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**DISPUTE SETTLEMENT PROCEDURE AT THE WORLD TRADE ORGANISATION:
ISSUES AFFECTING DEVELOPING COUNTRY PARTICIPATION**

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INTRODUCTION

The World Trade Organisation (WTO) was established in 1995 as a single institutional framework to govern world trade.¹ The WTO can be viewed as a space for members to create and alter global rules of trade while at the same time attempting to maximize the potential wealth achievable by society.² This is done through continual agreements liberalizing trade and enforcing commitments, seeking to avoid costs created by unnecessary trade barriers. The Dispute Settlement System (DSS) is used by member states to identify WTO-illegal measures and enforce existing trade obligations.³ It is therefore an essential mechanism to ensure maximum long-term welfare through the effective enforcement of trade liberalisation commitments, and at the same time to help ‘ensure a level playing field for all’.⁴

The general opinion is that the DSS has been a remarkable success.⁵ Various scholars have gone further than this, declaring the DSS as the ‘core lynchpin’ and ‘backbone of the multilateral trading system’⁶ due to its mandatory application to disputes, the binding nature of its agreements and its relatively effective remedies for non-compliance. Consequently it has been hailed as the most successful of any other comparable international institution.⁷

However, to focus exclusively on performance ignores the distributive aspects inherent in any legal system. Institutional performance needs to be measured not in its

¹ See Petersmann, *The GATT/WTO Dispute Settlement System*(London, 1997). This effectively replaced the existing 1947 General Agreement on Tariffs and Trade (GATT) as well as increasing the coverage to other sectors such as intellectual property (TRIPS) and trade in services (GATS).

² Mercuro and Medema, *Economics and the Law: From Posner to Post-Modernism* (Chichester, 1997, 66. The concept of determining efficiency can be traced back to Coase’s recognition that harm is reciprocal in nature and the maximum wealth can be achieved by ‘avoiding the most serious harm.’

³ Merrills, *International Dispute Settlement*, (Cambridge, 2005), 211-214

⁴ Statement by the Director-General. See http://www.wto.org/english/thewto_e/whatis_e/wto_dg_stat_e.htm

⁵A 2004 report on DS performance reflects this view. Although putting forward some proposals for reform, it generally highlights the need not to damage the positive attributes of the existing procedures. See ‘The Future of the WTO: Report by the Consultative Board to the Director-General Supachai Panitchapakdi,’ available at http://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.htm

⁶ Moore, *WTO’s Unique System of Settling Disputes Nears 200 Cases in 2000*, PRESS/180,(2000) Geneva: WTO

⁷ See Hudec, *Enforcing International Trade Law* (1993), Salem, 353 and Petersmann *supra* note 1, 63.

entirety but with reference to who gets what and whose costs get considered through analysis of the differential effects of these rules across members.⁸

I will attempt to establish the opportunity set of those states with lower levels of trade, geographical area, economic wealth and/or political power; those who are not key players in international relations. These characteristics are typically found in developing countries within the WTO membership.⁹ There are currently 32 least developed countries (LDCs) in the WTO, and to date only one of them has brought a dispute.¹⁰ We also need to look beneath these rules to the property rights of dispute settlement and the opportunity sets available to each member, as these are crucial to establishing the distributional implications of institutional structure.¹¹ It is therefore necessary to examine whether members have the equal opportunity to make use of the system.¹²

This paper proceeds in three parts. The existing procedures for dispute settlement, along with provisions specifically available to developing countries will first be examined. The next section will use a cost-benefit analysis to consider the gains and losses that developing countries face in the event that they choose to litigate. By attempting to define the reasons why developing countries choose to litigate, we can see what courses of action are

⁸ Schmid, *Property, Power and Public Choice: An Inquiry into Law and Economics* (1987), 2nd ed., New York, 105

⁹ Of course, the term ‘developing country’ is ambiguous. In the WTO it is undefined and countries can choose to have ‘developing’ status. This term therefore includes a diverse range of DSS players; Brazil, for example, is still considered a developing country yet is a major user of the system. I have therefore tried to specify wherever these larger economies are not to be considered as having the same disadvantages. A useful sub-category to bear in mind is that of Small and Vulnerable Economies, as used in some the Doha round negotiations.

¹⁰ See http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm for a list of WTO Members recognised as least developed by the UN. For the Bangladesh dispute, see *India – Anti-Dumping Measure on Batteries from Bangladesh*, WT/DS306/1 (28/01/2004). Available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds306_e.htm

¹¹ The allocation of property rights was seen to affect the distribution of income by Schmid *supra* note 8. This includes the aggregation of property rights in the form of institutions, as they control and direct the relationship of one entity to another. The opportunity sets available to a State (being the lines of action open to any one entity) are shaped by institutions. The structure of institutions shows how opportunity sets of parties interact; whichever line of action is taken depends on the relative structure of these rights combined with the capacity to use these rights. This ‘interacting conceptualisation’ can be traced back to Hohfeld in 1913. See Mercuro and Medema, *supra* note 2, 124.

¹² With a system of property rights, everyone cannot have what they want at the same time, so therefore need to cooperate or follow their own interests at the expense of another’s opportunity set. If the system allows them to operate at the expense of another, the maximum benefits (achieved through cooperation) will not be realized. Therefore the rights of one can be seen as a lack of freedom of another. See Schmid, *supra* note 8, 108

rationally available to them under the current procedures and thus establish whether they can use the DSS's legal rules to pursue their aims.¹³ In the final section, some alternatives will be considered that attempt to increase efficiency while reducing the distributive impacts of the current system.

I. DISPUTE SETTLEMENT AT THE WTO

A. Mechanics of the Dispute Procedure

Disputes before 1995 were resolved through Articles XXII and XXIII of the General Agreement on Tariffs and Trade (GATT),¹⁴ with some procedural aspects being formalised in the Tokyo round of agreements.¹⁵ It was not until the WTO was established that the entirety of these rules was codified in a new Dispute Settlement Understanding (DSU), annexed to the main Agreement.¹⁶ The WTO Agreement also created the Dispute Settlement Body (DSB) as the authoritative voice of the DSU, adopting panels, issuing reports and ensuring decisions are implemented.¹⁷ With more emphasis on legal procedure, the DSU has been praised as a model institution of the international spectrum where 'right preserves over might.'¹⁸ Indeed, it was created with the intention of insulating less powerful members from the more

¹³ In particular, this will be assessed through Kaldor-hicks version of efficiency; that of wealth maximisation. In this scenario, the legal rules of the DSS will be efficiency enhancing if a successful dispute will have a net benefit for the winning party.

¹⁴ Palmeter and Mavroidis *Dispute Settlement in the World Trade Organization*, (2004) London , 7-8

¹⁵ See the Understanding of Notification, Consultation, Dispute Settlement and Surveillance, 28/11/79, available at http://www.wto.org/english/docs_e/legal_e/tokyo_notif_e.pdf

¹⁶ See the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (hereafter DSU), 15/04/94 available at http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm

¹⁷ DSU Annex II Art.2

¹⁸ Lacarte-Muro and Gappah 'DCs and the WTO Legal and Dispute Settlement System: A View from the Bench,' (2000) 3 *JIEL* 395 at 401

diplomatically orientated settlement prevalent in GATT dispute resolution.¹⁹ To date, the WTO has settled 400 disputes under the new DSU²⁰, compared to less than 300 requests for consultation made throughout 47 GATT years.²¹

If a member feels its rights to market-access established under any of the covered agreements²² have been violated by another member, it can initiate DSU proceedings. The preferred method of settling disputes is considered to be mutual agreement between the parties rather than recourse to arbitration.²³ Consequently, the first step is to request bilateral consultations under Article 4 DSU. Third parties can also participate in these consultations if they are seen to have ‘a substantial trade interest’²⁴ in the matter raised for dispute. If after 60 days the parties have not reached a mutually acceptable solution, a formal panel can be established at the member’s request under Article 6. The panel, usually consisting of three independent specialists, assists the DSB by examining the facts and relevant WTO provisions to give an opinion on the dispute.²⁵ Their findings are published in a report which either party can appeal through the Appellate Body (AB), who can uphold, modify or reverse the panel’s findings²⁶. If the panel or AB decides the measure is WTO-illegal, it must recommend that the measure is brought into conformity with the requisite provisions.²⁷ The implementation procedure includes strict timelines for compliance and is kept under surveillance by the DSB²⁸. If the recommendations are not implemented within a reasonable time, remedies for the complainant can be authorised by the DSB under Article 22 DSU. When combined, the

¹⁹ The ‘promise of a Rule of Law system is to level the playing field between the mighty and the weak.’ Hudec, ‘Transcending the ostensible: Some reflections on the nature of litigation between governments,’ (1987) 72 *Minnesota Law Review*, 211 at 214

²⁰ See http://www.wto.org/english/news_e/pres09_e/pr578_e.htm

²¹ Zimmermann, ‘WTO Dispute Settlement at Ten,’ (2005) 60 *Aussenwirtschaft*, 27 at 31; these figures need to be taken with reference to the increasing number of members and commitments that can be subject to the DSU.

