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Dispute Settlement in the WTO: How Friendly is it for the LDCs

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Centre for Policy Dialogue (CPD)
House 40/C, Road 11, Dhanmondi R/A, GPO Box 2129, Dhaka 1209, Bangladesh
Tel: 8124770; Fax: 8130951; E-mail: cpd@bdonline.com
Website: www.cpd-bangladesh.org

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***The Centre for Policy Dialogue (CPD)**, established in 1993, is an innovative initiative to promote an ongoing process of dialogue between the principal partners in the decision-making and implementing process. The dialogues are designed to address important policy issues and to seek constructive solutions to these problems. The Centre has already organised a series of such major dialogues at local, regional and national levels. These dialogues have brought together Ministers, opposition frontbenchers, MPs, business leaders, NGOs, donors, professionals and other functional groups in civil society within a non-confrontational environment to promote focused discussions. The expectation of the CPD is to create a national policy consciousness where members of civil society will be made aware of critical policy issues affecting their lives and will come together in support of particular policy agendas which they feel are conducive to the well being of the country. The CPD has also organised a number of South Asian bilateral and regional dialogues as well as some international dialogues.*

In support of the dialogue process the Centre is engaged in research programmes which are both serviced by and are intended to serve as inputs for particular dialogues organised by the Centre throughout the year. Some of the major research programmes of the CPD include ***The Independent Review of Bangladesh's Development (IRBD), Trade Policy Analysis and Multilateral Trading System (TPA), Governance and Policy Reforms, Regional Cooperation and Integration, Investment Promotion and Enterprise Development, Agriculture and Rural Development, Ecosystems, Environmental Studies and Social Sectors and Youth Development Programme.*** *The CPD also conducts periodic public perception surveys on policy issues and issues of developmental concerns.*

As part of CPD's publication activities, a CPD Dialogue Report series is brought out in order to widely disseminate the summary of the discussions organised by the Centre. The present report contains the highlights of a dialogue organised by CPD under its Trade Policy Analysis programme on the theme of ***Dispute Settlement in the WTO: How Friendly is it for the LDCs?*** *The Dialogue was held at* ***CIRDAP Auditorium, Dhaka*** *on* ***January 26, 2004****.*

Report prepared by: *Mariam Rashid, Programme Associate, CPD*

Assistant Editors*: Anisatul Fatema Yousuf, Head (Dialogue & Communication)*
and
Fahmida Khatun, Research Fellow, CPD

Series editor: *Professor Rehman Sobhan, Chairman, CPD*

Dialogue on

Dispute Settlement in the WTO: How Friendly is it for the LDCs?

The Dialogue

The Centre for Policy Dialogue (CPD) organised a dialogue on January 26, 2004 titled ***Dispute Settlement in the WTO: How Friendly is it for the LDCs?*** at the CIRDAP Auditorium, Dhaka. The Honourable Minister for Commerce, *Mr Amir Khosru Mahmud Chowdhury, MP* was present as the Chief Guest. *Prof Mohammad Ali Taslim*, Chairman of the Bangladesh Tariff Commission, was the Guest of Honour and Lt.Col (rtd) *Mohammad Faruk Khan, MP*, Hon'ble Whip of the opposition was present as the Special Guest. *Dr Debapriya Bhattacharya*, Executive Director, CPD chaired the discussion. The participants of the dialogue included officials of the Government especially from the Ministry of Commerce, Ministry of Industries, the Tariff Commission, academia, development agencies, political parties, trade unions, NGOs and members of civil society organisations.

The keynote paper on *Dispute Settlement in the WTO: How Friendly is it for the LDCs?* was presented by *Mr Dennis Browne*, Director Emeritus, of the Centre for Trade Policy and Law (CTPL), Carleton University in Ottawa, Canada.

Opening Remarks

Dr Debapriya Bhattacharya initiated the dialogue by welcoming everyone present.

According to *Dr Bhattacharya*, dispute settlement is a complex and intricate subject which demands cross-disciplinary knowledge in matters of trade, law and also possibly some diplomatic experiences. It is one of the emerging areas and cutting edge of the multilateral trading system. Dispute Settlement is the "Jewel in the Crown" in the WTO architecture because its enforcement mechanism makes it different from any other mechanism. It is the presence of this mechanism (Dispute Settlement Mechanism) that helps countries decide to join the WTO. The Dispute Settlement Mechanism offers remedies and addresses the wrong doings of nations carrying out trade related disputes. It is this characteristic of the Dispute Settlement Mechanism that has distinguished it from the other systems of the WTO.

Dr Bhattacharya referred to the old GATT Articles 22 and 23 which gave a basis for initiating dispute settlement understanding. These articles also allow for consultation, ramification, impairment and other issues. But understanding regarding dispute settlement issues was reached only in the 1979 Tokyo Round Negotiations. Subsequently, dispute settlement issues were included in agreements particularly in 1989 and the process continues.
The Doha Declaration wanted to bring together some measures for consolidating the dispute settlement process and it was supposed to be fed into the Cancun process.

The law and judicial system guide all countries, and also agreements between countries and enterprises. Regarding the law and judicial justice system, *Dr Bhattacharya* pointed out that these are not accessible to the poor people because the law and judicial process are often cumbersome, cost intensive and is not within the reach of the common people. Unfortunately the WTO dispute settlement understanding has turned out to be something like the unreachable with corrupt law and judicial justice system. Not a single LDC to date could take advantage of the dispute settlement mechanism to invoke a case, to create a panel and also to get an award. Not only LDCs, but other countries also could not realise much from the dispute settlement understanding with respect to cash recovery or compensation. Instead there is more counter measures and retaliation from the dispute settlement.

