraints. DCMs not only face considerable financial constraints in being able to utilise the DSS, but are also severely hampered by the lack of adequate numbers of trained officers or access to legal advisors with experience in WTO law and the dispute settlement process in particular. Moreover, the length of dispute settlement proceedings – lasting from initiation, through consultation, panel proceedings, appellate proceedings and any subsequent arbitration, so that the proceedings can last for years – also adds to the drain on resources. This serves as a significant disincentive to the

initiation of proceedings under the DSU. Obviously, there is an equal drain on resources when DCMs find themselves on the respondent's side to a complaint. There are, however, a number of proposals that, if adopted, might attenuate these difficulties.

Establishment of a Fund to Assist DCMs

The African Group emphasised that the DSU is complicated and overly expensive, and that they need supplementary resources and means to be provided to develop both the institutional and human capacity for using the DSS. They argue that this is not adequately covered by technical assistance programmes,[54] and that financial assistance is necessary. Examples of how this could be done include specific measures such as the establishment of a permanent standing fund that receives contributions from Member contributions or otherwise within the framework of the Doha Development Agenda Global Trust Fund.[55] They also state that the WTO Advisory Law Centre is not a panacea for all institutional and human capacity constraints of developing countries, since its terms of reference are equivocal in certain instances and it does not cover all developing countries.[56] To these reasons may be added two further difficulties that would arise if the Advisory Centre for WTO Law were seen as a solution to the problems that DCMs face in participating effectively in the DSS.[57] The first is one of legal resources. It is envisaged that the centre will have only five lawyers to work, possibly simultaneously, on a number of cases. This level of staffing will mean that the centre will have to choose carefully the cases that it can take from start to finish, and there will obviously be a need for sub-contracting of its work to qualified law firms that have the litigation expertise and support necessary for such cases. This may involve additional expenses for the developing country in question. The second, more principled, issue is that of being able to represent fully the interests of a developing country in a particular case. The establishment of an independent WTO Advisory Centre, which can act objectively in the interests of its DCM clients is obviously a more satisfactory solution than relaxing the obligations of impartiality of the WTO Secretariat in any way. However, it is still arguably not the best solution from the perspective of DCMs, since even the staff of the Advisory Centre owe an institutional loyalty to the centre itself which is an international organisation with its own organisational interest. This might mean that directions from the Advisory Centre's decision-making organs could be issued to the centre's staff which hampered them in advising on the optimal way to prepare the substance of a complaint in order to gain a favourable outcome for a developing country.

Because of these difficulties with the present system, the African Group proposal to establish a fund for dispute settlement is very much warranted. The African Group proposes that a new Article 28 be introduced in the following terms:

Article 28

WTO Fund on Dispute Settlement

1. There shall be a fund on dispute settlement to facilitate the effective utilisation by developing and least developed country Members of this Understanding in the settlement of disputes arising from the covered agreements.

2. The fund established under paragraph 1 of this Article shall be financed from the regular WTO budget. However, to ensure its adequacy, the fund may additionally be funded from extra-budgetary sources, which may include voluntary contributions from Members.

3. The General Council shall annually review the adequacy and utilization of the fund with a view to improving its effectiveness and in this regard may adopt appropriate measures and amendments to this Understanding.[58]

This proposal, while worthwhile, may take time to build up sufficient resources to allow DCMs to participate effectively in the DSS.[59] In the light of this, the next proposal is very much worth pursuing since it gives DCMs the ability to organise their own legal representation in strong cases and would mean that they would not have to rely on contributions from other states.

The Awarding of Costs in Favour of DCMs

Cuba, Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe put forward the joint proposal that panels and the Appellate Body should be able to award costs against a DdCM either where it has been found in violation of its WTO obligations in relation to a DCM or where a DdCM has failed to prove its claim against a DCM in a dispute brought by it before a panel or the Appellate Body. The proposal of these states is that a provision to this effect be included in the working procedures of the panels in Appendix 3 of the DSU and of the Appellate Body.[60] This approach of payment of costs for DCMs is also supported by, for example, Jamaica which suggests that it would enable a DCM with a strong case to pursue dispute settlement proceedings against a DdCM where this would otherwise not be possible because of the burden of legal costs.[61]

The Adequacy of DSU Remedies for DCMs

The 'remedies' provided by the DSS often offer ineffective outcomes for DCMs.[62] One of the difficulties with the remedies offered by the DSS is that they have traditionally been viewed as being prospective. This has had the consequence for all WTO Members that, for example, any anti-dumping duties or countervailing duties paid as a consequence of an unlawful measure imposed by another Member are not recoverable. The lack of an effective remedy in such cases has hit DCMs particularly hard, since

they are very often the target of exactly such duties. It was thus not surprising that a DCM, Mexico, proposed that the notion of retroactivity be introduced into WTO dispute settlement proceedings, at least to some extent. Such a reform also has the more general advantage that it removes any incentive for a Member to artificially delay negotiations or other dispute settlement proceedings. There are three alternatives put forward from which date the determination of nullification or impairment can be calculated if a measure is found to be in violation of a covered Agreement. These are: (1) the date of imposition of the measure; (2) the date of the request for consultations; or (3) the date of establishment of the panel.[63] As such, Mexico proposed the following amendment to Article 22.7:

> 7. The arbitrator acting pursuant to paragraph 6 shall not examine the nature of the concessions or other obligations to be suspended but shall determine whether the level of such suspension is equivalent to the level of nullification or impairment, *measuring such nullification or impairment from the date of [imposition of the measure]* OR *[request for consultations]* OR *[establishment of the panel]. If actions have been authorized under Articles 12.6 bis and 12.6 ter, the trade impact of such actions shall be accounted for in the calculation of the nullification or impairment*. The arbitrator may also determine if the proposed suspension of concessions or other obligations is allowed under the covered agreement. The parties shall accept the arbitrator's decision as final and the parties concerned shall not seek a second arbitration. *However, if the level of nullification or impairment has changed, in order to conform to this change, parties may request the DSB to modify its authorization or a new arbitration may be sought*. The DSB shall be informed promptly of the decision of the arbitrator *or the determination pursuant to Articles 15 or 17* and shall upon request, grant authorization to suspend concessions or other obligations where the request is consistent with the decision of the arbitrator *or the determination pursuant to Articles 15 or 17*, unless the DSB decides by consensus to reject the request.[64]

This is one of the most important reform proposals that DCMs should push for in the negotiations for the reasons outlined above. An alternative proposal may be one that only allows the award of retroactive damages in the case of a DCM, although in practice such a proposal would be likely to be strongly resisted by other Members.

Measures to Ensure Compliance

DSU mechanisms to ensure compliance by states with a decision of a panel or the Appellate Body are often illusory in the case of DCMs. Article 22 of the DSU envisages temporary compensation or counter-measures as the mechanism that is used to pressure a state to bring its measures into compliance with a finding of inconsistency by a panel or Appellate Body. If requested, the Member in violation must enter into negotiations with the complainant party with a view to developing mutually accept-

able compensation. If there is no agreement as to compensation (which is voluntary), the complainant party may request authorisation from the DSB to suspend concessions or other obligations to the other non-compliant Member. The DSB shall grant authorisation to suspend concessions or other obligations unless it decides by consensus not to do so.

If DCMs cannot negotiate compensation, then they may have very limited meaningful measures open to them. A DCM often cannot in practice impose trade countermeasures against powerful DdCMs' interests since these would probably damage the DCM's own economic interests[65] and it is unlikely to have trade sectors open to it in which it will be meaningful to impose retaliatory measures (even where such measures are imposed they are unlikely to have a high impact on the target market). The imposition of high tariffs on imports from DCMs is impractical because the levels of imports from DCMs are unlikely to be high in volume and it will often be difficult to suspend concessions to a level which will be 'equivalent to the level of nullification or impairment'. Conversely, if a developing country is, as a respondent to dispute settlement proceedings, found to be in default, it does not in practice have the range of options in response that are open to DdCMs – the payment of compensation will not be a realistic option. This leaves DCMs open to suspension of concessions that will prove very harmful to their economies. As such, the issue of compliance for DCMs is one fraught with difficulties and in need of urgent reform. There are, in particular, four areas that need consideration: the time frame available for implementation by DCMs of a panel or Appellate Body decision; giving DCMs the choice of sectors in which trade counter-measures can be taken; the necessity for collective counter-measures; and the necessity for financial compensation in cases involving DCMs.

Time Frame for DCMs

Due to the resource-constraint difficulties often faced by DCMs in implementing panel and Appellate Body decisions, a number of DCMs have proposed that Article 21 – the DSU provision relating to surveillance of implementation of DSB rulings – should stipulate what constitutes a 'reasonable period of time' for DCMs to comply with a DSB ruling. At present, Article 21.2 is intended to provide DCMs with special treatment, but its vague terms have meant that it is largely redundant in practice: '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'. India, Cuba, Dominican Republic, Egypt, Honduras, Jamaica and Malaysia have therefore proposed the following changes:

> **Article 21.2**
> *Notwithstanding anything contained in this Article*, particular attention *shall* be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement *in the following manner:*

(a) if the party complained against is a developing country Member and the complaining party, a developed country Member,

(i) the reasonable period of time under paragraph 3 of this Article below should normally not be less than 15 months. If the measure at issue requires change of statutory provisions or change of long held practice/policy, the reasonable period of time should be at least two years. The arbitrator under paragraph 3 (c) of this Article may indicate, where the situation warrants, the requirement of a reasonable period of time beyond two years;

(ii) the complaining party should request consultations with the party concerned prior to seeking recourse to the proceedings under the terms of paragraph 5 of this Article. The time for completion of such proceedings should be increased from 90 days to 120 days. The panel should give consideration as may normally be given to the particular situation of developing country Members.