²² Those being GATT, GATS and TRIPS Agreements concluded at the Uruguay round.

²³ DSU Art.3.7. ‘A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred’.

²⁴ DSU Art.4.11 and art.10

²⁵ DSU Art.8

²⁶ DSU Art.17

²⁷ DSU Art.19

²⁸ DSU Art.21

specified time limits can result in legal proceedings taking around three years before countermeasures can be implemented.²⁹ The existing remedies under Article 22 are compensation, which is rarely used, and suspension of concessions (retaliation) in an amount equivalent to the nullification or impairment caused by the non-compliance.³⁰

B. Special provisions for Developing Members

Developing countries, including least developed States (LDCs)³¹ and economies in transition now account for over 75% of WTO membership³². The WTO Agreement places strong emphasis on the needs of developing members through its Special and Differential Treatment (S&DT) provisions.³³ Within the DSU, this is recognised by giving special attention to developing members in the consultations phase³⁴ and recognising that any applicable S&DT must be taken into account by the panel in its report.³⁵ Least developed members are also granted special consideration under Article 24 which encourages them to make use of good offices, conciliation and mediation before and during panel level.³⁶ Finally, the WTO Secretariat provides legal assistance to developing members but only to the extent that the impartiality of the Secretariat is not compromised.³⁷

²⁹ Although this seems quite lengthy, when compared to domestic cases of similar complexity, the dispute process fares quite well. See Hoekman *et al.*, ‘Winners and losers in the panel stage of the WTO dispute settlement system,’ in Thomas and Trachtman, *Developing Countries in the WTO Legal System*, (New York, 2009), 5

³⁰ Suspension of concessions is undertaken by implementing a separate trade measure against the non-complying member that would otherwise be deemed as inconsistent with WTO agreements.

³¹ As noted above, there is no WTO definition of ‘developing’ or ‘developed’ country. Members can adopt either status. ‘Least developed countries’ are those that have been given this status by the United Nations. See http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm

³² See http://www.wto.org/english/theWTO_e/whatis_e/tif_e/fact2_e.htm

³³ See http://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm

³⁴ DSU Art.4.10

³⁵ DSU Art.12.11

³⁶ DSU Art.5. This is subject to both parties giving their consent.

³⁷ DSU Art.27

Developing members who bring a dispute against a developed member are also able to use the accelerated procedures of the Decision of 5th April 1966.³⁸ This allows for the director-General to provide his good offices after consultation stage. If no resolution is reached, a panel may be formed but should report on the matter within 60 days. This procedure has never been used under the WTO, and only once under the GATT.³⁹

Outside of the special provisions of the WTO Agreements, the best assistance available to developing members is that of the Advisory Centre for WTO Law (ACWL), established in Geneva in 2001⁴⁰. This supports developing members, customs territories and economies in transition by providing legal assistance below the average rates of an international trade firm. The rates for legal services vary with the particular Member's share of world trade and its GNP per capita. There are 38 members of the ACWL, 28 of whom are entitled to its legal services along with 46 other developing members of the WTO.⁴¹ The Advisory Centre is funded by WTO members but is independent from the Secretariat, so has a vital role in providing partial legal advice to poorer Members. The ACWL uses private professionals on a pro-bono basis, all of whom provide valuable and highly specialised legal advice.⁴²

C. *What are the Underlying Issues?*

When combined, these forms of assistance help to give comprehensive support to developing members. Despite the US and EU being the forerunning users of the system, in

³⁸ DSU Art.3.12

³⁹ See Panel Report, *ECC — Member States' Import Regimes for Bananas*, 03/06/1993, DS32/R, http://www.wto.org/english/tratop_E/dispu_e/disp_settlement_cbt_e/a1s1p1_e.htm#eec_bananas

⁴⁰ For an overview, see the Quick Guide at

<http://www.acwl.ch/e/documents/ACWL%20new%20quick%20guide%202009%20for%20website%20January%202010.pdf>

⁴¹ *Ibid.*, 6

⁴² See http://www.acwl.ch/e/tools/news_detailsphoto_e.aspx?id=3c188583-5884-4a1d-ae02-e65b14370cc9 for details of participating firms.

the 1995-2008 period having initiated 91 and 78 complaints respectively, other significant users include India, Brazil and Mexico who are all self-designated developing countries.⁴³

Renato Ruggiero, the former WTO Director-General has commented that ‘many more [disputes] are being brought by developing countries, underlining their growing faith in the system’.⁴⁴ However, members with lower levels of development are statistically one-third less likely to file complaints against their developed counterparts under the WTO than the previous GATT settlement mechanisms.⁴⁵

The basic key to understanding patterns of dispute settlement is the assumption that any given Member will rationally seek to increase their gains, only raising a dispute if the expected benefits exceed the expected costs.⁴⁶ To examine whether developing countries do have enough incentive to litigate we can examine the costs and benefits that arise as a consequence of litigating through the DSU. The most significant costs relate to the differing financial and legal capacity held by Member States, but non-quantifiable costs relating to the political-economic consequences of bringing a dispute should not be disregarded. The costs of litigation are seen by the WTO as essential to deter disputes of little value or relevance in order to keep panels for bigger, more important cases (in trade stakes). But this doesn’t differentiate between the importance of a measure to the individual country and to the WTO

⁴³ India having initiated 21 disputes, Brazil 24 and Mexico 20. For a full list of cases initiated in this period see Bown (2009) *Self-Enforcing Trade: Developing Countries and WTO Dispute Settlement* p.70

⁴⁴ Ruggiero, R. (1998) *The Future of the World Trading System*. WTO. Available at <http://www.wto.org/wto/speeches/bergen.htm>. See also Petersmann, E-U. (1997) *The GATT/WTO Dispute Settlement System: International Law, International Organisations and Dispute Settlement*, London pp.202-205.

⁴⁵ Busch and Reinhardt, ‘Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes,’ (2000) 24 *Fordham International Law Journal*, 19

⁴⁶ Dunhoff and Trachtman formalizes this by stating, ‘states should seek to apply the rule of prescriptive jurisdiction that maximizes the present value of net gains: $NG = TG - (TL + TC)$, where:

- NG= net gains
- TG= sum of efficiency gains (allocation to state thinks its most valuable)
- TL= loss from allocation of prescription of this to other states
- TC= transaction costs.’

Dunhoff and Trachtman, ‘Economic Analysis of International Law: Microanalysis of Macroinstitutions,’ (1999) 24 *YJIL*, 24 and Mercuro and Medema, *supra* note 2, 57-58

as a whole.⁴⁷ The potential benefits of litigation can be described as the achievable gains in restored market access pursuant to the overall WTO objectives of increased liberalisation, along with the likelihood this will happen.⁴⁸ These will all be considered in the following sections.

II. COSTS OF LITIGATION FOR DEVELOPING COUNTRIES

A. Procedural and Administrative Costs

Procedural rules will always involve administrative costs and the capacity to absorb these will change depending on the financial situation of the member state that undertakes them.⁴⁹ With the move to a more rule-oriented system, States must navigate ever-increasing amounts of litigation and procedure; cases can run up to 25,000 pages⁵⁰ and the average time from the establishment of a panel to the issue of a report is 363 days.⁵¹ The increasing complexity of litigation has resulted in increased transaction costs,⁵² which are intensified by lengthier procedures. Countries with more legal resources have more procedural knowledge, so therefore have an ‘edge’ over those who are inexperienced in matters of trade law and procedure. Expertise in compiling legal documents, knowing WTO obligations and

⁴⁷ Those who can follow their opportunity are the ones who have the ability to implement their own interests in a situation of conflict. ‘If everyone cannot have what they want simultaneously, the choice is not power or no power, but who has the power... the ability to implement ones interests when they conflict with others.’ Schmid, *supra* note 8, 108

⁴⁸ Bown, ‘Participation in WTO Dispute Settlement: Complainants, Interested Parties and Free Riders,’ (2005) 19:2 *World Bank Economic Review* 287 at 297-300

⁴⁹ Cooter and Ulen, *Law and Economics* 2nd Edn., (Harlow, 1995), 336

⁵⁰ Busch *et al.*, ‘Does legal capacity matter? Explaining dispute initiation and antidumping actions in the WTO,’ (2008) ICTSD Working Paper No. 41456, available at <http://ictsd.org/i/publications/41456>, 8

⁵¹ Stoler, ‘The WTO dispute settlement process: did the negotiators get what they wanted?’ (2004) 3:1 *WTR* 99 at 109

⁵² Transaction costs are basically the costs of negotiating, monitoring and enforcing contractual agreements; see Mercuro and Medema, *supra* note 2, 68. The Coase Theorem states that if transaction costs are zero and rights are fully specified, parties to a dispute will bargain to the same efficient outcome irrespective of where the right was initially assigned. The problems created are that transaction costs are almost always positive, therefore the design of property rights (institutions) and the opportunities these create must be considered. Dunhoff and Trachtman, *supra* note 46, 24.

navigating complex procedural requirements are now vital prerequisites to bringing a successful dispute.⁵³

There are various areas where the new premium on administrative costs can be examined, including loss in opportunity, costs of expertise and supplementing existing legal capacity through private firms. These costs are exacerbated by the time needed to reach a resolution, especially when third parties are involved.