So ultimately the Dispute Settlement Mechanism in the WTO remains as a process that is constantly evolving. It needs to be strengthened and enhanced so that poor countries can take advantage of it. Keeping this point of view in mind this issue was put on the table and *Mr Dennis Browne*, an expert trade negotiator and advisor for trade policy mapping in Canada, countries in Europe and also for CPD was invited to make a presentation on this important issue.

Dr Bhattacharya also welcomed two of *Mr Browne's* colleagues, *Ms Rosemina Nathoo*, Legal Advisor and Communucation/ Training Officer, CTPL, Canada and *Ms Sarah Geddes*, Project/ Research Officer, CTPL, Canada.

Keynote Presentation by Mr Dennis Browne

Mr Dennis Browne started his presentation by elaborating the objective of the paper which was to evaluate the possibility for LDC members of the WTO to rely upon the

WTO dispute settlement provisions to gain the benefits they reasonably believe should accrue to them from their participation in the WTO.

Part I: Is Dispute Settlement Friendly to LDCs?

The key note presentation was divided into two parts. The first part mainly dealt with the question "Is dispute settlement friendly to the LDCs?" According to *Mr Browne*, dispute settlement in the WTO can be both friendly and unfriendly for LDCs at the same time. As the present situation stands, the Dispute Settlement Mechanism is friendly towards the LDC respondents but the LDC complainants are not benefited from it. To explain this statement, *Mr Browne* clarified that Dispute Settlement Mechanism has the potential to be friendly to both the respondents and complainants, but only if LDCs avail themselves of the facilities provided by the Dispute Settlement Body (DSB).

Article 24 of the Dispute Settlement Unit (DSU) stated that "Members shall exercise due restraint in raising matters under these procedures involving an LDC Member". This provision has been put forward in order to encourage LDCs to participate in the Dispute Settlement process. Inspite of this stipulation, out of the 280 disputes which have formally engaged the Dispute Settlement Body (DSB) of the WTO, none has involved an LDC member.

Even with this benefit, LDC complainants find the dispute settlement process as unfriendly as before because the procedures are too complex, too expensive (legal costs) and it takes too long—sometimes upto 3 years. Also decisions by the panel are extremely lengthy, often 300 to 500 pages long. In *Mr Browne's* opinion, "solutions" offered by the DSB are not sufficient to overcome the damages suffered by the LDC enterprises due to its inconsistent measures.

WTO Dispute Settlement Body

Mr Browne went on to give a brief overview of the DSB. The main point of the DSB that needs to be highlighted is that there has to be a basis or valid reason for bringing disputes before the DSB. Article 22 and 23 of the General Agreement on Tariff and Trade (GATT) can be used as preparatory guidelines before presenting a dispute before the body. The GATT article 22 provides for consultations between WTO

Members "with respect to any matter affecting the operation of [the relevant] agreement, and if such consultations between members fail to resolve the matter, they may consult the DSB".

The GATT article 23 is used more as a common basis for dispute settlement. Under this article it is stated that a dispute issue may be brought in by a Member who considers that any benefit accruing to it directly or indirectly under a WTO agreement is being nullified or impaired or that the attainment of the objectives of the WTO agreements are being impeded as a result of:

- Failure of another Member to carry out its obligations, or
- Application by another Member of any measure, which nullifies or impairs another Member's expected benefits; or
- Other than the two scenarios mentioned above, there may be the existence of some other situations, for instance:

  (i) *violation complaints*: these have been most common

  (ii) *non-violation complaints*: these have been rare

  (iii) *situational complaints*: these have never been used in dispute settlement.

In his presentation *Mr Browne* offered some remedies for the problems associated with the WTO Dispute Settlement Body. For violation complaints, nullification or impairment have been suggested. It has been recommended that the dispute settlement measures be brought in line with the obligations of the WTO. In the case of non-violation complaints, the nullification or impairment of this measure has to be removed. If removal of nullification is not possible, then trade compensation has to be provided elsewhere.

The WTO Dispute Settlement Process has been built on more than 50 years of GATT experience. The DSU codifies and improves these practices for use in present day dispute settlement cases. Over the years, new elements have been brought into the DSB. These are:

- Automaticity based on negative consensus
- Provision for appeal
- Rulings that are 'binding'
- More detailed, although flawed, implementation procedures

Mr Browne has divided the Approaches to Dispute Settlement into basically four. Of these the first three have been incorporated by the WTO into its DSB. These four approaches are:

- *Dispute avoidance*: This approach is found in the WTO's 'transparency' requirements which states that Members must provide advance notice and opportunities to comment or consult on various types of regulations before they are implemented.
- *Mutually agreed settlement*: In this type of dispute settlement, consultations are the first step that is taken. Some other options towards mutually agreed settlement include good offices, conciliation, and mediation. Unfortunately none of these options have been put to use by the disputing parties. *Mr Browne* had further noted that the Article 23 was not used for consultation for this type of settlement.
- *Legal resolution*: *Mr Browne* opined that 'expeditious arbitration within the WTO' had taken place and that a panel or appeal process had been set out in the DSU. Also the arbitration option which is an integral part of legal resolution was missing.
- *'Self help'*: Self-help is not part of the WTO dispute settlement process. Countries or parties can take part in this process by appointing expert and legal advice for their own benefit.

Mr Browne mentioned in his presentation that solutions to the problems faced by LDCs were also made available through the DSU. The removal of offending measures in DSB and making sure that the Dispute Settlement Body conformed to the WTO obligations was one of the solutions discussed by *Mr Browne*. He mentioned that some of the other solutions might be mainly temporary or permanent trade compensation and sometimes retaliation. *Mr Browne* stressed that retaliation must be the last resort and should always be temporary in nature.

