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Imbalance of Power: Procedural Inequities within the WTO Dispute Settlement System

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Imbalance of Power: Procedural Inequities within the WTO Dispute Settlement System

Amanda Bergstrom*

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I. INTRODUCTION

It has been said that the dispute resolution system is the heart of the World Trade Organization (WTO).¹ If this is the case, the lack of participation in the process by some members may prove dire to the long-term credibility and functionality of the system as a whole. Even though the common law system of *stare decisis* does not exist to the same extent within the WTO as it does in the western legal tradition, past decisions do serve as guideposts for reference as the panels and appellate bodies make decisions.² The virtual absence of some

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1. See Anna Lanoszka, *The Promises of Multilateralism and the Hazards of 'Single Understanding': The Breakdown of Decision Making Within the WTO*, 16 MICH. ST. J. INT'L L. 655, 669 (2008) (explaining that the dispute resolution system of the WTO is often called the WTO's crown jewel).

2. See generally Raj Bhala, *The Myth About Stare Decisis and International Trade Law (Part One of a*

developing countries as complainants to a dispute may mean that their interests are not represented in the development of the jurisprudence of the world's premier international dispute resolution system.³ "The lack of participation by large sections of the WTO membership, such as African countries, is a danger to the long-term 'predictability' function of the WTO and could undermine the usefulness of the entire process eventually. It is therefore in the interests of all WTO members to work towards resolving the problems that prevent them from making use of the system when they need to."⁴ In other words, the WTO dispute settlement system benefits when least developed countries can enforce their rights as effectively and reliably as developed country members. For example, during negotiations, a developing country member may be more inclined to make certain concessions when it trusts that a forum exists that will resolve a dispute regarding those concessions as well as compel any reciprocal concessions.⁵ In turn, when one member trusts that it will be able to enforce its rights, in the end the other members profit.

This article addresses the procedural concerns within the Dispute Settlement Understanding (DSU) and their effect on the ability of developing country members to assert their rights. The article argues that although the dispute settlement system is a step in the right direction in addressing the needs of developing countries, more steps should be taken. In Part II, this article provides specific examples of procedural flaws in the in the DSU as it relates to developing countries. Part III examines solutions that have been proposed to increase accessibility to the dispute settlement system and considers the benefits and drawbacks of each. Part III also argues for a reform to the Panel system and to the use of amicus briefs. It further proposes the creation of a litigation support team, increased third-party rights, and the expansion of available remedies. Part IV concludes that although no one solution is perfect, many viable options exist that will improve the current dispute settlement system.⁶

Trilogy), 14 AM. U. INT'L. L. REV. 845 (1999) (arguing that the WTO functions increasingly like an American court in the Appellate Body's use of precedent).

3. Victor Mosoti, *Africa in the First Decade of WTO Dispute Settlement*, 9 J. INT'L ECON. L. 427, 432 (2006).

4. *Id.*

5. See Niall Meagher, *Representing Developing Countries in WTO Dispute Settlement Proceedings*, in WTO LAW AND DEVELOPING COUNTRIES 213, 214-15 (George A. Bermann & Petros C. Mavroidis eds., 2007).

6. Although differences exist in middle income countries' access to the DSU as compared to least developed countries, that topic is beyond the scope of this article. However, the World Bank provides a country classification table according to the following categories: low income, lower middle income, upper income, and high income. See World Bank List of Economies, July 2008, <http://siteresources.worldbank.org/DATASTATISTICS/Resources/CLASS.XLS>.

II. THE SHORTCOMINGS OF THE DSU FOR DEVELOPING COUNTRIES

A. *Procedural Inadequacies*

Many members have expressed frustration at the DSU's procedures and its inability to address developing countries' needs. Their complaints range from frustration with the ever-growing complexity of the system, to disagreement over whether organizations who are not parties to the dispute should be permitted to provide amicus briefs to the decision-making body.⁷ Further complicating matters is the fact that developing country members sometimes disagree about the appropriate approach for solving the perceived power imbalance, leaving some dissatisfied with the WTO's attempts to level the playing field.⁸

1. *The Dispute Over Amicus Briefs*

Although developing countries are in general agreement on the use of unsolicited amicus briefs for use by the Panel and Appellate Body, it is a source of contention among some developing countries.⁹ The conflict arises in part because amicus briefs are viewed by some developing countries as another effort by rich nations to restrain their ability to participate effectively in the market.¹⁰ For example, it may frustrate a developing country member if a non-governmental organization (NGO) who is not involved in a particular dispute presents unsolicited information to influence the judges' opinion about an issue that is contrary to the developing country's position. This is especially true when a brief argues for added regulations that will be expensive or beyond that member's present technological capability. For developing countries, the choice may be between whether to comply or to incur higher tariffs on their goods. Therefore, the developing countries often automatically believe that the interests of NGOs will be contrary to their interests. When developed nations and wealthy private organizations present arguments in an effort to influence the direction of international law through amicus briefs, developing countries may feel bullied. This is particularly so if that member lacks the financial and legal resources to fully articulate and present competing arguments.¹¹ As a result, the question for

7. See C.L. Lim, *The Amicus Brief Issue at the WTO*, 4 CHINESE J. INT'L L. 85 (2005) (discussing the role non-governmental organizations play in WTO panel decisions); see also Victor Mosoti, *In Our Image, Not Theirs: Damages as an Antidote to the Remedial Deficiencies in the WTO Dispute Settlement Process; A View from Sub-Saharan Africa*, 19 B.U. INT'L L.J. 231 (2001) (arguing that the DSU is not suited for countries with weaker economies).

