Towards A Development-Supportive Dispute Settlement System in the WTO

Contributions by

Gregory Shaffer
Victor Mosoti
Asif Qureshi

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I. How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies
   by Gregory Shaffer

II. Does Africa Need the WTO Dispute Settlement System?
    by Victor Mosoti

III. Interpreting WTO Agreements for the Development Objective
     by Asif Qureshi

Executive Director: Ricardo Melendez-Ortiz
Project Coordinators: Christophe Bellmann, Victor Mosoti
Editor: Victor Mosoti

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FOREWORD

In the recent past, there has been an explosion of scholarship around the theme of developing countries and the multilateral trading system. Whereas much of this scholarship has dwelt on the issues that developing countries have been perennially concerned with since the days of the old General Agreement on Tariffs and Trade (GATT), increasingly, a spotlight has been cast on the dispute settlement system, its role in enhancing security and predictability to the system, and to much less extent, its shortcomings especially from the perspective of developing countries. As endeavours in academic discourse, this scholarship is well thought out and coherently presented. However, to the delegate or country representative, negotiating a bewildering array of issues in the on-going Doha Round, such works are of minimal help, as they are either too dense and academic, are rendered in a language that is not readily accessible or are simply out of touch with the timbre of the options available in the negotiations. The collection of essays which ICTSD offers here seeks to make a modest contribution in filling this void. As usual, ICTSD hopes to contribute to enhancing the trade-policy formulation process by making this collection widely available to delegates, civil society and the wider public.

ICTSD’s conviction that fashioning a dispute settlement system that is responsive to the sustainable development goals of societies in developing and least developed countries in the WTO is strongly shared and articulated by the writers. The WTO cannot and should not avoid being a forum through which developing and least developed countries can push their development goals forward, and a fortiori, neither should its dispute settlement process. Simply put, it would have failed if it does. By thinking through some of the fundamental reasons that contribute to the "rational decision" not to initiate disputes through the WTO, Professor Gregory Shaffer raises and proposes a set of responses to some of the most debilitating problems that confront developing and least developed countries. He assesses a number of strategies that some developing countries have used, and others could consider, to mobilize legal resources and overcome at least some of the challenges that they face. He also explains how WTO remedies are structured in favour of large developed countries, and how remedies could be modified so that the WTO legal system might better promote developing country participation, which, in turn, would better promote their development interests. Mr. Victor Mosoti’s paper looks at some of the issues that African countries have been concerned with. It answers, in the affirmative the question whether Africa indeed does need the WTO dispute settlement system. He asserts that this is so because, the system is not simply or solely about disputes, it is also about the steady evolution of a corpus of important international trade law principles whose effects and applicability will continue long into the future. The system is also a key element in the international architectural framework whose decisions have momentous, if potentially negative, development implications. This paper, while augmenting the views in the previous paper by Professor Gregory Shaffer, urges that African countries should therefore be at the forefront in the on going review of the system and should be more vigorously involved as third parties in various disputes that may be of interest to them. Finally Professor Asif Qureshi’s paper addresses the development dimension in the interpretation of the WTO Agreements. He asserts that this has hitherto neither been sufficiently articulated, nor coherently structured in the architecture of international trade agreements. Developing members have expressed dissatisfaction with the record of interpretation thus far in the jurisprudence of the WTO. The dissatisfaction has focused on the results of interpretation, the approaches to interpretation, the methodology involved in interpretation and the participants engaged in interpretation. Prof. Qureshi discusses the various ways in which the development objectives could be factored into the interpretive analysis.

It is not in doubt that the importance of the WTO dispute settlement system will grow, as more and more Members begin to engage in the process. There is a definite need to ensure that the sustainable development aspirations of the poorer Members are not smothered by an unsupportive and daunting legal system. This should be the objective of Members, whichever of the recommendations on the table for the review of the Dispute Settlement Understanding that they find favourable. In producing this collection, we have worked with the authors towards this objective, with roundtable discussions and conferences with various stakeholders. We at ICTSD look forward to the opportunity to further contribute to the capacity pool by bringing to the fore the often diminutive voices of sustainable development.

Ricardo Melendez-Ortiz
Executive Director
I.

HOW TO MAKE THE WTO DISPUTE SETTLEMENT SYSTEM WORK FOR DEVELOPING COUNTRIES: SOME PROACTIVE DEVELOPING COUNTRY STRATEGIES

By Gregory Shaffer

Gregory Shaffer is Associate Professor of Law, University of Wisconsin Law School and Senior Fellow, Center on World Affairs and the Global Economy. Support for this project has come from the UW Center on World Affairs and the Global Economy (WAGE), the UW CIBER fund and the International Centre for Trade and Sustainable Development (ICTSD). Prof. Shaffer can be reached at: gshaffer@facstaff.wisc.edu. His thanks go to Brian Larson, Jason Myatt and Rebecca Perlmutter for their valuable research assistance.
TABLE OF CONTENTS

I. HOW TO MAKE THE WTO DISPUTE SETTLEMENT SYSTEM WORK FOR DEVELOPING COUNTRIES: SOME PROACTIVE DEVELOPING COUNTRY STRATEGIES ................................................. 5

1. Introduction .......................................................................................................................... 5

2. Part I: The Law-in-Action of the WTO Dispute Settlement System: Use of WTO Dispute Settlement to Date ......................................................................................................................... 9
   2.1 The Legalization of the WTO Dispute Settlement System; Its Impact on Costs ......................... 9
   2.2 Why Participation in the WTO Dispute Settlement System Matters for Shaping WTO Law and International Economic Relations ................................................................. 10
   2.3 The Statistics on Developing Country Participation ...................................................................... 13
   2.4 Why Most Developing Countries are Not Active Participants in a Legalized Dispute Settlement System ........................................................................................................................ 15
   2.5 How the United States and EC Have Developed Public-Private Partnerships to Enhance their Resource Advantages in WTO Litigation .................................................................. 18
   2.6 The Varied Contexts of Developing Countries ............................................................................. 22

3. Part II: Three Developing Country Challenges for Participating in the WTO’s Dispute Settlement System: Three Strategies for Adaptation ................................................................. 26
   3.1 The Need for Internal Reform: Bureaucratic Specialization, Inter-agency Coordination, and Public-Private Collaboration to Enhance Knowledge and Capacity .............................................. 27
   3.2 The Need for Cost-Effective Legal Assistance: Role of the Advisory Centre on WTO Law ........... 29
   3.3 Countering U.S. and EC Extra-Legal Bilateral Pressure: The Need for North-South NGO-Government Alliances ................................................................................................................ 33

4. Part III: A Proactive Developing Country Agenda for DSU Review: Modifying WTO Remedies for Developing Countries ........................................................................................................... 37
   4.1 Biases and Perverse Incentives under the Current WTO Remedies System .................................. 37
   4.2 A Word of Caution before Addressing Changes in WTO Remedies .............................................. 40
   4.3 Potential Changes in WTO Remedies: Prospective and Retrospective Damages and Attorneys’ Fee Awards ...................................................................................................................... 41
   4.4 Rationale for One-Sided Modification of WTO Remedies ............................................................... 48
   4.5 Potential Modalities for Implementing Preferential Remedies in a Fair Manner .............................. 51
   4.6 A Potential Trade-off in Negotiations over DSU Reform: Transparency ........................................ 55
   4.7 Power and Political Feasibility ........................................................................................................ 57

5. Conclusion ............................................................................................................................... 59

Appendix 1: Participation in WTO Dispute Settlement proceedings since 1.1.1995 .......... 62

Appendix 2: Participation in WTO DSB proceedings since Jan. 1, 1995 (as of 17.01.03), along with global shares in exports / imports, 2001 ................................................................. 64
I. HOW TO MAKE THE WTO DISPUTE SETTLEMENT SYSTEM WORK FOR DEVELOPING COUNTRIES: SOME PROACTIVE DEVELOPING COUNTRY STRATEGIES

By Gregory Shaffer

1. INTRODUCTION

The WTO’s legalized dispute settlement system has been hailed as a new development in international economic relations in which law, more than power, might reign. However, while these developments in international law constitute a great achievement, the system remains far from a neutral technocratic process in its structure and operation. Large developed countries are much better-positioned to take advantage of the resource-demanding legalized system and have done so. The system’s rules on remedies, in particular, are structured to favour them. Many developing countries do not even consider bringing cases or otherwise participating as a third party in the dispute settlement system. In fact, there is little rationale for many of them to do so on account of the significant costs and uncertain benefits of participating.

This essay, divided in three parts, has three central goals. First, the essay aims to explain how the WTO’s more legalized dispute settlement system now operates in practice, how it does so to the advantage of large countries, and why many developing countries rationally decide not to use it. Second, the essay assesses a number of strategies that some developing countries have used, and others could consider deploying, to mobilize legal resources and overcome at least some of the challenges that they face. Third, the essay examines how WTO remedies are structured in favour of large developed countries, and how remedies could be modified so that the WTO legal system might better promote developing country participation, which, in turn, could better promote their development interests. In particular, the essay addresses arguments that WTO members should consider in determining whether to revise WTO remedies to provide for retrospective damages in the form of financial compensation or compensatory trade concessions when developing countries prevail in WTO litigation against developed countries. The majority of trade law scholarship has focused on individual WTO cases, substantive rules and their interpretation. However, substantive rules can be of limited value if procedures and remedies are not available for affected parties—and, in particular, weaker parties—to cost-effectively pursue their substantive rights. Although a number of scholars have

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1. See e.g. Julio Lacarte-Muro and Petina Gappah, Developing Countries and the WTO Legal and Dispute Settlement System: A View from the Bench, 4 J. Int’l Econ. L. 395, 401 (2001) (“In the WTO, right perseveres over might.”).

2. Similarly, there exists a risk that international trade economics can reify law as a relatively seamless, cost-free system, not subject to the effects of asymmetric information, resources, interpretation or manipulation, implying that once the rule of trade law is created, rights will be neutrally enforced. As a consequence, much of the economics literature concerning a new Doha “development round” of trade negotiations focuses on the potential for new substantive law and not mechanisms to apply it.
addressed alternative approaches to WTO remedies, the general presumption has been that formal WTO rules on remedies must apply “equally” to all WTO members, even though such system of remedies will have unequal impact on party behaviour.

Part I assesses why participation in the WTO dispute settlement system is of systemic importance for developing countries, since law matters not only for individual disputes, but also for discussions and negotiations conducted between parties in the shadow of potentially initiating a legal case. WTO law, as interpreted and applied over time by WTO panels, creates a framework for these bilateral interactions. Part I then addresses why most developing countries do not participate in the WTO dispute settlement system, whereas the United States and European Community (EC) have increased their relative use of the system vis-à-vis developing countries as compared to participation rates under the former, less-legalized GATT. In particular, Part I assesses how U.S. and EC public officials have collaborated with affected U.S. and EC private enterprises and their legal counsel in order to enhance their chances of prevailing in costly, time-intensive WTO litigation, further exacerbating litigation resource asymmetries.

Part II assesses three major challenges that developing countries face if they are to make use of the WTO dispute settlement system against resource-rich countries and their wealthy constituents: (i) lack of legal expertise in WTO law; (ii) lack of financial resources, including for the hiring of outside legal counsel; and (iii) fear of political and economic pressure from the United States and EC that induces them to abandon justified legal claims. Part II assesses three strategies that developing countries could adopt, individually and collectively, to better address these challenges and thereby enhance their participation and effectiveness in making use of the WTO’s dispute settlement system. None of these three strategies requires a modification of WTO rules.

Part III, in contrast, addresses a fourth, more difficult challenge that developing countries face, one which would require a modification of WTO rules—that of remedies. Current WTO remedies rely on trade sanctions to induce compliance instead of monetary damage awards. They thereby permit large countries, and in particular the United States and EC, to take advantage of the considerable market leverage that they exercise, leverage that developing

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3 See, e.g., Steven Charnovitz, Rethinking WTO Trade Sanctions, 95 Am. J. Int’l L. 792, 832 (Oct. 2001) (maintaining that “the current WTO approach is too coercive” and that “more can be done to use public opinion as a means to influence scofflaw governments”); Robert Lawrence, Crimes and Punishments?: An Analysis of Retaliation Under the WTO (draft on file with author) (proposing a system of “liberalization security deposits” to be paid when a WTO member fails to comply with a WTO panel decision); Petros Mavroidis, Remedies in the WTO Legal System: Between a Rock and a Hard Place, 11 Eur. J. Int’l L. 763 (2000) (arguing that “the effectiveness of WTO remedies depends on the relative ‘persuasive’ power of the WTO member threatening with countermeasures”); and Joost Pauwelyn, Enforcement and Countermeasures in the WTO: Rules are Rules—Toward a More Collective Approach, 94 Am. J. Int’l L. 335 (April 2000) (arguing that “a more collective and effective mechanism, one aimed at inducing compliance, is required).

4 See infra notes 34-44 and accompanying text.

5 As Charnovitz points out, the WTO texts never refer to the term “sanction.” However, commentators and practitioners perceive the remedy system as constituting sanctions through a withdrawal of concessions in order to induce compliance. See Charnovitz, Rethinking WTO Trade Concessions, supra note 4, at 792. Cf. Lawrence, supra note 4, at 36-37, 46 (characterizing WTO remedies as a “rebalancing” of concessions, and not as sanctions).
countries generally do not wield. Part III assesses how current WTO rules on remedies create perverse incentives for large countries to drag out legal cases and thereby impose severe litigation costs on developing countries so that they abandon or do not even consider bringing justified legal claims.

Part III considers whether WTO members should modify WTO remedies to provide that retrospective monetary damages be awarded when developing countries prevail against developed countries in WTO disputes, as well as (in certain cases) reasonable attorneys’ fees. The goal of these modifications would not be the payment of damages per se, but rather, the creation of a better means to ensure developed country compliance with market access commitments toward developing countries so that a liberalized trading system would work more to their benefit. The importance of such a change in remedies would lie less in specific disputes that might result in the payment of damages, than in its potential impact on discussions over trade barriers conducted between developed and developing countries in the shadow of a potential legal claim. Part III sets forth a development assistance rationale for a preferential modification of remedies that could be advanced by WTO members in light of the goals of a Doha development round and those promoted by heads of state and international institutions, such as at the International Conference on Financing for Development held in Monterrey, Mexico in March 2002 and the International Conference on Sustainable Development held in Johannesburg, South Africa in August 2002.

Part III also addresses the modalities for implementation of revised remedies that WTO members could consider in light of the variation in developing countries’ situations and the political constraints and potential political repercussions of adopting more stringent remedies. The essay recognizes that the term “developing country” is many-faceted and that different countries falling under this label face significantly different challenges. The essay notes criteria that have been used in other trade-related contexts to differentiate developing countries by their share in world trade and their per capita income, criteria that could be adapted to implement the considered modifications. The essay similarly addresses how WTO members could adopt more stringent remedies for certain WTO agreements on a step-by-step trial basis, with the aim of gaining wider acceptance of them as a development tool among political elites and the broader public in the United States, Europe and other developed countries. The essay recognizes the real politque challenges faced and that no matter how compelling the strategy, its effective implementation depends on its political acceptance by those WTO members bound by such remedies, and in particular the United States and Europe.

Under the November 2001 Doha Round mandate for trade negotiations, WTO members are to review the Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes (the Dispute Settlement Understanding, or DSU) with the aim of agreeing on “improvements and clarifications” by May 2003. Developing countries began to focus attention on the issue of remedies in the context of DSU review only relatively late in the process. Their proposals require serious attention from scholars and international

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6 See Ministerial Declaration, WTO/MIN(01)/DEC/1, ¶ 30 (Nov. 20, 2001).
7 See e.g. Communication from Ecuador, Contribution of Ecuador to the Improvement of the Dispute Settlement Understanding of the WTO, TN/DS/W/9 (July 8, 2002) (calling for compensation “in cash”); Proposals on DSU by Cuba, Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe, Negotiations on
policymakers if they are not to be simply dismissed by the WTO’s most powerful members. WTO members’ current review of the DSU and the larger Doha negotiating round provide opportunities to address the central systemic issue of remedies that, under current rules, dissuades developing country participation in the WTO dispute settlement system. This essay intends to recast scholarly and policy attention toward the law-in-action of WTO litigation with an aim toward reforms and adaptations that would facilitate developing country participation in the system in the longer run. It is the first step in a larger project that addresses how to make the WTO system work for developing countries as part of a broader, more integrated approach to development.

*the Dispute Settlement Understanding, TN/DS/W/19 (Oct. 9, 2002) (calling for payment of legal costs by developed countries); and Proposal by Mexico, *Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding*, TN/DS/W/23 (Nov. 4, 2002) (calling for retroactive damages, potentially including lawyer’s fees and litigation expenses). The time line is tight so that many countries have argued that the scope of review should be narrow. The central issue that a number of users of the system have wished to resolve through amending the DSU, and was arguably ready to be agreed at the time that negotiations broke down at the WTO ministerial meeting in Seattle, is the so-called sequencing issue concerning the relation of Articles 21.5 and 22 in the event of alleged non-compliance by a defendant with an adopted panel or Appellate Body report. See the so-called Suzuki draft proposal to amend provisions of the DSU. In addition, the United States and EC have placed the issue of transparency at the center of DSU review. Yet, these issues fail to address the central challenge that developing countries face under the current WTO dispute settlement system: that of remedies.
2. PART I: THE LAW-IN-ACTION OF THE WTO DISPUTE SETTLEMENT SYSTEM, USE OF WTO DISPUTE SETTLEMENT TO DATE

2.1 The Legalization of the WTO Dispute Settlement System; Its Impact on Costs

International trade relations have become much more legalized under the WTO than under the former international trade system created pursuant to the General Agreement on Tariffs and Trade (GATT). The WTO rules are much more detailed and precise. A defendant can no longer unilaterally block judicial proceedings. The appellate review system provides greater legal coherence. The seven-person Appellate Body, even though subject to significant constraints, operates as a form of world trade “supreme court.” WTO members now use and threaten to invoke the WTO remedy of an authorized withdrawal of trade concessions where a defendant fails to comply with a WTO ruling.

The texts of WTO panel and Appellate Body decisions deploy a more legalistic style and are much longer and more numerous. Whereas Hudec counted 216 GATT complaints filed over 15 years (from 1980 to 1994), the WTO web site shows that 281 complaints were filed over the first eight years (from 1995-2002). Whereas panel decisions under the GATT typically averaged around a dozen pages, under the WTO they can range from 100-500 pages, building on previous WTO jurisprudence as well as public international law. Whereas the GATT produced an average of 86 pages of panel findings per year from 1986-1995, the WTO produced 693 pages of panel findings in 1999, and this figure does not include Appellate Body decisions and follow-up panel and arbitration decisions concerning the implementation period, compliance measures and sanctions. Moreover, this calculation only includes the findings sections of the decisions. If one counts the entire judicial reports, then, in 2000, there were 6,008 pages of panel decisions, which count mounts to 7,251 pages when one includes Appellate Body and arbitration decisions.

In short, WTO law involves greater legalization along the dimensions of binding obligation, precision of rules, delegation to a dispute settlement institution, and use. As a consequence of these changes, WTO members and their commercial constituents increasingly perceive the

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8 The GATT was signed as a “provisional agreement” in 1947, but was never ratified by the United States Congress. The WTO was founded on January 1, 1995.
9 The GATT system solely was based on ad hoc three-person panels primarily composed of trade diplomats.
12 According to the WTO’s web site, in 2000, there were eighteen panel decisions, eight Appellate Body decisions, fifteen implementation decisions (pursuant to DSU Art. 21.3.c), seven compliance decisions (pursuant to DSU article 21.5), and two decisions on sanctions (pursuant to DSU article 22.6). These gave rise to 6,008 pages of panel decisions, 401 pages of Appellate Body decisions, 606 pages of decisions by compliance panels, 61 pages of arbitral decisions concerning the implementation period, and 75 pages of arbitral decisions concerning the amount of authorized sanctions.
WTO dispute settlement system as one that involves legal “rights,” as opposed to an extension of a diplomatic process for the negotiation and “rebalancing” of reciprocal state-to-state trade concessions.

As this essay will demonstrate, greater legalization of international trade dispute settlement does not come without costs. The demands on human resources have skyrocketed if a member wishes to invoke its international trading rights. Just to read through and understand the hundreds of WTO panel and Appellate Body decisions is an immense task, even for specialized academics. Actually deploying the legal system to defend a country’s interests through marshalling facts and legal arguments that takes account of WTO case law is a daunting enterprise. If developing countries are unable to mobilize the requisite legal resources, they do not stand a chance. As Marc Busch and Eric Reinhardt summarize,

“By adding 26,000 pages of new treaty text, not to mention a rapidly burgeoning case law; by imposing several new stages of legal activity per dispute, such as appeals, compliance reviews, and compensation arbitration; by judicializing proceedings and thus putting a premium on sophisticated legal argumentation as opposed to informal negotiation; and by adding a potential two years or more to defendants’ legally permissible delays in complying with adverse rulings, the WTO reforms have raised the hurdles facing [developing countries] contemplating litigation.”

2.2 Why Participation in the WTO Dispute Settlement System Matters for Shaping WTO Law and International Economic Relations

Participation in the WTO dispute settlement system is essential for shaping WTO law’s interpretation and application over time. Participation in WTO judicial processes is arguably more important than is participation in analogous judicial processes for shaping law in national systems for two reasons. First, the difficulty of amending or interpreting WTO law through the WTO political process enhances the impact of WTO jurisprudence. Unlike national or EC law, WTO law requires consensus to modify, so that the WTO political/legislative system remains extremely weak. Changes in WTO rules only take place

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15 Under Article X of the Uruguay Round Agreement Establishing the World Trade Organization, only a few provisions require a unanimous vote to be amended. From a technical perspective, most provisions can be amended by a 2/3 vote of the members, and will either take effect only with respect to those members or with respect to all members, depending on whether the provision alters the “rights and obligations” of the parties. See WTO Agreement, Art. X:1. In addition, WTO members may decide by a three-fourths majority that an amendment is of such importance that “any Member which has not accepted it within a period specified by the Ministerial Conference... shall be free to withdraw from the WTO or remain a Member with the consent of the Ministerial Conference.” WTO Agreement, Art. X:3. See generally Raj Bhala and Kevin Kennedy, World Trade Law § 4(f)(3) (1998). In practice, however, there have been no amendments to WTO rules since the WTO’s creation. Moreover, all prior amendments to GATT rules from 1947 to the WTO’s creation were made by consensus (i.e. with no contracting party opposing). See, e.g., Theodore Posner & Timothy Rief, Homage to a Bull Moose: Applying Lessons of History to Meet the Challenges of Globalization, 24 Fordham Int’l L.J. 481, 504-505 (2000) (“At least one thing is clear about WTO interpretations and amendments: they are not designed to be taken
through infrequent negotiating rounds (held around once per decade), involving complex tradeoffs between over one hundred and forty countries with widely varying interests, values, levels of development and priorities. In addition, because of the complex bargaining process within the WTO, rules are often purposefully drafted in a vague manner as part of a political compromise. WTO members thereby delegate significant *de facto* power to the WTO dispute settlement system to interpret and effectively make WTO law.

Second, WTO law, although it does not formally adopt a common law approach, has taken more of a common law orientation, with the WTO Appellate Body and WTO panels citing and relying on past WTO jurisprudence in their legal reasoning. Individual WTO cases involve more than the judicial resolution of an individual dispute. WTO panel and Appellate Body decisions also produce systemic effects for future cases.

As a result of the increased importance of WTO jurisprudence and the rigidity of the WTO political process to modify it through treaty amendment or formal interpretation, those governments that are able to participate most actively in the WTO dispute settlement system are best-positioned to effectively shape the law’s interpretation and application over time to their advantage. Not surprisingly, the United States and EC remain by far the predominant users of the system, and thereby are most likely to advance their larger systemic interests through the judicial process. From 1948 through the end of June 2000, the United States was either a complainant or defendant in 340 GATT/WTO disputes, constituting 52% of the total number of 654 disputes, while the European Community was a party in 238 disputes, or 36% of that total. The U.S. and EC participation rates are much higher than the United States’ and EC’s percentages of global trade, which in 1999 respectively were 16.8% and 20.1% of

regularly or readily. In fact, there has not been a single interpretation or amendment adopted since the WTO came into effect in 1995, and there were only six amendments (the last in 1965) in the previous forty-eight years of GATT. Moreover, the interpretation or amendment process—particularly, achieving a consensus—is only likely to become more difficult as the number of WTO members grows.

16 See, e.g., Raj Bhala, *The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (Part Two of a Trilogy)*, 9 J. Transnational L. & Pol. 1 (1999); and Raj Bhala, *International Trade Law: Theory and Practice* 240 (2nd ed. 2001). This raises the question of why the WTO Appellate Body has turned toward greater use of a common law approach based on judicial precedent and attention to specific facts, as opposed to generic principles. One explanation is structural. That is, the paralysis of the WTO political system could spur panels and lawyers in the WTO secretariat to more actively fill in the gaps in developing WTO law. Another explanation is interest-based. From a public choice perspective, members of the Appellate Body, panelists and lawyers in the WTO secretariat simply may enjoy the considerable authority and discretion that a common law-oriented approach provides them. Another explanation is cultural. That is, the common law-orientation could reflect the backgrounds and biases of the major players in the WTO system. The United States has been the predominant user of the GATT and WTO dispute settlement system, having been a party in over 50% of the disputes, and its active participation over time arguably has affected GATT and WTO jurisprudence. Similarly, many members of the WTO secretariat’s legal division and Appellate Body were trained in the United States, with its common law system. In particular, many were trained by Professor John Jackson who for years taught at the University of Michigan, and now teaches at Georgetown University. They commonly refer to themselves as part of the “Jackson mafia.” Confirmed in interviews in Geneva, June 2002. These explanations are not exclusive, but could be complementary. For purposes of this essay’s analysis, however, the important point is that the Appellate Body has shifted toward a common law-oriented approach to jurisprudence.

world exports. Moreover, the United States and EC are typically third parties in cases where they are not complainants or defendants, raising their respective participation rates in WTO litigation before panels to 88% (US) and 67% (EC). As parties and third parties, the United States and EC attempt to defend their systemic interests in shaping the interpretation of WTO rules over time. The United States and EC have been third parties in most cases that have gone before the WTO Appellate Body, where the impact on defining WTO law is greatest. In fact, as of February 2002, the United States had participated as a complainant, defendant or third party in every Appellate Body proceeding but one, constituting a 94% participation rate. (See Table 1 for an overview of U.S. and EC participation in WTO dispute settlement).

As any legal practitioner knows, law matters not only for the litigation of specific disputes, but, even more importantly, for settlements negotiated in the law’s shadow. Thus, the United States’ and EC’s participation in the shaping of WTO law, together with the greater credibility of a U.S. or EC threat to invoke WTO law, works to their advantage in bargaining in the law’s shadow. The vast majority of disputes over WTO legal obligations are settled. In the GATT and WTO contexts, Busch and Reinhardt note how “three-fifths of all [formal complaints] end prior to a panel ruling, and most of these without a request for a panel even being made.” In fact, with the creation of the more legalized WTO system, the percentage of formal complaints that went to a panel decreased. Moreover, Busch and Reinhardt note that around two-thirds “of those [formal complaints] ending prior to a ruling (whether before or after the establishment of a panel), exhibited full or partial concessions by the defendant,” and that “the net effect of invoking adjudication, in the form of panel establishment, is to significantly increase the level of liberalization of disputed measures.” Busch and Reinhardt do not include disputes that are bargained over and settled without the filing of a formal WTO complaint, so that the percentage of trade conflicts involving WTO obligations that are

19 Since this latter count includes third party submissions, it is based on the total number of formal complaints that went to the panel stage (125), as opposed to the total number of requests for consultations made to the WTO Dispute Settlement Body (273), as of Oct. 29, 2002.
20 As Jay Smith notes, “the US has taken part as a third party participant in a remarkable 94% of appeals (15 of 16), while the EU has done so in 64% (18 of 28)” in cases where they have not been a complainant or defendant. Jay Smith, Inequality in International Trade? Developing Countries and WTO Dispute Settlement, Rev. of Int’l Political Economy (forthcoming 2003), at 16 of draft version.
21 See, e.g., Marc Galanter, Contract in Court; or Almost Everything You May or May Not Want to Know about Contract Litigation, 2001 Wis. L. Rev. 577, 579 (Contracts Symposium 2001) (referring to “lititigation” to remind us “that the career of most cases does not lead to full-blown trial and adjudication but consists of negotiation and maneuver in the strategic pursuit of settlement through mobilization of the court process”); Marc Galanter, Worlds of Deals: Using Negotiation to Teach About Legal Process, 34 J. Legal Educ. 268, 268 (1984).
23 Id., at 161(chart noting decrease from 41.8% in the period of 1989-1994 to 33.5% during the period from 1995-1999, the first five years of the WTO). See also C. Christopher Parlin, Operation of Consultations, Deterrence, and Mediation, 31 Law. & Pol’y Int’l Bus. 565, 567-69 (2000).
resolved through trade concessions without the need for a WTO panel decision is actually much higher.

In short, if we are to understand the impact of WTO law in practice, analysts must assess how WTO law affects bargaining in WTO law’s shadow. There are two primary shadow effects of law: the law’s substance and the costs of invoking the law’s procedures. First, as Robert Mnookin and Lewis Kornhauser have written in the context of bargaining over divorce settlements, “the outcome that the law will impose if no agreement is reached gives each [party] certain bargaining chips— an endowment of sorts.”

In other words, the substance of WTO law, as set forth in the WTO agreements and defined by WTO case law, inform and constrain settlement negotiations conducted in the law’s shadow.

Second, as Herbert Kritzer has pointed out, the law’s “shadow” effects include not only the law’s substance, but also the costs to deploy the law procedurally. As Kritzer writes, “the ability to impose costs on the opponent and the capability of absorbing costs” also affect how the law operates in practice.

As will be seen, where large developed countries, such as the United States and EC, can absorb high litigation costs by dragging out a WTO case, while imposing them on developing country complainants, they can seriously constrain developing countries’ incentives to initiate a claim, and correspondingly enhance developing countries’ incentives to settle a dispute unfavourably. When developing countries are unable to mobilize legal resources cost-effectively, their threats to invoke WTO legal procedures against a developed country lack credibility. Unless developing countries are able to develop techniques to more cost-effectively mobilize legal resources, they actually could be worse off under a legalized system that has become much more resource-intensive in its demands.

2.3 The Statistics on Developing Country Participation

Developing countries’ relative participation in the international trade dispute settlement system in complaints against developed countries has declined since the advent of the WTO

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27 Herbert Kritzer, *Let’s Make a Deal: Understanding the Negotiation Process in Ordinary Litigation* 73-75, 103-104, 132-133 (1991) (noting that the shadow of the law is also “the ability to impose costs on the opponent and the capability of absorbing costs”); David Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. Rev. 72 (1983) (an important study of litigation in the United States); and Herbert Jacob, *The Elusive Shadow of the Law*, 26 Law & Soc’y Rev. 565, 586 (1992) (noting “the language in which a claim is initially framed combined with the manner in which attorneys are used and the success of consultation with personal networks are perhaps the key variables in determining the strength of the shadow of the law”). In the WTO context, WTO law will tend to cast a weaker shadow for countries that use diplomats who are not conversant in WTO law. Developing countries are more likely to fit this description. As Stewart Macaulay writes, “under bargaining, winning and losing is not necessarily related to ‘legal’ right or wrong; it may be related to the power and resources of the bargainers.” Stuart Macaulay et al., *The Legal System in Operation: Highlighting the Importance of Discretion, Bargaining, and “the Law,”* in *Law & Society: Readings on the Social Study of Law* 160 (Macaulay et al. eds., 1995).
compared to their relative participation under the less-legalized GATT. As Reinhardt has
documented, developing countries “are one-third less likely to file complaints against
developed states under the WTO than they were under the post-1989 GATT regime.” In
contrast, “the fraction of cases targeting [developing countries] has risen dramatically, from
19 to 33 percent,” suggesting that a developing country “is up to five times more likely to be
subject to a complaint under the WTO.” Bernard Hoekman and Michel Kostecki confirm
that, under the WTO, “the developing country share in terms of being a defendant rose to 37
percent” compared to “only 8 percent of all cases brought during the GATT years.”
Constantine Michalopoulos has documented how developing countries’ use of the WTO
dispute settlement against developed countries is considerably less than their share of
developed country trade. “By mid 2000, 46 per cent of the developed countries’ complaints
had been lodged against developing-country WTO members, while the latter accounted for
only about 25 per cent of developed-country trade. Just over 50 per cent of the developing
countries’ complaints, on the other hand, were lodged against developed countries, which was
considerably less than the latter’s share of trade with developing countries.” In many cases,
developing countries’ participation may be overstated by simple reference to numerical
charts, since the developing country may be piggybacking on a U.S. or EC complaint. (See
Appendix 1 for an overview of participation of WTO members as defendants, complainants
and third parties in WTO disputes).