Soft Law Vs Hard Law

The presentation discussed some of the laws which are in use by the Dispute Settlement body. These have been termed as 'Soft Law' and 'Hard Law'. The 'soft law' is non-enforceable and depends upon the commitment and good faith of the parties, e.g., negotiated solutions or agreement to accept third party adjudication. On

the other hand 'hard law' as the name suggests is legalistic and binding on the parties, e.g., third party adjudication. Most Special & Differential treatment (S&DT) provisions are soft law characterized by the terms 'should'; 'may'; 'consider'; 'as appropriate'; etc.

Depending on the situation and type of dispute, the decision has to be taken regarding the appropriate law to be applied, though there is some quandary on which law would be most apt for a given case. The problem lies in the fact that much of the text of WTO agreements is written as soft law, but the DSU, especially during the appeal stage, relies on hard law and all its provisions. As a result the soft law becomes nullified along with its S&DT provisions.

The efficiency of S&DT is compromised by the use of soft law to characterise it, even though there are some exceptions. For instance, during implementation periods; *de minimis* provisions (e.g., for safeguards and subsidy countervailing duties); export subsidies; preferential trade agreements; etc. So far virtually no progress has been made in order to implement the S&DT elements of the Doha Ministerial Declaration into the Dispute Settlement Unit. Some developed countries that are members of the WTO want S&DT to be temporary. According to some of the developed countries, S&DT should be present until all Members of the WTO can accept the same obligations. In other words, once developing countries move out of the LDC list, they should no longer be recipients of the S&D provision. Fortunately, this sentiment is shared by only a few of the industralised countries. Most of the developed countries however do recognize and sympathise with the difficulties faced by LDCs.

In discussing the merits of the 'soft law' versus the 'hard law', *Mr Browne* has raised the question of whether it is *reasonable to expect* to have the benefits of 'soft law' S&DT treatment in a dispute settlement system that has come to apply 'hard law' criteria to rights and obligations? To address this particularly conflicting view, *Mr Browne* has stated that the Appellate Body of the DSU has tended not to be guided by soft law provisions, even though there are two instances where arbitrators have taken guidance from 'soft law'.

Part II: Making the Dispute Settlement Unit more Friendly to LDCs

The second part of *Mr Dennis Browne's* presentation deals with the factors or provisions that can work towards making the Dispute Settlement Mechanism more friendly towards LDCs. *Mr Browne* thinks that regardless of the developed countries' attitudes to S&D in general, a case can be made so that alternative dispute settlement procedures are readily available to LDCs. According to *Mr Browne*, alternative procedures of dispute settlement do exist, but they have not been put to use, maybe because these procedures seem to have room for further improvement.

During his presentation *Mr Browne* admitted that making the DSU friendlier to LDCs is a considerable task with pitfalls that need to be avoided and looked into carefully. At this point any attempt to introduce brand new concepts into the DSU, with a view to improve it, will certainly be extremely difficult. Furthermore, it is better to work with what is already there and improve the existing framework instead of creating new ones. Another important point to consider is that proposals should offer benefits to all the other Members of the WTO as well. Aim should be to improve soft law backed up by binding arbitration.

Improving Existing Dispute Settlement Unit Provisions

Mr Browne put forward the Article 3 in the DSU which highlighted the provisions that can make the Dispute Settlement process friendlier to LDCs. These provisions include the security provided by dispute settlement body and its predictability to the multilateral trading system. Article 3 also calls for prompt settlement of disputes, and it's the aim is to secure a positive and mutually acceptable solution consistent with WTO obligations.

Other Articles present in the Dispute Settlement work towards the improvement of the existing provisions of the Dispute Settlement Unit, so that they are more friendly towards LDCs. Dispute settlement is done in stages which are as follows:

- Article 4: Consultations—there are no changes required in this process.
    (i) Members have to resolve to strengthen and improve effectiveness of consultation procedures.
    (ii) Members have to respond to request within 10 days, begin consultations within 30 days and complete them within 60 days.

(iii) Give special attention to problems and interests of developing countries - *interpret to mean consultation take place in LDC capital.*

- Article 5: *Good Offices, Conciliation and Mediation*
  (i) Undertaken voluntarily if agreed by parties in the dispute
  (ii) May be requested at any time by any party
  (iii) DG may offer such services to assist settlement
- Conciliation
  (i) Secretariat to provide briefing on legal, historical and procedural aspects of matter in dispute to conciliator and to parties.
  (ii) Conciliator will establish the facts; examine parties' claims; clearly define issues; and, taking account of all relevant factors (including LDC), submit non-binding proposals.
  (iii) The conciliation has to be completed within 60 days.

- Article 25 - *Arbitration*
  (i) Expeditious arbitration within the WTO that are subject to mutual agreement of the parties (shall agree on procedures). Ensure that DSB agreed arbitration follows failure of conciliation; and to establish standard rules of procedure to be completed within 60 days.

- Article 21 - *Surveillance of Implementation*
  (i) Members involved in the dispute shall have a reasonable period of time to comply with arbitrator's recommendations. Therefore according to DSB interpretation if there is LDC complainant, application of measure vis-à-vis LDC shall be suspended within 60 days pending bringing it into conformity
  (ii) If the matter is raised by a developing country, DSB shall consider what appropriate further action might be taken, taking into account the trade coverage of measure and their impact on the economy of the developing country.

Before concluding his presentation, *Mr Dennis Browne* talked about the steps that can be taken to make the Dispute Settlement Process more friendly for LDCs so that they can take advantage of the DSB. *Mr Browne* called this the 'special track' for LDCs to follow. This can be done in several ways. Firstly, the consultation process can take place in the LDC capital in question, and the time period for this should not exceed 60

days. Secondly, the conciliation process can use another 60 days with an additional 15 days needed to accept recommendations put forward by the DSU. Thirdly, the Expeditious arbitration can take up 60 days. Fourthly, if the application of the measure is suspended, the time for that has been recommended as 60 days also. Finally, if monetary compensation for damages to LDC enterprises is forthcoming, the Dispute Settlement Body can decide the amount of the compensation.

