The WTO dispute settlement system - one size does not fit all.

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Declaration of Authenticity and Author's Rights

This thesis is the result of the author's original research. It has been composed by the author and has not been previously submitted for examination which has led to the award of a degree. Elements of this thesis were presented as work in progress in the following peer-reviewed journal articles:

(i) Ronald Cullen Kerr Welsh, 'Frustration through Futility: Least Developed Countries and the WTO's Settlement of Disputes' (2016) 2016 International Review of Law 1.

(ii) Ronald Cullen Kerr Welsh, 'Special and Differential Treatment: A New Factor Explaining LDC Engagement with the WTO Dispute Settlement System?' (2018) 2018 International Review of Law 39.

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Abstract

This thesis examines the operation of the World Trade Organisation (WTO) Dispute Settlement Understanding (DSU) from the perspective of the Least Developed Countries (LDCs). Ensuring predictability and stability in the rules-based international trading system requires the DSU to be accessible, efficient, reliable, and able to redress imbalances. The inability of the LDCs to fully utilise with the DSU, thus denigrates their ability to redress imbalances and, by extension, their ability to fully engage in international trade, which logically could restrict their economic growth. This thesis builds upon our existing knowledge by exploring and examining why the LDCs, having brought only one dispute, appear to have difficulties -engaging with the DSU, and this thesis reveals a series of issues and concerns. Since the 1990s, the DSU has been the subject of review, and this thesis also explores these ongoing review negotiations from an LDC viewpoint. This LDC-focused analysis and evaluation represent an original and important contribution to the general body of academic knowledge, illuminating areas of these negotiations which have hitherto been overlooked within the academic *fora*. The thesis also narrates how during both the negotiations which led to the creation of the DSU and those relating to its review, the repeated failure of the LDC proposals to either gain traction or even, upon occasion, be discussed by the wider WTO membership, contributed towards a growing bias amongst the LDCs against engaging with the DSU which is a recurring theme of this thesis. The thesis makes recommendations to address some of the engagement issues faced by the LDCs. Arguing that WTO action alone will not address all these issues, the thesis advocates that the LDCs must themselves be prepared to take measures to address their structural and other weaknesses.

List of Abbreviations

ACWL	Advisory Centre on WTO Law
ADP	The Agreement on Implementation of Article VI of the GATT
BTC	Bangladesh Tariff Commission
CTD	Committee on Trade and Development
DSB	Dispute Settlement Body
DSB Special Session	Special Sessions of the Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EC	The European Communities
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GSP	Generalized System of Preferences
ITO	International Trade Organisation
LDCs	Least-developed Countries
MFN	Most-favoured-nation
MTN	Multilateral Trade Negotiations

SA	The Agreement on Safeguards
SCM	The Agreement on Subsidies and Countervailing Measures
SDT	Special and differential treatment
SPS	The Agreement on the Application of Sanitary and Phytosanitary Measures
TFA	The Trade Facilitation Agreement
The Enabling Clause	1979 Tokyo declaration, *Differential & More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries*
The GATT	The General Agreement on Tariffs and Trade 1994
The GATT Review	GATT 1954-1955 Review Session
UN	The United Nations
UNCTAD	United Nations Conference on Trade and Development
Uruguay Round	1986-1994 Uruguay Round of trade negotiations
US	United States
WTO	World Trade Organisation

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Chapter 1

Introduction

1. Background

In 1995 when the World Trade Organisation (WTO) was formed,[1] the World Bank reported that the value of world merchandise exports was $5.19 trillion,[2] which had risen to $19.05 trillion by 2019.[3] These often-unseen international trade flows are an essential part of what we now consider to be our world. Indeed, except for the air we breathe, everything that is not locally produced, that we eat, use, wear, our cars, appliances, and even our utilities are all closely intertwined, reliant, and dependent upon international trade to a greater or lesser extent.[4] Moreover, trade, in terms of both the goods and services that countries export and import, creates and sustains employment while fostering economic growth and development, which are particularly significant to developing countries.[5] To achieve this economic growth and development, developing countries must first be able to participate fully in world trade.[6]

[1] 'WTO | What Is the WTO? - Who We Are' <https://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm> accessed 31 March 2019.
[2] The World Bank, 'The World Bank, Trade Data, Merchandise Exports' (*Merchandise exports (current US$)*, 2021) <https://data.worldbank.org/topic/21> accessed 4 April 2021.
[3] ibid.
[4] Even locally produced or grown items may rely on imported parts, components, or other inputs such as fertilisers etc.
[5] Ashford C Chea, 'Sub-Saharan Africa and Global Trade: What Sub-Saharan Africa Needs to Do to Maximize the Benefits from Global Trade Integration, Increase Economic Growth and Reduce Poverty' (2012) 2(4) International Journal of Academic Research in Business and Social Sciences 360; Michael R Mullen and others, 'The Effects of International Trade on Economic Growth and Meeting Basic Human Needs' (2001) 15 Journal of Global Marketing 31.
[6] Chea (n 5) 360.

World trade[7] is comprised of an interrelated, multifaceted amalgam of sovereign states, enterprises, and international organisations. The agreements, rules and treaties regulating this trade form part of Public International Law.[8] Within this, the rules that govern international trade fall under the remit of the General Agreement on Tariffs and Trade (GATT)/WTO, which are the subject of this analysis

The creation of the WTO in 1995 and the Understanding on Rules and Procedures Governing the Settlement of Disputes[9] (the DSU) were two of the significant outcomes of what is regarded as the largest, most comprehensive set of trade negotiations ever undertaken, namely the 1986-1994 Uruguay Round of trade negotiations (Uruguay Round).[10]

The WTO is a global organisation comprised of 164 members[11] who represent 98% of world trade,[12] with 25 governments of other states[13] having Observer status.[14]

The membership is divided into three categories 'developed,' 'developing' and 'Least-developed' countries. Unlike the Least-developed countries,

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[7] Trade is defined as the business of buying and selling or bartering goods or services Garner Bryan A., ed., *Black's Law Dictionary* (10th Edition, Thomson Reuters 2014) 1720.
[8] Pascal Lamy, 'The Place of the WTO and Its Law in the International Legal Order' (2006) 17 European Journal of International Law 969, 969.
[9] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' <https://www.wto.org/english/docs_e/legal_e/28-dsu.pdf> accessed 17 January 2015.
[10] The negotiations involved 123 countries and spanned virtually every aspect of trade 'WTO | Understanding the WTO - The Uruguay Round' <https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm> accessed 9 September 2022.
[11] 'WTO | What Is the WTO? - Who We Are' (n 1).
[12] ibid.
[13] The 25 governments are those of Algeria, Andorra, Azerbaijan, Bahamas, Belarus, Bhutan, Bosnia and Herzegovina, Comoros, Curaçao, Equatorial Guinea, Ethiopia, Holy See, Iran, Iraq, Lebanese Republic, Libya, Sao Tomé and Principe, Serbia, Somalia, South Sudan, Sudan, Syrian Arab Republic, Timor-Leste, Turkmenistan, and Uzbekistan. 'WTO Members and Observers' <https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm> accessed 16 April 2021.
[14] With the exception of the Holy See, all observer governments are expected to start accession negotiations within 5 years of becoming observers. ibid.

there is no formal definition of what a 'developed' country or a 'developing' country is,[15] with the status being determined on accession.[16] The developing countries (whom one can think of as countries that are in varying stages of their economic development) comprise approximately two-thirds of the total WTO membership.[17] Least-developed Countries (LDCs), as defined by the United Nations,[18] are comprised of nearly 1 billion people[19] in 46 countries.[20] Of these 46 countries[21], 35 are members

[15] See 'Who are the Developing Countries in the WTO?' available at https://www.wto.org/english/tratop_e/devel_e/d1who_e.htm

[16] Although countries determine whether they are "developed" or "developing", this decision can be challenged by other members. Who are the Developing Countries in the WTO?' available at https://www.wto.org/english/tratop_e/devel_e/d1who_e.htm

[17] See 'Understanding the WTO: Developing Countries' available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/dev1_e.htm

[18] It should be noted that the LDCs are not per se a fixed 'block' of countries. LDCs can and have 'graduated' to developing country member status, see 'Equatorial Guinea Graduates from the Category of Least Developed Countries, 4 June 2017' (UN office of the high representative for the Least Developed Countries, Landlocked Developing Countries and Small Island States 2017) <https://www.un.org/ldcportal/content/equatorial-guinea-graduation-history> accessed 25 January 2019; 'Maldives Identifies Challenges in Graduating to a Developing Country' (2011) <https://mihaaru.com/haveeru_online ; (copy on file with author)>.

[19] 'Least Developed Countries: UN Classification | Data' <http://data.worldbank.org/region/LDC> accessed 31 July 2015.

[20] 'LDCs at a Glance | Department of Economic and Social Affairs' (25 May 2008) <https://www.un.org/development/desa/dpad/least-developed-country-category/ldcs-at-a-glance.html/> accessed 8 April 2021.

[21] There are 46 LDC; for ease of comprehension where an LDC is a WTO member, the date of membership is shown as (****); if the LDC was also a member of GATT the date of membership is shown as [****]; Afghanistan (2016), Angola (1996),[1994], Bangladesh (1995),[1972], Benin (1996),[1963], Bhutan, Burkina Faso(1995),[1963], Burundi (1995),[1965], Cambodia (2014), Central African Republic (1995),[1963], Chad (1996),[1963], Comoros, Democratic Republic of the Congo (1997), Djibouti (1995),[1994], Eritrea, Ethiopia, Gambia (1996),[1965], Guinea (1995),[1994], Guinea-Bissau (1995),[1994], Haiti (1996),[1950], Kiribati, Lao People's Dem. Republic (2013), Lesotho (1995),[1988], Liberia (2016), Madagascar (1995),[1963], Malawi (1995),[1964], Mali (1995),[1993], Mauritania (1995), [1963], Mozambique (1995),[1992], Myanmar (1995),[1948], Nepal (2004), Niger (1996),[1963], Rwanda (1996), [1966], Sao Tome and Principe, Senegal (1995),[1963], Sierra Leone (1995),[1961], Solomon Islands (1996),[1994], Somalia, South Sudan, Sudan, Timor-Leste, Togo (1995),[1964], Tuvalu, Uganda (1995),[1962], United Republic of Tanzania (1995),[1961], Yemen (2014), and Zambia (1995),[1982] 'WTO | Understanding the WTO - Least-Developed Countries' <https://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm> accessed 7 September 2022; 'UN List of Least Developed Countries' (*UNCTAD*) <https://unctad.org/topic/least-developed-countries/list> accessed 7 September 2022.

of the WTO,[22] with a further eight countries[23] in the process of accession.[24] LDCs are recognised by the WTO[25] and are a subset of 'developing' countries.[26]

The origin and concept of classifying a country as being a 'Least Developed Country' stemmed from discussions by members of the United Nations (UN),[27] which took place during the 1960s and 1970s,[28] which resulted in the creation of LDCs as a separate and distinct UN category by resolution 2768 of the UN General Assembly in 1971.[29] LDCs were considered to be low-income countries having acute structural weaknesses that limited their ability to grow economically.[30] A group of twenty-five least developed countries[31] were originally identified based upon three criteria; per capita GDP, percentage share of manufacturing, and adult literacy.[32] Article 8 of UN resolution 2768[33] further requested all

[22] 'WTO | Development - The Sub-Committee on Least-Developed Countries' <https://www.wto.org/english/tratop_e/devel_e/dev_sub_committee_ldc_e.htm> accessed 1 April 2019.
[23] The 8 countries are Bhutan, Comoros, Ethiopia, Sao Tome and Principe, Somalia, South Sudan, Sudan and Timor-Leste, ibid.
[24] ibid.
[25] 'WTO | Understanding the WTO - Least-Developed Countries' (n 21).
[26] 'WTO | Development - Who Are the Developing Countries in the WTO?' <https://www.wto.org/english/tratop_e/devel_e/d1who_e.htm> accessed 1 July 2015.
[27] 'United Nations Member States' <https://www.un.org/en/about-us/member-states> accessed 20 April 2022.
[28] Helen Hawthorne, *Least Developed Countries and the WTO* (Palgrave Macmillan 2013) 23; Djalita Fialho, 'Altruism but Not Quite: The Genesis of the Least Developed Country (LDC) Category' (2012) 33 Third World Quarterly 751, 753.
[29] Resolution 2768, 18 November 1971 'General Assembly Resolutions 26th Session' <http://www.un.org/documents/ga/res/26/ares26.htm> accessed 2 March 2016.
[30] See UN, DESA, 'Brief History of LDC Category' <http://www.un.org/en/development/desa/policy/cdp/ldc_history.shtml> accessed 5 March 2016.
[31] There are currently 46 LDCs see, 'LDCs at a Glance | Department of Economic and Social Affairs' (n 20).
[32] The three original criteria were GDP per capita of less than US$100, (now US$1,190, supra,); manufacturing accounting for 10% or less of GDP and a 20% or less rate of adult literacy. Fialho (n 28) 760.
[33] 'United Nations General Assembly - Twenty-Sixth Session; Resolution 2768 (XXVI) Identification of the Least Developed Countries among the Developing Countries' <http://www.worldlii.org/int/other/UNGA/1971/21.pdf>.

organisations within the UN to "...take fully into account the special needs..."[34] of LDCs when promulgating activities and projects.

Within the trade arena, LDCs were formally recognised[35] by the GATT in the Tokyo Declaration of 1973.[36] The Tokyo ministerial declaration *inter alia* stressed that LDCs should be given "...special treatment in the context of any general or specific measures..."[37] within the context of developing country measures, a topic which is a significant area of focus within this thesis.

The WTO as an organisation fulfils three core functions (i) the facilitation of trade and trade-related negotiations,[38] (ii) oversight of the WTO agreements[39] (created by the Uruguay Round), and finally, (iii) dispute settlement.[40] The DSU is a system used to settle complaints[41] amongst WTO members about their rights, commitments, and obligations under covered agreements, which are dealt with by the Dispute Settlement Body (DSB).[42]

The DSU contained state-of-the-art provisions to ensure that parties could

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[34] Clause 8 of Resoultion 2768, 18 November 1971 ibid.
[35] Hawthorne notes evidence of LDC recognition within the GATT council minutes of 1971. Hawthorne (n 28) 45; *GATT Council; Minutes of Meeting; Held in the Palais des Nations, Geneva on 9 November 1971* (1971) C/M/74 12–13.
[36] Neither the GATT nor its successor the WTO were/ are specialised agencies of the UN. *GATT Ministerial Meeting, Declaration of Ministers approved at Tokyo on 14th September 1973* (1973) MIN (73)1 6.
[37] *ibid ,6.*
[38] William J Davey, 'The WTO and Rules-Based Dispute Settlement: Historical Evolution, Operational Success, and Future Challenges' (2014) 17 Journal of International Economic Law 679.
[39] ibid.
[40] ibid.
[41] In essence there are 3 types of complaints, (a) 'violation complaints', (b) 'non-violation' complaints" and (c) 'situation complaints' all of which could inhibit, impair or nullify a benefit accruing to a WTO member either directly or indirectly, see WTO Secretariat, *The WTO Agreement Series 2, General Agreement on Tariffs and Trade* (WTO Publications, World Trade Organization, Centre William Rappard, rue de Lausanne 154, Geneva, Switzerland 1988) 56–57.
[42] Article 2 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9).

not block the dispute process, an independent Appellate function whose rulings are automatically binding, and so forth,[43] all of which meant that the DSU was widely regarded as the "crown jewel" of the then new WTO system.[44] Article 3.2 of the DSU recites how the DSU is to be a "…central element providing security and predictability to the multilateral trading system."[45] This security and predictability was to have been achieved through a rules-based method of resolving disputes where the disputing parties, irrespective of economic size or military power, have equal rights and opportunities to avail themselves of the DSU mechanism.[46] This methodology was in marked contrast to the GATT dispute mechanism, which lacked both scope and coverage[47] as well as having severely limited power to resolve trade disputes.,[48] arguably leaving a "...power-based system where the law of the jungle prevailed."[49] Clearly, for both developing countries and LDCs, the ability to raise and resolve complaints is important if they are to participate fully in global trade, which, as noted above, is pivotal to their economic development and growth.[50]

Since its inception, WTO members have extensively used the DSU, with

[43] Susan Esserman and Robert Howse, 'WTO on Trial' (2003) 82 Foreign Aff. 130, 131.
[44] Adam Gross, 'Can Sub-Saharan African Countries Defend Their Trade and Development Interests Effectively in the WTO? The Case of Cotton.' (2006) 18 European Journal of Development Research 369.
[45] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9).
[46] Johan Lindeque and Steven McGuire, 'The United States and Trade Disputes in the World Trade Organization: Hegemony Constrained or Confirmed?' (2007) 47 Management International Review 725, 726; Christina Fattore, 'The Influence of Legal Capacity on WTO Dispute Duration' (2013) 27 The International Trade Journal 450, 454; Gross (n 44) 372.
[47] Robert Gilpin and Jean M Gilpin, *Global Political Economy: Understanding the International Economic Order* (Princeton University Press 2001) 218.
[48] ibid.
[49] Lindeque and McGuire (n 46) 726.
[50] Chea (n 5) 360.

over 600 complaints having been brought to date.[51] One could argue the number of disputes alone is indicative of the fact that WTO members appear to have embraced the dispute settlement system and is a marker of their normative affirmation thereof. Further examination reveals that despite there being no shortage of potential disputes involving LDCs,[52] only one of these resulted in a DSU complaint being made by an LDC.[53] This lack of participation and engagement by LDCs with the DSU runs counter to the concept of the normative affirmation of the DSU by the WTO members, undermines the legitimacy of the WTO, and in a sense, taints the organisation as a whole and tarnishes the so-called 'crown jewel'. Moreover, it challenges the assertions by the likes of Lindeque and McGuire, Fattore, and Gross that every member has both equal rights and opportunities to avail themselves of the DSU mechanism.[54]

Against this background, this thesis identifies, explores, and examines the reasons, issues, and problems faced by the LDCs in terms of their ability to engage with the DSU, suggesting measures to remediate the same. In so doing, this thesis better informs our understanding of why there has

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[51] 'WTO | Dispute Settlement Gateway' <https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm#negotiations> accessed 29 May 2016.

[52] Victor Mosoti, 'Does Africa Need the WTO Dispute Settlement System?' [2003] Towards A Development-Supportive Dispute Settlement System in the WTO. Geneva: International Centre for Trade and Sustainable Development 79 <http://mercury.ethz.ch/serviceengine/Files/ISN/93004/ichaptersection_singledocument/48402eca-52f5-4220-895d-30ccf43cf3ad/en/No_05_chapter_2_+Towards_a_ Development _.pdf > accessed 8 December 2014.

[53] *India – Anti-Dumping Measure on Batteries from Bangladesh, Request for Consultations by Bangladesh, WT/DS306/1 G/L/669 G/ADP/D52/1, 2 February 2004* LDCs have participated as third parties in eight other disputes. See also, Manfred Elsig and Philipp Stucki, 'Low-Income Developing Countries and WTO Litigation: Why Wake up the Sleeping Dog?' (2012) 19 Review of International Political Economy 292, 296.

[54] Lindeque and McGuire (n 46) 726; Fattore (n 46) 454; Gross (n 44) 372.

been such a paucity of complaints made by the LDCs.

1.1 Research Questions

To improve our understanding of the reasons why the LDCs have not fully engaged with the DSU and to identify measures that could be taken to facilitate better engagement with the same, this thesis will seek answers to two overlapping and intertwined research questions.

a) Why and for what reasons have LDC members of the WTO chosen to eschew the DSU as a mechanism to redress violations of their trade rights?
b) Does the DSU have the functionality to enable LDC members to effectively use it to resolve trade disputes, and if not, what enhancements can be made thereto to facilitate the same?

1.2 Motivation, scope, contribution & importance

From the terms of the research questions, the scope and purpose of this thesis are to form a better understanding of the LDCs, in terms of their ability, or lack thereof, to engage with the DSU as means of protecting their trade rights. As a result, this thesis does not include consideration of the experiences of other WTO members or groups in terms of their experience of the DSU. Similarly, as this research is focused on the DSU, this thesis does not include discourse regarding other dispute settlement fora.

As noted above, LDC engagement with the DSU is very limited, with Bangladesh being the only LDC to have ever filed a complaint.[55] Seven other LDCs have participated as 3rd parties (a 3rd party is neither a complainant nor respondent but is a WTO member who has a substantial interest in the dispute[56]) in eight other WTO disputes.[57] In seeking to understand why the engagement is so limited, it is important to appreciate, in general terms, the chronic difficulties faced by LDCs, which should not be understated. The LDCs themselves, in a draft protocol relating to their ability to trade, opined that they

> "…face special problems, including infrastructural, institutional and financial problems arising from the extremely early stage of development of their economies."[58]

Traditionally, many of these problems have, *in solus* or in concert, been referred to as contributory factors which underpin and explain the complex, interrelated and intertwined reasons which account for the limited use of the DSU made by LDCs.[59] Van Den Bossche and Gathii

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[55] 'WTO | Dispute Settlement - the Disputes - DS306' <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds306_e.htm> accessed 19 July 2015; Bangladesh also participated as a third party in, *United States - Rules of Origin for Textiles and Apparel Products - Request to Join Consultations - Communication from Bangladesh, WT/DS243/2, 5 February 2002*.

[56] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) 360.

[57] LDC participation in the DSU is as follows: Bangladesh, as complainant (DS306), as third-party (DS243); Benin, as third-party (DS267); Chad, as third-party (DS267); Madagascar, as third-party (DS27, DS265, DS266, DS283); Malawi, as third-party (DS265, DS266, DS283, DS434); Senegal, as third-party, (DS27, DS58); Tanzania, as third-party (DS265, DS266, DS283); Zambia, as third-party (DS434).

[58] 'GATT; Multilateral Trade Negotiations, Trade Negotiations Committee' (MTN/W/37 1978) MTN/W/37 2 <https://docs.wto.org/gattdocs/q/.%5CTR%5CMTN%5CW37.PDF> accessed 5 March 2016.

[59] Richard Blackhurst, Bill Lyakurwa and Ademola Oyejide, 'Options for Improving Africa's Participation in the WTO' (2000) 23 The World Economy 491; Jan Bohanes, 'WTO Dispute Settlement and Industrial Policy' <https://e15initiative.org/wp-content/uploads/2015/09/E15-Industrial-Policy-Bohanes-FINAL.pdf>; Amin Alavi, 'African Countries and the WTO's Dispute

opine that the reasons why LDCs make limited use of the DSU are "…multiple, complex and interrelated."[60] They go on to identify capacity-related deficiencies in six areas, which they argue represent the primary causal factors inhibiting LDC engagement with the DSU.[61] These factors are (i) Economic, where as a consequence of the small and relatively undiversified nature of LDCs economies, they have a limited share of world trade, and therefore one would expect them to be infrequent users of the DSU,[62] (ii) the inherent complexity of the DSU mechanism itself,[63] coupled with a lack of endogenous legal resource,[64] together with structural institutional weaknesses which prevent LDCs from acquiring and assimilating the requisite evidence required to support a dispute claim,[65] (iii) the high costs of engaging external legal counsel to conduct a dispute on their behalf of an LDC,[66] (iv) the inability of LDCs to recognise when a violation of WTO law has occurred,[67] (v) a fear of reprisals from potential respondents,[68] and (vi) the perceived inability of an LDC to enforce the respondent's compliance with a favourable ruling

Settlement Mechanism' (2007) 25 Development Policy Review 25; CP Bown, 'Participation in WTO Dispute Settlement: Complainants, Interested Parties, and Free Riders' (2005) 19 The World Bank Economic Review 287; Chad P Bown and Kara M Reynolds, 'Trade Flows and Trade Disputes' (2014) 10 The Review of International Organizations 145; Elsig and Stucki (n 53); Gross (n 44); Gregory Shaffer, 'The Challenges of WTO Law: Strategies for Developing Country Adaptation' (2006) 5 World Trade Review 177.

[60] Peter Van den Bossche and James Gathii, 'Use of the WTO Dispute Settlement System by LDCs and LICs' 21 <https://www.trapca.org/wp-content/uploads/2019/09/TWP1304-Use-of-the-WTO-Dispute-Settlement-System-by-LDCs-and-LICs.pdf>.

[61] ibid.

[62] Interestingly, they opine that notwithstanding their limited share of world trade and export diversity these factors do not fully explain LDCs very limited usage of the DSU. ibid 22.

[63] ibid.

[64] ibid 23.

[65] ibid.

[66] ibid 23–24.

[67] ibid 25–26.

[68] ibid 26.

due to a lack of retaliative capacity.[69] Other academic writers take a similar deficit-based approach and identify two further capacity-related areas of structural weaknesses, namely LDC diplomatic representation at the WTO in Geneva[70] and both linguistic and communication difficulties,[71] all of which will be explored further in this thesis.

Despite the weight of academic research devoted to these eight areas of capacity / structural weakness, there appears to be no consensus among the many scholars as to the relevance, significance, weight, and, in some cases, the actual validity of some of these capacity issues.

Notwithstanding this lack of consensus, the literature indicates that capacity issues inhibit LDC engagement with the DSU. This raises the interesting question as to why these capacity constraints appear as valid today as they were in 1995 when the DSU came into effect,[72] despite, as discussed later, the major efforts that have been taken to address such constraints. This was partially answered by a representative of Bangladesh who noted that LDCs had not resorted to the DSU process despite having "...several disputes but because of underlying problems in

[69] ibid 26–27.
[70] Blackhurst, Lyakurwa and Oyejide (n 59) 493; Richard L Bernal, 'Small Developing Economies in the World Trade Organization' [2001] Agriculture, Trade and the WTO 108, 13; Gross (n 44) 371; V Mosoti, 'Africa in the First Decade of WTO Dispute Settlement' (2006) 9 Journal of International Economic Law 427, 453.
[71] Roderick Abbott, 'Are Developing Countries Deterred from Using the WTO Dispute Settlement System? Participation of Developing Countries in the DSM in the Years 1995-2005' (ECIPE Working Paper 2007) Working Paper 01/2007 11 <https://www.econstor.eu/handle/10419/174816> accessed 10 January 2015; Marc L Busch, Eric Reinhardt and Gregory Shaffer, 'Does Legal Capacity Matter? A Survey of WTO Members' (2009) 8 World Trade Review 559, 572.
[72] The DSU operated on a trial basis, (alongside the existing GATT dispute system), from April 1989 until the end of the Uruguay Round of negotiations. *GATT Basic Instruments and Selected Documents (GATT BISD)*, vol Supp.36, 45th Session (William S Hein & Co, Inc 2003) 61 et.seq.

the system, they could not pursue them."[73] If there are systemic issues within the DSU that prevent LDC engagement therewith, then it would be pointless, as Bohanes notes, to allocate scarce resources to unwanted legal expertise that will never be used.[74] In addition, the inability of LDCs to adjudicate disputes and enforce their trade rights will logically also have a negative effect on their economic growth.

As stated above, the DSU arose out of the Uruguay round of negotiations. Some 23[75] of the current 35 LDC members of the WTO (66%) were GATT members during the period when the DSU negotiations were underway. Leaving aside the fact that these LDCs would be acutely aware of their infrastructural, institutional, capacity, and financial frailties,[76] it would be unreasonable to assume that these 23 LDCs would simply blithely agree to a legally complex DSU process within which there were systemic issues that would prevent them using it.[77] There is very little academic discourse on the role played by the LDCs in the Uruguay Round DSU negotiations. Accordingly, one of the factors motivating this study was to address this lack of discourse and to explore the LDCs' role in these negotiations, revealing and recording, much of it for the first time, the depth of their opposition to the proposed DSU. In addition, this thesis reveals how the

[73] 'Special Session of the Dispute Settlement Body; Minutes of Meeting, 13 -14 November 2003' (2004) TN/DS/M/14 20 April 2004 6–7.
[74] Bohanes (n 59) 71.
[75] The 23 LDCs who were GATT members during the DSU negotiations were Angola, Bangladesh, Benin, Burkina Faso, Burundi, Central African Republic, Chad, Gambia, Haiti, Lesotho, Madagascar, Malawi, Mauritania, Mozambique, Myanmar, Niger, Rwanda, Senegal, Sierra Leone, Tanzania, Togo, Uganda and Zambia 'WTO | Understanding the WTO - Least-Developed Countries' (n 21).
[76] 'GATT; Multilateral Trade Negotiations, Trade Negotiations Committee' (n 58) 2.
[77] 'Special Session of the Dispute Settlement Body; Minutes of Meeting, 13 -14 November 2003' (n 73) 6–7.

LDCs attempted to completely opt-out of the DSU, favouring a bespoke LDC dispute resolution mechanism *in lieu* of the DSU. This new evidence represents both an original and significant contribution to the body of academic knowledge and our wider understanding of the issue of LDC non-engagement with the DSU. In addition, this thesis outlines, analyses, and assesses the effectiveness of the various measures that were originally incorporated into the DSU to assist LDC engagement. The thesis shows that these measures were never operationalised. Thus, in terms of evaluating whether the DSU as presently constituted functions equitably in relation to the LDCs, the thesis posits that the system *de facto* fails in this regard, with LDCs being either unable, incapable, or unwilling to engage with the DSU in the pursuit of violations of their trade rights.

A second key factor that motivated this thesis stemmed from research undertaken as part of my master's degree. There appeared to be little or no direct correlation between the academic discourse surrounding the capacity-related issues discussed above and the proposals put forward by the LDCs during the DSU review negotiations, which have been ongoing for over 20 years.[78] This was somewhat surprising given the fact that these proposals reflected the changes to the DSU that were sought by the LDCs to facilitate their engagement therewith[79] and suggested not only

[78] 'Uruguay Round, Trade Negotiations Committee, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Marrakesh, 15 April 1994' MTN/FA-2, 30 March 1994 419; Dencho Georgiev and Kim Van der Borght (eds), *Reform and Development of the WTO Dispute Settlement System* (Cameron May 2006); Jaemin Lee, 'A More Widely Available Public Good: Proposed DSU Reform and Its Implication for Developing Members' (2017) 51 Journal of World Trade 987; Thomas A Zimmermann, *Negotiating the Review of the WTO Dispute Settlement Understanding* (Cameron May 2006).

[79] Lee (n 78) 987,989; Zimmerman T. A., 'The DSU Review (1998-2004) : Negotiations, Problems and Perspectives' in, Georgiev and Van der Borght (n 78) 443.

that the existing academic discourse may in some way be incomplete, with the possibility that other unknown factors may be at play. As this thesis shows, the gaps in the literature were substantial, and this thesis has also identified several key new, critically important factors. Accordingly, this thesis explores these negotiations from the perspective of the LDCs. This LDC-focused analysis and evaluation represents a further original and important contribution to the general body of academic knowledge and illuminates areas overlooked within the academic *fora*. In the WTO agreements, some provisions give special rights to developing countries, which are referred to as Special and Differential Treatment SDT.[80] The analysis will show how the proposed changes to the DSU sought by the LDCs to facilitate their engagement with the DSU were driven by and reliant upon the application of SDT, which is discussed in detail in Chapter 2. Furthermore, the analysis demonstrates that any expectation by the LDCs that the wider WTO membership would support the LDC proposals because the application of SDT was justified based on their straitened circumstances and capacity constraints was sadly misplaced. As a result, proposal after proposal was rejected, rebutted, or simply ignored. These failures highlight the inherent weakness of pursuing a negotiating strategy that was overly reliant upon and justified by the need for SDT. This builds upon Hudec's arguments that SDT is an underproductive strategy and can be detrimental to the

[80] 'WTO | Development - Special and Differential Treatment Provisions' <https://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm> accessed 19 July 2015.

needs of developing countries.[81] The thesis will posit that the LDCs' negotiating strategy was, and more than two decades later still is, overly reliant on SDT, which represents a new reason explaining LDCs' lack of engagement with the DSU. In addition, the repeated failure of the LDC proposals to garner support amongst the wider WTO membership contributed towards a growing bias amongst the LDCs against engaging with the DSU, which is a key emergent theme of this thesis. Both the failure of the SDT-driven negotiating strategy and the emergence of bias represent further original and important contributions to the wider body of academic knowledge and literature.

The final motivation for this thesis stems from the current debate surrounding the DSU in general and the role, functioning, and remit of /need for the Appellate Body, all of which are discussed in Chapter 5. In this regard, several countries have tabled substantive proposals[82] which seek to address these issues. Interestingly, elements of these proposals include the use of SDT based upon a model used by the WTO Trade Facilitation Agreement, which contains provisions for technical assistance and capacity-building to simplify, harmonise and modernise cross-border

[81] Robert E Hudec and J Michael Finger, *Developing Countries in the GATT Legal System* (1st Edition, Cambridge University Press 2014) 6,9,30,33,139.

[82] European Commission, 'Concept Paper, "WTO Modernisation Introduction to Future EU Proposals."' <http://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf>; Global Affairs Canada Government of Canada, 'Strengthening and Modernizing the WTO: Discussion Paper Communication from Canada' (*Government of Canada*) <https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=248327&CurrentCatalogueIdIndex=0&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True> accessed 29 October 2018.

trade.[83] Drawing upon these proposals, this thesis explores and discusses several potential opportunities for LDCs, which would if implemented, significantly enhance the ability of LDCs to engage with the DSU. In doing so, they would thus finally have both equal rights and opportunities to avail themselves of the DSU mechanism, which again represents an original contribution to the wider academic body.

The importance of this research stems from the fact that the WTO is the body that deals with disputes pertaining to or relating to the rules of international trade as set out in the WTO agreements.[84] The WTO members agreed that the prompt resolution of disputes was "… essential to the effective functioning of the WTO…"[85] and the DSU created a mechanism to achieve this objective. As noted above, dispute settlement is one of the core functions of the WTO[86] , with Article 3.2 of the DSU reciting how DSU was to be a "…central element in providing security and predictability to the multilateral trading system."[87]

The fact that LDCs appear unable to engage with the DSU means that not only is the WTO not functioning effectively, but it also degrades the security and predictability of the multilateral trading system. Equally, it also limits the LDCs' ability to protect their trade rights and, by extension, their ability to fully engage in world trade, which in turn could potentially

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[83] *Annex to the Protocol amending the Marrakesh Agreement establishing the World Trade Organisation, Agreement on Trade Facilitation* (2014) WT/L/940.
[84] 'WTO | What Is the WTO?' <https://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm> accessed 5 December 2019.
[85] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) Art.3.3.
[86] Davey, 'The WTO and Rules-Based Dispute Settlement' (n 38) 679.
[87] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) Art. 3.2.

limit their economic growth. This overarching research not only deepens our understanding of the issues but also highlights new and different ways to address this recalcitrant problem.

1.3 Research Methodology

The thesis will be qualitative in nature, using both normative[88] and authoritative[89] sources. It will incorporate Dobinson and Johns's[90] three qualitative research categories of (i) 'problem' – LDCs engagement with the DSU, (ii) 'policy' – the rules, procedures, and process of the DSU, and (iii) 'reform' – the detailed formulation, implementation, and operation of new DSU measures. The research will primarily utilise doctrinal[91] methodology, comprising normative sources,[92] including *inter alia* WTO texts, general principles of law, customary law, and authoritative sources, including WTO cases and scholarly legal writings.[93] The possibility of undertaking interviews was considered and subsequently rejected following informal pre-thesis meetings in Geneva with the Ambassador of Benin (the current Chairman of the Trade Policy Review body), the Head of the LDC section of the WTO, and the Executive Director of the Advisory Centre on WTO Law (ACWL). The reason for this was the absence of suitable interviewees, a matter discussed in Chapters 2 and 3.

[88] Mark Van Hoecke, *Methodologies of Legal Research* (Hart Publishing ltd 2011) 11.
[89] ibid.
[90] Dobinson, I. and Johns, F., 'Qualitative Research' in Mike McConville and Wing Hong Chui eds, *Research Methods for Law* (Edinburgh University Press 2007) 19.
[91] Cownie, F. and Bradney A., 'Socio-legal studies - A challenge to the doctrinal approach' in Mandy Burton Dawn Watkins eds, *Research Methods in Law* (Routledge Ltd 2013) 34.
[92] Van Hoecke (n 88) 11.
[93] McConville and Chui (n 90) 19.

A forensic examination of the primary source material will be undertaken, mapping LDC participation in the Multilateral Trade negotiations leading up to and during the Uruguay Round of negotiations and the ongoing LDC participation within the Special Session of the Dispute Settlement Body.[94] The primary source material to be examined will be (i) historical primary source material relating to the multilateral trade negotiations which formed part of the Uruguay Round of negotiations from which the WTO, the covered agreements, and the DSU were all spawned, (ii) the documented submissions of the LDCs and others to the Disputes Settlement Body, and in particular the Special Session thereof relating to the reform of the DSU, specifically those in the period leading up to and including the Doha Round[95] of negotiations and the 2015 Nairobi Package, which contained six Ministerial decisions relating to LDC issues[96] together with the questions and answers arising therefrom and (iii) the submissions by various countries[97] regarding a more root and branch approach to the operation of the DSU as a whole and specifically the application of SDT thereto. Where relevant, each chapter will contain a literature review of the pertinent secondary academic material. Many of the primary sources have not been the subject of academic discourse,

[94] 'WTO | Dispute Settlement Gateway' (n 51).
[95] 'WTO | The Doha Round' <https://www.wto.org/english/tratop_e/dda_e/dda_e.htm> accessed 31 July 2015.
[96] 'WTO | Nairobi Package' <https://www.wto.org/english/thewto_e/minist_e/mc10_e/nairobipackage_e.htm> accessed 29 May 2016.
[97] European Commission (n 82); Government of Canada (n 82).

and their examination herein adds to the existing body of academic knowledge.

1.4 Structure

The thesis is comprised of six chapters (including this introductory chapter), with Chapters 2 – 4 exploring elements central to both research questions.[98] Chapter 5 focuses predominately on matters relating to the second research question, which asks whether the DSU has the functionality to enable LDC members to use it to resolve trade disputes and, if not, what enhancements can be made to facilitate the same. Finally, Chapter 6 concludes the thesis, which proceeds as follows.

Chapter 2. LDCs and the perfidious allure of SDT

As noted above, within the WTO agreements, some provisions give special rights to developing countries, which are referred to as SDT.[99] They include (i) more time to implement WTO agreements and commitments,[100] (ii) measures ensuring their trade interests are safeguarded by developing countries,[101] (iii) measures to stimulate the trade of developing countries,[102] (iv) capacity-building measures to allow

[98] The research questions are (i) Why and for what reasons have LDC members of the WTO chosen to eschew the DSU as a mechanism to redress violations of their trade rights? (ii) Does the DSU have the functionality to enable LDC members to effectively use it to resolve trade disputes and if not, what enhancements can be made thereto to facilitate the same?
[99] 'WTO | Development - Special and Differential Treatment Provisions' (n 80).
[100] ibid.
[101] ibid.
[102] ibid.

them to operate within the WTO, handle disputes and implement technical standards[103] and (v) specific provisions which relate to the LDCs.[104]

This chapter has two main aims. Firstly, it traces the evolution and scope of SDT from its beginnings as a tool to deal with specific economic issues faced by developing countries into a multi-purpose policy tool embraced by the LDCs, to address an ever-increasing set of non-economic issues. The chapter will show how, during the Uruguay negotiations relating to the DSU, the LDCs sought to rely on the application of SDT as a means of securing a bespoke LDC-only dispute settlement system that would sit outside the DSU. It is argued that the failure of the LDCs collectively to secure a DSU 'opt-out' arguably left them with the DSU, a system with which they neither wanted nor, in a sense, agreed to. This helps to address the second research question because the failure to secure the opt-out left the LDCs with a DSU system which lacked the functionality they required to redress violations of their trade rights. In practical terms, the failure of the LDCs to secure the opt-out left them with a dispute settlement system which the LDCs were largely unable to engage with effectively because of a variety of inherent structural difficulties within the DSU itself and the lack of critical endogenous capacity required to engage with the DSU.

The second aim of this chapter is to explore, evaluate and better understand these inherent structural difficulties and capacity shortages.

[103] ibid.
[104] ibid.

This maps directly to the first research question in two key respects. Firstly, these difficulties and capacity issues undoubtedly represent some of the reasons which inhibit LDC engagement with the DSU, and secondly, it would not be unreasonable to assume that if these matters were to be resolved, this would inevitably enhance the overall functionality of the DSU.

The chapter, therefore, explores and examines what academics have cited as being causal factors of LDC non-engagement with the DSU. This examination reveals that academics do not have a consensual view as to the definitive causes of LDC non-engagement with the DSU. The chapter explores key aspects within each thematic area where there is academic discord. Where discord is evinced, the chapter will consider whether the academic arguments and explanations may be incomplete, capable of an alternative interpretation, or suggest the possibility that some other factors may be in play. For each of these areas, the chapter will attempt to determine what these unknown factors are. The chapter also explores and critically assesses the measures designed to support and assist the LDCs taken by the WTO, the Advisory Centre on WTO Law[105] (ACWL), and other bodies such as the United Nations Conference on Trade and Development (UNCTAD).[106]

[105] The Advisory Centre on WTO Law is an independent international organisation established in 2001, see 'ACWL - Advisory Centre on WTO Law' <http://www.acwl.ch/e/index.html> accessed 29 June 2015.

[106] UNCTAD was established in 1964 as a permanent intergovernmental body and is part of the UN Secretariat dealing with matters relating to development issues, trade and investment issues, see, 'Unctad.Org | Home' <http://unctad.org/en/Pages/Home.aspx> accessed 9 February 2016.

Chapter 2 will demonstrate the existence not only of LDC inertia in respect of the dispute settlement system but also their disquiet in relation to its methodology and operation in general. The chapter concludes that the extant difficulties LDCs face in engaging with the DSU and potentially in enforcing favourable decisions, together with their failure to achieve the SDT-driven 'opt-out', all represent powerful forces acting upon them. The underlying effect of these forces is that the DSU is viewed by the LDCs as an unworkable system which in turn leads to a sustained pattern of antipathy and non-engagement therewith. Taken together, these represent a new facet in our wider understanding of this seemingly intractable problem.

Chapter 3. Evaluating LDCs' antipathy towards DSU engagement.

In chapter 2, the LDC proposal, advanced during the Uruguay Round, to 'opt-out of the DSU was discussed. This, however, was only one of several proposals put forward by the LDCs as part of the Uruguay negotiations surrounding the DSU.

The aim of chapter three is firstly to focus on these other proposals and secondly to evaluate the effectiveness of the SDT measures which were included in the DSU. Secondly, this chapter aims to analyse the LDC engagement with the DSU through cases in which they either participated or in respect of prospective disputes where the LDCs contemplated using DSU but rejected doing so. This chapter is directly relevant to both research questions. In respect of the first research question, the chapter adds to our understanding of the reasons why LDCs do not engage with

the DSU. In relation to the second research question, the chapter considers elements of the functionality which were incorporated into the DSU, which were primarily designed to facilitate LDCs and, to a lesser degree, other developing countries to engage with the DSU.

The chapter demonstrates that the bulk of the LDCs' proposals either failed to gain traction or were simply rejected out of hand. The chapter will further demonstrate that the majority of the SDT measures included in the final version of the DSU, in broad terms, failed to deliver the changes which the LDCs needed to enable them to engage with the DSU. The chapter argues that the effect of these failings both adds to and reinforces the perception of the DSU as a system that simply does not work for the LDCs. This argument is further supported by evidence showing that even where the economies of several LDCs were being severely damaged by measures taken by another WTO member which appeared to breach WTO rules, these LDCs nevertheless chose to eschew the DSU as a means of settling the dispute.[107]

The chapter concludes that, overall, the LDCs were unable to secure the general changes to the DSU they proposed during the Uruguay round of negotiations. In addition, their proposal to establish a bespoke LDC-only dispute settlement system was rejected without seemingly any debate. Consequently, they were therefore left with a DSU they could not easily use. Moreover, it became clear over time that within the overall

[107] Denis Pesche and Kako Nubukpo, 'The African Cotton Set in Cancùn: A Look Back at the Beginning of Negotiations', *International Trade Negotiations and Poverty Reduction: The White Paper on Cotton* (Enda Prospectives Dialogues Politiques 2005) p49.

functionality of the final draft of the DSU, the SDT proposals designed to foster LDC engagement were either non-effectual or never operationalised. The cumulative effects of these continual setbacks should not be underestimated, and the chapter concludes that LDCs exhibit a preference for eschewing engagement with the DSU, favouring instead resolving trade-related issues by other means.

Chapter 4. LDC activism in the DSU review process

As part of the Final Act Embodying the Uruguay Round,[108] Ministers called for a review of the DSU to be completed within four years from its entry into force.[109] Reviewing the DSU has been the subject of more than twenty years of negotiations within the WTO, which have, as yet, failed to produce any concrete changes or amendments to the DSU.[110] This chapter examines LDC participation in the negotiations in the ongoing review of the DSU,[111] which is being conducted through the aegis of the Special Session of the Dispute Settlement Body.[112] This examination builds on the two preceding chapters focusing on the failure of yet more LDC SDT-driven proposals submitted as part of these negotiations to gain traction, all of which continue to cause the LDCs to eschew the DSU. This directly

[108] 'Uruguay Round, Trade Negotiations Committee, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Marrakesh, 15 April 1994' (n 78).
[109] ibid 419.
[110] Lee (n 78) 989; Zimmerman T. A., 'The DSU Review (1998-2004): Negotiations, Problems and Perspectives' in, Georgiev and Van der Borght (n 78) 443.
[111] As part of the Uruguay Round of Trade Negotiations, Ministers called for the completion of a full review of the DSU within four years after the establishment of the WTO 'Uruguay Round, Trade Negotiations Committee, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Marrakesh, 15 April 1994' (n 78) 419.
[112] 'Dispute Settlement Body Special Session, First Formal Meeting of the Special Session of the DSB, Report by the Chairman to the Trade Negotiations Committee' TN/DS/1 23 April 2002.

maps to both research questions in terms of our understanding of the reasons why the LDCs have largely shied away from using the DSU and whether the DSU has the functionality required to allow the LDCs to engage with it.

The chapter has three main objectives. Firstly, it will determine whether the approach taken by the LDCs in terms of the proposals they tabled throughout the twenty-plus years of the review negotiations reflects a continuing and enduring SDT-driven approach[113] on their part. Secondly, the analysis will contrast and compare the 'new' LDC proposals under the current DSU review process with the five original proposals[114] submitted by the LDCs during the Uruguay round of negotiations from which the DSU was fashioned. The purpose of this is to ascertain whether the LDCs have either accepted that their original objectives were unachievable and focused instead on other areas of DSU review which are of interest to them or remain materially entrenched in a position premised upon the

[113] Continuity is an important factor particularly in light of the fact that since the conclusion of the GATT DSU negotiations a further 13 LDCs became members of the GATT and or the WTO swelling the number of LDCs from 23 to 36. The 'new' LDCs are Afghanistan (2016), Cambodia (2004), Congo, Democratic Republic (1997), Djibouti (1994), Guinea (1994), Guinea Bissau (1994), Lao People's Republic (2013), Liberia (2016), Mali (1993), Nepal (2004), Solomon Islands (1994), Vanuatu (2012) and Yemen (2014). 'WTO | Understanding the WTO - Least-Developed Countries' (n 21).

[114] The five proposals chronologically are (i) that the DSU should contain measures to allow LDCs to effectively use it (ii) that in relation to the DSU, LDCs should be provided with technical assistance, (iii) the creation of a bespoke LDC only dispute settlement mechanism, (iv) prior to initiating a complaint a WTO member must firstly notify the relevant LDC and then formally investigate the matter at issue, (iv) in any given dispute, prior to requesting recourse to Panel proceedings, all means of settling the dispute, including the use of good offices, should be exhausted and (v) flexibility in settling any given dispute should be extended to LDCs during all phases of the DSU process see, *Group of Negotiations on Goods (GATT), Communication from Bangladesh, Uruguay Round and the Least-Developed Countries (LLDCs), Revision* (1988) MTN.GNG/W/14/Rev.l [A 2]; *Sub-Committee on Trade of Least-Developed Countries, 28 September, Note of Proceedings of the Eleventh Meeting, Revision* (1989) COM.TD/LLDC/12/Rev.l; *Negotiating Group on Dispute Settlement; Proposals on behalf of the Least-Developed Countries* (1989) MTN.GNG/NGI3/W/34.

attainment of their original aims. Thirdly, the analysis will either ascertain whether the 'new' proposals themselves provide any evidence indicating a change in LDC bias against engagement with the DSU or demonstrate a willingness on their part to engage with the DSU.

The chapter concludes that it is evident from their proposals tabled throughout the review process that they still actively seek engagement with the DSU, an engagement which they still hope to facilitate through the application of SDT measures designed to resolve, remove, or ameliorate issues within the current DSU which they perceive impede said engagement. What is equally clear is that the LDCs' bias against engagement with the DSU will be deepened by the successive failure of their SDT-driven proposals to be accepted or otherwise gain traction. Significantly, it is argued that LDC non-engagement with the DSU as a means of protecting their trade and other rights under the WTO agreements is driven, in a sense, by the failure of their SDT-driven LDC policy to facilitate said engagement, thus leaving the LDCs with no choice other than to eschew the DSU as a means of resolving such disputes.

Chapter 5. Causes and solutions – LDCs and DSU engagement

This chapter aims to combine the research outcomes from this thesis and the extant body of knowledge to extrapolate a new and more comprehensive answer to examine LDC non-engagement with the DSU. Having thus achieved greater clarity as to the reasons why the LDCs do not engage with the DSU, this chapter will formulate a range of options and suggest new initiatives that, if adopted by the LDCs and/or the WTO

members, could resolve what has to date been an intractable situation. As noted in the preceding chapter, there is amongst WTO members a clear lack of *consensus ad idem* as to the scope and application and, indeed, the role of SDT amongst the WTO membership. As has been discussed in previous chapters, if LDCs persist with their strategy of seeking material changes to the DSU based upon the inclusion of a range of SDT measures, then this can and will only be successful if a consensually agreed position can be achieved. The chapter will use the current debate surrounding the future of the DSU and, indeed, the WTO[115] to review the current WTO reform proposals advanced by the EU[116] and Canada,[117] both of which suggest nuanced changes to SDT, and argue that while developing countries should be allowed SDT to meet their 'development goals,' SDT should be provided in a selective as opposed to a generalised way.[118] Drawing on this, the chapter formulates several new SDT solutions aimed at addressing some of the DSU engagement issues faced by the LDCs, which would also satisfy the more general demand for nuanced changes relating to the application of SDT and, as such, stand a better chance of being consensually agreed. The chapter also suggests that WTO action alone is not able to address all the issues which prevent LDCs from engaging with the DSU and advocates that the LDCs themselves must

[115] WTO Director General, Azevedo, R, 'Debate on WTO Reform Should Reflect All Perspectives, Trade Negotiations Committee and Heads of Delegation; Informal Meeting, 16th October 2018' (16 October 2018) <https://www.wto.org/english/news_e/news18_e/tnc_infstat_16oct18_e.htm> accessed 3 November 2018.
[116] European Commission (n 82).
[117] 'General Council, Strengthening and Modernizing the WTO: Discussion Paper, Communication from Canada' JOB/GC/201, 24 September 2018.
[118] WTO modernisation Future EU proposals on rulemaking, European Commission (n 82) Section II., 'Proposals for a new approach to flexibilities in the context of development objectives', pp.6–7.

equally show that they are prepared to take measures themselves to overcome some of their structural and other weaknesses.

The chapter concludes that against the backdrop of the failure of the long-running DSU review negotiations to make any progress, LDCs need to take a broader and more proactive position on DSU engagement while continuing to engage in the DSU review progress. The chapter will suggest a range of SDT-driven measures that, if secured, could thus foster LDC engagement with the DSU.

Chapter 6. Conclusion

This chapter provides a synopsis of the thesis, setting out the task and purpose of the research. It discusses the main elements of the research and the justification thereof. Similarly, the chapter explains and justifies the reasons why the research was needed, its importance, and the approach taken to achieve the same. An outline of the key findings made throughout the study is drawn together, and the chapter narrates how these findings were incorporated into the proposed solutions set out in chapter five. The chapter discusses the projected outcomes of these proposed solutions and how they align with the research questions. Finally, the chapter explores the limits of the utility of the research and discusses the nature of ongoing research requirements and identifies new areas within this field of study where further research would be required.

Chapter 2

2. LDCs and the perfidious allure of SDT

As a Haitian representative noted, "...concrete facts point to the conclusion that it is right to give special consideration to the particular situation of countries in [the] course of development."[119]

This chapter will trace the development of SDT from its beginnings as a means of accommodating specific economic issues faced by developing countries into a multi-purpose policy tool embraced by the LDCs, to address an ever-increasing set of non-economic issues. The chapter will discuss the evolution of SDT and chart its enshrinement as a legal principle within both the GATT and the WTO, discussing its effectiveness and legal nature. The chapter will discuss the twin principles of non-reciprocity in both negotiations and concessionary offers upon which SDT is grounded, which has led to a system of asymmetrical reciprocity and unilateral preferences.[120] The chapter will show how, during the Uruguay round of negotiations, the LDCs sought to rely on an SDT as a means of securing a bespoke LDC-only dispute settlement system adjunct to the DSU. The discovery of these LDC proposals, which were submitted during the final stages of the dispute settlement negotiations, and the discourse surrounding the subsequent failure of the LDCs to secure an alternative

[119] 'Press Release: Speech by Mr. A. Dominique, (Haiti) Delivered in Plenary Session on 10 November 1954', GATT/199 2 <https://docs.wto.org/gattdocs/q/GG/GATT/199.PDF> accessed 24 October 2016.
[120] Tony Heron, *Pathways from Preferential Trade* (Palgrave Macmillan 2013) 3.

dispute resolution system, represent a major and significant addition to the body of academic knowledge. Moreover, the legacy of their failure to secure a DSU ' opt-out' arguably left the LDCs with a DSU they neither wanted nor, in a sense, agreed to. This aligns with the second research question because the failure to secure the opt-out left the LDCs with a DSU system which lacked the functionality they required to redress violations of their trade rights. In practical terms, the LDCs were largely unable to engage with the DSU because of a variety of inherent structural difficulties within the DSU itself and the lack of critical endogenous capacity required to engage with the DSU. The chapter will explore both the inherent difficulties and the shortcomings in capacity, which would have to be addressed if the LDCs are to engage with the DSU in any meaningful way in the future. This maps directly to the first research question, as these difficulties and capacity issues represent some of the reasons which inhibit LDC engagement with the DSU. The chapter will argue that one of the reasons why LDCs have not thus far fully engaged with the DSU is their failure to secure the 'opt-out', which has left them unable to use the DSU as a means of resolving their trade disputes. The chapter argues that the failure of the 'opt-out' proposal, coupled with both the endogenous barriers faced by the LDCs, which inhibit their effective engagement with the DSU and the potential difficulties they may face enforcing favourable decisions, all represent powerful forces acting upon the LDCs. The underlying effect of these forces is that the DSU is viewed by them as an unworkable system which in turn leads to a

sustained pattern of antipathy and non-engagement therewith. Taken together, this chapter concludes that these represent a significant new facet in our wider understanding of this seemingly intractable problem.

2.1 The origins and underpinnings of SDT

SDT became the default negotiation policy pursued by LDCs, specifically in relation to the DSU. To understand how this situation arose, it is necessary first to know how and why SDT was created and, secondly, how it evolved. Operationally, within the GATT, SDT was conceived against the backdrop of trade negotiations and comprised of non–reciprocity in terms of negotiations and concessionary offers. Together these gave rise to the twin principles underpinning SDT, which are asymmetrical reciprocity and unilateral preferences.[121] It was the 1979 Tokyo declaration,"*Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries*"[122] (the Enabling Clause), that represented a key milestone in terms of the development and formulation of Special and Differential Treatment. The Enabling Clause firmly placed SDT at "…the very heart of developing and least developed countries' legal settlement within the trade regime and is…part of the "package deal of membership."[123] Furthermore, it was the Enabling Clause which

[121] ibid.
[122] 'General Agreement on Tariffs and Trade; Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries; L/4903;3 December 1979' <https://docs.wto.org/gattdocs/q/GG/L4999/4903.PDF> accessed 3 October 2016.
[123] Stephanie Switzer, 'A Contract Theory Approach to Special and Differential Treatment and the WTO' (2017) 16 Journal of International Trade Law and Policy 126, p135.

incorporated the term SDT into the multilateral trading system[124] and formally recognised LDCs as a separate subset of the developing countries.[125] Before this, the countries referred to in this thesis as LDCs formed part of an undefined collection of countries referred to as 'underdeveloped countries.'[126] As U Aung Soe of Burma (now Myanmar) noted, "countries…like my own, are generally known as underdeveloped countries. It is fashionable nowadays to speak of these countries as a group, as distinct from the more developed countries, on account of the peculiarity of their economic problems."[127]

2.1.1 The antecedents of SDT

The origins and rationale underpinning SDT pre-date the Enabling Clause. Hudec, in his seminal work discussed below, on the participation of Developing Countries in the GATT system,[128] opines that the 1946-1948 - post World-War II UN / GATT negotiations (discussed below)cast the

[124] B Hoekman, 'Operationalizing the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment' (2005) 8 Journal of International Economic Law 405, 405; Heron (n 120) 9–24; Bernard Hoekman, Constantine Michalopoulos and L Alan Winter, 'Special and Differential Treatment of Developing Countries in the WTO: Moving Forward after Cancun' (2004) 27 The World Economy 481, 482; Bernard M Hoekman and Michel M Kostecki, *The Political Economy of the World Trading System by Hoekman, Bernard M., Kostecki, Michel M. (2009) Paperback* (Third Edition, Oxford University Press 2009) 537; Constantine Michalopoulos, 'The Role of Special and Differential Treatment for Developing Countries' (The World Bank Development Research Group Trade 2000) Policy Research Working Paper 2388 25–41 <https://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-2388>; Mari Pangestu, 'Special and Differential Treatment in the Millennium: Special for Whom and How Different?' (2000) 23 The World Economy 1285, 1288; Whalley, John, 'Special and Differential Treatment in the Millennium Round' (1999) 22 The World Economy 1065, 3.

[125] Hawthorne (n 28) 45; *GATT Ministerial Meeting, Declaration of Ministers approved at Tokyo on 14th September 1973* (n 36) 6.

[126] *GATT The Ninth Session of the Contracting Parties and the Review of the GATT* (1954) MGT/27/54 4,5. Note, other descriptions were also used such as, 'less economically developed countries' ibid 4.

[127] *Delegation Release - Speech by U Aung Soe (Burma) Delivered in Plenary Session on 10 November 1954* (1954) MGT/54/54 1.

[128] Hudec and Finger (n 81).

future of international trade policy.[129] Hudec states that the trade policy rules governing international trade were exclusively premised upon there being a single set of rules which were to be applied equally to all countries, whether developing or otherwise.[130] Within the scope of the GATT, any advantage given by a GATT member to any other country had to be given to every other GATT member, which is known as the most-favoured-nation (MFN) principle.[131] There was not, however, uniform acceptance of this position. Initially, it was predominantly the Latin American countries who challenged the assumption that liberalising trade under the MFN, where essentially in relation to trade, all countries treat each other equally, would result in growth and development.[132] Hoekman argues that there was a "… belief that trade liberalization under most-favoured-nation (MFN) auspices does not necessarily help achieve growth and development…"[133] and that emerging industries in developing countries needed a degree of shielding from foreign competition.[134] Gibbs notes that SDT stemmed from "the coordinated political efforts of developing countries to correct the perceived inequalities of the post-war

[129] ibid 27.
[130] ibid 28.
[131] 'General Agreement on Tariffs and Trade (GATT 1947)' 2 <https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm>.
[132] Murray Gibbs, UNCTAD, Background paper on Special and Differential Treatment in the Context of Globalization, Note presented to the G15 Symposium on Special and Differential Treatment in the WTO Agreements, New Delhi, 10 December 1998, in UNCTAD, 'UNCTAD Commercial Diplomacy Programme, Training Tools for Multilateral Trade Negotiations: Special & Differential Treatment' (UNCTAD Geneva 2000) 26 <https://unctad.org/system/files/official-document/ditcmisc35_en.pdf>.
[133] Hoekman (n 124) 406.
[134] ibid.

international trading system,"[135] which they sought to achieve by obtaining preferential treatment in a range of economic areas.[136] However, with the post-war decolonisation by the European powers, the African and Asian countries argued that "…the peculiar structural features of the economies of developing countries and distortions arising from historical trading relationships constrained their trade prospects."[137] Not only did these countries add political weight to the argument for SDT, but they also sought to broaden the reach and scope of SDT to deal with issues key policy areas such as the balance of payments, broadening their industrial and export base through the use of subsidies, and reducing their dependence on primary exports.[138]

The forum for this debate was the 1946-1948 UN / GATT negotiations which related to the proposed creation of an International Trade Organisation whose broad remit was to have included oversight of *inter alia* international trade and labour. The output of these negotiations was the ill-fated International Trade Organisation Charter,[139] which contained SDT-esque provisions which Hawthorne notes represent the antecedents of SDT.[140] Hudec noted that the United States was of the view that while special rules and exceptions may be required for developing countries,

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[135] Murray Gibbs, UNCTAD, Background paper on Special and Differential Treatment in the Context of Globalization, Note presented to the G15 Symposium on Special and Differential Treatment in the WTO Agreements, New Delhi, 10 December 1998, in UNCTAD (n 132) 26.
[136] ibid.
[137] ibid.
[138] ibid.
[139] Hawthorne (n 28) 40; Murray Gibbs, UNCTAD, Background paper on Special and Differential Treatment in the Context of Globalization, Note presented to the G15 Symposium on Special and Differential Treatment in the WTO Agreements, New Delhi, 10 December 1998, in UNCTAD (n 132) 26.
[140] Hawthorne (n 28) 40.

these should be dealt with outside the realm of trade policy, by way of the UN (Economic and Development Sub-Commission) and by other institutions such as the World Bank.[141] Although the International Trade Organisation Charter was completed at the 1948 Havana Conference,[142] it was subsequently rejected by the US Congress and thus never came into force.[143]

The demise of the International Trade Organisation Charter, and with it, the International Trade Organisation it would have spawned, left the GATT as the primary mechanism governing world trade.[144] Nevertheless, some of the SDT provisions of the International Trade Charter, specifically those contained in Article 13 (Governmental Assistance to Economic Development and Reconstruction)[145], were incorporated into GATT Article XVIII.[146] These ITO measures were (a) the infant industry provisions (Article 13,7)[147], which allowed developing countries to introduce measures to foster the development of new industries[148], and (b) the ability to apply quantitative import restrictions Article (13,3)[149] to assist domestic producers.[150] Hudec notes that while many of the provisions

[141] Hudec and Finger (n 81) 28.
[142] 'Havana Charter for an International Trade Organisation' (International Commission for the International Trade Organisation 1947) <https://www.wto.org/english/docs_e/legal_e/havana_e.pdf>.
[143] Hudec and Finger (n 81) 33; TN Srinivasan, *Developing Countries and the Multilateral Trading System: From GATT to the Uruguay Round and the Future* (1st Edition, Westview Press Inc 1999) 11; Alex Ansong, *Special and Differential Treatment of Developing Countries in the GATT/WTO: Past, Present, Future* (1 edition, CreateSpace Independent Publishing Platform 2012) 9; Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization* (3rd Edition, Cambridge University Press 2013) 78.
[144] Hawthorne (n 28) 40.
[145] 'Havana Charter for an International Trade Organisation' (n 142) 21.
[146] Srinivasan (n 143) 23.
[147] 'Havana Charter for an International Trade Organisation' (n 142) 23.
[148] Hudec and Finger (n 81) 32; Hawthorne (n 28) 41.
[149] 'Havana Charter for an International Trade Organisation' (n 142) 22.
[150] Hawthorne (n 28) 41; Hudec and Finger (n 81) 32.

contained in the ITO were never incorporated into GATT 1947, nevertheless, the principle that the conditions faced by developing countries merited a degree of latitude and special dispensation from the GATT legal discipline was included therein.[151]

2.1.2 The GATT Review Session 1954-1955

The next major milestone in the development of SDT was the GATT 1954-1955 Review Session (the GATT Review),[152] the outcome of which many writers[153] cite as representing the genesis of SDT.[154]

At the outset of the 1954-1955 Review Session, the GATT had *per se* not come into force; the original agreement was, however, applied on the basis of the 1947 Protocol of Provisional Application.[155] The GATT Review afforded the opportunity for the GATT Contracting Parties to formulate both the creation of the GATT as a permanent body and to determine its long-term future.[156] As part of the GATT Review agenda formulation process, the GATT Intersessional Committee met in August 1954.[157] At this meeting, there was a 'general consensus that the GATT should be

[151] Hawthorne (n 28) 41; Hudec and Finger (n 81) 33.
[152] *GATT The Ninth Session of the Contracting Parties and the Review of the GATT* (n 126).
[153] Ansong (n 143) 25; George A. Bermann and Petros C. Mavroidis, *WTO Law and Developing Countries* (Cambridge University Press 2007) 17; Michalopoulos (n 124) 4; Constantine Michalopoulous, *Developing Countries in the WTO* (Palgrave Macmillan 2001) 25; Hunter Nottage, 'Trade and Competition in the WTO: Pondering the Applicability of Special and Differential Treatment' (2003) 6 Journal of International Economic Law 23, 25; Juliana Peixoto Batista, 'Flexibilities for Developing Countries in the DOHA Round as a La Carte Special and Differential Treatment; Retracing the Uruguay Steps?' (2010) 9 Cadernos PROLAM/USP 164, 169.
[154] Whalley argues that SDT evolved from the 1960s with the GATT Review being simply an attempt to incorporate the concerns of developing countries into the GATT system. See Whalley, John (n 124) 3.
[155] 'Protocol of Provisional Application, Geneva' (1947) <https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/prov_appl_gen_agree_e.pdf> accessed 17 October 2016.
[156] Hudec and Finger (n 81) 41.
[157] *GATT Intersessional Committee* (1954) Press Release GATT/162.

formalised into an organisation promoting global trade rules.[158] Moreover, "... the special problems of countries in less advanced stages of development were acknowledged as one of the most important elements in the Review Session."[159] However, as the opening of negotiations neared, this sentiment was tempered by the suggestion that there was a limit as to how far the GATT could respond economically to the needs of under-developed countries without having an overly adverse effect on the interests of other countries.[160] Hudec and Finger argue that the review gave the developing countries the opportunity to renew demands for greater legal freedom to create further protectionist measures to support small embryonic industries and seek relief from reciprocal tariff concessions.[161]

The GATT Review also allowed what we now call LDCs to air their concerns. Burma (now Myanmar[162]), for example, argued *inter alia* that if the GATT was not modified to take account of their special circumstances, this would harm and be prejudicial to their economic development.[163] Thus, to develop economically, they required the application of SDT to exempt them from the principle of reciprocity (where one country agrees to a tariff reduction in return for a reciprocal concession from its negotiating partner). They argued that they were unable to either desist

[158] ibid 1.
[159] ibid.
[160] *GATT The Ninth Session of the Contracting Parties and the Review of the GATT* (n 126) 5.
[161] Hudec and Finger (n 81) 41.
[162] 'Should It Be Burma or Myanmar?' *BBC News Magazine* (26 September 2007) <http://news.bbc.co.uk/2/hi/7013943.stm> accessed 1 May 2019.
[163] *Delegation Release - Speech by U. Aung Soe (Burma) Delivered in Plenary Session on 10 November 1954* (n 127) 1.

from the creation of new tariffs or to reduce existing tariffs which they deemed were required to establish both new industries and protect infant industries.[164] Similarly, they faced difficulties in seeking to remove quantitative restrictions, which were required to control capital outflows of foreign currency.[165] U Aung So, the Burmese delegate, also highlighted the fact that these tariffs raised a considerable amount of revenue in customs duties, a major source of government revenues.[166]

Hudec and Finger note that developing countries were in a powerful negotiating position during the GATT Review in so far as they possessed the ability to declare the GATT unsatisfactory, thereby threatening the GATT as well as the GATT review itself,[167] which would have resulted in their being no body regulating the conduct of international trade. Again, the LDCs gave voice to this, an example of which was expounded by Haiti, who stated that "...great trade movements can be preserved only if...all participants find them to their mutual and permanent interest..."[168]

In relation to SDT, the key outcomes of the GATT Review were (a) for the first time, with the adoption of the revision to Art. XVIII.[169] "…provisions were adopted to address the needs of developing countries as a group within the GATT…."[170] These provisions established what we would now

[164] ibid.
[165] ibid 2.
[166] ibid 1 There was also sharp criticism of developing countries for depressing the global prices by dumping surplus agricultural products potentially harming exports of rice upon which their trade was primarily based. ibid 2.
[167] Hudec and Finger (n 81) 42.
[168] 'Press Release: Speech by Mr. A. Dominique, (Haiti) Delivered in Plenary Session on 10 November 1954', (n 119) 2.
[169] *Contracting Parties Ninth Session Summary record of the Forty-Seventh Meeting* SR.9/47 18 March 1955, 3.
[170] Michalopoulos (n 124) 4.

call SDT for developing countries as a legal principle within the GATT[171] and (b) the acceptance of the principle that the provision of legal freedoms within GATT was beneficial to developing countries.[172] Hudec argued that these legal freedoms allowed developing countries to impose trade barriers by way of import quotas or high tariffs and allowed developing countries to discriminate in favour of other developing countries to the disadvantage of developed countries.[173] Hudec further opined that these SDT trade barriers actually harm developing countries and, by the 1980s, had caused economic stagnation and crippling levels of debt.[174]

Although measures to protect infant industries still required approval under the revised Art. XVIII, the right of an affected country to veto the measures was removed, which thus made it easier to initiate such measures.[175]

Furthermore, a new provision, Art. XVIII (B) was added with specific provisions to be exercised exclusively by developing countries to adopt quantitative restrictions on imports to protect their balance of payments.[176] This again clearly demonstrates that SDT was to be given to developing countries. In addition, Art. XVIII (B) *inter alia* provided that

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[171] Ansong (n 143) 25; Robert E Hudec, 'GATT and the Developing Countries' (1992) 1992 Colum Bus L Rev 67 15, 70.
[172] Hawthorne (n 28) 41; Hudec and Finger (n 81) 43.
[173] Hudec (n 171) 69.
[174] ibid 74.
[175] Hudec and Finger (n 81) 42; Michalopoulos (n 124) 4.
[176] Michalopoulous (n 153) 25; Ansong (n 143) 25; Hudec and Finger (n 81) 42; Nottage (n 153) 25; Sidney Wells, 'The Developing Countries GATT and UNCTAD' (1969) 45 International Affairs (Royal Institute of International Affairs 1944-) 64, 66; Batista (n 153) 169; Kessie, E., 'The Legal Status of Special and Differential Treatment Provisions under the WTO Agreements' in George A. Bermann and Petros C. Mavroidis (n 153) 17; Heron (n 120) 16.

the test to be applied to the adoption of such restrictions was based on a determination by the imposing country that the imposition of such measures was required to protect its monetary reserves and ensure adequate capital reserves required to support economic development.[177] Given that, as Hudec and Finger note, developing countries have a boundless requirement for developmental resources, this test permitted the imposition of virtually any restriction.[178]

As a result of the foregoing, developing countries had acquired the legal freedom to impose such restrictions, thus deviating from or opting out of the mainstream GATT rules relating to sectorial state assistance,[179] though, as Hudec noted, with this freedom came potentially damaging downsides.[180] As will be discussed later in the chapter, these downsides are not restricted exclusively to matters of economic policy. The LDC stance during the DSU negotiations, where they sought to opt-out of the mainstream rules, has caused and is still causing, the LDCs serious difficulties in resolving trade disputes

During the GATT Review, the Contracting parties, in relation to the procedures for tariff negotiations, further extended the concept of developing countries being able to opt-out of mainstream GATT provisions.[181] The principle of reciprocity (as defined above) was relaxed in

[177] 'The General Agreement on Tariffs and Trade (GATT 1947), Article XVIII: Governmental Assistance to Economic Development' 489 <https://www.wto.org/english/docs_e/legal_e/gatt47_02_e.htm#art18>.
[178] Hudec and Finger (n 81) 42.
[179] 'The General Agreement on Tariffs and Trade (GATT 1947), Article XVIII: Governmental Assistance to Economic Development' (n 177) [4 (a)]; Hudec (n 171) 70.
[180] Hudec (n 171) 74.
[181] *Review Working Party II on Tariffs, Schedules, and Customs Administration; Report to the Contracting Parties* (1955) L/329.

Article XXVIII (bis).[182] Clause 3 (ii) of Article XXVIII (bis) states that tariff negotiations involving less developed countries should be carried out in a flexible manner reflective of (a) tariff usage to assist economic development[183] and (b) tariff usage as a revenue source.[184] From this, it can be inferred that during trade negotiations, developed countries were not to press for full reciprocity from least developed countries;[185] thus, the principle of reciprocity need not necessarily be applied. [186] Beyond these measures, Hudec and Finger note that the very fact that any changes were made represents the most significant result of the GATT Review,[187] with the changes to Article XXVIII representing the end of the line for the principle of reciprocity, described as "... the dying gasp of a legal policy that was rapidly losing conviction." [188] Heron goes further, arguing that while the GATT Review *per se* was not noteworthy in terms of the substantive reforms, it created an environment and understanding that the development of SDT was mirrored by the decline in the application of GATT principles to the developing countries.[189] While the opinions of Hudec, Finger and Heron were of their time, recent events discussed later in this thesis indicate quite clearly that opposition to SDT was far from being a 'dying gasp'. Instead, opposition to SDT was simply in a state of

[182] Hudec and Finger (n 81) 42.
[183] *Review Working Party II on Tariffs, Schedules, and Customs Administration; Report to the Contracting Parties* (n 181) [3, 3(ii)] 23; Nottage (n 153) 25.
[184] *Review Working Party II on Tariffs, Schedules, and Customs Administration; Report to the Contracting Parties* (n 181) [3 (ii)] 23.
[185] Hudec and Finger (n 81) 42; Batista (n 153) 169; George A. Bermann and Petros C. Mavroidis (n 153) 17.
[186] Hudec and Finger (n 81) 42.
[187] ibid 43.
[188] ibid.
[189] Heron (n 120) 16.

stasis and would gradually re-emerge following the conclusion of the Uruguay Round.

What is clear is that the principle that developing countries should benefit from SDT, which had been tacitly recognized at the inception of the GATT, became enshrined within the body politic of the GATT during the GATT review. Additionally, the GATT review widened not only the scope of SDT but also, for the first time, proffered opt-outs to developing countries. As will be discussed later in this chapter, the LDCs opted to base their Uruguay Round negotiations concerning the creation of the DSU on a proposal to opt-out of the mainstream DSU. To the LDCs, the allure of SDT was that it would enable them to settle trade disputes through negotiation need to divert resources towards acquiring the skills, knowledge and infrastructure which would be required to fully engage with the DSU. SDT was thus to be the 'silver bullet' which would allow them to settle disputes without the need for any domestic or other reform.

2.1.3 Grounding SDT - the Haberler Report to the Tokyo Round

GATT members were unsure as to whether the outcomes of the 1954 - 1955 GATT review had been sufficient to deal with the special problems of developing countries and, in 1957, appointed a panel of experts, chaired by prominent Harvard economist Gottfried Haberler, to consider the

special problems of developing country Members.[190] The 1958 Haberler report (Trends in International Trade)[191] showed that developing countries' trade had failed to improve during the first decade of GATT.[192] Citing Tussie[193] and Evans[194], Hawthorne describes the Haberler report as a pivotal point in relations between developed and developing countries.[195] The recommendations of the report were directed towards the "primary producing countries,"[196] which, as will be discussed below, includes a number of what we would now recognize as being LDCs. The key recommendations were (i) that developed countries should ensure that the import demand for primary products (the mainstay of many LDCs' exports) should be shielded from the effects of business recessions,[197] (ii) that developed countries should give developing countries (which included what we now call LDCs) more unfettered economic aid,[198] (iii) that there should be "moderation of agricultural protectionism" to facilitate food exports of what we would now call LDCs [199] (iv) that developed countries should reduce the tariff levels in relation to the import of minerals[200] and (v) that there should be a reduction on the domestic revenue duties in

[190] Michael Hart and Bill Dymond, 'Special and Differential Treatment and the Doha" Development" Round' (2003) 37 Journal of World Trade 395, 400.
[191] *Trends in International Trade, (Preliminary Version); Note by the Executive Secretary* (1958) MGT/80/58.
[192] Hudec (n 171) 70.
[193] Diana Tussie, *The Less Developed Countries and the World Trading System: A Challenge to the Gatt* (Palgrave Macmillan 1987) 4.
[194] John W Evans, *The Kennedy Round in American Trade Policy: The Twilight of the GATT* (Harvard University Press 1971) 120.
[195] Hawthorne (n 28) 41.
[196] *Trends in International Trade, (Preliminary Version); Note by the Executive Secretary* (n 191) 135.
[197] *ibid.*
[198] *ibid.*
[199] *ibid.*
[200] ibid 135–136.

countries importing tropical food and drinks.[201] Writers agree that there was virtually no implementation of the primary recommendations[202] of the report, nor did it lead to significant changes in GATT policies.[203]

The Haberler report itself highlighted the developing countries' justifiable "...feeling of disquiet...that the present rules and conventions about commercial policies are relatively unfavourable to them."[204] Moreover, Lanoszka[205] argues that the emphasis placed by the Haberler report on the special considerations required for developing countries[206] formed the basis upon which SDT for LDCs was developed[207] and marked a major change in the orientation of developing country concerns.[208]
Although, as noted earlier, the main recommendations of the Haberler report failed to gain traction, the LDCs nonetheless still maintained that having a preferential market was vital to their economic development; hence they still maintained that legal recognition within the GATT of trade preferences was essential.[209] In 1964 the developing countries threatened to break away from the GATT under the auspices of a body called the

[201] *ibid 136.*
[202] Hart and Dymond (n 190) 400; Rorden Wilkinson and James Scott, 'Developing Country Participation in the GATT: A Reassessment' (2008) 7 World Trade Review 473, 490.
[203] Heron (n 120) 17.
[204] *Trends in International Trade, (Preliminary Version); Note by the Executive Secretary* (n 191) 12.
[205] Anna Lanoszka, *The World Trade Organization: Changing Dynamics in the Global Political Economy* (Lynne Rienner Publishers 2009) 201.
[206] *Trends in International Trade, (Preliminary Version); Note by the Executive Secretary* (n 191) 136.
[207] Lanoszka (n 205) 201; Hawthorne (n 28) 42.
[208] Heron (n 120) 17.
[209] Yusuf, A, 'Differential and More Favourable Treatment: The GATT Enabling Clause' (1980) 14 J. World Trade L. 20, 488.

United Nations Conference on Trade and Development (UNCTAD, which they had helped to create.[210]

Hudec notes that during the 1960s, "GATT was preoccupied with meeting UNCTAD's competition…"[211] and with the demands of developing countries who sought a range of development-related trade preferences.[212] Thus in 1964, the GATT adopted Part IV of the GATT,[213] which contained a non-binding commitment to create trade opportunities for developing countries. It was not, however, until 1968[214] that an agreement was reached to allow developed countries to offer developing countries non-reciprocal preferential treatment, such as low or duty-free treatment of products originating from said developing countries through a mechanism called the Generalized System of Preferences (GSP).[215] However, because the GSP violated the MFN clause contained in GATT Article I (1),[216] it took a further two years for GATT members to agree on a waiver to allow these GSP programs to be implemented.[217]

As noted above, until the 1970s, within the GATT, there was no stratification or differentiation between the least developed and

[210] Hudec (n 171) 70–71.
[211] ibid 72.
[212] Yusuf, A (n 209) 489.
[213] Hudec (n 171) 72; Yusuf, A (n 209) 489; 'General Agreement on Tariffs and Trade (GATT 1947)' (n 131) 53 et.seq.
[214] Hudec (n 171) 72; *GATT Basic Instruments and Selected Documents; Trade Arrangements between India, the United Arab Republic and Yugoslavia, Decision of 14th November 1968, L/3132*, vol Supplement 16 (William S Hein & Co, Inc, 2003) 17.
[215] See, Yusuf A., A, *Differential Treatment as a Dimension of the Right to Development.* (Sijthoff & Noordhoff 1980) 234 et. seq.
[216] 'General Agreement on Tariffs and Trade (GATT 1947)' (n 131) 3.
[217] Hudec (n 171); Yusuf, A (n 209) 490,491.

developing countries. This was highlighted in a statement by the Central African Republic at the 1963 Ministerial meeting where it was stressed that there were varying degrees of under-development between countries noting that the "...Central African Republic's economy, in particular, needs much more care than the Brazilian economy or the Nigerian economy."[218] This sentiment was echoed by the Congolese representative who stated that "...among what we generally refer to as the less-developed countries there are some which are particularly less developed..."[219]

While Hawthorne notes evidence of LDC recognition within the GATT council minutes of 1971,[220] as outlined above, LDCs as a defined group[221] were not formally recognised[222] within the GATT trade arena until the Tokyo Declaration of 1973.[223]

Not only did the 1979 Enabling Clause recognise the LDCs as a special group, it also conceptually grounded SDT for LDCs at the centre of the GATT legal system.[224] This grounding is clearly illustrated in paragraph 6

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[218] 'GATT Meeting of Ministers; Statement Made by Mr. Pierre Kalck, Economic Counsellor, Embassy in Paris, Representing the Minister of Economy and Rural Activities, Central African Republic', Spec (63)182, 17th May 1963 2 <https://docs.wto.org/gattdocs/q/GG/SPEC/63-82.pdf> accessed 15 November 2016.

[219] 'GATT Press Release; Meeting of Ministers 16-21 May 1963; Statement Made by Mr. Suminwa, Counsellor of Embassy at Brussels, Congo (Leopoldville)', (1963) GATT/ 784, 16 May 1963 1 <https://docs.wto.org/gattdocs/q/GG/GATT/784.PDF> accessed 15 November 2016.

[220] Hawthorne (n 28) 45; *GATT Council; Minutes of Meeting; Held in the Palais des Nations, Geneva on 9 November 1971* (n 35) 12–13.

[221] The possibility of defining LDCs was considered in 1964, however the idea was deferred, see, *Committee on the Legal and Institutional Framework of GATT in relation to Less-developed Countries; Report of Committee; Revision* (1964) L/2195/Rev. I 3.

[222] Hawthorne (n 28) 45; *GATT Council; Minutes of Meeting; Held in the Palais des Nations, Geneva on 9 November 1971* (n 35) 12–13.

[223] *GATT Ministerial Meeting, Declaration of Ministers approved at Tokyo on 14th September 1973* (n 36) 5.

[224] Kessie, E., 'The Legal Status of Special and Differential Treatment Provisions under the WTO Agreements' in George A. Bermann and Petros C. Mavroidis (n 153) 18; Hawthorne (n 28) 45; Nottage (n 153) 27; Pangestu (n 124) 1288; John Whalley, 'Non-Discriminatory Discrimination: Special and Differential Treatment Under the GATT for Developing Countries' (1990) 100 The Economic Journal 1318, 1321.

of the Enabling Clause, which *inter alia* states that during trade negotiations with LDCs, "...developed countries shall exercise the utmost restraint in seeking... and the least-developed countries shall not be expected to make concessions or contributions that are inconsistent with the recognition of their particular situation and problems."[225] The Enabling Clause also provided that LDCs were to be afforded "Special treatment...in the context of any general or specific measures in favour of developing countries."[226] This allowed LDCs to seek the application of SDT to all concessions made by developed countries to developing countries, and this became one of the core elements of a work programme of a separate LDC sub-committee,[227] discussed below in section 3.2.

In terms of the wider application of SDT, Hudec describes the 1979 Tokyo Round as the "…high-water mark of [SDT] treatment."[228] As part of the Tokyo Round, Yousef notes that in future negotiations, the contribution of Developing countries "…would be in line with their capacity… and the progressive development of their economies."[229] Arguably, this paved the way for the application of the country-specific SDT seen in the WTO Agreement on Trade Facilitation[230] , which is discussed in greater detail in Chapter five. However, the Enabling Clause failed to give "…a contractual

[225] 'General Agreement on Tariffs and Trade; Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries; L/4903;3 December 1979' (n 122) 3.
[226] ibid 2.
[227] *Sub-Committee on Trade of Least-Developed Countries; Proceedings of First Meeting* (1981) COM.TD/LLDC/1 6.
[228] Hudec (n 171) 73.
[229] Yusuf, A (n 209) 488.
[230] Switzer (n 123) 128,133,134 et. seq.

status to the preferential treatment of developing states…"[231] which had allowed the developed countries to selectively grant SDT in the first place.[232] Additionally, the writer posits that the absence of a clear contractual obligation to implement all measures contributed to SDT measures being granted which were hortatory in nature while derogating the enforceability and operationalisation of others, clear evidence of which will be shown in the next two chapters.

2.1.4 Summary of the origins and underpinnings of SDT

This section has charted the origin of the term SDT and has examined the sources and underpinning of SDT from the end of the Second World War. It has charted the antecedents of SDT from the failed International Trade Organization Charter,[233] showing how some of the provisions contained therein were incorporated into GATT Article XVIII.[234] Next, it charted the maturation of the concept of SDT through the (i) GATT Review Session[235] (narrating the opinions of several LDCs who were represented thereat.[236]) and (ii) the impact of the Haberler Report.[237]

Finally, the section reviewed the major changes ushered in at the Tokyo Round,[238] which not only included the formal recognition of LDCs as a

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[231] Yusuf, A (n 209) 507 The developing countries had committed to this in other ways such as Resolution 21(II) of UNCTAD, ibid.
[232] ibid.
[233] 'Havana Charter for an International Trade Organisation' (n 142).
[234] Srinivasan (n 143) 23.
[235] *GATT The Ninth Session of the Contracting Parties and the Review of the GATT* (n 126).
[236] *Delegation Release - Speech by U. Aung Soe (Burma) Delivered in Plenary Session on 10 November 1954* (n 127); 'Press Release: Speech by Mr. A. Dominique, (Haiti) Delivered in Plenary Session on 10 November 1954', (n 119).
[237] *Trends in International Trade, (Preliminary Version); Note by the Executive Secretary* (n 191).
[238] *GATT Ministerial Meeting, Declaration of Ministers approved at Tokyo on 14th September 1973* (n 36).

distinct subset of the Developing Countries[239] but also firmly embedded SDT for LDCs at the heart of the GATT legal system.[240] In the next section, consideration will be given to how the LDCs' acquired a platform from which they would evolve SDT from dealing with developmental and economic issues into a broader policy tool deployed by them in future GATT negotiations.

2.2 The expansion and development of SDT

Following the conclusion of the Tokyo Round in 1979, a work programme was initiated to "...ensure that the results of the negotiations are effectively implemented..."[241] To this end, a Committee on Trade and Development was created,[242] part of whose role was defined as providing "...special attention to the special problems of least developed countries."[243]

The committee opined that in relation to this role, its primary responsibility was to oversee and supervise the implementation of the Enabling Clause, particularly in relation to LDCs[244] and pondered the creation of a separate body specifically for LDCs.[245] Pending the outcome of these deliberations, there were signs that progress was being made in the implementation of SDT, with the EC exempting LDCs from duties on

[239] *GATT Council; Minutes of Meeting; Held in the Palais des Nations, Geneva on 9 November 1971* (n 35); Hawthorne (n 28) 45.
[240] Kessie, E., 'The Legal Status of Special and Differential Treatment Provisions under the WTO Agreements' in George A. Bermann and Petros C. Mavroidis (n 153) 18; Hawthorne (n 28) 45; Nottage (n 153) 27; Pangestu (n 124) 1288; Whalley (n 224) 1321.
[241] *GATT Work Programme; Proposal by the Director-General* (1979) C/W/334.
[242] ibid 3.
[243] ibid.
[244] *Work Programme of the Committee on Trade and Development; Note by the Secretariat* (1980) COM.TD/W/305 6.
[245] ibid.

some agricultural products[246] and some quantitative restrictions on industrial products.[247]

Meanwhile, the terms of reference and the scope of SDT were being expanded into the provision of training courses for LDCs. Finland, Sweden, and Norway funded training based on the wider objective of the Enabling Clause to give "... special consideration to the problems of the least developed among the developing countries."[248]

In March 1980, the Committee on Trade and Development again discussed the creation of a separate LDC body to oversee and supervise the implementation of the Enabling Clause. The proposal met with fierce opposition from some developed countries, who complained, amongst other things, about the proliferation of new bodies, the unnecessary duplication of work, that there were better ways of addressing the LDCs issues, demands for more clarity on the role and purpose of this body, and a clear understanding of the precise work to be undertaken.[249] Other delegations were, on balance, prepared to support it; however, they wished for further discussions about the proposal, proposing that the matter be re-visited at the next committee meeting.[250]

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[246] *Committee on Trade and Development; Background note for the review of implementation of Part IV; Prepared by the Secretariat* (1979) COM.TD/W/291 3.
[247] ibid.
[248] *Press Release: Finland, Norway and Sweden to sponsor courses for Developing Countries* (1979) GATT/1233.
[249] *Committee on Trade and Development; Proceedings of the Fortieth Session; Prepared by the Secretariat* (1980) COM.TD/104 19.
[250] ibid.

These positions drew an angry response from some of the eleven LDC members of the committee,[251] who feared that "…in the absence of specific machinery to focus on their problems, their interests once more might not get the attention required."[252] The chairman called for further consultations and deferred the proposal until the next meeting of the committee.[253] In July 1980, following discussions held by the Director General,[254] a Sub-Committee on Trade of Least Developed Countries was created.[255] The representative of Bangladesh opined that this body would "...serve as the forum in GATT for the discussion of trade problems facing the least-developed countries."[256]

Thus, the LDCs now had a vehicle to not only articulate their views but also the ability to focus on specific LDC problems within the GATT[257] and, as will be shown to broaden the scope and nature of SDT.

2.2.1 The expansion of SDT

At the inaugural meeting of the new body, the LDCs began to flesh out their ideas and policy stances; they called for (a) special measures, including duty-free access for all LDC exports to developed countries,[258] (b) the review of developments in world trade[259] to be extended to include

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[251] *Committee on Trade and Development; Membership of the Committee on Trade and Development* (1980) COM.TD/75/Rev.ll.
[252] *Committee on Trade and Development; Proceedings of the Fortieth Session; Prepared by the Secretariat* (n 249) 20.
[253] ibid 21.
[254] *Committee on Trade and Development; Proceedings of the Forty-first session; Prepared by the Secretariat* (1980) COM.TD/105 ,15.
[255] ibid 15.
[256] ibid 16.
[257] Hawthorne (n 28) 47.
[258] *Sub-Committee on Trade of Least-Developed Countries; Proceedings of First Meeting* (n 227) 2.
[259] *ibid 1.*

payments and finance,[260] (c) that SDT should be extended to the provision of technical assistance and training by the Secretariat[261] and (d) that there should be special financial assistance to assist LDCs in maximising the effectiveness of the SDT provisions provided for under the Tokyo Round Agreements.[262]

The first meeting also proposed extending the remit of review of developments in international trade (above) to include such matters as commercial policy[263], the activities of other GATT bodies[264] and other international bodies.[265]

This provides clear evidence that the range and scope of SDT were being extended; further examples of this are to be found in areas such as Health and Phytosanitary Regulations where there was a call for LDCs to be given SDT in the form of additional 'technical assistance' to understand and enable compliance with the phytosanitary regulations.[266] This extension of technical assistance went beyond simply training and seminars in the form of permanent missions to LDCs.[267]

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[260] ibid 3.
[261] ibid 4.
[262] ibid.
[263] ibid 6.
[264] ibid.
[265] ibid.
[266] In general, the LDCs appeared to accept health related SPS regulations and understood that these were unlikely to be relaxed, therefore they sought technical assistance to understand these regulations and how to comply therewith, see, *Sub-Committee on Trade of Least-Developed Countries; Proceedings of Second Meeting* [1981] COMTD/LLDC/2 3.
[267] *Sub-Committee on Trade of Least-Developed Countries; Proceedings of Third Meeting* (1982) COM.TD/LLDC/3 4.

For the 1982 Ministerial meeting[268], the committee submitted six proposals.[269] Three of these proposals, namely (i) the provision of more flexible rules of origin for LDC products,[270] (ii) a call for greater flexibility for the participation of LDCs in MTN agreements[271] and (iii) the strengthening of technical assistance for LDCs[272] which were approved at the 1982 Ministerial Meeting,[273] clearly extended the scope of SDT beyond that of simply negotiating the non-reciprocal grant of unilateral preferences.

2.2.2 The evolution of SDT as a driver for LDC trade policy

In the early 1960s, there were signs that LDCs were beginning to incorporate SDT into their trade policies. However, the concept of SDT carried with it a degree of stigmatisation in that SDT runs contrary to the MFN in that countries are not treating each other equally and in a non-discriminatory fashion. Because of this, some countries were reluctant to adopt a policy driven by SDT. Evidence can be found in the statement by Uganda at the GATT Ministerial meeting in May 1963, who commented, "I know that to accept differential treatment is to accept discrimination..."[274] nevertheless, he conceded that without SDT, his country would be unable

[268] *GATT Contracting Parties, Thirty-Eighth Session; Ministerial Declaration* (1982) W.38/4.
[269] *Sub-Committee on Trade of Least-Developed Countries; Proceedings of Third Meeting* (n 267) 7–8.
[270] ibid 7.
[271] ibid.
[272] ibid.
[273] *GATT Contracting Parties, Thirty-Eighth Session; Ministerial Declaration* (n 268).
[274] 'GATT Meeting of Ministers; Statement Made by Mr. J. S. Mayanja-Nyangi, Minister Without Portfolio, Ministry of Economic Affairs, Uganda', (1963) Spec (63)75, 17 May 1963 4 <https://docs.wto.org/gattdocs/q/GG/SPEC/63-75.pdf> accessed 15 November 2016.

to develop[275] and therefore Uganda adopted SDT as a policy opining that, ".... in this particular case it is discrimination for a good purpose."[276] Other countries, however, embraced the concept of SDT without such concerns.[277]

The creation of the LDC sub-committee to oversee the implementation of the Enabling Clause gave the LDCs a vehicle to articulate their views and focus on specific LDC problems within the GATT the SDT-driven policy stances of many LDCs. However, the inherent weaknesses in terms of both the enforcement and operationalisation of SDT were beginning to emerge. The LDCs, having embraced SDT as a policy, were increasingly concerned at the pace of implementation of the SDT measures they had fought so hard to secure. With this, the LDCs began pursuing SDT with ever more aggressiveness which can be observed within the LDC statements at the 1982 ministerial meeting discussed below.

Thus, the permanent representative of Madagascar narrated that his government had welcomed the renewed commitment of the GATT Contracting Parties at the 1981 Ministerial, where they had unanimously decided to apply in full the SDT provisions of the General Agreement, and his government had hoped that this would finally herald their full

[275] ibid.
[276] ibid.
[277] 'GATT Press Release; Meeting of Ministers 16-21 May 1963; Statement Made by Mr. Suminwa, Counsellor of Embassy at Brussels, Congo (Leopoldville)', (n 219); *Committee on the Legal and Institutional Framework of the GATT In Relation to the Less-Developed Countries; Statement by the Representative of the Central African Republic* (1963) Spec(63) 282; 'GATT Meeting of Ministers; Statement Made by Mr. Pierre Kalck, Economic Counsellor, Embassy in Paris, Representing the Minister of Economy and Rural Activities, Central African Republic', (n 218).

implementation.[278] In a scathing rebuke to the GATT Contracting Parties, he stated:

> "With great condescension, the rich accepted the idea that the poor must be given differential and preferential treatment on the world market, but Part IV, which they kindly agreed to include in the General Agreement for that purpose, has still not been put into effect after fifteen years."[279]

The representative then proceeded to narrate that Madagascar was of the view that addressing the specific problems they face should be given priority.[280] It is clear from this statement that Madagascar viewed SDT and its implementation to be a central part of its overall GATT policy.

The Minister of Commerce of Uganda, in his statement to the ministerial meeting, spoke similarly of the lack of commitment evinced by developed countries.[281] He noted that "…areas of the GATT which were negotiated at Tokyo which have not been implemented."[282] He added, "Let us be bold and implement those areas for which no resolution has been achieved, especially under Part IV of the GATT."[283] Using the threat of blocking proposals to incorporate the trade in services into the GATT,[284] he added

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[278] *Press Release: GATT contracting parties decide on meeting at Ministerial Level* (1981) GATT/1303.

[279] 'Ministerial Meeting (24-27 November 1982); Statement by Mr. Maurice Ramarozka, Minister Plenipotentiary, Permanent Representative A.I. of Madagascar' (1982) Spec (82)142, November 1982 3 <https://docs.wto.org/gattdocs/q/GG/SPEC/82-142.pdf> accessed 14 November 2016.

[280] ibid.

[281] *Ministerial Meeting (24-27 November 1982); Statement by the Hon Joel M Aliro-Omara, MP, Minister of Commerce of Uganda* (1982) Spec (82)143 1.

[282] ibid 2.

[283] ibid.

[284] Although parties threatened to oppose the inclusion of services a consultative resolution was passed, see *Press Release: Ministers at GATT Session adopt Declaration* (1982) GATT/1328 14.

that in the view of his government, "...we should perfect what we have before entering into new areas."[285] The Minister argued further that liberalisation of trade had been predominantly focussed on manufactured goods while agricultural exports, which formed the primary source of Ugandan export earnings, had been the subject of less focus.[286] Given that agricultural exports formed the primary source of Ugandan export earnings,[287] he went only to call for a review to include SDT measures to freeze current protection levels,[288] codify agricultural support measures[289] and limit export subsidies.[290] This demonstrates not only Uganda's commitment to SDT but also the significance thereof in their multilateral trade negotiations.

Another LDC again demonstrated how significant a factor SDT had become within the policy agenda. The Zambian Minister for Commerce and Industry, his delegation speaking for the first time at the GATT,[291] argued that Part IV of the GATT obliged the developed countries to assist LDCs in the promotion and development of their economies and to facilitate access to export markets[292] as also the provision of both technical and financial assistance measures specifically for LDCs.[293] The

[285] *Ministerial Meeting (24-27 November 1982); Statement by the Hon. Joel M Aliro-Omara, MP, Minister of Commerce of Uganda* (n 281) 2.
[286] ibid.
[287] ibid.
[288] ibid.
[289] ibid.
[290] ibid.
[291] *Ministerial Meeting (24-27 November 1982); statement by the Hon CM Mwananshiku, MP Minister of Commerce and Industry of the Republic of Zambia* (1982) Spec (82)150 1.
[292] ibid 2.
[293] ibid 3.

Minister spoke of the urgent need to implement these and other relevant provisions within the GATT.[294]

The Minister for Industries and Commerce of the People's Republic of Bangladesh, another of the LDCs, formulated a set of proposals predicated upon the SDT principle. Calling for several non-reciprocal special measures, (i) to permit LDCs[295] duty-free access to the exports of LDCs,[296] (ii) to introduce flexible rules or origin for LDC exports[297] and (iii) the eliminate non-tariff export barriers for the LDCs.[298]

A final example displaying how much the principle of SDT had permeated the policy-making of LDCs can be found in the ministerial statement made by the Minister for Trade of the Republic of Tanzania.[299] The minister again referred to the lack of progress that had been made in implementing the SDT provisions of the GATT, stating that the "...developed contracting parties have not translated these commitments into concrete and beneficial measures..."[300] The minister went on to call for (a) duty-free access for all LDC products into the markets of developed countries,[301] (b) the extension of SDT measures to include semi-manufactured goods,[302]

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[294] ibid.
[295] Under the GSP, where the preference giving country decides the scope, extent, and beneficiaries of trade preferences. The recipient countries play no part in determining or modifying the GSP scheme, see BP Onguglo, 'Developing Countries and Unilateral Trade Preferences in the New International Trading System', *Miguel Rodriguez Mendoza, Patrick Low and Barbara Kotschwar (editors), Trade Rules in the Making: Challenges in Regional and Multilateral Negotiation* (The Brookings Institution Press/Organization of American States 1999) Chapter 4,1.
[296] *Ministerial Meeting (24-27 November 1982); Statement by the Minister for Industries and Commerce, Government of the Peoples Republic of Bangladesh* (1982) Spec (82)99 2.
[297] *ibid.*
[298] ibid.
[299] 'Ministerial Meeting (24-27 November 1982); Statement by the Minister for Trade of the United Republic of Tanzania' Spec (82) 13 1 November 1982 <https://docs.wto.org/gattdocs/q/GG/SPEC/82-131.pdf> accessed 14 November 2016.
[300] *ibid 3.*
[301] ibid.
[302] ibid 2.

and (c) an increase in both technical assistance and training programmes.[303] In a similar vein to the Ugandan statement, the Tanzanian minister expressed his government's total opposition to the inclusion of the Trade in Services until such times as all outstanding matters had been adequately addressed.[304]

2.2.3 Summary of the expansion and development of SDT

This section has shown how following the conclusion of the Tokyo Round in 1979, a Committee on Trade and Development was established,[305] the remit of which included the consideration of the special problem affecting LDCs.[306] In March 1980, this committee considered establishing a separate sub-committee specifically for LDCs,[307] which, following consultations with the Director General[308], was established in July 1980.[309]

It has been shown in this section how the LDCs in the early 1980s used this sub-committee as a vehicle to elucidate their SDT objectives and to extend the scope of SDT beyond the realms of asymmetrical reciprocity and unilateral preferences. This culminated in a series of SDT-driven proposals, all of which were approved at the 1982 Ministerial Meeting.[310] The LDCs called for a range of specific measures spanning duty-free access for all LDC exports[311], the application of SDT to payments and

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[303] ibid 3.
[304] ibid 2.
[305] *GATT Work Programme; Proposal by the Director-General* (n 241).
[306] ibid 3.
[307] *Work Programme of the Committee on Trade and Development; Note by the Secretariat* (n 244) 6.
[308] *Committee on Trade and Development; Proceedings of the Forty-first session; Prepared by the Secretariat* (n 254) 15.
[309] ibid.
[310] *GATT Contracting Parties, Thirty-Eighth Session; Ministerial Declaration* (n 268).
[311] *Sub-Committee on Trade of Least-Developed Countries; Proceedings of First Meeting* (n 227) 2.

finance[312], calls for technical assistance and training,[313] and also special financial assistance to enable LDCs to maximise the opportunities that SDT afforded them.[314] Moreover, they called for specific assistance to deal with phytosanitary measures[315] and the establishment of permanent missions within LDCs to provide further technical assistance[316], all of which are beyond the scope of asymmetrical reciprocity and unilateral preferences in trade negotiations.

LDCs also proposed that the remit and scope of the sub-committee should be extended to include commercial policy, other GATT bodies and other international bodies.[317]This proposal has, at best, only a tenuous link to trade negotiations and has nothing to do with either trade-related asymmetrical reciprocity or unilateral preferences. This section not only highlighted the fact that the sub-committee gave the LDCs as a collective group a platform to make their voices heard within the wider GATT body but furthermore, the substance of the proposals also showed that the LDCs had adopted SDT as a key driver of their wider trade policies. The Tokyo Round had recognised LDCs as a defined sub-set of the GATT,[318] and as narrated above, the sub-committee gave them a voice within the GATT. This section, through various examples, shows how LDCs adopted

[312] ibid 3.
[313] ibid 4.
[314] ibid.
[315] *Sub-Committee on Trade of Least-Developed Countries; Proceedings of Second Meeting* (n 266) 3.
[316] *Sub-Committee on Trade of Least-Developed Countries; Proceedings of Third Meeting* (n 267) 4.
[317] *Sub-Committee on Trade of Least-Developed Countries; Proceedings of First Meeting* (n 227).
[318] *GATT Ministerial Meeting, Declaration of Ministers approved at Tokyo on 14th September 1973* (n 36) 6.

SDT as a specific trade policy from the 1960s onwards. It has also demonstrated how LDCs sought to implement their SDT policies using the sub-committee as a platform. While this section has clearly shown that many of the proposals submitted by the sub-committee[319] were accepted at the 1982 Ministerial meeting,[320] it also illustrated both the anger and frustration of the LDCs at the slow rate with which SDT measures were being implemented throughout the GATT agreements. Interestingly, Epps and Trebilcock note that in the 1980s many developing countries "…began to question the effectiveness of SDT, many began to reconsider what trade policies would be appropriate for their development."[321] However, this section has shown that in relation to the LDCs, SDT had permeated their trade policies, becoming a key driver thereof, evincing the beginnings of a divide between the LDCs and the developing countries which "had previously been a fairly homogeneous negotiating bloc."[322] Moreover, the threats to block the proposal to incorporate trade in services into the GATT [323] highlights both the importance of SDT within the trade policies of the LDCs as also the aggressiveness they were prepared to use in pursuit of their SDT policies.

[319] *Sub-Committee on Trade of Least-Developed Countries; Proceedings of Third Meeting* (n 267) 7.
[320] *GATT Contracting Parties, Thirty-Eighth Session; Ministerial Declaration* (n 268).
[321] Epps, Tracy D and Trebilcock, Michael J, 'Special and Differential Treatment in Agricultural Trade, Breaking the Impasse', *Developing Countries in the WTO Legal System, edited by Chantel Thomas and Joel P Trachtman* (Oxford University Press 2009) 331.
[322] ibid 333; See also Hudec (n 171) 74.
[323] *Ministerial Meeting (24-27 November 1982); Statement by the Minister for Industries and Commerce, Government of the Peoples Republic of Bangladesh* (n 296); 'Ministerial Meeting (24-27 November 1982); Statement by the Minister for Trade of the United Republic of Tanzania' (n 299).

