

PROBLEMS OF DEVELOPING COUNTRY ACCESS TO WTO DISPUTE SETTLEMENT

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INTRODUCTION

Although many international trade scholars view the dispute settlement system of the World Trade Organization (the “WTO”) as a success, the definition of “success” depends on the perspective and experience of each Member state. Developed (and some developing) countries such as the United States, the European Union (EU), Brazil, and India utilize the system with varying degrees of frequency.¹ However, Member states with smaller economies or in differing stages of development either tend to shy away from participating in disputes or are unable to

^{1a} Any views expressed herein by interviewees are private and do not necessarily represent the views of their respective organizations or other members of that organization.

¹ The terms EU and EC (European Communities) are used interchangeably throughout this article. Technically it is the EC that, according to Article XI of the 1994 Agreement Establishing the WTO, is a member of the WTO.

access the system.² The reasons for this may include a lack of resources, a lack of institutional capacity, or a lack of political will. Others have pointed out that overall smaller trade volumes also contribute to less usage by developing countries since there may be less potential for dispute.³

To date, only one least-developed country (as designated by the United Nations⁴) has initiated a complaint through the Dispute Settlement Body (DSB).⁵ Forty-four countries with “lower middle income” economies and twenty-four with “low income” economies have initiated complaints, but of the twenty-four complaints by low income economies, sixteen were on the part of India.⁶ With 380 WTO disputes initiated to date, this means that “developing countries,”⁷

² See, e.g., Chad P. Bown & Bernard M. Hoekman, *WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector*, 8 J. INT'L ECON. L. 861, 862 (2005) (“The poorest countries in the WTO system are almost completely disengaged from enforcement of their market access rights through formal dispute settlement litigation.”). See also GARCIA BERCERO & P. GARZOTTI, *DSU Reform: What are the Underlying Issues?*, in REFORM AND DEVELOPMENT OF THE WTO DISPUTE SETTLEMENT SYSTEM 123, 145 (Dencho Georgiev & Kim Van der Borgh eds., Cameron May Ltd. 2006). (“[M]ost low income developing countries and certainly the least-developed countries are notably absent from WTO dispute settlement”).

³ See, e.g., MOHAN KUMAR, *Dispute Settlement System in the WTO: Developing Country Participation and Possible Reform*, in REFORM AND DEVELOPMENT OF THE WTO DISPUTE SETTLEMENT SYSTEM 177 (Dencho Georgiev & Kim Van der Borgh eds., Cameron May Ltd. 2006).

⁴ See WTO.org, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm (last visited Oct. 25, 2008). Of the fifty least-developed countries on the United Nations' list, thirty-two are WTO members recognized as such. *Id.*

⁵ WorldTradeLaw.net, List of all WTO complaints brought pursuant to the DSU (not including Article 21.5 disputes), <http://0-www.worldtradelaw.net.gull.georgetown.edu/dsc/database/searchcomplaints.asp> (last visited Oct. 25, 2008). In January of 2004 Bangladesh requested consultations with India concerning an Indian anti-dumping measure on lead acid batteries from Bangladesh. Request for Consultations, *India – Anti-Dumping Measure on Batteries from Bangladesh*, WT/DS306/1 (January 28, 2004). India eventually removed the measure in question and the parties informed the DSB of a mutually satisfactory solution on February 20, 2006. WTO Website, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds306_e.htm (last visited Oct. 25, 2008).

⁶ See WorldTradeLaw.net, WTO Complaints Sorted by Type of Economy, available at <http://0-www.worldtradelaw.net.gull.georgetown.edu/dsc/database/complaintsclassification.asp> (last visited Oct. 25, 2008). The designations of “lower middle income” and “low income” are created by WorldTradeLaw.net. India remains a developing country, but it has become one of the world's fastest growing economies, with average growth rates of 8% over the past three years. See The World Bank, India Country Overview 2008, <http://www.worldbank.org.in/WBSITE/EXTERNAL/COUNTRIES/SOUTHASIAEXT/INDIAEXTN/0,,contentMDK:20195738~menuPK:295591~pagePK:141137~piPK:141127~theSitePK:295584,00.html> (last visited Nov. 17, 2008).

⁷ The term “developing country”, as used throughout this paper, includes countries with economies in transition and customs territories.

even as that term is defined in its most elastic form⁸, have brought less than 18% of the total complaints under the WTO system. Furthermore, even though developing countries make up the majority of the WTO membership, the minority membership of developed countries probably initiates more than 80% of the disputes.

Notwithstanding the impressive participation of some developing countries, such as Brazil, India, and Mexico, one commentator contends that “the vast majority of developing countries professed only what is known as ‘systemic interest’” in dispute settlement.⁹ Systemic interest refers to the fact that developing countries rarely have more than an “indirect commercial interest” in the litigation due to their comparatively smaller trade volumes. This tangential relationship to disputes often translates into developing country participation only at the consultation stage or as a third party.¹⁰

The paucity of developing country-initiated cases may run counter to the presumed goals of the Dispute Settlement Understanding (the “DSU”) drafters. The WTO negotiators plainly intended to encourage developing countries to use the system, as demonstrated by “special and differential treatment” provisions laid out across the various WTO agreements. These provisions specifically deviate from the general rules, and they provide special rights “which give developed countries the possibility to treat developing countries more favorably than other WTO Members.”¹¹ The text of the DSU alone contains at least eleven such provisions by which developing countries should enjoy, for example, the right to have special attention be paid to the

⁸ The WTO website provides no definition of either “developed” or “developing” country. Instead, it explains that members self-determine their development status. WTO.org, Who are the developing countries in the WTO? http://www.wto.org/english/tratop_e/devel_e/d1who_e.htm (last visited Nov. 14, 2008).

⁹ Kumar, *supra* note 3, at 180.

¹⁰ *Id.*

¹¹ WTO.org, Work on special and differential provisions, http://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm#legal_provisions (last visited Nov. 12, 2008).

particular problems of developing countries.¹² Another provision allows developing countries to insist that, in cases between them and a developed country, at least one panelist be from a developing country.¹³

Why then, given their greater number and the possibility for preferential treatment, are developing countries so underrepresented in launching WTO disputes? It is understandable if, due to smaller trade volumes, certain countries have less monetary incentive to participate. But if some Members desire to participate and cannot, due to unequal access or other reasons, this is troublesome. As mentioned above, some attribute the dearth of developing country-initiated disputes, at least in part, to what Gregory Shaffer has categorized as “constraints of legal knowledge, financial endowment, and political power, or, more simply . . . law, money, and politics.”¹⁴ One could also characterize this dilemma as simply a problem of mobilizing resources.

This top-heavy nature of the WTO dispute settlement system is troubling for many reasons. Most obvious is that if resource constraints or other external forces translate into a lack of access on the part of some Members, there is a fairness problem. Since the *rules* of international trade apply to all WTO Members, the *benefits* accruing from application and interpretation of those rules (including access to dispute resolution) should also apply in a

¹² WTO.org, Work on special and differential provisions, http://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm#legal_provisions (last visited Nov. 12, 2008). *See also* Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments - Results of the Uruguay Round, 33 I.L.M. 1125 (1994) art. 4.10 [hereinafter DSU]. Developing countries can also take advantage of unilateral preference schemes, such as the Generalized System of Preferences (GSP), which violate the principle of Most Favoured Nation but illustrate other forms of favorable treatment.

¹³ DSU, *supra* note 12, art. 8.10.

¹⁴ Gregory Shaffer, *The challenges of WTO law: strategies for developing country adaptation*, 5 WORLD TRADE REVIEW 177, 177 (2006). There are many potential reasons for less use of the dispute settlement system by developing countries. As mentioned above, comparatively smaller trade volumes may translate into less incentive to initiate disputes. This paper recognizes that there may be alternative explanations for the question raised, but focuses on resource problems (and how they translate into fact-finding challenges and lack of access) to analyze the issue of participation.

uniform manner.¹⁵ Probably more vexing, though, are the systemic issues raised by this apparent unfairness. One of the key characteristics setting the WTO apart from the General Agreement on Tariffs and Trade (the “GATT”) is the stronger and binding dispute settlement process. If access to this process is unequal, this raises larger questions of the organization’s overarching legitimacy and stature in the realm of international law.

To alleviate the inequities of this situation, the constraints of law, money, and politics must be boiled down and identified for the effects they have in practice. To a large extent, the complexities of each limitation intertwine with those of the others, and this paper addresses the problems within this naturally interconnected state. It will attempt to answer the general question, “what frustrates developing country participation in the WTO dispute settlement system?” It also aims to identify some possible solutions.

Part I of this paper examines some of the reasons why developing countries use the WTO dispute settlement system less than the WTO’s more wealthy developed Members. First, it examines the problem of fact-finding, briefly analyzing the increasing importance of facts in WTO jurisprudence, and why this is problematic for developing countries. Second, it identifies a lacuna of both formal and informal legal procedures within developing countries and relates this to endemic private sector attitudes. Finally, this section examines the problem of political will as it relates to the non-existence of developing country-initiated disputes.

Part II offers six proposals to address the problems identified in Part I. The proposals are the creation of a WTO fact-finding body, the formalization of a “discovery” phase at the WTO, the enhancement of public-private partnerships in WTO litigation, a small claims procedure, the

¹⁵ See NIALL MEAGHER, *Representing Developing Countries in WTO Dispute Settlement Proceedings*, in *WTO LAW AND DEVELOPING COUNTRIES* 213, 214 (George A. Bermann & Petros C. Mavroidis eds., Cambridge University Press 2007) (“[T]he multilateral trading system benefits from the uniform and consistent interpretation of rules that apply to all.”).

revitalization and expansion of the Advisory Centre on WTO Law, and a “continuum” of WTO Secretariat duties. This section addresses each proposal in kind, analyzing the feasibility of each. The Conclusion presents the most workable steps that can be immediately taken from each of the proposals at the lowest cost.

I. WHY DO DEVELOPING COUNTRIES USE THE WTO DISPUTE SETTLEMENT SYSTEM LESS?

There are a host of reasons why developing countries appear to use the WTO dispute settlement system less aggressively than, for example, the United States, the EU, or even Brazil. This paper does not intend to identify every reason, but focuses on three which, although addressed as stand-alone problems here, should be viewed as part of the interconnected whole of many issues.¹⁶

First, this section briefly addresses the increasing importance of fact-finding in WTO disputes. It specifies the particular kind of fact-finding at issue and examines its increasing cost. Second, this section discusses the importance of a link between private industry and government, which most developing countries lack. It refers to the U.S. and EU models of both formal and informal public-private partnerships. Finally, this section highlights the problems of political will faced by developing country Members of the WTO.

¹⁶ As already mentioned, Kumar has pointed out that developing countries may have small trade volumes compared to other WTO Members, and therefore will have less of a financial incentive to initiate disputes.

a. *The problem of fact-finding*

1. *Fact-finding is important*

As any experienced WTO practitioner can attest, the nature of litigating in the dispute settlement process is constantly evolving. From the early days of the GATT structure to the current WTO framework, the international trade community has witnessed a number of important changes to the way disputes are resolved.

Over time, WTO disputes have increasingly turned on the factual evidence presented as opposed to the application of simple *a priori* tests or principles, a reflection of what might be called a “legalization” of WTO dispute settlement. This is quite a dramatic shift from the nature of disputes under the GATT system. As Jackson, Davey and Sykes note, “[i]n GATT dispute settlement, it was often the case that factual issues were not that important.”¹⁷ Through the application of presumptions or other widely applicable legal principles, a GATT panel’s main objective was to determine whether a particular Member’s measure violated GATT rules.¹⁸

WTO panels face a more involved task. The issues brought before the DSB are progressively more complex (as discussed below) and the DSU presents varied procedural hurdles. As a result, panels today must pay closer attention to the facts presented by the parties. Consequently, WTO cases, more than GATT cases, can involve drawn-out disputes over complicated factual issues.¹⁹ The result of this evolution is a more factually contextualized

¹⁷ JOHN H. JACKSON, WILLIAM J. DAVEY & ALAN O. SYKES, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT 272 (5th ed. 2008).

¹⁸ *Id.*

¹⁹ *Id.*

jurisprudence. Instead of applying general legal principles, panels find themselves analyzing disputes on a highly detailed case-by-case basis.

This change did not occur overnight and was arguably due to the interplay of several different factors. One of the most important factors that contributed to this evolution was the “professionalization” of GATT dispute panels in the late 1970s and early 1980s. The character of the GATT during the 1960s was shaped by its two major “superpowers,” the United States and the European Community.²⁰ Given their common stance on the “antilegalism” of the GATT, dispute resolution came to a standstill in that decade.²¹

The 1970s ushered in a rejuvenation of the GATT’s dispute settlement system. The major event effecting this shift toward “legalization” was the Tokyo Round of 1979, which hosted negotiations of several new “MTN Codes” (multilateral trade negotiation) that required a stronger dispute settlement procedure.²² The combination of a renewed interest in dispute settlement, the 1979 reforms, and the desire for clearer rules led to the reinvention of the GATT dispute settlement system. As Robert Hudec noted, “[b]y the end of the 1970s, dispute settlement had regained a central place in GATT affairs.”²³ The Uruguay Round, which commenced in 1986, perpetuated this trend by introducing binding dispute settlement.

The assertion here is not that GATT panels failed to recognize the importance of the facts. Rather, the assertion is that the application of the rules is different in the WTO, and includes a far more expansive use of both economic and scientific facts. Whereas GATT cases probably settled the larger, more general principles, today’s typical WTO dispute presents nuanced conflicts that center on factual details.

²⁰ ROBERT HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM 12 (1993).

²¹ *Id.*

²² *Id.* at 13.

²³ *Id.*

It is clear, however, that this jurisprudential change was set in motion far before its effects began to surface. For example, in its discussion of the interpretation of “like or similar products,” the 1970 Report of the Working Party on *Border Tax Adjustments* stated, “the interpretation of the term should be examined on a *case-by-case basis*. This would allow a fair assessment in each case of the different elements that constitute a ‘similar’ product.”²⁴

However, WTO panels that examined this same issue approached their analysis in a much more exhaustive fashion. In its October 1996 report in *Japan - Taxes on Alcoholic Beverages* the WTO Appellate Body stated:

The criteria in *Border Tax Adjustments* should be examined, but there can be no one precise and absolute definition of what is "like". The concept of "likeness" is a relative one that evokes the image of an accordion. The accordion of "likeness" stretches and squeezes in different places as different provisions of the *WTO Agreement* are applied. *The width of the accordion in any one of those places must be determined by the particular provision in which the term "like" is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply.*²⁵

This passage, among similar passages from other cases, changed the nature of analysis required of panels. Instead of rote application of principles, panels must interpret the provisions of WTO agreements in a highly contextualized manner and must also consider the facts and “circumstances that prevail in any given case.”²⁶

Indeed, language such as this indicates a jurisprudential sea change from the GATT decisions that came before it. The facts of a case carry new weight. It is important, however, to

²⁴ Report of the Working Party on *Border Tax Adjustments*, BISD 18S/97, ¶ 18 (emphasis added).