Remarks from the Chief Guest

The Minister for Commerce, *Mr Amir Khosru Mahmud Chowdhury, MP,* started off the discussions. According to the Chief Guest, the subject that was presented by *Mr Dennis Browne* is very technical and requires both patience and consultation to understand. He said that dispute settlement is indeed the "Jewel in the Crown" of the WTO especially since the remedies of multilateral negotiations is not easy. It gives developing countries and LDCs a chance to resolve differences with other countries in an environment that is somewhat neutral. *Mr Chowdhury* put forward some suggestions regarding the function of the Dispute Settlement Body in the context of LDCs. The main suggestion was that Article 4.1.0 of the WTO should be amended along with other relevant articles in order to give more provisions in the Dispute Settlement Process for LDCs. Also, as *Mr Browne* mentioned earlier, the consultation meetings should first take place in the relevant capital of LDCs before going to the DSB. Furthermore, the developing countries and LDCs should be given sufficient time to prepare argument and they should get together and select at least one representative to act for them in the dispute settlement panels. To sum it up, the main point is that the dispute settlement process needs to be made more LDC specific.

The Honourable Minister moreover stressed the need for special attention for structural and fundamental issues. Dispute Settlement bodies should take into account trade restrictions and their effect on economy and development issues of LDCs. All Members of the WTO should have access to dispute settlement body. Successful complaint and collective retaliation should be allowed. *Mr Chowdhury* believed that the majority vote should be a must for final decision taken on dispute settlement cases. Decisions should not be based on unilateral measures.

The other point of interest, mentioned by the Minister is that we should look into the high cost of litigation. As the process is very costly LDCs cannot continue with dispute settlement unless some sort of fund or financial assistance is available. A Global Trust fund should be set up so that LDCs can bear the cost of litigation or appear before the dispute settlement body. The Minister ended his discussion by informing the participants that all these negotiations are currently underway and that bilateral and multilateral trade disputes are going on.

Open Discussion

Mr G M Quader, MP had a question regarding the dispute settlement process. In his opinion the dispute settlement process was discriminatory for LDCs since it provided less scope from LDCs' point of view. In a dispute between two economies, there is always the chance that the powerful economy will win. There is a lack of enforcing laws in favour of LDCs. In this regard *Mr Qader* wanted to know how LDCs could protect their interests in the dispute settlement process?

To this query, *Mr Browne's* suggestion was to suggest form groups by LDCs. In that way they can project a strong front in dealing with the stronger economies. *Mr Quader* however, expressed his concerns regarding the benefits expected from forming a group in dispute settlement.

The Former Secretary of Commerce *Sayed Alamgir Farrouk* Chowdhury said that the present state of discussion on Dispute Settlement Unit (DSU) was at a stalemate. He provided some suggestions which included agreeing in stages. He also pointed out that the Chairman of the dispute settlement body had given submissions on 42 proposals under debate, but unfortunately left out some important issues related to regarding LDCs. These issues should be incorporated in the dispute settlement process. Even after getting the ruling in favour of LDCs, it has been very difficult to implement it. The WTO Articles 21 and 22 need to be looked into and revised to shorten the time and expedite implementation. Note should also be taken in respect to the length of consultation period which sometimes take from 3 to 4 years. In order to make the dispute settlement process more effective, the time frame must be shortened.

Professor Ali Rashid from the Department of Economics, North South University refuted a point made by *Mr Dennis Browne*. According to *Mr Browne*, dispute

settlement process was both friendly and unfriendly to LDCs. *Dr Rashid* had argued that the above statement is just conjecture since there is no empirical evidence to substantiate this trend. *Dr Rashid* then requested for clarification on two points of Mr Browne's presentation. Firstly, he wanted to know the possible shape of the enhanced dispute settlement procedures for the LDC members. How can the switching to "retrogressive move" i.e. moving from arbitration to negotiation, with more emphasis on negotiation, be more successful? He wanted to know the basis of Mr Browne's suggestion and wanted to know how the speaker planned to logically defend such retrogation. Secondly, as mentioned by *Mr Browne*, since 1995 there have been only 112 cases pending implementation after consultations. Does this indicate that consultation processes are time consuming and impotent?

Dr M I Talukder, former Division Chief of the Planning Commission shared some of his observations with the participants of the dialogue. He expressed gratitude towards *Mr Browne* for bringing forward the real problem that Bangladesh faces. According to *Dr Talukder* Bangladesh is very shy when it comes to voicing their opinion and taking advantage of the dispute settlement mechanism. In a number of cases the exporters and entrepreneurs were reluctant to go for dispute settlement for fear of retaliation by the foreign trading partners. *Dr Talukder* wanted to know how this inherent fear could be overcome.

On this issue, *Dr Bhattacharya* wanted to know if "shyness" on the part of Bangladesh was actually "fear", and if so, is this fear justified?

Dr Mustafa Abid Khan, Deputy Chief, Bangladesh Tariff Commission raised some important issues. *Dr Khan* was concerned with the legal and political consequences of taking our problems to the Dispute Settlement Body and the effect that might have on our bilateral relationships. We also have to assess our benefits and figure out whether they are being hampered or not. Before assessing our benefits, we first have to identify the benefits and find out exactly how these being interfered with. Only after answering these questions we can approach the dispute settlement body and take a stand. Another factor to consider is the very high cost of taking an issue to the dispute settlement body. *Dr Kh*an agreed with *Mr Browne* on the point of arbitration and that it can be an important tool in dispute settlement without having to go through the lengthy process laid out by the DSB. He also expressed concern over the "swift

dispute settlement mechanism" idea put forward by the European Union regarding anti-dumping.