This section adds to the general body of academic knowledge by building upon the work of Hudec, while the evidence of a link between SDT and the trade policy of the LDCs both informs and adds to the seminal LDC work of Hawthorne.[324] This section further challenges the 'applied' approach to SDT taken by some writers in terms of its primary purpose being used to gain leverage in negotiations,[325] as a negotiated concession,[326]or as a series of exemptions[327] which do not form a particular policy or programme.[328] This section also demonstrates the clear and coherent relationship between SDT and the trade policies of LDCs.

The next section of this chapter will expand on this linkage concept showing how LDCs deployed their SDT-driven policy in the Uruguay Round negotiations.[329] Further, it will show the influence of SDT as expressed in the LDC proposal to opt-out out of the proposed DSU, favouring instead a bespoke LDC dispute settlement mechanism, which represents one of the core elements of this thesis.

2.3 SDT as a key policy driver in the Uruguay Round

[324] Hawthorne (n 28).
[325] Kessie, E., 'The Legal Status of Special and Differential Treatment Provisions under the WTO Agreements' in Batista (n 153) 170; Kessie, E., 'The Legal Status of Special and Differential Treatment Provisions under the WTO Agreements' in George A. Bermann and Petros C. Mavroidis (n 153) 20.
[326] Stefan De Vylder, *The Least Developed Countries and World Trade* (2nd ed, Sida 2007) 97.
[327] Paola Conconi and Carlo Perroni, 'Special and Differential Treatment of Developing Countries in the WTO' (2015) 14 World trade review 67, 68.
[328] De Vylder (n 326) 95.
[329] *Multilateral Trade Negotiations, The Uruguay Round Ministerial Declaration on the Uruguay Round* (1986) MIN.DEC.

This section will further demonstrate how during the Uruguay Round, SDT played a significant role and was a key driver of the negotiation objectives and strategies of the LDCs. Having regard to the negotiations that resulted in the formulation and drafting of the terms of the DSU, it will be clearly demonstrated that these SDT-driven objectives and strategies manifested themselves in terms of the proposals made by LDCs. Furthermore, it will be shown that when faced with the final draft of the DSU, which had the overwhelming support of WTO members (both developed and developing), LDCs used SDT to "opt-out" of the DSU, favouring instead to seek the creation of a bespoke LDC-only dispute settlement mechanism.

As outlined in Chapter 1, the Uruguay Round of trade negotiations Uruguay (1986-1994) is regarded as the largest, most comprehensive set of trade negotiations ever undertaken.[330] Among the key outcomes were the creation of the WTO and the adoption of the DSU.[331]
The GATT Uruguay round began with a Ministerial meeting on the 15th - 19th of September 1986, which determined the objectives of the trade round,[332] established the principles that would govern the conduct and

[330] The negotiations involved 123 countries and spanned virtually every aspect of trade. See "Understanding the WTO" at https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm>accessed 24 February 2016
[331] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9).
[332] *Multilateral Trade Negotiations, The Uruguay Round Ministerial Declaration on the Uruguay Round* (n 329) 2.

implementation of the outcomes of negotiations[333] and defined the areas that were to be negotiated upon.[334]

Key indicators that SDT represented a core policy objective of the LDCs are to be found in the addresses of the LDC representatives who outlined their country's policy aims *vis-a-vis* the negotiations.

The representative of Bangladesh set out a list of key SDT areas that his delegation "**...**considers vitally important..."[335] for the negotiations; these included (i) strict adherence to and the expansion of SDT in all areas,[336] (ii) complete duty-free access to all LDC exports,[337] (iii) the elimination of all types of non-tariff measures, restrictions and measures affecting LDC producers,[338] (iv) flexible rules of origin for LDC exports,[339] (v) preferential treatment to the LDCs in the application of safeguards, dispute settlement, MTN agreements and all other relevant matters,[340] and (vi) the expansion of technical assistance.[341]

The expansive nature of the above list indicates that SDT not only played a pivotal role in but was central to Bangladesh's policy. The use of the term 'vitally important' is indicative of the significance Bangladesh attached to securing SDT as a key policy instrument. Throughout the text,

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[333] ibid 2–5 It also provided that all of the constituent components of the Uruguay round were to be treated, '...as parts of a single undertaking' see ibid 2, which meant that all and any agreements had to be accepted, (or otherwise collectively fall) on a "warts and all" basis.
[334] ibid 5 et seq.
[335] 'GATT Contracting Parties at Ministerial Level, 15-19 September, Punta Del Este, Uruguay Statement of Bangladesh' MIN (86)/ST/9 16 September 1986 3 <https://docs.wto.org/gattdocs/q/UR/TNCMIN86/ST9.PDF> accessed 16 November 2016.
[336] ibid 4.
[337] ibid.
[338] ibid.
[339] ibid.
[340] ibid.
[341] ibid.

there are clear calls for an expanded application of SDT. Thus, for example, the Bangladesh representative calls for the elimination of *all* types of non-tariff measures and preferential treatment in the areas of safeguards, dispute settlement and all "...other relevant matters in which... [LDCs]...are at a disadvantage."[342]

Intuitively, given that LDCs are, by the very nature of being LDCs, always at a disadvantage, the term 'other relevant matters' signals the intention of Bangladesh to broaden the application of SDT beyond that of asymmetrical reciprocity and unilateral preferences into all facets of the Uruguay round. It is also of note that Bangladesh specifically singles out dispute settlement as an area where Bangladesh intends to seek 'preferential treatment', the ramifications of which are discussed in detail later in this section.

The Minister for Industries and Trade[343] for the LDC of Tanzania set out the Tanzanian policy objectives. The first objective given was that priority must be given to the "...effective and meaningful implementation of...provisions on differential and more favourable treatment...paying special attention to the least developed...." [344] Thereafter he narrated a list of other objectives, such as duty-free access to developed markets,[345]

[342] ibid.
[343] *Tanzania: Statement by Hon BP Mramba, Minister for Industries and Trade, at the meeting of the GATT Contracting Parties at Ministerial Level, 15-19 September, Punta Del Este, Uruguay* (1986) MIN (85)/ST/50 1.
[344] ibid 2.
[345] ibid.

the elimination of export subsidies and tariff escalation,[346] and also the removal of all non-tariff barriers and all restrictive trade practices.[347] Given that SDT was listed as Tanzania's first objective is suggestive not only of the importance placed upon SDT by Tanzania but also of the extent to which SDT was clearly at the core of their trade policy.

The Burmese representative[348] stated that Burma *inter alia* attached "...great importance to a substantial improvement..."[349] in the treatment of developing countries. Once again, the terminology used indicates how strongly SDT is embedded within and forms part of its overall strategy.

At the Ministerial Meeting, as aforesaid, the Congo, on behalf of *inter alia* the Congo itself and the LDCs Senegal and Tanzania, submitted a proposal[350] to strengthen the SDT provisions[351] within the proposed Brazilian draft ministerial declaration (discussed below). This statement[352] suggests that consultations and the drafting of the proposed declaration took place "...within the Preparatory Committee..."[353] It is worth noting that LDCs such as Rwanda, Senegal and Madagascar, whose representatives did not give statements at the opening session of the ministerial meeting, were all members of the Preparatory Committee.[354]

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346 ibid.
347 ibid.
348 *Burma: Statement by HE U Tin Tun, Permanent Representative, at the meeting of the GATT Contracting Parties at Ministerial Level, 15-19 September, Punta Del Este, Uruguay* (1986) MIN (86)/ST/6 9.
349 ibid 2.
350 *Contracting Parties, Session at Ministerial Level, September 1986, Communication from the Congo* MIN (86)/W/18.
351 ibid 1.
352 *Tanzania: Statement by Hon. B.P. Mramba, Minister for Industries and Trade, at the meeting of the GATT Contracting Parties at Ministerial Level, 15-19 September, Punta Del Este, Uruguay* (n 343).
353 ibid 2.
354 *Preparatory Committee; List of Representatives* (1986) PREP.COM (86) INF/2.

Unfortunately, there is no evidence within the GATT records of these discussions[355] from which one could ascertain whether or not the policies of these LDCs were influenced by SDT. Indeed, there is no record of these LDCs actively participating in the work of the committee at all. This is in marked contrast with Bangladesh and Tanzania, who were regular contributors to the work of the committee.[356] However, this lack of apparent activism may be due to the inaccuracy and/or incompleteness of the records. As with Rwanda, Senegal and Madagascar, there is similarly no mention of Burma within the records of these discussions, and yet in the Burmese Ministerial Statement, the Permanent Representative specifically refers to issues "... we have touched upon..." [357] during the discussions at the Preparatory Committee.[358] This points to the incompleteness of the records of the committee.

From the available evidence, it would appear clear that SDT played a significant role, and as shown above, for many LDCs, SDT represented the core of their trade policy. As was discussed in the last section, in the

[355] 'Preparatory Committee, Record of Discussions, Discussions of 4-5 February' PREP.COM (86) SR/2 18 March 1986 <https://docs.wto.org/gattdocs/q/UR/PREPCOM86/SR2.PDF> accessed 19 November 2016; *Preparatory Committee, Record of Discussions, Discussions of 25-26 February* (1986) PREP.COM (86) SR/3; *Preparatory Committee, Record of Discussions, Discussions of 17-20 March* (1986) PREP.COM (86) SR/4; *Preparatory Committee, Record of Discussions, Discussions of 14-16 April* (1986) PREP.COM (86) SR/5; *Preparatory Committee, Record of Discussions, Discussions of 5-7 May* (1986) PREP.COM (86) SR/6; *Preparatory Committee, Record of Discussions, Discussions of 9-12 June 1986* (1986) PREP.COM (86) SR/7; 'GATT Preparatory Committee, Record of Discussions, Discussions of 23-26 June' PREP.COM (86) SR/8 13 August 1986 <https://docs.wto.org/gattdocs/q/UR/PREPCOM86/SR8.PDF> accessed 19 November 2016; *Preparatory Committee, Record of Discussions, Discussions of 8-31 July 1986* (1986) PREP.COM (86) SR/9.

[356] *Preparatory Committee, Record of Discussions, Discussions of 14-16 April* (n 355) 32–33; *Preparatory Committee, Record of Discussions, Discussions of 5-7 May* (n 355) 10; *Preparatory Committee, Record of Discussions, Discussions of 8-31 July 1986* (n 355) 2, 32.

[357] *Burma: Statement by H.E. U Tin Tun, Permanent Representative, at the meeting of the GATT Contracting Parties at Ministerial Level, 15-19 September, Punta Del Este, Uruguay* (n 348) 2.

[358] ibid.

early 1980s, many developing countries began to question "…the effectiveness of SDT. Many began to reconsider what trade policies would be appropriate for their development."[359] The effect of this was that the recognition of fundamental differences between the developing countries led progressively to the cessation of the developing countries negotiating as a bloc. Thus, in relation to SDT, while the LDCs were acting in concert "developing countries showed themselves to be surprisingly willing to move away from the blocwide special and differential non-reciprocal approach to trade negotiation they had followed in the earlier Tokyo Round."[360] Trachtman and Thomas go further arguing that by the start of the Uruguay Round there was a marked shift away by the developing countries from, "…the centrality of [SDT] treatment towards one of limiting the effects of [SDT] treatment."[361] Batista argues that during the Uruguay Round, there was considerable push-back by the developed countries in terms of granting SDT, particularly to middle-income developing countries.[362] This, coupled with the move away from negotiating as a collective bloc,[363] meant that there was "…no consensus among developing countries for the adoption of a general "umbrella" framework for SDT provisions."[364] There was also a tangible change in how SDT would be applied, coupled with a growing preference for LDCs to

[359] Epps, Tracy D and Trebilcock, Michael J (n 321) 331.
[360] Whalley, John (n 124) 9.
[361] Thomas, Chantel and Trachtman, Joel P, *Developing Countries in the WTO Legal System* (Oxford University Press 2009) 9.
[362] Batista (n 153) 171.
[363] Whalley, John (n 124) 12.
[364] Batista (n 153) 171.

be the recipients of SDT,[365] by, as Whalley clearly states, "…focussing most of the benefits on the least developed the concept of tiering of SDT benefits across types of countries was also introduced."[366] While this may, from an LDC perspective, appear encouraging, as will be discussed in the next two chapters, many of the LDC-specific SDT provisions within the DSU proved to be token-esque, while others were unenforceable. This feature is representative of the current criticism of the application of SDT more generally, where the fact is that "most SDT provisions are not legally binding, either because they are not explicitly included in the WTO agreements or because they are simply expressed as 'best endeavour' clauses."[367] As to the future of SDT, Batista predicted that SDT would be increasingly limited to LDCs and that there "…will be certain tailor-made flexibilities, some sort of variable-geometry [SDT] approach, on a case-by-case basis."[368] Certainly, as will be discussed in Chapter 5, tailor-made, country-specific solutions are currently in vogue. However, in relation to the DSU, the hope of meaningful, effective, and enforceable LDC-specific SDT provisions is somewhat more speculative than substantive.

2.3.1 SDT and the DSU negotiations

Having thus discussed the broad LDC policy objectives and strategies, consideration of how these objectives manifested themselves within the LDC proposals made during the Uruguay Round itself will be considered.

[365] ibid.
[366] Whalley, John (n 124) 13.
[367] Conconi and Perroni (n 327) 10.
[368] Batista (n 153) 190.

The Punta del Este ministerial declaration[369] provided *inter alia* that the overall programme of negotiations was to be facilitated through the creation of a Trade Negotiation Committee.[370] Separate negotiation groups, which would report to the Trade Negotiation Committee,[371] were to be created in respect of the negotiations on goods[372] and services.[373] Four LDCs[374] became members of the Trade Negotiation Committee[375] and each of the two negotiation groups as aforesaid.[376]

As discussed above, LDCs had been active participants in a sub-committee of the Committee on Trade and Development. While this committee did not directly participate in the Uruguay negotiations *per se*, it did have an "...important role in keeping under review the progress of negotiations from the point of view of developing countries."[377]Although in the early years of the Uruguay negotiations, there had been no meetings of the sub-committee,[378] at the Sixty-first meeting of the Committee on Trade and Development, LDCs proposed that the sub-committee be re-activated.[379]

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[369] *Multilateral Trade Negotiations, The Uruguay Round Ministerial Declaration on the Uruguay Round* (n 329).
[370] ibid 1.
[371] ibid 9–10.
[372] ibid 9.
[373] ibid 10.
[374] The four LDCs are Bangladesh, Burma, Senegal Tanzania see, *Multilateral Trade Negotiation the Uruguay Round, Trade Negotiations Committee, Group of Negotiations of Goods (GATT), Group of Negotiation on Services* (1986) MTN.TNC/INF/1; MTN.GNG/INF/1; MTN.GNS/INF/1.
[375] *Trade Negotiations Committee, Meeting of 27 October 1986* (1986) MTN.TNC/1.
[376] *Multilateral Trade Negotiation the Uruguay Round, Trade Negotiations Committee, Group of Negotiations of Goods (GATT), Group of Negotiation on Services* (n 374).
[377] *Committee on Trade and Development, Sixty-First Session, 11-12 June 1987, Annotated Provisional Agenda* COM.TD/W/448 1.
[378] Hawthorne (n 28) 50.
[379] *Committee on Trade and Development, Proceedings of Sixty-First Session,* (1987) COM.TD/126 6; Hawthorne (n 28) 50.

The successful restoration of the sub-committee[380] gave LDCs a forum where they could collectively review the Uruguay negotiations from an LDC perspective[381] and discuss proposals which had been submitted collectively by LDCs to the various negotiation groups,[382] and also formulate and discuss the submission of future proposals.[383] This sub-committee, in effect, became both a clearing house for consensually agreed SDT-driven proposals and a pressure group to highlight LDC interests in the wider Uruguay negotiations.[384] The significance of the influence of this sub-committee on the negotiations surrounding the DSU will be discussed below.

Part I of The Ministerial Declaration on the Uruguay Round provided *inter alia* that dispute settlement was one of the subjects for negotiation,[385] and to facilitate this, Dispute Settlement, Negotiation Group 13 (a sub-group of the Negotiation Group on Goods) was established in February 1987[386] and held its inaugural meeting on the 10th of April 1987.[387] The composition of this sub-committee included three LDC representatives; Bangladesh,[388] Madagascar[389] and Tanzania.[390]

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[380] *Committee on Trade and Development, Proceedings of Sixty-First Session,* (n 379) 7.
[381] Hawthorne (n 28) 50.
[382] *Sub-Committee on Trade of Least-Developed Countries Ninth Meeting, 11 February 1988, Review of Developments in the Uruguay Round of Interest to the Least-Developed Countries* (1988) COM.TD/LLDC/W/32 4.
[383] *Sub-Committee on Trade of Least-Developed Countries, 28 September, Note of Proceedings of the Eleventh Meeting, Revision* (n 114).
[384] Hawthorne (n 28) 50.
[385] *Multilateral Trade Negotiations, The Uruguay Round Ministerial Declaration on the Uruguay Round* (n 329) 7.
[386] *Fifth Meeting of the Group of Negotiations on Goods, Record of Decisions Taken* (1987) MTN.GNG/5 3.
[387] *Negotiating Group on Dispute Settlement, Meeting of 6th April 1987* (1987) MTN.GNG/NG13/1.
[388] *Negotiating Group on Dispute Settlement, List of Representatives* (1987) MTN.GNG/NG13/INF/1 2.
[389] ibid 7.
[390] ibid 11.

By November 1987, there had been some twelve substantive proposals[391] submitted by some sixteen different countries as well as contributions from both the Nordic states[392], the EC[393] and two background papers provided by the GATT Secretariat.[394] Significantly, there were no proposals from any of the LDCs. Given the absence of specific proposals, it is difficult, if not impossible, to ascertain the degree of participation and activism of LDCs in the discussions during this period. The minutes of the meetings are formally written in such a fashion that the identities of the delegation or members are anonymised. For example, on the 11th of July 1988, when debating a note prepared by the Secretariat dealing with SDT in the GATT Dispute Settlement System,[395] the minutes refer simply to "Many delegations...representatives of a number of countries...other delegations...one delegation..."[396] Clearly, from this, it is impossible to determine the nationality of any delegation or representative.

Evidence supporting the participation of LDCs in the negotiations can be found in the Negotiating Group minutes of 4th October 1988,[397] where several of what we would now refer to as LDCs, "called on developed

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[391] Mexico(MTN.GNG/NG13/W/1), New Zealand (MTN.GNG/NG13/W/2), the United States (MTN.GNG/NG13/W/3 and 6), Jamaica (MTN.GNG/NG13/W/5), Japan (MTN.GNG/NG13/W/7 and 9), Switzerland (MTN.GNG/NG13/W/8),Australia (MTN.GNG/NG13/W/11), Canada (MTN.GNC/NG13/W/13) and Nicaragua (MTN.GNG/NG13[W(15), Argentina, Canada, Hong Kong, Hungary, Mexico and Uruguay (MTN.GNG/NG13/W/16); Argentina (MTN.GNG/NG13/W/17) and Hungary (MTN.GNG/NG13/W/18). Negotiating Group on Dispute Settlement, Meeting of 9th November 1987, Note by the Secretariat 1987 (1987) MTN.GNG/NG13/4.

[392] The Nordic States, (MTN.GNG/NG13/W/10), ibid 1.

[393] The European Communities (MTN.GNG/NG13/W/12), ibid.

[394] Background notes by the secretariat (MTN.GNG/NG13/W/4 and 14), ibid.

[395] *Negotiating Group on Dispute Settlement, Differential and More Favourable Treatment of Developing Countries in the GATT Dispute Settlement System, Note by the Secretariat* (1988) MTN.GNG/NGI3/W/27.

[396] *Negotiating Group on Dispute Settlement, Meeting on 11 July 1988, Note by the Secretariat* (1988) MTN.GNG/NG13/9 2.

[397] *Negotiating Group on Dispute Settlement, Meeting on 6 and 7 September 1988, Note by the Secretariat* (1988) MTN.GNG/NG13/10.

contracting parties to offer their views on the specific proposals for differential and more favourable treatment..."[398] in relation to the Secretariat note referred to above. This indicates not only the activism of the LDCs within the negotiation group but also reinforces the SDT-driven nature of their strategy. Similarly, the minutes evidence the importance of SDT to the developing countries who sought the provision of SDT "…to ensure developing countries' access to the GATT dispute settlement system…".[399]

By mid-October 1988, in the absence of substantive proposals from the LDCs, the Negotiating Group on Dispute Settlement began to finalise its proposals for the DSU.[400] The Group Chairman was tasked with formulating a comprehensive proposal, which was to be accompanied by a recommendation that the resolution should be approved at the Mid-Term Ministerial Review with a trial implementation thereof commencing on the 1st of January 1989.[401]

Although the reference to the chairman's task was subsequently deleted from the official minutes,[402] nevertheless, by the 15th of November 1988,[403] the negotiation group discussed drafts of (i) a Chairman's report to the Group Negotiating on Goods[404] and (ii) a Chairman's Paper

[398] ibid 2.
[399] ibid.
[400] *Negotiating Group on Dispute Settlement, Meeting of 10-12 October 1988, Note by the Secretariat* (1988) MTN.GNG/NG13/11.
[401] ibid 1.
[402] 'Group of Negotiations on Goods (GATT), Negotiating Group on Dispute Settlement, Meeting of 10-12 October 1988; Note by the Secretariat, Corrigendum' MTN.GNG/NGl3/ll/Corr.l 15 November 1988 <https://docs.wto.org/gattdocs/q/UR/GNGNG13/11C1.PDF> accessed 25 November 2016.
[403] *Negotiating Group on Dispute Settlement, Meeting of 15 November 1988, Note by the Secretariat* (1988) MTN.GNG/NG13/13.
[404] ibid 1.

containing a proposal for "...improvements to existing GATT dispute settlement rules and procedures, for adoption by Ministers at the Mid-Term Review and for trial application as of January 1989."[405] The meeting further agreed to continue with informal talks to seek final agreement on the Chairman's report, which was due to be submitted to the Group Negotiating Goods, whose mid-term review was due to begin on the 16th of November 1988.[406] From the foregoing, one can reasonably infer that the committee members were progressively moving towards a consensual position on the new Dispute Settlement system. In relation to the Chairman's report to the Group Negotiating Goods, the tenor of the minutes and the lack of substantive members' complaints would again indicate that not only were the members of the negotiating group in broad agreement but that the proposals appeared broadly acceptable to the wider Group Negotiating on Goods. Indeed, the November 1988 Ministerial Level report by the Group of Negotiation on Goods to the Trade Negotiations Committee[407] (who had overall responsibility for the conduct of the Uruguay negotiations) accepted the view of the group conducting the negotiations on dispute settlement that they were, "...in a position to make a comprehensive proposal for consideration and approval...and for trial application as of January 1989 until the close of the Uruguay Round."[408] The approval was, however, qualified, in so far as there were

[405] ibid.
[406] ibid.
[407] *Group of Negotiation on Goods, Report to the Trade Negotiations Committee meeting at Ministerial level, Montreal, December 1988* (1988) MTN.GNG/13.
[408] ibid 31.

"…some issues are not yet ripe for the formulation of recommendations and that further work is required to attain overall agreement…."[409] The Negotiating Group on Dispute Settlement next met on the 12th of May 1989.[410] The chairman restated that negotiations should continue during the DSU trial period and noted "…the right of all participants to… present new proposals."[411] Specifically, he acknowledged that the LDCs were preparing proposals designed to allow them to use "…the remedial measures or actions available in the GATT system, e.g. dispute settlement."[412]

At a meeting of the Sub-Committee on Trade of Least-Developed Countries on 28 September 1989,[413] Bangladesh noted that the Uruguay Round negotiations had reached a 'crucial phase'[414] where the positions of all parties regarding the various issues and proposals in each of the negotiating groups (as discussed above) had to be finalised.[415] Bangladesh *inter alia* outlined specific proposals in relation to Dispute Settlement, which would be submitted to the negotiation group "...in the coming weeks."[416]

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[409] ibid.
[410] *Negotiating Group on Dispute Settlement, Meeting of 12 May 1989, Note by the Secretariat* (1989) MTN.GNG/NG13/14.
[411] ibid 1.
[412] *Group of Negotiations on Goods (GATT); Communication from Bangladesh* (1988) MTN.GNG/W/14/Rev.1 2; *Negotiating Group on Dispute Settlement, Meeting of 12 May 1989, Note by the Secretariat* (1989) MTN.GNG/NG13/14 2.
[413] *Sub-Committee on Trade of Least-Developed Countries, 28 September, Note of Proceedings of the Eleventh Meeting, Revision* (n 114).
[414] ibid 2.
[415] ibid.
[416] ibid.

Bangladesh agreed to present the LDCs proposals in detail at the July meeting.[417] As the Bangladeshi representative could not attend either the July[418] or September[419] meetings, the LDCs finally presented their proposals on the 7th of December 1989.[420] Explaining the proposals, the representative of Bangladesh emphasised that LDCs were "...less equal among contracting parties..."[421] Moreover, Bangladesh stressed that the proposals were not merely seeking ad hoc SDT measures "...but was calling for the permanent institutionalization..."[422] of SDT measures in favour of LDCs. Furthermore, these proposals satisfied what one representative of the sub-committee described as "...the need for more simplified procedures in dispute settlement involving least-developed countries."[423]

Of the four substantive proposals,[424] the most radical proposal sought the,

> *"Establishment of a separate body (e.g., Group of Five) comprising of the Chairmen of the CONTRACTING PARTIES, Council, Committee on Trade and Development, Sub-Committee on the Trade of the Least-Developed Countries and the Director-General of GATT, should be explored with the objective of settling disputes involving*

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[417] *Negotiating Group on Dispute Settlement, Meeting of 12 May 1989, Note by the Secretariat* (n 410) 2.
[418] *Negotiating Group on Dispute Settlement, Meeting of 20 July 1989; Note by the Secretariat* (1989) MTN.GNG/NGI3/IS.
[419] *Negotiating Group on Dispute Settlement, Meeting of 28 September 1989, Note by the Secretariat* (1989) MTN.GNG/NG13/16 7.
[420] *Negotiating Group on Dispute Settlement, Meeting of 7 December 1989, Note by the Secretariat* (1989) MTN.GNG/NG13/17.
[421] ibid 1.
[422] ibid.
[423] *Sub-Committee on Trade of Least-Developed Countries, 28 September, Note of Proceedings of the Eleventh Meeting, Revision* (n 114) 3.
[424] *Negotiating Group on Dispute Settlement; Proposals on behalf of the Least-Developed Countries* (n 114).

the least-developed countries."[425]

This proposal received the 'wholehearted support' of all the other LDC representatives[426] and called for LDCs to be given SDT through the creation of a specific body out with the proposed new dispute structure to deal specifically with disputes involving LDCs. In other words, LDCs sought to 'opt-out' of the DSU and settle their trade disputes using a simplified, bespoke system which was simple to use. This SDT-driven proposal[427] indicates the degree to which SDT systemically framed and permeated LDC policy.

While some delegations supported the proposals on the basis that SDT should be applied to LDCs, others voiced various concerns, with one developing member stating that it was "...neither feasible nor appropriate to set up special procedures..." for LDCs.[428] The Chairman, at this point, intervened, suggesting the matter be deferred to a future meeting.[429] At the next meeting in February 1990, the minute simply records that in relation to LDC proposals, "No comments were made..."[430] hence the proposals were not discussed. Similarly, in April 1990, where again the minutes reveal that in relation to the LDC proposal, there were no comments which prompted the chairman to pointedly state that there had

[425] *Negotiating Group on Dispute Settlement, Proposals on behalf of the Least-Developed Countries, Communication from Bangladesh* (1989) MTN.GNG/NGI3/W/34.
[426] *Sub-Committee on Trade of Least-Developed Countries, 28 September, Note of Proceedings of the Eleventh Meeting, Revision* (n 114) 3.
[427] *Negotiating Group on Dispute Settlement, Meeting of 7 December 1989, Note by the Secretariat* (n 420) 1.
[428] ibid.
[429] ibid.
[430] *Negotiating Group on Dispute Settlement, Meeting of 7 February 1990, Note by the Secretariat* (1990) MTN.GNG/NG13/18.

been no discussions whatsoever about these proposals since December 1989.[431] Notably, at the same meeting, the Chairman called upon the Secretariat to focus on a single consolidated text.[432] At the next meeting of the Negotiation Group on Dispute Settlement on 19th July 1990, Bangladesh formally requested that further consideration should be given to the LDC proposals, and it was agreed that this should appear on the agenda of the next meeting.[433]

Interestingly, a week later the 26th of July 1990, without there being any record of any discussions regarding the LDC proposals having taken place, the Chairman of the Trade negotiations committee reported that in relation to dispute settlement, the "...remaining issues in this area have been identified..."[434] and that the final draft text should be ready by September 1990.[435]

The final meeting of the Negotiation Group on Dispute Settlement took place between the 24th of September and the 11th of October 1990.[436] At this meeting, there was no mention of the LDC proposal. Indeed, it was not even on the Agenda.[437] Moreover, the note of the session confirmed that the chairman had submitted an informal text on Dispute settlement

[431] *Negotiating Group on Dispute Settlement, Meeting of 5 April 1990, Note by the Secretariat* (1990) MTN.GNG/NG13/19.
[432] ibid 6.
[433] *Negotiating Group on Dispute Settlement, Meeting of 12 July 1990, Note by the Secretariat* (1990) MTN.GNG/NG13/21.
[434] *Trade Negotiations Committee, Chairman's summing-up at meeting of 26 July 1990* (1990) MTN.TNC/15 4.
[435] ibid.
[436] *Negotiating Group on Dispute Settlement, Meeting of 24 September to 11 October 1990, Note by the Secretariat* (1990) MTN.GNG/NG13/23.
[437] *Uruguay Round Negotiating Group on Dispute Settlement* (1990) GATT/AIR/3095.

to the chairman of the Trade Negotiations Committee.[438] Thus, the final text of what was to become the GATT DSU had been agreed upon, seemingly, without any discussion of the LDC proposals.

2.3.2 Summary of SDT as a key policy driver in the Uruguay Round

This section considered the LDC approach to and engagement with the Uruguay Round of negotiations, focusing specifically on those areas concerning the formulation of what we now know as the DSU. The section demonstrated the centrality of SDT as a key driver of the LDCs' negotiation objectives and strategies during the Uruguay Round DSU negotiations.

It was shown that as the negotiations of the DSU were reaching their endpoint, Bangladesh, on behalf of the LDCs *inter alia,* sought to 'opt-out' from the proposed DSU, arguing instead for the creation of a bespoke SDT-driven, LDC-only dispute settlement mechanism.

While, as discussed in the next chapter, some elements of the Bangladesh proposal put forward were included in the final text of what was to become the DSU,[439] their most radical proposal of creating a separate dispute body exclusively for LDCs appears to have been rejected. This met with disapproval from the LDCs, who stated that although some of

[438] *Negotiating Group on Dispute Settlement, Meeting of 24 September to 11 October 1990, Note by the Secretariat* (n 436).
[439] *Sub-Committee on Trade of Least Developed Countries, Fifteenth Meeting 7 November 1994, A description of the provisions concerning Least-developed Countries in the Uruguay Round Agreements, Legal Instruments and Ministerial Decisions* (1994) COM.TD/LLDC/W/54 22–23; *Sub-Committee on Trade of Least-Developed Countries, 31 October 1990, Draft Note of Proceedings of the of the Twelfth Meeting, Prepared by the Secretariat* (1990) Spec (90)43 3.

the concerns (discussed in the next chapter) had been taken on board, this was "...not to the full extent that would be desirable."[440]

2.4 The impact of the failure of the LDC 'opt-out'

As noted above, the LDCs' SDT-driven 'opt-out' proposal failed to gain traction despite it having the unanimous and wholehearted support of all of the LDCs.[441] While the LDCs clearly understood "...the need for more simplified procedures in dispute settlement involving least-developed countries,"[442] the creation of the DSU left them with a dispute resolution system viewed by the Africa Group of LDCs as being "…complicated and overly expensive to access."[443] In a similar vein, Zambia, on behalf of the LDCs, noted that "… the structural and other difficulties that were posed by the system" [444] limited LDC engagement with the DSU.

From this, it would not be unreasonable to surmise that the ability of LDCs to address or otherwise ameliorate these 'structural' and **'**other' difficulties could have a bearing on their engagement or non-engagement with the DSU. The importance of this section is that before one can assess the ability of the LDCs to address their 'structural' and **'**other' difficulties, they must first be identified, then evaluated, and fully understood. This

[440] *Group of Negotiations on Goods, Eighteenth meeting: 12 November 1990* (1990) MTN.GNG/25 3.
[441] *Sub-Committee on Trade of Least-Developed Countries, 28 September, Note of Proceedings of the Eleventh Meeting, Revision* (n 114) 3.
[442] ibid.
[443] 'Special Session of the Dispute Settlement Body, 10 September 2002, Minutes of Meeting' TN/DS/M/4, 6 November 2002 p20.
[444] ibid p25.

task aligns both with the research questions and forms the final substantive part of this chapter.

While it is easy to think of the LDCs as a homogenous group, this is not the case; hence the task of investigating, identifying, evaluating, and understanding the issues faced by each LDC individually in terms of their ability to engage with the LDC would require a far larger country-by-country study, a task beyond the purview of this thesis. This section of the thesis will therefore review these systemic and other difficulties impeding LDC engagement with the DSU through the prism of the relevant academic discourse. It should be noted that many of the matters reviewed are overlapping and intertwined. This, unfortunately, means that there is by necessity some repetition which the writer has sought to minimise where possible without negating the often-nuanced differences in the matters being reviewed.

The structural, systemic, and other difficulties and barriers inhibiting LDC engagement with the DSU have been the subject of much academic discourse.[445] As outlined in Chapter 1, this academic literature can be grouped into eight thematic, though often overlapping, areas, each of which will be examined in turn. The areas are (i) economic; LDCs have a limited share of world trade, and therefore disputes are unlikely to arise; (ii) the complexity of the DSU and a lack of legal resources; (iii) the inability of LDCs to recognise when a violation of WTO law has occurred;

[445] Blackhurst, Lyakurwa and Oyejide (n 59); Bohanes (n 59); Alavi (n 59); Bown (n 59); Bown and Reynolds (n 59); Elsig and Stucki (n 53); Gross (n 44); Shaffer (n 59).

(iv) structural institutional weaknesses which prevent LDCs from acquiring and assimilating the requisite evidence required to support a dispute claim; (v) a fear of reprisals eschewing from potential respondents, (vi) the high costs of engaging external legal counsel to conduct a dispute on their behalf of an LDC; (vii) the perceived inability of an LDC to enforce the respondent's compliance with a favourable ruling (viii) the lack of LDC representation in Geneva, linguistic and communication difficulties.

(i) Economic factors contributing to LDC non-participation

As discussed above, LDCs are low-income countries whose growth is limited by acute structural weaknesses[446] and in order to be classed as an LDC, the per capita gross income (the average income per person) must be less than $1,190 per annum.[447] The limited size of LDC economies means that their respective share of world trade is small, collectively comprising less than one per cent of all world exports in 2017.[448] Moreover, LDC economies lack export diversity in terms of the range of products exported, which are predominantly minerals, agricultural produce and fuel.[449] The combined effect of these factors would suggest a

[446] See UN, DESA, 'Brief History of LDC Category' (n 30).
[447] See 'What are the least developed countries?', United Nations Conference on Trade and Development (ed), *Growth with Structural Transformation: A Post-2015 Development Agenda* (United Nations 2014).
[448] World Trade Organization, 'World Trade Statistical Review 2018' (2018) 83 <https://www.wto.org/english/res_e/statis_e/wts2018_e/wts2018_e.pdf>.
[449] Joan Apecu, 'The Level of African Engagement at the World Trade Organization from 1995 to 2010.' [2013] International Development Policy 29, 4; Z Ntozintle Jobodwana, 'Participation of African Member States in the World Trade Organisation (WTO) Multilateral Trading System' (2006) 1 International Journal of African Renaissance Studies - Multi-, Inter- and Transdisciplinarity 244, 253.

simple outcome; there should be very few disputes evidenced by minimal usage of the DSU by LDCs.[450]

This argument has attracted a good deal of support, with Bown showing a clear linkage between the volume of exports and a county's pre-disposition to initiate a dispute[451]. This view is, however, tempered by the observation that having insufficient power in terms of retaliatory enforcement of favourable decisions (discussed below) is a salient feature[452]. Francois *et al.* noting the correlation between trade diversity and disputes, posit that the lack of LDC disputes is driven by the interaction between the twin factors of small trade volumes and small GDP levels as opposed to each factor on its own.[453] Horn, Mavroidis and Nordstrom take a nuanced approach, linking the share of a given country's world trade to its propensity to initiate dispute proceedings with trade diversity and the value of trade.[454] Bown and Reynolds provide some interesting data linking the propensity to initiate disputes to loss of market access, where this loss of market access arises through the imposition of a WTO inconsistent policy.[455] It can be inferred from this that the risk of LDCs losing market access and the consequent need for them to use the DSU should be very limited due to their very low levels of trade.

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[450] Van den Bossche and Gathii (n 60) ,21; Joseph F Francois, Henrik Horn and Niklas Kaunitz, 'Trading Profiles and Developing Country Participation in the WTO Dispute Settlement System' 8 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1534766> accessed 6 July 2015.
[451] Bown (n 59) 307.
[452] ibid 308.
[453] Francois, Horn and Kaunitz (n 450) 47.
[454] Henrik Horn, Petros C Mavroidis and Hakan Nordström, 'Is the Use of the WTO Dispute Settlement System Biased?' 26 <https://ideas.repec.org/p/cpr/ceprdp/2340.html>.
[455] Bown and Reynolds (n 59) 1,3 et.seq.

Summarising this argument, LDCs do not need to use the DSU because they have a diminutive share of world trade due to the small size of their undiversified economies. It would therefore be logical to assume that LDC engagement with the DSU would accelerate as and when their economies diversify, develop, and grow.

This, however, is not the case. During the period from 2000 to 2008, despite enjoying sustained economic growth of more than 7% of GDP per annum,[456] LDC engagement with the DSU did not improve. Similarly, following the 2008 global financial crisis, the LDCs experienced five years of growth,[457] again without any improvement in LDC engagement with the DSU. Overall, from 1995 to 2013, LDCs saw their global trade in goods and services more than double from 0.59% in 1995 to 1.23% in 2013.[458] In addition, their share of merchandise exports increased by 13% in 2017[459], outperforming the global average of 11%.[460] Yet despite all this, there is no improvement in LDC engagement with the DSU. Van den Bossche and Gathii opine that despite their limited share of world trade and lack of export diversity, these factors do not fully explain LDCs' very limited usage of the DSU.[461] This sentiment is echoed by Francois *et al.,* who, using an econometrically based model, predicted a higher level of LDC usage of the DSU than is *de facto* the case.[462] Bohanes and Garza

[456] Bhalla (n 447) ii.
[457] ibid.
[458] Note by the Secretarial, 'WTO and Least Developed Countries: Twenty Years of Supporting the Integration of Least Developed Countries into the Multilateral Trading System; WT/COMTD/LDC/W/61' 2.
[459] World Trade Organization (n 448) 83.
[460] ibid.
[461] Van den Bossche and Gathii (n 60) 22.
[462] Francois, Horn and Kaunitz (n 450) 47.

noted that despite low levels of trade, trade barriers such as quarantine measures and technical barriers could still affect African LDCs.[463] Citing Kessie and Addo, they note that even when faced with these measures and barriers, the affected LDCs may nevertheless still choose not to raise disputes to remediate the same.[464]

In addition, the argument that LDCs have, as a result of their limited trade and export diversity, no cases to bring before the DSU is strongly rebutted by Mosoti,[465] while Cortez states that most LDC exports had been affected by both SPS and TBT measures, which have largely been unreported.[466] Bartels goes further, arguing that it is pointless to even attempt to link DSU activity to the share of world trade.[467] Kessie and Addo posit that African LDCs, mindful of their limited resources, choose not to engage with the DSU, focussing instead on export diversity and market access.[468] Apecu similarly noted that survey data indicated that dispute settlement was a secondary priority.[469] In relation to Rwanda (a

[463] Jan Bohanes and Fernanda Garza, 'Going Beyond Stereotypes: Participation of Developing Countries in WTO Dispute Settlement' (2012) Vol. IV, No. 1 TRADE L. & DEV. 45, ,67.
[464] ibid.
[465] Mosoti (n 52) ,79; Dianna Rienstra (ed), 'International Trade Centre Rwanda Company Perspectives' (International Trade Centre 2014) C-16 646 RWA <https://vi.unctad.org/resources-mainmenu-64/digital-library?task=dl_doc&doc_name=1012_rwanda_comp>.
[466] Ana Luiza Cortez, 'Beyond Market Access: Trade-Related Measures for the Least Developed Countries. What Strategy' (2011) 9 <http://www.un.org/esa/desa/papers/2011/wp109_2011_old.pdf> accessed 2 February 2016; See also the case study on Rwanda, Rienstra (ed) (n 465).
[467] Lorand Bartels, 'Making WTO Dispute Settlement Work for African Countries: An Evaluation of Current Proposals for Reforming the DSU' (2013) 6 The Law and Development Review 48.
[468] Edwini Kessie and Kofi Addo, 'African Countries and the WTO Negotiations on the Dispute Settlement Understanding' 5, 21 <https://silo.tips/download/african-countries-and-the-wto-negotiations-on-the-dispute-settlement-understandi> accessed 3 October 2016 Note, they further posit that evidence of this is to be found in the disparity of participation between the trade and dispute negotiation arena. 5.
[469] Apecu (n 449) 7.

landlocked African LDC[470]), Rienstra notes that while Rwanda actively engages at the WTO in negotiations about trade-related violation issues,[471] they have not made use of the DSU as a means of resolving them.[472]

At its most simplistic, without trade, there could be no trade dispute, and therefore, logically, there must be a link between trade and disputes. The review has shown that the limited size and export diversity of the economies of LDCs does not render them immune to being subjected to the imposition of WTO non-compliant measures upon them by other WTO members. Statistically, LDCs should have initiated more disputes, with the LDCs themselves repeatedly stating that there was no shortage of prospective cases.[473] Moreover, it is suggested that LDCs' failure to engage with the DSU and initiate more disputes is due to them focusing resources on other areas. The foregoing suggests that LDCs, in practical terms, do not view the DSU as an effective and viable means of resolving trade issues, hence their non-engagement therewith.

(ii) The complexity of the DSU mechanism

The WTO is a rules-based organisation,[474] and these rules are enshrined in a wide-ranging set of legally binding WTO agreements, each of which is both technically complex and lengthy.[475] The DSU is the mechanism

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[470] Rienstra (ed) (n 465) xi Rwanda registered complaints that the both the EU and the US should, in addition to reducing subsidies, "…eliminate tariff and non-tariff barriers, including technical standards that impede the country's exports." 10.
[471] ibid 10.
[472] ibid.
[473] 'Special Session of the Dispute Settlement Body, 10 September 2002, Minutes of Meeting' (n 443) p25; 'Special Session of the Dispute Settlement Body, 13 -14 November 2003, Minutes of Meeting' TN/DS/M/14 20 April 2004 p7.
[474] 'WTO | About the Organization' <https://www.wto.org/english/thewto_e/thewto_e.htm> accessed 16 March 2016.
[475] Van den Bossche and Gathii (n 60) 22.

whereby these trade rules can be enforced.[476] The DSU employs complex, highly specialist legal argument that often involves the consideration of significant amounts of highly technical scientific and economic data.[477] Additionally, there is an extensive and continually expanding body of case law coupled with a complex set of procedural rules within the DSU itself.[478] From this, it is clear that in order to pursue a dispute, specialist legal advocacy skills[479] are required, together with the involvement of experts to present and explain what may be highly complex economic, technical and scientific data[480].

It is argued that LDC non-engagement with the DSU is the product of a lack of endogenous legal and specialist resources,[481] that combine to prevent LDCs from raising trade disputes.[482] Busch *et al.* argue that this lack of capacity is "...the main constraint limiting their access to dispute settlement...."[483] Ewart argues that developing countries often do not have the personnel with the requisite experience and knowledge of trade law, which thus delimits both their capacity and inclination to pursue a

[476] 'WTO | Understanding the WTO - A Unique Contribution' <https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm> accessed 16 March 2016.
[477] Van den Bossche and Gathii (n 60) 23.
[478] Bohanes and Garza (n 463) 70.
[479] These skills not only require a detailed working knowledge of the rules of WTO agreements, but also those of the DSU and a detailed understanding of a growing body of case law eschewing from the 492 disputes having been filed to date; See 'WTO | Dispute Settlement - Find Disputes Cases', <https://www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm?year=any&subject=none&agreement=none&member1=none&member2=none&complainant1=true&complainant2=true&respondent1=true&respondent2=true&thirdparty1=false&thirdparty2=false#results> accessed 24 February 2016
[480] Van den Bossche and Gathii (n 60) 323.
[481] Bohanes and Garza (n 463) 71.
[482] Van den Bossche and Gathii (n 60) 23.
[483] Busch, Reinhardt and Shaffer (n 71) 576.

complaint.[484] Fattore, Hoekman and Mavroidis argue that countries with poor legal capacity are simply unable to defend their trade interests and are thus unable to engage with the DSU.[485] In a similar vein, Jobodwana cites that LDCs lack the capacity to fully understand the terms of WTO agreements,[486] with Smith similarly arguing that lack of legal expertise and administrative capacity impacts on LDCs ability to take note of and understand the growing body of WTO jurisprudence[487]. This lack of capacity also extends to the implementation of WTO agreements.[488] Kongolo argues that developing countries lack not only the appropriate information but also both human and administrative resource required to initiate a dispute,[489] an argument supported by Kessie and Addo, who comment on the inadequate staffing level of African Trade Ministries[490] that often lack properly trained international trade lawyers.[491]

From the literature reviewed above, the LDCs clearly lack specialist "in-house" legal expertise within the trade arena. However, this lack of expertise was recognised by the drafters of the DSU, who addressed the issue directly by incorporating capacity-building provisions into the DSU. Article 27.2 DSU acknowledges that in regard to dispute settlement,

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[484] Andrea M Ewart, 'Small Developing States in the WTO: A Procedural Approach to Special and Differential Treatment through Reforms to Dispute Settlement' (2007) 35 Syracuse J. Int'l L. & Com. 27, 40.
[485] Fattore (n 46) 463; Bernard M Hoekman and Petros C Mavroidis, 'WTO Dispute Settlement, Transparency and Surveillance' (2000) 23 The World Economy 527, 563.
[486] Jobodwana (n 449) 258.
[487] James Smith, 'Inequality in International Trade? Developing Countries and Institutional Change in WTO Dispute Settlement' (2004) 11 Review of International Political Economy 542, 543.
[488] (n 465) 13; See also, 'Committee on Anti-Dumping Practices, Notification under Articles 16.4 and 16.5 of the Agreement, Rwanda' G/ADP/N/193/RWA 26 February 2010.
[489] Tshimanga Kongolo, 'The Wto Dispute Settlement Mechanism' (2001) 4 The Journal of World Intellectual Property 257, 260.
[490] Kessie and Addo (n 468) 4.
[491] ibid; Mosoti (n 52) 279.

developing county members may require both legal advice and assistance.[492] It further provides that the Secretariat shall, if requested by a developing country member, provide and make available to LDCs a qualified legal expert from the WTO co-operation service to assist them.[493] Article 27.3 DSU specifically obliges the Secretariat to provide special training courses relating to the DSU procedures and practices to ensure improved members' understanding of the system.[494] It is also worth recalling that UNCTAD provides training courses on dispute settlement[495] while the ACWL (discussed below) provides annual courses, seminars and training sessions, as well as nine-month traineeships for LDC government lawyers.[496]

While acknowledging that training has been provided in terms of Article 27.3, Kessie and Addo opine that these courses have had little effect due in part to their limited duration (each lasting 4-5 days) and further argue that the provision of experts to assist members has been severely restricted due to a lack of resource, with only two part-time 'experts' having been hired by the WTO for this purpose.[497] That said, Kessie and Addo do concede that in respect of LDCs, the shortcomings in respect of the provision of legal experts have been addressed by the ACWL.[498]

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[492] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) p372.
[493] ibid ,372.
[494] ibid.
[495] Shaffer (n 59) 183.
[496] *ACWL Training Courses* (2016) <https://www.acwl.ch/annual-training-course/> accessed 19 March 2016; Abbott (n 71) ,12.
[497] Kessie and Addo (n 468) 3.
[498] ibid 20.

Nonetheless, consideration must be given as to why LDCs, in general, have not, in the intervening 21 years, taken steps to build in-house capacity. In relation to African countries, Alavi posits that the rules of the DSU are "...of little or no value to them, and in fact have alienated them from the organisation."[499] Bohanes expands on this, questioning why LDCs would expend precious resources investing in unwanted legal expertise that will never be used.[500] This, of course, does not necessarily mean that the LDCs do not wish to use the DSU. As the representative of Bangladesh noted, LDCs had not resorted to the DSU process despite having "...several disputes but because of underlying problems in the system, they could not pursue them."[501] Clearly, lack of capacity is an issue which inhibits LDC engagement and is a matter which needs to be resolved, details of which will be discussed later in this thesis.

(iii) LDCs inability to recognise a violation of WTO law

The issue here is that prior to instigating a DSU dispute, the aggrieved party must first recognise that there exists a breach of their trade rights under the covered agreements. Secondly that the merits of any potential case be assessed and initial submissions prepared, all of which LDCs lack the capacity so to do.[502] Guzman and Simmons note that poor countries simply lack the resources both to identify and analyse a potential dispute

[499] Alavi (n 59) 38.
[500] Bohanes (n 59) 71.
[501] 'Special Session of the Dispute Settlement Body; Minutes of Meeting, 13 -14 November 2003' (n 73) 7.
[502] Bohanes and Garza (n 463) 79; Alavi (n 59) 32; Smith (n 487) 543.

and thereafter pursue the same,[503] while Kongolo, Bohanes and Garza, Van den Bossche and Gathii all concur (a) that many developing countries are forced to desist from initiating a DSU trade dispute due to a lack of administrative resources[504] and (b) that there is a disconnect in developing countries between the government and the private sector where the private sector does not provide the government with information as to export market activity, while governments fail to inform the private sector of the WTO trade rules thus violations cannot be identified.[505] Nottage notes that the majority of developing countries are unable to identify trade barriers,[506] while Olson opines that many developing countries lack the administrative capacity to detect and investigate potential cases, particularly where there is a focus on other domestic issues,[507] which Shaffer, in turn, links to budgetary resources being allocated to other non-trade priority areas.[508] Abbot and Alavi discuss the pre-litigation stage, arguing that developing countries may have difficulties identifying possible cases, arguing that this stage is a precursor to legal evaluation that will determine whether violations have,

[503] Andrew T Guzman and Beth A. Simmons, 'Power Plays and Capacity Constraints: The Selection of Defendants in World Trade Organization Disputes' (2005) 34 The Journal of Legal Studies 557, 558–559.
[504] Kongolo (n 489) 261; Bohanes and Garza (n 463) 79; Van den Bossche and Gathii (n 60) 25.
[505] Kongolo (n 489) 261; Bohanes and Garza (n 463) 79; Van den Bossche and Gathii (n 60) 25.
[506] Hunter Nottage, 'Developing Countries in the WTO Dispute Settlement System' (2009) 47 Global Economic Governance Programme Working Paper 11 <https://www.econstor.eu/bitstream/10419/196308/1/GEG-WP-047.pdf>.
[507] Luke Olson, 'Incentivizing Access to the WTO's Dispute System for the Least-Developed Countries: Legal Flaws in Brazil's Upland Cotton Decision' (2014) 23 Minn. J. Int'l L. 101, 123.
[508] Shaffer (n 59) 185.

de facto, occurred and evaluate the possibilities of both initiating and conducting a successful WTO dispute.[509]

While there is little doubt from the evidence presented above that LDCs face difficulties in both identifying potential infractions of WTO law, investigating and analysing the same and presenting the outcomes in a coherent way for legal analysis and evaluation, these factors should not be overstated. It has already been shown at (ii) above that certain LDCs have identified both potential infractions and breaches of WTO law and, indeed, have successfully utilised the DSU to pursue and protect their trade rights under WTO law.[510] However, as stated earlier, the LDCs are not a homogenous group and as such one must caution again generalising. Again, as shown in (ii) above, both technical advice and training are given by the WTO, with legal training being offered by the ACWL, and so far, six LDCs have availed themselves of the internships offered by the ACWL,[511] however legal training *per se* is only one part of the process of recognising that a violation of WTO law has taken place. In furtherance of this, Bohanes and Garza note the LDCs may obtain from the ACWL, free of charge, an initial evaluation as to whether a particular measure is WTO compliant or otherwise[512], therefore if an LDC even suspects that there may be an issue, it can obtain recourse to a legal opinion. Oduwole, when considering whether LDCs had the capacity to

[509] Abbott (n 71) 12–13; Alavi (n 59) 32.
[510] *India-Antidumping Measure on Batteries from Bangladesh, Request for Consultations* (2004) WT/DS306/1.
[511] 'ACWL - Advisory Centre on WTO Law' (n 105).
[512] Bohanes and Garza (n 463) 73.

engage with the DSU, noted that one of his interviewees opined that capacity constraints were not a priority issue as the resource was available through the auspices of the ACWL, NGOs or private companies before opining that, "African countries are not adequately utilising these resources or taking advantage of [the] help available,"[513] a sentiment echoed by another interviewee, though specifically in relation to the ACWL.[514] Oduwole concluded that there were a number of capacity-building resources available to LDCs that "...largely remained underutilised."[515] Oduwole further argued that LDCs needed "…to be better organised and prioritise human resource development in this area."[516] From the literature reviewed above, it is clear that LDCs suffer from structural and administrative issues, which detract from their ability to amass, understand and explain the large volumes of technical, scientific and economic data that may be required to successfully pursue a trade dispute through the DSU. Olsen cautions that smaller countries may not have the resource available to them to even furnish the ACWL with the requisite information to enable them to give an analysis[517] though Olsen does note that this could be attributable to the allocation of resources to "... more pressing domestic issues."[518]

[513] Jumoke Oduwole, 'Nothing Ventured, Nothing Gained? A Case Study of Africa's Participation in WTO Dispute Settlement' (2009) 2 International Journal of Private Law 358, 365.
[514] ibid.
[515] ibid 367.
[516] ibid.
[517] Olson (n 507) 123.
[518] ibid.

Clearly from the above, whilst undoubtedly LDCs are constrained by resource issues, there are some LDCs who can identify WTO non-compliant measures, while those who cannot identify WTO non-compliant measures would appear unwilling to avail themselves of the assistance and support that is freely available or prefer to allocate resources in other areas.

(iv) LDCs inability to acquire and assimilate evidence.

Thomas notes that WTO cases are becoming increasingly complicated, and WTO members are increasingly reliant on economic experts to correctly frame and emphasise the facts of a given case.[519] Van den Bossche and Gathii note that in *EC – Approval and Marketing of Biotech Products (2006)*,[520] over thirty different scientific specialisations were referred to by the European Union.[521] Ewart argues that most developing countries lack the funds and systems to even collect the data required to substantiate a WTO complaint.[522] Esserman and Howse note that developing countries such as Brazil have the capacity to participate fully in DSU proceedings[523] which, argue Van den Bossche and Gathii, is the result of being 'forced' to defend WTO cases against them and to invest in and create the bureaucratic structures staffed by in-house specialist scientific and economic experts, and the involvement of the private

[519] C Thomas, 'Of Facts and Phantoms: Economics, Epistemic Legitimacy, and WTO Dispute Settlement' (2011) 14 Journal of International Economic Law 295, 323–324.
[520] *European Communities – Measures Affecting the Approval and Marketing of Biotech Products* (WT/DS291/R; WT/DS292/R; WT/DS293/R).
[521] Van den Bossche and Gathii (n 60) 23.
[522] Ewart (n 484) 40.
[523] Esserman and Howse (n 43) 138.

sector.[524]

If taken simply at face value, this argument could represent a strong impediment to LDC engagement with the DSU. Fundamentally this argument is premised on the lack of financial, administrative, and human resources that LDCs have at their disposal and can commit to funding the acquisition and subsequent presentation of economic and scientific data necessary to formulate and conduct a successful WTO dispute case. While there can be little doubt that LDCs do suffer from these maladies, nonetheless, several factors should be borne in mind. Firstly, as was noted in (i) above, the range and diversity of LDC exports are very limited and mostly comprise primary products (see (ii) above); therefore, the range and spread of expert knowledge that may be required could be equally limited. Moreover, given the limited range and scope of their exports, it would be highly improbable that any case involving an LDC would be anywhere near as complex as *EC – Approval and Marketing of Biotech Products (2006).*[525] That said, there could still be a scenario whereby specialist expert resources could be required, and in the absence of any in-house expertise, this would require to be sourced and presumably funded. Article 27.1 of the DSU[526] tasks the Secretariat to firstly assist panels on legal and procedural matters and secondly to provide secretarial and technical support.[527] Bown argues that the decision

[524] Van den Bossche and Gathii (n 60) 23.
[525] *European Communities – Measures Affecting the Approval and Marketing of Biotech Products* (n 520).
[526] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) 372.
[527] ibid.

as to how this technical support will be provided in DSU panels and arbitrations is left to the Secretariat to decide, adding that there has been "...little previous analysis of Secretariat provision of technical, *economic* support…."[528] Thomas, while feeling that Bown's interpretation may be too broad,[529] still opines that the WTO Secretariat may be a potential source of economic information and advice to the parties,[530] and Article 27.2 of the DSU states that the WTO Secretariat should assist WTO member if requested by them so to do.[531]

LDCs could seek *amicus curiae* briefs from non-governmental agencies and bodies, though in the WTO context, this is an area of controversy, as discussed later.[532] That said, in some 19 disputes, information from international bodies and organisations has been sought by panels.[533]

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[528] Chad P Bown, *The Law, Economics and Politics of Retaliation in WTO Dispute Settlement* (CAMBRIDGE UNIVERSITY PRESS 2010) 392.
[529] Thomas (n 519) 317.
[530] ibid.
[531] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) 372.
[532] Thomas (n 519) 319.
[533] Gabrielle Z Marceau and Jennifer K Hawkins, 'Experts in WTO Dispute Settlement' (2012) 3 Journal of International Dispute Settlement 493, 494–495 See:- Consultation with the International Monetary Fund (IMF): India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products (India – Quantitative Restrictions), WT/DS90/R, adopted 22 September 1999 as modified by the Appellate Body Report WT/DS90/ AB/R, [5.11]–[5.13]; Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes (Dominican Republic – Import and Sale of Cigarettes), WT/ DS302/R, adopted 19 May 2005 as modified by the Appellate Body Report WT/DS302/AB/R, [1.8]. Consultation with the World Intellectual Property Organization: United States – Section 110(5) of US Copyright Act (US – Section 110[5] Copyright Act), WT/ DS160/R, adopted 27 July 2000, [1.7], [4.1]; United States – Section 211 Omnibus Appropriations Act of 1998 (US – Section 211 Appropriations Act), WT/176/R, adopted 2 January 2002 as modified by the Appellate Body Report WT/DS176/AB/R, [1.8], [8.11]–[8.13]; European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs (EC – Trademarks and Geographical Indications), WT/174/R and WT/DS190/R, adopted 20 April 2005, [2.16]–[2.18]; China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights (China – Intellectual Property Rights), WT/362/R, adopted 20 March 2009, [2.7]–[2.90]; Consultation with the World Customs Organization: European Communities – Customs Classification of Frozen Boneless Chicken Cuts (EC – Chicken Cuts), WT/DS269/R and WT/DS286/R, adopted 27 September 2005 as modified by the Appellate Body Reports WT/DS269/AB/R and WT/DS286/AB/R, [7.52]–[7.59]; China – Measures Affecting Imports of Automobile Parts (China – Autos Parts), WT/DS342/R, adopted 12 January 2009 as modified by the Appellate Body Report WT/DS342/AB/R, [2.5]–[2.6]; European Communities and its Member States – Tariff Treatment of

Therefore the LDCs would be unwise not to avail themselves of pertinent information from NGOs and organisations, where such bodies are prepared to facilitate it, and also the private sector where appropriate. Finally, the ACWL has a Technical Expertise Trust Fund,[534] which LDCs could access to assist in the acquisition of scientific, economic and other non-legal technical inputs, which may be required to conduct a WTO dispute.[535] As Nottage aptly states, "The commonly-identified cost and resource constraints, while relevant once, appear to have been largely addressed."[536] UNCTAD similarly note that if LDCs access the ACWL Technical Expertise Trust Fund, this could facilitate the assembly and compilation of a scientific and technical dossier for use in both the pre-litigation case evaluation as well as during the conduct of a WTO case.[537] The ability to thus create this scientific and technical dossier mitigates what Nordstrom and Shaffer view as one of the causal factors that

Certain Information Technology Products (EC – IT Products),WT/DS375/R, WT/DS376/R, WT/DS377/R, adopted 21 September 2010, [2.3]; Consultation with the Convention on Biological Diversity, Codex Alimentarius, Food and Agriculture Organization (FAO), International Plant Protection Convention, World Organization for Animal Health, United Nations Environmental Programme, World Health Organization: European Communities – Measures Affecting the Approval and Marketing of Biotech Products (EC – Approval and Marketing of Biotech Products), WT/DS291/R, WT/DS292/R, WT/DS293/R, adopted 21 November 2006, [7.31]–[7.32]; Consultation with the Codex Alimentarius Commission, Joint FAO/WHO Expert Committee on Food Additives (JECFA), International Agency for Research on Cancer: US/Canada – Continued Suspension, [1.7]; Consultation with the IMF and the Eastern Caribbean Central Bank: United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Recourse to Arbitration by the United States under Article 22.6 of the DSU (US – Gambling [Article 22.6 – US]), WT/285/ARB, circulated 21 December 2007, [2.32]–[2.35], and Consultation with the FAO in the following arbitration: Award of the Arbitrator, 1 August 2005, European Communities – The ACP-EC Partnership Agreement – Recourse to Arbitration Pursuant to the Decision of 14 November 2001 (EC – The ACP-EC Partnership Agreement) [11].

[534] 'Technical Expertise Fund' (*ACWL*, 2016) <http://www.acwl.ch/technical-expertise-fund/> accessed 21 March 2016.

[535] Nottage (n 506) 6.

[536] ibid.

[537] United Nations Conference on Trade and Development, 'Report of the Commission on Trade in Goods and Services, and Commodities on Its Seventh Session' (2003) TD/B/EX (31)/4 TD/B/COM.1/58 [108] 33 <http://unctad.org/en/Docs/c1d58_en.pdf>.

discriminate against small countries launching small-scale claims using the DSU.[538] Similarly, it allays the concerns, as outlined by Bown and Hoekman, that the ACWL could not provide the technical economic consulting services required to support litigation, leaving LDCs with no means of assessing the economic benefit of pursuing a case in the first instance.[539]

To conclude this section, while LDCs may lack the in-house capacity to acquire such technical information as may be required to support a potential dispute and equally may be unable to fund external experts to acquire the same on their behalf. Nonetheless, there are avenues and channels by which this could be facilitated.

(v) Fear of reprisals eschewing from potential respondents

There are two lines of argument where fears of reprisal by a potential respondent to a dispute dissuade LDCs from engaging with the DSU. Firstly, a potential respondent in a trade dispute may also be the provider of aid and assistance to the LDC complainant and by raising a trade dispute, that aid or assistance could potentially be compromised.[540] Bown notes that the more reliant a country is on a potential respondent country for aid, the less likely it is to either initiate a dispute or participate as a

[538] Hakan Nordström and Gregory Shaffer, 'Access to Justice in the World Trade Organization: A Case for a Small Claims Procedure?' (2008) 7 World Trade Review 587, 602.
[539] Chad P Bown and Bernard M Hoekman, 'WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector' (2005) 8 Journal of International Economic Law 861, 876.
[540] ibid 863; Christina L Davis and Sarah Blodgett Bermeo, 'Who Files? Developing Country Participation in GATT/WTO Adjudication' (2009) 71 The Journal of Politics 1033, 1035; Elsig and Stucki (n 53) 299.

third party.[541] Secondly, an LDC, by initiating a dispute, runs the risk that the respondent may elect to deny preferential access (discussed above at 3.6.5) to their markets for other LDC exports.[542]

Van den Bossche and Gathii note that while Article 3.10[543] explicitly states that the use of the DSU should not be considered a contentious act, the political reality is that commencing a trade dispute would nonetheless not be regarded as being an overtly 'friendly act'.[544] Cho sets out that threats of reprisal are not overt, positing that they may be veiled and unpublished, arguing that there is anecdotal information demonstrating that there are "subtle warnings conveyed through diplomatic channels."[545] Mosoti argues that subtly threatening to withdraw aid (a tactic which, Mosoti opines, has been effectively used in negotiations[546]) acts as an effective barrier that prevents a poor country from filing a dispute.[547] Substantiating these arguments is, by the nature of the arguments themselves, somewhat difficult. The fact that these arguments are largely premised upon unrecorded, unwritten oral statements, comments, and innuendo means that, at best, they can only be evaluated subjectively on a case-by-case basis. Illustrating this point, Gross strongly argues that in relation to the *US- Upland Cotton*[548] dispute, in particular, there is no

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[541] Bown (n 59) 307.
[542] Van den Bossche and Gathii (n 60) 26; Davis and Bermeo (n 540) 1035.
[543] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) 355.
[544] Van den Bossche and Gathii (n 60) 26.
[545] Sungjoon Cho, 'Beyond Dohas Promises- Administrative Barriers as an Obstruction' (2007) 25 Berkeley J. Int'l Law. 395, 413.
[546] Mosoti (n 52) 80.
[547] ibid.
[548] *United States - Subsidies on Upland Cotton; Notification of a Mutually Agreed Solution, WT/DS267/46* [2014].

evidence of "...any threat of reprisal – overt or implicit- by the US,"[549] while conceding the possibility that the absence of this evidence may be due to the 'behind closed doors' nature of trade diplomacy.[550] Davis and Bermeo note that fears of potential diplomatic repercussions proved to be baseless in the dispute between the developing country Costa Rica and the US in *US-Underwear,*[551] which related to a dispute regarding US restrictions on textile imports from Costa Rica where the US complied with the ruling without any of the anticipated diplomatic repercussion that had been anticipated.[552] While Elsig and Stucki acknowledge that these fears exist, nonetheless, they are capable of being overcome and cite the case of Chad, whose US Foreign aid increased despite being a third party in the *US-Upland Cotton.*[553] The fear of retaliation was a factor considered by Bangladesh prior to initiating its DSU complaint against India,[554] where the Ministry of Commerce undertook an assessment of the likely risks of retaliation.[555] While there may be a perception of retaliatory risk (a risk dismissed by the Bangladesh Minister of Commerce[556]), in practice, there would appear to be little evidence of it. Guzman and Simmons provide the strongest rebuttal of these arguments arguing that in relation to the

[549] Gross (n 44) 378.
[550] ibid.
[551] *United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear, Report of the Appellate Body* (WT/DS24/AB/R).
[552] Davis and Bermeo (n 540) 1035.
[553] Elsig and Stucki (n 53) 310; *WT/DS267/46* (n 548) It is worth noting that although listed as a 3rd party in this dispute, they did not actively participate in the dispute, see Chapter 4 infra.
[554] *India-Antidumping Measure on Batteries from Bangladesh, Request for Consultations* (n 510).
[555] Taslim, M.A., 'How the DSU Worked for Bangladesh: The First Least Developed Country to Bring a WTO Claim' in Gregory C Shaffer and Ricardo Meléndez-Ortiz, *Dispute Settlement at the WTO: The Developing Country Experience* (Cambridge University Press 2010) 244.
[556] Taslim, M.A., 'How the DSU Worked for Bangladesh: The First Least Developed Country to Bring a WTO Claim' in ibid.

inequalities between WTO members, "...the main problem does not appear to be the coercive tactic by the powerful,"[557] with Van den Bossche and Gathii arguing that the threat of retaliation provides an inadequate explanation for LDC non-engagement with the DSU.[558]

There is no clear evidence (a) that any reprisals have arisen as a direct result of the initiation or threat of initiating a WTO dispute or (b) any concrete examples of threats of reprisals being made either explicitly or overtly. While some writers[559] are dismissive of the concept as a whole, the fact that Bangladesh undertook an evaluation of the retaliatory risks before initiating its trade dispute with India[560] does, however, suggest that this issue cannot be discounted. Moreover, because this is a largely subjective issue which can only be evaluated, assessed, and addressed on a case-by-case basis by the parties involved, it is difficult to generalise the overall effect of this issue.

(vi) The high costs of engaging external legal counsel

Where an LDC lacks 'in-house' specialist legal resources, it could (a) be disadvantaged when conducting a potential case or (b) be otherwise unable to fully engage with and participate in the DSU. In *EC- Bananas III,*[561] the Appellate Body directed that parties to a dispute could choose their counsel to represent them, which, as the Appellate Body noted,

[557] Guzman and Beth A. Simmons (n 503) 592.
[558] Van den Bossche and Gathii (n 60) 28.
[559] Guzman and Beth A. Simmons (n 503).
[560] Taslim, M.A., 'How the DSU Worked for Bangladesh: The First Least Developed Country to Bring a WTO Claim' in Shaffer and Meléndez-Ortiz (n 555) 244.
[561] *Appellate Body Report, European Communities - Regime for the Importation, Sale and Distribution of Bananas* (WT/DS27/AB/R).

could be particularly important to developing country members, enabling them to "...participate fully in dispute settlement proceedings."[562] As Van den Bossche and Gathii note, many WTO members, both developed and developing, often lack the legal expertise to effectively engage with the DSU[563], and indeed since this ruling, with the exception of the USA and the European Union, specialist private lawyers are often used to represent countries in dispute proceedings.[564]

While the Appellate Body removed a potential DSU engagement barrier, i.e., the issue that LDCs lack "in-house" advocacy skills (discussed at (ii) above) by allowing countries to engage suitably qualified legal counsel, this, in turn, created two further perceived barriers, which have been the subject of much academic discourse. Firstly, LDCs could not afford to hire external counsel[565] and secondly, even if the funding could be found, the quantum of the claim and the economic benefits that might flow from successfully winning a dispute may be less than the costs of conducting the dispute in the first place.[566]

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[562] ibid [12].
[563] Van den Bossche and Gathii (n 60) 23.
[564] ibid 24.
[565] Abbott (n 71) 11; Richard L Bernal, 'Participation of Small Developing Economies in the Governance of the Multilateral Trading System' (Centre for International Governance Innovation 2009) Working Paper 44 26; Bohanes and Garza (n 463) 71.
[566] Bown and Hoekman (n 539) 863, 865; Bruce A Blonigen and Chad P Bown, 'Antidumping and Retaliation Threats' (2003) 60 Journal of International Economics 249, 253;The linkage of market share and litigation benefits is interesting; M Bronckers, 'Financial Compensation in the WTO: Improving the Remedies of WTO Dispute Settlement' (2005) 8 Journal of International Economic Law 101, 106; Busch, Reinhardt and Shaffer (n 71) 10; Cho (n 545) 412 citing World Bank, Global Economic Prospects 2004: Realizing the Development Promise of DOHA Agenda xxix (2003), 116; http://siteresources.worldbank.org/INTRGEP2004/Resources/gep2004fulltext.pdf; Anne-Célia Disdier and Lionel Fontagné, 'Trade Impact of European Measures on GMOs Condemned by the WTO Panel' (2010) 146 Review of World Economics 495, 22.

Again, at face value, these arguments appear to be robust, however as Van den Bossche and Gathii acknowledge, while it is not generally publicised, legal fees for a complainant party to a dispute are often borne by the industry that is directly interested in pursuing a dispute, as opposed to being paid by the concerned government itself.[567] They posit, however, that private funding of legal costs may be inappropriate if the wider political interests and policies of the state and those of the industry are misaligned.[568] Furthermore, they note that in LDCs, the domestic industry "...obviously does not have the resources available..."[569] to fund a case. While this may be true, if the LDC engaged the ACWL (which was created in 2001) to provide legal support and representation, the LDC would only pay 10% of the full cost of the dispute. Estimates as to legal costs vary, with Nordstrom and Shaffer suggesting costs for a simple case of US $321,250, rising to US $882,500 for a complex case,[570] while Bohanes and Garza suggest that a challenging case including an appeal would cost in the region of US $1 million.[571] Shaffer notes that a firm quoted US $200,000 for a small case conducted through the panel stage of the DSU.[572] Tasmin notes that Bangladesh was advised that the costs of an anti-dumping trade dispute would amount to US $150,000, which

[567] Van den Bossche and Gathii (n 60) 24.
[568] ibid 24-25; If one expands this point to include a scenario where an LDC was pursuing a policy of DSU non-engagement, then even in the unlikely event of the domestic industry being able to fund an action this funding would probably be declined.
[569] ibid 24.
[570] Nordström and Shaffer (n 538) 600.
[571] Bohanes and Garza (n 463) 71.
[572] Gregory Shaffer, *How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies*, vol ICTSD Resource Paper No. 5 (International Centre for Trade and Sustainable Development (ICTSD) 2003) 16 <https://repository.law.wisc.edu/s/uwlaw/item/41103>.

meant that the Bangladesh government if it engaged the services of the ACWL, would therefore only expect to pay the sum of US $15,000.[573] Moreover, as the Bangladesh government had already received an undertaking from the domestic producer to bear all the financial costs of the DSU process,[574] it would, in effect, have been left in a cost-neutral position. In the *US - Upland Cotton*[575] dispute, Zunckel narrates that Benin and Chad received legal assistance from a leading international law firm on a pro bono basis.[576] Zunckel also points out that UNCTAD has "...secured the limited services of a group of law firms who are prepared to provide some *pro bono* assistance for dispute settlement matters to deserving candidates."[577]

The previous section demonstrates that both access to legal representation and the cost thereof should not be considered barriers preventing LDC engagement with the DSU. Bohanes and Garza opine that in respect of obtaining an initial assessment of a potential case, there are no financial barriers, noting that ACWL provides legal opinions for free.[578] Bown *et al.* note that the obstacle imposed by the high legal costs of pursuing a dispute has been largely 'overcome' by the ACWL.[579] Elsig and

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[573] Taslim, M.A., 'How the DSU Worked for Bangladesh: The First Least Developed Country to Bring a WTO Claim' in Shaffer and Meléndez-Ortiz (n 555) 242.
[574] ibid.
[575] Hilton Zunckel E, 'The African Awakening in United States-Upland Cotton' (2005) Vol. 39 (6) Journal of World Trade 1071.
[576] ibid 1081.
[577] ibid 1082 The writer has been unable to verify this claim, though UNCTAD do have a project on dispute settlement with external advisers and in-house staff, -see, http://unctad.org/en/Pages/DITC/DisputeSettlement/Country-Assistance.aspx.
[578] Bohanes and Garza (n 463) 71.
[579] Chad P Bown and Rachel McCulloch, 'Developing Countries, Dispute Settlement, and the Advisory Centre on WTO Law' (2010) 19 The Journal of International Trade & Economic Development 33, 36.

Stucki argue that LDCs can address legal capacity concerns by drawing on the ACWL,[580] a sentiment with which Mosoti concurs.[581] Busch *et al.* caution that while the ACWL can provide legal capacity and there are specialist law firms who may provide *pro bono* services, nevertheless "…a WTO Member needs the legal capacity to make effective use of private law firms and the ACWL."[582]

To conclude this section, it seems clear that if LDCs actively sought engagement with the DSU, then they could avail themselves of a legal service which offers them the prospect of utilising qualified legal counsel to conduct a trade dispute from inception to conclusion and all for the price of a small family saloon car, i.e., $15,000.[583] However, not all LDCs view the ACWL as being necessarily a complete solution, and regardless of this, as discussed above, the LDCs would still need the legal capacity to engage with the ACWL. It has been shown that some African countries, for example, have stated that they would not consider engaging with the DSU unless legal services are provided completely free of charge,[584] an objective they hope to secure through an SDT-driven changes to the DSU. As will be seen in Chapters 3 and 4, the LDCs have used this LDC-driven approach throughout the lengthy process of DSU review negotiations.

(vii) LDC enforcement of a favourable ruling

[580] Elsig and Stucki (n 53) 297.
[581] Mosoti (n 52) 79.
[582] Busch, Reinhardt and Shaffer (n 71) 574.
[583] Taslim, M.A., 'How the DSU Worked for Bangladesh: The First Least Developed Country to Bring a WTO Claim' in Shaffer and Meléndez-Ortiz (n 555) 242.
[584] Kessie and Addo (n 468) 20.

The compliance argument is a subset of a wider argument that the DSU rules are, in general, not LDC friendly and are thus of little or no value to them, which, arguably alienates them from the organisation.[585] In this instance, Alavi argues that the rules regarding retaliation are designed for and thus can only be exclusively used by countries who have the capacity to retaliate and, as such, are of no use to LDCs who are bereft of this capacity.[586]

Article 19 of the DSU narrates that where a measure taken by a WTO member is found to be inconsistent with a covered agreement, the member concerned shall bring the measure into conformity with said covered agreement.[587] Thus the objective of the DSU is the withdrawal of an inconsistent measure, or alternatively, if the immediate withdrawal of the measure is impracticable, the member may maintain the measure on a temporary basis, providing it offers compensation,[588] which is acceptable to the complainant.[589] Where a Member neither complies nor provides mutually acceptable temporary compensation, the complainant may (with the approval of the DSB) take retaliatory measures equivalent to the economic harm and loss in trade benefits caused.[590]

The WTO has 'noted' that developing countries have difficulties in terms of both the availability and practicability of applying retaliatory

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[585] Alavi (n 59) 38.
[586] ibid.
[587] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) 365.
[588] ibid Art 3.7 354-355; Compensation is voluntary, see Art. 22.1 ibid 367.
[589] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) Art 22.2 367.
[590] ibid Art 22.4 369.

measures.[591] Apecu amplifies this point, noting that African countries have neither the necessary leverage nor possess "...a large basket of alternatives for retaliation."[592] Anderson similarly comments on the "...inherent injustice of retaliation"[593] where large countries have more scope to retaliate than smaller countries who may thus be dissuaded from using the DSU in the first place.[594] Mosoti, Brewster, Charnovitz, Bronckers and van den Broek argue that, in reality, the concept of retaliation as set out in the DSU is harmful to the economies of developing countries whose economies may face increased input costs arising out of having to source imported goods from other countries on less favourable terms to those from the respondent country whose cheaper imports they have banned by imposing retaliatory measures.[595] Hoekman and Mavroidis argue that retaliation can also result in collateral damage where an industry not involved in any trade dispute suffers loss as a result of the application of retaliatory measures.[596] Bartels, Bown and Hoekman argue that the ineffective nature of retaliatory measures may cause certain countries simply not to initiate disputes in the first instance.[597] The WTO further posit that larger respondent members may

[591] World Trade Organization (ed), *Six Decades of Multilateral Trade Cooperation: What Have We Learnt?* (WTO 2007) [iii] 282.
[592] Apecu (n 449) 26.
[593] Kym Anderson, 'Peculiarities of Retaliation in WTO Dispute Settlement' (2002) 1 World Trade Review 123, 129.
[594] ibid.
[595] Bronckers (n 566) 101–105; Mosoti (n 52) 80; Rachel Brewster, 'Remedy Gap: Institutional Design, Retaliation, and Trade Law Enforcement.' (2011) 80 Geo. Wash. L. Rev. 102, 148; Steve Charnovitz, 'Rethinking WTO Trade Sanctions' (2001) 95 American Journal of International Law 792, 797.
[596] Bernard M Hoekman and Petros C Mavroidis, 'Bite the Bullet' (2014) 20 European Law Journal 317, 317.
[597] Bartels (n 467) 49; Bown and Hoekman (n 539) 863.

simply either refuse to comply with a ruling or offer to settle on terms which may be unfavourable to a respondent.[598]

Clearly, enforcement issues are a concern, and one which has been duly recognised by the WTO as a body, and while it is an issue currently being considered within the wider context of the DSU as a whole,[599] as will be seen in the following chapters, the LDCs have actively sought changes to the DSU to maximise their ability to enforce favourable rulings.[600]

Van den Bossche and Gathii point to the very high compliance rates with recommendations and rulings, particularly in disputes involving developing country members as complainants.[601] Wilson notes that in almost all WTO disputes where a violation has occurred, the respondent country brings itself into compliance,[602] with Davey suggesting a compliance rate of between 83%[603] to 90%.[604] Meagher, arguing from a legal practitioner's perspective, opines that given the infrequent use of counter-measures, the extent to which enforcement problems affect DSU participation is questionable.[605] All of the foregoing points challenge the validity of the argument that the potential inability of an LDC to enforce a

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[598] World Trade Organization (n 591) 284.
[599] 'Dispute Settlement Body Special Session, Report by the Chairperson, Ambassador Coly Seck, to the Trade Negotiations Committee' TN/DS/30 27 November 2017 60.
[600] 'Dispute Settlement Body Special Session, Text for LDC Proposal on Dispute Settlement Understanding Negotiations, Communication from Haiti' TN/DS/W/37 22 January 2003 3; 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Côte d'Ivoire' TN/DS/W/92 5 March 2008 2.
[601] Van den Bossche and Gathii (n 60) 28.
[602] Bruce Wilson, 'Compliance by WTO Members with Adverse WTO Dispute Settlement Rulings: The Record to Date' (2007) 10 Journal of International Economic Law 397, 399.
[603] William J Davey, 'The WTO Dispute Settlement System: The First Ten Years' (2005) 8 Journal of International Economic Law 17, 47.
[604] 'WTO | Ministerial Conferences - in Brief' <https://www.wto.org/english/thewto_e/minist_e/mc11_e/briefing_notes_e/bfdispu_e.htm> accessed 11 April 2022; Wilson (n 602) 47.
[605] Meagher, N., 'Representing Developing Countries in WTO Dispute Settlement Proceedings' in George A. Bermann and Petros C. Mavroidis (n 153) 223.

favourable ruling accounts for LDC non-engagement with the DSU, which is reinforced by the fact that in the only case to date brought by an LDC,[606] the disputants reached a mutually agreeable solution.[607] While this may be the case, it is arguable that there may be a feeling that the DSU simply does not work for LDCs.

Enforcement may be achieved in other ways without having recourse to a retaliatory mechanism, which LDCs may find difficult or impossible to implement. Brewster argues that a ruling creates economic and political pressure on a government to comply, which makes it easier for governments to settle their disputes,[608] while van den Bossche and Gathii argue that LDCs should harness the potential of the DSU to hold violators of WTO to account by naming and shaming violators, the effectiveness of which they opine cannot be understated.[609] From this, one can reasonably infer that by pursuing a determined and sustained strategy, compliance with a favourable DSU ruling could be achieved without the use of retaliatory measures.

In concluding this section, LDCs could face insuperable difficulties enforcing a favourable ruling in the face of a recalcitrant and obstinate respondent insofar as they may be unable to successfully deploy the current WTO remedy of retaliation. That said, this issue must be viewed

[606] *India-Antidumping Measure on Batteries from Bangladesh, Request for Consultations* (n 510).
[607] *India-Antidumping Measure on Batteries from Bangladesh, Notification of Mutually Satisfactory Solution* (WT/DS306/3 G/L/669/Add1 G/ADP/D52/2).
[608] Brewster (n 595) 154.
[609] Van den Bossche and Gathii (n 60) 29.

(a) against a backdrop of high levels of respondent compliance ranging between 83%[610] to 90%[611] and (b) that recourse to the use of reprisals has been very limited indeed, with Wilson noting that sanctions were only authorised in 8 out of the 109 cases considered in the study,[612] (c) that 'naming and shaming' could provide an alternative strategy and (d) that in the only case to be brought thus far by an LDC, the deployment of retaliation was not required. Taking all of these into account, the suggestion that the inability of an LDC to enforce a favourable ruling explains why LDCs have not engaged with the DSU appears somewhat tenuous. That said, the LDCs have consistently, throughout the DSU review negotiations, cited enforcement as a key barrier preventing their engagement with the DSU. This adds weight to the writer's earlier observations regarding the underlying feeling that the DSU does not work for LDCs, which arguably could stem from the failure of the 'opt-out' proposal. Real or otherwise, the LDCs see this issue as a barrier to their engagement with the DSU, one which they have attempted to ameliorate through a series of SDT-driven proposals discussed in detail in chapter 4.(viii) The lack of representation in Geneva and linguistic difficulties

Blackhurst, Lyakurwa and Oyejide describe how the individual WTO member's delegations represent the "...arrowhead for the country's pursuit of its own national interests in the WTO."[613] Bernal notes that

[610] Davey, 'The WTO Dispute Settlement System' (n 603) 47.
[611] 'WTO | Ministerial Conferences - in Brief' (n 604); Wilson (n 602) 47.
[612] Wilson (n 602) 399.
[613] Blackhurst, Lyakurwa and Oyejide (n 59) 493.

many small developing countries do not have representation based in Geneva,[614] while Gross and Mosoti opine that, in relation to African member states, many of these WTO delegations are comprised of diplomats as opposed to specialist personnel with an understanding of the DSU which explains in part LDC non-engagement with the DSU.[615] Hoekman and Mavroidis link these factors opining that the combination thereof disadvantages LDCs in terms of both initiating disputes and defending their rights.[616] Busch *et al.* argue that the levels of experience and competence of specialist personnel are of import, particularly in areas such as the filing of submissions during litigation.[617] Two further themes emerge from these competency-based issues. Firstly, personnel lack the requisite linguistic skills and proficiency in the three official WTO languages, French, Spanish and English,[618] which, as Abbott notes, could be of significance given that most dispute panel and Appellate Body proceedings are in English,[619] with English being the common language of most panellists.[620] The second issue is that of internal communication difficulties between national governments, individual government departments/ key officials and their respective WTO missions in Geneva. Apecu issued a questionnaire to 39 African WTO delegates, an analysis of which revealed that overall, not only was there a lack of support from

[614] Bernal, 'Small Developing Economies in the World Trade Organization' (n 70) 13.
[615] Gross (n 44) 371; Mosoti (n 70) 453.
[616] Hoekman and Mavroidis (n 485) 535.
[617] Busch, Reinhardt and Shaffer (n 71) 562.
[618] ibid 572.
[619] Abbott (n 71) 11.
[620] ibid 18.

capitals but overall clear and effective communication between capitals and their WTO representatives was in some cases challenging and in others non-existent, all of which discouraged wider engagement with the WTO.[621] Schaffer, Mosoti and Qureshi bring this more sharply into focus; citing Victor Mosoti, they opine that in one WTO dispute, a submission deadline was missed because the authorisation of the submission had been delayed due to the "...complex exchange of formal letters between multiple ministries..."[622]

Collectively, the issues of WTO representation in Geneva, the lack of experienced legal personnel together with linguistic deficiencies and poor internal communication appear to be potential material factors which both singularly and collectively could inhibit LDC engagement with the DSU. This, however, is not a commonly held position amongst academic writers.

Thus in relation to WTO representation in Geneva, Apecu notes that in 1995 only half of all African countries had permanent representatives at the WTO.[623] This rose steadily over the years, 68% by 2001, 80% by 2005 and over 92% by 2010.[624] By 2014, more than 91% of all the LDC members of the WTO had permanent missions in Geneva, with only Gambia, Malawi and Vanuatu not having a permanent mission.[625] Apecu

[621] Apecu (n 449) 7.
[622] Gregory Shaffer, Victor Mosoti and Asif Qureshi, 'Towards a Development-Supportive Dispute Settlement System at the WTO' 28 <https://www.files.ethz.ch/isn/92796/No_05_complete_%20Towards_a_Development_.pdf>.
[623] Apecu (n 449) 6.
[624] ibid 40.
[625] 'WTO | Development - Geneva Week' <https://www.wto.org/english/tratop_e/devel_e/genwk_e.htm> accessed 1 August 2015.

further notes that despite the increase in African mission size and capacity-building, the levels of engagement with the DSU remain low,[626] a situation reflected throughout the LDC membership as a whole. The composition of the mission in terms of staffing by experienced legal personnel is again not as clear as the picture painted above. There is evidence to suggest that for many African countries, the primary areas of focus for their WTO missions lie in the areas of trade facilitation and commerce.[627] From this, it seems clear that dispute resolution and the requirements for trained and experienced personnel are, at best tertiary considerations. Issues surrounding inadequate staffing levels are not confined to LDCs, with Ewing *et al.* commenting that in relation to dispute settlement, the Permanent Mission of Thailand to the WTO is understaffed because of a lack of adequate funding.[628]

To determine and evaluate the significance and effect of having a properly staffed, fully resourced permanent mission in terms of a country's ability to use the DSU to successfully initiate and conduct trade litigation, one need look no further than the *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services.*[629] In this case, involving the cross-border supply of gambling and betting services,

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[626] Apecu (n 449) 6.
[627] ibid 7.
[628] M Ewing-Chow, AWS Goh and AK Patil, 'Are Asian WTO Members Using the WTO DSU "Effectively"?' (2013) 16 Journal of International Economic Law 669, 679.
[629] 'WTO | Dispute Settlement - the Disputes - DS285' <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm> accessed 25 May 2016; Douglas A Irwin and Joseph Weiler, 'Measures Affecting the Cross-Border Supply of Gambling and Betting Services (DS 285)' (2008) 7 World Trade Review 71 <http://journals.cambridge.org/abstract_S1474745608003674> accessed 25 May 2016.

Antigua and Barbuda, who do not have a permanent mission in Geneva,[630] nonetheless successfully initiated and won a trade dispute against the United States, a case which involved not only Panel[631], Arbitral [632]and Appellate Body proceedings[633] but also compliance proceedings.[634] From this simple illustration, it is clear that the lack of a fully staffed permanent mission does not preclude a WTO member from successfully pursuing a trade dispute. It is important to remember that this case was funded and supported by the US gambling industry[635], with the Antiguan Prime Minister Gaston Brown stating that, Antigua-based online gambling companies had incurred between $10 m and $15 m in legal fees[636] in pursuance of the WTO action. The quantum of these legal fees highlights the difference between the cost of engaging external counsel as opposed to the cost of engaging the ACWL, as discussed above.

Overall, however, it seems clear that when all the factors are taken together, they will undoubtedly influence the ability of LDCs to engage

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630 'WTO | Development - Geneva Week' (n 625).
631 *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services, Report of the Panel, WT/DS285/R, 10 November 2004*.
632 *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services - Arbitration under Article 213(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes - Award of the Arbiter, WT/DS285/13, 19 August 2005*.
633 *Report of the Appellate Body, United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/AB/R, 7 April 2005*.
634 *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/22, 22 June 2007 - Recourse by Antigua and Barbuda to Article 222 of the DSU*; *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/26, 25 April 2013 - Communication from Antigua and Barbuda*; *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/RW, 30 March 2007 - Recourse to Article 215 of the DSU by Antigua and Barbuda - Report of the Panel*.
635 Sarita Jackson, 'Small States and Compliance Bargaining in the WTO: An Analysis of the *Antigua–US Gambling Services Case*' (2012) 25 Cambridge Review of International Affairs 367.
636 Steven Stradbrooke, 'Antigua Fire Mark Mendel, New $100m Offer in WTO Gambling Dispute | Online Gambling News' (*CalvinAyre.com*, 9 September 2014) <https://calvinayre.com/2014/09/09/business/antigua-fires-attorney-mark-mendel-makes-new-100m-offer-to-end-us-wto-dispute/amp>.

with the DSU. Again, the size, functionality, and quality of representation are reflective of the heterogeneous nature of the individual LDCs. This, in turn, leads to difficulties in determining the criticality of under-representation in Geneva in terms of LDC engagement with the DSU.

The LDCs may also face issues or challenges related to linguistics and communications problems, particularly those whose native language is not Spanish, English, or French. While there can be no doubt that these could be problematic, they are not insurmountable. Firstly, the WTO does offer technical training support to members in respect of French, Spanish and English.[637] In addition, certified translation services are widely available[638] , both of which should ameliorate the situation. Secondly, there is a reasonable probability that where an LDC was a former colony of either France, Spain, or the UK, the respective languages might be spoken as either a first or second language.[639]

The final issues facing LDCs relates to the efficacy or otherwise of communications between governments and Geneva-based missions. Firstly, this issue is not one which exclusively applies to LDCs. Busch *et al.* graphically illustrate this point, citing the frustration of Latin American

[637] 'WTO | Development - ITTC - List of Courses' <https://www.wto.org/english/tratop_e/devel_e/train_e/course_details_e.htm> accessed 25 May 2016.

[638] See for example: 'Morningside Translations, WTO Certified Translation Services' <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiK8bymgO_5AhUGesAKHUSfBO8QFnoECAYQAQ&url=https%3A%2F%2Fwww.morningtrans.com%2Flanguage-services%2Fprofessional-translation-services%2Fcertified-translations%2F&usg=AOvVaw0twD4t0rJB-lI8jPSq2p1n>.

[639] This site would appear to support this contention. klaus kästle-Klaus Kastle, 'Megalanguages Spoken around the World - Nations Online Project' <https://www.nationsonline.org/oneworld/countries_by_languages.htm> accessed 13 April 2022.

representatives who complained variously of the time taken by the capital to approve a third-party submission, ineffective and incoherent written communications and a lack of clear guidance from their capitals.[640] Secondly, it is clear that communication problems are by no means universal with Apecu, for example, noting that in relation to some African Countries that have permanent missions in Geneva have "...tight Geneva-capital coordination and support."[641]

Issues such as the existence of a permanent WTO mission, the staffing thereof, the communication between capital and mission together with the linguistic challenges faced by speakers who do not know the three official languages of the WTO have been viewed as causative factors in the debate to explain LDC non-engagement with the WTO. By critically examining each of these factors, the part (if any) that they play is, at best, superficial.

(ix) LDC's lack of DSU engagement and the 'opt-out' failure.

What is clear from the foregoing analysis is that the LDCs suffer from several predominantly capacity-related issues which impede their engagement with the DSU as presently constituted. It would not, therefore, be unreasonable to assume that the LDCs were aware of their weaknesses, which is why they sought to achieve a simplified LDC-only dispute settlement system. There is, therefore, an argument that the reason why LDCs have not actively sought to resolve their trade disputes

[640] Busch, Reinhardt and Shaffer (n 71) 573.
[641] Apecu (n 449) 29.

at the WTO is primarily driven by their failure to achieve the SDT-driven 'opt-out' and secure the creation of a bespoke LDC-only dispute resolution system.

Because, as discussed later, details of the 'opt-out' have been overlooked by researchers and academics, there is no literature to review. The simplified, negotiation-based dispute resolution system envisaged by the LDCs would, at a stroke, have negated many of the capacity-related issues faced by LDCs. Thus, the complexity of the DSU would have been avoided, with the concomitant requirement for specialist advocacy and other skills; they would not have faced the high costs of legal counsel, the burden of preparing detailed technical submissions, and the assimilation of detailed econometric analysis, would similarly be limited. Arguably, the failure to secure the opt-out and, with it, the creation of a simplified LDC-only dispute resolution system collectively represents a new reason explaining why the LDCs have thus far not sought to settle their trade disputes at the WTO. Obviously, even with a simplified LDC-only dispute resolution system, they would, of course, still have faced potential issues in terms of recognising a violation of their rights. In terms of compliance and enforcement, rather than face a complex set of procedures, disputes would be settled by negotiating a mutually agreed solution.

Overall, had the LDCs' proposal been accepted, instead of them having to address a whole range of issues to engage with the DSU, they would instead have faced a few real difficulties engaging with the simplified 'opt-out' system.

2.5 Conclusion

This chapter explored the development of SDT, setting out how a mechanism designed to take account of purely economic issues arising out of trade negotiations expanded into a broader policy tool adopted and deployed by LDCs to address an ever-expanding set of non-economic issues. Moreover, it was shown that SDT became the dominant force that drove LDCs' trade policies within the GATT, an aspect which has thus far not been discussed in depth within the academic forum. The chapter probed the inherent weaknesses of SDT in terms of the lack of operationalisation and enforceability of SDT provisions. There was clear evidence that not only had the LDCs failed to properly consider these issues in the first instance, and that there was a fundamental lack of consensus as to the scope and meaning of SDT. The chapter noted the 'push-back' against the expansion of SDT by the developed countries during the Uruguay round and the lack of a bloc-wide SDT negotiation umbrella on the part of the developing countries. While the LDCs appear to have been isolated from these changes in so far as there appeared to be a consensus that LDCs should be the recipients of SDT, the twin issues of operationalisation and enforcement remained, with many new SDT provisions being considered as hortatory in nature.[642] The chapter also explored the post-Uruguay evolution of SDT, the application of which is

[642] Hoekman (n 124) 411.

today bespoke, designed to address specific issues in specific countries or groups of countries within a prescriptive period.[643]

This chapter showed that SDT conceptually underpinned the LDCs strategy in the DSU Uruguay Round negotiations. This conceptual underpinning dominated the LDCs' policies, negotiation objectives and wider trade strategy. The chapter explained how the LDCs used a sub-committee within the Uruguay negotiating framework as a platform not only to formulate and share SDT policy objectives and to draft and agree on SDT-driven proposals but also use as a pressure group to advance their SDT objectives within other Uruguay Round Negotiating Groups. The role played by the LDCs in the formulation of what was to become the DSU was critically examined in this section, which also explored how the LDCs again pursued, with some limited success, their SDT policies through the aegis of specific proposals. It was also shown that as these negotiations were reaching a critical phase, where the negotiating group were beginning to focus on agreeing to a draft text, the LDCs submitted a radical proposal supported by and premised upon SDT. This proposal espoused the creation of a separate, distinct, and bespoke dispute settlement system, which would sit outside of the GATT Dispute settlement system . This opt-out proposal has never been examined by academic writers and thus represents a significant further contribution to the body of academic knowledge. The chapter narrated how the LDC

[643] A good example of the new format of SDT is to be found in the Trade Facilitation Agreement see, Switzer (n 123).

proposal was side-lined and how despite the requests of the LDCs, the proposal was omitted as a discussion item from the meetings of the Group Negotiating Dispute settlement. Why this happened is, despite a forensic examination of the available documentation, unknown and represents an area worthy of further investigation. Nevertheless, the effect of this was that the LDCs were left with a Dispute Resolution System that, arguably, they did not want. They viewed the DSU as being overly complex, expensive to access and one with which they would face difficulties engaging with, and to this day, inhibit LDCs' engagement with the DSU. This has, arguably, denied the LDCs the right to seek resolution of their trade disputes through the operation of the DSU.

One of the objectives of this thesis is to formulate enhancements to the DSU to allow LDCs to use the DSU to resolve their trade disputes. To do so, one must first understand the barriers they face, and this chapter explored these through the prism of existing academic works. These academic works were grouped into eight thematic, though often overlapping, areas.[644] Each of these thematic areas was critically examined and evaluated, focusing on the effect and weighting, if any, that each thematic area had upon the ability of LDCs to engage with the DSU. This chapter also explored and critically assessed the measures

[644] The eight areas examined were, (i) Economic; LDCs have a limited share of world trade and therefore disputes are unlikely to arise; (ii) the complexity of the DSU and a lack of legal resource; (iii) the inability of LDCs to recognise when a violation of WTO law has occurred; (iv) structural institutional weaknesses which prevent LDCs from acquiring and assimilating the requisite evidence required to support a dispute claim; (v) a fear of reprisals eschewing from potential respondents, (vi) the high costs of engaging external legal counsel to conduct a dispute on their behalf of an LDC; (vii) the perceived inability of an LDC to enforce the respondent's compliance with a favourable ruling (viii) the lack of LDC representation in Geneva, linguistic and communication difficulties

taken by the ACWL,[645] which provides legal advice, representation, training, and support to LDCs.[646] Consideration was also given to the work of other bodies, such as the United Nations Conference on Trade and Development (UNCTAD),[647] to foster and enhance LDC participation through remedial actions and initiatives designed primarily to bolster the capacity of the LDCs. The importance of this section is to gain a better understanding of the wider challenges LDCs face when trying to engage with the DSU, and this analysis, together with the new challenges which emerge from this thesis, can form the basis of a series of benchmarks against which the proposals set out in Chapter 5 will be tested. That said, I would contend that one of the most powerful single factors inhibiting LDC from engaging with the DSU as a means of settling trade disputes is quite simply their collective desire for a separate and unique dispute settlement mechanism, a system which they could easily use.[648]

With the failure of SDT to deliver a simplified dispute resolution system, the next two chapters highlight further weaknesses and setbacks suffered by the LDC in terms of the application, enforcement, and operationalisation of SDT provisions in the DSU, as the promise of SDT turns sour.

[645] The Advisory Centre on WTO Law is an independent international organisation established in 2001, see 'ACWL - Advisory Centre on WTO Law' (n 105).
[646] ibid.
[647] UNCTAD was established in 1964 as a permanent intergovernmental body and is part of the UN Secretariat dealing with matters relating to development issues, trade and investment issues, see, 'Unctad.Org | Home' (n 106).
[648] Ronald Cullen Kerr Welsh, 'Special and Differential Treatment: A New Factor Explaining LDC Engagement with the WTO Dispute Settlement System?' (2018) 2018 International Review of Law 39.

Chapter 3

3. LDC antipathy towards the DSU.

While much of the previous chapter focused on the LDC 'opt-out' proposal of the DSU, this was, however, one of a series of proposals advanced by the LDCs during the DSU Uruguay negotiations.

This chapter focuses on these other proposals and then evaluates the effectiveness of other SDT measures incorporated into the DSU. Secondly, this chapter aims to examine LDC engagement with the DSU either directly as parties to a dispute or indirectly, where the LDCs contemplated using the DSU to settle a prospective dispute but ultimately decided against doing so. This chapter is directly relevant to the research questions in so far as it adds to our understanding of why the LDCs do not engage with the DSU and considers elements of the SDT provisions which were designed to improve the functionality of the DSU, and which were primarily designed to facilitate their engagement therewith.

It will be shown that most of the LDC proposals were either rejected out of hand or failed to get enough support to have the measure incorporated into the DSU. It will be demonstrated that the bulk of the SDT measures that were incorporated into the DSU failed to deliver the changes which the LDCs required to facilitate their engagement with the DSU. The chapter argues that the cumulative effect of these failings is to strengthen the feeling that the DSU simply does not work for the LDCs. This argument is reinforced by evidence which clearly shows that even when

several LDCs faced crippling and debilitating economic damage caused by another WTO Member which appeared to breach WTO rules, they nevertheless chose to eschew the DSU as a means of settling the dispute.[649]

The chapter finds that at its most basic, the LDCs simply failed to secure the general changes to the DSU they proposed during the Uruguay round of negotiations. Moreover, their proposal to establish a bespoke LDC-only dispute settlement system was rejected without seemingly any debate, and the net result is that they were left with a DSU they felt ill-equipped to use. This, in turn, was further exacerbated as it became clear that the SDT proposals which were included in the final DSU draft were either non-effectual or never operationalised. The cumulative effects of these continual setbacks should not be underestimated, and it is argued that the failure of SDT has reinforced the bias amongst LDCs against using, or engaging with, the DSU leaving them to resolve their - trade-related issues by extra-judicial means.

This chapter builds upon the previous two chapters and aligns with the research questions in terms of determining the reasons why the LDCs have tended to shy away from using the DSU by (a) ascertaining and understanding the exogenous and endogenous reasons limiting LDCs engagement with the DSU and, (b) understanding whether the primary and reason for LDC non-engagement is driven by a policy based upon the concept of SDT which led LDCs to - 'opt-out' of and eschew the DSU *in*

[649] Pesche and Nubukpo (n 107) p49.

toto, and (c) exploring whether the DSU has sufficient functionality to facilitate LDC engagement.

This analysis (i) provides substantive evidence supporting the hypothesis that LDCs' non-engagement with the DSU is primarily due to their strategic policy failure and (ii) narrates how this policy, when applied to extant academic arguments, produces a more cohesive and concise explanation of LDC non-engagement with the DSU.

The previous chapter explored those elements of the Multilateral Trade Negotiations of the Uruguay Round that formalised the DSU and created the Dispute Settlement Body, under whose auspices the DSU is administered.[650] It was shown that as these negotiations neared completion, the LDCs tabled three proposals,[651] which *inter alia* included a proposal that LDCs 'opt out' of the proposed DSU, favouring instead the formation of an alternative dispute resolution system specifically for LDCs.[652] As was shown in the previous chapter, this proposal, despite having the unanimous support of all the LDCs,[653] failed to gain traction amongst the remaining GATT contracting parties and did not, therefore, progress any further.

