

2011

Making WTO Remedies Work for Developing Nations: The Need for Class Actions

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MAKING WTO REMEDIES WORK FOR DEVELOPING NATIONS: THE NEED FOR CLASS ACTIONS

*Phoenix X.F. Cai**

INTRODUCTION	153
I. THE PROPOSAL IN A NUTSHELL	157
A. <i>The Need to Encourage Developing Nations to Participate More in Dispute Settlement</i>	158
B. <i>A Note on Scope</i>	159
II. BRIEF OVERVIEW OF THE WTO DISPUTE SETTLEMENT AND THE CHALLENGES DEVELOPING NATIONS FACE	159
A. <i>Consultations</i>	160
B. <i>The Panel Process</i>	163
C. <i>The Appeal</i>	166
D. <i>Implementation and Enforcement Mechanism</i>	167
III. EXISTING WTO REMEDIES	169
A. <i>Cessation</i>	169
B. <i>Compensation</i>	171
C. <i>Suspension of Concessions or Retaliation</i>	173
IV. NEW PROPOSAL: CLASS ACTION LAWSUITS	176
A. <i>The Strategy Is Supported by WTO Text</i>	177
B. <i>The Strategy in Action</i>	179
V. CRITERIA FOR EVALUATING PROPOSED CLASS ACTION STRATEGY ..	181
A. <i>Practicability</i>	181
1. <i>Benefits</i>	181
2. <i>Practical Challenges of the Proposal</i>	184
a. <i>Burdens on the Lead Complainant</i>	184
b. <i>Coordination Challenges</i>	185
c. <i>Lack of Commonality</i>	187
d. <i>Lack of Alignment on Outcomes</i>	188
e. <i>Confidentiality, Privilege, and Other Information-Flow Concerns</i>	188
B. <i>Systemic Contribution</i>	189

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<i>C. Impact on Negotiations</i>	190
<i>D. Governmental Coordination Difficulties</i>	191
<i>E. Legal Obstacles</i>	192
<i>F. Public-Private Interaction</i>	193
CONCLUSION	195

INTRODUCTION

Imagine that the chief executive officer of a large company has been convicted, after a fair trial, of embezzling millions of dollars. Imagine further that the criminal law regime where this takes place provides very limited remedies. The embezzler must return all the money that she has embezzled, but only up to any amount she actually has on hand, in cash. She may also refuse to pay, at her option. She does not get fired or even temporarily suspended from her job as CEO. Further, after conviction, she serves no prison sentence. She pays fines neither to her company nor to the shareholders whose trust she has betrayed. She pays no damages, punitive or otherwise. Her company may not garnish her wages to pay back the amount embezzled. The only remedy available is limited restitution of any cash left in hand.

This hypothetical is actually not that different from how remedies work in the World Trade Organization (“WTO”).¹ At the heart of the WTO lies a set of rules and negotiated trade terms, such as tariffs, designed to promote trade liberalization or the removal of barriers to free trade. When a WTO member nation violates a rule or trade term, the affected nation or nations may bring a complaint under the dispute settlement procedures of the WTO.² When nations win cases at the WTO, the preferred remedy is that the losing nation withdraws the offending measure or rule.³ This action is akin to stopping the embezzlement going forward. The remedy is purely prospective. If withdrawal occurs, the suit ends. If withdrawal does not occur, then the parties negotiate for compensation—but only if the offender agrees to pay. Fines or punitive damages are off the table. The remedy of last resort is the imposition of tariffs and import restrictions on the losing nation.⁴ However, this remedy is not helpful for developing nations that do not possess sufficient economic power to meaningfully use the remedy.⁵ For some WTO nations, the only real remedy is prospective withdrawal. It is as unsatisfactory of a remedy as that of limited restitution in the embezzling example.

¹ Obviously, the WTO is not a criminal system and the embezzlement analogy is not a perfect one. However, it is worth making to highlight the limited nature of remedies. Regardless of one’s views on the object and purpose of remedies, one is unlikely to find the limited remedy of restitution satisfactory.