According to *Mr M M Rezaul Karim*, Member, Advisory Council of BNP, the whole WTO affair, though related to trade, is fraught with political connotation and constraints. If the nations who are the guiding forces of the WTO want it to be successful, they have to reconsider some of the measures undertaken by the Dispute Settlement Body (DSB), for instance, retaliation. Due to retaliation we are not in a position to speak our minds, complain or take action. *Mr Karim's* suggestion to this dilemma would be to make it impossible for a stronger nation to retaliate against developing countries and LDCs, at least for a short while. *Mr Karim* strongly believes that a provision in this regard should be incorporated into the Dispute Settlement Body.

Ms Sharifa Khan, Senior Assistant Secretary of Ministry of Commerce pointed out that the main concern for Bangladesh was trained and experience human resource, lack of legal expertise and financial assistance. So it is very difficult to take part properly in the dispute settlement. *Ms Khan* further brought to the notice of the participants that there were only 3 recommendations made by *Mr Browne* regarding the role of LDCs in the Dispute Settlement Body. Zambia on the other hand had submitted 12 recommendations in favour of LDCs. She asked for *Mr Browne's* comments on those recommendations as to whether those are justified to be considered by LDCs. She also asked if we are correct in demanding legal judgement from the DSB.

According to the presentation, countries can go to DSB when they think they are being discriminated against. *Mr Annisul Huq*, President, Bangladesh Garments Manufacturers and Exporters Association (BGMEA) raised two questions regarding this. Firstly, *Mr Huq* wanted to know whether we can take USA to the DSB due to the fact that they have given free access to 36 LDCs since 2000. Secondly, if developed countries have preference for countries like Thailand and Singapore whether we can , have such preferences and can we take the matter to the DSB?

Mr Naser Alam, Barrister, National Commissioner of International Chamber of Commerce, Bangladesh (ICC-B) remarked that, in case of dispute resolution system, the WTO is not arbitrary. He asked *Mr Browne* for his view of LDCs participation in

the dispute settlement process. Moreover consultation, mediation, public participation and arbitration are parts of dispute settlement mechanism but they are not mandatory or binding. In view of this how can we utilise the alternative resolution process and make it more binding and mandatory?

Special and Differential Treatment measures in the Dispute Settlement Body

With respect to LDCs, the Honourable Minister for Commerce *Mr Amir Khosru Mahmud Chowdhury* said that most of the issues under negotiations in dispute settlement are biased and are related to the S&DT measures. S&DT has both economic and legal content. A lot of the issues related to dispute settlement would not come through unless S&DT was taken care of first. S&DT issues are very important as far as dispute settlement is concerned.

Rules for Compensation

On matters relating to compensation, the Minister for Commerce felt that Article 32.2 of the WTO should be followed. This article stated that compensation of LDCs should be made mandatory and monetary in nature. Furthermore, WTO Member countries should be restrained when LDCs are involved in the dispute settlement. No LDC should be retaliated against nor compensation should be sought against any LDC. Also supplementary resources need to be provided for LDCs to carry out dispute settlement process properly.

Dr Mustafa Abid Khan of the Tariff Commission wanted to know whether all three points for consultation could be put forward for the panel and whether new points could be brought forward from the consultation process into the panel process? Losses of trade benefits due to measures that are inconsistent to the WTO have been reported. So it was questioned whether the consultation process or the panel process was responsible for this outcome? *Dr Khan* also noted that after consultation, many countries are not notified and many do not report back to the Dispute Settlement Body. Therefore only those who get back to the DSB are reported. So far only 25 countries or enterprises have reported back.

Responses by the Keynote speaker Mr Dennis Browne

Mr Dennis Browne thanked the participants for their insightful questions and detailed discussion on his presentation. He also appreciated the recommendations and suggestions put on the table. *Mr Browne* confirmed that the private sector perspective was a real and valuable addition to the dialogue. The actual activity of trade is done by enterprises while the governments develop the framework and necessary regulatory support to facilitate the trade. As regulators, our objectives are to promote trade in a fair and unbiased environment instead of preventing it.

Trade in Bangladesh is done from the commercial point of view. Commercial aspects are not under the auspices of the WTO. The WTO has separated commercial and social aspects from the trade issues and its legal aspects. For example, in the Textile and Clothing sectors, social standards are being imposed on producers and the big buyers go to inspect the factories and industries. If there are lacks of social amenities (cafeteria, sanitary facilities etc), the buyers will not deal with the producers. This is totally beyond the concerns of the WTO. The legal aspects are absolutely separated from the social aspects.

Big players usually run over the small players. Here the advantage of the WTO dispute settlement is that the small players can also have a shot at the big players. For example, the USA placed restrictions on imports of men's undergarments from Costa Rica. So Costa Rica took this issue to the dispute settlement body and the WTO removed the measures placed by the USA.

Mr Browne said that it is important to have a clear understanding of end objectives before dispute settlement process is undertaken. All objectives and proposals need to be studied closely and concentration should be on the area where the benefits are more. The procedure suggested in this case is the use of "soft law".

The consultation process needs to be improved further and the panel process should also be developed more. *Mr Browne's* recommendation would be to find a parallel process instead of improving the existing panel process. For example, suppose there is a private dispute and it costs less than 8-10K, then *Small Claims Court* is the better option to take because it is less expensive and procedure is simple. The judge is like

an arbitrator, so the issues that are important to the parties should be dealt with in this way. If big countries have a go at each other, then the main issue gets warped and lost in the confusion. It is a wastage to spend huge amount of money for small disputes. When two countries go into negotiations, the weak country has to keep on pressing until they get what they want. These issues have to be narrowed down and put on the table.