The LDC proposal to 'opt-out' of the DSU called for the "... establishment of a separate body...with the objective of settling disputes involving the

[650] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) Article 2.1.
[651] *Negotiating Group on Dispute Settlement, Proposals on behalf of the Least-Developed Countries, Communication from Bangladesh* (n 425).
[652] ibid.
[653] *Sub-Committee on Trade of Least-Developed Countries, 28 September, Note of Proceedings of the Eleventh Meeting, Revision* (n 114) 3.

least-developed countries."[654] The new body was to be comprised of what the proposal called the 'Group of Five,'[655] being four Chairmen drawn from various GATT committees and bodies and the Director General.[656] This simplified approach to the settlement of disputes is indicative of the fact that LDCs had taken what Jackson describes as "...a 'negotiation' or 'diplomacy' oriented approach..."[657] where disputes are settled through a process of negotiation and compromise.[658] By eschewing the complex 'legalistic' provisions and regulations of the DSU and favouring a looser framework, LDCs exhibited what Hudec described as an 'antilegalist' viewpoint[659] where recourse to dispute resolution by formal adjudication is supplanted by "...more loosely structured consultation procedures in which governments seek to resolve conflicts through negotiation." [660] Against this backdrop, the final draft of the DSU, with its clearly defined legalistic rules and procedures, is the antithesis of the collective wishes and proposals of the LDCs. This chapter argues that the adoption of the DSU alienated the LDCs and created amongst them a bias against using the DSU. Moreover, as will be shown in this and the following chapter, it led the LDCs to actively pursue an SDT-driven policy of requesting

[654] *Negotiating Group on Dispute Settlement, Proposals on behalf of the Least-Developed Countries, Communication from Bangladesh* (n 425).
[655] *ibid.*
[656] *ibid.*
[657] John H Jackson, 'Dispute Settlement in the WTO: Policy and Jurisprudential Considerations', *Research Seminar in International Economics, The University of Michigan, Discussion Paper* (1998) p1 <http://fordschool.umich.edu/rsie/workingpapers/Papers401-425/r419.pdf> accessed 25 May 2017.
[658] ibid.
[659] Robert E Hudec, 'GATT Dispute Settlement After the Tokyo Round: An Unfinished Business' (1980) 13 Cornell Int'l LJ 145, p151.
[660] ibid.

structural changes to the DSU to facilitate their engagement therewith. Logically, their bias against engaging with the DSU would be heightened and their demands for structural change more pronounced if it were also found that the remaining proposals submitted by the LDCs regarding the settlement of disputes had been, as with the 'opt-out' proposal, similarly rebuffed.

This chapter will, for completeness, review the remainder of the LDC dispute settlement proposals tabled on 23rd November 1988[661] and 14th November 1989.[662] The analysis of these proposals will demonstrate that while some of the LDC proposals, such as the provision of technical assistance (discussed below), were implemented, no substantive proposals were materially incorporated into either the DSU or other WTO agreements. It is argued that the rejection of these substantive proposals, together with the failure of the LDCs'' 'opt-out', led LDCs to eschew the DSU and strengthened their resolve for the inclusion of SDT-driven structural changes to the DSU. Moreover, the failure of these SDT proposals to gain acceptance, coupled with the growing realisation of the inherent weakness of SDT provisions within the DSU in terms of their operationalisation and enforcement, leads to a deeper and more

[661] *Group of Negotiations on Goods (GATT), Communication from Bangladesh, Uruguay Round and the Least-Developed Countries (LLDCs), Revision* (n 114).
[662] *Negotiating Group on Dispute Settlement, Proposals on behalf of the Least-Developed Countries, Communication from Bangladesh* (n 425).

comprehensive understanding of the problems and issues faced by the LDCs and why they do not engage with the DSU.

The chapter will, furthermore, evaluate how the LDC policy of non-engagement with the DSU manifested itself in practical terms through their limited usage of the system. It will be shown that even where an infringement of WTO rules resulted in severe economic hardship in multiple countries, LDCs still pointedly refused to initiate a WTO complaint, thereby underlining that LDCs have collectively eschewed using the DSU as a means of resolving- trade-related issues.

Having explored the LDC bias against engagement with the DSU and thereafter discussed how this antipathy was externalised by non-engagement with the DSU, the final part of this chapter will re-evaluate the extant "...multiple, complex, and interrelated"[663] academic explanations[664] as to why LDCs do not engage with the DSU. The analysis of these explanations in Chapter 2 concluded that they failed to provide a comprehensive answer as to why LDCs did not engage with the DSU. This chapter, therefore, re-examines these extant explanations in light of the new reasons identified in this thesis. This process of combining and, where necessary, re-evaluating the current academic body of knowledge with the new information provided by this thesis will provide a more comprehensive understanding of LDC non-engagement. This represents a further addition to the body of academic knowledge.

[663] Van den Bossche and Gathii (n 60) 21.
[664] These were discussed in detail in chapter 2.

3.1 The assimilation of LDC proposals by the WTO

This section examines the various Uruguay Round LDC proposals regarding the DSU. The purpose of this is to evaluate the extent to which these proposals, or the sentiment thereof, were incorporated either into the DSU or were otherwise given effect elsewhere within the WTO framework. This directly aligns with the second research question by exploring whether the DSU has sufficient functionality to facilitate LDC engagement.

3.1.1 LDC Proposals (November 1988 & 1989)

The proposals submitted on 23rd of November 1988[665] (the 1988 proposals) were deemed by the LDCs to be preliminary in nature,[666] and while many of these proposals were of a general nature related to different areas of the Uruguay negotiations, two of them related to the negotiations regarding dispute settlement. The first of these was that in respect of the Uruguay Negotiations as a whole, "...provisions to facilitate effective utilization by least-developed countries of remedial measures or actions available in the GATT system..."[667] should be included, with dispute settlement cited as an exemplar.[668]

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[665] *Negotiating Group on Dispute Settlement, Proposals on behalf of the Least-Developed Countries, Communication from Bangladesh* (n 425).
[666] *Group of Negotiations on Goods (GATT), Communication from Bangladesh, Uruguay Round and the Least-Developed Countries (LLDCs), Revision* (n 114) 2 Bangladesh reserved the right to amend these preliminary proposals and address them directly to the individual negotiating groups. See 'Negotiating Group on Dispute Settlement, Proposals on behalf of the Least-Developed Countries, Communication from Bangladesh, MTN.GNG/NG13/W/34' 1.
[667] *ibid Section A, Clause 1(c), 2.*
[668] ibid 2.

The second proposal was that LDCs should be provided with increased technical assistance on "...all aspects of their trade development."[669] The DSU is a mechanism to protect trade rights (the infringement of which would impact upon the trade development), and as such, this provision, or at least the sentiment thereof, should therefore have been included within the DSU. While the 1988 proposals could be considered as being general or laudatory in nature, the common tenet thereof is that SDT provisions should be incorporated into the DSU intended to assist and support LDC engagement therewith.

Unlike the 1988 proposals, the proposals submitted on the 14th of November 1989[670] (the 1989 proposals) were more substantive in nature than the 1988 proposals and were submitted directly to the negotiating group on Dispute Settlement as opposed to the 1988 proposals that were simply circulated to the various negotiating groups.[671] Collectively, aside from seeking the inclusion of SDT provisions into the DSU, the 1989 proposals lacked definition, and the LDCs provided no information as to how their proposals would function or otherwise be institutionalised.[672] The lack of definition and clarity of purpose is problematic, particularly

[669] *Sub-Committee on Trade of Least-Developed Countries, 28 September, Note of Proceedings of the Eleventh Meeting, Revision* (n 114) Annex 1, 'General Proposals' 11.
[670] *Negotiating Group on Dispute Settlement, Proposals on behalf of the Least-Developed Countries, Communication from Bangladesh* (n 425).
[671] *Group of Negotiations on Goods (GATT), Communication from the Chairman of the Sub-Committee of Trade of Least-Developed Countries* (1988) MTN.GNG/W/15.
[672] As outlined in Chapter the 3 the LDCs were given several opportunities to explain their proposals in detail, however they never did so.

where one attempts to describe, analyse or explore these proposals in a meaningful way.[673]

The first of the 1989 proposals states that before taking 'any action' against an 'exporting' LDC, the "...investigating authority in the importing country will notify the concerned least-developed country...and establish with utmost care the causes of injury..."[674] communicating progress to the LDC concerned.[675] Within the context of the DSU, I contend that this proposal would constitute either (i) a new phase, which would take place after the submission of a complaint against an LDC and before the commencement of consultations or (ii) a 'pre-dispute' phase, which should be completed prior to the submission of a formal complaint.

The third of the 1989 proposals[676] states that "...recourse to Panel Procedure shall be the ultimate step after exhausting all other means available for dispute settlement...."[677] which should include the use of good offices.[678] As with the preceding proposal, the LDCs did not, except for the use of good offices, discussed below, explain how this provision

[673] Under the customary rules of public international law on the interpretation of treaties, Article 31(1) of the Vienna Convention on the Law of Treaties of 1969 provides: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose', United Nations, 'Vienna Convention on the Law of Treaties (1969)' (2005) Vol., 1155, United Nations Treaties Series 331, 12.

[674] *Negotiating Group on Dispute Settlement, Proposals on behalf of the Least-Developed Countries, Communication from Bangladesh* (n 425).

[675] ibid.

[676] The second proposal, as previously narrated, was that LDCs should 'opt-out' of the proposed dispute mechanism system, favouring instead the formation of an alternative dispute resolution system specifically for LDCs'. Clearly as the proposal was rejected as aforesaid, *de facto* there will be no evidence as to its implementation or inclusion within the DSU. There will therefore be no discussion of this proposal.

[677] *Negotiating Group on Dispute Settlement, Proposals on behalf of the Least-Developed Countries, Communication from Bangladesh* (n 425) 5.

[678] ibid 2.

would function. Arguably, within the context of the DSU, the proposal suggests the creation of a new mediation phase which would follow the conclusion of Article 4 Consultations[679] and precede Article 6, the Establishment of Panels.[680]

The fourth of the 1989 proposals, *inter alia,* provides that LDCs should be treated sympathetically and "in settling disputes ...flexibility shall be the rule rather than [the] exception."[681] It is argued that as the DSU is specifically designed as a method of 'settling' disputes, so, 'flexibility' should correctly be read and applied holistically to the DSU *in toto*. This differs from a narrower construction that 'flexibility' should only be applied to the actual 'settlement' of any given dispute, i.e., the determination of the *ex post facto* remedial measures and recommendations required to bring an inconsistent measure into conformity.[682]

Having thus described each of the LDC proposals, it is worth recalling that there are other SDT provisions within the DSU, and any examination of the functionality of the DSU would be incomplete without considering the extent to which these provisions provide the functionality to facilitate LDC engagement.

[679] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) 355–357.
[680] ibid 358.
[681] *Negotiating Group on Dispute Settlement, Proposals on behalf of the Least-Developed Countries, Communication from Bangladesh* (n 425).
[682] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) 365.

3.2 Overview of General SDT provisions in the DSU

In terms of the DSU, there are a total of eleven SDT provisions.[683] Seven of these can be broadly classed as measures designed to protect the interests of developing countries.[684] There is one provision regarding technical assistance[685] and one relating to the flexibility of commitments, action, and the use of policy instruments.[686] The remaining two provisions relate specifically to LDCs.[687]

3.3 Assimilation of 1988 proposals - engagement with the DSU

Having thus described the LDC proposals and the other SDT provisions within the DSU, this and the following sections evaluate the extent to which the LDC proposals can be mapped to either the SDT provisions of the DSU or to any of the other DSU provisions. In respect of any proposals which are not exclusively relevant solely to the DSU or where suitable DSU provisions cannot be found, an attempt will be made to map them to other provisions within the various WTO agreements. This will

[683] Van den Bossche and Zdouc (n 143) 300 Van den Bossche and Zdouc cite only 10 provisions, however the Committee on Trade and Development, "Special and Differential Treatment Provisions in WTO Agreements and Decisions – Note by the Secretariat", (22 September) WT/COMTD/W/219 – this states that there are 11. The additional provision relates to Article 21.8 of the DSU. Article 21.8 states that where a case is brought by a developing country, the DSB '...shall take into account not only the trade coverage of measures complained of, but also their impact on the economy of developing country Members concerned.' This provision was referred to in the Arbitral Decision in "European Communities - Regime for the Importation, Sale and Distribution of Bananas- Recourse to Arbitration by the European Communities under Article 22.6 of the DSU", WT/DS27/ARB/ECU, 24 March 2000, 28.
[684] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) Art 4.10, Art 8.10, Art 12.10, Art 12.11, Art 21.2, Art 21.7, and Art 21.8.
[685] ibid Art 27.2.
[686] ibid Art 3.12.
[687] ibid Art 24.1, Art 24.2.

determine the extent to which the 1988 and 1989 provisions were thus either given effect to or rebutted.

As narrated above, the common thread of the 1988 proposals was to garner a general acceptance that SDT provisions in favour of LDCs were to be included within the framework of the Uruguay Round of negotiations on the DSU. The first of the 1988 proposals[688] rests upon paragraph B (vii)[689] of the general principles governing the Uruguay Round of Negotiations[690] and paragraph 2(d)[691] of the Enabling Clause.[692] The proposal calls for the incorporation of "...provisions to facilitate effective utilization by least-developed countries of...e.g. dispute settlement."[693] The second of the 1988 proposals requested that LDCs be provided with increased technical assistance on "...all aspects of their trade development,"[694] the provision of which, as argued above, should also be applied to the DSU.

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[688] *Negotiating Group on Dispute Settlement, Proposals on behalf of the Least-Developed Countries, Communication from Bangladesh* (n 425).

[689] B.(vii) states 'Special attention shall be given to the particular situation and problems of the least-developed countries and to the need to encourage positive measures to facilitate expansion of their trading opportunities. Expeditious implementation of the relevant provisions of the 1982 Ministerial Declaration concerning the least-developed countries shall also be given appropriate attention,' 'GATT Multilateral Trade Negotiations, The Uruguay Round Ministerial Declaration on the Uruguay Round, MIN. DEC 20, September 1986' MIN. DEC 20 September 1986 Para B, (vii) 3 <https://www.wto.org/gatt_docs/English/SULPDF/91240152.pdf> accessed 26 June 2017.

[690] *Multilateral Trade Negotiations, The Uruguay Round Ministerial Declaration on the Uruguay Round* (n 329).

[691] Para 2(d) states, "Special treatment on the least developed among the developing countries in the context of any general or specific measures in favour of developing countries," 'Treatment of Developing Countries, Differential and More Favourable Treatment Reciprocity and the Fuller Participation of Developing Countries, Decision of 28 November 1979. (L/4903)' L/4903 Para 2(d) 191 <https://www.wto.org/english/docs_e/legal_e/tokyo_enabling_e.pdf> accessed 28 June 2017.

[692] 'Treatment of Developing Countries, Differential and More Favourable Treatment Reciprocity and the Fuller Participation of Developing Countries, Decision of 28 November 1979. (L/4903)' (n 691).

[693] *Group of Negotiations on Goods (GATT), Communication from Bangladesh, Uruguay Round and the Least-Developed Countries (LLDCs), Revision* (n 114) 2.

[694] *Sub-Committee on Trade of Least-Developed Countries, 28 September, Note of Proceedings of the Eleventh Meeting, Revision* (n 114) Annex 1, 'General Proposals' 11.

Article 27 of the DSU[695] has embedded within it two forms of technical assistance. Article 27.2 directs that the Secretariat should, if needed, provide "...legal advice and assistance in respect of dispute settlement to developing country Members."[696] To facilitate this, Article 27.2 further provides that the Secretariat will "...make available a qualified legal expert[697]...to... assist the developing country Member in a manner ensuring the continued impartiality of the Secretariat."[698] The second form of technical assistance within the DSU is contained within Article 27.3.[699] Although this is not *per se* an SDT provision, it nevertheless places an obligation on the Secretariat to provide training courses centred on the DSU procedures and practices[700] to "...enable Members' experts to be better informed in this regard."[701] Even though this is a general provision applicable to all WTO members, it nevertheless satisfies the sentiment of the first of the 1988 proposals LDC insofar as the provision of technical training support could help "...facilitate effective utilization by least-developed countries of remedial measures or actions available in the GATT system...."[702]

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[695] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) Art 27 372 Note Article 27 defines the roles and duties of the WTO Secretariat.
[696] ibid art 27.2 372.
[697] In 2016 the Secretariat reported that, 'The Secretariat makes available to developing countries the services of two consultants who are available to provide legal assistance to developing countries in dispute settlement, pursuant to this provision. This service is coordinated by ITTC [Institute for Training and Technical Cooperation],' *Committee on Trade and Development, Special and Differential Treatment Provisions in WTO Agreements and Decisions, Note by the Secretariat, WT/COMTD/W/219, 22 September 2016* 82.
[698] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) Art 27.2 372.
[699] ibid Art 27.3 372.
[700] ibid.
[701] ibid.
[702] *Group of Negotiations on Goods (GATT), Communication from Bangladesh, Uruguay Round and the Least-Developed Countries (LLDCs), Revision* (n 114) Section A, Clause 1(c), 2.

From this brief narrative, the 1988 proposals, which called for provisions allowing LDCs (i) to effectively utilize the DSU system[703] and (ii) be provided with increased technical assistance,[704] have arguably both been addressed and given effect within the DSU.[705]

3.4 Assimilation of 1989 Proposal - Pre-dispute Phase

As noted above, the first of the LDC proposals submitted on 14th November 1989[706] envisaged the creation of a formal phase prior to initiating a complaint.[707] The text of the proposal states that before "...initiating any action against any exporting least-developed country..."[708] which may lead to a potential dispute being raised,[709] the potential disputant should formally notify the respective LDC of its intention to do so. In total, the proposal seeks to impose three obligations in respect of a potential dispute. These were (i) notification of the intent to instigate an investigation, (ii) the imposition of a strict duty of care on the part of any prospective complainant in establishing "...with the utmost care the causes of injury..."[710] and (iii) a requirement that the prospective complainant should keep the respective LDC appraised as to the progress of the investigation.[711]

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[703] *ibid Section A, Clause 1(c) 2.*
[704] *Sub-Committee on Trade of Least-Developed Countries, 28 September, Note of Proceedings of the Eleventh Meeting, Revision* (n 114) Annex 1, 'General Proposals' 11.
[705] LDCs have made little or no use of these provisions, which is discussed in greater detail later in the chapter.
[706] *Negotiating Group on Dispute Settlement, Proposals on behalf of the Least-Developed Countries, Communication from Bangladesh* (n 425).
[707] *ibid.*
[708] ibid.
[709] ibid.
[710] ibid.
[711] ibid.

As discussed in the previous chapter, the LDCs neither explained nor elaborated upon their proposals; therefore, the operation, oversight, outcomes, and ramifications intended or envisaged by this proposal are unknown.

What is clear, however, is that no specific provision incorporating a pre-dispute phase, other than the requirement for consultations, was incorporated into the DSU. That said, Article 24.1[712] states (i) that "...at all stages of the determination of the causes of a particular dispute... particular consideration shall be given..."[713] to LDCs, and (ii) WTO Members shall "...exercise due restraint in raising matters under these procedures..."[714] Arguably if 'particular consideration' is to be given by a disputant to an LDC respondent 'at *all* stages' of the determination of the causes of a particular dispute, this could be construed as a pre-dispute obligation, which a prospective disputant must satisfy.

Therefore, before a WTO Member initiates an investigation, which could lead to a dispute, the Member would thus be obliged to inform an LDC of its intention to investigate an issue and thereafter keep the affected LDC appraised. Arguably, such an interpretation could satisfy the first and third elements of the LDC proposal, namely that an affected LDC would be notified of the intent to investigate an issue and apprised as to the progress of the said investigation. Unfortunately, as no disputes have

[712] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) 370.
[713] ibid.
[714] ibid.

thus far been initiated against LDCs under the DSU, this argument is thus untested.[715]

Given that the notification and appraisal elements of the proposal cannot thus be fully mapped to the DSU, consideration will be given to mapping these elements to provisions within other WTO agreements. In this regard, provisions relating to the notification of parties of an intended investigation are be found within several of the covered agreements, which are agreements covered by the DSU as set out in Appendix 1 of the DSU.[716] The agreements concerned are the Agreement on Implementation of Article VI of the GATT[717], the Agreement on Subsidies and Countervailing Measures[718] (SCM agreement), the Agreement on

[715] Within the context of Panel proceedings LDCs were shown 'particular consideration' in both Panel Report, US – *Upland Cotton*, para. 7.54, and Panel Report, US – *Upland Cotton (Article 21.5 – Brazil*, para. 8.29.

[716] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) 373.

[717] 'Agreement on Implementation of Article VI of The General Agreement on Tariffs and Trade 1994' <https://www.wto.org/english/docs_e/legal_e/19-adp.pdf> accessed 8 April 2017.

[718] 'Agreement on Subsidies and Countervailing Measures' 257 <https://www.wto.org/english/docs_e/legal_e/24-scm.pdf> accessed 8 April 2017 While there are pre-dispute provisions regarding notification and participation in relation to investigations contained within the Agreement on Subsidies and Countervailing Measures, (see Art 12 - 'Evidence', 243 and Art 13 - 'Consultations', 245). LDCs were afforded SDT treatment under Article 27.2 which inter alia provides that the prohibition of export subsidies contained in Article 3, 1(a), ('Agreement on Subsidies and Countervailing Measures' [n 49] Art 3, 1[a], 231), shall not apply to LDCs which thus negates the imposition of countervailing measures by an importing country. Article 27.2 (b) narrated that this waiver was initially to subsist for a period of 8 years; Debra P Steger, 'The Subsidies and Countervailing Measures Agreement: Ahead of Its Time or Time for Reform?' 782 <https://papers.ssrn.com/Sol3/papers.cfm?abstract_id=1915799> accessed 18 May 2017; This exemption would remain until any LDC's Gross National Product reach the equivalent of US$ 1,000 in constant 1999 US dollar value for three consecutive years Anwarul Hoda and Rajeev Ahuja, 'Agreement on Subsidies and Countervailing Measures: Need for Clarification and Improvement' (2005) 39 J. World Trade 1009, 1026–1027; *Ministerial Conference, Fourth Session Doha, 9 - 14 November 2001, Implementation-Related Issues and Concerns, Draft Decision, WT/MIN (01)/W/10* Given the foregoing, the writer thus does not propose to discuss the pre-disputes elements contained within the SCM.

Safeguards,[719] and the Agreement on the Application of Sanitary and Phytosanitary Measures[720] (the SPS Agreement).

3.4.1 Agreement on Implementation of Article VI of the GATT 1994

There is only one SDT provision in the Agreement on the Implementation of Article VI of the GATT 1994[721] ("Anti-Dumping Agreement") and as this has been held as imposing no legal obligation on Members, therefore it has no relevance to this analysis.[722] are provisions incorporating obligations akin to the LDC proposal to notify a potential respondent of an investigation and to permit representations to be made to the investigative body do exist within the Anti-Dumping Agreement, which will be discussed below.

The practice of dumping goods, and exporting goods to another country at less than their normal value, is itself lawful under WTO law.[723] However, where the dumping of goods causes injury[724], an injured Member may impose anti-dumping measures.[725] Article 2.4 of the Anti-dumping Agreement states that a "...fair comparison shall be made between the

[719] 'Agreement on Safeguards' <https://www.wto.org/english/docs_e/legal_e/25-safeg.pdf> accessed 18 May 2017.
[720] 'Agreement on the Application of Sanitary and Phytosanitary Measures' <https://www.wto.org/english/docs_e/legal_e/15-sps.pdf>.
[721] 'Agreement on Implementation of Article VI of The General Agreement on Tariffs and Trade 1994' (n 717).
[722] The only SDT provision in the Agreement is Article 15 (ibid 163), which as it imposes no legal obligations on Members, and is not relevant to this analysis. See *US — Steel Plate* (WT/DS206/R), where the Panel held that as, "the first sentence imposes no specific or general obligation on Members to undertake any particular action" (para 7.110, 37), therefore "Members cannot be expected to comply with an obligation whose parameters are entirely undefined." (ibid. para 7.110). A similar view is to be found in *EC – Tube or Pipe Fittings,* (WT/DS219/R) para 7.68.
[723] Van den Bossche and Zdouc (n 143) 677, 748.
[724] ibid 748.
[725] ibid.

export price and the normal value..."[726] with Articles 3.1 and 3.2 narrating that the determination of injury shall be based upon an 'objective examination'[727] and 'positive evidence'[728] carried out by 'investigating authorities'.[729] While the foregoing provisions fall somewhat short of the third obligation sought by the LDCs in their proposal, namely the imposition of a strict obligation to establish "...with the utmost care the causes of injury..."[730] nevertheless, they offer some 'comfort' in that regard.

In respect of the first obligation proposed by the LDCs, namely that of notification, Article 5.5 thereof provides that "...before proceeding to initiate an investigation, the authorities shall notify the government of the exporting Member."[731] Moreover, Article 6.1 provides that (i) all 'interested parties shall be given notice of the information which the investigating authorities require[732] and (ii) interested parties will be afforded the opportunity to present written evidence to the investigating body. Article 12.1 narrates that upon being satisfied that sufficient evidence exists to initiate an investigation,

> *"...the Member or Members the products of which are subject to such investigation and other interested parties known to the*

[726] 'Agreement on Implementation of Article VI of The General Agreement on Tariffs and Trade 1994' (n 717) 147.
[727] See Art 3.1, ibid 148.
[728] ibid.
[729] See Art 3.2 ibid.
[730] *Negotiating Group on Dispute Settlement, Proposals on behalf of the Least-Developed Countries, Communication from Bangladesh* (n 425).
[731] 'Agreement on Implementation of Article VI of The General Agreement on Tariffs and Trade 1994' (n 717) 152.
[732] ibid.

investigating authorities to have an interest therein shall be notified and a public notice shall be given."[733]

Additionally, Article 6.2 provides *inter alia* that at all stages of the anti-dumping investigation, "...all interested parties shall have a full opportunity for the defence of their interests."[734]

From this, an affected LDC would be informed of any prospective investigation, thus satisfying the notification requirement of the LDC proposal. Moreover, at face value, Article 6.2 would suggest that an affected LDC exporter would thus be informed of any investigation that could lead to the imposition of anti-dumping measures and have an opportunity to 'defend their interests' thereat thus further enhancing the level 'comfort' afforded to LDCs in respect of their second proposed obligation to "...establish with utmost care the causes of injury..."[735]

However, notification in terms of Article 12.1 is dependent upon the interested parties being 'known' to the investigating authorities.[736]

This was tested in *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice.*[737] This dispute, *inter alia,* centred on[738] the imposition by Mexico of anti-dumping measures on beef

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[733] ibid 161.
[734] ibid 153 Article 17, (ibid 164), allows an affected LDC member to, '...request in writing consultations with the Member or Members in question.' (ibid 164). From this it is clear that Art 17.3 must be triggered by the affected LDC – this is not the same as the obligation to provide notification which the LDC proposal intends.
[735] *Negotiating Group on Dispute Settlement, Proposals on behalf of the Least-Developed Countries, Communication from Bangladesh* (n 425) 1.
[736] 'Agreement on Implementation of Article VI of The General Agreement on Tariffs and Trade 1994' (n 717) 161.
[737] *Appellate Body Report, Mexico - Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice, WT/DS295/AB/R, Adopted 20 December 2005*.
[738] The United States also challenged various provisions of the Mexican Foreign Trade Act as also various provisions within the Mexican Federal Code of Civil Procedure.

and long-grained white rice imported from the United States.[739] Between March and August 1999, Mexico carried out an anti-dumping investigation to determine whether dumping had occurred.[740] In June 2002, the Ministry of Economy published its report and imposed a duty of 3.93% on one named exporter of rice from the United States[741] and a blanket duty of 10.18% on other rice exporters[742] from the United States.[743]

The Panel found that the act of notifying an affected state's government (with or without a request for assistance therefrom in identifying exporters) did not equate to compliance on the part of the investigative authorities' obligations to inform the foreign producers and exporters of the initiation of an investigation.[744]

The Panel determined that Mexico had failed to comply with Articles 6.1[745] and 12.1[746] because they "…failed to notify all interested parties known to have an interest in the investigation of the initiation of the investigation..."[747] The Panel further held that it is the duty of the investigating authority to "...inform all interested parties of the information that is required..."[748] Moreover, the Panel determined that in respect of the notification process, the phrase 'interested parties known

[739] *Panel Report, Mexico - Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice, WT/DS295/R 6 June 2005* Para 2.1 2.
[740] Note, the Ministry of the Economy also analysed historic data to establish injury, see, ibid 2.
[741] ibid 3.
[742] ibid.
[743] The Ministry of Economy report found no evidence of dumping in respect of a further two producers upon whom a zero per cent duty was imposed, ibid para.2.7 at 3.
[744] ibid para 7.199 155.
[745] ibid 155.
[746] ibid para 7.200 155.
[747] ibid.
[748] ibid Para 7.192 153, 7.199 155.

to...the investigating authorities' only encompassed those parties of whom "...it can reasonably obtain knowledge." From this, unlike the solipsistic approach taken by Mexico, it would be incumbent upon future investigations to proactively identify the requisite producers, which would, in the main, satisfy the intent of the notification element LDC proposal as aforesaid.

Mexico, however, subsequently challenged the Panel's findings about Articles 6.1[749] and 12.1.[750] The Appellate Body found that the Panel had erred in its interpretation of Article 12.1 to include the notification of exporters of whom it could reasonably obtain knowledge.[751] The Appellate Body, applying a literal interpretation of Article 12.1, found that the notification process extended solely to exporters who were known to the investigating authority at the actual time of the initiation of the investigation.[752] The Appellate Body further noted that it could find no legal basis for extending the duty to give notice to exporters under Article 6.1, which could imply "...a duty to undertake an inquiry, which may be extensive, to identify the exporters... which in some circumstances could be onerous."[753] As a result, the Appellate Body reversed the Panel's findings[754]

The LDC proposal[755] sought to impose an obligation on all WTO Members

[749] *Appellate Body Report, Mexico - Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice, WT/DS295/AB/R, Adopted 20 December 2005* (n 737) para 42 14.
[750] ibid para 42 14.
[751] ibid para 247 85.
[752] ibid para 251 86.
[753] ibid.
[754] ibid para 253 87.
[755] *Negotiating Group on Dispute Settlement, Proposals on behalf of the Least-Developed Countries, Communication from Bangladesh* (n 425).

to notify an affected LDC of any investigation which could result in "...any action against an exporting least-developed country..." and thereafter establish "...with the utmost care the causes of injury..."[756] The effect of the Appellate Body ruling is that notification will only be given to an LDC exporter if the exporter is a known party to an investigation. Where an affected LDC exporter is unknown to the investigation, notification will not be given; thus, the first LDC obligation of notification in respect of "...any action..."[757] is not satisfied.[758] Similarly, where LDC exporters are not informed of an investigation, they would, by extension, be unable to present any evidence to it, which thus erodes the level of 'comfort' in respect of the second LDC proposal, which sought the imposition of an absolute duty of care upon an investigation when establishing, "...the causes of injury..."[759]

3.4.2 The SCM and the Agreement on Safeguards

The SCM agreement sets out the rules relating to the use of government subsidies and the available remedies should these cause commercial harm,[760] while the Agreement on Safeguards (SA) allows a country to take safeguard measures by imposing temporary import restrictions in response to a surge in imported goods, which either causes or threatens

[756] *ibid.*
[757] ibid.
[758] This would not be the case where an investigation resulted in no action being taken against an LDC.
[759] *Negotiating Group on Dispute Settlement, Proposals on behalf of the Least-Developed Countries, Communication from Bangladesh* (n 425).
[760] 'Agreement on Subsidies and Countervailing Measures' (n 718) 229.

to cause material damage to an indigenous industry.[761] Unlike Article 27 of the SCM, which provides the LDCs with a derogation in terms of imposing export subsidies,[762] Article 9 of the SA provides a conditional dispensation in respect of the imposition of countervailing measures against developing countries.[763] This dispensation provides that where collectively developing countries do not account for more than 9% of the total imports[764] of the product at issue, then safeguard measures cannot be applied against said product originating from a developing country whose total share of imports does not exceed 3% of the total imports of the product at issue.[765] Thus an LDC exporting less than the foregoing *de minimis* levels would be excluded from the application of any safeguard measures. This was confirmed by the Appellate Body (which can uphold, modify, or reverse the legal findings of a panel) in the *US – Line Pipe*[766], where they upheld the Panel finding that the importing Member had acted in a manner which was inconsistent with Article 9.1 by not taking, "... all reasonable steps it could, and thus should have taken to exclude developing countries exporting less than *de minimis* levels..."[767]

[761] Van den Bossche and Zdouc (n 143) 607; Alan O Sykes, 'The Safeguards Mess: A Critique of WTO Jurisprudence' (2003) 2 World Trade Review 261, 261; 'Agreement on Safeguards' (n 719) 273.
[762] 'Agreement on Subsidies and Countervailing Measures' (n 718) 257.
[763] 'Agreement on Safeguards' (n 719) 277.
[764] ibid.
[765] ibid.
[766] *United States - Definitive Safeguard Measures on Imports of Circular Welded Quality Line Pipe from Korea, Report of the Appellate Body, WT/DS202/AB/R, 15 February 2002*.
[767] ibid 44.

Technically, therefore an LDC exporting more than the requisite *de minimis* level could thus have safeguards measures applied against it,[768] in which case the Member seeking to apply such measures is obliged under Article 3.1 to undertake an investigation.[769] The investigation must give "...reasonable public notice to all interested parties..."[770] and allow importers, exporters, and other interested parties to present evidence.[771] What constitutes 'reasonable public notice is undefined. However, in the *US — Wheat Gluten*[772]*,* the Appellate Body stated that all interested parties "...must be notified...and... must be given an opportunity to submit 'evidence'..." [773] which thus imposes a stricter obligation upon the investigating authorities.

While LDC exporters would expect to be notified, there is no obligation to inform the respective LDC government. Accordingly, the first obligation sought by the LDC proposal, namely that of notification of any investigation which may lead to a potential dispute being raised,[774] is thus not fully satisfied.

Additionally, while Article 12.1 of the SA obliges a Member to notify the Committee on Safeguards, who monitor the general implementation of

[768] Interestingly, during the Uruguay round negotiations LDCs sought to use SDT to exclude them in toto, of and from the application of safeguard measures against them either individually or collectively, see, *Sub-Committee on Trade of Least-Developed Countries, 28 September, Note of Proceedings of the Eleventh Meeting, Revision* (n 114) 14.
[769] 'Agreement on Safeguards' (n 719) 274.
[770] ibid 274.
[771] ibid 274.
[772] *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities, Report of the Appellate Body, WT/DS166/AB/R, 22 December 2000*.
[773] ibid 19.
[774] *Negotiating Group on Dispute Settlement, Proposals on behalf of the Least-Developed Countries, Communication from Bangladesh* (n 425).

the SA upon initiating an investigation,[775] there is no obligation to update the committee as to the progress or otherwise of such an investigation.[776] Thus, the third LDC requirement that a Member should keep the respective LDC appraised as to the progress of the investigation[777] is similarly unsated.

3.4.3 The SPS Agreement

Under the SPS agreement, WTO Members have the right to take sanitary and phytosanitary measures to protect people, plants and animals[778] from hazardous risks such as pests and diseases stemming from imported goods.[779] The imposition of such measures is of particular importance to the trade of LDCs, as Western European and other high-income developed countries are major export markets for developing African countries.[780] Accordingly, African countries are vulnerable to changes in the regulatory frameworks within these export markets and lack the "...resources to finance compliance with new and more restrictive sanitary and phytosanitary standards."[781] Moreover, the misapplication of sanitary and

[775] 'Agreement on Safeguards' (n 719) 278.
[776] Where Safeguard Measures are applied against a developing country, the Member imposing the same must immediately notify the Committee on Safeguards thereof, see ibid footnote 2 at 277.
[777] *Negotiating Group on Dispute Settlement, Proposals on behalf of the Least-Developed Countries, Communication from Bangladesh* (n 425).
[778] 'Agreement on the Application of Sanitary and Phytosanitary Measures' (n 720) 70.
[779] Anderson, K., McRae, C, Wilson, D., 'Introduction' to Cheryl McRae, David Wilson and Kym Anderson (eds), *The Economics of Quarantine and the SPS Agreement* (University of Adelaide Press 2015) 1.
[780] Tsunehiro O, Wilson J.S. and Sewadeh, M., 'Measuring the effect of food safety standards on African exports to Europe' in ibid 292.
[781] Tsunehiro O, Wilson J.S. and Sewadeh, M., 'Measuring the effect of food safety standards on African exports to Europe' in ibid.

phytosanitary measures can have serious economic consequences for an LDC affected thereby.[782]

As stated above, the LDC proposal sought the imposition of a strict duty of care on the part of any prospective complainant in establishing "...with the utmost care the causes of injury..."[783] while keeping the respective LDC appraised as to the progress of the investigation.[784] Unlike the previous agreements discussed above under the SPS, there is no formal investigation stage as such. However, Article 5.1[785] provides that the imposition of sanitary and phytosanitary measures should be an assessment based (dependent upon the specific risk at issue).[786] Aside from the provisions of Article 5.2[787], the agreement provides no prescriptive methodology as to the execution of the assessment.[788] While there is no provision *per se* that would require an LDC to be notified[789] about the initiation of an assessment[790], Article 10.1 provides that in preparing and applying SPS measures, Members should "... take account

[782] Ronald Cullen Kerr Welsh, 'Frustration through Futility: Least Developed Countries and the WTO's Settlement of Disputes' (2016) 2016 International Review of Law 1, 8.
[783] *Negotiating Group on Dispute Settlement, Proposals on behalf of the Least-Developed Countries, Communication from Bangladesh* (n 425).
[784] ibid.
[785] 'Agreement on the Application of Sanitary and Phytosanitary Measures' (n 720) 71.
[786] ibid.
[787] ibid 71–72 Note, these require members to take account of, '...available scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest- or disease-free areas; relevant ecological and environmental conditions; and quarantine or other treatment.'
[788] Van den Bossche and Zdouc (n 143) 917 Note, in conducting an assessment the concerned member is obliged to take account of the risk assessment techniques applied by international organisations.
[789] Note, notification is, '...interactive rather than a one-way process.' Joanne Scott, *The WTO Agreement on Sanitary and Phytosanitary Measures: A Commentary* (1 edition, Oxford University Press 2009) 204.
[790] Note, paragraph 5 of Annex B inter alia provides for the notification of all members in respect of proposed measure for which no international standards, guidelines or recommendations exist. Paragraph 6 of Annex B waives this obligation, '...where urgent problems of health protection arise or threaten to arise.' 'Agreement on the Application of Sanitary and Phytosanitary Measures' (n 720) Annex B Para 5-6 80.

of the special needs of developing country Members, and in particular of the least-developed country Members."[791] While various attempts have been made to operationalise Article 10.1,[792] Prevost notes that there is "...continued inadequate implementation of Article 10.1, despite its mandatory wording."[793] Scott argues that while the phrase 'take account of the special needs' is vague, nevertheless the provision "...is more than merely exhortatory..."[794]

Although untested in relation to an LDC, in *EC – Approval and Marketing of Biotech Products,*[795] the Panel held that in relation to a developing country,[796] 'taking account of special needs' did not mean that a WTO Member "...must invariably accord special and differential treatment in a case where a measure has led, or may lead, to a decrease, or a slower increase, in developing country exports."[797] This led Van den Bossche and Zudec to conclude that Members were merely required to consider the needs of developing countries,[798] with Scott opining that Article 10.1 does

[791] ibid 74.
[792] See generally, Denise Prevost, '"Operationalising" Special and Differential Treatment of Developing Countries under the SPS Agreement' (2005) 30 South African yearbook of international law 82, 10 Annex B of the 'Agreement on the Application of Sanitary and Phytosanitary Measures' (n 87), includes a range of transparency measures including, the publication of Regulations, para 1-2; the provision of Enquiry points, para 3-4; Notification procedures in respect of proposed regulations for which and international standard or guidelines either does not exist or does not otherwise meet the scope of a given proposed regulation, para 5-10.
[793] ibid 12 Attempts to operationalise Article 10.1 are still ongoing see, 'G90 proposal on the 25 Special and Differential Treatment Provisions and key issues /concerns to be addressed" JOB/DEV/29; JOB/TNC/51, 30 July 2015, in South Centre, Analytical Note, SC/AN/TDP/2013/7, 2017, No.6 24.
[794] Scott (n 789) 285.
[795] *European Communities - Measures affecting the Approval and Marketing of Biotech Products, Reports of the Panel, WT/DS291/R, WT/DS292/R, WT/DS293/R, 29 September 2006*.
[796] The developing country in this case, Argentina, see ibid
[797] *European Communities - Measures affecting the Approval and Marketing of Biotech Products, Reports of the Panel, WT/DS291/R, WT/DS292/R, WT/DS293/R, 29 September 2006* (n 795) 690.
[798] Van den Bossche and Zdouc (n 143) 938.

not prescribe "...a specific result to be achieved."[799]

From this brief analysis it is clear that in relation to the assessment and the imposition of measures under the SPS, none of the measures sought by LDCs in their proposal, namely those of notification[800] of the intent to instigate an assessment, and the ongoing appraisal,[801] of LDCs as to the progress of such assessment in establishing, "...the causes of injury..."[802] are satisfied.

3.4.4 1989 proposals - pre-dispute phase – Conclusion

The first of the LDC 1989 proposals[803] called for the creation of a formal pre-dispute phase before the initiation of any complaint against an exporting LDC.[804] The key elements thereof were (i) that a potential complainant should notify an affected LDC as to the initiation of any investigation that could result in a WTO complaint being made[805]and (ii) that the body conducting such an investigation should do so under a strict duty of care ensuring that the 'utmost care'[806] is taken in establishing the 'causes of injury'[807] and (iii) that the affected LDC should be continually appraised as to the progress of the said investigation. [808]

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[799] Scott (n 789) 285.
[800] *Negotiating Group on Dispute Settlement, Proposals on behalf of the Least-Developed Countries, Communication from Bangladesh* (n 425).
[801] *ibid.*
[802] ibid.
[803] *ibid.*
[804] *ibid.*
[805] *ibid.*
[806] *ibid.*
[807] *ibid.*
[808] *ibid.*

While no such provision was found in the DSU, there were provisions of a broadly similar nature to be found in several of the covered agreements. By examining each of these agreements in turn and having considered and evaluated the relevant case law, it is clear that, notwithstanding the use of often sympathetically sounding terminology, these agreements arguably, do not satisfy the core aims of the first LDC proposal.

3.4.5 Assimilation of 1989 proposal - Exhaustion of all other means

As stated above, the third[809] LDCs proposal submitted by Bangladesh on behalf of the LDCs on 14th November 1989[810] states that "...recourse to Panel Procedure shall be the ultimate step after exhausting all other means available for dispute settlement...."[811] which should include the use of good offices.[812] The writer opined that, this proposal arguably called for the creation of a mediation phase interposed between the consultation and Panel stages of a dispute, as aforementioned. In terms of the LDCs proposal, the mediation phase provides that recourse to the formation of a Panel should only take place after "...exhausting all other means available for dispute settlement, including the use of the good offices of the Chairman of the Council or the Director-General of GATT."[813] It is clear from the above LDCs viewed the use of good offices as a mandatory step in the DSU process, a step which had to be completed before the

[809] The second proposal was the 'opt-out', see earlier discussion thereanent.
[810] *Negotiating Group on Dispute Settlement, Proposals on behalf of the Least-Developed Countries, Communication from Bangladesh* (n 425).
[811] ibid.
[812] ibid.
[813] ibid.

formation of a Panel.[814] Given the specific nature of this proposal, it is argued that it can only be mapped directly to the DSU and not to any of the other WTO agreements.

This proposal appears to have been met in full with the inclusion of the first of the two LDC-only provisions (see above) in the DSU, namely Article 24.2.[815] This provides that in any dispute involving an LDC where consultations have failed to yield a satisfactory solution[816], the Director General or the Chairman of the DSB shall, if requested by the LDC[817], "...offer their good offices, conciliation and mediation with a view to assisting the parties to settle the dispute, before a request for a Panel is made."[818] There is, however, a material difference between Article 24.2 and the terms of the LDC proposal. Article 24.2 provides the Director General or the Chairman of the DSB shall "offer"[819] their good offices, conciliation, and mediation before the request for a Panel. It is a well-established principle of law that to be binding, an offer must be accepted. Thus "...a proposal which has not been accepted...will not bind either the proposer or the person to whom it is addressed."[820] Therefore the use of good offices in terms of Article 24.2 is not, as envisaged in the LDC proposal, a compulsory step in the DSU process but a voluntary one,

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[814] It is notable that the sentiment of the twin themes of mediation and the use of good offices are also at play in the 'opt-out' proposal which adds weight to the argument that LDCs favoured 'negotiation' over a 'litigation' as a means of resolving trade disputes.
[815] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) 370–371.
[816] ibid 370.
[817] ibid.
[818] ibid 370–371.
[819] ibid 370.
[820] William Anson R, Sir, *Principles of the English Law of Contract* (Clarenden Press, Oxford 1879) 15.

which would only be undertaken upon the acceptance of the 'offer' of good offices by a complainant. This view is reinforced within the context of the DSU by Article 5 (Good Offices, Conciliation and Mediation),[821] where Article 5.1 states that good offices, conciliation, and mediation are "... procedures that are undertaken voluntarily..."[822] if agreed by the parties.[823]

As evidenced above, notwithstanding the synergetic terminology used in the DSU *vis-a-vis* that expressed in the LDC proposal,[824] the operational use of good offices[825] within the DSU is entirely voluntary in nature, which runs contrary to the LDCs request that it should be mandatory.[826] Thus the third LDC proposal has, like the first and second proposals, not been given effect to.

3.4.6 Assimilation of 1989 proposal - 'flexibility' & 'due restraint'

The fourth proposal submitted on 14th November 1989[827] was that in settling a dispute, LDCs should be treated with complaisance, whereas in

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[821] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) 357.
[822] ibid.
[823] Within the SPS agreement Art. 12.2 provides for the use of consultations / mediation aimed at settling a prospective dispute. However as with the provisions within the DSU this mediation is entirely voluntary in nature see, 'Agreement on the Application of Sanitary and Phytosanitary Measures' (n 720) 75; Nohyoung Park and Myung-Hyan Chung, 'Analysis of a New Mediation Procedure under the WTO SPS Agreement' (2016) Vol. 50(1) Journal of World Trade 93, 105–106.
[824] *Negotiating Group on Dispute Settlement, Proposals on behalf of the Least-Developed Countries, Communication from Bangladesh* (n 425).
[825] Since the formation of the WTO, the provisions of Article 5, good offices, conciliation and mediation, have never been used, despite the Director General of the WTO being '...ready and willing to assist...', WT/DSB/25, 1. In 2001 in an attempt to stimulate the use of Article 5, the Director General issued a series of proposed guidelines setting out how good offices, conciliation and mediation could be accessed and how they would work, see, *Article 5 of the Dispute Settlement Understanding, Communication from the Director-General, WT/DSB/25*, despite this initiative in 2001, good offices, conciliation and mediation have still not been used. .
[826] *Negotiating Group on Dispute Settlement, Proposals on behalf of the Least-Developed Countries, Communication from Bangladesh* (n 425).
[827] *ibid.*

settling disputes, "...flexibility shall be the rule rather than the exception."[828] Again, as with the previous proposal, given the specific nature of this proposal, this can only be mapped directly to the DSU and not toother WTO agreements. The LDC proposers did not define or contextualise the term 'flexibility' nor provide any information as to how and where 'flexibility' was to be applied or otherwise be institutionalised within the DSU.[829]

Helfer states that the inclusion of measures incorporating varying degrees of flexibility can allow the parties to manage their treaty-related compliance risks.[830] Bilder, in his seminal work,[831] describes how in terms of risk management, flexibility will "…generally tend towards looser rather than more rigid commitments."[832] Feichtner notes that as international agreements become increasingly restrictive, this, in turn, raises both concerns and demands for flexibility from concerned states, and as such, flexibility is crucial to the legitimacy and effectiveness of international agreements.[833] Feichtner narrates that WTO law seeks to restrict the authority of WTO members in order to legitimize market conditions[834]

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[828] *ibid.*

[829] An alternative explanation for the lack of clarity and definition is of course that it could have been entirely deliberate. As discussed above, the LDCs had with unanimity eschewed the detailed 'legalistic' provisions of the DSU and proposed the creation of a bespoke dispute resolution system. Against this backdrop, the absence of a substantive narrative giving definition to the remaining LDC proposals leads anyone seeking to interpret or give effect to the proposals asking the simple question – what do LDCs actually want? – the answer of course is a separate and distinct dispute mechanism.

[830] Laurence R Helfer, 'Flexibility in International Agreements' in Jeffrey L Dunoff and Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press 2012) 175-176,190.

[831] Richard B Bilder, *Managing the Risks of International Agreement* (University of Wisconsin Press 1981) 199.

[832] ibid 200.

[833] Isabel Feichtner, *The Law and Politics of WTO Waivers: Stability and Flexibility in Public International Law* (Cambridge University Press 2011) 8.

[834] ibid 43.

which she argues leads to both claims that WTO is too restrictive[835] and to demands for flexibility.[836] Feichtner argues that specific waivers (the grant of a waiver allows a WTO member to waive specific obligations imposed on a member in terms of the covered agreements[837]) address these demands for flexibility.[838] In this instance, however, Feichtner's narrow specific waiver approach seems inappropriate given the fact that the LDCs have not defined a specific range of issues upon which 'flexibility' is sought. Moreover, the wording "in settling disputes ...flexibility shall be the rule rather than [the] exception"[839] suggests that the scope of the 'flexibility' being sought is broadly based and of a more generalized nature.

As the primary purpose of the DSU is to settle disputes, 'flexibility' in this instance should correctly be read and applied holistically to the DSU *in toto*, as opposed to a narrower construction that flexibility should only be applied in respect of *ex post facto* Panel/Appellate Body remedial measures sanctioned by the DSB.

In terms of seeking a definition for 'flexibility', I can find no WTO case where either a Panel or the Appellate Body has defined 'flexibility' or 'flexible'; similarly, neither 'flexibility' nor 'flexible' are defined in Black's Law Dictionary.[840] The definition and meaning of the term 'flexibility' that

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[835] ibid 55.
[836] ibid 8.
[837] See Art. IX:3 'Agreement Establishing the World Trade Organization' 13–14 <https://www.wto.org/english/docs_e/legal_e/04-wto.pdf> accessed 12 October 2015.
[838] Feichtner (n 833) 55,57.
[839] *Negotiating Group on Dispute Settlement, Proposals on behalf of the Least-Developed Countries, Communication from Bangladesh* (n 425).
[840] Garner Bryan A., ed. (n 7).

will thus be used herein are those derived from the Concise Oxford Dictionary[841] being, 'pliable', 'pliant', 'manageable', 'adaptable', 'versatile' or 'complaisant'."[842]

Within the DSU itself, the word 'flexibility' appears only once in Article 12.2, where again, the term is *per se* undefined.[843] However, DSU Article 24,[844] which is the second of the LDC-specific SDT measures, provides that in relation to disputes involving an LDC at "...all stages..."[845] of determining the causes of a dispute, and in the DSU procedures"...particular consideration shall be given to the special situation of least-developed country Member."[846] Article 24.1 thereafter proceeds to provide guidance as to the practical application of the provision, directing (i) that "...Members shall exercise due restraint..."[847] in raising disputes involving LDCs,[848] and (ii) that where a complainant has, as the result of the measure taken by an LDC, suffered nullification or impairment the complaining party shall "... exercise due restraint in asking for compensation or seeking authorization to suspend... concessions or other obligations..."[849] At face value, it could be argued that these 'due restraint' provisions within Article 24.1 suggest that a

[841] Sykes, J.B. (ed), *Concise Oxford English Dictionary: Seventh Edition* (Seventh Edition, The Clarendon Press 1982).
[842] ibid 373.
[843] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) 361 In article 12.2, 'flexibility' relates to the time taken to prepare Panel Reports, where the production of a high-quality report should not unduly delay the process as a whole.
[844] ibid 370.
[845] ibid.
[846] ibid.
[847] ibid.
[848] ibid.
[849] ibid.

degree of 'flexibility' is to be shown to LDCs in settling disputes. This argument would be strengthened if it could be shown that the obligation to show 'due restraint' was enforceable as opposed to being simply hortatory[850] in nature.[851] If this were the case, then arguably, it would partially satisfy the intent of the fourth LDC proposal that in "...settling disputes ...flexibility shall be the rule rather than the exception."[852]
Van den Bossche and Gathii suggest that within the DSU, '…due restraint' is of itself an indicator of inherent flexibility therein.[853] Further evidence supporting the view that the 'due restraint' provision of Article 24.1, within the context of Members initiating disputes,[854] is not hortatory is to be found in the *US – Upland Cotton*.[855] The Panel in the *US – Upland Cotton*,[856] noted that where a WTO Member considers that "...its benefits under the covered agreements are being impaired..."[857] the aggrieved Member has a "...comprehensive right to bring dispute settlement actions."[858] The Panel, however, qualified this by stating that the 'comprehensive right' should not be strictly interpreted but was instead "...subject to...Article 24.1."[859]

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[850] There LDCs have repeatedly attempted to strengthen this provision, the most prominent of which was during the Doha Round of trade negotiations which will be discussed in greater detail in Chapter 5.
[851] Van den Bossche and Zdouc (n 143) 233.
[852] *Negotiating Group on Dispute Settlement, Proposals on behalf of the Least-Developed Countries, Communication from Bangladesh* (n 425).
[853] Van den Bossche and Gathii (n 60) 51–52.
[854] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) 370.
[855] *United States - Subsidies on Upland Cotton, Report of the Panel, WT/DS267/R, 8 September 2004*.
[856] *ibid.*
[857] ibid para 7.318 96.
[858] ibid.
[859] ibid para 7.318, footnote 440 96.

While this could be taken as confirmation that there is a degree of flexibility inherent within the DSU on this point, the qualification of being "...subject to...Article 24.1,"[860] in turn, simply places an obligation on a Member to "...exercise due restraint..." [861] in for example raising a dispute involving an LDC.[862] Therefore to be successful, the argument that 'flexibility' is inherent within the DSU rests upon the meaning and effect of a Member's obligation to exercise 'due restraint.' The definition, meaning and significance of 'due restraint' have been tested within the DSU, though not in the context of either the initiation of disputes or in relation to LDCs. The now moribund [863] 'peace clause'[864], Article 13(b)(i) in the Agreement on Agriculture,[865] which arguably sought to protect developing countries' food procurement, provided exemptions [866] from the imposition of countervailing measures, "...unless a determination of injury or threat thereof [was] made in accordance with Article VI of GATT 1994 and Part V of the Subsidies Agreement, and due restraint shall be shown in initiating any countervailing duty investigations."[867]

In *Mexico — Olive Oil,*[868] the EC argued that Mexico acted inconsistently

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[860] *ibid.*
[861] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) 370.
[862] ibid.
[863] The 'peace' clause ceased to have effect in 2004 following the expiry of a nine-year implementation phase, (art 1 [f] of the Agreement on Agriculture, ibid), see Van den Bossche and Zdouc (n 143) 844.
[864] ibid.
[865] 'Agreement on Agriculture' 53 <https://www.wto.org/english/docs_e/legal_e/14-ag.pdf> accessed 25 June 2017.
[866] The exemptions were in respect of agricultural support measures, (i.e. subsidies paid to farmers), see, Van den Bossche and Zdouc (n 143) 844.
[867] 'Agreement on Agriculture' (n 865) 53.
[868] *Mexico - Definitive Countervailing Measures on Olive Oil from the European Communities, Report of the Panel, WT/DS341/R, 4 September 2008*.

with Article 13(b)(i) of the Agreement on Agriculture insofar as Mexico failed to show 'due restraint' in initiating a countervailing duty investigation on the imports of olive oil from the EC.[869] The EC defined 'restraint' by reference to the verb 'to restrain', which they claimed meant "...hold back or prevent from some course of action"[870] or "restrict, limit."[871] Mexico, however, disputed the EC definition, positing that within the context of the initiation of an investigation, 'due restraint' simply meant, "...adopting an appropriate and reasonable standard for allowing an investigation to be initiated, and it does not involve doing anything differently..."[872].

The Panel, noting that the definition of 'due restraint' had hitherto not been interpreted by either Panels or the Appellate Body,[873] determined that "...the ordinary meaning of "due restraint" is a proper, regular, and reasonable demonstration of self-control, caution, prudence, and reserve."[874]

It is clear that if this definition of 'due restraint' is applied to the LDC proposal, it does not place any obligation upon a complainant to be either 'pliable', 'pliant', 'manageable', 'adaptable', 'versatile', 'complaisant' or otherwise flexible in either initiating a dispute or in "...asking for

[869] ibid para.7.65 29.
[870] ibid 29.
[871] *Mexico – Definitive Countervailing Measures on Olive Oil, Second Oral Statement by the European Communities, WT/DS341* para 23 6; *Mexico - Definitive Countervailing Measures on Olive Oil from the European Communities, Report of the Panel, WT/DS341/R, 4 September 2008* (n 868) para 7.65 29.
[872] *Mexico - Definitive Countervailing Measures on Olive Oil from the European Communities, Report of the Panel, WT/DS341/R, 4 September 2008* (n 868) para 7.66 29.
[873] ibid para 7.67 29.
[874] ibid.

compensation or seeking authorization to suspend...concessions or other obligations..."[875] It is therefore contended that a complainant in 'exercising due restraint' when initiating a dispute involving LDC[876] would not have to demonstrate that its actions were 'flexible', merely that its actions satisfied one or more of the criteria of being "...proper, regular, and reasonable demonstration of self-control, caution, prudence and reserve."[877] Similarly, in terms of seeking compensation or the authorisation to suspend concessions,[878] a complainant would again not have to show that its actions were 'flexible', merely that it had exercised due restraint showing that its actions satisfied one or more of the foregoing criteria of being, "...proper, regular, and reasonable demonstration of self-control, caution, prudence and reserve."[879]

The fourth proposal submitted on 14th November 1989[880] was that in settling a dispute, LDCs should be treated with complaisance, with flexibility being "...the rule rather than [the] exception."[881] Based upon the above evidence, arguably, the obligation incumbent upon a prospective complainant to 'exercise due restraint' when either initiating a dispute[882]

[875] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) 370.
[876] ibid.
[877] *Mexico - Definitive Countervailing Measures on Olive Oil from the European Communities, Report of the Panel, WT/DS341/R, 4 September 2008* (n 868) para 7.67 29.
[878] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) 370.
[879] *Mexico - Definitive Countervailing Measures on Olive Oil from the European Communities, Report of the Panel, WT/DS341/R, 4 September 2008* (n 868) para 7.67 29.
[880] *Negotiating Group on Dispute Settlement, Proposals on behalf of the Least-Developed Countries, Communication from Bangladesh* (n 425).
[881] *ibid.*
[882] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) 370.

or seeking compensation or the authorisation to suspend concessions[883] does not give rise to any inherent flexibility within the DSU. As such, the fourth LDC proposal that in "...settling disputes ...flexibility shall be the rule rather than [the] exception"[884] has not therefore been incorporated into the DSU.

3.4.7 Assimilation of LDC proposals, summation

The purpose of this section was to examine the LDC proposals and determine the extent to which they or the sentiments thereof were included or otherwise accommodated either within the DSU or elsewhere within the WTO agreements. This analysis fits within a wider narrative that with the failure of LDCs to achieve a separate LDC-only dispute settlement system (which the writer contends contributed to their bias against using the DSU), the failure to incorporate some or all the remaining DSU proposals would build upon and further reinforce said bias. The analysis clearly showed that in respect of the preliminary proposals of 23rd of November 1988[885] (which were of a general nature), provisions were incorporated into the DSU to enable LDCs to both utilize the DSU[886] and be provided with technical assistance.[887] The same cannot, however, be said in respect of the more substantive LDC proposals.

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[883] ibid.
[884] *Negotiating Group on Dispute Settlement, Proposals on behalf of the Least-Developed Countries, Communication from Bangladesh* (n 425).
[885] *ibid.*
[886] *Group of Negotiations on Goods (GATT), Communication from Bangladesh, Uruguay Round and the Least-Developed Countries (LLDCs), Revision* (n 114) 2.
[887] *Sub-Committee on Trade of Least-Developed Countries, 28 September, Note of Proceedings of the Eleventh Meeting, Revision* (n 114) Annex 1, 'General Proposals' 11.

In respect of the first substantive proposal submitted on 14th November 1989,[888] LDCs sought the creation of a formal 'pre-dispute' phase.[889] The text of the proposal stated that before "...initiating any action against any exporting least-developed country..."[890] the potential disputant should formally notify the respective LDC of its intention to instigate any investigation, which may lead to a potential dispute being raised.[891] While no such provision could be found within the DSU, several provisions of relevance were identified within the covered agreements.[892] The respective provisions of each of these agreements were, together with relevant case law, reviewed, and it can be concluded that, notwithstanding the use of often sympathetically sounding terminology, these agreements, satisfied none of the core aims of the LDC proposal. The third proposal was made on the 14th of November 1989,[893] which sought the creation of a mandatory mediation phase between the consultation and Panel stages of DSU, during which the disputing parties would be required to, "...use of the good offices of the Chairman of the Council or the Director-General of GATT"[894] in an attempt to settle any given dispute.[895] Again while synergetic terminology appears in Article

[888] *Negotiating Group on Dispute Settlement, Proposals on behalf of the Least-Developed Countries, Communication from Bangladesh* (n 425).
[889] *ibid.*
[890] ibid.
[891] ibid.
[892] The covered agreements were the Agreement on Implementation of Article VI of the GATT; the Agreement on Subsidies and Countervailing Measures; the Agreement on Safeguards and the SPS Agreement.
[893] *Negotiating Group on Dispute Settlement, Proposals on behalf of the Least-Developed Countries, Communication from Bangladesh* (n 425).
[894] *ibid.*
[895] *ibid.*

24.2[896] of the DSU, as to the use of good offices, these were shown to be voluntary as opposed to mandatory in nature. Thus, the core aims of the proposal were frustrated.

The fourth and final proposal submitted on 14th November 1989[897] was that in settling a dispute, LDCs should be treated with complaisance, whereas in settling disputes involving LDCs, "...flexibility shall be the rule rather than the exception."[898] While the wording of both Article 24.1 of the DSU[899] and Article 13(b)(i) of the Agreement on Agriculture[900] was suggestive of a measure of inherent flexibility, an analysis of the relevant case law, *US – Upland Cotton*[901] and *Mexico — Olive Oil,*[902] clearly demonstrated that this was not the case and neither the LDC proposal nor the sentiment thereof had been assimilated into the DSU or incorporated into any other WTO agreements.

As stated above, during the Uruguay Round, LDCs not only failed to secure a bespoke LDC-only dispute settlement system, but also saw their remaining substantive proposals fail to gain traction. Together these have contributed to LDCs' reluctance to engage with the DSU, evidence of

[896] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) 370.
[897] *Negotiating Group on Dispute Settlement, Proposals on behalf of the Least-Developed Countries, Communication from Bangladesh* (n 425).
[898] *ibid.*
[899] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) 370.
[900] 'Agreement on Agriculture' (n 865) 53.
[901] *United States - Subsidies on Upland Cotton, Report of the Panel, WT/DS267/R, 8 September 2004* (n 855).
[902] *Mexico - Definitive Countervailing Measures on Olive Oil from the European Communities, Report of the Panel, WT/DS341/R, 4 September 2008* (n 868).

which, together with the practical effects thereof, will be discussed in the next section.

3.5 LDC Engagement with the DSU

The second section of this Chapter will evaluate how LDCs have thus far engaged with the DSU and demonstrate that LDCs have actively pursued a policy of non-engagement therewith. To date, the extent of LDC engagement with the DSU is comprised of one dispute initiated by an LDC, *India – Anti-Dumping Measure on Batteries from Bangladesh,*[903] with LDCs having participated as third parties in a further eight disputes.[904] This section will first review *India – Anti-Dumping Measure on Batteries from Bangladesh*. In reviewing the case, it will be demonstrated how the government of Bangladesh deliberately deployed what Taslim [905] describes as "...internal bureaucratic resistance..."[906] which emanated from two government ministries. First, the Ministry of Commerce were concerned about how India might view any trade dispute and the potential negative impact this could have on what were then their ongoing "delicate trade negotiations with India."[907] Secondly, The Ministry of Foreign Affairs were

[903] *India-Antidumping Measure on Batteries from Bangladesh, Request for Consultations* (n 510).
[904] LDC participation in the DSU is as follows: Bangladesh, as complainant (DS306), as third-party (DS243); Benin, as third-party (DS267); Chad, as third-party (DS267); Madagascar, as third-party (DS27, DS265, DS266, DS283); Malawi, as third-party (DS265, DS266, DS283, DS434); Senegal, as third-party, (DS27, DS58); Tanzania, as third-party (DS265, DS266, DS283); Zambia, as third-party (DS434).
[905] Taslim was formerly the Chairman of the Bangladesh Tariff Commission, and also the Chief negotiator for Bangladesh during the dispute with India, see, Haroon Habib, 'The Hindu Newspaper: Anti-Dumping: Dhaka Takes Delhi to WTO' *The Hindu Group* (India, 8 February 2004) <https://www.thehindu.com/todays-paper/tp-national/anti-dumping-dhaka-takes-delhi-to-wto/article27561308.ece>.
[906] Taslim, M.A., 'How the DSU Worked for Bangladesh: The First Least Developed Country to Bring a WTO Claim' in Shaffer and Meléndez-Ortiz (n 555) 240.
[907] Taslim, M.A., 'How the DSU Worked for Bangladesh: The First Least Developed Country to Bring a WTO Claim ibid 243.

also concerned about any "…untoward diplomatic ramifications…"[908] of a trade dispute and the impact this could have on the wider relationship between the two countries. .

Given that the bulk of LDC engagement with the DSU is as third parties, this section will secondly examine concepts of third-party participation and third-party rights as set out in the DSU. It will be shown that even where an infringement of WTO rules results in severe economic hardship in multiple countries, LDCs still pointedly refuse to initiate a WTO complaint, preferring instead to seek settlement by means other than by recourse to the DSU.

3.5.1 India – Anti-Dumping Measure on Batteries from Bangladesh

Shaffer notes that in developing countries, due primarily to the absence of 'public-private' networks designed to identify, investigate and prioritise trade barriers,[909] the private sector views dispute settlement as being solely within the purview of government.[910] Van den Bossche and Zdouc argue that most disputes are brought by WTO Members at the behest of a company or interest group.[911] Similarly, Bahri [912] argues that the involvement of the affected industry is a "...crucial enabling element for any government action."[913] Moreover, the absence or inertia of strong

[908] Taslim, M.A., 'How the DSU Worked for Bangladesh: ibid.
[909] Shaffer (n 59) 185; Dan Ciuriak, Beverly Lapham and Robert Wolfe, 'Firms in International Trade: Towards a New Agenda for the Next WTO Round' (2014) 6(2) Global Policy 12.
[910] Shaffer (n 59) 185.
[911] Van den Bossche and Zdouc (n 143) 177–178.
[912] Amrita Bahri, 'Handling WTO Disputes with the Private Sector: The Triumphant Brazilian Experience' (2016) 50 Journal of World Trade 641.
[913] ibid 646.

lobbying groups often results in there being "insufficient motivation to instigate trade disputes."[914]

The task of persuading a government to initiate a dispute would be doubly difficult if, as this thesis shows, they are pre-disposed to resolving trade disputes by means other than through recourse to the DSU. In *India –Anti-dumping Measure on Batteries from Bangladesh,*[915] it will be shown just how difficult this task was.

In 2001, India, at the behest of the indigenous Indian battery manufacturers,[916] initiated an investigation into allegations that batteries were being dumped into the Indian market.[917] In January 2002, India imposed anti-dumping duties on imports of lead acid batteries exported from Bangladesh to India.[918] The notification, *inter alia*, recites that lead acid batteries had been exported to India from Bangladesh at a price which was below the normal value thereof, causing injury to the Indian industry.[919] Duties were imposed on all exports of industrial, automotive, and motorcycle lead acid batteries from Bangladesh,[920] which "...resulted

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[914] Oduwole (n 513) 362.
[915] *India – Anti-Dumping Measure on Batteries from Bangladesh, Request for Consultations by Bangladesh, WT/DS306/1 G/L/669 G/ADP/D52/1, 2 February 2004* (n 53).
[916] For details of these manufacturers see 'Ministry of Commerce and Industry (Department of Commerce), (Directorate General of Anti-Dumping and Allied Duties), Notification, Final Findings (Mid Term Review), Reference Number 15/8/2003-DGAD, 26th October 2004' Section C, Domestic Industry, 6. 36 <https://www.dgtr.gov.in/sites/default/files/Final-FindingsMTR_1.pdf>.
[917] Mohammed Ali Taslim, M.A., 'How the DSU Worked for Bangladesh: The First Least Developed Country to Bring a WTO Claim' Shaffer and Meléndez-Ortiz (n 555) 237.
[918] The anti-dumping measures were imposed under Notification No. 1/2002 – Customs, issued by the Department of Revenue, Ministry of Finance of India dated 2 January 2002, *India – Anti-Dumping Measure on Batteries from Bangladesh, Request for Consultations by Bangladesh, WT/DS306/1 G/L/669 G/ADP/D52/1, 2 February 2004* (n 53) footnote 1 1.
[919] Central Board of Excise and Customs, Department of Revenue, Ministry of Finance, Government of India, Tariff Notifications of Customs in year 2002 2002 (Notification No 1 / 2nd January 2002) Third recital, (a) and (b), 1.
[920] ibid 2.

in the cessation of export of the concerned product..."[921] Taslim narrates that when India initiated the anti-dumping investigation that was to lead to the imposition of countervailing anti-dumping duties[922], the sole Bangladeshi battery manufacturer, Rahimafrooz, "...had no experience or knowledge in how to deal with the situation..."[923] Additionally, there were "...no competent people of [sic] institutions in the country that could be consulted on the matter."[924] The absence of institutions and a mechanism to deal with disputes is not a phenomenon that is unique to Bangladesh. Kessie and Addo contend that in relation to African countries, "...there are no proper institutional structures or mechanisms in place detailing the procedures to be followed if exporters should encounter any market access problems in foreign markets." [925]

This lack of government-industry coordination is not solely an issue for LDCs. Bahri[926] discussed the public/private measures, strategies and partnerships adopted by Brazil to take full advantage of the opportunities that were provided through engaging with the DSU.[927] She noted that developing countries could "... 'learn lessons' by peer-reviewing the dispute settlement partnership experience of Brazil."[928] It is, of course,

[921] Mohammed Ali Taslim, M.A., 'How the DSU Worked for Bangladesh: The First Least Developed Country to Bring a WTO Claim' in Shaffer and Meléndez-Ortiz (n 555) 231.
[922] Mohammed Ali Taslim, M.A., 'How the DSU Worked for Bangladesh: The First Least Developed Country to Bring a WTO Claim', ibid 237.
[923] Mohammed Ali Taslim, M.A., 'How the DSU Worked for Bangladesh: The First Least Developed Country to Bring a WTO Claim' ibid.
[924] Mohammed Ali Taslim, M.A., 'How the DSU Worked for Bangladesh: The First Least Developed Country to Bring a WTO Claim' ibid.
[925] Kessie and Addo (n 468) 5.
[926] Bahri (n 912).
[927] ibid 671 et.seq.
[928] ibid 674.

difficult to draw parallels between a country like Brazil, which is one of the most advanced developing countries, and the LDCs. Therefore, the absence of these institutions and structures could simply be reflective of the LDCs lack of available resources. Alternatively, the absence of these structures and institutions is entirely consistent with the argument that the LDCs do not view the DSU as a viable vehicle to resolve their trade disputes. If this argument is true, then the creation of such institutions and structures would quite simply represent an unnecessary and unwarranted waste of resources. The only exception to this would be, as discussed below, where an LDC, like Bangladesh, chose to engage with the DSU.

The Bangladeshi manufacturer Rahimafrooz found that the lack of clear directives from any institutional body as to (a) how an exporter could proceed in situations where market access problems subsist in foreign markets or (b) how an exporter could discover or navigate the pathways to the relevant government departments or bodies represented considerable obstacles. Despite the roadblocks, Rahimafrooz persisted, demonstrating the critical role that the private sector in an LDC must play in persuading its government to investigate, instigate, and prosecute a WTO case.[929]

The imposition of anti-dumping duties generated "...extensive adverse publicity...the near–unanimity of which... created difficult political

[929] Gregory C. Shaffer, Michelle Ratton Sanchez Badin & Barbara Rosenberg, 'Winning at the WTO: The Development of a Trade Policy Community within Brazil', in Shaffer and Meléndez-Ortiz (n 555) 78.

problems and considerable pressure on the government to act."[930] Rahimafrooz successfully lobbied the Bangladesh government to raise the matter with the Indian Ministry of commerce.[931] In March 2001, the respective Ministers for Commerce of Bangladesh and India met in Delhi, where Bangladesh unsuccessfully sought to halt the anti-dumping investigation,[932] and on March 5th 2001 Bangladesh began an examination into the dumping case.[933]

This inquiry was to be led by the Bangladesh Tariff Commission,[934] which is an advisory body whose primary role *inter alia* includes the provision of advice to the government [935] as to "...the protection of the interests of the industry of the country" [936] and the measures to be taken, "...to stop dumping and unfair methods regarding the import and selling of foreign goods."[937] Thus the Bangladesh Tariff Commission (BTC) constituted the authority tasked with conducting the 'investigation' required under Articles 10 and 11 of the SCM in respect of the imposition of any countervailing duties against goods imported into Bangladesh.[938] Under

[930] Mohammed Ali Taslim, M.A., 'How the DSU Worked for Bangladesh: The First Least Developed Country to Bring a WTO Claim', ibid 235.
[931] Mohammed Ali Taslim, M.A., 'How the DSU Worked for Bangladesh: The First Least Developed Country to Bring a WTO Claim', ibid 242.
[932] Mohammed Ali Taslim, M.A., 'How the DSU Worked for Bangladesh: The First Least Developed Country to Bring a WTO Claim', ibid 238.
[933] 'Business News -Task Force to Examine India's Dumping Move toward Batteries of Bangladesh' <http://www.bangla2000.com/news/archive/business/2001-03-05%5Cnews_detail5.shtm> accessed 5 July 2017; Mohammed Ali Taslim, M.A., 'How the DSU Worked for Bangladesh: The First Least Developed Country to Bring a WTO Claim', Shaffer and Meléndez-Ortiz (n 555) 242.
[934] 'Business News -Task Force to Examine India's Dumping Move toward Batteries of Bangladesh' (n 933).
[935] See, 'Functions of the Commission' 'The Bangladesh Tariff Commission Act, 1992' Para. 7.1 <http://www.sai.uni-heidelberg.de/workgroups/bdlaw/1992-a43.htm> accessed 3 July 2017.
[936] ibid para 7.1(a).
[937] ibid para 7.1(f).
[938] 'Agreement on Subsidies and Countervailing Measures' (n 718) 241–243.

Bangladeshi Law, no countervailing duty may be imposed unless "...the Bangladesh Tariff Commission...informs the Government that there is prima-facie evidence of injury which is caused by dumping..."[939] An identical provision also applies in relation to the imposition of Anti-Dumping duties.[940] While the core function of the BTC is that of an authority investigating cases where products are being 'dumped' into Bangladesh, the BTC also had a wider statutory remit to advise the government on "...the development of the export of goods of the country..."[941] Therefore in a sense, the choice of the BTC to lead the investigation was that of a 'gamekeeper' turned 'poacher'. The investigation, chaired by Taslim (as aforesaid), concluded that India had acted in a manner inconsistent with the Agreement on Implementation of Article VI of the GATT[942] (ADP) and strongly advised the Bangladeshi government to seek redress at the WTO.[943]

Rahimafrooz then lobbied the Bangladeshi government to initiate a dispute under the DSU,[944] and "...more importantly, it gave an undertaking to bear all the financial costs of the dispute..."[945] As a result of the "...dogged pursuit of the case by the victim of the anti-dumping

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[939] *Bangladesh Customs Act, 1969 1969 (Act No IV of 1969 [8th March 1969]) Chapter V, 18A, (7) 16.*
[940] ibid Chapter V, 18B, (7).
[941] 'The Bangladesh Tariff Commission Act, 1992' (n 935) para 7, 1(d).
[942] Mohammed Ali Taslim, M.A., 'How the DSU Worked for Bangladesh: The First Least Developed Country to Bring a WTO Claim' Shaffer and Meléndez-Ortiz (n 555) 242.
[943] Mohammed Ali Taslim, M.A., 'How the DSU Worked for Bangladesh: The First Least Developed Country to Bring a WTO Claim' ibid.
[944] Mohammed Ali Taslim, M.A., 'How the DSU Worked for Bangladesh: The First Least Developed Country to Bring a WTO Claim', ibid.
[945] Mohammed Ali Taslim, M.A., 'How the DSU Worked for Bangladesh: The First Least Developed Country to Bring a WTO Claim', ibid.

duties, Rahimafrooz..."[946] in 2004, Bangladesh requested consultations with India.[947] Bangladesh *inter alia* averred that the anti-dumping duties imposed by India were not justified under either Article VI of the General Agreement on Tariffs and Trade 1994 (the GATT)[948] or the ADP.[949] Bangladesh also averred that by imposing anti-dumping duties, India had acted in a manner inconsistent with its obligations under Articles I. 1 and II. 1 of the GATT[950] and the ADP, alleging that the benefits that Bangladesh should have accrued under the GATT Articles XXIII: 1(a) and (b) had been nullified and impaired.[951]

In 2006 Bangladesh and India notified the DSB that they had resolved the dispute by reaching a mutually satisfactory solution.[952] The agreement reached by the parties discontinued the anti-dumping duties by rescinding the notification imposing the anti-dumping duties.[953] This decision resulted from a review by the Indian Ministry of Commerce and Industry[954] that, *inter alia*, recommended the discontinuation.[955] This was premised upon the absence of "material injury [to the domestic industry] due to dumped

[946] Mohammed Ali Taslim, M.A., 'How the DSU Worked for Bangladesh: The First Least Developed Country to Bring a WTO Claim' ibid 241.
[947] Request for Consultations by Bangladesh, *India – Anti-Dumping Measure on Batteries from Bangladesh,* WT/DS306/1 (Feb. 2, 2004).
[948] ibid.
[949] ibid.
[950] ibid 3.
[951] ibid.
[952] *India – Anti-Dumping Measure on Batteries from Bangladesh, Notification of Mutually Satisfactory Solution, WT/DS306/3 G/L/669/Add1 G/ADP/D52/2, 23 February 2006*.
[953] ibid 3.
[954] 'Ministry of Commerce and Industry (Department of Commerce), (Directorate General of Anti-Dumping and Allied Duties), Notification, Final Findings (Mid Term Review), Reference Number 15/8/2003-DGAD, 26th October 2004' (n 916).
[955] ibid 58.

imports"[956] and the reasoning that the removal of anti-dumping duties would be unlikely to cause future injury to the domestic industry.[957]

The decision by Bangladesh to initiate a dispute with India was due to the presence of what Taslim describes as "...the confluence of positive factors..."[958] and was taken against a backdrop of both political reservations[959] and internal bureaucratic resistance.[960]

It is interesting to note that despite having achieved a successful outcome in an anti-dumping case, Bangladesh nevertheless did not subsequently challenge the anti-dumping duties imposed by Brazil on imports of jute bags from both India and Bangladesh, first imposed in 1992.[961] Following a sunset review, the anti-dumping duties were extended until 2008[962] though only in respect of imports from Bangladesh, India had successfully challenged the extension.[963] Taslim is of the view that the reason why Bangladesh did not seek to challenge this measure because it would have been "...prohibitively expensive for an LDC to contest a decision to impose an anti-dumping duty..."[964] and that Bangladesh lacked the core

[956] ibid.
[957] ibid.
[958] Mohammed Ali Taslim, M.A., 'How the DSU Worked for Bangladesh: The First Least Developed Country to Bring a WTO Claim' in Shaffer and Meléndez-Ortiz (n 555) 231.
[959] Mohammed Ali Taslim, M.A., 'How the DSU Worked for Bangladesh: The First Least Developed Country to Bring a WTO Claim' ibid 243.
[960] Mohammed Ali Taslim, M.A., 'How the DSU Worked for Bangladesh: The First Least Developed Country to Bring a WTO Claim' ibid 246.
[961] Mohammed Ali Taslim, M.A., 'How the DSU Worked for Bangladesh: The First Least Developed Country to Bring a WTO Claim, ibid 231, 240.
[962] Ministry of Textiles - English release, 'Jute Exports to Brazil Get a Boost - India Wins 7 Year Anti-Dumping Case against Brazil' <http://pib.nic.in/newsite/erelcontent.aspx?relid=6677> accessed 12 October 2017.
[963] 'International Jute Study Group, World Jute Profile, Brazil' <https://uia.org/s/or/en/1100035644>; Ministry of Textiles - English release (n 962).
[964] Mohammed Ali Taslim, M.A., 'How the DSU Worked for Bangladesh: The First Least Developed Country to Bring a WTO Claim' Shaffer and Meléndez-Ortiz (n 555) 240.

competencies required to deal with WTO litigation.[965] What this indicates is that the BTC had, *de facto*, acquired the competency skills to both investigate and reach an informed position as to the legality or otherwise of the imposition of anti-dumping duties in *India –Anti-dumping Measure on Batteries from Bangladesh.*[966] Against this backdrop, it is interesting to note that Taslim, save in respect of costs, advances no reason why in relation to jute bags, the situation should be materially different. Taslim narrates that the ACWL estimated the total legal costs of *India –Anti-dumping Measure on Batteries from Bangladesh*[967] (assuming the case went through all of the processes of the DSU) would be $150,000.[968] Furthermore, had Bangladesh used the services of the ACWL, their maximum contribution to these fees would, as an LDC, have been $15,000.[969] Against this backdrop, it is difficult to envisage why in relation to jute bags, there would be any substantial difference in the costings.

The preceding section demonstrates that those barriers (lack of competency and costs), which had purportedly prevented Bangladesh from initiating a formal dispute in respect of the anti-dumping duties imposed by Brazil on imports of jute bags, as aforesaid, had been

[965] Mohammed Ali Taslim, M.A., 'How the DSU Worked for Bangladesh: The First Least Developed Country to Bring a WTO Claim' ibid.
[966] *India – Anti-Dumping Measure on Batteries from Bangladesh, Request for Consultations by Bangladesh, WT/DS306/1 G/L/669 G/ADP/D52/1, 2 February 2004* (n 53).
[967] *ibid.*
[968] Mohammed Ali Taslim, M.A., 'How the DSU Worked for Bangladesh: The First Least Developed Country to Bring a WTO Claim' Shaffer and Meléndez-Ortiz (n 555) 242.
[969] Mohammed Ali Taslim, M.A., 'How the DSU Worked for Bangladesh: The First Least Developed Country to Bring a WTO Claim' ibid.

removed. Thus, despite having prevailed in a DSU dispute, nevertheless still preferred to eschew the DSU as a means of settling other trade-related issues.[970]

3.6 DSU - LDC third-party participation

In total, eight LDCs have participated as third parties in eight disputes.[971] At face value, it could be argued that this level of engagement detracts from the argument that LDCs eschew engagement with the DSU. Despite having participated in eight cases, several writers have described the third-party participation by LDCs as being both modest[972] and very limited,[973] and while eight LDCs have *de facto* participated in a dispute as a third-party, "...none of them is by any measure a regular third-party in WTO dispute settlement proceedings."[974]

Van den Bossche and Gathii opine that even where LDCs participate in a dispute as a third party, the "...involvement was not extensive,"[975] with

[970] It is interesting to observe that in relation to the imposition in 2017 of anti-dumping duties by India on Jute bags from Bangladesh, it would appear that extra-judicial remediation is being sought, 'DCCI Worried over India's Anti-Dumping Duty on Bangladesh Jute' (*Dhaka Tribune*, 21 October 2016) <http://www.dhakatribune.com/business/2016/10/21/dcci-worried-indias-anti-dumping-duty-bangladesh-jute/> accessed 9 July 2017; Sumon Mahbub, 'India to Review Antidumping Duty on Bangladesh Jute: Hasina' (*bdnews42.com*) <https://bdnews24.com/bangladesh/india-to-review-antidumping-duty-on-bangladesh-jute-hasina>.

[971] The LDC participants and cases are as follows: Senegal, *EC — Bananas III*, DS27; Senegal, *US — Shrimp*, DS58; Bangladesh, *US-Textiles Rules of Origin*, DS243; Madagascar, Malawi and Tanzania, *EC — Export Subsidies on Sugar*, DS265; Madagascar, Malawi and Tanzania, *EC — Export Subsidies on Sugar*, DS266; Benin and Chad, *US — Upland Cotton*, DS267; Madagascar, Malawi and Tanzania, *EC — Export Subsidies on Sugar*, DS283; Malawi and Zambia, *Australia — Tobacco Plain Packaging (Ukraine)*, DS434, (Authority for the establishment of the Panel lapsed as of 30 May 2016, WT/DS434/17, 30 June 2016)

[972] Van den Bossche and Gathii (n 60) 20.

[973] Sharmin J. Tania, 'Least Developed Countries in the WTO Dispute Settlement System' (2013) 60 Netherlands International Law Review 375, 386–388.

[974] Van den Bossche and Gathii (n 60) 7.

[975] ibid.

Elsig and Stucki[976] amplifying this point by citing that Senegal's involvement in *US – Shrimp*[977] "...was [as] a passive observer and did not make any active contribution to the case."[978] Similarly, in *US- Textiles Rules of Origin*,[979] while Bangladesh reserved its rights to participate in the Panel proceedings,[980] they did not present either written or oral Arguments.[981]

The fact that Bangladesh chose not to participate is interesting, given that Rahman states, "...the issues related to market access for apparel...are of heightened interest to Bangladesh."[982] Thus despite the strategic importance of the issue to Bangladesh does not view the DSU, a mechanism they neither wanted nor, in a sense, agreed to, as the vehicle by which trade-related issues can be resolved.

Writers have sought to understand the underlying reasons behind the inextensive nature of LDC participation as third parties in disputes.[983] Tania argues that LDCs participate as third parties "...to prevent a discriminatory settlement between the complainant and defendant that would downplay its own trade interest."[984] This argument stems from

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[976] Elsig and Stucki (n 53).
[977] *United States - Import Prohibition on certain Shrimp and Shrimp Products, Report of the Panel, WT/DS58/R, 15 May 1998*.
[978] Elsig and Stucki (n 53) p296.
[979] *United States - Rules of Origin for Textiles and Apparel Products, Report of the Panel, WT/DS243/R, 20 June 2003*.
[980] ibid para 1.6 1.
[981] ibid.
[982] Rahman, M, 'Rules of Origin in EU and US GSP Schemes: Concerns and Interests of Bangladesh' in Roman Grynberg (ed), *Rules of Origin: Textiles and Clothing Sector* (Cameron May 2005) 311.
[983] Van den Bossche and Gathii suggest that participating, as third parties could be an 'option', which LDCs could take in order to build legal capacity in relation to the DSU, Van den Bossche and Gathii (n 60) 49.
[984] Sharmin J. Tania (n 973) 388.

Bagwell and Staiger, who argue that a "...government may naturally fear that the extent of market access that it has secured...may be diminished in a future negotiation to which it is not a party."[985]

In essence, therefore, where the outcome of a dispute could potentially impact the trade interests of any country,[986] that country should logically participate as a third party to defensively protect its trade position. However, as Bown points out, "...dozens of affected exporting countries do not formally participate, even though they have a right to do so and an economic interest in the dispute's outcome,"[987] which detracts from this line of argument. Bown further argues that all WTO Members benefit from the situation where in resolving a dispute, the respondent removes WTO-inconsistent measures,[988] which he defines as 'free riding',[989] which Gross opines provide a "compelling reason for not launching their own"[990] disputes. Thus, LDCs could, subject to the terms of any given dispute settlement case, still potentially derive benefits from WTO litigation while not participating therein, however LDCs, by joining a dispute as a third-party, even where their involvement is very limited,[991] may help them to defensively protect their trade position.

As discussed above, it was argued that LDCs simply do not see the DSU,

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[985] Kyle Bagwell and Robert W Staiger, 'Multilateral Trade Negotiations, Bilateral Opportunism and the Rules of GATT/WTO' (2004) 63 Journal of International Economics 1, 24.
[986] Clearly if there was a direct impact the affected country it could be argued that either it should participate as a co-complainant or initiate a dispute.
[987] Bown (n 59) 289 Bown argues that non-participation may be due in part to the "...cost-benefit determinants" ibid 290 where the costs of participation are higher than the benefits accessing therefrom.
[988] ibid.
[989] ibid 290.
[990] Gross (n 44) 372.
[991] Sharmin J. Tania (n 973) 386–388.

as currently constituted, as a vehicle for resolving disputes. If this were the case, then one would expect that LDCs, when faced with a potential trade dispute, would attempt to seek a resolution by means other than recourse to the DSU as a complainant. However, this would not necessarily preclude LDCs from limited engagement as a third party in any given pertinent DSU dispute seeking thereby to either defend a specific trade position, as aforesaid or as a means of gaining leverage in negotiations elsewhere. This, arguably, explains both the LDCs' involvement as third parties and the minimalism exhibited by them in terms of their participation therein.

Evidence to support this interpretation is to be found in (i) the *US – Upland Cotton,*[992] where Benin and Chad joined as third parties at the Panel Stage,[993] and where, unlike the other disputes involving LDC third parties (see *infra* and *supra*), they played a more active role making both written[994] and oral[995] statements during the Panel proceedings, and actively participating in the Appellate Body proceedings[996] and (ii) the extra-judicial multilateral negotiations conducted by the LDCs in relation

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[992] *United States - Subsidies on Upland Cotton - Request for Consultations by Brazil, WT/DS267/1 G/L/571 G/SCM/D49/1 G/AG/GEN/54, 3 October 2002*.

[993] *United States - Subsidies on Upland Cotton - Constitution of the Panel Established at the Request of Brazil - Note by the Secretariat, WT/DS267/15, 23 May 2003*.

[994] Written submissions are Annex B-5, Third Party Submission of Benin, B-51; Annex E-4, Third Party Further Submission of Benin and Chad E-28; *United States - Subsidies on Upland Cotton, Report of the Panel, WT/DS267/R, 8 September 2004* (n 855).

[995] The oral statements are, Annex C-7, Third Party Oral Statement of Benin, C-33; Annex F-6 Third Party Oral Statement of Benin F-28; Annex F-7; Third Party Oral Statement of Chad, F-33; Annex J-3, Answers of Benin to the Panel's Questions Posed Following the First Session of the First Substantive Meeting (11 August 2003) J-37; Annex J-14; Answers of Benin and Chad to the Panel's Questions Posed Following the Resumed Session of the First Substantive Meeting (27 October 2003) at J-126 ibid.

[996] *United States - Subsidies on Upland Cotton, Report of the Appellate Body, WT/DS267/AB/R, 3 March 2005* 72 et seq.

to Upland cotton which, as will be shown, was the main focus of their attempts to resolve the issue.

3.6.1 Background of Cotton, US cotton subsidies and the effect on LDCs

In 2001/02, more than 70 countries produced some 18.6 million tonnes of cotton globally,[997] with some 81% of the total production centred in eight countries.[998] In 2001/02, the US was the largest producer of cotton, with an output of over 3.7 million tons,[999] which accounted for over 20% of global cotton production.[1000] Many of the largest cotton producers rarely exported any cotton.[1001] As a result, in 2001, only 5.4 million tonnes were traded internationally.[1002] Of the cotton traded internationally, the export trade of 5 countries accounted for some 70 per cent of global exports,[1003] with the US being the largest exporter.[1004] In 2001, six LDCs traded cotton internationally to the value of some $423 million US dollars,[1005] with cotton exports accounting for some 65% of Benin's total exports[1006],

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997 Ian Gillson and others, 'Developed Country Cotton Subsidies and Developing Countries.' [2004] Briefing Paper, ODI, London 5 <https://mpra.ub.uni-muenchen.de/15373/>.
998 The eight countries are China; the USA; India; Pakistan; Uzbekistan; Turkey; Brazil; and Australia. ibid.
999 ibid 5, Gillson, et al., cite a 2002 production figure of 3.733 million tons; this differs slightly from the writer's interpretation of the 'Food and Agriculture Organization of the United Nations' FAOSTAT database which listed US cotton production at 3.746 million tons in 2002, see http://www.fao.org/faostat/en/#data/QC; Accessed 16/07/2017.
1000 ibid 5.
1001 Most of the cotton produced in China, India, Pakistan and Turkey, is almost exclusively used domestically, ibid 7.
1002 ibid.
1003 The largest exporters of cotton are, US, Uzbekistan, Australia, Greece and Brazil. ibid.
1004 Karen Smaller, 'US and EU Cotton Production and Export Policies and Their Impact on West and Central Africa: Coming to Grips with International Human Rights Obligations' 1 <https://www.lancaster.ac.uk/universalhumanrights/documents/1404-EGICottonBrief_FINAL.pdf>.
1005 The LDCs are, Benin US$ 124 m., Burkina Faso US$ 105 m., Central African Republic US$ 9 m., Chad US$ 63 m., Mali US$ 161 m., Togo US$ 61 m., (Source data is taken from the International Cotton Advisory Committee, at https://www.icac.org/), Kevin Watkins, 'Cultivating Poverty: The Impact of US Cotton Subsidies on Africa' (2002) 2 Oxfam Policy and Practice: Agriculture, Food and Land 82, 18.
1006 Gillson and others (n 997) 7.

45% of the total exports from Burkina Faso[1007] and 34% of Chad's exports.[1008]

Clearly, given the high level of dependency of these LDCs on the exports of cotton, the health of their respective economies is, to a large extent, determined by the global price of cotton. From 1999-2002, the US government paid in total some US$ 9.8 Bn. in subsidies to domestic US cotton producers;[1009] this resulted in US cotton being dumped on international markets in 2002 at 61% below the cost of production.[1010] As a result of this, during the period from 1999-2002, the "...world market price for cotton fell to its lowest level in over a decade," [1011] with the average price of cotton between 1997 and 2002 declining by some 40%.[1012]

The reduction in prices had a marked effect on those LDCs whose economies were heavily dependent on cotton exports. By 2001-2002, the effect of the US subsidies, which depressed global cotton prices, cost Burkina Faso 12% of export earnings (1% of GDP), [1013] Mali 8 % (1.7% of GDP) [1014] and Benin 9 % (1.4% of GDP).[1015] The gravity of the situation was such that the governments of Benin and Mali, to avoid the total

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[1007] ibid.
[1008] ibid.
[1009] Randy Schnepf, *Background on the US-Brazil WTO Cotton Subsidy Dispute* (Congressional Research, The Library of Congress Service, Report for Congress 2005) 2 <https://digital.library.unt.edu/ark:/67531/metacrs9103/m1/1/high_res_d/RL32571_2005Jul11.pdf> accessed 26 July 2017.
[1010] Smaller (n 1004) 2.
[1011] Karen Halverson Cross, 'United States: Subsidies on Upland Cotton, Recourse to Article 21.5 of the DSU by Brazil' (2009) 103 American Journal of International Law 110, 111.
[1012] Smaller (n 1004) 1.
[1013] Elinor Lynn Heinisch, 'West Africa versus the United States on Cotton Subsidies: How, Why and What Next?' (2006) 44 The Journal of Modern African Studies 251, 255.
[1014] ibid.
[1015] ibid.

bankruptcy of all the indigenous cotton producers, had to provide direct assistance.[1016]

3.6.2 Benin and Chad as third parties in US – Upland Cotton

Unlike the LDCs, who, as discussed below, sought to resolve the matter through multilateral negotiations which, unlike the DSU, held the prospect of financial compensation,[1017] Brazil, in September 2002 requested consultations with the United States.[1018] Brazil claimed that the government of the United States had provided prohibited and actionable subsidies to the "...US producers, users and exporters of upland cotton."[1019] These subsidies (i) caused "...significant price suppression in the markets for upland cotton in Brazil and elsewhere..."[1020] in violation of Articles 5(c)[1021] and 6.3(b)[1022] of the SCM, and (ii) resulted in the over-production of US upland cotton which displaced and impeded Brazilian export market share[1023] in the world market,[1024] in violation of Articles 5(c) which states that the use of subsidies should not seriously prejudice the interests of another Member[1025] and 6.3(b) where the use of subsidies

[1016] Similar action was taken by Argentina, Colombia, Côte d'Ivoire and India Aluisio de Lima-Campos, 'Causes and Consequences of Low Prices in the Cotton Sector', *Economic Advisor, Embassy of Brazil, Delegate of Brazil to the ICAC, speech at Conference on Cotton and Global Trade Negotiations, Washington, DC* (2002) 5 <https://studylib.net/doc/8649671/causes-and-consequences-of-low-prices-in-the-cotton-sector> accessed 17 July 2017.
[1017] Gross (n 44) 379.
[1018] *United States - Subsidies on Upland Cotton - Request for Consultations by Brazil, WT/DS267/1 G/L/571 G/SCM/D49/1 G/AG/GEN/54, 3 October 2002* (n 992).
[1019] ibid 2nd recital 1.
[1020] ibid 3.
[1021] 'Agreement on Subsidies and Countervailing Measures' (n 718) 233.
[1022] ibid 234.
[1023] The collapse in the price of cotton caused sectoral losses amongst the LDCs. Similarly, Brazil in 2002 estimated that it had suffered a loss of $640 million as a result of the price collapse, see Aluisio de Lima-Campos (n 1016) 5; Watkins (n 1005) 8.
[1024] *United States - Subsidies on Upland Cotton - Request for Consultations by Brazil, WT/DS267/1 G/L/571 G/SCM/D49/1 G/AG/GEN/54, 3 October 2002* (n 992) 3.
[1025] Part III; Actionable Subsidies, Article 5, 'Adverse Effects' in, 'Agreement on Subsidies and Countervailing Measures' (n 718) 233.

cause lost sales /market share.[1026]

Additionally, Brazil averred that provisions providing direct or indirect support to the US upland cotton industry, including *inter alia* statutory subsidies and domestic support relating to "marketing loans, loan deficiency payments, commodity certificates, production flexibility contract payments, conservation payments...export credits and any other...provisions..."[1027] were inconsistent with variously, Articles 3.3,[1028] 8,[1029] 9.1,[1030] and 10.1[1031] of the Agreement on Agriculture, and with Articles 3.1(a),[1032] 3.1(b),[1033] 3.2,[1034] 5[1035] and 6.3[1036] of the SCM Agreement.

Given the severity of the effects of US subsidies on cotton exporting LDCs, it is surprising that no LDC sought to join the consultations, even though they had access to low-cost legal advice from the ACWL, and Requests to join consultations were made under Article 4.11[1037] by

[1026] Part III; Actionable Subsidies, Article 5, 'Adverse Effects' ibid 234.
[1027] *United States - Subsidies on Upland Cotton - Request for Consultations by Brazil, WT/DS267/1 G/L/571 G/SCM/D49/1 G/AG/GEN/54, 3 October 2002* (n 992) 2.
[1028] Article 3, 'Incorporation of Concessions and Commitments', in 'Agreement on Agriculture' (n 865) 45.
[1029] Article 8, 'Export Competition Commitments', in ibid 50.
[1030] Article 9, 'Export Subsidy Commitments', in ibid.
[1031] Article 10, 'Prevention of Circumvention of Export Subsidy Commitments', in ibid 51.
[1032] Part II: Prohibited Subsidies Article 3, 'Prohibition', 'Agreement on Subsidies and Countervailing Measures' (n 718) 231.
[1033] Part II: Prohibited Subsidies Article 3, 'Prohibition' ibid.
[1034] Part II: Prohibited Subsidies Article 3, 'Prohibition' ibid.
[1035] Part III; Actionable Subsidies, Article 5, 'Adverse Effects', ibid 233.
[1036] Part III; Actionable Subsidies, Article 6, 'Serious Prejudice', ibid 234.
[1037] See above for discourse on Consultations and art. 4.11 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) 356.

Zimbabwe,[1038] India,[1039] Argentina[1040] and Canada.[1041]

By their admission, LDCs had not only a significant and substantial trade interest in the consultations, but they also had a systemic interest in the consultations through the proper interpretation of domestic support and export subsidies under the SCM., Burkina Faso in May 2001, (i) stated that the income derived solely from the sale of a single crop of cotton "...accounted for almost 72 per cent of export revenue in 1997,"[1042] clearly demonstrating a trade interest in the consultations and (ii) having identified cotton as having 'significant' export potential[1043] opined that a **"...**substantial reduction of domestic support in the developed countries..."[1044] was required to ensure the crystallisation of said 'significant potential,'[1045] thus clearly demonstrating a systemic interest in the consultations through the proper interpretation of domestic support and export subsidies under the SCM.

Given the foregoing and the fact that the participation in disputes by third parties is regarded as being more the norm than the exception,[1046] the non-participation of Burkina Faso at any stage of this dispute could simply

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[1038] *United States - Subsidies on Upland Cotton - Request to Join Consultations, Communication from Zimbabwe, WT/DS267/2, 15 October 2002*.
[1039] *United States - Subsidies on Upland Cotton - Request to Join Consultations, Communication from India, WT/DS267/3, 18 October 2002*.
[1040] *United States - Subsidies on Upland Cotton - Request to Join Consultations, Communication from Argentina, WT/DS267/4, 22 October 2002*.
[1041] *United States - Subsidies on Upland Cotton - Request to Join Consultations, Communication from Canada, WT/DS267/5, 9 December 2002*.
[1042] 'Committee on Agriculture Special Session Proposal by Burkina Faso on the Negotiations on Agriculture, G/AG/NG/W/185, 16 May 2001' 1.
[1043] ibid 2.
[1044] ibid 3.
[1045] ibid 2.
[1046] Marc L Busch and Eric Reinhardt, 'Three's a Crowd: Third Parties and WTO Dispute Settlement' (2006) 58 World Politics 446, 446.

be an exception to the norm, or it could also arguably be symptomatic of a wider normative reluctance to engage with the DSU.

The LDCs Benin, Burkina Faso, Chad and Mali submitted a Joint Proposal to the Committee on Agriculture Special Session in May 2003. They stated therein that since the early 1980s, cotton had increasingly played "...an essential role in the economies of West and Central African countries..."[1047] narrating how these countries, in terms of cotton exports, had become "...the second largest exporter after the United States..."[1048] From the foregoing, it is evident that at the onset of the *US – Upland Cotton*[1049] dispute, these LDCs had a trade interest in the consultations. Moreover, they called for 'emergency measures'[1050] to be taken in respect of LDC cotton-producing countries, which include the substantial "...accelerated reductions for each of the types of support for cotton production and export..."[1051] citing the need for a "...systemic solution to the cotton problem..."[1052] Once again, this clearly shows that at the onset of this dispute, these LDCs also had a systemic interest in the consultations through the proper interpretation of domestic support and export subsidies under the SCM. Benin and Chad joined the dispute as

[1047] 'Committee on Agriculture Special Session, WTO Negotiations on Agriculture, Poverty Reduction: Sectoral Initiative in Favour of Cotton, Joint Proposal by Benin, Burkina Faso, Chad and Mali, TN/ AG/ GEN/4, 16 May 2003' part II para 10 2.
[1048] 'Committee on Agriculture Special Session Proposal by Burkina Faso on the Negotiations on Agriculture, G/AG/NG/W/185, 16 May 2001' (n 1042) part II, para 10 2.
[1049] *United States - Subsidies on Upland Cotton - Request for Consultations by Brazil, WT/DS267/1 G/L/571 G/SCM/D49/1 G/AG/GEN/54, 3 October 2002* (n 992).
[1050] 'Committee on Agriculture Special Session Proposal by Burkina Faso on the Negotiations on Agriculture, G/AG/NG/W/185, 16 May 2001' (n 1042) 6.
[1051] ibid.
[1052] 'Committee on Agriculture Special Session, WTO Negotiations on Agriculture, Poverty Reduction: Sectoral Initiative in Favour of Cotton, Joint Proposal by Benin, Burkina Faso, Chad and Mali, TN/ AG/ GEN/4, 16 May 2003' (n 1047) 5.

third parties at the Panel Stage.[1053] However, as the examination of their participation discussed below clearly shows, this was solely (i) to defensively protect their trade position and (ii) as an adjunct to and provide leverage for what I consider to be an extra-judicial preference for settling the dispute through multilateral negotiations as opposed to having recourse to the DSU. Mali, on the other hand, "…. abstained from acting as third-party..."[1054] again indicating that the DSU was not viewed as the preferred vehicle for settling trade disputes.