8. See Raj Bhala, *The Bananas War*, 31 MCGEORGE L. REV. 839 (describing the complicated tensions between developing countries involved in the Bananas dispute).

9. Mosoti, *supra* note 3, at 438.

10. Maura B. Jeffords, *Turning the Protester into a Partner for Development: The Need for Effective Consultation Between the WTO & NGOs*, BROOK. J. INT'L L. 937, 964-65 (2003).

11. *Id.*; Steve Charnovitz, *Opening the WTO to Nongovernmental Interests*, 24 FORDHAM INT'L L. J. 173, 211 (2000) (explaining that NGOs seek to submit an amicus brief to a panel hoping that it will foster the

developing countries becomes whether there is really any choice at all in the absence of meaningful choice.

On the other hand, NGOs argue for their ability to present amicus briefs to the Panel and Appellate Bodies as a way to offer essential information on issues that might have been excluded by the parties to the dispute.¹² The goal from the NGOs' perspective is not necessarily to stand in the way of development, but to provide the decision-makers with a broader picture of competing concerns.¹³ NGOs argue that, like many court systems, the WTO copes with overworked judges and staff who have political biases, little time to do extra research, and litigation tactics that intentionally omit important information relevant to areas of broad public interest.¹⁴

The Panel addressed the question of whether to allow amicus briefs in the *Shrimp-Turtle* case.¹⁵ There, the Panel was asked to decide specifically whether Article 13 of the DSU permitted amicus briefs.¹⁶ Article 13 specifically states that the Panel has the right to *seek* information in making its decision on a particular matter.¹⁷ The developing countries opposed the use of amicus briefs by focusing on the word *seek* to argue that NGOs may not present information to the Panel if it was not requested by the Panel first.¹⁸ The Panel concluded that accepting non-requested information from non-governmental sources would be inconsistent with the DSU.¹⁹ However, the Panel also noted that it was the usual practice for parties to introduce information relevant to support their case. Therefore, if a party to the dispute wanted to include submissions from non-governmental organizations as part of their own submissions, they were free to do so.²⁰

On appeal, the Appellate Body noted that the DSU accords the Panel with "ample and extensive authority to undertake and to control the process by which it informs itself both of the relevant facts of the dispute and of the legal norms and principles applicable to such facts."²¹ Based on this reasoning, it expanded the Panel decision by stating that the Panel was authorized to accept amicus

creation of international law. Such law then becomes 'the ammunition that NGOs use to brow-beat national governments.' This makes it difficult for governments to exercise 'sovereignty against NGO-promoted public outcries').

12. See generally Jeffords, *supra* note 10 (arguing that non-state actors should have the opportunity to voice their concerns within to the WTO).

13. Dinah Shelton, *The Participation of Nongovernmental Organizations in International Judicial Proceedings*, 88 AM. J. INT'L L. 611, 616 (1994).

14. *Id.*

15. Panel Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R (May 15, 1998).

16. See *id.* ¶ 7.7.

17. *Id.* ¶ 7.8.

18. *Id.*

19. *Id.*

20. *Id.*

21. Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 106, WT/DS58/AB/R (Oct. 12, 1998).

briefs not only from parties to the dispute, but directly from the non-governmental organizations as well.²²

Developing countries parted ways on the issue when Morocco, a WTO member but not a party to the dispute, presented its own amicus brief.²³ The novel question presented in this situation then was whether a WTO member not a party to the dispute could submit its own amicus brief. Peru opposed Morocco's position and argued that this was a violation of the DSU.²⁴ The Appellate Body agreed with Morocco and found that it would not make sense to treat non-members more favorably than members.²⁵ In other words, if the WTO allows non-members to submit amicus briefs, then certainly members should be allowed to do so.²⁶

2. Inadequate Resources and Institutional Capacity

A deficiency of resources as well as a lack of institutional capacity are additional obstacles to effective participation in the dispute settlement process.²⁷ For example, when a member does not fully staff its mission in Geneva, it may not learn about issues that will affect its interests. In turn, this member is not able to take part in consultations that lead to the consensus process. This is particularly debilitating considering that the consultations and the consensus process form the basis of the WTO decision-making system.²⁸ And although the number of meetings to address these increasingly complex issues has increased, some developing countries have not been able to increase their mission sizes in Geneva—if they have established a mission at all.²⁹ As a result, developing countries in such a situation are losing the opportunity to speak up in order to protect their interests on a given issue.³⁰

As rules and issues grow in complexity, a lack of legal expertise also places developing countries at a disadvantage because of their inability to independently maneuver through the DSU.³¹ Part of the problem is the cost of legal

22. *Id.* ¶¶ 107-08.

23. Appellate Body Report, *European Communities—Trade Description of Sardines*, ¶¶ 161-65, WT/DS231/AB/R (Oct. 23, 2002).

24. *Id.*

25. *Id.*

26. *Id.*

27. CONSTANTINE MICHALOPOULOS, *DEVELOPING COUNTRIES IN THE WTO* 152-175 (Palgrave MacMillan 2001).

28. *See id.*

29. *See id.*; Mosoti, *supra* note 3, at 442 (stating that most African countries have only one or two overburdened trade officials stationed in Geneva who do not have a great focus on dispute resolution).