As regards to lack of empirical evidence that no case has been brought against any LDCs, *Mr Browne* responded that evidence to support this fact could not be found because consultation processes are done privately. In fact as LDCs have not been engaged as complaints or respondents, they are missing out and not taking advantage of the dispute settlement process. If no one goes against you it means that your contribution to that market is small in relation to the whole market. For instance, Canada's exports to Bangladesh are very small, so any counter measure by Bangladesh is also insignificant. As a result Canada does not pursue any measure.

There has been too much emphasis on negotiations and the present system of arbitration has not been functioning properly. The alternative direction is impractical for LDCs, and hence another system should be considered. Arbitration has the characteristics of a *Small Claims Court*. Negotiations are more effective in dispute resolution.

Consultations are also confidential, and known by only the parties involved, so claims cannot be proved. New issues can be brought in later into the consultation period. During consultations a much better perspective of the opposite government's thinking can be extracted. So far there have been about 112 consultations but no reports. Maybe the parties involved are working on the issue or decided not to pursue it further. Remedies can be sought during consultation processes. If the parties decide to pursue the issue further and take into the conciliation stage, then the parties are likely to lose valuable ground. This is because the conciliator would not know what was discussed behind closed doors of the consultation process.

According to the rules of the WTO, results of the consultation have to be reported, but most parties do not follow this rule. So the outcomes of the consultation processes are never known, even though in most cases the parties meet and come to a solution. In some cases the party raising the issue decides that it is not worth pursuing further.

Often the private sector is reluctant to pursue dispute settlement indefinitely. A good example of this is the Central America shrimp-turtle case. The USA had put in place regulations that they would not buy/ import shrimp from Latin American countries that did not have turtle excluders fitted to their shrimping boats. In Guatemala the shrimp was the largest non-traditional export commodity and it was the major producer of shrimp in South America. Due to previous conflicts and dispute with North America, the Guatemalan raspberry industry went bankrupt and the market was closed. In a previous dispute, imports of raspberries into the USA and Canada were blocked for four years. The eventual result was that when the markets reopened, there was nobody to supply raspberries since the industry had shut down. Therefore the Guatemalans were determined not to let the same thing happen to the shrimp industry.

Mr Browne discussed the situation with the head of Guatemalan organisation that works to promote non-traditional exports from Guatemala. He wanted to know why Guatemala did not bring a case against the USA like the other Members regarding the turtle excluders. Guatemala decided to lay low on this issue simply because the shrimp market would not be able to survive years of litigation required to resolve it. For Guatemala, the WTO was not the main issue; instead they preferred to go for the survival of the shrimp market and have more exports. So when the USA passed the regulation for excluders, the Guatemalan Government ordered excluders and distributed them among the shrimp industry as quickly as possible. They kept the US mandate of including turtle excluders in the shrimp boats and thus preserved their shrimp industry. If Guatemala had taken part in their shrimp-turtle case, their shrimp industry would have been bankrupt even before the case could be opened at the DSB.

As far as the private sector is concerned, governments have to act in a way that best protects their interests and keeps their mandate open. *Mr Browne* proposed that LDCs do not need to take part in all WTO cases and decisions. Also in dispute settlement cases Bangladesh should go for “Soft Law” since it is shorter, less formal, less expensive and results are also quick. These provisions are already there in the WTO but have not been put to use by LDCs.

The objectives of LDCs should be to get decision in the Dispute Settlement Body that states that when consultation fails, conciliation will follow. *Mr Browne* said, that in cases where conciliation also fails, the choice to go for arbitration rests with the

parties involved. Effective arbitration depends on parties, the role of parties and their interest in the issue. The Dispute Settlement body will be asked to take measures. This process however is fraught with difficulties since the dispute settlement recognises failures of the LDCs to pursue their interests.

Standing Preference

The GATT did not distinguish between Developing and Least Developed Countries. Developed countries are the ones who decided which developing countries should be given preferential treatment. This was a self-selecting process.

National Security Sanctions

According to Article 21, "A member of WTO may take any trade measure deemed necessary for their national security". If this measure is sanctioned by the United Nations then it is generally accepted.

Some points to consider

- Disputes that are being dealt with are all government-based disputes. All civil society organizations are self-selected.
- Provisions in the Dispute Settlement Unit states that panels may seek information wherever they find it. This procedure is not very legal. A voluntarily submission by third party is not sought.
- Self-nominating organisations should not have the right to intervene in dispute between governments just because they want to.
- People can be allowed to observe proceedings only if sensitive aspects are not included. They can be observers and gain valuable experience on how dispute settlement are done.

Dr Bhattacharya then invited Ms Rosemina Nathoo, Trade Lawyer of CTPL.

A Practitioner's point of view

Ms Rosemina Nathoo, was invited to make an intervention and present some of the legal aspects of the Dispute Settlement Mechanism. She was the only person at the dialogue who has some practical experience as trade lawyer in the private sector. *Ms Nathoo* narrated the experience she had in Canada.

Canada has had some experience with the WTO Dispute Settlement Body. Furthermore the Canadian government has experience in regional dispute settlements specially North American Free Trade Agreement (NAFTA). According to *Ms Nathoo,* Canadians have become a stronger force than the USA in the Dispute Settlement process. There was a comment earlier in the day that "the WTO is merely a mutual understanding". In response to this *Ms Nathoo* said that the comment should be used cautiously because the WTO and DSU are more than a mutual understanding. The function of the WTO was and is Trade Liberalisation and Economic Prosperity. As a result, the WTO is essentially a "rules-based system" with specific obligations. A "rules-based system" means that the WTO is enforceable. It is enforceable because the WTO Members have signed on to this agreement and the original Members have bought into the provisions of the WTO and all its related institutions along with the Dispute Settlement agreement, which makes it legally binding. These agreements have been brought into the original rules of the WTO. Any changes or amendments of the Dispute Settlement Unit have to be reviewed carefully.