Developing countries also fail to defend their systemic interests within the WTO judicial
system as third parties. Among developing countries, only India, Brazil and Mexico had
participated as third parties in more than eight (of the first 273) WTO cases, whereas Japan
had done so forty-two times, the EC forty-one times, and the United States thirty-two times,
as of August 2002. The majority of developing country WTO members have never
participated.

Moreover, even where a developing country initiates a WTO case, a particular industry with
high per capita stakes in international trade is typically behind the dispute and finances it.
Thus, in the Venezuelan gas case against the United States, the Venezuelan national
petroleum company, Petroleos de Venezuela, financed a Washington DC law firm to assist the
government in bringing the WTO challenge. In a number of other cases, developing
countries have participated through the assistance of more powerful WTO members that are

28 See Busch & Reinhardt, Testing International Trade Law, supra note 15, at 466-467 (citing a table as well as
other work by Reinhardt). They also note how “Developing countries constituted some 31 percent of GATT
complainants, yet only 29 percent of WTO complainants, despite their ballooning proportion of the overall
membership.” These latter figures include the growing number of developing country cases against each other.
Ibid.
30 See Constantine Michalopoulos, Developing Countries in the WTO 167 (2001) (also explaining why the
differential does not appear to reflect simply a greater compliance by developed countries with WTO
obligations).
31 Similarly, lawyers from the Washington DC-based law firm Powell Goldstein Frazer & Murphy (who moved
to the firm Sidley Austin Brown & Wood in April 2002) were hired by the Brazilian aircraft manufacturer
Embraer to assist the Brazilian government in their long dispute with the Canadians over aircraft subsidies.
Interview with member of Sidley Austin, June 18, 2002. A lawyer at Powell Goldstein attended the panel
meetings as a member of the Brazilian delegation.
promoting their own interests, as when the EC worked with Santa Lucia in the EC-bananas case and with Morocco in the EC-sardines case. Yet, where developing countries such as Venezuela are not repeat players in WTO litigation, they are less likely to take larger systemic concerns into account in these one-shot, industry-financed (or developed country-financed) individual cases. They are less likely to “play for rules” that serve their countries’ long-term interests. Ironically, a private lawyer who has worked on behalf of developing countries in WTO litigation confirms that it is easier to work with developing countries than with the United States Trade Representative (USTR) or European Commission because developing countries are less likely “to get bogged down over systemic concerns” in an individual case.32

Finally, when developing countries have initiated complaints, their complaints have been less likely to result in favourable outcomes on account of their constrained ability to settle complaints against developed countries during the consultation phase. As Busch and Reinhardt statistically demonstrate, it is precisely in settlement negotiations after the filing of a complaint and before a WTO panel has issued a ruling, that “rich complainants are much more likely to get defendants to concede... than poor complainants.”33

2.4 Why Most Developing Countries are Not Active Participants in a Legalized Dispute Settlement System

Developing countries, other than the largest ones such as Brazil and India, are less likely to participate actively in WTO litigation because of two central structural factors: (i) individual developing countries’ relatively smaller value, volume and variety of exports, resulting in fewer economies of scale in mobilizing legal resources, and (ii) the high cost of access to the system.34 Developing countries often have high per capita stakes in individual cases, so that WTO law can be of potential benefit to them. Overall, however, developing countries simply export a vastly narrower array and limited value and volume of exports than do the United States and EC.35 Because individual developing countries are less active traders, they are less likely to be repeat players in WTO litigation.36 Because of their less frequent use of the WTO system, they have less incentive to deploy resources to develop internal WTO legal expertise. Their inability to benefit from economies of scale gives rise to long-term structural imbalances in the development of legal resources which can be tapped, when needed, for WTO disputes.

32 Interview in Geneva, Switz. (June 18, 2002).
33 Marc Busch and Eric Reinhardt, Developing Countries and GATT/WTO Dispute Settlement, at 12 (Jan. 20, 2003 draft).
34 In addition, developed countries are better able to shape WTO rules up front to their advantage because of their greater market leverage, negotiating clout and the greater legal resources that they can deploy in participating in the drafting of the detailed nuances of WTO law. See Richard Steinberg, In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO, 56 Int’l Org. 339 (Spring 2002). This essay, however, focuses on the ex postie challenges that developing countries confront after the codification of WTO law through international treaty negotiation.
In addition, the cost of bringing an individual WTO case is extremely high, further reducing developing countries’ incentives to participate. The WTO Appellate Body and WTO panels employ a highly contextualised, case-based approach, based on jurisprudence where individual case opinions average in the hundreds of pages. As a consequence, the demand on lawyer time, and thus the cost of specialized legal expertise, has skyrocketed. Litigation at the international level involves a distant forum in which legal expertise is U.S. and Eurocentric, highly specialized, and quite expensive. Developing countries can face fees ranging from $200-$600 (or more) an hour 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.

The factors of developing country stakes and WTO litigation costs are interrelated. As Lawrence Friedman and Robert Percival write regarding domestic litigation, “[a]s costs rise, so does the threshold at which litigation becomes worthwhile.” A developing country may have much higher relative stakes over a given trade measure than the United States and EC in relation to their respective economies, but the developing country’s case is likely to be of smaller aggregate value. Thus, the benefits for the developing country to bring its case are less likely to exceed the threshold of litigation costs that make bringing a WTO case worthwhile, especially in light of the uncertainty of WTO remedies.

Because of developing countries’ relative lack of resources and the structural incentives against their use of WTO law, developing countries are not developing human capital and know-how in WTO law. Most developing countries have few law schools and no professors to teach WTO law. In contrast, in response to growing demand, the number of law professors

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38 Confirmed in e-mail messages from two Washington DC trade lawyers, Jan. 15 and Jan. 18, 2003.


In the United States that teach WTO law has increased dramatically, such that there are well over one hundred law professors teaching aspects of WTO law each year in the United States to over two thousand law students.\(^{42}\) In consequence, unlike in the United States and Europe, there are no locally-available private lawyers in developing countries to advise local firms and trade associations on WTO rights and to work with them and developing country governments to defend those rights in WTO litigation and settlement negotiations. The small supply of lawyers educated in WTO law within developing countries thus increases the cost for developing country firms and governments to become aware of WTO violations and to hire and train lawyers to challenge these violations.

Because of developing countries’ less frequent use of the WTO system and their lack of local legal capital, the alternative for a developing country to train internal lawyers with WTO expertise is typically worse than hiring expensive U.S. or European outside legal counsel. Training internal counsel entails a significant long-term allocation of resources which is not cost-effective if a country is not an active player in the litigation system. Start-up costs are high and potential economies of scale low. Moreover, where a developing country’s internal lawyers develop expertise and exhibit talent, they can be snatched up by private law firms that pay salaries against which developing countries cannot compete.\(^{43}\) Although lawyers regularly leave government in the United States for the private sector, the fact that they largely remain in Washington and often subsequently return to government as part of Washington’s “revolving door” bureaucratic culture means that U.S. trade authorities are much more likely to take advantage of their acquired expertise. In the language of economics, a revolving door bureaucratic culture can have positive externalities for the United States in international litigation, since the developed expertise is available locally to be used predominantly by U.S. firms and government officials. The spill over effects for developing countries, in contrast, are largely negative, since, once a developing country trade official leaves to work for the private sector in the United States or Europe, that individual almost never returns to government service.

Developing countries’ perceptions of the WTO system also feed back on their awareness of whether they have legal claims available. Where developing countries and their commercial constituents have little faith in the WTO system, they are less likely to develop mechanisms to detect violations of WTO law that affect their interests. Even when they become aware of measures against which they could invoke their legal rights, developing countries are less likely to develop pro-active strategies to defend these rights and interests if they believe that the system is structured in such a way that they cannot do so in a cost-effective manner. As is the case in domestic legal systems, those with greater wealth and education (in this case, U.S. and European governments and commercial constituents) are more likely to recognize

\(^{42}\)In 2002, the American Association of Law Schools lists 598 law professors teaching “International Transactions” in U.S. law schools, of which 280 have 1-5 years of service, indicating the rapid growth of the field. Of these law professors, there are 123 who list international trade or the WTO as a specific subject area for teaching. See The AALS Directory of Law Teachers 2002-2003 (AALS West Group and Foundation Press: 2002).

\(^{43}\)To give an example, Patricio Grane is an excellent lawyer and proved his talent in Costa Rica’s WTO textile safeguards case against the United States. He now works for the U.S. law firm Sidley & Austin based in New York. The majority of the developing country students who attend WTO legal seminars appear to take jobs in the private sector. Interviews with developing country representatives to the WTO in Geneva, Sept. 2002.
situations where they can invoke legal rights (in this case, WTO rights). When they do so, they are also more likely to better manoeuvre procedures through which they can realize their objectives.

Overall, developing countries face incentives not to pursue justified legal claims, but rather settle, abandon or simply not deploy the resources to even become aware of them. In failing to participate, developing countries are acting rationally because it simply is not cost-effective for most of them to organize internally to take advantage of the WTO’s legalized international dispute settlement system. If policymakers do not address structural issues, then all of their talk about the need for “capacity-building” misses the point, since it will not change the central fact of structural incentives against developing country participation in the dispute settlement system.

What can be done? Exploring more meaningful options is this essay’s purpose. But first, we should review how the WTO’s most powerful and active members, the United States and EC, have adapted to enhance their resources and abilities to prevail under the WTO’s more legalized dispute settlement system. We then breakdown the concept of “developing countries” into the varying contexts and challenges that confront those falling under that malleable label.

2.5 How the United States and EC Have Developed Public-Private Partnerships to Enhance their Resource Advantages in WTO Litigation

U.S. and EC public authorities hold considerable resource advantages when participating in WTO litigation. In October 2002, the Office of the United States Trade Representative (USTR) employed over two dozen lawyers on trade matters. These lawyers are supplemented by those from other U.S. departments as needed in individual WTO disputes, including from the Department of Commerce, Department of Agriculture, Department of

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46 E-mail correspondence with a representative from USTR, Jan. 17, 2002 (noting that, as of mid-January 2003, there were 25-26 designated legal positions in USTR in Washington (of which 1 or 2 needed to be filled), complemented by three lawyers in the United States’ WTO mission in Geneva, making 28-29 legal positions in total. In addition, he noted that the USTR is “filled with lawyers in non-legal slots” (i.e. the number does not include lawyers handling diplomatic negotiating or other matters). In terms of legal positions where lawyers handle WTO cases on a “regular” basis, there were, in addition to the “1-2 vacancies,” “roughly 15 ‘lead counsel,’ 2 supervisors, and 3 ‘local counsels’” in Geneva).

47 Lawyers from the U.S. Department of Commerce and International Trade Commission, for example, assist in the numerous WTO antidumping and subsidy cases in which the United States is a party.

48 Lawyers from the U.S. Department of Agriculture assist in all U.S. agricultural cases, such as the EC-meat hormones and the EC-wheat gluten cases.
the Treasury, Office of Patents and Trademarks, and Environmental Protection Agency. The Legal Service division of the European Commission similarly employs numerous lawyers that regularly address WTO matters, and this division, in turn, is supplemented by the dozens of lawyers working in the Commission’s Trade Directorate Generale (DG) and other DGs, including DG Agriculture, DG Enterprise, DG Internal Market and DG Consumer Affairs, as well as private attorneys with offices a taxicab away in Brussels whom it hires when needed. These lawyers typically have studied WTO law in leading universities in the United States and Europe. In other words, any number of dozens of relatively well-trained U.S. and EC governmental lawyers can be assigned to individual WTO cases.

The United States and EC’s resources are supplemented by those of large and well-organized companies and commercial groups located within them that actively follow WTO matters. Given the financial demands and legal and factual complexity of bringing a successful WTO complaint, large and well-organized interests are best-positioned to avail themselves of legal rights through hiring lawyers, economists and other consultants, and then coordinating with U.S. and EC public authorities. These multinational firms are the world’s largest traders and consequently the most directly affected by the details and interpretive nuances of agreed rules. They thus have the incentive to inform themselves, organize and generally play an active role. They also hold the resources to help public authorities engage in complex, prolonged litigation in a remote forum, which they are willing to dedicate to these issues because of their stakes. With few exceptions, multinational corporations are based in developed countries and, in particular, the United States, EC and Japan. The interest of these companies, although not identical, are closely linked with those of their home countries. For example, the U.S. and European spirits industry successfully worked with U.S. and EC trade officials in WTO disputes against Japan, Korea and Chile to shape the interpretation of the term “like product” as used in GATT Article III.2. As a result, countries around the world

49 Lawyers from the U.S. Department of the Treasury assisted in the United States-FSC case brought by the EC against the United States, and the numerous cases that the United States brought against the EC. For example, a leading figure in defining the U.S. position in the FSC case was Kenneth Dam, Deputy Secretary of the Treasury, and author of The GATT: Law and International Economic Organization (1970) and The Rules of the Global Game: A New Look at US International Economic Policymaking. (2001).

50 Lawyers from the U.S. Patent and Trademark Office assist in all patent and trademark cases brought under the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

51 Lawyers from the EPA, for example, assisted in the U.S.-shrimp-turtle and the U.S.-Reformulated Gasoline cases.

52 A lawyer in the Commission’s Legal Service states that “there are 9 to 10 lawyers working on WTO matters in the Legal Service, including one person in Geneva.” E-mail message of Jan. 21, 2003. See also Shaffer, Defending Interests, supra note 40.

53 For example, in the early 1980’s, approximately forty percent of global trade was intra-firm trade conducted by 350 of the world’s largest multinational corporations. See World Bank, Global Economic Prospects and the Developing Countries (1992). The same held true in the 1990s. See Edward M. Graham, Global Corporations and National Governments 14 (1996) (stating that intra-firm trade of multinational corporations with their affiliates accounted for about one-third of world trade and around 50% of U.S. imports and exports).

54 See Neil Komesar, Imperfect Alternatives: Choosing Institutions in Law, Economics and Public Policy 8, 68 (1994) (maintaining that “[t]he character of institutional participation is determined by the interaction between the benefits of that participation and the costs of that participation. ...Interest groups with small numbers but high per capita stakes have significant advantages in political action over interest groups with large numbers and smaller per capita stakes.”).
have reduced their taxes on U.S. and EC grain-based alcohol, which was the primary goal of the U.S. and European spirits industry.\(^55\)

As WTO cases have become more factually and legally complex, the demands on WTO complainants and defendants have accumulated and private industry’s role in the dispute settlement system correspondingly has expanded. Although the USTR still seeks assistance from U.S. embassies that may prepare helpful studies, private industry representatives are fundamental for the establishment of the factual record, as well as the development of legal arguments to apply to those facts. Private counsel typically provides sample briefs or memoranda from which representatives at the USTR can cut and paste, as well as mark-ups of the USTR’s drafts.\(^56\)

The EC bananas case, for example, involved over a dozen claims under four WTO agreements.\(^57\) The initial panel decision alone was over four hundred and seventy pages, much of it setting forth the case’s factual background involving a detailed description of the EC’s byzantine banana quota and licensing regime. U.S. attorneys involved in the bananas case maintain that a mark of the United States’ success is that the factual description in the WTO panel report was largely taken from the U.S. brief.\(^58\) Much of that U.S. factual description had, in turn, been prepared by Chiquita and its lawyers.\(^59\)

Similarly, the European Commission has attempted to forge better direct links with EC private enterprises and trade associations in advancing the EC’s export interests as part of the EC’s Market Access Strategy.\(^60\) The Commission requires private sector input, especially as regards the detailed facts of a potential case, if it is to successfully litigate or threaten litigation before the WTO. As Tim Jackson of the Scotch Whisky Association states, “We must... be ready to assist the Commission (which sadly does not have unlimited resources to pursue such matters) often at very short notice when a WTO case is under way. For example,

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55 See Shaffer, Defending Interests, supra note 40. Because of the weakness of the WTO political structure, U.S. and EC private parties also can shape WTO law by working with U.S. and EC public officials in the litigation process.

56 Of course, USTR does not necessarily take all or even part of what outside private counsel offers, but USTR often makes use of outside counsel’s offerings whether because USTR finds the briefs quite helpful, because USTR is overwhelmed, or because of political pressure from Congress. Interviews with former and current representatives of USTR. Interviews with USTR officials in Washington (Aug. 19, 2001 & Oct. 18, 2001). Sometimes lower level USTR legal counsel receive mixed messages, being told to “stop doing it yourself and start farming out to private firms,” on the one hand, and then that they “should take responsibility for drafting everything,” on the other. Interview with USTR official in Washington (Oct. 18, 2001). See also Rossella Brevetti, Lawyer Sees Growing Role for Private Counsel in WTO Cases, 18 Int’l Trade Rep. (BNA) 720 (May 3, 2001) (reporting remarks of Geralyn Ritter, attorney at the Washington DC firm of Covington & Burling).

57 The relevant WTO Agreements were GATT (1994), GATS, TRIMS, and the Licensing Agreement. Request for Consultations by Ecuador, Guatemala, Honduras, Mexico and the United States, European Communities–Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/1 (Feb. 12, 1996).

58 Interview with USTR official (May 19, 1999). Confirmed in interview with a former member of the Legal Service division of the European Commission (June 22, 1999).

59 Interview with USTR official (May 19, 1999).

60 See Shaffer, Defending Interests, supra note 40. (noting how the European Commission has had to more proactively seek contact with private firms, and developed extensive data bases to compile and prioritize trade barriers affecting European exports).
during the Japan case we had to commission market research to help the Commission refute some of Japan's initial submission... It is a ‘partnership’ exercise with other industry colleagues, respective Governments and the Commission.” 61 Following the adoption of a market access strategy built on closer collaboration with EC export interests, the Commission has requested more consultations before the WTO dispute settlement body since 1997 than any other WTO member, including the United States. 62

As demonstrated in my earlier work on U.S. and EC use of the WTO dispute settlement system, U.S. and EC trade officials themselves typically are dependent on input from private parties, despite their already significant resource advantages. 63 Building a strong WTO legal case requires an intensive exchange of information between the relevant public authority (the USTR and the European Commission) and private firms. 64 Given the number of complicated cases that the USTR and Commission must litigate, the need for sophisticated factual development and legal argument, the tight deadlines imposed by the WTO’s Dispute Settlement Understanding, and the political stakes of winning or losing WTO cases, U.S. and EC public officials often require industry to submit convincing factual and legal memoranda as a prerequisite to the filing of a WTO complaint. 65 The collaboration among large private

61 Remarks of Tim Jackson, head of the Scotch Whisky Association, at a conference in Geneva in May 1997, distributed at conference (on file). The Scotch Whisky Association also assisted the Commission “by gathering market information/research for their Korea and Chile cases.” Jackson added, “Bilateral pressure can be effective and is a natural first step in registering disapproval with a foreign government – a good example is Korea where following such continued pressure from the Commission (and our Government) the Korean Government significantly reduced the discrimination against imported spirits – as a result a $20 million ECU market has grown to one in excess of $120 million ECU in the space of 10 years. Discrimination still exists but encouragingly last month the EU Member States agreed to request WTO consultations with Korea about the outstanding discrimination.” Id. The EC subsequently won the case.

62 See Shaffer, Defending Interests, supra note 40. During the first two years of the WTO’s existence, while the United States filed twenty-one WTO complaints (resulting in eight panel reports), the Commission filed eight complaints (resulting in only one panel report). From 1997-1999, however, the situation reversed. The Commission initiated thirty-one new WTO complaints (resulting in twelve panel reports), compared to eighteen initiated by the United States (resulting in four panel reports). See Overview of State of Play of WTO Disputes, available on the WTO web site at http://www.wto.org/. In addition, the EC has been more active than any other WTO member in negotiating bilateral free trade agreements. The EC maintains a list of these agreements on its Web site at http://europa.eu.int/comm/trade/pdf/ecrtagr.pdf (last visited May 14, 2001). See also Gary Yerkey, Business Execs Call on U.S. to Retake Leadership on Trade, Citing European Gains, 18 Int’l Trade Rep (BNA) 260-261 (Feb. 15, 2001) (noting the number of free-trade pacts the EU has signed since the conclusion of the Uruguay Round). See also the WTO 2001 Annual Report, available at http://www.wto.org, which states that the EU was involved in the highest number of regional trade agreements.

63 See Shaffer, Defending Interests, supra note 40.

64 See also, Brevetti, supra note 57, at 720(reporting remarks of Geralyn Ritter, attorney at the Washington DC firm of Covington & Burling, who noted “increasingly significant” role of private counsel in WTO cases, since government agencies handling WTO matters are “extremely short-staffed” and in particular, lack “access to the facts”).

65 As encapsulated in the remarks of one USTR lawyer, “we at USTR rely on industry.” Telephone interview (May 19, 1999). See also Judith H. Bello, Some Practical Observations About WTO Settlement of Intellectual Property Disputes, 37 Va. J. Int’l L. 357, 359-60 (1997) (noting that the “administration’s lawyers... rely upon and work closely with the directly affected private parties. The input provided by the latter serves as additional resources and thereby reduces the burden on an administration in WTO litigation.”). In the Korea-Alcohol case, for example, USTR asked industry representatives to take pictures of bars, check web sites and advertisements and prepare a market analysis for the USTR before it filed the suit. Interviews with USTR representative and representative of distilled spirits association (May 19, 1999). Similarly, in the Japan-Alcoholic Beverages case,
U.S. and EC interests and U.S. and EC government officials enhances the resources that USTR and the Commission wield in WTO litigation, increasing their advantages against weaker WTO members.

2.6 The Varied Contexts of Developing Countries

2.6.1 The Definition of “Developing Country”

The term developing country is broad, covering economies ranging from those largely based on subsistence agriculture to those of Brazil and India which have highly industrialized sectors that include commercial aircraft production and software engineering. Although the term “developing country” is often used in WTO agreements, the term is left undefined so that countries largely self-designate their status, subject to challenge from another member.

The general lack of definition of what constitutes a “developing” compared to a “developed” country has generated criticism. Yet, it is easy to explain the difficulty for WTO members to legally define what constitutes a “developing country” in the WTO context. Differentiating developing countries in terms of which countries receive meaningful preferential treatment is highly controversial in an agreement among one-hundred-forty members that can have real economic impacts on commercial sectors. Developed countries are wary of granting special and differential (“S&D”) treatment where doing so can affect their own commercial constituencies. They thus prefer either to retain control over the application of preferential programs (as under General System of Preferences (GSP) programs), limit their international obligations under preferential programs to “least developed” countries that pose little competitive threat (as under some WTO provisions), or make their obligations merely declaratory when applied to all “developing countries” so that they again retain discretion as to how to apply them (as under most “S&D” WTO provisions). In general, developed countries have agreed to include special treatment provisions in WTO agreements for an undefined mass of “developing countries” because the special provisions, in operation, are of limited relevance. They also have been willing to grant preferential market access to developing countries under national GSP programs because they can unilaterally modify them at will by withdrawing product coverage, resetting quotas, or “graduating” countries from the program. Were internationally-binding special and differential treatment to have real bite, such as through the creation of a preferential system of remedies, developed countries likely would insist on a much tighter definition of what constitutes a “developing country”

EC trade officials required industry to prepare detailed memoranda supporting the case before they were willing to take it to the WTO. Interview with USTR official (May 19, 1999) and a member of the Legal Service division of the European Commission (June 22 1999).

66 See, e.g., T. Ademola Oyejide, Special and Differential Treatment, in Development, Trade and the WTO: A Handbook, 504, 507 (Bernard Hoekman et al. eds., 2002) (maintaining that the S&D provisions appear to be “ad hoc and not closely linked to objective criteria reflecting differences in levels of development”).

67 As Hoekman and Kostecki note, “most of the 97 provisions in the WTO agreements calling for S&D treatment for developing countries are ‘best endeavor’ commitments—they are not binding on high-income countries.” Hoekman & Kostecki, The Political Economy of the World Trading System, supra note 19, at 392-393. As an example of how preferential programs can be manipulated to suit domestic U.S. political demands, they cite U.S. manipulations of rules of origin. Id., at 391 (case study regarding producers of ethanol under the U.S. Caribbean Basin Initiative).
beneficiary. In that case, developing country members surely would vie over the definition of the cut-off point as to whom would benefit and whom would not.

When WTO agreements refer to the term “least developed countries” (LDCs), in contrast, they incorporate a list of countries determined by the United Nations in a more objective manner. The UN Economic and Social Council determines which countries are “least developed” based on per capita income and related development criteria. As of January 1, 2003, forty-nine countries were designated as “least developed.” The WTO Agreement on Subsidies and Countervailing Measures provides a slight wrinkle, setting forth a third category of developing countries in order to slightly expand on the concept of the “least developed.” The agreement exempts twenty developing countries (in addition to the “least developed”) from its prohibition on export subsidies, so long as their per capita gross national product (GNP) remains less than $1,000 per year. Granting special treatment to these countries has raised less contention because these countries are so poor that they do not constitute a serious competitive threat. In fact, no “least developed” WTO member has ever initiated or been the subject of a WTO complaint. Nonetheless, developing countries without “least developed” status sometimes oppose the granting of special treatment to countries with that status, especially where they believe that such treatment would harm their own commercial sectors.

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68 When preferences have been granted under national general system of preferences (GSP) programs that result in real market impacts, certain developing countries have taken predominant advantage of them, leading to demands that these countries be “graduated” from the program. For example, through the mid-1980s, Hong Kong, Taiwan and Korea “accounted for about 45% of GSP gains,” and “through the early 1990s, 6 to 12 of the largest beneficiaries of the GSP system claimed 71 to 80 percent of the total [benefits].” See Oyejide, Special and Differential Treatment, supra note 67, at 506.

69 See, e.g., WTO Members Make Little Progress in Continued Discussions on S&D, Inside U.S. Trade, Oct. 11, 2002, at 14-15. (noting that “the issue of differentiation splits developing countries, with the majority opposed but with some arguing that it makes sense to differentiate between developing members, such as Hong Kong, Singapore, South Korea and Brazil, and other developing countries such as Kenya. But some developing countries in turn have also argued that there is little difference between some developing countries, such as Kenya, and least-developed country members such as Lesotho and Uganda.”); and Developing Countries in Sydney Embrace Staged Approach to S&D Inside U.S. Trade, Nov. 22, 2002, at 3. (“The S&D discussion saw little headway on the push by the EU and U.S. for agreement on criteria that would differentiate among developing countries for purposes of special treatment and that would allow countries to graduate out of developing country status. A number of developing countries including Brazil and Korea took a hard line against that proposal, which was raised by both Lamy and Zoellick.”).

70 The criteria used in the triennial review in 2000 were based on domestic gross domestic product (under $900 average over three years), a human resource index and an economic vulnerability index. See UNCTAD, What are the Least Developed Countries?, at: http://r0.unctad.org/lccls/LDCs/index.html (last visited Dec. 11, 2002).

71 Id., at 4. Senegal, for example, was granted least developed country status in 2002 in order to benefit from the new EC “everything but arms” (EBA) market access initiative in favor of the least-developed group, as well as enhanced technical assistance and the benefits of certain WTO preferential provisions. Interview with a member of a Geneva-based development agency working on behalf of less-advantaged countries. June 20, 2002. The EU Council of Ministers adopted the EBA initiative on February 26, 2001.

72 See Article 27.2(a) and Annex VII of the SCM Agreement.

73 Confirmed in interviews among developing country representatives in Geneva, Switz. See also, WTO Members Make Little Progress, supra note 70. See also Hoekman & Kostecki, The Political Economy of the World Trading System, supra note 19, at 392 (citing Brazil’s challenge of the EC’s GSP program in December 1998).
If a separate regime for certain WTO remedies is to be applied to developing countries to offset structural imbalances, WTO members will need to develop clearer legal criteria for defining “developing country” status. The alternative of leaving the definition to the Appellate Body under its case-by-case approach would leave the judicial system with too much political discretion and place it in an untenable position. Part III will address options that could be considered, including the criteria adopted by the new Advisory Centre on WTO Law for determining the Centre’s hourly rates for legal advice to developing country members. The Advisory Centre uses two proxies for a country’s development status and its relative need for subsidized legal assistance: a country’s per capita GNP and its share of global trade. Alternatively, the WTO could build on the World Bank’s criteria of dividing developing countries into “low” and “middle” income ones, or the breakdown of developing countries by the OECD’s Development Assistance Committee (DAC) into multiple categories, including “least developed countries,” “other low income countries,” “lower middle income countries,” “upper middle income countries,” and “high income countries.”

Because so many factors affect the assessment of a country’s level of development and its need for preferential treatment in the WTO context, defining the concept will not be easy conceptually or politically. Nonetheless, the more that WTO preferential provisions couple legal obligation with real economic implications, the greater the need for a clear legal definition of “developing country” that a WTO panel could apply.

2.6.2 Existing S&D Provisions

Certain provisions in WTO agreements grant “developing countries” special rights, often referred to as “special and differential treatment.” Under the GATT, developing countries incurred significantly fewer trade obligations so that the de facto impact of special treatment was much greater. Under the WTO, special and differential provisions now consist largely of special transitional periods and special import thresholds. For example, some WTO agreements, such as the Agreement on Trade-Related Intellectual Property Rights (TRIPS) and the Agreement on Trade-Related Investment Measures (TRIMS), grant longer transition

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74 Countries that are poorer in terms of per capita GNP and that engage in similar levels of trade pay lower rates. Countries that are at the same level of per capita GNP but engage in greater international trade pay higher rates.

75 Under the World Bank’s criteria for 2002, “low-income” economies have a per capita gross national income of $755 or less, and “middle-income” economies have a per capita gross national income of between $756-$9,265. See World Bank, Global Economic Prospects and the Developing Countries (2002).

76 As of January 1, 2001, under the OECD’s criteria, “other low income countries” had a per capita GNP of less than $760 (and include China, Honduras, India, Indonesia and Pakistan); “lower middle income countries” had a per capita GNP of between $761-$3,030 (and include Columbia, Costa Rica, Egypt, Peru, South Africa and Thailand); “upper middle income countries” had a per capita GNP of between $3,031-$9,360 (and include Brazil, Chile, Malaysia, Mexico and Trinidad & Tobago); and “high income countries” had a per capita GNP of more than $9,360 (and include Slovenia). In addition, the DAC list has two categories for “countries and territories in transition,” which include “central and Eastern European countries,” such as Poland, Romania and Russia, on the one hand, and “more advanced developing countries and territories,” such as Hong Kong, Israel, Korea and Singapore, on the other. See The DAC List of Aid Recipients as of 1 January 2001, at http://www.oecd.org/htm/M00024000/M00024666.htm (last visited Dec. 11, 2002).

periods before certain WTO obligations apply to “developing countries.” Once these transition periods expire, however, developing countries are to be treated the same as all other WTO members, regardless of their development status. Similarly, the Agreement on Subsidies and Countervailing Measures and the Agreement on Safeguards contain provisions pursuant to which higher import duties may not be imposed against “developing country” imports unless these imports reach a higher *de minimis* threshold.

The WTO Dispute Settlement Understanding also includes a number of provisions that grant differential treatment to “developing country” members. For example, Article 8 of the DSU provides that a WTO panel shall “include at least one panellist from a developing country Member” when a dispute is between developing and developed country members and the developing country member so requests. However, these provisions are of rather limited scope and many of them are merely declarative and not obligatory (using language such as “should”). Since special and differential provisions in favour of developing countries are of limited scope, they have been rarely invoked in WTO cases, and where they have been invoked, they have been of little relevance. The Doha Declaration instructs WTO members to review all “S&D” provisions with a view to strengthening them, although whether or not they will be strengthened significantly remains a contentious and open question. India raised the issue of special and differential treatment of WTO remedies in the WTO Committee on Trade and Development, but the Committee directed the matter to the DSU review process, to which we will turn in Part III.