First, the opportunity costs that result from channelling limited government resources into the DSS are much higher for developing members due to the size of their government budgets and economies. With other needs having more significance, investing in WTO legal expertise is not a high priority⁵⁴. And yet WTO expertise is crucial to reducing absolute costs for an individual case and improving litigation frequency; therefore achieving the market access benefits a member is entitled to receive. A member state with higher levels of legal capacity typically has a dedicated WTO team, and more trained staff in other sectors to fill any gaps when a complex dispute requires more man-power than is already provided.⁵⁵

Guzman and Simmons find that the larger opportunity costs incurred for developing members impacts on the type of disputes they can rationally pursue.⁵⁶ Bearing the higher loss in opportunity needs higher payoffs, so cases are only brought where there is the greatest potential return in market access. This results in cases with systemic value or modest gains not being pursued, and poorer countries will not be able to enhance their reputation in trade conflicts.⁵⁷

Disputes will never be brought if countries lack cost-effective mechanisms to identify WTO-illegal measures and prioritise potential claims in the first place. Otherwise known as

⁵³ A members legal capacity affects the decision to litigate both by increasing the costs of litigation and impacting on the amount of information capable of being processed in the cost:benefit ratio.

⁵⁴ Michalopoulos, ‘Developing countries in the WTO,’ (1999) 22 *World Economy*, 117 at 123-127

⁵⁵ *Ibid.*, 123

⁵⁶ Guzman and Simmons, ‘Power plays and capacity constraints: The selection of defendants in WTO disputes,’ (2005) 34 *JLS* 557 at 586

⁵⁷ *Ibid.*, 567

‘naming, blaming and claiming’⁵⁸, this stage is inherently linked to the decision to litigate, as members must already be convinced a case is worth pursuing before they do so. The self-enforcing nature of the DSS means that members are obliged to monitor any occurrences of non-compliance themselves. This creates additional burdens as developing countries typically do not have adequate monitoring abilities.⁵⁹ This stage is crucial for a Member to estimate the likelihood of success, the amount of real benefit in market access it can achieve, and the relative time it will take to gain a favourable result. Therefore a Member needs some existing governmental capacity to be able to identify a WTO-illegal measure and to effectively coordinate its resources with both the ACWL and private law firms.⁶⁰

The prospective benefits also cannot be conclusively assessed beforehand as the actions of the respondent determine when, or if, a favourable outcome is reached.⁶¹ If the complainant has a cast-iron case yet the respondent continues past appellate level and does not comply, the variable litigation costs of procedure may have exceeded the market access gains sought. Therefore, through economic analysis of the respective trade stakes in question, experts can assess the probability of various courses of action and the member will have a more accurate indication of costs and timescales. Any uncertainty as to the costs involved can discourage Members from litigation.

The higher opportunity costs involved for developing countries drive down the importance of WTO legal capacity.⁶² A Member’s legal capacity consists of the institutional

⁵⁸ See generally Felsteiner *et al.*, (1980) ‘The Emergence and Transformation of Disputes: Naming, Blaming and Claiming,’ 15 LSR 631

⁵⁹ ‘Poor countries often lack the expertise and resources to systematically monitor foreign trade policy developments and proactively identify and pursue the best cases. Yet this critical stage occurs long before the hiring of legal representation for any litigation which may ensue.’ Busch *et al.*, *supra* note 50, 4.

⁶⁰ See Horn *et al.*, ‘Is the use of the WTO dispute settlement system biased?’ (1999) *CEPR Discussion Paper* 2340, 14 and Busch *et al.*, *supra* note 50

⁶¹ This exists as a primary uncertainty as future events crucial to economic decisions in the present are unknown. See Cooter and Ulen, *supra* note 49, 42.

⁶² Shaffer, ‘The challenges of WTO law: Strategies for developing country adaptation,’ (2006) 5:2 *WTR*, 117 at 179

resources it has available to identify, analyse, pursue and litigate a case.⁶³ Counties with fewer resources face much higher absolute costs per dispute; the leading players in dispute settlement benefit from economies of scale, with previous knowledge and specialisation in WTO law driving down initial start-up costs. For example, the US and EC have been litigants or have participated as a third party in 99% and 86% respectively of cases that have resulted in an adopted decision.⁶⁴ Key players can spread the fixed costs of the system over more cases than those who participate rarely, making it less cost-effective for developing countries to develop internal expertise when they hardly ever use the DSS.⁶⁵ Consequently, the internal governments of these members are not equipped to handle complex trade disputes; around two-thirds of them do not have permanent offices in Geneva.⁶⁶ This results in legal matters being inappropriately delegated to essentially diplomatic staff with little expertise in WTO law or trade economics.⁶⁷ Developing country delegates who are based in Geneva note their inability to properly follow through with potential disputes due to the lack of support from their home capital.⁶⁸ Bureaucratic organisation at home and in Geneva is vital to encourage a co-ordinated effort towards initiating and proceeding with disputes. Related to this is language barriers combined with complex litigation involved in disputes. In 1992, a Brazilian anti-dumping duty placed on jute bags resulted in the ceasing of all Bangladeshi exports.

⁶³ Guzman and Simmons, *supra* note 56, 566.

⁶⁴ Shaffer, *supra* note 62, 186

⁶⁵ Information of course can be seen as a good, and more is gained only as long as net benefit is greater than the cost. Therefore it may be rational to lack information, and if the price of the information rises, so does the level of ignorance. See Mercuro and Medema, *supra* note 2, 58.

⁶⁶ See http://www.wto.org/english/thewto_e/whatis_e/tif_e/dev1_e.htm#maison

⁶⁷ Shaffer, *supra* note 62, 180

⁶⁸ A small Asian Member representative reported a ‘lack of knowledge and ‘lack of interest’ in WTO matters from the national government in the capital. In contrast, a representative of a frequent user noted that ‘if anything, we have to defect interest from other government departments.’ Busch, *et al.* ‘Does Legal Capacity Matter? A survey of WTO Members,’ (2009) 8:4 *WTR*, 559 at 573-574

Brazil submitted all the requisite legal documents in Portuguese, which took months for the Bangladeshi authorities to translate.⁶⁹

Therefore LDCs, with little of their own internal legal capacity, look to outside sources of expertise to litigate on their behalf; they work with private international law firms. There is some uncertainty as to the real costs involved in hiring private legal counsel as firms do not specifically advertise their charges. In the Japan-Photographic Film case, the legal costs were rumoured to exceed \$10 million for each party.⁷⁰ Nordstrom and Shaffer provide some guidance as to the estimated amounts for members by multiplying the usual commercial firm rates by the time budget indicated by ACWL guidance. Excluding other expenses such as travel and fact-finding experts, they estimate an average hourly rate of \$500 is charged. As the ACWL typically spend more time on cases than they report, Nordstrom and Shaffer upscale the time budget reported by a factor of 2.5 to account for private firms billing accurately proportionate hours per case. The resulting cost for a case of normal complexity is estimated at \$100,000, with cases reaching the appellate body costing over \$500,000.⁷¹

Other costs of negotiation and litigation not included in this estimate can be considerable too. The basis of a dispute is always related to the ‘nullification or impairment’ of some sort of trade, and a necessary part of proving this is to provide supporting economic evidence. The cost of hiring scientists or economists to provide expertise of the circumstantial facts has been estimated to increase the cost by up to £200,000.⁷² With government budgets already constrained, financing experts and private counsel at these rates makes such a course of action irrational.

