

OVERCOMING LIMITS OF LAW, MONEY AND POLITICS - FINDING A VOICE FOR SMALL AND VULNERABLE ECONOMIES IN THE WTO DISPUTE SETTLEMENT MECHANISM THROUGH THIRD PARTY PARTICIPATION

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INTRODUCTION:

The World Trade Organisation (WTO) Dispute Settlement Understanding was an altogether unique innovation in international law. Heralded as the ‘jewel in the crown’ of the WTO¹ it held promise of a rules-based system of trade regulation and shift away from the power politics of earlier generations. Soon after signature of the Marrakech Agreement, Peter Sutherland the then Director-General of the GATT,² emphatically proclaimed it as the most significant strengthening of the effectiveness and credibility of international trade rules in fifty years:

‘...nothing less than a reinforcement of the rule of law in international economic relations, a reinforcement for which the need is both urgent and universal.’³

Furthermore, special emphasis was placed on the importance of a rules based system to developing countries, particularly small and medium size economies. In November 1994 the GATT Committee on Trade and Development observed that:

‘For all small and medium sized trading nations, conducting trade according to multilaterally agreed concepts, principles and rules rather than resort to bilateral negotiating power is of paramount importance.’⁴

The dispute settlement mechanism, with the Appellate Body’s oversight, represented a key aspect of the Uruguay ‘bargain’ for small and developing economies. Fourteen years on, various

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¹ Gross, Adam (2006). *Can Sub-Saharan African Countries Defend their Trade and Development Interests Effectively in the WTO? The Case of Cotton*. The European Journal of Development Research vol 18 (3) September 2006 at 368.

² The General Agreement on Tariffs and Trade 1947 was a multilateral agreement governing trade in goods only. It was incorporated into the GATT 1994 under the Agreements which established the WTO. The Agreement was not supported by a full institutional structure until the formation of the WTO but served as a makeshift international trade organization in the interim.

³ GATT Digital Library. *Peter Sutherland Dismisses Fears that the World Trade Organization Will Infringe National Sovereignty as Unfounded*. (GATT/1634) dated 30 May 1994.

⁴ GATT Committee on Trade and Development Seventy-Seventh Session 21 and 25 November 1994. *Developing Countries and the Uruguay Round: An Overview (Note by the Secretariat)*. (COM.TD/W/512) 10 November 1994. Available online at the GATT Digital Library <<<http://gatt.stanford.edu/page/home>>> at 1.

commentators and developing countries alike have pointed to the failure of some developing countries to initiate disputes and conclude that the dispute settlement mechanism (DSM) has failed them. The current Doha round negotiations on improving the rules governing dispute settlement have reflected these concerns with many of the reform proposals currently on the table addressing aspects of improving participation by developing Members.⁵

What much of this debate has failed to appreciate is that there are compelling and sometimes rational economic reasons that some developing states do not initiate disputes. While some of these reasons relate to capacity and cost, others are political and even cultural. Furthermore, as we shall see it is clearly not *all* developing countries that are shut out of the dispute settlement mechanism.

In this essay I argue for a shift in the focus of efforts to improve access to the WTO dispute procedures. While greater assistance for developing countries seeking to enforce their rights by initiating disputes is to be welcomed, pursuing this as the sole aim of reform efforts has considerable risks. Firstly, as I have alluded, the WTO is unique in international law in terms of the amount of power and sovereignty Members conceded to its dispute settlement processes. Those arguing for still greater concessions through, for example, stronger remedies or greater quasi-judicial powers must appreciate that the DSM is in many respects a high-water mark for the international rule of law already. Furthermore, reform requiring structural changes to the *Dispute Settlement Understanding*⁶ or WTO institutions⁷ rest on the agreement of all WTO Members, many of whom were taken by surprise as to how active the existing dispute procedures have been.⁸ At best such reforms will be long term propositions requiring major concessions by powerful Members who will no doubt demand reciprocity in other areas. Finally, even if the cost and capacity constraints can be removed, political and cultural impediments may persist and will be far more difficult to address.

While the world waits for such structural and institutional changes, a large proportion of smaller developing countries will be left with no voice in the DSM. I argue that this deafening silence is a greater concern than the failure to initiate disputes. As the Appellate Body and panels develop a growing body of jurisprudence, interpreting and applying the WTO Agreements with ever increasing rigor, they do so without the guidance of the smallest and most vulnerable Members of the WTO. This is jeopardising their long term interests and eroding their *existing* rights under the WTO Agreements.

⁵ See for example the following papers which are referred to throughout this paper WTO Dispute Settlement Body Special Session. Negotiations on the Dispute Settlement Understanding Proposal by the African Group (TN/DS/W/15) 25 September 2002 at 1; WTO Dispute Settlement Body Special Session Text for the African Group Proposals on Dispute Settlement Understanding Negotiations. (TN/DS/W/925 March 2008. WTO Dispute Settlement Body Special Session. Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding – Proposal by Ecuador. (TN/DS/W/33) 23 January 2003.

⁶ For an example of structural solutions see generally the International Centre for Trade and Sustainable Development (ICTSD) Project on Dispute Settlement and the idea of a small claims procedure as set out in, Hakan Nordstrom and Gregory Shaffer (2007). *Access to Justice in the World Trade Organisation: the Case for a Small Claims Procedure a preliminary analysis*. ICTSD Issue Paper No2, June 2007.

⁷ Here I refer to those that do not require changes to the WTO Dispute Settlement Understanding, they include for example strengthening the capacity of the WTO Advisory Law Centre or establishing a ‘fund’ to assist developing countries in dispute settlement as suggested by the African Group.

⁸ We can take for granted for example that mandatory and prior consent to the jurisdiction of international courts or tribunals are a rare feature of international law, even the International Court of Justice does not enjoy such universal jurisdiction from Members of the United National. Even bilaterally in trade and investment agreements prior consent to third party arbitration is a rare concession from many states. The existence of an appellate structure in the WTO is to my knowledge entirely unique in international law.

The purpose of this essay is to present third party participation as a means for finding a voice for those small and vulnerable Members in the dispute settlement mechanism.

Structure of the Paper

Part one of the paper gives a brief statistical overview of who has used the dispute settlement mechanism and how. It is important to empirically isolate which Members are under-represented at the DSM and explain why we would *expect* greater participation by them. I also separately consider third party participation at the WTO and show the marked differences in how it has been used between Members. Small and vulnerable economies have rarely exercised their third party rights and where they have it has been in the context of their direct commercial interests. Larger economies on the other hand, have tended to use their third party rights to protect their long-term *systemic* interests in the DSM.

Part two considers the reasons for the failure of smaller developing countries to initiate proceedings. Very broadly the constraints faced by developing countries can be summarised as limitations of ‘law, money and politics’.⁹ The African Group themselves delve deeper to tease out the structural inadequacies in the *Dispute Settlement Understanding*¹⁰ which limits its use by smaller developing states. I add a fifth constraint, that of *cultural* differences between Members in their willingness to use adversarial litigation. Faced by these limits, and operating under the current institutional structure, I argue that we would not expect smaller economies to be *initiating* more disputes than they are presently.

Part three of the paper considers third party participation as a means of overcoming limits of law, money, politics and culture in the WTO dispute settlement processes. I consider the existing rights and obligations of Members appearing as third parties in disputes. I outline the importance of protecting and advancing the *systemic* interests (as oppose to narrow commercial interests) of small developing nations through greater third party participation. Third party participation is also an effective means of developing the ‘in-house’ legal and bureaucratic expertise necessary to participate effectively in dispute settlement.¹¹ Accordingly it can serve to overcome the limitations of law, money and politics in the long term.

1 SMALL DEVELOPING COUNTRY PARTICIPATION IN THE DISPUTE SETTLEMENT PROCEDURES

In the history of the WTO, not one of its 38 Sub-Saharan African Members has brought a complaint in the dispute settlement body. This is remarkable when considered against the total of 373 disputes (as at 3 March 2008) which have been initiated since the WTO dispute settlement procedures began.¹²

⁹ Shaffer conveniently groups these limitations as those concerning ‘law, money and politics’ See Shaffer, Gregory (2006) *The challenges of WTO law: strategies for developing country adaptation*. World Trade Review 5:2,177-198

¹⁰ Being the WTO Agreement which sets out the rules and procedures for resolution of disputes.

¹¹ Shaffer refers to this as achieving ‘economies of scale’. He points out that developing countries face high costs of dispute settlement both relative to their size and in absolute terms because they must acquire expertise from scratch to engage in each dispute while repeat players are able to rely on their ‘in house’ expertise.

