ANNEX A

Summary of Proposals for DSU reform

1. Issue: Post-retaliation Procedure

Proponents: (i) Argentina, Brazil, Canada, India, New Zealand and Norway,
(ii) The European Communities and Japan

Gist: A defending party that has failed to comply with the recommendations and rulings of the DSB may face retaliatory measures by a complaining party. Currently, the DSU does not explicitly mention the procedures that should govern situations where a defending party subsequently asserts that it has complied and that the retaliatory measures should be lifted. The EU's previous proposal on the same issue did not include an explicit mechanism to adjust the authorized suspension of obligations i.e. the level or form of retaliation, following a compliance review, the outcome of which is that there still is a violation and/ or nullification or impairment. They have now introduced additional text in the form of a proposed paragraph 8(e) of Article 22. This provision foresees a specific procedure for modifying the previously granted authorization to suspend obligations in cases where the compliance review results in a finding that the implementing Member still violates a covered agreement and/or nullifies or impairs benefits there under.

2. Issue: Sequencing

Proponents: (i) Argentina, Brazil, Canada, India, New Zealand and Norway,
(ii) The European Communities and Japan

Gist: This proposal seeks to resolve practical conflict between Article 21.5 and 22. The dispute settlement system faced a possible meltdown in the *Bananas* dispute as the US and the EC battled over the relationship of Article 21.5 and Article 22. Even though parties in subsequent cases have reached agreements on how they will proceed, the ambiguity remains and may arise again and cause similar problems. Thus, a solution is much needed. However, it adds significant time to the implementation phase of dispute settlement.

The initial proposal on sequencing provided that the compliance proceeding would go before the original panel if there had been no appeal and before the Appellate Body if there had been an appeal. In the latter case, the Appellate Body would have been permitted to call upon the panel for factual determinations. Some questioned whether it was appropriate to give the Appellate Body a non-appellate role. In any event, it seems likely that an appeal possibility will be included in any amendment since practice has evolved such that compliance panel reports are routinely appealed. While none of the first three compliance matters (*Bananas, Salmon* and *Leather*) was appealed, eight of the nine Compliance Panel reports since those three have been appealed. While an appeal adds to the overall time taken to resolve a matter, the additional 60-90 days does not seem excessive.

It is proposed to insert Article 21bis in the DSU. This would require that in the event of a disagreement over whether an implementing measure is WTO-consistent, an expedited panel process would be employed, which where possible will be the original panel. If it is ultimately decided to require consultations, it is likely that they will be abbreviated, such that the compliance panel may be established at or shortly after the end of the reasonable period of time. The compliance panel is to report within the more general terms of Article 21.2 may remain necessary to provide discretion to arbitrators to take account of the special situation of developing countries.

Article 22 would also be extensively revised. A new Article 22.1bis would provide that the parties could request arbitration of the level of nullification or impairment at any time after the adoption of the DSB's recommendations in a case. The hope is that setting the level of nullification or impairment early on in the implementation process would facilitate compensation negotiations where compliance is not likely to be implemented within the reasonable period of time.

3. Issue: Strictly Confidential Information (SCI)

Proponents: Canada

Gist: Canada introduced a revised proposal on the protection of confidential information in panel and Appellate Body proceedings. While the original January 2003 proposal (TN/DS/W/41) narrowly addressed "business confidential information" this

proposal broadly addresses "strictly" confidential information. It also covers requests for information in disputes over subsidies outlined under Annex 5 of the Agreement on Subsidies and Countervailing Measures - the so-called 'Annex 5' procedures require governments to disclose data about grants to companies - and the destruction or return of such information. According to the proposal, a party that introduces as evidence proprietary or commercially sensitive information not in the public domain would be permitted to designate it as confidential, provided that it acts in good faith and exercises restraint.

Access to strictly confidential information would be limited to persons who have signed a declaration of non-disclosure and who are representatives of the disputing parties, members of the panel, WTO Secretariat staff or experts appointed by the panel. In introducing this proposal, Canada noted the potential link between this issue and that of transparency and suggested that both issues would be integrated as work progressed.

4. Issue: Referral procedure ("Remand")

Proponents: Argentina, Brazil, Canada, India, New Zealand and Norway

Conceptual Proposal by: Korea

Gist: The issues that have arisen in the context of remand are - What situations might give rise to remand? Who should have the initiative of remand, the DSB, the AB or the parties? What kind of mechanism was envisaged for the process of remand? What were the time limits involved in this kind of procedure? What would be the status of issues not slotted for the remand procedure?