30. *See generally* Mosoti, *supra* note 3, at 452 (concluding that African countries “still need to improve their participation in the system, particularly because it is not only about disputes but also because it is an evolving body of international economic law principles, that are steadily being shaped by WTO members that are active participants”).

31. *Id.* at 442.

representation.³² When faced with a shortage of funds for basic infrastructural necessities within the country, the option to litigate may seem daunting, if not impossible.³³ Further crippling their ability to participate is the fact that developing countries often do not have sufficient in-country WTO trained lawyers with enough experience to litigate a particular issue, nor the resources to hire outside counsel.³⁴ While members who regularly take part in litigation continually gain invaluable experience, those who remain uninvolved do not. This absence only widens the gap in these members' knowledge and expertise of the dispute settlement process.³⁵

The need for legal support during a dispute did not go unrecognized by the WTO. The DSU states that members are to be offered legal support while involved in the dispute settlement system under Articles 27.2 and 27.3.³⁶ Unfortunately, the WTO Secretariat has only hired two part-time experts and two junior staff who offer support and oddly, the DSU provides assistance only in the situation where a member participates as a respondent.³⁷ As a result, it is not surprising that so few developing countries act as individual complainants to a dispute, especially against a developed country.³⁸

3. *Developing Countries' Use of Outside Counsel*

In light of the complexity of the issues and potential time and resources required to adequately address them, the support provided to developing countries through the WTO itself is insufficient to place them on equal footing with developed country members. As a result, developing countries may require the assistance of outside counsel to aid them wade through the ever-increasing intricacy of the rules.³⁹

The *Bananas* case was the first to address the issue of hiring outside counsel. In that case, the complainants objected to the presence of private lawyers at Panel meetings.⁴⁰ The Panel considered four factors in deciding against allowing

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. Carrie P. Smith, *Patenting Life: The Potential and the Pitfalls of Using the WTO to Globalize Intellectual Property Rights*, 26 N.C. J. INT'L L. & COM. REG. 143, 168 (2000).

37. MOHAMMAD TANZIMUDDIN KHAN, WTO DISPUTE SETTLEMENT SYSTEM AND DEVELOPING COUNTRIES: A NEOREALIST CRITIQUE 40 (Biiss Papers 2004).

38. See Hansel T. Pham, *Developing Countries and the WTO: The Need for More Mediation in the DSU*, 9 HARV. NEGOT. L. REV. 331, 348-49 (2004) (explaining that the legal expert provided by the Secretariat may only assist a developing country in a way that will not compromise the impartiality of the Secretariat); Meagher, *supra* note 5 (discussing the development, benefits and limitations of the Advisory Center on WTO Law (ACWL)).

39. KHAN, *supra* note 37 (noting that legal expertise is required for a country to identify violations of WTO rules or impairing practices).

40. Panel Report, *European Communities—Regime for the Importation, Sale and Distribution of*

outside counsel at these meetings: (1) it had been past practice in GATT and WTO dispute settlement proceedings not to admit private lawyers to panel meetings if any party objected to their presence; (2) the working procedures of the Panel expressed the expectation that only members of governments would be present at Panel meetings; (3) given that private lawyers may not be subject to disciplinary rules such as those applied to members of governments, their presence in Panel meetings could give rise to concerns about breaches of confidentiality; and (4) the Panel was concerned about whether the presence of private lawyers would change the intergovernmental character of WTO dispute settlement proceedings.⁴¹ In addition, concerns about bringing in large western-style law firms may have been present in the sense that their involvement would lead to excessive adversarial zeal, biased processes in favor of western-developed common law style litigation, and the resulting elevated costs that accompany western-style litigation.⁴²

On appeal, the Appellate Body reversed the Panel in a decision favorable to developing country members.⁴³ For example, some may not have adequate in-country counsel with enough WTO litigation experience, and without adequate counsel, a member may effectively be prevented from bringing a claim at all.⁴⁴ However, the Appellate Body in *Bananas* took into consideration the policy concerns of prohibiting private counsel to developing countries and altered the Panel's ruling on the matter in favor of the complainants.⁴⁵ In a victory for the respondents, the Appellate Body explained that there was nothing in the Agreements or Working Procedures that prevented the use of private counsel.⁴⁶ It further noted that governments have the ability to hire a private entity to represent their cause.⁴⁷ They simply call the private entity a paid public servant once hired by the government.⁴⁸

Bananas, ¶ 7.10, WT/DS27/R/ECU, WT/DS27/R/GTM/HND, WT/DS27/R/MEX, WT/DS27/R/USA (Sept. 25, 1997) [hereinafter Panel Report – *Bananas*].

41. *Id.* ¶ 7.11(f).

42. Jeffrey Waincymer, *Transparency of Dispute Settlement Within the World Trade Organization*, 24 MELB. U. L. REV. 797, 819 (2000) (arguing that there are many procedural uncertainties in the dispute settlement process which have an adverse impact on transparency and could be remedied by allowing private party rights of standing in WTO dispute settlement).

43. Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, ¶ 147, WT/DS27/AB/R (Sep. 9, 1997) [hereinafter Appellate Body Report – *Bananas*].