¹² WTO Dispute Settlement Gateway, available online at http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm last visited 11 March 2008.

The ability to enforce and defend legal rights is absolutely pivotal to effective participation in a rules based system such as the WTO. In a paper to the Dispute Settlement Body in 2002, the African Group observed:

...diminutive participation is not because [African Members] have never had occasion to want to enforce their rights, or the obligations of other Members, but due to structural difficulties of the DS.¹³ (emphasis added)

In discussing the developing world's participation in the WTO DSM in quantitative terms we must be clear about the purpose of our analysis. Many commentators in this area assume that a failure to initiate proceedings demonstrates a failing in the system.¹⁴ Such an assumption however, negates the fact that there are many rational reasons that certain countries may choose to avoid dispute settlement.

This part aims to pin-point where under-representation of developing countries in the dispute settlement mechanism exists. It is important to do so in order to identify the substance of any deficiency in that participation. In the following I consider the following questions from an empirical perspective:

- (a) Do developing countries use dispute settlement less than developed countries?
- (b) Does the size or trade share play a role in the use of dispute settlement?
- (c) Do smaller developing countries use the DSM less than we would *expect* based on the purely rational economic grounds?
- (d) How have smaller economies used the DSM third party procedures?

As we shall see, while developing country use of the DSM is increasing this is largely due to a few repeat players who utilise the DSM with as much confidence and success as the developed world. However, there is a majority of developing countries that do not participate in any capacity. Improving the presence of these Members is the focus of this paper.

1.1.1 Do developing Members use the DSM less than developed Members

The World Bank has recently commissioned a comprehensive statistical survey of WTO dispute settlement.¹⁵ The broad based statistical study conducted by Amin Alavi and Anders Millhoj is also a neat starting point for our analysis¹⁶ although it only covers the period from 1995 to 2005.

¹³ WTO Dispute Settlement Body Special Session. Negotiations on the Dispute Settlement Understanding Proposal by the African Group (TN/DS/W/15) 25 September 2002 at 1.

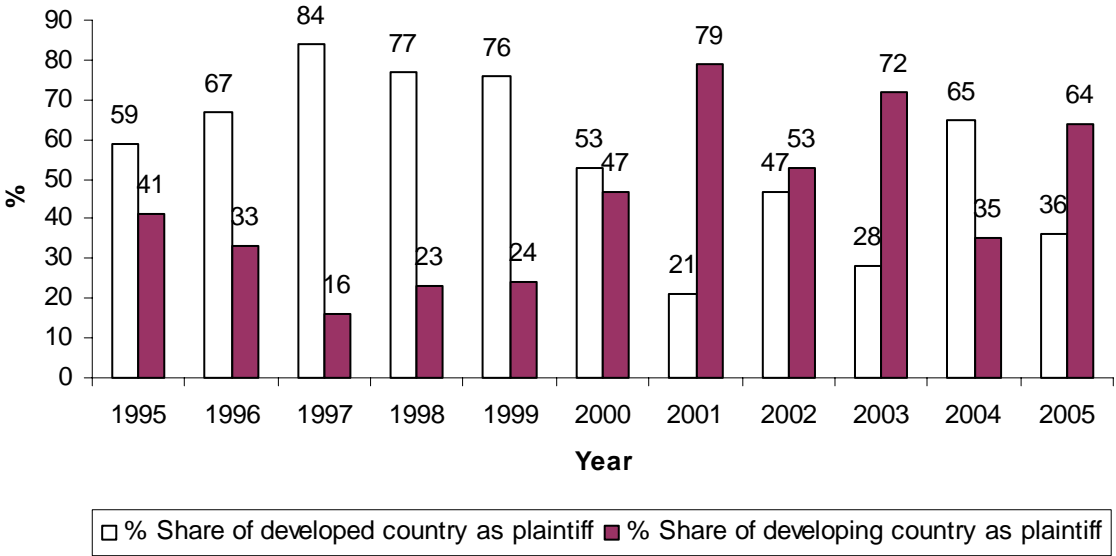
¹⁴ For example see Horlick, N, and Mizulin, N. Developing Countries and WTO Dispute Settlement. *Wilmer Cutler Pickering LLP*, Washington DC.

¹⁵ WTO Dispute Settlement Database available at the World Bank website <http://econ.worldbank.org>. Follow the links Home > Data & Research > Research > WTO Dispute Settlement Database. Visited 15 May 2008. This work was done by non-Bank authors Henrik Horn and Petros C. Mavroidis and is accompanied by a paper summarising their research *The WTO Dispute Settlement System 1995-2006 Dataset Descriptive Statistics Overview* also available on the same page.

¹⁶ Alavi, Amin and Millhoj, Anders (2008)(unpublished). *The participation of developing countries in the WTO's dispute settlement mechanism*. This paper was obtained by personal communication with the authors, the article is yet to be published. The Alavi, Millhoj analysis disregards the six WTO cases which have involved co-complainants who are both developed and developing. Amin Alavi is postdoctoral researcher at University of Aarhus, Department of Law (amal@asb.dk). Anders Milhøj is associate professor of statistics at the Department of Economics at University of Copenhagen (Anders.Milhoj@econ.ku.dk).

The Alavi and Millhoj study finds that of 335 disputes over the period 59% or 197 were filed by developed countries. Although 70% of WTO Members were developing countries they accounted for only 39% of disputes filed of which more than half were against other developing country Members.

Figure 1. Initiated cases



It would appear from the above that developing country participation has risen since 2000. Indeed since 2000 developing countries have initiated around 58% of disputes, a figure closer to their relative proportion of membership. Similar observations have led some commentators to the conclusion that ‘*Developing countries as a group are active participants in the DSU system*’.¹⁷

However, the upward trend masks the under-representation of a large group of small and vulnerable economies; those with perhaps most to gain from a rules-based dispute settlement mechanism. Development status in the above studies and others are based on World Bank *per capita* income statistics (High, Upper Middle, Lower and Low).¹⁸ However low *per capita* income does not necessarily equate will lesser political power in the trade arena. To illustrate, India is a ‘low income’ country based on its *per capita* income¹⁹ but also a member of the G4²⁰ representing the most powerful trade interests at the WTO!

If we look beyond the aggregate figures we begin to see that a handful of repeat players are responsible for the developing world’s caseload. Of the cases brought by developing countries 22 were by Brazil, 16 by India, 15 by Mexico, 12 by Korea 11 by Thailand, 10 by Chile and 9 by Argentina. These seven Members were responsible for 95 of the 134 disputes brought by

¹⁷ Guzman, A and Simmons, B (2005). *Power Plays and Capacity Constraints: The Selection of Defendants in the World Trade Organization Disputes*

¹⁸ See Guzman at 561.

¹⁹ See the World Bank website <www.web.worldbank.org> follow links from Home>Data > Country Groups, last visited 15 May 2008.

²⁰ The G4 Process in the WTO included the four most influential players in the current negotiating round being India, Brazil, the European Union and the United States. The process earlier this year on the basis of disagreements concerning agriculture see news coverage at ABC website <<http://www.abc.net.au/news/stories/2007/06/22/1958642.htm>>

developing countries. This, of course, excludes a vast majority of developing countries at the WTO but more importantly it excludes several vital groups of smaller developing states including:

- The 32 Least Developed Countries (LDCs) that are Members of the WTO. Only one case was filed by a least developed country and this was the *India – Anti-dumping measures on batteries from Bangladesh* by Bangladesh.
- The West African Cotton Producers (Benin, Burkina Faso, Mali and Chad) who have been active during negotiating rounds²¹ but have not been party to any disputes even those that specifically addressed the US Cotton Subsidies which they have lobbied against
- The Pacific Island States, three of whom are WTO Members²² with a further three seeking accession.²³ None has initiated a dispute.²⁴

References to smaller or vulnerable developing countries in this essay are to these types of Members. I have intentionally avoided strictly defining this group because any delineation based on GDP or development status does not fully capture all the relevant Members. I am referring not only to least developed countries (LDCs) but also to other developing countries excluding the ‘repeat players’ in WTO disputes outlined above.

1.1.2 Does size play a role in dispute settlement participation?

If development status alone does not correlate with a lack of dispute settlement presence then what other factors are influential? Looking at those countries which are yet to initiate a dispute, the obvious answer emerges; economic size or more particularly a member’s relative share of global trade. The World Bank data set developed by Horn and Mavroidis bear out this observation.²⁵ An interesting analysis of the World Bank dataset is given by Nordstrom and Shaffer who plot disputes against the global export ranking in a particular commodity of the complaining party. As the figure below shows, it is the top three exporters of any particular commodity that initiate the majority of disputes.²⁶

²¹ Particularly concerning their Sectoral Initiative in Favour of Cotton. See WTO Committee on Agriculture Special Session. *Poverty Reduction: Sectoral Initiative in Favour of Cotton – Joint proposal by Benin, Burkino Faso, Chad and Mali (West and Central African countries)*. 16 May 2003 (TN/AG/GEN/4).

