CHAPTER – VII

DISPUTE SETTLEMENT SYSTEM AND DEVELOPING AND LEAST DEVELOPED COUNTRIES

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CHAPTER – VII

DISPUTE SETTLEMENT SYSTEM AND DEVELOPING
AND LEAST DEVELOPED COUNTRIES

7.1. General Introduction

In fact the WTO is wholly dominated by a few industrial countries. For example US, EC, therefore the WTO provisions are thus always operated by the developed country. Thus the rich countries in fact control the whole international trade system.¹

In order to make the developing countries as a force for development of their economic capacity in the WTO’s regime framework, there is need to employ their influence more effectively. The developing and the least developed countries constitute the majority of the WTO members. So, there is a need to encourage a more active involvement of developing countries in WTO sectors. WTO risks being controlled by a small group of rich countries.

The principles of WTO system, rules, obligations and protections of the interest of all the members, including the economically less powerful, the developing and the least developed countries, through government assistance to plan and follow up economic reform programs.²

The WTO’s DSU rules provide special and differential treatment for developing countries and least developed countries.

² P. Gallagher, GUIDE TO THE WTO AND DEVELOPING COUNTRIES, 13 (2000).
The WTO’s legalized dispute settlement system has been welcomed as a new development in international economic relations. Here law is more than power and control.

These developments in international law constitute a great achievement; but the system remains far from a neutral technocratic process in its structure and operation. Large developed countries are in much better position to take benefit from resort to dispute legalized system. The system’s rules on remedies, in particular, are structured to support them.

Most developing countries hesitate to bring cases and to participate as third parties in the dispute settlement system. In developing countries capacity to take active participation, there are many obstacles; for example significant costs and uncertain benefits of joining the dispute settlement mechanisms.

The current dispute settlement system of the WTO creates a particular challenge for small States which they have limited exports, litigation costs are more or less independent of the commercial stakes involved in the disputes. Small member states may therefore find it too costly to pursue legitimate claims. Reviewing the aims and practices of the small claims’ procedures at the national level, this report analyses whether a similar institution could be introduced at the WTO.

When the WTO was created in 1995, there were expectations that the enforcement regime of the "Understanding on Rules and Procedures Governing the Settlement of Disputes" (DSU) would be better than the previous one under the 1947 General Agreement on Tariffs and Trade. *This study attempts to evaluate the extent of DSU enforcement system which has been functioning, to assess how well the*
compliance and remedy systems have served developing countries and to analyse how compliance and remedies may be improved with regard to developing countries.

This chapter will examine the position of the developing and the least developed countries in dispute settlement system, discuss the problems they face, and influence their active participation in dispute settlement system and other WTO’s activities. With the focus on the Special and Differential Treatment granted to them, the discussion will provide an important proposal for improving their role.

This chapter deals with the dispute settlement system in relation to developing and least developed countries. It discusses:

- The Classifications of WTO Members;
- Developing Countries as Plaintiffs and as Defendants in Trade Disputes;
- The WTO Agreements and Developing Countries;
- Participation of Developing Countries in the DSM;
- Special and Differential Treatment for Developing Countries;
- The Ambiguity in the Idea or Notion of Preferential Treatment;
- Problems faced by developing countries;
- Least-Developed Countries (LDCs) Position in WTO Regime;
- The Advisory Centre on WTO Law (ACWL);
- Absence of Active Participation by Developing Countries;
- Conclusion.

7.2. Classifications of WTO Members as Developing and Least Developed Countries

The WTO divided its membership into three groups: developed countries, developing countries, and least developed countries. No formal definition of the term
“developing countries” has ever been adopted by the old GATT 1947 or the WTO 1995 Members.

For developing countries there is a degree of self-selection that differentiates between them and developed countries. The GATT classification and definition of the developing countries as those whose economy “can only support low standards of living and is in the early stages of development”.\(^3\)

Least developed country (LDC) is the name given to a country which, according to Article XI: 2 of the WTO Agreement accepted the United Nation’s designation as LDC. It exhibits the lowest indicators of socioeconomic development, with the ‘lowest Human Development’ Index ratings of all countries in the world. The concept of LDCs originated in the late 1960s.\(^4\)

A member country is classified as Least-developed Country if it meets three criteria:

a) Low-income, as measured by per capita gross national income;
b) Weak human resource, based on indicators of nutrition, health, education and adult literacy;

c) low economic diversification, as measured by instability of agricultural production, instability of exports of goods and services, economic importance of non-traditional activities, merchandise export concentration, handicap of economic smallness, and the percentage of population displaced by natural disasters.\(^5\)

\(^3\)K. c. Kennedy, INTERNATIONAL TRADE REGULATION- READINGS, CASES, NOTES, AND PROBLEMS, 479 (2009).

\(^4\)The first group of LDCs was listed by the UN in its resolution 2768 (XXVI) of 18 November 1971.


A country typically joins the WTO as a developing-country, and that announcement usually goes unopposed by other members. Because of the many WTO rules extending special and differential treatment to developing countries, this self-selection process is more than a matter of form.