²⁵ Appellate Body Report, *Japan - Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4, 1996) at 21 (emphasis added) [hereinafter *Japan - Alcoholic Beverages*]. WTO case law provides many such examples of deeper factual contextualization of the disputes. See, e.g., Appellate Body Report, *European Communities - Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (March 12, 2001) at ¶ 94, ¶ 96, ¶ 101; Appellate Body Report, *European Communities - Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, (WT/DS286/AB/R (Sept. 12, 2005) at ¶ 17.

²⁶ *Japan - Alcoholic Beverages*, *supra* note 25 at 21.

specify exactly what kinds of facts are important or, for the purposes herein, what kinds of facts pose a challenge for developing countries.

2. *What kind of fact-finding is problematic?*

The increasing importance of fact-finding at the WTO manifests in various ways. As the nature of WTO dispute settlement becomes more technical, panels may need to broaden their understanding of issues. Depending upon the type of case, parties may find the need to produce economic and/or scientific evidence.²⁷ More often than not, this information is extremely complicated and therefore resides better within the scope of specialized experts.

With the understanding that technical evidence plays an important role in dispute settlement, parties increasingly formulate the basis for their arguments using quantitative economic analysis. The various Alcohol cases afford three notable examples. In *Japan - Alcoholic Beverages II*, *Korea - Alcoholic Beverages*, and *Chile - Alcoholic Beverages*, all of which considered GATT Article III claims, the parties “adduced quantitative economic analysis in order to strengthen their arguments on whether products were ‘directly competitive or substitutable.’”²⁸ Parties arguing in each case utilized econometric and non-econometric evidence to attempt to satisfy the DSB’s criteria.²⁹

Cases brought under the Agreement on the Application of Sanitary and Phytosanitary Measures (the “SPS Agreement”) also deal heavily in factual analysis, particularly scientific

²⁷ It may even be difficult to obtain regular legal evidence. For example, information on the laws and regulations in China may not be fully accessible to the public.

²⁸ World Trade Report 2005, “Exploring the Links between Trade, Standards and the WTO,” Thematic Essay: “Quantitative Economics in WTO Dispute Settlement,” at 191. The essay points out that “[e]conometric analysis makes it possible to pin down whether an observed relationship between two variables is likely to be a significant relationship or rather a coincidental one.” *Id.* at 193.

²⁹ *Id.* at 191.

evidence. In *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, for example, the panel narrowed down three issues on which it desired the consultation of outside experts.³⁰ The scientific questions involved were of such a complex nature that the European Communities recommended the panel seek advice from at least two experts competent in at least forty-four fields of expertise.³¹ The recent Appellate Body report in *European Communities – Measures Affecting Livestock and Meat (Hormones)* provides another example of heavy reliance on science. There the Appellate Body reversed the panel on several findings because “the Panel drew too rigid a distinction between the chosen level of protection and the ‘insufficiency’ of the relevant scientific evidence under Article 5.7 of the SPS Agreement.”³²

The provisions offering the legal basis for such use of experts by panels are peppered throughout the WTO agreements. Article 13.2 of the DSU states: “Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter.”³³ Panels can also request an expert to prepare an advisory report with respect to factual matters concerning “scientific or other technical” issues raised by the parties.³⁴

³⁰ Panel Report, *European Communities - Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R (Sept. 29, 2006) at ¶ 7.18.

³¹ *Id.* at ¶ 7.20. The EU listed the following fields in which it felt the experts should be competent: “agrobiodiversity, agronomy, allergology, animal husbandry, animal pathology, biochemistry, biological diversity, control and inspection methods, crop husbandry, DNA amplification, ecology, epidemiology, entomology, environmental impact monitoring methods, environmental sciences, food and feed safety, gene expression, gene sequencing, genetics, genetic modification detection methods, genomic stability, handling transport and packaging methods, herbicide chemistry, histopathology, immunology, malherberology and weed sciences, medicine, medical microbiology and antibiotics, molecular biology, nutrition, ornithology, phytopathology, plant breeding, plant development, plant-microbe interactions, plant protection and residues of plant protection products, plant reproduction and plant biology, population genetics, risk assessment and risk analysis processes, sampling methods, soil chemistry and soil sciences, soil microbiology therapeutics, toxicology, and veterinary medicine.” *Id.*

³² Appellate Body Report, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS320/AB/R (Oct. 16, 2008) at ¶ 733 [hereinafter *EC - Hormones*].

³³ DSU, *supra* note 12, art. 13.2.

³⁴ *Id.*

Provisions for the use of experts appear outside the DSU as well. The Agreement on Technical Barriers to Trade (the “TBT Agreement”) allows panels to establish a group of technical experts “[a]t the request of a party to a dispute[] or at its own initiative.”³⁵ Article 4.5 of the Agreement on Subsidies and Countervailing Measures (the “SCM Agreement”) states that the “panel may request the assistance of the Permanent Group of Experts” which is established by Article 24 of that same agreement.³⁶ Article 24.4 of the SCM Agreement also allows any Member to consult the Permanent Group of Experts to receive an “advisory opinion . . . on the nature of any subsidy proposed to be introduced or currently maintained by that Member.”³⁷ Furthermore, the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (the “Customs Valuation Agreement”) provides in Article 19.4 that “[a]t the request of a party . . . or on its own initiative, a panel . . . may request the Technical Committee” to examine “questions requiring technical consideration.”³⁸

Also notable is article 11.2 of the SPS Agreement, which advises that for cases involving scientific or technical issues “a panel *should* seek advice from experts.”³⁹ The SPS Agreement contains the only hortatory language with respect to a panel’s consultation with experts, and suggests that the drafters foresaw the complicated nature of the disputes under that agreement.

Developing country concerns regarding experts, however, do not arise from scientists or economists appointed by *panels*. Instead, developing countries face difficulties from the

³⁵ Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 121 (Cambridge University Press 1999), art. 14.2 [hereinafter TBT].

³⁶ Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 14, art. 4.5 [hereinafter SCM].

³⁷ *Id.* at art. 24.4.

³⁸ Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 172 (Cambridge University Press 1999), art. 19.4 [hereinafter Customs Valuation Agreement].

³⁹ Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 493, art. 11.2, emphasis added [hereinafter SPS].

increasing need for parties to hire experts for research and testimony to support their cases.⁴⁰ As the text of the SCM Agreement and Customs Valuation Agreement indicates, some provisions permit parties to request that experts examine or analyze evidence presented before the panel, and sometimes they can also request that the various technical committees provide advisory reports on complicated subjects.

While these provisions may appear helpful for developing countries, they neglect to address the crucial stages of pre-litigation investigation and preparatory work. The WTO agreements contemplate reference to experts once a matter is already before the panel, but they do not provide such services in the pre-litigation stages, such as when a developing country may be analyzing whether or not to bring a case at all. This key step of cost-benefit analysis is often overlooked.

As discussed above, the authority to conduct broad fact-finding resides within the capacity of panels. Basic evidence in a dispute, such as an administrative record in an anti-dumping proceeding or a subsidies case, is generally available, and therefore should not be difficult to obtain. The excerpted provisions on resorting to expert analysis, however, fail to address the need for collection of technical evidence prior to the litigation itself.

As reflected in the text of the agreements, the WTO negotiators confirmed that fact-finding is indeed important. The agreements also demonstrate that technical fact-finding, in particular, presents new challenges for WTO litigants. But the questions remain: why does this put developing countries at a disadvantage? How much can the singular issue of fact-finding contribute to the participation level of developing countries?

⁴⁰ See generally Joost Pauwelyn, *The Use of Experts in WTO Dispute Settlement*, 51 INT'L & COMP. L.Q. 325 (2002) (explaining that under the WTO framework, the use of experts has become much more common).

3. *Fact-finding is expensive*

Without considering the cost of fact-finding specifically, the general cost of litigation in front of the WTO is already high, and more so if a private law firm is hired. In some estimations, private law firms can charge anywhere from \$250 to \$1,000 per hour in fees, leading to total fees anywhere between \$100,000 to over \$1,000,000.⁴¹ These figures, however, probably represent rather conservative estimates, even for a relatively simple case.⁴²

The prices only increase for complex cases, such as *Japan - Photographic Film*, where legal fees charged to Kodak and Fuji were reportedly in excess of 10 million dollars.⁴³ Others estimate that law firms' hourly rates are even higher, and include the fact that firms also charge for additional, non-legal expenses. According to Håkan Nordström, chief economist of Sweden's National Board of Trade, "first class law firms fly first class and stay at first class hotels."⁴⁴ It has been estimated that the costs of supporting such litigation with data collection, economic analysis, and the hiring of experts as testifying witnesses could increase the base cost by up to \$100,000 or \$200,000.⁴⁵

⁴¹ These fee estimates are based on calculations using hour estimates from the ACWL Billing Policy and Time Budget for 2007 (Decision 2007/7 Adopted by the Management Board on Nov. 19, 2007). The ACWL time budget contemplates that a complicated case (including recourse to Article 21.3, 21.5, and 22.6 proceedings) requires a maximum of 1,452 hours. The \$100,000 to \$1,000,000 range of fees is an estimate of cost given prevailing private law firm rates.

⁴² Håkan Nordström, *The Cost of WTO litigation, legal aid and small claim procedures* (June 1, 2005) (Stockholm: Swedish National Board of Trade (Global Trade Department), 1 n.3, unpublished manuscript, http://wage.wisc.edu/uploads/WTO%20Conference/nordstroem_update.pdf (footnote explaining that according to the Executive Director of the ACWL, the ACWL staff typically devotes much more time to a case than that for which it actually bills the client).

⁴³ Gregory Shaffer, *How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies*, in *TOWARDS A DEVELOPMENT-SUPPORTIVE DISPUTE SETTLEMENT SYSTEM IN THE WTO* (ICTSD, Geneva), http://ictsd.net/downloads/2008/06/dsu_2003.pdf (March 2003) 5-65, 16 [Shaffer 2003a].

⁴⁴ Nordström, *supra* note 42, at 1.

⁴⁵ Bown & Hoekman, *supra* note 2, at 870.

A. *Private firm price data for hiring experts*

A Washington, D.C.-based attorney who works for a private law firm quoted prices for hiring experts that reflect the large expenses cited above. In a complex agricultural subsidies case that went before both the panel and the Appellate Body, his firm found it necessary to hire an economic expert. Given the complicated factual nature of the case, the lawyers needed the expert to conduct economic modeling and projections. For his services, the expert charged USD\$250,000 in fees.⁴⁶ With regular legal fees in this case in excess of a million dollars, the client obviously paid a hefty bill.

The attorney was careful to point out that USD\$250,000 is not a typical expert price tag, but that it depended on various factors. First, he pointed out that this was a politically sensitive case. Given the overall importance of the interests involved, the client did not feel that USD\$250,000 was too high a price. He also explained that, for a case that went before both the panel and the Appellate Body, this price was not unreasonable. If the legal fees had been closer to USD\$300,000 or USD\$400,000, then the firm would have considered this particular economic expert overly expensive. The fees of experts, he explained, need to be considered in the context of the overall cost of the case.⁴⁷

Second, he explained that part of what raised the price tag for this particular expert was his specialization. Experts on discreet issues of law usually range from between USD\$50,000 to USD\$100,000, with anything more than USD\$100,000 being expensive. Fees for damages experts, on the other hand, typically run for about half a million dollars. It depends on the level

⁴⁶ Telephone Interview with Washington, D.C.-based attorney at private law firm (Oct. 20, 2008).

⁴⁷ *Id.*

of expertise of the expert, the attorney explained. “In an agricultural case, you need an expert in *agricultural* economics, not just any economist.”⁴⁸

Finally, he argued that experts are not that common in WTO cases. He agreed that SPS cases often require expert testimony and analysis, but felt that these types of cases were rare.⁴⁹ Even if this has been the case, the landscape of WTO jurisprudence is changing. As Scott Andersen, the managing partner in Sidley Austin Brown & Wood’s Geneva office stated, WTO dispute settlement is “shaped by increasingly fact-intensive cases.” He noted the recent examples of the *United States – Upland Cotton* and *Korea – Commercial Vessels* (under the SCM Agreement), as well as increasing disputes under the SPS Agreement, and believes they reflect the growing trend discussed herein toward more factually complex disputes.⁵⁰ If this trend continues, reliance on experts will be increasingly necessary.

B. ACWL price data for hiring experts

The Advisory Centre on WTO Law is a Geneva-based legal service organization that provides subsidized legal assistance to developing countries.⁵¹ The Centre’s figures for expert retainer fees are also high, though the prices are made slightly more affordable for developing

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ SCOTT ANDERSEN, *Administration of evidence in WTO dispute settlement proceedings*, in KEY ISSUES IN WTO DISPUTE SETTLEMENT: THE FIRST TEN YEARS 177, 177 (Rufus Yerxa & Bruce Wilson eds., Cambridge University Press 2005).

⁵¹ Shaffer has noted that similar to all participants in WTO litigation, the ACWL suffers financial challenges in light of the changing nature of WTO jurisprudence. SHAFFER (2006), *supra* note 14, at 189 (“The Centre, as all participants in WTO litigation, has encountered major challenges in light of WTO jurisprudential developments that require intensive fact-gathering and rely less on presumptions and references to general principles.”).

countries by the ACWL's varying subsidization of the cost.⁵² In a 2004 case under the SPS Agreement, the ACWL retained a scientific expert during the investigative portion of the proceedings (pre-litigation) for approximately 4,000 Swiss francs, but the matter never went before a panel. The ACWL explained that "[o]f course, the expert's costs would have been higher had the matter gone to a panel and if we needed to engage him to conduct more detailed work."⁵³

In 2005, the ACWL retained the services of a former Department of Commerce officer who provided expert evidence on the conduct of an anti-dumping investigation, and the officer charged 2,000 Swiss francs.⁵⁴ In a 2008 case under the Customs Valuation Agreement, the ACWL retained an external auditor to provide information as to how the respondent's customs valuation procedures operated in practice. The auditor charged 4,000 Swiss francs. An economist for an agricultural case that same year charged 4,000 Swiss francs as well.⁵⁵

Perhaps the most incredible of the expert price tags, though, was for a 2005 agricultural dispute in which the ACWL retained the services of an economist and an external auditor. The economist charged approximately 30,000 Swiss francs for his services and the external auditor charged approximately 6,000 Swiss francs.⁵⁶ Although the ACWL represented more than one developing country in this case, and therefore a more complicated factual scenario probably existed, one must keep in mind that these figures represent only a portion of the litigation costs. When one factors in other investigative expenditures as well as ACWL fees, it is not difficult to understand the steeply escalating costs that developing countries face.

⁵² For each of the price quotes listed here, the ACWL subsidized anywhere between 40 and 60 percent, depending on the development classification of the country they are assisting. E-mail from Senior Lawyer #1, Advisory Centre on WTO Law, to Kristin Bohl (Oct. 27, 2008, 06:45:00 EST) (on file with author).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

The private firm cost estimates for hiring experts are usually higher than those cited by the ACWL. According to the ACWL, there may be two reasons for this differential. First, the ACWL provides services to countries in various stages of development. As a matter of policy, the Centre tries to negotiate the best possible rates with experts as the costs are shared by the country represented at a percentage equal to their category of development classification. One senior lawyer explained, “We advise the experts that we are acting for a developing country and that sometimes makes them give us a better rate.”⁵⁷ The lawyer did point out, however, that this is not always the case.⁵⁸

Second, the ACWL usually retains experts to assist on discrete issues, maintaining as narrow a focus as possible to reduce costs. They also strive to engage local experts whenever possible. Local experts may be more familiar with the industry in question and, as the ACWL lawyer explained, “their fees are lower than what one would expect in North America or Europe.”⁵⁹

Even if the expert costs cited by the ACWL do not seem overly burdensome, one must consider three factors that exacerbate the costs for developing countries. First, more than one expert may be necessary to produce and testify as to the evidence in any given case. The 2004 SPS case mentioned above is a perfect example. As the ACWL explained, the price in that scenario only contemplated pre-litigation issues. The expert would have needed to engage in deeper analysis had the matter gone before a panel, and there would have been a corresponding rise in his price.