Gross argued that in the *US - Upland Cotton* dispute, Benin and Chad "...largely took a back seat in supporting what was a Brazilian initiative."[1055] Gross, having interviewed "...various sources close to Benin and Chad..."[1056] narrated that Benin and Chad declined an offer from Brazil to participate as co-complainants.[1057] Gross further argued that LDCs deliberately eschewed the opportunity to participate as co-complainants stating that as third parties, they hoped to secure the benefits of a successful dispute without having to actively participate as co-complainants, describing their behaviour as being analogous to "riding at a reduced rate,"[1058] as opposed simply to "free riding."[1059] Significantly, Gross further opined that the LDCs, "...level of engagement was substantially higher..."[1060] in the multilateral negotiations than it was in

[1053] *United States - Subsidies on Upland Cotton - Constitution of the Panel Established at the Request of Brazil - Note by the Secretariat, WT/DS267/15, 23 May 2003* (n 993).
[1054] Elsig and Stucki (n 53) 301.
[1055] Gross (n 44) 374.
[1056] ibid.
[1057] ibid.
[1058] ibid 380.
[1059] Bown (n 59) 290.
[1060] Gross (n 44) 374.

the *US –Upland Cotton*.[1061] This, he suggested, was a "manifestation of their belief that the current system of DSB remedies fails to offer sufficient protection for their trading rights," insofar as multilateral negotiations held the prospect of financial compensation, which would not be the case with the DSU.[1062]

Reinforcing Gross's arguments, Zunckel noted that Benin and Chad's participation in the dispute was designed to "...influence the wider negotiation dynamic..."[1063] of the multilateral negotiations. Moreover, Zunckel opined that third-party participation of Benin and Chad ensured that the political elements of these wider negotiations were "...sufficiently raised to ensure that the Panel was indeed aware of the wider negotiating context at play in parallel with the Panel proceedings."[1064]

Benin and Chad, at both the Panel and the Appellate stages of the dispute, sought to defend their trade interests by seeking a specific determination that Benin and Chad had, separately from Brazil, suffered serious injury as a direct result of the US subsidies.[1065] In relation to the Panel, Benin and Chad requested that the Panel should examine and give full substantive consideration to "...the serious prejudice caused to Benin and Chad's economies..."[1066] Before the Appellate Body, Benin and Chad argued *inter alia* that the Appellate Body should "...draw

[1061] ibid.
[1062] ibid 379.
[1063] Zunckel (n 575) 1079.
[1064] ibid 1078.
[1065] ibid 1083; Sharmin J. Tania (n 973) 393.
[1066] *United States - Subsidies on Upland Cotton, Report of the Panel, WT/DS267/R, 8 September 2004* (n 855) 326.

conclusions...that would require the United States to withdraw the subsidy or remove the adverse effects, not only with respect to Brazil but also with respect to Benin and Chad."[1067] Zunckel narrated how such a finding of serious prejudice would both (i) "...trigger a concomitant obligation on the United States to remove the adverse effects..."[1068] that had caused the severe prejudice, i.e. the US subsidies and (ii) could, "...assist Benin and Chad in any compensation negotiations with the United States later on."[1069] Unfortunately, the Appellate Body elected not to give a ruling on the issue.[1070]

As discussed above, it was argued that LDCs avoided engagement with the DSU as means of resolving trade disputes. Moreover, I demonstrate that third-party participation in any given dispute was viewed by participating LDCs as a secondary matter, focusing on the defence of trade rights and providing leverage for extra-judicial multilateral negotiations, which was the preferred dispute settlement methodology favoured by LDCs. From the above review of the participation of Benin and Chad in the *US - Upland Cotton,* the participating LDCs viewed their participation in the dispute as being in parallel with or as an adjunct to a negotiated settlement that was being sought through the multilateral trade negotiations discussed below. Moreover, from the above, it is also clear that the participating LDCs actively pursued a defensive strategy

[1067] *United States - Subsidies on Upland Cotton, Report of the Appellate Body, WT/DS267/AB/R, 3 March 2005* (n 996) 214 See generally, para 209-214 72-73.
[1068] Zunckel (n 575) 1083.
[1069] ibid.
[1070] *United States - Subsidies on Upland Cotton, Report of the Appellate Body, WT/DS267/AB/R, 3 March 2005* (n 996) para 504-512.

aimed at protecting their trade rights, thus evincing the argument that participation as a third party in a pertinent dispute was viewed by the LDC as being very much a secondary matter focussing on the defence of trade rights as aforesaid. This finding that third-party involvement is based upon a defensive strategy is further supported by Elsig and Stucki, who note that LDC participation as third parties in "...two cases, (*EC–Bananas III*[1071] and *EC–Sugar*[1072]), the LDCs were on the defendant's side, fearing a loss of EU market shares due to preference erosion."[1073]

The final substantive element required of the argument is that where an LDCs trade rights have been infringed by another WTO Member, then one would expect to see the LDC primarily attempting to resolve the matter extra-judicially, through multilateral or other negotiations.

3.6.3 Multilateral Negotiations – 'Upland Cotton'

As discussed above, it is argued that LDCs actively avoid using the DSU as a means of resolving trade disputes. If this line of argument is correct, then one would expect that LDCs, when faced with a potential trade dispute, would attempt to seek resolution thereof by means other than recourse to the DSU.

[1071] Senegal participated as part of the wider 'ACP' group see, *European Communities - Regime for the Importation, Sale and Distribution of Bananas, Complaint by the United States, Report of the Panel, WT/DS27/R/USA, 22 May 1997* para 5.1 et.seq. 249 et.seq.

[1072] In relation to both complaints, (i) Madagascar, Malawi and Tanzania participated as part of a wider group of Sugar Supplying States, (ACP Countries), see *European Communities - Export Subsidies on Sugar, Complaint by Australia, Report of the Panel, WT/DS265/R, 15 October 2004* para 1.9 2 and para 5.1 et.seq. 89 et.seq.; (ii) Madagascar, Malawi and Tanzania participated as part of the wider ACP Countries (as aforesaid) and presented a joint written submission as well as a joint oral presentation and separately endorsed the ACP countries views expressed in, *European Communities - Export Subsidies on Sugar, Complaint by Brazil, Report of the Panel, WT/DS266/R, 15 October 2004* para 1.9 2 and para 5.1 et.seq. 89 et.seq.

[1073] Elsig and Stucki (n 53) 296.

The third part of this chapter will show that neither the limited size nor limited diversity of the economies of LDCs fully explain the limited use of the DSU by LDCs[1074] nor render them immune to the imposition of WTO inconsistent measures.[1075] It is contended that, in itself, the absence of litigation is a strong general indicator that LDCs have a preference toward resolving disputes through extra-judicial means as opposed to resorting to litigation through the DSU. Specific evidence of LDCs preferring extra-judicial remediation can be found in the conduct of LDCs in and around the *US - Upland Cotton* dispute.

In January 2001, the West African LDC cotton producer Mali tabled a proposal in respect of cotton which called for a "...substantial reduction of domestic support in developed countries,"[1076] while in Brazil, preparatory steps were being taken to garner support for a WTO case against the US cotton subsidies.[1077] Elsig and Stucki opined that the west African cotton producers had some two years to decide on their position *vis-a-vis* litigation, arguing that the LDCs could either (i) have acted as co-complainants with Brazil in asking for consultations[1078] or (ii) sought a separate case, which they argue, would have, "...had a good chance of being merged with the Brazilian complaint."[1079] Elsig and Stucki concluded that the LDCs were "...waiting until the last minute to decide their

[1074] Van den Bossche and Gathii (n 60) 22.
[1075] Bohanes and Garza (n 463) 67.
[1076] *Committee on Agriculture Special Session, Malian Proposals for the Future Negotiations on Agriculture, G/AG/NG/W/99, 11 January 2001* 2.
[1077] Elsig and Stucki (n 53) 301.
[1078] ibid 303.
[1079] ibid This opinion is contained within a report from the ACWL which is on file with the authors, see 312 .

position on litigation."[1080] Pesche and Nubu, Heinisch and Mutume disagreed with this view noting that some five months before Brazil requested consultations with the US on subsidies of upland cotton[1081] and some eleven months before Brazil requested the establishment of a Panel[1082] the Conference of Ministers of Agriculture for West and Central African had, at a meeting in June 2002, already decided against litigation, favouring instead to resolve the issue by way of extra-judicial negotiation.[1083]

Pesche and Nubu narrated how at the Ministerial meeting, the African governments were divided as to which approach to take.[1084] Some governments were in favour of initiating a complaint through the DSU,[1085] with others preferring to negotiate.[1086] However it was "...decided that the second option should be adopted."[1087] This clearly shows that at the Ministerial level, there was a collective policy preference for resolving the cotton dispute through extra-judicial means as opposed to having recourse to the DSU. This adds considerable weight to the views expressed above that LDCs considered participation as third parties in the *–US-Upland Cotton* as being an adjunct to and as a provider of leverage

[1080] ibid.
[1081] *United States - Subsidies on Upland Cotton - Request for Consultations by Brazil, WT/DS267/1 G/L/571 G/SCM/D49/1 G/AG/GEN/54, 3 October 2002* (n 992).
[1082] *United States - Subsidies on Upland Cotton - Constitution of the Panel Established at the Request of Brazil - Note by the Secretariat, WT/DS267/15, 23 May 2003* (n 993).
[1083] Pesche and Nubukpo (n 107) 49; Heinisch (n 1013) 263; G Mutume, 'Mounting Opposition to Northern Farm Subsidies: African Cotton Farmers Battling to Survive.' (2003) 17 Africa Recovery, Vol. 17,1 (May 2003) 18.
[1084] Pesche and Nubukpo (n 107) 49.
[1085] ibid.
[1086] ibid.
[1087] ibid.

for the extra-judicial settlement[1088] that was to be sought through the multilateral trade negotiations.

In this section, it has been shown that LDCs, when faced with a potential trade dispute, would attempt to seek resolution thereof by means other than recourse to the DSU as a complainant. Moreover, this section has demonstrated and provided evidence supporting the view that LDCs passively pursued a policy of non-engagement with the DSU because of perceived systemic difficulties inherent therein, difficulties which they hoped to remediate through structural, SDT-driven reforms**.** From this, it is evident that LDCs, when faced with a potential trade dispute, prefer to resolve the same extra-judicially and without recourse to the DSU.

3.7 Re-evaluating LDC engagement with the DSU

As noted above, the purpose of this section is to re-examine existing explanations set out by academics as to why LDCs do not engage with the DSU, overlaying and applying the new reasons identified in this thesis. This process of combining and, where necessary, re-evaluating the current academic body of knowledge with the new information provided by this thesis will provide a more comprehensive understanding of the reasons why LDCs have not fully engaged with the DSU as a means of resolving their trade disputes, which aligns to the first research question.

[1088] Gross (n 44) 364; Zunckel (n 575) 1078–1079; Elsig and Stucki (n 53) 307.

In 1989, Bangladesh,[1089] with the "...wholehearted support..."[1090] of the other LDCs,[1091] had "...reiterated the need for more simplified procedures in dispute settlement involving least-developed countries."[1092] As set out above, I opined that the final draft of the DSU, with legalistic rules and procedures, was the antithesis of the collective wishes LDCs for a simplified LDC-only dispute settlement system. Moreover, as discussed above, the fact that the other substantive proposals put forward by the LDCs for inclusion within the DSU had, by and large, not been given effect to, could only further exacerbate this bias against engagement with the DSU. All of which was poignantly illustrated in 2002 when (as part of the negotiations aimed at reforming the DSU[1093]), the LDCs stated that they had avoided resolving disputes through the DSU, not through a lack of prospective cases[1094] but rather "...due to the structural and other difficulties that are posed by the system itself."[1095]

In Chapter 2, I categorised and discussed the extant academic explanations as to why LDCs do not engage with the DSU. Given the new information contained within this thesis, these explanations[1096] will be re-evaluated by overlaying and applying the hypothesis that LDCs have at the policy level eschewed using DSU as a means of resolving trade

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[1089] *Sub-Committee on Trade of Least-Developed Countries, 28 September, Note of Proceedings of the Eleventh Meeting, Revision* (n 114).
[1090] ibid 3.
[1091] ibid.
[1092] ibid.
[1093] These negotiations are discussed in more detail in Chapter 5
[1094] *Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposal by the LDC Group, TN/DS/W/17, 9 October 2002* 1.
[1095] *ibid.*
[1096] For ease of comprehension and comparison the same categories used to group the various explanations set out in Chapter 2 will be used.

disputes, preferring instead to seek alternative means of resolution thereof even though some 44% of all notified DSU disputes appear to have been resolved without litigation.[1097]

The categories discussed in Chapter 2 were (i) Economic; due to the small and undiversified nature of LDCs economies, they have a limited share of world trade and therefore disputes were unlikely to arise; (ii) the complexity of the DSU coupled with a lack legal resources meant LDCs did not have the capacity to engage therewith, (iii) the inability of LDCs to recognise when a violation of WTO law had occurred delimited their engagement with the DSU, (iv) structural institutional weaknesses prevent LDCs from acquiring and assimilating the requisite evidence required to support a WTO dispute, (v) LDCs feared possible reprisals eschewing from potential respondents, (vi) LDCs could either not afford the cost of hiring external counsel to conduct a dispute or said costs exceeded the economic benefits to be gained from a successful dispute, (vii) the perceived inability of an LDC to enforce the respondent's compliance given a favourable ruling and, (viii) the lack of LDC representation in Geneva, linguistic and communication difficulties.

[1097] Giorgio Sacerdoti, 'The WTO Dispute Settlement System: Consolidating Success and Confronting New Challenges' [2016] Bocconi Legal Studies Research Paper, Bocconi University 4 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2809122> Sacerdoti notes that of the 500 disputes which were notified as at the end of 2014, 110 cases were resolved through negotiation (including withdrawal of the complaint), while a further 108 cases are considered as either dormant or settled, ibid 4.

3.7.1 Economic factors contributing to LDC non-participation

The economic arguments are premised on the fact that LDCs' collective share of world trade is less than 1.1 per cent of all exports,[1098] which would suggest that there should be very few disputes.[1099] It was, however, shown that despite the limited size and diversity of the economies of LDCs were not immune to the imposition of WTO inconsistent measures. [1100] Moreover, even with their limited trade flow, statistically, LDCs should have initiated more disputes,[1101] and the literature revealed that there was no shortage of prospective cases. [1102] Similarly, the LDCs acknowledged that they had chosen not to engage with the DSU not because they had "...no concerns worth referring...but rather due to structural and other difficulties that are posed by the system itself."[1103]

The core of the economic argument is premised upon the fact that LDCs do not engage with the DSU because of a lack of potential disputes driven by their limited trade flows. From the evidence presented, this is not the case. Moreover, the LDCs have clearly stated that they have avoided using the DSU to remediate disputes because of systemic difficulties with the DSU itself, which would support the view that the LDCs have adopted a policy of non-engagement therewith.

[1098] Hubert Escaith and Andreas Maurer, 'World Trade Organisation International Trade Statistics 2015' 28 <https://www.wto.org/english/res_e/statis_e/its2015_e/its2015_e.pdf> LDCs total share of the global trade in 'Commercial Services', (of which tourism is the largest LDC sector), is similarly low at 0.75%, ibid 62.
[1099] Van den Bossche and Gathii (n 60) 21; Francois, Horn and Kaunitz (n 450) 8.
[1100] Bohanes and Garza (n 463) 67.
[1101] Francois, Horn and Kaunitz (n 450) 47.
[1102] Mosoti (n 52) 79; Rienstra (ed) (n 465) 75; *Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposal by the LDC Group, TN/DS/W/17, 9 October 2002* (n 1094) 1.
[1103] *Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposal by the LDC Group, TN/DS/W/17, 9 October 2002* (n 1094) 1.

3.7.2 The complexity of the DSU mechanism

The crux of the argument is that the DSU itself is highly legalistic in nature; therefore, to pursue a dispute, specialist legal advocacy skills[1104] are required, skills that LDCs lack,[1105] hence the lack of DSU disputes.[1106] While the reviewed literature demonstrated that LDCs lacked legal capacity within the trade arena,[1107] the literature also revealed that the DSU contained measures to ameliorate the deficit faced by LDCs[1108] and to build capacity.[1109] Additionally, agencies such as UNCTAD[1110] and the ACWL[1111] offer capacity-building courses and seminars,[1112] and traineeships[1113]. Thus, although LDCs have acquired at least some of the requisite legal capacity in the years since the formation of the WTO in 1995, they appear reluctant to deploy the same. The literature offered no comprehensive rationale for this. Alavi argued that in respect of African countries, the DSU rules were "...of little or no value to them..."[1114] while

[1104] These skills not only require a detailed working knowledge of the rules of WTO agreements, but also those of the DSU and a detailed understanding of a growing body of case law eschewing from the 492 disputes having been filed to date; See 'WTO | Dispute Settlement - Find Disputes Cases', <https://www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm?year=any&subject=none&agreement=none&Member1=none&Member2=none&complainant1=true&complainant2=true&respondent1=true&respondent2=true&thirdparty1=false&thirdparty2=false#results> accessed 24 February 2016

[1105] Bohanes and Garza (n 463) 71.

[1106] Van den Bossche and Gathii (n 60) 23.

[1107] Ewart (n 484) 40; Kessie and Addo (n 468) 4; Smith (n 487) 543.

[1108] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) art 27.2 372.

[1109] ibid art 27.3 372.

[1110] Shaffer (n 59) 183.

[1111] *ACWL Training Courses* (n 496); Abbott (n 71) 12.

[1112] ACWL, 'Report on Operations 2016' 34 <http://www.acwl.ch/download/dd/reports_ops/Final_Report_on_Operations_2016_website.pdf> accessed 30 November 2017 To date, the ACWL has awarded Certificates of Training to delegates from two thirds of LDCs with missions in Geneva.

[1113] ibid 39 To date, a total of 35 government lawyers from 17 developing countries and seven LDCs have participated in traineeships.

[1114] Alavi (n 59) 38.

Bohanes opined that the lack of disputes meant that LDCs were disinclined to build legal capacity.[1115]

From the above, it is clear that LDCs *de facto* lack the requisite core legal skills required to engage with the DSU. As was demonstrated above, although LDCs have acquired at least some skills and built some capacity, they still do not engage with the DSU. The fact that LDCs have not done so would suggest that they have decided against using the DSU as a vehicle to resolve disputes unless and until structural changes have been made to better facilitate their engagement. When viewed from this perspective, it is hardly surprising that LDCs are reluctant to enhance and expand the core skills and capacity that would be required to engage with the DSU.

3.7.3 LDCs inability to recognise a violation of WTO law

The central themes of this argument are that the diminutive nature of LDC engagement with the DSU can be explained by the fact that LDCs lack the capacity both to (a) initiate a dispute and (b) amass and assimilate technical and scientific evidence which may be required during the conduct of dispute.

As with any legal action, before initiating a DSU complaint, the aggrieved party must (i) recognise that their trade rights have been infringed, (ii) legally assess the merits of any potential complaint and (iii) prepare initial submissions. In respect of these prerequisites, the literature illustrated

[1115] Bohanes and Garza (n 463) 71.

that LDCs lack the capacity to do so.[1116] The literature, however, also revealed that notwithstanding the lack of capacity, LDCs nevertheless had identified both potential infractions and breaches of WTO law[1117] and had successfully utilised the DSU to pursue and protect their trade rights under WTO law.[1118] Furthermore, Oduwole[1119] noted that if LDCs were unable to determine whether a breach had occurred, they could seek assistance in this regard from the ACWL, NGOs or private companies, resources which "... have largely remained underutilised...."[1120] From the reviewed literature, it seems clear that if they so desire, LDCs are capable of identifying a breach of WTO law and assessing the legal merits of any given case either in *solus*[1121] or in conjunction with other bodies,[1122] which thus weakens the overall argument.

In terms of amassing the technical, scientific and economic data that may be required to successfully pursue or defend a complaint, Ewart[1123] opined that LDCs were constrained in each of these areas.[1124] The literature suggested that this 'constraint' was caused by a lack of resources, driven by a preference of governments to focus resources on other areas,[1125] such as domestic issues.[1126] The latter stance oversimplifies what can be a

[1116] ibid 79; Alavi (n 59) 32; Smith (n 487) 543.
[1117] Mosoti (n 52) 79; Rienstra (ed) (n 465).
[1118] *India-Antidumping Measure on Batteries from Bangladesh, Request for Consultations* (n 510).
[1119] Oduwole (n 513).
[1120] ibid 367.
[1121] Mosoti (n 52) 79; Rienstra (ed) (n 465); *Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposal by the LDC Group, TN/DS/W/17, 9 October 2002* (n 1094) 1.
[1122] Oduwole (n 513) 365–367.
[1123] Ewart (n 484).
[1124] ibid 40.
[1125] Shaffer (n 59) 185.
[1126] Olson (n 507) 123.

highly complex and technical task, which could be beyond the capability of many developing countries far less LDCs.[1127] Given this, it could be argued that amassing complex scientific and technical evidence could, in any specific case, limit LDC engagement with the DSU, though this must be tempered by the fact that the LDCs have themselves chosen not to allocate resources for this purpose.[1128]

The latter point does, however, make sense if one accepts that, pending meaningful reforms to the DSU, LDCs have eschewed engagement with the DSU, in which case there would be little or no point in LDCs allocating resources specifically aimed at facilitating engagement with the DSU if *de facto* they do not intend to use it.

3.7.4 Structural, institutional weaknesses.

WTO cases are becoming increasingly complicated,[1129] and WTO Members are increasingly reliant on economic experts who can correctly frame and emphasise the facts of a given case.[1130] Given that most developing countries lack the funds and systems to even collect the data required to substantiate a WTO complaint,[1131] there can be little doubt that in relation to LDCs, the situation will be even more acute.

[1127] One only needs to consider EC – Approval and Marketing of Biotech Products (2006) *European Communities - Measures affecting the Approval and Marketing of Biotech Products, Reports of the Panel, WT/DS291/R, WT/DS292/R, WT/DS293/R, 29 September 2006* (n 795); where over thirty different scientific specializations were referred to by the EC see Van den Bossche and Gathii Van den Bossche and Gathii (n 60) 23.
[1128] Shaffer (n 59) 185.
[1129] As noted earlier, in EC – Approval and Marketing of Biotech Products (2006) *European Communities - Measures affecting the Approval and Marketing of Biotech Products, Reports of the Panel, WT/DS291/R, WT/DS292/R, WT/DS293/R, 29 September 2006* (n 795); over thirty different scientific specializations were referred to by the EC see Van den Bossche and Gathii Van den Bossche and Gathii (n 60) 23.
[1130] Thomas (n 519) 323–324.
[1131] Ewart (n 484) 40.

However, there are a few potential ways in which LDCs could seek assistance in overcoming these issues. Firstly, Article 27.1 of the DSU[1132] tasks the secretariat to provide secretarial and technical support,[1133] though the literature is somewhat unclear as to the mechanics of providing such support.[1134] Thomas noted that the Secretariat might be a potential source of economic information and advice to the parties.[1135] However, it is unclear whether this would extend to the provision of scientific advice for any given dispute or as to the utility thereof in any given litigation. Secondly, approaches could be made to NGOs and other agencies, which, providing that such bodies were prepared to help, could be a rich source of the requisite technical and scientific expertise. This type of expertise was successfully used by Benin and Chad in the formulation of their third-party submissions in the *US – Upland Cotton*.[1136] Lastly, LDCs could access the ACWL Technical Expertise Fund,[1137] which can be used to assist in the acquisition of scientific, economic, and other non-legal technical inputs.[1138] As Nottage aptly states, "the commonly-identified cost and resource constraints, while relevant once, appear to have been largely addressed."[1139]

[1132] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) 372.
[1133] ibid.
[1134] Bown (n 528) 392.
[1135] Thomas (n 519) 317.
[1136] Sharmin J. Tania (n 973) 391; In US - Upland Cotton, LDC also used experts from the International Food Policy Research Institute, who presented the results of a study showing the effects of depressed world cotton prices on poverty in Benin, Zunckel (n 575) 1080.
[1137] 'Technical Expertise Fund' (n 534).
[1138] Nottage (n 506) 6.
[1139] ibid.

While it has been shown there are several potential ways in which this technical information may be garnered; there is no guarantee *per se* that these will be successful. While this issue does not apply exclusively to LDCs,[1140] nevertheless, it could be argued that LDCs as primary producers could proportionally be more susceptible to SPS-based disputes. Given, as noted earlier, in *EC – Approval and Marketing of Biotech Products (2006),*[1141] over thirty different scientific specialisations were referred to by the EC,[1142] the inability of LDCs to access such specialisations could thus have a greater impact on their ability to defend their trade interests, and thus could thus potentially play a significant role in explaining the lack of LDC engagement with the DSU. However, an analysis of LDC exports to the European Union in 2021[1143] shows that primary exports, such as agricultural and fisher product products, only account for some 12.2% of the total value of all goods exported to the EU.[1144] When viewed in this context, it seems clear from the trade flows that the inability of LDCs to access technical, and scientific information, while potentially being a causal factor in terms of preventing the pursuit of a dispute, its importance should not be overstated.

[1140] Ewart (n 484) 40.
[1141] *European Communities – Measures Affecting the Approval and Marketing of Biotech Products* (n 520); Van den Bossche and Gathii (n 60) 23.
[1142] Van den Bossche and Gathii (n 60) 23.
[1143] Directorate General for Trade, 'European Union, Trade in Goods with LDC (Least Developed Countries), 2021' (2021).
[1144] ibid 2.

3.7.5 Fear of reprisals eschewing from potential respondents

The crux of this explanation as to why LDCs have failed to engage with the DSU is premised on the argument that the fear of potential reprisals eschewing from a potential respondent dissuades them from initiating a complaint. There are two strands to the argument, firstly, LDCs may be reliant on aid and assistance provided by a potential respondent, which could be compromised by raising a trade dispute;[1145] and secondly, by initiating a trade dispute, a potential respondent may elect to deny preferential access for LDC exports.[1146]

The reviewed literature in Chapter 2 found no evidence of reprisals resulting from either initiating or threatening to initiate a WTO dispute, nor did the literature provide any concrete examples of threats of reprisals (explicit, implied, or otherwise)[1147] with the concept being discounted by Guzman and Simmons.[1148] Given the foregoing, at face value, the issue of reprisals should be discounted. Jawara and Kwa[1149] claim that in respect of trade negotiations, other subtler forms of pressure were applied, particularly against LDCs.[1150] They narrate that this pressure may take the form of a suggestion such as that of "...putting the country on a blacklist of unfriendly countries who deserve to have their

[1145] Bown and Hoekman (n 539) 863; Davis and Bermeo (n 540) 1035; Elsig and Stucki (n 53) 299.
[1146] Van den Bossche and Gathii (n 60) 26; Davis and Bermeo (n 540) 1035.
[1147] Gross (n 44) 379.
[1148] Guzman and Beth A. Simmons (n 503) 592.
[1149] Fatoumata Jawara and Aileen Kwa, *Behind the Scenes at the WTO: The Real World of International Trade Negotiations/Lessons of Cancun* (Revised edition, Zed Books 2004).
[1150] ibid 150 et seq.

preferential trade agreements suspended..."[1151] Watkins[1152] argues that because of their reliance on debt relief and aid, African cotton-producing LDCs are vulnerable to "…the threat of unilateral withdrawal of trade preferences."[1153] Cho states that the threats by donor countries to discontinue financial aid are, "...understandably veiled and not published, anecdotes eloquently demonstrate the subtle warnings conveyed through diplomatic channels..."[1154]

While as stated earlier, there is no concrete evidence of such practices being used, and if the LDCs truly feared reprisals, then their arguments for the creation of their own bespoke system would appear counter-intuitive. Notwithstanding these arguments, it would be equally naïve to completely dismiss the possibility that such factors could, in relation to any prospective dispute, be in play and, as such, should not be discounted in *toto.*

3.7.6 The high costs of engaging external legal counsel

The historical foundation of this argument centred upon the fact that LDCs lacked specialist 'in-house' legal advocacy skills[1155] required to engage with the DSU (see 3.1.2 above). In *EC- Bananas III,*[1156] the Appellate Body directed that in order to enable the disputing parties

[1151] ibid 150.
[1152] Kevin Watkins, 'Cultivating Poverty: The Impact of US Cotton Subsidies on Africa' (2002) 2 Oxfam Policy and Practice: Agriculture, Food and Land 82.
[1153] ibid 4.
[1154] Cho (n 545) 413.
[1155] Bohanes and Garza (n 463) 71.
[1156] *Appellate Body Report, European Communities - Regime for the Importation, Sale and Distribution of Bananas* (n 561).

"...participate fully in dispute settlement proceedings,"[1157] the parties could engage external counsel to represent them. This, in turn, created two further barriers, firstly, LDCs could not afford to hire external counsel[1158] and secondly, even if the funding could be found, the quantum of the claim and the economic benefits that might flow from successfully winning a dispute may be less than the costs of conducting the dispute in the first place.[1159]

While at face value, these arguments appear to be meritorious, Van den Bossche and Gathii noted that legal fees were often borne by the affected industry as opposed to the concerned government,[1160] though they noted that LDC domestic industries may "...not have the resources available..."[1161] Furthermore, they observed that such private funding might be inappropriate where the wider political interests and policies of the state and those of the industry were misaligned.[1162]

The literature also revealed that LDC governments could avail themselves of the services of the ACWL to provide legal support and representation to an LDC at a fraction of the cost of hiring external counsel.[1163] Thus in *India*

[1157] ibid para 12.
[1158] Abbott (n 71) 11; Bernal, 'Participation of Small Developing Economies in the Governance of the Multilateral Trading System' (n 565) 26; Bohanes and Garza (n 463) 71.
[1159] Bown and Hoekman (n 539) 863, 865; Blonigen and Bown (n 566) 253 Links Market share and benefits; Bronckers (n 566) 106; Busch, Reinhardt and Shaffer (n 71) 10; Cho (n 545) 412 citing, World Bank (ed), *Realizing the Development Promise of the Doha Agenda* (World Bank 2003) 116; Disdier and Fontagné (n 566) 22.
[1160] Van den Bossche and Gathii (n 60) 24.
[1161] ibid.
[1162] ibid 24–25 If one expands this point to include a scenario where an LDC was pursuing a policy of DSU non-engagement, then even in the unlikely event of the domestic industry being able to fund an action this funding would probably be declined.
[1163] Bohanes and Garza (n 463) 73; Elsig and Stucki (n 53) 297.

–Anti-dumping Measure on Batteries from Bangladesh,[1164] Taslim notes that Bangladesh was advised that if the ACWL were engaged to conduct the dispute, the costs would be limited to $15,000.[1165] Bown *et al.* note that the barrier of high legal costs had largely been 'overcome' by the ACWL.[1166] Elsig and Stucki note that the ACWL ameliorate issues surrounding LDCs' legal capacity,[1167] a sentiment with which Mosoti concurs.[1168] Busch *et al.* caution that although the ACWL provide legal capacity, LDCs must nevertheless engage with them, which they note could be problematic due to the limited legal capacity of LDCs.[1169]

In addition to the ACWL, the literature further revealed that LDCs could seek *pro bono* legal representation either directly from professional law firms[1170] or indirectly from UNCTAD.[1171] Thus in the *US - Upland Cotton*,[1172] Zunckel narrated that Benin and Chad received legal assistance from a leading international law firm on a *pro bono* basis.[1173]

From the above review, it is clear that the first barrier, namely the LDCs' inability to finance the costs of external counsel[1174] to conduct a trade

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[1164] *India – Anti-Dumping Measure on Batteries from Bangladesh, Request for Consultations by Bangladesh, WT/DS306/1 G/L/669 G/ADP/D52/1, 2 February 2004* (n 53).
[1165] Taslim, M.A., 'How the DSU Worked for Bangladesh: The First Least Developed Country to Bring a WTO Claim' in Shaffer and Meléndez-Ortiz (n 555) 242 Bangladesh received an undertaking from the domestic producer to bear all financial costs of the DSU process, ibid.
[1166] Bown and McCulloch (n 579) 36.
[1167] Elsig and Stucki (n 53) 297.
[1168] Mosoti (n 52) 79.
[1169] Busch, Reinhardt and Shaffer (n 71) 574.
[1170] Alavi (n 59) 32.
[1171] Zunckel (n 575) 1082 The writer has been unable to verify this claim, though UNCTAD do have a project on dispute settlement with external advisers and in-house staff, -see, http://unctad.org/en/Pages/DITC/DisputeSettlement/Country-Assistance.aspx.
[1172] *United States - Subsidies on Upland Cotton - Request for Consultations by Brazil, WT/DS267/1 G/L/571 G/SCM/D49/1 G/AG/GEN/54, 3 October 2002* (n 992).
[1173] Zunckel (n 575) 1081; The ACWL also represented Chad in the dispute, see, Bown and McCulloch (n 579) 49.
[1174] Abbott (n 71) 11; Bernal, 'Participation of Small Developing Economies in the Governance of the Multilateral Trading System' (n 565) 26; Bohanes and Garza (n 463) 71.

dispute, does not represent an insurmountable problem, with a variety of options being open to LDCs. The second barrier rested on the argument that the quantum of the claim and the economic benefits that might flow from successfully winning a dispute may be less than the costs of conducting the dispute in the first place.[1175] Clearly, the argument carries little weight where the legal council is engaged on a *pro bono* basis. Similarly, where the services of the ACWL are used, the fees charged to LDCs are currently capped to a maximum of US$ 5,880 for consultations,[1176] US$ 17,760 in respect of Panel proceedings[1177] and US$ 10,520 in relation to Appellate Body proceedings.[1178] Given a maximum total cost of US$ 34,160,[1179] the argument that the quantum of economic benefits eschewing from a successful dispute would be outweighed by the legal costs is, at best, somewhat implausible. Notwithstanding the foregoing, the literature showed certain African countries would not even *consider* engaging with the DSU unless legal services were provided completely free of charge.[1180]

This counterintuitive position can only be rationally explained if it is conceptualised within the wider narrative of LDCs' disinterest in engaging with the DSU as it is presently configured. In such a situation, any litigation costs, no matter how insignificant, would, in principle, be

[1175] Bown and Hoekman (n 539) 863–865; Blonigen and Bown (n 566) 253 Links Market share and benefits; Bronckers (n 566) 106; Busch, Reinhardt and Shaffer (n 71) 10; Cho (n 545) 412 citing; World Bank (n 1159) 116; Disdier and Fontagné (n 566) 22.
[1176] Advisory Centre on WTO Law, (ACWL), 'The Fees Charged By the ACWL, A Note by the Management Board, ACWL/MB/W/2015/7' <https://www.acwl.ch/fees/>.
[1177] ibid 3.
[1178] ibid.
[1179] ibid All pre-dispute consultations and legal opinions are provided by the ACWL for free.
[1180] Kessie and Addo (n 468) 20.

objected to, which is synergistically aligned with the argument that LDCs pursue a policy of resolving trade disputes through means other than through recourse to the DSU.

3.7.7 LDC enforcement of a favourable ruling

DSU Article 19 narrates that when it is found that a measure is inconsistent with a covered agreement, the concerned Member will bring the measure into conformity with the requisite covered agreement.[1181] In the event of non-compliance therewith, the complainant may take retaliatory measures[1182] equivalent to the economic harm and loss in trade benefits caused.[1183]

The literature shows that LDCs lack the capacity to retaliate, with Kym Anderson speaking of the "...inherent injustice of retaliation,"[1184] while Apecu argues that African countries have neither the leverage nor a sufficiently wide product base to give them the "...alternatives for retaliation."[1185] Bartels, Bown and Hoekman argue that the ineffective nature of retaliatory measures may cause certain countries simply not to initiate disputes in the first instance.[1186]

While the foregoing enunciated that enforcement issues could be of legitimate concern to LDCs, within the wider context of the DSU, there is a very high compliance rate in respect of DSU cases. Davey, in 2005

[1181] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) art 19.1 365.
[1182] Article 22.4 provides that these must be approved by the DSB ibid 369.
[1183] ibid art 22.4 369.
[1184] Anderson (n 593) 129.
[1185] Apecu (n 449) 26.
[1186] Bartels (n 467) 49; Bown and Hoekman (n 539) 863.

suggested a compliance rate of 83%,[1187] while Sacerdoti, in 2016, noted that some 90% of all cases were resolved "...by the removal of measures found to be in breach of WTO obligations."[1188] The literature also showed that in almost all WTO disputes where a violation has occurred, the respondent country eventually[1189] brings itself into compliance.[1190] Meagher went further, and argued that given the infrequent use of counter-measures, the argument that enforcement problems affect DSU participation is questionable.[1191] Moreover, to date, in the only case brought by an LDC,[1192] the disputants reached a mutually agreeable solution.[1193] The literature further narrated how an adverse ruling could create economic and political pressure on a government to comply therewith, thus making it politically easier for governments to settle disputes.[1194] Similarly, van den Bossche and Gathii opined that LDCs should harness the potential of soft law[1195] in naming and shaming violators as a means of ensuring their compliance.[1196]

The review concluded that LDCs when faced with a recalcitrant and obstinate respondent, could face insuperable difficulties enforcing a

[1187] Davey, 'The WTO Dispute Settlement System' (n 603) 47.
[1188] Sacerdoti (n 1097) 1.
[1189] The length of time taken to bring a measure into compliance is discussed in depth in Chapter 5.
[1190] Wilson (n 602) 399.
[1191] Meagher, N., 'Representing Developing Countries in WTO Dispute Settlement Proceedings' in George A. Bermann and Petros C. Mavroidis (n 153) 223.
[1192] *India-Antidumping Measure on Batteries from Bangladesh, Request for Consultations* (n 510).
[1193] *India-Antidumping Measure on Batteries from Bangladesh, Notification of Mutually Satisfactory Solution* (n 607).
[1194] Brewster (n 595) 154.
[1195] 'soft Law' is defined as guidelines, policy declarations, or codes of conduct that set standards of conduct but are not legally binding see Garner Bryan A., ed. (n 7) 1606.
[1196] Van den Bossche and Gathii (n 60) 29.

decision. That view had, however, to be considered within the wider context of the 90% levels of respondent compliance,[1197] the rarity of having to resort to the use of reprisals to force compliance,[1198] as also the influence of 'soft law' in securing compliance. It is contended that the cumulative effect of these factors degrades the argument that LDCs did not engage with the DSU due to enforcement difficulties. Indeed, it could be argued that given the high rates of compliance discussed above, LDCs, by not fully utilising the DSU, are, in a sense restricting their ability to resolve a trade dispute. Evidence supporting this argument is to be found in *US-Upland Cotton,*[1199] where Brazil, despite facing enforcement issues[1200], nevertheless managed to settle the dispute through a mutually agreed solution,[1201] whereas LDCs who (as discussed above) participated therein only as third parties are still endeavouring to reach an extra-judicial settlement.[1202]

Overall, the issue of enforceability in absolute terms cannot be ruled out as a barrier to LDC engagement with the DSU, a barrier which LDCs are seeking to remediate through the application of SDT-centric structural reforms to the DSU, which are discussed in the next chapter.

[1197] Sacerdoti (n 1097) 1.
[1198] Meagher, N., 'Representing Developing Countries in WTO Dispute Settlement Proceedings' in George A. Bermann and Petros C. Mavroidis (n 153) 223.
[1199] *United States - Subsidies on Upland Cotton - Constitution of the Panel Established at the Request of Brazil - Note by the Secretariat, WT/DS267/15, 23 May 2003* (n 993).
[1200] Bahri (n 912) 664.
[1201] *United States - Subsidies on Upland Cotton, Notification of a Mutually Agreed Solution, WT/DS267/46, 23 October 2014*.
[1202] 'Least Developed Countries Propose New Caps on Trade-Distorting Farm Subsidies at WTO' (*Tralac*) <https://www.tralac.org/news/article/11222-least-developed-countries-propose-new-caps-on-trade-distorting-farm-subsidies-at-wto.html>.

3.7.8 Missions, linguistic & communication difficulties

The first part of this argument is grounded on the concept that having a diplomatic mission in Geneva is of key importance to the pursuit of a country's national interest at the WTO.[1203] Bernal notes that many small countries do not have a mission in Geneva.[1204] However, 91% of LDCs do have representation in Geneva,[1205] yet in spite of this, LDC engagement with the DSU remains low,[1206] which can be explained by the fact that the primary focus of some missions lies in trade facilitation and commerce,[1207] as opposed to the litigation of disputes.[1208] This non-juridical focus accords with the argument that LDCs have little or no interest in the DSU and, thus, have no reason to staff a mission with DSU specialists.[1209]

The second strand of the argument is that most dispute Panel and Appellate Body proceedings are conducted in English[1210] (which is the common language of most Panellists[1211]). Thus, if LDCs sought to engage with the DSU, their personnel could lack the requisite linguistic skills. The literature demonstrated how the WTO offers technical training support to Members linguistically,[1212] while certified translation services were also widely available.[1213] While neither translation services nor technical

[1203] Blackhurst, Lyakurwa and Oyjide (n 58) 493.
[1204] Bernal, 'Small Developing Economies in the World Trade Organization' (n 70) 13.
[1205] 'WTO | Development - Geneva Week' (n 625).
[1206] Apecu (n 449) 6.
[1207] ibid 7.
[1208] Gross (n 44) 371; Hoekman and Mavroidis (n 485) 535.
[1209] It is arguably conceivable that the absence of diplomatic posts and career pathways within the public sector could in part explain why LDCs lack the human capital in terms of DSU litigation.
[1210] Abbott (n 71) 11.
[1211] ibid 18.
[1212] 'WTO | Development - ITTC - List of Courses' (n 637).
[1213] See for example: 'Morningside Translations, WTO Certified Translation Services' (n 638).

training will completely resolve linguistic difficulties, nevertheless, they should assist in ameliorating them.

The third element of the argument was that engagement by LDCs was hampered by the combination of a lack of support from and poor internal communication between national governments, individual government departments/ key officials and their respective WTO missions.[1214]

However, Busch *et al.* narrate that poor levels of communication are not universally an issue with all LDCs, some of whom had "...tight Geneva-capital coordination and support."[1215] Given the conflicting and somewhat nebulous nature of the reviewed literature, the argument that communication difficulties *de facto* act as a barrier preventing LDCs from engaging with the DSU cannot thus be substantiated. That said, while this argument cannot be completely dismissed, its significance should not be overstated.

Overall, in respect of the presence of missions, linguistic difficulties and communication weaknesses, the findings from reviewed literature paint a mixed and somewhat incoherent picture, from which it is difficult to either draw a definitive conclusion or ascribe a weighting of the influence these factors have upon LDC engagement with the DSU. However, there is evidence to show that the presence of a permanent mission staffed with suitably qualified and experienced legal specialists, is not *per se* a pre-requisite for engagement with the DSU. Thus, in the *United States* –

[1214] Apecu (n 449) 7.
[1215] ibid 29.

Measures Affecting the Cross-Border Supply of Gambling and Betting Services,[1216] although neither Antigua nor Barbuda had a mission in Geneva,[1217] nevertheless, with strong industry backing,[1218] they successfully initiated and won a trade dispute against the United States. Similarly, although Chad had no representation in Geneva, they did, with the assistance of Oxfam,[1219] participate in *US-Upland Cotton,*[1220] which led Gross to opine that "...issues of representation are not a decisive factor."[1221]

From these simple illustrations, if LDCs so desired, they could fully engage with the DSU with or without the need for representation in Geneva *per se,* and as such, again, while this issue cannot be simply dismissed, its significance should not be exaggerated.

3.8 Reformulating LDC lack of engagement with the DSU

Van den Bossche and Gathii argued that the reasons why LDC have made limited use of the DSU are "...multiple, complex and interrelated."[1222] This section has re-evaluated the extant reasons, which sought to explain LDCs' non-engagement with the DSU, adding thereto the new information

[1216] 'WTO | Dispute Settlement - the Disputes - DS285' (n 629); Douglas A Irwin and Joseph Weiler, 'Measures Affecting the Cross-Border Supply of Gambling and Betting Services (DS 285)' (2008) 7 World Trade Review 71.
[1217] 'WTO | Development - Geneva Week' (n 625).
[1218] Horlick, J and Fennell, K., 'WTO Dispute Settlement from the Perspective of Developing Countries', in Yong-Shik Lee and others (eds), *Law and Development Perspective on International Trade Law* (Cambridge University Press 2011) 166–167; Note the size of the US gambling industry is highlighted in Irwin and Weiler (n 1216) 72–73.
[1219] Gregory Shaffer, Michelle Ratton Sanchez Badin and Barbara Rosenberg, 'The Trials of Winning at the WTO: What Lies behind Brazil's Success' 41 Cornell Int'l L. J. 383, 502 (2008) 463–464.
[1220] *United States - Subsidies on Upland Cotton - Constitution of the Panel Established at the Request of Brazil - Note by the Secretariat, WT/DS267/15, 23 May 2003* (n 993).
[1221] Gross (n 44) 377.
[1222] Van den Bossche and Gathii (n 60) 21.

revealed in this thesis, thus enhancing the existing body of academic knowledge. It has been shown that LDCs, despite their limited economic size, nevertheless have their trade rights infringed. Similarly, it has been shown in this section that, notwithstanding their human capital deficit in terms of legal capacity, LDCs could possess sufficient legal capacity to enable them to identify when a breach of WTO law has occurred. Collectively these demonstrate that the LDCs had sufficient capacity to enable them to engage with the simplified, diplomacy-oriented dispute settlement system envisaged by the 'opt-out' proposal to settle their trade disputes. Instead, they faced attempting to resolve their disputes through the highly legalistic DSU, a system where they lacked, and still lack, the core skills[1223] to engage therewith.

This, together with the general rebuttal of most of the other LDC proposals, when added to the overall ineffectiveness of the other SDT provisions within the DSU, has arguably created a bias against engaging with the DSU and a clear preference for settling disputes by extra-judicial means. While it is difficult to assess the extent of this bias against engaging with DSU, there is clear evidence, as shown in the case of the Upland Cotton dispute discussed above, that it extends to the highest echelons of several African governments.

[1223] As the DSU matured, and the body of case law grew, both the level and complexity of e.g., legal skills and the diversity of other requisite skills e.g., scientific, technical, and economic grew and expanded.

The generally held view is that LDCs' lack of engagement with the DSU is multifactorial in nature. This research has identified bias against engagement with the DSU, driven for the most part by the failure of the LDCs to achieve their SDT-driven opt-out. This represents a new factor in terms of understanding and explaining why LDCs do not engage with the DSU.

3.9 Conclusion

Chapter 2 narrated how the LDCs, as the Uruguay round of negotiations (which gave rise to the creation of the DSU) were reaching a critical phase, submitted a radical proposal supported by and premised upon SDT. This proposal eschewed the creation of a separate, distinct, and bespoke dispute settlement system, which would sit outside of the GATT Dispute settlement system , and its WTO successor, the DSU. Chapter 2 also reviewed the traditional academic explanations as to why LDCs did not engage with the DSU, and it was argued that collectively these explanations failed to provide a comprehensive explanation as to said non-engagement and hypothesised that there were yet unknown factors at play.

This chapter firstly focussed on the LDC proposals tabled on 23rd November 1988[1224] and 14th November 1989[1225] regarding the settlement of disputes and evaluated the extent to which these proposals, or the

[1224] *Group of Negotiations on Goods (GATT), Communication from Bangladesh, Uruguay Round and the Least-Developed Countries (LLDCs), Revision, MTN.GNG/W/14/Rev.l*.
[1225] *Negotiating Group on Dispute Settlement, Proposals on behalf of the Least-Developed Countries, Communication from Bangladesh* (n 425).

sentiment thereof, had been incorporated either within the DSU or had been given effect to elsewhere within the other WTO agreements. By examining both the DSU and various covered agreements in turn and having considered and evaluated the pertinent case law, I concluded that, notwithstanding the use of often-sympathetically sounding terminology used in said agreements, with the possible exception of the provision of technical assistance, arguably do not fully address the core aims of the LDC proposals had been addressed.

Secondly, the chapter evaluated LDCs' engagement with the DSU by reviewing the limited usage of the DSU by LDCs to date. The review highlighted how the decision by Bangladesh to initiate a dispute with India was due to the presence of what Taslim describes as "...the confluence of positive factors..."[1226] and was taken against a backdrop of both political reservations[1227] and internal bureaucratic resistance.[1228] It was further shown that, despite the removal of the barriers, which had purportedly prevented Bangladesh from taking action in respect of the anti-dumping duties imposed by Brazil on imports of jute bags in 1992,[1229] Bangladesh still took no action. This inaction on the part of Bangladesh aligns with the argument that LDCs in general, and in this instance Bangladesh in

[1226] Mohammed Ali Taslim, M.A., 'How the DSU Worked for Bangladesh: The First Least Developed Country to Bring a WTO Claim' in Shaffer and Meléndez-Ortiz (n 555) 231.
[1227] Mohammed Ali Taslim, M.A., 'How the DSU Worked for Bangladesh: The First Least Developed Country to Bring a WTO Claim' ibid 243.
[1228] Mohammed Ali Taslim, M.A., 'How the DSU Worked for Bangladesh: The First Least Developed Country to Bring a WTO Claim' ibid 246.
[1229] Mohammed Ali Taslim, M.A., 'How the DSU Worked for Bangladesh: The First Least Developed Country to Bring a WTO Claim' ibid 231, 240.

particular, pursue an SDT-driven policy of non-engagement with the DSU.[1230]

The chapter then examined LDC usage of the DSU through the participation of LDCs as third parties in disputes. It was shown that, even where an infringement of WTO rules resulted in severe economic hardship in multiple countries, LDCs still pointedly refused to initiate a WTO complaint. Moreover, the preference of LDCs to eschew engagement with the DSU preferring instead to seek resolution of disputes through extra-judicial means, was clearly shown to be policy driven. Additionally, where LDCs participated as a third party in a dispute, they did so either passively without making any active contribution[1231], defensively fearing the loss of market share[1232] or, as was shown in the *US –Upland Cotton*[1233] as an adjunct to and a means of providing leverage for said wider policy driven preference of settling disputes extra-judicially.

Finally, the chapter re-evaluated the extant academic reasons why LDCs had failed to engage with the DSU. The reasons were viewed through the prism of the LDCs' failure to achieve either a simplified dispute settlement system[1234] or any of the core aims of their other substantive DSU

[1230] It is interesting to observe that in relation to the imposition in 2017 of anti-dumping duties by India on Jute bags from Bangladesh, it would appear that extra-judicial remediation is being sought, 'DCCI Worried over India's Anti-Dumping Duty on Bangladesh Jute' (n 970); Sumon Mahbub (n 970).
[1231] An exemplar of this is the level of participation by Senegal in US — Shrimp, DS58, Elsig and Stucki (n 53) 296.
[1232] Senegal, EC — Bananas III, DS27, Madagascar, Tanzania, EC — Export Subsidies on Sugar, DS265; Malawi and Tanzania, EC — Export Subsidies on Sugar, DS283, see, ibid.
[1233] *United States - Subsidies on Upland Cotton - Request for Consultations by Brazil, WT/DS267/1 G/L/571 G/SCM/D49/1 G/AG/GEN/54, 3 October 2002* (n 992).
[1234] *Sub-Committee on Trade of Least-Developed Countries, 28 September, Note of Proceedings of the Eleventh Meeting, Revision* (n 114) 3.

proposals,[1235] which in turn led to a bias against engaging with the DSU as a means of dispute resolution and to them seeking structural reforms to the DSU designed to facilitate their engagement therewith. The outcome of this evaluation was that, while LDCs had the requisite skills to engage with the simplified dispute system they had proposed, they lacked both the skills and capacity required to engage with the DSU. This, coupled with the failure of their proposals and the shortcomings of the other SDT provisions within the DSU, led to a bias against engagement with the DSU. It was clearly shown in relation to the *Upland-Cotton* dispute that this bias had permeated to the highest levels of government, with the West and Central African LDC agriculture ministers rejecting DSU engagement, preferring to settle the dispute by negotiation, a preference which is aligned to the LDC- opt-out proposal.[1236]

The difficulty involved in assessing the impact of this bias against engaging with the DSU was acknowledged in the chapter.

However, an indicator of how widely spread this belief was can be seen in the 2002 LDC statement, which clearly states that "... they had avoided resolving disputes through the DSU ... due to structural and other difficulties caused by the system...."[1237] From this, there can be no doubt that, at least until 2002, LDCs had taken a 'collective approach' to pursue

[1235] *Group of Negotiations on Goods (GATT), Communication from Bangladesh, Uruguay Round and the Least-Developed Countries (LLDCs), Revision* (n 114); *Negotiating Group on Dispute Settlement, Proposals on behalf of the Least-Developed Countries, Communication from Bangladesh* (n 425).
[1236] Pesche and Nubukpo (n 107) 95.
[1237] *Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposal by the LDC Group, TN/DS/W/17, 9 October 2002* (n 1094).

an officially authorised 'standard course of action' eschewing the DSU as a means of resolving disputes.

The next chapter will review the LDC proposals submitted as part of the current round of negotiations concerning the reform of the DSU being conducted through the aegis of the Special Session of the Dispute Settlement Body,[1238] mapping the continued influence of both SDT and evincing the enduring bias against engaging with the DSU which exists to this day.

[1238] 'Dispute Settlement Body Special Session, First Formal Meeting of the Special Session of the DSB, Report by the Chairman to the Trade Negotiations Committee' (n 112).

Chapter 4

4. LDC activism in the DSU review process

The reform of the DSU has been the subject of more than twenty years of negotiations within the WTO, which have, as yet, failed to produce any concrete changes or amendments to the DSU.[1239] This chapter will examine LDC participation in the negotiations concerning the ongoing review of the DSU,[1240] which is currently being conducted through the aegis of the Special Session of the Dispute Settlement Body.[1241] This examination builds on the two preceding chapters focussing on the continuing role played by SDT, which led the LDCs to eschew the DSU. This directly maps to both research questions in terms of our understanding of the reasons why the LDCs have largely shied away from using the DSU and whether the DSU has the functionality required to allow the LDCs to engage with it.

As was discussed in Chapter 2, during the Uruguay Round, the LDCs, as a collective, unsuccessfully sought to use SDT as the justification for the creation of a simplified separate and unique LDC-only dispute settlement mechanism.[1242] Similarly, in Chapter 3, it was shown that virtually all the

[1239] Lee (n 78) 989; Zimmerman T. A., 'The DSU Review (1998-2004): Negotiations, Problems and Perspectives' in, Georgiev and Van der Borght (n 78) 443.
[1240] As part of the Uruguay Round of Trade Negotiations, Ministers called for the completion of a full review of the DSU within four years after the establishment of the WTO 'Uruguay Round, Trade Negotiations Committee, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Marrakesh, 15 April 1994' (n 78) 419.
[1241] 'Dispute Settlement Body Special Session, First Formal Meeting of the Special Session of the DSB, Report by the Chairman to the Trade Negotiations Committee' (n 112).
[1242] *Negotiating Group on Dispute Settlement, Proposals on behalf of the Least-Developed Countries, Communication from Bangladesh* (n 425) 5.

other SDT proposed amendments to the DSU advanced by the LDCs were similarly rebuffed. Given the clear preference expressed by the LDCs for the creation of a separate LDC-only dispute settlement mechanism and the rebuttal of their other substantive proposals regarding the DSU, this chapter explored the possibility that this may have led the LDCs to simply ignore the DSU as a means of resolving trade disputes. The analysis, which links to the first research question about understanding why LDCs do not engage with the DSU, also adds a new dimension to our understanding, that of bias against engaging with the DSU. Chapter 3 revealed evidence of this when it was found that LDCs, when attempting to resolve an economically damaging violation of their trade rights in respect of the strategically important cotton industry,[1243] chose to eschew the use of the DSU to seek redress of said violations,[1244] favouring instead to seek a negotiated settlement thereof. Against this backdrop, the proposals submitted by the LDCs, as part of the current DSU reform process will be analysed in this chapter which will proceed as follows. After setting out the background to the DSU review process, the chapter will chronologically analyse the current DSU review process separating it into four sequential sections which reflect the various deadlines set by WTO membership for the completion of the review, being (i) 1995-1999, (ii) 1999-2001, (iii) 2001-July 2003 and (iv) July 2003- date.

[1243] Matthew Eagleton-Pierce, *Symbolic Power in the World Trade Organization* (OUP Oxford 2012) 88.

[1244] Denis Pesche and Kato Nubukpo, 'The African Cotton Set in Cancún: A Look Back at the Beginning of Negotiations', in Edward Hazard (ed.), *International Trade Negotiations and Poverty Reduction: The White Paper on Cotton* (Occasional Papers, n° 249 enda editions, 2005) 49 <https://searchworks.stanford.edu/view/9156728>; Eagleton-Pierce (n 1243) 92.

The objective of the analysis is three-fold: firstly, it will determine whether both the proposals themselves and the approach taken by the LDCs in terms of their engagement with the review process reflect a continuing SDT-driven approach[1245] on the part of the LDCs. Secondly, the analysis will contrast and compare the 'new' LDC proposals under the current DSU review process with the five original proposals[1246] submitted by the LDCs during the Uruguay round of negotiations from which the DSU was fashioned. The purpose of this is to ascertain whether the LDCs have either accepted that their original objectives were unachievable and focused instead on other areas of DSU review which are of interest to them or remain materially entrenched in a position premised upon the attainment of their original aims. Thirdly, the analysis will ascertain whether the 'new' proposals themselves provide any evidence indicating a change in the bias against engagement with the DSU or alternatively demonstrate a willingness on their part to engage with the DSU, which they hope to facilitate through the application of SDT measures designed

[1245] Continuity is an important factor particularly in light of the fact that since the conclusion of the GATT DSU negotiations a further 13 LDCs became members of the GATT and or the WTO swelling the number of LDCs from 23 to 35. The 'new' LDCs are Afghanistan (2016), Cambodia (2004), Congo, Democratic Republic (1997), Djibouti (1994), Guinea (1994), Guinea Bissau (1994), Lao People's Republic (2013), Liberia (2016), Mali (1993), Nepal (2004), Solomon Islands (1994), and Yemen (2014). 'WTO | Understanding the WTO - Least-Developed Countries' (n 21).

[1246] The five proposals chronologically are (i) that the DSU should contain measures to allow LDCs to effectively use it (ii) that in relation to the DSU, LDCs should be provided with technical assistance, (iii) the creation of a bespoke LDC only dispute settlement mechanism, (iv) prior to initiating a complaint a WTO member must firstly notify the relevant LDC and then formally investigate the matter at issue, (iv) in any given dispute, prior to requesting recourse to Panel proceedings, all means of settling the dispute, including the use of good offices, should be exhausted and (v) flexibility in settling any given dispute should be extended to LDCs during all phases of the DSU process see, *Group of Negotiations on Goods (GATT), Communication from Bangladesh, Uruguay Round and the Least-Developed Countries (LLDCs), Revision* (n 114) para A 2; *Sub-Committee on Trade of Least-Developed Countries, 28 September, Note of Proceedings of the Eleventh Meeting, Revision* (n 114); *Negotiating Group on Dispute Settlement; Proposals on behalf of the Least-Developed Countries* (n 114).

to resolve, remove, or ameliorate issues within the current DSU which they perceive impede said engagement.

This expands our understanding of the reasons for LDC's non-engagement with the DSU and whether this non-engagement is driven, in a sense, by the failure of the SDT to facilitate said engagement, thus leaving the LDCs with no choice other than to settle their trade disputes by means other than through recourse to the DSU.

4.1 DSU Review overview

As discussed in Chapter 2, as part of the Uruguay Round, the GATT dispute settlement and rules and procedures were the subject of intense negotiations, which culminated in the creation of the DSU in its current form.[1247] As part of the Final Act Embodying the Uruguay Round,[1248] Ministers called for a review of the DSU to be completed within four years from the entry into force of DSU.[1249] The scope of the review was to be wide-ranging in nature and was designed to allow Ministers, upon completion of the review, to decide whether or not to "...continue, modify or terminate such dispute settlement rules and procedures."[1250]

4.2 DSU Review 1995 - 1999

[1247] 'Council, 12 April 1989, Matters Arising from the December 1988 and April 1989 Meetings of the Trade Negotiations Committee, Communication from the Council Chairman' C/W/585 31 March 1989 2.
[1248] 'Uruguay Round, Trade Negotiations Committee, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Marrakesh, 15 April 1994' (n 78).
[1249] ibid 419.
[1250] ibid.

Aside from the provisions of the Final Act Embodying the Uruguay Round,[1251] as aforesaid, the first official mention of the DSU Review occurred in 1997.[1252] The chairman of the DSB noted that a review was to be completed by January 1999.[1253] There were several procedural issues to be discussed,[1254] and as a result, substantive negotiations only started in mid-October 1998,[1255] and these were held in a "...largely informal mode."[1256] By the December 1998 deadline,[1257] despite a series of 10 informal meetings[1258] being held, there had been little meaningful consensus,[1259] and the review was extended until the end of July 1999;[1260] again, however, no consensus on substantive proposals could be secured.[1261] The review negotiations were concisely summarised by the representative of Hong Kong, who stated that "...more than 300 proposals had been submitted during the review, but none had achieved a consensus by 31 July 1999,"[1262] and with that, this phase of the DSU review process ended.

[1251] 'Uruguay Round, Trade Negotiations Committee, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Marrakesh, 15 April 1994' (n 78).
[1252] 'Dispute Settlement Body, Minutes of Meeting, Held on 18 November 1977' WT/DSB/M/39, 7 January 1998 15.
[1253] ibid 16.
[1254] ibid.
[1255] Zimmermann (n 78) 99.
[1256] Zimmerman T. A., 'The DSU Review (1998-2004): Negotiations, Problems and Perspectives' in Georgiev and Van der Borght (n 78) 445.
[1257] 'Dispute Settlement Body, Minutes of Meeting, Held on 18 November 1977' (n 1252) 16.
[1258] Zimmermann (n 78) 99.
[1259] William J Davey, 'Reforming WTO Dispute Settlement' [2004] SSRN Electronic Journal 6 <https://www.researchgate.net/publication/228182745_Reforming_WTO_Dispute_Settlement>.
[1260] 'General Council 9-11 and 18 December 1998, Minutes of Meeting' WT/GC/M/32 9 February 1999 52; Zimmermann (n 78) 99; Davey, 'Reforming WTO Dispute Settlement' (n 1259) 6.
[1261] Davey, 'Reforming WTO Dispute Settlement' (n 1259) 8; Zimmermann (n 78) 102.
[1262] 'General Council 6 October 1999 Minutes of Meeting' WT/GC/M/48 27 October 1999 27.

Bercero and Garzotti state that WTO members initially tabled a "...vast array of proposals covering issues from transparency to the creation of a permanent panel body,"[1263] however these proposals, that comprised some 50 pages of text[1264] "...were never circulated as a WTO document, and minutes of informal meetings were not prepared."[1265] Against this backdrop, it is virtually impossible to gauge the level of LDC activism or engagement with the review process during this period. Of the documents which are in the public domain, such as the minutes of the Dispute Settlement Body and those of the General Council, the identities of members have, in many cases, been generalised. Thus, one finds, for example, the chairman of the DSU stating that"... on different occasions, several delegations had identified issues..."[1266] That said, following an exhaustive search of the minutes of both the DSU and the General Council, there is some evidence which shows LDC's engagement with the review process. An example of this can be found in the minutes of the February 1999 meeting of the General Council. Bangladesh, discussing a proposal by the EC in respect of the provision by the Secretariat of legal advice to developing countries under Article 27.2 of the DSU, stated that, while it could derive benefit from the proposal, nevertheless, they "...hoped that the underlying inadequacies in the WTO dispute settlement

[1263] Ignacio Garcia Bercero and Paolo Garzotti, 'DSU Reform: Why Have Negotiations to Improve WTO Dispute Settlement Failed So Far and What Are the Underlying Issues' (2005) 6 J. World Investment & Trade 847, 848.
[1264] Davey, 'Reforming WTO Dispute Settlement' (n 1259) 6.
[1265] ibid.
[1266] 'Dispute Settlement Body, Minutes of Meeting, Held on 18 November 1977' (n 1252) 15.

system would be addressed fully by the wider WTO membership."[1267] Not only does this evince LDC participation in the process it also implies a degree of disquiet on the part of Bangladesh with the outcome of the review process as a whole. While they find merit in the EC proposal, it does not address the 'underlying inadequacies' of the DSU, which Bangladesh calls upon the 'wider WTO membership' to address.[1268] Unfortunately, Bangladesh does not elucidate what these 'underlying inadequacies' are. In terms of the general activism and participation in the review process by the wider body of LDCs, the writer could only find one oblique reference thereto, which is contained within the statement made by Hong Kong when speaking on the subject of extending the review beyond the 31 July 1991 deadline, with a view to reaching agreement on a package of proposals by the 15th of October 1999.[1269] While Hong Kong expressed its willingness to continue the process, it signalled its concern that "...small delegations, especially those of least-developed countries, would not have the resources to engage in any meaningful discussions on the DSU review in view of the more pressing demands of the preparatory work for the Ministerial Conference."[1270]

4.3 DSU Review 1999 – 2001

Following the 1999 Seattle Ministerial Conference, which was adjourned without any decisions having been made in the face of issues which were

[1267] 'General Council 15 and 16 February 1999 Minutes of Meeting' WT/GC/M/35 30 March 1999 35.
[1268] 'General Council, Minutes of Meeting, 8 February 2006' WT/GC/M/101 4 April 2006 35.
[1269] 'General Council 6 October 1999 Minutes of Meeting' (n 1262) 27.
[1270] ibid.

described as being "as complex as the world itself,"[1271] the review of the DSU "... essentially remained in limbo through most of 2000 and 2001."[1272] Meaningful progress did not restart until the Doha Ministerial meeting in 2001, [1273]which gave rise to the wider Doha Development Round of multilateral negotiations.[1274] Hoekman notes that in the run-up to 2001, there were, as had been the case with the 1999 Seattle Ministerial[1275] meeting, "calls for the launch of a 'Development Round' of negotiation."[1276] Scott and Wilkinson state that at the 1999 Seattle Ministerial meeting, "…most developing countries declared themselves to be at best ambivalent and at worst hostile to the launch of another round."[1277] The developing countries were aggrieved that the Uruguay Round and earlier GATT agreements had been implemented by the developed countries in such a way that failed to substantially liberalise access to their markets.[1278]

However, by 2001, the developing countries had become convinced that the new round should "…redress the imbalance of the Uruguay Round and

[1271] 'Ministerial Conference Third Session Seattle, 30 November - 3 December 1999, Summary Record of the Eighth Meeting' WT/MIN (99)/SR/8 14 January 2000 2.
[1272] Zimmerman T. A., 'The DSU Review (1998-2004): Negotiations, Problems and Perspectives' in Georgiev and Van der Borght (n 78) 447.
[1273] 'Ministerial Conference, Fourth Session Doha, 9 - 14 November 2001, Ministerial Declaration' WT/MIN (01)/DEC/1 20 November 2001 6; Davey, 'Reforming WTO Dispute Settlement' (n 1259) 9.
[1274] Batista (n 153) 172; Sungjoon Cho, 'The Demise of Development in the Doha Round Negotiations' (2009) 45 Tex. Int'l LJ 573, 576; Hart and Dymond (n 190) 395; Bernard Hoekman, 'Strengthening the Global Trade Architecture for Development: The Post Doha Agenda' (2002) 1 World Trade Review 24.
[1275] Hoekman (n 1274) 23.
[1276] ibid 24.
[1277] James Scott and Rorden Wilkinson, 'The Poverty of the Doha Round and the Least Developed Countries' (2011) 32 Third World Quarterly 611, 617.
[1278] ibid 618.

previous GATT agreements…"[1279] by giving special consideration to their developmental needs and allowing them to negotiate on the basis of less than full reciprocity.[1280] The LDCs'[1281] approach was more clearly defined in that collectively they were of the view that any work programme needed to be specifically linked to development and capacity.[1282] In addition, it is clear that the LDCs, approached the Ministerial Meeting with an agenda premised upon SDT, showing the extent to which the norm of SDT had been internalised by the LDCs. This is evident from the statements of the representatives of some 15 LDCs,[1283] with the Minister of Industry and

[1279] ibid.
[1280] ibid.
[1281] 'Ministerial Conference, Fourth Session Doha, 9 - 13 November 2001, Tanzania, Corrigendum' WT/MIN (01)/ST/23/Corr.1, 13 November 2001.
[1282] 'Ministerial Conference, Fourth Session Doha, 9 - 13 November 2001, Tanzania, Statement by the Honourable Iddi Mohamed Simba Minister for Industry and Trade' WT/MIN (01)/ST/23,10 November 2001 1.
[1283] 'Ministerial Conference, Fourth Session Doha, 9 - 13 November 2001, Benin, Statement by H.E. Mr. Lazare Sehoueto Minister of Industry, Trade and Employment Promotion' WT/MIN (01)/ST/131 12 November 2001 2–3; 'Ministerial Conference, Fourth Session Doha, 9 - 13 November 2001, Burkina Faso, Statement by H.E. Mr. Bédouma Alain Yoda Minister of Trade, Business Promotion and Handicrafts' WT/MIN (01)/ST/94 11 November 2001 2; 'Ministerial Conference, Fourth Session Doha, 9 - 13 November 2001, Burundi, Statement by H.E. Mr. Adolphe Nahayo Ambassador, Permanent Representative in Geneva' WT/MIN (01)/ST/127 12 November 2001 2; 'Ministerial Conference, Fourth Session Doha, 9 - 13 November 2001, Chad, Statement by H.E. Mr. Mahamat Saleh Adoum Minister of Commerce, Industry and Handcrafts' WT/MIN (01)/ST/117 12 November 2001 2; 'Ministerial Conference, Fourth Session Doha, 9 - 13 November 2001, Lao People's Democratic Republic, Statement Circulated by H. E. Mr. Siaosavath Savengsuksa Vice Minister, Ministry of Commerce, (As an Observer)' WT/MIN (01)/ST/98 11 November 2001 2; 'Ministerial Conference, Fourth Session Doha, 9 - 13 November 2001, Lesotho, Statement by the Honourable Mpho Meli Malie Minister of Industry, Trade and Marketing' WT/MIN (01)/ST/52 11 November 2001 2; 'Ministerial Conference, Fourth Session Doha, 9 - 13 November 2001, Madagascar, Statement by H.E. Mr. Maxime Zafera, Ambassador, Permanent Representative to the United Nations at Geneva' WT/MIN (01)/ST/88 11 November 2001 1; 'Ministerial Conference, Fourth Session Doha, 9 - 13 November 2001, Malawi, Statement by the Honourable Peter Kaleso MP Minister of Commerce and Industry' WT/MIN (01)/ST/121 12 November 2001 2; 'Ministerial Conference, Fourth Session Doha, 9 - 13 November 2001, Mali, Statement Circulated by H.E. Mrs. Toure Alimata Traore Minister of Industry, Commerce and Transport' WT/MIN (01)/ST/140 12 November 2001 2; 'Ministerial Conference, Fourth Session Doha, 9 - 13 November 2001, Mozambique, Statement by H.E. Mr. Salvador Namburete Deputy-Minister of Industry and Trade' WT/MIN (01)/ST/84 11 November 2001 1; 'Ministerial Conference, Fourth Session Doha, 9 - 13 November 2001, Nepal, Statement by the Honourable Purna Bahadur Khadka Minister for Industry, Commerce and Supplies (Speaking as an Observer)' WT/MIN (01)/ST/148 12 November 2001 1; 'Ministerial Conference, Fourth Session Doha, 9 - 13 November 2001, Republic of Guinea, Statement by H.E. Mrs. Hadja Mariama Déo Baldé Minister of Commerce, Industry and Small- and Medium -Sized Enterprises' WT/MIN (01)/ST/114 12 November 2001 1; 'Ministerial Conference, Fourth Session Doha, 9 - 13 November 2001, Solomon Islands, Statement by Mr. Robert Sisilo

trade of the Republic of Guinea stating that consolidation of SDT in firm commitments is "…something our countries cannot be denied," [1284] while the Minister of Industry and Trade of Mozambique affirms that SDT for, "…the developing countries, particularly the LDCs, is a core principle of the WTO"[1285] with both Uganda,[1286] Chad[1287] and Solomon Islands[1288] calling for binding SDT measures, the latter opining that, "Sweet words are just not good enough."[1289]

Davey notes that from 1997-2001, notwithstanding the lack of progress on DSU review, there was nevertheless "… a strong conviction that some review of the DSU was needed."[1290] This was reflected in the Doha Ministerial declaration[1291] where as part of the work programme, it was agreed in paragraph 30 that negotiations should be undertaken "…on improvements and clarifications of the Dispute Settlement

Ambassador to the European Union' WT/MIN (01)/ST/115 12 November 2001 2–3; 'Ministerial Conference, Fourth Session Doha, 9 - 13 November 2001, Tanzania, Statement by the Honourable Iddi Mohamed Simba Minister for Industry and Trade' (n 1282) 2; 'Ministerial Conference, Fourth Session Doha, 9 - 13 November 2001, Togo, Statement by H.E. Mr. Dama Dramani Minister of Commerce, Industry, Transport and Free Zone Development' WT/MIN (01)/ST/59 11 November 2001 1; WT/MIN (01)/ST/111 12 November 2001 2.

[1284] 'Ministerial Conference, Fourth Session Doha, 9 - 13 November 2001, Republic of Guinea, Statement by H.E. Mrs. Hadja Mariama Déo Baldé Minister of Commerce, Industry and Small- and Medium -Sized Enterprises' (n 1283) 1.

[1285] 'Ministerial Conference, Fourth Session Doha, 9 - 13 November 2001, Mozambique, Statement by H.E. Mr. Salvador Namburete Deputy-Minister of Industry and Trade' (n 1283) 1.

[1286] 'Ministerial Conference, Fourth Session Doha, 9 - 13 November 2001, Uganda, Statement by the Honourable Edward B. Rugumayo Minister of Tourism, Trade and Industry' (n 1283) 2.

[1287] 'Ministerial Conference, Fourth Session Doha, 9 - 13 November 2001, Chad, Statement by H.E. Mr. Mahamat Saleh Adoum Minister of Commerce, Industry and Handcrafts' (n 1283) 2.

[1288] 'Ministerial Conference, Fourth Session Doha, 9 - 13 November 2001, Solomon Islands, Statement by Mr. Robert Sisilo Ambassador to the European Union' (n 1283) 2.

[1289] ibid.

[1290] Davey, 'Reforming WTO Dispute Settlement' (n 1259) 9.

[1291] 'Ministerial Conference, Fourth Session Doha, 9 - 14 November 2001, Ministerial Declaration' (n 1273).

Understanding…"[1292] with the aim of completing the same by May 2003.[1293] Davey notes that it was hoped that by putting the negotiations on dispute settlement on a separate and faster track than other negotiations, it was hoped that the "…proposed reforms would not become hostage to trade-offs in the general trade negotiations under the Doha mandate."[1294] As to the substance of these negotiations, the Ministerial Declaration states that the "… negotiations should be based on the work done thus far as well as any additional proposals."[1295] Pham notes the complete absence of any reference within the Ministerial Declaration to either developing countries[1296] or to the inclusion of SDT provisions which he opines is in "...striking contrast to the other paragraphs in the Declaration where such language is ubiquitous."[1297] From this, it would appear that the concerns regarding the imbalances of the Uruguay round and GATT agreements discussed above were set to be repeated. The absence of any reference to SDT in this regard was not lost on the LDCs, who collectively proposed that Paragraph 44 of the Declaration[1298] (which *inter alia* called for SDT provisions to be reviewed to make them more precise, effective and

[1292] ibid 6.
[1293] ibid.
[1294] Davey, 'Reforming WTO Dispute Settlement' (n 1259) 9; Bryan Mercurio, 'Improving Dispute Settlement in the World Trade Organization: The Dispute Settlement Understanding Review - Making It Work?' 38(5) Journal of World Trade 795, 796–797.
[1295] 'Ministerial Conference, Fourth Session Doha, 9 - 14 November 2001, Ministerial Declaration' (n 1273) 6; Zimmermann (n 78) 111; Davey, 'Reforming WTO Dispute Settlement' (n 1259) 9.
[1296] Hansel T Pham, 'Developing Countries and the WTO: The Need for More Mediation in the DSU' (2004) 9 Harv. Negot. L. Rev. 331, 339.
[1297] ibid 340.
[1298] 'Ministerial Conference, Fourth Session Doha, 9 - 14 November 2001, Ministerial Declaration' (n 1273) 9.

operational[1299]), should be specifically revised to, "… ensure that SDT treatment is mandatory and legally binding through the dispute settlement system of the WTO."[1300] This again demonstrated the weight that LDCs have attached to SDT and the influence it has on their negotiating strategies, aims and goals. Further evidence of this SDT-driven approach will be highlighted in the next section, which reviews not only the approach taken by the LDCs but also the proposals submitted by them in the post -Doha negotiations on DSU review.

4.4 DSU Review from 2001 – July 2003

Following the Doha Ministerial declaration in November 2001,[1301] the Trade Negotiations Committee, which has oversight of supervises trade negotiations,[1302] met on the 28th of January and the 1st of February 2002.[1303] It was proposed that "…negotiations on improvements and clarifications to the Dispute Settlement Understanding will take place in

[1299] Paragraph 44 of the Doha Ministerial declaration deals with Special and Differential Treatment, and states that, 'We reaffirm that provisions for special and differential treatment are an integral part of the WTO Agreements. We note the concerns expressed regarding their operation in addressing specific constraints faced by developing countries, particularly least-developed countries. In that connection, we also note that some Members have proposed a Framework Agreement on Special and Differential Treatment (WT/GC/W/442). We therefore agree that all special and differential treatment provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational. In this connection, we endorse the work programme on special and differential treatment set out in the Decision on Implementation-Related Issues and Concerns.', ibid.

[1300] 'Ministerial Conference, Fourth Session Doha, 9 - 13 November 2001, Proposals by Least-Developed Countries for Alternative Text in the Draft Ministerial Declaration JOB (01)/140/REV.1 OF 27 October 2001, Communication from Tanzania' WT/MIN (01)/W/7 12 November 2001 4.

[1301] 'Ministerial Conference, Fourth Session Doha, 9 - 14 November 2001, Ministerial Declaration' (n 1273).

[1302] 'WTO | Trade Negotiations Committee' <https://www.wto.org/english/tratop_e/dda_e/tnc_e.htm> accessed 15 April 2022.

[1303] 'Trade Negotiations Committee 28 January and 1 February 2002, Minutes of Meeting' TN/C/M/1 14 February 2002.

Special Sessions of the Dispute Settlement Body,"[1304] (hereinafter DSB Special Session), a proposal which was duly accepted.[1305]

The Trade Negotiations Committee also declared that the review of all SDT provisions[1306] as set out in Paragraph 44 of the Ministerial declaration[1307] would be conducted by the Committee on Trade and Development (CTD), meeting in Special Sessions.[1308] In May 2002, the LDCs set out their position regarding the SDT review.[1309] The LDCs referred to both the Doha Decision on SDT[1310] and to paragraph 12 of the Decision on Implementation-Related Issues and Concerns, which was to identify and seek to give effect to existing SDT provisions and suggest how these provisions could best be employed by the LDCs. [1311] These,

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[1304] ibid 4.

[1305] ibid 5.

[1306] 'Trade Negotiations Committee, 28 January and 1 February 2002, Minutes of Meeting' TN/C/M/1 14 February 2002 5.

[1307] 'Ministerial Conference, Fourth Session Doha, 9 - 14 November 2001, Ministerial Declaration' (n 1273) 9.

[1308] 'Trade Negotiations Committee, 28 January and 1 February 2002, Minutes of Meeting' (n 1306) 5.

[1309] 'Committee on Trade and Development Special Session, Special and Differential Treatment Provisions, Joint Communication by the Least-Developed Countries' TN/CTD/W/4 24 May 2002.

[1310] 'Ministerial Conference, Fourth Session Doha, 9 - 14 November 2001, Ministerial Declaration' (n 1273) 9.

[1311] Paragraph 12, 'Cross-cutting Issues' narrates that, "12.1 The Committee on Trade and Development is instructed: (i) to identify those special and differential treatment provisions that are already mandatory in nature and those that are non-binding in character, to consider the legal and practical implications for developed and developing Members of converting special and differential treatment measures into mandatory provisions, to identify those that Members consider should be made mandatory, and to report to the General Council with clear recommendations for a decision by July 2002; (ii) to examine additional ways in which special and differential treatment provisions can be made more effective, to consider ways, including improved information flows, in which developing countries, in particular the least-developed countries, may be assisted to make best use of special and differential treatment provisions, and to report to the General Council with clear recommendations for a decision by July 2002; and (iii) to consider, in the context of the work programme adopted at the Fourth Session of the Ministerial Conference, how special and differential treatment may be incorporated into the architecture of WTO rules. The work of the Committee on Trade and Development in this regard shall take fully into consideration previous work undertaken as noted in WT/COMTD/W/77/Rev. 1. It will also be without prejudice to work in respect of implementation of WTO Agreements in the General Council and in other Councils and Committees. 12.2 Reaffirms that preferences granted to developing countries pursuant to the Decision of the Contracting Parties of 28 November 1979 ('Enabling Clause')1 should be generalised, non-reciprocal and non-discriminatory." 'Ministerial Conference, Fourth

they argued, meant that the Doha work programme should, in relation to the provision of SDT in favour of the LDCs, (i) make extant SDT measures binding,[1312] (ii) provide additional measures to make SDT more effective[1313] and (iii) incorporate the, "…principles of SDT Treatment (and the principles or foundation on which SDT Treatment is based) into the system and architecture of the WTO."[1314] The LDCs further argued that these SDT provisions were specifically to be applied in providing flexibility in procedures concerning "… complaints/disputes brought against….least-developed countries, such as the special procedures under the Subsidies and Antidumping Agreements."[1315] Moreover, they argued that SDT treatment measures should be strengthened and operationalised within the DSU together with the addition of SDT provisions which would incorporate "… the general development principles within…dispute settlement"[1316] reflective of the special problems and issues faced by the LDCs due to their, "…lack of resources and other imbalances, for example, that it is difficult or unfeasible for them to take recourse to the remedy of trade retaliation."[1317] These sentiments indicate that while the LDCs had an understanding of the problems and issues which prevented them from accessing the DSU, their solution to these was SDT, notwithstanding the

Session Doha, 9 - 14 November 2001, Implementation-Related Issues and Concerns, Decision of 14 November 2001' WT/MIN (01)/17 20 November 2001 8.

[1312] 'Committee on Trade and Development Special Session, Special and Differential Treatment Provisions, Joint Communication by the Least-Developed Countries' (n 1309) 1.

[1313] ibid.

[1314] ibid.

[1315] ibid 3.

[1316] ibid 4.

[1317] ibid.

failure of the same strategy to produce meaningful results during the DSU Uruguay round negotiations. Before the first formal meeting of the DSB Special Session on the 16th of April 2002,[1318] three informal meetings were held on the 4th and 14th of March, as also the 12th of April 2002,[1319] with a view to establishing a twin-track approach to the DSU negotiations being, "…a general discussion of the issues and objectives for the negotiation will take place under Track 1 in parallel with a discussion of specific proposals by Members under Track 2."[1320]

At the DSB Special Session meeting on the 16th of April 2002,[1321]although the chairman urged delegations to submit proposals "…at the earliest time possible…in order to advance in a timely manner towards an agreed text at the latest by May 2003,"[1322] marked differences between members quickly surfaced as to both the terms of reference of the negotiations themselves and their scope. Brazil posited that "...there was a need to decide whether the scope of the negotiations should be broad or narrow,"[1323] adding that it would not be "…easy to reach a consensus on this matter."[1324] Ecuador favoured a narrow approach arguing that the review should be limited to "…issues of urgency which had already been

[1318] 'Dispute Settlement Body Special Session, First Formal Meeting of the Special Session of the DSB, Report by the Chairman to the Trade Negotiations Committee' (n 112).
[1319] ibid 1.
[1320] ibid.
[1321] 'Special Session of the Dispute Settlement Body, 16 April 2002, Minutes of Meeting' TN/DS/M/1,12 June 2002.
[1322] ibid 2.
[1323] ibid 4.
[1324] ibid.

discussed,"[1325] a sentiment broadly shared by Chile,[1326] Norway[1327] and Uruguay.[1328] Switzerland argued that under the Doha Ministerial Agreement, members had agreed to comprehensive negotiations "…based not only on 'the work done thus far' but also on 'any additional proposals'."[1329] Argentina supported this, noting, however, that the mandate "…might call for more than an adjustment or fine tuning."[1330] Australia[1331] and Bulgaria[1332] were of the view that the mandate for negotiations should not limited, with Australia stating that, "…Members would be better off to starting from a blank page…."[1333] Bulgaria stated its opposition to the idea that any pre-Doha review proposals should have a "…favourable position in the current negotiations…" noting that there had been no consensus previously reached on them,"[1334] a sentiment echoed by Hungary.[1335] Cuba[1336] was of the view that there needed to be a distinction in the negotiations between technical and procedural improvements[1337] and believed that priority in the negotiations should be given to issues with "…more global, systemic and political

[1325] ibid 5.
[1326] ibid.
[1327] ibid 7.
[1328] ibid 9.
[1329] ibid.
[1330] ibid 13.
[1331] ibid 10–12.
[1332] ibid 12.
[1333] ibid.
[1334] ibid.
[1335] ibid 13.
[1336] ibid.
[1337] ibid.

repercussions,"[1338] the first of which was a review of the SDT provisions.[1339]

The chairman of the DSB Special Session noted that it was "…clear that there was a divergence of views among delegations as to what issues were ripe for consensus."[1340] The evidence, however, strongly suggests that this divergence extended to the fundamental core of the negotiations themselves and both the range and scope of issues that members would be prepared to negotiate about, as opposed to being a simple disagreement over which issues were 'ripe' for consensus. This divergence was and remains to this day a feature of the ongoing negotiations.

4.4.1 DSB Special Session – LDC proposals

In total, there were four groups of proposals where LDC involvement can be directly evinced, and each of these will be discussed in detail. The first set of LDC Group[1341] proposals were submitted on the 19th of September 2002.[1342] The second set of proposals were submitted by the Africa Group

[1338] ibid.

[1339] ibid.

[1340] ibid 16.

[1341] The LDC Group is comprised of 35 LDCs, namely Afghanistan, Angola, Bangladesh, Benin, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Democratic Republic of the Congo, Djibouti, Gambia, Guinea, Guinea-Bissau, Haiti, Lao People's Democratic Republic, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Myanmar, Nepal, Niger, Rwanda, Senegal, Sierra Leone, Solomon Islands, Tanzania, Togo, Uganda, Yemen, Zambia 'WTO, Groups in the Negotiations' (*World Trade Organisation*) <https://www.wto.org/english/tratop_e/dda_e/negotiating_groups_e.htm> accessed 30 May 2018.

[1342] 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposal by the LDC Group' TN/DS/W/17 9 October 2002.

(which includes 26 LDCs)[1343] on the 9th of September 2002.[1344] The third and fourth groups of proposals were both submitted on the 20th of September 2002.[1345] The third proposal emanated from a group which was originally comprised of eight countries,[1346] with the fourth proposal being from a group of nine countries,[1347] both of which included the LDC Tanzania (the Tanzanian Proposals).

Collectively, following the submission of the proposals, they were discussed, either formally or informally, during various DSB Special Session meetings discussed below, , the Tanzanian proposals appear to have gained little or no traction, both the LDC Group and the Africa Group submitted formal texts in January 2003,[1348] which outlined the changes to

[1343] The Africa Group is comprised of 43 countries of whom 26 countries are LDCs being Angola, Benin, Burkina Faso, Burundi, Central African Republic, Chad, Democratic Republic of the Congo, Djibouti, Gambia, Guinea, Guinea-Bissau, Lesotho, Madagascar, Malawi, Mali, Mauritania, Mozambique, Niger, Rwanda, Senegal, Sierra Leone, Tanzania, Togo, Uganda, and Zambia. 'WTO, Groups in the Negotiations' (n 1341).

[1344] 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposal by the African Group' TN/DS/W/15 25 September 2002.

[1345] 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposals on DSU by Cuba, Honduras, India, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe' TN/DS/W/18 7 October 2002; 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Special and Differential Treatment for Developing Countries Proposals on DSU by Cuba, Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe' TN/DS/W/19 9 October 2002.

[1346] For the original 8 sponsor countries see, 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposals on DSU by Cuba, Honduras, India, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe' (n 1345) A ninth sponsor, Jamaica, requested to be added to the list of sponsors on 9th October 2002, see; 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Special and Differential Treatment for Developing Countries Proposals on DSU by Cuba, Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe' TN/DS/W/18/Add. 1 9 October 2002.

[1347] For the 9 sponsor countries, see 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Special and Differential Treatment for Developing Countries Proposals on DSU by Cuba, Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe' (n 1346).

[1348] 'Dispute Settlement Body Special Session, Text for LDC Proposal on Dispute Settlement Understanding Negotiations, Communication from Haiti' (n 600); 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Kenya' TN/DS/W/42 24 January 2003; The Africa Group submitted a revised text in 2008, (discussed below), see, 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Côte d'Ivoire' (n 600).

the DSU that they respectively sought to be included in a final agreed legal text to be agreed by May 2003 deadline.[1349]

4.4.2 LDC Group Proposals

The LDC Group proposals are set out in three primary source documents.[1350] As the literature reviewed below will demonstrate, there has, to date, been no comprehensive academic assessment or exploration of these proposals.[1351] Sarooshi, in his 2003 commentary,[1352] refers to and comments upon some of the individual LDC proposals.[1353] Similarly, while Kessie and Addo refer to the LDC proposals,[1354] their primary focus is centred upon the African Group proposals,[1355] whereas amongst other academic writers, there are only limited and oblique references to the proposals.[1356] For these reasons, this section will examine these proposals in detail.

[1349] 'Dispute Settlement Body Special Session, First Formal Meeting of the Special Session of the DSB, Report by the Chairman to the Trade Negotiations Committee' (n 112) 1.

[1350] 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposal by the LDC Group' (n 1342); 'Dispute Settlement Body Special Session, Text for LDC Proposal on Dispute Settlement Understanding Negotiations, Communication from Haiti' (n 600); 'Special Session of the Dispute Settlement Body, 10 September 2002, Minutes of Meeting' (n 443).

[1351] This may be in part be due to what Mercurio describes as the general lack of attention paid to the DSU negotiations by the media and NGO's, see Mercurio (n 1294) 798–799.

[1352] Sarooshi, D., 'Reform of the WTO Dispute Settlement Understanding: A critical Juncture for Developing Countries,' in Ivan Mbirimi, Bridget Chilala and Roman Grynberg, *From Doha to Cancún: Delivering a Development Round* (Commonwealth Secretariat 2003).

[1353] Sarooshi, D., 'Reform of the WTO Dispute Settlement Understanding: A critical Juncture for Developing Countries,' in ibid 107–108, 117–121.

[1354] Kessie and Addo (n 468) 15.

[1355] See, ibid 9–21.

[1356] See for example, Bercero and Garzotti (n 1263) 866; Pham (n 1296) 365–367; Zimmermann (n 78) 158, 183; Alavi (n 59) 30–31; Andrew D Mitchell, 'A Legal Principle of Special and Differential Treatment for WTO Disputes' (2006) 8(5) World Trade Review 445:469, 463; Joel P Trachtman, 'The WTO Cathedral' (2007) 43 Stan. J. Int'l L. 127, 128; Mercurio (n 1294) 821–822, 825.

The LDC Group, in their proposal of 9 October 2002,[1357] highlighted that no LDC had sought to use the DSU to resolve a trade dispute, stating that this was "…definitely not because these countries have had no concerns worth referring to the DSU…."[1358] For their part, the LDCs state that the lack of participation is due to "…structural and other difficulties that are posed by the system itself."[1359] In addition, they argued that key provisions conferring rights and "…other structurally fundamental provisions of the DSU…" lacked specificity.[1360] The intention of the LDCs to pursue an SDT-driven approach in the negotiations was spelt out by the LDCs, who stated that SDT should be "…fully reflected in the rules for dispute settlement."[1361] To this end, the LDCs stated that the text and purpose of their proposals were "…to accord treatment that was LDC-specific and that reflected their relatively more disadvantaged position."[1362] The LDCs then proceeded to set out a series of specific SDT proposals to address the perceived DSU engagement issues that they faced, as also proposals aimed at strengthening SDT within the DSU.

[1357] 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposal by the LDC Group' (n 1342).
[1358] ibid 1.
[1359] ibid.
[1360] ibid.
[1361] 'Special Session of the Dispute Settlement Body, 10 September 2002, Minutes of Meeting' (n 443) 25.
[1362] ibid.

4.4.3 Proposals re Consultations

Article 4 of the DSU[1363] sets out the consultation procedures to be followed by the parties as part of the dispute settlement process. Article 4.10 imposes a non-binding obligation where Members "… *should* give special attention to the particular problems and interests of developing country Members."[1364] The LDCs sought to make this obligation mandatory proposing that Members "…*shall* give special attention to the particular problems and interests of developing country Members...."[1365] Secondly, citing constraints in human resources[1366] in terms of (a) the under (or lack of) LDC representation in Geneva[1367] and (b) the probability that input for officials based in the capital will be required,[1368] the LDCs proposed that consideration should be given to holding consultations in the capital of the concerned LDC.[1369] To this end, the LDCs proposed that DSU Article 4.10 should be amended to oblige the parties to always explore the possibilities of holding the consultations in the LDC capital[1370] specifying that a "…joint note to this effect…"[1371] should be made, "…which shall be considered in the event of the request for a panel and any

[1363] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) 355.
[1364] ibid art 4.10 356.
[1365] 'Dispute Settlement Body Special Session, Text for LDC Proposal on Dispute Settlement Understanding Negotiations, Communication from Haiti' (n 600) 1.
[1366] 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposal by the LDC Group' (n 1342) 1.
[1367] ibid.
[1368] ibid.
[1369] ibid.
[1370] 'Dispute Settlement Body Special Session, Text for LDC Proposal on Dispute Settlement Understanding Negotiations, Communication from Haiti' (n 600) 1.
[1371] ibid.

proceedings."[1372] While Sarooshi posited that these proposals might have been accepted on the basis that WTO members placed importance on being seen to involve LDCs in the DSU,[1373] he doubted that it would have any material impact as LDCs could still not afford the costs of litigating a WTO case.[1374] Moreover, the potential implications that could flow from the joint statement in terms of requesting the establishment of a panel are unclear, which is compounded by the fact that the LDCs did not seek, for example, to qualify terms DSU Article 6.2, Establishment of Panels,[1375] to similarly consider the possibility of holding panel proceedings in the capital of the concerned LDC.

4.4.4 Proposal re Article 7- Terms of Reference of Panels

DSU Article 7 sets out the terms of reference of a panel[1376] which *inter alia* includes an examination of matters pertinent to a dispute[1377] as also the making of "…such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)."[1378] Additionally, the DSB may authorize the chairman of the panel to "…draw up the terms of reference of the panel in consultation with the parties to the dispute…"[1379] and circulate these to all WTO

[1372] ibid.
[1373] Sarooshi, D., 'Reform of the WTO Dispute Settlement Understanding: A critical Juncture for Developing Countries,' in Mbirimi, Chilala and Grynberg (n 1352) 119.
[1374] Sarooshi, D., 'Reform of the WTO Dispute Settlement Understanding: A critical Juncture for Developing Countries,' in ibid.
[1375] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) 358.
[1376] ibid.
[1377] ibid art 7.1 358; ibid art 7.2 358.
[1378] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) art 7.1 358.
[1379] ibid art 7.3 358.

members.[1380] The LDCs proposed to amend Article 7, adding new paragraph, 7.4.[1381] The draft paragraph specified that where an LDC is either a party or a third party in any given dispute,[1382] the panel shall be obliged to both consider and make specific findings regarding both "…the development implications of the issues raised in the dispute…"[1383] and any adverse social and economic impact that may arise as a consequence of the panel findings.[1384] Again, the LDCs have neither explained the purpose of this proposal nor provided any specific reasoning or rationale underpinning the same. The terminology used is, however, strongly mirrored other LDC proposals where there is a similar emphasis placed upon the developmental impacts of various decisions and actions, such as the proposals relating to DSU Articles 21.8 and 22, both of which are discussed below.

4.4.5 Proposals re Panels

LDCs proposed changes to the composition of panels[1385] and specifically to DSU Article 8.10, which narrates that where a dispute is between a developed and a developing country Member, the Panel shall, "…if the developing country Member, so request include at least one panelist from a developing country Member."[1386] The LDCs firstly proposed to

[1380] ibid.

[1381] 'Dispute Settlement Body Special Session, Text for LDC Proposal on Dispute Settlement Understanding Negotiations, Communication from Haiti' (n 600) 1.

[1382] ibid.

[1383] ibid.

[1384] ibid.

[1385] Article 8 of the DSU deals with all aspects the Composition of Panels, see 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) 358–359.

[1386] ibid art 8.10 359.

strengthen this provision by providing that where a panel is to be convened as aforesaid, the panel should *a priori* include one panelist from a developing country Member, and if requested, "… there shall be a second panelist from a developing country Member."[1387] To operationalise this, they proposed a new article, 8.10. b.[1388] be added, providing that where a dispute is between either a developed or developing country Member and an LDC that any panel should include at least one panelist from an LDC and 'if requested' by the LDC, a second panelist from an LDC.[1389] Aside from the fact that these proposals are both premised upon SDT, the LDCs provide very little information as to the rationale underpinning them. The LDCs made a general statement that without these changes, the "… confidence of a party to a dispute may be at risk if it appears that that party has no input in the dispute resolution process and is entirely excluded."[1390] One can only speculate that perhaps a panelist from an LDC would in some way be more receptive towards and have, possibly through having first-hand knowledge, a better understanding of the issues and arguments being led by an LDC. Equally, a more cynical view would be that the confidence of an LDC disputant

[1387] 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposal by the LDC Group' (n 1342) 2; 'Dispute Settlement Body Special Session, Text for LDC Proposal on Dispute Settlement Understanding Negotiations, Communication from Haiti' (n 600) 1.
[1388] 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposal by the LDC Group' (n 1342) 2; 'Dispute Settlement Body Special Session, Text for LDC Proposal on Dispute Settlement Understanding Negotiations, Communication from Haiti' (n 600) 2.
[1389] 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposal by the LDC Group' (n 1342) 2.
[1390] ibid.

may be boosted with the knowledge that they may have had an influence upon the listing[1391] of two of the three panellists appointed to decide any given case.[1392] Sarooshi expands on this point, noting that there is little or no precedent for such a proposal within other international courts and tribunals, opining that, at best, these proposals only had a remote chance of being accepted.[1393]

Secondly, the LDCs sought changes to the format of the reports issued by both the Appellate Body and Panels through the introduction of "…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."[1394] The LDCs argued that the extant DSU jurisprudence was not reflective of the "…interests and perspectives of developing countries,"[1395] positing that the introduction of dissenting judgements could highlight 'unheard concerns' which were omitted under the current system.[1396]

[1391] Article 8.4 of the DSU narrates that the Secretariat shall maintain a list of prospective panelists and 'Members may periodically suggest names of governmental and non-governmental individuals for inclusion on the indicative list, providing relevant information on their knowledge of international trade and of the sectors or subject matter of the covered agreements, and those names shall be added to the list upon approval by the DSB.' see, 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) 359.

[1392] Article 8.5 of the DSU provides that panels shall be comprised of 3 panelists unless the disputants agree to a panel of five panelists within ten days from the establishment of the panel see ibid.

[1393] Sarooshi, D., 'Reform of the WTO Dispute Settlement Understanding: A critical Juncture for Developing Countries,' in Mbirimi, Chilala and Grynberg (n 1352) 112.

[1394] 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposal by the LDC Group' (n 1342) 2.

[1395] ibid.

[1396] ibid In relation to dissenting opinions, the LDCs referred to the judicial practice of the International Court of Justice. It should however be noted that the LDCs in this proposal are calling for each Panel / Appellate Body member to deliver an individual judgement which is not the practice followed by the International Court of Justice.

To facilitate these proposals, the LDCs proposed removing the anonymity afforded (i) to panel members under Article 14.3 of the DSU[1397] and (ii) to Appellate Body members under Article 17.11 of the DSU.[1398] The LDCs proposed amending both Articles 14.3[1399] and 17.11,[1400] replacing each of them with identical provisions, (a) obliging each panellist and Appellate Body Member[1401] respectively to provide within their respective reports a, "…separate written opinion on the issues and make findings…"[1402] and (b) specifying that the "…majority finding shall be the decision…,"[1403] of the respective panel or Appellate Body. It is worth noting that these are not only reflective of LDC concerns but also speak to some of the present-day concerns regarding the broader function of the DSU, which are discussed in Chapter 5.

Thirdly, the LDCs outlined proposed changes to Article 12 Panel Procedures[1404] whereby they sought to modify and strengthen DSU Article 12.11[1405] to ensure they were afforded the same treatment as developing country members. They proposed to rewrite Article 12.11 in such a way

[1397] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) 362.
[1398] ibid 365.
[1399] 'Dispute Settlement Body Special Session, Text for LDC Proposal on Dispute Settlement Understanding Negotiations, Communication from Haiti' (n 600) 2.
[1400] ibid.
[1401] Provision for joint opinions was also made, see ibid.
[1402] ibid.
[1403] ibid p2.
[1404] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) art 12 361.
[1405] Article 12.11 provides that, 'Where one or more of the parties is a developing country Member, the panel's report shall explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favourable treatment for developing country Members that form part of the covered agreements which have been raised by the developing country Member in the course of the dispute settlement procedures.' ibid 362.

as to (a) specifically include LDC members[1406] and (b) change the extant obligations of a panel from simply having to "…indicate the form in which account was taken…"[1407] of the relevant SDT provisions applicable to LDCs members, within the covered agreements to a more stringent requirement obliging the panel to "…explicitly take into account…"[1408] the SDT provisions as aforesaid and (c) the LDCs proposed that in relation to the SDT measures which a panel should consider, the words "…which have been raised by the developing country Member in the course of the dispute settlement procedures"[1409] should be deleted. This, the LDCs explained, would remove the "…unnecessary legal burden"[1410] which was placed on LDCs and developing country members, a burden which they opined ran contrary to the established legal principle of *Jura Novit Curia*.[1411]

4.4.6 Proposals re Article 21 Implementation

The Sixth LDC proposal relates to the SDT provisions contained within Article 21 of the DSU – Surveillance of Implementation of

[1406] 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposal by the LDC Group' (n 1342) 3.
[1407] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) art 12.11 362.
[1408] 'Dispute Settlement Body Special Session, Text for LDC Proposal on Dispute Settlement Understanding Negotiations, Communication from Haiti' (n 600) 2.
[1409] 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposal by the LDC Group' (n 1342) 3.
[1410] Sarooshi, D., 'Reform of the WTO Dispute Settlement Understanding: A critical Juncture for Developing Countries,' in Mbirimi, Chilala and Grynberg (n 1352) 120.
[1411] 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposal by the LDC Group' (n 1342) 3; Sarooshi, D., 'Reform of the WTO Dispute Settlement Understanding: A critical Juncture for Developing Countries,' in Mbirimi, Chilala and Grynberg (n 1352) 120.