The notable illustration: during the accession process, China acceded to the WTO as a hybrid, with treatment in some cases as a developed country member and in other instances as a developing country. The clear example for those classifications, as safeguard measures relief, during 12-years period starting from the date of accession there is special transitional safeguard mechanism in case where imports of products of Chinese origin cause or threaten to cause market disruption to domestic producers of other WTO Members. The market disruption test is a less rigorous criterion for an importing country to satisfy it as the standard “serious injury” test contained in Article 2of the Safeguard Agreement. Moreover in the TRIMs agreement, China agreed not to require technology transfer as a condition to approve a foreign direct investment, a China--specific TRIMs Agreement obligations.6

7.3. Developing Countries as Plaintiffs and as Defendants in Trade Disputes

Chad P. Bown view that developing countries participation in the GATT-WTO trade dispute has been increasing their participation in the formal institutions and proceedings of the multilateral trading system. A prominent example is their more frequent involvement as defendants and plaintiffs in GATT/WTO trade disputes. This is clear through an initial economic appraisal of developing country performance in the GATT/WTO dispute settlement system. We measure the economic resolution of these disputes through trade liberalization gains, and our results suggest that

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developing country plaintiffs have had more success under WTO disputes than was the case under the GATT. We also document evidence on potential determinants of this success: the capacity for plaintiffs to make credible retaliatory threats and the guilty determinations by GATT/WTO panels. Finally, there is also some evidence that developing countries have recognized the importance of retaliatory threats and have responded by changing their pattern of dispute initiation under the WTO to take better advantage of the instances in which they have sufficient leverage to threaten retaliation and induce compliance with GATT/WTO obligations.

7.4. The WTO Agreements and Developing Countries

The agreements that arose from the 1986-1994 Uruguay Rounds, and the WTO’s agreement, more than fifteen years after the agreements took effect; the developing countries still experience complications with their implementation of WTO agreement.

The developing countries lack the financial and human resources to fulfil their obligations such as the complex requirements of the intellectual property agreement. So, the special and differential provisions are included in all WTO agreements. For example, to grant developing countries flexible terms within specified time limits, at longer transition periods, smaller commitments, like the commitments on agriculture.

In sum, the Special and Different Treatment provisions are aimed both to help developing countries implement the agreements and to emphasize the benefits they can enjoy.

The developing countries feel that these provisions have not served their ambitions. They claim that the special and differential treatments are insufficient and

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*C. P. Bown, Developing Countries as Plaintiffs and Defendants in GATT/WTO Trade Disputes, Volume 27 Blackwell Publishing in its journal The World Economy, 5 (2004).*
unsatisfactory and that limit requirements of category are too unclear and often disregarded by developed countries. According to those claims, developing countries are willing to bring their problems prominent in the present round of negotiations in order to correct perceived lapses and gaps in Uruguay Round texts. In order to realise the benefits from international trade, somewhat to gain equally between WTO’s members.

The Senior Vice President and Chief Economist of the World Bank expressed “as Developing countries take steps to open their economies and expand their exports, in too many sectors they find themselves encountering significant trade barriers leaving them, in effect, with neither aid nor trade. They quickly run up against dumping duties, when no economist would say they are really engaged in dumping, or they face protected or restricted markets in their areas of natural comparative advantage, like agriculture or textiles”.

7.5. Participation of Developing Countries in the DSM

Roderick Abbott, view that the data issued by the WTO Secretariat on disputes shows that developing countries have participated in one-third of the cases 1995-2005. The data should be corrected to exclude some OECD member countries and some others with high GDP per capita. These adjustments reduce by about 30 numbers of cases and, in addition, analysis shows that the vast majority of the developing country cases were launched by just five members. If another eight members are added, you have 90% present of developing member dispute activity, which means that around 80-90 members have had no dispute participation at all. He discusses the reasons for that passive attitude and concludes that there seems to be little in the WTO system per se that needs correcting in this context. It is rather

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problems of internal governance and organization in many capitals that may be
responsible for the relative absence of many members from the WTO dispute scene.⁹

7.6. Special and Differential Treatment for Developing Countries

The developing and Least-developed countries have problems realizing the
profit of the WTO dispute settlement system compared with a developed country. In
practice those problems that face them, cannot be overcome through the grant of
procedural privileges. The developing countries have therefore seldom invoked such
provisions in the DSU and the dispute settlement process has been hesitant to apply
them.

The basic objective should therefore be put to developing countries in the
position to effectively protect their rights in dispute settlement system. Special and
differential treatment for developing country in the WTO dispute settlement, that
require them to take and depend on legal expertise and to call for more treatments in
present negotiations to enhance their positions in WTO regime.¹⁰

This section will discuss:

• The Meaning and Term of Special and Differential Treatment;
• The History and concept of Special and Differential Treatment;
• Different Forms of Special and Differential Treatment;
• Special and Differential Treatment in the WTO; and
• Special and Differential Treatment and Developing Countries.

⁹Roderick Abbot a member of ECIPE's Steering Committee and Advisory Board, he was a Deputy
Director General of World Trade Organization until 2005.
(2004).
7.6.1. The Meaning and Term of Special and Differential Treatment

The logical foundations of these SDT arrangements in GATT go back to the 1950's and even earlier. It was widely believed in the early 1950s that balance of payment problems for developing countries were source to low income position, thus, the developing countries would face permanent balance of payments difficulties.

It was argued that it was impossible for most of the developing countries to liberalize since such actions would only widen their trade deficits. It was alleged that it was desirable for developing countries to use safeguard on infant industry grounds in part because of the apparent experience of Japan for example that protected industries were able to generate export growth only after a period of relying on domestic markets.

These arguments, held that developing countries always face a secular decline in their terms of trade; suggesting that developing countries would need to be given preferential access to developed country markets to counterbalance these effects.

The term special and differential treatment in the GATT evolved from debates in the 1960's as to how the growth and development of developing countries were best facilitated by trade rules. The term itself derived from a reference in the 1973 Tokyo Round Declaration which recognized “the importance of the application of differential measures in developing countries in ways which will provide special and more favourable treatment for them in areas of negotiation where this is feasible”. Special and differential in this form denoted both an access and a right to protect component. This preferential access developed to be as special and differential treatment was adopted by GATT /WTO system recently.
The history of special and differential treatment of developing countries can be divided into two stages: the time before and after the GATT Uruguay Round which began in 1986. This eight-year negotiation round at whose end in 1994 stood the ratification of the "Marrakesh Agreement Establishing the WTO".