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78 See Article 65.2 of TRIPS, Article 5.2 of TRIMS. See also Article 27 of the SCM Agreement.
79 See Article 27.10 of the SCM Agreement and Article 9 of the Safeguards Agreement. Article 15 of the Agreement on Antidumping simply provides that “special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement.” The agreement leaves it to WTO members’ discretion as to how they will do so.
80 See Victor Mosoti, *Does Africa Need the WTO Dispute Settlement System?*, available at: http://www.cid.harvard.edu/cidtrade/Papers/mosoti.pdf. Mosoti was the first sub-Saharan African to serve as an intern in the Appellate Body division of the WTO secretariat.
82 See Delich, *Developing Countries and the WTO*, supra note 82, at 73.
84 E-mail from Geneva insider, Dec. 16, 2002 (concerning delegates’ reports following a submission from India). See Communication from India, *Special and Differential Treatment Provisions*, TN/CTD/W/6 (June 17, 2002).
3. PART II: THREE DEVELOPING COUNTRY CHALLENGES FOR PARTICIPATING IN THE WTO’S DISPUTE SETTLEMENT SYSTEM, THREE STRATEGIES FOR ADAPTATION

With the creation of the WTO, an area of international law may have become more like law as we commonly perceive it. Yet, it is not the neutral technocratic process some of its proponents idealize it to be. Whatever be one’s perspective on trade liberalization and its enforcement, developing countries and developing country constituents clearly are at a disadvantage before the WTO’s current dispute settlement system. If the United States and EC have dozens of well-trained governmental lawyers and still are dependent on assistance from private firms and trade associations, what does this bode for developing country participation in the system? Those who support the creation of international trading rights need be cognizant of how they are deployed—that is, of the law-in-action.

Yet, forsaking such law will not rid the world of systemic biases either. As always, the choice is among imperfect alternatives. A world without a legalized dispute settlement system for trade conflicts still is beset by power imbalances. Critics of a legalized trade dispute settlement system only need recall how the United States effectively used Section 301 of the 1974 U.S. Trade Act, as well as other means, to unilaterally pressure developing countries under the less legalized GATT system. WTO law can provide leverage to less powerful countries to ward off the threats of the more powerful. The key issue is not whether to eliminate the WTO’s legalized system, but rather, how developing countries should adapt to the system, on the one hand, and how the system’s rules could be modified so as to reduce structural biases within it, on the other.

Outside DSU review itself, developing countries face three primary challenges if they are to more meaningfully participate in the WTO dispute settlement system. These challenges are: (i) lack of legal expertise in WTO law and the capacity to organize information concerning trade barriers and opportunities to challenge them; (ii) lack of financial resources, including for the hiring of outside legal counsel, to effectively use the WTO legal system; and (iii) fear of political and economic pressure from the United States and EC, undermining their ability to bring WTO claims. Legal scholars need to work with international institutions to assist developing countries in developing new mechanisms that can offset current structural biases under the WTO’s legalized system. This section explores three strategies that do not involve a modification of WTO law that could be considered for responding to these three challenges. A fourth challenge, that of the current structure of remedies under the DSU, is addressed in Part III.

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85 The phrase imperfect alternatives is used by Neil Komesar in his book Imperfect Alternatives: Choosing Institutions in Law, Economics and Public Policy (1994) (a book calling for assessment of policy in terms of its likely handling by alternative institutions–be they courts, legislatures or markets–in which different parties will be better, or less well, represented). As Komesar notes, all institutions are imperfect. The key issue is which alternative is relatively less imperfect. Given systemic biases of the WTO judicial system toward the wealthy and politically connected, one obvious alternative is to curtail cross-border trading rights, resulting in more closed economies throughout the world. Such curtailment, however, would arguably reduce aggregate national welfare in developing as well as developed countries. It also would not eliminate coercive political and economic pressures, but rather could exacerbate them.
3.1 The Need for Internal Reform: Bureaucratic Specialization, Inter-agency Coordination, and Public-Private Collaboration to Enhance Knowledge and Capacity

In order for a WTO member successfully to use the WTO system, it must develop cost-effective mechanisms to perceive injuries to its trading prospects, identify who is responsible and mobilize resources to bring a legal claim or negotiate a settlement. In other words, a WTO member’s participation in the system will be, in part, a function of its ability to process knowledge of trade injuries and their relation to WTO rights. Hiring internal lawyers to defend WTO claims is of little use if developing countries lack cost-effective mechanisms to identify and prioritize claims in the first place. Similarly, where developing countries become aware of actionable injuries, their awareness will not be transformed into a legal claim if, based on experience, they lack confidence that a claim is worth pursuing given high litigation costs and scant remedies.

The United States and EC have developed informal and formal legal mechanisms to identify foreign trade barriers, to prioritize them according to their impact, and to mobilize resources for WTO complaints. They have mobilized resources through interagency coordination and networking with the private sector. Some developing countries also have adapted to the WTO system by creating specialized trade bureaucracies, coordinating interagency trade policy processes in home capitals, and maintaining specialized trade units in Geneva. Some of them also have hired and trained lawyers to specialize in WTO law and developed closer relations on trade matters with the private export sector.

Nonetheless, in contrast to the situation in the United States and EC, most developing countries only have one or a handful of lawyers to address WTO matters, few or no lawyers in the private sector knowledgeable of WTO law, and few or no firms or trade associations having regular contact with state officials on trade matters. Moreover, WTO law—as opposed to traditional “public international law”—is not even taught in many countries, so that they are dependent on foreign education to develop local talent. Even worse, most developing country officials must work in a foreign language in WTO judicial proceedings within this

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86 In 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).

87 A leading example is Brazil. Presentation of Brazil’s legal representative at ICTSD’s seminar on WTO dispute settlement, Feb. 7, 2003 (Geneva) (concerning the “three pillars” of Brazil’s Geneva office, a special WTO legal division in its capital, and organized relations with its private sector). Formerly, most developing countries had a single diplomatic mission for UN and WTO members, with UN representation being of greater hierarchical importance within the foreign affairs ministry. This organizational situation remains in place for many developing countries, although many others have adapted through creating a separate ambassador for WTO matters, a separate diplomatic mission, or a separate WTO unit within the embassy.


89 To give just one example, the Philippines had only one lawyer working on WTO matters, with no assistance from the Philippine private bar. Interview with Philippine official, in Geneva, Switz. (Sept. 2002).

90 Confirmed in interviews with developing country representatives in Geneva, Switz. (Sept. 2002).
“Anglophone organization.” Thais, Malays and Indonesians, to give just three examples, are asked to master the legal nuances of multiple three-hundred page WTO judicial decisions, often with limited legal training, and to do so in a foreign tongue. As noted earlier, in many cases, the cost of developing internal legal expertise is not cost-effective, so that the Doha Round’s emphasis on “capacity building” may offer only a hollow hope.

Yet, developing countries need to start somewhere. One mechanism that many developing countries can develop further is to organize more routinised relations with the private sector to identify trade barriers and investigate and prioritise them, just as the United States and Europe have done. Developing country officials could aim to foster the development of a reflex within the private sector to work with public officials when exporters face a trade barrier that raises WTO issues, assisting public officials in investigating the claim and building a factual and legal case. Developing countries then would have better access to the information necessary to enforce their rights (and, ultimately, the interests of their constituents) through the WTO dispute settlement system and through settlement in its shadow.

Developing countries also could reorganize and coordinate their ministries to target more resources at opening foreign markets, as did the EC in the mid-1990s following the WTO’s creation. For example, many developing countries require the approval of the attorney general’s office in order to file a third party submission in a WTO case, which can involve a complex exchange of formal letters between multiple ministries. In at least one case, by the time the WTO representative in Geneva received the requisite government approval, the WTO deadline for submissions had passed.

In addition, developing countries could demand more technical assistance from international development institutions regarding opportunities for them to exercise their WTO rights, instead of advice targeted on implementation of their TRIPS, TRIMS, GATS and other WTO obligations. Developing countries could request reports on trade barriers, assessed on a

91 Although English, French and Spanish are the three official languages of the WTO, English predominates. French and Spanish-speaking countries are at a disadvantage linguistically. Interview with the representative of an international organization that works with least developed organizations from Francophone Africa, in Geneva, Switz. (June 20, 2002).

92 E-mail from Victor Mosoti, who had provided assistance in such a case, Jan. 21, 2003 (“In most developing countries, particularly those in Africa, all government litigation has to be authorized or undertaken by the offices of the Attorney General (this is functionally more analogous to the US Solicitor General than the Attorney General). Without such clearance, no proceedings can commence. Typically therefore there has to be a complex exchange of letters (literally) between the Ministry of Trade (Geneva office sends this to the Minister in Capital who then endorses and sends to), the Attorney General’s office, (that then has to liaise with) the Ministry of Foreign Affairs (for consistency with foreign policy).... The result is that there is extreme delay in delivering instructions to Geneva to proceed, which often is after the deadline.”).

93 For an overview of trade technical assistance, see Michel Kostecki, Technical Assistance Services in Trade-Policy, ICTSD Resource Paper No. 2 (Nov. 2001). At Doha, developing nations won a significant commitment for increased technical assistance. See Director-General Mike Moore’s comments at a March 2002 pledging conference convened in accordance with the creation of a Doha Development Agenda Global Trust Fund by the General Council in December 2001, at http://www.wto.org/english/news_e/spmm_e/spmm79_e.htm (last viewed on Dec. 23, 2002). By mid-2002, the WTO’s monthly spending on technical assistance programs rose by 50%, with no signs of slowing down. See WTO Secretariat, High Level Briefing/Meeting on Technical Cooperation and Capacity Building for Capital-Based Senior Officials, WT/COMTD/43 (Sept. 20, 2002) (Statement by Paul-Henri Ravier, Deputy-Director General, WTO). GATS is the WTO General Agreement on Trade in Services.
sectoral basis, that their exporters face. They also could request assistance in organizing a data base or other informational system to identify and prioritize trade barriers.\textsuperscript{94} They could seek financing to help them pool their resources by operating through regional centres involving networks of public-private representatives, private firms and trade associations, legal academics, and international consultants to help identify trade barriers and coordinate actions. 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.”\textsuperscript{95} 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.

Ultimately, if developing countries are to deploy WTO law to their advantage, they will need to maintain routine on-going procedures for gathering, processing and prioritizing information from foreign embassies, the private sector and international trade consultants regarding foreign trade barriers.\textsuperscript{96} By working more consistently with the private sector, developing country officials can foster the development of reflexes in the private sector to view the WTO as an opportunity to ensure market access, thereby more effectively using the WTO system to their advantage. Building requisite developing country public-private partnerships will take time. Yet, it is an essential task if the WTO dispute settlement system is to work for them.

\textbf{3.2 The Need for Cost-Effective Legal Assistance: Role of the Advisory Centre on WTO Law}

Second, developing countries need external cost-effective legal assistance to help identify, pursue and defend their WTO rights. In theory, the WTO secretariat could assume the role of a global public prosecutor empowered to challenge WTO member violations of their WTO obligations. The EC has adopted such an internal system through empowering the European Commission to challenge European member state violations of their obligations under the Treaty Establishing the European Community, with the result that member states almost never file claims against each other.\textsuperscript{97} Developing an analogous system within the WTO

\textsuperscript{94} UNCTAD and the World Bank jointly developed a software program named SMART (Software for Market Analysis and Restrictions on Trade) as a tool to assist developing countries during the Uruguay Round negotiations. The software permits countries to run a simulation of the trade effects of trade barriers so as to inform their negotiating strategies. The software has been installed in a large number of developing countries. It has been incorporated into UNCTAD’s TRAINS system (Trade Analysis and Information System). See http://r0.unctad.org/trains/. Cf. Shaffer, \textit{Defending Interests\textsuperscript{,} supra note 40 (concerning the EC’s market access database)}.

\textsuperscript{95} Hoekman & Kostecki, \textit{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”).

\textsuperscript{96} The EC, for example, hired consultants to identify and report on key trade barriers, which reports resulted in a number of successful WTO cases. See Shaffer, \textit{Defending Interests\textsuperscript{,} supra note 40.

\textsuperscript{97} As a result of the Commission’s empowerment, European governments rarely have brought claims against each other under EC law, but rather have relied on the Commission to bring these claims. From 1960-1999, member states brought only 4 infringement cases to the European Court of Justice, whereas the European
would greatly benefit poorer countries, since they would no longer have to mobilize litigation resources on their own. However, the WTO’s public legitimacy appears too fragile for a section of the WTO’s secretariat to initiate complaints against WTO member governments. The WTO is already an easy target for anti-globalisation protestors in the United States and Europe that wish to limit developing country imports on social policy grounds. Were the WTO secretariat itself to bring cases against the United States and Europe, the protestors could find powerful allies within U.S. and European governments, potentially triggering a greater nationalist backlash against the WTO and its legal system. In consequence, it appears that developing countries’ best alternative, at least in the foreseeable future, may be to work through a legal services organization that is autonomous of the WTO.

Fortunately for developing countries, they now have the opportunity to obtain legal assistance on a more cost-effective basis through an international legal services organization— the new Advisory Centre on WTO Law in Geneva. The Agreement establishing the Advisory Centre on WTO Law was signed by twenty-nine countries on December 1, 1999 at the WTO Ministerial Meeting in Seattle, Washington, and it entered into force on July 15, 2001. By the fall of 2002, the Centre consisted of seven lawyers, under the executive directorship of Frieder Roessler, former head of the legal affairs division of the GATT secretariat.

The Advisory Centre is designed to counsel and represent developing countries so that they may defend their WTO rights at rates that vary depending on the country’s membership status, share of world trade and per capita income. Through participating in multiple WTO disputes each year, the Advisory Centre will gain significant WTO expertise that individual developing countries could not acquire cost-effectively on their own. Already by June 2002, the Advisory Centre had represented four developing countries in six WTO matters. As a repeat player in WTO litigation, the Advisory Centre can provide services to developing countries in a manner somewhat analogous to the way in which the European Commission’s
legal service division assists individual EC member states in WTO litigation, although the Centre will operate in a more ad hoc manner. The Advisory Centre will develop a reservoir of WTO expertise into which developing countries can tap, as needed. Similarly, by pooling their resources, European member states have enhanced their voice and collective knowledge of WTO law in a cost-effective manner.

Developing countries may use the Advisory Centre in different ways, depending on their level of development and the frequency with which they participate in WTO disputes. Larger, more active countries, such as India, may use the Centre to develop their own national expertise in WTO dispute settlement. For example, the Centre will provide internship possibilities and organize periodic seminars for developing country officials.

Smaller countries that rarely engage in WTO disputes may find it less cost-effective to develop their own legal expertise and thus almost solely rely on the Centre, as did Peru in its recent case against the EC concerning the marketing of sardines.

Nonetheless, even larger developing countries with sophisticated trade bureaucracies may find that the Advisory Centre provides a necessary complement to their domestic resources. Just as the EC has sometimes farmed out cases to private law firms, and just as the USTR and the EC have collaborated with private counsel hired by private firms, so the Centre can be of assistance to even the most sophisticated developing country trade administration. Additionally, private enterprises may pay all or a percentage of the Centre’s fees, or hire a private law firm that can assist developing country trade officials and the Centre’s lawyers in gathering facts and formulating legal arguments in a time-sensitive manner.

The Advisory Centre also could assist groups of like-minded countries in preparing third party submissions in WTO disputes to defend their systemic interests. In light of the weakness of the current WTO political system and the resulting importance of individual WTO cases for the interpretation of WTO law, developing countries could organize on a more consistent basis to present their views as third parties. As noted earlier, only the United States and EC currently participate as third parties in most WTO cases, especially before the Appellate Body where participation has the greatest systemic impact. Just as European countries have pooled their resources over trade matters through the European Commission,

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102 Most WTO expertise in Europe now resides within the European Commission, and not in individual European member state administrations. See Shaffer, *Defending Interests*, supra note 40.

103 Except for least developed countries, there is a cost to joining the Centre, based on a country’s share of world trade and per capita income. See *Report on Operations*, supra note 100, at 8. As a result, a country may wait to join the Centre until it believes that its export sectors can benefit meaningfully from WTO law.


106 However, because the interests of private firms are not always symmetrical with the national interest, it is important that national authorities, working with the Centre, channel these resources toward national, as well as private, ends. Of course, some developing country governments may retain private counsel themselves (instead of the Advisory Centre) in light of their determination of the case’s relative importance, private counsel’s reputation and cost-effectiveness, and the country’s past experience.
developing countries could pool their resources through the Advisory Centre, although in a less formal manner, in order to participate more effectively in WTO cases as third parties. By preparing joint third party submissions, the Advisory Centre could place dispute settlement panels and the Appellate Body on notice of the views of developing countries in individual cases.

In addition, developing countries may wish to seek funding for creating legal support centres in Washington and Brussels to complement the Advisory Centre. Most of the action in terms of fighting for market access takes place before U.S. and EC administrative bodies, in particular in antidumping, subsidy and safeguard cases. These cases can be extremely expensive, so expensive that many developing country enterprises simply cease exporting to the United States or Europe upon the initiation of an antidumping or other complaint. WTO cases increasingly involve challenges of these U.S. and EC administrative procedures. Countries thus must develop a favourable factual and legal record in the U.S. and EC domestic proceeding. The WTO Appellate Body has been wary of finding U.S. and European laws themselves in violation of WTO obligations, preferring to hold against U.S. and European administrative practices. In consequence, parties need to ensure that U.S. and European administrative bodies take account of WTO jurisprudence in applying domestic law. Although WTO law does not have direct effect in the United States and Europe, domestic administrative bodies should take account of WTO law in interpreting the relevant domestic statutes on the ground that these statutes were intended to implement WTO law. Developing analogous legal centres in Washington and Brussels to provide developing countries with subsidized legal support may be a great challenge, but that does not detract from its need.

Developing countries also could pool their resources through developing regional WTO centres that can develop WTO expertise in a more cost-effective manner. These centres, for example, could assist in defining trade priorities, coordinating trade negotiating strategies, building public-private networks, identifying trade barriers, and (potentially) providing legal support in WTO litigation. As Victor Mosoti writes, a Trade Law Centre for Southern Africa

107 From the WTO’s formation through September 2001, WTO members filed eighteen complaints against the United States in respect of its antidumping and countervailing duty laws and six additional complaints against U.S. application of its import safeguards law. During the first nine months of 2001 alone, WTO members filed seven new requests for consultations and panel formations in respect of U.S. antidumping and countervailing duty laws and measures. In a three week period at the end of the summer of 2001, WTO panels were formed to hear challenges on four separate challenges against U.S. import protection laws and proceedings. See, e.g., U.S. Peppered with WTO Complaints, Criticizes Prior Rulings, 19 Inside U.S. Trade 6 (Aug. 24, 2001).

108 See, e.g., Report of the Appellate Body, United States - Countervailing Measures Concerning Certain Products from the European Communities, WT/DS212/AB/R (Nov. 22, 2002), para. 161 (reversing the panel’s decision that certain provisions of U.S. countervailing duty law did not conform with the United States’ obligations under the SCM Agreement, but upholding the panel’s decision that the U.S. administrative determinations were made in a manner “inconsistent” with the SCM Agreement, and “requesting” the United States to bring its “administrative practice... into conformity with its [WTO] obligations.”).

109 The U.S. Supreme Court has maintained that “an Act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains.” Murray v Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 188 (1804) (Marshall C.J.) (known as the “Charming Betsy” rule). The European Court of Justice applies a similar rule of interpretation in regards to the relationship between EC law and WTO agreements. See Case C-53/96, Hermes Int’l v FHT Mktg. Choice BV, 1998 ECR I-3603.
was recently created to support the governments of southern Africa. Similarly, African countries are exploring whether to create a regional centre located in Cairo, Egypt. If desired, these regional centres, in turn, could assist the Advisory Centre in WTO litigation. States within regions face diverse challenges and their national interests can conflict, so that the development of regional centres also faces significant challenges. Nonetheless, taking from the European example, countries increasingly realize the benefits to be gained from coordinating and pooling their resources.

Finally, the Advisory Centre and developing countries could work with academics that specialize in WTO law on a consultancy or pro bono basis. Some U.S. legal scholars, for example, already have worked on amicus curiae briefs in WTO cases, although they so far have sided with the great powers against developing country complainants, as in the U.S.-shrimp and EC-sardines cases. Many legal academics, however, might welcome the possibility of assisting developing countries on a WTO case. Not only would they provide a needed public service, but their own scholarship would benefit. They would gain inside knowledge into how the WTO process works in practice. They could write more informed, contextualised analyses of WTO jurisprudence. National and regional trade law advisory centres on trade law could affiliate with universities, as has the Trade Law Centre for Southern Africa.

3.3 Countering U.S. and EC Extra-Legal Bilateral Pressure: The Need for North-South NGO-Government Alliances

Developing countries always will face extra-legal pressure from powerful countries, undermining the goal of objective trade dispute resolution through law. The powerful will exploit power imbalances where they can, however they may rhetorically rationalize their actions. Many times, there is little that a small developing country can do to counter U.S. or EC threats to withdraw GSP benefits or food or other aid were the developing country to challenge a U.S. or European trade measure. Nonetheless, developing countries can adopt more-effective strategies to attempt to constrain such extra-legal coercion. As some recent cases demonstrate, developing countries can forge alliances with constituencies within the global powers. By harnessing domestic political pressure and legal expertise within the United States and Europe, developing countries can curtail, at least somewhat, great power coercion and otherwise offset some of the resource imbalances that they face.

110 See Mosoti, Does Africa Need the WTO Dispute Settlement System?, supra note 81.
111 Id.
112 See, e.g., Paul-Henri Bischoff, How Far, Where To? Regionalism, the Southern African Development Community and Decision-Making into the Millennium in Globalization and Emerging Trends in African States’ Foreign Policy-Making Process 283, 299 (Korwa Gombe Adar & Rok Ajulu eds., 2002) (“However, the durability of national interests and intensification of transnational influences have not helped the SADC [Southern African Development Community] as a model of regional organization.”).
113 See e.g. Thomas Catan, Mercosur seeks to build ties with Mexico, Financial Times, at 2 (July 6, 2002).
114 See Mosoti, Does Africa Need the WTO Dispute Settlement System?, supra note 81.
An example of a relatively successful north-south alliance is that between developing countries and northern-based non-governmental organizations (NGOs), such as Doctors Without Borders, concerning the recognition, scope and enforcement of pharmaceutical patent rights. Together, they helped counter U.S. pressure on developing countries to enforce U.S. pharmaceutical company patents under a strict interpretation of the TRIPS Agreement. First, the United States withdrew its threat of initiating a WTO claim against South Africa in response to pressures from AIDS activists on Vice President Gore’s presidential campaign. Second, in June 2001, the Bush administration withdrew the United States’ claim against Brazil’s compulsory licensing provisions under Brazil’s patent law in the context of widespread protest against the U.S. action from advocacy groups who maintained that the U.S. government was placing corporate interests above life-and-death medical concerns. This NGO pressure was complemented by prodding from international health organizations.

Third, USTR Robert Zoellick abandoned the U.S. pharmaceutical industry with little consultation in agreeing to the “Declaration on the TRIPS Agreement and Public Health” at Doha. Even though northern activists and developing countries would like to go further in modifying and officially interpreting the TRIPS Agreement, they have countered the United States’ aggressive behaviour and shifted the terms of the debate over the protection of pharmaceutical patents.

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115 See Steven Meyers, South Africa and U.S. End Dispute Over Drugs, N.Y. Times, Sept. 18, 1999, at A8 (stating that 300 protesters gathered in Philadelphia in June 1999 to chant “Gore’s greed kills!”); and Doug Ireland, AIDS Drugs for Africa, Nation, Oct. 4, 1999, at 5 (noting ACT UP demonstrators’ chants of “Gore’s greed kills” to pressure the administration to change its policies toward South Africa). Vice-President Gore was co-chairman of the U.S.-South Africa Bi-national Commission on pharmaceutical issues. Eventually, the U.S. Administration capitulated. See Gary Yerkey, President Orders Easing of IPR Policy For Sub-Saharan Africa to Help Fight AIDS, 17 Int’l Trade Rep. (BNA) 792 (May 18, 2000).

116 See, e.g., U.S., Brazil End WTO Case on Patents, Split on Bilateral Process, 19 Inside U.S. Trade 1, 2 (June 29, 2001) (“Inform ed sources said t he U. S. backpeda ling from the WTO panel, which it had requested in February, reflected an unwillingness on the part of U.S. Trade Representative Robert Zoellick to give opponents of trade liberalization a red-hot issue that appeared to give credence to the idea of the WTO interfering with poor countries’ health policies.”). Doctors Without Borders declared that Brazil’s patent policy was key to the success of the Brazil’s strategy to offer universal access to HIV/AIDS medication in Brazil. Brazil’s health program includes free distribution of antiretroviral drugs produced in Brazil. This program has allegedly reduced AIDS deaths by 50 percent since it was introduced and saved the government an estimated $422 million in hospitalization and medical care costs. See Daniel Prazin, US Responds to Criticisms of Brazilian Patent Law Complaint, 18 Int’l Trade Rep. (BNA) 238 (February 8, 2001). Oxfam, a British NGO, backed Brazil’s efforts in a policy paper that maintained that the U.S. complaint was an assault on public health. See Drug Companies vs. Brazil: The Threat to Public Health, at: http://www.oxfam.org.uk/policy/papers/brazilletc/ctcbraz.htm (last visited Sept. 25, 2002).

117 For example, 52 countries of a 53 member United Nations Commission endorsed Brazil’s AIDS policy and backed a resolution sponsored by Brazil that called on all states to promote access to AIDS drugs. See UN Rights Body Backs Brazil on AIDS Drugs, News24.com, Apr. 24, 2001, available at http://www.news24.com/contentDisplay/level4Article/0,1113,2-1134_1014970,00.html (Last visited Sept. 29, 2002).

118 E-mail from Washington insider (June 27, 2002) (concerning the lack of consultation). See also Gary Yerkey & Daniel Prazin, Agreement on TRIPS/Public Health Reached at WTO Ministerial in Doha, 18 Int’l Trade Rep. (BNA) 1817 (Nov. 15, 2001) (noting that “representatives with the pharmaceutical industry were less than enthusiastic,” and a Swiss official, also representing pharmaceutical interests, “expressed fury at being excluded”). See generally WTO Secretariat, Declaration on the TRIPS Agreement and Public Health, WT/MIN(01)/DEC/2 (Nov. 20, 2001) (recognizing a number of “flexibilities” in the TRIPS Agreement).
Similarly, developing countries can work with northern consumer groups in bringing WTO claims. In the case *EC-Trade Description for Sardines*, the UK Consumers’ Association, the largest consumers association in Europe and the second largest in the world, worked with a UK law firm, Clyde & Co, on a *pro bono* basis, to prepare an *amicus curiae* brief in support of Peru’s submissions to the WTO panel. In this case, Peru challenged an EC regulation that would not permit Peruvian fish to be sold as Peruvian sardines within the EC, even though they could be sold throughout the world as sardines in accordance with an international standard agreed under the auspices of the Codex Alimentarius Commission. The ten-page brief of the Consumers’ Association’s addressed how the EC regulation “clearly acts against the economic and information interests of Europe’s consumers,” and rather constitutes “base protectionism in favour of a particular industry within the EU,” and, in particular, the Spanish fishing industry. Thanks to the Consumers’ Association and its law firm, Peru and the Advisory Centre received free legal research and counsel on such complex issues as the history and application of relevant EC regulations and of Codex Alimentarius standard-setting procedures, framed in a way to assist Peru prevail in its claim.

Moreover, the Advisory Centre attached the Consumers’ Association amicus brief to Peru’s panel submission and quoted it with approval. The brief clearly had an impact on the WTO panel, which cited it concerning European consumer views. When the EC challenged the panel’s use of the Consumers’ Association brief during interim review, the panel confirmed that it justifiably considered the brief “in determining whether the European consumers associate the term ‘sardines’ exclusively with *Sardina pilchardus,*” the fish species swimming in European waters. The panel then found that European consumers did not so exclusively associate sardines, in contradiction of the EC’s position, so that there was no reason that the Peruvian species could not be sold as sardines in the EC market.

The new Advisory Centre on WTO Law can assist in the forging of such north-south NGO-government alliances in specific WTO disputes. Since the Centre’s lawyers are repeat players in WTO litigation, and since they are based in Geneva, the home of the WTO, they more easily can develop relations with northern groups to provide assistance in specific trade matters. For example, northern NGOs more likely will be aware of how they can assist in an individual WTO dispute in which the Centre is involved because they will contact the Centre’s web site more frequently than they would that of an individual developing country. In the Peruvian case, the Advisory Centre had posted Peru’s submissions to the dispute settlement panel on the Centre’s web site pursuant to the Centre’s policy on transparency.

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120 For example, Peru referred to the brief in its submission to the panel to point out how a “wide range of tuna or bonito species can be marketed in the Community under a common standards regime,” rendering it “difficult to understand why sardines should be marked out for a particularly restrictive regulatory regime.” Second Submission of Peru, *EC–Trade Description of Sardines*, WT/DS231 (Jan. 11, 2002), para. 71, available at http://www.acwl.ch/pdf/SecondSubmitPeru.pdf (last visited Sept. 29, 2002).

121 See Report of the Panel, *EC–Trade Description of Sardines*, WT/DS231/R (May 29, 2002), paras. 6.13-15, 7.131-132. The panel refused to review letters from other EC consumer organizations that the EC submitted during the interim review stage, on the grounds that such stage was too late in the process to introduce new evidence. See id. at 6.16.

122 Interview with member of the Advisory Centre on WTO law, in Geneva, Switz. (June 18, 2002). See the Centre’s web site at www.acwl.ch (last visited Dec. 13, 2002).
Some developing country NGOs, such as the Indian NGO Consumer Unity & Trust Society (CUTS), likewise are taking the initiative of trying to forge such north-south alliances.\textsuperscript{123} As happened for Peru in the sardines case, these alliances can be of unexpected and serendipitous benefit.\textsuperscript{124}

\textsuperscript{123} Confirmed in e-mail from CUTS representative, Sept. 19, 2002.

\textsuperscript{124} Largely serendipitously, the Advisory Centre’s director, Mr Roessler, met a senior member of the UK Consumers’ Association at a conference in London concerning international trade law. Following the conference, the Consumers’ Association agreed to support Peru’s submissions in the EC-Sardines case. Telephone interview with member of the UK Consumer’s Association (Sept. 10, 2002).
4. PART III: A PROACTIVE DEVELOPING COUNTRY AGENDA FOR DSU REVIEW, MODIFYING WTO REMEDIES FOR DEVELOPING COUNTRIES

4.1 Biases and Perverse Incentives under the Current WTO Remedies System

Developing countries face a fourth major challenge if they are to effectively use the WTO dispute settlement system – that of WTO remedies. As the leading trade law scholar Robert Hudec writes, “Larger and more powerful countries – those accustomed to living by rules slanted in their favour – are likely to aim for a somewhat less balanced result. For them, the optimal remedy package will be one that works well against others but not so well against themselves. This tendency also has to be considered in explaining why WTO remedies are as they are.”

Under the current WTO system, where a WTO member breaches its WTO obligations and refuses to comply with a WTO ruling, the parties to the dispute must attempt to negotiate “mutually acceptable compensation.” Payment of compensation, however, is not mandatory and, not surprisingly, has rarely occurred. Rather, under Article 22.2 of the DSU, if the parties cannot agree on the amount of compensation, the claimant may obtain authorization from the WTO Dispute Settlement Body to suspend the claimant’s WTO obligations toward the offending member to an extent “equivalent to the level of the nullification or impairment” resulting from the violation. The United States has twice so retaliated against the EC, in

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126 Compensation was paid by Japan in exchange for an extension of the implementation period in the Japan-Alcoholic Beverages case, as well as by the United States in the U.S.-Copyright case. In the latter case, there was an arbitration under DSU Art. 25 to determine the level of compensation. The United States has paid this compensation which is being distributed to EC collecting societies. See Award of the Arbitrators on E.C. Complaint concerning United States - Section 110(5) of the U.S. Copyright Act, Recourse to Arbitration Under Article 25 of the DSU, WT/DS160/ARB25/1 (Nov. 9, 2001); and Communication from Japan, Mutually Acceptable Solutions on Modalities for Implementation, on U.S. Complaint concerning Japan - Taxes on Alcoholic Beverages, WT/DS8/19 (Jan. 12, 1998).

The reason that parties generally have not agreed to a remedy of compensatory market access are two-fold. First, for the losing party, the compensatory concessions likely are to be greater in effect than the amount of withheld concessions because they must be made on a most-favored-nation basis. Trade officials will face domestic political pressure not to make these concessions, but rather retain them as a bargaining chip for a future negotiating round. Second, at least where the United States is a complainant, there is often a large private party behind the WTO claim which has helped finance it. This party places pressure on the USTR, including through congressional representatives, not to agree to a settlement pursuant to which other enterprises in other sectors would benefit from compensatory market access, while the original trade barrier would remain. Scott Anderson, who currently heads the trade law practice at the Geneva office of the U.S. firm Sidley & Austin, and who was formerly a litigator within USTR, made this latter point at a meeting on DSU review in Geneva, Sept 12, 2002. In the U.S.-Copyright case, compensation was channeled to the financially-affected EC private parties, so that the remedy worked.

each case raising tariffs against an array of EC products.\textsuperscript{128} Ironically, the legal consequence of trade discrimination can be an authorized escalation of it.