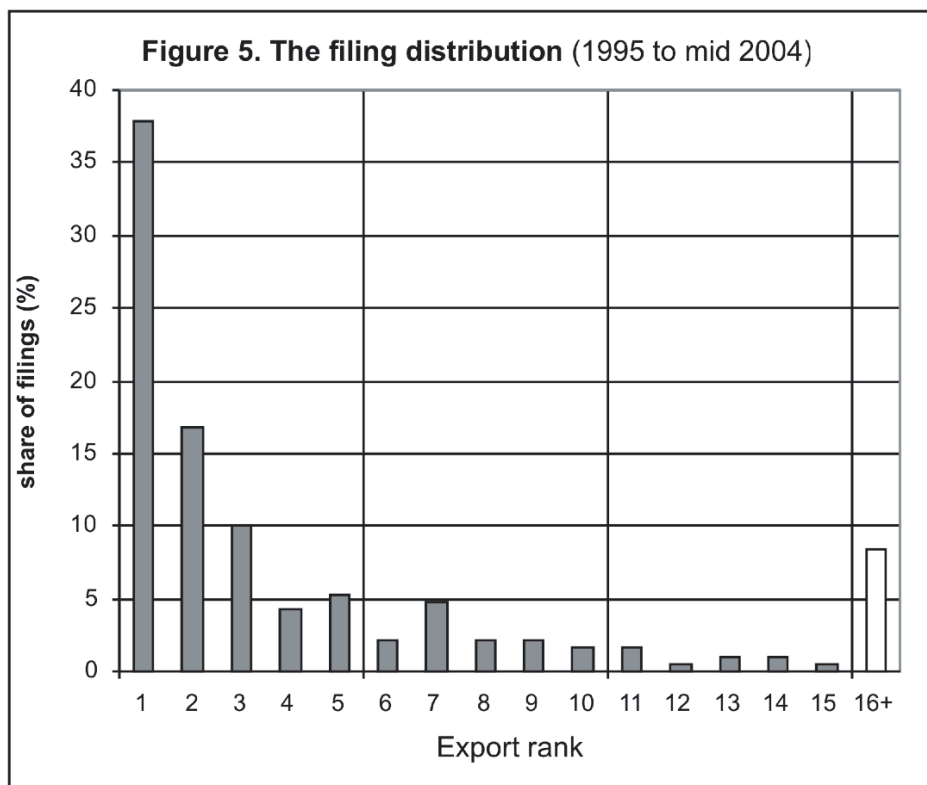
²² Papua New Guinea, Solomon Islands and Fiji.

²³ Vanuatu, Samoa and Tonga.

²⁴ For a more detailed discussion of Pacific Island countries at the WTO including disputes see Grynberg, Roman. *The Pacific Island States and the WTO Towards a post Seattle Agenda for the Small Vulnerable States*. Multilateral Trade Policy Advisor, Pacific Island Forum Secretariat, Suva Fiji. For a good discussion on the challenges faced by Pacific nations at the WTO, including some discussion of disputes see WTO Case Studies – Case 13. Stoler, Andrew. *Fiji: Preparing for the End of Preferences?* Available from the WTO Website bookshop www.wto.org.

²⁵ See supra note 13.

²⁶ ICTSD Dispute Settlement and Legal Aspects of International Trade. Nordstrom, Hakan and Shaffer, Gregory (2007). *Access to Justice in the World Trade Organisation – The Case for a Small Claims Procedure, a preliminary analysis*. Issue Paper No.2 available at the ICTSDS website www.ictsd.org/pubs/.



1.1.3 Do small developing economies use the dispute settlement procedures less than we would expect on rational economic grounds?

We might say the observation that the biggest exporters initiate the majority of disputes is unsurprising, since it is the largest exporters who have the greatest interest in enforcing trade rules for a particular commodity. However, this negates the *relative* importance of exports for a particular member. The United States may be the biggest producer of cotton in the world but cotton exports are relatively more important to economies of Sub-Saharan African nations.²⁷ In an ostensibly democratic institution like the WTO, there is no reason why they should be less able to defend their legal rights. Another illustration of this point is to compare the relative importance of USD \$1 million to the overall economy of different Members, which ranges from 1.5% of Burundi's total exports to just 0.000025 of the EU's exports.²⁸

²⁷ See WCA Paper at supra note 19 at 2.

²⁸ See Table 1 in Nordstrom and Shaffer supra note 24.

The bar chart below is taken from a paper by Mexico diagnosing the problems in the DSM. It clearly shows that Members with the greatest relative importance of trade to their economies are not initiating disputes.²⁹



In addition smaller economies tend to be less diverse exporters which rely on a few key commodities, this in turn increases the relative importance of trade in particular sectors to their economies. If disputes were initiated on the basis of the *relative* importance of trade we would expect that smaller economies with a reliance on an undiversified export sector would be the primary users of dispute settlement.

1.2 Protecting systemic interests through third party participation

At the core of the benefits of third party participation is the protection of long-term systemic interests which are affected by the interpretation and application of the WTO Agreements by panels and Appellate Body. As we shall see in Part 2, many of the developing world’s concerns relate to a perception that panels and the Appellate Body are not paying due regard to their interests. It is precisely for this reason that smaller economies must take a greater role as third parties.

Only half of the WTOs developing country members have exercised their third party rights at all (Annex A gives a summary of all third party participation). Considering this participation in more detail I argue that their practice shows that they have focused on protecting narrow commercial interests to the exclusion of any systemic considerations.

1.2.1 Evidence of a lack of systemic focus by small economy third party participation

Major trading economies (the G2 and industrialised economies, as well as the emerging developing country ‘repeat players’) have demonstrated through practice their value for the role of third party participation in protecting *systemic* interests. The United States and the EU have respectively participated as either parties or third parties in 99% and 85% of all WTO disputes which have led to an adopted report.³⁰ Accordingly their coverage of WTO disputes as third parties has been near universal and well beyond disputes involving simply their commercial interests.

Analysis of smaller developing country approaches to third party participation is hampered by the relatively small number of times they have appeared. Nevertheless, as Annex A shows, there is

²⁹ WTO Dispute Settlement Body Special Session (2007). *Diagnosis Of The Problems Affecting The Dispute Settlement Mechanism – some Ideas by Mexico*. (TN/DS/W/90) 16 July 2007

³⁰ See Shaffer supra note 9 at 186.

some indication of a willingness to take up this form of participation even among the smallest economies. However, if we look behind the aggregate figures and ask *in what cases small developing countries are appearing as third parties*, we see that they are largely concentrated in a few disputes involving commodities of direct concern to their economies.

I have assembled the table at Annex B to demonstrate this point. The table describes participation in WTO cases which have dealt directly with development provisions of the WTO Agreements. These are provisions specifically outlining ‘special and differentiated’ treatment for developing countries. Recalling the criticism of the African Group that panels and the Appellate Body have ‘*exceeded their mandate and fundamentally prejudiced the interests and rights of developing country Members as enshrined in the WTO Agreements*’ we would expect a suite of developing countries and particularly the most vulnerable, eager to exercise their third party rights in these cases. What we find in Annex B is virtually the opposite.

In the cases where development provisions in the WTO Agreements were addressed in panel or Appellate Body reports, only one concerning *EC – Bananas*³¹ attracted significant smaller developing country third party participation. The only other example of small developing country participation in ‘development’ cases was Sri Lanka appearing in *Brazil – Desiccated Coconut*.³² It is worth noting that in both cases, the third parties had a direct *commercial* interest in the disputes. Both these cases are therefore exceptions which prove a rule that smaller developing countries, even though who are beginning to exercise their third party rights, are not aiming to protect their systemic interests through third party participation.

The *EC - Banana* dispute provides an example of one of the more substantive third party submission from smaller developing states at the WTO. Generally, third party submissions by small economies have tended to comprise high level and broad policy statements rather than detailed legal submissions.³³ In *EC Banans*, ACP (African, Caribbean and Pacific)³⁴ countries provided a collective and fairly detailed submission covering some of the procedural and legal aspects of dispute. On appeal the ACP countries identified several alleged errors of law by the Panel and four pages of the Appellate Body’s report are devoted to summarizing their submissions. However, the dispute was a challenged to the preferences granted by the EC to the ACP countries. Thus the case impacted the ACP countries commercial interests directly, in fact more than it did the respondent’s. Furthermore, none of the legal issues raised by the ACP related to interpretation of the development provisions raised in the dispute.