⁶⁹ Taslim, ‘Dispute Settlement in the WTO and the LDCs: The Case of India’s Antidumping Duties on lead Acid Battery Imports from Bangladesh,’ (2006) ICTSD working paper no. 11333, available at <http://ictsd.org/i/publications/11333/>, 2.

⁷⁰ Nordstrom and Shaffer, ‘Access to justice in the WTO: The case for a Small Claims Procedure,’ (2008) 7:4 *WTR* 587 at 600

⁷¹ *Ibid.*, Table 3. \$100,000 accounts for situations where the parties have settled after the initial required consultation or the complainant has withdrawn. If the case reaches panel level another \$320,000 must be added to this, with any appeal raising the costs by another \$135,000.

⁷² Bown and Hoekman, ‘WTO dispute settlement and the missing developing country cases: Engaging the private sector,’ (2005) 8:4 *JEIL* 861 at 870.

The addition of third parties to a dispute has also been found to increase the costs of litigation. This is especially relevant to poorer countries, as they tend to file against large-market defendants due to the higher gains they can expect if successful,⁷³ and these cases attract more third parties⁷⁴. By attracting those members who operate larger trading markets, smaller trading nations seek to improve the odds that a larger respondent will negotiate a resolution; they are trying to ‘even out the playing field’ if you will. However, Busch and Reinhardt find that, by increasing the diversity of interests in the case, the litigation involved and the time taken for the case to be resolved are increased.⁷⁵ Third parties undermine early settlement by increasing the transparency of negotiations, inspiring States to ‘dig in their heels’, and by influencing the content of their submissions, especially where they have a systemic interest in the dispute with broader policy goals than the initial party.⁷⁶

Alternatively, the benefits of third parties are that they can increase the likelihood of a dispute being won. In another study it was found that the more third parties a complainant amasses, the more likely its complaint will prevail at panel/AB level.⁷⁷ But third parties crucially lower the chances of resolution at consultation. This is where the most pay-offs in terms of market access are likely to occur (see below). Of course, being able to have the option to bring a dispute to the DSB at any stage is still a better solution than not litigating, as this has no benefits at all in terms of market access.

B. Political Economic Costs

⁷³ Higher gains are seen to be more likely the more potentially coercive a Member is considered due to its size, trade levels or power.

⁷⁴ Disputes attract on average 3.9 third parties, but when DCs litigate they have on average 6.2 third parties. Busch and Reinhardt, ‘DC complaints and third-party participation,’ in Thomas and Trachtman, *DCs in the WTO Legal System*, (New York, 2009)

⁷⁵ *Ibid.* 9-11. See also fig.1: proportion of complaints settled early against the number of third parties.

⁷⁶ ‘Most telling, in this regard, is that, of the 11 disputes that attracted more than five third parties, only one ended in early settlement. With this tipping point in mind, it is interesting to note that Ecuador’s consultations with the EC drew 18.’ *Ibid.*, 18

⁷⁷ Busch and Reinhardt, ‘Three’s a Crowd: Third Parties and WTO Dispute Settlement,’ *World Politics* 58 (3) 2006: 446-477.

Transaction costs, in the form of bargaining and legal costs, are relatively easy to estimate as they can be calculated in ‘monetized’ forms.⁷⁸ On the other hand, not all the costs of inter-state transactions can be measured. The costs relating to trading relationships and coercive tactics are very difficult to reduce to quantitative values, add to other considerations and weigh in process.⁷⁹ But some of the most important costs may in fact be non-quantifiable.⁸⁰ It is important to consider all the possible determinants of a developing member’s decision to litigate. Although the DSS is hailed as excluding power disparities from trade disputes, it still exists as a forum for states to further their individual interests, and as such will always include strategic bargaining.⁸¹ We can therefore expand the concept of ‘cost’ to include the potential political consequences of proceeding with litigation. Less ‘influential’ members may be deterred from bringing a dispute against a more powerful country for fear of extra-legal costs, such as a loss in a vital co-operative relationship outside the WTO. In particular, Bown finds that adversely affected exporters are less likely to participate if they are involved in a preferential trade agreement with the respondent or are particularly reliant on the respondent for bilateral assistance.⁸² LDCs are most likely to rely on foreign aid and if the donor country is responsible for imposing an illegal trade measure, this may not be challenged for fear that bilateral aid may be removed altogether.⁸³ It may be thus more cost-effective for an LDC to live with the illegal trade measure if the potential economic loss of foreign assistance is taken into account.

⁷⁸ Dunhoff and Trachtman, *supra* note 46, 48

⁷⁹ This can be seen through the concept of incommensurability at a domestic level; that actions cannot be justified by rational decisions when measures of social and personal values are included, as they do not promote commensurable relationships. See Baron and Dunhoff, ‘Against market rationality: Moral critiques of economic analysis in legal theory,’ (1996) 17 *Cardozo Law Review* 451-462

⁸⁰ Jackson, ‘Perspectives on the Jurisprudence of International Trade: Costs and Benefits of Legal Procedures in the United States,’ (1984) 82 *Michigan Law Review*, 1570 at 1583

⁸¹ This is highlighted by the preference for a resolution consultation phase; see note 24.

⁸² Bown, *supra* note 48

⁸³ For a list of aid donors to developing countries, along with the amounts of aid donated and received, see OECD statistics at <http://www.oecd.org/dataoecd/59/5/42139479.pdf>

It is not only considerations outside the WTO that can alter the significance of fear of political reprisal. Reinhardt found that the decision to go ahead with a dispute can increase the probability of the respondent filing a future case against the original complainant by up to 55 times.⁸⁴ The possibility of a counter-complaint being filed is recognised in the DSU.⁸⁵

Guzman and Simmons expressly place the costs of legal capacity as an alternative to extra-political factors to determine which offers the main constraint to developing country disputes. They conduct an empirical analysis based on the military expenditures of each member's government and the defendants GDP as proxies for levels of power within the WTO.⁸⁶ The results show there is little significant evidence to support the idea that politically weaker members are reluctant to file against more powerful ones for fear of political reprisals.

The majority of empirical evidence supports the view that politico-economic factors now have less influence on a member's decision to litigate.⁸⁷ With a qualitative survey of WTO members to back up their empirical research, Busch *et al.*⁸⁸ still note the predominance of legal and institutional capacity in determining developing members' decisions to litigate. Moreover, we can illustrate this point through the *Bangladesh- Lead Acid Batteries* case.⁸⁹ Bangladesh is the only WTO member categorized as an LDC to have initiated a dispute. India,

⁸⁴ Reinhardt (2000) *Aggressive Multilateralism: The Determinants of GATT/WTO Dispute Initiation, 1948-1998*, available at <http://userwww.service.emory.edu/~erein/research/initiation.pdf>

⁸⁵ DSU Art.3.10 states that ‘..the use of the dispute settlement procedures should not be intended or considered as contentious acts .. it is also understood that complaints and counter-complaints in regard to distinct matters should not be linked.’

⁸⁶ See Guzman and Simmons, *supra* note 56, 356

⁸⁷ See, for example, Horn *et al.*, *supra* note 60. Busch *et al.*, *supra* note 50. Note also Besson and Mehdi, ‘Is WTO Dispute Settlement Biased Against Developing Countries? An Empirical Analysis,’ (2004) available at http://www.ecomod.net/conferences/ecomod2004/ecomod2004_papers/199.pdf. They conclude a lack of legal capacity is the main constraint but also note the potential influence of bilateral aid donors.

⁸⁸ Busch *et al.*, *supra* note 68. They found that 88% of Members who undertook their survey answered that larger Members had the advantage due to their greater legal capacity. Only 48% saw market power related issues as giving larger states the advantage in disputes.

⁸⁹ This was brought to the DSB in early 2004 and concerned the legality of an anti-dumping measure implemented by India on lead acid battery imports from Bangladesh. After the DS procedure was initiated and the obligatory consultation meeting completed, India offered to withdraw the offending measure. Bangladesh continued with the dispute as a safeguard but India withdrew the anti-dumping duties before reaching panel stage. *India - Anti-Dumping Measures On Batteries From Bangladesh*, WT/DS306, available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds306_e.htm

being Bangladesh's biggest source of imports, is their largest trading partner.⁹⁰ Despite the possibility of adverse political costs, Bangladesh chose to litigate as soon as it was established that they had sufficient financial incentive to do so.⁹¹ The political concerns were mitigated by viewing the case as a dispute between two rival companies, not as between countries, and so with the view of maintaining their diplomatic relationship throughout negotiations.⁹²

Perhaps the conventional wisdom is right in this respect: adverse effects of differing levels of power have been excluded from the DSS. However, this still leaves us with the new premium on a member's capability to absorb legal costs.