Current WTO rules and practices on remedies are structurally biased in favour of countries with large markets, such as the United States and EC, in three ways. First, the United States and EC normally can press developing countries to comply with WTO rules and rulings because access to their large markets is essential to developing country exporters. Developing countries wield no such clout. Curtailing access to developing country markets has relatively little impact on large U.S. commercial interests that export throughout the world. Moreover, as the former Indian Ambassador to the WTO, Lal Das, states, “if the erring country is economically and politically strong, any retaliatory action against it is likely to have political and economic implications which a weak country would like to avoid.”\textsuperscript{129} As a consequence, it is less likely that a developing country can use the threat of sanctions to press the United States and EC to modify discriminatory regulations where there is U.S. or EC domestic political pressure to retain them.\textsuperscript{130}

Second, WTO panels and the Appellate Body typically have worded remedies as general “recommendations,” and have typically not even “suggest[ed] ways in which the Member could implement the recommendations,” as permitted under Article 19 of the DSU. The vagueness of these judicial decisions has asymmetric effects. They permit large developed countries to evade compliance, when on the losing side, and to use their market leverage to press smaller countries to comply, when prevailing. As Hudec writes: “As a general proposition, a system of ambiguous legal remedies tends to offer unequal pressures for enforcement for large and small countries. So long as larger governments find ambiguous remedial orders advantageous, and so long as panels remain the same sort of ad hoc bodies they have always been . . . , it can be expected that remedial orders will tend to lack specificity.”\textsuperscript{131} The WTO Appellate Body and WTO dispute settlement panels have used


\textsuperscript{129} See Bhagirath Lal Das, \textit{The WTO Agreements: Deficiencies, Imbalances and Required Changes} 14 (Third World Network 1998) [hereinafter, Lal Das, \textit{WTO Deficiencies}].

\textsuperscript{130} Moreover, U.S. and EC imports may be of greater strategic importance to developing country economies so that raising retaliatory trade barriers could more significantly harm their economies. As Lal Das notes, in respect of developing country sanctions, “a retaliatory additional duty or quantitative restriction always involves an economic cost, as the import of goods in question gets more costly in this manner.” Id.

\textsuperscript{131} See Robert Hudec, \textit{Broadening the Scope of Remedies in WTO Dispute Settlement}, supra note 126, at 382. Scholars often note Ecuador’s success in receiving authorization to retaliate against the EC for its failure to comply with the Appellate Body’s ruling in the bananas case. \textit{See Report of the Panel, European Communities - Regime for the Importation, Sale and Distribution of Bananas - Recourse to Article 21.5 by Ecuador, WT/DS27/RW/ECU} (Apr. 12, 1999); and Raj Bhala, \textit{The Bananas War}, 31 McGeorge L.R. 839, 949 n.234 (2000). However, although Ecuador may have had some legal success, it was unable to translate this legal victory into effective pressure to induce the EC to comply. Rather, the United States played the primary role in the settlement of the bananas case in line with U.S. constituent interests, and in particular, that of the U.S. company Chiqualita. Interview with official from Ecuador in Geneva, Switz. (June 2002).
ambiguous holdings in order to facilitate powerful WTO members’ ability to comply. Generally, they have refrained from holding that U.S. legislation violates WTO law (which would require a reticent U.S. Congress to pass new legislation), but rather held that only U.S. administrative practices fail to so comply. Such exercises of “judicial restraint” may make life easier for some politicians in Washington, and may indeed result in relatively greater U.S. compliance in light of an intransigent U.S. Congress. Yet, these results certainly raise the costs and reduce the effectiveness of WTO litigation for developing countries, since the administrative application of U.S. law must be challenged on a case-by-case basis.

Third, and perhaps most perversely, the current system of remedies creates an incentive for the United States and EC to simply drag out a legal case for years, so that even when a panel eventually finds that they have violated their WTO obligations, they have successfully closed their market without incurring any consequence. The perversity of this incentive has been shown most starkly in the textile sector, where, even though the United States has lost a series of textile safeguards cases, such as those brought by Costa Rica and Pakistan, it nonetheless had closed its market from developing country imports for almost three years without any consequence. As Pakistan’s representative stated at a meeting of the Dispute Settlement Body after Pakistan won its legal case:

“A safeguard action may be imposed under the [Agreement on Textiles and Clothing (ATC)] for a period of up to three years. Under the best of circumstances, Pakistan’s invocation of its rights under the DSU will have shortened the period of application of the safeguard action on its cotton yarn exports by a few months.... By forcing Pakistan to obtain rulings... by the [Textile Monitoring Body (TMB)], a panel and the Appellate Body, the United States succeeded in maintaining an obviously illegal safeguard action for almost three years.... Pakistan’s experience in this case raises the question of whether the WTO dispute settlement procedures permit WTO Members exporting textiles and clothing to enforce their rights under the ATC.... The procedures to enforce WTO law were turned into a mechanism to escape WTO law.”

In this case, Pakistan was able to hire the new Advisory Centre on WTO Law to represent it, and thereby overcome some of the considerable challenges that Pakistan faced on account of its relative lack of internal legal expertise and financial capacity to pay external counsel. Yet, given the nature of WTO remedies, Pakistan’s victory was merely symbolic. Unless WTO

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133 In the case brought by Costa Rica, the illegal U.S. safeguard expired on March 27, 1997, just a little more than a month following the adoption of the Appellate Body report. See Report of the Appellate Body, United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear, WT/DS24/AB/R (Feb. 10, 1997) (complaint by Costa Rica). Cf. Julio Lacarte-Muro and Petina Gappah, Developing Countries and the WTO Legal and Dispute Settlement System: A View from the Bench, 4 J. Int’l Econ. L. 395, 401 (2001) (“The textile case involving Costa Rica and the United States provides a striking example of how an economically and politically weaker Member can successfully challenge a stronger Member’s trade measures and obtain relief.”). Of course, effectiveness should not be measured by legal formalism, but on law’s impact on party behavior.

remedies are strengthened, developing countries will have less incentive to participate in a legal system that is, in practice, slanted against them. For them, the WTO could be more about obligations and less about rights.

In domestic legal systems, the creation of rights often precedes the creation of remedies. Yet, so long as the WTO system operates in this manner, the gap between developing countries’ WTO “rights” and meaningful remedies could lead to frustration, thereby discouraging developing countries from participating in the WTO dispute settlement system. Experiences such as Pakistan’s can shape developing countries’ perceptions of the system as so ineffective that they do not allocate scarce resources to create mechanisms to identify, prioritise and challenge trade barriers in order to defend their trading interests. The great powers may not have self-consciously structured the WTO dispute settlement system in this way. However, given that the United States and EC pursue their perceptions of their commercial interests, it is no surprise that this is how the WTO system operates.

4.2 A Word of Caution before Addressing Changes in WTO Remedies

Nonetheless, before advocating major changes in WTO remedies, a word of caution is in order. The WTO legal system is an intergovernmental one that should not be compared simplistically to a national system, in particular as regards remedies. Politics matter in interstate relations. A legalized international trading system with strong remedies could arm nationalists, on the political left and right, with new arguments to attack the WTO system for challenging national “sovereignty,” thereby triggering greater antagonism toward trade liberalization, the WTO, and the WTO’s dispute settlement system. The issue of taxation played a central role in the United States’ declaration of independence from Great Britain in 1776. Conflicts over tariff policy exacerbated tensions between the north and south of the United States in the build up toward southern succession and the U.S. civil war of 1861. Empowering an international body such as the WTO to impose large monetary fines that must be paid out of a country’s treasury can incite passionate opposition. WTO law arguably provides for only limited remedies because governments, and in particular powerful governments, have not wanted WTO law to be that binding.

As in any contractual situation, one fear of weaker parties is that if legal procedures are effective and remedies substantial, then the stronger party may terminate the contract. Thus, there may be an optimal level of WTO remedies for weaker parties. On the one hand,

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136 Similarly, in the domestic law context, Miller and Sarat note how, “the gap between rights and remedies contributes to feelings of frustration and alienation which breed adversity between individuals and institutions.” Miller & Sarat, *Grievances, Claims and Disputes*, supra note 136, at 564.


138 Richard Hofstadter, *The American Political Tradition* 78 (1948) ("It was tariffs, not slavery, that first made the South militant.").
remedies should be stringent enough to ensure relatively better compliance by strong parties than the alternative of having no legal obligations. On the other hand, if the stronger party finds the remedies to be too punitive, it may leave the system, preferring a world order based on power relations. Developing country proponents of stronger WTO remedies in their favor will need to overcome severe political constraints. This essay identifies potential strategies to deploy. However, their success and their advisability remain open questions.

4.3 Potential Changes in WTO Remedies: Prospective and Retrospective Damages and Attorneys’ Fee Awards

This section sets forth a series of reforms on WTO remedies that WTO members could consider in order to offset the system’s current structural biases. Some of these remedies could apply to all WTO members and some could apply only in favour of developing countries (or a defined subset of them) when they prevail in claims against developed countries (or a defined subset of them). Section 4 sets forth a rationale for preferential remedies. Section 5 sets forth modalities pursuant to which they could be implemented so as to offset biases under the current system, as opposed to introducing new biases. Section 6 sets forth a potential negotiating strategy pursuant to which developing countries could trade off a reform of WTO remedies against U.S. and European demands for greater WTO transparency.

There are obvious tensions between the implementation of a fairer system of international dispute settlement and the real politque of international bargaining. On the one hand, the political feasibility of achieving most, if any, of these changes is admittedly slim, and I, for one, am pessimistic in light of the history of international trade negotiations. On the other hand, there are strong rationales for these changes that need to be put forward. A pragmatic examination of the eventual modalities of their implementation likewise is needed. Setting forth a counterfactual of how a fairer system of remedies could operate helps place the operation of the current system in clearer perspective.

In order to offset the structural imbalances underlying the WTO dispute settlement system that favour the WTO’s most powerful members, the DSU could be modified in the following ways:

4.3.1 Prospective Damages: Monetary Fines

A first modification that WTO members could consider is the implementation of monetary fines as a prospective remedy, in lieu of a withdrawal of trade concessions. Although the preferred remedy could remain the grant of compensatory market access on a most-favoured-nation basis, as provided under current WTO rules, experience demonstrates that this alternative has not been chosen. In consequence, if the developed country refuses to grant compensatory market access, then the DSU could be modified to provide that the developed country shall pay prospective damages in the form of monetary fines as of the end of the implementation period. A number of developing countries, such as Pakistan, have

139 See Steinberg, In the Shadow of Law or Power?, supra note 35.
140 Of course, were the developed country to comply with the adopted panel or Appellate Body ruling within the implementation period, then no prospective monetary damages would be due.
promoted such an adaptation of WTO remedies.\footnote{See, e.g., Communication from Pakistan, \textit{Preparations for the 1999 Ministerial Conference - The Dispute Settlement Understanding (DSU)}, WT/GC/W/162 (Apr. 1, 1999) (“It would be useful to clarify that the term ‘compensation’ used in Article 22 includes grant of financial compensation to the complaining party by the country which has been found to be in violation of the rules.”).} Interestingly, in response to a proposal from Chile, the United States itself has supported a remedy of monetary fines for U.S. bilateral trade agreements with Chile and Singapore,\footnote{See \textit{U.S. Looks to Fines, Sanctions Mix for Chile, Singapore Talks}, Inside U.S. Trade 8 (Oct. 25, 2002). The U.S. was responding to a proposal from Chile. See \textit{Chile Looks for Monetary Sanctions as Enforcement Mechanism}, INSIDE U.S. TRADE 13 (Oct. 11, 2002) (also proposing that money be placed in an escrow account, which could be automatically released upon a legal judgment). The United States has concluded free trade agreements, subject to ratification, with Chile and Singapore on Dec. 11, 2002 and January 16, 2003 respectively. See \textit{U.S. and Chile Conclude Free Trade Agreement}, USTR Press Release, Dec. 11, 2002; and U.S. Reports a Final Deal for Singapore Trade Pact, N.Y. Times C19 (Jan. 17, 2003). See also USTR Trade Facts, \textit{Free Trade with Chile: Summary of the U.S.-Chile Free Trade Agreement}, at 9 (Dec. 11, 2002) (concerning the agreement’s dispute settlement provisions which include enforcement through monetary penalties); and Trade Facts, \textit{Free Trade with Singapore, America’s First Free Trade Agreement in Asia}, at 9 (Dec. 16, 2002), available at http://www.ustr.gov/ (last visited Jan. 17, 2003).} offering some hope that this remedy could be applied in the WTO context.

Some policymakers may fear that a remedy of monetary fines could create an incentive for developed countries to buy themselves out of their WTO obligations through the payment of compensation, rather than complying with them, thereby undoing agreed trade concessions. To remove this incentive, the DSU could provide that, in the event of a developed country’s refusal to comply with a ruling after a set time period (say one or two years), the amount of financial compensation would increase by a defined percentage. The DSU also could set a date for implementation in these cases, such as the date six months after the date of adoption of the panel or Appellate Body report.

The rationale for a punitive rate would be to reduce the incentive for a developed country to buy itself out of its WTO obligations. The developed country could avoid paying the punitive amount in either of two ways. First, it could comply with the adopted decision. Second, it could grant compensatory market access in an equivalent amount as determined by a dispute settlement panel. In this way, the prospect of paying a punitive amount could incite a developed country to increase its efforts to offer compensatory market access.\footnote{Under GATT, Art. XXVIII, WTO members always retain the right to negotiate an agreement pursuant to which they may “modify or withdraw a [tariff] concession,” while endeavoring “to maintain a general level of reciprocal and mutually advantageous concessions not less favorable to trade than that provided for in this Agreement prior to such negotiations.” However, this provision has been used primarily by developing countries. Chad Bown has assessed the disparity in the use of Article XXVIII and found that one explanation may be that developed countries such as the United States and EC have found other means to protect their industries without having to grant compensatory market access because of their greater market leverage and legal manipulations, as through the use of antidumping law. See e.g. Chad Bown, \textit{The Economics of Trade Disputes, the GATT’s Article XXIII and the WTO’s Dispute Settlement Understanding}, 14 Economics & Politics 283-323 (Nov. 2002); \textit{Trade Disputes and the Implementation of Protection under GATT: An Empirical Assessment}, J. of Int’l Economics (forthcoming); and \textit{Why Are Safeguards under the WTO So Unpopular?}, World Trade Rev. (forthcoming).} Where the developed country cannot comply with the WTO decision for some domestic political reason, then it could earmark the payment of compensation as a form of compensatory development assistance, as discussed further below.

\[\text{ICTSD Resource Paper No. 5}  \]
There are strong arguments for making a remedy of monetary compensation only available for successful developing country complainants against the largest developed countries. However, if developed countries simply are unwilling to agree to a one-sided remedy, then developing countries still may wish to consider agreeing to this remedy on a generalized basis.

4.3.2 Retrospective Monetary Damages

A second modification that WTO members could consider is the payment of retrospective monetary damages when a developing country successfully challenges a developed country trade barrier. The initial WTO panel could determine the amount of damages which, as Mexico has proposed, could be addressed relatively early in the dispute settlement process.\(^\text{144}\) The DSU could define the modalities for a panel’s determination of the amount of retrospective damages.

If WTO members agree that retrospective damages should be paid, then they face certain policy tradeoffs in determining the starting date from which damages would accrue. The starting date, for example, could be the date of imposition of the illegal trade measure, the date of filing of the complaint, or the date of the panel’s formation. Accruing damages as of the date of the illegal measure would provide the strongest incentive for developed countries not to violate their WTO commitments toward the developing world, and thus might be the most favourable for developing countries. Such a starting date would eliminate the incentive for developed countries to manipulate WTO procedures in order to buy time to protect domestic producers. However, in that case, developing countries could profit enormously even if they are aware of the measure but do not place the developed country on notice of their complaint. The amount of damages accrued before parties even enter into settlement consultations could be huge.

In contrast, fixing damages as of the date of the filing of a complaint, or the date of a panel’s formation, could create a greater incentive for the parties to settle the matter without going to litigation. Developed countries would have a much greater incentive to negotiate an amicable settlement if they are put on notice that a WTO claim will result in an order to pay retrospective damages if the matter is not settled by a fixed date. For example, by choosing the date of a panel’s formation as the starting date for the accrual of retrospective damages, the system could create structural incentives for increased bargaining in the shadow of WTO law. Developed countries would have a greater incentive to withdraw WTO-illegal measures before the most resource-intensive part of the legal process commences.

The expansion of WTO remedies to include the payment of retrospective monetary damages not only would enhance developing countries’ bargaining leverage in settlement negotiations, but also could facilitate developing countries’ ability to pay for the legal defence of their rights. Were retrospective damages paid, private attorneys could offer special fee arrangements, in conformity with their respective bar requirements, to represent developing country interests in WTO litigation. Under U.S. rules, private attorneys could receive a percentage of the award were the claim successful, but receive none were the claim to fail.

\(^{144}\) See Proposal of Mexico, \textit{Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding}, TN/DS/W/23 (Nov. 4, 2002).
Depending on applicable bar rules in civil law jurisdictions, private attorneys could receive a greater amount were the claim to be successful than were it to fail.\footnote{Rules in the United States permit for contingency fee arrangements, whereas in Switzerland and other civil law jurisdictions, there is a general prohibition of \textit{pacutum de quota litis}, so that attorneys may not charge fees in relation to a case’s success. However, there is some flexibility in many civil law jurisdictions. For example, Swiss rules do permit an attorney to enter into an arrangement pursuant to which the attorney “raises” the fee if the claim is successful. E-mail exchange with a Swiss attorney, Feb. 12, 2003. Also confirmed in discussion with Brussels-based attorney, Feb. 7, 2003.} The fee agreement could be structured in numerous ways. For example, an hourly rate could apply if the matter were settled prior to an award, such as before the date of a panel’s formation. In such cases, payment of legal fees typically would be part of the settlement. If the developed country refused to settle before the panel’s formation, then the resource-intensive part of the proceeding— with its drafting and exchange of legal submissions, oral hearings, rebuttals and potential appeals— would commence. Were the developing country ultimately successful, the outside counsel’s fee could be paid through the damages award.

Analogous to their role in the enforcement of domestic law, such fee arrangements would help provide “the poor man [in this case, poor countries] with the means to hire a lawyer.”\footnote{Cf. Lawrence Friedman & Jack Landinsky, \textit{Social Change and the Law of Industrial Accidents}, 67 Colum. L. Rev. 50 (1967) (noting the role of such fee arrangements as a useful mechanism in the “evolution of American industrial accident law.” As plaintiffs won lawsuits, “they encouraged still more plaintiffs to try their hand, still more attorneys to make a living from [such] work,” resulting in gradual change of judicial interpretations of existing law over time until new statutes were adopted).} With the assistance of legal counsel through fee agreements, developing countries could defend their interests in individual cases in a more cost-effective manner. Through thereby participating more often in WTO dispute settlement, they could exert more influence in the interpretation and definition of WTO law through WTO cases, a strategy that, at this time, only large developed countries pursue.

\subsection*{4.3.3 Award of Reasonable Attorneys’ Fees: Its Rationale}

Developing country’s reasonable attorneys’ fees when it is successful in challenging a developed country trade barrier.\footnote{The DSU could provide for a similar rule where the developing country is a defendant in WTO litigation unsuccessfully brought by a developed country. This is advocated in Lal Das, \textit{WTO Deficiencies}, supra note 130, at 21.} Although this proposal may sound the least politically feasible of the three, it could be implemented in a manner that would enhance developing countries’ ability to participate in the dispute settlement system, structured to induce settlement as opposed to full-fledged litigation, and tailored so as to result in easily affordable payments from large developed countries who fail to settle a case or comply with a panel decision.

The likely response of many western lawyers and policymakers is that we cannot introduce “bias” into the legal system. However, can we really accept this argument of “introducing bias”? Imagine a small West African complainant against the United States in respect of U.S. cotton subsidies. Can we for a moment argue in good faith that the current system is not biased given West African countries’ lack of domestic legal resources, the current costs of the legal system, the current structure of WTO remedies, and the extra-legal leverage that the
United States otherwise wields? In fact, West African countries do produce cotton, and the United States does subsidize its cotton industry to West Africa’s detriment, and when a West African country did consider initiating a WTO complaint, the United States threatened to curtail its food aid. Government use leverage where they can, including the withdrawal of food aid for basic subsistence, in order to protect domestic industries. Granting preferential remedies to induce greater compliance of large developed countries with their trading commitments toward the developing world may be potentially challenging (or ultimately infeasible), but it is quite a stretch to label preferential remedies, however they may be structured, as the introduction of bias into an otherwise neutral system.

Even a former Deputy USTR has recognized in print the need to consider a one-sided remedy covering litigation costs. As Susan Esserman writes, “One possibility [to address the issue of legal resource imbalances] would be to implement cost rules—that is, to require that when a developed country loses a case against one of the least-developed ones, it is required to pay at least a portion of the winner’s legal costs.”

There are numerous rationales that WTO members should consider in support of limited attorneys’ fee awards to successful developing country complainants. First, defending one’s rights within the WTO’s dispute settlement system requires considerable legal expertise, as documented in Parts I and II above. It is illusory to expect developing countries to participate and prevail in WTO litigation without hiring sophisticated outside legal counsel. However, bringing a WTO complaint costs approximately the same in legal fees whether the trade at stake is valued at US$ 150 million or US$ 150,000. The relative value of a developing country complaint may be just as important (or much more important) to its overall economy than a complaint brought by the United States or EC. Yet, developing countries have smaller economies and smaller aggregate exports, so that bringing a WTO complaint may not be worth the high litigation costs unless their attorneys’ fees are covered in one manner or another.

To give an example, in their study of U.S.-EC trade disputes, Busch and Reinhardt rank a dispute that affects over US$ 150 million in annual trade as a “high stakes” dispute. However, a $150 million dollar claim only represents about .0015% of U.S. gross domestic product. A claim of comparable importance for Honduras would equal around US$ 255 thousand dollars. Since an average WTO claim costs in the range of US$ 300-400,000 in

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151 In 2001, the United States gross domestic product (GDP) equaled approximately US$ 10.1 trillion. In 2000, Haiti’s GDP was about 12 million, Senegal’s about $16.2 billion, and Honduras’ approximately 17 billion, in terms of purchasing power parity, such that a “high value” claim under Busch and Reinhardt’s criteria respectively would equal from around $180,000 to $255,000 for these three countries. See CIA *World factbook*, available at http://cia.gov/cia/donstat/econm_finnc/conjn_econm/compr_inter/pdf/pib-ang.pdf (visited Feb. 10, 2003).
attorneys’ fees (although they possibly can be much more).\footnote{152} such a developing country could not even cover its attorneys’ fees were it to prevail in such a “high stakes” claim before the Dispute Settlement Body, and Honduras is not even a “least-developed country.” Even for larger developing countries such as Peru and Malaysia, although a comparable “high stakes” claim would be valued at around US$ 2-3 million, the risk of loss or non-compliance would significantly discount the case’s value.\footnote{153} Thus, even these countries may be disinclined to bring such “high stakes” claims under the current system, or at least much more so than the United States and EC. The prospect of attorneys’ fee awards that would cover all or part of litigation costs thus could spur developing countries’ defence of their WTO rights (in most cases for the first time) so that the international trading system could work more for their development interests.

Second, the current structure of WTO remedies creates an incentive for developed countries to impose high litigation costs on poorer, weaker parties by using legal procedures to drag out WTO cases, thereby forcing these countries to abandon or compromise justified legal claims. As a representative from even one of the largest developing countries confirms, “we always try to settle a case, as it is too complicated and expensive to go to a panel.”\footnote{154} The WTO system could create new incentive structures to curtail this practice. The ultimate goal of this rule modification would not be the award of attorneys’ fees \textit{per se}, but rather, the creation of incentives for developed countries to comply with their WTO commitments toward the developing world in the first place.

Third, as a matter of international development policy, developing countries should not suffer financial cost in successfully bringing a legal claim over a developed country trade barrier. Most developing countries have populations that live on less than $2 per day.\footnote{155} These countries should not be forced to spend scarce budgetary resources on U.S. and European trade lawyers to enforce their WTO rights against developed countries.

Fourth, there are precedents for fee-shifting rules in favour of weaker parties in developed countries themselves, such as under U.S. civil rights law and federal and state “Equal Access to Justice Acts.”\footnote{156} We sometimes feel sufficient solidarity domestically with the poor and

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\footnote{152} Discussion with a lawyer in Geneva, Feb. 7, 2003. However, Indonesia’s fees in the auto case allegedly rose to around $1,000,000 through the panel stage. Discussion with former WTO secretariat member, Feb. 12, 2003.

\footnote{153} Peru’s GDP was around $123 million and Malaysia’s around $212 million, based on purchasing power parity. See CIA \textit{World factbook}, supra note 152.

\footnote{154} Interview with a representative from one of the largest developing countries, in Geneva, Switz. (Sept. 13, 2002).

\footnote{155} World Bank, \textit{World Development Report 2002: Building Institutions for Markets} 234-35 (2002). For example, according to World Bank figures, in 2000, per capita income and purchasing power parity (in U.S. dollar amounts) were $460 and $2,390 in India; and $570 and $2840 in Indonesia.

underprivileged to recognize that remedies, such as attorneys’ fees, need to be structured so as to facilitate the defence of their rights. Otherwise, their “rights” become meaningless. So far, that sense of solidarity is lacking at the international level.

As for the amount of the award, this determination is much simpler than many trade negotiators might think, as it occurs all the time in domestic legal systems. In fact, fee-shifting systems are common throughout the world. WTO arbitrators already determine the amount of the suspension of benefits under Article 22 of the DSU. They could similarly determine whether a party has prevailed so that legal fees should be awarded, and if so, the amount of the attorneys’ fees to be awarded. Fee guidelines could be agreed upon and attached as an annex to the DSU and amended from time to time.

If desired, a fee-shifting rule could be structured so as to increase the likelihood of its acceptance by the United States, EC and other developed countries by reducing its cost. For example, the DSU could provide that attorneys’ fee awards be limited to one of the lower rates charged by the Advisory Centre on WTO Law. Under the Advisory Centre’s rules, the rates for legal support in WTO dispute settlement proceedings vary from $25 an hour for least developed countries to $200 an hour for category A developing country members, in reflection of the country’s share of world trade and its per capita income. In this way, least developed countries would have their attorneys’ fees fully subsidized when they prevail in a case, whereas other developing countries’ fees only would be partially subsidized. Relatively better-resourced developing countries would have to pay a higher percentage of their aggregate legal fees. In other words, the award of attorneys’ fees could be tailored to cover developing countries’ relative needs and be circumscribed so as not to be too onerous in their amounts.

One criticism of attorneys’ fee awards may be that their prospect could reduce developing countries’ incentives to settle WTO disputes, especially if they were coupled with an award of retrospective damages. However, the system should not be structured to create incentives for developing countries to settle or abandon legal claims simply because they cannot afford to

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157 See, e.g., Awards of Attorneys Fees by Federal Courts, Federal Agencies and Selected Foreign Countries (Mary V. Capisio, ed. 2002); Robert Rossi, Attorneys’ Fees (2nd ed. 1995); and Carolyne Krivacka & Paul Krivacka, Method of Calculating Attorney’s Fees Awarded in Common Fund or Common Benefit Cases–State Cases, 56 A.L.R. 5th 107 (1998) (reviewing alternative methods of calculating attorney’s fees in class action cases before U.S. state courts, including fees based on a percentage of a total recovery and lodestar methods based on an hourly rate and a reasonable number of hours).

158 See, e.g., John Yukio Gotanda, Supplemental Damages in Private International Law: The Awarding of Interest, Attorneys’ Fees and Costs, Punitive Damages and Damages Foreign Currency Examined in the Comparative and International Context 146 (1998) (“Most countries throughout the world statutorily provide national courts and arbitral tribunals with the authority to allocate costs in the award... The general practice in most countries is for the losing party to pay for all of the costs and legal fees of the winning party.” Gotanda notes U.S. exceptionalism in this respect).

159 See www.acwl.ch (last visited Dec. 13, 2002).

160 Alternatively, attorneys’ fee awards could be limited to only relatively poorer developing country members, such as “low income” developing countries under the World Bank’s criteria. See supra note 76 (on World Bank criteria).
defend themselves. Rather, WTO members could examine ways in which they could structure attorneys’ fee awards to induce settlements.\footnote{161}{See e.g. Keith Hylton, \textit{Fee Shifting and Incentives to Comply with Law}, 46 Vand. L. Rev. 1069, 1071-72 (Oct. 1993) (concluding that fee shifting in favor of prevailing plaintiffs generates less litigation because of greater incentive to comply with the law).} For example, attorneys’ fee awards could be made contingent on a developed country’s failure to agree in writing during the consultation period to withdraw its illegal measure within a fixed time period set forth in the DSU (such as within six months). Were the developed country to withdraw the trade measure during that time period, then no attorneys’ fees would be due. Were the developed country not to so agree and so withdraw the trade measure, and were the developing country successful in its complaint, then attorneys’ fees would be awarded. Similarly, attorneys’ fee awards could be structured so as to induce developed countries to grant compensatory market access where they refuse to withdraw an illegal trade measure. DSU rules could provide that no attorneys’ fees will be due if the developed country agrees in writing during the consultation period to grant compensatory market access in an equivalent amount, subject to binding arbitration over the adequacy of the market access granted.

\subsection*{4.4 Rationale for One-Sided Modification of WTO Remedies}

Developed countries could modify the DSU to apply these remedies to each other, if they desire to do so. These remedies also could apply to all WTO members equally, as set forth in Mexico’s proposal regarding retrospective damages.\footnote{162}{See Proposal of Mexico, \textit{supra} note 145.} However, in principle, these modifications of WTO remedies also could be preferentially applied in order to offset structural imbalances, and be subjected to clear definitions and modalities. That is, the United States, EC and other developed countries would not be able to seek retrospective monetary damages and attorneys’ fees against a developing country defendant. Developing countries face budgetary squeezes involving balance-of-payment problems, debt repayment, and the struggle to meet basic human needs, so that a monetary damages remedy would be inappropriate. Forcing a country whose population, on average, lives on a few dollars a day to pay damages to the United States and EC cannot be justified. In addition, given the structural importance of U.S. and EC markets, the rule changes are less needed to induce developing country compliance with WTO rulings. The threat of a WTO-authorized withdrawal of concessions by the United States and EC, under the current system, is sufficient. As for small developed countries, WTO remedy rules can be structured appropriately to take account of the varying contexts of WTO members, as when a smaller developed country (such as New Zealand) faces a larger developing country (such as China). The subsequent section discusses potential modalities for implementing preferential remedies in a fair manner.

The remedy proposals set forth above are not new. As Robert Hudec notes, “The most important challenge to the exclusively forward-looking view of GATT remedies was a 1965 effort by GATT developing countries to add monetary compensation to the list of dispute settlement remedies.”\footnote{163}{Hudec, Broadening the Scope of Remedies, \textit{supra} note 126, at 382-383. See also, Kenneth Dam, \textit{The GATT: Law and International Economic Organization} 368 (1970) (concerning a Uruguay-Brazil initiative in the 1960s); ICTSD Resource Paper No. 5 48}
Doha “development round,” on the one hand, and the world community’s renewed focus on creating mechanisms to foster sustainable development and global stability, on the other.

There are a number of rationales for a preferential modification of WTO remedies in favour of developing countries, or at least a significant subset of them. First, a remedy of monetary damages is needed to offset the structural biases under the WTO’s current system of remedies—based on the threat of trade sanctions—that favour wealthier countries in WTO litigation. When the United States and EC are complainants against developing countries, the greater importance of their markets permits them to exercise considerable leverage when threatening sanctions in order to induce compliance. Conversely, when the United States and EC are defendants against a developing country, they can drag out a case so that it is not cost-effective for a developing country to enforce its WTO rights.

Second, the United States itself has adopted a one-sided system of remedies pursuant to civil rights statutes and federal and state Equal Access to Justice programs in order to offset structural biases against weaker parties. The provisions of The Civil Rights Attorney's Fees Awards Act of 1976 allow for the recovery of reasonable attorneys' fees by the prevailing party in a number of civil rights actions. Under Equal Access to Justice programs, parties that bring suit against the federal government may recover attorneys’ fees, litigation expenses (including the preparation of expert witnesses and studies) and costs arising from the suit. A revised structure of remedies could be applied internationally as well if WTO rights are to be meaningful for developing countries, especially in “high stakes” claims.