The General Agreement on Tariffs and Trade (GATT) in its original version of October 1947 did not include specific provisions for developing countries. Rights and obligations were the same for all contracting parties. The preamble emphasizes on the basis of mutuality and reciprocity trade barriers in international trade were to be removed and discrimination was to be abolished. GATT was intended as a provisional agreement which was to be substituted by the broader Havana Charter to establish an international trade organization, ITO. The US Congress, however, prevented the ratification of the Charter by the USA and thus the foundation of the ITO. Consequently, since 1st January 1948 all international trade issues had to be dealt with under GATT. Of the original 23 signatory states of GATT, 11 can be considered as developing countries.\footnote{Brazil, Burma (Myanmar), Ceylon (Sri Lanka), Chile, Cuba, China, India, Lebanon, Pakistan, Southern Rhodesia und Syria.} It has to be noted that at that time many of these countries were still under colonial rule and won independence only in the subsequent years.

The notion of special treatment, was expressed during the initial GATT/ITO negotiations in 1947, that based on the opinion of equality of treatment among countries are unsuitable when countries are not economic equals; moreover the notion of poor countries would be given treatment that reflected their poverty, and thus relative absence of capacity bargaining power.
There are two kinds of special treatment developed. The first viewpoint is evading obligations, commitments made by developed countries. Thus, the developing countries would fulfil obligations more slowly or less severely, and they would not have to make the same concessions as developed countries members. The second viewpoint of getting special privileges, the developed and developing countries negotiated the GSP program. In this programme, developed countries are permitted and encouraged preferential market access to the developing countries by lowering tariffs for them. The GSP system was instituted in the hope that developing countries could use the trade preference to raise their interest in international trade, according to the GATT/WTO system. The viewpoint was that the preferences would accelerate the economic development of least developed countries and would increase the power of these countries to strengthen their economy. Generally, that helps to restore and preserve balance within system.\(^{12}\)

In the WTO 1995, the concept of preferential treatment of developing countries derived from the permanent legal structure of GATT 1947 and its many subsidiary agreements.\(^{13}\)

The special and differential treatment for developing countries, interests in the WTO is found in the substantive agreement themselves where, almost without exception, there is provision for lower inceptions and longer timeframes for implantation of WTO obligations by developing countries.

In general terms those provisions offer additional time for developing countries to achieve their obligations, design to increase developing countries trading share opportunities through greater market access to the developed countries market.


\(^{13}\) K. C. Kennedy, INTERNATIONAL TRADE REGULATION- READINGS, CASES, NOTES, AND PROBLEMS, 479 (2009).
furthermore WTO members are required to protect the interest of developing countries when adopting certain domestic or international measures, and also provide different means of helping and sustain developing countries.\textsuperscript{14}

One criticism of the Uruguay Round of negotiations was that developing countries' concerns were added into agreements on an ad hoc basis, only when an appropriate negotiator was present. Consequently, the WTO consultation and negotiations need careful management in a future trade Round. By active participation and collective work from developing countries, they can realize benefits and attain more special attention for their barriers and difficulties to access developed country markets and also to safeguard their markets from any risks.

\textbf{7.6.3. Different Forms of Special and Differential Treatment}

The Special and differential treatment takes a different form in the DSU than in the other covered agreements, which contain the substantive rules governing international trade. The DSU recognizes the special situation of developing and least-developed country Members by making available to them, for example, additional or privileged procedures and legal assistance.

Developing countries may choose a faster procedure, request longer time-limits, or request legal assistance. WTO Members are encouraged to give special consideration to the situation of the developing country Members. These rules will be specifically addressed below. Some are applied very frequently, but others have not yet had any practical relevance. A general criticism is that several of these rules are not very specific.

\textsuperscript{14} S. Lester, \textit{et at}, \textit{WORLD TRADE LAW- TEXT, MATERIAL AND COMMENTARY}, 788 (2008).
During consultations stage, Members should give special attention to the particular problems and interests of the developing country Members.\(^{15}\) If the purposes of the consultations are a measure taken by a developing country Member, the parties may agree to extend the regular periods of consultation. Moreover, at the end of the consultation period, if the parties cannot agree that the consultations have concluded, the DSB chairman can extend the time-period for consultations.\(^{16}\)

At the panel stage, there is a Special and Differential Treatment offered for the developing country Members. When a dispute is between a developing country Member and a developed country Member the panel must, upon request by the developing country Member, include at least one panelist from a developing country Members.\(^{17}\)

When a developing country Member is the defendant, the panel must accord it sufficient time to prepare and present its defence. However, this must not affect the overall time period for the panel to complete the dispute settlement procedure.\(^{18}\) One panel has already applied this provision by granting the responding developing country Member, upon request, an additional period of ten days to prepare its first written submission to the panel, despite the complainant’s objection. The notable example in India – Quantitative Restrictions\(^{19}\), India requested extra time to make and present its first written submission, according to Article 12.10 of the WTO’s DSU. The Panel decided that “in light of this provision, and considering the administrative

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\(^{15}\) Article 4.10 of the DSU.
\(^{16}\) Article 12.10 of the DSU.
\(^{17}\) Article 8.10 of the DSU.
\(^{18}\) Article 12.10 of the DSU.
\(^{19}\) DS/90-96, India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products (Complainants: United States of America, Australia, Canada, New Zealand, Switzerland, Japan, European Communities) 15 July 1997.
reorganization taking place in India as a result of the recent change in government”, India may be granted an additional period of 10 days.\(^{20}\)

When a developing country Member is party to a dispute and raises rules on special and differential treatment of the DSU or other covered agreements, the panel report must explicitly indicate the form in which these rules have been taken into account.\(^{21}\) This is to make clear how effective these rules have been in a given case and to show how they have really been implemented.