The conceptual responses are as follows: The complexity of cases is on the increase and Panels often use judicial economy, which has proven to be unhelpful at the appellate stage. Secondly, it is often difficult for panels to conduct exhaustive analyses due to time constraints. Therefore this procedure is envisages to solve not only the problem of incomplete factual findings but also of facilitating article 21.5 arbitral proceedings which in the past have become *de facto* remand procedures.

According to the G6, while the decision to initiate the remand proceedings would come from the AB, but only the parties to the dispute would have the competence to decide which issues they wished to have sent back to the Panel for remand. According to the G6,

the remand procedure would not prevent the adoption of the report of the AB by the DSB. Those issues that were clear and not subject to remand proceedings would head for implementation.

5. Issue: Flexibility and Member control

Proponent: United States

Gist: The proposal has a number of issues addressed in it. Firstly, it makes provision for interim reports at the Appellate Body stage, thus allowing parties to comment to strengthen the final report. It also provides a mechanism for parties, after review of the interim report, to delete by mutual agreement findings in the report that are not necessary or helpful to resolving the dispute, thus continuing to allow the parties to retain control over the terms of reference.

The idea of being able to expunge portions of legal reports of the panels and the Appellate body is inherently dangerous as it's not difficult to imagine a situation whereby a larger member of the WTO, in order to delete findings unfavourable to itself, would twist the arm of the smaller member in the dispute. Secondly, making provision for some form of "partial adoption" procedure, where the DSB would decline to adopt certain parts of reports while still allowing the parties to secure the DSB recommendations and rulings necessary to help resolve the dispute. This option is novel and while it may add to the time involved in the final settlement of a dispute, it does not take away anything from developing membership, as it requires the agreement of the entire DSB.

Thirdly, providing the parties a right, by mutual agreement, to suspend panel and Appellate Body procedures to allow time to continue to work on resolving the dispute. While this is not a novel procedure, and therefore there are no imminent chances of unfair use. Fourthly, ensuring that the members of panels have appropriate expertise to appreciate the issues presented in a dispute. This is also relatively harmless and provides for what takes place in practice.

Fifthly, draft parameters concerning the measure under review in WTO Dispute Settlement. Under this heading the first element to be considered was the issue of "order of analysis". The first part prohibits panels from making findings that do not help the resolution of the dispute. The second part prohibits a member from requesting

consultations if the measure in question lapses, is revoked or expires on the day of the request.

6. Issue: Third party rights

Proponents: (i) Argentina, Brazil, Canada, India, Mexico, New Zealand and Norway
(ii) Hong Kong
(iii) Switzerland

Gist: The proponents are of the view that in order to increase transparency and non-discrimination, especially for developing members, it was vital that they were given maximum exposure to these proceedings regardless of the comparative value of their trade interests. As it stands currently, Article 10 and Appendix 3 of the DSU provide that third parties shall receive a copy of the parties' submissions to the first meeting of the panel, have a right to make a written submission to the panel and to appear before the panel at a session of the first meeting set aside for that purpose. The DSU extends third parties no further rights, although additional rights have been provided by some WTO panels in some cases such as the *Bananas* case.

Third parties would have a right to present their views orally at the first meeting and could be asked questions by the panel at any time. This change appears to have broad support in the WTO membership. The main issues would seem to be whether or not third parties (i) should have a right to receive the interim report, make comments thereon, receive comments of others thereon and attend any panels meeting in connection therewith and (ii) whether panels and the Appellate Body should be required to address all third-party arguments.

7. Issue: Possible Time-Savings

Proponents: Australia

Gist: According to Australia, time-savings in the WTO dispute settlement procedures are both desirable and achievable while maintaining flexibility in the system and respecting the balance between the interests of complainants and respondents. Therefore they have proposed the following changes:

Australia proposes that the existing 60-day consultations period be reduced to 30 days, thus saving 30 days. This 30-day period shall be extended by up to 30 days at the request of a developing country Member that is a consulting party. The panels be established at the first request at the DSB, thus saving a minimum of 15 days. Where the party complained against is a developing country Member, the complaining party shall accord sympathetic consideration to a request from that Member to postpone the establishment of a panel.

That it would be appropriate to begin the timetable from the date of the organisational meeting with the parties and to incorporate the organisational meeting within the panel schedule (it is currently omitted). Shortening the time period of 3-6 weeks for a complaint to five days of the organisational meeting with the parties as a complainant moves forward with a panel request at a time of its own choosing and therefore could only choose to take this step when its first submission was well-developed.