Recommendations and Rulings.[1412] Under DSU Article 19.1, where a complaint has been successful, the panel or the Appellate Body shall recommend that the measure at issue is brought back into conformity with the respective covered agreement and may suggest how this should be achieved.[1413] Following the adoption of a panel or, where applicable, any Appellate Body report by the DSB, "...a 'recommendation or ruling' of the DSB is addressed to the respondent…"[1414] to bring the measure at issue into conformity with the relevant covered agreement.[1415] Article 21.1 narrates that prompt compliance with rulings or recommendations of the DSB is essential to ensure the effective resolution of disputes;[1416] Article 21.2, however, states that "…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."[1417] There is no definition as to what 'particular attention' is nor as to how or what 'matters affecting the interests of developing countries' will be either assessed or quantified. Moreover, there is no clear linkage as to how, having taken account of developing countries' interests, this will be incorporated into or otherwise modify the rulings and recommendations of the DSB as outlined in Article 21.1 as aforesaid. The lack of both clarity

[1412] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) 366.
[1413] ibid 365.
[1414] WTO Secretariat, *A Handbook on the WTO Dispute Settlement System* (2nd Edition, Cambridge University Press 2017) 130.
[1415] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) art 19.1 365; WTO Secretariat (n 1414) 130.
[1416] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) 366.
[1417] ibid.

and definition means that, in practical terms, this SDT provision is largely redundant.[1418] The LDCs stated that there needed to be "…absolute clarity…that Article 21.2 does indeed qualify Article 21.1"[1419] and proposed (a) that a footnote to that effect should be added to Article 21.2[1420] and (b) that the words "and least developed countries"[1421] should be added to that Article 21.2, thereby ensuring that matters specifically affecting LDCs would fall within the scope of a modified text which would read, "Matters affecting the interests of least-developed countries and developing countries shall be taken into account in particular with respect to measures which have been subject to dispute settlement."[1422]

4.4.7 Proposals re Article 21 Compliance and Compensation

Where immediate compliance with, and implementation of, the recommendations and rulings is impracticable, Article 21.3 *inter alia* provides that "…the Member concerned shall have a reasonable period of time in which to do so."[1423] The DSB is tasked under DSU Article 21.6 with keeping the progress of implementation under surveillance.[1424] Article 21.6 provides that while any Member may, at any time following the adoption

[1418] Sarooshi, D., 'Reform of the WTO Dispute Settlement Understanding: A critical Juncture for Developing Countries,' in Mbirimi, Chilala and Grynberg (n 1352) 125.
[1419] 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposal by the LDC Group' (n 1342) 3.
[1420] ibid; 'Dispute Settlement Body Special Session, Text for LDC Proposal on Dispute Settlement Understanding Negotiations, Communication from Haiti' (n 600) 2.
[1421] 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposal by the LDC Group' (n 1342) 3.
[1422] 'Dispute Settlement Body Special Session, Text for LDC Proposal on Dispute Settlement Understanding Negotiations, Communication from Haiti' (n 600) 2.
[1423] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) 366.
[1424] WTO Secretariat (n 1414) 152.

of the panel (and where applicable, any Appellate Body) report(s), raise issues regarding the implementation of the recommendations of a ruling,[1425] there is no obligation to have the matter on the DSB agenda.[1426] The issue of implementation will (unless agreed otherwise by consensus) only be placed on the agenda of DSB meetings six months after the date of the determination of the reasonable time period as aforesaid,[1427] and (ii) that implementing member shall provide a written status report detailing the progress made in implementing said recommendations and rulings.[1428] At this DSB meeting, Article 21.7 provides that where the issue of implementation is raised by a developing country member, "…the DSB shall consider what further action it might take which would be appropriate to the circumstances.[1429] In considering 'what appropriate action might be taken,' Article 21.8[1430] obliges the DSB to consider (i) the trade coverage of the measure[1431] and (ii) the impact on the economy of the developing country concerned.[1432]

The LDCs called for revisions to both Articles 21.7 and 21.8 of the DSU, wherein they sought to both strengthen and broaden the scope of these SDT provisions. In relation to Article 21.7, they proposed that rather than the DSB being obliged to 'consider what action it might take,' the DSB

[1425] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) 367.
[1426] WTO Secretariat (n 1414) 152.
[1427] ibid n 97, 152.
[1428] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) art 21.6 367.
[1429] ibid 367.
[1430] ibid.
[1431] ibid.
[1432] ibid.

should be obliged to "…take any further action as appropriate in the circumstances."[1433] In respect of Article 21.8 the LDCs sought firstly to strengthen the provision by replacing the obligation incumbent on the DSB to consider "…what appropriate action might be taken"[1434] with an obligation to consider, "…what appropriate action to take"[1435] Secondly the LDCs sought to broaden the scope of article 21.8 by requiring that the DSB, when considering the phrase 'appropriate action to be taken,' should take account not only (i) the trade coverage of the measure[1436] and (ii) the impact on the economy of the concerned member,[1437] but also "…the development prospects of the developing-country Members or least developed country Members concerned,"[1438] and (iii) in cases brought by an LDC or developing country, the "…DSB shall recommend monetary and other appropriate compensation taking into account the injury suffered…,"[1439] with the quantification of both the injury suffered[1440] and

[1433] 'Dispute Settlement Body Special Session, Text for LDC Proposal on Dispute Settlement Understanding Negotiations, Communication from Haiti' (n 600) 3; See also, 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposal by the LDC Group' (n 1342) 3.
[1434] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) 367.
[1435] 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposal by the LDC Group' (n 1342) 3; 'Dispute Settlement Body Special Session, Text for LDC Proposal on Dispute Settlement Understanding Negotiations, Communication from Haiti' (n 600) 3.
[1436] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) art 21.8 367.
[1437] ibid.
[1438] 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposal by the LDC Group' (n 1342) 3; 'Dispute Settlement Body Special Session, Text for LDC Proposal on Dispute Settlement Understanding Negotiations, Communication from Haiti' (n 600) 3.
[1439] 'Dispute Settlement Body Special Session, Text for LDC Proposal on Dispute Settlement Understanding Negotiations, Communication from Haiti' (n 600) 3.
[1440] ibid.

the quantum of the compensation[1441] being computed from the date of the implementation of the inconsistent measure until the date of its withdrawal.[1442]

In terms of the rationale underpinning these proposals, one needs to understand the potential economic repercussions that the application of a measure which is inconsistent with a covered agreement can have on LDCs. As was shown in relation to cotton, discussed in the preceding chapter, the effects of the introduction of inconsistent measures debilitated the economies of the LDCs Benin, Burkina Faso, Chad, and Mali. Welsh[1443] provides further evidence of such effects, where as a result of a European Union ban on fresh fish from east Africa, "…the Ugandan, Tanzanian, and Kenyan economies were decimated."[1444] These examples illustrate why prompt remedial action is often urgently required, and this underpins these proposals, a point highlighted by the LDCs who stated that "…the imperative and the urgency of prompt compliance multiplies immensely…when the lack of prompt compliance is causing misery in an LDC."[1445]

Given the foregoing, it is somewhat surprising that the LDCs did not seek to address the fact that whereas a member can, as discussed above, raise the issue of implementation as soon as the requisite report(s) has been

[1441] ibid.
[1442] ibid.
[1443] Welsh (n 782).
[1444] ibid 5.
[1445] 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposal by the LDC Group' (n 1342) 3.

adopted, this does not create an obligation for the inclusion thereof as a standing item on the DSB agenda,[1446] from whence action on the part of the DSB regarding implementation may emanate.[1447]

4.4.8 Proposals regarding Enforcement and Compensation

With these proposals, the LDCs called for specific changes to DSU Article 22, which sets out the compensation and suspension of concessions measures that are available in situations where recommendations and rulings are not implemented within a reasonable period.[1448]

The LDCs argued that they were disenfranchised due to the "…inadequacies and structural rigidities of the remedies available to poor countries…"[1449] and called for changes to be made that would enable LDCs to "…use the DS meaningfully…."[1450] The difficulties faced by LDC in enforcing a favourable ruling have been the subject of much academic discourse,[1451] which was discussed in Chapter 2. With these proposals, the LDCs sought to make the negotiations regarding compensation under Article 22.2[1452] mandatory by the elimination of the phrase "if so requested."[1453] The LDCs also strongly argued that the term

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[1446] WTO Secretariat (n 1414) 152.
[1447] ibid 153.
[1448] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) art 22.1 367.
[1449] 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposal by the LDC Group' (n 1342) 3.
[1450] ibid.
[1451] Taslim, M.A., 'How the DSU Worked for Bangladesh: The First Least Developed Country to Bring a WTO Claim' in, Shaffer and Meléndez-Ortiz (n 555) 242; Kessie and Addo (n 468) 20; Alavi (n 59) 38; Anderson (n 593) 129; Apecu (n 449) 26; Bronckers (n 566) 101; Brewster (n 595) 148; Charnovitz (n 595) 797; Hoekman and Mavroidis (n 596) 317; Bartels (n 467) 49; Bown and Hoekman (n 539) 863; World Trade Organization (n 591) 282.
[1452] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) 367.
[1453] 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposal by the LDC Group' (n 1342) 4; Article 22.2 provides that where a

'compensation' referred to in Article 22.2 needed to be clarified to the effect that said compensation[1454] "…should not take the form of enhanced market access if this will prejudice other Members and that monetary compensation is to be preferred."[1455] The LDCs also proposed (i) that the quantum of the monetary compensation should be " …equal to the loss or injury suffered and directly arising from the offending measure or foreseeable under the offending measure"[1456] and (ii) that the monetary compensation should be both a mandatory obligation,[1457] and be retrospectively applied from the date of the adoption of the offending measure[1458] and (iii) that the experience gained by both panels and the Appellate Body in calculating the level of nullification and impairment should be used to effect, "…a transition to a monetary compensation system."[1459]

The LDCs also proposed changes as to how disputes should be settled in instances where they were the losing respondent. Here they argued that

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member has within the reasonable period of time either (i) not brought an inconsistent measure into conformity with the relevant covered agreement or (ii) has otherwise failed to comply with the rulings and recommendations stipulated by the DSB, then such member, "…shall, if so requested, and no later than the expiry of the reasonable period of time, enter into negotiations…with a view to developing mutually acceptable compensation." see, 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) 367.

[1454] The objective of the DSU is the withdrawal of an inconsistent measure or alternatively if the immediate withdrawal of the measure is impracticable, the member may maintain the measure on a temporary basis providing it offers adequate compensation, see 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) Art 3.7 354-355.

[1455] 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposal by the LDC Group' (n 1342) 4.

[1456] ibid.

[1457] ibid; 'Special Session of the Dispute Settlement Body, 10 September 2002, Minutes of Meeting' (n 443) 25.

[1458] 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposal by the LDC Group' (n 1342) 4; 'Special Session of the Dispute Settlement Body, 10 September 2002, Minutes of Meeting' (n 443) 25.

[1459] 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposal by the LDC Group' (n 1342) 4.

the "…full implications of a negative finding against an LDC…"[1460] should be assessed as part of the panel proceedings before the final panel decision is made. They posited that particularly where there was the "…risk of severe harm to the already fragile economy of the LDC,"[1461] such an assessment could "inspire the parties to reach a mutually agreed solution."[1462] To facilitate this, they proposed re-writing the terms of reference of the panel to include a "…mandatory requirement..."[1463] that would require a panel too "…call for research input on the effects of a negative decision against an LDC…."[1464] The WTO Secretariat, Economic Research and Statistics Division,[1465] UNCTAD and the UNDP [1466] were to be consulted in respect thereof.[1467]

This proposal echoes the sentiments expressed by the LDCs during the Uruguay Round where, as discussed in Chapter 3, they proposed[1468] that in settling disputes, they should be treated with complaisance, with "...flexibility shall be the rule rather than the exception."[1469] In this proposal, complaisance and flexibility are manifested in the requirement

[1460] ibid.
[1461] ibid.
[1462] ibid.
[1463] ibid.
[1464] ibid.
[1465] See, Economic Research and Statistics Division at 'WTO | Secretariat and Budget - Divisions' <https://www.wto.org/english/thewto_e/secre_e/div_e.htm> accessed 12 May 2018.
[1466] The United Nations Development programme (UNDP) see 'About Us | UNDP' <http://www.undp.org/content/undp/en/home/about-us.html> accessed 12 May 2018.
[1467] 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposal by the LDC Group' (n 1342) 4.
[1468] *Negotiating Group on Dispute Settlement, Proposals on behalf of the Least-Developed Countries, Communication from Bangladesh* (n 425).
[1469] ibid 1.

for an assessment of any negative findings being used to 'inspire' the parties when reaching a mutually agreeable understanding.[1470]

4.4.9 Proposal for collective retaliation

The LDCs stated that their limited engagement with the DSU was "…linked to the inadequacies and structural rigidities of the remedies available to poor countries…."[1471] The LDCs proposed that the "…principle of collective responsibility…"[1472] should be adopted, whereby WTO members would collectively have both the right and the responsibility to enforce the DSB recommendations.[1473] The adoption of collective retaliation could, they argued, resolve both the issue of a lack of an effective enforcement mechanism[1474] and also mitigate the deleterious economic effects that retaliatory measures could have on poor countries.[1475] Moreover, the LDCs further argued that where an LDC has been a successful complainant, "…collective retaliation should be available automatically, as a matter of special and differential treatment."[1476]

To achieve these objectives, the LDCs proposed renaming the existing Article 22.6 as 22.6 (a),[1477] and adding two new sub-paragraphs (b) and (c).[1478] DSU Article 22[1479] deals with the situation where the

[1470] 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposal by the LDC Group' (n 1342) 4.
[1471] ibid 3.
[1472] ibid 4.
[1473] ibid.
[1474] ibid.
[1475] ibid.
[1476] ibid.
[1477] 'Dispute Settlement Body Special Session, Text for LDC Proposal on Dispute Settlement Understanding Negotiations, Communication from Haiti' (n 600) 3.
[1478] ibid.
[1479] Article 22, 'Compensation and the Suspension of Concessions', 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) 367–370.

recommendations and rulings of a panel have not been correctly implemented within a reasonable period of time.[1480] Article 22.2[1481] *inter alia* provides that where the foregoing situation arises, the parties will, at the request of the complainant, enter into negotiations with the respondent with a view to achieving a mutually agreed settlement.[1482] Where a settlement is not forthcoming, then the complainant may "…request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements."[1483] Article 22.6 provides that, pursuant to such a request, the DSB shall, within 30 days,[1484] grant authorisation for the suspension of concessions or other obligations unless the DSB decides by consensus to reject the request.[1485]

The LDCs' first new SDT-based paragraph 22.6(b)[1486] is comprised of a recital[1487] and three sub-paragraphs[1488] The LDCs stated in the recital, that where an LDC requests the suspension of concessions other obligations, as aforesaid, against a Developed-country Member,[1489] the DSB, "...shall grant authorization to all Members to suspend concessions or other

[1480] ibid art 21.1 367; Van den Bossche and Zdouc (n 143) 296.
[1481] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) 367.
[1482] ibid art 22.2 367; Van den Bossche and Zdouc (n 143) 296.
[1483] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) art 22.2 367.
[1484] ibid 369.
[1485] Art.22.6 also provides that where a respondent objects to the level of suspension proposed, or claims that the principles and procedures have not been followed, that the suspension of the concessions shall be kept in abeyance until these objections have been resolved by arbitration, see, ibid; Van den Bossche and Zdouc (n 143) 296.
[1486] 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Côte d'Ivoire' (n 600) 3.
[1487] 'Dispute Settlement Body Special Session, Text for LDC Proposal on Dispute Settlement Understanding Negotiations, Communication from Haiti' (n 600) 3.
[1488] ibid.
[1489] ibid.

obligations within 30 days unless the DSB decides by consensus to reject the request."[1490] The first sub-paragraph of the new paragraph 22.6(b)[1491] provides that the level of nullification and impairment shall, prior to the LDC having made such a request, have been determined by way of arbitration.[1492] The arbiter(s), when reaching a decision, would be obliged to take into account (i) the "legitimate expectations"[1493] of the LDC concerned and (ii) any obstacle or hindrance to the achievement of the "…development objectives of the WTO Agreement…as further elaborated upon by…"[1494] the concerned LDC. The second subparagraph of 22.6(b)[1495] further stipulates that the arbiter(s) would be obliged to consider whether it would be appropriate[1496] (in terms of securing the withdrawal of the measure found to be inconsistent by the panel)[1497] for the LDC to seek the suspension of concessions or obligations in other sectors.[1498] In this regard, the arbiter(s) would be obliged to take "…into account any possible adverse effects on that least developed country Member."[1499] In the third subparagraph of 22.6 (b),[1500] the LDCs narrate that where the DSB authorized all WTO Members to suspend concessions or other obligations, the level shall be "…an appropriate percentage of the

[1490] ibid.
[1491] ibid.
[1492] ibid.
[1493] ibid.
[1494] ibid.
[1495] ibid.
[1496] ibid.
[1497] ibid.
[1498] ibid.
[1499] ibid.
[1500] ibid.

nullification and impairment determined under arbitration."[1501] This general obligation is caveated in respect of cases brought by LDCs,[1502] where each WTO Member shall be obliged to suspend concessions or other obligations to the same level that was, as noted above, previously been, "…determined under arbitration to have been suffered by the least-developed country Member."[1503] Sarooshi observed that it was unlikely that a developed country would jeopardise its trade interests to enforce a decision on behalf of another Member.[1504] Similarly, in respect of the LDCs, the writer would argue that obliging them to suspend concessions and obligations as aforesaid would expose them to the very same deleterious economic side-effects discussed above, which are one of the key justifications for the proposal in the first place.

The final LDC proposal in this section was the addition of a new paragraph 22.6 (b),[1505] which simply provided that the operation of paragraph 22.6 (a) would be reviewed by the DSB after five years.[1506]

4.4.10 Proposals re Special LDC Procedures -Article 24

As discussed in Chapter 3, the provisions contained within Article 24 are SDT measures which apply exclusively to LDCs.[1507] Article 24.1 of the DSU

[1501] ibid.
[1502] ibid.
[1503] ibid.
[1504] Sarooshi, D., 'Reform of the WTO Dispute Settlement Understanding: A critical Juncture for Developing Countries,' in Mbirimi, Chilala and Grynberg (n 1352) 128 Sarooshi, suggested that Members may wish to have such a capability could prove to be important insofar as there could be instances where such action may be considered, "…whether motivated by systemic or other interests," ibid.127 .
[1505] 'Dispute Settlement Body Special Session, Text for LDC Proposal on Dispute Settlement Understanding Negotiations, Communication from Haiti' (n 600) 3.
[1506] ibid.
[1507] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) 370-371.

provides that in "at all stages"[1508] of determining the causes of a dispute and throughout all stages of the dispute settlement process[1509]

"...particular consideration shall be given to the special situation of least-developed country Members."[1510] Article 24.1 also provides guidance as to how this provision should be applied, directing that complainants shall exercise "due restraint"[1511] when either initiating disputes[1512] or in the event of a successful complaint when asking for either compensation or in seeking to suspend concessions or other obligations.[1513]

The LDCs, in their proposal, stressed the importance of this SDT provision to them, stating that any "…revision to their detriment shall be unacceptable."[1514] They argued that there was a need to clarify the provision in terms of (a) determining whether 'due restraint' has been exercised in any given dispute[1515] and (b) specifying what the consequences would be where it was shown that 'due restraint' had not been exercised as aforesaid.[1516] To this end, they first proposed that at the "…outset of the case.."[1517] a panel should have the authority to determine whether a complainant initiating a dispute had "… a *prima facie* case and

[1508] ibid 370.
[1509] ibid.
[1510] ibid.
[1511] ibid.
[1512] ibid.
[1513] ibid.
[1514] 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposal by the LDC Group' (n 1342) 4.
[1515] ibid.
[1516] ibid.
[1517] ibid The use of the words 'outset of the case' is somewhat awkward. The 'outset' of a dispute in terms of the DSU would normally be the written request for consultations under Article 4.4 thereof. For the purposes of this analysis it will be assumed that the word 'outset' refers to the beginning of the panel stage of a dispute.

whether the complainant exercised due restraint;"[1518] the LDCs, when explaining this proposal to the DSB Special Session, modified their position on this proposal stating that a new rule should be introduced "…requiring a preliminary hearing by panels with a view to establishing whether restraint had been exercised."[1519] Secondly, they proposed that the term 'restraint' should extend to a determination as to whether (a) in the circumstances of the dispute, it would have been better to "… invoke the assistance of the 'good offices of the Director-General',"[1520] and (b) to establish whether due restraint had been undertaken with the, "…objective of actually settling the dispute and what the outcome of this was."[1521] As discussed in Chapter 3, the panel in *Mexico — Olive Oil,*[1522] determined that "...the ordinary meaning of "due restraint" is a proper, regular, and reasonable demonstration of self-control, caution, prudence and reserve,"[1523] The LDCs by expanding the definition of "due restraint' in their proposal are signaling not only that the use of good offices would not only be a mandatory requirement but also that the focus thereof should be specifically aimed at arriving at a mutually agreeable solution. In order to operationalise the foregoing proposals, the LDCs sought to amend DSU Article 24.2, which *inter alia* provides that where

[1518] ibid.
[1519] 'Special Session of the Dispute Settlement Body, 10 September 2002, Minutes of Meeting' (n 443) 25.
[1520] 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposal by the LDC Group' (n 1342) 4.
[1521] 'Special Session of the Dispute Settlement Body, 10 September 2002, Minutes of Meeting' (n 443) 25–26; 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposal by the LDC Group' (n 1342) 4.
[1522] *Mexico - Definitive Countervailing Measures on Olive Oil from the European Communities, Report of the Panel, WT/DS341/R, 4 September 2008* (n 868).
[1523] ibid para 7.67 29.

consultations have failed to resolve a given dispute involving an LDC, either the Director-General or the chairman of the DSB shall "…upon request by a least-developed country Member"[1524] offer their good-offices, conciliation and mediation in an attempt to resolve the dispute before a request to form a panel is made.[1525] The amendment sought by LDCs was to remove the obligation placed on LDCs to request the use of good offices, conciliation and mediation[1526] and to "…make it incumbent on the complaining party to seek the "good offices" of the Director-General."[1527] The LDCs explained that this amendment would thus make the use of good offices, conciliation and mediation a mandatory requirement,[1528] which panels could, at the preliminary hearings, take into account as part of the "due restraint" ' in attempting to settle the dispute.[1529] The LDCs further proposed amending Article 24 through the addition of a new paragraph, 24.3.[1530] This new paragraph sets out two prerequisites that must be purified by a developed country member prior to requesting the establishment of a panel. Firstly that prior to such a request, the developed country must have fully used, the good offices, conciliation and mediation before the Director-General or the chairman of the DSB.[1531]

[1524] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) 370.
[1525] ibid 371–372.
[1526] 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposal by the LDC Group' (n 1342) 4.
[1527] ibid.
[1528] 'Special Session of the Dispute Settlement Body, 10 September 2002, Minutes of Meeting' (n 443) 25.
[1529] ibid 25–26; 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposal by the LDC Group' (n 1342) 4–5.
[1530] 'Dispute Settlement Body Special Session, Text for LDC Proposal on Dispute Settlement Understanding Negotiations, Communication from Haiti' (n 600) 4.
[1531] ibid.

Secondly, when submitting a request, as aforesaid, the developed country member shall "…provide the DSB with a written account of how it has exercised due restraint...."[1532] The LDCs then set out that where the DSB grants the request for the establishment of the panel, the developing country complainant shall file the aforementioned written request on due restraint with the panel.[1533] The LDCs then propose that the panel will be directed to "…make preliminary findings, before proceeding with the case, on the written account, on the basis of the provisions of [Article 24.1 noted above]…and on the existence and adequacy of efforts to reach a mutually agreed solution."[1534] The proposal thereafter narrates that where the panel finds that either due restraint has not been exercised or that "… no efforts or inadequate efforts had been made to reach a mutually agreed solution,"[1535] the matter will be referred back to the DSB.[1536] At this juncture, the LDCs propose that the DSB shall, taking into account the panel findings, make preliminary recommendations and rulings on the matter, requesting the Director General to provide good offices, conciliation and mediation. These proposals affirm and reinforce the writer's assertion, discussed in Chapter 3, that the LDC approach to the DSU as a whole was what Jackson described as "...a 'negotiation' or 'diplomacy' oriented approach..."[1537] where disputes are settled through a

[1532] Interestingly, the LDCs provide no direction as to what consideration, if any, the DSB should give to the responses provided in response to these pre-requisites in terms of its decision to grant a request for a panel or otherwise, ibid.
[1533] ibid.
[1534] ibid.
[1535] ibid.
[1536] ibid.
[1537] Jackson (n 657) 1.

process of negotiation and compromise.[1538] Crucially, however, whereas previously, again as discussed in Chapter 3, the LDCs had proposed the creation of a bespoke, standalone LDC-only dispute settlement system (where disputes involving LDCs were to be settled through negotiation by the "Group of Five"[1539]), these proposals clearly show that this position has changed even though the antecedents thereof are firmly grounded in resolving disputes through negotiation is still the LDCs preferred solution. These proposals clearly show that the LDCs are *de facto* prepared to engage with the DSU if it can be modified in such a way as to make the DSU, in a sense, more LDC 'user friendly.' Moreover, the lack of this user-friendliness has primarily resulted in the LDCs eschewing the DSU as a means of resolving their trade disputes.

The final proposals in this section relate to the outcomes of a dispute where an LDC has been a losing respondent. Article 24.1 of the DSU[1540] provides that in such circumstances, the complaining party shall "…exercise due restraint in asking for compensation or seeking authorization to suspend the application of concessions or other obligations."[1541] The LDCs once again asked to be treated with complaisance. In seeking the, "…full and benevolent support…"[1542] of the wider WTO membership they asked them firstly to give consideration to

[1538] ibid.
[1539] *Negotiating Group on Dispute Settlement, Proposals on behalf of the Least-Developed Countries, Communication from Bangladesh* (n 425) 2 The 'Group of Five' was to be comprised of, four Chairmen drawn from various GATT committees and bodies as also the Director General.
[1540] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) 370.
[1541] ibid.
[1542] 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposal by the LDC Group' (n 1342) 5.

completely excluding LDCs from all demands for compensation or the suspension of concessions or other obligations[1543] on the understanding that the concerned LDC would, "…be *expected* to withdraw the offending provision."[1544] The LDCs formalised the proposal stressing that in addition to members having to exercise 'restraint' when initiating a dispute with an LDC, (i) no compensation should be sought from an LDC,[1545] (ii) that no retaliatory measures should be taken against an LDC[1546] and (iii) that the LDC would be expected to withdraw an offending measure where, "…a case has been established against them through the DS system."[1547] This proposal can be clearly linked to the Uruguay Round LDC proposal where they proposed[1548] that in settling disputes they should be treated with complaisance where "...flexibility shall be the rule rather than exception."[1549] What is perhaps most striking about this latest LDC proposal is the fact that given that term 'due restraint ' was at that time undefined in WTO jurisprudence[1550], the LDCs sought to preclude a successful complainant, (having exercised 'due restraint'), from seeking either compensation from or requesting retaliatory measures against the

[1543] ibid.
[1544] ibid.
[1545] ibid.
[1546] ibid.
[1547] ibid.
[1548] *Negotiating Group on Dispute Settlement, Proposals on behalf of the Least-Developed Countries, Communication from Bangladesh* (n 425).
[1549] ibid 1.
[1550] As discussed above, the term 'due restraint' was defined in Mexico — Olive Oil, where the Panel, determined that, "...the ordinary meaning of 'due restraint' is a proper, regular, and reasonable demonstration of self-control, caution, prudence and reserve.", *Mexico - Definitive Countervailing Measures on Olive Oil from the European Communities, Report of the Panel, WT/DS341/R, 4 September 2008* (n 868) para 7.67 29 This definition the writer argued in Chapter 4, did not legally oblige a successful complainant to be complaisant or otherwise flexible when asking for compensation or seeking authorization to suspend concessions or other obligations.

respondent LDC.

4.4.11 SDT assistance to LDCs from the Secretariat -Article 27

The penultimate group of LDC proposals relates to the role played by the Secretariat in providing technical assistance to panels.[1551] Once again, these proposals clearly show the continuing influence of the LDCs SDT-driven approach.

DSU Article 27.1 inter alia provides that the Secretariat shall specifically assist panels with the "…legal, historical and procedural aspects of the matters dealt with."[1552] The LDCs strongly attack this assistance which they describe as being "… pernicious and impacts heavily on the outcome of the case."[1553] Citing the need for openness and transparency,[1554] the LDCs propose that all legal research, assistance, and "other commentary"[1555] prepared in the course of and for use in a case, shall be disclosed to the parties.[1556] To this end, the LDCs proposed that article 27.1 be expanded to the extent that all of the foregoing information should expressly (i) be provided to LDCs, "…that are parties or third parties in the dispute"[1557] and (ii) that the information provided by the Secretariat as aforesaid should "…cover and specifically provide guidance on the specific rights and obligations relating to the particular issues

[1551] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) 372.
[1552] ibid The terms of Article 27.1 also oblige the Secretariat to provide panels with secretarial and technical support.
[1553] 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposal by the LDC Group' (n 1342) 5.
[1554] ibid.
[1555] ibid.
[1556] ibid.
[1557] 'Dispute Settlement Body Special Session, Text for LDC Proposal on Dispute Settlement Understanding Negotiations, Communication from Haiti' (n 600) 4.

raised in the case."[1558] This, the LDCs argued, would enable the parties to adequately prepare their case, which would be of "… significant assistance considering their capacity constraints."[1559] Sarooshi opines that whereas proposals seeking to enhance the transparency and fairness of the DSU would be appealing to the wider WTO membership and would likely be adopted,[1560] he is notably silent in respect of these LDC proposals.

The second change the LDCs sought relates to the provision of legal assistance by the Secretariat to developing country members.[1561] The legal assistance is to be provided by a "… qualified legal expert from the WTO technical cooperation services."[1562] The provision of legal assistance is caveated to the extent that the expert should provide the assistance "… in a manner ensuring the continued impartiality of the Secretariat."[1563] The LDCs argued that this caveat unnecessarily constrained the legal expert from providing the "…full breadth of assistance as envisaged by the Members…"[1564] proposing that the legal expert should be allowed to offer legal assistance without such constraints, thereby assuming the "…full role of "counsel" as properly understood."[1565] The LDCs further proposed that the obligation imposed by the Secretariat to provide a qualified legal

[1558] ibid.
[1559] 'Special Session of the Dispute Settlement Body, 10 September 2002, Minutes of Meeting' (n 443) 20.
[1560] Sarooshi, D., 'Reform of the WTO Dispute Settlement Understanding: A critical Juncture for Developing Countries,' in Mbirimi, Chilala and Grynberg (n 1352) 114–115.
[1561] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) art 27.2 372.
[1562] ibid.
[1563] ibid.
[1564] 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposal by the LDC Group' (n 1342) 5.
[1565] ibid.

expert[1566] , as aforesaid should be broadened and expanded upon through an amendment to Article 27.2 of the DSU.[1567] This amendment comprised the inclusion of an additional SDT provision that would oblige the Secretariat to provide "… a geographically balanced roster of legal experts from which least-developed country Members may select the experts to provide the legal services."[1568]

4.4.12 Proposed addition to Appendix 1

The final proposal from the LDCs relates to Appendix I of the DSU[1569]. Article 1 of the DSU states that it will apply to disputes "…brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding…."[1570] Appendix 1 of the DSU[1571] lists 'the agreements' referred to in Article 1 (said list inter alia, including the Agreement establishing the WTO[1572]and both the Multilateral[1573] and Plurilateral[1574] Agreements). While the foregoing agreements form part of the Marrakesh Agreement,[1575] the Marrakesh Agreement also incorporates twenty-seven Ministerial Decisions and

[1566] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) art 27.2 372.
[1567] ibid.
[1568] 'Dispute Settlement Body Special Session, Text for LDC Proposal on Dispute Settlement Understanding Negotiations, Communication from Haiti' (n 600) 4.
[1569] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) Appendix I 373.
[1570] ibid art 1 353.
[1571] ibid Appendix 1 373.
[1572] 'Agreement Establishing the World Trade Organization' (n 837); 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) Appendix 1 373.
[1573] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) Appendix 1 373.
[1574] ibid.
[1575] 'Marrakesh Agreement Establishing the World Trade Organization (with Final Act, Annexes and Protocol). Concluded at Marrakesh on 15 April 1994; Registered by the Director-General of the World Trade Organization, Acting on Behalf of the Parties, on 1 June 1995' (1995) 31874, Vol. 1867, 1–31874 <https://treaties.un.org/doc/Publication/UNTS/Volume%201867/volume-1867-A-31874-English.pdf>.

Declarations,[1576] which are not included in Appendix I. Thus, these Decisions and Declarations would not create any specific obligations or rights capable of enforcement under the DSU.[1577]

Amongst these twenty-seven Ministerial Decisions and Declarations is a "Decision on measures in favour of Least-developed Countries."[1578] The LDCs stated that to "…specifically take into account (*sic*) the Decision on Measures in Favour of Least-Developed Countries…"[1579] this measure should be added to Appendix I. This 1993 Ministerial Decision on Measures in Favour of Least-Developed Countries[1580] was adopted during the Uruguay Round to address the specific concerns of the LDCs. In particular, the Ministerial Decision (i) calls for the 'expeditious implementation' of LDC-specific provisions,[1581] and (ii) states that in respect of LDCs, the rules "…set out in the various agreements and instruments…in the Uruguay Round should be applied in a flexible and supportive manner…,"[1582] (iii) instructs that "…sympathetic consideration

[1576] ibid 4; Van den Bossche and Zdouc (n 143) 50.
[1577] Van den Bossche and Zdouc (n 143) 50.
[1578] 'Marrakesh Agreement Establishing the World Trade Organization (with Final Act, Annexes and Protocol). Concluded at Marrakesh on 15 April 1994; Registered by the Director-General of the World Trade Organization, Acting on Behalf of the Parties, on 1 June 1995' (n 1575) 40; 'Trade Negotiations Committee, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations' MTN/FA 15 December 1993 1–2.
[1579] 'Dispute Settlement Body Special Session, Text for LDC Proposal on Dispute Settlement Understanding Negotiations, Communication from Haiti' (n 600) 2.
[1580] Decision on measures in favour of Least-developed Countries, 'Trade Negotiations Committee, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations' (n 1578) part III-1 1-2.
[1581] ibid part III-1 1; 'Committee on Trade and Development, Special and Differential Treatment for Least-Developed Countries, Note, by the Secretariat' WT/COMTD/W/135 5 October 2004 3.
[1582] 'Trade Negotiations Committee, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations' (n 1578) part III-1 2.

shall be given…"[1583] to the concerns raised by LDCs, and (iv) calls for the provision of substantially increased technical assistance.[1584]

As discussed above, none of the foregoing obligations are enforceable under the DSU; therefore, the LDCs sought to remediate this by proposing that in order to "…specifically take into account the Decision on Measures in Favour of Least-Developed Countries…"[1585] this Ministerial Decision should be added to the list of agreements specified in appendix 1.[1586]

4.5 DSB Special Session – African Group proposals

As outlined above, the African Group, within the context of the WTO, is a coalition of 43 African countries, of whom 26 countries (61%) are African LDCs.[1587] The Africa Group proposals and their explanation thereof are to be found in four primary source documents.[1588] Referring to the LDC Group proposals, the Africa group stated that there were "…similarities

[1583] ibid.
[1584] 'Committee on Trade and Development, Special and Differential Treatment for Least-Developed Countries, Note, by the Secretariat' (n 1581) 3; 'Trade Negotiations Committee, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations' (n 1578) part III-1 2.
[1585] 'Dispute Settlement Body Special Session, Text for LDC Proposal on Dispute Settlement Understanding Negotiations, Communication from Haiti' (n 600) 2.
[1586] ibid.
[1587] The Africa Group is comprised of 43 countries of whom 26 countries are LDCs being Angola, Benin, Burkina Faso, Burundi, Central African Republic, Chad, Democratic Republic of the Congo, Djibouti, Gambia, Guinea, Guinea-Bissau, Lesotho, Madagascar, Malawi, Mali, Mauritania, Mozambique, Niger, Rwanda, Senegal, Sierra Leone, Tanzania, Togo, Uganda, and Zambia. 'WTO, Groups in the Negotiations' (n 1341).
[1588] 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposal by the African Group' (n 1344); 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Kenya' (n 1348); 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Côte d'Ivoire' (n 600); 'Special Session of the Dispute Settlement Body, 10 September 2002, Minutes of Meeting' (n 443).

between their proposal and that of the African Group given the fact that out of the 49 LDCs, 34 were African countries."[1589] When the Africa Group proposals are mapped to the LDC Group proposals, six[1590] of the ten[1591] extant Articles of the DSU, which the Africa Group propose changing, are the subject of specific LDC proposals, narrated above. This section will therefore focus solely on those proposals relating to the residual four Articles of the DSU[1592] as aforesaid, as also the African Group proposal to create a new Article 28 of the DSU.[1593]

4.5.1 Conflicts between provisions and Agreements

The Africa Group complained that both panels and the Appellate Body had, in their interpretation and application of provisions within the covered agreements, "…in several instances, exceeded their mandate and fundamentally prejudiced the interests and rights of developing-country Members as enshrined in the WTO Agreement."[1594] DSU Article 3.2 states that in relation to dispute settlement, the "…recommendations and rulings of the DSB [1595] cannot add to or diminish the rights and obligations

[1589] 'Special Session of the Dispute Settlement Body, 10 September 2002, Minutes of Meeting' (n 443) 26.
[1590] The DSU Articles are, Articles 7, 14.3, 17.11, 21, (specifically, 21.2 and 21.8), 22.6 and 27, (specifically, 27.1 and 27.2), see 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Kenya' (n 1348); The Africa Group submitted a revised text in 2008, (discussed below), see, 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Côte d'Ivoire' (n 600).
[1591] The remaining four of the extant DSU Articles are, Articles 3, (specifically 3.2 and 3.6), 10, 13 and 17.10, see 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Kenya' (n 1348).
[1592] The proposals are those relating to Articles 3, (specifically Arts. 3.2 and 3.6), 10, 13 and 17.10 of the DSU, see ibid.
[1593] ibid 5.
[1594] 'Special Session of the Dispute Settlement Body, 10 September 2002, Minutes of Meeting' (n 443) 21.
[1595] Article 19.2 likewise provides that, '....in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.' 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of

provided in the covered agreements."[1596] The Africa Group proposed to expand the scope of Article 3.2 of the DSU to resolve situations where a panel[1597] or the Appellate Body[1598] were faced with conflicting provisions either within[1599] or between the covered agreements.[1600] In such circumstances, they proposed that the matter would be determined not by the panel or the Appellate Body but by way of a referral to the General Council,[1601] who would act in accordance with "…the authority conferred under paragraph 2 of Article IX[1602] of the WTO Agreement."[1603] Interestingly, while the Africa Group stated that both "…authoritative interpretation of the relevant provisions under consideration from the General Council and also the scope of the jurisdiction of panels and the Appellate Body…"[1604] should occur before proceeding further with cases,[1605] this pre-requisite is, however, absent from the text of the actual proposal itself,[1606] which limits the scope of the proposal.

Disputes' (n 9) 366.
[1596] ibid art 3.2 354.
[1597] 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Kenya' (n 1348) 1.
[1598] ibid.
[1599] ibid.
[1600] ibid.
[1601] ibid; Kessie and Addo (n 468) 9.
[1602] Paragraph 2 of Article IX states that the Ministerial Conference and the General Council, '...have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements...on the basis of a recommendation by the Council overseeing the functioning of that Agreement.' 'Agreement Establishing the World Trade Organization' (n 837) 13.
[1603] 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Kenya' (n 1348) 1.
[1604] 'Special Session of the Dispute Settlement Body, 10 September 2002, Minutes of Meeting' (n 443) 21.
[1605] ibid.
[1606] 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Kenya' (n 1348) 1.

4.5.2 Article 3.6 - The Compensation for withdrawal of measures.

The Africa Group argued that the extant DSU contained no provision which would compensate a member who had suffered injury or loss arising from the imposition of "…offending measures… withdrawn before or after the commencement of proceedings."[1607] Sarooshi narrates that countries could thus be subject to "...'hit and run' practices by Members who may provide short-term trade protection…"[1608] in domestic market sectors, which are the subject of competing exports.[1609] Kessie and Addo similarly note that "… the mere imposition of trade-restrictive measures could have devastating consequences on the industry affected…."[1610] To guard against this, the Africa Group proposed the introduction of two key revisions of Article 3.6[1611] of the DSU, which would apply exclusively to instances where a developed-country member applied and subsequently withdrew measures against a developing country or an LDC.[1612] As noted by Sarooshi, the first of these reforms envisaged the creation of a new rule should whereby (a) all measures which are withdrawn during consultations should be notified to the DSB as mutually agreed

[1607] 'Special Session of the Dispute Settlement Body, 10 September 2002, Minutes of Meeting' (n 443) 20; Kessie and Addo (n 468) 12.
[1608] Sarooshi, D., 'Reform of the WTO Dispute Settlement Understanding: A critical Juncture for Developing Countries,' in Mbirimi, Chilala and Grynberg (n 1352) 110.
[1609] Sarooshi, D., 'Reform of the WTO Dispute Settlement Understanding: A critical Juncture for Developing Countries,' in ibid.
[1610] Kessie and Addo (n 468) 12.
[1611] Article 3.6 provides that, 'Mutually agreed solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements shall be notified to the DSB and the relevant Councils and Committees, where any Member may raise any point relating thereto' 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) 354; The Africa Group propose to operationalize their proposal through the addition of 3 new sub-paragraphs, see 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Kenya' (n 1348) 1.
[1612] 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Kenya' (n 1348) 1.

solutions[1613] and (b) that the DSB shall recommend compensation for the injury suffered as a result thereof.[1614] The second of these reforms sought the creation of a second rule, whereby the compensation awarded by the DSB should be "…enforceable under the DSU at the Instance of the Member Affected."[1615] Kessie and Addo note that while this proposal was sympathetically received, it attracted very little support.[1616]

4.5.3 Articles 10 and 17- Proposals re Third Parties

The Africa Group proposed changes to the rights of third parties in Article 10,[1617] Third Parties, and Article 17,[1618] Appellate Review. Specifically, in respect of both LDCs and developing countries, they sought the effective removal of the requirement[1619] under Article 10.2 that only a member "…having a substantial interest in a matter before a panel…"[1620] can have

[1613] Sarooshi, D., 'Reform of the WTO Dispute Settlement Understanding: A critical Juncture for Developing Countries,' in Mbirimi, Chilala and Grynberg (n 1352) 109; 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposal by the African Group' (n 1344) 2; 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Kenya' (n 1348) 1; 'Special Session of the Dispute Settlement Body, 10 September 2002, Minutes of Meeting' (n 443) 20.
[1614] Sarooshi, D., 'Reform of the WTO Dispute Settlement Understanding: A critical Juncture for Developing Countries,' in Mbirimi, Chilala and Grynberg (n 1352) 109; 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposal by the African Group' (n 1344) 2; 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Kenya' (n 1348) 1; 'Special Session of the Dispute Settlement Body, 10 September 2002, Minutes of Meeting' (n 443) 20.
[1615] 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposal by the African Group' (n 1344) 2; Sarooshi, D., 'Reform of the WTO Dispute Settlement Understanding: A critical Juncture for Developing Countries,' in Mbirimi, Chilala and Grynberg (n 1352) 109.
[1616] Kessie and Addo (n 468) 12.
[1617] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) 360; Kessie and Addo (n 468) 14.
[1618] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) 364; Kessie and Addo (n 468) 14.
[1619] Sarooshi, D., 'Reform of the WTO Dispute Settlement Understanding: A critical Juncture for Developing Countries,' in Mbirimi, Chilala and Grynberg (n 1352) 131; 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposal by the African Group' (n 1344) 4; 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Kenya' (n 1348) 2.
[1620] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9)

the right to be heard by or make written submissions to a panel. This proposal was rejected by the "…major trading partners who thought that it would make the participation of all developing countries automatic…"[1621] which would lengthen the dispute settlement process[1622] and make the possibility of reaching a mutually agreed solution more difficult.[1623] Secondly, the Africa Group proposed that developing countries and LDCs should, in respect of any dispute, [1624]and at any stage thereof,[1625] have the right, if they so request 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."[1626] Moreover, "…in order to fully participate in all the proceedings…"[1627] it was further proposed both the LDCs and developing countries should have the rights to all documents and information pertinent to any given dispute.[1628] Kessie and Addo note that there was "… a broad consensus on the need to enhance third party

360.
[1621] Kessie and Addo (n 468) 13.
[1622] ibid.
[1623] ibid 13–14.
[1624] 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposal by the African Group' (n 1344) 4; Sarooshi, D., 'Reform of the WTO Dispute Settlement Understanding: A critical Juncture for Developing Countries,' in Mbirimi, Chilala and Grynberg (n 1352) 131.
[1625] 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposal by the African Group' (n 1344) 4; Sarooshi, D., 'Reform of the WTO Dispute Settlement Understanding: A critical Juncture for Developing Countries,' in Mbirimi, Chilala and Grynberg (n 1352) 131.
[1626] 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Kenya' (n 1348) 2.
[1627] 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposal by the African Group' (n 1344) 4.
[1628] ibid; Sarooshi, D., 'Reform of the WTO Dispute Settlement Understanding: A critical Juncture for Developing Countries,' in Mbirimi, Chilala and Grynberg (n 1352) 131; 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Kenya' (n 1348) 2.

rights…"[1629] which were reflected in the 2003 chairman's text,[1630]discussed below. .

As referred to above, the Africa Group also proposed that changes be made to the Appellate Review process[1631] specifically to DSU Article 17.4.[1632] Here they sought to strengthen third-party rights, by replacing the second sentence thereof, [1633] with a new sentence affording third parties in panel proceedings (if they so request)[1634] the right to "… attend the proceedings and have an opportunity to be heard and to make written submissions[1635] to the Appellate Body."[1636] Again, while Kessie and Addo note that the proposal was "…supported by a significant number of developing countries... the view was expressed that it could delay the proceedings at the Appellate level…,"[1637] and again, no consensual position could be reached.[1638]

[1629] Kessie and Addo (n 468) 14.
[1630] ibid As discussed below, the 2003 Chairman's text was rejected, with no consensual position being reached.
[1631] 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Kenya' (n 1348) 1; 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposal by the African Group' (n 1344) 2.
[1632] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) 364.
[1633] The second sentence states that, 'Third parties which have notified the DSB of a substantial interest in the matter pursuant to paragraph 2 of Article 10 may make written submissions to, and be given an opportunity to be heard by, the Appellate Body.' see ibid.
[1634] 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Kenya' (n 1348) 2.
[1635] These 'submissions' shall also, (i) be given to the parties to the dispute and (ii) be reflected in the Appellate Body report see, ibid.
[1636] ibid.
[1637] Kessie and Addo (n 468) 15.
[1638] ibid.

4.5.4 Article 13 - Right to Seek Information- Amicus curiae submissions

Within the context of the WTO, Amicus curiae submissions relate to unsolicited submissions received by panels and the Appellate Body, often from NGOs, industry associations, scholars and others who are not parties to the dispute at issue.[1639] Article 13 of the DSU affords Panels a considerable degree of latitude and flexibility in respect of seeking technical advice from "…any individual or body which it deems appropriate"[1640] and the ability to "…seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter."[1641] The Africa Group argued that these rights had been interpreted as "…an obligation to receive un-requested information"[1642] and that the use of the term "… *'Amicus Curiae'* in the context of Article 13 is inappropriate."[1643] The Africa Group specifically pointed out that the use of *Amicus Curiae* should refer solely to the use of respected experts that may be requested by a panel for "…additional advice and guidance on issues of law and interpretation and issues requiring expert knowledge"[1644] and should not be used to adduce, "…factual evidence in support of a party's case."[1645] The Africa Group thus sought to clarify Article 13 by

[1639] 'WTO | Disputes - Dispute Settlement CBT - Participation in Dispute Settlement Proceedings - Amicus Curiae Submissions - Page 1' <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c9s3p1_e.htm> accessed 17 April 2022; See also, Garner Bryan A., ed. (n 7) 280.
[1640] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) art 13.1 362.
[1641] ibid art 13.2 362.
[1642] 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposal by the African Group' (n 1344) 5.
[1643] ibid.
[1644] ibid 5–6.
[1645] ibid 6.

adding a new sub-paragraph 13.3[1646] stating that " …For purposes of this Article, 'the right to seek information and technical advice' shall not be construed as a requirement to receive unsolicited information or technical advice."[1647] Kessie and Addo noted that the discussions of this issue were "…polarised in the Special Session…"[1648] with a clear division of opinion between the developed and developing countries on this issue,[1649] with there being little prospect of consensus being reached.[1650]

4.5.5 Proposal to create a fund for dispute settlement

The final proposal in this section relates to the creation of a WTO dispute settlement fund, the rationale for which was both influenced and driven by SDT. The Africa Group stated that they were not of the view that the DSU had been a resounding success,[1651] arguing that a "…system which had sidelined more than half of the membership of the WTO could not possibly be described in those terms."[1652] They explained that developing-country members needed "…supplementary resources and means to be provided to develop both the institutional and human capacity…"[1653] to engage with the DSU[1654] and called for additional specific measures to

[1646] Kessie and Addo (n 468) 16.
[1647] 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Kenya' (n 1348) 5; Kessie and Addo (n 468) 16; Sarooshi, D., 'Reform of the WTO Dispute Settlement Understanding: A critical Juncture for Developing Countries,' in Mbirimi, Chilala and Grynberg (n 1352) 117.
[1648] Kessie and Addo (n 468) 16.
[1649] ibid.
[1650] ibid.
[1651] 'Special Session of the Dispute Settlement Body, 10 September 2002, Minutes of Meeting' (n 443) 21.
[1652] ibid.
[1653] 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposal by the African Group' (n 1344) 2; Sarooshi, D., 'Reform of the WTO Dispute Settlement Understanding: A critical Juncture for Developing Countries,' in Mbirimi, Chilala and Grynberg (n 1352) 122; Kessie and Addo (n 468) 20–21.
[1654] 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement

address this issue,[1655] over and above the technical assistance programmes which were already provided.[1656] In terms of the provision of legal services, the Africa Group were critical of the ACWL. The Africa Group stated that the ACWL "…should not be considered as a panacea for all institutional and human capacity constraints of developing countries..."[1657] positing that most "…decent legal systems…"[1658] contained provisions to allow financially constrained parties, who would otherwise be prevented from exercising their legal rights, with the means to do so.[1659] In order to give effect to this proposal, they proposed that a new Article 28 should be added to the DSU.[1660] This new article posited the creation of a dispute settlement fund, the purpose of which was to "…facilitate the effective utilization by developing and least-developed country Members…"[1661] of the DSU to settle disputes.[1662]

While Sarooshi opines that the proposal to establish such a fund was "…very much warranted…,"[1663] Jaramillo, having previously informally discussed a similar idea with several WTO members[1664] arguing, that

Understanding, Proposal by the African Group' (n 1344) 2.
[1655] ibid.
[1656] ibid.
[1657] ibid.
[1658] ibid.
[1659] ibid.
[1660] Kessie and Addo (n 468) 20–21; Sarooshi, D., 'Reform of the WTO Dispute Settlement Understanding: A critical Juncture for Developing Countries,' in Mbirimi, Chilala and Grynberg (n 1352) 122; 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Kenya' (n 1348) 5.
[1661] 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Kenya' (n 1348) 5.
[1662] The fund was to be financed from the WTO budget, to be supplemented, if necessary, by extra-budgetary sources such as voluntary contributions from WTO Members, see ibid.
[1663] Sarooshi, D., 'Reform of the WTO Dispute Settlement Understanding: A critical Juncture for Developing Countries,' in Mbirimi, Chilala and Grynberg (n 1352) 122.
[1664] Claudia O Jaramillo, 'The Genesis of the ACWL', *ACWL at Ten: Looking Back, Looking Forward* (Advisory Centre on WTO Law 2011) 9 <https://www.acwl.ch/download/ql/ACWL_AT_TEN.pdf>.

while "… the idea of legal aid and technical cooperation was well received, the concept of a trust fund appeared to be a non-starter."[1665] Kessie and Addo note that the proposal received "…varying degrees of support…"[1666] opining that the developed countries would prefer to limit access to such a fund and that they would "…like the beneficiaries to be least-developed countries and other poor developing countries…."[1667] as opposed to funding advanced developing countries who have both the resources and the capacity to engage with the DSU.[1668] This proposal strengthens the writer's argument, noted above, that the LDCs are *de facto* prepared to engage with the DSU if, through the incorporation of SDT, it can be made more LDC 'user friendly,' which again, runs contrary to the idea that they are actively pursuing a strict policy of non-engagement with the DSU.

4.6 DSB Special Session - Tanzanian Proposals

As narrated above, the third group of proposals where LDC involvement is evident is the Tanzanian Proposals. They are, as outlined above, two distinct sets of proposals, the first of which emanated from a group which was originally comprised of eight countries,[1669] with the second set of proposals being from a group of nine countries.[1670] Aside from the fact

[1665] ibid.
[1666] Kessie and Addo (n 468) 21.
[1667] ibid.
[1668] ibid.
[1669] For the original 8 sponsor countries see, 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposals on DSU by Cuba, Honduras, India, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe' (n 1345) A ninth sponsor, Jamaica, requested to be added to the list of sponsors on 9th October 2002, see; 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Special and Differential Treatment for Developing Countries Proposals on DSU by Cuba, Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe' (n 1346).
[1670] For the 9 sponsor countries, see 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Special and Differential Treatment for Developing Countries Proposals on DSU by Cuba, Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka,

that the LDC Tanzania was one of the countries sponsoring these proposals, it is unclear the extent to which these were supported or otherwise, by the wider body of LDCs. Thus, when the first of these proposals[1671] was informally introduced[1672] at the September 2002 meeting of the DSB Special Session,[1673] it drew no response from either the LDC Group or the Africa Group, both of whom presented proposals at the same meeting.[1674] Similarly, when both sets of proposals were formally discussed at the October 2002 meeting of the DSB Special Session[1675] once again, there was no formal response from either the LDC or Africa Groups.[1676] Indeed, the only evidence of the Tanzanian proposals having any tangible support from the wider LDC membership came from Senegal which "…welcomed all the proposals[1677] that had been tabled…."[1678] This general statement was caveated by Senegal, who added the phrase, "…particularly those by the African and LDC Groups,"[1679] before

Tanzania and Zimbabwe' (n 1346).
[1671] 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposals on DSU by Cuba, Honduras, India, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe' (n 1345).
[1672] 'Special Session of the Dispute Settlement Body, 14 October 2002, Minutes of Meeting' TN/DS/M/5 27 February 2003 1.
[1673] 'Special Session of the Dispute Settlement Body, 10 September 2002, Minutes of Meeting' (n 443) 21–23.
[1674] ibid 20–21, 25–26.
[1675] 'Special Session of the Dispute Settlement Body, 14 October 2002, Minutes of Meeting' (n 1672) 1–5.
[1676] In October 2005 India stated that they had informally met with both the LDC and the African Groups regarding a possible revised proposal founded upon an Indian proposal (TN/DS/W/47) and the two Tanzanian proposals as aforesaid. While the African Group expressed support for the statement from India, they stated that they were reviewing their own proposals which they would revert to at a future meeting. There was however no comment from the LDC Group. 'Special Session of the Dispute Settlement Body, 24 October 2005, Minutes of Meeting' TN/DS/M/29 20 January 2006 for India, see para 11; for the African Group see para 13.
[1677] As well as the Tanzanian proposals, there were proposals from both Jamaica and Japan as also discussion of the Africa and LDC group proposals. 'Special Session of the Dispute Settlement Body, 14 October 2002, Minutes of Meeting' (n 1672).
[1678] ibid 14.
[1679] ibid 15.

commenting solely only on the latter two proposals.[1680] In addition to the foregoing, there is no evidence quantifying either the degree of input by or influence of Tanzania or indeed the wider LDC membership, in the framing and drafting of these proposals. This silence can perhaps be explained by the fact that the bulk of Tanzanian proposals can be mapped to the LDC and Africa Group proposals. Indeed, across both sets of Tanzanian proposals, there are only three instances where this is not the case.[1681] This section will therefore focus solely on those three specific proposals where divergence exists. It is noticeable that unlike the bulk of the other LDC proposals analysed in this chapter, none of these proposals is premised upon calls for SDT.

4.6.1 Proposal re Notification of Mutually Agreed Solutions.

While the Africa Group submitted proposals regarding mutually agreed solutions,[1682] the Tanzanian Proposal[1683] relating to Article 3.6[1684] deals specifically with both the absence of time limits for the notification of mutually agreed solutions[1685] and the substance of said notification.[1686] The proposal sets out an amendment to Article 3.6, providing that where

[1680] ibid 14–15.
[1681] The three areas of divergence are, (i) a proposal relating to DSU art 3.6, and (ii) two proposals relating to DSU art 17 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposals on DSU by Cuba, Honduras, India, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe' (n 1345) 1–2, 4–5, 6.
[1682] 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Côte d'Ivoire' (n 600) 1.
[1683] 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposals on DSU by Cuba, Honduras, India, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe' (n 1345) 1–2.
[1684] Art 3.6 notification of mutually agreed solutions, see 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) 354.
[1685] 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposals on DSU by Cuba, Honduras, India, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe' (n 1345) 2.
[1686] ibid.

mutually agreed solutions have been reached by the parties to a dispute, the "…terms of settlement of mutually agreed solutions… shall be notified within 60 days… and in sufficient detail to the DSB and the relevant Councils and Committees, where any Member may raise any point relating thereto."[1687] The purpose of this proposal is two-fold, firstly to ensure that members are aware that a mutually agreed solution has been reached[1688] and that members can avail themselves, following an assessment of "…the impact of such solutions on their trade,"[1689] of any benefits that have been offered as part of the settlement.[1690]

4.6.2 Proposal re Appellate Body members.

Article 17 of the DSU deals with the Appellate Review process.[1691] Article 17.2 inter alia provides that Appellate Body members shall be appointed by the DSB [1692] and serve for "…a four-year term, and each person may be reappointed once."[1693] The sponsors of the Tanzanian proposal opined that making the process of reappointment reliant upon gaining the consent of the DSB, [1694] was neither reflective of the high office held by Appellate Body members[1695] nor "…conducive for the independence that the

[1687] ibid.
[1688] Sarooshi, D., 'Reform of the WTO Dispute Settlement Understanding: A critical Juncture for Developing Countries,' in Mbirimi, Chilala and Grynberg (n 1352) 108.
[1689] 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposals on DSU by Cuba, Honduras, India, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe' (n 1345) 2.
[1690] Sarooshi, D., 'Reform of the WTO Dispute Settlement Understanding: A critical Juncture for Developing Countries,' in Mbirimi, Chilala and Grynberg (n 1352) 108.
[1691] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) 364–365.
[1692] ibid 364.
[1693] ibid.
[1694] 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposals on DSU by Cuba, Honduras, India, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe' (n 1345) 4.
[1695] ibid 5.

Appellate Body members are required to exercise in the discharge of their duties."[1696] Citing two former Appellate Body members (who called for a single non-renewable term of eight years[1697]), the Tanzanian proposal called for the appointment of Appellate Body members for a non-renewable fixed period of six years,[1698] which they claimed would, "…promote an atmosphere conducive for impartial and independent functioning of the Appellate Body."[1699]

Sarooshi states that the "…only difficulty with this proposal is that six years may be too short a term,"[1700] positing that an eight-year term would be preferable[1701] as it would (a) minimise the loss of knowledge occasioned by personnel changes[1702] and (b) eight years would conform with the maximum term of appointment of two four-year terms specified in Article 17.2.[1703]

4.6.3 Proposal re Notification of Appeal.

DSU Article 17 subsections 9 to 13 specify the procedures governing the Appellate Review,[1704] with Article 17.9 narrating that working procedures

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[1696] ibid.
[1697] ibid; See also, Claus-Dieter Ehlermann, 'Some Personal Experiences as Member of the Appellate Body of the WTO.' (2002) Policy Papers, RSC No. 02/9 European University Institute, Robert Schuman Centre for Advanced Studies 7–8; Petros C Mavroidis and Kim Van der Borght, 'Impartiality, Independence and the WTO Appellate Body', in Georgiev and Van der Borght (n 78) 218.
[1698] 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposals on DSU by Cuba, Honduras, India, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe' (n 1345) 5.
[1699] ibid.
[1700] Sarooshi, D., 'Reform of the WTO Dispute Settlement Understanding: A critical Juncture for Developing Countries,' in Mbirimi, Chilala and Grynberg (n 1352) 115.
[1701] ibid.
[1702] ibid.
[1703] ibid.
[1704] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) 364–365.

relating thereto will be formulated by the Appellate Body.[1705] The Tanzanian proposal narrates that under Rule 20.2 of these procedures,[1706] a notice of appeal should consist of "…a brief statement of the nature of an appeal, including the allegations of errors in the issues of law covered in the panel report and legal interpretations developed by the panel."[1707] The proponents of the Tanzanian proposal stated that "in a few cases, the Notices of Appeal were too brief and the appellees and the third parties could not make out as to what legal issues were in appeal,"[1708] which they argued adversely affected their rights to both respond[1709] and prepare an adequate defence.[1710] To remediate this perceived defect, they proposed that the Appellate Body should both provide guidelines as to the nature of the Notice of Appeals[1711] as also revise their working procedures.[1712]

4.7 DSB Special Session 2001- July 2003 – Outcome of Negotiations.

As narrated above, the Doha Ministerial Conference restarted the DSU review process with the remit of concluding an agreement by May

[1705] ibid 364.
[1706] 'Appellate Body, Working Procedures for Appellate Review' WT/AB/WP/4 1 May 2003 10; These rules have since been superseded, with the latest version thereof being, 'Working Procedures for Appellate Review, Communication from the Appellate Body' WT/AB/WP/W/11 27 July 2010.
[1707] 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposals on DSU by Cuba, Honduras, India, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe' (n 1345) 6; 'Appellate Body, Working Procedures for Appellate Review' (n 1706) rule 20.2 10.
[1708] 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposals on DSU by Cuba, Honduras, India, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe' (n 1345) 6.
[1709] ibid.
[1710] ibid.
[1711] ibid.
[1712] ibid.

2003.[1713] Mercurio notes that in total, while there were some 42 proposals tabled in total[1714], which were discussed and revised at some 13 meetings[1715] , nevertheless, "…strong differences remained, and an agreement could not be reached."[1716] In what Mercurio describes as a "…last ditch attempt…"[1717] to reach a consensus, the chairman of the DSB Special Session "...collated areas of agreement and drafted a framework negotiating agreement in the form of draft amendments[1718] to the DSU."[1719] At the DSB Special Session meeting in April 2003,[1720] the chairman, as part of this 'collation', enquired as to whether or not both LDC and African Groups had "…made an assessment of which of their proposals commanded broad support… and whether they would agree to the setting aside of some of their proposals for further discussion after the Cancún Ministerial Conference."[1721] Nigeria, on behalf of the African Group, stated that while they were prepared to explore the possibility of "…developing a common text as an input to the process,"[1722] the African

[1713] 'Dispute Settlement Body 18 December 2001, DSU Negotiations, Statement by the Chairman' WT/DSB/W/181 17 December 2001 1; 'Ministerial Conference, Fourth Session Doha, 9 - 14 November 2001, Ministerial Declaration' (n 1273) 6; Mercurio (n 1294) 796.
[1714] Mercurio (n 1294) 799; 'Dispute Settlement Body Special Session, Special Session of the Dispute Settlement Body, Report by the Chairman, Ambassador Péter Balás' TN/DS/9 6 June 2003 1; Sarooshi states that there were, 'more than 44 formal proposals', see, Sarooshi, D., 'Reform of the WTO Dispute Settlement Understanding: A critical Juncture for Developing Countries,' in Mbirimi, Chilala and Grynberg (n 1352) 105.
[1715] 'Dispute Settlement Body Special Session, Special Session of the Dispute Settlement Body, Report by the Chairman, Ambassador Péter Balás' (n 1714) 1; Mercurio (n 1294) 799.
[1716] Mercurio (n 1294) 799.
[1717] ibid.
[1718] 'Dispute Settlement Body Special Session, Special Session of the Dispute Settlement Body, Report by the Chairman, Ambassador Péter Balás' (n 1714) 3–19.
[1719] Mercurio (n 1294) 797.
[1720] 'Special Session of the Dispute Settlement Body, 10 – 11 April 2003, Minutes of Meeting' TN/DS/M/11 13 November 2003 5.
[1721] ibid.
[1722] ibid 11.

Group proposals should be reflected in any compromise document.[1723] The LDC Group were silent on the issue however, at the meeting on the 21st - 23rd of May 2003, they stated that while the text of the compromise document was still being analysed[1724] if an agreement was to be reached by the end of May, "…further work was needed to achieve the mandate given by Ministers,"[1725] opining that the group was determined to, "…ensure substantive progress was made in the negotiations."[1726]

With the May 2003 deadline for the completion of the DSU negotiations looming, the chairman of the DSB Special Session submitted a revised text.[1727] Arguing that while he had "…done his best…"[1728] to incorporate both the members' views and include within the text those proposals which enjoyed "…broad consensus during the negotiations..."[1729] he nevertheless conceded that "…no proposal in the text had been expressly agreed to by Members."[1730] The text drew an angry response from the African Group, who were disappointed that "…the proposals of the African Group were not sufficiently reflected in the text."[1731] Pakistan expressed concern that the text did not reflect the "…proposals tabled by least-

[1723] 'Special Session of the Dispute Settlement Body, 10 – 11 March 2003, Minutes of Meeting' TN/DS/M/10 14 August 2003 11.
[1724] 'Special Session of the Dispute Settlement Body, 20, 21 and 23 May 2003, Minutes If Meeting' TN/DS/M/12 19 January 2004 10.
[1725] ibid.
[1726] ibid.
[1727] 'Special Session of the Dispute Settlement Body, 28 May 2003, Minutes of Meeting' TN/DS/M/13 2 April 2004.
[1728] ibid 1.
[1729] ibid.
[1730] ibid.
[1731] ibid 2.

developed and developing countries."[1732] China stated that it was disappointed about the outcome of the negotiations[1733] stating that it would not adopt the text[1734] because, among others,[1735] of the substantive omission of the LDC proposals.[1736] The chairman of the DSB Special Session took note of the concerns as to the non-inclusion of "…proposals in the text and their warning that it would be difficult for them to accept a package that did not reflect these proposals."[1737] He further noted the views expressed by various delegations that the 2003 mandate for the completion of negotiations should be extended[1738], a matter which he said would be "…taken up by the General Council at its July meeting and probably by Ministers at the Cancún meeting."[1739] Bercero and Garzotti note that the chairman's text failed "…not because of what was in it but due to what was left out."[1740] Mercurio opines that far from resolving issues, the terms of the draft text had "…in fact done the opposite and may have created more animosity between Members."[1741]

[1732] ibid 4.

[1733] ibid 10.

[1734] 'Special Session of the Dispute Settlement Body, 21 June 2005, Minutes of Meeting' TN/DS/M/26 27 July 2005 10.

[1735] China also complained about the inclusion of weak SDT provisions, the absence of provisions, 'which would facilitate access and greater use of the system', as also the absence of other proposals tabled by developing countries, see 'Special Session of the Dispute Settlement Body, 28 May 2003, Minutes of Meeting' (n 1727) 10.

[1736] ibid Interestingly, there is no mention in the minutes of LDC Group position.

[1737] ibid 11; Kessie and Addo (n 468) 9.

[1738] 'Special Session of the Dispute Settlement Body, 28 May 2003, Minutes of Meeting' (n 1727) 11.

[1739] ibid.

[1740] Bercero and Garzotti (n 1263) 851.

[1741] Mercurio (n 1294) 798.

In June 2003, the chairman of the DSB Special Session reported to the Trade Negotiations Committee.[1742] He pointed out that the scope of his mandate gave no clear guidance as to the scope of the negotiations[1743] and that, as such, "…shared understanding was difficult, and there were different levels of ambition among Members."[1744] The chairman went on to stress despite this, "…most delegations expressed the view that further work would be desirable, in order to reach such an outcome."[1745] The matter was then discussed at the July Meeting of the General Council,[1746] where the Council chairman proposed that the DSU negotiations should be extended to May 2004,[1747] a proposal which the General Council Approved.[1748] Despite the efforts of the LDC Group as a whole, as also the efforts of the LDCs within the Africa Group, none of the proposals they submitted, nor indeed any other Member's proposals, gained sufficient traction for a reform agreement to be reached by May 2003. At best, the status quo remained.

4.8 DSU Review from July 2003 – date

Following the General Council's July decision to extend the DSU negotiations,[1749] the first formal meeting of the DSB Special Session was

[1742] 'Trade Negotiations Committee 10-11 June 2003, Minutes of Meeting' TN/C/M/10 10 November 2003.
[1743] ibid 2.
[1744] ibid.
[1745] ibid.
[1746] 'General Council 24-25 July 2003, Minutes of Meeting' WT/GC/M/81 28 August 2003.
[1747] ibid 18.
[1748] ibid; Bercero and Garzotti (n 1263) 851; Mercurio (n 1294) 797; Zimmerman T. A., 'The DSU Review (1998-2004): Negotiations, Problems and Perspectives' in Georgiev and Van der Borght (n 78) 452.
[1749] 'General Council 24-25 July 2003, Minutes of Meeting' (n 1746) 2.

held in November 2003.[1750] The chairman noted that the General Council had mandated that the first meeting should be devoted to the discussion of 'conceptual issues'[1751] and that Mexico had circulated a paper to this end.[1752]

Mexico argued that one of the main problems with the DSU was the "…non-usage of the system by least-developed countries…[that]… was striking because of the relative importance of trade to these countries."[1753] Both India and Djibouti enquired as to whether or not this non-usage was due to either a lack of interest[1754] or a lack of expertise,[1755] arguing that if it were, the latter WTO members would have to find ways of improving their participation.[1756] In terms of the former point, the chairman referred to the active participation by both the LDC and African Groups in the negotiations, stating that the "…proposals submitted by these two groups underscored the importance which they attached to the dispute settlement system."[1757]

The LDC Group explained their lack of participation, opining that they "…had several disputes, but because of underlying problems in the system, they could not pursue them."[1758] Moreover, they stressed that the

[1750] 'Special Session of the Dispute Settlement Body, 13 -14 November 2003, Minutes of Meeting' (n 473) 1 An informal meeting of the Special Session of the DSB was held in October 2003. ibid.
[1751] ibid.
[1752] ibid.
[1753] Mexico illustrated this point reciting that the shares of trade to the GDP for the African Group and the LDC Group were 72 per cent and 63 per cent, respectively, see ibid 2–3.
[1754] ibid 4, 10.
[1755] ibid.
[1756] ibid.
[1757] ibid 4.
[1758] ibid 7.

proposals they had previously submitted were specifically designed to address these underlying systemic problems and that it was "…their expectation that Members would favourably consider it."[1759] The African Group, while reserving their position with regards to the Mexican Paper, nevertheless clearly set out their position, stating in a similar vein to the LDC Group, that they expected that "…the negotiations would facilitate the participation of African countries in the dispute settlement system."[1760] Zimmerman notes that "…the review negotiations did not regain their previous momentum …."[1761] Indeed, between November 2003 and March 2004, there was only one meeting.[1762] Bercero and Garzotti note that by March 2004, the process had slowed down, and the chairman of the DSB Special Session was replaced in an attempt to revamp the process.[1763] At the meeting of the DSB Special Session on the 1st of March 2004,[1764] the outgoing chairman expressed his gratitude to the LDC Members and the African Countries for their active participation,[1765] with the new chairman opining that "...it would be a challenge to meet the end of May deadline..."[1766] The LDC Group restated their position as set out in

[1759] ibid.

[1760] ibid 11.

[1761] Zimmerman T. A., 'The DSU Review (1998-2004): Negotiations, Problems and Perspectives' in Georgiev and Van der Borght (n 78) 452.

[1762] 'Special Session of the Dispute Settlement Body, 26-27 January 2004, Minutes of Meeting' TN/DS/M/15 4 June 2004 There was no participation by either the LDC or African Group.

[1763] Bercero and Garzotti (n 1263) 851.

[1764] 'Special Session of the Dispute Settlement Body, 1 March 2004, Minutes of Meeting' TN/DS/M/16 7 June 2004.

[1765] ibid 1.

[1766] ibid The deadline was subsequently missed see, Bercero and Garzotti (n 1263) 851; Zimmerman T. A., 'The DSU Review (1998-2004): Negotiations, Problems and Perspectives' in Georgiev and Van der Borght (n 78) 452.

November 2003, that they "…had specific objectives in the negotiations and hoped that these objectives would be achieved…"[1767] with the African Group adding that significant progress could be made based on the 2003 chairman's text, "…and other proposals submitted by members,"[1768] a clear reference to the fact that agreement could only be reached if their proposals were included.

As noted above, the chairman had expressed the view that the deadline set to conclude the DSU negotiations by the end of May 2004 would be a difficult task.[1769] By June, with the deadline having passed, the chairman intimated that he intended to report to the Trade Negotiations Committee that good progress had been made in negotiations[1770] and that there was a need "…to intensify the process in the second half of the year with a view to presenting positive results to Ministers in Hong Kong."[1771]

However, in the actual report submitted by the chairman[1772], the focus of his recommendations had changed. While he still opined that more time was required to complete the negotiations,[1773] he did not "…propose to recommend, at this point, any such target date, although such a date

[1767] 'Special Session of the Dispute Settlement Body, 1 March 2004, Minutes of Meeting' (n 1764) 3.
[1768] ibid 4.
[1769] ibid 1.
[1770] 'Special Session of the Dispute Settlement Body, 21 June 2005, Minutes of Meeting' (n 1734) 2.
[1771] ibid.
[1772] 'Dispute Settlement Body Special Session, Special Session of the Dispute Settlement Body, Report by the Chairman, Ambassador David Spencer, to the Trade Negotiations Committee' TN/DS/10 21 June 2004.
[1773] ibid 1.

might be considered later."[1774] At the June Meeting of the Trade Negotiation Committee,[1775] he reported that the Members of the DSB Special Session "…wanted to continue to work on the understanding that all proposals remained on the table."[1776] The LDC Group re-stated their position that in the negotiations SDT, "…provisions were critical for the LDCs…[and]… it was through the SDT provisions that LDCs could be kept on board."[1777]

Following the approval of his report,[1778] the matter was discussed at the General Council at the end of July 2004,[1779] which passed[1780] what is known as the 'July package,'[1781] which *inter alia* provided that the "…that work in the Special Session should continue on the basis set out by the chairman of that body in his report to the TNC,"[1782] thus no target date for the conclusion of the negotiations was set.

As narrated above, at the October 2005 meeting of the DSB Special Session,[1783] India intimated that it had consulted with both the LDC Group and the African Group[1784] in connection with a possible submission of a

[1774] ibid The Chairman explained that while, 'there are some Members who would prefer to establish a new specific target-date for this continued work', he felt it would be inappropriate. ibid.
[1775] 'Trade Negotiations Committee, 30 June 2004, Minutes of Meeting' TN/C/M/13 12 August 2004.
[1776] ibid 2.
[1777] ibid 36.
[1778] ibid 55.
[1779] 'General Council 27 July and 1 August 2004, Minutes of Meeting' WT/GC/M/87 4 October 2004.
[1780] ibid 21.
[1781] ibid n 1; 'General Council, 27 and 31 July 2004, Doha Work Programme, Draft General Council, Decision of 31 July 2004' WT/GC/W/5351 31 July 2004.
[1782] 'General Council, 27 and 31 July 2004, Doha Work Programme, Draft General Council, Decision of 31 July 2004' (n 1781) 3.
[1783] 'Special Session of the Dispute Settlement Body, 24 October 2005, Minutes of Meeting' (n 1676).
[1784] ibid 5.

new set of proposals based upon an earlier Indian proposal[1785] and the two Tanzanian proposals[1786] discussed above. While this was welcomed by the African Group,[1787] they explained that they were "…reviewing the proposals tabled by them and would like to revert to them at subsequent meetings of the DSB Special Session."[1788] The African Group finally submitted their revised proposal in March 2008.[1789] While this proposal is founded upon the 2003 proposal[1790] (in so far as it proposes similar amendments to DSU Articles 10, 17.4, 13, 22.6 as also the creation of a Dispute Settlement Fund, all as discussed above), the proposals are not as expansive. Moreover, the 2003 proposed amendments to DSU Articles 3.2, 7, 13, 21 and 27 are all (as discussed above) notably absent. Unfortunately, while there is a clear record of the 2008 proposal having been tabled, there is no record of any discussion of this proposal having taken place.

From 2006 until 2011, there are no published minutes of any meetings of the DSB Special Session. The chairman notes in the 2011 minutes[1791] that

[1785] 'Dispute Settlement Body Special Session, Dispute Settlement Understanding Proposals: Legal Text, Communication from India on Behalf of Cuba, Dominican Republic, Egypt, Honduras, Jamaica and Malaysia' TN/DS/W/47 11 February 2003.

[1786] 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposals on DSU by Cuba, Honduras, India, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe' (n 1345); 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Special and Differential Treatment for Developing Countries Proposals on DSU by Cuba, Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe' (n 1345).

[1787] 'Special Session of the Dispute Settlement Body, 24 October 2005, Minutes of Meeting' (n 1676) 4.

[1788] ibid.

[1789] 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Kenya' (n 1348).

[1790] 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Côte d'Ivoire' (n 600).

[1791] 'Special Session of the Dispute Settlement Body, 30 September 2011, Minutes of Meeting.' TN/DS/M/35 26 October 2011.

the last meeting of the DSB Special Session was held in August 2006 [1792] and that since then, "…the DSB Special Session had met informally on numerous occasions[1793] and commented that, "…participants appear to be fully committed to continuing to work constructively for the successful completion of this work, toward a rapid conclusion of the negotiations."[1794] Given the foregoing and the possibility that the 2008 African proposal could merely represent a clarification of some of the extant proposals, the writer is of the view that it would be presumptuous to conclude that the African Group's position had *de facto* changed. In terms of the review process, a thorough examination of the WTO documents to date indicates that there are no further substantive contributions to the DSU review process from either the LDC Group, the African Group or any individual LDC members. Indeed, aside from the 2008 proposal as aforesaid, the only record of LDC participation in the review process comprises welcoming the appointment of a new chairman of the special session.[1795] The DSB Special Session next met in 2016,[1796] where it was noted that the body "…was without a current Chairperson…"[1797] and the meeting was closed after it was agreed to appoint a new Chairperson.[1798] Furthermore, again as narrated above, the only substantive item of business at the last

[1792] ibid 1.
[1793] ibid.
[1794] ibid 3.
[1795] 'Special Session of the Dispute Settlement Body, Thirty-Ninth Special Session, Minutes of Meeting.' TN/DS/M/36 23 May 2016 1; 'Special Session of the Dispute Settlement Body, Fortieth Special Session, Minutes of Meeting on 4 May 2017.' TN/DS/M/37 12 May 2017 1.
[1796] 'Special Session of the Dispute Settlement Body, Thirty-Ninth Special Session, Minutes of Meeting.' (n 1795).
[1797] ibid 1.
[1798] ibid.

meeting of the DSB Special Session (for which minutes are available) was in 2017,[1799] where, following the election of a new Chairperson,[1800] the meeting was closed.[1801] The foregoing lack of minutes, coupled with the absence of any further academic discourse, collectively gives the impression of the DSU reform negotiations having either stalled or lapsed into a state of stasis. This research, however, reveals that this is misleading and highlights the fact that these negotiations continued albeit *in camera*.

At the 2005 Hong Kong Ministerial Meeting,[1802] Ministers directed the DSB Special Session to, "…continue to work towards a rapid conclusion of the negotiations…"[1803] At the General Council meeting in February 2006,[1804] the Director General and Chairman of the Trade negotiations Committee argued that the, "…only way to make progress across the board in the negotiations was to focus on the two main elements Members had to develop – numbers and words."[1805] At the same meeting, it was proposed that the Costa Rican Ambassador Ronald Saborio Soto should be the new chairman of the DSB Special Session[1806] As narrated above, in 2011 the new Chairman of the DSB Special Session alluded to the fact that a series

[1799] 'Special Session of the Dispute Settlement Body, Fortieth Special Session, Minutes of Meeting on 4 May 2017.' (n 1795).
[1800] ibid 2.
[1801] ibid.
[1802] 'Ministerial Conference Sixth Session Hong Kong, 13 - 18 December 2005, Doha Work Programme, Ministerial Declaration, Adopted on 18 December 2005' WT/MIN (05)/DEC 22 December 2005.
[1803] ibid para 34.
[1804] 'General Council, Minutes of Meeting, 8 February 2006' (n 1268).
[1805] ibid 2.
[1806] ibid 20.

of informal meetings had taken place between 2006 and 2011.[1807] The Chairman, recalling both the Ministerial Directive directing that the DSB special session should work towards a rapid conclusion of negotiations[1808] and the need expressed by the Director General for increased focus amongst negotiating groups,[1809] signalled his intention to use these informal meetings as a means to (a) allow delegations to revise their proposals[1810] with a view to beginning "…text-based discussion…" by the summer of 2006.[1811] While the self-imposed summer deadline proved overly optimistic, nevertheless from the Chairman's successive reports to the Trade Negotiations Committee[1812] it seems that solid progress was being made and by July 2008 the Chairman reported to the Trade Negotiations Committee[1813] that in pursuit of a "….further advance towards a rapid conclusion of the negotiations as mandated by Ministers…"[1814] he had held "…substantive consultations in various formats….focussing (sic)

[1807] 'Special Session of the Dispute Settlement Body, 30 September 2011, Minutes of Meeting.' (n 1791) 1.
[1808] 'Ministerial Conference Sixth Session Hong Kong, 13 - 18 December 2005, Doha Work Programme, Ministerial Declaration, Adopted on 18 December 2005' (n 1802) para 34.
[1809] 'General Council, Minutes of Meeting, 8 February 2006' (n 1268) 2.
[1810] 'Dispute Settlement Body Special Session, Report by the Chairman, Ambassador Ronald Saborío Soto, to the Trade Negotiations Committee' TN/DS/15 29 March 2006 1.
[1811] ibid p1.
[1812] 'Dispute Settlement Body Special Session, Report by the Chairman, Ambassador Ronald Saborío Soto, to the Trade Negotiations Committee' TN/DS/16 9 May 2006; 'Dispute Settlement Body Special Session, Report by the Chairman, Ambassador Ronald Saborío Soto, to the Trade Negotiations Committee' TN/DS/17 27 July 2006; 'Dispute Settlement Body Special Session, Report by the Chairman, Ambassador Ronald Saborío Soto, to the Trade Negotiations Committee' TN/DS/18 1 September 2006 The Africa Group stated that they were working on SDT proposals which should be considered in a draft text, see 2008 proposals by the Africa Group ; 'Dispute Settlement Body Special Session, Report by the Chairman, Ambassador Ronald Saborío Soto, to the Trade Negotiations Committee' TN/DS/19 4 May 2007 In April 2007, the Chairman of the Special Session met with the Africa Group and dispute settlement experts regarding the drafting of SDT proposals, ibid 1; ibid The African and LDC Groups indicated that they were '...working towards revising their contributions...so that they can be reflected in our further work' ibid 1.
[1813] 'Dispute Settlement Body Special Session, Report by the Chairman, Ambassador Ronald Saborío Soto, to the Trade Negotiations Committee' TN/DS/22 18 July 2008.
[1814] ibid 1.

on draft legal text on all issues…."[1815] The output from this was a Consolidated Draft Legal Text,[1816] drafted by the Chairman of the DSB Special Session in July 2008,[1817] (hereinafter 'July 2008 text'), which was, "… based primarily on Members' recent revised drafting proposals…"[1818] as also those of the Chairman himself[1819] was endorsed by the members[1820] and was to be the primary focus of the on-going negotiations.[1821] The July 2008 text, (discussed in more detail below), focuses on 12 thematic categories,[1822] which still currently underpin the work being carried out today by the DSB Special Session.[1823] By March 2010 the Chairman reported that between January 2009 and February 2010 the DSB Special Session had met informally six times.[1824] The Chairman noted that while they had, "…almost completed the first round of discussion of all issues…"[1825] contained in the July 2008 text, there was only, "…limited

[1815] ibid.
[1816] The 'Consolidated Draft Legal Text' was circulated confidentially as JOB(08)/81. This was reproduced as Annex A of, 'Dispute Settlement Body Special Session, Report by the Chairman, Ambassador Ronald Saborío Soto, to the Trade Negotiations Committee' TN/DS/25 21 April 2011.
[1817] 'Dispute Settlement Body Special Session, Report by the Chairman, Ambassador Ronald Saborío Soto, to the Trade Negotiations Committee' TN/DS/23 5 December 2008 1.
[1818] ibid.
[1819] ibid.
[1820] ibid.
[1821] 'Dispute Settlement Body Special Session, Report by the Chairman, Ambassador Ronald Saborío Soto, to the Trade Negotiations Committee' (n 1813) paras 4, 5; 'Dispute Settlement Body Special Session, Report by the Chairman, Ambassador Ronald Saborío Soto, to the Trade Negotiations Committee' (n 1817) 1.
[1822] The 12 thematic areas focused on are, Third party rights; Panel composition; Remand; Mutually agreed solutions; Strictly confidential information; Sequencing; Post-retaliation; Transparency and amicus curiae briefs; Timeframes; Developing country interests, including special and differential treatment; Flexibility and Member control and Effective compliance 'Dispute Settlement Body Special Session, Report by the Chairman, Ambassador Ronald Saborío Soto, to the Trade Negotiations Committee' (n 1816) para 16, A-3.
[1823] 'Dispute Settlement Body Special Session, Report by the Chairperson, Ambassador Coly Seck, to the Trade Negotiations Committee' (n 599) 5; 'General Council 15-16 October 2019, Minutes of Meeting' WT/GC/M/180 3 December 2019 81.
[1824] There are no published minutes of these meetings
[1825] 'Dispute Settlement Body Special Session, Report by the Chairman, Ambassador Ronald Saborío Soto, to the Trade Negotiations Committee for the Purpose of the TNC Stocktaking Exercise' TN/DS/24 22 March 2010 1.

concrete progress…in reaching further convergence on the various issues under discussion."[1826] In an attempt to conclude negotiations the Chairman indicated that he would "…start a more intensive process, in which it will be necessary for delegations to engage on the basis of the comments received in the previous phase."[1827]

By 2012, the DSB Special session had completed a "…detailed text-based issue-by-issue discussion…"[1828] of the 12 thematic areas of the July 2008 text,[1829] and by June 2013, progress had been made in respect of Sequencing, where all the 'technical work' had been completed,[1830] as also in the areas of Mutually Agreed Solutions[1831] and Special and Confidential Information[1832] where all but a few "…limited issues remain to be addressed."[1833] With respect to the other nine thematic areas of negotiations, as aforesaid, there was no clear agreement or consensus.[1834] From June 2013, the informal work of the DSB Special Session[1835] was based on a 'horizontal process'[1836] whereby members were encouraged to seek flexibility to bridge areas where consensus had thus far not been reached.[1837] By 10th June 2015, the Chairman opined that if the flexibilities

[1826] ibid.
[1827] ibid.
[1828] 'Dispute Settlement Body Special Session, Report by the Chairman, Ambassador Ronald Saborío Soto.' TN/DS/26 30 January 2015 1.
[1829] 'Dispute Settlement Body Special Session, Report by the Chairman, Ambassador Ronald Saborío Soto, to the Trade Negotiations Committee' (n 1816) A-3.
[1830] 'Dispute Settlement Body Special Session, Report by the Chairman, Ambassador Ronald Saborío Soto.' (n 1828) 5.
[1831] ibid.
[1832] ibid.
[1833] ibid.
[1834] ibid Annex 1, 5 et seq.
[1835] ibid 2.
[1836] ibid.
[1837] ibid.

and solutions advanced informally by the members as a result of the 'horizontal process'[1838] were to become the official position of said members,[1839] then these, when combined with those areas upon which previously consensus had previously been achieved, had the potential to form "…the basis of final outcomes."[1840] The Chairman did, however, note that members should be "…guided by the objective of seeking agreement on achievable, realistic and workable solutions…."[1841] The objective of seeking agreement on what was achievable was reiterated more forcibly by the Chairman in August 2015 when he stated that the "…time has come for us to make decisions…"[1842] and exhorted members to "…confirm the elements on which convergence can be achieved and to translate this into agreed legal text."[1843]

In an attempt to secure at least a partial agreement amongst the members of the DSB Special Session, the Chairman reported that "…recent discussions addressed the possibility of reaching agreement on a limited number of mature areas to capitalize on the progress made to date."[1844] The Chairman recalled that while some members were supportive "…of the goal of achieving agreement where possible - and implementing resulting improvements - as early as possible…"[1845] other

[1838] ibid 3.
[1839] ibid.
[1840] ibid.
[1841] ibid.
[1842] 'Dispute Settlement Body Special Session, Report by the Chairman, Ambassador Ronald Saborío Soto.' TN/DS/27 6 August 2015 1.
[1843] ibid.
[1844] 'Dispute Settlement Body Special Session, Report by the Chairman, Ambassador Ronald Saborío Soto.' TN/DS/28 4 December 2015 1.
[1845] ibid.

members preferred to continue working towards a more comprehensive agreement. Thus, with there being no consensus, the Chairman's initiative proved otiose.

From the foregoing, it would appear that once again, the negotiations had stalled; however, in May 2016, Ambassador Stephen Karau of Kenya was appointed as the new Chairman of the DSB Special Session.[1846] With the new Chairman came a new approach to the negotiations, whereby (i) members would work sequentially through the 12 thematic areas[1847] as aforesaid, with a fixed period of time being allocated to each issue;[1848] (ii) the work on each thematic area would focus only on, "…those components of a specific issue that present a sufficiently strong possibility for convergence on an outcome…"[1849] with the discussion of any omitted components, (or other outstanding items relating to any given area), being addressed after the completion of the work on all 12 areas; (iii) the sequential work on each thematic area would output to a final negotiated texts which could be in the form of an amendment to the DSU[1850] or be part of a DSB decision clarifying the DSU,[1851] with the final approval being determined at the political level through either the Ministerial Conference[1852] or the General Council.[1853]

[1846] 'Special Session of the Dispute Settlement Body, Thirty-Ninth Special Session, Minutes of Meeting.' (n 1795) 1.
[1847] 'Dispute Settlement Body, Special Session, Report by the Chairman, Ambassador Dr Stephen Ndungu Karau, to the Trade Negotiations Committee' TN/DS/29 2 May 2017 1.
[1848] ibid.
[1849] ibid 2.
[1850] ibid.
[1851] ibid.
[1852] ibid.
[1853] ibid.

This approach would therefore allow members the freedom to formulate and agree to outcomes "…without prejudice to that Member's final position on approving the outcome."[1854] This approach should, intuitively, speed up the time taken to reach a consensus (i.e. members would not need to report back to their capitals for approval), as also/ remove/mitigate any perceived need or desire of any given member to agree on one issue to ensure concessions in another area of negotiations. Within the course of some eight months from May 2016 to February 2017, this approach appears to have paid dividends, with agreed solutions and supporting draft legal text having been produced in respect of two of the 12 thematic areas being Mutually Agreed Solutions[1855] and Third-Party rights.[1856]

In May 2017, Ambassador Coly Seck (Senegal) took over the Chairmanship of the DSB Special Session[1857] and stated that he "…intended to continue the focused and sequential work started by Ambassador Karau on the 12 issues under negotiation."[1858] By November 2017, with agreed solutions and supporting draft legal text had been produced in respect of further two of the 12 thematic areas being Strictly Confidential Information[1859] and Sequencing.[1860] An "indicative timetable of

[1854] ibid.
[1855] ibid app, 8.
[1856] ibid app, 8 et seq.
[1857] 'Special Session of the Dispute Settlement Body, Fortieth Special Session, Minutes of Meeting on 4 May 2017.' (n 1795) 1.
[1858] ibid 2.
[1859] 'Dispute Settlement Body Special Session, Report by the Chairperson, Ambassador Coly Seck, to the Trade Negotiations Committee' (n 599) app, 3-4.
[1860] ibid app, 5-7.

work"[1861] to be undertaken in 2018 was circulated in January 2018.[1862] During the first quarter of the year, the issue of post-retaliation was the subject of these negotiations,[1863] with the Chairman of the DSB Special Session indicating that by late March 2018 he, "…intends to take up Transparency as the next issue."[1864] In November 2017, the Chairman of the DSB special session noted that despite the progress that it has yet to transcend into any concrete results in terms of modifying the DSU, a fact which has not been lost on some members of the DSB Special Session whom the Chairman had noted were disappointed at, "… the continued lack of any results, even incremental, despite the substantial efforts that have been undertaken since the DSB-SS embarked on its focused sequential work…."[1865] Despite this, some progress was made, with the Chairman reporting in 2019 that had been some incremental results with the Secretariat having made the procedures surrounding the protection of strictly confidential information available online to the public.[1866] It was further reported the DSB Special Session had completed work on 10 out of the 12 issues the residual items being Flexibility and Member control as also Effective compliance.[1867] In respect of these two issues the Chairman of the DSB Special Session reported that substantive work had been completed and to the, "…extent that other components of those issues

[1861] 'General Council, 7 March 2018, Minutes of Meeting.' WT/GC/M/171, 24 April 2018 21.
[1862] ibid.
[1863] ibid.
[1864] ibid.
[1865] 'Dispute Settlement Body Special Session, Report by the Chairperson, Ambassador Coly Seck, to the Trade Negotiations Committee' (n 599) 2.
[1866] 'Dispute Settlement Body Special Session, Report by the Chairperson, Ambassador Coly Seck' TN/DS/31 17 June 2019 6.
[1867] ibid 5.

were not discussed, this was at the specific request of the proponent(s)."[1868] The Chairman, while believing that a comprehensive outcome covering all 12 of the negotiated issues as possible,[1869] caveated this firstly by noting that this would, "…require a degree of political will that has not been evident to date,"[1870] and secondly by stating that further work would be required on the draft legal texts which in turn would, "… also require more flexibility on the part of certain proponents or other participants."[1871] In essence therefore the DSB special session since the adoption of this revised approach to the negotiations in November 2016[1872] had after some 47 meetings[1873] finally completed its deliberations and had reached what its Chairman called an "important milestone."[1874]

A new Chairman of the DSB special session, Ambassador Kokou Yackoley Johnson (Togo), was appointed in July 2019[1875] following the departure of Ambassador Coly Seck.[1876] In October 2019, the new Chairman updated the General Council on the progress he was making. He intimated that he was consulting with members on the report presented by Ambassador Coly Seck and hoped to discuss the future work of the DSB special session later in the Autumn of 2019.

[1868] ibid.
[1869] 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Côte d'Ivoire' (n 600) 6.
[1870] ibid.
[1871] ibid 7.
[1872] 'Dispute Settlement Body Special Session, Report by the Chairperson, Ambassador Coly Seck' (n 1866) 3.
[1873] ibid.
[1874] ibid 5.
[1875] 'General Council 15-16 October 2019, Minutes of Meeting' (n 1823) 81.
[1876] 'General Council 7 May 2019, Minutes of Meeting' WT/GC/M/177 9 July 2019 61.

There is, at the time of writing, no further information available regarding the outcome of either his consultations regarding the report or the future work plan for the DSB special session. Therefore, the fate of these proposals is still very much an open question, and while a greater degree of consensus appears to be emerging on certain issues, it should be remembered that these consensual positions do not carry and need not be reflective of, the member's *de facto* position on any given matter and thus, at best, should only be viewed as indicative. What is certainly the case is that the negotiations being carried out by DSB Special Session are far from moribund and may yet bear fruit.

4.8.1 The impact on LDCs of the latest DSU review proposals

Arguably, the latest proposals of the DSB special session represent, a synthesis or consolidation of various proposals submitted by WTO members since the inception of the reviews process where, in the eyes of the various Chairmen of the DSU review, there is a possibility of consensus being reached. The purpose of this section is to determine the extent to which these proposed changes to the DSU relate to those sought by the LDC. Accordingly, therefore, these proposals will (i) be mapped against the changes to the DSU sought by the LDCs as expressed through the proposals submitted by them as part of the DSU review process; (ii) be critiqued as to their respective benefits and drawbacks, and evaluated in terms of their potential effectiveness in addressing and resolving the issues and barriers preventing or impeding LDCs engagement with the DSU as described in Chapter 2 of this thesis and

(iii), be assessed in terms of the likelihood or otherwise of these proposals, or any of them, gaining traction within the wider WTO membership.

4.8.2 Current DSB Special Session proposals

As discussed above, the discussions regarding the review of the DSU are ongoing, therefore, the final outcome of the review is unknown. . Given the foregoing, the outcomes of this analysis and critique, as also the validity thereof, will, by the very nature of the fluidity of said negotiations, be time delineated not only to the specific point in time when the analysis and critique were performed, as also as the content and substance of the material under consideration.

In terms of the content and substance of the material that will be considered in respect of the LDC proposals, this will primarily focus on those proposals for which the LDCs have tabled formal legal texts providing *inter alia* for the specific amendment to or revision of the DSU,[1877] (hereinafter collectively referred to as "the LDC abridged proposals"). In respect of the current proposals of the DSB Special Session, the subject matter that will be considered comprises the 2008 Consolidated Draft Legal Text[1878] as amended by the DSB Chairman's

[1877] 'Dispute Settlement Body Special Session, Text for LDC Proposal on Dispute Settlement Understanding Negotiations, Communication from Haiti' (n 600); 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Kenya' (n 1348); 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Côte d'Ivoire' (n 600).

[1878] 'Dispute Settlement Body Special Session, Report by the Chairman, Ambassador Ronald Saborío Soto, to the Trade Negotiations Committee' (n 1816) app, A-4-A-32.

Texts of February 2017[1879] and November 2017[1880] (hereinafter collectively referred to as "the Special Session proposals").

4.8.3 Mapping LDC abridged proposals to Special Session proposals.

As noted above, legal texts incorporating LDC proposals were submitted by both the LDC Group[1881] and the Africa Group.[1882] These proposals *inter alia* contained article-specific textual amendments/additions to specific articles of the DSU. Furthermore, as discussed above, there was a degree of overlap between the two sets of proposals in terms of the respective articles of the DSU where/ amendments/additions were sought, which can be seen in Table 1 below, which provides a consolidated view of the DSU Articles which the LDCs sought to change. Table 1 shows, that the LDC group in their proposals sought to make 19 changes to 13 DSU Articles and a change to Appendix 1 giving 20 changes in total. However, the current DSB Special Session negotiations are centred on only seven DSU Articles which are of possible interest to the LDCs, namely, Articles 3.2, 4.10, 10, 13, 21.8, 22.6 and 28 (a new Article) of the DSU.[1883] This means that 13 out of 20 proposed changes

[1879] 'Dispute Settlement Body, Special Session, Report by the Chairman, Ambassador Dr Stephen Ndungu Karau, to the Trade Negotiations Committee' (n 1847) app, 8-9.
[1880] 'Dispute Settlement Body Special Session, Report by the Chairperson, Ambassador Coly Seck, to the Trade Negotiations Committee' (n 599) 4–7.
[1881] 'Dispute Settlement Body Special Session, Text for LDC Proposal on Dispute Settlement Understanding Negotiations, Communication from Haiti' (n 600).
[1882] 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Kenya' (n 1348); 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Côte d'Ivoire' (n 600).
[1883] 'Dispute Settlement Body Special Session, Report by the Chairman, Ambassador Ronald Saborío Soto, to the Trade Negotiations Committee' (n 1816) app, A-4-A-32; 'Dispute Settlement Body, Special Session, Report by the Chairman, Ambassador Dr Stephen Ndungu Karau, to the Trade Negotiations Committee' (n 1847) app, 8-9; 'Dispute Settlement Body Special Session, Report by the Chairperson, Ambassador Coly Seck, to the Trade Negotiations Committee' (n 599) 4–7.

sought by the LDCs relate to articles which are not even part of the negotiations. This, in itself, an indication that the LDCs have, at least at this stage of the negotiations, failed to achieve many of their objectives. As noted above, the only specific DSU articles which are currently under discussion in the DSB Special Session that map to the LDCs are proposals relate to proposed changes to Articles 3.2, 4.10, 10,13, 21.8, 22.6 and 28 (a new Article) of the DSU.[1884] To understand the extent to which the proposed changes to these Articles satisfy the objectives set by the LDCs, each of the seven respective LDC abridged proposals will be mapped to the corresponding proposals (if any) of the Special Session proposals. This mapping will focus specifically only on those areas of the DSB Special Session proposals which relate directly to the subject matter raised within the LDCs' abridged proposals. The objective of this is to ascertain the extent or otherwise to which the aspirations and wishes of the LDCs have been accommodated.

[1884] 'Dispute Settlement Body Special Session, Report by the Chairman, Ambassador Ronald Saborío Soto, to the Trade Negotiations Committee' (n 1816) app, A-4-A-32; 'Dispute Settlement Body, Special Session, Report by the Chairman, Ambassador Dr Stephen Ndungu Karau, to the Trade Negotiations Committee' (n 1847) app, 8-9; 'Dispute Settlement Body Special Session, Report by the Chairperson, Ambassador Coly Seck, to the Trade Negotiations Committee' (n 599) 4–7.

TABLE 1. LDC abridged proposals

	LDC Group proposals, TN/DS/W/37, (2003)	African Group proposals, TN/DS/W/42, (2003)	African Group proposals, TN/DS/W/92, (2008)
	DSU article number	DSU article number	DSU article number
1	-	Art 3.2	-
2	-	Art. 3.6	-
3	Art. 4.10	-	-
4	Art. 7	Art. 7	-
5	Art. 8.10	-	-
6	-	Art. 10	Art. 10
7	Art. 12.11	-	-
8	-	Art. 13	Art. 13
9	Art. 14.3	Art. 14.3	-
10	-	Art. 17.4	Art. 17.4
11	Art. 17.11	Art. 17.11	-
12	Art. 21.2	Art. 21.2	-
13	Art. 21.7	-	-
14	Art. 21.8	Art. 21.8	-
15	Art. 22.6	Art. 22.6	Art. 22.6
16	Art. 24.2	-	-
17	Art. 27.1	Art. 27.1	-
18	Art 27.2	Art. 27.2	-
19	-	New Art. 28	New Art. 28
20	Appendix 1 -Covered Agreements	-	-

4.8.4 Proposed revision of DSU Article 3.2

Article 3.2 *inter alia* provides that the recommendations and rulings of the DSB cannot "…add to or diminish the rights and obligations provided in the covered agreements."[1885] The Africa Group alleged that in "…several instances…"[1886] when interpreting and applying provisions within the covered agreements, both the Appellate Body and panels had "…exceeded their mandate and fundamentally prejudiced the interests and rights of developing-country Members as enshrined in the WTO Agreement."[1887] The Africa Group proposed that if either a panel[1888] or the Appellate Body[1889] faced conflicting provisions either within[1890] or between the covered agreements,[1891] the matter would be determined not by the panel or the Appellate Body but by way of a referral to the General Council.[1892] The Special Session proposals do not *per se* specifically seek to alter or amend Article 3.2 of the DSU, however in August 2015,[1893] the Chairman of the Special Session reported suggestions that specific issues could be addressed by the DSB[1894] by providing guidance to WTO adjudicators in, "…applying and administering the rules more efficiently…."[1895] The

[1885] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) 354.
[1886] 'Special Session of the Dispute Settlement Body, 10 September 2002, Minutes of Meeting' (n 443) 21.
[1887] ibid.
[1888] 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Kenya' (n 1348) 1.
[1889] ibid.
[1890] ibid.
[1891] ibid.
[1892] ibid; Kessie and Addo (n 468) 9.
[1893] 'Dispute Settlement Body Special Session, Report by the Chairman, Ambassador Ronald Saborío Soto.' (n 1842) 11.
[1894] ibid.
[1895] ibid.

Chairman further reported that said guidance might specifically include a restatement of Article 3.2,[1896] that the "…recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided under the covered agreements…,"[1897] as also address the wider issues of the principles of treaty interpretation in disputes.[1898] To this end, a draft of a proposed decision by DSB[1899] setting out "Additional Guidance for WTO Adjudicative Bodies"[1900] reaffirms that under Article 3.2, DSB rulings and recommendations cannot diminish or add to the rights and obligations of the covered agreements as aforesaid,[1901] and provides that WTO adjudicative bodies must ensure that their interpretative approach, "…results neither in supplementing nor in reducing the rights and obligations of Members under the covered agreements."[1902] Additionally, they specifically direct that the function of WTO Adjudicative bodies is to resolve disputes between members, "…over obligations undertaken, not to substitute for negotiators and re-write, reduce or supplement the agreed text."[1903]

[1896] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) 354.
[1897] 'Dispute Settlement Body Special Session, Report by the Chairman, Ambassador Ronald Saborío Soto.' (n 1842) 12; 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) 354.
[1898] 'Dispute Settlement Body Special Session, Report by the Chairman, Ambassador Ronald Saborío Soto.' (n 1842) 12.
[1899] 'Dispute Settlement Body Special Session, Report by the Chairman, Ambassador Ronald Saborío Soto, to the Trade Negotiations Committee' (n 1816) A-27.
[1900] ibid.
[1901] ibid A-29.
[1902] ibid.
[1903] ibid A-30.

Van Damme[1904] notes that WTO Members are "…increasingly vocal about their perception of law-making by the Appellate Body, and claim that the Appellate Body 'read[s] words into the text' and thus uses its power to expand WTO treaty law."[1905] Lauterpacht opines that any 'quasi-legislative function'[1906] should not be exercised in such a manner as to "…give justifiable ground for the reproach that the tribunal has substituted its intention for that of the parties,"[1907] all of which is explored in greater detail in the next chapter.

This 'reproach' is evident from the text of the abridged LDC proposal, where the LDCs state that both the Appellate Body and panels have, in their interpretation and application of specific provisions within the covered agreements "…exceeded their mandate and fundamentally prejudiced the interests and rights of developing-country Members…."[1908] While the text of the Additional Guidance for WTO Adjudicative Bodies, outlined above, would appear at face value to address these issues, the LDCs advocated that the General Council[1909] would, upon referral from either a panel or the Appellate Body,[1910] resolve and determine conflicting

[1904] Isabelle Van Damme, *Treaty Interpretation by the WTO Appellate Body* (1st edn, Oxford University Press 2009).
[1905] ibid 118.
[1906] H Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties' 26 26 Brit. Y. B. Int'l L. 48 (1949) 74.
[1907] ibid.
[1908] 'Special Session of the Dispute Settlement Body, 10 September 2002, Minutes of Meeting' (n 443) 21.
[1909] 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Kenya' (n 1348) 1; Kessie and Addo (n 468) 9.
[1910] 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Kenya' (n 1348) 1; Kessie and Addo (n 468) 9.

provisions either within[1911] or between the covered agreements.[1912] This provision is notably absent from the text of the Additional Guidance for WTO Adjudicative Bodies, and this matter would thus remain unresolved. Similarly, while the LDCs sought to ensure the enforceability of these changes by specifically amending Article 3.2, in 2011, the Chairman of the Special Session noted that the Additional Guidance for Adjudicators, had been clarified so that "…the intent would be for the DSB to adopt such guidelines in a decision that would not have the legal status of treaty text."[1913] This 'clarification' appears to have softened in the intervening period, and by 2019 the Chairman of the Special Session requested further clarification on the same point, asking whether "…WTO adjudicators would be required, rather than merely invited, to follow this Guidance in addition to the DSU rules,"[1914] therefore this issue, is still technically still a possibility.

Against this backdrop, while the LDCs may derive some 'comfort' from the sentiment of the Special Session proposal, it falls far short of their expectations.

[1911] 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Kenya' (n 1348) 1.
[1912] ibid.
[1913] 'Dispute Settlement Body Special Session, Report by the Chairman, Ambassador Ronald Saborío Soto, to the Trade Negotiations Committee' (n 1816) A-42.
[1914] 'Dispute Settlement Body Special Session, Report by the Chairperson, Ambassador Coly Seck' (n 1866) 72.