² WORLD TRADE ORGANIZATION, A HANDBOOK ON THE WTO DISPUTE SETTLEMENT SYSTEM 3 (2004) [hereinafter WTO HANDBOOK].

³ Chi Carmody, *Remedies and Conformity Under the WTO Agreement*, 5 J. INT’L ECON. L. 307, 315 (2002).

⁴ Kym Anderson, *Peculiarities of Retaliation in WTO Dispute Settlement System*, 1 WORLD TRADE REV. 123, 126–27 (2002).

⁵ See *infra* Part III.C.

Of the 153 nations that are members of the WTO, more than two-thirds are developing nations.⁶ Yet, despite their strength in numbers, developing nations as a group rarely participate in dispute settlement, a core aspect of the WTO.⁷ This is problematic because the WTO is essentially a self-enforcing system of reciprocal trade rights that relies on proactive monitoring by all members.⁸ Use of the self-enforcement mechanism—initiating cases under the Dispute Settlement Understanding (“DSU”)⁹—is critical. No WTO police or prosecutor

⁶ *Understanding the WTO: Developing Countries—Overview*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/tif_e/dev1_e.htm (last visited Mar. 12, 2011).

⁷ *See The Sub-Committee on Least-Developed Countries*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/devel_e/dev_sub_committee_ldc_e.htm (last visited Mar. 4, 2011) (explaining that the WTO recognizes as least-developed countries (“LDCs”) those countries that have been designated as such by the United Nations (“UN”); that there are at present fifty LDCs on the UN list; and that, with the accession of Cape Verde as a member on August 18, 2010, thirty-three of those LDCs are members of the WTO); *see also* U.N. Statistics Div., Standard Country and Area Codes Classifications (M49) (Feb. 17, 2011), <http://unstats.un.org/unsd/methods/m49/m49regin.htm> (“There is no established convention for the designation of ‘developed’ and ‘developing’ countries or areas in the UN system. In common practice, Japan in Asia, Canada and the United States in North America, Australia and New Zealand in Oceania, and Europe are considered ‘developed’ regions or areas. In international trade statistics, the Southern African Customs Union is also treated as developed region and Israel as a developed country; countries emerging from the former Yugoslavia are treated as developing countries; and countries of eastern Europe and [the former USSR countries] in Europe are not included under either developed or developing regions.”). *But see* U.N. Statistics Div., Millennium Development Goals Indicators: Goal 8. Develop a Global Partnership for Development: Net ODA as Percentage of OECD/DAC Donors GNI, <http://unstats.un.org/unsd/mdg/Metadata.aspx?IndicatorID=0&SeriesId=568> (last visited Apr. 1, 2011) (explaining that the UN, however, does have a system to designate a list of those countries considered to be LDCs, whereby on the recommendation of the Committee for Development Policy, the General Assembly decides on the countries to be included on the LDC list). In Africa, the UN-designated LDCs are: Angola, Benin, Burkina Faso, Burundi, Cape Verde, Central African Republic, Chad, Comoros, Democratic Republic of the Congo, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Niger, Rwanda, Sao Tome and Principe, Senegal, Sierra Leone, Somalia, Sudan, Togo, Uganda, United Republic of Tanzania, and Zambia. *Id.* In Asia and the Pacific, they are: Afghanistan, Bangladesh, Bhutan, Cambodia, Kiribati, Lao People’s Democratic Republic, Maldives, Myanmar, Nepal, Samoa, Solomon Islands, Tuvalu, Vanuatu, and Yemen. *Id.* In Latin America and the Caribbean, Haiti is a UN-designated LDC. *Id.* While there are numerous significant differences among countries falling into these groups, in this Article, the Author refers generally to “developing nations” to include all the LDCs and all the developing economies, without necessarily differentiating between them. This is not to say the differences between them are not important—they certainly are. Instead, this reference reflects the fact that they share certain common concerns, particularly with respect to trade, such that they may be treated as one group for the purpose of this Article. Thus, the term “developing nations” is used merely as a convenient shorthand.