Second, spending the equivalent of 4,000 to 30,000 Swiss francs or more on one expert may not seem out of the ordinary for a U.S. law firm (or the client paying that bill), but

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

considering the relative size of a developing country's economy and government budget, these additional fact-finding costs are higher than for a developed country. As Shaffer explains, developing countries face significantly higher relative costs in WTO disputes.⁶⁰ Due to their limited budgets, financial investment in WTO legal expertise makes less sense.

Furthermore, as a matter of absolute costs, WTO litigation is more expensive for developing countries because, due to less frequent participation, "they do not benefit from economies of scale."⁶¹ Indeed, due to their less frequent participation, it is unlikely that developing countries have ready access to experts.⁶² They probably have to obtain their experts on an *ad hoc* basis, which likely raises the "start-up costs" for each particular case.⁶³ A third consideration for developing countries with respect to fact-finding is that these costs are *in addition* to the already pricey general legal services mentioned above.

C. *Additional ACWL efforts*

To help defray the expenses of fact-finding and hiring experts, the ACWL maintains a Technical Expertise Fund.⁶⁴ The Technical Expertise Fund operates externally from the regular budget of the ACWL. This indicates the ACWL's recognition that fact-finding, separate and apart from general litigation costs, strains the resources of developing countries. To date, only three WTO Members have contributed or pledged contributions to the Technical Expertise Fund. Denmark, Norway, and the Netherlands contributed 373,160, 250,000 and 85,000 Swiss francs,

⁶⁰ SHAFER (2006) *supra* note 14, at 186.

⁶¹ *Id.*

⁶² MEAGHER, *supra* note 15, at 219.

⁶³ *Id.*

⁶⁴ See Advisory Centre on WTO Law, Technical Expertise Fund, http://www.acwl.ch/e/dispute/technical_e.aspx (last visited Oct. 25, 2008).

respectively, for a total of 708,160 Swiss francs currently in the Fund.⁶⁵ According to the ACWL website, developing countries can access the Fund at virtually any stage of the process (at the early investigative stage or during the panel process, etc).⁶⁶ The website also notes that the Technical Expertise Fund is of particular value for “fact-intensive” disputes such as those under the SPS or TBT Agreements.⁶⁷

With only three contributing Members, the resources of the Technical Expertise Fund remain impressive. Yet with the WTO membership surpassing 150 countries, this scant participation is disappointing. The same argument can be made regarding supporters of the ACWL itself. To date, major economic powers such as the United States, the EC, and Japan have declined to make financial contributions to support the Centre.⁶⁸ The lack of developed country involvement in and support for the Centre is not surprising. However, as the proposals in the following section argue, the lack of system access for developing countries threatens the legitimacy of the entire system. It can be argued, therefore, that supporting the ACWL is actually in the interests of all WTO Members.

4. *Is it just about money?*

Some Members of developing country delegations to the WTO have expressed the view that, more than any other factor, the WTO dispute settlement system is about money, and “whoever has the most wins.”⁶⁹ The problem of fact-finding illustrates this point well. Indeed, it

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ The Agreement establishing the Advisory Centre on WTO Law, Annex 1, Nov. 30, 1999, *available at* http://www.acwl.ch/e/tools/doc_e.aspx (last visited Nov. 13, 2008).

⁶⁹ Telephone Interview with member of developing country delegation from the Organization of American States (OAS) (Oct. 17, 2008).

might even be the case that, similar to U.S. litigation, the wealthier party in a WTO dispute can “bury” their opponent in the factual evidence it has gathered.

Yet it should be pointed out that not all WTO-system participants feel that fact-finding poses a substantial barrier for developing countries. Or, they agree that fact-finding creates difficulties, but view other intervening causes as more influential. The next section examines institutional problems stemming from the lack of developing country procedural mechanisms by which private industry can petition the government to bring WTO complaints. It also considers the problem of traditional notions of public and private sector roles in WTO litigation. Even as nearly every WTO participant agrees that fact-finding must be addressed, most feel that underlying and exacerbating the problem of facts is the systemic problem addressed below.

b. The missing link between private industry and government

As one developing country Member stated, “[the] capacity to bring or defend a case is about the ability to find facts; this is how you establish a case. It is on this premise that the entire system is based.”⁷⁰ The previous section left no doubt that developing countries face an uphill struggle with obtaining WTO-dedicated resources for fact-finding. Yet to view this problem in isolation fails to recognize the entire picture. On top of the money problem, the problems of law and politics converge on the situation of developing countries, amplifying the difficulties they have with dispute settlement access.

⁷⁰ *Id.*

1. *The lack of a procedural petition mechanism*

Interviews with various representatives from the WTO system yielded a diverse collection of viewpoints. Yet the results with respect to at least one issue were virtually the same: regardless of their “sector,” all interviewees agreed that developing countries lack sufficient procedural mechanisms to initiate WTO disputes.⁷¹ More specifically, most developing countries do not provide a formal petition method by which private industry (exporters, mainly) can lobby the government to initiate a complaint on its behalf.⁷²

According to one interviewee, most Latin American and African WTO Members have no method of communication, let alone a formal mechanism. Instead, trade policy decisions rest on having the right kinds of connections. As the interviewee stated, “[i]f the case is compelling enough, and if the industry is big enough, then the government will bring a case.”⁷³ Unfortunately, this suggests that smaller industries, including fledgling entities trying to establish a presence, do not receive adequate attention from their governments.

Why is this missing procedural mechanism so pivotal for developing countries to obtain? The answer lies with one of the defining characteristics of the WTO dispute settlement system: standing. Under WTO law, only Member states have standing to bring or defend a complaint.⁷⁴

⁷¹ Interviews were conducted with developing country representatives, private Washington D.C.-based attorneys, employees of the ACWL, an economist, various legal scholars and trade specialists.

⁷² Telephone Interview with Washington, D.C.-based attorney, *supra* note 46; E-mail from Senior Staff Member, Advisory Centre on WTO Law, to Kristin Bohl (Oct. 21, 2008, 05:57:00 EST) (on file with author); E-mail from Senior Lawyer #2, Advisory Centre on WTO Law, to Kristin Bohl (Oct. 21, 2008, 04:49:00 EST) (on file with author).

⁷³ Telephone Interview with Washington, D.C.-based attorney, *supra* note 46.

⁷⁴ BERNARD M. HOEKMAN & PETROS C. MAVROIDIS, *WTO Dispute Settlement, Transparency and Surveillance, in DEVELOPING COUNTRIES AND THE WTO: A PRO-ACTIVE AGENDA* 131, 133 (Bernard Hoekman & Will Martin eds., Blackwell Publishers Ltd. 2001) (“Only governments have legal standing to bring cases to the WTO [Dispute Settlement Procedures] DSP. Thus, export interests must operate through a government filter”). Some have proposed giving direct access to WTO dispute settlement to private entities, but concluded that governmental “discretion” of whether or not to bring a case is generally desirable. *Id.* at 134.

Private persons or organizations are not permitted to bring claims, meaning government-initiated complaints afford the only pathway to seeking relief.

That the ability of private persons and entities (arguably those who are most affected by international trade) to raise awareness of trade issues is hampered by procedural shortcomings is troubling. As the *US – Section 301* panel stated in its report, “Trade is conducted most often and increasingly by private operators. It is through improved conditions for these private operators that Members benefit from WTO disciplines. The denial of benefits to a Member which flows from a breach is often indirect and results from the impact of the breach on the market place and the activities of individuals within it.”⁷⁵

Yet governments do not have the capabilities to recognize and investigate every foreign trade barrier affecting its domestic industries. Regardless of the oversight by administrative agencies or departments responsible for a particular sector, potentially viable complaints can go unnoticed or receive less priority. This means that unless the private sector has a way to notify the government of these barriers, they will likely go unchallenged and certain WTO rights will go unenforced.⁷⁶

Though most developing countries lack such a procedural mechanism, well-established and tested examples do exist. The United States and the EC offer what are probably the most widely recognized (and most utilized) communication pathways between private industry and the government. They also offer examples of the more informal public-private partnerships that will also be discussed herein. Because the EC’s statutory equivalent surfaced later in time than the U.S.’s Section 301, the evolution of EC policy may offer the most useful model for developing countries. Both U.S. and EC systems are discussed below.

⁷⁵ Panel Report, *United States - Sections 301-310 of the Trade Act of 1974*, WT/DS152/R (December 22, 1999) at ¶ 7.77 [hereinafter *US – Section 301*].

⁷⁶ Telephone Interview with Washington, D.C.-based attorney, *supra* note 46.

A. *The U.S. model*

The statutory petition mechanism in the United States is known as Section 301⁷⁷, and, over time, it has engendered its fair share of controversy.⁷⁸ The U.S. was the first GATT Member to create such a procedure, and it has often suffered attacks of being unilateralist due to its aggressive use of the statute. Regardless of the legitimacy or fairness of how Section 301 has been used in practice, it effectively aligns private industry interests with the government's ability to take action at the WTO. Shaffer describes this as "the formation of ad hoc public-private networks to develop and *exploit* public international economic law in order to advance U.S. national and commercial interests."⁷⁹

The procedure of Section 301 begins with a petition that can be filed by private firms, trade associations or the like.⁸⁰ Once private industry initiates the process, Section 301 sets forth a course of action to be taken by the United States Trade Representative (USTR).⁸¹ The USTR investigates the foreign trade barriers alleged by the petition, and takes action against them if

⁷⁷ 19 U.S.C. § 2411 (1974).

⁷⁸ See, e.g., JAGDISH BHAGWATI & HUGH T. PATRICK, *AGGRESSIVE UNILATERALISM: AMERICA'S 301 TRADING POLICY AND THE WORLD TRADING SYSTEM* (Bhagwati & Patrick, eds. University of Michigan Press 1990); THOMAS O. BAYARD & KIMBERLY ANN ELLIOTT, *RECIPROCITY AND RETALIATION IN U.S. TRADE POLICY* (Washington: Institute for International Economics 1994). But see ROBERT E. HUDEC, *Thinking about the New Section 301: Beyond Good and Evil* in Robert E. Hudec, *ESSAYS ON THE NATURE OF INTERNATIONAL TRADE LAW* at 153 (1999). See also GREGORY C. SHAFFER, *DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIPS IN WTO LITIGATION* (Brookings Institution Press 2003) [Shaffer 2003b]. Shaffer posits that in spite of the criticisms, it is possible to view Section 301 as a "tool to counter U.S. constituent demands for greater protectionism." *Id.* at 21. He bases this argument on the fact that the impetus behind and expansion of Section 301 was to quell the fears of U.S. industry that U.S. markets were disproportionately open compared to foreign markets. Congress hoped to use the statute to force other markets to liberalize commensurate with those of the U.S., in effect leading to more free trade. *Id.* at 20-21.

⁷⁹ Shaffer (2003b), *supra* note 78, at 20.

⁸⁰ 19 U.S.C. § 2412(a) (1974).

⁸¹ 19 U.S.C. § 2411(c) (1974).

necessary.⁸² The USTR can also self-initiate an investigation,⁸³ but in practice, any such government initiation typically results from the encouragement of a private firm.⁸⁴

Authority for decision-making under Section 301 has shifted over time. Originally, the sole discretion to make determinations under Section 301 rested with the president, and private firms felt their interests were not being adequately addressed.⁸⁵ Through effective lobbying, however, private industry succeeded in shifting power over such issues to the newly created USTR (created in 1962). Unlike the president, whom Congress could not call on to testify, the USTR was subject to intense grilling by congressional committees.⁸⁶ By forcing the USTR to publicly answer to private industry (via Congress), a system of accountability was established. In effect, now there is someone to answer for why action was or was not taken with respect to a Section 301 petition.⁸⁷

This power shift and accountability illustrates a crucial lesson for developing countries. Through a system of responsibility that forces, in a way, the executive to answer the demands of private industry (or at least *hear* those demands), the Section 301 procedure fosters a relationship between organized private actors and the government. Any developing country seeking to create a statutory procedure for private industry should aim to establish a similar set of checks and

⁸² *Id.*

⁸³ 19 U.S.C. § 2412(b) (1974).

⁸⁴ SHAFFER (2003b), *supra* note 78, at 21.

⁸⁵ *Id.* at 22.

⁸⁶ *Id.*

⁸⁷ *Id.* at 22-23. In addition to conducting an internal investigation, the USTR also relies on several Advisory Committees that focus on the connection between trade and specific policy areas such as labor, environment and agriculture. Office of the United States Trade Representative List of USTR Advisory Committees, http://www.ustr.gov/Who_We_Are/List_of_USTR_Advisory_Committees.html (last visited Jan. 5, 2009). The USTR also consults with various executive branch agencies via their participation on the Trade Policy Staff Committee and the Trade Policy Review Group. Office of the United States Trade Representative, Executive Branch Agencies on the Trade Policy Staff Committee and the Trade Policy Review Group, http://www.ustr.gov/Who_We_Are/Executive_Branch_Agencies_on_the_Trade_Policy_Staff_Committee_the_Trade_Policy_Review_Group.html (last visited Jan. 5, 2009).

balances. As will be discussed further below, however, governments may not necessarily agree with such automatic procedures.

In spite of Section 301's apparent effectiveness, however, according to the USTR's Website, that office has not initiated a Section 301 investigation since October of 1997.⁸⁸ It is unclear whether this has resulted from a lack of petitions submitted by private industry, or from the USTR's decision not to take action on a particular petition. What it does suggest is a shift from this formal mechanism to the more informal partnerships discussed below. The consequences of that shift will be explored further in that section.

B. *The EU model*

Europe's counterpart to the USTR is the Trade Directorate-General of the European Commission. Unlike the situation in the United States, where unilateral use of Section 301 by the USTR assuaged any private industry concern about whether the government would fight to protect export interests, the evolution of trade policy in the EU was more reactionary.⁸⁹ For this reason, the EC model sets forth a more usable roadmap for institutionalizing this relationship.

The EC maintains two procedural mechanisms through which it can initiate WTO complaints on behalf of private interests. The first method is through Article 133 of the European Treaty.⁹⁰ The second is the more recently enacted Trade Barrier Regulation (the "TBR"), which

⁸⁸ Section 301 Table of Cases, http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/asset_upload_file985_6885.pdf (last visited Jan. 8, 2009).

⁸⁹ SHAFFER (2003b), *supra* note 78, at 70.

⁹⁰ Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and certain related acts, art. 133, Oct. 2, 1997, Official Journal C 340, 10 November 1997.

the Commission adopted in 1994 just prior to the formation of the WTO.⁹¹ Although Article 133 does contemplate the participation of commercial interests and trade associations⁹², it is the TBR that more closely mirrors the private role set forth in U.S. Section 301. For that reason, this section will focus on the TBR.