In order for developing members to benefit from the system, especially when the fixed transaction costs they face are so high, they must seek to maximise the prospective gains through improved terms of market access or trade liberalisation from the respondent member. In order to have a complete picture of the systematic constraints faced by developing members, we must therefore also examine the potential gains in terms of restored market access combined with the probability that this will happen.

III. ACHIEVABLE GAINS OF LITIGATION

A. *Amount of Restored Market Access*

Less capacity results in higher opportunity costs and therefore a disproportionate burden of transaction costs. Bearing these needs higher expected payoffs in order for a

⁹⁰ Taslim, 'Dispute Settlement in the WTO and the LDCs: The Case of India's Antidumping Duties on lead Acid Battery Imports from Bangladesh,' (2006) ICTSD working paper no. 11333, available at <http://ictsd.org/i/publications/11333/>, 3

⁹¹ *Ibid.*, 13. In order to resume its exports to India, a private company agreed to pay the legal costs involved if the government took the case to the DSB.

⁹² *Ibid.*, 14-15

dispute to be initiated. Bown finds that members who have a substantial economic stake in the case are more likely to participate in dispute settlement procedure.⁹³ In addition, Guzman and Simmons conjecture that poorer complainants are likely to target bigger economies since the expected payoff from larger markets is greater when the costs of litigation are included.⁹⁴ These evaluations both complement the most well-known empirical study on potential systemic bias. Horn, Mavroidis and Nordstrom assume that ‘litigation involves some fixed costs, and therefore the trade values involved must exceed some minimum level for litigation to be worthwhile.’⁹⁵ When fixed transaction costs of the system are so high, and there is uncertainty as to how high variable costs can reach, the smaller nation is effectively barred from litigation as the procedural costs will surpass any expected trade benefits. Those that are most disadvantaged by the DSS are typically less significant trading nations; small island economies or those nations with undiversified export portfolios. The problem here is that the DSS doesn’t take into account the variation in levels of tradable goods and services that exist between members. For example, the law doesn’t differentiate between a claim with potential market access benefits of one million dollars and one billion dollars yet the procedure for both these claims is the exact same.⁹⁶ While a million dollars in lost export revenue may be relatively insignificant for key players like the US and EU, for small LDCs like Burundi or Gambia, this amount can account for a crucial 1.45% of their annual exports⁹⁷.

We can return to the Bangladesh case above to demonstrate. Although only constituting a small amount of Bangladesh’s total exports, lead-acid batteries were, at the time of the dispute, a very important product. Bangladesh has one of the most undiversified export ranges in the world with 76% of their 2004 exports being limited to ready-made garments. In order to prevent over-reliance on the one product and the detrimental

⁹³ Bown, *supra* note 48.

⁹⁴ Guzman and Simmons, *supra* note 56.

⁹⁵ Horn *et al.*, *supra* note 60, 6

⁹⁶ Nordstrom and Shaffer, *supra* note 69.

⁹⁷ *Ibid.*, Table 1 shows the relative importance of \$1m worth of exports to WTO members.

consequences of this should world prices fall, it is widely recognised that a diverse portfolio in exports, especially in manufactured goods, is advantageous for developing nations. Therefore this small but growing battery export to India was crucial to its overall trade aims of diversifying products and gaining a foothold in other sectors of cross-border markets. The government took the decision to litigate as a private company agreed to fund the process and despite the small gains in market access, it was significant to the government's long term plans to diversify exports. Small is a relative concept; but the prospective future benefits of pursuing a case are still limited by the smaller trade amounts at stake, and without the input from the private sector, it is doubtful whether Bangladesh would have pursued the case. Members operating small trade amounts are imposed a disproportionate burden of high litigation costs. They therefore have little incentive to litigate and small claims are effectively excluded as they may still not be seen as economically 'fruitful' under Article 3.7 DSU.

Past the decision to litigate, there are more systemic limits to the amount of potential gains. One of these is that the most returns cannot be found by following the proper procedure to panel/AB stage. Panel and appellate body procedure may result in justifiable arbitration⁹⁸, but this is at considerable expense in the form of increased institutional and legal transaction costs.⁹⁹

Busch and Reinhardt find that 'the effectiveness of the regime disproportionately manifests itself at consultation stage,'¹⁰⁰ as this is where the most pay-offs occur. In the disputes included in their study, 59.9 percent of the concessions made by respondents were given at pre-ruling settlements, either through ongoing negotiations or at the required

⁹⁸ At panel stage, the data suggests that the success rate of claims brought is similar throughout the board, regardless of each member's level of development. This may be because those who reach panel stage have some standards of administrative expertise - those without don't participate as complainants in the first place. See Hoekman *et al.*, *supra* note 29, 14.

⁹⁹ If the parties agree about the plaintiff's probability of prevailing at trial, there always exists a range of out-of-court settlements that can make both of them better off; this range is determined by the sum of their litigation costs. Polinsky, A. M., *An Introduction to Law and Economics*, 3rd edn., (New York, 2003), 137.

¹⁰⁰ Busch and Reinhardt, 'Bargaining in the shadow of the law: Early settlement in GATT/WTO disputes,' (2000) 24 Fordham International Law Journal, 158 at 159

consultation stage. This, they conclude, is due to the uncertainty that exists as to the respondent's preferences. There may be a small possibility that the respondent will be more adversely affected by a ruling, especially through the complainants' possible retaliatory capacity, than choosing to settle early.¹⁰¹ This is even more significant when 63 percent of cases end before a panel report is issued: the most benefits in terms of market access restored are given before panel stage is even reached.¹⁰² Although certain fixed costs are undertaken as soon as a request for consultation is initiated, the variable transaction costs can be kept to a minimum by settling a dispute sooner rather than later, without the need for complex panel and appellate body proceedings.¹⁰³ Developed members are more likely to settle early. Nearly all of the legal reforms in 1995 were focused on helping developing countries reach panel level and continue through the litigation process to a ruling.¹⁰⁴ Therefore they may get greater concessions out of the WTO *because* they settle early.¹⁰⁵

B. Probability of an Effective Remedy

Methods of remedying non-compliance are relevant to the extent that they influence the decision to initiate a dispute. The more certain a state is that the prospective result can be achieved the easier the decision is to expend various costs. Essential to a dispute being economically successful is the idea that any outcome will be actualised; that an agreement at

¹⁰¹ *Ibid.*, 166-167.

¹⁰² In addition, settling out of court avoids the risk of an uncertain outcome at panel level and even beyond this if there is doubt the losing member will comply with the DSBs adopted ruling.

¹⁰³ So because the results of settlement or trial are the same by assumption, the error costs are the same. The admin costs of settlement are however much lower than at trial. So long as the resulting settlement is the same as it would be at trial, this reduces the social costs of resolving disputes. Given this fact the law should encourage settlements that replicate the expected judgement. By doing so, the law can achieve the same results as trials while lowering social costs. Cooter and Ulen, *supra* note 49, 337.

¹⁰⁴ Busch and Reinhardt, 'Developing countries and GATT/WTO dispute settlement,' (2003) 37:4 *Journal of World Trade* 719 at 733

¹⁰⁵ *Ibid.*, 720.

consultation or a ruling by a panel will be complied with, but most importantly that the expected outcome is achieved, no matter what stage a dispute reaches.

Non-compliance rules have been described as ‘a punch that will not hit anyone.’¹⁰⁶ Trade retaliation in particular is seen by most participants as inefficient.¹⁰⁷ Small countries are unlikely to receive any benefits from implementing an authorised retaliatory measure as they cannot exert realistic pressure on the defaulting country to comply, especially if it is a large player.¹⁰⁸

Suspension of concessions is undertaken by implementing a separate trade measure against the non-complying member that would otherwise be deemed as inconsistent with WTO law. Retaliatory measures have intentional negative externalities¹⁰⁹ in that a disproportionate burden is placed on unrelated sectors of the non-compliant members’ economy. In order to pressure others into compliance, a member must inefficiently ‘shoot itself in the foot’ by restricting imports, negatively affecting its own importers and consumers.¹¹⁰ This disproportionately affects countries with weak economies. Less developed countries are typically smaller trading nations that are unable to affect world prices; this necessarily results in trade retaliation damaging their own economy through the standard cost of protectionist barriers.¹¹¹

¹⁰⁶ Hudec, ‘Transcending the ostensible: Some reflections on the nature of litigation between governments,’ (1987) 72 *Minnesota Law Review*, 211 at 219

¹⁰⁷ See generally Plasai, ‘Compliance and remedies against non-compliance under the WTO System,’ (2007) ICTSD Issue Paper 3, available at <http://ictsd.org/i/publications/11297/>

¹⁰⁸ Of course, larger DCs such as Brazil, India, China and South Africa are able to exert pressure through suspension of concessions, and the problem of ineffective retaliation due to negligible trade influence can be applied to small developed members. The only authorised retaliation under the GATT 1947, to the Netherlands against non-compliance by the US, was never implemented. See GATT, 1st supp. BISD 62 (1953). See also Bergstrom, ‘Imbalance of power: Procedural inequities within the WTO DSS,’ (2009) 22 *Pacific McGeorge Law Journal* 93 at 102

¹⁰⁹ Typically, parties to an exchange take all the benefits and bear all the costs. But sometimes the costs may spill over onto other parties. These external costs cause the individuals’ self-interest to diverge from social efficiency. See Cooter and Ulen, *supra* note 49, 38 and 118.