Based on the analysis presented above, there has been virtually no use by small developing countries of third party rights under the DSU to protect their *systemic* interests. Although my analysis above focused on cases involving ‘special and differentiated’ treatment under the WTO Agreements, the systemic interests of smaller economies do not end here of course. Virtually all aspects of the *Agriculture Agreement* for example will have direct or indirect consequences for

³¹ A series of disputes concerned the European Communities regime governing importation of Bananas. Although technically different disputes they all concerned appeal or compliance proceedings of the original action or actions brought by different complainants against the same measures.

³² Report of the Panel *Brazil – Desiccated Coconut* (DS 22).

³³ Sri Lanka’s third party appearance in the other dispute concerning ‘development’ provisions in the WTO Agreements *Brazil – Desiccated Coconut* (WT/DS22/R) is not even summarized independently by the Panel, indicating that no novel issues were raised by it during the proceedings (see Report of the Panel).

³⁴ The ACP (African, Caribbean and Pacific) countries are the signatories to the Cotonou Agreement which secured duty free access to the European Communities for bananas under the European preference scheme. The ACP countries are Belize, Cameroon, Cote d’Ivoire, Dominica, Dominican Republic, Ghana, Grenada, Jamaica, Saint Lucia, St. Vincent and the Grenadines, Senegal and Suriname.

small economies whether in terms of exports or food security.³⁵ Smaller developing states must equip themselves to protect these threshold interests whenever they arise in dispute settlement.

2 LIMITATIONS OF LAW, MONEY AND POLITICS IN THE DISPUTE SETTLEMENT MECHANISM

In this section I review the reasons given by developing Members themselves, and a selection of commentators, for the lack of integration into the DSM. I begin with the analysis of perhaps the most marginalised group of countries in the WTO dispute settlement procedures, the African Group. Their concerns fall into three themes: (i) practical concerns regarding complexity and cost, (ii) the inadequacy of remedies available under the DSU to suite the needs of smaller economies, and (iii) a perception that dispute settlement processes do not protect the interests of developing Members. These concerns reflect the ‘law and money’ aspects of Shaffer’s analysis but he adds a further element which I will also consider, political pressure. I add a final constraint based largely on my own experience; that of cultural differences in the willingness of different countries to use adversarial dispute settlement procedures.

2.1 *Concerns of the African Group regarding the Dispute Settlement Mechanism*³⁶

There is little wonder that the African Group have shown an interest in the issue of access to the DSM. As we saw in Part I the African Members have been notably absent from the dispute settlement arena since its inception. While even smaller economies in other parts of the world have attempted to gain a foothold, particularly through joining consultations and third party participation, the African Group and particularly African LDCs have made few in-roads. No African member had initiated a dispute and none has appeared more than three times as a third party in the history of the WTO.³⁷

It is fitting then to leave the opening assessment of what has held back smaller economies to the African Members themselves. Early in the Doha negotiations on the dispute settlement understanding the African Group set out the major problems facing African Members seeking to use the DSM. Their concerns apply equally to any small and developing economy and can be summarized as follows:

- The system is *overly* complicated and expensive
- Injury suffered has not been satisfactorily compensated where measures are withdrawn before the commencement of proceedings

³⁵ Whether agricultural exporters or net food importers, commodity prices will affect all smaller economies at least from the perspective of food security. The author began an analysis of third party participation by smaller economies in cases concerning the *Agriculture Agreement* and found similar trends to the ‘development provisions’ analysis presented above. This was left out in the interests of brevity.

³⁶ In addition to the African Group paper at supra note 12, text has also been proposed to implement its proposals, WTO Dispute Settlement Body Special Session. *Text for the African Group Proposals on Dispute Settlement Understanding Negotiations – Communication from Cote d’Ivoire* (TN/DS/W/92) 5 March 2008.

³⁷ See World Bank statistical survey at supra note 13.

- The available remedies are skewed against disadvantaged Members
- Panels and the Appellate Body have aimed to contribute towards the tangible attainment of the development objectives of the WTO Agreement
- Particularly in their interpretation and application of provisions, panels and the Appellate Body have exceeded their mandate and fundamentally prejudiced the interests and rights of developing-country Members, and
- The composition and operation of panels and the Appellate Body are inequitable in terms of geographical distribution,³⁸
- The Special Procedures for developing countries in the DSU have been ineffective.³⁹

2.1.1 Concerns of complexity and cost

Underlying practical considerations are both the oppressive costs of participation and secondly a relative lack of legal expertise in WTO law. In the compelling words of the African Group:

...every decent legal system ensures that parties that would not be able to exercise their rights in the judicial system for financial constraints are provided a means to do so.

Smaller developing countries face greater costs of participation in both relative and absolute terms. The cost of initiating a dispute is of course high relative to the size of their economy, and also the volume of trade in a particular commodity. Beyond this they face greater absolute costs in initiating disputes because they cannot rely on 'in-house' expertise or acquired corporate knowledge by very reason of their lack of participation. Without in-house expertise smaller economies are left with little choice than to seek the assistance of the Advisory Centre WTO Law or private legal counsel.

Various law firms, primarily US based, have established legal practices representing developing countries at the WTO. Their clients, of course, have tended to be the larger developing Members discussed earlier who have used their services to establish a formidable presence in the DSM. Brazil used Sidley Austin Brown & Wood for the cotton and sugar subsidies cases against the United States and the EC with notable success and Thailand used Lalive & Partners in the US *Shrimp-Turtle Case*.⁴⁰

Of course such firms are costly, to put it lightly. Although the actual figures are not made public, some commentators have made rough estimates. Using time budgets obtained from the Advisory Centre on WTO Law and an estimated hourly rate of \$USD 500, Nordstrom and Shaffer estimate that costs could range from \$ USD 321,250 to \$ USD 882,500 depending on the degree of complexity involved.⁴¹ Cases which go through a full round of appeal and subsequent compliance hearing may far exceed these figures. Unofficial records of the *Japan – Photographic Film* case suggest that costs, for each side, topped \$USD10 million in legal fees alone.⁴²

³⁸Equitable composition is an on-going concern for many developing country Members not just the African Group. See for example WTO Dispute Settlement Body. *Jordan's Contribution towards the improvement and clarification of the WTO dispute settlement understanding*. 28 January 2003 (TN/DS/W/43)

³⁹Article 24 of the DSU provides for special procedures for developing countries including a commitment to exercise 'due restraint' in initiating disputes against least developed countries.

⁴⁰See Shaffer supra note 8 at 187

⁴¹ICTSD Nordstrom and Shaffer section 2.2.

⁴²ICTSD Nordstrom and Shaffer section 2.2.

The fact that \$USD 1 million represents between 1 and 1.5% of total national exports for countries like Burundi, Gambia or the Solomon Islands puts the scale of the cost barrier into perspective.⁴³

2.1.1.1 The Advisory Centre on WTO Law

Facing such odds, the subsidized legal assistance of the WTO Advisory Law Centre has proved to be insufficient to meet the needs of small developing country Members.

The Advisory Centre on WTO Law should not be considered a panacea for all institutional and human capacity constraints of developing countries. Its terms of reference are equivocal in certain instances and it does not cover all developing countries.⁴⁴

The Centre has only eight permanent lawyers and has a mandate much broader than simply disputes settlement. Despite its mission to ensure ‘equal opportunity’ for all Members to defend their interests in the WTO DSM, it is clearly under-resourced to fully meet this goal.⁴⁵ Only 10 developed countries are Members of the ACWL and these are responsible for sustaining it financially. The low membership does not only reflect the financial costs of assisting the ACWL. There are domestic political problems associated with assisting an organization which may ultimately help a trading partner bring a dispute against the developed country supporter!

As dire as the legal cost barriers are, they do not represent the extent of the financial burden facing smaller developing country Members. Without established bureaucratic channels for dispute settlement participation, they face additional administrative hurdles to participations. While all developed Members and most large developing countries have diplomatic missions in Geneva (often with personnel specifically devoted to representation at the WTO) many smaller countries are represented by officials flown in from capitals or external posts who are already managing a variety of unrelated duties. This raises material costs of having the temporary presence in Geneva required to participate in a dispute, and also the additional human resources costs of hiring and training staff specifically for that purpose. It is worth noting also that even if external legal counsel is used, time and expertise must be invested in briefing these lawyers if they are to properly represent the countries interests.