Regarding the stage of surveillance of implementation, the DSU mandates that particular attention must be paid to matters affecting the interests of developing country Members.\(^{22}\) This provision has already been applied repeatedly by arbitrators acting under the DSU in their determination of the reasonable period of time for implementation.\(^{23}\)

One arbitrator has, relying on the Article 21.2 of the DSU, explicitly granted an additional period for implementation in the certain case. It is illustrated in the case Indonesia – Autos\(^{24}\): the Arbitrator, in defining the “reasonable period of time” pursuant to the Article 21.3(c) of the DSU, considered not only Indonesia’s position as a developing country in determining the “reasonable period of time”, but also the fact that “it is a developing country that is currently in a dire economic and financial situation”.\(^{25}\)

\(^{20}\)Panel Report on India – Quantitative Restrictions, Para. 5.10.
\(^{21}\)Article 12.11 of the DSU.
\(^{22}\)Article 21.2 of the DSU.
\(^{23}\)Article 21.3(c) of the DSU. DS/59, Indonesia — Certain Measures Affecting the Automobile Industry (Complainant: United States of America) in 8 October 1996.
\(^{24}\)Article 21.3 of the DSU.
\(^{25}\)Award of the Arbitrator on Indonesia – Autos (Article 21.3), Para.24. See also Award of the Arbitrator on Argentina – Hides and Leather (Article 21.3), Para. 51.
This provision was called by Argentina and Chile\(^\text{26}\) in arbitration procedures on the length of the reasonable period of time for the implementations of DSB recommendations and rulings. The arbitrator recognised that provision, though cast in general terms "is not simply to be disregarded" because it's stipulated in the WTO's DSU. In another case Indonesia- Automobile Industry, the arbitrator depends on the Article 21.2 as the legal base in order to make an extension of the implementation period by six months. This makes clear the practical impact of this provision for developing countries' interests.\(^\text{27}\)

Moreover the Article 21.3(c) of the DSU, took into account in determining the "reasonable period of time", but also the fact that "it is a developing country but also that it is currently in a dire economic and financial situation" in the interests of the developing country Members.\(^\text{28}\)

In deciding what suitable action must be taken in a case brought by a developing country Member, the DSB has to consider not only the trade coverage of the challenged measures, but also their effect on the economy of the developing country. The provisions according to the developing countries procedural privileges are Articles 21.7 and 21.8, according to which the DSB shall take into account the interests of developing countries in its task of surveying the implementation of recommendations and rulings.

When a developing country Member makes a complaint against a developed country Member, the complaining party has the discretionary right to invoke, as an

\(^{26}\)DS/351, Chile — Provisional Safeguard Measure on Certain Milk Products (Complainant: Argentina) 25 October 2006.
\(^{28}\)Award of the Arbitrator on Indonesia – Autos (Article 21.3), Para. 24.
alternative to the provisions as consultation, good offices, conciliation and mediation.\(^{29}\)

In general, the WTO's DSU provide special provisions for developing country, as \textit{first}, that the Director-General may use his good offices, and conduct consultations at the request of the developing country with a view to assist an agreed solution to the dispute, when the consultations between the parties of dispute have failed. \textit{Second}, when these consultations conducted by the Director-General do not bring about a mutually satisfactory solution within two months, the Director-General submits, at the request of one of the parties, a report on his achievement between the parties to the dispute. Subsequently, the DSB establishes the panel with the agreement of the parties of dispute.

\textit{Third}, the panel must take due account of all circumstances and considerations relating to the request of the challenged measures, and their influence on the trade and economic development of the affected Members.

\textit{Fourth}, the resolution provides for only 60 days for the panel to submit its findings from the date the matter was referred to it. Where the Panel considers this time-frame insufficient it may extend it with the agreement of the complaining party. In practice, developing countries Members tend to prefer to have more time to prepare their submissions.

However, members often insist that the panel respect the overall time-frames for the completion of the procedure. The review of the operation of DSU provisions on special and differential treatment for the developing countries, points to more encouragement for participation in WTO dispute settlement system with special provisions they enjoy and the other party does not. Besides, developing countries also

\(^{29}\)Articles 4, 5, 6 and 12 of the DSU.
fear that the application of procedural provisions biased in their favour may weaken the legitimacy of the result of the procedures and hence reduce the normative force of the ruling which they are pursuing.30

Currently developing countries receive special and differential treatment not only in WTO rules, but also in special trade programs established for them by developed countries. In the long run, however, such special tariff treatment is of limited value to developing countries in attaining the aim of steady, healthy economic growth. So, the tariff decreases associated with preferential treatment system are inherently uncertain because they depend completely on the trade strategies of the donor countries. In general, with the lower tariff reduction in developed countries, result the MTN rounds, that reflect on benefit of beneficiary developing countries under preferential tariff treatment.

7.6.4. Special and Differential Treatment in the WTO

Alexander Keck and Patrick Low point out for many developing countries, a satisfactory outcome on special and differential treatment issues will be at the core of their judgment on the results of the Doha negotiations and the utility of the WTO as an institution supportive of development. The focus here has largely been on SDT in terms of the debate as it has unfolded in the WTO. The discussion is not about whether SDT provisions are legitimate, but how they should be designed to respond to the needs of developing countries as they undergo economic transformation through a process of development. Little mention has been made of other aspects of the multilateral trading system that also influence development. The question of better market access for products of export interest to developing countries has not been

addressed. Nor has much attention been paid to the ways in which obligations under the WTO can help to strengthen the ability of developing countries to pursue effective development policies. They suggest some proposals for special and differential treatment:

I. Special and differential treatment provisions are not safe haven from poorly framed rules that compromise development objectives, the best interests of developing countries would be served through engagement with respect to the substance of core proposals, seeking exemptions via S&D merely postpones any difficulties that might arise from inherently flawed rules.