Incorporating the organisational meeting within the panel schedule and providing for the complainant's first submission within 5 days of the organisational meeting, a time saving of between 6 and 27 days could be achieved. The time a respondent party would have from receipt of the complainant's submission to file its first submission be extended to 3-4 weeks (from 2-3 weeks as currently provided) in order to better reflect the pressures and realities of the dispute settlement process.

The need for accelerated timeframes for disputes on safeguard measures: According to Australia, a major anomaly in the current WTO dispute settlement rules is the lack of accelerated dispute settlement timeframes for disputes on safeguard measures. They are proposing changes to DSU Article 1.2 with the insertion of article 8 bis that sees a 30 days consultation period followed by the immediate request and setting up of panel with time for all stages of the dispute cut in half. However there are S&D provisions for developing and LDC members.

8. Issue: Special and Differential Treatment

Proponents: Like Minded Group (Cuba, Egypt, India, Malaysia, Pakistan),

Gist: On Mutually Agreed Solutions: The LMG proposes to amend Art 3.6 of the DSU so as to have parties to a dispute to notify in sufficient detail to the DSB, the mutually agreed solution, within 10 days of the settlement. Currently, there is no specified time for notification and there are no indications as to what the notification should contain.

On Amicus Curiae Briefs: The LMG proposed for the clarification of the word "seek" found in Art. 13 of the DSU to ensure that Panels do not accept unsolicited amicus curiae briefs. There is also a proposal to add a footnote explaining that the Appellate Body may not consider any information by way of amicus briefs as this was rejected by the membership during the Uruguay round and in the year 2000 after the EC asbestos dispute.

On Suspension of Concessions and Other Obligations: The LMG propose that a complaining developing-country Member should be permitted to seek authorization for suspending concessions and other obligations in sectors of their choice. They should not be required to go through the process set out in Article 22.3 which requires them to prove that it was not "practicable or effective" to suspend concession in the same sector or agreement where the violation was found and that the "circumstances are serious enough" to seek suspension of concessions under the agreements other than those in which violation was found exist.

Developing countries have found securing compliance from the defaulting developed Member to be a difficult task. When those developing countries have to seek recourse to suspension of concessions and other obligations under Article 22, the economic cost of withdrawal of concessions would have a greater adverse impact on the complaining developing-country Member than on the defaulting developed-country Member and in facts lends to deepening the imbalance in their trade relations already seriously injured by the nullification and impairment of benefits.

On Litigation costs: The LMG proposes for S&D treatment to be accorded to developing-country and LDC Members in disputes against developed-country Members. There is a proposed insertion of Article 3bis which provides that if a developed-country Member is

found to be in violation of its obligations under the WTO covered agreements in a dispute brought by a developing-country Member or if the developed-country Member failed to prove its claims against a developing-country Member in a dispute brought by it, the panel and or appellate body shall determine a reasonable amount of the legal costs and other expenses of the developing-country Member, to be borne by the developed-country Member.

Other S&D provisions: The LMG has proposed changes to the language in 4.10, 12.10 and 21.2 of the DSU and also adding an article 6.2 to the DSU. Almost all of these entail the concretisation of the S&D provisions already present in the DSU. With the insertion of article 6.2, a process is envisaged whereby the developed members have to show in their request for establishment of panels if they actually gave special consideration to developing members during the consultative phase or not.

9. Issue: Special and Differential Treatment

Proponents: The African Group

Gist: On Third party rights: The African group, like the G7, envisages enhancement of third party rights amending Article 10 of the DSU.

On Amicus briefs: Like the LMG, the African group wishes to see that the power of Panels to consider amicus briefs is limited to those that have been actively solicited by the Panels and to prevent the appellate body from either accessing them or using those sent to them.

Problems with compliance: The African group has highlighted the problem of compliance and implementation of the recommendations and rulings of the DSB by developed members by introducing the concept of "effective enforcement of recommendations and rulings" by amending article 22.6.This will then allow for a situation wherein the DSB may, upon request, authorise a Member or a group of Members to suspend concessions on behalf of the affected Member.

Fund on dispute settlement: The African group, like the LMG, has proposed a new Article 28 which will facilitate the effective utilisation by developing and least-developed country Members of the dispute settlement system. It shall be financed from the regular

WTO budget and cater to both legal bills and capacity building of legal staff in developing and least developed members.