(iii) Filing of status report under the terms of paragraph 6 of this Article should be in alternative meetings rather than in every regular meeting of the DSB.

...

(c) if the complaint is by a developing country Member against a developed country Member: reasonable period of time under the terms of paragraph 3 below should not exceed 15 months. Existing 90 days time limit for proceedings in accordance with paragraph 5 of this Article should be observed strictly. In case of delay the developed country Member concerned should offer mutually acceptable compensation for continuing trade loss to the developing country complainant.[66]

These proposals would assist DCMs considerably in being able to implement DSB rulings in a manner that does not adversely affect their development situation while also allowing them to comply fully with their obligations under the covered agreements. The proposals are likely to encounter resistance from other Members who may argue that a 15 to 24-month minimum time period – depending on the domestic measure to be changed – is excessive and that this would compromise the binding nature and effectiveness of the WTO Agreements. Using this, as well as other arguments, opposing states may try and press for a reduced minimum period of implementation. The basis for such an argument does not, however, stand up to scrutiny. It is well-known that even DdCMs have taken long periods of time to implement DSB rulings (e.g. the EC in *Bananas* cases), and the special position of DCMs would seem to justify granting them the proposed treatment.

Allowing DCMs to Choose the Sectors in which they can Suspend Concessions

A number of DCMs have proposed that in order to secure effective compliance from a defaulting Member, DCMs should be permitted to seek authorisation for suspending concessions and other obligations in sectors of their choice.[67] They should not, in

particular, be required to go through the process of proving that: (1) it was not 'practicable or effective' to suspend concessions in the same sector or agreement where the violation was found;[68] and (2) that the 'circumstances are serious enough' to seek suspension of concessions under the agreement other than those in which the violation was found to exist.[69] Discharging this burden of proof is difficult, as Ecuador found in the *Bananas* dispute.[70] Accordingly, DCMs have suggested the insertion of a new Article 22.3 *bis* that provides as follows:

> Notwithstanding the principles and procedures contained in paragraph 3, in a dispute involving a developing country Member as complaining party and a developed country Member as a party complained against, the complaining party shall have the right to seek authorization for suspension of concessions or other obligations with respect to any or all sectors under any covered agreements, if the party complained against fails to bring its measures into compliance with the rulings and recommendations of the DSB or a covered agreement.[71]

The adoption of such a provision would enable DCMs at least to begin to try to use the mechanisms for compliance that the DSU provides. Due, however, to the relatively low levels of trade of a large number of DCMs there is still arguably a need for further reforms to be adopted in this area of compliance.

Collective Counter-measures

A number of DCMs consider that in order for the suspension of concessions to operate effectively as a means of encouraging compliance by a Member in breach of WTO obligations owed to a DCM, it is necessary for all WTO Members to be authorised to suspend collectively concessions to a non-compliant Member.[72] This proposal in relation to DCMs should, it is argued, be adopted notwithstanding the requirement that the suspension of concessions is to be based on the equivalent level of nullification and impairment of benefits.[73] Thus Haiti, for example,[74] proposes that Article 22.6 should be amended by renaming the current provision as paragraph (a) and adding, *inter alia*, the following paragraph (b):

> *(b) Where the case is one brought by a least developed country Member against a developed country Member and the situation described in paragraph 2 occurs, and in order to promote the timely and effective implementation of recommendations and rulings made in favour of least developed country Members, the DSB, upon request, shall grant authorization to all Members to suspend concessions or other obligations within 30 days unless the DSB decides by consensus to reject the request. The following principles and procedures shall apply to such a request.*
>
> *(i) Before making such a request, the least developed country Member shall refer the matter to arbitration for determination of the level of nullification and impairment,*

which shall be done taking into account the legitimate expectations of the least developed country Member. The arbitration shall further take into account any impediment to the attainment of the development objectives of the WTO Agreement and as further elaborated upon by the least developed country Member concerned.
(ii) The arbitration shall consider whether suspension of concessions or other obligations in other sectors by the least developed country Member would be appropriate to effectively encourage the withdrawal of the measure found to be inconsistent with a covered Agreement, taking into account possible adverse effects on that least developed country Member.
(iii) Where the DSB grants authorization to all Members to suspend concessions or other obligations, the level of suspension for each Member shall be an appropriate percentage of the nullification and impairment determined under arbitration. In a case brought by a least developed country Member, the level of suspension for each Member shall be the level determined under arbitration to have been suffered by the least developed country Member.[75]

This approach is important both as a matter of principle and of practice. As a matter of principle it demonstrates that all WTO Members are concerned about ensuring that DCMs can also benefit from the WTO Agreements, and as a matter of practice the utilisation of the economic power of WTO Members to assist DCMs may enhance compliance with DSB rulings in cases involving DCMs. Whether, however, this leads to DdCMs imposing counter-measures on behalf of DCMs remains to be seen. Employing a realistic approach, it seems unlikely that DdCMs will jeopardise their own trade interests on behalf of a DCM to enforce a decision against another DdCM. Nonetheless, the facility of being able to do so may prove important since there may be cases where a DdCM decides to take such action, whether it is motivated by systemic or other interests.