2.1.1.2 Do the high costs and complexity arise from inherent problems with the WTO rules?

The African paper assumes that many of the cost and complexity issues arise from the WTO structure and the *Dispute Settlement Understanding* itself.⁴⁶ Commentators have tended to agree with this position and have advocated amendments to the *Dispute Settlement Understanding* along with other structural changes to remedy the perceived defects.⁴⁷ Nordstrom and Shaffer propose the establishment of a ‘small claims’ procedure to specifically suit the needs of smaller developing States with low volumes of trade.⁴⁸ Other commentators have concluded that the transition from GATT to WTO dispute settlement has compounded capacity constraints for developing countries due to its greater complexity.⁴⁹ These observations rest on the assumption that the DSM is more

⁴³ *Ibid* at Table 1.

⁴⁴ African Group paper at *supra* note 13.

⁴⁵ See the Advisory Centre on WTO Law website http://www.acwl.ch/e/index_e.aspx last visited 12 May 2008.

⁴⁶ *Surpa* note 12.

⁴⁷ See for example, Alavi, Amin (2007). *African Countries and the WTO's Dispute Settlement Mechanism..* Development Policy Review (2007), 25(1) at 25.

⁴⁸ *Supra* note 24.

⁴⁹ Moonhawk, Kim (2006). Unequal Law: Procedural Costs of WTO Rules on Developing Countries. *Paper presented at the annual meeting of The Midwest Political Science Association, Palmer House Hilton, Chicago, Illinois, Apr 20, 2006* available online at http://www.allacademic.com/meta/p139048_index.html.

complex and costly than it needs to be. They need to be balanced by an understanding of the complexity inherent in regulating international trade as well as the vastly expanded coverage of the WTO Agreements.

The first self-evident, observation to make is that the WTO covers far more ground than the GATT and therefore is necessarily more complex. Among the various matters which the WTO Agreements addressed for the first time multilaterally were Agriculture, Services, Intellectual Property, Investment and indeed a complete dispute settlement framework itself. While some may lament the complexity of the rules involved this is partly a by-product of the highly sensitive issues covered.

Secondly, it is interesting to note that the degree of complexity of WTO cases has steadily increased over the past fourteen years since its establishment. This is reflected in both Panel/Appellate Body reports (which have grown in complexity since the early days of dispute settlement), the length of submissions by Members and the complexity of legal issues involved.⁵⁰ Of course, this rising complexity is not due to structural changes to the *Dispute Settlement Understanding*, of which there have been none, nor the WTO Agreements.⁵¹ The increasing complexity is largely a product of two factors:

(a) first, increasing complexity of legal argument is an almost natural consequence of a rules based system particularly in the early stages of its development. Each reported decision creates new legal precedents which must be understood, applied and distinguished by future adjudicators.⁵²

(b) second, as the rules based system matures, instances of blatant violation are gradually replaced by more nuanced complaints which often require more detailed understanding of the measures at issue and their application. A good example of this trend towards more complex complaints is that subsidies have tended to be increasingly challenged on the grounds of their 'adverse effects',⁵³ rather than simply on the basis of being 'prohibited'. Arguing that a subsidy is prohibited is significantly less complex than demonstrating adverse effects which requires detailed economic evidence.⁵⁴ The fact that overt breaches of the WTO rules are apparently lessening is of course a positive feature and one of the great benefits of rules based trade regulation.

Finally, the WTO rules and adjudicators have done their utmost to limit the length of proceedings. This is perhaps the single most effective means of limiting costs and complexity. As any domestic lawyer would concede, the timelines for panel and Appellate Body processes are furiously fast. Appellate Body hearings must be *completed* within 60 days or at most within 90 days of the filing of the appeal. Considering that the Appellate Body will not have both Parties written submissions

⁵⁰ This observation is based on the Author's own observations and personal communications by a member of the Appellate Body secretariat.

⁵¹ The WTO Agreements have been amended only once since their adoption in 1995 and this was in relation to the Trade in Intellectual Property Agreement (TRIPS) and that change has not been subject to dispute.

⁵² Although there is strictly no doctrine of precedent in WTO law the Appellate Body recently confirmed that panels are required follow an established line of Appellate Body reasoning unless there were compelling reasons not to. *Appellate Body Report in US – Anti-dumping (Mexico)* at paragraph 161-162.

⁵³ Under the WTO Subsidies and Countervailing Measures Agreement some subsidies (those contingent on export performance or import substitution) are prohibited under (Article 3) while others are merely 'actionable' (Article 5). For a subsidy to be actionable it must cause 'adverse effects' to the interests of a trading partner, for instance by suppressing prices or displacing imported products. Detailed consideration of the rules governing these subsidies is beyond the scope of this essay.

⁵⁴ See for example the series of cases brought by Brazil concerning *US – Upland Cotton*.

until day 25, the oral hearing will generally take place on days 30 to 40 and often two weeks or so must be left for translation of the oral hearing into the official languages, even the 90 day limit seems ambitious and is in any event considerably faster than any domestic appeal process.⁵⁵ And yet, the Appellate Body has generally met these timelines.⁵⁶

In summary, the complexity of WTO disputes and law is not necessarily a reflection of a structural failing but rather a product of a comprehensive dispute settlement system and increasingly complex regulatory environment. The structural changes suggested in the DSM negotiations and the commentary will have little chance of countering *inherent* complexity. Smaller developing countries and their advocates would do well not to rest all their hopes for better representation on the success of such measures.

2.1.2 *Inadequacy of Remedies Under the Dispute Settlement Understanding*

A second theme of the African Group's concerns can be categorized as issues with the remedies available under the DSM. The approach outlined in this paper for improving small developing country integration into the DSM does not focus on suggested improvements to the *Dispute Settlement Understanding* itself. Accordingly broadening the scope of remedies available to Members is beyond the scope of this paper. Nevertheless, it is worth considering some of the problems that have been identified.

2.1.2.1 Remedies in WTO dispute settlement procedures

The remedies for breach of the WTO agreements and subsequent non-compliance with panel or Appellate Body findings are primarily based on the ability to retaliate through the suspension of 'concessions.' That is, if a Member does not comply with rulings then the affected Member can withdraw privileges which it grants to the offending Member under the WTO Agreements. Retaliation may be authorized in different sectors from those in which the original dispute arose, amplifying their potential effect. Nevertheless there are obvious limitations to the impact that such retaliatory measures may have when used by a small economy against a larger trading partner.

The African Group raises a number of specific complaints in relation to remedies. The first is that the dispute procedures take no account of the fact that economies of small developing nations are badly affected by measures which impede their exports even for short periods of time. There are no remedies currently provided to compensate aggrieved Members where the offending measures are withdrawn prior to commencement or finalization of proceedings.

2.1.2.2 Reform suggestions by the African Group and commentators

The substance of the African Group's suggestions for reform are that monetary compensation should be one of the remedies available to the dispute settlement body in cases where loss has been suffered. This should also be applied in cases where a measure is withdrawn before proceedings are finalized.⁵⁷ Several commentators have made similar suggestions based primarily on monetary

⁵⁵ For a discussion of Appeal timelines see WTO Secretariat Publication (2004). A Handbook on the WTO Dispute Settlement System. Cambridge University Press at 74.

⁵⁶ Even if the Appellate Body exceeds the 60 day deadline it must provide the Dispute Settlement Body (comprising all Member States) reasons for the delay. It has only exceeded the 90 day deadline in exceptional circumstances for example see Appellate Body Reports in *US – Lead and Bismuth II*, paragraph 8, *EC – Asbestos* at paragraph 8, *Thailand – H-Beams* at paragraph 7.

⁵⁷ African Group Paper *supra* note 12 at 3

compensation. Although the current procedures make provision for compensation they are rarely used because their imposition is only with the consent of the offending party.

While the idea of obligatory monetary compensation is familiar to us from domestic legal processes, the prospects for its acceptance in the WTO are, to say the least, remote. These issues were raised during the Uruguay Round negotiations without avail and have not been accepted in the negotiations on dispute settlement to date.

2.1.3 Failure to appreciate and apply development fundamentals

The final theme of the African Group's concerns for the DSM relates to a perception that it has not been sensitive to 'development fundamentals'. There are three aspects to this complaint:

- The interpretation and application of the WTO Agreements has fundamentally prejudiced the interests and rights of developing country Members,
- The DSM has not satisfactorily and clearly aimed its operation to deliver tangible development objectives as set out in the WTO Agreements
- Composition of panels and the Appellate Body have not been equitable in terms of geographical distribution.