Similar to Section 301, the TBR provides a petition right to individual private enterprises. Through this mechanism, commercial interests can urge the EC to investigate possible foreign trade barriers and initiate claims before the WTO.⁹³ The TBR is an improved iteration of a previous regulation known as the New Commercial Policy Instrument (the “NCPI”), which required the support of an entire “Community industry.”⁹⁴

Through coordinated efforts governed by the TBR, European business entities and associations partner with the EC to investigate potential claims. As TBR cases can sometimes be factually intensive, the government depends on input provided by private industry.⁹⁵ The relationship formed in these situations, both officially through the TBR and unofficially through alignment of interests (as described below), is what developing countries lack.

It should be pointed out that perhaps the mere existence of Section 301 and the TBR, more than their actual use, helps to facilitate trade policy in the U.S. and EC. One economist interviewed emphasized this point, highlighting the fact that more than just procedural tools, Section 301 and the TBR were political devices. As he further stated, “[i]t doesn’t matter what

⁹¹ Council Regulation 3286/94, 1994 J.O. L 349, 71. *See also* European Commission website on trade policy issues explaining the Trade Barrier Regulation (TBR), http://ec.europa.eu/trade/issues/respectrules/tbr/index_en.htm (last visited Nov. 14, 2008). This website not only explains what the TBR is but who can use it and how to file a complaint. *Id.*

⁹² SHAFFER (2003b), *supra* note 79, Table 4.2. For a thorough analysis of the Article 133 process, *see id.* at 75-84. Shaffer explains that even though lawyers view the TBR process as more transparent compared to that of Article 133, the procedures set forth by Article 133 are still used more frequently. *Id.* at 89.

⁹³ *Id.* at 85.

⁹⁴ *Id.* The NCPI was enacted in response to aggressive U.S. use of Section 301, but did not catch on with the private sector, which only filed seven petitions in ten years. *Id.*

⁹⁵ *Id.* For more information on the EU’s explanation of the TBR, *see* <http://ec.europa.eu/trade/issues/respectrules/tbr/over.htm> (last visited Nov. 14, 2008).

triggers the USTR to bring a case or not – if the USTR isn't responsive to the U.S. export industry's interests, they still have the USTR's actions on record, and can therefore engage in a political battle."⁹⁶ Perhaps it is at this political stage when the informal relationships, discussed below, are truly effective. If so, the lack of such relationships in developing countries forms an additional barrier to their access to dispute resolution.

2. *Informal partnerships in the U.S. and EU*

In addition to formal procedural mechanisms, the United States and EC also benefit from a proactive private sector that encourages informal, *ad hoc* relationships between private industry and governments. The U.S. and EU models represent the most widely recognized examples of such "public-private partnerships," and are also the most developed.⁹⁷ It is important to note that the formation of these "unofficial" relationships build largely on the official alliances fashioned under Section 301 and TBR.

For purposes of analysis geared toward helping developing countries, it is useful to compare the U.S. and EU models because of their divergent approaches. The U.S. tends to have a more "bottom-up" approach, whereas the EU approach can be seen as more "top-down."⁹⁸ In practice, Shaffer explains, this signifies that U.S. firms and trade associations take a relatively proactive role, and in the EC, it is a more centralized authority that takes the lead.⁹⁹

U.S. public-private partnerships enjoy a longer historical legacy than those of the EU and, for this reason, reflect a more "finished" quality. Shaffer identifies the following six elements

⁹⁶ Telephone Interview with economist who spent a year working with the WTO Secretariat (Oct. 27, 2008).

⁹⁷ For an extensive exploration of public-private partnerships in the United States and EU, *see* SHAFFER (2003b), *supra* note 78.

⁹⁸ *Id.* at 6.

⁹⁹ *Id.*

making up the U.S. strategy: 1) coordination through trade associations, 2) public-private exchange of information, 3) navigating the interagency 301 committee, 4) use of congressional pressure, 5) strategic use of leverage points, and 6) ultimately, litigation before the WTO.¹⁰⁰ Although they are understood as a rather informal process, these six strategy points suggest a highly sophisticated relationship.

As previously mentioned, usage of U.S. Section 301 has come to a halt in the last ten years. Not surprisingly, the number of WTO complaints filed by the U.S. has also dropped.¹⁰¹ Since 1997, many of the cases filed by the U.S. were probably the result of informal public-private initiatives incorporating some or all of the six strategies listed above.¹⁰² While such informal partnerships should be encouraged in developing countries, it should also be noted that the U.S.'s transition from formal to informal mechanisms may reflect power dynamics that prevent smaller, less connected private interests from being heard. If they begin partnership-building with such an informal, network-based approach, developing countries may run the risk of cronyism and corruption determining which complaints go forward.

By contrast to the U.S. model, the EC's public-private architecture seems a bit more primitive. According to Shaffer, unlike U.S. firms that aggressively lobby the public sector to act, "[a]t times the Commission has proactively sought contact with private firms, lobbying firms to

¹⁰⁰ *Id.* at 31-50. It seems pertinent to mention again here that the impressive engagement between sectors that the U.S. model provides probably relies heavily on the official relationships established pursuant to Section 301. Specifically, it should be noted that the informal channels of persuasion utilized in the public-private partnerships are likely to have considerably more effect given the checks and balances structure highlighted in the section covering Section 301. In other words, coordination through trade associations and the use of congressional pressure, for example, are valuable tools because U.S. Section 301 effectively makes the executive "accountable" to the public via the Congress.

¹⁰¹ According to WorldTradeLaw.net, the U.S. filed six complaints in 1995 and seventeen complaints in both 1996 and 1997. From 1998 to the present, the most complaints the U.S. filed in one year was ten, in both 1998 and 1999. After 1999 the number of U.S. complaints ranged from one to eight, with an average about 3.4 cases per year. List of all WTO complaints brought pursuant to the DSU (not including Article 21.5 disputes), <http://0-www.worldtradelaw.net.gull.georgetown.edu/dsc/database/searchcomplaints.asp> (last visited Jan. 5, 2009).

¹⁰² U.S. complaints could also have resulted from self-initiation by the USTR. 19 U.S.C. § 2412(b).

lobby it.”¹⁰³ Similar to the current situation of many developing countries, the EC lacked the entrenched public-private linkage that already existed in the U.S. European firms, as a result, reacted more cautiously to governmental efforts to act on its behalf.¹⁰⁴ However, the EC made up for an original lack of trust between the public and private sectors with an admirable effort at rallying commercial interests. This paper will focus on the EC’s model for fostering public-private partnerships with more detail in the section considering the various proposals, *infra*.

Developing countries, for the most part, lack any such informal structure aligning public and private interests. In fact, the situation in many developing countries is quite the opposite. Instead of coordinated efforts, interviews with many involved in the process suggest that it looks a lot more like finger pointing and shrugging on the part of private industry.

3. *Entrenched private sector attitudes*

Behind the procedural deficiencies plaguing developing country access is a historical and developmental phenomenon. As the excerpt from the *US – Section 301* panel above indicates, injuries from trade barriers affect private industry first and foremost.¹⁰⁵ In spite of this practical reality though, developing country industries maintain the antiquated view that enforcement of international trade policies lies solely within the domain of the government. As one interviewee explained, “[o]ne of the biggest problems in Latin America is that industry still believes that for

¹⁰³ Shaffer (2003b), *supra* note 78, at 66.

¹⁰⁴ *Id.* at 70.

¹⁰⁵ See *US – Section 301*, *supra* note 75, ¶ 7.77 (“Trade is conducted most often and increasingly by private operators. It is through improved conditions for these private operators that Members benefit from WTO disciplines. The denial of benefits to a Member which flows from a breach is often indirect and results from the impact of the breach on the market place and the activities of individuals within it.”).

any matter related to the WTO, the government is responsible. And government should also foot the bill.”¹⁰⁶

In one respect, the industries are completely correct. As has already been noted, governments, and governments only, have standing before the WTO dispute settlement body. Of course, then it is the government’s job to actually initiate a complaint and carry a case through to its end. But, as the U.S. and EC models analyzed above illustrate, the private sector plays a vital role in both the initiation and development of a case, contributing resources and conducting its own independent investigations.

As one lawyer who represents developing countries before the WTO explained, “[i]f industry would provide financial resources, then governments could do pre-litigation.”¹⁰⁷ He also suggested that if the private sector would provide human resources, they could substantially improve the government’s ability to engage in a cost-benefit analysis of whether to bring a case.¹⁰⁸

These attitudes must change if developing countries want to reap the same benefits from international trade litigation as the U.S. and EU. This essential shift will be discussed in greater detail in the section considering proposals, *infra*, but for purposes of this section it is important to recognize the considerable limitation this mentality presents.

c. The problem of political will

Given the entrenched attitudes of developing country firms described above, it might be easy to cast blame on the private sector for many of developing countries’ dispute settlement

¹⁰⁶ Telephone Interview with Washington, D.C.-based attorney, *supra* note 46.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

woes. Yet the private sector is not the only culpable party. Closely linked to the private sector's misplaced understanding of roles is a corresponding political reluctance to take action on the part of governments. This reluctance stems from any number of factors. This section briefly examines governmental hesitation to act in the WTO as it arises from legal and political incapacity in the realm of international trade and fear of political and trade reprisal.

1. *Lack of legal and political capacity in international trade*

The idea of legal and political capacity to participate effectively in WTO dispute resolution dovetails heavily with the already-discussed issue of public-private partnerships. But the finer point here refers to establishing a WTO-dedicated bureaucracy. Perhaps due to limited resources, the staff placed in Geneva from developing countries, if any, often lacks background and training in international trade related matters.¹⁰⁹ Unlike the United States and EC, whose Geneva representatives are trade experts and specialists, developing country representatives have typically been career foreign affairs ministers with little trade experience.¹¹⁰

Let alone having a talented staff of trade experts to assume the lead on dispute matters, some developing countries do not even have a bureaucratic presence in Geneva.¹¹¹ As of 2007, about one-quarter of the WTO membership had no WTO mission.¹¹² Without a point person situated in Geneva to facilitate the filing of a WTO complaint, developing country governments are saddled with the burden of performing all the necessary groundwork on their own. This

¹⁰⁹ SHAFFER (2006), *supra* note 14, at 179.

¹¹⁰ MEAGHER, *supra* note 15, at 218. In recent years, though, developing countries have begun to send more qualified trade professionals to Geneva.

¹¹¹ KUMAR, *supra* note 3, at 183-84.

¹¹² MEAGHER, *supra* note 15, at 219. Even if there is a physical presence in Geneva, the mission may lack basic office resources such as computers and phones. Telephone Interview with Senior Trade Specialist at the Organization of American States (Oct. 16, 2008).

includes any difficult fact-finding as discussed above, dedicating time to formulating an effective litigation strategy,¹¹³ and understanding the ramifications of an unsuccessful complaint. Moreover, throughout the entire process a government must weigh certain political challenges discussed next.

2. *Fear of political or trade reprisal*

If a developing country government fears that by bringing a dispute to the WTO it will jeopardize the stability of its trading relationships, it is unlikely the government will move forward. In theory, the same might be said of any country, developed and developing. As the Doha Development Round has demonstrated, disagreements over international trade policy ignite heated debate.¹¹⁴ The trade relationships formed can be delicate, and countries may want to avoid setting off the frail balance through disruptive contests with little gain in the end. When one country depends on another for a crucial trade relationship, sometimes that factor outweighs any rights they may seek to enforce at the WTO. Furthermore, even if a country brings a case to the WTO and wins, there is no guarantee it will produce beneficial trade results.¹¹⁵

In practice, however, it does not appear that many developed WTO Members fear political or trade reprisal for their dispute settlement actions. Since the inception of the WTO, the

¹¹³ *Id.*

¹¹⁴ See, e.g., Guardian.com, Mandelson: US greed caused the Doha collapse, <http://www.guardian.co.uk/business/2006/jul/30/usnews.development>; <http://www.guardian.co.uk/business/2006/jul/30/usnews.development> Guardian.com, Doha: India accuses US of sacrificing world's poor at trade talks, <http://www.guardian.co.uk/world/2008/jul/31/wto.india>; International Economic Law and Policy Blog, The Collapse of the Doha Round Negotiation: Some Reflections, <http://worldtradelaw.typepad.com/ielpblog/2008/07/the-collapse-of.html>.

¹¹⁵ The ongoing problem of remedies related to WTO disputes is beyond the scope of this paper. For further discussion of this topic, see Marco Bronckers & Naboth van den Broek, *Financial Compensation in the WTO: Improving the Remedies of WTO Dispute Settlement*, 8 J. INT'L ECON. L. 101 (2005); GARY N. HORLICK, *Problems With the Compliance Structure of the WTO Dispute Resolution Process*, in THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW 636 (Daniel Kennedy & James Southwick eds., 2002); and Petros C. Mavroidis, *Remedies in the WTO Legal System: Between a Rock and a Hard Place*, 11 EUR. J. INT'L L. 763 (2000).

United States and EC have brought 90 and 79 complaints, respectively.¹¹⁶ Even if, in the early years of dispute settlement, political considerations actually did give pause to these two economic powerhouses, it does not appear to hold them back now. In fact, it may be that political imperatives actually spur larger countries into taking action at the WTO.¹¹⁷ The ongoing Boeing – Airbus dispute suggests that any U.S.-EU concerns with bringing such a political dispute to the WTO have been overcome.¹¹⁸

Developing countries are yet to overcome fears of reprisal, and also suffer from internal political squabbling over trade issues. It is difficult for a developing country to affirmatively determine that its resources will be well spent on filing a WTO complaint when the outcome is so uncertain.¹¹⁹ Financial constraints combined with the fear of political and trade consequences, not to mention a host of non-trade related problems, may create more internal reluctance to dedicating time and money to WTO disputes in developing countries.¹²⁰

More challenging than the internal debate, however, is the external political reality that developing countries must navigate. Developing countries are more likely to be reliant on the richer WTO membership not just for maintaining its trading volumes, but also for development

¹¹⁶ WorldTradeLaw.net, List of all WTO complaints brought pursuant to the DSU (not including Article 21.5 disputes), <http://0-www.worldtradelaw.net.gull.georgetown.edu/dsc/database/searchcomplaints.asp> (last visited Nov. 15, 2008).

¹¹⁷ MEAGHER, *supra* note 15, at 219 (“There may be very few political costs for the United States or the European Communities in initiating dispute settlement proceedings. These disputes generally do not resonate loudly with the public at large (and when they do, the political imperatives may make the decision to litigate very easy). A decision to initiate proceedings may be viewed by the public . . . positively, as a means of enforcing rights.”)

¹¹⁸ There is debate as to whether the WTO provides the appropriate forum for such a political dispute. *See, e.g.*, Nils Meier-Kaienburg, *The WTO’s “Toughest” Case: An Examination of the Effectiveness of the WTO Dispute Resolution Procedure in the Airbus-Boeing Dispute Over Aircraft Subsidies*, 71 J. AIR L. & COM. 191 (2006); Claude Barfield, American Enterprise Institute for Public Policy Research, *Avoiding an Air War* (Oct. 20, 2004), http://www.aei.org/publications/filter.all.pubID.21412/pub_detail.asp.