44. *Id.* “[T]he disparity in the size and expertise of WTO Missions in Geneva, coupled with the role of governmental counsel for many of the larger Members, suggests that smaller developing countries which feel unable to best present their own cases should have the right to hire whatever staff they feel are appropriate to present the relevant arguments.” Waincymer, *supra* note 42.

45. Appellate Body Report – *Bananas*, *supra* note 43, ¶ 12.

46. *Id.*

47. *Id.*

48. *Id.*

4. Panel System and Dissenting Opinions

Another procedural concern is whether the DSU is a development-friendly system.⁴⁹ The paucity of representatives from LDCs to act as judges on panels and as Appellate Body members presents another impediment to their participation in the dispute settlement process.⁵⁰ Many least developed countries complain that they have had few members offering guidance as panelists or Appellate Body members.⁵¹ African members, in particular, have had little participation in the panel system.⁵² As stated by the African Group in a proposal regarding its role in dispute settlement, “[there is] a still unbalanced representation of Africa on the panels and the Appellate body. A balanced geographical representation will assist in promoting a balanced DS that reflects the various backgrounds and inherent concerns of the entire WTO Membership.”⁵³

However, simply because a panelist is from a developing country does not automatically suggest that this panelist will be sympathetic to the concerns of the developing country that is a party to the dispute. However, it does make sense to attempt to balance leaders on the Panel and Appellate Body by including judges from all regions who can bring a variety of backgrounds and perspectives. A deciding body made primarily of European and U.S. members would present at least an outwardly skewed perspective.⁵⁴

A related concern is that currently the dissenting opinions are not included in the decisions.⁵⁵ The concern here is that an opposing viewpoint may shed light on important issues and approaches to problems that currently go unheard.⁵⁶ Some developing countries argue that the increased cost of requiring each member of the panel to submit an opinion is warranted because of the positive input for the development of WTO jurisprudence.⁵⁷ This argument makes sense not just in light of issues pertaining to developing countries, but as a way to strengthen the development of WTO jurisprudence generally.⁵⁸

49. Mosoti, *supra* note 3, at 442.

50. *Id.* at 440.

51. *Id.*

52. *Id.*

53. *Id.* at 441.

54. See Petko D. Kantchevski, Note and Comment, *The Differences Between the Panel Procedures of the GATT and the WTO: The Role of GATT and WTO Panels in Trade Dispute Settlement*, 3 BYU INT'L L. & MGMT. REV. 79, 98 (2006) (explaining the Panel selection process).

55. Lawrence D. Roberts, *Beyond Notions of Diplomacy and Legalism: Building a Just Mechanism for WTO Dispute Resolution*, 40 AM. BUS. L.J. 511, 542-45 (2003) (discussing the effect of an anonymous panel and the lack of dissenting opinions in the current dispute resolution system).

56. *Id.* at 542.

57. *Id.* at 544.

58. *Id.*

5. Third-party Rights

The diminutive rights allotted to third parties to a dispute have proved disadvantageous to developing countries as well.⁵⁹ Although the ability to participate as a third-party allows some voice for countries who otherwise could not afford to be included at all, third-parties do not have the same rights as the principal complainants do.⁶⁰ As a result, their voice is present, but muffled. This problem was particularly apparent in the *Bananas* case because all of the African countries on the respondent side were involved as third parties, whereas the only principal party was the European Communities (EC).⁶¹ The African countries responded to the situation by requesting “enhanced third-party rights.”⁶² The panel in this case ruled that “[m]embers of governments of third parties would be permitted to observe the second substantive meeting of the Panel with the parties, and would have the opportunity to make a brief statement during the second meeting,” but denied further participatory rights.⁶³

Generally, third-party rights are limited to the minimum guarantees granted under Article 10 and Appendix 3 of the DSU.⁶⁴ The issue was also addressed in a case brought by India against the EC regarding the conditions for granting tariff preferences to developing countries.⁶⁵ In that case, because “their substantial interest is of special importance to the dispute,”⁶⁶ the eleven third-party members requested to the ability to “attend all the Panel meetings, to present their points of view at such meetings, receive copies of all submissions to the Panel, to make

59. Panel Report – *Bananas*, *supra* note 40, ¶ 7.51.

60. *Id.*

61. *Id.* ¶ V.1.

62. *Id.* ¶ V.12.

63. *Id.* ¶ 7.8.

64. Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 of the WTO, Article 10: Third Parties, Apr. 15, 1994, http://www.wto.org/english/tratop_e/dispu_e/dsu_e.html [hereinafter DSU]. The Dispute Settlement Understanding, Article 10, lists the rights of third parties as follows:

1. The interests of the parties to a dispute and those of other Members under a covered agreement at issue in the dispute shall be fully taken into account during the panel process. 2. Any Member having a substantial interest in a matter before a panel and having notified its interest to the DSB (referred to in this Understanding as a “third party”) shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report. 3. Third parties shall receive the submissions of the parties to the dispute to the first meeting of the panel. 4. If a third party considers that a measure already the subject of a panel proceeding nullifies or impairs benefits accruing to it under any covered agreement, that Member may have recourse to normal dispute settlement procedures under this Understanding. Such a dispute shall be referred to the original panel wherever possible.

Id.