It is this final aspect of the African Group's claims that is of greatest systemic concern to smaller economies and indeed the WTO dispute settlement system as a whole. In the words of the former WTO Director-General Mr Renato Ruggeri '*the credibility of a rules based system is dependent on its universality*'. The African Group's criticism strikes at the heart of the DSM's universality and represents the urgent problem which arises from the lack of smaller developing state participation.

2.1.3.1 Failure to appreciate the development ramifications in interpretation and application of the WTO Agreements.

A doctrine of precedent is fast evolving and gaining credence in the WTO. The Appellate Body recently affirmed that it expected panels to follow established lines of reasoning unless compelling reasons exist for departing from it.⁵⁸ Despite their insistence that this does not represent a doctrine of precedent in WTO law it is difficult to see how it differs from traditional *stare decisis* in practical terms. Decisions on law must be followed unless they can be distinguished on the facts of a particular dispute. The Appellate Body's demand for continuity is the natural result of its status as a permanent appellate body charged with protecting the security and predictability of the multilateral trading system.⁵⁹

Especially in these formative years of the DSM, the importance of evolving jurisprudence cannot be underestimated. The approaches to applying the WTO Agreements are being formed with each case that is heard. This is a period when the perspectives of all Members are desperately needed to ensure that the rapidly expanding body of law develops in a manner which protects and balances the diverse interests enshrined in the WTO Agreements.

⁵⁸ Appellate Body Report *US –Anti-dumping (Mexico)* at 171,172.

⁵⁹ See Article 3.2 of the *Dispute Settlement Understanding*

2.1.4 Issues of Power and Politics

The WTO dispute settlement rules are expressly intended to be apolitical. The *Dispute Settlement Understanding* advises Members:

It is understood that requests for conciliation and the use of the dispute settlement procedures should **not be intended or considered as contentious acts** and that, if a dispute arises, all Members will engage in these procedures in **good faith** in an effort to resolve the dispute. It is also understood that **complaints and counter-complaints** in regard to distinct matters should not be linked [emphasis added]⁶⁰

Ultimately it is in the interests of all Members to safeguard the integrity of the dispute settlement process. Untoward political pressures will undermine the merits of a rules based system and are no more tolerable in the international setting than they are in the domestic when manifested in intimidation or blackmail.

However the fear of backlash from more powerful trading partners either in the WTO forum or even in other international relations is ever present for smaller developing countries. Some anecdotes even allege that high level threats have in the past included suspension of food aid if action in Geneva was pursued!⁶¹

While extreme examples of blatant intimidation are hopefully few and far between, less obnoxious political maneuvering will also play a role in a small economy's decision of whether or not to initiate disputes. More subtle uses of political influence will be far more difficult to pinpoint and counteract. Indeed, much of the perceived pressure may be ultimately considered normal aspects of international diplomacy ever present where discrepancies in power exist.

Analysts have not been able to establish a clear link between dispute settlement behaviour and power politics. One relatively recent study tested the notion that politically weak countries refrain from filing complaints against politically powerful states for fear of costly retaliation.⁶² Guzman and Simmons conclude that there is no evidence of such an effect, a surprising and perhaps questionable conclusion.⁶³ Nevertheless one table cited by those authors is revealing in itself; it shows that there is a remarkable parity between the number of disputes a Member has taken and the number of times it has been challenged as a complainant.⁶⁴

While the influence of power politics itself may be difficult to demonstrate it is clear from the empirical evidence that those countries that are active complainants (irrespective of development status) are also challenged as complainants in roughly proportionate terms. This fact demands that we question whether greater involvement *as litigants* is necessarily a good thing for small and already vulnerable economies.

⁶⁰ Article 3 of the Dispute Settlement Understanding

⁶¹ Shaffer makes this assertion based on interviews with former USTR officials. See footnote 66 in Shaffer (2006) at supra note 13.

⁶² Guzman, A and Simmons, B (2005). *Power Plays and Capacity Constraints: The Selection of Defendants in the World Trade Organization Disputes*. The Journal of Legal Studies vol 34 at 560.

⁶³ For discussion of one aspect of the Guzman study see Section 1.1.1 above.

⁶⁴ See Table 1 in Guzman and Simmons (which shows number of appearances as complainant/defendant by country grouping), also confirmed by the table on page 11 of Amin which shows appearances as complainant/defendant for all developing countries individually).

2.1.5 Cultural factors

The final limitation to participation is primarily based on my own observations and impressions. It is well established, at least by popular wisdom, that cultures differ on their approach and propensity towards adversarial dispute settlement.⁶⁵ It is not a stretch to imagine this applies equally at the international level. While studies do not appear to have been conducted on this aspect of the WTO dispute settlement usage, the more general study by Wolfgang Pape considers the relevance of cultural differences to the WTO as a whole and makes fascinating reading. His observation below compares the US and Japanese litigation cultures:

...in contrast to the high numbers of lawyers in the US and the strong tendency of Americans to resort to the law and courts to resolve conflicts, the Japanese are said to prefer arbitration and compromise over direct confrontation.⁶⁶

The same could be said for many cultures represented at the WTO (especially when contrasted against the US or EU in the WTO). Indeed the statement is perhaps even more applicable to small and vulnerable economies which have traditionally been wary of confrontation on the international stage.

Cultural differences in approaches to litigation are another aspect which we must be cognizant of in arguing for greater participation in the dispute settlement mechanism. With a membership of 152 nations, we must be open to the possibility that some will inevitably choose not to bring disputes even if provided all the means for doing so. And yet, their interests must still be represented in the evolving body of WTO law lest the complaints of the African Group outlined above are to persist.

2.1.6 Conclusion on the limitations to initiation of WTO disputes

In discussing the reasons for limited use of the DSM (in terms of initiation of disputes) by smaller developing countries we have seen that:

- *Complexity* is in many respects inherent to a rules based system regulating the complexities of international trade
- *Cost* burdens of initiating disputes are massive, particularly when considered relative to the economies of smaller Members, and the existing means of providing legal capacity are simply not on a scale which could make an appreciable difference
- *Remedies* available under the DSM, although inadequate in many respects represent a high water mark in international dispute resolution and the prospect of securing by agreement, compulsory money compensation is remote

⁶⁵ I have prefaced this remark by saying that the observations are largely based on my own perspectives because in research this point I was surprised to find that many of the sociological studies which consider cultural differences in litigiousness do not bear out that there are *inherent* cultural differences but find that aspects of the overall legal and institutional framework can explain greater or lesser resort to the courts. See for example Kritzer, H.M, Bogart, W.A. Vidmar (1991). *Aftermath of Injury: Cultural Factors in Compensation Seeking in the Canada and United States*. Law and Society Review vol 25 (3) at 499; Blackenburg, Erhard (1994). *Infrastructure for avoiding litigation: Comparing Cultures of Legal Behaviour in Netherlands and West Germany*. Law and Society Review, vol 28(4)(1994) at 789.

⁶⁶ Pape, Wolfgang. *Socio-Cultural Differences and the International Competition Law*. European Law Journal, Vol 5(4) December 1999 at 447

- *Political* impediments to participation would be difficult to overcome and counteract, and finally,
- *Cultural* dispositions towards the use of adversarial dispute settlement will differ among Members and some smaller economies may choose not to initiate disputes even if given the means.

In summary, there are fundamental reasons why smaller developing countries do not *initiate* disputes under the current institutional structure and these will not be easily counteracted. At best overcoming the limitations to initiation of disputes is a long term project. In the meantime, the smaller nations are left without any representation in the WTO dispute settlement which evolves in their absence.

3 THIRD PARTY PARTICIPATION AS A MEANS OF OVERCOMING THE BARRIERS OF LAW, MONEY, POLITICS AND CULTURE

In this part I present third party participation as a means to overcome the limitations of law, money, politics and culture outlined in the previous section. In order to do this we must first consider in some detail the existing rules governing third party participation in the WTO as set out in the *Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding or DSU)*. I then look at how smaller developing Members have used their third party rights and suggest how that practice must be improved.

3.1 Third Party Rights under the WTO Dispute Settlement Understanding

Many aspects of the *WTO Agreements* reflect that the drafters understood and appreciated that all Members would have interests in the outcome of disputes, not simply those directly involved. The Dispute Settlement Body (DSB) itself, consisting of representatives of all Members, is a clear illustration of this. Its broad functions include establishing panels, adopting reports and general surveillance of the dispute settlement procedures. Ultimately it is the DSB that makes rulings and recommendations based on panel and Appellate Body reports.