II. Preferences have proved helpful to some countries for certain periods of time when certain other conditions have been present. Exports from such countries have gained footholds in industrial country markets in the presence of preferences.

III. Local content requirements and the protection of domestic industries against foreign competition may have done more harm than good to the growth prospects of some developing countries.

Flexibility as to when developing countries should assume WTO obligations reflects an appreciation of the adjustment costs of change as well as administrative and infrastructural capacity needs that might be associated with implementation, also Flexibility to subsidize must be carefully designed to avoid wasteful subsidy competition.31

7.6.5. Special and Differential Treatment and Developing Countries

With the views of Alexander Keck and Patrick Low, Special and differential treatment S&D for developing countries continue to be a defining feature of the multilateral trading system. It argues that concerns about graduation – the definition of which countries qualify for special treatment – have complicated progress on this issue, suggesting that a focus on measures rather than on country status would obviate this difficulty, while at the same time increasing the analytical underpinning of the case for special and differential treatment. For many developing countries, a satisfactory outcome on S&D issues will be at the core of their judgment on the results of the Doha negotiations and the utility of the WTO as an institution supportive of development. The focus here has largely been on S & D in terms of the debate as it has unfolded in the WTO.32

7.7. The Ambiguity in the Idea or Notion of Preferential Treatment

The WTO has been unable to make important progress regarding the explanation, clarifying and implementation of the principle of special and differential or preferential treatment for the developing countries. The principle is in order to allow them to develop their economies, so that they can in due course compete with the developed countries on an equal footing. Several provisions of the WTO agreements declare of granting special and differential or preferential treatment for the developing countries without specifying the nature and scope of such treatment and how to implement them effectively. It was expected that once the WTO came into existence it would work out the detailed modalities of such treatment to developing countries. However, little has been done in this area. There is a discussion now as to which developing countries should actually qualify for such treatment.
Many countries seem reluctant to accord the same special and differential treatment to the more developed, developing countries such as China and Korea - on the one hand, and less developed developing countries such as Laos and Mali - on the other hand.\textsuperscript{32}

The Doha Declaration decided fully to take into account the principles of special and differential treatment for developing and least-developed countries embodied in, inter alia, the Decision of 28\textsuperscript{th} November 1979 on Differential and More Favorable Treatment, Reciprocity and Full Participation of Developing Countries. However, it did not go beyond recognizing the concept of special and differential treatment for developing countries and studying the provisions for special and differential treatment with an opinion to reinforce them and making them more precise, effective, and operational for the developing countries.\textsuperscript{33}

\textbf{7.8. Problems faced by developing countries}

Developing countries clearly are at a disadvantage before the WTO's current dispute settlement system. The significant subject is how developing countries should adjust to the WTO’s system, on the one hand, and how the system’s rules could be modified to reduce structural prejudices within it, on the other.

In fact the developing countries face three main problems, when they are to be more importantly participating in the WTO dispute settlement system.

\textsuperscript{33} WTO, Ministerial Declaration, Doha, 14 November 2001: WT/MIN (01)/DEC/W/1.
These problems are as follows:

I. Absence of legal specialists in the WTO system; moreover the lack of capacity to establish information regarding trade barriers and opportunities to face any violations;

II. Shortage of financial means for the hiring of law firms, for defense before WTO, DSB;

III. Concern of political and economic pressure from the developed countries especially from US and EU that affect their capacity to make out case before WTO’ dispute settlement system.

To use the WTO system successfully, developing countries shall develop their legal ability to observe any damage to their trading, and develop specialists in different WTO fields in order to organize all the means to establish case before WTO’ DSB or to negotiate a settlement.34

Also, where developing countries become conscious of any violations against their rights, their consciousness will not be transformed into a legal claim unless based on knowledge how to deal with the dispute settlement process, one gains confidence that a case is going to benefit the claiming member.

Many developing countries complain that in the Uruguay Round the application of special and differential treatment and also the treatment of different country circumstances were random and that longer implementation deadlines for the developing countries were decided arbitrarily.

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34In the domestic socio-legal literature, these stages are referred to as naming, blaming and claiming (i.e. perceiving an injury, identifying a culpable party, and bringing a claim against such party). See, e.g., William Felstiner et al., The Emergence and Transformation of Disputes: Naming, Blaming and Claiming, 15 Law & Soc'y Rev. 631 (1980-81).
So, there needs to be a good application of flexibility in designing future WTO rules. Appropriate flexibility should be integrated systematically into WTO agreements. We believe future WTO rules should:

- contain better structures or targeted provisions to eliminate the problems which countries may face;
- to be built on a better understanding of what might be the difficulties in putting new rules into practice; and
- comprise trustworthy implementation processes that match different country capacities. \(^{35}\)

### 7.9. Least-Developed Countries Position in WTO Regime

The weak role for LDCs for participation in all WTO activities, require collective efforts from WTO’s Secretariat and other nongovernment organizations to enhance their role.

It is essential that we retain, strengthen and reform the WTO and the rules-based system, and ensure that it works for poor countries. The alternative is a situation in which the rich and powerful dominate the rest, or where the richer economies make bilateral trade deals between themselves and exclude the poorest.

The removal of all barriers to imports from the least developed countries is among the significant moves bound for the present round of negotiations of World Trade Organizations Director-General Mike Moore has called on WTO Member governments to do away with tariffs and quotas on products from the LDCs.

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\(^{35}\) A summary of DFID’s policies on trade and development is contained in the Why Trade Matters booklet. See, website at www.dfid.gov.uk. Visited on 20.10.2011.
Another means to grant preferential treatment for the products imported from LDCs is by reduction or elimination of tariff duty, in order to facilitate market access to their products.