The most attractive proposal, however, in this area is for DCMs to receive monetary compensation for the duration of non-compliance.

Compensation Issues

A more general difficulty with retaliation measures as a method of inducing compliance is that, as the government of Ecuador points out, such measures are not likely to be effective in the case of large developed economies. The government of Ecuador points to the example of the *Bananas* dispute where, despite the withdrawal of concessions, the EC took a further 30 months to comply with the ruling after the expiry of the reasonable period of 15 months established by the DSB, and easily withstood 27 months of retaliatory measures.[76] It is for this reason that, among others, the government of Ecuador proposes the strengthening of the system of compensation. Ecuador suggests that the level of compensation should be consensual but that it should be

based on a determination by the panel of the level of nullification and impairment caused to the complaining party,[77] and that in terms of the type of compensation this could be made up of a package of trade benefits or any other form of compensation that does not affect other Members under the agreements concerned.[78] This system of compensation still, however, suffers from the failings of the present system – set out above – as far as DCMs are concerned.[79] A more useful proposal put forward by Ecuador is to make compensation compulsory so that it would become a sanction imposed by the multilateral system on Members that fail to comply with their obligations in relation to DCMs. The specific proposal is that the DSB, when adopting the report of the panel responsible for verifying compliance, could decide that the Member concerned must obligatorily compensate the complaining party; and in this case the non-compliant Member must submit a compensation package to the next DSB meeting for its approval. This proposal has some merit, especially in the case of DCMs where the threat of retaliation is ineffective as a mechanism for ensuring compliance with a Member's WTO obligations. However, it would be important to ensure that this measure would not, of course, be available against DCMs, since in their case the present system of the threat of retaliation is sufficient to ensure effective compliance with DSB decisions.

The African Group does not, however, go as far as Ecuador, the LDCMs and Haiti to propose that Article 21.8 *requires* monetary compensation when it states that the provision should be amended by adding the following sentence:

> *Further, if the case is one brought by a developing country* Member *against a developed country member, the DSB may recommend monetary and other appropriate compensation taking into account the injury suffered. The quantification of injury and compensation shall be computed as from the date of the adoption of the measure found to be inconsistent with covered agreements until the date of its withdrawal.*[80]

This kind of proposal by DCMs may attract support, since the EC has itself proposed making trade compensation a more realistic alternative to the suspension of concessions or other WTO obligations in order to implement a DSB ruling.[81] The EC points out 'that trade compensation is currently not a realistic option before the application of trade sanctions',[82] since the very structure of the DSU is such that Members are first required to request suspension of concessions. Article 22 only gives 20 days after the end of the reasonable period of time to conclude negotiations of compensation, and, more importantly, it is only in requesting the suspension of concessions and in triggering an Article 22.6 arbitration that the parties will know the level of nullification and impairment, i.e. the main element for the negotiation of compensation can only be obtained in requesting the authorization to apply sanctions. The EC suggests that this element of the DSU should be changed by allowing the complainant party to obtain an independent decision from a WTO arbitrator about the level of nullification and

impairment *before* the request for suspension of concessions is submitted.[83] DCMs could usefully support such a proposal, in return for which they could seek support for the above proposals relating to special treatment in relation to compensation. In any case, making compensation a more available mechanism can only benefit DCMs as opposed to their having to rely on the impractical mechanism of retaliatory measures.

7 Third Parties

Dispensing with the 'Special Interest' Requirement

Article 10 of the DSU and the Working Procedures, contained in Appendix 3 of the DSU, determine the status and participation of third parties in dispute settlement proceedings. Normally, third parties which possess a 'substantial interest' have 'the opportunity to be heard by the panel and to make written submissions to the panel' which, in turn, are given to the complainant and respondent and are reflected in the final panel report. Paragraph 6 of Appendix 3 provides that third parties shall be invited 'to present their views during a session of the first substantive meeting of the panel set aside for that purpose. All such third parties may be present during the entirety of this session.' The rights of third parties do not as such extend to being able to be present at meetings of the panel with the parties.[84] They simply 'receive the submissions of the parties to the dispute to the first meeting of the panel'. The panel in *EC-Bananas III*[85] departed from the usual practice under Article 10. The panel's approach in this case is usefully summarised by Footer:

> It [the panel] *ruled that, after consulting with the parties, it had decided, contrary to usual practice under Article 10 of the DSU, to admit members of governments of third parties 'to observe the second substantive meeting of the panel with the parties', i.e. with the complainants and respondent present. It also afforded them the right to make a brief statement 'at a suitable moment during the second meeting' but cautioned them that they were not expected to submit additional written material beyond responses to questions, posed at the first meeting. The panel based its decision on a number of factors, including the large economic effect of the disputed EC banana regime on certain third parties, the fact that certain third parties derived rights from a non-WTO international treaty between them and the respondent and that broader third-party rights had been granted in the previous two banana disputes. However, the limits of this 'enhanced status' were reached when the panel refused to entertain the grant of further participatory rights to third parties, following the second substantive meeting of the panel with the parties, including their involvement in the interim review process. Thus, certain DCMs (*in casu *the ACP third parties) did achieve a limited extension of their third-party rights, leading to greater involvement in the panel proceedings. However, the panel took the trouble to point out that they 'enjoyed broader participatory rights than are granted to third parties under the DSU.*[86]