10. Issue: Compensation and Suspension of Benefits

Proponents: Mexico

Gist: As the dispute settlement mechanism has evolved, disputes have become more complicated and this has resulted in longer procedures, which mean more time with an illegal measure in place and its negative consequences. There is currently no mechanism available for a Member challenging a WTO-inconsistent measure to recover the losses resulting from that measure, even after Panel or Appellate Body reports have ruled its inconsistency. This allows illegal measures to remain in place sometimes for more than three years before a complaining party may obtain compensation or retaliate. This has prompted Members to recognise that the issue of compliance needs to be addressed.

The fundamental problem of the WTO dispute settlement system lies in the period of time during which a WTO-inconsistent measure can be in place without the slightest consequence. This amounts to a *de facto* waiver in which a Member can maintain a WTO-inconsistent measure, which unduly harms exporters, service suppliers or holders of intellectual property rights of other Members and seriously undermines the objectives of security and predictability enshrined in the DSU.

11. Issue: Partial adoption

Proponent: United States

Gist: The United States is proposing a procedure a member country may request the DSB against the adoption of a finding or a basic rationale behind a finding, in a panel or Appellate Body report. The Member shall specify in the proposal the finding or the basic rationale behind a finding at issue and give a brief description of the reason not to adopt. It will allow for a "partial adoption" procedure, where the DSB would decline, by consensus, to adopt certain parts of reports while still allowing the parties to secure the DSB recommendations and rulings necessary to help resolve the dispute.

12. Issue: Open meetings

Proponent: United States

Gist: This proposal, also known as the transparency proposal, aims to enable the public and any interested party to observe all substantive and expert meetings with the parties of a panel, an arbitrator, or the Appellate Body except for those portions dealing with confidential information. This may be done through physical presence or media. Interestingly, it forbids *ex parte* communications with the panel, arbitrator, or Appellate Body concerning matters under consideration the abovementioned.

Almost all developing members are not too keen to have complete and total transparency this early in the life of the WTO. While it may be inevitable, its important to keep the perspective of the development levels of countries and ability to deal with such a high level of "outside interference" as stated by some members.

13. Issue: Additional guidance to WTO adjudicative bodies

Proponent: United States

Gist: The US has serious reservations as to the interpretive methods used by panels and the AB whereby they fill gaps left in place deliberately by negotiators. The first kind of gap filling occurs when Panels or the AB reads into the text of a covered agreement an obligation or right that is not present in the text, for example by extrapolating from a different provision" and secondly, "to resolve ambiguity in the text of a covered agreement in a manner that supplements or diminishes rights and obligations under the covered agreement". They also do not believe that the use of precedent is justified as "prior reports of WTO adjudicative bodies are not covered agreements and do not represent agreed text".

14. Issue: Panel composition

Proponent: The European Union

Gist: The EC is proposing a roster for permanent or "dedicated" body of panelists much like the 7 member AB. The timeframe for serving on this permanent roster for each of these panelists shall be 5 years with one renewal for a similar term. They propose a minimum of 20 and maximum of 30 panelists to serve on the roster at

any one time. Persons eligible for appointment on the Roster must satisfy the qualifications of having extensive knowledge of the covered agreements and a thorough understanding of the multilateral trading system. Experience in WTO dispute settlement or other forms of adjudication are desirable, but not a necessary qualification. However, the Roster may never include more than four persons that are citizens of the same Member and whom this Member has proposed.

The DSB shall appoint an advisory committee that shall review candidacies for the Roster. The advisory committee shall review the qualifications of nominated candidates by reviewing their written applications and conducting interviews. On this basis, the advisory committee shall present a list of candidates to the Director-General, the Chairman of the DSB, and the Chairmen of the Goods, Services, TRIPS and General Councils, who shall then present a proposal to the DSB regarding the persons who should serve on the Roster.

Each time when a panel has to be constituted, the parties shall convey to the Secretariat their preference on how to compose the panel. If both parties wish to compose the panel entirely from the Roster, the three panelists shall be drawn by draw of lots from the Roster in the presence of the parties, except for those names on which the parties are in agreement.

If at least one of the parties indicates that it also wishes to consider persons from outside the Roster with a particular expertise, the Secretariat shall present a single exhaustive list of all persons who are available and correspond to the requested profile(s). In accordance with paragraph 10 of Article 8 of the DSU, when a dispute is between a developing country Member and a developed country Member and the developing country Member so requests, this Decision shall be applied in such a manner that at least one panelist shall be from a developing country Member.