Any Member with a ‘substantial interest’ in a matter before a panel has the opportunity to be heard and to give written submissions. Written submissions must be given to the Parties and reflected in the Panel’s report. In practice this means that all third party submissions are summarized or referenced at the beginning of panel reports and Appellate Body reports.

However ordinary third party rights under the DSU are limited. According to the Working Procedures for panel’s, third parties are only entitled to participate in the first substantive meeting of the panel which is specifically set aside for that purpose.⁶⁷ panels are unable to make rulings on issues raised by third parties if these have not been raised by the Parties.⁶⁸

In appellate processes third party rights are also constrained. They may join an appeal as a ‘third participant’, but cannot themselves appeal any aspect of a panel finding. Furthermore, in order to be a third party on appeal a Member must have been a third party in the original hearing. This is

⁶⁷ 3.6 Annex 3 (Working Procedures) to the Dispute Settlement Understanding.

⁶⁸ *U.S. - Cotton Subsidies, Article 21.5 (Panel)* at 8.27 to 28

problematic since many legal issues, particularly approaches to interpretation arise in the panel proceedings which are not foreseeable at the outset.

In special circumstances panels have granted ‘enhanced third party’ rights, a practice that has been upheld by the Appellate Body.⁶⁹ panels may exercise their discretion to grant enhanced rights ‘where considerations of due process necessitate’, for example, especially complex evidence or where two similar disputes are heard by the same panel. The first dispute in which this discretion was exercised concerned the importation of bananas into the EU and attracted several smaller developing countries to participate as third parties.⁷⁰ In that case, the Panel allowed third parties to appear at all meetings not only the one set aside for third parties, they were also allowed to make submissions at ‘suitable’ moments.

Importantly, the requirement for a ‘substantial interest’ does not need to be a direct commercial interest in the outcome of the dispute. It extends also to systemic interests in the matters considered by the Panel. To date no member has been refused third party rights solely on the basis that they lacked a substantive interest.

3.2 *Third Party Participation and limits of law, money, politics and culture*

3.2.1 *Cost and capacity*

It is no surprise that third party participation is less costly than initiating a dispute or even joining as a co-complainant. Generally third parties prepare only one written submission and will also appear to deliver a short oral submission if they desire. The bulk of work on the third party submission (particularly on appeal) will only begin once the complainant’s written submission is received. As we have already discussed above timelines for WTO disputes are already short, and accordingly there is little time for a third party accumulate legal fees even if external counsel is used.

Using Norstrom’s⁷¹ rough estimate of USD 500 per hour and a conservative figure of 20 hours of legal time to prepare a written submission (enough for a third party submission of medium complexity) we have a very approximate figure of \$USD 10,000. Even this figure could of course be barrier to the smallest economies at the WTO.

The cost of third party participation is further reduced by Members joining together to represent their interests collectively. Developing countries have throughout the Doha Round discovered the considerable clout that negotiating groups can generate.⁷² There is no reason that these negotiating groups could not similarly be deployed to protect systemic interests in disputes. Collective action in disputes has already been employed by the Cotton Producers of West and Central Africa and the African, Caribbean and Pacific (ACP) countries, both of whom used the assistance of private lawyers to represent their collective interests as third parties in two major disputes.⁷³

⁶⁹ Appellate Body has confirmed this practice in various decisions including *EC – Hormones* Appellate Body Report at 150

⁷⁰ *EC – Regime for Importation Sale and Distribution of Bananas* Panel Report, 22 May 1997) at 7.4.

⁷¹ See section 2.11 above.

⁷² For a detailed discussion of developing country groupings at the WTO see Rolland, Sonia (2007). *Developing Country Coalitions at the WTO. In Search of Legal Support*. Harvard International Law Journal, Volume 48(2) Summer 2007.

⁷³ These being the series of disputes involving *US – Upland Cotton* (West, Central African Cotton Producers) and *EC – Bananas* (ACP) countries discussed above.

The \$USD 10,000 figure above assumes the use of private lawyers (with an expertise in WTO law) each time a third party submission is filed. However, one of the greatest benefits to third party participation is the generation of in-house expertise. The African Group has recognized that that third party participation should be encouraged as way for developing countries:

‘gaining legal expertise in procedural, substantive, systemic, or other issues; as well as gaining insight into the workings of the WTO’.⁷⁴

Underlying this statement, particularly the plea for ‘*insight into the workings of the WTO*’ is the feeling among smaller economies of being locked out of the dispute settlement forum. Lifting this cloak of mystery should be a primary goal of those advocating greater integration into the WTO system. My own experience is that involvement in the preparation third party submissions builds an understanding of WTO law and procedures far more readily than could be possible through other forms of training. It is a cost effective and time efficient means for smaller economies to take the task of WTO legal ‘capacity building’ into their own hands and for their own benefit.

3.2.2 *Politics and power*

As we have already seen, political influence still plays a role in the determination dispute settlement behavior despite of the move towards a rules based system. However, the arena of third party participation is *relatively* free from the influences of politics and power. That is not to say that no Members use their third party rights in political ways, but rather that there are plenty of examples where third party rights are exercised apolitically. Political ‘friends’ or prior co-complainants have often exercised their third party rights ‘against’ their partners in later disputes.

Third party representation is by its nature conducive to such apolitical use. Particularly where the ‘substantive interests’ of the third party are systemic and not directly related to the product in dispute it is not uncommon to find that submissions will support the complainant on some legal issues and the respondent on others. Such use of third party rights encourages better decision making by panels and the Appellate Body since it steams from a concern to achieve the best interpretation of the rules.⁷⁵

It is imperative that smaller economies begin to systematically use their third party rights in this way. By establishing a precedent of apolitical use they will be able to freely use third party rights without fear of reprisal.

3.2.3 *Cultural aspects*

Overcoming any cultural barriers to adversarial disputes should also be easier in the context of third party participation. This process will be as much dependent on the actions and attitudes of powerful trade interests at the WTO as the mindset of smaller economies. While the initiation of a dispute will always be a confrontational act on some level, participation as a third party need not be portrayed in this light. Indeed, the role of smaller developing economies as third parties should be recognized by all Members as an invaluable contribution which adds to the integrity and impartiality of the DSM as a whole.

⁷⁴ African Group paper at 4.

⁷⁵ Informal personal communications with present and past lawyers in the Appellate Body secretariat confirm that these types of third party submissions are especially valued by the Appellate Body.

Representations in the dispute settlement body will be the key to encouraging greater involvement by smaller developing countries as third parties. Both complainants and respondents should encourage this process, particularly by restraining themselves in the use of the veto powers against third party participation when smaller developing states are involved.⁷⁶ Representatives should aim to create an atmosphere of inclusion which recognizes the contribution of particularly smaller developing countries to the DSM.

3.2.4 *Inadequacy of DSU Remedies*

One of the central concerns of developing countries with regard to the DSM is the inadequacy of its remedies. Certainly, participation as a third party can do little to ameliorate these concerns; however, the immediate (rather than systemic) benefits of third party participation may indeed be comparable to those which the parties receive. Through third party participation Members can encourage panels and Appellate Body to reach a decision which serves their interests. Due to the most favoured nation obligations in the WTO Agreements, concessions which are won by the complainants will immediately and unconditionally flow to all other Members. Similarly, with regards to domestic measures such as subsidies, the removal of the offending measures will benefit all WTO Members equally.

4 CONCLUSION

An affinity for adversarial dispute settlement is shared among many of the larger and more powerful Members of the WTO. However, a desire to increase involvement in the dispute settlement mechanism by *initiating* more disputes should not be assumed to apply to all Members. The decision of whether to engage more regularly as a complainant will be a matter for the particular Member concerned, to be taken in light of all the limiting factors we have discussed including money, law, politics and culture. It is a decision that cannot be rushed nor made on their behalf.

This paper has argued that the WTO faces a far more pressing concern than the failure of smaller Members to *initiate* disputes. This is that their voice is not being heard in the dispute settlement arm of the WTO. Panels and Appellate Body are not being given the benefit of their contribution when weighing and balancing rights under the WTO Agreements. In undertaking their duties panels and the Appellate Body need the assistance of all WTO Members. Without that involvement there is an ever-present risk that application and interpretation of the rules will be skewed in the favour of those who are active in the DSM, that is, the largest and most powerful Members. This is a matter of grave and immediate concern which cannot wait for long term structural changes to the dispute settlement rules.

Some smaller economies have already started to take a more active role as third parties; however, their involvement has not attempted to tackle the systemic concerns they have articulated in other WTO forums. Rather their contribution has been limited to disputes concerning their direct commercial interests.