In the light of this experience, the African Group proposes that Article 10 should be amended by adding the following to paragraph 2:

> *For purposes of developing and least developed country Members, the term 'substantial interest' shall be interpreted to include, any amount of international trade; trade impact on major domestic macroeconomic indicators such as employment, national income, and foreign exchange reserves; the gaining of expertise in the procedural, substantive, and systemic issues relating to this Understanding; and protecting long-term development interests that any measures inconsistent with covered agreements and any findings, recommendations and rulings could affect.*[87]

The African Group also propose that Article 10 should be further amended by replacing paragraph 3 with the following:

> *Third parties shall receive all the documentation relating to the dispute from the parties, other third parties, and the panel without prejudice to the provisions of paragraph 2 of Article 18. Third parties, if they request, shall have a right to attend the proceedings and to be availed the opportunity to put written and oral questions to the parties and other third parties during the proceedings.*[88]

The African Group proposes that DCMs should not be required to demonstrate a trade or economic interest in a case as a precondition for admission as third parties, and that DCMs may also be admitted as third parties at whatever stage a case may be. The important objective of this proposal is to gain valuable legal expertise and experience in utilising the DSS,[89] and as such it should be supported by DCMs.

Time Limits for Third Party Intervention

The EC contends that Article 10.2 should be amended so as to provide expressly that the time frame for notifying a third party interest is 10 days.[90] This would clarify the current situation that is based on 'past practice'. This short time period is necessary since the notification of third party interests is a prerequisite for the composition of the panel (as panellists may not be nationals of third parties). DCMs should push for considerable more time than a 10-day notification period, since, due to DCM resource constraints, it will often take much longer than 10 days in order to analyse the issues in the case and decide whether third party participation in the case is warranted.

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Notes

1 The EC, for example, notes in its Communication on DSU reform that 244 cases have been brought under the DSU as at February 2002: 'Communication from European Communities', TN/DS/W/1, p. 1.
2 See also the related proposal made by India, Cuba, Dominican Republic, Egypt, Honduras, Jamaica and Malaysia, who propose that Article 12.10 (which provides for the extension of time periods for dispute settlement consultations relating to a measure taken by a DCM) be amended as follows:
'Article 12.10 of the DSU
In the context of consultations involving a measure taken by a developing-country Member, the parties may agree to extend the periods established in paragraphs 7 and 8 of Article 4. *If, after the relevant period has elapsed, the parties fail to agree that the consultations have concluded, the Chairman of the DSB shall, at the request of the developing country Member concerned, decide to extend the relevant period for not less than 15 days, in cases of urgency as envisaged in paragraph 8 of Article 4, and not less than 30 days in all other cases. In addition, in examining a complaint against a developing-country Member, the panel shall allow sufficient time, not less than two additional weeks in normal circumstance, for the developing-country Member to prepare and present its first written submission and one additional week thereafter at each stage of written submission or presentation. The additional time taken above shall be added to the time-frames envisaged in Article 20 and paragraph 4 of Article 21.*' ('Communication from India on behalf of Cuba, Dominican Republic, Egypt, Honduras, Jamaica and Malaysia', TN/DS/W/47, p.3.) (Please note that proposed additions to the text of DSU provisions throughout this Chapter are consistently denoted by placing the added text in italics.)