¹¹⁰ Bronckers and van Broek, ‘Financial Compensation in the WTO: Improving the remedies of WTO dispute settlement,’ (2005) 8 *JIEL*, 101 at 101

¹¹¹ See Mavroidis, ‘Remedies in the WTO legal system: Between a rock and a hard place,’ (2000) 11:4 *EJIL*, 763-764

In some situations, performance of obligations is less efficient than breaching obligations.¹¹² More gains may be found from establishing WTO-illegal barriers than upholding their agreed obligations, and from non-compliance with a panel/AB ruling. Larger states with advanced economies have the advantage in that they can often ‘afford’ the effects of retaliatory measures and thus continue with the trade violation indefinitely, resulting in the sub-optimal erection of more barriers to trade than is necessary¹¹³. For LDCs confronting a much larger trading member, the procedure of effectively raising trade barriers combined with the possibility that this action will have no positive effect may be enough to deter them from adopting retaliatory measures altogether.

These problems can be illustrated by the authorisation for suspension of concessions in the long-running *Bananas* case¹¹⁴. After an arbitration ruled both the US and Ecuador were authorised to increase tariffs on imports of European goods, only the US did so. Ecuador did not import goods from the EU at a level that could affect trade. They were authorised to cross-retaliate under TRIPS, but the level of trade affected was unlikely to amount to any negligible pressure on the EU to change their Banana import regime.¹¹⁵

C. Summary of Net Costs/Benefits

¹¹² For more info on the theory of efficient breach see Posner, *Economic analysis of law* 4th edn (Boston, 1992), 95-96 and 135-36

¹¹³ Dunhoff and Trachtman, *supra* note 46, 31. For a breach to be efficient for all parties, effective enforcement mechanisms that can compel payment of damages are needed. As discussed above, the DSS has no effective form of providing payment with trade compensation hardly ever used and suspension of concession being sub-optimal, so any breach cannot be efficient as the party attempting to recuperate losses has no way to do so; but see below at monetary compensation.

¹¹⁴ See Anderson, ‘Peculiarities of retaliation in WTO dispute settlement,’ (2002) 1:2 *WTR* 123 at 133 and *EC-Regime for the importation, sale and distribution of bananas- Recourse to Arbitration by the EC under Article 22.6 DSU, WT/DS27/46*

¹¹⁵ In their decision, the arbitrators noted that ‘given the difficulties... it could be that Ecuador may find itself in a situation where it is not realistic or possible for it to implement the suspension authorised by the DSB for the full amount of the level of nullification and impairment,’ *EC- Regime for the importation, sale and distribution of bananas- recourse to arbitration by the EC under Article 22.6 DSU, Decision by the Arbitrators, WT/DS27/ARB/ECU 24/032000*, para 117

Why do small developing countries fail to litigate? The answer lies in the self-representing and self-enforcing nature of the DSS, combined with the greater legalistic procedure that must be navigated. Dispute Settlement has been altered from a system that favours those members with more political and trading power to those who have more legal and economic resources.

Even if Members with less legal capacity feel they have an unbeatable case that can be legally ‘won’ at panel level, they will choose not to litigate if this would result in an economically unsuccessful outcome. This results in disputes simply not being taken to the DSB by developing members; they typically have less revenue to invest in the capacity to pursue self-enforcement and smaller trade amounts. They therefore receive fewer benefits, or none at all if transaction costs exceed them. The move to a more legalistic system, although intended to help less developed members, was less burdensome for those who already possessed the capacity to bring a dispute and who could more easily adapt to the increase in procedural complexity.

There appears to no bias in the actual adjudication procedure; right does preserve over might as all members have the right to bring a claim and the adopted rulings do not favour any particular group of countries. However, some members are prevented from exercising this right: where the procedures are the same but the stakes are not, the DSS is not neutral to size. The rule of law can only help developing countries if pursuing their right is beneficial. The result of DS procedures is to create a threshold effect that discriminates against countries with lower levels of capacity, lower relative trade stakes, and less ability to enforce non-compliance. The problems created by lack of compliance may be irrelevant for small LDCs, but this is a consequence of none having brought a case this far through the DSS. The larger barrier to access is the increased costs of litigation, not small market size, making the threshold more discriminatory towards developing members.

The DSS therefore does not promote sufficient incentive for all members to engage in efficient behaviour (that is, to maximise the net benefits – costs)¹¹⁶ when the differences between members are taken into account. This discriminatory structure necessarily results in an inefficient procedure, as there is not an equally effective method for all members to police each other's trade commitments. This is detrimental both to the WTO's aims of trade liberalisation and in consequence to the overall performance of the economy. A sub-optimal dispute procedure results in sub-optimal methods of trade regulation.

IV. PROPOSALS FOR REFORM

As John Jackson notes, 'those who criticize the existing system must bear the responsibility of weighing that system against viable alternative[s].'¹¹⁷ Assessing the systemic disparities is not enough if no suitable improvement can practicably be implemented. It is therefore necessary to establish whether any forms of systemic reform can impact on the DSU to the extent that its procedures will promote more efficient performance. In addition, this should mean a broader spectrum of members can access the procedure without limiting or reducing the current advantages of the DSS. It must be noted that within the WTO, any systemic reforms would be very hard to agree upon and implement. Therefore I have chosen one area where current procedures can be enhanced, namely the pre-litigation phase by an increased mandate for the ACWL, which would help developing country access in the short-term. I then consider two proposals for reform applicable to different stages of the procedure, a small claims procedure and monetary compensation, which I believe will result in better institutional performance.

¹¹⁶ Dunhoff and Trachtman, *supra* note 46, 23-34

¹¹⁷ Jackson, *supra* note 79, 1583

A. ACWL +

The establishment of the ACWL has gone a long way to lower systemic costs. If a party is eligible and uses ACWL facilities, the estimated costs are reduced to 10% of a private firms'.¹¹⁸ This substantially reduces the transaction costs for Members who could otherwise not afford to bring a dispute and is therefore currently the best mechanism available to 'level the playing field' between those member who possess capital to invest in legal capacity and those with less revenue at their disposal. One option then would be to expand the functions of the ACWL. This can be done in three areas; by advising in the pre-litigation phase, by staffing trade experts and by expanding its operations to other centres than Geneva.

However, the help offered by the ACWL is not enough to adequately address DC problems. The discounted legal services are not free; considerable levels of revenue are still needed to litigate. The ACWL only operates from Geneva. As not all developing countries maintain a presence in Geneva, it may be difficult to establish co-ordinated access to even these discounted services. The ACWL also faces limitations which stem from its inability to advise members with regards to dispute initiation; it can only advise members once they request it, and one of the major stumbling blocks of the procedure surrounds the ability of countries with less capacity to recognise and initiate a dispute. In addition, knowledge of the law by ACWL legal experts is not the only criteria sufficient to bring a successful case. Success is also judged by the economic merits of a case and detailed knowledge of trade policy and implementation, such as the estimated levels of "injury" associated with a trade violation.¹¹⁹ Expert advice is crucial to providing a full argument at Panel stage. Complete submissions thus require a combination of legal and economic expertise which is currently

¹¹⁸ For an extensive overview of ACWL contributions to dispute settlement, see Bown, *Self-Enforcing Trade: DCs and WTO Dispute Settlement*, (Harrisonburg, 2009), Chapter 6.