Director-General Mike Moore states:

"Taken together, least developed countries constitute only one half of a percent of world trade. Removing barriers to trade from these countries poses no serious threat to anyone, but it does provide some of the poorest people on the earth with the gift of opportunity that is vital to their future growth and development".

Director-General aimed to see Ministers approve removal of barriers to LDC products as a move of importance at the conference, which may launch a new round of trade negotiations, to discuss all barriers facing LDCs to actively participate in the WTO system.

The concept of eliminating trade barriers to import from LDCs was formerly introduced by the former WTO Director-General Renato Ruggiero.36

In December of that year Minister from member Governments approved at the first WTO Ministerial Conference in Singapore to adopt a comprehensive and integrated strategy action for LDCs. The outcome of that initiative was a high conference for LDCs.37

At that conference different States38 provided formal notifications of their objectives to develop access of their markets for the LDCs imports, besides the

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36Mr. Renato Ruggiero was today (24 March) formally appointed as the next Director-General of the World Trade Organization and the GATT in succession to Mr Peter Sutherland. Mr. Ruggiero will take office on 1 May 1995 and will serve as WTO Director-General for a four-year term.
37Meeting held in Geneva in October 1997.
38Canada, Egypt, European Union, Mauritius, Switzerland, Turkey, and the United State.
conference led to formation of the integrated framework for Trade Related Technical Assistance for the Least Developed Countries.\textsuperscript{39}

In the next sections research will discuss:

- The Treatment for the Least-Developed Countries (LDCs);
- special and differential treatment of the Least Developed Countries; and
- Least Developed Countries bring case to WTO’s Dispute Settlement system, the Case of India’s Anti-Dumping Duties on Lead Acid Battery Import from Bangladesh.

7.9.1. The Treatment for the LDCs

There is real concern toward LDCs from WTO member ‘developed countries’, UNCTAD, and the World Bank, IMF, and The United Nations Development Programme and the International Center, combined forces to put out effort aimed at bringing the LDCs from sidelines of the multilateral trading system. However, there were many governments who believe that the process requires a fresh political commitment if it is sufficiently to address the LDCs problems restricting them to achieve real benefit from WTO regime.\textsuperscript{40} Concerning LDCs, the WTO has committed itself through the Doha Declaration to realize the objective of duty-free, quota-free market access for products generating from LDCs’. But those obligations have not been transformed into tangible and obligatory obligations for WTO Members. At present, these are promises rather than actions. For example, with the expiry of the Agreement on Textiles and Clothing, the quota system in textiles and clothing under the global trade treaties has practically disappeared.

\textsuperscript{39} K. R. Gupta, A STUDY OF WORLD TRADE ORGANIZATION, 251(2000).
\textsuperscript{40} Ibid, 252.
The matters of implementation of the duty-free system for the exports from the LDCs, exists in some form of a quota system under other non-WTO agreements, such as the Cotonou Agreement, successor to the more widely known Lome Conventions concluded between the EU and the ACP countries. The WTO’s practices vis-a-vis among these agreements which would be limited for granting abandonment. Certainly, the requests for the abandonment or waivers in relation to certain products from the ACP States were approved and permitted by the Doha Ministerial Meeting of the WTO.41

7.9.2. Special and Differential Treatment of the Least Developed Countries

The establishment of the WTO with DSB has opened up a new way for amends of trade related disputes among countries. Those remedies encourage the smaller and weaker trading countries who find themselves in a highly unequal position in trade dispute with powerful economic countries, to bring case against them with the hope to win it. The superior negotiating strength of the latter often does not produce a fair outcome for the weaker countries in bilateral negotiations. So, all the rules of Special and differential treatment for the developing countries apply to the least-developed country Members. Moreover, the WTO’s DSU set out a few particular rules applicable only to least developed country Members in order to take active participants in WTO’s dispute settlement system.42

The least developed countries were given special treatment in two Uruguay Round Decisions and in several of the Uruguay Round MTAs. The treatment includes and intends on two issues such as:

a) Prolonged alteration periods before various substantive commitments become binding, and

b) Whole exclusions from some commitments.

So the decision provides for the least-developed countries reassurance in the following five areas:

a) Expeditious implementations of all special and different measures taken in favour of least-developed countries.

b) To the extent possible, MFN concession on tariff and non-tariff measures agreed in the Uruguay Round on product of exports interest to the least-developed countries may be implemented autonomously, in advance and without staging. Consideration should be given to further improvement of GSP and other schemes for the product of particular interest to the least developed countries.

c) The rule set out in various agreements, instruments and transnational provisions in the Uruguay Round should be applied in flexible and supportive manner for the least-developed countries.

d) In the application of import relief measures referred to in paragraph 3(c) of Article XXXVII (in particular safeguard actions) ... special considerations should be given to the export interests of the least-developed countries.

e) Least-developed countries should be accorded substantially increased technical assistance in the development, strengthening and diversification of their production and export bases including those of services, as well as in
trade promotion, to enable them to maximize the benefits from liberalized access of markets.\textsuperscript{43}

Where a least-developed country Member is involved in a dispute, particular considerations must be given to the special situations of the Member at all stages of the dispute. Member countries have a duty to apply due restraint in bringing dispute against a least-developed countries member and to ask for compensation or seeking authorisations to suspend obligations against a least developed countries Member that has lost a dispute.\textsuperscript{44}

In case of dispute involving a Least-developed Country Member, the DSU provides specifically provisions such as, good offices, conciliation and mediation.\textsuperscript{45}

Where consultations have not resulted in satisfactory solutions and the least-developed country Members so requests, the Director- General or the chairman of DSB must offer their good offices, conciliations and mediations - alternative means in order to assist the parties to settle the dispute before the establishment of the panel. Regarding providing such assistance, the Director –General or the chairman of the DSB, may consult any source which either party believes appropriate.\textsuperscript{46}

7.9.3. Least Developed Countries Bring Case to WTO

The Case of India's Anti-Dumping Duties on Lead Acid Battery Import from Bangladesh; Trade between countries is being progressively accorded with rules and agreements negotiated at the World Trade Organization. The increasing importance of WTO in the conduct of trade has reduced the pressure of bilateral negotiations to resolve contentious trade issues, in specific trade disputes arising. Almost all trade

\textsuperscript{44}Article 24.1 of the DSU.
\textsuperscript{45}Article 5 of the DSU.
\textsuperscript{46}Article 24.2 of the DSU.
disputes between WTO’s Members settled through different mechanisms established by the WTO system.