This proposal has a number of features that will, if adopted, prove of importance to DCMs. The first part of the proposal gives guidance to the DSB Chair, upon being approached by either party, for extending the period at least 15 or 30 days as the case may be in normal circumstances. In the case of exceptional circumstances, (the expression used in Article 21.4), the Chair can exercise a discretion and give more time to the parties. The second part of the proposal directs the panel to give extra time of at least two weeks for the first submission, one week each for the second submission, first and second oral presentations and for interim submissions, if any. The third part of the proposal seeks to extend the overall time-frames in dispute settlement proceedings involving a DCM as a respondent.
3 Similarly, the government of Jordan proposes that after the first sentence in Article 5.1 that the following sentence be added: 'In disputes involving developing country or least developed country Members, such procedures shall be mandatory'. ('Communication from Jordan', TN/DS/W/43, p.2.) Moreover, Jordan proposes in relation to Article 4.4. that after the first sentence the following second sentence be inserted: 'If one of the parties is a developing or a least developed country Member, procedures for good offices, conciliation or mediation shall continue while the panel process proceeds unless both parties agree otherwise'. ('Communication from Jordan', TN/DS/W/43, p. 2.)
4 'Communication from Haiti', TN/DS/W/37, p.4.
5 See, for example, United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/R, panel Report, pp. 74–79.
6 'Communication from the European Communities', TN/DS/W/1, p. 7.
7 'Communication from the European Communities', TN/DS/W/1, p. 7.
8 The same type of issue arises in relation to bilateral compensation deals being agreed between parties to a case which have no timetable for implementation and which are not offered to other Members whose rights and obligations have also been nullified and impaired. The Australian government makes the point that if Members are forced to initiate their own complaints to acquire compensation rights, when it has already been proven that the Member concerned is in breach of its WTO obligations, this will place considerable pressure on the WTO dispute settlement system and will lead to a waste of valuable resources. ('Communication from Australia', TN/DS/W/8, p. 3. See also 'Communication from Brazil', TN/DS/W/45/Rev.1, pp. 1–3.) From the perspective of DCMs this also has the consequence that unless they monitor all cases and initiate proceedings in relevant cases where they do not automatically benefit from a bilateral compensation arrangement, then they will be excluded in effect from the trade benefits that the WTO system is supposed to offer them. As such, the following proposed Australian amendment to Article 22.2 should be supported:
'*Article 22*
Compensation and the Suspension of Concessions
...
2. If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period

of time determined pursuant to paragraph 3 of Article 21, such Member shall, if so requested, enter into negotiations *within 10 days of such a request* with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation. *If any party having invoked these dispute settlement procedures and the Member whose measure has been found to be inconsistent agree on acceptable compensation but such compensation is not available to third parties to a dispute, the Member whose measure has been found to be inconsistent shall, on request, agree to expedited arbitration under Article 25 to determine the right of a third party to compensation*. If no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time any party having invoked the dispute settlement procedures may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements.' ('Communication from Australia', TN/DS/W/49, p. 4.)

9 There is an important potential MFN exemption that may, however, allow states not to offer a benefit as part of a settlement to all WTO Member States. Under the General Agreement on Trade in Services, states have the facility of being able to make one-off MFN exemptions, and such an exemption *may* allow a state – depending on its terms – to offer another state a benefit in settlement of a dispute without having to extend it to all WTO Members.

10 'Proposals on DSU by Cuba, Honduras, India, Jamaica, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe', TN/DS/W/18, p. 2 and TN/DS/W/18/Add.1.

11 'Proposal by the African Group', TN/DS/W/15, p. 2.

12 'Proposal by the African Group', TN/DS/W/15, p. 3.

13 'Communication from Kenya on behalf of the African Group', TN/DS/W/42, p. 1.

14 'Proposal by the African Group', TN/DS/W/15, p.3. See, on this monetary compensation proposal, infra Section 6(iii)(d).

15 'Communication from European Communities', TN/DS/W/1, pp. 2–3.

16 The EC supports this argument by pointing out that in 1996 the average time for selection of panellists was 30 days, while in 2001 it had increased to 67 ('The European Communities replies to India's questions', TN/DS/W/7, 30 May 2001, p. 2.)

17 'The European Communities replies to India's questions', TN/DS/W/7, 30 May 2001, p. 3.

18 'The European Communities replies to India's questions', TN/DS/W/7, 30 May 2001, p. 3.

19 'India's Questions to the EC and its Member States on their Proposal relating to improvements of the DSU', TN/DS/W/5, 7 May 2002, p. 3.

20 'The European Communities replies to India's questions', TN/DS/W/7, 30 May 2001, p. 4.

21 'Proposal by the African Group', TN/DS/W/15, p. 6.

22 'Communication from the European Communities', TN/DS/W/38, pp. 3–4.

23 'Communication from Canada', TN/DS/W/41, pp.15-17.

24 'Proposal by the LDC Group', TN/DS/W/17, p.2.

25 'Communication from Jordan', TN/DS/W/53, p.3.

26 'Communication from Haiti', TN/DS/W/37, pp. 1–2. Haiti also proposes that Article 8.10 should be further amended by renaming the current provision as paragraph (a) – as amended – and adding the following paragraph (b): '*10.(b) When a dispute is between a least-developed country Member and a developing or 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, there shall be a second panellist from a least-developed country Member.*' ('Communication from Haiti', TN/DS/W/37, p. 2.)

27 'Communication from India on behalf of Cuba, Dominican Republic, Egypt, Honduras, Jamaica and Malaysia', TN/DS/W/47, p. 2. Jordan agrees with the substance of this proposal: 'Communication from Jordan', TN/DS/W/43, p. 9.

28 'Communication from Thailand', TN/DS/W/2, 20 March 2002.

29 'Communication from India on behalf of Cuba, Dominican Republic, Egypt, Honduras, Jamaica and Malaysia', TN/DS/W/47, p. 1; 'Communication from Cuba, Honduras, India, Jamaica, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe', TN/DS/W/18, p. 6 and TN/DS/W/18/Add.1; and 'Communication from the European Communities', TN/DS/W/38, p. 5.