¹¹⁹ MEAGHER, *supra* note 15, at 219-220 (explaining, through the example of Bangladesh, that developing countries face weightier issues within their internal politics than do developed countries, and thus answering the initial question of whether to even initiate proceedings is harder).

¹²⁰ Telephone Interview with Washington, D.C.-based attorney, *supra* note 46. *See also*, SHAFFER (2006), *supra* note 14, at 178.

assistance and other global aid initiatives.¹²¹ When facing “trade and aid friends” as potential respondents, developing countries may prefer to avoid upsetting that relationship. Indeed, as some commentators have put it, “[t]he associated vulnerability to extra-WTO retaliation may decrease their willingness to invoke the DSU.”¹²²

Developing countries also fear that overly aggressive use of dispute settlement may land them with more counter claims, otherwise known as the “glass house” syndrome.¹²³ It is troublesome to imagine a situation where a developing country has a legitimate claim, but elects not to file a complaint due to fear of retaliation. Furthermore, it turns the entire notion of the WTO’s rule-based system on its head. As Hoekman and Mavroidis state, “concerns that bringing a case would ‘disturb’ a country’s relationship with a major trading partner to some extent nullifies the *raison d’être* of the WTO – the establishment of a rule-based as opposed to a power-based system of trade relations.”¹²⁴

It is with all of the above problems in mind, then, that the subject now turns to possible solutions. As has already been stated, the problems of fact-finding, a lack of legal capacity, and a challenging political environment represent a small portion of the mixed bag of developing country issues at the WTO. They also face the challenges of balancing smaller trade volumes with an adequate level of WTO activity, potentially insufficient remedies, as well as significant complications in the area of “trade and” issues.¹²⁵ But if progress is to be made, it may just be taking on one small problem at a time.

¹²¹ Bown & Hoekman, *supra* note 2, at 863.

¹²² *Id.*

¹²³ HOEKMAN & MAVROIDIS, *supra* note 74, at 133.

¹²⁴ *Id.* at 134.

¹²⁵ See, e.g., Jeffrey Dunoff, *The Death of the Trade Regime*, 10 EUR. J. INT. LAW 733 (1999) and DOAA ABDEL MOTAAL, *The Trade and Environment Policy Formulation Process*, in TRADE AND ENVIRONMENT: A RESOURCE BOOK 17 (Adil Najam et al. eds., International Centre for Trade and Sustainable Development 2007).

II. PROPOSALS FOR ENHANCING DEVELOPING COUNTRY ACCESS TO WTO DISPUTE SETTLEMENT

With such a vast array of problems facing developing country Members of the WTO, the right approach cannot aim to find a panacea. Rather, targeted strategies and solutions should be employed to address ground-level problems. Each proposal suggested here aims to improve developing country access to the WTO dispute settlement system. The proposals vary to the extent they address the problem of fact-finding (or, more generally, money), internal legal capacity (law), or political will (politics). This section will analyze each proposal and ultimately determine that while some merit further exploration, others appear less feasible given other WTO constraints.

a. Create an institutionalized fact-finding body at the WTO

The challenges developing countries face with respect to fact-finding and with respect to *technical* fact-finding in particular, require remedy. Notwithstanding the laudable efforts of the ACWL in this area, this paper has already demonstrated that due to barriers related to fact-finding (among others,) developing countries often fail to seek redress for their international trade injuries through WTO dispute settlement.

This section proposes the creation of an institutionalized fact-finding body to be included under the umbrella of WTO standing bodies. It will first walk through the logistics of such an institution, then analyze the pros and cons of this approach.

1. *What would an institutionalized fact-finding body look like?*

David Collins, a lecturer at the City University of London Law School, has argued for a “standing agency to conduct fact-finding in order to correct evidentiary deficiencies in submissions by Members to panels during dispute settlement.”¹²⁶ While there is more to the fact-finding problem than deficiencies of submissions, this idea is compelling.¹²⁷

Collins suggests setting up the fact-finding body so as to fit within the pre-existing right that panels already have under DSU Article 13 to seek information. Alternatively, he posits that such a body’s mandate could derive from international law generally, where tribunals are typically granted a wide scope for investigation.¹²⁸ The duty of such a fact-finding agency would be to “clarify existing facts as well as ascertain missing information helpful to the rendering of judgment.”¹²⁹

As Collins envisions it, the body would not analyze nor editorialize the information it collected. Rather, it would function at the behest of the panel when the panel or parties felt that information was insufficient.¹³⁰ Quite effectively, Collins manages to couch his proposal as a “remedial” option as opposed to being advocacy-based. As he clarifies, “[the body] would step in to address inadequacies in the evidence as submitted by the parties for the purpose of fully informed decision-making.”¹³¹

If the goal is to help developing countries both before and during dispute settlement proceedings, however, it seems Collins’ proposal may fall short. Perhaps a better source of

¹²⁶ David Collins, *Institutionalized Fact-Finding at the WTO*, 27 U. PA. J. INT’L ECON. L. 367, 367 (2006).

¹²⁷ Collins does recognize that part of the deficiency in member submissions of evidence to WTO panels results from developing country incapacity to “produce full disclosure.” However, as this paper has made clear, the problems of fact-finding for developing countries are likely to manifest prior to the actual litigation stage.

¹²⁸ Collins, *supra* note 127, at 367.

¹²⁹ *Id.* at 368.

¹³⁰ *Id.*

¹³¹ *Id.*

authority for such a body can be found under DSU Article 27.2. This article recognizes the need to “provide additional legal advice and assistance in respect of dispute settlement to developing country Members.”¹³² It requires the WTO Secretariat, with its concomitant role of assisting panels and providing support, to “make available a qualified legal expert from the WTO technical cooperation services to any developing country Member which so requests.”¹³³

If an institutionalized fact-finding body is created, the mandate should be found under Article 27.2. Whether the body is formed pursuant to the need for “assistance in respect of dispute settlement,” or under the auspices of the WTO technical cooperation services, it seems that developing country interests would be better served by a body under Secretariat supervision that could engage in the pre-litigation stage as well as during the proceedings.

2. *The pros and cons of an institutionalized fact-finding body*

As a preliminary matter, an institutionalized fact-finding body at the WTO would go a long way toward satisfying what many otherwise view as empty commitments to recognize the special and different situation of developing countries at the WTO. The special and differential treatment provisions have been, for the most part, a disappointment.¹³⁴ By creating a WTO institution under DSU Article 27.2 whose mandate would be to aid developing countries engaging in fact-finding at both the pre-litigation and litigation stages, the WTO would gain legitimacy in the eyes of many disenfranchised Members.

¹³² DSU, *supra* note 12, art. 27.2.

¹³³ *Id.*

¹³⁴ See, e.g., Andrea M. Ewart, *Small Developing States in the WTO: A Procedural Approach to Special and Differential Treatment through Reforms to Dispute Settlement*, 35 SYRACUSE J. INT'L. L. & COM. 27 (2007); Raj Bhala, *World Agricultural Trade in Purgatory: The Uruguay Round Agriculture Agreement and its Implications for the Doha Round*, 79 N.D. L. REV. 691, 828 (2003).

Furthermore, a fact-finding body formed under the umbrella of the Secretariat would accomplish two related goals through the same action. As it engaged with developing countries in the fact-finding process, it would simultaneously transfer to them legal knowledge and capacity to better recognize WTO violations, and more effectively gather evidence. Although the Secretariat does already provide training through its trade-related technical assistance (“TRTA”) activities, amongst other programs,¹³⁵ it could expand its dedication to developing country issues by engaging in the fact-finding itself, thereby relieving some of the burden.

As promising as such an institutionalized body may appear, however, there are many arguments against it. First and foremost, regardless of how appropriately an institutionalized fact-finding body may seem to fit into either DSU Article 27.2 or Article 13, such a body likely falls outside the WTO Secretariat’s mandate. Numerous interviewees reiterated this point. As one private firm attorney stated, “[t]he WTO is a Member-driven organization, and the neutrality of the Secretariat is sacred, very closely guarded. Any ‘body’ that would gather information that could be used against other Members would almost be a non-starter.”¹³⁶ A senior trade specialist from the Organization of American States felt that a Secretariat- or WTO-based body would suffer from a lack of legitimacy and trust.¹³⁷ Additionally, the chief economist at the Swedish National Board of Trade has said that with the important advisory role the Secretariat already has to panels and the Appellate Body, “[i]t would make a mockery of the dispute settlement system

¹³⁵ WTO.org, WTO technical assistance and training, http://www.wto.org/english/tratop_e/devel_e/teccop_e/tct_e.htm (last visited Nov. 15, 2008).

¹³⁶ Telephone Interview with Washington, D.C.-based attorney, *supra* note 46. Curiously, though, the EC has proposed an “independent unit” of the WTO Secretariat to provide legal assistance to developing countries in dispute settlement. See Andrea Greisberger, *Enhancing the Legitimacy of the World Trade Organization: Why the United States and the European Union Should Support the Advisory Centre on WTO Law*, 37 VAND. J. TRANSNAT’L L. 827, 854 (2004).

¹³⁷ Telephone Interview with Senior Trade Specialist, *supra* note 112.

if the Secretariat would advise also the parties to the dispute.”¹³⁸ Trust would be difficult to establish for both developed and developing countries.

Commentators similarly reflect the understanding expressed by the interviewees that the neutrality of the Secretariat is of paramount importance. As Shaffer describes it, “WTO Members and the WTO Secretariat often refer to the WTO as a ‘contract organization.’ By contract organization, they refer to a ‘member-driven’ institution.”¹³⁹ The Secretariat, therefore, understands its role as one of facilitation, not advocacy.

To his credit, Collins recognized the need for impartial decision making in WTO disputes. He crafted his solution with the understanding that the fact-finding arm of the WTO would be independent of the decision-making arm, and he also envisioned the makeup of the body to be based on Member appointments to avoid the apprehension of bias. What Collins failed to anticipate, though, was that separation from the panels was not enough. Mere association with the WTO itself probably makes an institutionalized fact-finding body infeasible.

This proposal also suffers from logistical shortcomings. For one, does the WTO really need more bureaucracy?¹⁴⁰ As a senior staff member of the ACWL stated, “[w]hat would be the incremental value of another fact-finding institution?”¹⁴¹ And who would fund such a body? If the United States and EC are yet to financially support the ACWL, they are unlikely to fund a WTO institution aimed at helping developing countries launch cases against them. In spite of the good idea behind it, the proposal for an institutionalized WTO fact-finding body is probably a non-starter.

¹³⁸ Nordström, *supra* note 42, at 9.

¹³⁹ GREGORY SHAFFER, *Can Technical Assistance and Capacity Building Serve Developing Countries?*, in *REFORMING THE WORLD TRADING SYSTEM: LEGITIMACY, EFFICIENCY, AND DEMOCRATIC GOVERNANCE* 245, 248 (Ernst-Ulrich Petersmann & James Harrison eds., 2005) [Shaffer 2005].

¹⁴⁰ Telephone Interview w/ Senior Trade Specialist, *supra* note 112.

¹⁴¹ E-mail from Senior Staff Member, Advisory Centre on WTO Law, *supra* note 72.

b. *Formalize the discovery process*

As a dovetail to the previous proposal, this section proposes the formalization of a discovery process in WTO dispute settlement. Currently the DSU provides no rules of evidence for the parties or the panel to follow, even in the panel working procedures. This gap includes any rules that might cover admissibility, production, or sufficiency of evidence.”¹⁴²

From a developing country perspective, the lack of formal discovery rules can have both positive and negative consequences. For example, parties to a dispute enjoy the right to present any evidence they deem relevant, without having to argue it into admissibility.¹⁴³ Hopefully this means that, on the whole, more time is spent examining important facts and that relevant evidence is not kept out due to overly strict rules.

On the other hand, because the rules on the timing of evidentiary submissions are also lax, there is the opportunity for parties to continue introducing new evidence as the dispute moves forward. As Andersen notes, “[i]t is not unusual in fact-intensive cases for more exhibits to be filed by the complaining party *after* it files its first submission than were included in its first submission.”¹⁴⁴

An even larger problem facing developing countries, though, appears when a counterparty *refuses* to submit evidence. Perhaps the weakest link in the void of WTO rules of evidence is a panel’s inability to compel a party to produce evidence within its exclusive control.¹⁴⁵ This deficiency is particularly relevant for developing countries, which already face

¹⁴² Andersen, *supra* note 50, at 179.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 183.

¹⁴⁵ Telephone Interview with Washington, D.C.-based attorney, *supra* note 46.

an uphill battle discussed herein to produce their own evidence. If a wealthier counterparty can further manipulate the disparity in resources by “failing” to provide evidence, it forces developing countries to do even more scrambling.

1. *Recommendations on formalizing discovery*

As a potential solution to these problems, this section recommends that the WTO formalize its discovery process. This would include setting forth rules of evidence, but would focus less on rules of admissibility and more on the ability of a panel to compel evidence.¹⁴⁶ It also argues that where the DSU “permits” or “suggests” that a panel refer to experts, it in fact should say “shall.”

For a frame of reference, one could look to the rules of discovery and fact-finding exercised in international arbitration. The International Center for the Settlement of Investment Disputes (“ICSID”) provides in Arbitration Rule 34(2)(a) that “[t]he Tribunal may, if it deems it necessary at any stage of the proceeding: call upon the parties to produce documents, witnesses and experts.”¹⁴⁷ Unlike WTO panels, which cannot compel parties to act but only “seek information” under DSU Article 13.1, ICSID arbiters can order a party to produce evidence.

Even after the Appellate Body’s 1999 interpretation of DSU Article 13.1 in *Canada – Measures Affecting the Export of Civilian Aircraft*, a formalization of discovery could improve access to information in WTO disputes, particularly for developing countries. DSU Article 13.1 states, “[a] Member *should* respond promptly and fully to any request by a panel for such

¹⁴⁶ *Id.* This attorney believed a panel’s inability to compel evidence was a major deficiency in the administration of justice at the WTO.

¹⁴⁷ ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules) (as amended Apr. 10, 2006), Chapter IV: Written and Oral Procedures, Rule 34(2)(a), *available at* <http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp> [hereinafter ICSID Arbitration Rules].

information as the panel considers necessary and appropriate.”¹⁴⁸ In *Canada - Aircraft* the Appellate Body stated: “we are of the view that the word “should” in the third sentence of Article 13.1 is, in the context of the whole of Article 13, used in a normative, rather than a merely exhortative, sense.”¹⁴⁹

In spite of the Appellate Body’s admonition, parties have, from time to time, thwarted a panel’s request for information.¹⁵⁰ While a panel is authorized draw adverse inferences from such a failure to produce evidence, they have shown a reluctance to do so.¹⁵¹ This reluctance is appropriate, if indeed the goal is to settle controversies based on all the facts. As Collins put it, “[w]hile an adverse inference may offer some assistance in arriving upon a determination of fact, independent verification of evidence through investigation would be infinitely more useful from the perspective of completeness and accuracy.”¹⁵² To avoid situations where drawing an adverse inference is the only remedy, then, the WTO should formalize discovery through a provision in the DSU that requires parties to comply with requests for evidence. Failure to comply could be penalized through sanctions, similar to those applied under U.S. rules of procedure.