65. Panel Report, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/R (Dec. 1, 2003).

66. *Id.* ¶ 1.8, Annex A ¶ 1 (Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Peru, and Venezuela argued that the measure at issue determined the conditions of access of their exports to the European market as beneficiaries of the tariff preferences scheme).

submissions to the Panel at its second meeting, to review the draft summary of arguments in the descriptive part of the Panel report.”⁶⁷ Likening the situation to *Bananas*, the Panel noted the economic impact of the preference programmes on third-party developing countries. In its discretion, the Panel granted enhanced rights to observe the first substantive meeting with the parties, receive the second submissions of the parties, observe the second substantive meeting with the parties, make a brief statement during the second substantive meeting with the parties, and review the summary of their respective arguments in the draft descriptive part of the panel report.⁶⁸ Currently, “enhanced third party rights” are allowed in the discretion of the panel as long as the enhanced rights are consistent with the DSU and due process.⁶⁹

While these changes are an improvement on the rights generally granted to third parties under the DSU, they are by no means as substantial as the rights of members who have the funding and expertise to maintain active involvement as complainants, particularly in *Bananas* where further participatory rights were denied. Additionally, third parties do not have the same rights to remedies when they prevail in a dispute. For example, they do not have the option to retaliate against the losing party in the case of non-compliance with a ruling.⁷⁰

6. *Inadequate Remedies*

One of the greatest barriers to developing countries ability to participate effectively in the dispute settlement system is the problem of non-compliance.⁷¹ The problem exists because sometimes it may be more efficient for a developing country to choose to breach its obligations and face retaliatory measures than to bring itself into compliance with WTO policy.⁷² Part of the problem under the DSU, as under GATT procedure, is that the WTO lacks enforcement powers.⁷³ When a Panel finds for one of the parties, the only authority it has is to offer toothless recommendations to the offending member to bring itself into compliance.⁷⁴ As a result, the offending nation is free to choose whether the

67. *Id.*

68. *Id.* at Annex A, ¶ 8.

69. Appellate Body Report, *United States—Tax Treatment for “Foreign Sales Corporations,”* ¶ 243 WT/DS108/AB/RW (Jan. 14, 2002).

70. Sonia E. Rolland, *Developing Country Coalitions at the WTO: In Search of Legal Support*, 48 HARV. INT’L L.J. 483, 543 (2007).

71. Joel P. Trachtman, *The WTO Cathedral*, 43 STAN. J. INT’L L. 127, 128 (explaining the reasons why developing countries that win a lawsuit at the WTO may find that the remedies are ineffective or inadequate).

72. See generally Carolyn B. Gleason & Pamela D. Walther, *The WTO Dispute Settlement Implementation Procedures: A System in Need of Reform*, 31 LAW & POL’Y INT’L BUS. 709 (2000) (discussing problems that have arisen with WTO non-compliance procedures and urging reform to resolve disagreements over these procedures).

73. KHAN, *supra* note 37, at 43-44.

74. See generally Gleason & Walther, *supra* note 72, at 728 (noting that the current procedures have been ineffective in producing European compliance with WTO rulings in modest commercial disputes).

recommendation is in its best interest or not.⁷⁵ If the only result will be a decision in their favor, with no ability to take action, when faced with the choice of whether to use limited resources to bring a suit, developing countries are less likely to attempt to enforce their rights.⁷⁶

The *Antigua* case illustrates the problem.⁷⁷ In that case, the Panel was asked whether legislation creating a “total prohibition” by the U.S. on cross-border supply of gambling and betting services provided by Antigua was discriminatory.⁷⁸ Antigua, a relatively small island nation whose economy has largely been supported by online gambling and betting, was negatively impacted by the U.S. legislation.⁷⁹ As a result, Antigua claimed the new legislation violated the U.S.’s international trade agreements.⁸⁰ Antigua sought the aid of the WTO in an attempt to force the U.S. to comply with its obligations under the General Agreement on Trade in Services (GATS). The Appellate Body ultimately sided with Antigua and found that the U.S. prohibition did, in fact, violate its GATS agreements since the U.S. allowed other forms of online gambling.⁸¹ Further, the Appellate Body stated that the U.S. must modify the legislation to avoid inconsistencies with its international obligations.⁸² The U.S., however, refused to comply claiming that the laws were necessary to protect the public morals and order.⁸³ Antigua, as the winning party, had the right to try to force compliance through retaliation, and it has considered suspension of intellectual property protection.⁸⁴ However, the economic effect on a country as large as the U.S. would likely be negligible.⁸⁵ Therefore, despite the favorable outcome, Antigua could do little to enforce the ruling.⁸⁶

75. *Id.*

76. KHAN, *supra* note 37, at 43. (“[T]he DSU is recognized to be the heart of legalist model of dispute settlement procedures as it has eliminated the legal provisions of the GATT that offered the dominant countries with the scope of exercising their political and economic influence. However, in granting such recognition, the existence of power paradox in the WTO regime is often overlooked. Power paradox, in fact, emanates from the fact that the WTO is an intergovernmental organization and it still requires Member states’ economic power and political influence to ensure implementation and compliance of panel ruling.”).

77. Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R (Nov. 10, 2004) [hereinafter Panel Report, *United States—Gambling*].

78. *Id.* ¶ 3.74.

79. *See id.* ¶ 3.2, 3.74.