The WTO dispute settlement system confers some benefits for the smaller and weaker countries, like the least developed countries, which find themselves in a highly unequal position in trade negotiations with larger and more powerful countries. Such a country can hardly expect to get a fair deal in bilateral negotiations with powerful developed nations to solve trade related disputes. The dispute settlement mechanism of WTO requires the involvement of experts from several countries other than the disputants in order to offer legal assistance for LDCs for example, the Advisory Centre on WTO Law (ACWL).

When the disputes are brought to the WTO for settlement where experts and observers from several countries become involved, it can tilt the balance toward more equal opportunities. There are instances in which the weaker countries have won decisions in their favor against developed countries.

For example, the Case India’s Anti-Dumping Duties on Lead Acid Battery Import from Bangladesh\(^ {47}\) is summarized:

In January 2002, India had imposed an anti-dumping duty on maintenance free and non-maintenance free lead acid batteries imported from Bangladesh for use in automobiles, motorcycles and industries.

Bangladesh claims that India had started probes despite “unsubstantiated claim” by the applicants that they represented the domestic industry and did not end them though the volume of imports from Bangladesh was insignificant, comparative with imports from India to Bangladesh.

\(^ {47}\) DS/306, India — Anti-Dumping Measure on Batteries from Bangladesh (Complainant: Bangladesh) 28 January 2004.
Moreover it claimed India did not factor in the information submitted by the Bangladesh Accumulator and Battery Manufacturers Association, which had asked for the Indian data. Bangladesh exported 54,203 pieces during probe period. The volume, it argued, was not significant and would not affect the Indian industry.

Bangladesh had also questioned the procedure adopted in calculating the normal value, determination of export price and a comparison between the two.

When, "as a result of the imposition of anti-dumping duties in a manner not justified under General Agreement of Trade and Tariffs, India may also be acting inconsistently with its obligations. Consequently, Bangladesh considers that the benefits accruing to it directly or indirectly under the WTO Agreement are being nullified or impaired".48

Bangladesh was the first LDC to officially request the WTO during the tenth year from initiation, to resolve a trade dispute with India as a developing country. Bangladesh had to overcome difficult barriers beside the psychological obstacle in order to pursue restore of the harmful trade with India. This case is considered as notable lesson, for other LDCs to have recourse to WTO dispute settlement system to redress and to face any violation from another WTO member.

It's remarkable that the legal assistance provided by the Advisory Centre on WTO Law (ACWL) was absolutely essential in preparing for and conducting the case through different process and to remove the unfair trade practice imposed on Bangladesh.

The good legal services provided by Advisory Centre on WTO Law for LDCs to redress unfair trade practice from strong economic members encourage the LDCs that intend to take recourse to dispute settlement mechanism.49

7.10. The Advisory Centre on WTO Law (ACWL)

The WTO came in force on January 1st, 1995 with 128 Members. Now, the WTO membership is 153, the majority from developing countries, with 32 of the poorest classified as least developed countries (LDCs). Yet many observers, and especially those representing the interests of poor countries, evaluate that participation in the Uruguay Round and in the WTO have realized a few benefits for these countries.

Many developing countries point to the high cost of litigations, and several have proposed that the WTO should bear all costs associated with the efforts of developing countries to enforce their market access rights and legal assistance for requesting DSB regarding any violations. In appreciation of the necessity for this type of assistance for developing and least developed countries, the Advisory Centre on WTO Law (ACWL) was established in 2001.

So, the developing countries use DSU through the resource of the ACWL, which may have affected the way they use WTO enforcement.

Based on these results, we highlight an additional need of developing countries for support of their WTO self-enforcement efforts. The data suggest that when developing countries have good information regarding a foreign market access violation, they are able to pursue it through the DSU process.

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49 M.A. Taslim, Dispute Settlement in the WTO and the Least Developed Countries: The Case of India's Anti-Dumping Duties on Lead Acid Battery Import from Bangladesh, 25-26 January (2006).
Institution of the ACWL has generally overcome the difficulty posed by the high cost of the legal assistance required for WTO process. However, insufficient data around violations of their market access rights in a significant difficulty that exporter in developing countries face in their WTO enforcement efforts.

As Hoekman and Kostecki write, "The Advisory Centre on WTO Law focuses only on the 'downstream' dimension of enforcement, not on the 'upstream' collection of information." Yet, a central part of the overall process of dispute settlement is the identification of legal claims. These identification mechanisms could build on and feed into the WTO's committee and council procedures and its trade policy reviews of countries' compliance with WTO obligations.

7.11. Absence of Active Participation by Developing Countries

There is a most important question regarding participants in legalized dispute settlement system, compared with the active participation of developed countries.

Developing countries are less likely to participate actively in WTO litigation because of two main reasons:

(i) single developing countries' relatively smaller value, volume and variety of exports, resulting in fewer economies of scale in organizing legal means, and

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50Hoekman & Kostecki, *The Political Economy of the World Trading System*, supra note 19, at 94-95 (also noting that "One option to deal with the information problem is for the private sector to cooperate and to create mechanisms through which data on trade barriers are collected and analyzed").