4.8.5 Proposed changes to consultations, DSU Article 4.10

As noted above, Article 4.10 exhorted Members to take into account the problems and interests of developing countries during consultations.[1915] The LDCs sought firstly to make this obligation mandatory[1916] and secondly proposed that the possibility of holding consultations in the concerned developing country's capital should be explored.[1917] During the course of the negotiations, two (unnamed) co-proponents conceded that with advances in technology, secure and confidential videoconferencing could be used and that the proposals could be amended to reflect this.[1918] In terms of making the obligation mandatory, the proposal appears to have gained some traction, with it being reported that only one Member "…made a cautionary note about the mandatory nature of the proposal,"[1919] which echoes the near identical opposition to this proposal as was reported in 2015.[1920] However, it would appear that the scale of opposition to this proposal, as reported in 2015,[1921] seems to have somewhat dissipated. In relation to holding consultations in the concerned developing country capital, the response was more varied, with some Members being "…open to exploring the idea of holding consultations at a

[1915] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) 356.
[1916] 'Dispute Settlement Body Special Session, Text for LDC Proposal on Dispute Settlement Understanding Negotiations, Communication from Haiti' (n 600) 1.
[1917] 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposal by the LDC Group' (n 1342) 1; 'Dispute Settlement Body Special Session, Text for LDC Proposal on Dispute Settlement Understanding Negotiations, Communication from Haiti' (n 600) 1.
[1918] 'Dispute Settlement Body Special Session, Special Session of the Dispute Settlement Body, Report by the Chairman, Ambassador Coly Seck' TN/DS/31, 17 June 2019 63–64.
[1919] ibid 64.
[1920] 'Dispute Settlement Body Special Session, Report by the Chairman, Ambassador Ronald Saborío Soto.' (n 1828) 97.
[1921] ibid.

venue other than Geneva,"[1922] another member called for a series of different scenarios to be developed,[1923] with another seeking to expand the proposal to include *inter alia* matters such as efficiency and convenience for developed countries.[1924] In light of the "…incremental additional convergence that was achieved during the focussed work," the Chairman's proposed text includes making Article 4.10 mandatory by changing 'should' to 'shall' in the *Chapeau* of Article 4.10.[1925] The text includes two new sub-clauses, (a) and (b).[1926] Sub-clause (a) provides Members with a choice of two alternative versions, the first of which is that a developed country should accept any request from a developing country regarding the venue of the negotiations.[1927] The second version provides that consultations shall be held in the capital of the developing country or, where appropriate, by secure videoconferencing.[1928]

Overall, there is evidence of resistance to this proposal at multiple levels which centre around the proposed changes to c*hapeau* of Article 4.10,[1929] and while the same member considers Chairman's text to be 'helpful'[1930] and the concept of videoconferencing 'interesting',[1931] they are "…still not

[1922] 'Dispute Settlement Body Special Session, Special Session of the Dispute Settlement Body, Report by the Chairman, Ambassador Coly Seck' (n 1918) 64.
[1923] ibid.
[1924] ibid.
[1925] ibid 67.
[1926] ibid.
[1927] ibid.
[1928] ibid.
[1929] ibid 66.
[1930] ibid.
[1931] ibid.

sufficient to address the main concern related to the mandatory wording of the proposal."[1932]

If the Chairman's text was to be adopted, then the changes to the c*hapeau* of Article 4.10 of the DSU would satisfy the first objective of the LDCs by making the obligations therein mandatory, while either of the proposed versions of the new sub-clause (a) satisfy and indeed exceed the objectives of the LDCs, however as mentioned above, there is some deep-seated resistance to these proposals which would have to be overcome for these proposals to be accepted.

4.8.6 Proposed revision of DSU Article 10

The abridged LDC proposals[1933] detail amendments to sub-paragraphs 10.2 and 10.3 of Article 10 of the DSU.[1934] The LDCs sought to change Article 10.2 by either (i) removing the first pre-requisite that of having a "…substantial interest in a matter…"[1935] or (ii) by the inclusion of a specific wider and more favourable definition of the term 'substantial', applicable exclusively to LDCs and developing countries.[1936] The latter LDC

[1932] ibid.
[1933] 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Côte d'Ivoire' (n 600); 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Kenya' (n 1348).
[1934] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) 360.
[1935] ibid.
[1936] In this proposal, the term 'substantial' would in its application and interpretation be extend to and include, (a) any level of international trade or, (b) the dispute impact them whether socially, economically, fiscally or financially or (c) the dispute being perceived by them as way of "…gaining of expertise in the procedural, substantive, and systemic issues relating to this Understanding…" or otherwise (d) the dispute being of interest to them in terms of protecting their long-term development interest that could be affected by the dispute, 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Kenya' (n 1348) 2.

proposal was both accepted and included within the Special Session proposals in the form of a revised Article 10.2(a).[1937]

The LDC abridged proposals about Article 10.3 were that in respect of third party participation in any given dispute, (i) the third party should receive 'all documentation' relating to the dispute[1938] as opposed to being entitled to receive only the "…submissions of the parties to the dispute to the first meeting of the panel"[1939] and (ii) that a third party should be given the right to both attend 'the proceedings'[1940] and participate therein through the submission of both oral[1941] and written questions[1942] to both the parties and other third parties to the dispute.[1943]

In relation to the provision of documentation, the Special Session proposals largely satisfy the requests of the LDCs. Firstly, all third-party submissions will be made available to all other third parties at the time of

[1937] 'Dispute Settlement Body Special Session, Report by the Chairman, Ambassador Ronald Saborío Soto, to the Trade Negotiations Committee' (n 1816) A-7; 'Dispute Settlement Body Special Session, Special Session of the Dispute Settlement Body, Report by the Chairman, Ambassador Coly Seck' (n 1918) 17–18.

[1938] 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Kenya' (n 1348) 2; 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Côte d'Ivoire' (n 600) 1.

[1939] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) 360.

[1940] 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Côte d'Ivoire' (n 600) 2; 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Kenya' (n 1348) 1.

[1941] 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Côte d'Ivoire' (n 600) 2; 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Kenya' (n 1348) 1.

[1942] 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Côte d'Ivoire' (n 600) 2; 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Kenya' (n 1348) 1.

[1943] 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Côte d'Ivoire' (n 600) 2; 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Kenya' (n 1348) 1.

their submission;[1944] secondly, all written submissions of the parties to the dispute (other than those after the interim report has been issued[1945]) will be made available to third parties at the time they are made. [1946]

In relation to attendance, the LDCs appear to have once again been partially accommodated in so far as the Special Session proposals provide that a third party will have the right to attend "…the substantive meetings of the panel…preceding the issuance of the interim report…."[1947] This, however, is caveated to the extent that third parties may be excluded from parts of said meeting where matters designated by a member as strictly confidential are discussed[1948] unless the panel decides otherwise[1949] in terms of a new proposed Article 18.3.[1950] In terms of their participation during proceedings, the Special Session proposals limit participation to (a) a written submission to be submitted before the first substantive panel meeting[1951] and (b) making an oral statement to the panel (and responding to any questions), at a session of the first substantive panel meeting set aside for that purpose.[1952]

[1944] 'Dispute Settlement Body Special Session, Report by the Chairman, Ambassador Ronald Saborío Soto, to the Trade Negotiations Committee' (n 1816) A-8.
[1945] 'Dispute Settlement Body Special Session, Special Session of the Dispute Settlement Body, Report by the Chairman, Ambassador Ronald Saborío Soto, to the Trade Negotiations Committee' TN/DS/25 21 April 2011 A-8.
[1946] ibid.
[1947] 'Dispute Settlement Body Special Session, Report by the Chairperson, Ambassador Coly Seck, to the Trade Negotiations Committee' (n 599) 4.
[1948] 'Dispute Settlement Body Special Session, Report by the Chairman, Ambassador Ronald Saborío Soto, to the Trade Negotiations Committee' (n 1816) A-7.
[1949] 'Dispute Settlement Body Special Session, Report by the Chairperson, Ambassador Coly Seck, to the Trade Negotiations Committee' (n 599) 4.
[1950] 'Dispute Settlement Body Special Session, Report by the Chairman, Ambassador Ronald Saborío Soto, to the Trade Negotiations Committee' (n 1816) A-13.
[1951] ibid A-7.
[1952] ibid.

While the LDCs have achieved some of their specific aims in terms of gaining experience as third parties and having the right to attend substantive meetings (as a way of gaining experience and exposure in terms of leading and presenting evidence), the package overall does not meet their full expectations.

4.8.7 Proposed revision of DSU Article 13

Article 13 of the DSU relates to the right of panels to seek information.[1953] In terms of the LDC abridged proposals, the LDCs sought to amend Article 13 by adding a new sub-clause 13.3, the latest incantation of which states that a panel in "…exercising the right to seek information and technical advice, the panel shall not accept or consider information or technical advice provided by any individual or body from whom the panel has not sought it."[1954]

While this wording is repeated *verbatim* within the Special Session proposals,[1955] the text is enclosed within square brackets, indicating that there is no consensus on the proposal amongst the Members.[1956] In 2019 the Chairman of the Special Session discussed a proposed compromise solution he had advanced, which *inter alia* would allow Panels to accept

[1953] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) 362.
[1954] 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Côte d'Ivoire' (n 600) 1; There is an earlier version of this clause, see, 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Kenya' (n 1348) 3.
[1955] 'Dispute Settlement Body Special Session, Report by the Chairman, Ambassador Ronald Saborío Soto, to the Trade Negotiations Committee' (n 1816) A-9; 'Dispute Settlement Body Special Session, Report by the Chairperson, Ambassador Coly Seck' (n 1866) 98.
[1956] 'Dispute Settlement Body Special Session, Report by the Chairman, Ambassador Ronald Saborío Soto, to the Trade Negotiations Committee' (n 1816) A-3.

unsolicited *amicus curie* briefs with the approval of the disputing parties.[1957] The compromise proposal was given a mixed reception, some members viewing it as a possible basis for further negotiations,[1958] others opposed the conditionality it imposed regarding the acceptance of *amicus curie* briefs by Panels.[1959] Against this backdrop, it is impossible to state with any accuracy whether the LDCs will prevail in this matter.

4.8.8 Proposed revision of DSU Article 21.8

Article 21 of the DSU[1960] sets out procedures designed to ensure prompt compliance with DSB rulings and recommendations to finalise the resolution of any given trade dispute.[1961] The LDC abridged proposals sought to expand Article 21.8 to the extent that where a dispute had been brought by either a developing country[1962] or an LDC[1963] against a developed country,[1964] the "…DSB may recommend monetary and other appropriate compensation taking into account the injury suffered …,"[1965] the computation of which was to be calculated retrospectively, " from the

[1957] 'Dispute Settlement Body Special Session, Report by the Chairperson, Ambassador Coly Seck' (n 1866) 33.
[1958] ibid.
[1959] ibid.
[1960] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) 366–367.
[1961] ibid 366.
[1962] 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Kenya' (n 1348) 3.
[1963] 'Dispute Settlement Body Special Session, Text for LDC Proposal on Dispute Settlement Understanding Negotiations, Communication from Haiti' (n 600) 3.
[1964] 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Kenya' (n 1348) 3; 'Dispute Settlement Body Special Session, Text for LDC Proposal on Dispute Settlement Understanding Negotiations, Communication from Haiti' (n 600) 3.
[1965] 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Kenya' (n 1348) 3; 'Dispute Settlement Body Special Session, Text for LDC Proposal on Dispute Settlement Understanding Negotiations, Communication from Haiti' (n 600) 3.

date of the adoption of the inconsistent measure until the date of its withdrawal."[1966]

While there is no reference within the Special Session proposals to either of the above proposals, there is, however, a proposed revision to Article 22.[1967] Article 22 sets out provisions for the application of compensation and the suspension of concessions as a temporary measure where the rulings and recommendations, as aforesaid, are not timeously implemented.[1968] Article 22.2 directs that where said rulings and recommendations are not timeously implemented by a Member[1969], the Member may be requested to "…enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation."[1970] The revision suggested by the Special Session proposals is that compensation "…to developing country Members will be monetary unless otherwise agreed."[1971] It should, however, be noted that once again, the text of the proposal is enclosed within square brackets, indicating that there is no consensus of the proposal amongst the Members.[1972]

[1966] 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Kenya' (n 1348) 3; 'Dispute Settlement Body Special Session, Text for LDC Proposal on Dispute Settlement Understanding Negotiations, Communication from Haiti' (n 600) 3.
[1967] 'Dispute Settlement Body Special Session, Report by the Chairman, Ambassador Ronald Saborío Soto, to the Trade Negotiations Committee' (n 1816) A-14, A-15.
[1968] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) 367.
[1969] ibid.
[1970] ibid.
[1971] 'Dispute Settlement Body Special Session, Report by the Chairman, Ambassador Ronald Saborío Soto, to the Trade Negotiations Committee' (n 1816) A-24, A-25 This does not preclude, '...the possibility for developed Members to obtain monetary compensation, if agreed' ibid A-25.
[1972] ibid A-3.

In essence, therefore, in both sets of proposals, the application of monetary compensation is discretionary.[1973] However, the LDC proposal would permit an LDC, in terms of the revised version of Article 21 as aforesaid, to raise the issue of monetary compensation with the DSB at any time after the adoption of said rulings and recommendations; whereas under the Special Session proposals, while the opportunity to raise the subject of monetary compensation would not present itself until such times as said rulings and recommendations had been deemed to have not been implemented. Given the foregoing, it would appear once again that the aspirations of the LDCs may, at least in part, be sated; however, it should be borne in mind that, as stated earlier, the Special Session proposal was not consensual in nature, and given the absence of any further discourse in the latest report by the Chairman of the Special Session,[1974] one can only assume further negotiations would be required to reach a consensual position.

4.7.9 Proposed revision of DSU Article 22.6

As previously discussed, the LDCs stated that their limited engagement with the DSU was in part due to "…inadequacies and structural rigidities of the remedies available…"[1975] under the terms of the DSU. The LDCs

[1973] ibid A-14; 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Kenya' (n 1348) 3; 'Dispute Settlement Body Special Session, Text for LDC Proposal on Dispute Settlement Understanding Negotiations, Communication from Haiti' (n 600) 3.
[1974] 'Dispute Settlement Body Special Session, Report by the Chairperson, Ambassador Coly Seck' (n 1866).
[1975] 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposal by the LDC Group' (n 1342) 3.

proposed that the "…principle of collective responsibility…"[1976] should be adopted whereby WTO members would collectively enforce the DSB recommendations,[1977] which they argued, would resolve not only the issue of a lack of an effective enforcement mechanism[1978] but also ameliorate the adverse economic effects that extant DSU retaliatory measures could have on poor countries.[1979] The LDCs further argued that collective retaliation should, as a matter of SDT, be automatically available where an LDC has been a successful complainant.[1980]

The LDC proposed to incorporate their ideas on collective retaliation by modifying Article 22.6[1981] of the DSU to the extent that Article 22.6 would be re-named as article 22.6 (a)[1982] to which there would be added further sub-clauses (b) and (c).[1983] While the text of these proposals appears

[1976] ibid 4.
[1977] ibid.
[1978] ibid.
[1979] ibid.
[1980] ibid.
[1981] Article 22 deals with situations where recommendations and rulings of a panel have not been correctly implemented within a reasonable period, whereupon under Article 22.2 the parties will, (at the request of the complainant), enter into negotiations with the respondent with a view to achieving a mutually agreed settlement. If a settlement is not reached, the complainant may request the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements. Article 22.6 provides that, pursuant to a request under Article 22.2 the DSB shall, grant authorisation for the suspension of concessions or other obligations within 30 days, unless the DSB decides by consensus to reject the request. 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) 369.
[1982] 'Dispute Settlement Body Special Session, Text for LDC Proposal on Dispute Settlement Understanding Negotiations, Communication from Haiti' (n 600) 3; 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Kenya' (n 1348) 3; 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Côte d'Ivoire' (n 600) 2.
[1983] 'Dispute Settlement Body Special Session, Text for LDC Proposal on Dispute Settlement Understanding Negotiations, Communication from Haiti' (n 600) 3; In this proposal the Africa Group also proposed the inclusion of a fourth sub-paragraph, 22.6 (d), see, 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Kenya' (n 1348) 3–4; 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Côte d'Ivoire' (n 600) 2.

verbatim within the Special Session proposals,[1984] once again, they do so yet again within square brackets,[1985] indicating that no consensus had been reached as to their adoption.[1986] While there was "some sympathy for the concerns being addressed through the proposal..."[1987] several Members were not "…persuaded whether the proposal could properly address these concerns."[1988] The Chairman of the Special Session noted that while the initial discussions[1989] on collective enforcement had provided some clarification,[1990] "…further understanding of the underlying concepts as well as the proposed modalities of the proposal would be needed for a fuller assessment of the proposal."[1991] One particular issue expressed by Members was the very real concern that in applying collective retaliatory measures, they "…risked causing themselves economic harm…."[1992] Others related to clarifying "… the exact sequence of events that would arise under this proposed procedure."[1993] The modalities referred to above were the subject of further negotiations.[1994] In relation to the proposed Article 22.6 (b), there were issues around the practical operation of this provision specifically (i) the timing of the request by the complaining developed country to the DSB to authorise other members to suspend

[1984] 'Dispute Settlement Body Special Session, Report by the Chairman, Ambassador Ronald Saborío Soto, to the Trade Negotiations Committee' (n 1816).
[1985] ibid A-16.
[1986] ibid A-3.
[1987] ibid B-2.
[1988] ibid.
[1989] ibid A-43, B-2.
[1990] ibid.
[1991] ibid A-43.
[1992] ibid B-2.
[1993] ibid A-43.
[1994] 'Dispute Settlement Body Special Session, Report by the Chairperson, Ambassador Coly Seck' (n 1866) 61.

concessions on its behalf,[1995] (ii) whether the suspending Members would be named in advance,[1996] and (iii) whether once suspending Members have been duly authorised, does the complaining Member lose its right to suspend concessions, and if not, whether all authorized Members could simultaneously suspend concessions.[1997]

While one could legitimately expect that through the course of further negotiations, issues surrounding procedures and clarification could be overcome, the risk of economic damage to a member imposing retaliatory measures is far more problematic, and it is difficult to conceive any obvious solution. Even a basic solution, such as making retaliatory participation a voluntary obligation while overcoming any potential economic damage for a given member who decides not to participate, potentially exacerbates the economic effects of participation by other members (thereby disincentivizing them from participating in the first place), thus further diluting the power of collective retaliation. The writer is of the view that these difficulties still subsist, and as such, the LDCs are unlikely to secure a meaningful consensus for their objectives in this area.

4.8.10 Proposed addition of a new DSU Article 28

As discussed in Chapter 2, one of the barriers which prevented LDCs from engaging with the DSU were the costs of litigating a dispute. The last of the LDC abridged proposals sought, through the inclusion of a new DSU

[1995] ibid.
[1996] ibid.
[1997] ibid.

Article 28,[1998] to establish a "WTO fund on Dispute Settlement."[1999] The purpose of this proposed fund was to, "…facilitate the effective utilization by developing and least-developed country Members…in the settlement of disputes arising from the covered agreements."[2000] As discussed above, the rationale underpinning the creation of the fund was (i) that LDCs needed additional, "…resources and means to be provided to develop both the institutional and human capacity…"[2001] to enable them to engage with the DSU[2002] and, (ii) that in terms of the provision of legal services (a) they argued that the ACWL should not be considered as a "…panacea for all institutional and human capacity constraints of developing countries..."[2003] and (b) they argued that the proposed fund would allow financially constrained parties, who would otherwise be prevented from exercising their legal rights, with the means to do so.[2004] Once again, the text of these proposals appears *verbatim* within the Special Session proposals, save that the proposed fund would extend to all developing

[1998] 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Kenya' (n 1348) 5; 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Côte d'Ivoire' (n 600) 2.
[1999] 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Kenya' (n 1348) 5; 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Côte d'Ivoire' (n 600) 2.
[2000] 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Kenya' (n 1348) 5; 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Côte d'Ivoire' (n 600) 2.
[2001] 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposal by the African Group' (n 1344) 2; Sarooshi, D., 'Reform of the WTO Dispute Settlement Understanding: A critical Juncture for Developing Countries,' in Mbirimi, Chilala and Grynberg (n 1352) 122; Kessie and Addo (n 468) 20–21.
[2002] 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposal by the African Group' (n 1344) 2.
[2003] ibid.
[2004] ibid.

country Members.[2005] However, in this case, not only is the text contained within square brackets[2006] (indicating that no consensus had been reached as to their adoption[2007]) but also the text forms part of an expanded proposal which also introduced the concept of awarding litigation costs[2008] to developing country member who has prevailed in a dispute but whose "…access to the fund would not be possible...,"[2009] due to any funding shortfall.[2010] In 2011, the Chairman of the Special noted that there had been "…no opportunity yet to consider the possible combination of the two proposed mechanisms…"[2011] though from earlier discussions, more detail was required in several areas.[2012] By 2013, the Chairman noted that there while there had been clarification of "…some important aspects of the expected functioning of both mechanisms…"[2013] significant questions remained in three key areas (i) the budgetary implications of the proposals,[2014] (ii) the detailed operation thereof[2015] and, (iii) the relationship between the proposals and, "….the functions of the

[2005] 'Dispute Settlement Body Special Session, Report by the Chairman, Ambassador Ronald Saborío Soto, to the Trade Negotiations Committee' (n 1816) A-19, A-20.
[2006] ibid.
[2007] ibid A-3.
[2008] ibid A-20.
[2009] 'Dispute Settlement Body Special Session, Report by the Chairman, Ambassador Ronald Saborío Soto, to the General Council' TN/DS/21 6 December 2007, as corrected by TN/DS/21/Corr.1 21 December 2007 A-20, A-40.
[2010] ibid.
[2011] 'Dispute Settlement Body Special Session, Report by the Chairman, Ambassador Ronald Saborío Soto, to the Trade Negotiations Committee' (n 1816) A-40.
[2012] The concerned areas related to (i) a determination as to the likely beneficiaries of the measures, (ii) the relationship between the proposals and (a) the technical assistance provided by the WTO Secretariat and, (b) the services provided by the ACWL and (iii) the operational details of both proposals including budgetory implications, see ibid A-40, A-41.
[2013] 'Dispute Settlement Body Special Session, Report by the Chairman, Ambassador Ronald Saborío Soto.' (n 1828) 9.
[2014] ibid.
[2015] ibid.

ACWL...."[2016] Since then, significant progress appears to have been made by the Special Session.

The proposed new Article 28 is now comprised of two sub-clauses, (a) and (b), and a new Annex.[2017] Clause 28 (a) instructs the DSB to establish a DSB fund"…to facilitate the effective utilisation of the dispute settlement procedures by developing country Members."[2018] Disbursements from this fund are to be made in accordance with the Appendix, which inter alia deals with budgetary matters and drawing rights and the inclusion of a capped table of fees.[2019] The proposed Article 28(b) deals with situations where a developing country member involved in a dispute with a developed country is unable to access the DSB Fund due to the exhaustion of its funds.[2020] Article 28 (b) provides that in such circumstances, the panel or the Appellate Body will, as part of their recommendations under Article 19,[2021] award costs in favour of the developing country Member where it has prevailed in said dispute.[2022] There are eight substantive clauses in the proposed Appendix,[2023] which, as stated in the chapeau, set out the criteria governing disbursements from the DSB Fund.[2024] Clause 1 establishes that the DSB Fund is

[2016] ibid.
[2017] 'Dispute Settlement Body Special Session, Report by the Chairperson, Ambassador Coly Seck' (n 1866) 68–69.
[2018] ibid 68.
[2019] ibid 68–69.
[2020] ibid 68.
[2021] Article 19 sets out Panel and Appellate Body Recommendations 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) 365.
[2022] 'Dispute Settlement Body Special Session, Report by the Chairperson, Ambassador Coly Seck' (n 1866) 68.
[2023] ibid 68–69.
[2024] ibid 68.

accessible to developing countries involved in a dispute as complainants, co-complainants or respondents.[2025] The Chairman of the DSB, in response to questions about how funds would be distributed,[2026] added a rider to the clause stipulating that disbursements were to be made every quarter "…on a first come, first served basis."[2027] Clause 2 sets out that the DSB Fund will be financed from the WTO budget, though voluntary contributions would also be accepted.[2028] Clause 3 deals with the financial mechanics and budget of the DSB fund.[2029] The DSB Fund is to have an initial funding of 4 million CHF,[2030] with an annual budget thereafter of 2 million CHF.[2031] Of the initial 4 million CHF, 2 million CHF would be allocated to a separate reserve or "…buffer fund called the DSB Operation Fund…"[2032] which would be drawn upon in the event of the DSB fund being exhausted in any given fiscal year.[2033] It is further provided that at the end of each fiscal year, any residual funds in the DSB Fund would be transferred to the DSB Operation fund.[2034] Lastly, the clause sets out that if the balance of the DSB Operation fund at the end of any fiscal year is less than 2 million CHF, then the shortfall in funding will be topped up from the regular WTO budget.[2035] Clause 4 stipulates that disbursements

[2025] ibid.
[2026] ibid 65.
[2027] ibid 65,68.
[2028] ibid 68.
[2029] ibid.
[2030] ibid.
[2031] ibid.
[2032] ibid.
[2033] ibid.
[2034] ibid.
[2035] ibid.

will only be made in respect of legal fees and charges.[2036] Clause 5 is comprised of a scale table of capped legal fees (reviewable biennially[2037]), which would be available for disbursement during the various stages of a dispute, up to a maximum of CHF 279,148,[2038] all as shown in the table below.

Table 2 Table of Scale Fees Annex to Article 28[1999]

Stage of the Dispute Settlement Process	**Maximum Amount to be Reimbursed**
Consultations	CHF 28,261
Panel	CHF 85,359
Appellate Body	CHF 50,562
Article 21.3 (c)	CHF 21,532
Article 21.5 Panel	CHF 37,104
Article 21.5 AB	CHF 34,221
Article 22.6 Panel	CHF 22,109
Total	**CHF 279,148**

Clause 6 limits the drawing rights on the fund by developing country members who can only access the DSB fund for two disputes per annum.[2039] Clause 7 deals with payments which will be made (subject to the availability of funds)[2040] by the Secretariat to the developing country member who shall have submitted a bill in respect of legal fees at the end of each stage of the dispute as set out above.[2041] The final Clause 8 deals

[2036] This would still leave LDCs having to fund all other intromissions and outgoings incurred as part of any given dispute, ibid 69.
[2037] ibid.
[2038] ibid.
[2039] ibid.
[2040] ibid.
[2041] ibid.

with oversight which is to be carried out by the Committee on Budget, Finance and Administration.[2042]

While there still appears to be some lingering opposition to these proposals, with two other members having repeated their earlier concerns about creating a DSB Fund when assistance was available from the ACWL.[2043] While this argument was countered by the arguments that the ACWL was not always available due to conflicts of interest[2044] and that in such an event, the developing country would still have to finance the legal fees,[2045] there is no indication if the two opposing members had been persuaded to change their view. What is perhaps more encouraging is the notable absence of any overt antipathy towards these proposals. This, of course, is not a guarantee that these proposals will be adopted. However, the costs involved in settling disputes are regarded as a significant issue by the LDCs[2046] thus, finding a solution to this is an important part of resolving the lack of LDC engagement with the DSU.

4.8.11 DSU review current negotiations - conclusion

As noted above, the current round of discussions by the DSB Special Session centred upon 12 thematic areas.[2047] The discussions within each

[2042] ibid.
[2043] ibid 65.
[2044] ibid.
[2045] ibid.
[2046] Mosoti (n 52) 79.
[2047] 'Dispute Settlement Body, Special Session, Report by the Chairman, Ambassador Dr Stephen Ndungu Karau, to the Trade Negotiations Committee' (n 1847) 2; The 12 thematic areas focused on are, third party rights; Panel composition; Remand; Mutually agreed solutions; Strictly confidential information; Sequencing; Post-retaliation; Transparency and amicus curiae briefs; Timeframes; Developing country interests, including special and differential treatment; Flexibility and Member control and Effective compliance, 'Dispute Settlement Body Special Session, Report by the Chairman, Ambassador Ronald Saborío Soto, to the General Council' (n 2009) A-3.

area are restricted solely to matters that "… present a sufficiently strong possibility for convergence on an outcome…"[2048] with all other matters where there was no presumption of convergence as aforesaid being addressed after the completion of the work on all 12 areas.[2049] To date, only 4 of the 12 thematic areas have been discussed, being (i) Mutually Agreed Solutions,[2050] (ii) Third-Party rights,[2051] (iii) Strictly Confidential Information[2052] and (iv) Sequencing.[2053] Two further areas, post-retaliation[2054] and Transparency,[2055] are currently under discussion.[2056] Given, therefore, that these discussions have not yet reached their mid-point, it would be speculative at best to attempt to draw any conclusions therefrom. That said, as noted above, the fact some 14 of the 20 LDC abridged proposals are not included in the Special Session proposals currently under discussion is an indicator that the LDCs are unlikely to secure a meaningful change in each of those areas. Furthermore, while the outcomes of the current discussions in respect of the changes to both Article 3.2 and Article 10 (both discussed above) appear to be supportive of the LDCs' position, the remaining areas spanning as noted above, articles 13, 21.8, 22.6 and 28, all discussed above, have yet to be

[2048] 'Dispute Settlement Body, Special Session, Report by the Chairman, Ambassador Dr Stephen Ndungu Karau, to the Trade Negotiations Committee' (n 1847) 2.
[2049] ibid These final discussions would also include any matter where despite a presumtion of convergence, actual convergence could not be found ibid.
[2050] ibid app, 8.
[2051] ibid app, 8 et seq.
[2052] 'Dispute Settlement Body Special Session, Report by the Chairperson, Ambassador Coly Seck, to the Trade Negotiations Committee' (n 599) app, 3-4.
[2053] ibid app, 5-7.
[2054] 'General Council, 7 March 2018, Minutes of Meeting.' (n 1861) 21.
[2055] ibid.
[2056] ibid.

discussed under the on-going negotiations; therefore, the outcome thereof is unknown. However, given the failure of the LDCs thus far to secure their SDT-driven objectives, it seems unlikely that these outstanding proposals will gain traction.

What one can adduce from the negotiations to date is that where, as with Article 3.2, the aspirations of the LDCs are aligned to those of the wider WTO membership, the LDCs are more likely to secure a meaningful outcome. On the other hand, the wider WTO membership appears reluctant to grant LDCs any new SDT-driven concessions or to countenance any expansion/extension of extant SDT provisions within the DSU. This may be reflective of the wider debate currently underway about modernizing the WTO, discussed in Chapter 5. However, it also strengthens the reasoning that in relation to the first research questions, the LDCs have, in part, chosen not to use DSU as a means of settling their trade disputes because of the failure to both secure and operationalise SDT provisions within the DSU which would assist them in doing so. In relation to the second research question, this section demonstrates that while there are provisions within the DSU which would have assisted LDCs in terms of their wider engagement with the DSU. The failure to operationalise these provisions has delimited the intended functionality of the DSU, and as such, further enhancements are required.

4.9 Conclusion

As set out above, this chapter had three clear objectives. The first objective was to determine whether both the LDC proposals and the

approach taken by the LDCs in terms of their engagement with the review process reflected a continuing SDT-driven approach on the part of the LDCs. The foregoing analysis of the LDC proposals clearly shows that, except for some of the Tanzanian proposals, the LDCs have collectively continued to pursue an SDT-driven approach to the negotiations. As for the Tanzanian proposals, given (i) the absence of clear evidence showing that these proposals have the *de facto* support of the LDCs and (ii) that unlike both the LDC and African Group proposals, no formal legal texts specifying the specific textual changes to the relevant sections of the DSU were subsequently tabled for discussion, the writer took the view that the significance of these proposals should be heavily discounted.

The second objective of this chapter was to contrast and compare the 'new' LDC proposals with the original LDC proposals[2057] submitted during the Uruguay Round to determine if the LDCs have conceded that their original DSU review aims were unattainable and have instead chosen to negotiate on new areas of DSU review or whether they have remained materially entrenched in a position premised upon the attainment of their original aims. In this regard, the writer demonstrated that the objectives

[2057] The five proposals chronologically are (i) that the DSU should contain measures to allow LDCs to effectively use it (ii) that in relation to the DSU, LDCs should be provided with technical assistance, (iii) the creation of a bespoke LDC-only dispute settlement mechanism, (iv) prior to initiating a complaint a WTO member must firstly notify the relevant LDC and then formally investigate the matter at issue, (iv) in any given dispute, prior to requesting recourse to Panel proceedings, all means of settling the dispute, including the use of good offices, should be exhausted and (v) flexibility in settling any given dispute should be extended to LDCs during all phases of the DSU process see, *Group of Negotiations on Goods (GATT), Communication from Bangladesh, Uruguay Round and the Least-Developed Countries (LLDCs), Revision* (n 113) para A, 2; *Sub-Committee on Trade of Least-Developed Countries, 28 September, Note of Proceedings of the Eleventh Meeting, Revision* (n 113); *Negotiating Group on Dispute Settlement; Proposals on behalf of the Least-Developed Countries* (n 113).

of the new LDC proposals mapped directly to the original objectives set by the LDCs. In terms of evaluating whether the LDC position regarding the bespoke LDC-only dispute settlement system discussed in Chapter 2 had changed, the LDC proposals regarding the mandatory use of good offices clearly show a continuity of the LDC preference for seeking the resolution of disputes through negotiation, which was the central element of the 'opt-out' proposal discussed in Chapter 2 as aforesaid. The third objective of the chapter was to ascertain whether the 'new' proposals were indicative of any changes in the LDCs' bias against engagement with the DSU or alternatively demonstrate a willingness on their part to engage with the DSU, which they hope to facilitate through the application of SDT measures designed to resolve, remove, or ameliorate issues within the current DSU which they perceive impede said engagement. This chapter has demonstrated the importance the LDCs attach to DSU engagement. As Kessie and Addo note, "African countries realize the importance of the dispute settlement system, hence the submission of detailed proposals to the Special Session of the Dispute Settlement Body to facilitate greater access and ensure the reaping of tangible benefits from the system"[2058] a sentiment shared by the writer. This chapter has, through the analysis of the LDC proposals, demonstrated that they actively seek engagement with the DSU, an engagement which they hope to facilitate through the application of SDT measures designed to resolve, remove, or ameliorate issues within the current DSU, which, they perceive, impedes said

[2058] Kessie and Addo (n 468) 8.

engagement. What is equally clear is that the LDCs bias against engagement with the DSU will be deepened by the successive failure of their SDT-driven proposals to be accepted or otherwise gain traction.

In terms of the research objective of this thesis, this chapter has built upon the preceding two chapters, the result of which is a clear and precise understanding of the exogenous and endogenous reasons delimiting LDCs engagement with the DSU. Moreover, arguably the over-arching reason for this non-engagement could be the result of the failure of the SDT-driven LDC policy to facilitate said engagement, thus leaving the LDCs with no choice other than to eschew and thus 'opt-out' of the DSU as a means of resolving trade disputes.

In the next chapter, the writer will, as set out in the second research question, address the formulation and assessment of new measures within the DSU designed to facilitate LDC engagement with the DSU as a means of resolving their trade disputes.

Chapter 5

Leveraging improvements in LDCs' DSU engagement – the art of the possible?

At the June 2022 Ministerial Conference, WTO members re-affirmed that the provision of SDT to the LDCs was an "…integral part of the WTO and its agreements…"[2059] and confirmed that SDT provisions in WTO agreements should be "…precise, effective and operational."[2060] This re-affirmation is nothing new, with similar statements being found in the 2001 Doha Ministerial Declaration,[2061] the 2005 Hong Kong Ministerial Declaration[2062] and the 2015 Nairobi Declaration.[2063] Given the continuity and consistency of agreement by the WTO membership in relation to both the provision and implementation of SDT to the LDCs, this chapter firstly considers why WTO members still appear reticent when it comes to operationalising both the extant SDT provisions within the DSU and also agree to any new SDT provisions which would enable the LDCs to engage with the DSU. Chapter 2 discussed the creation and evolution of SDT, with the preceding two chapters set out how SDT became the central element underpinning the proposals advanced by the LDCs to facilitate

[2059] 'Ministerial Conference, Twelfth Session Geneva, 12-15 June 2022, MC12 Outcome Document, Adopted on 17 June 2022' (2022) WT/MIN(22)/24 WT/L/1135 1.
[2060] ibid.
[2061] 'Ministerial Conference, Fourth Session Doha, 9 - 14 November 2001, Ministerial Declaration' (n 1273) 9.
[2062] 'Ministerial Conference Sixth Session Hong Kong, 13 - 18 December 2005, Doha Work Programme, Ministerial Declaration, Adopted on 18 December 2005' (n 1802) 6.
[2063] 'WTO | Ministerial Conferences - Tenth WTO Ministerial Conference - Nairobi' 5 <https://www.wto.org/english/thewto_e/minist_e/mc10_e/mc10_e.htm> accessed 21 September 2018.

their more effective engagement with the DSU. SDT continues to evolve, and while there is still discord and deep-seated divisions between WTO members as to the scope and implementation of SDT,[2064] it is clear from the 2022 WTO Ministerial Conference that SDT is still very much part of the street furniture of the DSU.[2065] Further evidence supporting this can be found in the latest WTO Agreement on Fisheries Subsidies,[2066] which contains multiple SDT provisions.[2067] Chapter 2 also highlighted the attempts that have been made to operationalise SDT provisions within the covered agreements, all of which again failed to materially gain traction amongst the WTO membership. This failure to implement the extant SDT provisions and to agree to the SDT provisions proposed by the LDCs to facilitate their engagement with the DSU maps to the first research questions in terms of understanding the reasons why LDCs do not engage with the DSU.

This chapter also considers the recent trends regarding the future direction of SDT, which WTO members are discussing as part of a wider WTO reform debate, exploring the nuanced yet perceptible changes as to the scope, nature, and application of SDT, which appear to be garnering some support amongst the WTO membership. In essence, this approach calls for a needs-based application of country-specific SDT measures

[2064] Hoekman and Kostecki (n 124) 547.
[2065] 'Ministerial Conference, Twelfth Session Geneva, 12-15 June 2022, MC12 Outcome Document, Adopted on 17 June 2022' (n 2059) 1.
[2066] *Annex to the Protocol amending the Marrakesh Agreement establishing the World Trade Organisation, Agreement on Fisheries Subsidies* WT/MIN(22)/33 WT/L/1144.
[2067] ibid Arts.,3.8, 4.4 ,6, and 7.

similar to that found in the WTO Agreement on Trade Facilitation (TFA).[2068] Whether this new approach could prove to be the key to securing the requisite political will, creativity, and engagement amongst the WTO members to operationalise existing SDT provisions and also allow the implementation of new provisions is yet to be seen. As the chairperson of the Special Session Committee on Trade and Development observed, "…the difficulties surrounding S&D would not simply go away…"[2069] noting that in her view, "…it was only by tackling these issues and working together that Members would be able to find the much-needed solutions."[2070] The chapter will explain the rationale behind this new approach to SDT and explore how the proponents envisage it working in practice.

By leveraging this debate and using the current innovations in the development and direction of SDT as a template, the final substantive section of the chapter sets out a series of new SDT proposals and recommendations. It is important that these proposals and recommendations could be realistically achieved in the current political climate. Accordingly, therefore, each of them will be mapped directly to the template. Collectively, these DSU enhancements would, were they to be adopted, either remove or significantly ameliorate the difficulties faced by the LDCs in terms of their engagement with the DSU, which maps

[2068] *Annex to the Protocol amending the Marrakesh Agreement establishing the World Trade Organisation, Agreement on Trade Facilitation* (n 83).
[2069] 'Committee on Trade and Development Fifty-Sixth Special Session, Note of the Meeting of 24th September 2021' (2021) TN/CTD/M/56 2.
[2070] ibid.

directly to the second research question. The final section of this chapter will provide some concluding remarks.

5.1 The WTO all talk and no action?

As discussed in Chapters 2 and 3, various proposals were submitted by the LDCs during the Uruguay Round. These proposals attempted, among other things, to ameliorate structural and capacity issues posed by the DSU and thus ensure that the LDCs were fully integrated into the proposed new WTO rules-based system. It was shown that while these LDCs' proposals were either ignored or failed to gain traction amongst the wider GATT membership, some elements of SDT were incorporated into provisions within the DSU and the covered agreements. These provisions were designed to stimulate the trade of developing countries,[2071] as well as capacity-building measures designed to allow them to operate within the WTO, handle disputes and implement technical standards.[2072] However, as was also shown in Chapter 3, all attempts to operationalise these existing SDT measures within the covered agreements have failed for over a quarter of a century.

Collectively, these failures to operationalise existing SDT measures run counter to the publicly pronounced position adopted by the WTO membership. At the 2001 Doha Ministerial Conference, the Doha Ministerial Declaration stated that "…all special and differential treatment

[2071] 'WTO | Development - Special and Differential Treatment Provisions' (n 80).
[2072] ibid.

provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational…."[2073] This consensually agreed position of WTO members remained and was, as noted above, re-affirmed at the 2022 Ministerial Conference, with WTO members agreeing that they viewed "…the provisions of special and differential treatment for developing country Members and LDCs as an integral part of the WTO and its agreements. Special and differential treatment in WTO agreements should be precise, effective, and operational."[2074] The WTO members also instructed officials to continue to work on "…improving the application of special and differential treatment…"[2075] and report on their progress before the next Ministerial Conference.[2076] The latter point, namely the introduction of a progress report, represents a small yet nuanced step which gives oversight of the progress officials are making in terms of implementing SDT provisions.

While there may be some signs of progress in implementing extant trade-related and other provisions, the same does not necessarily apply to agreeing to new SDT measures within the DSU. From this, it is reasonable to infer that if one of the objectives of the WTO is to facilitate a multilateral, development-led, inclusive, and equitable global trading

[2073] 'Ministerial Conference, Fourth Session Doha, 9 - 14 November 2001, Ministerial Declaration' (n 1273) 9.
[2074] 'Ministerial Conference, Twelfth Session Geneva,12-15 June 2022, MC12 Outcome Document' (2022) WT/MIN(22)/24 WT/L/1135 1.
[2075] ibid.
[2076] ibid.

system, then a solution to the various divisive issues surrounding SDT need to be resolved.

At its most basic level, the answer to the first research question as to why the LDCs have chosen to eschew the DSU as a mechanism to redress violations of their trade rights is quite simple. It is because collectively, the WTO members have resisted all attempts to turn their grandiloquence into tangible outcomes, even though the 1979 Enabling Clause established the legal basis for SDT,[2077] while the Doha Declaration was a direct response to the SDT implementation issues raised by the developing countries.[2078]

Similarly, this line of argument could equally be applied to the first part of the second research question in that it partially explains why the DSU lacks the functionality to enable LDC members to use it to resolve trade disputes. In relation to the second part of the second research question relating to enhancement to the DSU, again, had the WTO membership agreed on tangible outcomes premised upon the various LDC proposals, then these would constitute enhancements to the DSU, which would help to facilitate their engagement with the DSU.

5.2 SDT, resolving the impasse - a new approach

[2077] 'General Agreement on Tariffs and Trade; Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries; L/4903;3 December 1979' (n 122); Abdulqawi A Yusuf, 'Differential and More Favourable Treatment: The GATT Enabling Clause' (1980) 14 Journal of World Trade Law 488, 491.
[2078] 'Ministerial Conference, Fourth Session Doha, 9 - 14 November 2001, Ministerial Declaration' (n 1273) 9.

I would contend that the reason why a new approach to the application of SDT is being promoted is that the WTO membership appears to be unable to reach consensually agreed outcomes on the further implementation and operationalisation of SDT, a subject signposted in Chapter 2. Hoekman and Kostecki note that the negotiations which followed the Doha Ministerial Declaration revealed the "…deep divisions between WTO members on the appropriate scope of SDT…"[2079] and its implementation. Bernal argues that certain developed countries operate double standards noting that their practice of applying SDT domestically "…does not diminish the virulence of their opposition to SDT for developing countries in the multilateral trading system."[2080]

The US are amongst the most vocal opponents of SDT, arguing that the WTO "…remains stuck in a simplistic and clearly outdated construct of "North-South" division, developed and developing countries…"[2081] where the trade rules are assiduously applied to developed countries[2082] while developing countries, "…regardless of economic, social, trade, and other indicators…"[2083] benefit from SDT through "…flexibilities or exemptions…."[2084] Moreover, the US argues that, unless there is some form of differentiation amongst the developing countries, they will

[2079] Hoekman and Kostecki (n 124) 547.
[2080] Bernal, Richard L, Special and Differential Treatment for Small Developing Economies in Roman Grynberg (ed), *WTO at the Margins: Small States and the Multilateral Trading System* (Cambridge University Press 2006) 323.
[2081] 'An Undifferentiated WTO: Self-Declared Development Status Risks Institutional Irrelevance, Communication from the US' WT/GC/W/757, 16 January 2019 2.
[2082] ibid.
[2083] ibid.
[2084] ibid.

continue to benefit from the application of SDT even where it is "…no longer warranted by factual circumstances."[2085] Clearly, for the LDCs, any changes in either the scope or application of SDT could have a significant impact on them, particularly in light of the SDT-driven nature of their DSU review proposals. However, were the US to succeed in securing differentiation among developing countries as to their SDT eligibility, then this may be of benefit to the LDCs, by making it easier for them to secure SDT, even though at the 2022 Ministerial Conference, the US agreed with other WTO members in that they viewed "…the provisions of special and differential treatment for developing country Members and LDCs as an integral part of the WTO and its agreements."[2086] Whether the US will change policy in the medium term is unknown. In terms of the Biden administration's wider approach, there is little indication of any significant policy shift, with the emphasis being on "changes of style rather than substance."[2087] That said, the US appears adamant that the SDT as currently constructed and applied is unacceptable to them and that they would "…not support additional work to renegotiate or revise S&D provisions in existing WTO Agreements."[2088]

2018 witnessed the growth of calls to reform or modernise the WTO, with the former WTO Director General noting that more leaders are "…

[2085] ibid.
[2086] 'Ministerial Conference, Twelfth Session Geneva,12-15 June 2022, MC12 Outcome Document' (n 2074) 1.
[2087] '"All Talk and No Walk": America Ain't Back at the WTO' (*POLITICO*, 23 November 2021) <https://www.politico.eu/article/united-states-world-trade-organization-joe-biden/> accessed 17 April 2022.
[2088] 'Committee on Trade and Development Fifty-Sixth Special Session, Note of the Meeting of 24th September 2021' (n 2069) 6,8.

becoming engaged and talking to each other about this…."[2089] These calls for modernisation and the reform of the WTO came more sharply into focus with the announcement of new US tariffs on "…hundreds of billions of dollars of imports…"[2090] of Chinese goods, with further measures being proposed.[2091] The former WTO Director-General noted that "…there is no doubt that we are facing a crisis…[and]… at present, there is no end in sight."[2092] He added that "… the root of the current tensions is the argument that the trading system is allowing distortive trade practices to go unchecked…"[2093] positing that the system needed to change and become more responsive to such practices.[2094]

In terms of LDC engagement with the DSU, unless a solution can be found which overcomes the US stated objection to either operationalising existing SDT provisions or the creation of future SDT provisions, there is little prospect of seeing any material change in their DSU engagement. To address some of the US concerns, the European Council stressing "…the importance of preserving and deepening the rules-based multilateral system"[2095] gave the EU Commission a mandate to consider how to modernise the WTO.[2096]

[2089] WTO Director General, Azevedo, R (n 115).
[2090] Director-General Roberto Azevêdo, '"We Must Preserve What We Have, Even as We Work to Improve It"' (17 October 2018) <https://www.wto.org/english/news_e/spra_e/spra243_e.htm> accessed 3 November 2018.
[2091] ibid.
[2092] ibid.
[2093] ibid.
[2094] ibid.
[2095] 'European Council Conclusions, 28 June 2018' 4, 3.
[2096] ibid.

The terms of reference of the mandate focused on six key areas,[2097] two of which have a bearing on the subject matter of this thesis being areas; (iv) the adoption of a new approach to development[2098] and (v) securing a more effective and transparent dispute settlement.[2099]

On the 18th of September 2018, the European Commission presented a concept paper[2100] setting out the "…EU's approach to the World Trade Organisation (WTO) reform…."[2101] Europe, however, was not alone in seeking to reform the WTO and on the 21st of September 2018, Canada published its discussion paper,[2102] which included measures to "…(1) improve the efficiency and effectiveness of the monitoring function; (2) safeguard and strengthen the dispute settlement system; and, (3) lay the foundation for modernizing the substantive trade rules…."[2103] There is a clear commonality in terms of key focus areas between both the EU and Canadian positions in terms of modernisation, improving the DSU and so forth. This led to the convening of a Ministerial Meeting between some 13

[2097] ibid The 6 areas are, '...(i) more flexible negotiations, (ii) new rules that address current challenges, including in the field of industrial subsidies, intellectual property and forced technology transfers, (iii) reduction of trade costs, (iv) a new approach to development, (v) more effective and transparent dispute settlement, including the Appellate Body, with a view to ensuring a level playing field, and (vi) strengthening the WTO as an institution, including in its transparency and surveillance function.' ibid 3.
[2098] ibid.
[2099] ibid.
[2100] European Commission (n 82).
[2101] 'European Commission Presents Comprehensive Approach for the Modernisation of the World Trade Organisation' <http://europa.eu/rapid/press-release_IP-18-5786_en.htm>.
[2102] 'General Council, Strengthening and Modernizing the WTO: Discussion Paper, Communication from Canada' (n 117).
[2103] ibid 1.

WTO members[2104] in Ottawa on the 24-25th of October 2018,[2105] the subject of which was WTO reform. The EU opined that the "…outcome of the ministerial meeting broadly supports the proposals made by the EU in its WTO reform concept paper…."[2106]

While the fact that these proposals appear to have been broadly acceptable to the 13 WTO members present in Ottawa may be an indicator that these proposals will gain some traction, it does not necessarily follow that this will automatically engender a wider groundswell of support amongst the rest of the WTO members. It is noticeable, for example, that there was no LDC representative present at the meeting. Given, as discussed above, the fact that SDT is a central pillar of their WTO strategy, the absence of an LDC representative at these talks is clearly a concern as they would have to 'buy into' any proposed changes. Similarly, while the US was not a party to these talks in Ottawa, it appears at least willing to engage with the EU proposals.[2107] In short, while these proposals are at best at an embryonic stage of development, there does appear to be a willingness to engage with the

[2104] The 13 WTO Members represented were, Australia, Brazil, Canada, Chile, European Union, Japan, Kenya, Korea, Mexico, New Zealand, Norway, Singapore and Switzerland see 'Joint Communiqué of the Ottawa Ministerial on WTO Reform – Ottawa, October 25, 2018' (2018) 1 <https://trade.ec.europa.eu/doclib/docs/2018/october/tradoc_157466.pdf>.

[2105] 'Joint Communiqué of the Ottawa Ministerial on WTO Reform – Ottawa, October 25, 2018' (n 2104).

[2106] 'Alliance Emerges on WTO Reform at Ottawa Ministerial' (*Trade - European Commission*, 2018) <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1932> accessed 14 November 2018; See also, 'Joint Communiqué of the Ottawa Ministerial on WTO Reform – Ottawa, October 25, 2018' (n 2104).

[2107] Reuters, 'U.S. Says It Cannot Support Some of EU's Ideas for WTO Reform' *Reuters* (2018) <https://uk.reuters.com/article/us-usa-trade-wto-idUKKCN1ME2C3> accessed 19 January 2019; 'China, EU Submit Joint Proposals on Reform of WTO's Appellate Body' <http://www.china.org.cn/business/2018-11/30/content_74225048.htm> accessed 19 January 2019.

subject of reform, though whether that will transcend into a consensual agreement is far from certain. What is clear, however, is that unless progress is made to operationalise extant SDT provisions and the creation of new provisions, there is little, if any, prospect of any improvement in LDC engagement with the DSU. Equally, the ability of the proposals and recommendations set out in this chapter to secure traction is a pre-requisite if they are to be given effect to. Concern must also be given to both the current WTO political climate, with proposals and recommendations being premised upon the art of the possible.

5.3 EU/Canada – proposals on development & SDT

As detailed above in the two preceding chapters, the LDCs' proposals regarding DSU reform are founded upon, and both driven and justified by SDT. Switzer[2108] notes that SDT "…goes to the very heart of developing and least developed countries' legal settlement within the trade regime and is…part of the "package deal" of membership."[2109] In their proposals, the EU is seeking nuanced changes to the SDT part of the 'package deal', arguing that while developing countries should be allowed SDT to meet their 'development goals, ' SDT should be provided in a selective as opposed to a generalised way.[2110] Intrinsically, this approach is not radically new, given the mandate set out in paragraph 44 of the Doha

[2108] Switzer (n 123).
[2109] ibid 135.
[2110] WTO modernisation Future EU proposals on rulemaking, European Commission (n 82) s II, 6-7.

Round Ministerial Declaration.[2111] While implementing SDT had been the focus of hours of meetings and discussion, many issues remained unresolved,[2112] with the terms of the application of SDT having "… become a totem for developed countries, and a taboo for developing ones."[2113] In respect of SDT within existing WTO agreements, while the EU did not challenge extant SDT provisions, they proposed that the provision of "…additional SDT… should be done only on the basis of a case-by-case analysis…."[2114] They propose that in respect of any request for additional SDT, there must first be an analysis which (i) identifies the development objective being "…affected by the rule in question"[2115] and (ii) sets out the economic effects of the proposed SDT,[2116] (iii) considers the impact of the proposed SDT on other WTO members[2117] and (iv) sets out the lifecycle timeframe of the SDT provision and the WTO member recipients of the same.[2118] Secondly, upon completion of the foregoing analysis and depending upon the outcome, "…various approaches can be

[2111] 'WTO | Doha 4th Ministerial - Ministerial Declaration' <https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm#special> accessed 18 April 2022.
[2112] Alexander Keck and Patrick Low, 'World Trade Organization Economic Research and Statistics Division; Special and Differential Treatment in the WTO: Why, When and How?' (2004) Staff Working Paper ERSD-2004-03 6 <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjm1b3x9O75AhWdQUEAHTUBBEsQFnoECAsQAQ&url=https%3A%2F%2Fwww.wto.org%2Fenglish%2Fres_e%2Freser_e%2Fersd200403_e.doc&usg=AOvVaw2i_J6WFQ8Q0b_KgyF7eT_8>.
[2113] Jean-Marie Paugam and Anne-Sophie Novel, 'Why and How Differentiate Developing Countries in the WTO?' (IFRI - Institut français des relations internationales 2005) 2 <https://www.ifri.org/en/publications/notes-de-lifri/why-and-how-differentiate-developing-countries-wto-theoretical-options>.
[2114] WTO modernisation Future EU proposals on rulemaking, European Commission (n 82) s II, 7.
[2115] ibid.
[2116] ibid.
[2117] ibid.
[2118] ibid It is clear from the phraseology of this section that all new SDT provisions would have a defined 'ish' or be otherwise time delimited.

used to consider additional flexibilities."[2119] This narrower definition is echoed by the Canadian government, who similarly argued that a new approach to SDT is required, an approach that "…recognizes the need for flexibility for development purposes while acknowledging that not all countries need or should benefit from the same level of flexibility."[2120] The sentiment of this is echoed by the US, who opined that SDT was "…conceived as a tool to help Members thought to be having difficulty integrating into the world trading system."[2121] As with the EU proposals, the Canadian proposals echo the sentiments that SDT should be applied on a country-specific basis[2122] using an evidentially grounded needs-based approach.[2123]

5.4 The LDC impact of EU/Canada SDT proposals.

While the EU affirm and acknowledge the need for "… particularly flexible treatment of LDCs…"[2124] their proposals are noticeably silent as to the precise nature and extent of said 'particularly flexible treatment'. Similarly, while the EU state that "…existing SDT provisions in current agreements should not be contested…,"[2125] what constitutes "…additional

[2119] ibid.
[2120] Government of Canada (n 82) Theme 3; 'General Council, Strengthening and Modernizing the WTO: Discussion Paper, Communication from Canada' (n 117) 5–6.
[2121] 'An Undifferentiated WTO: Self-Declared Development Status Risks Institutional Irrelevance, Communication from the US' (n 2081) 11.
[2122] Government of Canada (n 82) Theme 3; 'General Council, Strengthening and Modernizing the WTO: Discussion Paper, Communication from Canada' (n 117) 6.
[2123] Government of Canada (n 82) Theme 3; 'General Council, Strengthening and Modernizing the WTO: Discussion Paper, Communication from Canada' (n 117) 6.
[2124] European Commission (n 82) Future EU proposals on rulemaking, s II 'Proposals for a new approach to flexibilities in the context of development objectives' (b) This caveat is notably absent from the Canadian proposals.
[2125] ibid Future EU proposals on rulemaking, s II 'Proposals for a new approach to flexibilities in the context of development objectives' (c).

SDT in existing agreements…"[2126] is similarly unclear. Therefore, it could be argued that the LDC proposals, such as those in respect of Article 24.1 of the DSU[2127] (which were specifically designed to operationalise Article 24.1[2128]), could be regarded as being a request for additional SDT[2129] and would thus be subject to the requirements to perform the four-step analysis[2130] outlined above. Clearly, from an LDC perspective, such an interpretation would be a retrograde step because the analysis could be used as a means of blocking or weakening SDT provisions.

Given that the DSU is a set of rules and procedures governing the conduct of both current and any future disputes,[2131] the EU's obligation to provide "… an economic analysis of the impact of the rule and of the expected benefits of its relaxation…"[2132] while it would possibly quantify the benefits in a specific case, difficulties could arise trying to quantify benefits, particularly in respect of prospective or future disputes. Equally, by the same reasoning, the third of the four analytical steps (as above), namely the provision of "…an analysis of the impact of the requested

[2126] ibid.
[2127] 'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposal by the LDC Group' (n 1342) 4.
[2128] These proposals were discussed in detail in the two preceding chapters.
[2129] European Commission (n 82) Future EU proposals on rulemaking, s II 'Proposals for a new approach to flexibilities in the context of development objectives' (c).
[2130] ibid The analysis comprises of, (i) a clear identification of the development objective that is being affected by the rule in question; (ii) an economic analysis of the impact of the rule and of the expected benefits of its relaxation, (iii) an analysis of the impact of the requested flexibility on other WTO Members and (iv) a specification of the time period for which flexibility is requested and of its scope of application (one Member, a group of Members or all developing country Members) ibid.
[2131] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) art 1.
[2132] European Commission (n 82) Future EU proposals on rulemaking, s II 'Proposals for a new approach to flexibilities in the context of development objectives' (c).

flexibility on other WTO Members…"[2133] seems equally unachievable. In essence, therefore, the EU and Canadian proposals could, as currently configured, frustrate all and any attempts by the LDCs to develop, expand or enhance the provision of SDT within the DSU. While these proposals are, as discussed above, in their infancy, they are nevertheless a clear indicator of the wider desire to reimagine SDT functionality more generally within the wider WTO construct, premised upon the application of SDT within the Trade Facilitation Agreement[2134] (TFA). The change in functionality within the TFA focuses on the alignment and delimitation of the application of SDT to the specific verifiable needs of the intended recipient thereof,[2135] which can be broadly aligned to one of the US principal complaints.[2136]

5.5 Maximising SDT potential within the DSU

As discussed above, there is a renewed focus amongst WTO members on the use of SDT within the WTO framework. Canada opined that the provision of "… special and differential treatment in the Trade Facilitation Agreement[2137] (TFA) provides a precedent and a possible blueprint…"[2138] for this new approach. Switzer notes that SDT, as applied in the TFA, is a

[2133] ibid Future EU proposals on rulemaking, s II 'Proposals for a new approach to flexibilities in the context of development objectives' (c).
[2134] *Annex to the Protocol amending the Marrakesh Agreement establishing the World Trade Organisation, Agreement on Trade Facilitation* (n 83).
[2135] ibid Art 13.2, 13.3, 16.2, 18, 21.2, 21.3, 22.
[2136] 'An Undifferentiated WTO: Self-Declared Development Status Risks Institutional Irrelevance, Communication from the US' (n 2081) 11.
[2137] *Annex to the Protocol amending the Marrakesh Agreement establishing the World Trade Organisation, Agreement on Trade Facilitation* (n 83).
[2138] 'General Council, Strengthening and Modernizing the WTO: Discussion Paper, Communication from Canada' (n 117) 5–6; Government of Canada (n 82).

new type of SDT, discussed below, which represents a "…significant departure…"[2139] from the normative application of SDT elsewhere within the WTO framework agreements.[2140] Lamp opines that the TFA "…establishes a link between the obligations of developing countries on the one hand and their implementation capacity on the other hand..."[2141] with the European Commission arguing that SDT should in the future be determined on "…a needs-driven and evidence-based approach that will ensure that SDT will be as targeted as possible."[2142] Taken together, it would seem clear that were these proposals to gain traction, the methodology that will govern the future application of SDT will move away from the grant of "…open-ended block exemptions"[2143] towards a more refined, precise and restricted formulation of SDT which will either be WTO Member specific or targeted towards a specifically defined group of WTO Members. Further evidence supporting this view is to be found in the formulation of the SDT provisions within the WTO Agreement on Fisheries Subsidies.[2144] Articles 3.8[2145] and 4.4[2146] create block exemptions for both the developing countries and the LDCs; however, these are not open-ended, and both expire after two years.[2147] Against this backdrop,

[2139] Switzer (n 123) 134.
[2140] ibid; Nicolas Lamp, 'How Some Countries Became "Special": Developing Countries and the Construction of Difference in Multilateral Trade Lawmaking' (2015) 18 Journal of International Economic Law 743.
[2141] Lamp (n 2140) 768.
[2142] European Commission (n 82) Future EU proposals on rulemaking, s II Proposals for a new approach to flexibilities in the context of development objectives, (b).
[2143] ibid.
[2144] *Annex to the Protocol amending the Marrakesh Agreement establishing the World Trade Organisation, Agreement on Fisheries Subsidies.* (n 2066).
[2145] ibid 5.
[2146] ibid.
[2147] ibid This type of exemption is very similar to the Uruguay Round SDT provions which granted time extensions for implementation to both developing countries and LDCs.

the next section will outline these additional alternative SDT measures. The chapter will contend that within the framework created by the reimagined SDT functionality discussed above, the affirmation by the EU of the need for "… particularly flexible treatment of LDCs…"[2148] provides both the scope and the justification for these additional alternative measures. These measures are designed specifically to enhance LDC engagement with the DSU, as their fuller integration into the world trading system, in a manner which is consistent with the proposed new framework.

5.6 Rationale underpinning proposed new LDC measures

In 2003, the LDC Group explained their lack of participation was the result of "…underlying problems in the system…."[2149] Moreover, they stressed that their DSU review proposals were specifically designed to address these underlying problems.[2150] However, thus far, after over 20 years of negotiations and the LDCs, "… expectation that Members would favourably consider…"[2151] their proposals, no substantive changes have been made to the DSU. Moreover, as was shown in Chapter 4, many of the LDC proposals have, for want of meaningful support, failed to gain traction, which is indicative of an endemic failure by the WTO membership

[2148] European Commission (n 82) Future EU proposals on rulemaking, s II Proposals for a new approach to flexibilities in the context of development objectives, (b) This caveat is notably absent from the Canadian proposals.
[2149] 'Special Session of the Dispute Settlement Body, 13 -14 November 2003, Minutes of Meeting' (n 473) 7.
[2150] ibid.
[2151] ibid.

to translate their written and verbal support for LDCs into the provision of tangible SDT provisions. However, the tenets of some of the LDC proposals (the creation of a dispute settlement fund,[2152] monetary compensation,[2153] and the changes to Article 13 [2154]) are still the subject of ongoing negotiations.

As discussed in Chapter 4, in 2016, a new, more focused approach was taken to the DSU review negotiations, the aim of which was to quickly identify those proposals where a broad consensus could be discerned, which could then be actioned,[2155] leaving consideration of the residual non-consensual proposals to be decided upon at either a Ministerial Conference[2156] or the General Council.[2157] Despite some initial progress appearing to have been made with a draft legal text having been produced in respect of Mutually Agreed Solutions[2158] and Third-Party rights,[2159] by November 2017, the Chairman of the DSU review reported the frustration of members who were disappointed at "… the continued lack of any results, even incremental, despite the substantial efforts that

[2152] 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Kenya' (n 1348) 5.
[2153] ibid 3; 'Dispute Settlement Body Special Session, Text for LDC Proposal on Dispute Settlement Understanding Negotiations, Communication from Haiti' (n 600) 3.
[2154] 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Côte d'Ivoire' (n 600) 1; There is an earlier version of this clause, see, 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Kenya' (n 1348) 3.
[2155] 'Dispute Settlement Body, Special Session, Report by the Chairman, Ambassador Dr Stephen Ndungu Karau, to the Trade Negotiations Committee' (n 1847) 2.
[2156] ibid.
[2157] ibid.
[2158] ibid app 8.
[2159] ibid app 8 et seq.

have been undertaken since the DSB-SS embarked on its focused sequential work…."[2160]

In terms of the LDCs, the overall analysis in Chapter 4 suggests that there is little or no real evidence that any of their proposals will be consensually agreed upon by the wider WTO membership. Similarly, there and no evidence that the LDCs will relinquish their quest for SDT-driven changes to be made to the DSU, indeed, at the General Council meeting in December 2018 they re-affirmed that SDT, "…must remain at the centre of proposals, Agreements and their implementation."[2161] More recently, in July 2021, the G90 group of countries, 72 of whom are WTO members[2162] (including all of the LDCs),[2163] stressed that SDT is a "…central tenet of the WTO system that…must remain an integral part of WTO agreements"[2164] and called upon the WTO to review existing SDT provisions to make them "…more precise, effective and operational…."[2165]

[2160] 'Dispute Settlement Body Special Session, Report by the Chairperson, Ambassador Coly Seck, to the Trade Negotiations Committee' (n 599) 2.
[2161] 'General Council 12 December 2018, Minutes of the Meeting' WT/GC/M/175, 20 February 2019 62.
[2162] The 72 member countries are, Afghanistan, Angola, Antigua and Barbuda, Bangladesh, Barbados, Belize, Benin, Botswana, Burkina Faso, Burundi, Cambodia, Cameroon, Cabo Verde, Central African Republic, Chad, Congo, Côte d'Ivoire, Cuba, Democratic Republic of the Congo, Djibouti, Dominica, Dominican Republic, Egypt, Eswatini, Fiji, Gabon, Gambia, Ghana, Grenada, Guinea, Guinea-Bissau, Guyana, Haiti, Jamaica, Kenya, Lesotho, Madagascar, Malawi, Maldives, Mali, Mauritania, Mauritius, Morocco, Mozambique, Myanmar, Namibia, Nepal, Niger, Nigeria, Papua New Guinea, Rwanda, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Senegal, Sierra Leone, Solomon Islands, South Africa, Suriname, Tanzania, Togo, Trinidad and Tobago, Tunisia, Uganda, Zambia, Zimbabwe, Lao People's Democratic Republic, Liberia, Samoa, Seychelles, Vanuatu and Yemen 'WTO | Doha Development Agenda: Negotiations, Implementation and Development - Groups in the Negotiations' <https://www.wto.org/english/tratop_e/dda_e/negotiating_groups_e.htm> accessed 19 July 2021 A further 10 countries, Bahamas, Bhutan, Comoros, Equatorial Guinea, Ethiopia, Sao Tomé and Principe, Somalia, South Sudan, Sudan and Timor-Leste are negotiating accession to the WTO. The remaining G90 members, Cook Islands, Eritrea, Kiribati, Marshall Islands, Micronesia, Federated States of, Nauru, Niue, Palau, Tuvalu are neither members of nor observers at the WTO.
[2163] ibid.
[2164] 'General Council, G90 Declaration on Special and Differential Treatment' WT/GC/234 15 July 2021 2.
[2165] ibid.

Given the foregoing, the prognosis for LDC engagement with the DSU is somewhat bleak, with LDCs likely to continue to eschew recourse to the DSU unless there is either (i) a significant breakthrough in the negotiations or (ii) that LDCs simply accept that the wider WTO membership will not support their proposed changes and decide to use the DSU.

Clearly, if the LDCs achieved either of these outcomes (no matter how unlikely this may be), they would still have to overcome many of the capacity-related deficiencies highlighted and discussed previously. The proposals discussed below are designed to address these deficiencies. Moreover, it could be argued that if the LDCs actively took steps to remediate their capacity deficit, this may signal to the broader WTO membership their wider commitment to engage with the DSU, which in turn may add weight to their ongoing review proposals. Concomitantly to this, from a practical perspective, if LDCs could show, for example, how having succeeded in several disputes, they were unable to enforce a favourable ruling, it would add considerable moral weight to their overall arguments for favourable SDT measures remediating the same to be applied to the DSU. Indeed, conceptually, this template could be similarly applied to address what the LDCs refer to as the other "…underlying problems in the system…."[2166]

[2166] 'Special Session of the Dispute Settlement Body, 13 -14 November 2003, Minutes of Meeting' (n 473) 7.

Collectively this represents a more proactive approach towards the achievement of their wider SDT-driven policy aims, which in turn adds a new dimension to the extant LDC policy, and for this to succeed, the proposals need to satisfy three criteria. Firstly, the proposed measures should address and target some of the capacity-based deficiencies which currently inhibit LDC engagement and use of the DSU, which would, in terms of the TFA, constitute 'their implementation capacity.[2167] As has been shown in Chapter 4, the LDCs have repeatedly requested the provision of technical assistance and support. Indeed in 2018, they re-affirmed this, stating that "… our countries clearly need all the technical assistance possible – from Members and the WTO – to enable us to benefit concretely and significantly from the decisions taken."[2168] Secondly, the implementation of these proposed new measures should be founded upon the methodology underpinning SDT provisions in the TFA, which, as discussed above, should be used as a possible blueprint.[2169] The TFA methodology implies that in terms of the provision of technical capacity-building, this will be provided by WTO donor members.[2170] However, the only obligation imposed upon them in the TFA is "… merely to 'facilitate the provision' of technical assistance, as opposed to a direct requirement to provide technical assistance…."[2171] This use of non-legally

[2167] Lamp (n 2140) 768.
[2168] 'General Council 12 December 2018, Minutes of the Meeting' (n 2161) 62.
[2169] 'General Council, Strengthening and Modernizing the WTO: Discussion Paper, Communication from Canada' (n 117) 5–6; Government of Canada (n 82).
[2170] *Annex to the Protocol amending the Marrakesh Agreement establishing the World Trade Organisation, Agreement on Trade Facilitation* (n 83) art 21.1.
[2171] Ben Czapnik, 'The Unique Features of the Trade Facilitation Agreement: A Revolutionary New Approach to Multilateral Negotiations *or* the Exception Which Proves the Rule?' [2015] Journal of International Economic Law 41, 776; Switzer (n 123) 135; *Annex to the Protocol amending the*

binding SDT provisions is mirrored within the DSU where, as has been shown in previous chapters, the SDT provisions are hortatory in nature and not, *per se*, legally binding,[2172] which runs contrary to the sentiment of the Doha Mandate discussed above. Therefore, it seems clear that any new SDT measures should be capable of being operationalised in such a manner as to be both effective and ideally enforceable. The third and final criteria is that to avoid the creation of "…open-ended block exemptions,"[2173] ideally, therefore, any new capacity enhancing measures should be based upon existing SDT provisions in the DSU.[2174]

5.7 Scoping the proposed new measures - areas where no action is required

In Chapter 2, in addressing the first research question, which calls for an examination of the reasons why LDCs do not actively use the DSU, the chapter explored the academic literature discussing the reasons why LDCs

Marrakesh Agreement establishing the World Trade Organisation, Agreement on Trade Facilitation (n 83) art 21.1.

[2172] Switzer (n 123) 128; George A. Bermann and Petros C. Mavroidis (n 153) 14; Bernal, 'Small Developing Economies in the World Trade Organization' (n 70) 9; Richard L Bernal, 'Special and Differential Treatment for Small Developing Economies', *OECD Global Forum on Trade with the support of the University of the West Indies* (OECD Global Forum on Trade 2006) 5–6; Conconi and Perroni (n 327) 84; Cortez (n 466) 16–17; Hoekman (n 124) 412; Edwini Kessie, 'Enforceability of the Legal Provisions Relating to Special and Differential Treatment under the Wto Agreements' (2000) 3 The Journal of World Intellectual Property 955, 975.

[2173] European Commission (n 82) Future EU proposals on rulemaking, s II 'Proposals for a new approach to flexibilities in the context of development objectives' (b).

[2174] It should be recalled that the LDCs are not per se a fixed 'block' of countries. LDCs can and have 'graduated' to developing country member status, see 'Equatorial Guinea Graduates from the Category of Least Developed Countries, 4 June 2017' (UN office of the high representative for the Least Developed Countries, Landlocked Developing Countries and Small Island States 2017) <https://www.un.org/ldcportal/content/equatorial-guinea-graduation
-history> accessed 25 January 2019; 'Maldives Identifies Challenges in Graduating to a Developing Country' (2011) <https://mihaaru.com/haveeru_online ; (copy on file with author)>.

do not engage with the DSU, grouping these reasons under eight key thematic areas.

It was argued that in respect of five of the eight thematic areas: (i) economic, where the limited volume of trade explains LDC non-participation, (v) a fear of reprisals, (vi) the high costs of engaging external legal counsel, (vii) enforcement of a favourable ruling, and (viii) the question of representation in Geneva, there is, at this juncture, no need for the application of additional measures. The reasoning underpinning this is that in relation to area (i), economic arguments, the discourse in Chapter 2 challenged the basic assumptions underpinning the central pillar of the argument, which linked trade volumes to the incidence of infringements of trade rights, which accounted for the low level of LDC engagement with the DSU. While in absolute statistical terms, one can correlate the two, from a practical legal perspective, the evidence discussed[2175] showed quite clearly that there was no linkage between low trade volumes of LDC and the instances of the violation of trade rights. In respect of area (v) fear of reprisals, as discussed above, the argument here is that LDCs may be disincentivised from initiating a dispute due to the fear of reprisals from a more powerful adversary. In Chapter 2, it was argued that there was no clear evidence or proof substantiating or otherwise supporting this argument. Indeed some

[2175] Van den Bossche and Gathii (n 60) 22; Francois, Horn and Kaunitz (n 450) 47; Bohanes and Garza (n 463) 67; Mosoti (n 52) 79; Cortez (n 466) 9; Bartels (n 467) 48; Kessie and Addo (n 468) 5–21.

writers dismiss or discount the entire concept.[2176] Given the foregoing, it is argued that without concrete legal evidence and proof of this practice that any change to the DSU or its functionality would, at best, be speculative, unenforceable and thus impractical. As a consequence, therefore, no new measures relating thereto will be postulated. In respect of area (vi), the costs of external legal counsel, given (a) that the funding of external counsel is currently under discussion within the current DSU review process, and (b) the weight of academic opinion which supports the premise that the creation and subsequent operation of the ACWL had largely mitigated many of the negative effects of this barrier[2177], suggests that it would be largely meaningless at this juncture to discuss alternative solutions. Similarly, the issues surrounding area (vii) enforcement of a favourable ruling is a matter currently being discussed within the current DSU review process, and as such, the formulation of any alternative solution should be held in abeyance pending the outcome of said review. Finally, in relation to area (viii) representation in Geneva, linguistic and communication difficulties these arguments were explored in depth in Chapter 2, where it was shown that by and large, these difficulties have largely been resolved or otherwise can be ameliorated,[2178] therefore, again, no new solutions will be discussed herein.

[2176] Van den Bossche and Gathii (n 60) 28; Guzman and Beth A. Simmons (n 503) 592; Taslim, M.A., 'How the DSU Worked for Bangladesh: The First Least Developed Country to Bring a WTO Claim' in, Shaffer and Meléndez-Ortiz (n 555) 244; Davis and Bermeo (n 540) 1037.
[2177] Bohanes and Garza (n 463) 71; Bown and McCulloch (n 579) 36; Elsig and Stucki (n 53) 297; Mosoti (n 52) 79; The ACWL provide legal capacity, governments need to engage with the ACWL which is not always the case see, Busch, Reinhardt and Shaffer (n 71) 574.
[2178] Apecu (n 449) 6–40; 'WTO | Development - Geneva Week' (n 625); For communication difficulties, the picture here is mixed, see, ibid; Apecu (n 449) 29; For discourse showing that

5.8 Scoping the proposed new measures – areas where action is required

In relation to the remaining barriers impeding LDC engagement with the DSU, it is plausible to suggest that within the new SDT framework outlined above, SDT measures could be introduced, which would be of assistance to the LDCs in overcoming the remaining difficulties they face. Accordingly, therefore, the next section will outline and discuss alternative proposals which could be introduced in respect of areas (ii) DSU complexity and the LDCs' lack of endogenous legal resources; (iii) the LDCs' inability to recognise a violation of WTO law and (iv) the LDCs inability to acquire and assimilate evidence to support a dispute claim. These alternative SDT measures would, either individually or collectively, enhance the capabilities of LDCs to engage, either directly or indirectly, with the DSU while satisfying the three distinct criteria tests as set out in the current WTO reform proposals narrated above.

5.9 Proposal 1 - DSU complexity and the LDCs lack of legal resource

As demonstrated, the LDCs' lack of specialist "in-house" legal expertise within the trade arena impedes their ability to engage with the DSU.[2179]

communications issues are not solely limited to LDCs see, Busch, Reinhardt and Shaffer (n 71) 573; Ewing-Chow, Goh and Patil (n 628) 679.

[2179] Guzman and Beth A. Simmons (n 503) 558–559; Kongolo (n 489) 261; Bohanes and Garza (n 463) 79; Olson (n 507) 123; Nottage (n 506) 11; Abbott (n 71) 12–13; Alavi (n 59) 32.

The provision of both legal assistance[2180] and legal training[2181] is provided for under both Articles 27.2 and 27.3 of the DSU.[2182] Moreover, both UNCTAD[2183] and the ACWL[2184] provide legal training courses[2185] and also offer short traineeships for LDC government lawyers.[2186] Collectively, as these have been criticised as inadequate,[2187] it is argued that a more comprehensive and longer-term approach to resolving this issue should be adopted.

While the simplistic solution might simply be to call for more intensive/longer-term training programmes, continuing the policy on a more of the same basis would not necessarily provide the desired outcomes, particularly where the legal training is given to officials as an adjunct to their primary governmental roles and duties, and who may not even be legally qualified.[2188] A given LDC may, for example, have insufficient financial resources to sustain even a small legal team whose primary task is to advise on trade-related legal matters,[2189] thus potentially denying them the opportunity to initiate a dispute. Bahri[2190] notes that "…the DSU participation benefits come at a cost which may not be equally affordable by all WTO Members"[2191] Moreover, it should be

[2180] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) 372.
[2181] ibid.
[2182] ibid.
[2183] Shaffer (n 59) 183.
[2184] ibid.
[2185] ibid.
[2186] *ACWL Training Courses* (n 496); Abbott (n 71) 12.
[2187] Kessie and Addo (n 468) 3.
[2188] Mosoti (n 52) 279; Kessie and Addo (n 468) 4.
[2189] Kessie and Addo (n 468) 4; Kongolo (n 489) 260.
[2190] Bahri (n 912).
[2191] ibid 643.

recalled that LDCs have a marked deficit in 'human capital' and overall, their administrative structures are at best constrained.[2192]

The first proposal, designed to resolve the foregoing issues, is, SDT-driven and envisages the provisioning and resourcing of a dedicated legal team within each LDC that does not have an extant legal team in place.[2193] WTO donor members would be called upon to directly fund this. Second, each team would be provided with long-term training centred around the operation and functioning of the DSU and trade-related WTO compliance. This would be supplemented by internships where team members would be embedded within WTO member donor countries (ideally those who are more frequent users of the DSU) which would provide the interns the opportunity to apply their theoretical knowledge in practice.

This proposal would meet the first of the new criteria as they relate to and address implementation capacity issues[2194] which LDCs face in engaging with DSU. In relation to the second criteria, the clear involvement of donor members is informed by the TFA methodology underpinning SDT provisions; therefore, the TFA 'blueprint' has been utilised.[2195] Finally, in relation to the third criteria, as this proposal does not create any "…open-ended block exemptions,"[2196] this criterion is therefore satisfied.

[2192] Bohanes and Garza (n 463) 71.

[2193] The rationale underpinning this is to satisfy the criteria noted above whereby the provision of SDT should be needs based.

[2194] Lamp (n 2140) 768.

[2195] 'General Council, Strengthening and Modernizing the WTO: Discussion Paper, Communication from Canada' (n 117) 5–6; Government of Canada (n 82).

[2196] European Commission (n 82) s II b Special and Differential Treatment (SDT) in future agreements.

The costs involved in creating such a vast legal infrastructure could be regarded as not only prohibitively expensive but also lead to the creation of capacity which may be significantly underutilised, a sentiment echoed by Van den Bossche and Gathii[2197] and Bohanes and Garza.[2198] However, all these factors could provide the LDCs with significant additional leverage in their pursuit of the creation of a dispute settlement fund,[2199] as discussed in Chapter 4.

5.10 Proposal 2 - The LDCs' inability to recognise a violation of WTO law

The ability to recognise that an infraction of WTO law has taken place is a pre-requisite to the initiation of a dispute, and therefore if the LDCs are to gain the maximum benefit from the DSU, then they would need to have in place the resources and staff in place to monitor international trade practices,[2200] particularly in those areas which directly affect their trade. Furthermore, the LDCs would also require to have in place "…the domestic institutions necessary to participate in international negotiations…"[2201] both in the lead-up to the initiation of a dispute and throughout the consultation phase of the DSU settlement process.[2202] The provision of

[2197] Van den Bossche and Gathii (n 60) 49.
[2198] Bohanes and Garza (n 463) 71.
[2199] 'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Kenya' (n 1348) 5.
[2200] Marc L Busch and Eric Reinhardt, 'The WTO Dispute Settlement Mechanism and Developing Countries' (Swedish International Development Cooperation Agency 2004) Art. no.: SIDA3600en 3 <https://www.sida.se/en/publications/the-wto-dispute-settlement>; Bahri (n 912) 643.
[2201] Busch and Reinhardt (n 2200) 3.
[2202] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) art 4 They may also be required to negotiate any mutually agreed solution to a dispute that may be proposed.

such resources comes at a cost that, again, many LDCs may be unable to afford.[2203] It is worth remembering that developing countries often lack "…the necessary dedicated trade negotiation bureaucracy at home…,"[2204] and the same applies equally to LDCs.[2205]

Against this backdrop, the second proposal represents a very simple solution that largely mirrors the first SDT proposal in that within each LDC there would be created a dedicated team of civil servants funded directly by WTO donor members, who would be (a) trained to monitor international trade practices specifically focussing on those sectors directly relevant to the LDC concerned, (b) be able to engage with the private sector providing to and receiving from them information pertinent to any trade infraction and (c) schooled in the art of trade negotiations within the wider construct of the WTO, and the workings of both the WTO and the DSU focussing specifically on the negotiations surrounding consultations and mutually agreed solutions. Once again, this training could again be supplemented by donor-sponsored internships within WTO member countries, ideally with those WTO members who are more frequent users of the DSU. This model also circumvents the enforceability difficulties that have dogged SDT provisions in general.

The proposals would satisfy all three criteria as these proposals (i) relate to and address implementational capacity issues,[2206] (ii) there is clear

[2203] Bahri (n 912) 643.
[2204] Busch and Reinhardt (n 2200) 4.
[2205] Apecu (n 449) 6–7; Bernal, 'Participation of Small Developing Economies in the Governance of the Multilateral Trading System' (n 565) 10, 13; Bohanes and Garza (n 463) 79; Kessie and Addo (n 468) 4.
[2206] Lamp (n 2140) 768.

involvement of donor members, as informed by the TFA methodology regarding SDT provisions, and hence the TFA blueprint' has been utilised,[2207] and (iii) these proposals do not create any, "…open-ended block exemptions."[2208]

As with the first proposal, the key downside is that the costs involved in creating such a vast legal infrastructure could be regarded as not only prohibitively expensive but also may be significantly underutilised.

5.11 Proposal 3 - LDCs' inability to acquire and assimilate evidence

The issue here is that LDCs, due to structural endogenous institutional weaknesses, are unable to acquire, collate, interpret, and present evidence to fully support a dispute claim. While this capacity could be created using the same methodology as outlined in the two preceding proposals, the scale, scope, and extent of the evidential requirements are largely case-specific. Moreover, the range, for example, of scientific skills that could be required for a given set of hypothetical cases cannot be easily quantified. Therefore, if one was to use either of the foregoing proposals as a template, the costs involved could be prohibitively high. This third proposal circumvents many of these issues by advocating those functions of acquiring, collating, interpreting and presenting the requisite evidence to fully support a dispute claim should be undertaken by

[2207] 'General Council, Strengthening and Modernizing the WTO: Discussion Paper, Communication from Canada' (n 117) 5–6; Government of Canada (n 82).
[2208] European Commission (n 82) s II.b Special and Differential Treatment (SDT) in future agreements.

specialist third parties, with the WTO donors underwriting the costs of the provision of direct support to LDCs on a case-by-case basis. These specialists could be drawn either from organisations such as the World Bank, UNCTAD or other specialist scientific bodies or associations. Alternatively, the experts could be drawn from the ranks of specialists currently working within the governments of WTO members.

In terms of enabling this proposal, rather than creating a new SDT provision, this proposal could be enabled simply by broadening the definition of the scope of Article 27 of the DSU[2209]. Firstly it should be noted that Article 27.1 of the DSU[2210] tasks the WTO Secretariat to firstly assist panels on legal and procedural matters and secondly to provide secretarial and technical support.[2211] Bown argues that while the provision of technical support to DSU panels and arbitrations is left to the WTO Secretariat, in relation to the second obligation as aforesaid, there has been "...little previous analysis of Secretariat provision of technical *economic* support."[2212] Thomas, while suggesting that Bown's interpretation may be too broad,[2213] still opines that the WTO Secretariat may be a potential source of economic information and advice to the parties.[2214] Secondly, Article 27.2 of the DSU states that the WTO Secretariat should assist WTO members if requested by them so to do.[2215]

[2209] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) 372.
[2210] ibid.
[2211] ibid.
[2212] Bown (n 528) 392.
[2213] Thomas (n 519) 317.
[2214] ibid.
[2215] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) art 27.2.

If this proposal were to be included as part of the definition of the "…provision of technical *economic* support"[2216] within Article 27.1[2217] as aforesaid, then LDCs could request the WTO Secretariat to enable this proposal under Article 27.2 of the DSU, which states that the WTO Secretariat should assist WTO member if requested by them so to do.[2218] In any event, if Article 27 could not be used, the proposal *per se* satisfies the three criteria as it (i) relates to and address implementational capacity issues,[2219] (ii) donor members' involvement is central to the proposal; thus, the TFA 'blueprint' has been utilised,[2220] and (iii) no, "…open-ended block exemptions,"[2221] are created by this proposal.

5.12 Proposal 4 - The Creation of an ACWL-esque resource centre body

While the above proposals strongly chime with the terms of the 2015 Nairobi Declaration, where Ministers reiterated "… the importance of targeted and sustainable financial, technical, and capacity building assistance programmes to support the developing country Members, in particular LDCs, to implement their agreements…,"[2222] they also do not fall

[2216] Bown (n 528) 392.
[2217] 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' (n 9) art 27.2.
[2218] ibid.
[2219] Lamp (n 2140) 768.
[2220] 'General Council, Strengthening and Modernizing the WTO: Discussion Paper, Communication from Canada' (n 117) 5–6; Government of Canada (n 82).
[2221] European Commission (n 82) s II.b Special and Differential Treatment (SDT) in future agreements.
[2222] 'Ministerial Conference Tenth Session Nairobi, 15-18 December 2015, Nairobi Ministerial Declaration, Adopted on 19 December 2015' WT/MIN (15)/DEC 21 December 2015 3.

foul of the proposed SDT criteria under the current proposals regarding new SDT commitments. However, as discussed, these proposals would require significant long-term funding costs, which donors would be asked to meet, the justification of which could be problematic. Moreover, they would create a mini DSU-related bureaucracy within each LDC, which could potentially be significantly under-utilized. This could be a source of frisson domestically for would-be donor governments and prove difficult to justify politically to their respective electorates.

Against this backdrop, the fourth proposal offers a more elegant and cost-effective through the creation of a new organisation akin to ACWL, which would be funded in the same way as the ACWL[2223] though its functionality would be different. This body would be staffed by personnel who would have the necessary legal, economic, and scientific skills to assist countries in their initial determination as to whether a violation of trade rights had occurred as also paralegal skills in terms of the preparation of documents, collation of evidence and so forth which would allow LDCs to engage with either external counsel or the ACWL. Similarly, this new body would have staff skilled in negotiation techniques as also others with the requisite economic and econometric skills necessary to surveil international trade together with a core group of staff possessing a sound trade-related

[2223] The bulk of the ACWL funding stems from an Endowment Fund that was created from the contributions of both the developed and developing country Members. The contributions of developing countries vary with each country's share of world trade and income per capita. LDCs are not required to contribute to the Endowment Fund in order to be entitled to use the ACWL. Each of the ACWL developed country members – Australia, Canada, Denmark, Finland, Ireland, Italy, the Netherlands, Norway, Sweden, Switzerland and the United Kingdom – has contributed at least US$ 1 million to the Endowment Fund or to the annual budgets of the ACWL or to both, see 'Financial Matters' in 'The ACWL Organisational Structure' (*ACWL*, 2019) <http://www.acwl.ch/organisational-structure/> accessed 20 January 2019.

scientific background who could be used to accumulate and assimilate basic scientific information. Just as with the ACWL, clients who have subscribed to the body could access the services provided on a pay-as-you-use basis, with preferential rates being offered to the LDCs. In respect of the provision of paralegal service, ideally, the activities of this body should be complementary to the advocacy role of the ACWL. In terms of trade surveillance, the resource centre could provide LDCs with bulletins and updates in terms of their respective trade interests,[2224] all of which would go some way to addressing the capacity issues faced by LDCs collectively as a whole.

However, creating and maintaining such an organisation would require long-term funding. If, as suggested above, an ACWL-type funding model (which is largely derived from a CHF 25.5 m, (USD 25.2 m) endowment fund)[2225] was to be used, then clearly donors would be required to contribute to the said trust fund and the key issue is whether donors would come forward to support a new organisation whose primary role was to render technical assistance to LDCs. In terms of the availability of funding, it is notable that the Doha Development Agenda Trust Fund, which provides "…support to a wide range of trade-related technical assistance activities,"[2226] has attracted donations of over CHF 32.75

[2224] With the closure of the International Centre for Trade and Sustainable Development in 2018, the need for this type of surveillance is even more acute, see 'Announcement: Closure of ICTSD | International Centre for Trade and Sustainable Development' <(ICTSD closed), Copy on file with author> accessed 16 January 2019.
[2225] ACWL, 'Report on the Endowment Fund Investment Portfolio as of 31 October 2018' ACWL/GA/W/2018/5, 12 November 2018 <http://www.acwl.ch/wpfb-file/acwl-ga-w-2018-5-report-of-the-endowment-fund-as-of-31-october-2018-pdf/>.
[2226] 'World Trade Organisation, Trade Related Technical Assistance, Financing of Trade Related Technical Assistance'

million[2227] (USD 32.5 million) since its launch in 2014,[2228] from some 16 countries.[2229] Additionally, Norway in 2015-16 donated some "…NOK 58.5 million (CHF 6.8 million) to trade-related programmes for developing countries, in particular least-developed countries (LDCs)…."[2230] Against this backdrop, it would appear that funding such an organisation would be possible.

5.13 Conclusion

This chapter is informed by the previous three chapters, which narrated how all attempts by the LDCs over more than a quarter of a century to facilitate their engagement with the DSU through either changing the terms thereof or the operationalisation of extant SDT measures had been frustrated. The chapter noted that a consensual position could not be reached by the WTO members on these matters due to stubborn resistance from members who appeared to be implacably opposed to SDT, hence their reticence in terms of operationalising both the extant SDT provisions within the covered agreements and also their failure to agree to any new SDT provisions which would enable the LDCs to engage with the DSU. The chapter argued that if an objective of the WTO was to facilitate a multilateral, development-led, inclusive, and equitable global

<https://www.wto.org/english/tratop_e/devel_e/teccop_e/financing_trta_e.htm> accessed 10 May 2019.
[2227] ibid.
[2228] ibid.
[2229] ibid.
[2230] WTO, News Bytes, 'Norway Donates NOK 58.5M to Boost Trading Capacity of Developing Countries and LDCs' (*WTO Trade Facilitation, News Bytes*, 2015) <https://www.wto.org/english/news_e/pres15_e/pr758_e.htm>.

trading system, then it was imperative that issues surrounding SDT which currently divides the WTO membership need to be resolved.

This chapter then reviewed the nuanced yet perceptible changes as to the scope, nature, and application of SDT, which appear to be garnering some support amongst the WTO membership. In essence, this approach calls for a needs-based application of country-specific SDT measures similar to those found in the TFA.[2231] Whether this new approach could prove to be the key to securing the requisite political will, creativity and engagement amongst the WTO members to operationalise existing SDT provisions and also allow the implementation of new provisions is yet to be seen. The chapter explained the rationale behind this new approach to SDT and explored how the proponents envisaged it working in practice.

Using this new approach as a template, the chapter explored a range of alternative SDT measures designed specifically to foster LDC engagement with the DSU. In discussing each alternative measure, demonstrated how each measure would satisfy the requirements of this new approach.

The proposals each contained a series of specific SDT measures formulated to address issues in terms of (a) the complexity of the DSU and the LDCs' lack of endogenous legal resources; (b) the LDCs' inability to recognise a violation of WTO law (c) the LDCs' inability to acquire and assimilate evidence to support a dispute claim.

[2231] *Annex to the Protocol amending the Marrakesh Agreement establishing the World Trade Organisation, Agreement on Trade Facilitation* (n 83).

The first proposal sought to address the issues surrounding the complexity of the DSU and the lack of endogenous legal resources through the creation, resourcing and provisioning of a dedicated legal team within each LDC that lacked a dedicated specialist legal resource.[2232] This proposal satisfies all three of the new SDT creation criteria set out above as it (i) relates to and addresses implementation capacity issues,[2233] (ii) t is informed by the TFA methodology underpinning SDT provisions,[2234] and (iii) the proposal does not create any, "…open-ended block exemptions."[2235]

The second proposal sought to address the issues surrounding the LDCs' inability to recognise an infraction of WTO law. The proposal broadly uses the same formula as that of the first proposal in that within each LDC, where none exists, a dedicated team funded directly by WTO donor members would be (a) trained to monitor international trade practices pertinent to the trade of their respective LDC, (b) able to engage with the private sector providing to and receiving from them information pertinent to any trade infraction and (c) trained in trade negotiations within the wider construct of the WTO, and the workings of both the WTO and the DSU focussing specifically in the negotiations surrounding consultations

[2232] The rationale underpinning this is to satisfy the criteria noted above whereby the provision of SDT should be needs based.
[2233] Lamp (n 2140) 768.
[2234] 'General Council, Strengthening and Modernizing the WTO: Discussion Paper, Communication from Canada' (n 117) 5–6; Government of Canada (n 82).
[2235] European Commission (n 82) s II b Special and Differential Treatment (SDT) in future agreements.

and mutually agreed solution. The proposal again satisfies the three SDT criteria set out above.

The third proposal addresses the difficulties LDCs face in acquiring, collating, interpreting and presenting evidence to fully support a trade dispute caused by their inherent structural and institutional weaknesses. The drawback with this solution is that the scale, scope, and extent of the evidential requirements are case-specific. Hence the requisite/ skills/personnel a given LDC would require cannot be easily quantified, leading potentially to prohibitively high costs.

The third proposal sought to resolve this by outsourcing these functions to specialist third parties, with the WTO donors underwriting the costs of the provision of direct support to LDCs on a case-by-case basis.

This chapter acknowledged that the three proposals discussed above all required significant long-term funding costs, the justification of which could be problematic.

The final proposal took account of these legitimate concerns and advocated the establishment of a new functionally different 'ACWL-esque' organisation funded using the ACWL business model.[2236] The proposal, by way of examples, illustrated that funding for such a body was not an impossibility. This body would be staffed by personnel with the skills to

[2236] The bulk of the ACWL funding stems from an Endowment Fund that was created from the contributions of both the developed and developing country Members. The contributions of developing countries vary with each country's share of world trade and income per capita. LDCs are not required to contribute to the Endowment Fund in order to be entitled to use the ACWL. Each of the ACWL developed country members – Australia, Canada, Denmark, Finland, Ireland, Italy, the Netherlands, Norway, Sweden, Switzerland and the United Kingdom – has contributed at least US$ 1 million to the Endowment Fund or to the annual budgets of the ACWL or to both, see 'Financial Matters' in 'The ACWL Organisational Structure' (n 2223).

determine whether a violation of trade rights may have occurred, and have the skills required to prepare all necessary documentation collation of evidence and so forth, which would allow LDCs to engage with either external counsel or the ACWL. Similarly, this new body would have staff skilled in negotiation techniques as also others with the requisite economic, econometric, and scientific skills necessary to surveil international trade, aaccumulate and assimilate basic scientific information. Such a resource centre would represent a more cost-effective solution to the bespoke solutions outlined above and would be capable of providing the LDCs with the capacity they require to be able to engage with the DSU. As this proposal did not involve the creation of an SDT obligation, there is no need to satisfy the three criteria set out above In summary, therefore, this chapter outlined and discussed various innovative and original proposals which are informed by this research. If implemented, they would undoubtedly positively impact the ability LDCs to engage more fully at a technical level. While they do not collectively resolve the deeper structural problems which impede LDC engagement, the chapter explored how by adopting a more proactive position regarding engagement with the DSU, the LDCs could provide leverage in their ongoing quest for changes to the DSU.

Chapter 6

Conclusion

6.1 Purpose of the research

This thesis explores the limited interaction and engagement of the LDCs with the DSU. The purpose of the study is to seek answers to two key questions (i) why and for what reasons have LDC members of the WTO chosen to eschew the DSU as a mechanism to redress violations of their trade rights, and (ii) does the DSU have the functionality to enable LDC members to effectively use it to resolve trade disputes and, if not, what enhancements can be made thereto to facilitate the same.

6.2 Hypothesis

There is a rich body of academic research and discourse which endeavours to explain and address the problem of the lack of LDC engagement with the DSU. In general terms, much of this discourse was premised on a deficit approach, where the lack of LDC engagement was the result of the absence or insufficiency of one or more engagement-enabling factors. Despite the weight of academic research, there appeared to be no clear consensus as to the relevance, significance and, in some cases, the validity of the various factors which had been identified. The absence of a consensually agreed position in respect of these causal factors has, in turn, resulted in the absence of a convergent position as to how to resolve the lack of LDC engagement with the DSU

The absence of an agreed position amongst writers as to the causative factors and the divergent approaches they proposed to deal with the lack of LDC engagement with the DSU led the writer to hypothesise that perhaps other factors explaining the lack of LDC engagement were at play. If indeed other factors were in play, this could suggest that the existing academic discourse was in some way incomplete. Specifically, there appeared to be gaps in the existing literature, most noticeably, (i) the absence of a detailed review of the LDCs proposals tabled as part of the Uruguay DSU negotiations, (ii) an incomplete examination of LDC participation, and the proposals submitted by them during, the ongoing DSU review negotiations and (iii) a marked lack of focussed discourse surrounding the growing influence of, and the potential problems posed by, the over-reliance of the LDCs on SDT which underpinned their proposals and negotiation strategy.

By undertaking a comprehensive analysis, assessment, and evaluation of the three areas outlined above, the writer is of the view that the new information contained within this work, when added to the existing body of academic work, results in a clearer and more coherent picture of why LDCs do not engage with the DSU. Armed with this deeper understanding, it is, therefore, possible to formulate a consensually agreed series of measures which would, if implemented, represent a major step forward in addressing this most recalcitrant of problems.

6.3. The approach adopted

Before the commencement of this work, the writer had initially hoped to interview LDC staff whose remit extended to trade and the DSU review negotiations. Cross-referencing the output from these interviews with the extant academic discourse may either have elicited the presence of new factors explaining the lack of LDC engagement or validated the currency of our current understanding of these factors. Following a series of exploratory meetings in Geneva with an LDC ambassador, a senior member of the LDC section of the WTO Secretariat and the ACWL, this approach was rejected, principally due to the absence of Geneva-based LDC interviewees [2237] whose briefs covered the DSU and trade disputes. This outcome is mirrored in similar comments made by various other writers, which were discussed in Chapters 2 at 2.4 (viii) and 3 at 3.6.8. Although conducting face-to-face interviews was not possible, the voices of the LDC negotiators, Ambassadors and Ministers could be heard within the archived primary source documents published by both the GATT and the WTO. Within these archives, the material of particular interest to this thesis was (i) material relating to the multilateral trade negotiations which formed part of the Uruguay Round of negotiations which formulated the DSU, (ii) the submissions of the LDCs and others to the Disputes Settlement Body, and in particular the Special Session thereof relating to the review of the DSU and (iii) the submissions by various countries regarding a more root and branch approach to the operation of the DSU

[2237] Undertaking in-country interviews in each individual LDC would, aside from being time consuming, also have been prohibitively expensive.

as a whole and specifically the application of SDT thereto. Much of this material has not been the subject of academic discourse. The approach taken by this thesis is to forensically examine this primary source material. The output of this has not only added to the current body of academic knowledge through the revelation of LDCs' demands for a new bespoke LDC-only dispute resolution system but also highlighted the power and influence of SDT as a further factor contributing to the LDCs' limited engagement with the DSU. Moreover, this approach complements and builds upon the existing academic endeavours in this field of study by first fully reviewing both the LDCs Uruguay and DSU review proposals. Secondly, the thesis updates inform and builds upon the progress of the DSU review negotiations by charting the progress thereof from 2012 to date, which again has thus far not been the subject of academic discourse. A further approach adopted by this thesis is to map and evaluate the effectiveness of the LDCs' proposals submitted during the Uruguay Round of dispute settlement negotiations with those submitted by the LDCs as part of the current DSU review negotiations. This strikingly reveals not only a remarkable consistency in terms of the changes they are seeking to be made to the DSU to facilitate their engagement therewith. It also illuminates the influence, bordering on blind faith, that SDT has had in terms of underpinning the LDCs' approach to the DSU negotiations and the abject failure thereof in terms of deliverables achieved.

6.4 Importance of the study

This work is important for several reasons. Firstly, LDCs are amongst the poorest low-income countries with acute structural weaknesses. If they are to prosper economically, then strategically, they need to be able to trade internationally. The security and predictability of international trade are in part achieved through the operation of the DSU, a rules-based method of resolving disputes where the disputing parties, regardless of economic size or military might, have equal rights and equal opportunities. It is therefore important that the LDCs can raise and resolve trade-related complaints if they are to fully participate in global trade, which, as noted above, is pivotal to their current and future economic development and growth. What is clear is that while the DSU has been used to resolve hundreds of complaints, only one of these complaints was filed by an LDC.[2238] This lack of participation and engagement by LDCs with the DSU undermines the legitimacy of the WTO, and in a sense, it taints the organisation as a whole and challenges the notion that every WTO member has both equal rights and opportunities to avail themselves of the DSU mechanism. This work, seeks not only to achieve a better and deeper understanding of the drivers which inhibit wider LDC engagement but also solutions which would reduce or delimit the effects of these drivers, thus offering the prospect of LDCs being able to better protect and enforce their trade rights through enhanced usage of the DSU in the future. Secondly, from

[2238] *India-Antidumping Measure on Batteries from Bangladesh, Request for Consultations* (n 510).

an academic perspective at the macro level, this work is important because it focuses on the creation, operation, and ongoing review of the DSU, specifically from the perspective of the LDCs. This differentiates it from the works of most academic writers who have considered these issues from the standpoint of developing as opposed to least developed countries. The existing body of academic work, insofar as it relates to the LDCs, is, at best, piecemeal and fragmented. The scope and depth of this work help not only to consolidate our academic understanding of this field of study, moreover, it also substantially adds to that academic understanding. This work is important because it builds upon and expands our understanding of the issues and barriers which inhibit LDC engagement with the DSU. Furthermore, the thesis presents evidence that, for first time, casts light on the existence of new, hitherto unknown factors which degrade the ability of LDCs to engage with the DSU. Significantly, it also reveals the fact that the LDCs' understood from the outset that they could not engage with the proposed DSU and narrates how their various attempts to remediate this were shunned. Similarly, this thesis highlights the over-reliance the LDCs had placed upon SDT-driven proposals. The failure of the LDCs to secure these proposals and the wider failure of the implementation of SDT provisions represent new factors which help to explain the inability of LDCs to fully engage with the DSU.

The importance of this work also stems from the fact that, in relation to the DSU review process, it had been assumed by many scholars, including the writer, that as of 2012, the DSU review process had either stalled or

was otherwise moribund. This was due, in the main to the absence of any WTO meeting minutes or reports and so forth, which in turn was reflected in the dearth of academic output from observers interested in this area of study. This thesis revealed that the generally accepted view of the DSU review process being somewhat in a state of stasis was, in fact, a misconception and the thesis adds to the general body of academic knowledge by narrating the progress of this process from 2012 to date. Finally, as this work has deepened and expanded our understanding of the reasons why LDCs do not fully engage with the DSU, this, in turn, has allowed the writer to formulate a series of proposals which could resolve or otherwise ameliorate some of the difficulties faced by the LDCs offering the prospect of their widening engagement with the DSU.