Third, developed country trade barriers thwart not only a developing country’s WTO rights, but also its development prospects. In an era where U.S. and European foreign development

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164 As Albert Hirschman stated, the essence of economic power is the capacity to obstruct commercial exchange. A state's large market provides it with leverage over other states' domestic policies because access to its market matters. In Hirschman's words, “Thus, the power to interrupt commercial or financial relations with any country considered as an attribute of national sovereignty, is the root cause of the influence or power position which a country acquires in other countries... What we have called the influence effect of foreign trade derives from the fact that the trade conducted between country A, on the one hand, and countries B, C, D, etc., on the other, is worth something to B, C, D, etc., and that they would therefore consent to grant A certain advantages—military, political, economic—in order to retain the possibility of trading with A.”

Hirschman, National Power and the Structure of Foreign Trade 16-17 (1945).


assistance has declined dramatically, development increasingly depends on access to developed country markets. Yet, as former world bank economist Joseph Stiglitz writes, “Outward-oriented policies will succeed only to the extent that there are markets in which developing countries can sell their products, as well as international rules that allow developing countries to make good use of their areas of comparative advantage.” Where a developed country cannot comply with its market access commitments to developing countries, whether for domestic political reasons or otherwise, the developed country member arguably should pay financial compensation to the developing country as a form of increased development assistance. Otherwise, developed country arguments in favour of trade over aid are hypocritical. That is, developed countries would have cut back on direct development assistance, often questioning its effectiveness, but, in exchange, agreed to open their markets. Yet, in then failing to meet their market access commitments, they would suffer no monetary consequence. Unless developed countries are forced to pay financial compensation, their agreement to grant market access is merely symbolic, whereas their cutback in development finance has real financial consequences.

Fourth, the primary goal of these remedies is not the payment of damages in individual cases, but the creation of incentives for developed countries to comply with their trade commitments toward the developing world. DSU rules providing for retrospective monetary damages and reasonable attorneys’ fees would provide developing countries with much greater leverage to negotiate the removal of trade barriers without the need to litigate. The threat of these remedies would reduce the incentives for developed countries to deploy procedural manoeuvres to prolong litigation and avoid obligations.

Fifth, following the tragic events of September 11, 2001, developed countries increasingly recognize that third world development is not only a matter of economic justice, but also of developed countries’ national security. As stated in the Bush administration’s National

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167 As Joseph Stiglitz, former World Bank Senior Vice President and Chief Economist, notes, “aid per capita to the developing world fell by nearly a third in the 1990s.... The figure was US$32.27 in aid per developing-country resident in 1990, but only US$22.41 in 1997.” Joseph Stiglitz, Two Principles for the Next Round or, How to Bring Developing Countries in from the Cold, 23 WORLD ECON. 437 (April 2000) (citing the World Bank’s Statistical Information and Management Analysis (SIMA) database).

168 Stiglitz, How to Bring Developing Countries In, supra note 168, at 453.


170 Similarly, Stiglitz writes, “Too often, cuts in aid budgets are accompanied by the slogan ‘trade, not aid,’ exhortations for the developing world to participate fully in the global marketplace, and lectures about how government subsidies and protectionism distort prices and impede growth. All too often there is a hollow ring to these exhortations. As developing countries take steps to open their economies and expand their exports, in to many sectors they find themselves confronting significant trade barriers (anti-dumping, high tariffs in sectors of natural comparative advantage, like agriculture or clothing)—leaving them, in effect, with neither aid nor trade.” Stiglitz, How to Bring Developing Countries In, supra note 168, at 438.
Security Strategy, “A world where some live in comfort and plenty, while half of the human race lives on less than $2 a day, is neither just nor stable. Including all of the world’s poor in an expanding circle of development and opportunity is a moral imperative and one of the top priorities of U.S. international policy.” In its policy, the Bush administration stresses the importance “of global economic growth through free markets and free trade.” As part of a market-based international program of development assistance, the United States and EC could take the lead in supporting new WTO remedies for developing countries. U.S. and European administrations know that they are sometimes unable to meet trade commitments for domestic political reasons, especially where there are close presidential and congressional races at stake. To help resolve the contradiction between larger U.S. and European development and security goals and short-term domestic political needs, the United States and Europe could support the payment of financial compensation to developing countries when developing countries prevail against them in WTO litigation. They could earmark this payment as a complementary form of development assistance within a larger vision of global equity, stability and security.

Finally, a system of remedies in favour of developing countries could serve the interests of the WTO system. By taking such an initiative, the WTO would play a more positive role in international development policy. Were the United States, EC and other developed countries to support these initiatives, the development goals of the WTO would be made clearer to the general public, helping to undercut the criticism that the WTO has been structured to serve large U.S. and European corporate interests.

4.5 Potential Modalities for Implementing Preferential Remedies in a Fair Manner

Although there are multiple rationales for a one-sided modification of WTO remedies, such proposals are bound to raise scepticism and opposition among many developed country members. In an organization characterized by mercantilist bargaining, developed countries will be wary of proposals that reduce their ability to protect domestic producers without enhancing their leverage for their exporters. Developing countries, conversely, will support a one-sided system of remedies because it will advance their export interests without increasing their obligations toward imports.

As discussed earlier, the situations of “developed” and “developing” countries vary greatly. To the extent that preferential remedy proposals fail to recognize these varying situations, then their chances of implementation will be reduced. Applying preferential remedies where a small developing country faces a large developed country (such as Peru facing the EC) is a

172 Id.
173 Of course, implementing these remedies should not, in any case, be deemed a replacement of development assistance, but rather a market-oriented complement.
174 The WTO is an organization whose aim is to facilitate trade liberalization through successive negotiating rounds, but in which WTO members bargain in a mercantilist manner, attempting to advance their export interests, on the one hand, and defend their domestic industry from imports, on the other.
completely different scenario than a large developing country facing a small developed country (such as New Zealand facing China, or Iceland facing Brazil). Even though China and Brazil are developing countries and New Zealand and Iceland developed ones, China and Brazil arguably wield much greater market and political leverage.\footnote{See Simon Everett, \textit{Sticking to the Rules: Quantifying the market access that is potentially protected by WTO-sanctioned trade retaliation} (paper prepared for the World Trade Forum, August 11, 2002) (finding East Asian countries relatively better situated in terms of trade leverage). One commentator, for example, has noted that Korea is “scared to death of taking the Chinese on. They’re convinced that the Chinese will take it out on them one way or another.” See, e.g., Noah Smith, \textit{Korea Seen as Unwilling to Challenge Excessive Antidumping Tariffs}, 19 Int’l Trade Rep. (BNA) 1914 (Nov. 7, 2002) (citing a “Beijing-based trade lawyer” statement that “Korea has been by far the biggest target in Chinese antidumping cases,” but fears to challenge China’s antidumping measures.).}

In addition, a system of asymmetric remedies could create perverse incentives for large developing countries that wield market leverage. Imagine a scenario, for example, where Brazil and Canada bring tit-for-tat anti-subsidy claims regarding their respective domestic support programs for Embraer and Bombardier commercial aircraft, and that a WTO panel finds that both countries have provided illegal subsidies in the same amount.\footnote{Cf. the actual cases between Brazil and Canada in their respective complaints: WTO Dispute Appellate Body Report on Canada Complaint Concerning Brazil - Export Financing Programme for Aircraft, WT/DS46/AB/R (July 21, 2000); WTO Dispute Panel Report on Canada Complaint Concerning Brazil- Export Financing Programme for Aircraft, WT/DS46/R (May 9, 2000); WTO Dispute Appellate Body Report on Brazil Complaint Concerning Canada - Measures Affecting the Export of Civilian Aircraft, WT/DS70/AB/R (July 21, 2000); and WTO Dispute Panel Report on Brazil Complaint Concerning Canada - Measures Affecting the Export of Civilian Aircraft, WT/DS70/R (May 9, 2000).} Imagine, for the sake of simplicity, that the total accrued amount of WTO-illegal subsidies is $200 million dollars for each country over a 3-year period. Imagine next that a WTO panel holds that, for Brazil’s remedy, Canada must pay Brazil prospective and retrospective monetary damages accruing since the date that Canada granted the subsidy, complemented by reimbursement of Brazil’s attorneys’ fees. Imagine that the same panel holds that Canada’s only remedy is that Brazil must cease subsidizing by an agreed implementation date (about three years after the date of Canada’s initial complaint), or be subjected to a prospective withdrawal of concessions.\footnote{Were Brazil to refuse to stop subsidizing by the implementation date, then Canada would be authorized to withdraw concessions equivalent to the amount of the subsidy, but only starting as of the implementation date.} As a result of the unequal remedies, Brazil could receive the same amount in retrospective damages ($200 million dollars) in monetary relief that it subsidized Embraer (as well as recoup its attorneys’ fees), whereas Canada would receive no monetary relief, but only be authorized to withdraw concessions from Brazil prospectively, and only if Brazil continued to subsidize Embraer. Brazil would come out $200 million dollars ahead, so that Canada’s taxpayers would have subsidized Embraer for a three-year period. This asymmetric situation would create an incentive for Brazil to enter into subsidy wars with developed countries, knowing that WTO remedy rules would always favour it.

In short, although there are compelling reasons to implement a preferential system of remedies to offset structural biases, and although there exist analogous programs in national legal systems for similar reasons, WTO members would have to define the modalities for implementation of a preferential system of remedies within the WTO context in a fair and
acceptable manner. This section sets forth some preliminary indications of how these modalities could be structured.

4.5.1 Potentially Limiting the Obligation to a Category of Developed Countries
WTO rules require consensus to modify. To enhance the possibility of agreement, the preferential remedy rules could apply to the largest developed countries only, and, in particular, the United States, EC and Japan, as well as those other developed countries that would agree to them as part of an international development initiative. One possibility would be to develop a system analogous to the Advisory Centre’s for determining developing country fees, except opposite in effect. That is, the DSU could provide that only WTO members having a per capita GNP and share in global trade above an agreed threshold are subject to the more stringent remedies when successfully challenged by developing country complainants.

4.5.2 Potentially Limiting the Beneficiaries to a Category of Developing Countries
Similarly, beneficiary developing countries could be limited to those having a per capita GNP and share of global trade below specified amounts. In this way, as countries reached certain development criteria, as did Korea and Hong Kong during the 1980s, they would be graduated from the preferential remedy system. If the rule modification is to be meaningful, however, the GNP and trade thresholds should not be set too low.

4.5.3 Provisions for Equitable Discretion: Tit-for-tat Subsidy Wars
To avoid the rare (but potential) Brazil-Canada scenario described above, DSU rules could grant equitable discretion to WTO panels to not award preferential remedies in cases where the panel deems that the result would be manifestly unfair. Such a provision would permit panels to protect against potential abuse of preferential remedies, as in cases where parties initiate complaints against each other regarding similar WTO violations, as in a subsidy war.

4.5.4 Potentially Capping the Amount of Retrospective Damages
The DSU could set a cap on the amount of damages, whether in individual cases or on an annual basis, in order to eliminate concerns that a stray damages award could have severe budgetary consequences. These concerns could be illusory given that developing country imports are relatively small in comparison to the size of the economies of developed countries, and thus, the damages incurred should be easily affordable. If a cap is set, it could be done as a percentage of the developed country’s gross domestic product, since developed countries vary significantly in terms of the size of their economies. For example, the monetary caps could be set in accordance with UN guidelines for development assistance. One possibility would be to set the cap at the developed country-agreed target for annual development assistance, after taking account of the development assistance that such country provided during a defined time period. In this way, developed countries that meet their UN

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178 See, e.g., Earth Summit: Agenda 21, A/CONF.151/26, vol. III, at § 33.13 (adopted at the United Nations Conference on Environment and Development (UNCED), Rio de Janeiro, Brazil, June 3-14, 1992), available at: http://www.un.org/esa/sustdev/agenda21chapter33.htm (“Developed countries reaffirm their commitments to reach the accepted United Nations target of 0.7 per cent of GNP....”). The cap could be set at 0.7% of GNP, after fully taking account of all development assistance that the developed country has provided during that (or the previous) calendar year. Thus, if the developed country already had paid 0.2% of its GNP in development
commitments on development assistance would be favoured, and not subject to monetary remedies.

4.5.5 Potentially Limiting the Remedy to Certain WTO Agreements
WTO members could consider initially limiting application of a revised remedy rule to apply to certain WTO agreements, such as the Agreement on Textiles and Clothing, the Agreement on Agriculture, the Agreement on Safeguards, and/or the Antidumping Agreement. After a trial period, application of the rule could expand to cover all WTO agreements. This negotiating option may be more politically attractive to some WTO members.

4.5.6 Enforcement where a Developed Country Refuses to Pay Damages
The risk always exists that a developed country might not comply with a damages award. However, the DSU does not need to address every contingency. First, there would be normative pressure on a developed country to comply with a damages award to which it agreed under revised DSU rules. Second, even if the developed country were not to comply, a debt would accrue with interest that the developing country could offset against its own obligations. Third, the developing country still could retaliate by withdrawing concessions in an equivalent amount, in which case it would be no worse off than under current DSU rules.

In theory, a developed country’s refusal to pay compensation could trigger severe punitive remedies. For example, the former Indian ambassador Lal Das has recommended “collective retaliation by all Members” against a country’s failure to comply with a dispute settlement decision, “particularly if the complaining country is a developing country and the erring country is a developed country.” Punitive collective retaliation, however, could be harmful for the system, since it not only could result in a severe curtailment of trade, in contradiction of one of the WTO’s primary purposes, but potentially could undo the system were the United States or EC to revoke their memberships. An administrative remedy alternatively could be applied pursuant to which the offending member’s right to bring WTO claims would be suspended until it paid the financial compensation due. However, this punitive remedy also could be inappropriate. Once again, there are strong arguments for retaining some slack in the WTO system, especially for politically-charged cases.

4.5.7 Potentially Expanding a More Stringent Remedy System to All WTO Members
Mexico has submitted a proposal pursuant to which retroactive damages and awards of attorneys’ fees would apply in all WTO cases, regardless of the development status of the

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179 Lal Das, WTO Deficiencies, supra note 130, at 106.
180 See 4.2 above (on the notion of optimal remedies). For example, there may be valid domestic political reasons for a country not to modify its domestic laws or regulations to comply with a WTO decision. Imagine that a developing country such as Argentina were to prevail in a challenge of the EC’s regulations on genetically modified foods under the SPS Agreement. The EC likely would be politically unable to comply with the ruling. The EC should find it more politically palatable to earmark monetary compensation as a form of development assistance pursuant to UN Guidelines, than to incur collective retaliation.
Certainly developed countries and larger developing countries such as Mexico (which is an OECD member) could agree to generalize these measures to apply to each other. To the extent that developing countries are more likely to comply with WTO obligations than are developed countries because of the greater leverage that developed countries already wield, then some countries may find that they have little to lose by agreeing to a generalized system of stronger remedies.

However, before developing countries agree to generalize stronger remedies for all WTO members, they should seriously consider the potential impact, and in particular the following two concerns. First, most scholars question whether the TRIPS Agreement is appropriate for developing countries, maintaining that it likely will lead to net wealth transfers from poor to rich countries. The TRIPS Agreement has provided the greatest ammunition for anti-globalist critics of the WTO. Developing countries should think twice before they agree to stronger remedies to enforce intellectual property rules that may be inappropriate in the first place. Second, awarding attorneys’ fees and retrospective damages to all WTO parties arguably would not be neutral in its impact. In fact, it could worsen the asymmetries of the current system since the threat of having to pay attorneys’ fees and retrospective damages could reduce even further developing countries’ leverage in settlement negotiations. Because WTO litigation costs are relatively higher as a percentage of their governmental budgets, developing countries could be under greater pressure to settle WTO complaints (including TRIPS complaints) to avoid the risk of a large damages award.

4.6 A Potential Trade-off in Negotiations over DSU Reform: Transparency

There are endless variations to be considered for implementing a more equitable and effective system of WTO remedies. However, their implementation will depend on developed countries’ political will, which may be lacking. Thus, potential tradeoffs of importance to developed country constituencies could be explored.

The United States and EC have submitted separate proposals to the Dispute Settlement Body for enhancing the transparency of the WTO’s dispute settlement system. These proposals concern, first, the opening of all or part of panel and Appellate Body proceedings to the public, including by “broadcasting meetings to special viewing facilities;” second, immediate or otherwise timely public access to a party’s legal submissions and to final panel and Appellate Body reports, such as through the WTO’s web site; and third, the regulation of amicus curiae submissions.182

Many developing countries and developing country non-governmental groups fear that these proposals, if implemented, primarily would be used by large corporations and NGOs based in

182 The quoted language is from Contribution of the United States to the Improvement of the Dispute Settlement Understanding of the WTO Related to Transparency, TN/DS/W/13 (Aug. 22, 2002), at 2. See also, Contribution of the European Communities and its Member States to the Improvement of the WTO Dispute Settlement Understanding, TN/DS/W/1 (Mar. 13, 2002), at 6-7 (concerning transparency and amicus briefs).
the United States and Europe to advance commercial and social interests and priorities of U.S. and European constituents. They are wary that greater WTO transparency merely would permit northern groups, defending northern interests, to better exploit the media to pressure state delegates, the WTO secretariat and WTO dispute settlement panellists to take their views into account and thereby advance northern ends. Civil and business groups in developed countries more likely have access to the Internet, the resources to develop sophisticated legal briefs, and the means to exert pressure on WTO panels through strategic use of the media. These developing country concerns are justified.

The closed nature of WTO legal proceedings nonetheless remains under serious challenge in the United States and Europe, where constituents expect proceedings that can have severe economic, social and environmental impacts to be transparent. Opponents of trade liberalization, in particular, use the system’s lack of transparency to call into question its legitimacy. These challenges to the WTO risk undermining developing countries’ prospects for securing meaningful access to U.S. and European markets. One way or another, they need to be addressed.

Some demands for increased transparency should pose relatively little risk to developing countries. For example, making a party’s panel submissions publicly available actually can assist developing country litigants. The new Advisory Centre on WTO Law, for example, posts, with the approval of the developing country client, all of its submissions. In the case EC-Trade Description of Sardines, the Advisory Centre posted Peru’s briefs on its web site, facilitating its work with Europe’s largest consumer group to counter a number of the EC’s arguments. Similarly, making panel and Appellate Body decisions available to the public, whether immediately or shortly after they have been circulated to WTO members, should pose little risk to developing countries. The decisions will not be modified, in any case, and they already are leaked regularly to the press, without having prejudiced developing country interests.

All or part of panel proceedings also could be opened to the general public, without permitting photographic or film equipment in the room. The U.S. Supreme Court applies a similar rule in order to retain judicial decorum. There is nothing to hide in these proceedings, so that opening them to the public would be largely symbolic. Where confidential commercial information is to be discussed, proceedings could occur in a closed session.

The issue of amicus curiae briefs, however, raises the greatest risk of bias against developing countries. First, private interests within the United States and Europe predominantly hold the legal expertise and financing to submit persuasive briefs. Second, developing countries are already at a disadvantage in the dispute settlement process. Making them respond to legal briefs from not only the USTR and the European Commission, but also those of developed

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184 The WTO proceedings are conducted in English, the language of U.S. constituents who demand greater access to WTO proceedings. Most constituents in developing countries will be unable to follow them even if they are, in theory, made publicly available. See id.
country corporations, non-governmental organizations and academics, would exacerbate the problem of resource asymmetries. To control for this potential bias and maintain the intergovernmental nature of the proceedings, the DSU could be modified to provide that panels only should take account of amicus briefs when the complainant or defendant affirms that the brief’s contents reflect its own positions (as Peru affirmed in the EC-Sardines case). This approach largely reflects current panel and Appellate Body practice, following developing countries’ uproar against the Appellate Body’s indication that it would accept private amicus briefs, although there will be pressure for this practice to change.

Many of these transparency issues are largely symbolic in practice, although they are taken quite seriously by many U.S. and European constituents. The issue of preferential remedies, however, would have a real economic impact on developing countries, by increasing their leverage in making use of their WTO rights. Developing countries thus could consider agreeing to those U.S. and EC proposals for greater transparency of WTO dispute settlement that are not structurally biased against developing country interests. This trade-off could be a win-win in terms of their impact on public perceptions of the WTO.

4.7 Power and Political Feasibility

There remain obvious political constraints on modifying the WTO’s system of remedies for developing countries’ benefit. The United States, which has not contributed to the endowment of the new Advisory Centre on WTO Law, and has not otherwise supported the provision of free or cost-effective WTO legal services for developing countries to any significant extent, almost surely will oppose a system of preferential remedies. The United States combines large public resources with vast private resources to form well-developed public-private partnerships to deploy in WTO litigation. The Office of the USTR, under pressure from a U.S. Congress that is protective of local constituents, will wish for the United States to retain its considerable advantages in WTO litigation.

Anticipating an adverse U.S. reaction to these modifications of WTO remedies, some developing countries may be reluctant to advance them. For example, at an ICTSD seminar in Geneva, a developing country commentator suggested that the issue of more stringent WTO remedies should not be raised in DSU review because such change is not politically feasible.

185 Interview with member of USTR legal staff, in Washington D.C. (Apr. 1999). Initially, the United States even argued that private lawyers should not be permitted to plead on behalf of developing countries before WTO panels and the Appellate Body. Id.

186 The United States consistently has opposed retrospective remedies, in particular in response to the protectionist U.S. antidumping lobby. See, e.g., Report of the Appellate Body, Guatemala—Antidumping Investigation Regarding Portland Cement from Mexico, WT/DS60/AB/R (adopted 25 Nov. 1998), par. 5.63., where the U.S. joined as a third party in an antidumping case. When ratifying the WTO agreements, the U.S. Congress even adopted a statutory provision that provides that antidumping, countervailing duty and safeguard duties that are found to be illegal under WTO law shall not be refunded for “liquidated” entries. (Goods are liquidated when final customs duties are paid). Liquidation is suspended during AD, CVD and safeguard proceedings, but these proceedings will have terminated prior to the WTO ruling. See section 129 of the Uruguay Round Agreements Act, 108 Stat. 4813, 4836, 19 U.S.C. 3501, 3538(c) (1994). The United States is wary of international law when it applies to the United States.
Developing countries could, in light of U.S. and EC initial responses, relinquish their initiatives.

That is power’s impact. Power is not simply the ability of country A to cause country B to take action X under the threat of some consequence. Power is also the ability to silence country B so that country B does not even raise issues vital to its interests. Developing countries need be aware of, and struggle against, the power of silencing. Otherwise, only the great powers will set WTO agendas, and the WTO will serve predominantly their interests.

In the current review of the WTO Dispute Settlement Understanding, the central issue for developing countries is that of remedies. For developing countries not to press this issue would be a lost opportunity. Developing countries may not prevail immediately, but they could strive to do so, both in DSU review and, over the longer term, in the Doha round of trade negotiations. Just as the United States was relentless in pressing for the inclusion of agreements on services and intellectual property rights into the WTO system so as to advance U.S. constituent interests, so developing countries could demand relentlessly that WTO remedies be modified so as to advance interests vital to their development.

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5. CONCLUSION

Developing countries have a great deal at stake in the WTO and its legal system. With trade disciplines in areas from textiles and agriculture to health and safety standards taking firmer root under the WTO system, questions regarding how the WTO legal system works in practice and how it can be improved for developing countries’ benefit beg careful attention: How can developing countries mobilize legal resources to defend their rights through WTO dispute settlement? If they participate, will they find the system efficacious? How could the DSU be modified to enhance the system’s effectiveness for developing countries?

The ultimate question as regards any legal system is how law operates in the world by affecting party behaviour. The substantive provisions of WTO agreements will benefit developing countries if they affect developed country behaviour, whether in settlement discussions in the shadow of the law, or otherwise. As with any contract, only a few of the many disputes over WTO obligations are resolved through litigation before a judicial process. However, these disputes often are negotiated within the shadow of the contractual bargain and the costs of its potential enforcement. If WTO legal procedures are not cost-effective for developing countries to deploy and if the ultimate remedies are insubstantial, then WTO substantive law will be of less use in their trade relations. Conversely, developing more cost-effective techniques for deploying legal resources and making WTO remedies more efficacious could spur greater developing country participation in the WTO system, and, in turn, developing country leverage in settlement negotiations over trade barriers. Moreover, if developing countries perceive that the WTO judicial system can work to their advantage, they will have increased incentives to participate in a more informed manner in WTO negotiations over the details of substantive law, as well as in implementation reviews before WTO committees and councils, so that the substantive rules themselves are relatively more likely to reflect their needs and interests.

This essay has examined three central challenges that developing countries face if they are to participate in WTO dispute settlement—relative lack of legal expertise, relative lack of finances, and extra-legal constraints on account of power imbalances. The essay also has examined three strategies to confront these challenges. First, developing countries could develop better coordination with the private sector to assist in bringing cases to their attention and in developing factual and legal arguments. Second, developing countries could make better use of the Advisory Centre on WTO Law. As a repeat player in WTO litigation, the Advisory Centre can develop expertise and defend developing country interests more cost-effectively. Developing countries could explore expanding the Advisory Centre, or pooling their resources through regional WTO centres that could complement it. Third, developing countries and the Advisory Centre could forge alliances with constituencies within developed countries, such as northern consumer and other non-governmental groups. These developed country constituencies could assist them through wielding domestic political pressure (as they have done to counter U.S. and EC pressure over pharmaceutical patent protection) and

188 Under the University of Wisconsin’s “law in action” approach to contract law, the course starts with a study of remedies, which serves to contextualise the study of substantive contract law. See Stewart Macaulay et al., Contracts: Law in Action (1995).
through providing free assistance in developing factual and legal arguments in WTO cases (as done in the *EC-sardines* litigation).

This essay also has examined alternatives to the current WTO system of remedies which inhibits developing country participation. In the context of the Doha trade negotiating round and the review of the WTO Dispute Settlement Understanding, developing countries could press for more efficacious remedies, and, in particular, the award of retrospective damages and attorneys’ fees when a developing country prevails in a complaint against a developed country. Part III of this essay has explored the modalities of these changes in order to ensure fairness in light of the varying contexts of “developed” and “developing” countries, from Senegal to the United States, from New Zealand to China.

These DSU initiatives are not just about defending trading rights. They constitute important tools to implement development strategies in a world where increasing economic inequality and unequal participation in the international trading system are global public policy concerns. Developed countries have curtailed their development aid, in part by adopting the argument that trade is more important than aid for the sustained development and growth of developing economies. Yet, developed countries’ failure to comply with their WTO obligations toward developing countries undermines these arguments. If the international community is serious about enhancing development through trade, then WTO members could adopt more efficacious WTO remedies for developing country members. Declarations by U.S. President Bush and other developed country leaders about the need to ensure developing country access to global markets could be used to support these initiatives. The struggle may be long, but it is unavoidable if the WTO system is to work for the developing world.

In light of the leverage that the United States and EC wield in WTO negotiations, these changes would require support (or at least not resistance) from political elites and the general public in the United States and Europe. A multifaceted strategy would be needed. These modifications could be advanced through a unified developing country position during the Doha round, complemented by pressure through the media from northern and southern NGOs, and support from international development organizations, such as the World Bank and UNCTAD. As the Doha declaration demonstrates, authority can be exercised not only materially but also discursively—that is, by compelling argument wielded by developing country members, supported by international institutions, NGOs and scholars. While in politics, as in litigation, the clout of the privileged speaks louder, these are the realities of the international political and economic system in which the WTO and its dispute settlement system operate, and in which developing countries, and their advocates, must fend.

There is reason to be pessimistic, given the history of GATT and WTO trade negotiations. Nonetheless, even if developing countries are unsuccessful in advancing new WTO remedies, they still can adopt versions of the internal changes discussed in Part II of this essay in order to mobilize litigation resources more cost-effectively. As Robert Hudec points out, “a legal ruling without retaliation can still be an effective policy tool for a developing country seeking to reverse a legal violation by a larger country,” at least compared to the alternative of no
legal system. A WTO ruling creates normative pressure for compliance, empowering domestic actors that would prefer the country to comply in the first place, and enhancing the impact of pressure from other WTO members. As a representative from Costa Rica confirms, even though Costa Rica’s remedy was limited when it prevailed in its complaint against a U.S. textile safeguard, the United States has exercised more constraint in adopting safeguard relief against Costa Rican textile imports after that case.

This essay has examined some of the important factors in shaping the contexts in which developing countries attempt to adapt to a legalized WTO dispute settlement system. Since developing countries face different contexts, there is no single strategy that fits all of them. Exporting legal strategies across cultures regardless of context has never worked, as shown in the demise of the law and development movement of the 1970s. Each country will need to determine how best to adapt the strategies that this essay explores in light of its particular circumstances. Many countries already have adopted some or all of them to a varying extent. The essay’s central purpose is to highlight options and provoke imaginative debate and experimentation with strategies that developing countries and their constituencies may adopt to better defend themselves in the international trading system.

190 Interview with representative from the Costa Rican mission, in Geneva, Switz. (Sept. 2002).
### Appendix 1: Participation in WTO Dispute Settlement proceedings since 1.1.1995

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(aas of 17.01.2003)
How to Make the WTO Dispute Settlement System Work for Developing Countries
March 2003

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<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>St. Vincent</td>
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<td></td>
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<tr>
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<td>0.70%</td>
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<td></td>
</tr>
<tr>
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<td>2</td>
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<td>1.85%</td>
</tr>
<tr>
<td>Timor &amp; East</td>
<td>2</td>
<td>0.70%</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Timor</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Turkey</td>
<td>7</td>
<td>2.60%</td>
<td>1</td>
<td>0.40%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>U.S.</td>
<td>4</td>
<td>1.40%</td>
<td>1</td>
<td>0.40%</td>
<td></td>
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</tr>
<tr>
<td>Uruguay</td>
<td>1</td>
<td>0.40%</td>
<td></td>
<td></td>
<td>2</td>
<td>0.70%</td>
</tr>
<tr>
<td>Venezuela</td>
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<td>0.70%</td>
<td>1</td>
<td>0.40%</td>
<td>2</td>
<td>0.70%</td>
</tr>
<tr>
<td>Vietnam</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Zimbabwe</td>
<td>3</td>
<td>1.10%</td>
<td></td>
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</tbody>
</table>

* Combined figures for the EC and its member states are denoted with “EC (+)”. Eight member states have appeared individually (as defendants) before the Dispute Settlement Body: Belgium, Denmark, France, Greece, Ireland, Netherlands, Portugal, and Sweden. As regards defendants, most cases are brought against the EC and not against individual EC member states. As regards complainants, complaints have always been brought by the EC.