⁷⁶ Under Article 4.11 of the DSU a member requesting to join the consultations as a third party can be refused by the responding Member on grounds that they do not have a substantial trade interest. Although this veto is frequently used it is largely a delaying tactic as third party rights cannot be refused by the respondent in relation to later requests for third party rights in the DSB.

Marshalling the expertise they have already acquired through participating in multilateral trade negotiations, and perhaps even utilizing the same alliances which have been successful in that arena, smaller developing states must use their *existing* rights under the WTO Agreements to ensure their *systemic* interests are protected. Better third party involvement will also build the legal capacity and confidence of smaller developing country Members, preparing them for greater involvement if they choose.

The eminent American jurist Justice Cardozo's great strength was said to have been that he viewed law '*not solely as an authoritative technique for the resolution of strife, but chiefly as a social process for recognising and marshalling the values that we prize*'.⁷⁷

As the dispute settlement mechanism of the WTO matures, Members should appreciate its role in marshalling the 'values' of the WTO. Far from being merely a blunt instrument for mediating strife between powerful Members, the Appellate Body's oversight is ensuring that coherent and legally astute body of law is emerging from the DSM. This body of law will in time crystallize subtle balances of rights in the WTO Agreements between complainants and respondents, between Members imposing regulatory restrictions to trade and those seeking to challenge them. All Members must take an active role in ensuring that their interests are properly accounted in achieving that balance.

⁷⁷ Weeramantry, Christopher (1975). *Law in Crisis – Bridges of Understanding*. Cape Moss (1975) at 7 from Judge Wyzanski "A Trial Judges Freedom and responsibility. *Records of the Association of the Bar of the City of New York, 1952* at 283.

ANNEX A

WTO THIRD PARTY PARTICIPATION⁷⁸

G2	DEV cont.
EC 58	Colombia 15
US 56	Costa Rica 6
G2 total 114	Côte d'Ivoire 4
	Cuba 16
IND	Dominica 3
Australia 38	Dominican Republic 2
Canada 58	Ecuador 7
Hong Kong – China 9	Egypt 2
Hungary 2 El	Salvador 9
Iceland 6	Fiji 3
Israel 3	Ghana 1
Japan 65	Grenada 1
Korea 27	Guatemala 10
Mexico 38	Guyana 3
New Zealand 20	Honduras 9
Norway 21	India 43
Poland 1	Indonesia 3
Singapore 4	Jamaica 7
Switzerland 2	Kenya 3
Turkey 14	Malaysia 10
IND total 308	Mauritius 5
	Nicaragua 6
LDC	Nigeria 1
Bangladesh 1	Pakistan 4
Benin 1	Panama 1
Chad 1	Paraguay 13
Madagascar 3	Peru 7
Malawi 3	Philippines 4
Senegal 2	Saint Kitts and Nevis 3
LDC total 11	Saint Lucia 3
	Saint Vincent and the Grenadines 1
DEV	Sri Lanka 3
Argentina 12	Suriname 1
Barbados 4	Swaziland 3
Belize 4	Tanzania 3
Bolivia 1	Thailand 24
Brazil 31	Trinidad and Tobago 3
Cameroon 1	Uruguay 4
Chile 15	Venezuela 16
China 39	Zimbabwe 1
Chinese Taipei 28	DEV total 398
Grand total 831	

⁷⁸ Horn and Mavroidis at 10

ANNEX B

WTO CASES ADDRESSING DEVELOPMENT PROVISIONS IN THE AGREEMENTS*

Dispute Name	Development provision examined	Participation
EC – Bananas II 21.5 Panel (DS27)(2008)	DSU 12.11, 12.10	<i>Complainant:</i> Ecuador <i>Respondent:</i> EC <i>Third Parties:</i> Belize, Brazil, Cameroon, Colombia, Côte d'Ivoire, Dominica, Dominican Republic, Ghana, Jamaica, Japan, Madagascar, Nicaragua, Panama, St. Lucia, St. Vincent and the Grenadines, Suriname, United States
Turkey - Measures Affecting the Importation of Rice Panel (DS 334)(2007)	DSU 12.10, 12.11	<i>Complainant:</i> U.S. <i>Respondent:</i> Turkey <i>Third Parties:</i> Argentina, Australia
Mexico - Measures Affecting Telecommunications Services (Panel) (DS204) (2004)	DSU 12.10,12.11	<i>Complainant:</i> U.S. <i>Respondent:</i> Mexico <i>Third Parties:</i> Australia, Brazil, Canada, Cuba, EC, Guatemala, Honduras, India, Japan, Nicaragua
Brazil - Export Financing Programme for Aircraft (1999)(DS 46)	Art 27 SCM	<i>Appellant/Appellee:</i> Brazil <i>Appellant/Appellee:</i> Canada <i>Third Participants:</i> EC, U.S.
EC – Bed Linen (21.5) Panel (DS 141) 2003	Art. 15 AD	<i>Complainant:</i> India <i>Respondent:</i> EC <i>Third Parties:</i> Japan, Korea, U.S.
US – Dumping/Subsidy Offset Act ("Byrd Amendment") Panel (DS 217) 2003	Art 15 AD, and Art 12.11 DSU	<i>Complainants:</i> DS217 - Australia, Brazil, Chile, EC, India, Indonesia, Japan, Korea, Thailand; DS234 - Canada, Mexico <i>Respondent:</i> U.S. <i>Third Parties:</i> DS217 - Argentina, Canada, Costa Rica, Hong Kong (China), Israel, Mexico and Norway; DS234 - Australia, Brazil, Canada (in complaint by Mexico), EC, India, Indonesia, Japan, Korea, Mexico (in complaint by Canada), Thailand
US – India Steel Plate Panel (DS 206) 2002	Art. 15 AD	<i>Complainant:</i> India <i>Respondent:</i> U.S. <i>Third Parties:</i> Chile, EC, Japan
US – Line Pipe Safeguards Panel / Appellate Body (202) 2002	Art 9 Safeguards	<i>Complainant:</i> Korea <i>Respondent:</i> U.S. <i>Third Parties:</i> Australia, Canada, EC, Japan, Mexico

EC – Bed Linen Panel (141) 2001	Art. 15 AD	<i>Complainant:</i> India <i>Respondent:</i> EC <i>Third Parties:</i> Egypt, Japan, U.S.
Korea – Beef Panel / Appellate Body 161, 169 2001	Art. 6.4 Agriculture	<i>Complainants:</i> Australia, U.S. <i>Respondent:</i> Korea <i>Third Parties:</i> Australia (in complaint by U.S.), Canada, New Zealand, U.S. (in complaint by Australia)
India – QRs Panel / Appellate Body 90 September 22, 1999	Art 12.10 DSU and Art. XVIII GATT	<i>Complainant:</i> U.S. <i>Respondent:</i> India <i>Third Parties:</i> None
Brazil – Aircraft Panel / Appellate Body 46 August 20, 1999	Art. 27 SCM	<i>Complainant:</i> Canada <i>Respondent:</i> Brazil <i>Third Parties:</i> EC, U.S.
Indonesia – Automobiles Panel 54, 55, 59, 64 July 23, 1998	Art. 27 SCM and Art 65 TRIPS	<i>Complainants:</i> EC, Japan, U.S. <i>Respondent:</i> Indonesia <i>Third Parties:</i> India, Korea
EC – Poultry Panel / Appellate Body 69 July 23, 1998	Art. 1.2, 3.5(j) and 3.5(a) Licensing	<i>Complainant:</i> Brazil <i>Respondent:</i> EC <i>Third Parties:</i> Thailand, U.S.
India – Patents (US) Panel 50 January 16, 1998	56 TRIPS	<i>Complainant:</i> U.S. <i>Respondent:</i> India <i>Third Party:</i> EC
EC – Bananas Panel 27 September 25, 1997	1.2 Licensing	<i>Complainants:</i> Ecuador, Guatemala, Honduras, Mexico, U.S. <i>Respondent:</i> EC <i>Third Parties:</i> Belize, Canada, Cameroon, Colombia, Costa Rica, Côte d'Ivoire, Dominica, Dominican Republic, Ghana, Grenada, India, Jamaica, Japan, Nicaragua, the Philippines, Saint Vincent and the Grenadines, Saint Lucia, Senegal, Suriname and Venezuela
Brazil – Desiccated Coconut Panel 22 March 20, 1997	Art 6 Agriculture	<i>Complainant:</i> Philippines <i>Respondent:</i> Brazil <i>Third Parties:</i> Canada, EC, Indonesia, Sri Lanka, U.S.

* Assembled by the author using www.worldtradelaw.net case law indexes.