30 'Communication from the European Communities', TN/DS/W/1, p. 7. The USA initially proposed that it may be helpful to adopt guideline procedures for handling amicus curiae submissions to address procedural concerns that have been raised by Members, panels, and the Appellate Body. ('Contribution of the US to the Improvement of the DSU of the WTO related to transparency', TN/DS/W/13, p. 3.)

31 'India's Questions to the EC and its Member States on their Proposal relating to improvements of the DSU', TN/DS/W/5, 7 May 2002, p. 5.

32 'Contribution of the EC and its Member States to the Improvement of the WTO DSU', 13 March 2002, TN/DS/W/1, p. 7.
33 Similarly, the African Group states that the use of the expression '*amicus curiae*' in the context of Article 13 is inappropriate, since this Article is concerned with the right to seek information while *amicus curiae* refers to 'friends of the court' to whom a court may turn to request additional advice and guidance on issues of law and interpretation and issues requiring expert knowledge. The African Group state that the 'term is not ordinarily used in reference to the adducing of factual evidence in support of a party's case.' ('Proposal by the African Group', TN/DS/W/15, p. 5.)
34 'India's Questions to the EC and its Member States on their Proposal relating to improvements of the DSU', TN/DS/W/5, 7 May 2002, p. 5.
35 'Proposals on DSU by Cuba, Honduras, India, Jamaica, Malaysia, Pakistan, Sri Lanka, Tanzania, and Zimbabwe, TN/DS/W/18, p.4 and TN/DS/W/18/Add.1. See the similar proposal against *amicus* briefs made by the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu: 'Communication from Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu', TN/DS/W/25, p. 1.
36 'Communication from India on behalf of Cuba, Dominican Republic, Egypt, Honduras, Jamaica and Malaysia', TN/DS/W/47, p. 1.
37 'Communication from India on behalf of Cuba, Dominican Republic, Egypt, Honduras, Jamaica and Malaysia', TN/DS/W/47, p. 2.
38 'Communication from the United States', TN/DS/W/46, p. 3.
39 'Communication from Jordan', TN/DS/W/53, p. 2.
40 'Communication from India on behalf of Cuba, Dominican Republic, Egypt, Honduras, Jamaica and Malaysia', TN/DS/W/47, p.3. See also the virtually identical following proposal: 'Proposals on DSU by Cuba, Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka, Tanzania, and Zimbabwe', p. 3.
41 'Proposal by the LDC Group', TN/DS/W/17, p. 1.
42 'Proposal by the LDC Group', TN/DS/W/17, pp. 1–2.
43 'Communication from Haiti', TN/DS/W/37, p. 1.
44 'Communication from Kenya on behalf of the Africa Group', TN/DS/W/42, p. 2. Haiti makes an identical proposal to that contained in paragraph 4 of the African Group proposal except that the Haitian proposal refers generically to DCMs as including LDCMs: 'Communication from Haiti', TN/DS/W/37, p. 1.
45 'Proposal by the African Group', TN/DS/W/15, p .4. A similar proposal is made by the LDC Group, TN/DS/W/17, p. 4.
46 'Proposal by the African Group', TN/DS/W/15, p. 4. A similar proposal is made by the LDC Group, TN/DS/W/17, p. 4.
47 'Proposal by the LDC Group', TN/DS/W/17, p. 2.
48 'Proposal by the LDC Group', TN/DS/W/17, p. 3.
49 'Communication from Haiti', TN/DS/W/37, p. 2.
50 Bhagirath Lal Das, 'Strengthening Developing Country Members in the WTO', *Trade and Development Series No* 8, Third World Online Network.
51 Bhagirath Lal Das, 'Strengthening Developing Country Members in the WTO', *Trade and Development Series No* 8, Third World Online Network.
53 Article 3(1) of the Statute of the International Court of Justice provides: 'The Court shall consist of fifteen members, no two of whom may be nationals of the same state'.
54 See an acknowledgment of this by the EC: 'Communication from the EC: Developing Country Members and the WTO Dispute Settlement Mechanism', WT/GC/W/148, 24 February 1998.
55 'Proposal by the African Group', TN/DS/W/15, p. 2.
56 'Proposal by the African Group', TN/DS/W/15, p. 2. The establishment of such a fund will likely require amendment of the institutional provisions of the DSU, such as Article 2.
57 Jamaica, moreover, argues that the cost of membership of the WTO Advisory Law Centre still prohibits some developing countries from accessing its facilities, and that additional independent mechanisms need to be developed to ensure that DCMs not only obtain general legal advice, but can also obtain assistance in arguing their case before a panel at a cost which these countries can afford. ('Communication from Jamaica', TN/DS/W/21, p. 2.)
58 'Communication from Kenya on behalf of the Africa Group', TN/DS/W/42, p. 5.
59 Cf., however, the African Group, which has put forward some more immediately realisable proposals relating to their participation in the DSS. Their proposal is that assistance is provided in the form of a pool of experts and lawyers in the preparation and conduct of cases, the payment of fees and expenses entailed, compilation by the WTO Secretariat of all applicable law including past decisions to be fully availed to and usable by both the parties