LDCs have to accept WTO as it is the best case study of multilateral trading disputes. Members have signed on it and bought into their agreements. Since it is a rule-based system, the Members' obligations are also binding. LDCs have to look at the WTO in that context. At the WTO each Member is supposed to have equal voices but that is not so in reality.

Ms Nathoo believes that as lawyers it is their duty to inform, train and educate other lawyers and other sectors of society involved in the WTO process. The effort should be in making the WTO as it was meant to be- a simple framework of rules in the dispute settlement mechanism that does have enforcement procedures attached to it. But this can only be taken advantage of by people who are informed, trained and educated.

Ms Nathoo also suggested that if LDCs go to the WTO in a group, they should not trade off, not settling for less at the dispute settlement resolution. As a group LDCs have a position of leverage because there is the other option of trade credibility. South Asian Free Trade Area (SAFTA) can become a major tool in negotiation and Dispute Settlement process.

NAFTA has seen great improvement in a fast retract process. The WTO in reality is a long and drawn-out process. It has also been seen that rulings are bindings in NAFTA with no appeals process, not even in the judicial system. The WTO rules are also binding but it also has an appeals process. Private entity can seek remedies for violations in trade measures. In the dispute settlement process in chapter 11 of NAFTA there is a provision by which a private business corporation can seek remedy against a violator.

There are rumours that the WTO is fraught with political undertone and that it has to be changed. Fortunately, Bangladesh and LDCs do not have to make decisions regarding political aspect of the WTO. These decisions can be taken by SAFTA.

The reality of the WTO process is that it is costly in many respects, time consuming, requires expert knowledge and staff to research into the various problems, etc and in the end, no one wins. It is a lose-lose situation. The recommendation put forward by *Ms Nathoo* called upon the role of Bangladesh as the leader of LDCs. Bangladesh has a duty to address the shyness faced by most LDCs in Dispute Settlement and decide if they want to proceed on Dispute Settlement at the WTO or strengthen regional agreements and settle disputes at the regional level. They have to seek counsel and inform the government, civil society, grassroots organisations and business community of any disputes/ inconsistencies in trade. Since LDCs do not have expert help, they can seek counsel from other countries that has had experience in trade dispute settlement. In the end, the decision to address the WTO or to strengthen regional trade agreements lies with LDCs.

Remarks by the Guest of Honour Dr Mohammad Ali Taslim, Chairman, Bangladesh Tariff Commission

Dr Taslim started off the discussion by thanking Mr Browne for his informative paper and *Ms Nathoo* for putting forward the legal aspects of the Dispute Settlement Mechanism. *Dr Taslim* noted that before attempting the new set of problems, we have to first try to answer the questions already on board. The nature of the main problem is clear by now. We have to find a way to avoid being treated as an LDC by the WTO. So far it has been said that the best way to avoid this treatment is to get out of the

status of being an LDC. Since powerful countries are bound to have the upper hand, the least we can do is try to be stronger in our dealings. Developed countries follow the three C's: controlling, conditioning and cajoling when dealing with developing countries and LDCs.

In addition to this treatment, *Dr Taslim* has accurately pinpointed that legal processes in dealing with disputes are very lengthy and costly. Also there is a lack of expert manpower and LDCs do not have the resources or expert help in dealing with disputes in the WTO. For instance, when Bangladesh was engaged in dispute with another country, the matter could not be taken to the WTO because Bangladesh could not find an expert lawyer to represent the country.

Not only is dispute settlement an expensive and lengthy process, sometimes the solutions presented by the DSB are very tricky and unreliable. Often the solution turns out to be more complicated than the problem. Also the process of dispute settlement is so lengthy that by the time there is a resolution of the problem, the firm/ enterprise bringing in the complaint may be out of business, he added.

One of the major drawbacks of the WTO Dispute Settlement, according to *Dr Taslim*, is that LDCs are only allowed to go to the DSB with complaints regarding the violations carried out by other governments. Unfortunately, violations of agreements are not restricted to governments only, private companies also violate rules and regulations set out by the WTO. So far LDCs have the advantage of cheap labour. But many impositions are currently underway at the WTO to increase the cost of labour. If that happens LDCs will lose the advantage that they have.

Dr Taslim further said, "Any macro event could be explained in terms of micro behaviour". So if we want to explain national investment, we start from individual investors. The same logic can be applied to the legal aspects of dispute settlements. Dr Taslim beautifully explained the structure of the WTO with a simple example:
Rich Man - USA
Poor Man/ farmer- Bangladesh/ LDCs
Violation of farmer's daughter- Anti-dumping duty
Thana/ court- WTO Dispute Settlement Body
Zakat/ Fitra- Trade Facilitation/ Preferential Treatment.
Foreign Assistance- Food Aid

Victim's Guardian- Trade Minister/ Government

Cost is the major factor that discourages people from pursuing settlement of disputed cases. Just like the example of the poor farmer against the rich. The poor farmer does not have the financial resources to pursue dispute settlement without help. Someone else has to give money to the poor farmer to pursue the case.

The difficult question that plays in the mind of all LDC governments is what can be done about the financial resources? Due to this uncertainty, LDCs prefer not to go into dispute settlement agreements.

Remarks by the Special Guest

According to *Mr Faruk Khan, MP*, Honourable Whip of the Opposition, trade negotiations do not look very promising for Bangladesh at this point because the procedure in Dispute Settlement Body is not beneficial for LDCs. It is very disquieting that of the 250 cases filed with the dispute settlement body, not a single one involved an LDC. It clearly shows LDCs position in the overall scenerio. *Mr Khan* expressed his hope that the Minister of Commerce would fight for the rights of LDCs in the WTO. Furthermore *Mr Khan* agreed with *Ms Nathoo* that there is no shortcut to education. We have to train more people to handle the mandates of the WTO. We need to keep an eye on scholarships and training programmes offered by the WTO and take advantage of these programmes. Regional agreement and settlement is important according to *Mr Faruq Khan.*

Finally *Mr Khan* mentioned that *Dr Debapriya Bhattacharya* and the Centre for Policy Dialogue need to fight more and create more awareness regarding WTO issues.