* Source: WTO Secretariat, *Update of WTO Dispute Settlement Cases*, WT/DS/OV/10 (Jan. 22, 2003). Note: These calculations are based on the number of complaints listed on the WTO website. The actual number arguably would be a lesser number since some requests for consultations concern the same substantive dispute.

b Instances where parties join in consultations are not recorded a second time here after a panel is formed. Instances where a single panel is formed to consider multiple disputes, in accordance with Article 9.1 of the DSU, are treated here as a single dispute for the purpose of counting subsequently joining third parties.
Appendix 2: Participation in WTO DSB proceedings since Jan. 1, 1995 (as of 17.01.03), along with global shares in exports / imports, 2001

<table>
<thead>
<tr>
<th>Defendant</th>
<th>Imports</th>
<th>Complainant</th>
<th>Request for consultations</th>
<th>Plaintiff</th>
<th>Exports</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>court</td>
<td>share</td>
<td>(global share in trade of goods)</td>
<td>court</td>
<td>share</td>
</tr>
<tr>
<td>Argentina</td>
<td>15</td>
<td>5.40%</td>
<td>0.40%</td>
<td>2</td>
<td>0.70%</td>
</tr>
<tr>
<td>Australia</td>
<td>8</td>
<td>2.90%</td>
<td>1.30%</td>
<td>4</td>
<td>1.40%</td>
</tr>
<tr>
<td>Bangladesh</td>
<td>3</td>
<td>1.10%</td>
<td>0.20%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Belgium*</td>
<td>12</td>
<td>4.30%</td>
<td>1.20%</td>
<td>10</td>
<td>3.00%</td>
</tr>
<tr>
<td>Brazil</td>
<td>12</td>
<td>4.30%</td>
<td>4.50%</td>
<td>14</td>
<td>5.00%</td>
</tr>
<tr>
<td>Canada</td>
<td>10</td>
<td>3.60%</td>
<td>0.30%</td>
<td>4</td>
<td>1.40%</td>
</tr>
<tr>
<td>China</td>
<td>4</td>
<td>0.40%</td>
<td>4.90%</td>
<td>1</td>
<td>0.40%</td>
</tr>
<tr>
<td>Colombia</td>
<td>1</td>
<td>0.40%</td>
<td>0.30%</td>
<td>1</td>
<td>0.40%</td>
</tr>
<tr>
<td>Costa Rica</td>
<td>1</td>
<td>0.40%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Czeck Rep.</td>
<td>1</td>
<td>0.40%</td>
<td>0.70%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Denmark*</td>
<td>1</td>
<td>0.40%</td>
<td>0.20%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ecuador</td>
<td>2</td>
<td>0.70%</td>
<td>0.30%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Egypt</td>
<td>2</td>
<td>0.70%</td>
<td>0.30%</td>
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<tr>
<td>EC*</td>
<td>41</td>
<td>14.70%</td>
<td>18.20%</td>
<td>29</td>
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</tr>
<tr>
<td>EC (+)*</td>
<td>54</td>
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<td>29</td>
<td>10.40%</td>
</tr>
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<td>France*</td>
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<tr>
<td>Greece*</td>
<td>2</td>
<td>0.70%</td>
<td>0.50%</td>
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<tr>
<td>Guatemala</td>
<td>2</td>
<td>0.70%</td>
<td>0.30%</td>
<td>1</td>
<td>0.40%</td>
</tr>
<tr>
<td>Honduras</td>
<td>1</td>
<td>0.40%</td>
<td>0.30%</td>
<td>1</td>
<td>0.40%</td>
</tr>
<tr>
<td>Hong Kong</td>
<td>2</td>
<td>0.70%</td>
<td>0.60%</td>
<td>1</td>
<td>0.40%</td>
</tr>
<tr>
<td>Hungary</td>
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<td>0.70%</td>
<td>4</td>
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</tr>
<tr>
<td>Iceland</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>India</td>
<td>14</td>
<td>5.00%</td>
<td>1.00%</td>
<td>8</td>
<td>2.90%</td>
</tr>
<tr>
<td>Indonesia</td>
<td>4</td>
<td>1.40%</td>
<td>0.60%</td>
<td>1</td>
<td>0.40%</td>
</tr>
<tr>
<td>Ireland*</td>
<td>2</td>
<td>0.70%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Israel</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Japan</td>
<td>13</td>
<td>4.70%</td>
<td>7.00%</td>
<td>7</td>
<td>2.60%</td>
</tr>
<tr>
<td>Korea</td>
<td>12</td>
<td>4.30%</td>
<td>2.80%</td>
<td>6</td>
<td>1.80%</td>
</tr>
<tr>
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<td>1</td>
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<td>1.50%</td>
<td>1</td>
<td>0.40%</td>
</tr>
<tr>
<td>Mexico</td>
<td>7</td>
<td>2.50%</td>
<td>3.60%</td>
<td>4</td>
<td>1.40%</td>
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<tr>
<td>Netherlands*</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>New Zld</td>
<td>6</td>
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<td>5</td>
<td>1.80%</td>
</tr>
<tr>
<td>Nicaragua</td>
<td>2</td>
<td>0.70%</td>
<td>0.20%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Nigeria</td>
<td></td>
<td></td>
<td></td>
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</table>
How to Make the WTO Dispute Settlement System Work for Developing Countries

March 2003

<table>
<thead>
<tr>
<th>Defendant</th>
<th>Imports (global share in trade of goods)</th>
<th>Complainant (panel decision or pending)</th>
<th>Request for consultations (no panel)</th>
<th>Plaintiff (complainant or consultations)</th>
<th>Exports (global share in trade of goods)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>count</td>
<td>share</td>
<td>count</td>
<td>share</td>
<td>count</td>
</tr>
<tr>
<td>Norway</td>
<td></td>
<td></td>
<td>1</td>
<td>0.40%</td>
<td></td>
</tr>
<tr>
<td>Pakistan</td>
<td>2</td>
<td>0.70%</td>
<td>2</td>
<td>0.70%</td>
<td></td>
</tr>
<tr>
<td>Panama</td>
<td></td>
<td></td>
<td>2</td>
<td>0.70%</td>
<td></td>
</tr>
<tr>
<td>Peru</td>
<td>4</td>
<td>1.40%</td>
<td>2</td>
<td>0.70%</td>
<td></td>
</tr>
<tr>
<td>Philippines</td>
<td>4</td>
<td>1.40%</td>
<td>1</td>
<td>0.40%</td>
<td>3</td>
</tr>
<tr>
<td>Poland</td>
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<td>0.40%</td>
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</tr>
<tr>
<td>Portugal*</td>
<td>1</td>
<td>0.40%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Romania</td>
<td>2</td>
<td>0.70%</td>
<td>0.30%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Singapore</td>
<td></td>
<td></td>
<td>1</td>
<td>0.40%</td>
<td>1</td>
</tr>
<tr>
<td>Slovak Rep.</td>
<td>3</td>
<td>1.10%</td>
<td>0.30%</td>
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</tr>
<tr>
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<td>0.70%</td>
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<td></td>
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<td>0.40%</td>
<td>1</td>
</tr>
<tr>
<td>Sweden*</td>
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<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Switzerland</td>
<td></td>
<td></td>
<td>1</td>
<td>0.40%</td>
<td>3</td>
</tr>
<tr>
<td>Taiwan, Ch.</td>
<td></td>
<td></td>
<td>1</td>
<td>0.40%</td>
<td></td>
</tr>
<tr>
<td>Thailand</td>
<td>1</td>
<td>0.40%</td>
<td>1.20%</td>
<td>3</td>
<td>1.10%</td>
</tr>
<tr>
<td>Trinidad &amp; Tob.</td>
<td>2</td>
<td>0.70%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Turkey</td>
<td>7</td>
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<td>0.80%</td>
<td>1</td>
<td>0.40%</td>
</tr>
<tr>
<td>U.S.</td>
<td>75</td>
<td>26.90%</td>
<td>23.59%</td>
<td>30</td>
<td>10.98%</td>
</tr>
<tr>
<td>Uruguay</td>
<td>1</td>
<td>0.40%</td>
<td></td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>Venezuela</td>
<td>2</td>
<td>0.70%</td>
<td>0.40%</td>
<td>1</td>
<td>0.40%</td>
</tr>
</tbody>
</table>

* Combined figures for the EC and its member states are denoted with "EC (+)". Eight member states have appeared individually (as defendants) before the Dispute Settlement Body: Belgium, Denmark, France, Greece, Ireland, Netherlands, Portugal, and Sweden. As regards defendants, most cases are brought against the EC and not against individual EC member states. As regards complainants, complaints have always been brought by the EC.

a Source: Update of WTO Dispute Settlement Cases, WT/DS/OV/10 (Jan. 22, 2003). Note: These calculations are based on the number of complaints listed on the WTO website. The actual number arguably would be a lesser number since some requests for consultations concern the same substantive dispute.

How to Make the WTO Dispute Settlement System Work for Developing Countries
March 2003
ICTSD Resource Paper No. 5
II.

DOES AFRICA NEED THE WTO DISPUTE SETTLEMENT SYSTEM?

By Victor Mosoti

Victor Mosoti is Coordinator for African and Legal Affairs at ICTSD. He is currently writing his Doctoral thesis on this subject at the University of Wisconsin Law School. He can be reached at vmosoti@ictsd.ch.
TABLE OF CONTENTS

II. DOES AFRICA NEED THE WTO DISPUTE SETTLEMENT SYSTEM? .......... 71

Abstract ............................................................................................................................... 71
1. Introduction ................................................................................................................ 71
2. The Development Imperative in DS Objectives and Jurisprudence ................... 74
3. Towards a Development Friendly DS ....................................................................... 76
4. African Countries in the DS: Impostors at an Alien Shrine? ............................... 79
6. Should law completely supplant diplomacy in the DS? ........................................ 83
7. How African countries could be more involved in the DS ................................. 84
8. Conclusion ................................................................................................................ 87
II. DOES AFRICA NEED THE WTO DISPUTE SETTLEMENT SYSTEM?

By Victor Mosoti

Abstract
Some doubt has been raised as to whether Africa really needs the WTO dispute settlement system, particularly given the minimal involvement of African countries in the system and their relatively low volume of trade among other reasons. This paper answers, in the affirmative the question whether Africa indeed does need the system. This is because, the system is not simply or solely about disputes, it is also about the steady evolution of a corpus of important international trade law principles whose effects and applicability will continue long into the future. The system is also a key element in the international architectural framework whose decisions have momentous, if potentially negative, development implications. This paper, while augmenting the views in the previous paper by Professor Gregory Shaffer, urges that African countries should therefore be at the forefront in the on-going review of the system and should be advised to be more vigorously involved as third parties in various disputes that may be of interest to them. The rest of the WTO Membership, particularly developed countries, should make provision and space for this to be a reality by collaborating to make the dispute settlement system as development friendly as possible.

1. INTRODUCTION

It has become rather fallacious to discuss the involvement of developing countries in the World Trade Organization (WTO)\(^1\) Dispute Settlement Process (DS)\(^2\). No area of the WTO has received more attention than its DS.\(^3\) Indeed the very success and reputation of the DS has been perceived and is synonymous with the success of the WTO as an institution. Often however, the conclusions arrived draw largely from the fact that the DS has been functioning exceptionally well since the coming to birth of the WTO in 1995. To be sure, it is not in

\(^1\) See Marrakech Agreement Establishing the World Trade Organization, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (hereafter WTO Agreement), Legal Instruments – Results of the Uruguay Round (hereafter Results of the Uruguay Round), 6, 6-18; 33 I.L.M. 1140, 1144-1153 (1994). For a historical background of the creation of the WTO, see generally World Trade: Toward Fair and Free Trade in the Twenty First Century (Marie Griesgraber & Bernhard G. Hunter eds. 1997).

\(^2\) A number of excellent articles have been written on this subject. See for instance; Julio Lacarte-Muro and Petina Gappah, Developing Countries and the WTO Legal and Dispute Settlement System: A View From the Bench, JIEL (2000) 395-401; Thaddeus McBride, Rejuvenating The WTO: Why The U.S. Must Assist Developing Countries In Trade Disputes, 11 International Legal Perspectives 65, Spring 1999; Robert Rogowsky, The Effectiveness of the DSU for Developing and Middle Income Countries, Paper Delivered at the World Trade Forum, Berne, Switzerland, August 2002; March Busch and Eric Reinhardt, Developing Countries and GATT/WTO Dispute Settlement (On file with author); Jose Luis Perez Gabilondo, Developing Countries in the WTO Dispute Settlement Procedures, Journal of World Trade 35(4):483-488.

dispute that the DS has indeed been a success story,\(^4\) particularly when viewed in comparison with other international tribunals such as the International Court of Justice (ICJ) or the International Tribunal for the Law of the Sea\(^5\), or even with the old GATT\(^6\), to state however that developing countries are now more vigorously involved in the process, with often-favourable litigation experiences and results is misleading and should not be used to augment the success of the system. Often, the criterion used to underscore the success of the system is the number of disputes\(^7\) that have been submitted by Members.\(^8\) As long as the weakest of the WTO Membership, which comprises the majority of countries, and which is invariably African, remain virtually absent in the dispute settlement process in all senses, the success of the system must not be taken as absolute, even implicitly. There is no doubt that statistically, more disputes are now brought by or against developing countries.\(^9\) However, only a few

\(^4\) It has been described variously as "very positive", "has worked and continues to work extremely well since inception", "satisfactory", "largely successful" and so on. See Ira Shapiro, S. Bruce Wilson, D.G. Waddell, and Bernd Langeheine, *Comments: National Perspectives on the System*, 32 International Lawyer 811, fall 1998. See also, William Davey, *The WTO Dispute Settlement System*, JIEL (2000) 15-18, who states: "So far the record of the WTO dispute settlement system is impressive. It has been extensively used..." According to Ernst Ulrich Petersmann, "...the 1994 WTO Agreement and its mandatory worldwide dispute settlement system are milestones on the long and winding road to worldwide economic freedom, consumer welfare and democratic peace." See Ernst Ulrich Petersmann, *The GATT/WTO Dispute Settlement System*, Kluwer Law International, 1996, p.4.

\(^5\) The intention here is not to say that the International Court of Justice, in its over 50 years of existence, and the International Tribunal for the Law of the Sea in its much shorter life, have been less successful, except for the number of disputes they have handled. An increase in the number of cases that the ICJ has handled since 1980 has been attributed to the increase in UN Membership to 185 states and also improvements in the internal judicial practice at the court. See R.Y Jennings, *The International Court of Justice after Fifty Years*, American Journal of International Law 1995, pp. 493-505.

\(^6\) However, Robert Hudec has urged caution in this respect, particularly emphasizing that some far-reaching foundational changes had already taken place in the GATT dispute settlement system as early as 1980 that laid a basis for what was agreed to by Members at the conclusion of the Uruguay Round. See Robert Hudec, *The New WTO Dispute Settlement Procedure: An Overview Of The First Three Years*, 8 Minnesota Journal of Global Trade 1, winter 1999.

\(^7\) A total of 261 cases had been filed as at the time of writing. This number includes all complaints initiating a formal proceeding by one or more Members against another Member. It is noteworthy that by the time a petition is filed with the WTO, informal consultations have proven unsuccessful and the formal dispute resolution process of the DSU was deemed necessary by the complaining party. This is not the case in the large number of disputes that get resolved at the consultations phase, formally within the WTO or even bilaterally. Under these circumstances, ‘negotiating in the shadow of WTO law’ has often helped the parties arrive at a resolution mutually acceptable to both. See Marc Busch and Eric Reinhardt, *Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes*, 24 Fordham Int'l L. J. 3, 158, 158-9 (2000).

\(^8\) According to John Jackson, "...the relatively large number of settlements that are occurring" is "one of the more positive indicia" of the general success of the system. See John Jackson, *Dispute Settlement and the WTO: Emerging Problems*, JIEL (1998) 329-351, 340.

\(^9\) Park and Umbricht observe that the share of cases brought by developed countries between 1995 and 2000 was 71% though the proportion against developed countries was 56%. Developing Countries were the targets of 40% but they only initiated 26% of the cases. See Y. Park and G. Umbricht, *WTO Dispute Settlement 1995-2000: A Statistical Analysis*, JIEL 213-30 (2001). Busch and Reinhardt are bolder in their analysis. See M. Busch and E. Reinhardt, *Testing International Trade Law: Empirical Studies of GATT/WTO Dispute Settlement*, in D.L.M Kennedy and J.D Southwick (eds.), *The Political Economy of International Trade Law: Essays in Honor of Robert Hudec* (Cambridge University Press 2002), 457-81. One of the two yardsticks they use is to compare usage of the WTO DS with that of GATT. In doing so, they take account of the changing composition of Membership. They find that developing countries accounted for 31% of the complaints in GATT, but only 29% of the complaints under the WTO in the period to 2000. The share of cases brought against developing countries rose 8% to 37%. These changes contrast with a rise in the index of developing countries’ ‘Member years’ from 66% in the GATT to 75% in the WTO. Horn, Mavroidis and Nordstrom set up a model to predict what one may
developing countries are "repeat players"\textsuperscript{10}, and none of those is from sub-Saharan Africa.\textsuperscript{11} Much of the writing on developing countries and the DS often side step the deep concerns that African countries have expressed about the system. Whether this is deliberate, or a function of inadequate intellectual incentive is beside the point.\textsuperscript{12} Often, the issue of the absence of African participation is a glaring omission. At best, this whole subject is dealt with by a single line sentence to the effect that Africa has not been involved in the process.\textsuperscript{13} Some scholars wryly remark that the region does not need the DS due to its low volume of trade and that instead, there are other immediate priorities that should concern African countries. They stop short of listing such priorities as being fighting starvation, poverty, AIDS, poor governance the spectre of failed states \textsuperscript{14}, and a litany of endless woes that the world loves to ascribe to the continent, rightly or often, presumptuously.\textsuperscript{15} To be sure, the presence of all these problems is not in dispute. However, whereas the DS is about disputes, it is also about the evolution of a \textit{corpus} of international trade law principles and jurisprudence that will govern multi-lateral
Does Africa Need the WTO Dispute Settlement System? March 2003

trade relations for years to come. African and other poor countries are absent from this important chance of shaping the evolution of such legal principles. There is absolutely no reason why African countries should not be at the forefront in the on-going DS review process for instance. There is also no reason why African countries have not been third parties in as many disputes as the United States or the European Communities.

My singular point in this paper is to say “yes” to the question, “Does Africa need the DS?” I suggest that a deep, genuinely motivated discussion about the absence of the region from the DS should immediately take place, particularly within the context of the on-going DS review exercise. As long as the whole region, which makes up the single largest block of Members, continues to be absent from the DS, there will never be an honest talk of a successful and all-inclusive DS process, which should be the aspiration of a world body such as the WTO. Genuine, effective and full integration of the poorer nations of the world into the WTO should include a spirited effort to ensure that these countries can confidently lodge disputes and litigate them, despite the global political power asymmetries. It should also include a motivated and genuine effort to take into consideration the views of these countries in the DS review process and not to simply dismiss their proposals, as indications show already, will be the case.

In arriving at the conclusion that African countries do indeed need the DS, this paper shall address several questions. These shall include the following: What is the overall goal of the DS? What are the elements of a development friendly DS? What has been the experience of other developing countries in the DS? Is there a need for special and differential treatment provisions in the Dispute Settlement Understanding (DSU)? Is the space for diplomacy all gone from the DS? Is there a need to re-evaluate the terms of reference of panels in the light of development objectives? We address these questions together under the headings that follow.

2. THE DEVELOPMENT IMPERATIVE IN DS OBJECTIVES AND JURISPRUDENCE

According to Article 3 of the DSU, one of the objectives of the DS is to confer security and predictability to the multi-lateral trading system. The clarification of rules and procedures, in the light of the Vienna Convention on the Law of Treaties, is yet another of these

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16 Gregory Shaffer in the previous paper has very lucidly described the impact of such power and resource "asymmetries" on developing countries' participation in the WTO dispute settlement system. He notes: "The resources deployed by public-private networks in the United States and EC in WTO litigation exacerbates power asymmetries in the use of the WTO legal system to the detriment of developing countries and their constituents."

17 One of the key proposals in the recent African Group's Proposal (WTO Doc. TN/DS/W/15) for reform of the DSU is to the effect that collective retaliation should be included in the DSU. Immediately, upon submission of this proposal for change, a developed country envoy was quoted remarking that "there is no chance such a change would ever be approved. It's just a non-starter." See Robert Evans, Africa Asks for Mass Retaliation in Trade Rows, September 11 2002 (Reuters). The article is available on the Internet at the following address: http://www.cnn.com/2002/WORLD/africa/09/11/trade.disputes.reut/ (last visited on October 23, 2002).

18 Article 2 DSU.
Circumscribing the entire intent of an efficient multi-lateral trading system is what we term as the “development imperative”. Nations have been coming together since 1947 to progressively agree on common rules that should govern their trade relations. Arguably, they come to the negotiating table with the conviction that they stand to benefit from an effective participation in the trading process, that the lives of their nationals should be better out of engagement with other nations. The national objective, as contained in the negotiators’ minds is to benefit from the common pool of market access and cheap availability of commodities through the destruction of trade barriers.

The dictum “trade is not an end in itself” is often heard in WTO corridors and is contained in many publications from the WTO secretariat. Indeed the first substantive paragraph of the Agreement Establishing the WTO lists aspirations including "raising the standards of living, ensuring full employment and a steadily growing volume of real income and effective demand, and expanding the production of trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development...". The constant assertion that trade is not an end in itself encapsulates what in my view is the single most important reason why poorer nations joined or seek to join the WTO, that is, the hope that trade will bring about a meaningful, discernible, significant, and incremental improvement in the lives of their citizens. A failure to understand this simply stated fact, may be the reason behind the disconnect that exists between the developed and developing country Members in the WTO. To developing countries therefore, trade must result in opportunities for their overall development, it must lead to tangible life-improving benefits. It must reduce destitution and it must improve life expectancy through easier access to drugs. Poor tea and coffee farmers in the developing world must realize a meaningful income from their internationally marketed products. Put simply, trade must make life worthwhile.

According to Article 3 of the DSU, Members recognize that the DS serves to “preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public

19 Ibid.
20 Since World War II there have been eight complete GATT rounds of trade negotiations (Geneva 1947; Annecy 1949; Torquay 1951; Geneva 1956; Dillon 1960-61; Kennedy 1964-67; Tokyo 1974-79; Uruguay 1986-90). The ninth, the Doha Work Program, begun only last year and is not due for completion until 2005.
23 A lot of work has been done lately in raising awareness about the impact of an insensitive patent protection regime in the access to essential medicines, particularly in poor countries. Infectious diseases kill over 10 million people each year, more than 90 percent of whom are in the developing world. The leading causes of illness and death in Africa, Asia, and South America, regions that account for four-fifths of the world's population, are HIV/AIDS, respiratory infections, malaria, and tuberculosis. In particular, the magnitude of the AIDS crisis has drawn attention to the fact that millions of people in the developing world do not have access to the medicines that are needed to treat disease or alleviate suffering. Each day, close to eight thousand people die of AIDS in the developing world. See Ellen ’t Hoen, TRIPs Pharmaceutical Patents, And Access To Essential Medicines: A Long Way From Seattle To Doha, 3 Chicago Journal of International Law 27, Spring 2002; Nitya Nanda, Ritu Lodha, Proceedings of the 2002 Conference Access to Medicines in the Developing World: International Facilitation or Hindrance? Making Essential Medicines Affordable To The Poor, 20 Wisconsin International Law Journal 581, Summer 2002.
international law.” Further, the section provides that “Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.” Article 3 should be interpreted within the wider context of the WTO legal system to support development goals. In being interpreted in a manner that does not add to the rights of members, care should be taken not to defeat the development objectives of individual Member countries, particularly poor economies. The ultimate of ironies is that in the years since African economies earnestly were engaged in the multi-lateral trading system, particularly since the conclusion of the Uruguay Round, their economies have deteriorated on the aggregate. They have witnessed severe balance of payments problems. Unemployment has risen astronomically. Established and fledgling industries have collapsed. The conclusion of the Uruguay Round resulted in a large number of Agreements many of which contain special and differential treatment (S&D) clauses, and other provisions that should strengthen the development goals of poor economies. These S&D provisions are largely best endeavour clauses and not legally enforceable. They however provide a framework upon which the centrality of development concerns in the WTO could hinge. The DS must provide an avenue through which the overall development goal can be realized. Imbuing S&D provisions such as those on technical assistance with the force of law could be one way of ensuring that they are complied with for the development benefit of developing countries.

3. TOWARDS A DEVELOPMENT FRIENDLY DS

Currently, the standard terms of reference for panels require them to examine in the light of the relevant provisions cited by the parties, the matter referred to the Dispute Settlement Body (DSB), and to make any findings as will assist the DSB in making the recommendations or in giving rulings provided for in the agreements. Nothing in the current terms of reference makes it mandatory for panels to examine the development implications of their decisions. This is, ostensibly left to the good sense, and benevolence of the serving panellists. Making such requirements explicit for panellists would be a good way of putting development goals at the centre of a panel’s legal analysis, and indeed at the centre of the dispute settlement process. The facts to be borne in mind and which determine the nature, direction and extent of the legal analysis are decided at the panel stage. This is

24 In the US – Gasoline (WT/DS2/AB/R) case at p.17, the Appellate Body stated this objective in the following words: “The general rule of interpretation [as set out in Article 31(1) of the Vienna Convention on the Law of Treaties] has attained the status of a rule of customary or general international law. As such, it forms part of the "customary rules of interpretation of public international law" which the Appellate Body has been directed, by Article 3(2) of the DSU, to apply in seeking to clarify the provisions of the General Agreement and the other "covered agreements" of the Marrakech Agreement Establishing the World Trade Organization (the "WTO Agreement"). That direction reflects a measure of recognition that the General Agreement is not to be read in clinical isolation from public international law.”

25 See generally WTO Secretariat, Participation of Developing Countries in World Trade: Recent Developments, and Trade of Least-Developed Countries, WT/COMTD/W/65; 15 February 2000.


27 See Edwini Kessie, Enforceability of the Legal Provisions Relating to Special and Differential Treatment Under the WTO Agreements (On file with author).

28 It is by no means suggested that the DS as it stands is not development friendly.

29 DSU Article 7.
the time at which the principles of development jurisprudence should start evolving. Panels should be
required to consider the development implications of their decisions at every stage of their deliberation
process. If necessary, the panels should require research input from the WTO Research and Economic
Affairs Division and other intergovernmental organizations concerned with development.\(^\text{30}\)

It is in no way suggested that panellists have been callous in exercising their good sense to
ensure that the development goals of developing countries are met. The inclusion of
development goals in the terms of reference of panels as a feature that ensures that panels
advert themselves to the development consequences of their decisions should be seen as a
confidence building measure that could wash off the ambivalence of some developing
countries about the effectiveness of the DS. Parties always have the option to craft alternative
terms of reference, to those in the DSU, within 20 days from the establishment of the panel.\(^\text{31}\)
In practice, however, parties have tended to retain the terms of reference as stated in the DSU,
in the vast majority of disputes. Tied to the requirement to consider development
consequences of panel decision, should be a requirement that the DSB itself should also
review the development implications of adopting a panel recommendation, and where this is
bound to result in negative consequences, to always consider appropriate alternatives.\(^\text{32}\)
In addition, the General Council, as the “overall supervising authority”\(^\text{33}\) should also be regularly
notified of legal reasoning being developed in the DS, for its consideration and action in order
to address any concerns Members may wish to present and to ensure that the DS develops a
development-friendly, equitable and appropriate body of law and practice. The burden of
notifying the General Council should be vested on the legal divisions of the WTO such as
Rules and Legal Affairs and the Appellate Body secretariat.

The jurisdiction of WTO panels is presently limited to claims under the WTO covered
agreements.\(^\text{34}\) The DSU only applies to disputes brought pursuant to the consultation and
dispute settlement provisions of the agreements listed in Appendix I to the Dispute Settlement

\(^{30}\) It is not in doubt that Panels are perfectly within their scope to seek such information. The Appellate has
recognized this in the Japan – Agricultural Products II, case (WT/DS76/AB/R) paras. 127-128 wherein it stated:
“... Article 13 of the DSU allows a panel to seek information from any relevant source and to consult individual experts or
expert bodies to obtain their opinion on certain aspects of the matter before it. In our Report in United States – Import
Prohibition of Certain Shrimp and Shrimp Products (“United States – Shrimp”), we noted the “comprehensive nature” of this
authority, and stated that this authority is "indispensably necessary" to enable a panel to discharge its duty imposed by Article
11 of the DSU to "make an objective assessment of the matter before it, including an objective assessment of the facts of the
case and the applicability of and conformity with the relevant covered agreements..." Furthermore, we note that the present
dispute is a dispute under the SPS Agreement. Article 11.2 of the SPS Agreement explicitly instructs panels in disputes under
this Agreement involving scientific and technical issues to “seek advice from experts.”

Consultation with the International Monetary Fund is provided for instance in the WTO Agreement.
And as was stated by the Appellate Body in Argentina – Textiles and Apparel, paras. 84-85 (WT/DS56/AB/R) ““The only
 provision of the WTO Agreement that requires consultations with the IMF is Article XV: 2 of the GATT 1994. This provision
 requires the WTO to consult with the IMF when dealing with problems concerning monetary reserves, balances of payments
or foreign exchange arrangements.”

\(^{31}\) Ibid.

\(^{32}\) Useful discussions with Francis Mangeni and Sisule Musungu are acknowledged in this regard.

\(^{33}\) John Jackson, From GATT to the WTO: Implications for the World Trading System, in Thomas Cottier, (ed.)

\(^{34}\) Panels are further constrained to only examine those legal issues that flow from their terms of reference. In the
EC – Hormones ((WT/DS26/AB/R, WT/DS48/AB/R) case, the Appellate Body underscored this interpretation of
the law in the following words:
Understanding. The breadth of these provisions allows for violation complaints, non-violation complaints and situation complaints. Article 3.2 that states that the purpose of the DSU is to “preserve the rights and obligations of Members under the covered agreements” further underlines the limitation on the jurisdiction of panels. Article 11 of the DSU instructs panels to “make an objective assessment of...the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making recommendations or in giving the rulings provided for in the covered agreements.” Consequently, as matters stand, no claims of violation of rules, other than those set out in the covered agreements can be brought before a WTO panel. A panel does not have jurisdiction to consider claims under WTO rules other than those set out in the covered agreements. This very narrow interpretation of what constitutes “covered agreements” goes against the interests of poorer nations, and is particularly detrimental to their development concerns. Many of the Ministerial Decisions and declarations contain clauses and understandings that confer certain rights on them. Paragraph 1 of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations states that Ministerial Declarations and Decisions are part of the corpus of the negotiated results that “form an integral part of” the Final Act, The Agreement Establishing the World Trade Organization, which is a part of the Final Act, is included in the “covered agreements” in accordance with Appendix 1 to the DSU. Consequently, and by dint of Article 12.11, the panel reports should explicitly indicate the form in which account has been taken of the relevant provisions on differential and more favourable treatment for developing and least-developed country Members that form part of the covered agreements as understood above, to include the Ministerial Decisions and Declarations. This should be particularly the case when the Ministerial Declaration or Decision confers certain clear and identifiable rights to a group of Members to the exclusion of others, as paragraphs 1 and 2 of the Decision on Measures in Favour of Least Developed Countries does, for instance. Excluding such central rights-conferring Ministerial Decisions from enforceability as part of the covered agreements would be tantamount to a denial of fully negotiated and granted rights and privileges.

We also suggest that one way of ensuring that a development jurisprudence evolves incrementally is by allowing for panellists and appellate body Members to freely express their legal opinions unfettered by the strictures of having a single uniform consensual final opinion. The practice of WTO judicial decision making, particularly at the Appellate Body, is such that all issues have to be thrashed out between the panellists or Appellate Body Members. In my

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35 These are claims of violation of WTO rules.
37 See also the standard terms of reference of panels.
38 Joost Pauwelyn, The Role of Public International Law in the WTO: How Far Can We Go? 95 AJIL 535, 554.
39 Ibid. Joost Pauwelyn gives examples of rules the breach of which is not covered by the DSU as including for instance those set out in “the ministerial decisions and declarations that are part of the Final Act but not of the WTO Agreement, or rules set out in mutually acceptable solution agreed upon in the context of a WTO dispute.”
view, this has the unavoidable result of muting what could be bold divergent development oriented views. The objective is usually to hammer all divergent views into a single consensual idea. The experience of many common law countries is that some of the most widely accepted legal principles now, found their way into the legal system through dissenting, often very unpopular judgments at the time they were rendered. There is no reason to think that the same cannot happen in the DS or that dissenting opinions will be a digression from the overall objective of the DS in developing a single coherent corpus of international trade law principles. In the ICJ for instance, the fact that dissenting opinions have always been a part of the features of the system has not prevented it from coming up with and advancing some of the settled principles of public international law. Petersmann has criticized the provision for dissenting opinions, among other practices in the ICJ as “time-consuming and inefficient,”\(^{40}\) We respectfully disagree. The value added by the divergent opinions, to the evolution of international legal principles is far greater than the desire for speedy unrepresentative and singular conclusions. Perhaps the real reason for what may be perceived as “inefficient” lies more in the sheer number of separate judgments, potentially up to 15, that could come out of a single proceeding, and the fact that these judgments are often excessively and unnecessarily lengthy, totalling not infrequently several hundred pages.

4. AFRICAN COUNTRIES IN THE DS: IMPOSTORS AT AN ALIEN SHRINE?

As at August 2002, 262 complaints with 180 distinct matters had been filed with the DS. In none of these disputes has a country from sub-Saharan Africa been involved as a complainant or a respondent. Some countries such as Nigeria\(^{41}\), Senegal\(^{42}\), Cameroon\(^{43}\), Zimbabwe\(^{44}\) and Côte-d'Ivoire\(^{45}\) have been involved as third parties. Morocco recently earned the dubious distinction of being the first WTO Member to present an *amicus curiae* brief in the *EU – Trade Description of Sardines Case*. It should be stated from the outset that this lack of participation is not because these countries have had no potential disputes that they could submit to the DS. A number of reasons exist. The DS is complicated and expensive. Developing country Members need time to continually train domestic lawyers in the WTO disciplines and the practice of dispute settlement, to a level that would be equal or comparable to the legal skills at the easy disposal of developed Members. The participation of developing and least developed Members in the DS has been minimal due to the lack of adequate and skilled trade lawyers. Any little success they have had in the DS has been severely constrained and ultimately at a heavy cost, adversely straining their scarce resources. They have had to incur huge expenses resulting from the hiring of very expensive private lawyers. Some of these problems have been commendably solved to a degree by the existence of the recently inaugurated Advisory Centre on WTO Law (ACWL). Some challenges, such as the training of a cadre of local trade lawyers will persist for a long time to come, and perhaps only can be resolved through

\(^{40}\) Supra note 3, Ernst Ulrich Petersmann, p. 61.  
\(^{43}\) Ibid.  
\(^{44}\) Ibid.  
\(^{45}\) Ibid.
concerted efforts at regional levels, with the assistance of the ACWL, the WTO Training Institute and such other bodies.