80. *See id.* ¶ 3.28-3.39

81. Appellate Body Report, *United States—Measures Affecting the Cross Border Supply of Gambling and Betting Services*, ¶¶ 362-72, WT/DS285/AB/R (Apr. 7, 2005).

82. *Id.* ¶ 374.

83. Henning Grosse Ruse-Khan, *A Pirate of the Caribbean? The Attractions of Suspending TRIPS Obligations*, 11 J. INT’L ECON. L. 313, 317 (2008).

84. *Id.* at 314.

85. *Id.* at 332.

86. *See id.*; Joseph E. Stiglitz, *Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalized World Balancing Rights with Responsibilities*, 23 AM. U. INT’L L. REV. 451, 465 (2008) (“Imposing trade sanctions would have hurt Antigua far more than it would have hurt the United States.”).

It is important to note that without the support of the DSU, Antigua would have had little recourse on its own in terms of bilateral negotiations with the U.S.⁸⁷ However, a positive ruling does little good if it cannot be enforced. Such an outcome suggests that nations like Antigua cannot rely on the dispute settlement process to protect its rights when entering into trade agreements. Alternatively, it is arguable that the U.S. should not be required to come into compliance with a ruling that is morally unacceptable to its citizens.⁸⁸

A related concern of developing countries is that they may fear that any attempts at retaliation will only worsen their situation.⁸⁹ For example, if one member receives aid from another member, the donee of the aid might abstain from enforcing a WTO ruling for fear that the support could be withdrawn. Further, the donee member may fear that whatever retaliation it imposes will be ineffective and only create tension with the donor country.

Even when retaliation is a viable option, the offending country may prevent a member for making use of this remedy in a timely manner. The reason is that except for the status reports required every six months under Article 21, the Panel may not regulate a specific time frame within which the offending country must come into full compliance.⁹⁰ Although the timeframe for compliance must be “reasonable”, it is still unclear what this term means and whose view of reasonable will apply.⁹¹ As a result, the lack of specificity can create conflicts for developing countries in that the offending nation may manipulate the system in order to avoid compliance.⁹²

87. See generally Caley Ross, *David Gambles to Slay Goliath and Barely Lives to Tell the Tale: Antigua v. United States*, 11 GAMING L. REV. 674 (2007) (in recounting the U.S.–Antigua dispute, the author refers to Antigua as “David” and the United States as “Goliath” in the article title).

88. See Panel Report, *United States—Gambling*, *supra* note 77 (the Panel found that the challenged measures were designed to protect public morals, public order, and secure compliance with other WTO-consistent laws); Warren F. Schwartz & Alan O. Sykes, *The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization*, 31 J. LEGAL STUD. 179 (2002) (discussing the concept of efficient breach within the WTO dispute settlement process using the economic theory of contract remedies); *but see* Thomas Sebastian, *World Trade Organization Remedies and the Assessment of Proportionality: Equivalence and Appropriateness*, 48 HARV. INT’L L.J. 337, 375 (noting that Sykes and Schwartz argue that “the function of the WTO remedial regime is to provide appropriate incentives so that WTO Members behave in a manner that maximizes joint welfare . . . Sykes and Schwartz understand welfare to mean political welfare rather than the aggregate welfare levels of citizens of WTO Member states.”).

89. Ji Li, *From “See You in Court!” to “See You in Geneva!”: An Empirical Study of the Role of Social Norms in International Trade Dispute Resolution*, 32 YALE J. INT’L L. 485, 488-89 (2007).

90. See generally Shin-yi Peng, *How Much Time is Reasonable?—The Arbitral Decisions Under Article 21.3(C) of the DSU*, 26 BERKELEY J. INT’L L. 323, 324 (2008) (stating that although “justice delayed is better than justice denied, the delay must still be reasonable”).

91. *Id.*

92. *Id.*; see C. O’Neal Taylor, *Impossible Cases: Lessons from the First Decade of WTO Dispute Settlement*, 28 U. PA. J. INT’L ECON. L. 309, 332-38 (2007) (explaining why developed countries are more able to employ delay tactics to avoid complying with a ruling).

III. PROPOSED SOLUTIONS

A. *Amicus Briefs*

The use of amicus briefs may prove beneficial to developing countries when attention is also given to their particular needs. Currently, the Panel has the discretion on whether to accept or reject amicus briefs. Developing countries continue to oppose this practice because they fear that wealthy organizations will be employed to provide information supporting the use of more trade limitations on them than under current WTO law.⁹³ As such, while development should be one focus of the WTO, this goal does not necessarily need to take place at the cost of silencing other interests, such as environmental or labor issues, which may be voiced through amicus briefs. However, modifications to the use the briefs should be considered.

First, NGOs should be required to include alternative solutions to the problem they are presenting in their amicus briefs. These alternatives should address the economic and social situations of developing countries when making proposals for inclusion into international law. Less costly solutions should be considered along with technological support when needed. Staged compliance dates should be included as an option. Such a requirement may enable developing country members to feel less resistance to amicus briefs if their specific needs are addressed by NGOs. In the end, it may be to the long-term benefit of developing countries to take the information included in the brief into consideration.⁹⁴

B. *High Cost of Litigation and Institutional Capacity*

The DSU should be made more accessible to developing countries by lowering their litigation costs and through litigation support. Some members have suggested the creation of a fund to help defray costs.⁹⁵ Such financial support could also be used to fund a special team of lawyers whose mission it is to assist developing countries litigate.⁹⁶ The development of this team would help solve the problem of inaccessibility of litigation resulting from the increasing complexity of the law. Although the fund could be implemented in a variety of ways,⁹⁷ one option would be to include a mandatory fee that goes toward

93. Shoaib A. Ghias, *International Judicial Lawmaking: A Theoretical and Political Analysis of the WTO Appellate Body*, 24 BERKELEY J. INT'L L. 534, 551 (2006).