and the panels/Appellate Body in each individual case. ('Proposal by the African Group', TN/DS/W/15, p. 4.)
60 'Proposals on DSU by Cuba, Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe', p. 3.
61 'Communication from Jamaica', TN/DS/W/21, p. 4.
62 H. Horn and P. Mavroidis, *Remedies in the WTO Dispute Settlement System and Developing Country Interests*, Institute for International Economic Studies, Stockholm University Centre for Economic Policy Research, 11 April 1999 (paper on file with author).
63 'Proposal by Mexico', TN/DS/W/23, p. 4.
64 'Communication from Mexico', TN/DS/W/40, p. 6.
65 For a critique more generally of such counter-measures, see S. Charnovitz, 'Rethinking Trade Sanctions', *AJIL*, 95 (2001), p.792.
66 'Communication from India on behalf of Cuba, Dominican Republic, Egypt, Honduras, Jamaica and Malaysia', TN/DS/W/47, pp. 3–4.
67 Cf. Article 22.3(a) which provides that in general a State should first seek to suspend concessions with respect to the same sector as that in which the panel or Appellate Body has found a violation.
68 Cf. Article 22.3(b).
69 Cf. Article 22.3(c).
70 S. Charnovitz, 'Rethinking Trade Sanctions', *AJIL*, 95 (2001), p. 792 at p. 822.
71 'Communication from India on behalf of Cuba, Dominican Republic, Egypt, Honduras, Jamaica and Malaysia', TN/DS/W/47, p. 2.
72 See generally on this approach: J. Pauwelyn, 'Enforcement and Counter-measures in the WTO: Rules are Rules – Toward a More Collective Approach', *AJIL*, 94 (2000), p.335.
73 Cf. Article 22.4.
74 See also the similar proposals in substance made by the government of Mexico, 'Communication from Mexico, TN/DS/W/40, pp. 1, 6; 'Proposal by the African Group', TN/DS/W/15, p. 3; and 'Communication from Kenya on behalf of the African Group', TN/DS/W/15, p. 4. Cf., however, the LDC Group who propose that collective measures in relation to the enforcement of a decision in favour of DCMs should be automatic as a matter of Special and Differential Treatment: TN/DS/W/17, p. 4.
75 'Communication from Haiti', TN/DS/W/37, pp. 4–5.
76 'Communication from Ecuador', TN/DS/W/9, p. 2.
77 'Communication from Ecuador', TN/DS/W/9, p. 3.
78 'Communication from Ecuador', TN/DS/W/9, p. 4.
79 'Communication from Ecuador', TN/DS/W/9, p. 5. See also the same substantive proposal made by LDCMs: 'Proposal by the LDC Group', TN/DS/W/17, p. 4. Cf. the proposal by Haiti that Article 21.8 should be amended to require monetary compensation only in relation to LDCMs: 'Communication from Haiti', TN/DS/W/37, p. 3. This approach has academic support: see, for example, J. Pauwelyn, 'Enforcement and Counter-measures in the WTO: Rules are Rules – Toward a More Collective Approach', *AJIL*, 94 (2000), p. 335 at pp. 345–346.
80 'Communication from Kenya on behalf of the Africa Group', TN/DS/W/42, p. 3.
81 In fact the EC in one of its proposals expressly noted the proposal of Ecuador and states that it is 'ready therefore to work constructively with Ecuador and other WTO Members with a view to establish a generally acceptable text on this issue.' ('Communication from the European Communities', TN/DS/W/38, p. 9.)
82 'Contribution of the EC and its Member States to the Improvement of the WTO DSU', 13 March 2002, TN/DS/W/1, p. 5.
83 'Contribution of the EC and its Member States to the Improvement of the WTO DSU', 13 March 2002, TN/DS/W/1, p. 5.
84 M. Footer, 'Developing Country Practice in the Matter of WTO Dispute Settlement' *Journal of World Trade*, 35 (1), (2001), p. 55 at p. 93.
85 European Communities – Regime for the Importation, Sale and Distribution of Bananas, complaints by Ecuador (WT/DS27/R/ECU), Guatemala and Honduras (WT/DS27/R/GTM and WT/DS27/R/HND), Mexico (WT/DS27/R/MEX), and the United States (WT/DS27/R/USA), panel Report, 22 May 1997.
86 Footer, supra n. 84, pp. 93–94.
87 'Communication from Kenya on behalf of the Africa Group', TN/DS/W/42, p. 2.
88 'Communication from Kenya on behalf of the Africa Group', TN/DS/W/42, p. 2.
89 'Proposal by the African Group', TN/DS/W/15, p.5.
90 'Communication from the European Communities', TN/DS/W/1, p. 8; and see also, e.g., 'Communication from the Separate Customs Territory of Taiwan.