Developing countries, particularly those in Africa are also subject to the vagaries of global power asymmetries. Many of them receive aid or some form of development assistance from much of the developed world. Generally, this kind of relationship does not bode well in a litigation climate. The poor countries are bound to receive threats or subtle warnings to the effect that their aid package will be withdrawn if they file a dispute against their benefactor. These kinds of threats work very effectively because the repercussions of aid withdrawal are debilitating on the economies.

Poor economies are also constantly worried that the remedies available under the DSU may not confer any meaningful benefits even if they were actually successful in the dispute. Many delegations have been heard to remark that a remedy such as retaliation is of use only to an economy as powerful as that against which it shall be leveraged, and that it will hurt the weaker country much more if it tried to retaliate.

An important feature of any rule-based system is the way in which the system tackles a failure to respect the rules. The WTO dispute settlement system responds to such a failure through a series of remedies that are set forth in the Dispute Settlement Understanding (DSU) and in other covered agreements. The first measure under the DSU is the option of “bringing the measure into conformity”. As specified in Article 3.7 of the DSU, in the absence of a mutually agreed solution, "the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measure". If a measure is found to be "inconsistent with a covered agreement", Article 19.1 of the DSU calls for panels or the Appellate Body to "recommend that the Member concerned bring the measure into conformity" with the covered agreements. Panels and the Appellate Body may "suggest ways" that the recommendations could be implemented. The DSU does not dictate how a measure is to be brought into conformity with the covered agreements. Although Article 3.7 of the DSU uses hortatory language ("usually") to indicate that the preferred means of implementation is "withdrawal" of the measure, that is not the sole means by which a measure may be brought into conformity. A Member may, for instance, be able to modify a measure so that the WTO-inconsistencies are removed, without it being necessary to withdraw the measure in its entirety.

The second remedy is under Article 22 of the DSU. If a Member fails to bring its measure into conformity, it may agree to provide "satisfactory compensation" to the injured Member(s). Under Articles 3.7, compensation is a "temporary measure" to be offered only if "immediate withdrawal" of the measure is not possible and it may only be provided pending proper implementation. Compensation under WTO law is voluntary and has no retrospective

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46 Supra note 14.
47 This strategy has been effectively used already in the negotiations. African negotiators have been prevailed upon to take certain positions to safeguard certain aid packages or even GSP schemes, in fact the ACP-EU Cotonou waiver was a trade off to include Singapore issues in the Doha Round.
48 See the previous paper by Gregory Shaffer for a good analysis on this and other dilemmas that face poor litigants in the DS.
49 Articles 22.1 and 22.2 use similar language.
50 See also Article 22.1 of the DSU.
element to it. It does not therefore address the past effects of the measure. Further, the level of "satisfactory compensation" is usually measured by reference to the level of the "nullification or impairment" resulting from the failure to bring a measure into conformity. Additionally, compensation under the DSU will not usually involve the payment of money, but rather take the form of additional concessions.

The other remedy available to a WTO member is the suspension of concessions under Article 22 of the DSU. According to Article 22, in the event of a failure to comply fully with the DSB's recommendations, and if compensation is not agreed, a Member may seek authorization from the DSB to suspend concessions or other obligations owed to it by the author Member. The requirement for DSB authorization is mandatory as unilateral action is disallowed. On the whole, it is accepted that the DSB's authorization of suspension of concessions must follow dispute settlement proceedings under Article 21.5 of the DSU. The suspension of concessions is antithetical to the free trade objectives of WTO. Yet again, it is a primary right of WTO members to withdraw concessions should circumstances leave that as the only feasible option. Withdrawal of concessions is effective when it hits the author of WTO-inconsistent measure enough to want to reconsider the measure. The majority of African countries, like many in the developing world are dependent on continuing trade relationship with the agricultural rest of world. The bulk of unprocessed goods such as agricultural produce, which are the primary export commodity of African countries, end up in one developed nation or other. These countries do not have much of an alternative with which to retaliate. Their own economies would stand to suffer if they tried to retaliate. Consequently, these countries are at a loss, and will be at a loss if they were faced with circumstances when they had to use retaliation.

4.1 "Mass" Retaliation?

One of the most innovative of the several key points in the recently issued African Group Proposal is that there should be a provision for collective retaliation in the DS. The basis underlying this proposition is unassailable. Anyone that follows the DS history and process knows that one of the worst setbacks for developing and least developed Members in the system is the choice of enforcement means. The ultimate sanction against a non-complying

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51 There is some disagreement as to whether the DSB can authorize the suspension of concessions on the basis of a unilateral assessment of non-implementation or whether this must be established through dispute settlement proceedings under Article 21.5 of the DSU. In European Communities – Regime for the Importation of Bananas (WT/DS27), the United States maintained that the DSB could authorize the suspension of concessions, even if the European Communities' implementation measures had not been reviewed by a panel under Article 21.5 of the DSU. However, in the same dispute, Ecuador had recourse to Article 21.5 of the DSU before seeking authorization for the suspension of concessions. In the disputes in United States – Import Prohibition of Certain Shrimp and Shrimp Products (WT/DS58), United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMs) of One Megabit or Above From Korea (WT/DS99), Australia – Measures Affecting Importation of Salmon (WT/DS18), Brazil – Export Financing Program for Aircraft (WT/DS46), Canada – Measures Affecting the Export of Civilian Aircraft (WT/DS70), Australia – Subsidies Provided to Producers and Exporters of Automotive Leather (WT/DS126), the parties agreed that, if it should prove relevant, the implementation measures should be reviewed under Article 21.5 before authorization for suspension of concessions is requested from the DSB. This, the so-called sequencing issue, should be resolved in the DSU review exercise. There have been excellent proposals on it and broad consensus.

52 TN/DS/W/15
Member is trade retaliation, through suspension of equivalent concessions accorded under the WTO Agreement. This is a sanction that developing and least developed Members are not in a position to effectively use, as we have seen from the previous paper and previous section in this paper. According to the African Group, this fundamental shortcoming must be addressed “as the barest minimum that should be done to redress the imbalanced and inequitable nature of the very foundation of the DS.” At page 3, the proposal states:

“There should be a provision stating that: in the resort to the suspension of concessions, all WTO Members shall be authorized to collectively suspend concessions to a developed Member that adopts measures in breach of WTO obligations against a developing Member, notwithstanding the requirement that suspension of concessions is to be based on the equivalent level of nullification and impairment of benefits. The African Group realizes that this proposal has implications for the underlying approach to certain concepts such as nullification and impairment of benefits, and will therefore work closely with other delegations to address the implications and detailed mechanisms of this proposal. But the Group will do so on the basis that special and differential treatment for developing and least-developed country Members is a fundamental rule of the WTO Agreement.”

It would have been well to add that collective retaliation should be available automatically where developing and least developed Members are successful complainants – as a matter of special and differential treatment, and only upon substantiated request to the DSB in the case of successful developed country complainants.

5. SPECIAL AND DIFFERENTIAL TREATMENT PROVISIONS IN THE DSU: ARE THEY OF ANY HELP?

There are a number of S&D provisions in the DSU that were designed to help developing countries in the DS. Negotiators were concerned about the likely disadvantages that smaller economies would face in a legal dispute pitting them against powerful economies. The differences in resources and litigation sophistication was sought to be addressed by several S&D provisions. The DSU contains a number of these provisions; the right to invoke the Decision of 1966; special attention to particular problems and interests of developing countries during consultations; that panels shall include at least one panellist from a developing country; special time frames during consultations and during the procedures (provided that time frames for DSB decisions are not affected and sufficient time is given for the developing country to prepare its argumentation); that panels shall explicitly indicate the relevant provisions on differential treatment contained in the agreements that have been raised; and that attention shall be given to matters affecting developing countries with regard to the surveillance of the DSB recommendations. The question we seek to answer in this

53 Article 3.12 DSU
54 Article 4.10 DSU
55 Article 8.10 DSU
56 Article 12.10 DSU
57 Article 12.11 DSU
58 Article 21.2 DSU
part of the paper is whether these provisions have been of any help in building the confidence of poor potential litigants. The Africa Group is clear that S&D provisions in the DSU have not "fully and coherently addressed the core difficulties developing country Members face in seeking to use the WTO dispute settlement system" and that the difficulties relate, *inter alia*, to "the shortage of human and financial resources."

The practical utility of the provision that a panel should have at least one panellist from a developing country if the dispute involves a developing country has been questioned. It has been argued if the dispute is legally weighted against the developing country, the presence of the panellist will not help matters. Our argument is that this provision is more about building the confidence of developing countries in the system than it is about conferring a legal benefit on them. For this reason, it should be enhanced and supported.

Occasionally however, a chance may arise for developing country panellist to actually bring to bear his intimate knowledge about the situation of a developing country involved in a dispute, to such an extent that this may tilt the case in the favour of such a country. Of course it is difficult to see the rule-orientation of the system being compromised in such circumstances, but such a panellist may influence the interpretation of facts in a much more realistic manner, hence benefiting the developing country complainant. In enhancing the practical benefits of this provision, the LDC Group has proposed the amendment of that provision to state: "When a dispute is between a least-developed country Member and a developing or developed country Member, the panel shall include at least one panellist from a least-developed country Member and if the least-developed country Member so requests, there shall be a second panellist from a least-developed country Member."

6. SHOULD LAW COMPLETELY SUPPLANT DIPLOMACY IN THE DS?

Developing countries still have a residual faith in diplomacy. There is no greater evidence of this faith than the African Group proposal. The proposal details when African countries think a matter should be referred to the DSB or the General Council. The proposal deserves full quotation on this point:

"10. The panels and the Appellate Body have come up with "surprises" in their interpretation and application of WTO provisions, in some cases totally unexpected and unintended in the negotiation of the provisions. (a) This has affected the rights and obligations, and the expectations of the Members…Conflicts between Agreements or provisions have been conveniently interpreted away, to the prejudice or potential prejudice of development prospects. For instance, the flexibility developing country Members may have under transition periods and exceptions could be subject to what the panels and Appellate Body might consider over-riding or cumulative obligations. To address such excesses, there should be rules requiring that: the General Council shall be regularly briefed on and shall consider the jurisprudence developed in the DS; parties to proceedings shall have a right to refer questions of

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59 Quoted from the oral remarks of Scott Andersen of Sidley Austin and Brown LL.P. (Geneva, September 12 2002).
interpretation to the General Council at any stage of the proceedings before the authorization of suspension of concessions; and there shall be periodic reviews every five years to evaluate and improve through necessary amendments the manner that the DS promotes the development goals of the WTO. The right to seek information, conferred under Article 13 to panels, has been interpreted to mean an obligation to receive un-requested information. This has implications for the intergovernmental nature of the DS and the rights of Members when they seek participation in the DS as third parties. Regarding the right of the panels to seek information, the negotiations should clarify the position and adopt new rules stating that: un-requested information may be directed to the parties and shall not be directed to the panels; the Appellate Body shall not receive information that is inconsistent with its exclusive function of examining questions of law and legal interpretations raised on appeal; the right under Article 13 does not refer to the Appellate Body but to panels; and in deciding whether to seek information the panels shall consult the parties and their legal advisors. The rules should further reaffirm the use of expert review groups under Article 13.2 and Appendix 4 procedures; and clarify that in disputes raising issues that exceed the trade competence of the WTO, advisory opinions may be sought from the International Court of Justice in order to promote international legal harmony.”

One may envisage certain situations when it would be necessary to refer matters to the General Council, in the light of the proposal. Such situations could include: Where two or more provisions or Agreements are pleaded or are part of the applicable law, and issues arise relating to their meaning, interpretation, application, consistency or inconsistency; Where any provisions of the covered Agreements including the DSU, are under consideration and the party considers that their interpretation or application may affect or modify the rights and obligations of any Member; and perhaps where any interpretation, application, finding, or recommendation, has the effect of modifying any provisions of any Agreement, or any rights and obligations for Members, or creates new concepts or meanings not envisaged in the negotiations.

The reason for this obvious proposition is quite straightforward. Whereas African countries are the single largest block of WTO Members, they have realized that the overly complicated, legalistic and expensive nature of the DS will not usually work to their favour. The DS has been monopolized, in usage, administration and jurisprudential leaning and evolution by developed and a few large developing countries. This exclusion is both subtle and overt, the consequence of which is that their faith in the system has not been steadily growing, as has been the case for the rest of the world. If push ever came to shove, and an issue was subjected to vote in a perfectly balanced setting, their interests will carry the day. That is because they have realized that rule-orientation does not insulate them from the vagaries of global power asymmetries as it was thought. They would rather arrive at an amicable solution than to have concessions withdrawn by a major trading partner.

7. HOW AFRICAN COUNTRIES COULD BE MORE INVOLVED IN THE DS

In the previous paper, Gregory Shaffer has pointed out that the United States and the European Union are constantly engaged in the DS either as litigants or as third parties. Through such constant participation, their delegations and counsel gain invaluable exposure
on the internal dynamics of the system, get to test litigation strategies and simply put, become more familiarized with the system. Further, even in municipal systems, a lawyer that appears before a particular judge develops certain judge-friendly skills that often endear them to that particular judge. The lawyer becomes aware of the idiosyncrasies of the judge, and that way, becomes a better and more effective pleader for his clients. A comparable scenario may be envisaged in the DS. The delegations that are frequently in the DS develop familiarity, confidence and a knowledge base that usually puts them in good stead in subsequent cases.

African countries have already come up with modalities on how to optimally utilize their scarce human resource potential. They have “focal points” for various negotiation issues, and a coordination strategy. They hold regular meetings, typically every Tuesday morning. In this way, they have put in place a mechanism that enables them to, at the minimum, have one person that is familiar with the issues, in most areas of WTO negotiations. This person then is tasked with the burden of briefing the rest of the delegates in the regular meetings. The meetings also serve as strategy sessions at which views and ideas are exchanged. Knowing that European delegations receive heavy support from a battery of extremely capable lawyers and economists at the European Commission, it is only sensible that African countries pool their resources together in this manner too. This “pool” design should be extended to participation in the DS as third parties. In the main, the only obstacle the countries may have is in showing sufficient and legitimate interest in the case at hand. There will be very few disputes in my view that a single African country cannot show a legitimate and sufficient interest. The Advisory Centre on WTO Law could be asked to give the initial advice as to the benefit in participating as a third party in each dispute, in doing a preliminary assessment whether there is sufficient interest, and possibly in drafting submissions.\textsuperscript{60}

As indicated earlier, one or two professionals typically staff African delegations to the WTO in Geneva. These two, usually subdivide their work in a function-driven manner. Sometimes, a more senior diplomat simply takes what he has dealt with for the longest time or what he has most competence in, or indeed what interests him or her most, and whatever remains is then assigned to the junior or later arriving delegate. A quick survey carried out in Geneva showed that most of the senior diplomats tend not to deal with the DS in general or in the negotiations. It is usually the newer or younger diplomats who deal with it. Due to the breadth of issues they have to cover, the DS receives little attention. The consequence is that the issues are not receiving as much attention as they should due largely to resource constraints. We recommend that delegations should make an effort to attend DSB and DSB special session meetings and familiarize themselves with the issues at play. Setting up a legal monitoring unit within the African Group that could always explore possibilities of participating as third parties in disputes, joining consultation in, as many disputes and even bringing joint disputes when such an occasion presents itself should be encouraged. African countries should also not shy away from making any kinds of proposals, a step that has already been undertaken, in the context of the DS and that should be replicated for other negotiations. African negotiators often exercise a large degree of rationalized restraint they go to great lengths to craft positions that we curry favour with the United States and the European Union, and other major powers, even before they actually know what the position of these countries is. They simply work with the benefit of hindsight and often the end result

\textsuperscript{60} Supra note 11.
is defensive attitude and defensive proposals. African countries should feel confident to engage at the table, make proposals and respond to them unabashedly, and with their underprivileged circumstances in mind. They should also actively engage the Advisory Center on WTO Law, in seeking legal advice and if need be, representation. They should also engage actively with civil society organizations such as the International Centre for Trade and Sustainable Development (ICTSD)$^{61}$ and inter governmental Organizations such as UNCTAD$^{62}$ and the South Center$^{63}$ that have capacity on DS issues. Such organizations could make the work of delegations easier by preparing studies and papers on various issues either on request or within the context of projects that they are running. Delegations could then feel free to use such publications or papers as they wish.

As a way of building long-term capacity for full engagement in the DS and the multi-lateral trading process as a whole, African countries may wish to think about establishing regional advisory centres on WTO law, and these need not be heavily capital intensive ventures if the model outlined below is followed. Already, preliminary discussions have taken place on a centre on WTO law and policy to be located in Egypt.$^{64}$ Such a move will no doubt complement the Geneva based ACWL and the work of the WTO Training Institute. The primary goal of such centres would be to train capacity and act as issue monitoring centres. The regional centres could also act as some kind of clearing houses for potential disputes. They could carry out preliminary fact gathering and possibly even fact analysis with the view of building a WTO dispute. The centres could be located in Universities with academics working very closely with the Ministries of Trade or Commerce. The primary research could be conducted by academics on sabbaticals or by graduate students. This way, the need for the hiring of new staff and associated extra expenses could be forestalled. Usually such collaboration could be by a simple Memorandum of Understanding (MoU) between the University or research group and the government department concerned. A very innovative approach that African countries may wish to support and be engaged in further, or borrow a model from, is the recently established Trade Law Center For Southern Africa (TRALAC).$^{65}$ It is a research institute affiliated jointly with the University of Stellenbosch in South Africa and the University of Namibia. It provides support to the governments in the Southern Africa region, largely by carrying out consultancy-type studies, to provide a basis for trade policy formulation. The objective is to establish satellite centres in the Africa as a whole.

Much has been said about the WTO secretariat not being geographically representative of its Membership. This is an important issue and that needs immediate attention. Whereas a staff member of the Secretariat does not represent the interests of their home countries, and are required to be neutral professionals, in the recent past, it remains the ideal venue to rake up experience in trade law and policy. Indeed many of the staff from the legal divisions have found themselves extremely attractive in the job market, particularly in the lucrative private sector where the skills they have gained at the secretariat are prized. Other staff have been seconded from institutions such as the European Commission for a period of time in the

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$^{61}$ www.ictsd.org  
$^{62}$ www.unctad.org  
$^{63}$ www.southcentre.org  
$^{64}$ Remarks of Dr. Magdi Farahat, Minister Plenipotentiary, Permanent Mission of Egypt to the United Nations in Geneva and the WTO, at the COMESA Regional workshop for delegates held in Nairobi, Kenya August 8 2002.  
$^{65}$ www.tralac.org
Secretariat, often at very senior positions. For African countries, neither the representation, nor the un-aided facility to second staff exists. The trade policy courses are few and inadequate. There is currently not a single African in the Legal Affairs division or the Appellate Body. The WTO should immediately show support by ensuring that there is at least some African representation in the legal divisions at any one given time, at the minimum for training purposes, and as a confidence building measure. The African Group proposal for instance states:

“The African Group notes with concern the still unbalanced representation of Africa on the panels and the Appellate Body. A balanced geographical representation will assist in promoting a balanced DS that reflects the various backgrounds and inherent concerns of the entire WTO membership.”

The evolution of a critical mass of Africa trade lawyers is crucial to the building of confidence in the system. There is no better way to do this than to have representation at the secretariat. Clearly, the high turnover of lawyers from the Legal Affairs Division, Rules Division and the Appellate Body, and where these lawyers end up, upon leaving the WTO, has worked to the advantage of the litigation capacity of developed countries.

8. CONCLUSION

This article has made a case for the greater involvement of African countries in the DS from which, Africa countries have thus far been virtually absent. This absence has been attributed to a number of factors including the fact that the DS is prohibitively expensive and complicated, that the ultimate remedy in the case of violation of WTO obligations, retaliation, is skewed against and to the disadvantage of poor countries, and therefore not effectively usable if such need arose, that Africa countries are virtually un-represented at the panel, Appellate Body and the WTO secretariat levels, and that the dispute settlement system, by adopting an excessively legalistic mode of operation, un-tempered by broad development concerns such as those expressed in the Doha Declarations, has not supported the unique development aspirations of African countries. The DS faces the danger of exacerbating the development difficulties that African countries face by not consciously making an effort to integrate such concerns in legal interpretation. It is already a negative confidence building measure that there is no African representation in any of the legal divisions of the WTO secretariat.

Clearly, there is no reason why, African countries should not be as involved as the rest of the world is, in all aspects of the WTO, including the DS. Particularly so, it should be recognized that the DS is constantly evolving a set of legal principles and legal interpretations that will continue to form the foundational basis for WTO law in the years to come. As long as African countries are not involved in the system, we are hard pressed to see how their unique interests, views and aspirations will be reflected in the body of WTO law being formulated. These countries will not find it easy, and in fact may lack the basis, to inject their own unique

66 Supra note 11 at page 6.
viewpoints when the need or opportunity to do so comes in the not too distant future in the form of a full fledged dispute.

African countries should feel free to attend and take an active role in meetings of the DSB, and to actively participate in the DS as third parties. They should also consider setting up regional advisory centres on WTO law, at minimal cost by, for instance, setting them up as specialized centres in Universities that teach law in the region. They could also consider encouraging law or economics professors from the region to spend time at the country missions in Geneva, as part of the staff of the mission during their sabbaticals. That way, they will gain in-depth exposure into the working of the system, and with academic rigor, could foster the development of the requisite knowledge base.

It is definitely not in doubt that the DS has functioned commendably well for the past 7 years. However, the fact that it needed some review was recognized from the very outset. Like every dynamic legal system (in the words of Thomas Cottier: “the most advanced laboratory of contemporary international law”

67), the need for reform to effectively meet the dispute resolution and development objectives of Members is paramount. In the on-going review exercise, Members will do well to recognize the unique difficulties that developing and least developed countries have documented in their proposals and to adopt a genuine solution-seeking mode of deliberations.

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III.

INTERPRETING WTO AGREEMENTS FOR THE DEVELOPMENT OBJECTIVE

By Asif Qureshi

Asif Qureshi is a Barrister and Professor of Law at the University of Manchester School of Law. He can be reached at a.h.qureshi@man.ac.uk.
TABLE OF CONTENTS

III. INTERPRETING WTO AGREEMENTS FOR THE DEVELOPMENT OBJECTIVE ................................................................. 93

1. Introduction and Executive Summary ......................................................... 93

2. The development dimension in the interpretation of WTO Agreements .......... 95
   2.1 Factoring in development as an “objective” ........................................... 96
   2.2 Factoring in the “condition of development” in the interpretation / application of WTO Agreements ................................................................. 97
   2.3 Factoring in the special characteristics of development .................................. 97
   2.4 Factoring in the textual approach in rein .................................................. 98
   2.5 Factoring in a teleological approach ....................................................... 100
   2.6 Factoring in “good governance” in the process of interpretation .................. 102
   2.7 Factoring in “relevant rules of international law applicable in the relations between the parties” that facilitate development ........................................... 103
   2.8 Factoring in an appropriate approach to interpreting SDT provisions .............. 104

3. “Foresight” of Interpretative Issues and Outcomes ..................................... 105
   3.1 Strategies in interpretation ................................................................... 105

4. Proposals for Reform in the Doha Round .................................................. 106
III. INTERPRETING WTO AGREEMENTS FOR THE DEVELOPMENT OBJECTIVE

By Asif H Qureshi

1. INTRODUCTION AND EXECUTIVE SUMMARY

Of late there has been considerable general focus amongst legal analysts, on the processes involved in the interpretation of the WTO Agreements. Yet the methods of interpreting international agreements have been the subject of consideration for almost as long as treaties have been in existence, with established international rules and practices in existence for some time now. By the same token despite the increasing participation of developing members in the WTO and its dispute settlement system, a significant number of developing members have expressed concerns in relation to the interpretation and application of WTO Agreements in the DSU, in the context of the development dimension.

There are a number of reasons for this particular focus on the WTO interpretative processes. First, the apparently established international rules on treaty interpretation have been “expressed at a level of generality sufficient to ensure” continued debate with respect to them. For example is sequencing or a holistic approach to the operation of Article 31 [1] of the Vienna Convention on the Law of Treaties [hereinafter referred to as VC] the appropriate methodology under International Law? Is a textual approach to the interpretation of WTO agreements the only approach sanctioned under international rules of interpretation? What exactly is meant by “relevant rules of international law applicable in the relations between the parties” under Article 31 [3] of the VC?


2 See the Vienna Convention on the Law of Treaties 1969. Essentially, there are three approaches to interpretation based on the text, the intention and the object and purposes of the agreement (the teleological approach).

3 “In their interpretation and application of the provisions, the panels and the Appellate Body have in several instances exceeded their mandate and fundamentally prejudiced the interests and rights of developing-country Members as enshrined in the WTO Agreement; The panel and Appellate Body composition and operation have not been conducive to ensuring the achievement of the development objectives of the WTO and of equity in geographical distribution; And The core development and equity concerns of African Members have not been taken into account in assessing the operation and the need for improvement of the DS…Conflicts between Agreements or provisions have been conveniently interpreted away, to the prejudice or potential prejudice of development prospects. For instance, the flexibility developing country Members may have under transition periods and exceptions could be subject to what the panels and Appellate Body might consider over-riding or cumulative obligations.” African Group: TN/DS/W/15, 25th Sept 2002. See also the LDC Group: TN/DS/W/17.9th Oct 2002; and India on behalf of Cuba, Honduras, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe:TN/DS/W/18.7th Oct 2002.

Second, the development dimension in the interpretation of the WTO Agreements has hitherto neither been sufficiently articulated, nor coherently structured in the architecture of international trade agreements. Indeed, developing members have expressed dissatisfaction with the record of interpretation thus far in the jurisprudence of the WTO. The dissatisfaction has focussed on the results of interpretation, the approaches to interpretation, the methodology involved in interpretation and the participants engaged in interpretation.

Third, underpinning some of the preferences for particular approaches and methods of interpretation of the WTO agreements are in fact perceived economic advantages, and the desire to preserve advantages gained. Although no economic analysis in the “interpretation” sphere in this context has been conducted, the subject in fact may have some useful pointers or at any rate provide a focal point for analysis. Of the line of enquiries that economic analysis can offer, the effects of the approaches to interpretation in terms particularly of “market access costs and benefits” to individual members and the membership of the WTO as a whole, is the most central. Second, enquiries into motivation of members [through Game Theory] in the sphere of interpretation may also provide useful insights into strategies that have been adopted, and that need to be adopted. Finally, normative economic analysis also has a bearing in the sphere of interpretation. This is because the process of interpretation can indeed involve creating or extending goals. Normative economic analysis would thus suggest interpretations that enhance efficiency.

Impressionistically thus, drawing from economic analysis, initial individual approaches to interpretation one might assume are informed inter-alia by a preference for those approaches which are least likely to undermine or jeopardise the market access gains, represented in the WTO agreements. The strategy here post agreement for the “winners” may be more of preservation rather than further gains. On the other hand, for the “losers”, the initial rational strategy would be further cost reduction; increasing gains secured, and drawing on the gains set in the long term objectives. The strategy here is not so much one of preservation post agreement but rather dynamic and legislative. In conclusion, the winning strategy would be a textual approach, with a greater stake in the policing of the agreement by the “winners” in the bargain. Equally, those whose gains in the WTO system will materialise more in the long term will emphasise the objects and purposes of the agreement [i.e., the teleological approach], which facilitate future gains.

Fourth, the WTO agreements are not static normative frameworks. They are and have set in motion a dynamic evolving system. This character of the agreements calls for greater attention and scrutiny of the interpretative process on a continuing basis. This is to ensure that national sovereignty negotiated away is not further interpreted away.

Finally, as negotiators become more skilled, and as developing countries mature in the skills of engaging in international economic relations, the value of a foresight of interpretative issues and outcomes in the future becomes increasingly apparent at the time of negotiations.

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The development dimension in interpreting WTO Agreements involves:

- Factoring in development as an objective
- Factoring in the “condition of development” in the interpretation and application of WTO Agreements
- Factoring in the specific characteristics of development
- Factoring the textual approach in rein
- Factoring in the option of a teleological approach
- Factoring in “good governance” in the process of interpretation
- Factoring in “relevant rules of International law” that facilitate development
- Factoring in an appropriate approach to interpreting SDT terms

This development dimension to interpreting WTO Agreements not only needs to be considered at the time of negotiating trade agreements and thereafter, but also requires its institutionalising into the architecture of the WTO system. There has to be “oversight and foresight of interpretative” issues and outcomes at the time of negotiations. There has to be a strategy to institutionalise a development friendly interpretative process, which should be fostered in the Doha Round. To this end a number of constructive proposals have already been tabled by a number of developing members, which factor in some of the considerations that form the building blocks for a development dimension to interpretation.

Given that the development dimension to interpreting WTO agreements needs to be pursued both at the time of negotiations, as well post-agreement continually – this paper touches on both time frameworks. Further, this paper is concerned with the process of interpretation rather than actual interpretation of particular provisions as such.

2. THE DEVELOPMENT DIMENSION IN THE INTERPRETATION OF WTO AGREEMENTS

Focusing on the process of interpretation of WTO Agreements for development unravels essentially four lines of enquiry:

- Questions relating to the propriety of a “development” bias in the interpretation process.
- Questions relating to the adequacy of the existing principles for interpreting the WTO agreements for development.
- Questions relating to the necessary cannons of interpretation and materials for inclusion in the interpretative process so as to facilitate the development objective.
- Questions relating to the general procedures and the participants involved in the process of interpretation.

These are the questions, which shed light on what the “development dimension” to interpretation involves. In particular, the development dimension to interpretation involves:
2.1 Factoring in development as an “objective”

Development as an objective needs to be factored in at the level of drafting WTO Agreements; institutionalised in the very process of interpreting WTO Agreements; engineered in actual interpretations of WTO Agreements; and facilitated through the introduction of development friendly material in the judicial process.

The principles of interpretation as applied in the jurisprudence of the WTO, and as set out in Articles 31-32 of the VC, allow for the development dimension to be factored in – particularly through reference to the text, context and the object and purpose of the WTO Agreements. With reference to this, briefly here, the following points may be highlighted.

- First, this range of material [text, context and object and purpose] is intended to facilitate a holistic approach to interpretation, and may even be characterised as a description of one. Thus, sequencing between the materials in the agreement of “text”, “context” and “object and purpose” as a *modus operandi* in interpretation, if it involves exclusion and hierarchy as between those materials, is controversial. Sequencing has the consequence of detracting from the role of the object and purposes of the agreement. In fact the consideration of these materials is a neutral process, and involves a holistic approach. Since the convenience of sequencing can result in an “intellectual lapse”, it does indeed need to be checked.

- Second, and related, this multi-dimensional technique of interpretation is, as every international lawyer aware, not a precise but a malleable tool. It allows for a margin of appreciation. Where there is that margin of appreciation questions may need to be asked as to why development factors were not allowed to trump over other considerations. Therefore, DSU provisions which invite for an explanation as to how development has been taken into account facilitate the inculcation of the development objective, and need to be strengthened where necessary as has indeed been suggested by some developing members.

- Third, it needs to be noted that the objects and purposes of an agreement are generally expressly set out and often found in the preamble to the agreement. However, express statements of the objects and purposes – although the normal source for discerning the expressed objects and purposes of an agreement – are not the only source. The object and purpose of an agreement need not only to be found explicitly expressed, but can also be discerned from the “operative clauses” of the agreement “taken as a whole”.

- Fourth, the objects and purposes of the WTO, along with certain specific provisions and instruments in the WTO already call for a development supportive

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7 See for example M. Lennard op cit at p.28.


9 See Sinclair op cit at p.128 quoting Fitzmaurice from 33 BYIL (1957) at p.228.
interpretation\textsuperscript{10}. This needs to be emphasised, and strategies and arguments reinforcing this need to be further probed.

2.2 Factoring in the “condition of development” in the interpretation / application of WTO Agreements

In the practice of WTO dispute settlement, developing members have invoked the developing condition, particularly as a shield as respondents on a number of occasions. Similarly, developed members have not refrained from actually “policing” or challenging the use by developing members, of the developing condition, as a basis for departures from normal WTO obligations. The developing condition has been proffered firstly as a relevant factual condition, and secondly as a justification for preferential implementation obligations. The normative framework of the WTO allows for the “development condition” to be a “justiciable” issue in certain circumstances.