¹⁴⁸ DSU, *supra* note 12, art. 13.1.

¹⁴⁹ Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R (Aug. 2, 1999) at ¶ 187 [hereinafter *Canada – Aircraft*].

¹⁵⁰ ANDERSEN, *supra* note 50, at 188. *See, e.g.*, Panel Report, *United States – Investigation of the International Trade Commission In Softwood Lumber From Canada*, WT/DS277/RW (Feb. 15, 2005) [hereinafter *Softwood Lumber Investigation*] (the U.S. complaining that Canada obstructed the International Trade Commission’s efforts to investigate possible subsidization of Canada’s softwood lumber industry); Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R (Dec. 19, 1997) at ¶ 94 (“If, in the aftermath of consultations, any party believes that all the pertinent facts relating to a claim are, for any reason, not before the panel, then that party should ask the panel in that case to engage in additional fact-finding” (after claim that the U.S. had allegedly failed to include one claim in its terms of reference)); *Canada – Aircraft*, *supra* note 149 (where Canada repeatedly refused to fulfill the panel’s fact-finding requests). *See also* John A. Ragosta, *Unmasking the WTO – Access to the DSB System: Can the WTO DSB Live Up to the Moniker “World Trade Court”?*, 31 LAW & POL’Y INT’L BUS. 739, 762-63 (2000) (“Another issue that must be addressed, if the dispute settlement system is to function properly, is the current tendency of governments to ignore panel requests for documents.”).

¹⁵¹ ANDERSEN, *supra* note 50, at 188. *See also* Collins, *supra* note 126, at 371.

¹⁵² Collins, *supra* note 126, at 371-72.

Additionally, this section proposes that a panel should be required to use experts in every case concerning a covered agreement with expert provisions (the SPS, TBT, SCM and Customs Valuation Agreements). As discussed above, the increasingly complex and technical nature of disputes requires more than just legal and institutional knowledge to resolve them. Therefore, it should be assumed that if the DSU drafters thought to provide panels the opportunity to refer to experts, panels should be compelled to do so. The hope is that results in highly technical cases would improve due to better understanding of the nature of the dispute.

2. *Problems with formalizing discovery*

There are several drawbacks to this approach. First, formalizing the discovery process would probably lead to delays in the dispute settlement process. If panels required a party to produce evidence, and a financial censure ensued due to lack of compliance, this would only increase the time required to settle the dispute. There would be a similar result from compelling panels to use experts. Many Members feel the WTO DSB already suffers from overly drawn out dispute proceedings, and formalizing discovery would only lengthen the process.

Second, formalizing the discovery process would likely increase the costs of dispute settlement for all participants. If disputes take longer to resolve, this translates into more billable hours for the expensive legal counsel, not to mention the cost to the institution itself for referring to experts in more cases. Furthermore, by requiring panels to refer to experts in every SPS, TBT, SCM, and Customs Valuation case the DSB runs the risk of turning the adjudicatory power over to experts.

More importantly, even if formalizing discovery is aimed at aiding developing country participation, there is always the danger that the process could be turned around and used against them. If a developing country did not produce information required by a panel simply because it was unable, then sanctions for lack of compliance would seem to have the opposite of the desired effect of increasing developing country participation in dispute settlement.

The weakness of this proposal may also stem from its attempt at *over-legalization* of the WTO dispute settlement system. Ultimately, the WTO remains a diplomatic forum. Less restrictive procedural rules allow for flexibility in the context of political negotiations. Despite concerns regarding production of evidence and insufficient use of experts, it is unlikely that formalization of discovery will truly facilitate more developing country participation.

c. Foster public-private partnerships

Perhaps the factor that most hinders developing countries from participating in WTO dispute settlement is their failure to employ both formal and informal linkages between the private sector and the government. As discussed above, such relationships are the primary basis by which the United States and the EC bring most cases to the WTO. Every WTO participant interviewed for this article identified the communication breakdown between industry and government as a major barrier for developing country access.¹⁵³

¹⁵³ See, e.g., E-mail from Senior Staff Member, Advisory Centre on WTO Law, *supra* note 72; E-mail from Senior Lawyer #2, Advisory Centre on WTO Law, *supra* note 72; Telephone Interview with Washington, D.C.-based attorney, *supra* note 46; Telephone Interview with economist, *supra* note 96.

1. A procedural mechanism

To remedy this inadequacy, developing countries could adopt legislation (by whatever means necessary within each individual political system) creating a formal petition mechanism for private industries. While this would probably be the most efficient means of initially catapulting developing country access to dispute settlement, it is also the most difficult. Assuming all developing countries would be amenable to creating such a right, such an undertaking would require a careful examination of each country's internal legislative process.¹⁵⁴

Creating an effective procedural mechanism is not impossible, though, and developing countries have a good model in the experience of the EU. Since the Commission did not enact the TBR until 1994, the EU's more recent experience provides a chronologically relevant roadmap for developing countries to mimic. Again, though, such drastic legislative action would take efforts not just by the private sector in the form of pressure, but more importantly would require governments to willingly engage in the groundwork to get it passed.

Much more likely than government cooperation, however, would be opposition to the idea. By instituting a procedural right of petition, a government would thereby obligate itself to be responsive to any such petition, and it would also make a dispute that was initiated more difficult to stop if it became necessary or politically convenient to do so. If a government already shows reluctance to bring a WTO case for financial or political reasons without a formalized procedure, it is highly unlikely they would ever obligate themselves as such.

Furthermore, to function effectively, a formal petition mechanism would still rely heavily on informal public-private partnerships. These relationships facilitate better trade policy

¹⁵⁴ While this may be a worthwhile exercise, it is beyond the scope of this paper.

regardless of the existence of a formal procedural mechanism, and therefore this proposal focuses on providing a foundation to build the necessary public-private alliance.

2. *Foundations for public-private partnership*

A. *Collaboration among private sector entities*

This proposal offers three methods to cultivate relationships between the public and private sectors. First, private commercial interests in developing countries need to create broad-based collaborative efforts among sectors. As Shaffer explains, the increasingly legalized nature of the WTO system requires the dedication of “significantly more time, expense and effort” than ever before.¹⁵⁵ Considering the resources necessary, not to mention the political capital to be spent, the arm of government focusing on trade policy will be much more receptive to the needs of a collective sectoral interest, as opposed to just one company.¹⁵⁶

To this end, private entities in developing countries should focus on taking collective action through trade associations. But developing countries should also expand typical notions of private sector joint ventures to include academia, think tanks, consultancies, and civil society.¹⁵⁷ A relevant model for developing countries to follow here would be that of Brazil, one of the most active (and advanced) developing countries in WTO dispute settlement.¹⁵⁸ In response to

¹⁵⁵ SHAFFER (2003b), *supra* note 78, at 33.

¹⁵⁶ *Id.*

¹⁵⁷ Gregory Shaffer, Michelle Rattón Sanchez & Barbara Rosenberg *The Trials of Winning at the WTO: What Lies Behind Brazil's Success*, 41 CORNELL INT'L L.J. 383, 446 (2008).

¹⁵⁸ For a comprehensive analysis of Brazil's reorganization efforts geared toward increasing access to the WTO dispute settlement mechanism, *see id.* A case study of Brazil's successful “three pillar” structure may go a long way toward the crafting of a similar policy in another developing country. This paper focuses on a few relevant strategies mentioned therein. The important lesson other countries can take from Brazil's experience is that a high level of WTO competence can be achieved in spite of a relatively basic internal WTO infrastructure.

increased liberalization of Brazil's market as well as foreign markets, Brazilian trade associations undertook coordinated efforts to communicate their input on trade issues to the government.¹⁵⁹ Simultaneously, academic and for-profit ventures organized in an effort to assist both the Brazilian government and the private sector in developing international trade policy positions that would aid in negotiations.¹⁶⁰

B. Effective exchange of information

Second, once private industry has successfully organized, it must engage in the effective exchange of information with the government. As a Senior Staff Member at the ACWL explained, “[t]he export industries in developing countries usually know which obstacles they face when attempting to enter into other countries’ markets.”¹⁶¹ The challenge, then, is using that information in a way that protects any WTO rights that might be violated by such obstacles.

Due to limited resources, a government will need to rely heavily on the private sector. Developing country governments will depend not only on the private sector's superior ability to collect information about foreign trade barriers, but also on its ability to *organize* that information.¹⁶² Since the industry will be relying on the government to then turn around and utilize the organized information to defend the industry's interest, both sides should have the incentive to cooperate.¹⁶³ In the United States, Shaffer explains, “[f]irms are, in many ways, the

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 449-50.

¹⁶¹ E-mail from Senior Staff Member, Advisory Centre on WTO Law, *supra* note 72.

¹⁶² SHAFER (2003b), *supra* note 79, at 34-35.

¹⁶³ *Id.* at 35.

USTR's eyes . . . firms know best the impact of a trade restriction on the market in which they operate or wish to enter.”¹⁶⁴

To more effectively facilitate this exchange of information between commercial entities and governments, firms should rely on the assistance of private legal counsel. Even if a company or trade association can recognize a trade barrier and identify the potential claim involved, resources will be more efficiently utilized if private lawyers formulate the legal arguments. This is an expense that private firms or trade associations should bear if they want to equalize their country's access to WTO dispute settlement. Most commentators argue that private sector investment has, up to this point, been insufficient, but some suggest that larger industry associations are already doing this.¹⁶⁵

One additional method through which government and industry should collaborate and communicate would be the Trade Policy Review (“TPR”) process to which every WTO Member must submit at a frequency based upon its share of world trade. The goal of the TPR process is to enhance transparency of each Member's trade policies, and administration of this mechanism generally falls within the responsibilities of the WTO Secretariat.¹⁶⁶ Member country governments have two essential roles to play in TPR: they prepare a policy statement for the Trade Policy Review Body (“TPRB”) to review, and they are asked to cooperate with the Secretariat in preparation of its report.¹⁶⁷ Throughout both stages of this process, developing country governments should recruit the aid of private industry.¹⁶⁸ The benefits would run in both directions: government would receive much-needed support in gathering relevant information for

¹⁶⁴ *Id.*

¹⁶⁵ KUMAR, *supra* note 3, at 184.

¹⁶⁶ WTO.org, Overseeing national trade policies: the TPRM, http://www.wto.org/english/tratop_e/tpr_e/tp_int_e.htm (last visited Nov. 16, 2008).

¹⁶⁷ *Id.*

¹⁶⁸ JOSEPH F. FRANCOIS, *Maximizing the Benefits of the Trade Policy Review Mechanism for Developing Countries*, in *DEVELOPING COUNTRIES AND THE WTO: A PRO-ACTIVE AGENDA* 147, 150 (Bernard Hoekman & Will Martin eds., Blackwell Publishers Ltd. 2001).

the report, and industry would receive exposure to trade policy generally and be given the opportunity to weigh in on domestic trade policy matters.

C. *A strategic private industry presence*

Finally, private industry needs to establish a presence at the international trade table. Specifically, firms need to delegate at least one official or representative to attend the frequent conferences and seminars held on trade issues worldwide.¹⁶⁹ The WTO, World Bank, International Monetary Fund, as well as many private organizations, all dedicate resources to gathering information about WTO-relevant policies, producing papers with an analysis of the issues, and then presenting the information to governments at conferences or through dissemination of the papers.¹⁷⁰ It is crucial that commercial interests create a presence for themselves here, including assigning resources for processing the information once received.¹⁷¹

Here again, the case of Brazil is illustrative. In 1997, Brazil hosted the Summit of the Americas in Belo Horizonte, which gathered government leaders but also included a coincident “Business Forum” to converge government officials and business leaders.¹⁷² Members from the business side made proposals representing their interests and formed partnerships with other business sectors with an aim toward collectively focusing on trade negotiations.¹⁷³ The coalition of business formed at the summit later organized working groups on trade topics and drafted

¹⁶⁹ This recommendation probably applies to all WTO Members, not just developing countries. U.S. companies would also benefit from increased participation in the global trade dialogue.

¹⁷⁰ Telephone Interview with Washington, D.C.-based attorney, *supra* note 46.

¹⁷¹ *Id.* This attorney emphasized that even when governments receive this information, they are often not organized to process it. Therefore, private industry must get involved directly, not just depending on governments to relay information.

¹⁷² Shaffer, Ratton & Rosenberg, *supra* note 157, at 446.

¹⁷³ *Id.* at 446-47.

trade policy position papers.¹⁷⁴ Remarking on the landmark success of the coalition formed, two commentators noted that one of the most important results of the summit and eventual business coalition “was an autonomous expression of the business community with respect to the Brazilian government. Therefore it helped to determine a trade agenda based on a different rationale.”¹⁷⁵

If successful, the creation of effective public-private networks could finally begin to close the gap in access to WTO dispute settlement. The difficulty with such an approach is the groundswell of mobilization it requires to move forward. The case of Brazil resulted from a historic effort on the part of many actors, along with a collective desire to change Brazil’s relationship with WTO disputes. Each part of this proposal requires the participation of more than just governments and private industry – it also relies on contributions from lawyers and law firms, international organizations, civil society, and perhaps even law schools through the use of clinics. Unfortunately, given the current entrenched “it’s-the-government’s-problem” attitude found in the private sector of many developing countries, a political and cultural shift would need to occur before the mobilization necessary to create these networks could be realized.

d. Small claims procedure

Giving consideration to the high costs of litigating before the WTO, and the amplification of those costs with respect to developing countries, this section proposes the introduction of a

¹⁷⁴ *Id.* at 447.

¹⁷⁵ *Id.* at 447-48 (quoting PEDRO DA MOTTA VEIGA & VIVIANNE VENTURA-DIAZ, BRAZIL, The Fine-Tuning of Trade Liberalization, *in* TRADE POLICY REFORMS IN LATIN AMERICA: MULTILATERAL RULES AND DOMESTIC INSTITUTIONS 98 (Miguel Lengyel & Vivianne Ventura-Diaz eds., 2004)).

“small claims” procedure to the WTO dispute settlement process.¹⁷⁶ The benefit of such a procedure would be to carve out a less costly, less time-consuming procedure for smaller-stakes claims at the WTO, with the aim of facilitating more developing country access to dispute resolution.

According to Håkan Nordström, the seeds for some type of small claims resolution already exist. He highlights three DSU provisions that may contemplate the idea of small claims, even if not discussed as such. First, DSU Article 5 allows parties to voluntarily undertake the procedures of good offices, conciliation, and/or mediation.¹⁷⁷ Each of these methods would provide a less costly route to dispute resolution if successful. Additionally, if the parties agree, DSU Article 5.5 allows for the continuation of any of these procedures while the panel process moves forward.¹⁷⁸ Obviously the hope would be to resolve the dispute before the panel progresses very far.