6.5 Key Findings

Chapter 2 showed how SDT, which had been conceived to deal with economic issues arising from trade negotiations, had progressively been expanded by the LDCs into a broader policy tool adopted and deployed by them to address an ever-expanding set of non-economic issues. Indeed, it was found that an SDT-driven approach dominated and underpinned the LDC's negotiation strategy[2239] during both the Uruguay Round DSU negotiations and the subsequent DSU review negotiations initiated by the WTO. Moreover, Chapter 2 probed the inherent weaknesses of SDT in

[2239] The LDCs used a sub-committee which they had established as part of the Uruguay negotiating framework as a platform not only to formulate and share SDT policy objectives, draft and agree SDT-driven proposal but also use as a pressure group to advance their SDT objectives within other Uruguay Round Negotiating Groups

terms of the lack of operationalisation and enforceability of SDT provisions. Clear evidence was found to support the view that not only had the LDCs failed to properly consider these issues in the first instance, but there was also, within the wider membership of the WTO, a fundamental lack of consensus as to the scope and meaning of SDT. Moreover, the evidence highlighted a 'push-back' against the expansion of SDT by the developed countries during the Uruguay Round and the lack of a bloc-wide SDT negotiation umbrella on the part of the developing countries. Although there appeared to be a consensus that LDCs should be the recipients of SDT, the twin issues of non-operationalisation and enforcement of SDT measures remained, with it being found that many of the new SDT provisions were, arguably hortatory in nature.

A key finding discussed in Chapter 2 was that the LDCs viewed the proposed DSU as being overly complex, expensive to access and one with which they would face difficulties engaging with. To address this, they submitted a radical proposal which espoused the creation of a separate, distinct, and bespoke LDC-only dispute settlement system, which would sit outside of the proposed new DSU. The LDCs justified the need for the SDT in this instance because, without it, they would be left with an unworkable dispute settlement mechanism. The LDCs not only failed in this instance to secure the application of SDT, but this key proposal was side-lined and, notwithstanding numerous LDC requests for the discussion of the proposal, was omitted as a discussion item from all subsequent meetings of the Group Negotiating Dispute settlement. As a result, the

LDCs were left with a Dispute Resolution System that, arguably, they did not want and one which they could not easily interact with. This key finding, in part, explains why the LDCs have largely eschewed using the DSU as a means of resolving their trade disputes.

Having explored the failure of the opt-out proposal to gain traction, an analysis was undertaken of the remaining SDT-driven LDC proposals tabled on 23rd November 1988 [2240] and 14th November 1989.[2241] The purpose of this analysis was to evaluate the extent to which these proposals, or the sentiment of thereof, had been incorporated either within the DSU or had been given effect elsewhere within the various WTO agreements. This analysis examined not only the DSU but also the various covered agreements in turn and any pertinent case law relating thereto. The analysis found that notwithstanding the use of often-sympathetically sounding terminology (with the possible exception of the provision of technical assistance) none of the core aims of the LDC proposals had been addressed. This again highlighted the fact that the SDT-driven aspirations of the LDCs were not only misplaced but also ineffectual in terms of enhancing their ability to engage with the DSU, which in itself represents a new factor helping to explain the failure of the LDCs to meaningfully engage with the DSU.

[2240] *Group of Negotiations on Goods (GATT), Communication from Bangladesh, Uruguay Round and the Least-Developed Countries (LLDCs), Revision, MTN.GNG/W/14/Rev.l*.
[2241] *Negotiating Group on Dispute Settlement, Proposals on behalf of the Least-Developed Countries, Communication from Bangladesh* (n 425).

As outlined above, the existing academic discourse sought to explain the lack of LDC engagement with the DSU by reference to the presence of issues in one or more of the eight thematic areas. These areas are (i) economic, where the limited volume of trade explains LDC non-participation, (ii) the complexity of the DSU and a lack of legal resources, (iii) the inability of LDCs to recognise when a violation of WTO law has occurred, (iv) structural institutional weaknesses which prevent LDCs from acquiring and assimilating the requisite evidence required to support a dispute claim, (v) a fear of reprisals (vi) the high costs of engaging external legal counsel (vii) enforcement of a favourable ruling and (viii) lack of representation / linguistic difficulties at the WTO in Geneva.

In respect of areas (i) – (iv) and (vii), the findings of this study align with and are in accord with the findings of previous writers. However, in relation to areas (v), (vi), and (viii), there is a divergence of views. In Chapter 2, it was found that there was no clear linkage between low trade volumes of LDC and the instances of the violation of trade rights. Similarly, there was no clear evidence or proof substantiating or otherwise supporting the arguments that LDCs may be disincentivised from initiating a dispute due to the fear of reprisals from a more powerful adversary. In relation to the high costs of engaging legal counsel, the weight of academic opinion supported the premise that the creation and subsequent operation of the ACWL have largely mitigated many of the negative effects of this barrier. That said, Chapter 2 also found clear evidence that the LDCs regarded the funding of external counsel as a live

and ongoing issue and supported proposals tabled as part of the DSU review process, the discussion of which is still ongoing. In relation to representation and communications issues, these were found to have been largely resolved and should, therefore, be discounted.

Further evidence supporting the hypothesis that other unknown factors explaining the lack of LDC engagement with the DSU emerged in Chapter 3. The findings in Chapter 3 indicated the increasingly powerful influence of a bias amongst the LDCs against engagement with the DSU, which, in turn, was fuelled by the failure of the LDCs' policy of pursuing an SDT-driven strategy. This finding stems from an evaluation of the LDCs' limited usage of the DSU by LDCs to date. The review highlighted how the decision by Bangladesh to initiate a dispute with India was taken against a backdrop of both political reservations[2242] and internal bureaucratic resistance.[2243] This inaction on the part of Bangladesh aligned with the contention that LDCs in general, and in this instance Bangladesh in particular, were exhibiting a bias against engagement with the DSU.

More evidence supporting the presence of an increasingly powerful bias amongst the LDCs against engaging with the DSU stemmed from an analysis of LDC usage of the DSU through the participation by LDCs as 3rd parties in disputes. As was shown in Chapter 3, even where an infringement of WTO rules resulted in severe economic hardship in

[2242] Mohammed Ali Taslim, M.A., 'How the DSU Worked for Bangladesh: The First Least Developed Country to Bring a WTO Claim' Shaffer and Meléndez-Ortiz (n 555) 243.
[2243] Mohammed Ali Taslim, M.A., 'How the DSU Worked for Bangladesh: The First Least Developed Country to Bring a WTO Claim' ibid 246.

multiple countries, LDCs still pointedly refused to initiate a WTO complaint. Additionally, where LDCs participated as a 3rd party in a dispute, they did so either passively or as was shown in the *US –Upland Cotton*[2244] as an adjunct to and a means of providing leverage to settling the dispute without recourse to the DSU.

Proof of the presence and the growing influence of bias against the DSU at the highest levels of decision-making was also found in Chapter 3. It was clearly shown in relation to the *Upland-Cotton* dispute that this bias had permeated to the upper echelons of governmental decision-making where African Foreign Ministers rejected DSU engagement, preferring to settle the dispute by negotiation. This clear preference to negotiate aligns perfectly with the wording and sentiment of the LDC opt-out proposal. In addition, in Chapter 3, clear evidence was found which supports the view that, at least up to 2002, the bias against engaging with the DSU was widely held amongst the LDC group as a collective who openly stated that "... they had avoided resolving disputes through the DSU ... due to structural and other difficulties caused by the system...."[2245]

Another key finding of this work is to be found in Chapter 4. Here it was shown that notwithstanding the complete failure of their Uruguay Round proposals to gain traction, the LDCs did not concede that their original aims were unattainable. Throughout the entire DSU review process, from

[2244] *United States - Subsidies on Upland Cotton - Request for Consultations by Brazil, WT/DS267/1 G/L/571 G/SCM/D49/1 G/AG/GEN/54, 3 October 2002* (n 992).
[2245] *Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposal by the LDC Group, TN/DS/W/17, 9 October 2002* (n 1094).

1995 to date, they have remained steadfastly entrenched in a negotiating position premised upon the attainment of their original aims. Chapter 4 mapped the LDCs Uruguay round proposals to those later proposals submitted by them as part of the ongoing DSU review negotiation. This demonstrated the fact that the new LDC proposals mapped directly to the original objectives set by the LDCs. Of particular significance is the finding that in relation to their most far-reaching proposal, namely the creation of a bespoke dispute settlement system, while their new proposals were more nuanced, they still insisted on the mandatory use of good offices in all LDC disputes. This demonstrates not only the enduring nature of their preference for seeking to resolve disputes through negotiation but also the desire for LDC disputes to be treated differently from other disputes.

A further key finding of the analysis and mapping undertaken in Chapter 4 is the continuing determination of the LDCs to improve their ability to access and make use of the DSU. The very fact that they have continued to submit detailed proposals to the Special Session of the Dispute Settlement Body and are active participants in the deliberations of the Special Session clearly indicates that the LDCs are still seeking ways to engage with the DSU. However, this must be tempered by the fact that the modus for achieving this goal remains the application of a range of SDT-driven measures. In Chapter 4, it was found that the bulk of these SDT-driven proposals fell due to their failure to gain meaningful traction.

What is equally obvious is that these successive failures will, if anything, deepen the LDCs' bias against engagement with the DSU.

The findings in Chapter 4 reinforce the argument that a new reason explaining LDC's non-engagement with the DSU is the failure of the LDC SDT-driven strategy to deliver the special treatment required to facilitate said engagement. This, in turn, has left the LDCs with no choice other than to eschew and 'opt-out' of the DSU as a means of resolving trade disputes.

A key finding in Chapter 5 surrounds the current discussions aimed at re-imagining the application of SDT in a more refined, precise, and targeted way as opposed to its normative application as a series of "…open-ended block exemptions."[2246] Within the scope of this new version of SDT, there was a declared need for the "… particularly flexible treatment of LDCs…,"[2247] all of which could be used by the LDCs as individual states to seek the application of targeted SDT focussed on overcoming some of the barriers which prevent or impede their engagement with the DSU.

6.6 Proposed solutions and projected outcomes

The overall analysis in Chapter 4 suggests that, in terms of the DSU review process, there is little or no real evidence that any of the LDC proposals will be consensually agreed upon by the wider WTO membership and no evidence that the LDCs will relinquish their quest for SDT-driven changes to be made to the DSU. Given the foregoing, the

[2246] European Commission (n 82) Future EU proposals on rulemaking, s II Proposals for a new approach to flexibilities in the context of development objectives, (b).
[2247] ibid.

prognosis in terms of LDC engagement with the DSU is somewhat bleak, with the likely outcome being that, for the foreseeable future, LDCs will continue to eschew recourse to the DSU as a means of resolving trade issues unless there is either (i) a significant breakthrough in the negotiations or (ii) LDCs simply accept that the wider WTO membership will not support their proposed SDT-driven changes and adopt a different strategy, one which is not reliant for its success upon the application of SDT or (iii) the LDCs modify their strategy by leveraging off the success of the TFA and formulate a series of proposals with SDT provisions which are both evidence-based and demonstrably needs-driven which may in certain instances be country specific. This new strategy informed the proposals set out in Chapter 5.

The first proposal spoke to the LDCs' lack of specialist "in-house" legal expertise within the trade arena and the inadequacy of the assistance currently in place to resolve this.

The simplistic solution of expanding the current assistance programmes was rejected simply because it would not necessarily provide the desired outcomes, particularly where the legal training is given to officials as an adjunct to their primary governmental roles and duties, many of whom lacked even basic legal training. The proposed solution was to target LDCs who did not have specialist "in-house" trade-related legal expertise and establish a fully resourced dedicated legal team. WTO donor members would be called upon to directly fund this provisioning. Secondly, each team would then be provided with long-term training schemes centred

around the operation and functioning of the DSU as also trade-related WTO compliance, which would be supplemented by internships where team members would be embedded within WTO member donor countries (ideally those who are more frequent users of the DSU) which would assist the internees in translating their theoretical knowledge into practice.

The ability to recognise that an infraction of WTO law has taken place is a prerequisite to the initiation of a dispute. If the LDCs are to engage with the DSU, they would need the staff and resources to monitor international trade practices, particularly those affecting their trade. Similarly, they would also need the infrastructure and staff who could competently engage in negotiations leading up to the initiation of a dispute and through the consultation phase of the DSU. These resources come at a cost that, again, many LDCs may be unable to afford.

Once again, a proposal which, in many ways, is like the preceding solution presents a possible way forward. Where an LDC lacks these resources, there would be created a dedicated team of civil servants funded directly by WTO donor members and who would be (a) trained to monitor international trade practices specifically focussing on those sectors directly relevant to the LDC concerned, (b) be able to engage with the private sector providing to and receiving from them information pertinent to any trade infraction and (c) schooled in the art of trade negotiations within the wider construct of the WTO, and in the workings

of both the WTO and the DSU focussing specifically in the negotiations surrounding consultations and mutually agreed solution. Once again, this training could again be supplemented by donor-sponsored internships within WTO member countries, ideally with those WTO members who are more frequent users of the DSU as aforesaid. The third solution addresses the inability of the LDCs, to acquire, collate, interpret and present evidence to fully support or rebut a trade dispute. Once again, this issue is driven by the absence or dearth of resources and infrastructure. While this capacity could be created using the same methodology as outlined in the two preceding proposals, the scale, scope, and extent of the evidential requirements are largely case specific. Moreover, the range of skills that could be required for a given set of hypothetical cases cannot be easily quantified. Therefore, if one was to use either of the foregoing proposals as a template, the costs involved could be prohibitively high. To limit the costs, it is proposed that these functions be undertaken by specialist third parties. WTO donors would underwrite the costs of the provision of this direct support to LDCs on a case-by-case basis. These specialists could be drawn either from organisations such as the World Bank, UNCTAD or other specialist scientific bodies or association., Alternatively the experts could be drawn from the ranks of specialists currently working within the governments of WTO members.

If these proposals were to be implemented, they would require significant long-term funding costs, which donors would be asked to meet. Moreover, if implemented, they would possibly create a mini DSU-related

bureaucracy within each LDC, which could potentially be significantly under-utilized. This could be a source of frisson domestically for would-be donor governments and prove difficult to justify politically to their respective electorates. A solution to this might lie in the creation of a new organisation akin to the ACWL using a similar funding/charging model, though, in terms of its functionality, it would be very different. This body would operate with personnel who would have the necessary legal, economic, and scientific skills to assist countries in their initial determination as to whether a violation of trade rights had occurred as also the paralegal skills in terms of the preparation of documents, collation of evidence and so forth which would allow LDCs to engage with either external counsel or the ACWL. Similarly, this new body would have staff skilled in negotiation techniques as also others with the requisite economic and econometric skills necessary to surveil international trade together with a core group of staff possessing a sound trade-related scientific background who could be used to accumulate and assimilate basic scientific information. As was demonstrated in Chapter 5, funding such a resource was both achievable and practical. Moreover, the writer is of the view that such a resource centre would represent a more cost-effective solution to the bespoke solutions outlined above.

A key finding of this work was the growing influence amongst the LDCs of bias against engaging with the DSU. Indubitably, the presence of capacity-related difficulties, which act as roadblocks inhibiting engagement with the DSU, contribute this bias. These proposals directly

address these difficulties, and if implemented, they would make it significantly easier for the LDCs to engage with the DSU. Logically this should, in turn, begin to degrade the growing bias against using the DSU and build upon the underlying desire of the LDCs to engage with DSU, as discussed above.

6.7 Limits to the utility of this study

In essence, this study sought to understand the reasons why the LDCs did not engage with the DSU and sought solutions to remediate this. These reasons were already described as being "…multiple, complex and interrelated,"[2248] and this work has added new levels to each of these descriptors. Given the complexities involved, it was clear from the outset that it would be highly unlikely that a single 'silver bullet' solution would emerge from this research, and that has proved to be the case. Although this piece of research has now finished, the negotiations surrounding the review of the DSU are still ongoing, as are the discussions surrounding changes to SDT and how it is implemented. While the solutions proposed in this work address the capacity-related barriers impeding LDC engagement with the DSU, they do not speak to the issue of costs and enforcement. As the DSU review process nears completion, discussions on resolving these issues are at an advanced stage, with finalised texts now being in place. That said, there is no guarantee that the review proposals will be adopted. The capacity-related proposals advanced as part of this

[2248] Van den Bossche and Gathii (n 60) 21.

research have been designed specifically not only to resolve the specific capacity issues inhibiting LDC engagement with the DSU but also to satisfy the latest iterations emanating from the discussions surrounding the future scope and application of SDT. Cumulatively these limit the utility of the solutions advanced herein. In addition, this study has focussed on the LDCs as a homogenised group, while some of the proposed solutions are designed to be LDC-specific. Clearly, the relevance and effectiveness of these solutions could vary from LDC to LDC. The depth and scale of research required to evaluate this would be significant and well beyond the scope of this study.

Bibliography

(All links correct as of 22nd April 2022)

Aarnio A, *Essays on the Doctrinal Study of Law*, vol 96 Law and Philosophy Library (Law and Philosophy Library, Springer Netherlands 2011)

Abbott R, 'Are Developing Countries Deterred from Using the WTO Dispute Settlement System? Participation of Developing Countries in the DSM in the Years 1995-2005' (ECIPE Working Paper 2007) Working Paper 01/2007 <https://www.econstor.eu/handle/10419/174816> accessed 10 January 2015

Abedin Z and Tareq MA, 'Trends of Trade Disputes During the WTO Regime' (American International University-Bangladesh, Office of Research and Publications (ORP) 2008) <http://www.researchgate.net/profile/Mohammad_Tareq2/publication/4903405_Trends_of_Trade_Disputes_During_the_WTO_Regime/links/0deec53442ecd46314000000.pdf> accessed 7 July 2015

'About Us | UNDP' <http://www.undp.org/content/undp/en/home/about-us.html> accessed 12 May 2018

ACWL, 'Report on Operations 2016' <http://www.acwl.ch/download/dd/reports_ops/Final_Report_on_Operations_2016_website.pdf> accessed 30 November 2017

——, 'Report on the Endowment Fund Investment Portfolio as of 31 October 2018' ACWL/GA/W/2018/5, 12 November 2018 <http://www.acwl.ch/wpfb-file/acwl-ga-w-2018-5-report-of-the-endowment-fund-as-of-31-october-2018-pdf/>

'ACWL - Advisory Centre on WTO Law' <http://www.acwl.ch/e/index.html> accessed 29 June 2015

ACWL Training Courses (http://www.acwl.ch/training-introduction/ 2016) < https://www.acwl.ch/annual-training-course/> accessed 19 March 2016

Advisory Centre on WTO Law, (ACWL), 'The Fees Charged By the ACWL, A Note by the Management Board, ACWL/MB/W/2015/7' <https://www.acwl.ch/fees/>

'Agreement Establishing the World Trade Organization' <https://www.wto.org/english/docs_e/legal_e/04-wto.pdf> accessed 12 October 2015

'Agreement on Agriculture' <https://www.wto.org/english/docs_e/legal_e/14-ag.pdf> accessed 25 June 2017

'Agreement on Implementation of Article VI of The General Agreement on Tariffs and Trade 1994' <https://www.wto.org/english/docs_e/legal_e/19-adp.pdf> accessed 8 April 2017

'Agreement on Safeguards' <https://www.wto.org/english/docs_e/legal_e/25-safeg.pdf> accessed 18 May 2017

'Agreement on Subsidies and Countervailing Measures' <https://www.wto.org/english/docs_e/legal_e/24-scm.pdf> accessed 8 April 2017

'Agreement on Technical Barriers to Trade' (*World Trade Organisation*, 2015) <https://www.wto.org/english/docs_e/legal_e/17-tbt.pdf> accessed 14 March 2015

'Agreement on the Application of Sanitary and Phytosanitary Measures' <https://www.wto.org/english/docs_e/legal_e/15-sps.pdf>

'Agreement-Establishing-the-ASEAN-Australia-New-Zealand-Free-Trade-Area.Pdf'

Alavi A, 'African Countries and the WTO's Dispute Settlement Mechanism' (2007) 25 Development Policy Review 25

Albashar FA and Maniruzzaman AFM, 'Reforming the WTO Dispute Settlement System: A Rethink of the Third Party Right of Access to Panel and Appeal Processes from Developing Countries' Perspectives' (2010) 11 J. World Investment & Trade 311

'"All Talk and No Walk": America Ain't Back at the WTO' (*POLITICO*, 23 November 2021) <https://www.politico.eu/article/united-states-world-trade-organization-joe-biden/> accessed 17 April 2022

'Alliance Emerges on WTO Reform at Ottawa Ministerial' (*Trade - European Commission*, 2018) <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1932> accessed 14 November 2018

Alschner W, 'Amicable Settlements of WTO Disputes: Bilateral Solutions in a Multilateral System' [2014] World Trade Review 1

Altaer A, 'The WTO and Developing Countries: The Missing Link of International Distributive Justice' (2010)

Aluisio de Lima-Campos, 'Causes and Consequences of Low Prices in the Cotton Sector', *Economic Advisor, Embassy of Brazil, Delegate of Brazil to the ICAC, speech at Conference on Cotton and Global Trade Negotiations, Washington, DC* (2002) <https://studylib.net/doc/8649671/causes-and-consequences-of-low-prices-in-the-cotton-sector> accessed 17 July 2017

Alvarez-Jimenez A, 'Enhancing of the WTO Judiciary's Control over Disputes and Suggestions for the Exceptional Expansion of Such Control to Favour Developing and Least Developed Countries, The' (2007) 6 Law & Prac. Int'l Cts. & Tribunals 269

Alvarez-Jiménez A, 'Mutually Agreed Solutions under the WTO Dispute Settlement Understanding: An Analytical Framework after the Softwood Lumber Arbitration' (2011) 10 World Trade Review 343

Alvesson M and Skoldberg K, *Reflexive Methodology: New Vistas for Qualitative Research* (Second Edition, SAGE Publications Ltd 2009)

'An Undifferentiated WTO: Self-Declared Development Status Risks Institutional Irrelevance, Communication from the US' WT/GC/W/757, 16 January 2019

Anderson K, 'Peculiarities of Retaliation in WTO Dispute Settlement' (2002) 1 World Trade Review 123

Anderson, Robert, Dr. Frédéric Jenny and Anna Caroline Müller, *Combating Anti-Competitive Practices: A Guide for Developing Economy Exporters.* (UN Distributed Titles 2012)

'Annex 1B General Agreement on Trade and Services' <https://www.wto.org/english/docs_e/legal_e/26-gats.pdf> accessed 18 July 2016

'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' < https://www.wto.org/english/docs_e/legal_e/28-dsu.pdf> accessed 17 January 2015

'Announcement: Closure of ICTSD | International Centre for Trade and Sustainable Development' <(ICTSD closed), Copy on file with author> accessed 16 January 2019

Anson W R, Sir, *Principles of the English Law of Contract* (Clarenden Press, Oxford 1879)

Ansong A, *Special and Differential Treatment of Developing Countries in the GATT/WTO: Past, Present, Future* (1 edition, CreateSpace Independent Publishing Platform 2012)

Antell G and Coleman JW, 'Empirical Analysis of Wealth Disparities in WTO Disputes: Do Poorer Countries Suffer from Strategic Delay during Dispute Litigation' (2011) 29 BU Int'l LJ 267

Apecu J, 'The Level of African Engagement at the World Trade Organization from 1995 to 2010.' [2013] International Development Policy | Revue internationale de politique de développement 29

'Appellate Body, Working Procedures for Appellate Review' WT/AB/WP/4 1 May 2003

'April 1989 Decision on Improvements to the GATT Dispute Settlement Rules and Procedures, Extension of Application, Decision of 22 February 1994' L/7416, 28 February 1994

'Article 5 of the Dispute Settlement Understanding, Communication from the Director-General' WT/DSB/25 17 July 2001

Arvis J-F, Raballand G and Marteau J-F, 'The Cost of Being Landlocked: Logistics Costs and Supply Chain Reliability' [2007] World Bank Policy Research Working Paper <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=995079> accessed 7 July 2015

Bader JA, 'Biden's China Policy Needs to Be More than Just Trump Lite' (*Brookings*, 25 January 2022) <https://www.brookings.edu/blog/order-from-chaos/2022/01/25/bidens-china-policy-needs-to-be-more-than-just-trump-lite/> accessed 17 April 2022

Baere PD, Du Parc C, and International Trade Centre UNCTAD/GATT, *Export Promotion and the WTO: A Brief Guide* (United Nations 2009)

Bagwell K and Staiger RW, 'Multilateral Trade Negotiations, Bilateral Opportunism and the Rules of GATT/WTO' (2004) 63 Journal of International Economics 1

——, 'Backward Stealing and Forward Manipulation in the WTO' (2010) 82 Journal of International Economics 49

Bahri A, 'Handling WTO Disputes with the Private Sector: The Triumphant Brazilian Experience' (2016) 50 Journal of World Trade 641

Banakar R and Travers M (eds), *Theory and Method in Socio-Legal Research* (Hart Publishing 2005)

Barnett M, 'Cambodia v. Thailand: A Case Study on the Use of Provisional Measures to Protect Human Rights in International Border Disputes' (2012) 38 Brook. J. Int'l L. 269

Bartels L, 'Making WTO Dispute Settlement Work for African Countries: An Evaluation of Current Proposals for Reforming the DSU' (2013) 6 The Law and Development Review

Batista JP, 'Flexibilities for Developing Countries in the DOHA Round as a La Carte Special and Differential Treatment; Retracing the Uruguay Steps?' (2010) 9 Cadernos PROLAM/USP 164

'BB 2011-12-21 WTO Eight Ministerial Conference: Chairman's Concluding Statement' (*International Trade Centre*, 2011) <Copy on file with author; full text of Statement available at http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/WT/MIN11/11.doc>

Bedikian MA, 'Alternative Dispute Resolution' (2010) 56 Wayne L. Rev. 85

Benicchio, Romain, *Oxfam Briefing Paper, Dumping: The Beginning of the End? Implications of the Ruling in the Brazil/US Cotton Dispute*, vol Oxford Briefing Paper 64 (Oxfam International 2004) <https://oxfamilibrary.openrepository.com/bitstream/handle/10546/114472/bp64-dumping-the-beginning-of-the-end-050804-en.pdf;jsessionid=D397B981104BA5F1127AEB0A4BDF0142?sequence=1>

Bercero IG and Garzotti P, 'DSU Reform: Why Have Negotiations to Improve WTO Dispute Settlement Failed So Far and What Are the Underlying Issues' (2005) 6 J. World Investment & Trade 847

Bernal RL, 'Small Developing Economies in the World Trade Organization' [2001] Agriculture, Trade and the WTO 108

——, 'Special and Differential Treatment for Small Developing Economies', *OECD Global Forum on Trade with the support of the University of the West Indies* (OECD Global Forum on Trade 2006)

——, 'Participation of Small Developing Economies in the Governance of the Multilateral Trading System' (Centre for International Governance Innovation, Centre pour l'innovation dans la gouvernance internationale 2009) Working Paper 44 <https://www.cigionline.org/publications/participation-small-developing-economies-governance-multilateral-trading-system/> accessed 8 November 2014

Beverelli C, Neumueller S and Teh R, 'Export Diversification Effects of the WTO Trade Facilitation Agreement' (2015) 76 World Development 293

Bhagwati J, *Termites in the Trading System: How Preferential Agreements Undermine Free Trade* (Oxford University Press 2008)

Bhalla P (ed), *Transforming Rural Economies* (United Nations 2015)

Bhattacharya D and Dasgupta S, 'Global Financial and Economic Crisis: Exploring the Resilience of the Least Developed Countries' (2012) 24 Journal of International Development 673

Bhattacharya S, 'Proceedings at Your Own Risk: Evaluating a New Principle of International Law for Provisional Measures' (2013) 38 Yale J. Int'l L 511

Bhattacharyya B, 'Rules of Origin: The Way Ahead: Lessons from the USA-EC-India Textiles Dispute' [2003] *Commonwealth Trade Hot Topics, London*

'Bienvenido al Portal Del MERCOSUR - Institucional' <http://www.mercosur.int/> accessed 30 June 2015

Bilder RB, *Managing the Risks of International Agreement* (University of Wisconsin Press 1981)

Blackhurst R, Lyakurwa B and Oyejide A, 'Options for Improving Africa's Participation in the WTO' (2000) 23 The World Economy 491

Blonigen BA and Bown CP, 'Antidumping and Retaliation Threats' (2003) 60 Journal of International Economics 249

Bohanes J, 'WTO Dispute Settlement and Industrial Policy' <https://e15initiative.org/wp-content/uploads/2015/09/E15-Industrial-Policy-Bohanes-FINAL.pdf>

Bohanes J and Garza F, 'Going Beyond Stereotypes: Participation of Developing Countries in WTO Dispute Settlement' (2012) Vol. IV, No. 1 TRADE L. & DEV. 45

Bown CP, 'Trade Remedies and World Trade Organization Dispute Settlement: Why Are so Few Challenged?' (2005) 34 The Journal of Legal Studies 515

Bown CP, 'Participation in WTO Dispute Settlement: Complainants, Interested Parties, and Free Riders' (2005) 19 The World Bank Economic Review 287

Bown CP, *The Law, Economics and Politics of Retaliation in WTO Dispute Settlement* (CAMBRIDGE UNIVERSITY PRESS 2010)

Bown CP and Hoekman BM, 'WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector' (2005) 8 Journal of International Economic Law 861

Bown CP and McCulloch R, 'Non-Discrimination and the WTO Agreement on Safeguards' (2003) 2 World Trade Review 327

——, 'Developing Countries, Dispute Settlement, and the Advisory Centre on WTO Law' (2010) 19 The Journal of International Trade & Economic Development 33

Bown CP and Meagher N, 'Mexico–Olive Oil: Remedy without a Cause?' (2010) 9 World Trade Review 85

Bown CP and Pauwelyn J (eds), *The Law, Economics and Politics of Retaliation in WTO Dispute Settlement* (Cambridge University Press 2014)

Bown CP and Reynolds KM, 'Trade Flows and Trade Disputes' (2014) 10 The Review of International Organizations 145

Brambilla I, Porto G and Tarozzi A, 'Adjusting to Trade-Policy Changes in Export Markets: Evidence from U.S. Antidumping Duties on Vietnamese Catfish' (2009) Policy Research Working Paper WPS4990 The World Bank Development Research Group Trade and Integration Team <https://openknowledge.worldbank.org/handle/10986/4182?show=full&locale-attribute=es>

Brambilla Irene, Guido Porto, and Alessandro Tarozzi, 'Adjusting to Trade-Policy Changes in Export Markets Evidence from U.S. Antidumping Duties on Vietnamese Catfish' (The World Bank Development Research Group Trade and Integration Team 2009) Policy Research Working Paper 4990 WPS4990 <https://elibrary.worldbank.org/doi/abs/10.1596/1813-9450-4990>

Braun V and Clarke V, 'Using Thematic Analysis in Psychology' (2006) 3 Qualitative Research in Psychology 77

Brenton P, *Integrating the Least Developed Countries into the World Trading System: The Current Impact of EU Preferences under Everything but Arms*, vol 3018 (World Bank Publications 2003)

Breuss F, 'WTO Dispute Settlement: Four EU–US Mini Trade Wars—A Rejoinder' (2004) 4 Journal of Industry, Competition and Trade 373

Brewster R, 'Remedy Gap: Institutional Design, Retaliation, and Trade Law Enforcement.' (2011) 80 Geo. Wash. L. Rev. 102

'Brief History of LDC Category' <http://www.un.org/en/development/desa/policy/cdp/ldc_history.shtml> accessed 5 March 2016

Briguglio L, 'Small Island Developing States and Their Economic Vulnerabilities' (1995) 23 World development 1615

Brinkley J, 'Trump Is Quietly Trying to Vandalize the WTO' <https://www.forbes.com/sites/johnbrinkley/2017/11/27/trump-quietly-trying-to-vandalize-the-wto/#2724daea263f> accessed 19 January 2019

Broadbent N, 'Alternative Dispute Resolution' (2009) 9 Legal Information Management 195

Bronckers M, 'Financial Compensation in the WTO: Improving the Remedies of WTO Dispute Settlement' (2005) 8 Journal of International Economic Law 101

Bronckers M and Baetens F, 'Reconsidering Financial Remedies in WTO Dispute Settlement' (2013) 16 Journal of International Economic Law 281

Broude T and Moore M, 'US–Anti-Dumping Measures on Certain Shrimp from Viet Nam: A Stir-Fry of Seafood, Statistics, and Lacunae' (2013) 12 World Trade Review 433

Brower CN and Tupman WM, 'Court-Ordered Provisional Measures Under the New York Convention' [1986] American Journal of International Law 24

Brown C, 'The Inherent Powers of International Courts and Tribunals' (2006) 76 The British Yearbook of International Law 195

Burgess H, Sieminski S and Arthur L, *Achieving Your Doctorate in Education* (SAGE 2006)

Burnley J and Pereira J, 'Riding the Wave of Reform Fast Tracking Myanmar's Future with Good Quality Aid' (Oxfam International 2014) Briefing Paper <https://www.oxfam.org/en/research/myanmar-riding-wave-reform>

Busch ML and Reinhardt E, 'Developing Countries and General Agreement on Tariffs and Trade/World Trade Organization Dispute Settlement' (2003) 37 Journal of World Trade 719

——, 'The WTO Dispute Settlement Mechanism and Developing Countries' (Swedish International Development Cooperation Agency 2004) Art. no.: SIDA3600en <https://www.sida.se/en/publications/the-wto-dispute-settlement>

——, 'Three's a Crowd: Third Parties and WTO Dispute Settlement' (2006) 58 World Politics 446

Busch ML, Reinhardt E and Shaffer G, 'Does Legal Capacity Matter? A Survey of WTO Members' (2009) 8 World Trade Review 559

'Business News -Task Force to Examine India's Dumping Move toward Batteries of Bangladesh' <http://www.bangla2000.com/news/archive/business/2001-03-05%5Cnews_detail5.shtm> accessed 5 July 2017

Calliari, Marcelo, Vera Kanas and Fernanda Sayeg, 'Business Guide to Trade Remedies in Brazil: Anti-Dumping, Countervailing and Safeguard Legislation, Practices and Procedures.' (International Trade Centre 2009) TC, 2009. XV / C-33 076 BUS <https://www.ceintelligence.com/files/documents/Trade_Remedies_Brazil.pdf>

Castel J-G, 'The Uruguay Round and the Improvements to the GATT Dispute Settlement Rules and Procedures' (1989) 38 International and Comparative Law Quarterly 834

Charnovitz S, 'Rethinking WTO Trade Sanctions' (2001) 95 American Journal of International Law 792

'Charter of the United Nations' (1947) 1 The International Law Quarterly 90

Charvriat C and Benicchio R, 'Dumping: The Beginning of the End Implications of the Ruling in the Brazil/US Cotton Dispute' (2004) 4 Oxfam Policy and Practice: Agriculture, Food and Land 99

Chea AC, 'Sub-Saharan Africa and Global Trade: What Sub-Saharan Africa Needs to Do to Maximize the Benefits from Global Trade Integration, Increase Economic Growth and Reduce Poverty' (2012) 2(4) International Journal of Academic Research in Business and Social Sciences 360

'China, EU Submit Joint Proposals on Reform of WTO's Appellate Body' <http://www.china.org.cn/business/2018-11/30/content_74225048.htm> accessed 19 January 2019

Chisik R, 'Trade Disputes, Quality Choice, and Economic Integration' (2012) 88 Journal of International Economics 47

Cho S, 'Beyond Dohas Promises- Administrative Barriers as an Obstruction' (2007) 25 Berkeley J. Int'l Law. 395

——, 'The Demise of Development in the Doha Round Negotiations' (2009) 45 Tex. Int'l LJ 573

Ciuriak D, Lapham B and Wolfe R, 'Firms in International Trade: Towards a New Agenda for the Next WTO Round' (2014) 6(2) Global Policy

Claus-Dieter Ehlermann, 'Some Personal Experiences as Member of the Appellate Body of the WTO.' (2002) Policy Papers, RSC No. 02/9 European University Institute, Robert Schuman Centre for Advanced Studies

Colares JF, 'The Limits of WTO Adjudication: Is Compliance the Problem?' (2011) 14 Journal of International Economic Law 403

Collins D, 'Alternative Dispute Resolution for Stakeholders in International Investment Law' (2012) 15 Journal of International Economic Law 673

'COMESA Court of Justice' <http://about.comesa.int/index.php?option=com_content&view=article&id=83&Itemid=133> accessed 1 April 2016

'Comité Du Commerce et Du Développement, Traitement Spécial et Différencié, Les Pays Les Moins Avancés, Note Du Secrétariat' WT/COMTD/W/135 5 Cctobre 2004

'Commercial Arbitration in Africa: Present and Future' [2017] Africa Legal Briefings, Herbert Smith Freehills

'Committee on Agriculture Special Session, Common Position of the Member States of the West African Economic and Monetary Union (WAEMU) in the Multilateral Trade Negotiations on Agriculture, G/AG/NG/W/188, 26 September 2002'

'Committee on Agriculture Special Session Proposal by Burkina Faso on the Negotiations on Agriculture, G/AG/NG/W/185, 16 May 2001'

'Committee on Agriculture Special Session, WTO Negotiations on Agriculture, Poverty Reduction: Sectoral Initiative in Favour of Cotton, Joint Proposal by Benin, Burkina Faso, Chad and Mali, TN/ AG/ GEN/4, 16 May 2003'

Committee on Anti-Dumping Practices, Notification under Articles 16.4 and 16.5 of the Agreement, Rwanda' G/ADP/N/193/RWA 26 February 2010.

'Committee on Market Access, Periodic Report of the Committee to the Council for Trade in Goods' G/MA/157 6 April 2005

'Committee on Sanitary and Phytosanitary Measures, Recommended Procedures for Implementing the Transparency Obligations of the SPS Agreement (Article 7), as of 1 December 2008, Revision' G/SPS/7/Rev.3 20 June 2008

'Committee on Trade and Development Fifty-Sixth Special Session, Note of the Meeting of 24th September 2021' (2021) TN/CTD/M/56

'Committee on Trade and Development Forty-First Session 10-11 July 1980 Annotated Provisional Agenda' COM.TD/W/309 6 June 1980 <https://docs.wto.org/gattdocs/q/GG/COMTD/W309.PDF> accessed 13 November 2016

'Committee on Trade and Development, Membership of the Committees on Trade and Development' (1987) COM.TD/125 26 January 1987

<https://docs.wto.org/gattdocs/q/GG/COMTD/125.PDF> accessed 19 November 2016

'Committee on Trade and Development, Special and Differential Treatment for Least-Developed Countries, Note, by the Secretariat' WT/COMTD/W/135 5 October 2004

'Committee on Trade and Development, Special and Differential Treatment Provisions in WTO Agreements and Decisions, Note by the Secretariat' (2013) WT/COMTD/W/196 14 June 2013

'Committee on Trade and Development Special Session, Special and Differential Treatment Provisions, Joint Communication by the Least-Developed Countries' TN/CTD/W/4 24 May 2002

'Committee on Trade and Development Special Session, Special and Differential Treatment Provisions, Joint Communication from Cuba, Dominican Republic, Egypt, Honduras, India, Indonesia, Kenya, Mauritius, Pakistan, Sri Lanka, Tanzania and Zimbabwe' TN/CTD/W/2 14 May 2002

'Committee on Trade and Development Special Session, Special and Differential Treatment Provisions, Joint Communication from Cuba, Dominican Republic, Honduras, India, Indonesia, Kenya, Pakistan, Sri Lanka, Tanzania and Zimbabwe' TN/CTD/W/1 14 May 2002

'Committee on Trade and Development Special Session, Special and Differential Treatment Provisions, Joint Communication from the African Group in the WTO Revision' TN/CTD/W/3/Rev.2 17 July 2002

'Committee on Trade and Development Special Session, Special and Differential Treatment Provisions, Joint Least-Developed Countries Proposals on Special and Differential Treatment, Addendum' TN/CTD/W/4/Add.1 1 July 2002

'Committee on Trade and Development Special Session, Third, Fourth and Fifth Special Sessions of the Committee on Trade and Development' TN/CTD/2 11 July 2002

Commonwealth Secretariat, 'Salient Characteristics of Least-Developed Countries', *Trade, Growth and Poverty Reduction, Landlocked Developing Countries and Small States in the Global Economic System* (Academic Foundation 2009)

Conconi P and Perroni C, 'Special and Differential Treatment of Developing Countries in the WTO' (2015) 14 World trade review 67

Conrad CR, 'The EC–Biotech Dispute and Applicability of the SPS Agreement: Are the Panel's Findings Built on Shaky Ground?' (2007) 6 World Trade Review 233

Cooper R and John A, 'Coordinating Coordination Failures in Keynesian Models' (1988) 103 The Quarterly Journal of Economics 441

Coppens D, 'How Special Is the Special and Differential Treatment under the SCM Agreement? A Legal and Normative Analysis of WTO Subsidy Disciplines on Developing Countries' (2013) 12 World Trade Review 79

Cortez AL, 'Beyond Market Access: Trade-Related Measures for the Least Developed Countries. What Strategy' (2011) <http://www.un.org/esa/desa/papers/2011/wp109_2011_old.pdf> accessed 2 February 2016

'Council, 12 April 1989, Matters Arising from the December 1988 and April 1989 Meetings of the Trade Negotiations Committee, Communication from the Council Chairman' C/W/585 31 March 1989

Cour internationale de justice, *Charter of the United Nations, Statute and Rules of Court and Other Documents / International Court of Justice.* ([AW Sijthoff] 2007)

Creamer CD and Godaimirska Z, '(De) Legitimation at the WTO Dispute Settlement Mechanism' (2016) 49 Vand. J. Transnat'l L. 275

Cross KH, 'United States: Subsidies on Upland Cotton, Recourse to Article 21.5 of the DSU by Brazil' (2009) 103 American Journal of International Law 110

Crowley MA and Howse R, 'Tuna–Dolphin II: A Legal and Economic Analysis of the Appellate Body Report' (2014) 13 World Trade Review 321

Curti AM, 'WTO Dispute Settlement Understanding: An Unlikely Weapon in the Fight against AIDS, The' (2001) 27 Am. JL & Med. 469

Czako J, Human J and Miranda J, *A Handbook on Anti-Dumping Investigations* (Cambridge University Press 2003)

Czapnik B, 'The Unique Features of the Trade Facilitation Agreement: A Revolutionary New Approach to Multilateral Negotiations or the Exception Which Proves the Rule?' [2015] Journal of International Economic Law 41

Davey WJ, 'Reforming WTO Dispute Settlement' [2004] SSRN Electronic Journal <https://www.researchgate.net/publication/228182745_Reforming_WTO_Dispute_Settlement>

——, 'The WTO Dispute Settlement System: The First Ten Years' (2005) 8 Journal of International Economic Law 17

——, 'The WTO and Rules-Based Dispute Settlement: Historical Evolution, Operational Success, and Future Challenges' (2014) 17 Journal of International Economic Law

Davey WJ and Sapir A, 'United States–Subsidies on Upland Cotton Recourse to Article 21.5 by Brazil, WT/DS267/AB/RW (2 June 2008)' (2010) 9 World Trade Review 181

Davies A, 'The DSU Article 3.8 Presumption That an Infringement Constitutes a Prima Facie Case of Nullification or Impairment: When Does It Operate and Why?' (2010) 13 Journal of International Economic Law 181

Davis CL and Bermeo SB, 'Who Files? Developing Country Participation in GATT/WTO Adjudication' (2009) 71 The Journal of Politics 1033

Dawn Watkins MB eds, *Research Methods in Law* (Routledge Ltd 2013)

'DCCI Worried over India's Anti-Dumping Duty on Bangladesh Jute' (*Dhaka Tribune*, 21 October 2016) <http://www.dhakatribune.com/business/2016/10/21/dcci-worried-indias-anti-dumping-duty-bangladesh-jute/> accessed 9 July 2017

De Benedictis L and Tajoli L, 'The World Trade Network' (2011) 34 The World Economy 1417

De Vylder S, *The Least Developed Countries and World Trade* (2nd ed, Sida 2007)

Debaere PM, 'Small Fish-Big Issues: The Effect of Trade Policy on the Global Shrimp Market' <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=838166> accessed 8 November 2014

'Department of Economic and Social Affairs Development Policy and Analysis Division Committee for Development Policy' <https://www.itu.int/en/ITU-D/LDCs/Pages/Who-are-the-LDCs.aspx>

'Developing Countries and the WTO Dispute Settlement Mechanism, Communication from the European Communities' WT/GC/W/148 24 February 1999

'DG Azevêdo Announces New Fund to Help LDCs Participate in Fisheries Subsidies Talks' <https://www.wto.org/english/news_e/news19_e/tnc_03may19_e.htm> accessed 10 May 2019

'DG Azevêdo Meets Prime Minister Trudeau in Ottawa; Welcomes Strong Support for WTO'

<https://www.wto.org/english/news_e/news18_e/dgra_25oct18_e.htm> accessed 3 November 2018

DiCaprio A and Suominen K, *Aid for Trade in Asia and the Pacific - Thinking Forward about Trade Costs and the Digital Economy.* (Asian Development Bank 2015)

DiCaprio A and Trommer S, 'Bilateral Graduation: The Impact of EPAs on LDC Trade Space' (2010) 46 Journal of Development Studies 1607

Dickinson A, 'Provisional Measures in the "Brussels I" Regulation, Disturbing the Status Quo' (2010) 6 Journal of Private International Law 519

Directorate General for Trade, 'European Union, Trade in Goods with LDC (Least Developed Countries), 2021' (2021)

Director-General Roberto Azevêdo, '"We Must Preserve What We Have, Even as We Work to Improve It"' (17 October 2018) <https://www.wto.org/english/news_e/spra_e/spra243_e.htm> accessed 3 November 2018

Disdier A-C and Fontagné L, 'Trade Impact of European Measures on GMOs Condemned by the WTO Panel' (2010) 146 Review of World Economics 495

Disdier A-C, Fontagné L and Mimouni M, 'The Impact of Regulations on Agricultural Trade: Evidence from the SPS and TBT Agreements' (2008) 90 American Journal of Agricultural Economics 336

'Dispute Settlement - Appellate Body Members' <https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm> accessed 8 February 2022

'Dispute Settlement Body 2 March 1999 Minutes of Meeting' WT/DSB/M/56 12 May 1999

'Dispute Settlement Body 3 June 1999 Minutes of Meeting' WT/DSB/M/63 6 July 1999

'Dispute Settlement Body 6 May 1999 Minutes of Meeting' WT/DSB/M/61 30 June 1999

'Dispute Settlement Body 6 November 1998, Minutes of Meeting' WT/DSB/M/50 14 December 1998

'Dispute Settlement Body 8 December 1998 Minutes of Meeting' WT/DSB/M/52 3 February 1999

'Dispute Settlement Body 12 January 1999 Minutes of Meeting' WT/DSB/M/53 18 March 1999

'Dispute Settlement Body 13 February 1998, Minutes of Meeting' WT/DSB/M/42 16 March 1998

'Dispute Settlement Body 13 March 1998, Minutes of Meeting' WT/DSB/M/43 8 April 1998

'Dispute Settlement Body 14th October 1999 Minutes of Meeting' WT/DSB/M/69 28 October 1999

'Dispute Settlement Body 15 April 1999 Minutes of Meeting' WT/DSB/M/58 19 May 1999

'Dispute Settlement Body 16 June 1999 Minutes of Meeting' WT/DSB/M/64 21 July 1999

'Dispute Settlement Body 17 February 1999 Minutes of Meeting' WT/DSB/M/55 29 April 1999

'Dispute Settlement Body 18 December 2001, DSU Negotiations, Statement by the Chairman' WT/DSB/W/181 17 December 2001

'Dispute Settlement Body 18 November 1997, Minutes of Meeting' WT/DSB/M/39 7 January 1998

'Dispute Settlement Body 19 April 1999 Minutes of Meeting' WT/DSB/M/59 3 June 1999

'Dispute Settlement Body 19 March 1999 Minutes of Meeting' WT/DSB/M/57 19 May 1999

'Dispute Settlement Body 20 August 1999 Minutes of Meeting' WT/DSB/M/67 30 September 1999

'Dispute Settlement Body 21 October 1998, Minutes of Meeting' WT/DSB/M/49 19 November 1998

'Dispute Settlement Body 22 April 1998 Minutes of Meeting' WT/DSB/M/45 10 June 1998

'Dispute Settlement Body 22 February 2021, Minutes of Meeting' (2021) WT/DSB/M/449

'Dispute Settlement Body 22 June 1998 Minutes of Meeting' WT/DSB/M/46 6 August 1998

'Dispute Settlement Body 22 September 1998 Minutes of Meeting' WT/DSB/M/48 20 October 1998

'Dispute Settlement Body 23 July 1998 Minutes of Meeting' WT/DSB/M/47 18 September 1998

'Dispute Settlement Body 23 May 2016, Minutes of Meeting' WT/DSB/M/379, 29 August 2016

'Dispute Settlement Body 25, 28 and 29 January and 1 February 1999 Minutes of Meeting' WT/DSB/M/54 20 April 1999

'Dispute Settlement Body 25 January 2021, Minutes of Meeting' (2021) WT/DSB/M/448

'Dispute Settlement Body 25 January 2022, Proposed Agenda' WT/DSB/W/692

'Dispute Settlement Body 25 March 1998 Minutes of Meeting' WT/DSB/M/44 4 May 1998

'Dispute Settlement Body 25 November 1998 Minutes of Meeting' WT/DSB/M/51 22 January 1999

'Dispute Settlement Body 26 July 1999 Minutes of Meeting' WT/DSB/M/65 15 September 1999

'Dispute Settlement Body 26 May 1999 Minutes of Meeting' WT/DSB/M/62 2 July 1999

'Dispute Settlement Body 27 October and 3 November 1999' WT/DSB/M/70 15 December 1999

'Dispute Settlement Body 27 September 2021, Minutes of Meeting' (2021) WT/DSB/M/456

'Dispute Settlement Body 28 April 1999 Minutes of Meeting' WT/DSB/M/60 21 June 1999

'Dispute Settlement Body 29 June 2020, Proposed Agenda.' WT/DSB/W/664 25 June 2020

'Dispute Settlement Body 29 November 2021, Appellate Body Appointments' (2021) WT/DSB/W/609/Rev.20

'Dispute Settlement Body, Annual Report (1995)' WT/DSB/3 2 February 1996

'Dispute Settlement Body, Annual Report (1996)' WT/DSB/8 28 October 1996

'Dispute Settlement Body, Annual Report (1997)' WT/DSB/10 28 November 1997

'Dispute Settlement Body, Annual Report (1998)' WT/DSB/14 27 November 1998

'Dispute Settlement Body, Annual Report (1999)' WT/DSB/16 22 October 1999

'Dispute Settlement Body, Annual Report (2000)' WT/DSB/21 27 November 2000

'Dispute Settlement Body, Annual Report (2001)' WT/DSB/26 12 October 2001

'Dispute Settlement Body, Annual Report (2002)' WT/DSB/29 29 November 2002

'Dispute Settlement Body, Draft Annual Report (2019/2020)' WT/DSB/W/662 16 October 2020

'Dispute Settlement Body, Minutes of Meeting, 25 January 2022' WT/DSB/M/460, 7 March 2022

'Dispute Settlement Body, Minutes of Meeting, 28 February 2022' WT/DSB/M/461, 19 April 2022

'Dispute Settlement Body, Minutes of Meeting Held on 10 February 1995' WT/DSB/M/1 28 February 1995

'Dispute Settlement Body, Minutes of Meeting, Held on 18 November 1977' WT/DSB/M/39, 7 January 1998

'Dispute Settlement Body, Minutes of Meeting, Held on 21 May 2002' TN/DS/M/2 3 July 2002

'Dispute Settlement Body, Minutes of Meeting, Held on 22 and 24 September 1999' WT/DSB/M/68 20 October 1999

'Dispute Settlement Body, Minutes of Meeting Held on 28 January 2013, WT/DSB/M/328, 22 March 2013'

'Dispute Settlement Body, Procedures for the Review of the Dispute Settlement Understanding' WT/DSB/W/74 26 February 1998

'Dispute Settlement Body Special Session, 22 February 2006, Minutes of Meeting' TN/DS/M/30 26 June 2006

'Dispute Settlement Body Special Session, Amendments to the Understanding on Rules and Procedures Governing the Settlement of Disputes, Proposed Text by Mexico, Communication from Mexico.' TN/DS/W/40 27 January 2003

'Dispute Settlement Body, Special Session, Communication from Australia' TN/DS/W/8 8 July 2002

'Dispute Settlement Body, Special Session, Communication from Brazil' TN/DS/W/45 11 February 2003

'Dispute Settlement Body, Special Session, Communication from Brazil, Revision' TN/DS/W/45/Rev.1 4 March 2003

'Dispute Settlement Body, Special Session, Communication from Canada.' TN/DS/W/41 24 January 2003

'Dispute Settlement Body, Special Session, Communication from China.' TN/DS/W/51 5 March 2003

'Dispute Settlement Body, Special Session Communication from China, Revision.' TN/DS/W/51/Rev.1 13 March 2003

'Dispute Settlement Body, Special Session, Communication from Costa Rica' TN/DS/W/12 24 July 2002

'Dispute Settlement Body, Special Session, Communication from Ecuador' TN/DS/W/9 8 July 2002

'Dispute Settlement Body, Special Session, Communication from India' TN/DS/W/5 7 May 2002

'Dispute Settlement Body, Special Session, Communication from India on Behalf of Cuba, Dominican Republic, Egypt, Honduras, Jamaica and Malaysia' TN/DS/W/47 11 February 2003

'Dispute Settlement Body, Special Session, Communication from Jamaica' TN/DS/W/44 11 February 2003

'Dispute Settlement Body, Special Session, Communication from Jamaica, Corrigendum' TN/DS/W/21/Corr.1 18 October 2002

'Dispute Settlement Body, Special Session, Communication from Jamaica, Revision' TN/DS/W/44/Rev.1 14 February 2003

'Dispute Settlement Body, Special Session, Communication from Mexico' TN/DS/W/40 27 January 2003

'Dispute Settlement Body, Special Session, Communication from Paraguay' TN/DS/W/16 25 September 2002

'Dispute Settlement Body, Special Session, Communication from Thailand' TN/DS/W/31 22 January 2003

'Dispute Settlement Body, Special Session, Communication from the European Communities' TN/DS/W/38 23 January 2003

'——' TN/DS/W/7 30 May 2002

'Dispute Settlement Body, Special Session, Communication from the Philippines and Thailand' TN/DS/W/3 21 March 2002

'Dispute Settlement Body, Special Session, Communication from the Republic of Korea' TN/DS/W/35 22 January 2003

'——' TN/DS/W/11 11 July 2002

'Dispute Settlement Body, Special Session, Communication from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu' TN/DS/W/36 22 January 2003

'——' TN/DS/W/25 27 November 2002

'Dispute Settlement Body, Special Session, Communication from the United States' TN/DS/W/46 11 February 2003

'——' TN/DS/W/13 22 August 2002

'Dispute Settlement Body, Special Session, Contribution by Chile and the United States' TN/DS/W/28 23 December 2002

'Dispute Settlement Body, Special Session, Contribution by the United States' TN/DS/W/74 15 March 2005

'Dispute Settlement Body Special Session, Contribution from Indonesia and Thailand.' TN/DS/W/61 12 December 2003

'Dispute Settlement Body, Special Session, Contribution from Thailand (Related to Article 17 of the DSU)' TN/DS/W/60 8 December 2003

'Dispute Settlement Body Special Session, Contribution of the United States on Some Practical Considerations in Improving the Dispute Settlement Understanding of the WTO Related to Transparency and Open Meetings.' TN/DS/W/79 13 July 2005

'Dispute Settlement Body Special Session, Diagnosis of the Problems Affecting the Dispute Settlement Mechanism, Some Ideas by Mexico' TN/DS/W/90 16 July 2007

'Dispute Settlement Body Special Session, Dispute Settlement Understanding Proposals: Legal Text, Communication from India on Behalf of Cuba, Dominican Republic, Egypt, Honduras, Jamaica and Malaysia' TN/DS/W/47 11 February 2003

'Dispute Settlement Body Special Session, First Formal Meeting of the Special Session of the DSB, Report by the Chairman to the Trade Negotiations Committee' TN/DS/1 23 April 2002

'Dispute Settlement Body Special Session Flexibility and Member Control Revised Textual Proposal by Chile and the United States, Communication from Chile and the United States' TN/DS/W/89 31 May 2007

'Dispute Settlement Body Special Session, Further Contribution of the United States to the Improvement of the Dispute Settlement Understanding of the WTO Related to Transparency - Revised Legal Drafting, Communication from the United States' TN/DS/W/86 21 April 2006

'Dispute Settlement Body Special Session, Improvements and Clarifications of Dispute Settlement Understanding, Proposal by Mexico' TN/DS/W/91 16 July 2007

'Dispute Settlement Body Special Session, Jordan's Contribution towards the Improvement and Clarification of the WTO Dispute Settlement Understanding, Communication from Jordan' TN/DS/W/43 28 January 2003

'Dispute Settlement Body, Special Session, Jordan's Further Contribution towards the Improvement and Clarification of the Dispute Settlement Understanding' TN/DS/W/56 19 May 2003

'——' TN/DS/W/53 21 March 2003

'Dispute Settlement Body Special Session, Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding.' TN/DS/W/34 22 January 2003

'Dispute Settlement Body Special Session, Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding, Further Contribution of the United States on Improving Flexibility and Member Control in WTO Dispute Settlement, Communication from the United States' TN/DS/W/82 24 October 2005

'Dispute Settlement Body Special Session, Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding, Further Contribution of the United States on Improving Flexibility and Member Control in WTO Dispute Settlement, Communication from the United States, Addendum' TN/DS/W/82/Add.1 25 October 2005

'Dispute Settlement Body Special Session, Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding, Further Contribution of the United States on Improving Flexibility and Member Control in WTO Dispute Settlement, Communication from the United States, Addendum, Corrigendum' TN/DS/W/82/Add.1/Corr.11 27 October 2005

'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposal by the African Group' TN/DS/W/15 25 September 2002

'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposal by the LDC Group' TN/DS/W/17 9 October 2002

'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposals on DSU by Cuba, Honduras, India, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe' TN/DS/W/18 7 October 2002

'Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Special and Differential Treatment for Developing Countries Proposals on DSU by Cuba, Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe' TN/DS/W/19 9 October 2002

'——' TN/DS/W/18/Add. 1 9 October 2002

'Dispute Settlement Body, Special Session, Proposal by Ecuador' TN/DS/W/33 23 January 2003

'——' TN/DS/W/26 26 November 2002

'Dispute Settlement Body, Special Session, Proposal by Japan' TN/DS/W/32 22 January 2003

'——' TN/DS/W/22 28 October 2002

'Dispute Settlement Body, Special Session, Proposal by Mexico' TN/DS/W/23 4 November 2002

'Dispute Settlement Body, Special Session, Report by the Chairman, Ambassador Coly Seck, to the Trade Negotiations Committee' TN/DS/30 27 November 2017

'Dispute Settlement Body, Special Session, Report by the Chairman, Ambassador David Spencer, to the Trade Negotiations Committee' TN/DS/14 25 November 2005

'Dispute Settlement Body, Special Session, Report by the Chairman, Ambassador David Spenser, to the General Council' TN/DS/13 26 July 2005

'Dispute Settlement Body, Special Session, Report by the Chairman, Ambassador David Spenser, to the Trade Negotiations Committee' TN/DS/12 21 July 2005

'Dispute Settlement Body, Special Session, Report by the Chairman, Ambassador Dr Stephen Ndungu Karau, to the Trade Negotiations Committee' TN/DS/29 2 May 2017

'Dispute Settlement Body Special Session, Report by the Chairman, Ambassador Kokou Yackoley Johnson to the Trade Negotiations Committee' TN/DS/32, 17 November 2021

'Dispute Settlement Body Special Session, Report by the Chairman, Ambassador Péter Balás, to the Trade Negotiations Committee' TN/DS/4 28 November 2002

'Dispute Settlement Body, Special Session, Report by the Chairman, Ambassador Péter Balás, to the Trade Negotiations Committee' TN/DS/5 4 February 2003

'——' TN/DS/6 3 March 2003

'——' TN/DS/7 2 April 2003

'——' TN/DS/8 7 May 2003

'Dispute Settlement Body Special Session, Report by the Chairman, Ambassador Ronald Saborio Soto' (2015) TN/DS/26, 30 January 2015

'Dispute Settlement Body Special Session, Report by the Chairman, Ambassador Ronald Saborío Soto.' TN/DS/26 30 January 2015

'——' TN/DS/27 6 August 2015

'——' TN/DS/28 4 December 2015

'Dispute Settlement Body, Special Session, Report by the Chairman, Ambassador Ronald Saborío Soto' TN/DS/28 4 December 2015

'——' TN/DS/28 4 December 2015

'Dispute Settlement Body Special Session, Report by the Chairman, Ambassador Ronald Saborío Soto, to the General Council' TN/DS/21 6 December 2007, as corrected by TN/DS/21/Corr.1 21 December 2007

'Dispute Settlement Body, Special Session, Report by the Chairman, Ambassador Ronald Saborío Soto, to the General Council' TN/DS/18 1 September 2006

'——' TN/DS/19 4 May 2007

'Dispute Settlement Body Special Session, Report by the Chairman, Ambassador Ronald Saborío Soto, to the Trade Negotiations Committee' TN/DS/23 5 December 2008

'——' TN/DS/22 18 July 2008

'——' TN/DS/20 26 July 2007

'——' TN/DS/19 4 May 2007

‘——’ TN/DS/18 1 September 2006

‘——’ TN/DS/17 27 July 2006

‘——’ TN/DS/16 9 May 2006

‘——’ TN/DS/15 29 March 2006

‘——’ TN/DS/14 25 November 2005

‘——’ TN/DS/25 21 April 2011

‘Dispute Settlement Body, Special Session, Report by the Chairman, Ambassador Ronald Saborío Soto, to the Trade Negotiations Committee’ TN/DS/15 29 March 2006

‘——’ TN/DS/16 9 May 2006

‘——’ TN/DS/17 27 July 2006

‘——’ TN/DS/20 26 July 2007

‘——’ TN/DS/22 18 July 2008

‘——’ TN/DS/23 5 December 2008

‘——’ TN/DS/25 21 April 2011

‘——’ TN/DS/25 21 April 2011

‘Dispute Settlement Body Special Session, Report by the Chairman, Ambassador Ronald Saborío Soto, to the Trade Negotiations Committee for the Purpose of the TNC Stocktaking Exercise’ TN/DS/24 22 March 2010

‘Dispute Settlement Body, Special Session, Report by the Chairman, Ambassador Ronald Saborío Soto, to the Trade Negotiations Committee for the Purpose of the TNC Stocktaking Exercise’ TN/DS/24 22 March 2010

‘Dispute Settlement Body Special Session, Report by the Chairman to the Trade Negotiations Committee’ (2002) TN/DS/2 9 July 2002

‘——’ TN/DS/3 2 October 2002

‘Dispute Settlement Body Special Session, Report by the Chairperson, Ambassador Coly Seck’ TN/DS/31 17 June 2019

‘Dispute Settlement Body Special Session, Report by the Chairperson, Ambassador Coly Seck, to the Trade Negotiations Committee’ TN/DS/30 27 November 2017

‘Dispute Settlement Body, Special Session, Responses to Questions on the Specific Input of China’ TN/DS/W/57 19 May 2003

'Dispute Settlement Body Special Session, Special Session of the Dispute Settlement Body, Report by the Chairman, Ambassador Coly Seck' TN/DS/31, 17 June 2019

'Dispute Settlement Body Special Session, Special Session of the Dispute Settlement Body, Report by the Chairman, Ambassador David Spencer, to the Trade Negotiations Committee' TN/DS/10 21 June 2004

'——' TN/DS/10 21 June 2004

'Dispute Settlement Body Special Session, Special Session of the Dispute Settlement Body, Report by the Chairman, Ambassador Péter Balás' TN/DS/9 6 June 2003

'Dispute Settlement Body Special Session, Special Session of the Dispute Settlement Body, Report by the Chairman, Ambassador Ronald Saborio Soto' TN/DS/26

'Dispute Settlement Body Special Session, Special Session of the Dispute Settlement Body, Report by the Chairman, Ambassador Ronald Saborío Soto, to the Trade Negotiations Committee' TN/DS/25 21 April 2011

'Dispute Settlement Body, Special Session, Special Session, Report by the Chairman, Ambassador Ronald Saborío Soto' TN/DS/27 6 August 2015

'Dispute Settlement Body Special Session, Text for LDC Proposal on Dispute Settlement Understanding Negotiations, Communication from Haiti' TN/DS/W/37 22 January 2003

'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Côte d'Ivoire' TN/DS/W/92 5 March 2008

'Dispute Settlement Body Special Session, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Kenya' TN/DS/W/42 24 January 2003

'Dispute Settlement Body, Special Session, Textual Contribution by Chile and the United States.' TN/DS/W/52 14 March 2003

Disputes IC for S of I, *ICSID Convention, Regulations and Rules* (International Centre for Settlement of Investment Disputes 2003)

'Doha Work Programme Decision Adopted by the General Council on 1 August 2004' WT/L/579 2 August 2004

'——' WT/L/579 2 August 2004

Drake-Brockman J and Diallo A, 'LDC Services Exports, Trends and Success Stories' <https://dokumen.tips/documents/ldc-services-exports-traends-and-success-stories.html?page=1>

Dunoff JL and Pollack MA (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press 2012) <https://www.cambridge.org/core/books/interdisciplinary-perspectives-on-international-law-and-international-relations/21D1528540C96B9E2F7FFED8375650C8> accessed 2 September 2022

Eagleton-Pierce M, *Symbolic Power in the World Trade Organization* (OUP Oxford 2012)

'East African Court of Justice' (*East African Court of Justice*, 2016) <http://eacj.org/> accessed 1 April 2016

Eckhardt J and De Bievre D, 'Boomerangs over Lac Léman: Transnational Lobbying and Foreign Venue Shopping in WTO Dispute Settlement' (2015) 14 World Trade Review 507

'Economic Community of West African States (ECOWAS), List of Member States' (*United States Trade Representative*) <https://ustr.gov/countries-regions/africa/regional-economic-communities-rec/economic-community-west-african-states>

'EFTA Court' <http://www.eftacourt.int/> accessed 30 June 2015

Eliason A, 'The Trade Facilitation Agreement: A New Hope for the World Trade Organization' (2015) 14 World Trade Review 643

Elsig M, 'Principal–Agent Theory and the World Trade Organization: Complex Agency and "Missing Delegation"' (2011) 17 European Journal of International Relations 495

——, 'The E15 Initiative, Functioning of the WTO: Proposals and Analysis.' <https://e15initiative.org/wp-content/uploads/2015/09/E15-Functioning-of-WTO-Elsig-Final.pdf>

Elsig M, Pollack M and Shaffer G, 'The U.S. Is Causing a Major Controversy in the World Trade Organization. Here's What's Happening.' *Washington Post* <https://www.washingtonpost.com/news/monkey-cage/wp/2016/06/06/the-u-s-is-trying-to-block-the-reappointment-of-a-wto-judge-here-are-3-things-to-know/> accessed 26 January 2019

Elsig M and Stucki P, 'Low-Income Developing Countries and WTO Litigation: Why Wake up the Sleeping Dog?' (2012) 19 Review of International Political Economy 292

Epps, Tracy D and Trebilcock, Michael J, 'Special and Differential Treatment in Agricultural Trade, Breaking the Impasse', *Developing*

Countries in the WTO Legal System, edited by Chantel Thomas and Joel P Trachtman (Oxford University Press 2009)

Epstein L and King G, 'The Rules of Inference' (2002) 69 1 The University of Chicago Law Review 1

'Equatorial Guinea Graduates from the Category of Least Developed Countries, 4 June 2017' (UN office of the high representative for the Least Developed Countries, Landlocked Developing Countries and Small Island States 2017) <https://www.un.org/ldcportal/content/equatorial-guinea-graduation-history> accessed 25 January 2019

Escaith H and Maurer A, 'World Trade Organisation International Trade Statistics 2015' <https://www.wto.org/english/res_e/statis_e/its2015_e/its2015_e.pdf>

Esserman S and Howse R, 'WTO on Trial' (2003) 82 Foreign Aff. 130

Essoff PA, 'Finland v. Denmark: A Call to Clarify the International Court of Justice's Standards for Provisional Measures' (1991) 15 Fordham Int'l LJ 839

'EUROPA - Court of Justice (CJEU) - The EU Institutions Explained' <http://europa.eu/about-eu/institutions-bodies/court-justice/index_en.htm> accessed 30 June 2015

European and Commission, 'European Union, Trade in Goods with LDC (Least Developed Countries), 2016' (European Commission, Directorate-General for Trade)

European Commission, 'Concept Paper, "WTO Modernisation Introduction to Future EU Proposals."' <http://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf>

'European Commission Presents Comprehensive Approach for the Modernisation of the World Trade Organisation' <http://europa.eu/rapid/press-release_IP-18-5786_en.htm>

'European Council Conclusions, 28 June 2018' 4

Evans JW, *The Kennedy Round in American Trade Policy: The Twilight of the GATT* (Harvard University Press 1971)

Ewart AM, 'Small Developing States in the WTO: A Procedural Approach to Special and Differential Treatment through Reforms to Dispute Settlement' (2007) 35 Syracuse J. Int'l L. & Com. 27

Ewing-Chow M, Goh AWS and Patil AK, 'Are Asian WTO Members Using the WTO DSU "Effectively"?' (2013) 16 Journal of International Economic Law 669

Ezeani EC, 'Can the WTO Judges Assist the Development Agenda?' (2011) 10 Journal of International Trade Law and Policy 124

Fabri HR, 'Is There a Case - Legally and Politically - for Direct Effect of WTO Obligations?' (2014) 25 European Journal of International Law 151

Fairlie MA, 'Miranda and Its (More Rights-Protective) International Counterparts' (2013) 20 UC Davis J. Int'l L. & Pol'y 1

Fattore C, 'The Influence of Legal Capacity on WTO Dispute Duration' (2013) 27 The International Trade Journal 450

Feichtner I, *The Law and Politics of WTO Waivers: Stability and Flexibility in Public International Law* (Cambridge University Press 2011)

Fialho D, 'Altruism but Not Quite: The Genesis of the Least Developed Country (LDC) Category' (2012) 33 Third World Quarterly 751

Finger JM, 'The WTO Trade Facilitation Agreement: Form without Substance Again?' (2014) 48 (6) Journal of World Trade 1279

'"Food and Agriculture Organization of the United Nations" FAOSTAT Database' (*FAOSTAT*, 2017) <http://www.fao.org/faostat/en/#data/QC> accessed 16 July 2017

Footer ME, 'Developing Country Practice in the Matter of Wto Dispute Settlement' (2001) 35 Journal of World Trade 55

——, *An Institutional and Normative Analysis of the World Trade Organization* (Martinus Nijhoff Publishers 2006)

Franck TM, 'On Proportionality of Countermeasures in International Law' [2008] American Journal of International Law 715

Francois JF, Horn H and Kaunitz N, 'Trading Profiles and Developing Country Participation in the WTO Dispute Settlement System' <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1534766> accessed 6 July 2015

Fraser V, 'Horizontal Mechanism Proposal for the Resolution of Non-Tariff Barrier Disputes at the WTO: An Analysis' (2012) 15 Journal of International Economic Law 1033

'From Brussels to Istanbul Key Development Challenges Facing the Least Developed Countries' (United Nations Conference on Trade and Development, Geneva 2011)

Fullerton K, *Legal Research Skills for Scots Lawyers* (Second Edition, Thomson Reuters 2008)

Gana RL, 'The Myth of Development, The Progress of Rights: Human Rights to Intellectual Property and Development*' (1996) 18 Law & Policy 315

Gantz DA, 'An Existential Threat to WTO Dispute Settlement: Blocking Appointment of Appellate Body Members by the United States' [2018] SSRN Electronic Journal <https://www.ssrn.com/abstract=3216633> accessed 19 January 2019

Garcia FJ, 'Beyond Special and Differential Treatment' 27 Comparative Law Review 29

Garner Bryan A., ed., *Black's Law Dictionary* (10th Edition, Thomson Reuters 2014)

GATT Basic Instruments and Selected Documents (GATT BISD), vol Supp.36, 45th Session (William S Hein & Co, Inc 2003)

GATT Basic Instruments and Selected Documents; Trade Arrangements between India, the United Arab Republic and Yugoslavia, Decision of 14th November 1968, L/3132, vol Supplement 16 (William S Hein & Co, Inc, 2003)

'GATT Contracting Parties at Ministerial Level, 15-19 September, Punta Del Este, Uruguay Statement of Bangladesh' MIN (86)/ST/9 16 September 1986 <https://docs.wto.org/gattdocs/q/UR/TNCMIN86/ST9.PDF> accessed 16 November 2016

'GATT Contracting Parties Fourteenth Session Note Submitted by the Less-Developed Countries' W.14/L5 20 May 1959 <https://docs.wto.org/gattdocs/q/GG/W/14-15.PDF> accessed 2 November 2016

'GATT Council, Matters Arising from the December 1988 and April 1989 Meetings of the Trade Negotiations Committee.' C/W/585 31 March 1989

'Gatt International Trade - 1955, A Report by the Secretariat on Trade, Trade Barriers and the Activities of the Contracting Parties' MGT/49/56 <https://docs.wto.org/gattdocs/q/GG/MGT/56-49.PDF> accessed 2 November 2016

'GATT Meeting of Ministers; Statement Made by Mr. J. S. Mayanja-Nyangi, Minister Without Portfolio, Ministry of Economic Affairs, Uganda', (1963) Spec (63)75, 17 May 1963

<https://docs.wto.org/gattdocs/q/GG/SPEC/63-75.pdf> accessed 15 November 2016

'GATT Meeting of Ministers; Statement Made by Mr. Pierre Kalck, Economic Counsellor, Embassy in Paris, Representing the Minister of Economy and Rural Activities, Central African Republic', Spec (63)182, 17th May 1963 <https://docs.wto.org/gattdocs/q/GG/SPEC/63-82.pdf> accessed 15 November 2016

'GATT; Multilateral Trade Negotiations, Group "Safeguards"' (1976) MTN/SG/W/8

'GATT, Multilateral Trade Negotiations, the Uruguay Round, Group of Negotiations on Goods (GATT), Negotiating, Group on Dispute Settlement' (1990) MTN.GNG/NG13/20

'GATT Multilateral Trade Negotiations, The Uruguay Round Ministerial Declaration on the Uruguay Round, MIN. DEC 20, September 1986' MIN. DEC 20 September 1986 <https://www.wto.org/gatt_docs/English/SULPDF/91240152.pdf> accessed 26 June 2017

'GATT; Multilateral Trade Negotiations, Trade Negotiations Committee' (MTN/W/37 1978) MTN/W/37 <https://docs.wto.org/gattdocs/q/.%5CTR%5CMTN%5CW37.PDF> accessed 5 March 2016

'GATT Preparatory Committee, Draft Ministerial Declaration Revision' PREP.COM (86) W/41/Rev.1, 16 July1986 <https://docs.wto.org/gattdocs/q/UR/PREPCOM86/W41R1.PDF> accessed 16 November 2016

'GATT Preparatory Committee, Record of Discussion of 27-28 January 1986' PREP.COM (86) SR/1 10 March 1986

'GATT Preparatory Committee, Record of Discussions, Discussions of 23-26 June' PREP.COM (86) SR/8 13 August 1986 <https://docs.wto.org/gattdocs/q/UR/PREPCOM86/SR8.PDF> accessed 19 November 2016

'GATT Preparatory Committee, Record of Discussions, of 4-5 February' PREP.COM (86) SR/2, 18 March 1986

'GATT Press Release; Meeting of Ministers 16-21 May 1963; Statement Made by Mr. Suminwa, Counsellor of Embassy at Brussels, Congo (Leopoldville)', (1963) GATT/ 784, 16 May 1963 <https://docs.wto.org/gattdocs/q/GG/GATT/784.PDF> accessed 15 November 2016

'GATT, Protocol Amending the GATT to Introduce Part IV on Trade and Development' L/2355 12 February 1965

'GATT, Trends in International Trade, Note by the Executive Secretary' INF/60 18 September 1958

'GATT Uruguay Round Negotiating Group on Dispute Settlement, Proposed Agenda' GATT/AIR/2390, 9 MARCH 1987

Gee JP, *An Introduction to Discourse Analysis: Theory and Method* (Second Edition, Routledge 2005)

Geest W van der. and International Trade Centre UNCTAD/WTO., *Market Access, Transparency and Fairness in Global Trade: Export Impact for Good 2010* (International Trade Centre 2010)

Gehl Sampath P, 'Innovation and Competitive Capacity in Bangladesh's Pharmaceutical Sector' <http://collections.unu.edu/view/UNU:513> accessed 7 July 2015

'General Agreement on Tariffs and Trade, 1994' <https://www.wto.org/english/docs_e/legal_e/06-gatt.pdf> accessed 13 July 2017

'General Agreement on Tariffs and Trade; Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries; L/4903;3 December 1979' <https://docs.wto.org/gattdocs/q/GG/L4999/4903.PDF> accessed 3 October 2016

'General Agreement on Tariffs and Trade (GATT 1947)' <https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm>

'General Assembly Resolutions 26th Session' <http://www.un.org/documents/ga/res/26/ares26.htm> accessed 2 March 2016

'General Council 3 and 4 November 1999 Minutes of Meeting' WT/GC/M/50 16 November 1999

'General Council 3 and 8 May 2000 Minutes of Meeting' WT/GC/M/55 16 June 2000

'General Council 6 October 1999 Minutes of Meeting' WT/GC/M/48 27 October 1999

'General Council 7, 8, 11 and 15 December 2000 Minutes of Meeting' WT/GC/M/61 7 February 2001

'General Council 7 and 8 February 2000 Minutes of Meeting' WT/GC/M/53 15 March 2000

‘General Council, 7 March 2018, Minutes of Meeting.’ WT/GC/M/171, 24 April 2018

‘General Council 7 May 2019, Minutes of Meeting’ WT/GC/M/177 9 July 2019

‘General Council 8 and 9 February 2001 Minutes of Meeting’ WT/GC/M/63 2 March 2001

‘General Council 8 and 9 May 2001 Minutes of Meeting’ WT/GC/M/65 18 June 2001

‘General Council 9-11 and 18 December 1998, Minutes of Meeting’ WT/GC/M/32 9 February 1999

‘General Council 10 October 2000 Minutes of Meeting’ WT/GC/M/58 8 November 200

‘——’ WT/GC/M/58 8 November 2000

‘General Council 10 October 2001 Minutes of Meeting’ WT/GC/M/69 26 October 2001

‘General Council 12 December 2018, Minutes of the Meeting’ WT/GC/M/175, 20 February 2019

‘General Council, 13 March 2000, Minutes of Meeting’ WT/GC/M/54 24 March 2000

‘General Council 15 and 16 February 1999 Minutes of Meeting’ WT/GC/M/35 30 March 1999

‘General Council 15-16 October 2019, Minutes of Meeting’ WT/GC/M/180 3 December 2019

‘General Council 16-17 December 2020, Draft Annual Report (2020).’ WT/GC/W/809 2 December 2020

‘General Council 17 and 19 July 2000 Minutes of Meeting’ WT/GC/M/57 14 September 2000

‘General Council 17 December 1999 Minutes of Meeting’ WT/GC/M/52 3 January 2000

‘General Council 18 and 19 July 2001 Minutes of Meeting’ WT/GC/M/66 10 August 2001

‘General Council 19 – 20 December 2001 Minutes of Meeting’ WT/GC/M/72 6 February 2002

‘General Council 22 November 2000 Minutes of Meeting’ WT/GC/M/60 23 January 2001

'General Council 24-25 July 2003, Minutes of Meeting' WT/GC/M/81 28 August 2003

'General Council 26-27 July 2018; 2017 Report to Congress on China's WTO Compliance.' WT/GC/W/746 16 July 2018

'General Council, 26-27 July 2018; 2017 Report to Congress on China's WTO Compliance, Report from the United States Representative, January 2018, Communication from the United States' WT/GC/W/746 16 July 2018

'General Council, 26-27 July 2018, China's Trade-Disruptive Economic Model, Communication from the United States' WT/GC/W/745 16 July 2018

'General Council, 27 and 31 July 2004, Doha Work Programme, Draft General Council, Decision of 31 July 2004' WT/GC/W/5351 31 July 2004

'General Council 27 July and 1 August 2004, Minutes of Meeting' WT/GC/M/87 4 October 2004

'General Council 31 October and 1 November 2001 Minutes of Meeting' WT/GC/M/71 13 December 2001

'General Council Annual Report (1999)' WT/GC/28 12 November 1999

'General Council, China and The World Trade Organisation, Communication from China' WT/GC/W/749 19 July 2018

'General Council, Derestriction of Official GATT 1947 Documents, 2006, WT/GC/W/562'

'General Council, G90 Declaration on Special and Differential Treatment' WT/GC/234 15 July 2021

'General Council, Minutes of Meeting, 8 February 2006' WT/GC/M/101 4 April 2006

'General Council Special Session on Implementation 3 October and 1 November 2001 Minutes of Meeting' WT/GC/M/70 10 January 2002

'General Council Special Session on Implementation 15 December 2000 Minutes of Meeting' WT/GC/M/62 28 February 2001

'General Council Special Session on Implementation 20 July 2001 Minutes of Meeting' WT/GC/M/67 29 August 2001

'General Council, Special Session on Implementation, 22 June and 3 July 2000, Minutes of Meeting' WT/GC/M/56 12 September 2000

'General Council Special Session on Implementation 27 April 2001 Minutes of Meeting' WT/GC/M/64 15 June 2001

'General Council, Strengthening and Modernizing the WTO: Discussion Paper, Communication from Canada' JOB/GC/201, 24 September 2018

George A. Bermann and Petros C. Mavroidis, *WTO Law and Developing Countries* (Cambridge University Press 2007)

Georgiev D and Van der Borght K (eds), *Reform and Development of the WTO Dispute Settlement System* (Cameron May 2006)

Geraldo Vidigal, 'Re-Assessing WTO Remedies: The Prospective and the Retrospective' (2013) 16 (3) J Int Economic Law 505

Ghosh A, 'Developing Countries in the WTO Trade Policy Review Mechanism' (2010) 9 World Trade Review 419

Gibbs M, 'Special and Differential Treatment in the Context of Globalization' [1998] Note presented to the G15 Symposium on Special and Differential Treatment in the WTO Agreements, New Delhi, 10 December 1998 <https://www.wto.org/english/tratop_e/devel_e/sem01_e/gibbs_e.doc >

Gillett RD and Food and Agriculture Organization of the United Nations., *Global Study of Shrimp Fisheries* (Food and Agriculture Organization of the United Nations 2008)

Gillham B, *Case Study Research Methods* (Continnuum-3PL 2000)

Gillson I and others, 'Developed Country Cotton Subsidies and Developing Countries.' [2004] Briefing Paper, ODI, London <https://mpra.ub.uni-muenchen.de/15373/>

Gilpin R and Gilpin JM, *Global Political Economy: Understanding the International Economic Order* (Princeton University Press 2001)

Goodson I and Sikes PJ, *Life History Research in Educational Settings: Learning from Lives* (Open University 2001)

Gore C and Kozul-Wright Z, 'An Overview of UNCTAD's Least Developed Countries Report 2010: Towards a New International Development Architecture for LDCs' (2011) 23 European Journal of Development Research 3

Götz C, Heckelei T and Rudloff B, 'What Makes Countries Initiate WTO Disputes on Food-Related Issues?' (2010) 35 Food Policy 154

Government of Canada GAC, 'Strengthening and Modernizing the WTO: Discussion Paper Communication from Canada' (*Government of Canada*) <https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=248327&CurrentCatalogueIdIndex=0&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True> accessed 29 October 2018

Grando MT, *Evidence, Proof, and Fact-Finding in WTO Dispute Settlement* (Oxford University Press 2009)

Green A and de Gorter H, 'Analyzing the System of Preferential Tariffs for Least Developed Countries: ANALYSING PREFERENTIAL TARIFFS FOR LDCS' (2011) 19 Review of International Economics 436

Gross A, 'Can Sub-Saharan African Countries Defend Their Trade and Development Interests Effectively in the WTO? The Case of Cotton.' (2006) 18 European Journal of Development Research

Grossman GM and Sykes AO, '"Optimal" Retaliation in the WTO – a Commentary on the Upland Cotton Arbitration' (2011) 10 World Trade Review 133

'Group of Negotiations on Goods (GATT), Fifth Meeting, Record of Decisions Taken' MTN.GNG/5 9 February 1987

'Group of Negotiations on Goods (GATT) Negotiating Group on Dispute Settlement, Communication from the EEC' MTN.GNG/NG13/W/22 2 March 1988

'Group of Negotiations on Goods (GATT), Negotiating Group on Dispute Settlement, Meeting of 10-12 October 1988; Note by the Secretariat, Corrigendum' MTN.GNG/NGl3/ll/Corr.l 15 November 1988 <https://docs.wto.org/gattdocs/q/UR/GNGNG13/11C1.PDF> accessed 25 November 2016

'Group of Negotiations on Goods (GATT), Negotiating Group on Dispute Settlement Meeting of 12-13 September 1990, Note by the Secretariat' MTNGNG/NG13/22 24 October 1990

'Group of Negotiations on Goods (GATT), Negotiating Group on Dispute Settlement, Report by the Chairman' MTN.GNGNG13W43 18 July 1990

'Group of Negotiations on Services Meeting at Ministerial Level Brussels, December 1990, Statement by H.E. Mr. Georges Solofoson Minister for Trade of Madagascar, Spokesman for the African Countries' MTN.TNC/MIN (90)/ST/33 4 December 1990

Grynberg R (ed), *Rules of Origin: Textiles and Clothing Sector* (Cameron May 2005)

—— (ed), *WTO at the Margins: Small States and the Multilateral Trading System* (Cambridge University Press 2006)

Guan S, 'WTO Retaliation Rules in Subsidy-Related Cases: What Can We Learn from the US-Upland Cotton Arbitration?' (2013) 48 Journal of World Trade 815

Guest GS (Stephen), MacQueen KM and Namey EE, *Applied Thematic Analysis* (SAGE Publications, Inc 2012)

Guzman AT and Beth A. Simmons, 'Power Plays and Capacity Constraints: The Selection of Defendants in World Trade Organization Disputes' (2005) 34 The Journal of Legal Studies 557

Halliday S and Schmidt P, *Conducting Law and Society Research* (Cambridge University Press - MUA 2009)

Hamilton C and Whalley J, 'Coalitions in the Uruguay Round: The Extent, Pros and Cons of Developing Country Participation 1, 2' (National Bureau of Economic Research 1988) <http://www.nber.org/papers/w2751> accessed 16 October 2015

Hammersley M and Atkinson P, *Ethnography: Principles in Practice* (2nd ed., Routledge 1995)

Hammersley M and Traianou A, 'Foucault and Research Ethics on the Autonomy of the Researcher' (2014) 20 Qualitative Inquiry 227

Haroon Habib, 'The Hindu Newspaper: Anti-Dumping: Dhaka Takes Delhi to WTO' *The Hindu Group* (India, 8 February 2004) <https://www.thehindu.com/todays-paper/tp-national/anti-dumping-dhaka-takes-delhi-to-wto/article27561308.ece>

Hart M and Dymond B, 'Special and Differential Treatment and the Doha" Development" Round' (2003) 37 Journal of World Trade 395

Hartigan JC, 'Did the Agreement on Safeguards Nullify Their Use?' (2015) 15 Global Economy Journal

Hartigan JC and Vandenbussche H, 'Disfavored Nations: Anti-Dumping at the WTO: Disfavored Nations: Anti-Dumping at the WTO' (2013) 17 Review of Development Economics 105

Hasan QM and Ibrahim MK, 'The Role of Advisory Centre on World Trade Organization Law (ACWL) in Supporting Developing Countries Regarding the Dispute Settlement Mechanism' (2016) 3 International Journal of Social Sciences & Educational Studies 10

Hauser H and Zimmerman TA, 'The Challenge of Reforming the WTO Dispute Settlement Understanding' (2003) 38 Intereconomics 241

'Havana Charter for an International Trade Organisation' (International Commission for the International Trade Organisation 1947) <https://www.wto.org/english/docs_e/legal_e/havana_e.pdf>

Hawthorne H, *Least Developed Countries and the WTO* (Palgrave Macmillan 2013)

Hayter R and Edenhoffer K, 'Trade Disputes, Dispute Settlement Mechanisms, and Local Development' (2014) 66 The Professional Geographer 631

Hazard (ed.) E, *International Trade Negotiations and Poverty Reduction: The White Paper on Cotton* (Occasional Papers, n° 249 enda editions, 2005) <https://searchworks.stanford.edu/view/9156728>

Heinisch EL, 'West Africa versus the United States on Cotton Subsidies: How, Why and What Next?' (2006) 44 The Journal of Modern African Studies 251

Helfer LR, 'Flexibility in International Agreements' in Jeffrey L Dunoff and Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press 2012)

Hellawell D, 'Inside–out: Analysis of the Insider–Outsider Concept as a Heuristic Device to Develop Reflexivity in Students Doing Qualitative Research' (2006) 11 Teaching in Higher Education 483

Helleiner GK, 'Transnational Enterprise, Manufactured Exports and Employment in Less Developed Countries' (1976) 11, No. 5/7 Economic and Political Weekly 247

Henson S, Brouder A-M and Mitullah W, 'Food Safety Requirements and Food Exports from Developing Countries: The Case of Fish Exports from Kenya to the European Union' [2000] American Journal of Agricultural Economics 1159

Herdegen M, *Principles of International Economic Law* (Oxford University Press)

Heron T, *Pathways from Preferential Trade* (Palgrave Macmillan 2013)

Hey E, 'Considerations Regarding the Hormones Case, the Precautionary Principle and International Dispute Settlement Procedures' (2000) 13 Leiden Journal of International Law 239

Hoda A and Ahuja R, 'Agreement on Subsidies and Countervailing Measures: Need for Clarification and Improvement' (2005) 39 J. World Trade 1009

Hoekman B, 'Strengthening the Global Trade Architecture for Development: The Post Doha Agenda' (2002) 1 World Trade Review

Hoekman B, 'Operationalizing the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment' (2005) 8 Journal of International Economic Law 405

Hoekman B, 'Proposals for WTO Reform: A Synthesis and Assessment' (2011) 20 Minn. J. Int'l L. 324

Hoekman B, Michalopoulos C and Winter LA, 'Special and Differential Treatment of Developing Countries in the WTO: Moving Forward after Cancun' (2004) 27 The World Economy 481

Hoekman BM, 'Developing Country Participation in the Uruguay Round', *Research Seminar in International Economics, Seminar Discussion Paper 225* (The University of Michigan 1988) <http://deepblue.lib.umich.edu/handle/2027.42/100759> accessed 16 October 2015

Hoekman BM and Kostecki MM, *The Political Economy of the World Trading System by Hoekman, Bernard M., Kostecki, Michel M. (2009) Paperback* (Third Edition, Oxford University Press 2009)

Hoekman BM and Mavroidis PC, 'WTO Dispute Settlement, Transparency and Surveillance' (2000) 23 The World Economy 527

——, 'Bite the Bullet' (2014) 20 European Law Journal 317

Honeck D, '"Expect the Unexpected"? LDC GATS Commitments as Internationally Credible Policy Indicators? The Example of Mali' [2011] World Trade Organization Staff Working Paper No. ERSD-2011-07 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1865813> accessed 7 July 2015

Hoque MM and Yusop Z, 'Impacts of Trade Liberalization on Export Performance in Bangladesh: An Empirical Investigation' (2012) 13 South Asia Economic Journal 207

Horn H, Johannesson L and Mavroidis PC, 'The WTO Dispute Settlement System 1995-2010: Some Descriptive Statistics' (IFN Working Paper 2011) <http://www.econstor.eu/handle/10419/81532> accessed 20 June 2014

Horn H and Mavroidis PC, 'US–Lamb United States–Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia: What Should Be Required of a Safeguard Investigation?' (2003) 2 World Trade Review 395

Horn H, Mavroidis PC and Nordström H, 'Is the Use of the WTO Dispute Settlement System Biased?' <https://ideas.repec.org/p/cpr/ceprdp/2340.html>

Horn H, Mavroidis PC and Wijkström EN, 'In the Shadow of the DSU: Addressing Specific Trade Concerns in the WTO SPS and TBT Committees' (2013) IFN Working Paper No. 960, Columbia Law and Economics

Working Paper No. 494
<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2478598>
accessed 27 September 2015

Howse R, 'The World Trade Organization 20 Years On: Global Governance by Judiciary' (2016) 27 European Journal of International Law 9

Huang Y, 'Trade Remedy Measures in the WTO and Regional Trade Agreements' (University of Edinburgh 2012)
<https://era.ed.ac.uk/bitstream/handle/1842/7784/Huang2013.pdf?sequence=2&isAllowed=y>

Hudec RE, 'GATT Dispute Settlement After the Tokyo Round: An Unfinished Business' (1980) 13 Cornell Int'l LJ 145

——, 'GATT and the Developing Countries' (1992) 1992 Colum Bus L Rev 67 15

——, 'Broadening the Scope of Remedies in WTO Dispute Settlement', *Improving WTO Dispute Settlement Procedures,* (Cameron May 2000)

Hudec RE and Finger JM, *Developing Countries in the GATT Legal System* (1st Edition, Cambridge University Press 2014)

Hudec, Robert, 'The GATT Legal System: A Diplomat's Jurisprudence' (1970) Vol.5 Journal of World Trade Law 615

Huerta-Goldman JA, 'How Easy Is an Easy Case for a Complainant? Comment on US–Zeroing (Korea) DS402' (2013) 12 World Trade Review 427

Hufbauer GC and Schott JJ, 'Will the World Trade Organization Enjoy a Bright Future?' (2012) PB12-11 Policy Brief in International Economics
<https://www.piie.com/sites/default/files/publications/pb/pb12-11.pdf>

Information and Media Relations Division of the WTO and Secretariat, 'Background Fact Sheet WTO Agriculture Negotiations August 2003. Tariff Negotiations in Agriculture Reduction Methods. The Swiss Formula - a Special Case of a Harmonizing Formula Tariff Cut.'
<https://www.wto.org/english/tratop_e/agric_e/agnegs_swissformula_e.htm>

'International Centre for Settlement of Investment Disputes | ICSID Arbitration'
<https://icsid.worldbank.org/sites/default/files/documents/ICSID_Convention.pdf> accessed 30 June 2015

'International Centre for Settlement of Investment Disputes, Chapter IV Arbitration'

<https://icsid.worldbank.org/sites/default/files/documents/ICSID_Convention.pdf>

'International Court of Justice | ICJ | Decisions' <http://www.worldcourts.com/icj/eng/index.htm> accessed 2 December 2015

'International Jute Study Group, World Jute Profile, Brazil' <https://uia.org/s/or/en/1100035644>

Irwin DA and Weiler J, 'Measures Affecting the Cross-Border Supply of Gambling and Betting Services (DS 285)' (2008) 7 World Trade Review 71

Islam MS and Grönlund A, 'Agriculture Market Information Services (AMIS) in the Least Developed Countries (LDCs): Nature, Scopes, and Challenges', *Electronic Government* (Springer 2010)

'Issues Regarding the Review of the WTO Dispute Settlement Mechanism' (South Centre 1999) Trade-Related Agenda, Development and Equity, Working Papers 1, February 1999 <https://www.econbiz.de/Record/occasional-papers-trade-related-agenda-development-and-equity-t-r-a-d-e-south-centre/10004514533>

Jackson JH, 'Dispute Settlement in the WTO: Policy and Jurisprudential Considerations', *Research Seminar in International Economics, The University of Michigan, Discussion Paper* (1998) <http://fordschool.umich.edu/rsie/workingpapers/Papers401-425/r419.pdf> accessed 25 May 2017

——, 'International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to" Buy Out"?' (2004) 98 AJIL 109

——, *Sovereignty, the WTO and Changing Fundamentals of International Law* (Cambridge University Press 2006)

——, 'The Role and Effectiveness of the WTO Dispute Settlement Mechanism [with Comments and Discussion]' [2022] Brookings Trade Forum 59

Jackson S, 'Small States and Compliance Bargaining in the WTO: An Analysis of the *Antigua–US Gambling Services Case*' (2012) 25 Cambridge Review of International Affairs 367

Jales M, 'How Would a Trade Deal on Cotton Affect Exporting and Importing Countries?' (International Centre for Trade and Sustainable Development (ICTSD) 2010) Issue Paper No. 26 <https://www.files.ethz.ch/isn/117541/m_jales_web3.pdf>

James C, 'Global Status of Commercialized Biotech/GM Crops: 2008' [2008] International Service for the Acquisition of Agri-biotech

applications, ISAAA Briefs, Brief 39 <https://isaaa.org/resources/publications/briefs/39/download/isaaa-brief-39-2008.pdf>

Janow ME, Donaldson V and Yanovich A, *The WTO: Governance, Dispute Settlement, and Developing Countries* (Juris Publishing 2008)

Jansen M, 'Aid for Trade and SME Competitiveness Connecting Developing Country SMEs to Global Value Chains' (2014) <https://www.wto.org/english/tratop_e/devel_e/a4t_e/wkshop_oct14_e/jansen_e.pdf> accessed 3 September 2015

'Japan - Taxes on Alcoholic Beverages, Mutually Acceptable Solution on Modalities for Implementation' (1998) WT/DS8/19, WT/DS10/19, WT/DS11/17 12 January 1998

'Japan Offers JPY 26 Million on to Strengthen Negotiating Capacity of Poorest Members' <https://www.wto.org/english/news_e/pres19_e/pr836_e.htm> accessed 14 September 2021

Jaramillo CO, 'The Genesis of the ACWL', *ACWL at Ten: Looking Back, Looking Forward* (Advisory Centre on WTO Law 2011) <https://www.acwl.ch/download/ql/ACWL_AT_TEN.pdf>

Javelosa JC, Schmitz A, and others, 'Cost-Benefit Analysis of a WTO Dispute' (International Agricultural Trade and Policy Center (IATPC) 2004) WPTC 04-03 <https://ideas.repec.org/p/ags/uflowp/15648.html>

Jawara F and Kwa A, *Behind the Scenes at the WTO: The Real World of International Trade Negotiations/Lessons of Cancun* (Revised edition, Zed Books 2004)

Jo H and Namgung H, 'Dispute Settlement Mechanisms in Preferential Trade Agreements: Democracy, Boilerplates, and the Multilateral Trade Regime' (2012) 56 Journal of Conflict Resolution 1041

Jobodwana ZN, 'Participation of African Member States in the World Trade Organisation (WTO) Multilateral Trading System' (2006) 1 International Journal of African Renaissance Studies - Multi-, Inter- and Transdisciplinarity 244

'Joint Communiqué of the Ottawa Ministerial on WTO Reform – Ottawa, October 25, 2018' (2018) <https://trade.ec.europa.eu/doclib/docs/2018/october/tradoc_157466.pdf>

Juenger FK, 'The ILA Principles on Provisional and Protective Measures' (1997) 45 The American Journal of Comparative Law 941

'Jute Exports Stall as India Imposes Antidumping Duty | The Daily Star' <http://www.thedailystar.net/business/jute-exports-stall-india-imposes-antidumping-duty-1343398> accessed 9 July 2017

Karingi S, Valensisi G and Taal S, 'Reducing Trade Costs to Support Africa's Transformation - The Role of Aid for Trade' (United Nations Economic Commission for Africa 2015) <https://www.tralac.org/images/docs/7662/reducing-trade-costs-to-support-africas-transformation-role-of-aid-for-trade-uneca-2015.pdf>

Kearns JE and Charnovitz S, 'Adjudicating Compliance in the WTO: A Review of DSU Article 21.5' (2002) 5 Journal of International Economic Law 331

Keaton J, 'As Trump Rails, US Allies Take Lead in Changing Trade Rules' *Washington Post* (22 November 2018) <https://apnews.com/article/cd10e94b24b1420da9a410dd1f1bcefc>

Keck A and Low P, 'World Trade Organization Economic Research and Statistics Division; Special and Differential Treatment in the WTO: Why, When and How?' (2004) Staff Working Paper ERSD-2004-03 <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjm1b3x9O75AhWdQUEAHTUBBEsQFnoECAsQAQ&url=https%3A%2F%2Fwww.wto.org%2Fenglish%2Fres_e%2Freser_e%2Fersd200403_e.doc&usg=AOvVaw2i_J6WFQ8Q0b_KgyF7eT_8>

Kennedy M, 'Why Are WTO Panels Taking Longer? And What Can Be Done about It?' (2011) 45(1) Journal of World Trade 221

Kessie E, 'Enforceability of the Legal Provisions Relating to Special and Differential Treatment under the Wto Agreements' (2000) 3 The Journal of World Intellectual Property 955

Kessie E and Addo K, 'African Countries and the WTO Negotiations on the Dispute Settlement Understanding'

< https://silo.tips/download/african-countries-and-the-wto-negotiations-on-the-dispute-settlement-understandi> accessed 3 October 2016

Khush GS, 'Genetically Modified Crops: The Fastest Adopted Crop Technology in the History of Modern Agriculture' (2012) 1 Agriculture & Food Security 14

Kim SY, 'Chad P. Bown. 2009. Self-Enforcing Trade: Developing Countries and WTO Dispute Settlement (Washington, DC: Brookings Institution Press)' (2010) 5 The Review of International Organizations 497

Kishore P, 'Special and Differential Treatment in the Multilateral Trading System' (2014) 13 Chinese Journal of International Law 363

Kituyi Dr M, 'The Least Developed Countries Report 2014' (UNCTAD 2014) <https://unctad.org/system/files/official-document/ldc2014_en.pdf>

Klaus Kastle klaus kästle-, 'Megalanguages Spoken around the World - Nations Online Project' <https://www.nationsonline.org/oneworld/countries_by_languages.htm> accessed 13 April 2022

Klein N, 'Provisional Measures and Provisional Arrangements in Maritime Boundary Disputes' (2006) 21 Int'l J. Marine & Coastal L. 423

——, *Litigating International Law Disputes: Weighing the Options* (Cambridge University Press 2014)

Knebel Christian and others, 'Malawi: Company Perspectives. An ITC Series on Non-Tariff Measures' (International Trade Centre (ITC) 2012) MAR-12-222. / EC-16 454 MAL <https://intracen.org/media/file/11023>

Kock K, *International Trade Policy and the Gatt 1947-1967* (Almqvist & Wiksell 1969)

Komuro N, 'The WTO Dispute Settlement Mechanism–Coverage and Procedures of the WTO Understanding' (1995) 12 Journal of International Arbitration 81

Kongolo T, 'The Wto Dispute Settlement Mechanism' (2001) 4 The Journal of World Intellectual Property 257

Kono DY, 'Optimal Obfuscation: Democracy and Trade Policy Transparency' (2006) 100 American Political Science Review 369

Kreier J, 'Uruguay Round Agreements on Subsidies and on Anti-Dumping', *2nd World Conference of Trade Promotion Organizations (TPOs)* (1998)

Kristina Daugirdas and Julian David Mortenson (eds), 'Contemporary Practice of the United States Relating to International Law, United States Blocks Reappointment of WTO Appellate Body Member' (2016) 110 American Journal of International Law 573

Kuyper PJ and Parlin CC, 'Remedies and Retaliation in the WTO: Are They Likely to Be Effective? The State Perspective and the Company Perspective', *Proceedings of the Annual Meeting (American Society of International Law)* (JSTOR 1997) <http://www.jstor.org/stable/25659132> accessed 16 April 2015

Kvale S and Brinkmann S, *Interviews: Learning the Craft of Qualitative Research Interviewing* (Second Edition, SAGE Publications, Inc 2008)

Kwon R, 'Is Tariff Reduction a Viable Strategy for Economic Growth in the Periphery? An Examination of Tariff Interaction Effects in 69 Less Developed Countries.' (2013) 19 Journal of World-Systems Research

la Cour LF and Müller J, 'Growth and Project Finance in the Least Developed Countries' [2014] International Journal of Economic Sciences and Applied Research 77

Lacarte-Muro J and Gappah P, 'Developing Countries and the WTO Legal and Dispute Settlement System: A View from the Bench' (2000) 3 Journal of International Economic Law 395

Lamp N, 'How Some Countries Became "Special": Developing Countries and the Construction of Difference in Multilateral Trade Lawmaking' (2015) 18 Journal of International Economic Law 743

Lamy P, 'The Place of the WTO and Its Law in the International Legal Order' (2006) 17 European Journal of International Law 969

Lan NTP, 'Social and Ecological Challenges of Market-Oriented Shrimp Farming in Vietnam' (2013) 2 Springerplus 675

Lang AT, 'Provisional Measures under Article 5.7 of the WTO's Agreement on Sanitary and Phytosanitary Measures: Some Criticisms of the Jurisprudence so Far' <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1153660> accessed 1 August 2015

Langan M and Scott J, 'The Aid for Trade Charade' (2013) 49(2) Cooperation and Conflict 143

Lanoszka A, *The World Trade Organization: Changing Dynamics in the Global Political Economy* (Lynne Rienner Publishers 2009)

Laowonsiri A, 'Application of the Precautionary Principle to the SPS Agreement' (2010) 14 Max Planck Yearbook of United Nations Law 565

Lauterpacht H, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties' 26 26 Brit. Y. B. Int'l L. 48 (1949)

'LDC - What Is a Least Developed Country?' <https://unctad.org/en/pages/PressRelease.aspx?OriginalVersionID=438> accessed 25 January 2019

'LDC Services Exports: Trends and Success Stories' (International Trade Centre 2013) Technical Paper Doc. No. SC-13-233.E <https://dokumen.tips/documents/ldc-services-exports-traends-and-success-stories.html?page=1>