¹¹⁹ Ibid., pp. 876

not all supplied by the ACWL; the provision of economic expertise is still only available at market rates. The non-governmental organisation iLEAP (International Lawyers and Economists against Poverty)¹²⁰ has tried to address this by providing assistance from both legal and economic professionals who are mostly developing country nationals. This helps to build professional capacity to these countries as well as provide trade-related advice. If the ACWL could provide members with information on both the legal and economic viability of a case before it is brought to the DSB, and economic help throughout the process, the additional work that must be undertaken internally by a member can be alleviated.

Establishing a satellite ACWL in a location like Washington DC, a global hub for international lawyers, may also increase the possibility of legal and trade experts contributing to ACWL services on a pro-bono basis due to excess capacity within the city¹²¹. The prestigious nature of WTO cases means that many firms would not be averse to lending out their staff, especially in order to gain additional knowledge of complex practicalities of trade disputes and to increase their firms' reputation in the international arena, making it more attractive to prospective clients. Even if experienced trade lawyers cannot be attracted to operate on a pro-bono basis, the ACWL could seek to expand its current "roster of external counsel" who provide assistance at subsidised rates, through enhancing the ACWLs profile and therefore increasing the reputational gains available to any participating firm.

Of course, in order to increase the ACWL's mandate, there needs to be an increase in funding. This is received entirely from WTO states, mostly developed members located within the EU.¹²² Even though Member States recognise the need to assist less developed

¹²⁰ See <http://www.ileap-jeicp.org/programmes/index.html>

¹²¹ Bohl, 'Problems of DC access to WTO dispute settlement,' (2009) 9 *Chicago-Kent Journal of International and Comparative Law* 130 at 190.

¹²² The ACWL's Endowment fund is contributed to by both developed and developing members. The ten developed members, Canada, Denmark, Finland, Ireland, Italy, the Netherlands, Norway, Sweden, Switzerland and the UK, have all contributed over \$1,000,000. The contributions of DCs vary depending on each members' share of world trade and income per capita. No LDCs are required to contribute to the endowment fund and they receive priority access to the ACWL's services. Note the absence of contributions from the US, France, Germany and Japan. See http://www.acwl.ch/e/about/org_structure.html

countries in order to maximise the effectiveness of the DSS overall, they are unlikely to provide substantial contributions to something that could one day assist a challenge against their own interests. There is the possibility that outside donations could be accepted such as from non-governmental organisations (NGOs) or private entities but this may lead to the outcomes of disputes being influenced by their policy agendas.

The main problem with enhancing the ACWL mandate is that, although this may have an impact on member states' performance, it will have none on institutional performance. The legal services are also not free; considerable levels of revenue are still needed to litigate. The lines of action available to members will for the majority remain the same, especially for those with small trade stakes. Systemic reform is the only way to enhance the efficiency of the DSS to change the distributional bias of its positive effects.

Members can also try to adapt their own institutions to cope with the increased complexity of litigation for example by investing in their own capacity or expanding public-private partnerships.¹²³ Brazil, a key player in dispute settlement, operates through a 'three-pillar' structure involving a specialised WTO dispute settlement division in the capital, a mission in Geneva and full co-ordination between these and Brazil's private sector. This is widely touted as a good model to improve DC access.

B. Small Claims Procedure

As discussed above, the costs involved in filing act as a filter for disputes. In low-value disputes the filing costs exceed the expected value of the legal claim, so these members don't litigate, whereas in high-value disputes pass through the filter and result in cases.¹²⁴ We have already seen that a more effective ACWL will help to lower transaction costs by

¹²³ For an overview see Bown and Hoekman, *supra* note 71 and Shaffer *et al.*, 'The trials of winning at the WTO: What lies behind Brazil's success,'(2008) 41 *Cornell International Law Journal* 383-484

¹²⁴ Cooter and Ulen, *supra* note 49, 342. See figure 10.4 for representative diagram of this.

improving member's legal capacity. These kinds of proposals have been popular with advocates of the DSS but they reinforce the idea that it is the responsibility of less developed countries to catch up with those operating efficiently at dispute settlement. This can only ever be a partial solution. The inequities are caused by procedure; it is through procedural reform that they must be solved. It is therefore necessary to make more radical systematic changes in order to even out the "rules of the game" and provide us with an optimally functional DSM.

The main systemic factors constraining the benefits of litigation are the costs involved and the time they take to complete. Nordstrom and Shaffer address this by proposing to introduce a small claims procedure to the DSS. The small claims format is taken from previous examples both nationally and internationally, such as small claims courts in the US and the new European Small Claims Procedure.¹²⁵ In the WTO, such a solution may already have its origins in the quicker procedures of good offices, conciliation and/or mediation. These however are hardly ever used, partly because most developing members believe they do not give them sufficient time to adequately prepare their case when such complex litigation is involved.¹²⁶ They are also only available if both parties agree to use them.¹²⁷

Two criteria introduced by a small claims proposal are that cases should only be allowed when their monetary value is beneath a specified amount and only where clear precedent exists; this excludes cases with low monetary value but possible high systemic ramifications.¹²⁸ Nordstrom and Shaffer also suggest a small claims proceeding should limit party filings, hearings, pages of submissions and length of decisions, thus reducing time and

¹²⁵ Nordstrom and Shaffer, *supra* note 69, 608-614

¹²⁶ The accelerated procedures of DSU Art.3.12 have never been used presumably for this reason too. Bohl, *supra* note 119, 184. The WTO homepage states that developing members don't use the accelerated procedures as they 'prefer to have more time to prepare their submissions.' See

http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c11s2p1_e.htm

¹²⁷ DSU Art.5.1. Members who have the advantage in regular DS procedures are unlikely to opt for these as they will not want to put the other party 'on an equal footing'. Nordstrom and Shaffer, *supra* note 69, 606

¹²⁸ *Ibid.*, 617. Any measures to induce compliance could also be capped. Excluding potentially lengthier cases where precedent is not yet established also increases the efficiency of a small claims procedure by reducing uncertainties as to outcome and making it more streamlined/less costly.

costs¹²⁹. An additional rule preventing automatic appeals by the Appellate Body could also be introduced.¹³⁰ One addition to Nordstrom and Shaffer's proposals would be to limit third party involvement in a small claims procedure. As discussed above, the addition of third parties increase the complexity and time of decisions, as more interests must be considered.

Small claims would therefore be separated from those with high precedential value or large trade stakes. This would potentially be more efficient as it reduces procedural complexity instead of promoting legal aid where the cost of litigation could still exceed the social value of the claim.¹³¹

Systematic abuse could also be undertaken by larger trading states. Nordstrom and Shaffer consider both limiting availability to an established subset of states or allowing all members to participate¹³². With the rationale of reform based on increasing access for those who currently have no incentive to litigate, opening up the procedure to all would only exacerbate the in-built bias as developed states would, through their increased capacity, be able to monopolise the procedure precisely as they do now with the current DSU. Of course, it would be hard to get states to agree to a system from which some were effectively excluded. Nordstrom and Shaffer propose that those members with access could be limited to only bring claims against each other. This is not an appropriate solution. By excluding major markets such as the EU and the US, there would still be no beneficial course of action available for developing countries to remove an illegal trade measure from many of their main trading partners.¹³³

¹²⁹ *Ibid.*, fn 105. This method has already been tried and tested at the national level; most domestic courts impose word limits on legal submissions.

¹³⁰ To protect procedural legitimacy, the AB could grant judicial review instead.

¹³¹ This is the primary rationale behind the proposal for a small claims procedure.

¹³² As in line with some domestic small claims courts who don't allow businesses to take part as they are more able to use the regular court system N and s 608-610.

¹³³ In order to exclude those members who are classified as developed yet have major markets and an established base of legal capacity such as India or Brazil, a small claims procedure could be limited to listed LDCs and some small island economies. A possible list could be that used in the S&DT provision in the SCM Agreement which exempts LDCs plus 20 other members. See Agreement on Subsidies and Countervailing Measures, 15 April 1994, Marrakesh Agreement Establishing the WTO, Article 27.2(a) and Annex VII.

At the same time, this proposal may not go far enough to addressing current procedural inequities. Countries with disproportionately high transaction costs may still be unable to pursue cases involving high trade or systemic value that would be excluded. Of course, in these situations, the benefits of pursuing a case may exceed administrative losses but there still exists the barrier of not being able to rely on an effective remedy.