Second, DSU Article 25 provides for “[e]xpeditious arbitration . . . as an alternative means of dispute settlement . . . subject to mutual agreement of the parties.”¹⁷⁹ As Nordström explains, arbitration could be a cheaper and quicker resolution than that provided by a panel, but to date Article 25 has never been invoked as an alternative to a panel.¹⁸⁰

Finally, Nordström highlights the accelerated procedures of the Decision of 5 April 1966 (BISD 14S/18), now encompassed by DSU Article 3.12.¹⁸¹ This provision has also never been

¹⁷⁶ Håkan Nordström is a well-known scholar who has proposed a small claims approach, and has also collaborated with Gregory Shaffer on the preparation of a comprehensive description of the form a small claims procedure could possibly take. See Nordström, *supra* note 42; See also Håkan Nordström & Gregory Shaffer, *Access to Justice in the World Trade Organization: The Case for a Small Claims Procedure?* 7 *WORLD TRADE REVIEW* 587 (2008) (unpublished manuscript, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=983586).

¹⁷⁷ DSU, *supra* note 12, art. 5.1.

¹⁷⁸ *Id.* at art. 5.5.

¹⁷⁹ *Id.* at art. 25.1 and 25.2.

¹⁸⁰ Nordström, *supra* note 42, at 14. The only time Article 25 has been used was to arbitrate the level of nullification or impairment in *United States – Section 110(5) of the US Copyright Act*, WT/DS160/ARB25/1 (Nov. 9, 2001).

¹⁸¹ Nordström, *supra* note 42, at 15. DSU, *supra* note 12, art. 3.12.

used. In fact, according to lawyers familiar with DSU procedures, most developing country representatives see no benefit from this acceleration and believe its shorter deadlines would be detrimental to their preparation of a case.¹⁸²

Nonetheless, Nordström and Shaffer took the small claims proposal a step further, suggesting eight potential design features that such a procedure could have.¹⁸³ This section will highlight four of those features: streamlined procedures (including appellate review of rulings only via petition), rulings with no precedential effect, a permanent small claims body, and limiting availability of the procedure to a defined subset of the WTO Membership.¹⁸⁴ Throughout this analysis, the reader should bear in mind the underlying conceptual difficulty pointed out by Nordström and Shaffer. That is, “can we define a “small claim” in a context where government policies are being disputed?”¹⁸⁵ Those writers consider that a claim’s monetary value, the existence of precedent for the dispute and the identity of the parties involved should be threshold issues in defining a small claim.¹⁸⁶

1. Streamlined procedures

If asked about the causes for high priced litigation at the WTO, many Members would first indicate the issue of time. Specifically, they would point out the many delays in WTO

¹⁸² Interview with attorney practicing at the WTO (Nov. 21, 2008). Nordström & Shaffer, *supra* note 176, at 32.

¹⁸³ Nordström & Shaffer, *supra* note 177, at 1.

¹⁸⁴ *Id.* Nordström and Shaffer also lay out a detailed case in favor of a small claims procedure generally, examining similar systems in both the United States and EU contexts, as well as the international setting. *See id.* at 3-25. This paper combines two of Nordström and Shaffer’s elements – streamlining procedures and appellate review only via petition. The three design features not included here are maintaining any small claim procedure separate from traditional procedures (as an alternative, not a replacement), the various suggested remedies for small claims and experimenting with a small claims procedure on a trial basis. *Id.* at 1. These features were not included because, while practical, it was felt that the other recommendations provided sufficient basis for discussion of this recommendation.

¹⁸⁵ *Id.* at 1. The authors point out that unlike the parallel small claims procedures in other types of civil proceedings, WTO proceedings are not between private parties, but governments. *Id.* at 27.

¹⁸⁶ *Id.* at 28-33 (discussing three criteria for consideration in determining what is a small claim).

dispute proceedings, and how that lag increases costs for final settlement. If the goal of a small claims procedure is to reduce costs related to WTO litigation, streamlining procedures in dispute settlement seems an appropriate area in which to make adjustments.

William Davey has already made several suggestions for expediting WTO procedures, and Nordström and Shaffer make the case for their applicability to a small claims procedure. Davey suggested the DSB should meet only once before establishing a panel rather than twice, the establishment of a permanent body of panelists, actual adherence to submission deadlines (and perhaps a modifications of these timelines), and removal of the stage of interim review.¹⁸⁷ In practice, these adjustments may not save much time. Additionally, Nordström and Shaffer recommend limiting party filings, oral hearings, the page numbers of party submissions, and the length of decisions.¹⁸⁸ These changes may indeed expedite the process, especially if the sections on recitation of the facts and the parties' arguments are removed.¹⁸⁹

Two supplementary recommendations are offered herein. First, small claims procedures should not be subject to the same confidentiality provisions as regular disputes.¹⁹⁰ The strict confidentiality of the DSU's regular proceedings has been criticized as reducing overall transparency. If small claims would involve less of a monetary stake as well as issues with precedent, parties may be willing to relax the confidentiality rules. More transparent proceedings would contribute to a more timely result. Business confidential information ("BCI"), of course, would remain an exception.

¹⁸⁷ *Id.* at 39 (citing WILLIAM J. DAVEY, *Expediting the Panel Process in WTO Dispute Settlement*, in *WTO: GOVERNANCE, DISPUTE SETTLEMENT AND DEVELOPING COUNTRIES* 409 (Merit E. Janow, Victoria Donaldson & Alan Yanovich eds., Juris Publishing 2008).

¹⁸⁸ Nordström & Shaffer at 39.

¹⁸⁹ Interview with Washington D.C.-based trade remedy attorney (Nov. 24, 2008).

¹⁹⁰ See DSU, *supra* note 12, art. 14. See also *id.* at Appendix 3, *Working Procedures*, ¶ 3.

Second, a small claims procedure should limit or exclude third party rights. Currently, third parties are permitted to present their views in the first substantive meeting of the parties, lengthening the duration of disputes.¹⁹¹ Given the nature of a small claim, third party rights would not likely be implicated. If third party rights were implicated, the lack of precedential effect for small claims rulings (to be discussed below) would mean those interests would not be significantly altered.

Finally, Nordström and Shaffer argue that automatic appeal should not be available for small claims decisions.¹⁹² Instead, to avoid the additional costs of automatic appeal but still preserve the notion of judicial accuracy, small claims parties could petition the Appellate Body to grant judicial review, similar to a writ of *certiorari* in U.S. law.¹⁹³

2. *Rulings with no precedential effect*

One justifiable concern with a small claims procedure would be abuse of the system. Nordström and Shaffer consider the problem of a claim with little pecuniary value but potentially large-scale systemic ramifications, as well as claims that could stoke political tensions. They address this concern by suggesting that the DSU “state explicitly that an adopted panel decision from a small claims procedure shall have no relevance for future cases and cannot be cited in any subsequent small claims or other DSU proceeding.”¹⁹⁴ Small claims decisions, thus, would not create the “legitimate expectations” for parties, as do the regular decisions.¹⁹⁵ Correspondingly, Nordström and Shaffer recommend that small claims procedures should only be available for

¹⁹¹ See *id.* at art. 10. See also *id.* at Appendix 3, *Working Procedures*, ¶ 6.

¹⁹² Nordström & Shaffer, *supra* note 176, at 40.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 35.

¹⁹⁵ *Id.*

cases where clear WTO precedent applies, preventing the use of small claims for novel WTO concepts.¹⁹⁶

3. *A permanent small claims body*

A third consideration for a small claims procedure would be the creation of a permanent body of panelists to adjudicate such claims.¹⁹⁷ The idea of a permanent body of panelists has also been suggested for regular WTO disputes.¹⁹⁸ Nordström and Shaffer posit that a permanent small claims body may pave the way for a permanent WTO panel, which could then hear both types of disputes.¹⁹⁹ A permanent small claims body could decrease the WTO's travel and accommodation costs for panelists and also promote quality decisions by experienced panelists.

Practical concerns to keep in mind here are cost and availability of panelists. Even if it is assumed that costs would decrease due to fewer international flights and hotels being booked for panelists from around the world, one also must consider the price of paying permanent panelists a full-time WTO salary. If a full-time salary is not going to be paid, then panelists may be less available at any given time due to other career pursuits.

¹⁹⁶ *Id.* at 29.

¹⁹⁷ *Id.* at 39.

¹⁹⁸ See, e.g., Dispute Settlement Body, *Contribution of the European Communities and its Member States to the improvement and clarification of the WTO Dispute Settlement Understanding*, TN/DS/W/38 (Jan. 23, 2003).

¹⁹⁹ Nordström and Shaffer, *supra* note 176, at 39.

4. *Limit access to small claims procedure*

Nordström and Shaffer consider the two alternatives of making a small claims procedure available to all WTO Members as well limiting its use to “countries with smaller trade stakes.”²⁰⁰ As the goal of this paper is to enhance developing country access to the system, it argues for limiting availability of small claims procedures to least-developed countries and developing countries with smaller economies.

The rationale for limiting availability of such a procedure is that it would facilitate access for countries that otherwise have not or cannot make use of the regular DSU procedures for the reasons identified (among others) in Section II of this paper.²⁰¹ There are compelling arguments against limiting the availability of a small claims procedure (it would build *de jure* inequality into the system and would require arbitrary decisions as to which Members could use it, to name a few).²⁰² Yet the risk associated with availability to all Members (abuse of the system by wealthy countries, primarily) is great, and could potentially topple the balance such a procedure would seek to achieve. One potential alternative would be to make it available only if both parties to a dispute consented, though this option could also be subject to abuse.

There is no doubt that a proposal for a small claims procedure would raise many eyebrows among WTO Members. Moreover, this proposal suffers from pragmatic shortcomings. First, Nordström and Shaffer are quick to point out that a small claims procedure, while fully functioning in the national context, may simply be inapplicable to the WTO.²⁰³ In a traditional

²⁰⁰ *Id.* at 31.

²⁰¹ *Id.* As Nordström and Shaffer explain, “[w]here Members’ trade stakes radically differ and DSU procedures are the same for all claims, the system is not neutral to size. Small trading nations are effectively constrained from being able to use the legal system, constituting, in practice, a form of in-built [sic] discrimination.” *Id.* at 31-32.

²⁰² *Id.* at 32.

²⁰³ *Id.* at 25.

small claims procedure, private individuals file claims, but in the WTO private persons have no standing. Second, the authors explain that it would be politically difficult to restrict access to this procedure when those being restricted are the most powerful WTO Members.²⁰⁴ Nonetheless, even if a full-blown small claims procedure is unworkable, the WTO could borrow some of its more practical design schemes to improve the current process.

e. The ACWL+

The Advisory Centre on WTO Law is a great success and provides a much needed service to the WTO Members who would otherwise be disenfranchised by the system.²⁰⁵ This proposal in no way seeks to diminish the achievements of the Centre. It merely suggests ways to enhance its capabilities and provide even better access to dispute settlement.

1. Hire full-time economists on staff

As stated by the Director-General of the WTO, “[t]he opening of national markets to international trade . . . will encourage and contribute to sustainable development, raise people’s

²⁰⁴ *Id.* at 32.

²⁰⁵ According to the ACWL’s Web site, since July 2001 the Centre has provided direct services to developing countries in twenty-seven disputes, and has provided services through the hiring of external legal counsel four times. Assistance in WTO dispute settlement proceedings since July 2001, http://www.acwl.ch/e/dispute/wto_e.aspx (last visited Jan. 6, 2009). The Centre also offers several types of training programs for lawyers, including a Secondment Programme for Trade Lawyers, as well as courses and seminars on WTO law and procedure. Training, http://www.acwl.ch/e/training/training_e.aspx (last visited Jan. 6, 2009). See also the ACWL’s representation of Peru in the *EC – Sardines* dispute. Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R (Sept. 26, 2002) (upholding the panel’s finding and Peru’s claim that the EC’s regulation was inconsistent with the TBT Agreement).

welfare, reduce poverty, and foster peace and stability.”²⁰⁶ With such goals in mind, one concludes that it is not just access to dispute settlement for developing countries that is sought, but *smart* usage of that system once access is granted.

The ACWL does a wonderful job of broadening the potential for developing country access to WTO dispute settlement. To enhance this potential, in line with the development goals mentioned above, the ACWL should hire full-time economic experts for its staff. These economists would fulfill a development-oriented role for the ACWL, aiding developing countries to make intelligent and strategic decisions about whether to bring claims to the WTO.

It is the job of the legal personnel at the ACWL to help developing countries analyze their options, as they stem from *legal* rights and obligations, which the Centre does through various functions.²⁰⁷ For example, the ACWL provides legal advice as to the chances of a client prevailing in a dispute it has considered initiating at the WTO.²⁰⁸ A full-time economist, on the other hand, could help developing countries analyze dispute settlement from the standpoint of economic costs and benefits. An economist could help a developing country focus on *economic growth* through trade policy, instead of just enforcement of rights.²⁰⁹

²⁰⁶ WTO.org, About the WTO – a statement by the Director-General, http://www.wto.org/english/thewto_e/whatis_e/wto_dg_stat_e.htm (last visited Nov. 17, 2008).

²⁰⁷ E-mail from Senior Lawyer #2, Advisory Centre on WTO Law, *supra* note 72 (“[T]he better part of our work these days consists on providing legal opinions to developing countries/LDCs on issues relating both to their own compliance with their WTO obligations, systemic issues of WTO process/law, and...issues relating to whether they should pursue disputes against other countries [if that country has presented the dispute to the Centre].”)

²⁰⁸ Advisory Centre on WTO Law, Legal advice on all WTO legal matters, http://www.acwl.ch/e/legal/legal_e.aspx (last visited Nov. 17, 2008).

²⁰⁹ Telephone Interview with economist, *supra* note 96. This proposal reflects the views of the author as well as the views of several interviewees. It should be noted, however, that at least one Senior Lawyer from the ACWL did not feel there was sufficient need for an economic expert on staff. E-mail from Senior Lawyer #2, Advisory Centre on WTO Law, *supra* note 72.

2. *Create more ACWL-like establishments (and allow them to solicit cases)*

There are two drawbacks to the ACWL: first, there is only one location and the demands on it are many. Second, the ACWL's mandate is limited. For reasons of impartiality and conflict, it cannot initiate disputes.²¹⁰ The ACWL can help a country that presents a potential claim to decide whether to file a complaint, but it cannot research possible violations and then encourage a developing country to pursue dispute settlement. For these reasons, this section first proposes the creation of more ACWL-like institutions. It then suggests that any new legal aid organizations allow for proactive solicitation of claims on behalf of developing countries if WTO inconsistencies are apparent.

Since the WTO DSB is situated in Geneva, it made logical sense to establish the ACWL in the same locale. Many developing countries, however, do not have legal or administrative staffs placed in Geneva. Indeed, as mentioned above, some have no Geneva presence at all.²¹¹ This might make it difficult, then, for certain countries to access the resources provided by the ACWL.

This proposal, however, is more than just a matter of alleviating geographical inconvenience. Rather, it recognizes that Geneva does not have a monopoly on international trade expertise. Washington, D.C., for example, is overflowing with international trade lawyers. It makes geographical sense to expand a developing country's legal aid options (the U.S. might be an easier locale for Central American countries, for example), and it also makes sense to tap into the resource of legal expertise that exists in Washington.²¹²

²¹⁰ E-mail from Senior Lawyer #2, Advisory Centre on WTO Law, *supra* note 72.

²¹¹ KUMAR, *supra* note 3, at 183-84.

²¹² Shaffer has also argued in support of establishing additional legal service organizations to complement the work of the ACWL. See SHAFFER (2006), *supra* note 14, at 189.