94. See Charnovitz, *supra* note 11, at 965-66.

95. Mosoti, *supra* note 3, at 442.

96. *Id.*

97. Another option is to include a voluntary fund. However, considering that some of the WTOs wealthiest members have declined to support the ACWL, it is likely that they would refuse to voluntarily support a similar program provided by the WTO itself. See Timothy Stostad, *Trappings of Legality: Judicialization of Dispute Settlement in the WTO, and its Impact on Developing Countries*, 39 CORNELL INT'L

litigation costs for developing countries in the membership dues for developed countries.⁹⁸

There may be some concern as to why developed countries should help provide litigation support to developing countries when it may not be in their best interest to do so. However, if it is a principle of the WTO to provide an equitable and mutually acceptable resolution to a dispute, attempts should be made to balance access to funds for litigation.⁹⁹ The system as a whole is disserved when some developing countries are largely absent from disputes.¹⁰⁰ Their absence impedes the development of a more predictable body of law from which to draw.¹⁰¹ Because predictability is in all members' interest, those with greater economic capacity should be required to provide financial support as well.

C. Panel System Reform

As previously mentioned, a common concern regarding the panel system is that it is inherently biased in favor of developed nations.¹⁰² A panel system that includes significantly fewer panelists from developing countries may not adequately reflect the variety of perspectives and methods of addressing the issues that are raised in trade disputes. This disparity in numbers is particularly questionable when the majority of member nations are developing countries.

Even though the inclusion of at least one panelist from the parties to a dispute may not protect developing countries interests by itself, it is an important step in the right direction. Such a requirement would reflect the WTO's commitment to meet the variety of needs of its members and in turn, potentially increase confidence in the system. Furthermore, it might often be the case that the developing country panelist could provide a fresh perspective on an issue. This new perspective, even if it departs from other panelists' views, could be helpful in the development of WTO jurisprudence. This is even more reason to include a written dissent.

L.J. 811, 840 (2006). Other options include representation on a pro-bono basis by private law firms or by non-governmental organizations with a particular interest in developing countries. See Chad P. Bown, *Comment on Niall Meagher's "Representing Developing Countries in WTO Dispute Settlement Proceedings,"* in *WTO LAW AND DEVELOPING COUNTRIES* 227, 232 (George A. Bermard & Petros C. Mavroidis eds., 2007).

98. See generally Stostad, *supra* note 97 (explaining that the WTO should provide legal assistance and outright advocacy).

99. World Trade Organization, *Understanding the WTO: Settling Disputes*, http://www.wto.org/english/thewto_e/whatis_e/tif_e/displ_e.htm (last visited Apr. 20, 2009).

100. See Meagher, *supra* note 5.

101. *Id.*

102. See Mosoti, *supra* note 3, at 439-40.

D. Third-Party Rights

Many countries chose to participate in a dispute as third parties because they are not sufficiently experienced with the WTO litigation process and because they simply do not have the resources to participate as primary complainants. However, the problem of diminished rights allotted to countries who act as third parties could potentially be solved by the previously mentioned fund for litigation support. If a country chooses to become a third party because of a lack of money for litigation, and the inability to adequately represent themselves as a complainant, then the creation of a support fund to defray these costs reduces the need to rethink third-party rights.

In the absence of such a fund, the DSU should provide a version of special and differential treatment for developing countries who act as third-parties. A version of this has been done by leaving the decision on whether to enhance third-party rights to the discretion to the Panel.¹⁰³ However, rather than leaving it entirely to a discretionary decision, a formalized procedure for the granting of such preferences would offer more predictability to members who may consider whether, and what role, to take part in a dispute.

E. Collective Retaliation

For retaliation to be an effective remedy, the complainant nation must have the ability to suspend equivalent concessions to the level of nullification or impairment.¹⁰⁴ Under the DSU, the ultimate sanction against a non-complying member is trade retaliation through suspension of equivalent concessions.¹⁰⁵ However, as discussed previously, some countries may not have the economic ability to suspend equivalent concessions. So far there is not a single situation where countermeasures to induce compliance have been imposed on a developed member by a developing country member.¹⁰⁶ Included in the list of Ten Common Misunderstandings about the WTO includes a section entitled “Weaker countries do have a choice, they are NOT forced to join the WTO.” Also in this section is an explanation of the benefits of membership. “By joining the WTO, even a small country automatically enjoys the benefits that all WTO Members grant to each other. And small countries have won dispute cases against rich countries –

103. Panel Report, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/R (Dec. 1, 2003).

104. DSU, *supra* note 64, art. 22, ¶ 4; see Kyle Bagwell et al., *Considering Remedies: Panel Discussion*, in *THE WTO: GOVERNANCE, DISPUTE SETTLEMENT, AND DEVELOPING COUNTRIES* 817, 829 (Merit E. Janow et al. eds., Juris Publishing 2008) (during a panel discussion, one panelist likened the necessity of painful retaliatory measures to a burr under the saddle in order to be effective, and notes that retroactive measures should be considered).