C. Monetary Compensation

In addition to the above solutions to first increase the capacity of particular member states, and a procedure for systemic reform once they have some established capacity, we must also try to increase the chances of developing countries actually receiving the restoration of market access owed to them after a dispute. Numerous proposals have been put forward as alternative remedies to those currently offered by the DSU.¹³⁴ Most of these try to resolve the problems of enforcing compliance without addressing the injury caused to members by the need to ‘shoot themselves in the foot’. However, for developing countries in particular, both of these issues are essential to the initial cost-benefit analysis undertaken before initiating a dispute.¹³⁵

One relatively new proposal that could provide a viable solution is to adopt a rule of monetary compensation.¹³⁶ This option has two principal benefits: it can provide reparation to those sectors of industry who suffered due to the WTO-illegal trade measure and, in circumstances where the member wishes to avoid monetary payment, can help to induce

¹³⁴Marvroidis *supra* note 110. The most common proposal for reform is to recover the costs of litigation from the offending State. For a summary of Member’s reform proposals, see www.law.georgetown.edu/iiel/research/projects/dsureview/synopsis.html. Note in particular Ecuador’s proposed amendment of Art. 22.2.

¹³⁵Bronckers *supra* note 109, 109

¹³⁶This proposal has been submitted more recently by a group of LDCs as part of the DSU review process tied to the Doha round. This remains a controversial proposal as there has never been a practice of compensation by financial means until the *US - copyright* case, and some believe this was wrongly authorized as it violated the most-favoured nation principle. See O’Connor and Djordjevic, ‘Practical aspects of Monetary Compensation: The *US – Copyright* case,’ (2005) 8 *JIEL*, 127-142

compliance without restricting trade in retaliation.¹³⁷ The basic components of monetary compensation would have to be set up by partial reform of Article 22.2 DSU. Like the current remedies available, monetary compensation would still only be temporary, with the main objective being compliance by the defecting member.

Firstly, in order for the maximum returns to be gained by reform, monetary compensation should be mandatory¹³⁸ and applied on a preferential basis.¹³⁹ Bronckers and van Broek do not see mandatory compensation as feasible, in that retaliation can be imposed unilaterally yet compensation is a ‘self-help’ remedy; it depends on the non-complying members’ co-operation regardless of whether the rule is obligatory or simply recommended.¹⁴⁰ On the other hand mandatory application, without the need for consent from the non-complying member, would remove compensation from the largely theoretical position it currently holds within the DSS. It is important to note that his proposal for reform will not in theory replace the current DSU remedies; they will simply be an additional recourse for injured members. If the obligation to pay monetary compensation is not upheld by the non-conforming member, the aggrieved member can still return to retaliatory measures. However, this situation would appear to be unlikely; experience shows that financial awards to be paid by states usually are.¹⁴¹

There is some contention also as to how the amount of compensation can be calculated; in particular, from what date it could apply from. Some believe that retroactively applying compensation is beneficial as it redresses the damages suffered by providing

¹³⁷ ‘Key to compliance is the price of the breach: where the price of the breach is sufficiently high, compliance will result.’ Dunhoff and Trachtman, *supra* note 46, 31.

¹³⁸ Some proposals prefer a voluntary application. The LDC group propose it as mandatory by the elimination of ‘if so requested’ in DSU Art.22.2.

¹³⁹ Preferential in that the compensation need not be in keeping with the MFN principle: only the member attempting to force compliance can receive it.

¹⁴⁰ Bronckers and van Broek, *supra* note 109, 114.

¹⁴¹ For example, the us-copyright case did result in financial damages to an amount of 1,219,900 Euros per annum to the European music industry for as long as the US continued not to comply with the DSBs adopted ruling. See WT/DS/160/ARB25/1, Recourse to Article 25 of the DSU, Award of Arbitrators, 9 Nov 2001. Outside the WTO, examples of financial compensation paid by states include state-investor disputes in NAFTA or ICTSD and awards granted to private interests by the Iran-US Claims Tribunal. Bronckers er. A1 (2005),115

reparation for past harms.¹⁴² However, any steps to introduce retroactive compensation could result in very large and indefinite financial liabilities arising, the uncertainties involved in which could result in members being deterred from litigation. Members cannot be obliged to monitor every measure they implement and we have already established that developing countries have no current ability to do so. A scheme of compensation starting from the date of panel ruling or end of reasonable period of time would be more feasible.¹⁴³

Of course, this proposal could have adverse effects on those most vulnerable to the inefficiencies of the current DSU rules. If smaller, less developed trading nations see themselves as facing the additional burden of having to pay monetary compensation themselves they could be deterred from participating in the DSS.¹⁴⁴ This seems unlikely; the main problem faced by developing members is access to the DSS altogether. Developing members will find more incentives to litigate with monetary compensation through the increased possibility that they can rely on an effective remedy.

Some have argued that monetary compensation will be less able to exert pressure on members to comply than the current system of retaliation. The fear is that rich countries may be able to ‘buy their way out’ of compliance in the same way they can currently take retaliatory measures in their stride if insufficient pressure is exerted.¹⁴⁵ Permanent buy-outs by richer countries can be negated if a rule of payments that increase over time is introduced.¹⁴⁶ This could result in the amount payable rising to a form of punitive damage by exceeding the level of “nullification and impairment” under Article 22.4 DSU. Bronckers et al (2005) do not see any reason to introduce such a system as punitive elements have never

¹⁴² Mavroidis (2000) pp.789

¹⁴³ See Bronckers and van Broek, *supra* note 109, 122-123.

¹⁴⁴ In these cases, S&DT could act as a waiver releasing the member from the need to pay financial compensation. Davey, ‘The Sutherland Report on dispute settlement: A comment,’ (2005) 8 *JIEL* 321-344, fn 12.

¹⁴⁵ Of course, this is another contentious issue with regard to larger (eg. Brazil, China and India) and richer (eg. Singapore and China-HK) developing countries. See Bronckers and van Broek, *supra* note 109, 120.

¹⁴⁶ Davey (2005)

been included or intended in the WTO's legal system. However, such punitive compensation could be advantageous if used as an enforcement tool to induce compliance in the sense that if a member fails to do so, this would amount to an additional violation that justifies the increased sanction.¹⁴⁷ In this sense, monetary compensation is likely to be more effective at inducing compliance than suspension of concessions for developed countries that operate with lesser trade stakes.¹⁴⁸ The problem of inducing compliance between states will constantly be an issue in the international arena. The optimal solution is, as always, to have market access increased without having to resort to measures inducing compliance.¹⁴⁹ And yet in the current system, the complainant is left worse off than before the decision to litigate by not only facing restrictive trade measures but by raising its own barriers in response. Under a system of obligatory monetary compensation, this would not need to happen. Richer countries may still buy their way out and the prospective gains in market access may not be realised, but at least those who cannot induce compliance do receive some gains in the form of monetary compensation.¹⁵⁰

Financial compensation could also be used in harmony with a small claims procedure simply by capping the amount of compensation payable when it is used at this level.

It may even be easier to adopt this, as the problems created by uncertainty as to how much would be paid could be limited by the value of the claim brought, providing a more concrete basis for cost-benefit analysis before litigation.

CONCLUSION

¹⁴⁷ Kenyan at p16 and Davey. If the compensation did exceed the actual loss it would certainly help DCs cover costs of extra litigation involved in the procedure of enforcing non-compliance rules, over and above anticipated legislative costs. Punitive aspects would not be meant as a punishment, just as a temporary measure that stops buy out of obligations with an overall aim of removing the WTO-illegal measure.

¹⁴⁸ Bronckers et al (2005) at 110.

¹⁴⁹ DSU Art.22.1

¹⁵⁰ This relates back to the theory of an efficient breach. See Cooter and Ulen *supra* note 49, 215-220 and Mercuro and Medema *supra* note 2, 69.

An examination of the current system of dispute settlement by way of its aggregate costs and benefits highlights the problems inherent within. Even though more disputes are being brought to the DSB and therefore more trade is liberalized, the price of doing so has increased through ever more complex procedure. The benefits in market access are therefore unattainable by some members due to the existence of a systemic threshold effect, resulting in some having the opportunity to challenge a potentially trade restrictive measure while others do not. I have tried to offer some reforms that would change the cost-benefit ratio for developing members, therefore increasing the likelihood they would choose to litigate. By increasing their relative capacity to make use of their rights by changing the DSS's working rules, the performance of the world trading system will ultimately be enhanced.

The move to a more legalistic system was intended to create a more equitable procedure. Efficiency has to do with the size of the pie, but equity is how it is sliced. Increasing the number of disputes brought to the DSB may have increased procedural efficiency to some extent, but this doesn't take in the distributive effects on all members. If there are positive transaction costs, the inefficient choices induced by a desire to avoid them can result in detrimental effects on the systemic performance; not enough WTO-illegal measures across the spectrum of members will be challenged, barriers to trade will continue to exist and long-term welfare will not be evenly maximized. A balance must be sought that equitably distributes benefits in market access as well as maintaining or improving efficiency.