Concluding Remarks by the Chairperson

According to *Dr Bhattacharya*, we need to work more on our "capacity building". We have moved out from simpler to more complex issues. Now Rules of Origin (RoO) and issues like Agreement on Agriculture (AoA), Special and Differential Treatment, Doha Declaration and Cancun are also being discussed in every household.

In Cancun we have shown that we have learned the rules of the game. Through the rules of the game, one-country one-vote system has been brought to a dead lock. The

outcome of Cancun has made it clear that trade related strength along with economic strength will get us what we want. We have to enhance the position of LDCs and move out of the LDC status and become just developing countries. For this level of development, resources are required. Canada and the European Union are helping us gather resources to make the shift easier. We should try to use these resources more efficiently.

Dr Bhattacharya then thanked everyone for participating in this dialogue and was pleased at the discussion and outcome of the dialogue. He ended the session with the note that "A politician can be a good politician if he is a good citizen".

Annexure A

List of Participants

(*in alphabetical order*)

Mr Naser Alam	Barrister, National Commissioner, ICC-B
Ms Rajani Alexander	First Secretary, Development, Canadian High Commission
Mr Md Hossain Ali	Economic Consultant, DCCI
Mr Liaquat Ali	Director (Physical), BSTI
Mr Robert Beadle	Counsellor, Canadian High Commission
Ms Nilufar Begum	Deputy Chief (PPB), Ministry of Agriculture
Ms Ferdous Ara Begum	Additional Secretary, DCCI
Mr Md Masum Billah	Programme Associate, CPD
Mr Damien Brosnan	Visiting Intern, CPD
Mr Hasanur Rahman Chowdhury	Deputy Secretary (Training), DCCI
Mr Amir Khosru Mahmud Chowdhury, MP	Hon'ble Minister for Commerce
Dr Uttam Kumar Deb	Research Fellow, CPD
Mr Amlan Dewan	French Trade Commission
Ms Sarah Geddes	Research Project Officer, CTPL , Carleton University, Canada
Mr A K M Nashirul Haq	Member Directing Staff , Bangladesh Public Administration Training Centre, Savar
Mr Mohammad Masoom Hasan	Programme Associate, CPD
Mr Md Ishtiaque Hossain	Senior Information officer, Ministry of Commerce
Mr Syed Saifuddin Hossain	Research Associate, CPD
Mr Annisul Huq	Chairman, Mohammadi Group
Mr Md Khalid Hussein	Research Officer, Bangladesh Tariff Commission
Mr Nurul Islam	President, BTUK (TUC)
Ms Sylvia Islam	Development Advisor, CIDA
Mr Md Nurul Islam	Secretary, BCI
Mr M M Rezaul Karim	Member, Advisory Council of BNP
Mr Moin Al Kashem	Executive Director of SCL Securities Limited Dhaka Stock Exchange Ltd

Lt Col Mohammed Faruk Khan psc (Rtd), MP	Chairman, SUMMIT Properties and Construction Company Pvt Ltd
Dr Mostafa Abid Khan	Deputy Chief , Bangladesh Tariff Commission
Ms Sharifa Khan	Senior Assistant Secretary, Ministry of Commerce
Mr Mabroor Mahmood	Research Associate, CPD
Ms Anne Marchal	Second Secretary, European Commission
Mr Md Mizanur Rahman Mukul	Deputy Secretary, FBCCI
Mr Md Ghulam Murtaza	General Manager (Research), Bangladesh Bank
Ms Rosemina Nathoo	Legal Advisor, CTPL, Carleton University, Canada
Mr Saif Noman	Senior Lecturer, School of Business, City University
Mr Herman Parfenov	Head, Trade Sector, Embassy of Russia
Mr G M Quader	Member of Parliament
Mr Shafique Rahman	American Embassy
Mr S M Khalilur Rahman	Head of Agriculture Economics and Social Science, BARC
Mr Md Safiqur Rahman	Director, Bangladesh Standards and Testing Institution
Dr Ananya Raihan	Research Fellow, CPD
Dr M Ali Rashid	Professor, North South University
Mr Amaranth Reddy	Programme Coordinator, Royal Danish Embassy
Mr Prodip Roy	Programme Officer
Mr Wares Sardar	Deputy Secretary, BCI
Mr Mohammad Rafiqul Hasan Siddique	Research Officer, Bangladesh Tariff Commission
Dr Mohammad Ali Taslim	Chairman, Bangladesh Tariff Commission
Dr Md Rahmat Ullah	Lecturer, Department of Law, University of Dhaka
Ms Yumiko Yamakawa	Embassy of Japan, Dhaka.

Annexure B

List of Journalists

(in alphabetical order)

Mr Tanim Ahmed	New Age
Mr Farid Ahmed	BTV
Mr Azim Anas	Independent
Mr Masudul Karim Biswas	The Bangladesh Observer
Mr Md Enamul	Bangladesh Betar
Mr Md Hasan	The Daily Ajker Kagoj
Mr Shakhawat Hossain	News Today
Mr Md Towhidul Islam	Inqilab
Ms Sakila Jesmin	Channel-I
Mr Nurul Hasan Khan	Dinkal
Mr Dewan Hanif Muhammad	Prothom Alo
Mr Ruhul Raha	ATN Bangla
Mr M Abdul Rahim	The Daily Star
Mr Md Mustafizur Rahman	The Bangladesh Today
Mr M Azizur Rahman	Financial express
Mr Zia Rahman	Sangbad
Mr Seyon Sarkar	Good Morning