(ii) high cost of access to the dispute settlement system. Developing countries frequently have high participation in individual cases; therefore, the WTO law can be of possible benefit for them.

Generally, in comparison to a developed country, the developing countries export at limited value and volume of goods, especially to the United States and EC.

For the reason, that developing countries are less active traders, they are less likely to be repeat players in WTO litigation. Because of their less repeated recourse to and use of the WTO system, their incapacity to benefit from international trade, which negatively reflect imbalances in the development of legal means, when required, for dispute settlement.

Moreover, the cost of litigation is very high, that decreasing in developing countries motivations to actively participates in WTO’s law system.

Developing countries lack legal professionals in the area of WTO law, because they are not developing specialist lawyers. On the other side, developed country response to growing demand, particularly the number of law professors in the United States that teach WTO law has increased dramatically.

In the case of developing country bringing case to WTO’ DSB and resulting in the lack of national legal expertise, requires hiring legal experts to defend their rights before panel and appellate body. Therefore there is increase of the cost of litigations. Hence, necessity for teaching, WTO system to prepare law specialists for developing countries to distinguish between rights and obligations and any violation of these.

52 Developing countries can face fees ranging from $200-$600 or more when they hire private law firms to advise and represent them in WTO cases. Lawyers for Kodak and Fuji in the Japan-Photographic Film case respectively charged their clients fees in excess of $10 million dollars. Such fees are unthinkable for most developing countries. Even for a relatively small case, a law firm quoted a figure of $200,000 for representing the developing country only through the panel stage.
This is needed, to reduce the high cost of litigations, and to have more incentive to active participation in WTO dispute settlement system.

In other sense, developing countries' consciousness of the WTO system also has positive reflections on their awareness of whether they have legal claims existing.\(^\text{53}\)

7.12. Conclusion

The provisions of special and deferential treatment aim to ensure that a general principle is applied for the developing countries, to be more effective. However, there is hesitation in developing countries to invoke the DSU provisions according to them, special and differential treatment must be given to effect those provisions. Besides to the SDT the developing countries will use their diplomatic means to attain privileges that they will subsequently not invoke.

There are other available ways to realize relative equality with developed countries in WTO dispute settlement system. The developing countries get the legal and technical assistance they need to protect their rights as efficiently as developed countries. According to provisions of the DSU, the WTO Secretariat is responsible to provide legal advice and assistance regarding the dispute settlements of any developing country Member.\(^\text{54}\) Therefore, the experts of the WTO Secretariat “shall assist the developing countries member in manner of ensuring the continued impartiality of the secretariat”. Thus, developing countries are able to receive legal assistance from the expert of WTO Secretariat to act as an advocate for their interests in a legal proceeding against another Member.


\(^{54}\) Article 27.2 of the DSU.
The importance of the full and effective participation of developing and least developed countries in the multilateral trading system can contribute in generating an atmosphere of reliance and confidence in the system among its weak members and thus improve the credibility of the WTO rules-based trading system.

In conclusion, the developing and the least developed countries are becoming more active in bringing cases in the WTO. However, it has also been shown that in cases of non-compliance such as developing countries have no effective means to ensure compliance by the developed countries. This calls for rethinking of WTO remedies and this is the subject matter under consideration of WTO’s Members in the next Ministerial meeting.

The collective effort is needed to encourage a more active involvement by developing countries in the WTO. There are three elements: increasing policy-making capacity in developing country capitals, improving their representation in WTO and improving the organisation of activities inside the WTO. Indeed, that makes developing and least-developed countries become more active and influential. In fact, the trade negotiations need skilled staff and organised information. It is essential for the developing countries to build sufficient policy capacity in their capitals if they are to attain results in trade negotiations.

Moreover, the lack of representation in the WTO in Geneva from many developing countries, reflect negatively on their interest. The importance of presentation in WTO sectors for protecting and to achieve equal benefit comparative with the industrial countries must be recognized.

The WTO’s Secretariat and developed countries must provide suitable support to strengthen the participation of these countries in all WTO’s sectors. But the duty of
developing country is to build their capacity in WTO which requires reformation in different sectors relating to economic, through active support for public administration reform programmes and more specific trade policy capacity building. Those efforts together with other legal and technical support from WTO Secretariat strengthen developing countries capacities to eliminate all difficulty in participating fully in the WTO.

Effective spreading of information in the WTO, and more transparency is vital and important to guarantee that members are continuously kept involved and informed. The WTO Secretariat has recently launched daily news through internet website, periodical and yearly reports and other publication covering all details about WTO activities, in order to keep all WTO members informed. Also the consultations and negotiations in WTO need to be arranged and organised to facilitate the full participation of developing countries, without exclusion from any activities. Within the framework of the negotiations on DSU, developed countries are therefore in favour of initiatives aimed at granting the developing countries a better access to the system and providing them with the necessary training and technical assistance.

We conclude from the above that the process of improving the performance of developing and least developed countries in the effective participation requires the complete reform process.

First of all from the side of developing countries, the existence of full willpower to take advantage of various preferential treatments granted to them, as well as a collective claim to be more acceptable and effective to grant opportunity and facilities for access to developed countries' markets.
Second, work on the training and education of national experts in various sectors of the WTO. Through the promotion effective presence and active participation in all activities of the organization with the coordination of efforts and claims collectively in order to be more acceptable and influential.

Finally, the developing and the least-developed countries, must utilize preferential treatment and all legal and necessary training and technical assistance available, with the emphasis on the necessary and urgent reform in the dispute settlement system especially the implementation issues in the next negotiations or ministerial conference, to enhance their position and active participation in WTO regime.