Generally, the developing condition of a member in the dispute settlement process can become relevant where any of the WTO Agreements expressly accords special/differential and more favourable treatment [hereinafter referred to as SDT] to developing members. However, there are also occasions when the judicial apparatus of the WTO has also had to grapple with the question of the extent to which, if any, the developing condition of a member is relevant, either in the interpretation, and/or the application of a particular WTO provision to a national measure or practice, in the absence of express WTO reference to SDT. Potential examples of such obligations are: “unjustifiable discrimination” [Article XX of GATT 1994] where the “developing condition” may provide justification; and “necessary” [Article XX of GATT 1994, Article XIV of GATS and Article XIV of TRIPS] where the developing condition might inform what is necessary\textsuperscript{11}.

It may be that the circumstances when the developing condition of a member is relevant, needs further clarification.

2.3 Factoring in the special characteristics of development

Development is an objective that has built-in a degree of flexibility\textsuperscript{12}, and is coloured by time and circumstance. Therefore, the means to achieve it are similarly determined. In particular, because it is an objective that is somewhat “flexible”, it calls for “adjustments”, through for example interpretation, “to link the conceptual and practical levels effectively”\textsuperscript{13}. Thus,

\textsuperscript{10} See the Preamble to the Marrakesh Agreement; United States – Import Prohibition of Certain Shrimps and Shrimp Products AB Report, WT/DS58/AB/R; Articles 12.11 and 24 of the DSU; and the1993 Ministerial Decision on Measures in favour of Least-Developed Countries.

\textsuperscript{11} Other examples: “when it is administratively practicable”; “administer ... in a reasonable manner;” “as soon as practicable”, Article X of GATT 1994; “reasonable having regard to the conditions of traffic”, Article V (4) of GATT 1994; “administer laws... in a reasonable manner”, Art XVIII of GATT 1994; “necessary to the enforcement of governmental measures”, Article XI of GATT 1994.

\textsuperscript{12} UNCTAD, International Investment Agreements Flexibility for Development supra at p.128.

\textsuperscript{13} ibid.
development-related provisions “that are vague or ineffective or are expressed in “best
deavour” terms\textsuperscript{14}, require “a more precise and action oriented interpretation\textsuperscript{15}.” They need
to be made operational, as developing members have repeatedly asserted.

\subsection*{2.4 Factoring in the textual approach \textit{in rein}}

It has been observed that the textual approach is to be found in the practice of the WTO\textsuperscript{16}. Thus, Claus-Dieter Ehlermann states\textsuperscript{17}:

“According to Article 31.1 of the Vienna Convention, “a Treaty shall be interpreted
in good faith in accordance with the ordinary meaning to be given to the terms of the
treaty in their context and in the light of its object and purpose”. Among these three
criteria, the Appellate Body has certainly attached the greatest weight to the first, i.e.,
“the ordinary meaning of the terms of the treaty”. This is easily illustrated by the
frequent references in Appellate Body reports to dictionaries, in particular to the
\textit{Shorter Oxford Dictionary}, which, in the words of certain critical observers, has
become “one of the covered agreements”. The second criterion, i.e., “context” has
less weight than the first, but is certainly more often used and relied upon than the
third, i.e., “object and purpose. ….the Appellate Body clearly privileges ‘literal’
interpretation,…”

There are a number of points that need to be made here in relation to the claim that the
“literal” option has become a \textit{trend} in the practice of the WTO\textsuperscript{18}. First, frequent references to
dictionary meanings, is not in itself conclusive evidence of a trend in which primacy is given
to the “ordinary meaning of the terms of that treaty.” Second, the claim of a WTO practice is
couched in too certain and sweeping terms. In fact, an evaluation of such a WTO practice
itself involves \textit{inter-alia} the exercise of judgement as to whether there is a trend of a literal
approach. It involves judgement as to whether at any given time the Appellate Body has given
weight unduly to one material or another, which Article 31 of the VC enjoins a treaty
interpreter to factor in. Furthermore, it is questionable whether the claim has been
substantiated with sufficient Appellate Body practice. Finally, however, if what is being
claimed is in fact the case, then this does indeed call for a review of Appellate Body
decisions, since neither the VC nor the WTO Agreements authorise such an interpretative
approach.

The option in favour of a “predominantly literal approach” is justified by Ehlermann in terms
of the provision of “clear guidance” to the Appellate Body members working in different
divisions, the panels and the members of the WTO\textsuperscript{19}, thus providing “security and
predictability” in accordance with Article 32 of the DSU. This justification begs two
questions. What kind of clarity and predictability – if indeed this is the case. Second, is

\begin{footnotesize}
\begin{tabular}{ll}
\textsuperscript{14} & ibid. \\
\textsuperscript{15} & ibid. \\
\textsuperscript{17} & ibid Ehlermann at p.615 \\
\textsuperscript{18} & ibid. \\
\textsuperscript{19} & ibid. \\
\end{tabular}
\end{footnotesize}
predictability really being engineered if the intentions of the members and the expressed objects and purposes of the agreements are in fact being diluted?

Further, this judicial conservatism is justified by Ehlermann as providing protection to the Appellate Body from criticism that “its reports have added to or diminished the rights and obligations provided in the covered agreements” as per Article 3.2 of the DSU. It is questionable whether this is borne out. In addition, this judicial conservatism, this acknowledged “defensive adjudication” – although it may not have “added to or diminished” member’s rights and obligations – still begs the question whether it in fact preserved their rights and obligations – which should have been the driving force.

Finally, Ehlermann adds:

“The choice has been approved both by Members of the WTO and by critical observers, in particular by experts of international [trade] law.”

Unfortunately, it is not clear where and how Members of the WTO are supposed to have approved of the literal approach. Can such an insight into the practice of the Appellate Body be imputed to the Dispute Settlement Body of the WTO – still less approval of that practice? Nor is it explained who the critical observers are who are being relied upon. Certainly, there are trade experts who are critical of the literal approach, as indeed developing members.

In conclusion, in the light of the nature of the justifications that have been proffered for the literal approach – grounded as they seem to be in considerations of expediency and defensiveness – there is a serious question whether the literal approach really is an established and accepted practice, or is it in fact a desideratum that is being advanced.

This perception of a textual approach is also reinforced by the characterisation variously of the WTO agreements as being essentially contractual in nature, and as representing a bargain of concessions whose balance needs to be maintained. Thus, G. Marceau states:

“This obligation to read the WTO as a whole and in a coherent manner reinforces the idea that members wanted to set up an international system of rules and obligations specific to their trade relations, a system that would be coherent in itself and within which rights, obligations and related State action would be the result of an overall balance of concessions.”

There are a number of observations that need to be made here. First, that it is no longer possible to characterise the WTO agreements as being of a monolithic character. In fact the agreements contain elements of a constitution of an organisation and a trading system, as well as exhibiting legislative and contractual characteristics. Further, the agreements contain both rules, as well as concessions. Second, it does not necessarily follow from the fact that because

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21 India on behalf of Cuba, Honduras, India, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe: “Though there was no hierarchy between ‘ordinary meaning’ i.e., ‘text’ and ‘context’, ‘object and purpose’, the practice of the Appellate Body and the panels to date has been to begin their clarifications with textual interpretation by referring to the dictionary meaning of the provisions of the covered agreements.” TN/DS/W/18, 7th Oct 2002.

Interpreting WTO Agreements for the Development Objective

February 2003

a Single Undertaking is arrived at as a consequence of a balance of bargains that its post-interpretation should be driven by the imprimatur of that prior-final agreement process. After all, all agreements are a process of a bargain and represent the bargain. However, once the agreements are established, they acquire an independent life of their own, and the individual provisions need not necessarily be interpreted with reference to the nature of the balance [or imbalance] of the bargain finally established as between the parties. In any event the notion of balance of bargain in the negotiations is distorted here by the fact that developed members have not expected reciprocity from developing members in the negotiations. It follows therefore that that non-reciprocity principle in the negotiations of concessions as between developed and developing members, should also be mirrored in the interpretation process of the WTO agreements – so that the intention behind the non-reciprocity practice in negotiations in order to accommodate and facilitate development also permeates the process of interpretation. Third, the obligation to interpret the Single undertaking in a coherent and harmonious manner elicits the role of the objects and purposes of the Single Undertaking more so than its contractual character. Once development is recognised in a trade agreement, its dye is cast deeper than other colours. Development is so fundamental a concept in international economic relations and law, that once it is taken into account, it must have a profound impact in the pot of colours. Its colour therefore can only be coherently and harmoniously taken into account by recognising its significance as an important informing agent in the process of interpretation.

2.5 Factoring in a teleological approach

The WTO Agreements partake of constitutional, legislative and contractual characteristics. Development is a constitutional and legislative tenet of the WTO, and therefore calls for a teleological approach, at any rate when it comes to development related provisions. In this respect there are important insights to be gained from a focus on comparative approaches to interpretation in the international economic sphere. Furthermore, there is a case for the WTO interpretative process to be attuned to the practice of other international organisations, if the WTO is to effectively and continually discharge its function of achieving greater coherence in global economic policy-making.

In the law and practice of international monetary law, the Articles of Agreement of the IMF are interpreted in accordance with customary international law principles of interpretation, but with a strong teleological orientation. There are mainly two reasons for the use and preference of this orientation. First, Article I of the IMF Articles of Agreement directs observance of a teleological approach. Second, the Articles of Agreement of the IMF have a

23 See for example Article XXXVI (8) of GATT 1994.
25 Article III of Marrakech Agreement.
27 Article 1 of the IMF Articles of Agreement states: “The Fund shall be guided in all its decisions by the purposes set forth above.”
28 J.Gold op cit at p.19.
constitutional function and character in terms of international monetary relations, and therefore are more suited to such an interpretative approach. This IMF approach to interpretation is mirrored in the law and practice of the World Bank Group. The teleological approach is similarly justified on the basis of an express mandate, for example set out in Article I of the IBRD.

In the field of international investment law, in the practice of ICSID arbitrations, in interpreting Bilateral Investment Treaties [BITs], there is evidence of a focus on the intention of the Contracting Parties, and on a number of occasions at the object and purposes of the BITs, as set out in the preamble. Tribunals have also relied on a number of occasions on the objects and purposes of ICSID in interpreting its provisions - in particular in relation to one of its key provisions defining its jurisdiction viz., Article 25 of ICSID. Similarly, on the occasions when the International Court of Justice has been involved in interpreting investment agreements, in particular FCN treaties, the Court has taken into account the object and purposes of the agreements in question.

In the sphere of International Fiscal Law, at the national level, the approach to interpreting double taxation agreements has not completely been uniform. Thus, in Germany, the UK, Norway and Switzerland, generally a textual approach has been adopted. In the United States and Netherlands on the other hand, the focus has been on the intent of the contracting parties. However, the role of the teleological approach is unclear. Double taxation agreements have a contractual/bilateral character but also have law-making aspects. In the circumstances, two situations have been identified where the teleological approach is considered relevant. First, where there is an “improper use of double taxation conventions”. And second, where there are “convention provisions that are not directly concerned with the avoidance of double taxation, but with other purposes”. Generally, however, it is maintained that the textual approach, should prevail in relation to double taxation agreements. This has

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29 ibid p.172.
31 Ibid and see Article I of the International Bank for Reconstruction and Development, which States: “The Bank shall be guided in all its decisions by the purposes set forth above.”
32 International Centre for the Settlement of Investment Disputes.
36 See for example Case Concerning Eletronica Sicula S.p.A (ELSI), US vs Italy, ICJ (1989); Case Concerning Oil Platforms, Islamic Republic of Iran vs United States of America (1996); Case Concerning the Gabčikovo-Nagymaros Project, Hungary/Slovakia, ICJ (1997).
37 See for example ELSI case op cit para 132. See also para 64.
38 See ibid General Report at p.60.
39 ibid.
40 ibid at p.68.
41 ibid at p.72.
42 ibid at p. 73.
43 Ibid at pages 74 and 83.
been justified in the interest of legal certainty, but may also be explained because of the particular nature of double taxation agreements.

In the context of regional economic integration agreements, in the European Union, the Court of Justice of the European Communities has adopted the contextual and teleological approaches, with “increasing resort to the latter”. The emphasis on the teleological approach in interpreting the agreements establishing the European Union is also reinforced by the fact that in most continental legal systems the teleological approach is widely used in interpreting national legislation. Indeed, the teleological approach is “expressly enjoined upon the Swiss Courts by the Swiss Civil Code of 1922”. The teleological approach is also endorsed in NAFTA. Article 102 [2] of NAFTA specifically obliges parties to the agreement to interpret and apply its provisions in the light of the objectives set out.

In conclusion, three particular lessons are to be drawn from this comparative insight. First that the teleological approach can be used, and is widely used in other multilateral and regional economic arrangements. Second, whereas the WTO agreements may have a variegated character i.e., in part constitutional, in part legislative, in part contractual – this variegated character does not preclude, indeed invites, the application of the teleological approach, as appropriate in the particular circumstances. Finally, the teleological approach can actually be entrenched as a direction for the approach to be adopted for interpretation. Indeed, in relation to LDCs this approach is arguably already entrenched, but may need further clarification.

2.6 Factoring in “good governance” in the process of interpretation

Good governance in the interpretation process involves mainly questions of transparency and judicial participation, and is of particular concern to developing countries. The participants involved in interpreting WTO agreements need to be representative of the membership of the WTO as a whole – particularly if the development objective is to be transparently facilitated. This consideration operates at all levels. Thus, it is as pertinent at the level of the legal advisors from the Legal Affairs Division and the Appellate Body who service Panels [and can also have an influence in fact on the composition of a Panel], and the Appellate Body, as it is relevant in terms of Panellists and Appellate Body judges. Appointments of lawyers in the WTO may be on merits but they are also set against the background of a “quota” system, and arguably subject to a political process. Certainly, it is the case that both the chief lawyers in the Legal Affairs Division and the Appellate Body have always been thus far Canadian, US or EU nationals. Further, since such appointments in the WTO are not open to external scrutiny or account the process remains one of public interest.

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44 N.Brown & T.Kennedy, “The Court of Justice of the European Communities”, (2000) Chapter Fourteen at page 324. However, H.G.Schermers & N M Blokker in “International Institutional Law” (1995) at 1350 refer to an earlier study by D.Simon, “L’interpretation judiciaire des traits d’organisation internationales” stating that “Simon concludes that neither the ICJ nor the European Court emphasizes one or another of the recognized schools of interpretation. On the contrary, his study reveals that both courts display considerable eclectism in order to achieve the desired result, they do not hesitate to mingle different cannons of interpretation.”


46 Ibid p.341.

47 See Article 102 (1) and (2) of NAFTA. See also S.D.Myers, Inc. Vs. Government of Canada 40 ILM 1408.

48 See for example paragraph 2 (iii) of the December 1993 Ministerial Decision on Measures in Favour of Least-Developed Countries; and Article 24 of the DSU.
Similarly, there is no specific requirement in the DSU that Panels should have at any given time a panellist from a developing country. Certainly, when there is a dispute involving a developing member that member may require a panellist to be from a developing member state and generally has an input in the selection of the Panel. Further, it is the case that the selection of panellists should involve a composition from a diverse background\textsuperscript{49}. However, the development dimension in the development of the WTO jurisprudence does not necessarily feature only when a dispute involves a developed and a developing member. Similar concerns may also be raised in relation to the AB.

By the same token the need for transparency in terms of the materials and advice given by the lawyers from the respective legal divisions of the Panel and the AB is also relevant, as has been pointed out by a number of developing members.

2.7 Factoring in “relevant rules of international law applicable in the relations between the parties” that facilitate development

There has been much ado about the precise scope of Article 31 [3] [c] of the VC\textsuperscript{50}, which calls for “any relevant rules of international law applicable in the relations between the parties” to be taken into account in the interpretative process. In particular there are some differences of opinion as to what is meant by the “parties”\textsuperscript{51}. Is the reference to all the WTO members\textsuperscript{52}? Is the reference to the parties to the dispute as accepted by the other members of the WTO\textsuperscript{53}? Is the reference to treaties that are open to all members of the WTO? Is the reference to norms agreed and tolerated by all WTO members\textsuperscript{54}?

For developing members there are two concerns in particular which arise in the determination of the precise scope of this provision. First, it is likely that many developing members may not be parties to as many relevant international agreements as perhaps developed members may be. There may be a number of reasons, here including deliberate choice. In such circumstances, albeit in the context of interpretation, being subject to the influence of such international agreements may be of concern. Second, it needs to be emphasised that relevant rules of International Law need not merely be “obligations”, but may also partake of rights. Further they are not confined to human rights or environmental norms, but include development-orientated norms. Development is an imperative of the international economic order. It is also an aspect of the function of “achieving greater coherence in global economic policy-making” that the WTO is charged with in cooperation with the World Bank and the IMF\textsuperscript{55}.

\textsuperscript{49} Article 8 (2) (2) of the DSU.
\textsuperscript{50} See for example G.Marcou EJIL op cit
\textsuperscript{51} ibid at pages 778,781 to 782.
\textsuperscript{52} Ibid and US-Tuna EEC GATT (unadopted).
\textsuperscript{53} Ibid referring to WTO US-Shrimps case.
\textsuperscript{54} Ibid refereeing to J.Pauwelyn “The role of Public International Law in the WTO: How far can we go? 95 AJIL (2001) 595.
\textsuperscript{55} Article III (5) of the Marrakesh Agreement.
2.8 Factoring in an appropriate approach to interpreting SDT provisions

In relation to interpretation, there is a general tendency on the part of developed members to argue for limiting the scope of the SDT provision, whereas the developing members have had to argue for a liberal interpretation, often emphasising the preamble and the object and purposes of relevant agreements, including invoking presumptions in favour of developing members.\(^{56}\) In Panel and Appellate Body practice there is frequent reliance on the object and purpose of the particular agreement in question. Further, the significance of the preamble to the Marrakesh Agreement is noted, as is any heading of a particular provision. Indeed, there is some evidence that apparently exhortatory provisions can and have been interpreted to give some binding force to them. However, this purposive approach seems to be affected by the principle that waivers and exceptions are to be interpreted narrowly, where SDT provisions can be characterised as “waivers and exceptions”\(^{57}\).

In the circumstances, it has been suggested that despite the emphasis on the purposive approach, there is a “trend towards a stricter interpretation” of SDT provisions\(^{58}\). This is also the perception of some developing country delegates to the WTO. This observation however needs to be evaluated against the number of cases the assessment of a trend is based on; and whether it distinguishes between “outcomes” that are a consequence of “strict interpretations”, and “outcomes” that inevitably reflect the language of the provisions as negotiated. Certainly it is the case, that there is no doctrine of strict interpretation of SDT provisions that has been articulated expressly as such. In fact, there is frequent reference to “object and purpose” in the jurisprudence of the WTO.

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\(^{56}\) See for example, Brazil-Export Financing Programmes For Aircraft (A-B-1999-1); European Communities – Anti-Dumping Duties On Imports of Cotton-Type Bed Linen From India, WT/DS141/R (October 2000); European Communities – Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/R/GTM? HND and ECU (22nd May 1997); India - Quantitative Restriction on Imports of Agricultural, Textiles and Industrial Products WT/DS90/R (April 1999); India - Patent Protection for Pharmaceutical & Agricultural Chemicals Products WT/DS79/R (August 1998).

\(^{57}\) In “Indonesia – Certain Measures Affecting the Automobile Industry” the Panel stated that given “that under the WTO system, waivers and exceptions "have to be interpreted narrowly", the waiver of the prohibition under Article 3.1(b) of the SCM Agreement cannot reasonably be interpreted as a license to violate any and all other obligations under the WTO agreements. …By its own words, Article 27.3 of the SCM Agreement is limited to stipulate a temporary exception to the prohibition contained in Article 3.1 (b) of the same agreement in favour of developing Members. It does not “authorise explicitly” developing Members to deviate from any other obligation, either in the SCM Agreement, such as Article 5, or in other agreements, such as GATT Articles III: 2…”

\(^{58}\) See Mary Footer “Developing Country Practice in the Matter of WTO Dispute Settlement” JWT 35 (1) 55-98 (2001) at p.84 where she relies on India – Quantitative Restrictions; Indonesia – Automobiles; Brazil - Export Financing Programme for Aircraft and an Egyptian communication to this effect.
3. “FORESIGHT” OF INTERPRETATIVE ISSUES AND OUTCOMES

3.1 Strategies in interpretation

There are two stages when the interpretative process becomes relevant viz., at the time of negotiations, and post and outside the framework of negotiations.

During negotiations: there are a number of considerations which negotiators need to be aware of:

- First, having come to preliminary conclusions in the negotiations – it is always advisable to engage in some kind of “foresight in interpretation” through legal advice. This involves engaging in legal analysis – in particular positing the question: “If any of the draft terms agreed upon, given the likely composition of panels and the Appellate Body – were the subject of interpretation in the DSU, what are the possible interpretations that might be put on the terms?”
- Second, positing the question from this analysis whether there is any possible advantage in the promotion of the development objective or leaving a possible ambiguity as it is?
- Third, engaging in documented consensus building as to desirable interpretations [Art 31 [2] [a] and [b] VC].
- Fourth, ensuring that a paper trail of an adequate history of a development friendly interpretation is created [Article 32 VC].
- Fifth, ensuring that the drafting of the agreement itself is such that there is built-in sufficient flexibility to promote development

Post and outside the framework of negotiations:

- Focusing on the formation of subsequent agreements or practices, which may inform interpretations of particular provisions. Care to be taken that there is no acquiescence in interpretations that thwart the development objective.
- Ensuring that other relevant international agreements entered into prior to or post negotiations – which may have a bearing on the trade agreement being negotiated – expressly excludes or includes as the case may be – its application in the particular trade relations negotiated.
- Development friendly selection of Panellists and Appellate Body Judges.
- Development friendly selection of lawyers in the WTO legal department and Appellate Body.
- Encouraging and promoting legal scholarship and publications that are development orientated.

59 See for example UNCTAD “International Investment Agreements: Flexibility for Development” op cit for development orientated drafting provisions.
4. PROPOSALS FOR REFORM IN THE DOHA ROUND

In the context of the problems related to interpreting WTO Agreements, particularly from the perspective of developing members, the Work Programme under the Doha Ministerial Declaration appears to address this issue principally in the following manner:

- In a general manner under the title “implementation-related issues and concerns” [para 12 of the Declaration].
- Through a focus on Special and Differential Treatment provisions [para 44].
- Through a focus on the relationship between WTO provisions and MEAs [para 32]
- In the framework of individual topics identified in the Doha Agenda – in particular review of the DSU [para 30].

More particularly the approach adopted is one of clarification of selected provisions of WTO Agreements by the membership of the WTO; review with a view to clarification of some provisions; SDT engineering so as to clarify, strengthen, and make operational these provisions; consideration of how SDT provisions “may be incorporated into the architecture of the WTO rules”; clarification of the relationship between WTO provisions and MEAs; and last but not least the opportunity to reform specifically the interpretative process through the DSU review.

However, the Doha agenda does not identify expressly the process of interpretation of WTO Agreements for developing countries as an issue as such. Rather, the agenda mainly engages or sets in motion an actual “politicised” interpretative process on selected provisions and issues only. The clarifications provided and the provisions identified for clarification review by no means seem to be exhaustive. The general review of SDT provisions provides only a partial accommodation of the development perspective. There are development related issues that arise from non-SDT provisions as well. However, it may be that the call for SDT provisions to be “incorporated into the architecture of the WTO rules” in the Ministerial Declaration facilitates the enunciation of a general approach to interpretation for development.

Certainly, there have been proposals and observations particularly in relation to the process of interpretation by developing members in the review of the DS. The proposals of note that partake of the elements of the development dimension identified here, and that are concerned mainly with the process of interpretation, are as follows:

1. Need for an agreed negotiating history to assist panels and the Appellate Body\(^{60}\) in accordance with the VC.
2. Provision for dissenting judgements in the DSU\(^{61}\).

\(^{60}\) Jamaica: TN/DS/W/21 (10\(^{th}\) Oct 2002)

\(^{61}\) LDC Group: TN/DS/W/17 (9 October 2002)
3. Explicit indication of how account is taken of SDT provisions in favour of developing and LDCs in the DSU. [Art 12.11 of the DSU].

4. Transparency in the inputs provided by the WTO Secretariat to Panels.

5. Clarification of the circumstances in which amicus curiae briefs can be submitted.

6. At least one panellist from a developing member in disputes between developed and developing member.


8. Regular and periodic review by the General Council of the Jurisprudence developed by the DSB.

These proposals, whilst constructive, have been variously put forward generally in a piece-meal and unconnected fashion, mainly in reaction to some interpretative practices that have become apparent. They do not seem to form part of a focussed, organised and proactive attempt at developing a coherent approach to the process of interpretation with a development dimension. Indeed, the Doha agenda along with the contribution of developing members thus far is mainly concerned with actual interpretation of particular provisions, including SDT provisions, rather than focussing as well on the fundamental and underlying process of interpretation which will facilitate the attainment of the development objective on a permanent basis.

Further, the proposals are not respectively set in a conceptual framework, but appear at random. It is important to identify in an appraisal of the process of interpretation with a development dimension the pegs wherein the development dimension can be hung, so that the full strain of the peg can be ascertained. With this methodology the range of possibilities is increased, and the shaping of a coherent strategy for reform more likely to emerge. For example, the focus on the range of materials which shapes a particular interpretative outcome is welcomed. Thus, reference has been made to the historical texts, the material from the WTO Secretariat to the panels, and clarification on the acceptance of amicus briefs. However, this focus is not complete. For example, no reference is made in the form of a proposal as to the appropriateness of a narrow or a teleological approach to interpretation. Nor is there any reference in the form of a proposal to the kind of relationship that other international agreements may have in the process of interpretation of WTO agreements, other than MEAs. Similarly, there is no allusion to the nurturing of legal writings in development orientated trade literature, despite the fact that Article 38 of the Statute of the International Court of justice specifically mentions publicists as a law determining source in International Law.

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62 ibid.
63 India on behalf of Cuba, Honduras, India, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe: TN/DS/W18 (7th October 2002)
64 Ibid.
65 Proposal on Special and Differential Treatment by the African Group in the WTO (2002).
66 Ibid.
By the same token, there has been focus on issues relating to good governance. For example, there is reference to the inclusion of at least one panellist from a developing member in disputes between developed and developing members. Similarly, allowing for dissenting opinions [in addition to their value per se in the development of the jurisprudence of the WTO] increases the chances also of a diverse panel being composed – as opposed to a panel that will tend to fit into a type of a “coherent peg”. However, here also there are other issues that need to be considered. For example should there not always be a panellist from a developing member – after all, to reiterate, systemic issues that touch upon development can also feature in disputes between developed members.

In conclusion, it is suggested that developing members adopt a strategy for an interpretative process, which has a development dimension along the lines suggested here. In particular, this strategy should include the following:

1. Adoption of the teleological approach to interpretation, along with a strengthening of the development objective in the preamble to the Marrakesh Agreement.

2. Introduction of a rule that “exceptions and derogations” to facilitate development should not be strictly interpreted.

3. Provision for the promotion of legal writings from a development perspective in international trade.
MAKING THE DISPUTE SETTLEMENT SYSTEM WORK FOR DEVELOPING AND LEAST DEVELOPED COUNTRIES

Initial drafts of these three papers were presented at a conference organised by ICTSD on February 7th 2003, in Geneva on the theme "Making the Dispute Settlement System Work for Developing and Least Developed Countries". The conference and this publication were made possible by a generous grant from the Swiss Development Cooperation (SDC).

Conference Agenda
Chair: Ricardo Melendez-Ortiz
Rapporteur: Victor Mosoti


9h10 – 10h00
- Ambassador Peter BALAS: "An Appraisal on the State of Play of the DSU Review Negotiations"
- Dr. Frieder ROESSLER: "Special and Differential Treatment for Developing Countries in the DSU"
- Prof. Gregory SHAFFER: "Systemic Issues Facing Developing Countries in WTO Dispute Settlement; ICTSD's Longer Term Project"

10h00 – 10h45 Open Dialogue

11h00 - 12h00
- Dr. Arthur APPLETON: "Placing the Horse Before the Cart: DSU Reform in Perspective"
- Prof. Dr. Ernst Ulrich PETERSMANN: "Proposals And Problems Of Moving From Ad Hoc To Permanent WTO Panelists"
- Ms. Natalie MCNELIS: "A practitioner's perspective on the challenges faced by developing countries in participating in the WTO dispute settlement system"

12h00 – 13h00 Open Dialogue & Rapporteur's Remarks

Afternoon Session: Elements of a Reformed WTO Dispute Settlement System

14h00 – 15h15
- Mr. Bernard O'CONNOR: "Making DSU remedies just: some ideas on needed reforms"
- Prof. Gregory SHAFFER: "How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Strategies"
- Discussant: Mr. Edward CHISANGA: "Reactions: The Experience of Least Developed Countries (LDCs) and a Comment on Some of the Reform Proposals"
- Discussant: Mr. Koteswara RAO: "Reactions: The Experience of India and a Comment on Some Reform Proposals"
- Discussant: Mr. Celso de TARSO PEREIRA: "Reactions: The Experience of Brazil and a Comment on Some Reform Proposals"

15h15 – 16h15 Open Dialogue

16h30 – 17h30
- Prof. Asif QURESHI: "Interpreting WTO Agreements for the Development Objective"
- Mr. Mateo DIEGO-FERNANDEZ: "The Experience of Mexico in the WTO Dispute Settlement Process and A Short Comment on Select Reform Proposals by Mexico"
- Prof. Thomas COTTIER: "The Professionalization of the Panel Stage and its Impact on the Balance of Power in the WTO"

16h30 – 17h30 Open Dialogue, Rapporteur's Remarks & Closing Remarks
TEAM OF PANELLISTS

Dr. Arthur Appleton  
Lalive & Partners  
Switzerland

Prof. Dr. Ernst Ulrich Petersmann  
Professor  
European University Institute  
Department of Law  
Italy

H.E Dr. Peter Balás  
Ambassador  
Permanent Representative of the Republic of Hungary to the WTO  
Switzerland

Prof. Asif Qureshi  
Professor  
University of Manchester School of Law  
United Kingdom

Mr. Edward Chisanga  
First Secretary  
Permanent Mission of Zambia to the WTO  
Switzerland

Mr. Koteswara Rao  
First Secretary (Legal)  
Permanent Mission of India to the WTO  
Switzerland

Prof. Thomas Cottier  
Director and Professor  
World Trade Institute  
Switzerland

Dr. Frieder Roessler  
Executive Director  
Advisory Centre on WTO Law  
Switzerland

Mr. Mateo Diego-Fernandez  
Counsellor  
Permanent Mission of Mexico to the WTO  
Switzerland

Prof. Gregory Shaffer  
Professor  
University of Wisconsin Law School  
USA

Ms. Natalie McNelis  
Wilmer Cutler & Pickering  
Belgium

Mr. Celso de Tarso Pereira  
Second Secretary  
Permanent Mission of Brazil to the WTO  
Switzerland

Mr. Bernard O'Connor  
O'Connor and Company  
European Lawyers  
Belgium
This resource paper offers three contributions commissioned by ICTSD on the theme "Making the Dispute Settlement System Work for Developing and Least Developed Countries", which were also the subject of a seminar under the same title held in Geneva on February 7, 2003. Collectively, the papers aim to address issues that have been raised in the on-going review of the WTO Dispute Settlement Understanding (DSU) and some additional ones, by focusing on the specific concerns of developing countries. All three contributions are inspired by ICTSD’s conviction that the WTO dispute settlement system needs to be fashioned to better serve the sustainable development aspirations of poor countries and the weaker communities. Professor Gregory Shaffer proposes a set of responses through the DSU to some of the most debilitating problems that confront developing and least developed countries. He assesses a number of strategies that some developing countries have used, and that others could consider, to mobilize legal resources and overcome some of the challenges that they face. He also explains how WTO remedies are structured in favour of large developed countries, and how they could be modified to promote developing country participation in the WTO legal system, which would better support their development interests. In the paper by Mr. Victor Mosoti some of the issues that African countries have been concerned with are examined. He’s assertive with respect to Africa’s need the of the WTO dispute settlement system, in the understanding that making the system effective and using it is critical from the perspective of the evolution of the corpus of international trade law principles whose effects and applicability will continue into the future. Professor Asif Qureshi addresses the development dimension in the interpretation of the WTO Agreements and the dispute management provisions. He argues that this has until now neither been sufficiently articulated, nor coherently structured in the architecture of international trade agreements.