'LDCs at a Glance | Department of Economic and Social Affairs' (25 May 2008) <https://www.un.org/development/desa/dpad/least-developed-country-category/ldcs-at-a-glance.html/> accessed 8 April 2021

Le T, 'Vietnam's Experience in Developing International Trade Lawyers Following Five Years of World Trade Organization Accession' (2013) 47 Journal of World Trade 675

'Least Developed Countries Propose New Caps on Trade-Distorting Farm Subsidies at WTO' (*Tralac*) <https://www.tralac.org/news/article/11222-least-developed-countries-propose-new-caps-on-trade-distorting-farm-subsidies-at-wto.html>

'Least Developed Countries: UN Classification | Data' <http://data.worldbank.org/region/LDC> accessed 31 July 2015

Lee J, 'A More Widely Available Public Good: Proposed DSU Reform and Its Implication for Developing Members' (2017) 51 Journal of World Trade 987

Lee Y-S and others (eds), *Law and Development Perspective on International Trade Law* (Cambridge University Press 2011)

Legal Affairs Division WTO, *GATT Analytical Index: Guide to GATT Law and Practice* (Updated 6th Edition, Bernan Press 1995)

Legal Affairs Division WTOLA, *WTO Analytical Index: Guide to WTO Law and Practice*, vol 1 (Cambridge University Press 2012 2012)

Leitner K and Lester S, 'WTO Dispute Settlement 1995-2013--A Statistical Analysis' (2014) 17 Journal of International Economic Law 191

Lester S, 'Katherine Tai on Fixing WTO Dispute Settlement' (*International Economic Law and Policy Blog*) <https://ielp.worldtradelaw.net/2022/06/katherine-tai-on-fixing-wto-dispute-settlement.html> accessed 18 June 2022

——, 'Katherine Tai on WTO Dispute Settlement' (*International Economic Law and Policy Blog*) <https://ielp.worldtradelaw.net/2021/10/katherine-tai-on-wto-dispute-settlement.html> accessed 26 January 2022

——, 'Maria Pagan on Reforming WTO Dispute Settlement and the Appellate Body' (*International Economic Law and Policy Blog*) <https://ielp.worldtradelaw.net/2021/10/marian-pagan-on-reforming-wto-dispute-settlement-and-the-appellate-body.html> accessed 26 January 2022

——, 'What Does the Biden Administration Think About a Power-Based vs. a Rules-Based Trading System?' (*International Economic Law and Policy Blog*) <https://ielp.worldtradelaw.net/2021/10/what-does-the-biden-

administration-think-about-a-power-based-or-rules-based-trading-system.html> accessed 26 January 2022

Lester Simon, 'What Does the Biden Administration Think About a Power-Based vs. a Rules-Based Trading System?' (*International Economic Law and Policy Blog*) <https://ielp.worldtradelaw.net/2021/10/what-does-the-biden-administration-think-about-a-power-based-or-rules-based-trading-system.html> accessed 26 January 2022

Lilliston B, 'Brazil's Challenge of U.S. Cotton Program at the WTO: What's at Stake?' <https://www.iatp.org/documents/brazils-challenge-us-cotton-program-wto-whats-stake>

Lindeque J and McGuire S, 'The United States and Trade Disputes in the World Trade Organization: Hegemony Constrained or Confirmed?' (2007) 47 Management International Review 725

Mah JS, 'Special and Differential Treatment of Developing Countries and Export Promotion Policies under the WTO: SPECIAL AND DIFFERENTIAL TREATMENT' (2011) 34 The World Economy 1999

Maher G and Rodger BJ, 'Provisional and Protective Remedies: The British Experience of the Brussels Convention' (1999) 48 Int'l & Comp. L.Q 302

'Maldives Identifies Challenges in Graduating to a Developing Country' (2011) <https://mihaaru.com/haveeru_online ; (copy on file with author)>

Manduna C, 'Daring to Dispute: Are There Shifting Trends in African Participation in WTO Dispute Settlement?'' [2005] Tralac Trade Brief <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwj5hcaW_u75AhUCRsAKHedxBW4QFnoECBYQAQ&url=https%3A%2F%2Fwww.wto.org%2Fenglish%2Fnews_e%2Fevents_e%2Fsymp05_e%2Fmanduna14_e.ppt&usg=AOvVaw10A7y2w7PEiajUIpwHp3nv>

Marceau GZ and Hawkins JK, 'Experts in WTO Dispute Settlement' (2012) 3 Journal of International Dispute Settlement 493

Marchant MA and Ruppel FJ, 'The Impacts of Lesser Countries on Southern Agricultural Exports' <http://ageconsearch.umn.edu/bitstream/31638/1/22010071.pdf> accessed 14 June 2014

'Marrakesh Agreement Establishing the World Trade Organization (with Final Act, Annexes and Protocol). Concluded at Marrakesh on 15 April 1994; Registered by the Director-General of the World Trade Organization, Acting on Behalf of the Parties, on 1 June 1995' (1995) 31874, Vol. 1867, 1–31874

<https://treaties.un.org/doc/Publication/UNTS/Volume%201867/volume-1867-A-31874-English.pdf>

Masakure O, Cranfield J and Henson S, 'Factors Affecting the Incidence and Intensity of Standards Certification Evidence from Exporting Firms in Pakistan' (2011) 43 Applied Economics 901

Matsushita M, 'WTO Dispute Cases Relating to Food Safety Issues', *Frontiers of Economics and Globalization, Trade Disputes and the Dispute Settlement Understanding of the WTO: An Interdisciplinary Assessment*, vol 6 (Emerald Group Publishing 2009)

Mavroidis PC, 'Always Look at the Bright Side of Non-Delivery: WTO and Preferential Trade Agreements, Yesterday and Today' (2011) 10 World Trade Review 375

Mbirimi I, Chilala B and Grynberg R, *From Doha to Cancún: Delivering a Development Round* (Commonwealth Secretariat 2003)

McConville M and Chui WH eds, *Research Methods for Law* (Edinburgh University Press 2007)

McKinney JA, 'The World Trade Regime: Past Successes and Future Challenges' 49 INT'l J 445

McLachlan C, 'The Continuing Controversy over Provisional Measures in International Disputes' (2005) 7 Int'l L.F. D. Int'l 5

McMillan M, Zwane AP and Ashraf N, 'My Policies or Yours: Does OECD Support for Agriculture Increase Poverty in Developing Countries?', *Globalization and Poverty* (University of Chicago Press 2007)

McRae C, Wilson D and Anderson K (eds), *The Economics of Quarantine and the SPS Agreement* (University of Adelaide Press 2015)

Mendez-Parra M, Balchin N and Calabrese L, 'Imagining a New Negotiation Strategy for LDCs at the WTO' (Overseas Development Institute 2015) Briefing <https://odi.org/en/publications/imagining-a-new-negotiation-strategy-for-ldcs-at-the-wto/>

Mercurio B, 'Why Compensation Cannot Replace Trade Retaliation in the WTO Dispute Settlement Understanding' (2009) 8 World Trade Review 315

——, '"Seizing" Pharmaceuticals in Transit: Analysing the WTO Dispute That Wasn't T' (2012) 61 International and Comparative Law Quarterly 389

——, ‘Improving Dispute Settlement in the World Trade Organization: The Dispute Settlement Understanding Review - Making It Work?’ 38(5) Journal of World Trade 795

Merton RK, ‘Insiders and Outsiders: A Chapter in the Sociology of Knowledge’ (1972) Vol. 78 American Journal of Sociology, 9

Michalopoulos C, ‘The Role of Special and Differential Treatment for Developing Countries’ (The World Bank Development Research Group Trade 2000) Policy Research Working Paper 2388 <https://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-2388>

Michalopoulous C, *Developing Countries in the WTO* (Palgrave Macmillan 2001)

‘Ministerial Conference Eleventh Session Buenos Aires, 10-13 December 2017, Africa and Development, Proposal by the African Group’ WT/MIN (17)/11, JOB/GC/167 JOB/TNC/69, JOB/AG/133 JOB/DEV/50, JOB/DS/24 JOB/IP/28, JOB/MA/133 JOB/RL/10, JOB/SERV/275 JOB/TE/48 5 December 2017

‘Ministerial Conference, Fourth Session Doha, 9 - 13 November 2001, Benin, Statement by H.E. Mr. Lazare Sehoueto Minister of Industry, Trade and Employment Promotion’ WT/MIN (01)/ST/131 12 November 2001

‘Ministerial Conference, Fourth Session Doha, 9 - 13 November 2001, Burkina Faso, Statement by H.E. Mr. Bédouma Alain Yoda Minister of Trade, Business Promotion and Handicrafts’ WT/MIN (01)/ST/94 11 November 2001

‘Ministerial Conference, Fourth Session Doha, 9 - 13 November 2001, Burundi, Statement by H.E. Mr. Adolphe Nahayo Ambassador, Permanent Representative in Geneva’ WT/MIN (01)/ST/127 12 November 2001

‘Ministerial Conference, Fourth Session Doha, 9 - 13 November 2001, Chad, Statement by H.E. Mr. Mahamat Saleh Adoum Minister of Commerce, Industry and Handcrafts’ WT/MIN (01)/ST/117 12 November 2001

‘Ministerial Conference, Fourth Session Doha, 9 - 13 November 2001, Lao People’s Democratic Republic, Statement Circulated by H. E. Mr. Siaosavath Savengsuksa Vice Minister, Ministry of Commerce, (As an Observer)’ WT/MIN (01)/ST/98 11 November 2001

‘Ministerial Conference, Fourth Session Doha, 9 - 13 November 2001, Lesotho, Statement by the Honourable Mpho Meli Malie Minister of Industry, Trade and Marketing’ WT/MIN (01)/ST/52 11 November 2001

'Ministerial Conference, Fourth Session Doha, 9 - 13 November 2001, Madagascar, Statement by H.E. Mr. Maxime Zafera, Ambassador, Permanent Representative to the United Nations at Geneva' WT/MIN (01)/ST/88 11 November 2001

'Ministerial Conference, Fourth Session Doha, 9 - 13 November 2001, Malawi, Statement by the Honourable Peter Kaleso MP Minister of Commerce and Industry' WT/MIN (01)/ST/121 12 November 2001

'Ministerial Conference, Fourth Session Doha, 9 - 13 November 2001, Mali, Statement Circulated by H.E. Mrs. Toure Alimata Traore Minister of Industry, Commerce and Transport' WT/MIN (01)/ST/140 12 November 2001

'Ministerial Conference Fourth Session Doha, 9 - 13 November 2001, Mauritania, Statement by H.E. Mr Ould Mohamed Lemine Ambassador, Permanent Representative to the WTO' WT/MIN (01)/ST/41 10 November 2001

'Ministerial Conference, Fourth Session Doha, 9 - 13 November 2001, Mozambique, Statement by H.E. Mr. Salvador Namburete Deputy-Minister of Industry and Trade' WT/MIN (01)/ST/84 11 November 2001

'Ministerial Conference, Fourth Session Doha, 9 - 13 November 2001, Nepal, Statement by the Honourable Purna Bahadur Khadka Minister for Industry, Commerce and Supplies (Speaking as an Observer)' WT/MIN (01)/ST/148 12 November 2001

'Ministerial Conference, Fourth Session Doha, 9 - 13 November 2001, Proposals by Least-Developed Countries for Alternative Text in the Draft Ministerial Declaration JOB (01)/140/REV.1 OF 27 October 2001, Communication from Tanzania' WT/MIN (01)/W/7 12 November 2001

'Ministerial Conference, Fourth Session Doha, 9 - 13 November 2001, Republic of Guinea, Statement by H.E. Mrs. Hadja Mariama Déo Baldé Minister of Commerce, Industry and Small- and Medium -Sized Enterprises' WT/MIN (01)/ST/114 12 November 2001

'Ministerial Conference, Fourth Session Doha, 9 - 13 November 2001, Senegal, Statement by H.E. Mrs. Aïchatou Agne Pouye, Minister of Small- and Medium -Sized Enterprises and Trade' WT/MIN (01)/ST/38 10 November 2001

'Ministerial Conference, Fourth Session Doha, 9 - 13 November 2001, Solomon Islands, Statement by Mr. Robert Sisilo Ambassador to the European Union' WT/MIN (01)/ST/115 12 November 2001

'Ministerial Conference, Fourth Session Doha, 9 - 13 November 2001, Tanzania, Corrigendum' WT/MIN (01)/ST/23/Corr.1, 13 November 2001

'Ministerial Conference, Fourth Session Doha, 9 - 13 November 2001, Tanzania, Statement by the Honourable Iddi Mohamed Simba Minister for Industry and Trade' WT/MIN (01)/ST/23,10 November 2001

'Ministerial Conference, Fourth Session Doha, 9 - 13 November 2001, Togo, Statement by H.E. Mr. Dama Dramani Minister of Commerce, Industry, Transport and Free Zone Development' WT/MIN (01)/ST/59 11 November 2001

'Ministerial Conference, Fourth Session Doha, 9 - 13 November 2001, Uganda, Statement by the Honourable Edward B. Rugumayo Minister of Tourism, Trade and Industry' WT/MIN (01)/ST/111 12 November 2001

'Ministerial Conference, Fourth Session Doha, 9 - 14 November 2001, Implementation-Related Issues and Concerns, Decision of 14 November 2001' WT/MIN (01)/17 20 November 2001

'Ministerial Conference Fourth Session Doha, 9 - 14 November 2001, List of Representatives' WT/MIN (01)/INF/15/Rev.1, 11 December 2001

'Ministerial Conference, Fourth Session Doha, 9 - 14 November 2001, Ministerial Declaration' WT/MIN (01)/DEC/1 20 November 2001

'Ministerial Conference Sixth Session Hong Kong, 13 - 18 December 2005, Doha Work Programme, Ministerial Declaration, Adopted on 18 December 2005' WT/MIN (05)/DEC 22 December 2005

'Ministerial Conference Tenth Session Nairobi, 15-18 December 2015, Nairobi Ministerial Declaration, Adopted on 19 December 2015' WT/MIN (15)/DEC 21 December 2015

'Ministerial Conference Third Session Seattle, 30 November - 3 December 1999, Summary Record of the Eighth Meeting' WT/MIN (99)/SR/8 14 January 2000

'Ministerial Conference, Twelfth Session Geneva,12-15 June 2022, MC12 Outcome Document' (2022) WT/MIN(22)/24 WT/L/1135

'Ministerial Meeting (24-27 November 1982); Statement by Mr. Maurice Ramarozka, Minister Plenipotentiary, Permanent Representative A.I. of Madagascar' (1982) Spec (82)142, November 1982 <https://docs.wto.org/gattdocs/q/GG/SPEC/82-142.pdf> accessed 14 November 2016

'Ministerial Meeting (24-27 November 1982); Statement by the Minister for Trade of the United Republic of Tanzania' Spec (82) 13 1 November 1982 <https://docs.wto.org/gattdocs/q/GG/SPEC/82-131.pdf> accessed 14 November 2016

'Ministry of Commerce and Industry (Department of Commerce), (Directorate General of Anti-Dumping and Allied Duties), Notification, Final Findings (Mid Term Review), Reference Number 15/8/2003-DGAD, 26th October 2004' <https://www.dgtr.gov.in/sites/default/files/Final-FindingsMTR_1.pdf>

'Ministry of Finance, (Department of Revenue) Notification No. 1/2002-Customs, 2nd January 2002' <https://www.seair.co.in/custom-notifications/notifications-issued-in-the-year-2002-notification-no-12002-dated-2nd-jan-2002-63816.aspx>

Ministry of Textiles - English release, 'Jute Exports to Brazil Get a Boost - India Wins 7 Year Anti-Dumping Case against Brazil' <http://pib.nic.in/newsite/erelcontent.aspx?relid=6677> accessed 12 October 2017

Mitchell AD, 'A Legal Principle of Special and Differential Treatment for WTO Disputes' (2006) 8(5) World Trade Review 445:469

——, 'Good Faith in WTO Dispute Settlement' (2006) 7 Melb. J. Int'l L. 339

Mohan S, 'Reforming Agricultural Trade among Developing Countries' (2007) 6 World Trade Review 397

'Morningside Translations, WTO Certified Translation Services' <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiK8bymgO_5AhUGesAKHUSfBO8QFnoECAYQAQ&url=https%3A%2F%2Fwww.morningtrans.com%2Flanguage-services%2Fprofessional-translation-services%2Fcertified-translations%2F&usg=AOvVaw0twD4t0rJB-lI8jPSq2p1n>

Mosoti V, 'In Our Own Image, Not Theirs: Damages as an Antidote to the Remedial Deficiencies in the WTO Dispute Settlement Process; A View from Sub-Saharan Africa' (2001) 19 BU Int'l LJ 231

——, 'Damages as an Antidote to the Remedial Deficiencies in the WTO Dispute Settlement Process: A View from Sub-Saharan Africa' (2001) 48 Netherlands International Law Review 319

——, 'Does Africa Need the WTO Dispute Settlement System?', *Towards A Development-Supportive Dispute Settlement System in the WTO.* (International Centre for Trade and Sustainable Development, 2003) <https://www.files.ethz.ch/isn/92796/No_05_complete_%20Towards_a_Development_.pdf> accessed 8 December 2014

——, 'WTO Agreement on Trade Related Investment Measures and the Flow of Foreign Direct Investment in Africa: Meeting the Development Challenge, The' (2003) 15 Pace Int'l L. Rev. 181

Mosoti V, 'The Legal Implications of Sudan's Accession to the World Trade Organization' (2004) 103 African Affairs 269

——, 'Africa in the First Decade of WTO Dispute Settlement' (2006) 9 Journal of International Economic Law 427

Mullen MR and others, 'The Effects of International Trade on Economic Growth and Meeting Basic Human Needs' (2001) 15 Journal of Global Marketing 31

'Multilateral Trade Negotiations Group "Safeguards" Dispute Settlement in International Economic Agreements, Factual Study by the Secretariat' MTN/SG/W/8 6 April 1976

'Multilateral Trade Negotiations, Group "Safeguards", Meeting of February 1977, Summing-up by the Chairman' MTN/SG/ 7 17 February 1977

'Multilateral Trade Negotiations Group "Safeguards", Meeting of July 1976, Summing-up by the Chairman' MTN/SG/5 23 July 1976

'Multilateral Trade Negotiations Group "Safeguards" Meeting of June - July 1975, Summing-up by the Chairman' MTN/ SG/2 7 July 1975

'Multilateral Trade Negotiations Group "Safeguards", Meeting of May1976, Summing-up by the Chairman' MTN/SG/4 5 May 1976

'Multilateral Trade Negotiations, Group "Safeguards", Meeting of October 1976, Summing-up by the Acting Chairman' MTN/SG/6 2nd November 1976

'Multilateral Trade Negotiations Group "Safeguards", Note by the Chairman, Meeting of 10 and 11 April 1975' MTN/SG/1 15 April 1975

Musteen M, Rhyne L and Zheng C, 'Asset or Constraint: Corporate Reputation and MNCs' Involvement in the Least Developed Countries' (2013) 48 Journal of World Business 321

Mutume G, 'Mounting Opposition to Northern Farm Subsidies: African Cotton Farmers Battling to Survive.' (2003) 17 Africa Recovery, Vol. 17,1 (May 2003)

Naples MI, 'Business Failures and the Expenditure Multiplier, or How Recessions Become Depressions' (1997) 19 Journal of Post Keynesian Economics 511

Nohyoung Park and Myung-Hyan Chung, 'Analysis of a New Mediation Procedure under the WTO SPS Agreement' (2016) Vol. 50(1) Journal of World Trade 93

Nordström H and Shaffer G, 'Access to Justice in the World Trade Organization: A Case for a Small Claims Procedure?' (2008) 7 World Trade Review 587

Nordström H and Shaffer G, 'Access to Justice in the WTO: A Case for a Small-Claims Procedure?', *Developing Countries in the WTO Legal System* (Oxford University Press 2009)

Note by the Secretarial, 'WTO and Least Developed Countries: Twenty Years of Supporting the Integration of Least Developed Countries into the Multilateral Trading System; WT/COMTD/LDC/W/61'

Nottage H, 'Trade and Competition in the WTO: Pondering the Applicability of Special and Differential Treatment' (2003) 6 Journal of International Economic Law 23

——, 'Developing Countries in the WTO Dispute Settlement System' (2009) 47 Global Economic Governance Programme Working Paper <https://www.econstor.eu/bitstream/10419/196308/1/GEG-WP-047.pdf>

——, 'Commonwealth Small States and Least Developed Countries in the WTO Dispute Settlement System', vol 2014/02 (2014) Commonwealth Trade Policy Discussion Papers 2014/02 <https://www.thecommonwealth-ilibrary.org/index.php/comsec/catalog/book/421>

Ochs E and Schieffelin BB (eds), *Developmental Pragmatics* (Academic Press Inc 1979)

Oduwole J, 'Nothing Ventured, Nothing Gained? A Case Study of Africa's Participation in WTO Dispute Settlement' (2009) 2 International Journal of Private Law 358

Oellers-Frahm K, 'Expanding the Competence to Issue Provisional Measures-Strengthening the International Judicial Function' (2011) 12 German LJ 1279

Oke Y, 'Public International Law and Sustainable Utilization of Mineral Resources: The Case of Sub-Saharan Africa' (2009) 21 Sri Lanka J. Int'l L. 85

Olga Skorobogatova, Mondher Mimouni, Carolin Averbeck,Elisa Gamberoni and others, 'Business Perceptions of Changing Trade Measures', *'The fateful allure of protectionism:Taking stock for the G8'* (Centre for Economic Policy Research 2009) <https://cepr.org/publications/books-and-reports/fateful-allure-protectionism-taking-stock-g8>

Olson L, 'Incentivizing Access to the WTO's Dispute System for the Least-Developed Countries: Legal Flaws in Brazil's Upland Cotton Decision' (2014) 23 Minn. J. Int'l L. 101

Onguglo BP, 'Developing Countries and Unilateral Trade Preferences in the New International Trading System', *Miguel Rodriguez Mendoza, Patrick Low and Barbara Kotschwar (editors), Trade Rules in the Making: Challenges in Regional and Multilateral Negotiation* (The Brookings Institution Press/Organization of American States 1999)

'Órgano de Solución de Diferencias En Sesión Extraordinaria, Comunicación de México, Corrigendum' TN/DS/W/40/Corr.1 29 de enero de 2003

'OSCE Court of Conciliation and Arbitration | OSCE' <http://www.osce.org/cca> accessed 30 June 2015

Osiemo O, 'The Last Frontier: Sanitary and Phytosanitary Standards and Technical Regulations as Non-Tariff Barriers in Intra-African Trade' (2015) 23 African Journal of International and Comparative Law 174

Page S, 'Working Paper, Developing Countries in GATT/WTO Negotiations' (Oversees Development Institute, London 2002) <https://cdn.odi.org/media/documents/4738.pdf>

Page S and Kleen P, *Special and Differential Treatment of Developing Countries in the World Trade Organization* (EGDI Secretariat, Ministry for Foreign Affairs 2005)

Pangestu M, 'Special and Differential Treatment in the Millennium: Special for Whom and How Different?' (2000) 23 The World Economy 1285

Panke D, 'Dwarfs in International Negotiations: How Small States Make Their Voices Heard' (2012) 25 Cambridge Review of International Affairs 313

'Paraguay: Perspectivas Empresariales – Serie del ITC sobre Medidas No Arancelarias' 136

Parlin C, 'Operation of Consultations, Deterrence, and Mediation' (1999) 31 Law & Pol'y Int'l Bus. 9

Parsan E, 'Trinidad and Tobago: Company Perspectives – An ITC Series on Non-Tariff Measures' [2013] ITC Technical Paper, Geneva <https://ntmsurvey.intracen.org/trinidadandtobago>

Paugam J-M and Anne-Sophie Novel, 'Why and How Differentiate Developing Countries in the WTO?' (IFRI - Institut français des relations internationales 2005) <https://www.ifri.org/en/publications/notes-de-

lifri/why-and-how-differentiate-developing-countries-wto-theoretical-options>

Pauwelyn J, 'Enforcement and Countermeasures in the WTO: Rules Are Rules-Toward a More Collective Approach' (2000) 94 No.2 American Journal of International Law 335

——, 'The Use of Experts in WTO Dispute Settlement' (2002) 51 International and Comparative Law Quarterly 325

——, 'The Transformation of World Trade' (2005) 104 Michigan Law Review 1

Payosova T, Hufbauer GC and Schott JJ, 'Policy Brief 18-5: The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures' <https://www.piie.com/publications/policy-briefs/dispute-settlement-crisis-world-trade-organization-causes-and-cures>

Pelc KJ, 'Eluding Efficiency: Why Do We Not See More Efficient Breach at the WTO?' (2010) 9 World Trade Review 629

——, 'How States Ration Flexibility: Tariffs, Remedies, and Exchange Rates as Policy Substitutes' (2011) 63 World Politics 618

'Permanent Court of Arbitration' <http://www.pca-cpa.org/showpage.asp?pag_id=363> accessed 30 June 2015

Pervez F, 'Elections and The Timing of Trade Disputes' <http://www.uni-heidelberg.de/md/awi/peio/pervez_09.09.2013.pdf> accessed 9 May 2014

Pesche D and Nubukpo K, 'The African Cotton Set in Cancùn: A Look Back at the Beginning of Negotiations', *International Trade Negotiations and Poverty Reduction: The White Paper on Cotton* (Enda Prospectives Dialogues Politiques 2005)

Peters A, 'Latest Developments in the Wto Internet Gambling Dispute and Challenges Ahead' (2010) 13 Journal of Internet Law 3

Petersmann E-U, 'Dispute Settlement System of the World Trade Organization and the Evolution of the GATT Dispute Settlement System Since 1948, The' (1994) 31 Common Market L. Rev. 1157

——, 'Administration of Justice in the World Trade Organization: Did the WTO Appellate Body Commit "Grave Injustice"?' (2009) 8 The Law & Practice of International Courts and Tribunals 329

Petersmann E-U and Harrison J (eds), *Reforming the World Trading System: Legitimacy, Efficiency, and Democratic Governance* (Oxford University Press 2005)

Pfumorodze J, 'WTO Remedies and Developing Countries' (2011) 10 Journal of International Trade Law and Policy 83

Pham HT, 'Developing Countries and the WTO: The Need for More Mediation in the DSU' (204AD) 9 Harv. Negot. L. Rev. 331

——, 'Developing Countries and the WTO: The Need for More Mediation in the DSU' (2004) 9 Harv. Negot. L. Rev. 331

Pitel SG and Valentine A, 'The Evolution of the Extra-Territorial Mareva Injunction in Canada: Three Issues' (2006) 2 Journal of Private International Law 339

Portelli B, 'Coordination Failures and the Role of Foreign Direct Investment in Least Developed Countries: Exploring the Dynamics of a Virtuous Process for Industrial Upgrading', *International Institutions and Multinational Enterprises: Global Players–Global Markets* (Edward Elgar Publishing 2004)

Portugal-Perez A and Wilson JS, 'Why Trade Facilitation Matters to Africa' (2009) 8 World Trade Review 379

Prebisch, Raul, 'The Economic Development of Latin America and Its Principal Problems' <http://archivo.cepal.org/pdfs/cdPrebisch/002.pdf> accessed 8 December 2016

'Preparatory Committee, Record of Discussions, Discussions of 4-5 February' PREP.COM (86) SR/2 18 March 1986 <https://docs.wto.org/gattdocs/q/UR/PREPCOM86/SR2.PDF> accessed 19 November 2016

'Press Release: Finland, Norway and Sweden to Sponsor Courses for Developing Countries, Training Courses in GATT Vill Stress Results of Tokyo Round Negotiations' GATT/1233 11 April 1979

'Press Release: Speech by Mr. A. Dominique, (Haiti) Delivered in Plenary Session on 10 November 1954', GATT/199 <https://docs.wto.org/gattdocs/q/GG/GATT/199.PDF> accessed 24 October 2016

Prevost D, '"Operationalising" Special and Differential Treatment of Developing Countries under the SPS Agreement' (2005) 30 South African yearbook of international law 82

Pritchard B, 'How the Rule of the Market Rules the Law: The Political Economy of WTO Dispute Settlement as Evidenced in the *US – Lamb Meat* Decision' (2005) 12 Review of International Political Economy 776

'Procedures for the Review of the Dispute Settlement Understanding' WT/DSB/W/74 26 February 1998

'Proposal to Amend Certain Provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) Pursuant to Article X of the Marrakesh Agreement Establishing the World Trade Organisation World Trade Organisation, Submission by Canada, Colombia, Costa Rica, Ecuador, Japan, Korea, New Zealand, Norway, Peru, Switzerland and Venezuela' (2000) WT/GC/W/410 29 September 2000

'Protocol of Provisional Application, Geneva' (1947) <https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/prov_appl_gen_agree_e.pdf> accessed 17 October 2016

Prusa TJ and Vermulst E, 'Guilt by Association: US–Measures Relating to Shrimp from Thailand and US–Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties' (2010) 9 World Trade Review 59

Puig Gonzalo Villalta and Lee Tsun Tat, 'Problems with the ASEAN Free Trade Area Dispute Settlement Mechanism and Solutions for the ASEAN Economic Community' (2015) 49, Issue 2 Journal of World Trade 227

Punch KF, *Introduction to Social Research: Quantitative and Qualitative Approaches* (Second Edition, SAGE Publications Ltd 2005)

Qureshi AH, 'Participation of Developing Countries in the WTO Dispute Settlement System' (2003) 47, Issue 2 Journal of African law 174

Rahman M and Rahman KM, 'Proposed Changes to WTO Special and Differential Treatment Provisions: An Analysis from the Perspective of Asian LDCs' (2006) <http://www.unescap.org/sites/default/files/AWP%20No.%2013.pdf> accessed 24 January 2016

Ram JR, 'Revisiting the Idea of Provisional Measures in the WTO Dispute Settlement Mechanism' (2014) 26 Fla. J. Int'l L. 197

Ray J, *A Collection of English Proverbs: Digested Into a Convenient Method for the Speedy Finding Any One Upon Occasion : With Short Annotations. : Whereunto Are Added Local Proverbs with Their Explications, Old Proverbial Rhythmes, Less Known Or Exotick Proverbial Sentences, and Scottish Proverbs* (Cambridge: printed by John Hayes, printer to the University, for W Morden 1678)

Rege V and others, 'Could Least Developed Countries (LDCs) and Other Developing Countries Which Have Not Been Able to Establish Legal Framework for the Application of Trade Remedy Measures Make a Beginning by Establishing Mechanism for the Application of Safeguard Measures Only?' (2013) 47 JOURNAL OF WORLD TRADE 453

Reichert D, 'Provisional Remedies in International Litigation: A Comprehensive Bibliography' (1985) 19,4 The International Lawyer 1429

Reimann M and Zimmerman R, *The Oxford Handbook of Comparative Law* (Oxford University Press 2006)

Reuters, 'U.S. Says It Cannot Support Some of EU's Ideas for WTO Reform' *Reuters* (2018) <https://uk.reuters.com/article/us-usa-trade-wto-idUKKCN1ME2C3> accessed 19 January 2019

Reynolds KM, 'Why Are So Many WTO Disputes Abandoned?' (2009) 6 Frontiers of Economics and Globalization 191

Richter JH, 'Trends in International Trade: Review Article' (1959) 73, Issue 4 The Quarterly Journal of Economics 576

Rienstra, Dianna (ed), *National Trade Policy for Export Success* (International Trade Centre 2011) <https://www.un-ilibrary.org/content/books/9789213614884>

Rienstra (ed) D, 'International Trade Centre Rwanda Company Perspectives' (International Trade Centre 2014) C-16 646 RWA <https://vi.unctad.org/resources-mainmenu-64/digital-library?task=dl_doc&doc_name=1012_rwanda_comp>

Rolf Traeger (team leader), 'UNCTAD -The Least Developed Countries Report 2020' (United Nations 2020) UNCTAD/LDC/2020 <https://unctad.org/webflyer/least-developed-countries-report-2020>

Rolland SE, 'Redesigning the Negotiation Process at the WTO' (2010) 13 Journal of International Economic Law 65

Rosendorff BP, 'Domestic Politics and International Disputes' in Lisa L Martin (ed), *The Oxford Handbook of the Political Economy of International Trade* (1st edn, Oxford University Press 2015)

Rosenne S, *Provisional Measures in International Law: The International Court of Justice and the International Tribunal for the Law of the Sea* (OUP Oxford 2004)

Rubini L, '"The Crown and the Jewel" The Rise and Fall of the WTO Appellate Body: A Critical Analysis' (*International Economic Law and Policy Blog*) <https://ielp.worldtradelaw.net/2021/10/guest-post-the-crown-and-the-jewel-the-rise-and-fall-of-the-wto-appellate-body-a-critical-analysis.html> accessed 26 January 2022

'Rules of Arbitration of the International Chamber of Commerce, in Force as from 1 January 2012' <http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Rules-of-arbitration/Download-

ICC-Rules-of-Arbitration/ICC-Rules-of-Arbitration-in-several-languages/> accessed 17 July 2016

Sacerdoti G, 'From the GATT to the WTO' (2006) 5 The Law and Practice of International Courts and Tribunals 49

——, 'The WTO Dispute Settlement System: Consolidating Success and Confronting New Challenges' [2016] Bocconi Legal Studies Research Paper, Bocconi University <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2809122>

Saeed M, 'The WTO Trade Facilitation Agreement: Implications for Pakistan's Domestic Trade Policy Formulation' (2014) 19 The Lahore Journal of Economics 439

Sandholtz W and Whytock C, *Research Handbook on the Politics of International Law* (Edward Elgar Publishing 2017) <https://www.elgaronline.com/view/9781783473977.xml> accessed 26 January 2019

Santana R and Jackson LA, 'Identifying Non-Tariff Barriers: Evolution of Multilateral Instruments and Evidence from the Disputes (1948- 2011)' (2012) 11 World Trade Review 462

——, 'Identifying Non-Tariff Barriers: Evolution of Multilateral Instruments and Evidence from the Disputes (1948−2011)' (2012) 11 World Trade Review 462

Sapir A and Trachtman JP, 'Subsidisation, Price Suppression, and Expertise: Causation and Precision in Upland Cotton' (2008) 07 World Trade Review 183

Sarooshi D, 'Future of the WTO and Its Dispute Settlement System, The' (2005) 2 Int'l Org. L. Rev. 129

——, 'Provisional Measures and Investment Treaty Arbitration' (2013) 29 Arbitration International 361

Scelta G, 'LDC Participation in the Dispute Settlement System | Support Measures Portal for Least Developed Countries' (*United Nations LDC Portal - International Support Measures for Least Developed Countries*) <https://www.un.org/ldcportal/> accessed 6 April 2019

Schnepf R, *Background on the US-Brazil WTO Cotton Subsidy Dispute* (Congressional Research, The Library of Congress Service, Report for Congress 2005) <https://digital.library.unt.edu/ark:/67531/metacrs9103/m1/1/high_res_d/RL32571_2005Jul11.pdf> accessed 26 July 2017

Scott J, *The WTO Agreement on Sanitary and Phytosanitary Measures: A Commentary* (1 edition, Oxford University Press 2009)

Scott J and Wilkinson R, 'The Poverty of the Doha Round and the Least Developed Countries' (2011) 32 Third World Quarterly 611

Shadikhodjaev S and Nohyoung P, 'Cessation and Reparation in the GATT/WTO Legal System: A View from the Law of State Responsibility' (2007) 41 Journal of World Trade 1237

Shaffer G, *How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies*, vol ICTSD Resource Paper No. 5 (International Centre for Trade and Sustainable Development (ICTSD) 2003) <https://repository.law.wisc.edu/s/uwlaw/item/41103>

——, 'Weaknesses and Proposed Improvements to the WTO Dispute Settlement System: An Economic and Market-Oriented View' (2005) <http://www.researchgate.net/profile/Gregory_Shaffer2/publication/228380122_Weaknesses_and_proposed_improvements_to_the_WTO_Dispute_Settlement_System_an_economic_and_market-oriented_view/links/552be2670cf29b22c9c23297.pdf>

——, 'The Challenges of WTO Law: Strategies for Developing Country Adaptation' (2006) 5 World Trade Review 177

Shaffer G, Mosoti V and Qureshi A, 'Towards a Development-Supportive Dispute Settlement System at the WTO' <https://www.files.ethz.ch/isn/92796/No_05_complete_%20Towards_a_Development_.pdf>

Shaffer G, Sanchez Badin MR and Rosenberg B, 'The Trials of Winning at the WTO: What Lies behind Brazil's Success' 41 Cornell Int'l L. J. 383, 502 (2008)

Shaffer GC and Meléndez-Ortiz R, *Dispute Settlement at the WTO: The Developing Country Experience* (Cambridge University Press 2010)

Sharmin J. Tania, 'Least Developed Countries in the WTO Dispute Settlement System' (2013) 60 Netherlands International Law Review 375

'Should It Be Burma or Myanmar?' *BBC News Magazine* (26 September 2007) <http://news.bbc.co.uk/2/hi/7013943.stm> accessed 1 May 2019

Showalter JM, 'Cruel Trilemma: The Flawed Political Economy of Remedies to WTO Subsidies Disputes, A' (2004) 37 Vand. J. Transnat'l L. 587

Sibanda OS, 'Towards a Revised GATT/WTO Special and Differential Treatment Regime for Least Developed and Developing Countries' (2015) 50 Foreign Trade Review 31

Singer HW, 'The Distribution of Gains between Investing and Borrowing Countries', *The Strategy of International Development. Essays in the Economics of Backwardness* (1st edn, The MacMillan Press Ltd 1975)

Smaller K, 'US and EU Cotton Production and Export Policies and Their Impact on West and Central Africa: Coming to Grips with International Human Rights Obligations' <https://www.lancaster.ac.uk/universalhumanrights/documents/1404-EGICottonBrief_FINAL.pdf>

Smith A and Parthasarathi P, *The Wealth of Nations* (CJ Bullock ed, Barnes & Noble 2004)

Smith J, 'Inequality in International Trade? Developing Countries and Institutional Change in WTO Dispute Settlement' (2004) 11 Review of International Political Economy 542

Smith S and others, 'International Commercial Dispute Resolution' (2008) 42 Int'l Law. 363

Sorsa P, 'Sub-Saharan African Own Commitments in the Uruguay Round - Myth or Reality?' (1996) 19 The World Economy 287

'Southern African Development Community: SADC Tribunal' <http://www.sadc.int/about-sadc/sadc-institutions/tribun/> accessed 1 April 2016

Spadano LEFA, 'Cross-Agreement Retaliation in the WTO Dispute Settlement System: An Important Enforcement Mechanism for Developing Countries?' (2008) 7 World Trade Review 511

'Special Session of the Dispute Settlement Body, 1 March 2004, Minutes of Meeting' TN/DS/M/16 7 June 2004

'Special Session of the Dispute Settlement Body, 1 March 2004, Proposed Agenda' TN/DS/W/64 27 February 2004

'Special Session of the Dispute Settlement Body, 4-5 April 2005, Proposed Agenda' TN/DS/W/75 31 March 2005

'Special Session of the Dispute Settlement Body, 5 April 2005 Minutes of Meeting' TN/DS/M/24 26 May 2005

'Special Session of the Dispute Settlement Body, 10 – 11 April 2003, Minutes of Meeting' TN/DS/M/11 13 November 2003

'Special Session of the Dispute Settlement Body, 10 – 11 March 2003, Minutes of Meeting' TN/DS/M/10 14 August 2003

'Special Session of the Dispute Settlement Body, 10 and 11 April 2003, Proposed Agenda' TN/DS/W/54 8 April 2003

'Special Session of the Dispute Settlement Body, 10 and 11 March 2003, Proposed Agenda' TN/DS/W/50 7 March 2003

'Special Session of the Dispute Settlement Body, 10 and 11 September 2002, Proposed Agenda' TN/DS/W/14 4 September 2002

'Special Session of the Dispute Settlement Body, 10 May 2004, Proposed Agenda' TN/DS/W/67 7 May 2004

'Special Session of the Dispute Settlement Body, 10 May 2005, Minutes of Meeting' TN/DS/M/25 6 June 2005

'Special Session of the Dispute Settlement Body, 10 May 2005, Proposed Agenda' TN/DS/W/76 4 May 2005

'Special Session of the Dispute Settlement Body, 10 September 2002, Minutes of Meeting' TN/DS/M/4, 6 November 2002

'Special Session of the Dispute Settlement Body, 13, 14 and 15 November 2002, Proposed Agenda' TN/DS/W/24 11 November 2002

'Special Session of the Dispute Settlement Body, 13 -14 November 2003, Minutes of Meeting' TN/DS/M/14 20 April 2004

'Special Session of the Dispute Settlement Body, 13 July 2006, Minutes of Meeting' TN/DS/M/34 4 August 2006

'Special Session of the Dispute Settlement Body, 13 July 2006, Proposed Agenda.' TN/DS/W/88 11 July 2006

'Special Session of the Dispute Settlement Body, 13-14 November 2003, Proposed Agenda, Revision' TN/DS/W/59/Rev.1 11 November 2003

'Special Session of the Dispute Settlement Body, 14 October 2002, Minutes of Meeting' TN/DS/M/5 27 February 2003

'Special Session of the Dispute Settlement Body, 14 October 2002, Proposed Agenda' TN/DS/W/20 10 October 2002

'Special Session of the Dispute Settlement Body, 15 and 16 July 2002, Proposed Agenda' TN/DS/W/10 12 July 2002

'Special Session of the Dispute Settlement Body, 15 July 2005, Minutes of Meeting' TN/DS/M/27 29 July 2005

'Special Session of the Dispute Settlement Body, 15 July 2005, Proposed Agenda' TN/DS/W/78 13 July 2005

'Special Session of the Dispute Settlement Body, 16 – 18 December 2002, Minutes of Meeting' TN/DS/M/7 26 June 2003

'Special Session of the Dispute Settlement Body 16 – 18 December 2002, Minutes of Meeting, Corrigendum' TN/DS/M/7/Corr.1 23 July 2003

'Special Session of the Dispute Settlement Body, 16, 17 and 18 December 2002, Proposed Agenda' TN/DS/W/27 13 December 2002

'Special Session of the Dispute Settlement Body, 16 April 2002, Minutes of Meeting' TN/DS/M/1,12 June 2002

'Special Session of the Dispute Settlement Body, 16 April 2002, Proposed Agenda' TN/DS/W/4 12 April 2002

'Special Session of the Dispute Settlement Body, 16-17 October 2003, Proposed Agenda' TN/DS/W/59 14 October 2003

'Special Session of the Dispute Settlement Body 17 – 18 February 2003, Minutes of Meeting' TN/DS/M/9 1 July 2003

'Special Session of the Dispute Settlement Body, 17 and 18 February 2003, Proposed Agenda' TN/DS/W/48 14 February 2003

'Special Session of the Dispute Settlement Body 18 January 2005, Minutes of Meeting' TN/DS/M/22 26 May 2005

'Special Session of the Dispute Settlement Body, 18-19 December 2003, Proposed Agenda' TN/DS/W/62 16 December 2003

'Special Session of the Dispute Settlement Body, 18-19 January 2005, Proposed Agenda' TN/DS/W/72 14 January 2005

'Special Session of the Dispute Settlement Body, 20, 21 and 23 May 2003, Minutes If Meeting' TN/DS/M/12 19 January 2004

'Special Session of the Dispute Settlement Body, 20, 21 and 23 May 2003, Proposed Agenda' TN/DS/W/55 16 May 2003

'Special Session of the Dispute Settlement Body, 21 June 2005, Minutes of Meeting' TN/DS/M/26 27 July 2005

'Special Session of the Dispute Settlement Body, 21 March 2006, Minutes of Meeting' TN/DS/M/31 26 June 2006

'Special Session of the Dispute Settlement Body, 21 May 2002, Proposed Agenda' TN/DS/W/6 16 May 2002

'Special Session of the Dispute Settlement Body, 21-22 June 2005, Proposed Agenda' TN/DS/W/77 17 June 2005

'Special Session of the Dispute Settlement Body, 21-22 March 2006, Proposed Agenda' TN/DS/W/84 17 March 2006

'Special Session of the Dispute Settlement Body, 22 May 2006, Minutes of Meeting' TN/DS/M/33 29 June 2006

'Special Session of the Dispute Settlement Body, 22 October 2004, Minutes of Meeting' TN/DS/M/20 26 May 2005

'Special Session of the Dispute Settlement Body, 22 October 2004, Proposed Agenda' TN/DS/W/70 20 October 2004

'Special Session of the Dispute Settlement Body, 22 September 2005, Minutes of Meeting' TN/DS/M/28 28 October 2005

'Special Session of the Dispute Settlement Body, 22 September 2005, Proposed Agenda' TN/DS/W/80 20 September 2005

'Special Session of the Dispute Settlement Body, 22-23 February 2006, Proposed Agenda' TN/DS/W/83 20 February 2006

'Special Session of the Dispute Settlement Body, 22-23 May 2006, Proposed Agenda' TN/DS/W/87 18 May 2006

'Special Session of the Dispute Settlement Body, 24 -25 April 2006, Minutes of Meeting' TN/DS/M/32 29 June 2006

'Special Session of the Dispute Settlement Body, 24 and 25 May 2004, Proposed Agenda' TN/DS/W/68 19 May 2004

'Special Session of the Dispute Settlement Body, 24 October 2005, Minutes of Meeting' TN/DS/M/29 20 January 2006

'Special Session of the Dispute Settlement Body, 24-25 April 2006, Proposed Agenda.' TN/DS/W/85 20 April 2006

'Special Session of the Dispute Settlement Body, 24-25 October 2005, Proposed Agenda' TN/DS/W/81 20 October 2005

'Special Session of the Dispute Settlement Body, 24th May 2004, Minutes of Meeting' TN/DS/M/18 15 June 2004

'Special Session of the Dispute Settlement Body, 25 March 2004, Minutes of Meeting' TN/DS/M/17 9 June 2004

'Special Session of the Dispute Settlement Body, 25 March 2004, Proposed Agenda' TN/DS/W/65 23 March 2004

'Special Session of the Dispute Settlement Body 25-26 November 2004, Minutes of Meeting' TN/DS/M/21 26 May 2005

'Special Session of the Dispute Settlement Body, 25-26 November 2004, Proposed Agenda' TN/DS/W/71 23 November 2004

'Special Session of the Dispute Settlement Body, 26-27 January 2004, Minutes of Meeting' TN/DS/M/15 4 June 2004

'Special Session of the Dispute Settlement Body, 26-27 January 2004, Proposed Agenda' TN/DS/W/63 23 January 2004

'Special Session of the Dispute Settlement Body, 28 – 30 January 2003, Minutes of Meeting' TN/DS/M/8 30 June 2003

'Special Session of the Dispute Settlement Body, 28, 29 and 30 January 2003, Proposed Agenda' TN/DS/W/39 24 January 2003

'Special Session of the Dispute Settlement Body, 28 and 30 April 2004, Proposed Agenda' TN/DS/W/66 26 April 2004

'Special Session of the Dispute Settlement Body, 28 February 2005, Minutes of Meeting' TN/DS/M/23 26 May 2005

'Special Session of the Dispute Settlement Body, 28 February 2005, Proposed Agenda' TN/DS/W/73 24 February 2005

'Special Session of the Dispute Settlement Body, 28 May 2003, Minutes of Meeting' TN/DS/M/13 2 April 2004

'Special Session of the Dispute Settlement Body, 28 May 2003, Proposed Agenda' TN/DS/W/58 26 May 2003

'Special Session of the Dispute Settlement Body, 28 May 2004, Minutes of Meeting' TN/DS/M19 17 June 2004

'Special Session of the Dispute Settlement Body, 28 May 2004, Proposed Agenda' TN/DS/W/69 26 May 2004

'Special Session of the Dispute Settlement Body, 30 September 2011, Minutes of Meeting.' TN/DS/M/35 26 October 2011

'Special Session of the Dispute Settlement Body, 30 September 2011, Minutes of Meeting, Corrigendum' TN/DS/M/35/Corr.1 9 November 2011

'Special Session of the Dispute Settlement Body, 30 September 2011, Proposed Agenda' TN/DS/W/93 28 September 2011

'Special Session of the Dispute Settlement Body, Fortieth Special Session, Minutes of Meeting Held on 4 May 2017' TN/DS/M/37 12 May 2017

'Special Session of the Dispute Settlement Body, Fortieth Special Session, Minutes of Meeting on 4 May 2017.' TN/DS/M/37 12 May 2017

'Special Session of the Dispute Settlement Body; Minutes of Meeting, 13 - 14 November 2003' (2004) TN/DS/M/14 20 April 2004

'Special Session of the Dispute Settlement Body, Minutes of Meeting Held on 10 September 2002, Corrigendum' TN/DS/M/4/Corr.1 24 January 2003

'Special Session of the Dispute Settlement Body, Minutes of Meeting Held on 15 July 2002' TN/DS/M/3 9 September 2002

'Special Session of the Dispute Settlement Body, Report by the Chairman, Ambassador Ronald Saborío Soto, to the General Council, Corrigendum' TN/DS/21/Corr.1 21 December 2007

'Special Session of the Dispute Settlement Body, Thirty-Ninth Special Session, Minutes of Meeting.' TN/DS/M/36 23 May 2016

'Special Session of the Dispute Settlement Body, Thirty-Ninth Special Session, Minutes of Meeting Held on 9 May 2016' TN/DS/M/36 23 May 2016

'Special Session of the Dispute Settlement Body,13 – 15 November 2002, Minutes of Meeting' TN/DS/M/6 31 March 2003

Srinivasan TN, *Developing Countries and the Multilateral Trading System: From GATT to the Uruguay Round and the Future* (1st Edition, Westview Press Inc 1999)

Staiger RW and others, 'Measuring Industry-Specific Protection: Antidumping in the United States' (1994) 1994 Brookings Papers on Economic Activity. Microeconomics 51

Staiger RW and Sykes AO, 'Non-Violations' (2013) 16 Journal of International Economic Law 741

Stanculescu, Dominic and Laura Gibson, 'Microfinance in East Africa-Schemes for Women in the Coffee Sector -Technical Paper' (International Trade Centre (ITC) 2011) Briefing Paper Doc. No. SC-11-195.E / F-04.03 MIC <https://www.findevgateway.org/paper/2011/01/microfinance-east-africa-schemes-women-coffee-sector>

Stanton G, 'The SPS Agreement' [2010] International Trade Forum pp.24

'Statement by the United States at the May 23, 2016, DSB Meeting' (*U.S. Mission to International Organizations in Geneva*, 24 May 2016) <https://geneva.usmission.gov/2016/05/24/statement-by-the-united-states-at-the-may-23-2016-dsb-meeting/> accessed 26 January 2019

'Statement by the United States at the Meeting of the WTO Dispute Settlement Body' (2016) U.S. Mission to International Organisations in Geneva, <https://geneva.usmission.gov/2016/05/24/statement-by-the-united-states-at-the-may-23-2016-dsb-meeting/>

'Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes' (2020) JOB/DSB/1/Add.12

'Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes, Supplement' (2020) JOB/DSB/1/Add.12/Suppl.3

Steger DP, 'The Future of the WTO: The Case for Institutional Reform' (2009) 12 Journal of International Economic Law 803

Steger DP, 'The Subsidies and Countervailing Measures Agreement: Ahead of Its Time or Time for Reform?' <https://papers.ssrn.com/Sol3/papers.cfm?abstract_id=1915799> accessed 18 May 2017

Stewart TP, 'Disputed Court: A Look at the Challenges to (and from) the WTO Dispute Settlement System' [2017] Stewart and Stewart, Global Business Dialogue – December 20, 2017 <https://www.law.berkeley.edu/wp-content/uploads/2018/01/Terence-P.-Stewart-Asia-Society-Paper-re-dispute-settlement-WEB-VERSION-1.pdf>

Stockbridge M, 'Agricultural Trade Policy in Developing Countries During Take-Off' (Oxfam GB 2006) <https://policy-practice.oxfam.org/resources/agricultural-trade-policy-in-developing-countries-during-take-off-111929/>

Stoler AL, 'The WTO Dispute Settlement Process: Did the Negotiators Get What They Wanted?' (2004) 3 World Trade Review 99

Stovel K, Golub B and Milgrom EMM, 'Stabilizing Brokerage' (2011) 108 Proceedings of the National Academy of Sciences 21326

Stradbrooke S, 'Antigua Fire Mark Mendel, New $100m Offer in WTO Gambling Dispute | Online Gambling News' (*CalvinAyre.com*, 9 September 2014) <https://calvinayre.com/2014/09/09/business/antigua-fires-attorney-mark-mendel-makes-new-100m-offer-to-end-us-wto-dispute/amp>

Strauss DM, 'Feast or Famine: The Impact of the WTO Decision Favoring the US Biotechnology Industry in the EU Ban of Genetically Modified Foods' (2008) 45 American Business Law Journal 775

Streeten P, 'The Special Problems of Small Countries' (1993) 21 World Development 197

Sumon Mahbub, 'India to Review Antidumping Duty on Bangladesh Jute: Hasina' (*bdnews42.com*) <https://bdnews24.com/bangladesh/india-to-review-antidumping-duty-on-bangladesh-jute-hasina>

——, 'India to Review Antidumping Duty on Bangladesh Jute: Hasina - Bdnews24.Com' <https://bdnews24.com/bangladesh/india-to-review-antidumping-duty-on-bangladesh-jute-hasina> accessed 12 October 2017

Surya P. Subedi, 'The Notion of Free Trade and the First Ten Years of the World Trade Organisation: How Level Is the "Level Playing Field"' (2006) 53 Netherlands International Law Review 273

Sutherland P and others, *The Future of the WTO - Addressing Institutional Challenges in the New Millennium* (World Trade Organisation 2004) <https://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.pdf>

Sutrisno N, 'Substantive Justice Formulated, Implemented, and Enforced as Formal and Procedural Justice: A Lesson from WTO Special and Differential Treatment Provisions for Developing Countries' (2009) 13 J. Gender Race & Just. 671

Switzer S, 'A Contract Theory Approach to Special and Differential Treatment and the WTO' (2017) 16 Journal of International Trade Law and Policy 126

Sykes AO, 'The Safeguards Mess: A Critique of WTO Jurisprudence' (2003) 2 World Trade Review 261

Sykes, J.B. (ed), *Concise Oxford English Dictionary: Seventh Edition* (Seventh Edition, The Clarendon Press 1982)

Taniguchi Y, Yanovich A and Bohanes J (eds), *The WTO in the Twenty-First Century: Dispute Settlement, Negotiations, and Regionalism in Asia* (1st edn, Cambridge University Press 2007)

Taubman A, Wager H and Watal J (eds), *A Handbook on the WTO TRIPS Agreement* (Cambridge University Press 2012)

'Technical Expertise Fund' (*ACWL*, 2016) <http://www.acwl.ch/technical-expertise-fund/> accessed 21 March 2016

Tekin RB, 'Economic Growth, Exports, and Foreign Direct Investment in Least Developed Countries: A Panel Granger Causality Analysis' (2012) 29 Economic Modelling 868

'The ACWL Organisational Structure' (*ACWL*, 2019) <http://www.acwl.ch/organisational-structure/> accessed 20 January 2019

The Appellate Body Secretariat, *WTO Appellate Body Repertory of Reports and Awards 2 Volume Hardback Set: 1995-2013* (5th edn, Cambridge University Press 2014)

'The Bangladesh Tariff Commission Act, 1992' <http://www.sai.uni-heidelberg.de/workgroups/bdlaw/1992-a43.htm> accessed 3 July 2017

'The Community Court of Justice, Economic Community of West African States' <http://www.courtecowas.org/> accessed 30 June 2015

'The General Agreement on Tariffs and Trade' <https://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf>

'The General Agreement on Tariffs and Trade (GATT 1947), Article XVIII: Governmental Assistance to Economic Development' <https://www.wto.org/english/docs_e/legal_e/gatt47_02_e.htm#art18>

'The Heidelberg Bangladesh Law Translation Project' <http://www.sai.uni-heidelberg.de/workgroups/bdlaw/> accessed 3 July 2017

The South Centre, 'The WTO's Special and Differential Treatment Negotiations (Paragraph 44)' (2017) Analytical Note, SC/AN/ TDP/2017/3 <https://www.southcentre.int/wp-content/uploads/2017/01/AN_TDP_2017_3_The-WTO%E2%80%99s-Special-and-Differential-Treatment-Negotiations-Paragraph-44_EN.pdf>

The World Bank, 'The World Bank, Trade Data, Merchandise Exports' (*Merchandise exports (current US$)*, 2021) <https://data.worldbank.org/topic/21> accessed 4 April 2021

The WTO Consultative Board, 'The Future of the WTO, Addressing Institutional Challenges in the New Millennium, Report by the Consultative Board to the Former Director-General Supachai Panitchpakdi' (World Trade Organisation (WTO) 2004) <https://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.htm>

'The WTO's Special and Differential Treatment Negotiations (Paragraph 44)' (South Centre 2017) Analytical Note SC/AN/TDP/2017/3 January 2017 <http://www.southcentre.int>

Thomas C, 'Of Facts and Phantoms: Economics, Epistemic Legitimacy, and WTO Dispute Settlement' (2011) 14 Journal of International Economic Law 295

Thomas, Chantel and Trachtman, Joel P, *Developing Countries in the WTO Legal System* (Oxford University Press 2009)

Torres RA, 'Use of the WTO Trade Dispute Settlement Mechanism by the Latin American Countries Dispelling Myths and Breaking Down Barriers'

[2012] SSRN Electronic Journal <http://www.ssrn.com/abstract=2001440> accessed 13 March 2018

Townsend DJ and Charnovitz S, 'Preventing Opportunistic Uncompliance by WTO Members' (2011) 14 Journal of International Economic Law 437

Trachtman JP, 'The Domain of WTO Dispute Resolution' (1999) 40 Harv. Int'l L.J. 333

——, 'The Constitutions of the WTO' (2006) Volume 17 Issue 3 E.J.I.L. 623

Trachtman JP, 'The WTO Cathedral' (2007) 43 Stan. J. Int'l L. 127

'Trade Negotiations Committee 10-11 June 2003, Minutes of Meeting' TN/C/M/10 10 November 2003

'Trade Negotiations Committee 28 January and 1 February 2002, Minutes of Meeting' TN/C/M/1 14 February 2002

'Trade Negotiations Committee, 28 January and 1 February 2002, Minutes of Meeting' TN/C/M/1 14 February 2002

'Trade Negotiations Committee, 30 June 2004, Minutes of Meeting' TN/C/M/13 12 August 2004

'Trade Negotiations Committee; Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Negotiations' MTN.TNC/W/35

'Trade Negotiations Committee, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations' MTN/FA 15 December 1993

'Trade Negotiations Committee, Meeting at Ministerial Level, Brussels, December 1990, Malawi, Statement by Hon. R.W. Chirwa, Minister of Trade, Industry and Tourism' MTN.TNC/MIN (90)/ST/70 5 December 1990

'Trade Negotiations Committee Meeting at Ministerial Level Brussels, December 1990; Senegal, Statement by H.E. Mr. Alioune Sene, Ambassador, Permanent Representative to the United Nations Office at Geneva' MTN.TNC/MIN (90)/ST/75 6 December 1990

'Trade Policy Agenda 2018 and 2017 Annual Report of the President of the United States on the Trade Agreements Program' The Office of the United States Trade Representative (USTR), March 2018

'Trade Policy Review Body, Annual Report by the Director-General, (Mid-October 2014 to Mid-October 2015)' WT/TPR/OV/18 17 November 2015

Traviss Alexandra, C, 'Temple of Preah Vihear: Lessons on Provisional Measures' (2012) 13 Chi. J. Int'l L. 317

'Treatment of Developing Countries, Differential and More Favourable Treatment Reciprocity and the Fuller Participation of Developing Countries, Decision of 28 November 1979. (L/4903)' L/4903 <https://www.wto.org/english/docs_e/legal_e/tokyo_enabling_e.pdf> accessed 28 June 2017

'Trends in International Trade, Decisions Adopted by the Contracting Parties on 30 November 1957' L/775, 5 December 1957 <https://docs.wto.org/gattdocs/q/GG/L999/775.PDF> accessed 3 December 2016

Tussie D, *The Less Developed Countries and the World Trading System: A Challenge to the Gatt* (Palgrave Macmillan 1987)

'UN List of Least Developed Countries' (*UNCTAD*) <https://unctad.org/topic/least-developed-countries/list> accessed 7 September 2022

UNCTAD, 'UNCTAD Commercial Diplomacy Programme, Training Tools for Multilateral Trade Negotiations: Special & Differential Treatment' (UNCTAD Geneva 2000) <https://unctad.org/system/files/official-document/ditcmisc35_en.pdf>

——, 'Unctad.Org | UNCTAD's Trade Facilitation Work Boosted by New UK Funding' <https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=1831> accessed 15 April 2019

——, 'Unctad.Org | UNCTAD's Trade Facilitation Work Boosted by New UK Funding' <https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=1831> accessed 10 May 2019

'Unctad.Org | Home' <http://unctad.org/en/Pages/Home.aspx> accessed 9 February 2016

United Nations, 'Vienna Convention on the Law of Treaties (1969)' (2005) Vol., 1155, United Nations Treaties Series 331

——, 'Department of Economic and Social Affairs Development Policy and Analysis Division Committee for Development Policy, List of Least Developed Countries (as of 16 February 2016)' <https://www.itu.int/en/ITU-D/LDCs/Pages/Who-are-the-LDCs.aspx>

'United Nations Committee for Development Policy; List of Least Developed Countries (as of December 2018)' (*United Nations, Economic Analysis & Policy Division*, 2018) <https://www.un.org/development/desa/dpad/least-developed-country-category/ldcs-at-a-glance.html> accessed 4 January 2019

United Nations Conference on Trade and Development, 'Report of the Commission on Trade in Goods and Services, and Commodities on Its Seventh Session' (2003) TD/B/EX (31)/4 TD/B/COM.1/58 <http://unctad.org/en/Docs/c1d58_en.pdf>

'United Nations Conference on Trade and Development (UNCTAD), History' <http://unctad.org/en/Pages/About%20UNCTAD/A-Brief-History-of-UNCTAD.aspx> accessed 8 December 2016

'United Nations General Assembly - Twenty-Sixth Session; Resolution 2768 (XXVI) Identification of the Least Developed Countries among the Developing Countries' <http://www.worldlii.org/int/other/UNGA/1971/21.pdf>

'United Nations Member States' <https://www.un.org/en/about-us/member-states> accessed 20 April 2022

'United States - Rules of Origin for Textiles and Apparel Products: Report of the Panel' (2003) Panel Reports <https://www.wto-ilibrary.org/dispute-settlement/united-states-rules-of-origin-for-textiles-and-apparel-products_f3b28e3e-en> accessed 6 April 2019

'United States - Rules of Origin for Textiles and Apparel Products: Report of the Panel, WT/DS243/8 28 July 2003' (2003) Panel Reports <https://www.wto-ilibrary.org/dispute-settlement/united-states-rules-of-origin-for-textiles-and-apparel-products_f3b28e3e-en> accessed 6 April 2019

'Uruguay Round Negotiating Group on Dispute Settlement Notice and Agenda for Twelfth Meeting' GATT/AIR/300 1 22 MAY 1989

'Uruguay Round of Multilateral Trade Negotiations, Agreement on Technical Barriers to Trade'

'Uruguay Round, Trade Negotiations Committee, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Marrakesh, 15 April 1994' MTN/FA-2, 30 March 1994

Van Bael I, 'GATT Dispute Settlement Procedure, The' (1988) 22 J. World Trade 67

Van Damme I, *Treaty Interpretation by the WTO Appellate Body* (1st edn, Oxford University Press 2009)

Van den Bossche P and Gathii J, 'Use of the WTO Dispute Settlement System by LDCs and LICs' <https://www.trapca.org/wp-content/uploads/2019/09/TWP1304-Use-of-the-WTO-Dispute-Settlement-System-by-LDCs-and-LICs.pdf>

Van den Bossche P and Zdouc W, *The Law and Policy of the World Trade Organization* (3rd Edition, Cambridge University Press 2013)

Van der Borght K, 'Advisory Centre on WTO Law: Advancing Fairness and Equality' (1999) 2 J. Int'l Econ. L. 723

Van Hoecke M, *Methodologies of Legal Research* (Hart Publishing ltd 2011)

Vermulst E and Driessen B, 'An Overview of the WTO Dispute Settlement System and Its Relationship with the Uruguay Round Agreements Nice on Paper but Too Much Stress for the System?' (1995) 29 Journal of World Trade 131

Vermulst EA and Driessen B, 'An Overview of the WTO Dispute Settlement System and Its Relationship with the Uruguay Round Agreements.' (1995) 29(2) Journal of World Trade (Law-Economics-Public Policy) p.131

Vervaele JA, 'Mercosur and Regional Integration in South America' (2005) 54 International and Comparative Law Quarterly 387

Virata G, 'Effects of US Sugar Policy on Developing Countries' [2004] International Economic Studies Center, June <https://www.sciencedirect.com/science/article/abs/pii/0169515089900224>

Wamboye E, Adekola A and Sergi BS, 'Foreign Aid, Legal Origin, Economic Growth and Africa's Least Developed Countries' (2014) 14 Progress in Development Studies 335

Watal J and Taubman A, *The Making of the Trips Agreement: Personal Insights from the Uruguay Round Negotiations* (World Trade Organization 2015)

Watkins K, 'Cultivating Poverty: The Impact of US Cotton Subsidies on Africa' (2002) 2 Oxfam Policy and Practice: Agriculture, Food and Land 82

——, 'Dumping on the World: How EU Sugar Policies Hurt Poor Countries' (2004) 4 Oxfam Policy and Practice: Agriculture, Food and Land 1

Watkins, K, *Dumping on the World. How EU Sugar Policies Hurt Poor Countries*, vol Oxfam Briefing paper 61 (Oxfam International 2004) <https://oxfamilibrary.openrepository.com/handle/10546/114470>

Wells S, 'The Developing Countries GATT and UNCTAD' (1969) 45 International Affairs (Royal Institute of International Affairs 1944-) 64

Welsh RCK, 'Frustration through Futility: Least Developed Countries and the WTO's Settlement of Disputes' (2016) 2016 International Review of Law 1

——, ‘Special and Differential Treatment: A New Factor Explaining LDC Engagement with the WTO Dispute Settlement System?’ (2018) 2018 International Review of Law 39

——, ‘The WTO Dispute Settlement System - One Size Does Not Fit All.’

Wetherell M, Taylor S and Yates SJ (eds), *Discourse Theory and Practice: A Reader* (SAGE Publications Ltd 2001)

Whalley J, ‘Non-Discriminatory Discrimination: Special and Differential Treatment Under the GATT for Developing Countries’ (1990) 100 The Economic Journal 1318

——, *What Can the Developing Countries Infer from the Uruguay Round Models for Future Negotiations*, vol No 4, Policy Issues in International Trade and Commodities Study Series (United Nations 2000)

Whalley, John, ‘Special and Differential Treatment in the Millennium Round’ (1999) 22 The World Economy 1065

Wilcox C, ‘The Promise of the World Trade Charter’ (1949) 27 Foreign Affairs 486

Wilke, Marie (ed), ‘Practical Considerations in Managing Trade Disputes, Information Note, December 2012’ <https://vi.unctad.org/resources-mainmenu-64/digital-library?task=dl_doc&doc_name=871_practical_co>

Wilkinson R, Hannah E and Scott J, ‘The WTO in Bali What MC9 Means for the Doha Development Agenda and Why It Matters?’ [2014] BWPI Working Paper 194 <https://www.econbiz.de/Record/the-wto-in-bali-what-mc9-means-for-the-doha-development-agenda-and-why-it-matters-wilkinson-rorden/10010349352>

Wilkinson R and Scott J, ‘Developing Country Participation in the GATT: A Reassessment’ (2008) 7 World Trade Review 473

Wilson B, ‘Compliance by WTO Members with Adverse WTO Dispute Settlement Rulings: The Record to Date’ (2007) 10 Journal of International Economic Law 397

Winters LA, ‘The Road to Uruguay’ (1990) 100 The Economic Journal 1288

Wolfrum R, Stoll P-T and Hestermeyer H (eds), ‘Article XVIII. Governmental Assistance to Economic Development’, *WTO - Trade in Goods* (Brill | Nijhoff 2009) <https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art18_gatt47.pdf> accessed 11 September 2021

Wood LA and Kroger RO, *Doing Discourse Analysis: Methods for Studying Action in Talk and Text* (Sage Publications, Inc 2000)

'Working Procedures for Appellate Review, Communication from the Appellate Body' WT/AB/WP/W/11 27 July 2010

World Bank (ed), *Realizing the Development Promise of the Doha Agenda* (World Bank 2003)

'World Bank Group' <http://www.worldbank.org/en/about> accessed 12 October 2015

'World Trade 2013, Prospects for 2014, Modest Trade Growth Anticipated for 2014 and 2015 Following Two-Year Slump' WTO Press release, PRESS/721 14 April 2014

'World Trade Organisation, Trade Related Technical Assistance, Financing of Trade Related Technical Assistance' <https://www.wto.org/english/tratop_e/devel_e/teccop_e/financing_trta_e.htm> accessed 10 May 2019

World Trade Organization, *Basic Instruments & Selected Documents* (Hein 1998)

—— (ed), *Six Decades of Multilateral Trade Cooperation: What Have We Learnt?* (WTO 2007)

——, 'Resolving Trade Disputes between WTO Members WTO Dispute Settlement' (2015) <https://www.wto.org/english/thewto_e/20y_e/dispute_brochure20y_e.pdf> accessed 1 July 2015

——, 'World Trade Report 2018' (2018) <https://www.wto.org/english/res_e/publications_e/world_trade_report18_e.pdf>

——, 'World Trade Statistical Review 2018' (2018) <https://www.wto.org/english/res_e/statis_e/wts2018_e/wts2018_e.pdf>

——, 'World Trade Report 2015, Speeding up Trade: Benefits and Challenges of Implementing the WTO Trade Facilitation Agreement' <https://www.wto.org/english/res_e/publications_e/wtr15_e.htm>

'World Trade Organization Annual Report 2014' <http://www.wto.org/english/res_e/booksp_e/anrep_e/anrep14_e.pdf> accessed 31 May 2014

'World Trade Report 2018' 236

'World Trade Report 2018 Highlights Transformative Impact of Digital Technologies on Trade' <https://www.wto.org/english/news_e/news18_e/wtr_03oct18_e.htm> accessed 27 April 2019

'WTO | 2015 News Items - WTO Members Secure "Historic" Nairobi Package for Africa and the World' <https://www.wto.org/english/news_e/news15_e/mc10_19dec15_e.htm > accessed 10 February 2016

'WTO | 2018 News Items - World Trade Report 2018 Highlights Transformative Impact of Digital Technologies on Trade' <https://www.wto.org/english/news_e/news18_e/wtr_03oct18_e.htm> accessed 27 April 2019

'WTO | About the Organization' <https://www.wto.org/english/thewto_e/thewto_e.htm> accessed 16 March 2016

'WTO | Development — Aid for Trade' <https://www.wto.org/english/tratop_e/devel_e/a4t_e/aid4trade_e.htm> accessed 9 February 2016

'WTO | Development - Geneva Week' <https://www.wto.org/english/tratop_e/devel_e/genwk_e.htm> accessed 1 August 2015

'WTO | Development - ITTC - List of Courses' <https://www.wto.org/english/tratop_e/devel_e/train_e/course_details_e.htm> accessed 25 May 2016

'WTO | Development - Special and Differential Treatment Provisions' <https://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm> accessed 19 July 2015

'WTO | Development - The Sub-Committee on Least-Developed Countries' <https://www.wto.org/english/tratop_e/devel_e/dev_sub_committee_ldc_e.htm> accessed 1 April 2019

'WTO | Development - Who Are the Developing Countries in the WTO?' <https://www.wto.org/english/tratop_e/devel_e/d1who_e.htm> accessed 1 July 2015

'WTO | Dispute Settlement - Appellate Body Members' <https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm> accessed 26 January 2019

'WTO | Dispute Settlement - Find Disputes Cases' <https://www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm

?year=any&subject=none&agreement=none&member1=none&member2=none&complainant1=true&complainant2=true&respondent1=true&respondent2=true&thirdparty1=false&thirdparty2=false#results> accessed 3 April 2019

'WTO | Dispute Settlement - the Disputes - DS27' <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds27_e.htm> accessed 19 July 2015

'WTO | Dispute Settlement - the Disputes - DS58' <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm> accessed 19 July 2015

'WTO | Dispute Settlement - the Disputes - DS265' <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds265_e.htm> accessed 19 July 2015

'WTO | Dispute Settlement - the Disputes - DS267' <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds267_e.htm> accessed 19 July 2015

'WTO | Dispute Settlement - the Disputes - DS285' <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm> accessed 25 May 2016

'WTO | Dispute Settlement - the Disputes - DS291' <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds291_e.htm> accessed 6 May 2016

'WTO | Dispute Settlement - the Disputes - DS306' <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds306_e.htm> accessed 19 July 2015

'WTO | Dispute Settlement Gateway' <https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm#negotiations> accessed 29 May 2016

'WTO | Disputes - Dispute Settlement CBT - Participation in Dispute Settlement Proceedings - Amicus Curiae Submissions - Page 1' <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c9s3p1_e.htm> accessed 17 April 2022

'WTO | Doha 4th Ministerial - Ministerial Declaration' <https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm#special> accessed 18 April 2022

'WTO | Doha Development Agenda: Negotiations, Implementation and Development - Groups in the Negotiations'

<https://www.wto.org/english/tratop_e/dda_e/negotiating_groups_e.htm> accessed 19 July 2021

'WTO | Former Deputy Directors-General' <https://www.wto.org/english/thewto_e/dg_e/former_ddgs_e.htm> accessed 8 February 2022

'WTO | GATT Members' <https://www.wto.org/english/thewto_e/gattmem_e.htm> accessed 16 October 2016

'WTO | Intellectual Property (TRIPS) - Agreement Text - Enforcement' <https://www.wto.org/english/docs_e/legal_e/27-trips_05_e.htm> accessed 29 June 2015

'WTO | Ministerial Conferences - in Brief' <https://www.wto.org/english/thewto_e/minist_e/mc11_e/briefing_notes_e/bfdispu_e.htm> accessed 11 April 2022

'WTO | Ministerial Conferences - Ninth WTO Ministerial Conference - Briefing Notes' <https://www.wto.org/english/thewto_e/minist_e/mc9_e/balipackage_e.htm> accessed 31 July 2015

'WTO | Ministerial Conferences - Tenth WTO Ministerial Conference - Nairobi' <https://www.wto.org/english/thewto_e/minist_e/mc10_e/mc10_e.htm> accessed 21 September 2018

'WTO | Nairobi Package' <https://www.wto.org/english/thewto_e/minist_e/mc10_e/nairobipackage_e.htm> accessed 29 May 2016

'WTO | Publications' <http://www.wto.org/english/res_e/publications_e/dispu_settlement_e.htm> accessed 20 June 2014

'WTO | Sanitary and Phytosanitary Measures - Text of the Agreement' <https://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm> accessed 19 July 2015

'WTO | Secretariat and Budget - Divisions' <https://www.wto.org/english/thewto_e/secre_e/div_e.htm> accessed 12 May 2018

'WTO | The Doha Round' <https://www.wto.org/english/tratop_e/dda_e/dda_e.htm> accessed 31 July 2015

'WTO | Trade Negotiations Committee' <https://www.wto.org/english/tratop_e/dda_e/tnc_e.htm> accessed 15 April 2022

'WTO | Understanding the WTO - A Unique Contribution' <https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm> accessed 16 March 2016

'WTO | Understanding the WTO - Least-Developed Countries' <https://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm> accessed 7 September 2022

'WTO | Understanding the WTO - Members' <https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm> accessed 24 February 2016

'WTO | Understanding the WTO - Standards and Safety' <https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm4_e.htm> accessed 1 August 2015

'WTO | Understanding the WTO - the Secretariat' <https://www.wto.org/english/thewto_e/whatis_e/tif_e/org4_e.htm> accessed 31 July 2015

'WTO | Understanding the WTO - The Uruguay Round' <https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm> accessed 9 September 2022

'WTO | Understanding the WTO - Least-Developed Countries' <https://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm> accessed 1 July 2015

'WTO | Understanding the WTO - Members' <https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm> accessed 24 February 2016

'WTO | What Is the WTO?' <https://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm> accessed 5 December 2019

'WTO | What Is the WTO? - Who We Are' <https://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm> accessed 31 March 2019

'WTO: 2014 Press Releases: Modest Trade Growth Anticipated for 2014 and 2015 Following Two Year Slump - Press/721' <https://www.wto.org/english/news_e/pres14_e/pr721_e.htm> accessed 24 February 2016

'WTO Annual Report 2014'
<https://www.wto.org/english/res_e/publications_e/anrep14_e.htm>

WTO Appellate Body Secretariat, 'Annual Report for 2019-202, Appellate Body' (WTO 2020)

WTO Deputy Director-General Alan Wolff, 'Good Will and Creativity Can Yield Positive Results in Talks on Strengthening the WTO'
<https://www.wto.org/english/news_e/news18_e/ddgra_01nov18_e.htm> accessed 3 November 2018

WTO Director General, Azevedo, R, 'Debate on WTO Reform Should Reflect All Perspectives, Trade Negotiations Committee and Heads of Delegation; Informal Meeting, 16th October 2018' (16 October 2018)
<https://www.wto.org/english/news_e/news18_e/tnc_infstat_16oct18_e.htm> accessed 3 November 2018

'WTO Dispute Settlement: One-Page Case Summaries – 1995–2012 - Dispu_settl_1995_2012_e.Pdf'
<http://www.wto.org/english/res_e/booksp_e/dispu_settl_1995_2012_e.pdf> accessed 20 June 2014

'WTO, Groups in the Negotiations' (*World Trade Organisation*)
<https://www.wto.org/english/tratop_e/dda_e/negotiating_groups_e.htm> accessed 30 May 2018

'WTO Members and Observers'
<https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm> accessed 16 April 2021

WTO, News Bytes, 'Norway Donates NOK 58.5M to Boost Trading Capacity of Developing Countries and LDCs' (*WTO Trade Facilitation, News Bytes*, 2015) <https://www.wto.org/english/news_e/pres15_e/pr758_e.htm>

WTO Secretariat, *The WTO Agreement Series 2, General Agreement on Tariffs and Trade* (WTO Publications, World Trade Organization, Centre William Rappard, rue de Lausanne 154, Geneva, Switzerland 1988)

——, 'Developing Countries and the Multilateral Trading System: Past and Present' [1999] Background document for the high-level symposium on trade and development, Geneva (17–18 March 1999)
<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiPgOPXq_T5AhUWhf0HHcz1AZkQFnoECAwQAQ&url=https%3A%2F%2Fwww.wto.org%2Fenglish%2Ftratop_e%2Fdevel_e%2Ftr_dvbadoc_e.doc&usg=AOvVaw2AvgoNUWMtPGNxHbuj0iri> accessed 13 June 2016

——, *The WTO Dispute Settlement Procedures: A Collection of the Relevant Legal Texts* (3rd edn, Cambridge University Press 2012)

——, *Annex 1C Agreement on Trade-Related Aspects of Intellectual Property Rights* (2015) <https://www.wto.org/english/tratop_e/devel_e/teccop_e/tct_e.htm> accessed 1 February 2015

——, *WTO Dispute Settlement: One-Page Case Summaries 1995-2014* (2015 edition, World Trade Organization 2015)

——, *A Handbook on the WTO Dispute Settlement System* (2nd Edition, Cambridge University Press 2017)

——, *GATT Disputes: 1948-1995, Volume 1: Overview and One-Page Case Summaries*, vol 1 (World Trade Organization 2018)

——, *GATT Disputes: 1948-1995, Volume 2: Dispute Settlement Procedures*, vol 2 (World Trade Organization 2018)

Wu M, 'The "China, Inc." Challenge to Global Trade Governance' (2016) 57 Harv. Int'l L.J. 261

Yin RK, *Case Study Research: Design and Methods* (Fifth Edition, SAGE Publications, Inc 2013)

Yusuf, A, 'Differential and More Favourable Treatment: The GATT Enabling Clause' (1980) 14 J. World Trade L. 20

Yusuf A., A, *Differential Treatment as a Dimension of the Right to Development.* (Sijthoff & Noordhoff 1980)

Yusuf AA, 'Differential and More Favourable Treatment: The GATT Enabling Clause' (1980) 14 Journal of World Trade Law 488

Zaman K, 'Determining a "Reasonable" Implementation Timeline for Developing Countries in WTO Disputes: An Appraisal of Special Treatment Commitments in DSU Article 21.3 (c) Arbitrations' (2013) 12 The Law & Practice of International Courts and Tribunals 31

Zimmermann CD, 'Neglected Link between the Legal Nature of WTO Rules, the Political Filtering of WTO Disputes, and the Absence of Retrospective WTO Remedies, The' (2012) 4(1) TRADE L. & DEV. 251 251

——, 'Strengthening the WTO by Replacing Trade Retaliation with Stronger Informal Remedies?' (2012) 11 Journal of International Trade Law and Policy 82

Zimmermann TA, *Negotiating the Review of the WTO Dispute Settlement Understanding* (Cameron May 2006)

Zuckerman AAS, 'Interlocutory Remedies in Quest of Procedural Fairness1' (1993) 56 The Modern Law Review 325

Zunckel H E, 'The African Awakening in United States-Upland Cotton' (2005) Vol. 39 (6) Journal of World Trade 1071

'Interview with a Senior LDC Ambassador to the WTO. Transcript on File with the Author' (October 2013)

'Interview with WTO Secretariat Senior Manager. Transcript on File with the Author.' (October 2013)

<https://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm> Accessed 16 March 2016

Annex to the Protocol amending the Marrakesh Agreement establishing the World Trade Organisation, Agreement on Fisheries Subsidies WT/MIN(22)/33 WT/L/1144

Annex to the Protocol amending the Marrakesh Agreement establishing the World Trade Organisation, Agreement on Trade Facilitation (2014) WT/L/940

Appellate Body Report, European Communities - Regime for the Importation, Sale and Distribution of Bananas (WT/DS27/AB/R)

Appellate Body Report, Mexico - Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice, WT/DS295/AB/R, Adopted 20 December 2005

Argentina – Measures Relating to Trade in Goods and Services, Report of the Appellate Body (WT/DS453/AB/R)

Article 5 of the Dispute Settlement Understanding, Communication from the Director-General, WT/DSB/25 17 July 2001

Brazil - Measures Affecting Desiccated Coconut Appellate Body Report WT/DS22/AB/R Adopted 20 March 1977

Burma: Statement by HE U Tin Tun, Permanent Representative, at the meeting of the GATT Contracting Parties at Ministerial Level, 15-19 September, Punta Del Este, Uruguay (1986) MIN (86)/ST/6 9

Committee on Agriculture Special Session, Malian Proposals for the Future Negotiations on Agriculture, G/AG/NG/W/99, 11 January 2001

Committee on the Legal and Institutional Framework of GATT in relation to Less-developed Countries; Report of Committee; Revision (1964) L/2195/Rev. I

Committee on the Legal and Institutional Framework of the GATT In Relation to the Less-Developed Countries; Statement by the Representative of the Central African Republic (1963) Spec(63) 282

Committee on the Legal and Institutional Framework of the GATT In Relation to the Less-Developed Countries; Statement by the representative of the Central African Republic om 15th October [1963] spec (63) 282

Committee on Trade and Development; Background note for the review of implementation of Part IV; Prepared by the Secretariat (1979) COM.TD/W/291

Committee on Trade and Development; Membership of the Committee on Trade and Development (1980) COM.TD/75/Rev.ll

Committee on Trade and Development, Proceedings of Sixty-First Session, (1987) COM.TD/126

Committee on Trade and Development; Proceedings of the Fortieth Session; Prepared by the Secretariat (1980) COM.TD/104

Committee on Trade and Development; Proceedings of the Forty-first session; Prepared by the Secretariat (1980) COM.TD/105

Committee on Trade and Development, Sixty-First Session, 11-12 June 1987, Annotated Provisional Agenda COM.TD/W/448

Committee on Trade and Development, Special and Differential Treatment Provisions in WTO Agreements and Decisions, Note by the Secretariat, WT/COMTD/W/219, 22 September 2016

Congo: Statement by HE Alphonse Souchlaty Poaty, Minister for Trade, Small and Medium Enterprises and Craft Industries, at the meeting of the GATT Contracting Parties at Ministerial Level, 15-19 September, Punta Del Este, Uruguay (1986) MIN (86)/ST/19

Contracting Parties Ninth Session Summary record of the Forty-Seventh Meeting SR.9/47 18 March 1955

Contracting Parties, Session at Ministerial Level, September 1986, Communication from the Congo MIN (86)/W/18

Delegation Release - Speech by the Hon Shirley Corea, MP Minister of Commerce, Trade and Fisheries (Ceylon) Delivered in Plenary Session on 8 November 1954 (1954) MGT.35/54

Delegation Release - Speech by U Aung Soe (Burma) Delivered in Plenary Session on 10 November 1954 (1954) MGT/54/54

Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposal by the LDC Group, TN/DS/W/17, 9 October 2002

EC Measures Concerning Meat and Meat Products (Hormones), Report of the Appellate Body, WT/DS26/AB/R, WT/DS48/AB/R, 16 January 1998

European Communities - Export Subsidies on Sugar, Complaint by Australia, Report of the Panel, WT/DS265/R, 15 October 2004

European Communities - Export Subsidies on Sugar, Complaint by Brazil, Report of the Panel, WT/DS266/R, 15 October 2004

European Communities - Export Subsidies on Sugar, Complaint by Thailand, Report of the Panel, WT/DS283/R 15 October 2004

European Communities – Export Subsidies on Sugar, Complaint by Thailand, Report of the Panel, WT/DS283/R, 15 October 2004

European Communities – Measures Affecting the Approval and Marketing of Biotech Products (WT/DS291/R; WT/DS292/R; WT/DS293/R)

European Communities - Measures affecting the Approval and Marketing of Biotech Products, Reports of the Panel, WT/DS291/R, WT/DS292/R, WT/DS293/R, 29 September 2006

European Communities - Regime for the Importation, Sale and Distribution of Bananas, Complaint by the United States, Report of the Panel, WT/DS27/R/USA, 22 May 1997

Fifth Meeting of the Group of Negotiations on Goods, Record of Decisions Taken (1987) MTN.GNG/5

GATT - Fourth Round of Tariff Negotiations; Statement made by Dr HE Iriester, Economic Adviser to the Secretariat of Industry, Banking and Trade of the Dominican Republic (1956) MGT/18/56

GATT Contracting Parties, Session at Ministerial Level September 1986, Opening Address by HE Mr E Iglesias, Minister of Foreign Affairs of Uruguay, (1986) MIN (86)/2

GATT Contracting Parties, Session at Ministerial Level, September 1986, Opening Statement made by DR Julio Maria Sanguinetti, President of The Oriental Republic of Uruguay, at the GATT meeting in Punta Del Este, 15 September 1986 (1986) MIN (86)/I

GATT Contracting Parties, Thirty-Eighth Session; Ministerial Declaration (1982) W.38/4

GATT Council; Minutes of Meeting; Held in the Palais des Nations, Geneva on 9 November 1971 (1971) C/M/74

GATT Intersessional Committee (1954) Press Release GATT/162

GATT Ministerial Meeting, Declaration of Ministers approved at Tokyo on 14th September 1973 (1973) MIN (73)1

GATT The Ninth Session of the Contracting Parties and the Review of the GATT (1954) MGT/27/54

GATT Work Programme; Proposal by the Director-General (1979) C/W/334

General Agreement on Tariffs and Trade Eleventh Session of the Contracting Parties Speech by the Hon, MrRGSenanayake Minister of Commerce of Ceylon at the Opening of the Eleventh Session on 11 October 1956 (1956) GATT/307

Group of Negotiation on Goods, Report to the Trade Negotiations Committee meeting at Ministerial level, Montreal, December 1988 (1988) MTN.GNG/13

Group of Negotiations on Goods, Eighteenth meeting: 12 November 1990 (1990) MTN.GNG/25

Group of Negotiations on Goods (GATT); Communication from Bangladesh (1988) MTN.GNG/W/14/Rev.1

Group of Negotiations on Goods (GATT), Communication from Bangladesh, Uruguay Round and the Least-Developed Countries (LLDCs), Revision (1988) MTN.GNG/W/14/Rev.l

Group of Negotiations on Goods (GATT), Communication from the Chairman of the Sub-Committee of Trade of Least-Developed Countries (1988) MTN.GNG/W/15

Group of Negotiations on Goods (GATT, Negotiating Group on Tropical Products, Communication by Cameroon, Côte d'Ivoire, Senegal and Zaire (1987) MTN.GNG/NG6/W/14

Group of Negotiations on Goods, Second meeting: 7 and 12 November 1986 (1986) MTN.GNG/2

India – Anti-Dumping Measure on Batteries from Bangladesh, Notification of Mutually Satisfactory Solution, WT/DS306/3 G/L/669/Add1 G/ADP/D52/2, 23 February 2006

India – Anti-Dumping Measure on Batteries from Bangladesh, Request for Consultations by Bangladesh, WT/DS306/1 G/L/669 G/ADP/D52/1, 2 February 2004

India – Anti-Dumping Measure on Batteries from Bangladesh, Request to Join Consultations, Communication from the European Communities, WT/DS306/2 16 February 2004

India – Measures Concerning the Importation of Certain Agricultural Products, Report of the Appellate Body (WT/DS430/AB/R)

India-Antidumping Measure on Batteries from Bangladesh, Notification of Mutually Satisfactory Solution (WT/DS306/3 G/L/669/Add1 G/ADP/D52/2)

India-Antidumping Measure on Batteries from Bangladesh, Request for Consultations (2004) WT/DS306/1

Meeting of Ministers 16-21 May 1963; Statement made by the Hon TB Illangatantne, Minister of Commerce, Trade, Food and Shipping, Ceylon on 16 May 1963 GATT/787

Meeting of Ministers; United States Proposal for a declaration on Promotion of the trade of Less-Developed Countries (1961) MIN/3

Mexico - Definitive Countervailing Measures on Olive Oil from the European Communities, Report of the Panel, WT/DS341/R, 4 September 2008

Mexico – Definitive Countervailing Measures on Olive Oil, Second Oral Statement by the European Communities, WT/DS341

Ministerial Conference, Fourth Session Doha, 9 - 14 November 2001, Implementation-Related Issues and Concerns, Draft Decision, WT/MIN (01)/W/10

Ministerial Conference, Twelfth Session Geneva,12-15 June 2022, MC12 Outcome Document' (2022) WT/MIN(22)/24 WT/L/1135

Ministerial Meeting (24-27 November 1982); statement by the Hon CM Mwananshiku, MP Minister of Commerce and Industry of the Republic of Zambia (1982) Spec (82)150

Ministerial Meeting (24-27 November 1982); Statement by the Hon Joel M Aliro-Omara, MP, Minister of Commerce of Uganda (1982) Spec (82)143

Ministerial Meeting (24-27 November 1982); Statement by the Minister for Industries and Commerce, Government of the Peoples Republic of Bangladesh (1982) Spec (82)99

Multilateral Trade Negotiation the Uruguay Round, Trade Negotiations Committee, Group of Negotiations of Goods (GATT), Group of Negotiation on Services (1986) MTN.TNC/INF/1; MTN.GNG/INF/1; MTN.GNS/INF/1

Multilateral trade negotiations: Negotiating Group on Dispute Settlement: List of representatives (1987) MTN.GNG/NG13/INF/1

Multilateral Trade Negotiations, The Uruguay Round Ministerial Declaration on the Uruguay Round (1986) MIN.DEC

Negotiating Group on Dispute Settlement, Differential and More Favourable Treatment of Developing Countries in the GATT Dispute Settlement System, Note by the Secretariat (1988) MTN.GNG/NGI3/W/27

Negotiating Group on Dispute Settlement; Draft text on Dispute Settlement (1990) MTN.GNG/NG13/W/45

Negotiating Group on Dispute Settlement, List of Representatives (1987) MTN.GNG/NG13/INF/1

Negotiating Group on Dispute Settlement; Meeting 7 February 1990 (1990) MTN.GNG/NG13/18

Negotiating Group on Dispute Settlement, Meeting of 2 November 1988, Note by the Secretariat (1988) MTN.GNG/NG13/12

Negotiating Group on Dispute Settlement; Meeting of 5 April 1990 (1990) MTN.GNG/NG13/19

Negotiating Group on Dispute Settlement, Meeting of 5 April 1990, Note by the Secretariat (1990) MTN.GNG/NG13/19

Negotiating, Group on Dispute Settlement Meeting of 6-7 June 1990 (1990) MTN.GNG/NG13/20

Negotiating Group on Dispute Settlement, Meeting of 6th April 1987 (1987) MTN.GNG/NG13/1

Negotiating Group on Dispute Settlement; Meeting of 7 December 1989 (1989) MTN.GNG/NG13/17

Negotiating Group on Dispute Settlement, Meeting of 7 December 1989, Note by the Secretariat (1989) MTN.GNG/NG13/17

Negotiating Group on Dispute Settlement, Meeting of 7 February 1990, Note by the Secretariat (1990) MTN.GNG/NG13/18

Negotiating Group on Dispute Settlement, Meeting of 9th November 1987, Note by the Secretariat 1987 (1987) MTN.GNG/NG13/4

Negotiating Group on Dispute Settlement, Meeting of 10-12 October 1988, Note by the Secretariat (1988) MTN.GNG/NG13/11

Negotiating Group on Dispute Settlement; Meeting of 12 July 1990 (1990) MTN.GNG/NG13/21

Negotiating Group on Dispute Settlement, Meeting of 12 July 1990, Note by the Secretariat (1990) MTN.GNG/NG13/21

Negotiating Group on Dispute Settlement, Meeting of 12 May 1989, Note by the Secretariat (1989) MTN.GNG/NG13/14

Negotiating Group on Dispute Settlement, Meeting of 12 May 1989, Note by the Secretariat (1989) MTN.GNG/NG13/14

Negotiating Group on Dispute Settlement; Meeting of 12-13th September 1990 [1990] MTNGNG/NG13/22

Negotiating Group on Dispute Settlement, Meeting of 15 November 1988, Note by the Secretariat (1988) MTN.GNG/NG13/13

Negotiating Group on Dispute Settlement, Meeting of 20 July 1989; Note by the Secretariat (1989) MTN.GNG/NGI3/IS

Negotiating Group on Dispute Settlement, Meeting of 24 September to 11 October 1990, Note by the Secretariat (1990) MTN.GNG/NG13/23

Negotiating Group on Dispute Settlement, Meeting of 28 September 1989, Note by the Secretariat (1989) MTN.GNG/NG13/16

Negotiating Group on Dispute Settlement, Meeting on 6 and 7 September 1988, Note by the Secretariat (1988) MTN.GNG/NG13/10

Negotiating Group on Dispute Settlement, Meeting on 11 July 1988, Note by the Secretariat (1988) MTN.GNG/NG13/9

Negotiating Group on Dispute Settlement, Minute of 6th April 1987, Note by the Secretariat (1987) MTN.GNG/NG13/1.

Negotiating Group on Dispute Settlement; Minute of 24 September to 11 October 1990 (1990) MTN.GNG/NG13/23

Negotiating Group on Dispute Settlement, Minute of Meeting of 24 September to 11 October 1990, Note by the Secretariat (MTNGNG/NG13/23)

Negotiating Group on Dispute Settlement; Profile of the Status of the Work in the Group; Report by the Chairman (1990) MTN.GNG/NG13/W/43

Negotiating Group on Dispute Settlement; Proposals on behalf of the Least-Developed Countries (1989) MTN.GNG/NGI3/W/34

Negotiating Group on Dispute Settlement, Proposals on behalf of the Least-Developed Countries, Communication from Bangladesh (1989) MTN.GNG/NGI3/W/34

Notes on the GATT (1956) MGT/81/56

Panel Report, Mexico - Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice, WT/DS295/R 6 June 2005

Preparatory Committee, Communication from the Chairman (1986) PREP.COM (86) W/50

Preparatory Committee, Draft Ministerial Declaration (1986) PREP.COM (86) W/47

Preparatory Committee; List of Representatives (1986) PREP.COM (86) INF/2

Preparatory Committee, Note on first meeting (1986) PREP.COM (86) 1

Preparatory Committee, Record of Discussions, Discussions of 5-7 May (1986) PREP.COM (86) SR/6

Preparatory Committee, Record of Discussions, Discussions of 5-7 May (1986) PREP.COM (86) SR/6

Preparatory Committee, Record of Discussions, Discussions of 8-31 July 1986 (1986) PREP.COM (86) SR/9

Preparatory Committee, Record of Discussions, Discussions of 9-12 June 1986 (1986) PREP.COM (86) SR/7

Preparatory Committee, Record of Discussions, Discussions of 14-16 April (1986) PREP.COM (86) SR/5

Preparatory Committee, Record of Discussions, Discussions of 17-20 March (1986) PREP.COM (86) SR/4

Preparatory Committee, Record of Discussions, Discussions of 25-26 February (1986) PREP.COM (86) SR/3

Press Release: Finland, Norway and Sweden to sponsor courses for Developing Countries (1979) GATT/1233

Press Release: GATT contracting parties decide on meeting at Ministerial Level (1981) GATT/1303

Press Release: Ministers at GATT Session adopt Declaration (1982) GATT/1328

Proposed Declaration regarding trade problems of Less-developed Countries [1961] Spec(6l)36l

Protocol Amending the GATT to introduce Part IV on Trade and Development (1965) L/2355

Relaxation of obstacles to the expansion of trade of Less-Developed Countries (1960) Press Release GATT/517

Report of the Panel Body, United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services,

Review Working Party II on Tariffs, Schedules, and Customs Administration; Report to the Contracting Parties (1955) L/329

Sub-Committee on Trade of Least Developed Countries, Fifteenth Meeting 7 November 1994, A description of the provisions concerning Least-developed Countries in the Uruguay Round Agreements, Legal Instruments and Ministerial Decisions (1994) COM.TD/LLDC/W/54

Sub-Committee on Trade of Least-Developed Countrie8 Eleventh Meeting 28 September 1989 (1989) COM.TD/LLDC/W/40

Sub-Committee on Trade of Least-Developed Countries, 28 September, Note of Proceedings of the Eleventh Meeting, Revision (1989) COM.TD/LLDC/12/Rev.l

Sub-Committee on Trade of Least-Developed Countries, 31 October 1990, Draft Note of Proceedings of the of the Twelfth Meeting, Prepared by the Secretariat (1990) Spec (90)43

Sub-Committee on Trade of Least-Developed Countries, Communication from Bangladesh (1988) COM.TD/LLDC/W/37

Sub-Committee on Trade of Least-Developed Countries Ninth Meeting, 11 February 1988, Review of Developments in the Uruguay Round of Interest to the Least-Developed Countries (1988) COM.TD/LLDC/W/32

Sub-Committee on Trade of Least-Developed Countries Ninth Meeting,11 February 1988, Note of Proceedings of the Ninth Meeting Revision (1998) COM.TD/LLDC/10/Rev.1

Sub-Committee on Trade of Least-Developed Countries; Notes on Proceedings of the Twelfth Meeting; 31 October 1990 (1991) COM.TD/LLDC/13

Sub-Committee on Trade of Least-Developed Countries; Proceedings of Fifth Meeting (1983) COM.TD/LLDC/5

Sub-Committee on Trade of Least-Developed Countries; Proceedings of First Meeting (1981) COM.TD/LLDC/1

Sub-Committee on Trade of Least-Developed Countries; Proceedings of Fourth Meeting (1983) COM.TD/LLDC/4

Sub-Committee on Trade of Least-Developed Countries; Proceedings of Second Meeting [1981] COMTD/LLDC/2

Sub-Committee on Trade of Least-Developed Countries; Proceedings of Third Meeting (1982) COM.TD/LLDC/3

Tanzania: Statement by Hon BP Mramba, Minister for Industries and Trade, at the meeting of the GATT Contracting Parties at Ministerial Level, 15-19 September, Punta Del Este, Uruguay (1986) MIN (85)/ST/50

Trade Negotiations Committee, Chairman's summing-up at meeting of 26 July 1990 (1990) MTN.TNC/15

Trade Negotiations Committee; Meeting at Ministerial Level Brussels, December 1990; Bangladesh; Statement by HE Mr M Mokammel Hague, Secretary: Ministry of Commerce [1990] MTNTNC/MIN (90)/ST/37

Trade Negotiations Committee Meeting at Ministerial Level Brussels, December 1990, Malawi, Statement by Hon RW Chirwa, Minister of Trade, Industry and Tourism (1990) MTN.TNC/MIN (90)/ST/7

Trade Negotiations Committee, Meeting of 27 October 1986 (1986) MTN.TNC/1

Trade Negotiations Committee, Mid-Term Meeting (1989) MTN.TNC/11

Trends in International Trade, (Preliminary Version); Note by the Executive Secretary (1958) MGT/80/58

United States – Countervailing and Anti-Dumping Measures on Certain Products from China, Report of the Appellate Body (WT/DS449/AB/R)

United States – Countervailing Duty Measures on Certain Products from China, Report of the Appellate Body (WT/DS437/AB/R)

United States - Definitive Safeguard Measures on imports of circular welded quality line pipe from Korea, Report of the Appellate Body, WT/DS202/AB/R, 15 February 2002

United States - Definitive Safeguard Measures on Imports of Circular Welded Quality Line Pipe from Korea, Report of the Appellate Body, WT/DS202/AB/R, 15 February 2002

United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities, Report of the Appellate Body, WT/DS166/AB/R, 22 December 2000

United States - Import Prohibition on certain Shrimp and Shrimp Products, Report of the Panel, WT/DS58/R, 15 May 1998

United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India, Report of the Appellate Body (WT/DS33/AB/R)

United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services - Arbitration under Article 213(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes - Award of the Arbiter, WT/DS285/13, 19 August 2005

United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services, Recourse to Arbitration by the United States under Article 226 of the DSU - Decision of the Arbitrator

United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services, Report of the Appellate Body, WT/DS285/AB/R, 7 April 2005

United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services, Report of the Panel, WT/DS285/R, 10 November 2004

United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/1, 27 March 2003 - Request for Consultations by Antigua and Barbuda

United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/16, 26 May 2006 - Agreement between Antigua and Barbuda and the United States Regarding Procedures under Articles 21 and 22 of the DSU

United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/22, 22 June 2007 - Recourse by Antigua and Barbuda to Article 222 of the DSU

United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/26, 25 April 2013 - Communication from Antigua and Barbuda

United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/R, 10 November 2004 - Panel Report

United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/RW, 30 March 2007 - Recourse to Article 215 of the DSU by Antigua and Barbuda - Report of the Panel

United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear, Report of the Appellate Body (WT/DS24/AB/R)

United States - Rules of Origin for Textiles and Apparel Products - Request to Join Consultations - Communication from Bangladesh, WT/DS243/2, 5 February 2002

United States - Rules of Origin for Textiles and Apparel Products, Report of the Panel, WT/DS243/R, 20 June 2003

United States - Subsidies on Upland Cotton - Constitution of the Panel Established at the Request of Brazil - Note by the Secretariat, WT/DS267/15, 23 May 2003

United States - Subsidies on Upland Cotton - Request for Consultations by Brazil, WT/DS267/1 G/L/571 G/SCM/D49/1 G/AG/GEN/54, 3 October 2002

United States - Subsidies on Upland Cotton - Request to Join Consultations, Communication from Argentina, WT/DS267/4, 22 October 2002

United States - Subsidies on Upland Cotton - Request to Join Consultations, Communication from Canada, WT/DS267/5, 9 December 2002

United States - Subsidies on Upland Cotton - Request to Join Consultations, Communication from India, WT/DS267/3, 18 October 2002

United States - Subsidies on Upland Cotton - Request to Join Consultations, Communication from Zimbabwe, WT/DS267/2, 15 October 2002

United States - Subsidies on Upland Cotton, Notification of a Mutually Agreed Solution, WT/DS267/46, 23 October 2014

United States - Subsidies on Upland Cotton, Recourse to Article 215 of the DSU by Brazil, Report of the Panel, WT/DS267/RW, 18 December 2007

United States - Subsidies on Upland Cotton, Report of the Appellate Body, WT/DS267/AB/R, 3 March 2005

United States - Subsidies on Upland Cotton, Report of the Panel, WT/DS267/R, 8 September 2004

Uruguay Round Negotiating Group on Dispute Settlement (1987) GATT/AIR/2390

Uruguay Round Negotiating Group on Dispute Settlement (1990) GATT/AIR/3095

US—Measures Affecting the Cross-Border Supply of Gambling and Betting Services, 1 October 2003, WT/DS285 - First Submission of Antigua and Barbuda, available at <http://www antiguawto.com/wto/06_AB_1st_%20Submission_1Oct03.pdf> Accessed 03/07/2016

Work Programme of the Committee on Trade and Development; Note by the Secretariat (1980) COM.TD/W/305

Bangladesh Customs Act, 1969 1969 (Act No IV of 1969 [8th March 1969])

Central Board of Excise and Customs, Department of Revenue, Ministry of Finance, Government of India, Tariff Notifications of Customs in year 2002 2002 (Notification No 1 / 2nd January 2002)