105. DSU, *supra* note 64, art. 2, ¶ 1.

106. Kyle Bagwell et al., *The Case for Tradable Remedies in WTO Dispute Settlement* 14 (World Bank Policy Research Working Paper No. 3314, 2004).

they would not have been able to do so outside the WTO.”¹⁰⁷ The problem with this enthusiastic statement is that often, the win is in name only.

The concept of collective retaliation¹⁰⁸ has been proposed as a means of offering developing countries the ability to better enforce their rights under the DSU.¹⁰⁹ The value to a developing country to invoke collective retaliation is obvious—the concept as proposed states that “all or some” WTO members would be allowed to retaliate against the offending country in an effort to bring about compliance.¹¹⁰ As a result, in a case where a developing country succeeded in a claim, collective retaliation would be available automatically, as a matter of special and differential treatment.¹¹¹

Critics of the proposal argue that collective retaliation is counter to the primary goals of the WTO in that it is trade destructive rather than trade creative.¹¹² In other words, the WTO was organized to liberalize trade, but expanding the injured member’s remedy to countries who were not originally involved only creates more protectionist policies.¹¹³ As a result, there is a possibility of increased litigation because of greater involvement in disputes, and retaliating members who were not the original parties to the dispute will have incentive to elect a retaliation plan that focuses on their protectionist groups.¹¹⁴ This argument suggests that the end result is likely to be greater protectionism across the board.

Furthermore, collective retaliation may defeat the purpose of dispute settlement when economic tensions are spread to other parties. The concern is that the problem would simply escalate rather than result in a settlement.¹¹⁵ One apprehension is that it is impossible to predict the outcome of such a severe remedy. Likening collective retaliation to the events leading up to World War One, one scholar stated:

The consequence would be to turn a major bilateral dispute into a major trial for the multilateral system not entirely unlike the unintended events which unfolded in August 1914 following the assassination of an

107. World Trade Organization, The 10 Misunderstandings, http://www.wto.org/english/thewto_e/whatis_e/tifmis_e/tifmis_e/10m09_e.htm (last visited Apr. 20, 2009).

108. The goal of collective retaliation would be to allow countries to join together to exercise pressure on a non-complying member.

109. Alan W. Wolff, *Remedy in WTO Dispute Settlement*, in THE WTO: GOVERNANCE, DISPUTE SETTLEMENT & DEVELOPING COUNTRIES 783, 811 (Merit E. Janow et al. eds., Juris Publishing 2008).

110. Dispute Settlement Body, *Negotiations on the Dispute Settlement Understanding*, ¶ 15, TN/DS/W/17 (Oct. 9, 2002).

111. *Id.*

112. Jide Nzelibe, *The Case Against Reforming the WTO Enforcement Mechanism*, 2008 U. ILL. L. REV. 319, 338-39 (2008) (arguing that collective retaliation may increase global trade barriers while not inducing compliance by scofflaw states).

113. *Id.*

114. *Id.* at 321-22.

115. See Wolff, *supra* note 109.

Austrian archduke, although on a less grand scale. This concern is especially great if the offending Member believes that it has been unjustly found to be non-compliant with WTO policy.¹¹⁶

However, in the situation where a developed country understands that if it chooses to breach its obligations, it faces the potential for retaliation not just from one undeveloped country, but possibly all other WTO members. This may cause that country to reconsider coming into compliance, as the idea of an efficient breach may indeed appear less efficient when faced with possibility of expanded retaliation.¹¹⁷ For example, the U.S. may reassess its choice of noncompliance in the case against Antigua if faced with retaliation from several members. Proponents of the idea of efficient breach may disagree with such a drastic measure.¹¹⁸ Certainly, the potential for increased global level of trade barriers is a legitimate concern.¹¹⁹ However, if retaliation is available as a remedy within the WTO, it should be a viable remedy not just for some, but for all members.

For reasons previously stated, collective retaliation is a remedy that should be used sparingly, as a last resort to bring about compliance, and only where bilateral sanctions alone cannot bring about compliance. As such, this remedy should be reserved for a dispute involving a significant power imbalance, such as the one that exists between the U.S. and Antigua. But if the WTO permits the use of retaliation for some members, then in fairness it should be made available to all of its members.

IV. CONCLUSION

This article discusses the problem and highlights a variety of solutions to the problem of developing countries' lack of participation in the WTO dispute settlement system. Along with these suggestions comes recognition that much has been written on the subject and that many alternatives exist for improvement of the DSU. This includes the option of no reforms at all. However, as the WTO ages, its jurisprudence should increasingly reflect the voices of its developing country members. Without their presence, the functionality of the entire system eventually suffers from a lack of consistency. To fill this gap, increased participation from developing countries is needed through procedural reforms, which will, in turn, lead to greater legitimacy of the dispute settlement system as a whole.

116. *Id.* at 812.

117. See Joost Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules are Rules—Toward a More Collective Approach*, 94 AM. J. INT'L L. 335 (2001).

118. See generally Schwartz & Sykes, *supra* note 88 (explaining that conditions exist where efficient breach may be appropriate).

119. See Nzelibe, *supra*, note 112.

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