Other countries possess sophisticated (if not growing) legal expertise in international trade as well. Brazil, for example, may be a logical center for South American legal aid. The highly experienced countries of Australia and Japan may provide resources to countries situated in the Far East and southeast. Given the success of the ACWL, an effort should be made to expand the availability of such resources.

If there is funding to support the creation of additional ACWL-like organizations (which is certainly an issue), the founders of such new initiatives should take the opportunity to alter the blueprint. The ACWL's mandate prevents the Centre from being able to raise potential issues with developing countries and suggest that they take action.²¹³ In other words, "[t]he Advisory Centre on WTO Law focuses only on the 'downstream' dimension of enforcement, not on the 'upstream' collection of information."²¹⁴ As discussed in Section I, developing countries struggle with the collection and organization of information regarding potential foreign trade barriers and the responsible parties (also known as "naming, blaming and claiming"²¹⁵). Additional legal aid organizations should provide more than legal assistance. These entities should be created without the same restrictions that apply to the ACWL, meaning they should be free to alert developing countries to potential claims. They can then assist countries in deciding whether to take action (which the ACWL already does if the country approaches them with a potential claim).²¹⁶ Other

²¹³ E-mail from Senior Lawyer #2, Advisory Centre on WTO Law, *supra* note 72.

²¹⁴ BERNARD M. HOEKMAN & MICHEL M. KOSTECKI, *THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM: THE WTO AND BEYOND* 95 (Oxford University Press 2nd ed. 2001).

²¹⁵ See generally William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming and Claiming...*, 15 *LAW & SOC'Y REV.* 631 (1980-81).

²¹⁶ E-mail from Senior Lawyer #2, Advisory Centre on WTO Law, *supra* note 72. While this attorney found the ACWL's limitations to be logical ("most governments (developed and developing) are not going to want to fund intergovernmental organizations whose role is, in effect, ambulance chasing that could be used against them"), he felt that ambulance chasing (active case solicitation) was valuable and should be within the powers of other organizations.

potential sources of legal aid include legal clinics sponsored by law schools and staffed by students.²¹⁷

To this end, the ACWL+ proposal as a whole should not be strictly limited to legal services organizations. Rather, the proposal includes the notion that preexisting international economic and development organizations (such as Oxfam, the World Bank, the International Monetary Fund, the United Nations Conference on Trade and Development, the Center for International Environmental Law, the Inter-American Development Bank, the Organization of American States and the Economic Commission for Latin American and the Caribbean) should also be engaged in the pre-litigation fact-finding process, as well as in the information processing stage.²¹⁸

Some of the international organizations mentioned above already conduct this type of analysis.²¹⁹ Typically, though, the information they gather is provided to governments. The idea here is to promote more groups to participate in this process, and to encourage them not only to provide information to governments but to the private sector in developing countries. Ultimately, the goal would be for them to become a part of the public-private networks described above.

²¹⁷ Some law schools focus more on the development of WTO scholarship than on advocacy work. Georgetown University Law Center's Institution of International Economy Law ("IIEL") sponsors the Academy of WTO Law and Policy (<http://www.law.georgetown.edu/iielacademy/> (last visited Jan.5, 2009)), which is a professional development program, but the IIEL does not have a WTO clinic. <http://www.law.georgetown.edu/iiel/about/index.html> (last visited Jan 5, 2009). One Georgetown Law clinic where there is potential room for this type of advocacy is the Harrison Institute for Public Law – Policy Clinic, which has a Democracy and Trade Project. The Harrison Institute focuses more on global institutions and trade policy reform, but could provide a starting point for a WTO-focused clinic where students would provide supervised legal services in WTO cases. <http://www.law.georgetown.edu/clinics/hi/Trade.htm> (last visited Jan. 5, 2009). Another example of an institute focused on international trade and economic scholarship is the Jean Monnet Center for International and Regional Economic Law & Justice at New York University School of Law. <http://www.jeanmonnetprogram.org/intro.html> (last visited Jan. 5, 2009).

²¹⁸ The idea that international organizations should have a role in alerting developing countries of potential claims was supported by many interviewees. *See supra*, note 217.

²¹⁹ Telephone Interview with Washington, D.C.-based attorney, *supra* note 46. The Center for International Environmental Law, for example, examines potential issues in the trade and environment realm, looks at specific disputes, and processes information. It then provides this information to governments, and based on that information, a government can sense whether or not they have a potential claim. Oxfam also weighs in on larger international policy issues. *Id.*

3. *Encourage more broad-based support for ACWL*

The third and final proposal under ACWL+ is to foster more broad-based support for the organization itself, as well as for its Technical Expertise Fund. As with some of the other proposals in this paper, a major stumbling block will continue to be locating a source of funding. The problem, generally speaking, is that most potential donors decline to fund an organization when doing so will likely increase the frequency of complaints against it. Nonetheless, support and contributions from developed countries to the ACWL and the Technical Expertise Fund will enhance the legitimacy of the WTO dispute settlement system as a whole, as well as contribute to the overall fairness of the system.²²⁰ Perhaps any reform proposals to the WTO can include stipulations for providing financial support to the ACWL and other similar centers.

f. Continuum of Secretariat efforts

This final section proposes a continuum of efforts by the WTO Secretariat to facilitate developing country access to dispute settlement.²²¹ The aim is to identify a set of potential Secretariat functions *already existing within the WTO treaty terms* that represent an increasing level of assistance to developing countries. This proposal examines four sources of Secretariat action. Three of the functions proposed here were covered to some extent in other proposals, and therefore will not be discussed in detail except to explain where they fall on the continuum.

²²⁰ For more detailed arguments as to why developed nations such as the United States and the EU should support the ACWL, *see generally* Greisberger, *supra* note 136.

²²¹ C. Christopher Parlin, Adjunct Professor of Law at Georgetown University Law Center, proposed this idea to the author and helped develop it. The author would like to thank Professor Parlin for contributing this proposal and allowing the author to explore it in this paper.

1. *Article 27.2 (lowest level on the continuum)*

As previously discussed, pursuant to DSU Article 27.2, the Secretariat may be required to provide additional legal advice and assistance to developing countries during the dispute settlement process.²²² There is little guidance as to what form this assistance might take other than that “the Secretariat shall make available a qualified legal expert from the WTO technical cooperation services” if so requested by the developing country Member.²²³

The Article 27.2-level of assistance is quite stunted, primarily due to the passage of that article which states: “[t]his [WTO technical cooperation] expert shall assist the developing country Member in a manner *ensuring the continued impartiality of the Secretariat.*”²²⁴ The language ensuring Secretariat neutrality guts any potential assistance that could be given because it prevents an advocacy role in any form. As a result, Article 27.2 offers a weak level of Secretariat engagement and a correspondingly weak level of assistance.

2. *Secretariat TPR reports as tools for developing countries (a step up on the continuum)*

The TPRM has already been discussed in detail, and here it is suggested that the TPR process could be used by developing countries as an adjunct to existing fact-finding avenues. The Secretariat reports prepared for the TPR are extremely detailed, and, while these reports could not be cited as evidence in disputes, they certainly help to point developing-country complainants in the right direction. In other words, while it is not the official goal of the TPRM to identify policies that potentially violate the WTO, it may be a useful starting point for finding

²²² DSU, *supra* note 12, art. 27.2.

²²³ *Id.*

²²⁴ *Id.* (emphasis added).

other resources to prove such a violation.²²⁵ TPR reports are already publicly accessible, so in reality they can be used for any purpose. To the extent they are not already doing so, developing countries should be analyzing them to protect against violations of their WTO rights.

WTO Members are likely to balk at this proposal, as is the Secretariat. The TPR information is not supposed to be used for finding potential disputes, but if it gradually becomes accepted to do so, the downside for developing countries is that it could just as easily be used against them. In fact, developed countries have almost certainly already done this. One positive for developing Members, however, is that the frequency of TPRs depends on a country's share of world trade. This means that the developed countries' policies will be reviewed more frequently, providing more opportunities to access the wealth of information provided therein.

3. *Regular use of the technical expertise provisions (another step up on the continuum)*

It was already proposed above that the WTO provisions allowing for reliance upon technical experts be utilized more frequently, if not made compulsory. In this context, the Secretariat, through its role of assisting panels and pursuant to Article 27.2, could facilitate more regular use of the various provisions allowing panels to turn to experts for technical advice. To date, panels have rarely, if ever, appointed experts for cases other than those falling under the SPS Agreement. From a developing country perspective, more frequent use of the provisions allowing for the use of experts may help relieve some of the cost burden of hiring their own experts to bring to WTO disputes.

²²⁵ HOEKMAN & MAVROIDIS, *supra* note 74, at 137-38.

4. *Increased reliance on conciliation/mediation provisions in WTO agreements (highest level on the continuum)*

Finally, the Secretariat could engage in its highest level of involvement with developing countries by encouraging more resolutions of disputes through the good offices, conciliation, and mediation procedures of DSU Article 5. If more regular use of such procedures was made, it would obviate the need for or at least ease the cost burden of preparing for a fully developed suit at the DSB.

One area the Secretariat could look to for guidance on how to better facilitate these procedures is the SPS Agreement, which encourages alternative and early approaches to resolving potential disputes.²²⁶ Annex B to the SPS Agreement spells out a Member's "notification" obligations. In short, Members are required to "publish a notice of any *proposed* SPS regulation, and to notify other Members, through the [SPS] secretariat . . . together with a brief indication of its objective and rationale."²²⁷ As Scott explains, "[n]otification is conceived as an interactive rather than a one-way process," and Members are required to provide reasonable time for comment and discussion on those comments.²²⁸ Furthermore, Annex B recommends that a Member provide notification while a regulation is still in its draft stage, particularly so that amendments and comments can still be considered.²²⁹

Ultimately, if a Member encounters significant difficulties with a proposed measure, the Member is encouraged to "request an opportunity to discuss and resolve the potential difficulty with the notifying member," and it is expected that bilateral discussions will ensue.²³⁰ By

²²⁶ See generally, JOANNE SCOTT, *THE WTO AGREEMENT ON SANITARY AND PHYTOSANITARY MEASURES: A COMMENTARY* (Oxford University Press 2007).

²²⁷ *Id.* at 198.

²²⁸ *Id.* at 204.

²²⁹ *Id.*

²³⁰ *Id.* at 205.

providing for bilateral engagement at such an early stage, the SPS secretariat is probably averting disagreements that could eventually become full-blown disputes.

The WTO Secretariat should consider playing a similar role in promoting conciliation or mediation, especially for developing countries. The goal, of course, would not be to undermine the credibility of the WTO dispute settlement system. The DSS is invaluable and in many ways anchors the entire WTO system. Yet with rising litigation costs, particularly for developing countries relative to their economies, it is worthwhile for the Secretariat to facilitate less costly dispute resolution.

CONCLUSION

The problem of developing country access to WTO dispute settlement finds no simple remedy. Perhaps this is because the problem itself is so multi-faceted, or perhaps because the de facto inequality in the system caters to the will of the more powerful Members.

What remains clear is that however large the problems facing developing countries in the WTO appear, the issues boil down rather simply. First, WTO litigation, particularly fact-finding, is expensive. Developing countries struggle to finance trade initiatives when there are more pressing issues within their borders. Second, WTO litigation is complex, requiring a sophisticated level of legal capacity that, historically, developing countries have neither had nor dedicated much time to developing. Finally, WTO litigation plays out in a rules-based forum, yet the power politics of trade are omnipresent and influential on both the national and international level.

Unequal access to justice threatens to delegitimize the WTO dispute settlement system, the crown jewel of the world trade regime, as well as the WTO itself. Such inequality also offends universal notions of fairness. To get the system back on track, all Members must commit to seeking ways of granting developing countries more access to dispute settlement. Beyond the access issue, WTO leadership needs to recognize the nuance that comes with smaller scale trade operations, and address the differing interests of countries with smaller economies.

As this paper demonstrates, no one proposal provides a cure-all. The diverse proposals should be parsed to select those pieces that are effective and discard those that are not. Efforts must be broad-based but focused. Most importantly, developing country Members must take responsibility for their internal trade programs and commit to dedicating the proper resources toward trade policy development whenever possible.

The proposals set out in the previous section offer some useful starting points. Since cost is always an issue, it is helpful to focus on aspects of each proposal that do not require additional funding or encourage dispersed costs amongst the entire WTO Membership. Regarding the creation of an institutionalized fact-finding body, the takeaway may be to characterize the proposal in a way that shows the benefits to all WTO Members, not just developing countries. It will be easier to gain broad-based support (especially financial support) if the proposal appeals to the group's collective sense of litigation burdens. It is also important to stress impartiality. Collins' suggestion to separate any fact-finding body from decision-making bodies remains relevant going forward.

As to formalizing the discovery process, a good place to start is with more rigorous use of the DSU and other provisions that already exist. Panels have recourse to numerous provisions on

experts under the covered agreements, and should make every effort to rely on those provisions if a cost-benefit analysis suggests expert contributions would help resolve the dispute.

With respect to formal and informal public-private partnerships, developing countries may have trouble creating a formal legislative mechanism for private petition. Informally, however, private entities have many options. Apart from any official action on the part of the government, commercial interests should organize into trade associations geared toward efficient information exchange. The trade associations should hold symposiums and invite knowledgeable speakers to inform them on how the WTO affects their interests. The collective resources of the industry could fund such gatherings, thereby dispersing costs. If trade association support is widespread, such groups can exert significant pressure on government officials to take action on trade issues. Another way to avoid extra costs is to utilize the publicly available information in TPR reports. Once firms are better informed of their rights, they should use this information to persuade the government to act.

A small claims procedure may require a few start-up costs, but overall costs should go down once the appropriate claims can be settled through this expedited mechanism. One cost-free step toward a small claims procedure is to begin limiting page numbers of party submissions and require shorter decisions from the WTO adjudicative bodies even in the regular process. Also, panels and the Appellate Body could start an informal categorization and tracking system to flag cases that a) could be considered appropriate for a small claims proceeding and b) would represent settled precedent, which would lend itself to small claims procedures.

It is more difficult to find cost-free approaches to the ACWL+ proposal. By nature, that proposal requires funding, not just to increase and diversify the staff of the ACWL, but also to sponsor additional centers with the same goals and encourage broad-based support for the idea of

WTO legal aid. One feasible step toward achieving this goal would be to increase public awareness of the services offered by the ACWL, the hope being to engage private sector resources for funding. Currently the WTO homepage contains no visible link to the ACWL's Web site or to any easily accessible information on the Centre's mission. It would be inexpensive to include such a link with key information on the WTO site.

Finally, the idea behind a continuum of Secretariat efforts is already geared toward an incremental approach. By giving more teeth to DSU Article 27.2, one would take an initial step that would include a duty on the part of developing countries to invoke the services offered under the covered agreements. Since all of the continuum's steps come from Secretariat functions already existing in the WTO literature, no additional implementation costs should be incurred except for the price of hiring experts.

These preliminary steps are the pieces from each of the above proposals that are the most workable and the most cost-effective. They may eventually lead to full implementation of the recommendations, but for now they offer a feasible starting point.

Unless developing country access to dispute resolution improves, the WTO system will continue neglecting those that it promised, at its inception, to try to protect. If international trade is indeed a tool of sustainable development, increased welfare, and poverty reduction, then the WTO and its dispute settlement system need to help realize those goals for every single Member.