⁸ WTO HANDBOOK, *supra* note 2, at 7 (“WTO Members have agreed to use the multilateral system for settling their WTO trade disputes rather than resorting to unilateral action That means abiding by the agreed procedures and respecting the rulings once they are issued—and not taking the law into their own hands.”).

⁹ *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU]; *see also* Ernst-Ulrich Petersmann, *The Dispute Settlement System of the World Trade Organization and*

seeks out and punishes those who violated WTO rules. Rather, each WTO member has to police its interests.

When developing nations fail to initiate cases, the result is both under-enforcement of key WTO norms and skewed enforcement in favor of developed nations. First, under-enforcement occurs because the WTO is a self-policing system. When a developing nation forgoes participation in this system, it forgoes not only the opportunity to right a wrong that it suffered, but also the opportunity to set precedent¹⁰ for other developing nations. Therefore, the costs of under-enforcement are both individual (lack of redress for specific wrong) and systemic (lack of precedent-setting). Second, skewed enforcement occurs because issues of particular interests to developing nations—such as safeguards and market access for agricultural goods—are underrepresented. As a result, the WTO effectively affords less robust protection to developing nations than their developed counterparts.

Numerous scholars have attempted to explain why developing nations do not actively invoke the DSU and the literature on this topic is quite extensive.¹¹

the Evolution of the GATT Dispute Settlement System Since 1948, 31 COMMON MKT. L. REV. 1157, 1205–24 (1994) (providing a succinct but exhaustive description and analysis of the functioning of the DSU).

¹⁰ While the WTO does not recognize precedent or *stare decisis* as such, in practice, past decisions serve as persuasive authority and are often relied upon as guidance in future cases. David Palmeter & Petros C. Mavroidis, *The WTO Legal System: Sources of Law*, 92 AM. J. INT'L L. 398, 400–02 (1998); see, e.g., Panel Report, *United States—Section 337 of the Tariff Act of 1930*, ¶¶ 3.11, 3.21, 3.29, L/6439 (Jan. 16, 1989); see also Anne Scully-Hill & Hans Mahncke, *The Emergence of the Doctrine of Stare Decisis in the World Trade Organization Dispute Settlement System*, 36 LEGAL ISSUES ECON. INTEGRATION 133 (2009).

¹¹ The academic literature on the need for change to either the dispute settlement process in general or the structure of WTO remedies is well developed. See, e.g., John H. Jackson, *Dispute Settlement and the WTO: Emerging Problems*, in FROM GATT TO THE WTO: THE MULTILATERAL TRADING SYSTEM IN THE NEW MILLENNIUM 67 (2000); ROBERT Z. LAWRENCE, CRIMES & PUNISHMENTS? RETALIATION UNDER THE WTO (2003); Alan O. Sykes, *The Remedy for Breach of Obligations Under the WTO Dispute Settlement Understanding: Damages or Specific Performance?*, in NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW: ESSAYS IN HONOUR OF JOHN H. JACKSON 347 (Marco Bronckers & Reinhard Quick eds., 2000); Anderson, *supra* note 4; Claude Barfield, *WTO Dispute Settlement System in Need of Change*, 37 INTERECON. 131 (2002); Marco Bronckers & Naboth van den Broek, *Financial Compensation in the WTO: Improving the Remedies of WTO Dispute Settlement*, 8 J. INT'L ECON. L. 101 (2005); Chad P. Bown, *Developing Countries as Plaintiffs and Defendants in the GATT/WTO Trade Disputes*, 27 WORLD ECON. 59 (2004); Carmody, *supra* note 3; Steve Charnovitz, *Rethinking WTO Trade Sanctions*, 95 AM. J. INT'L L. 792 (2001); Susan Esserman & Robert Howse, *The WTO on Trial*, FOREIGN AFF., Jan.–Feb. 2003, at 130; Patricio Grané, *Remedies Under WTO Law*, 4 J. INT'L ECON. L. 755 (2001); Andrew T. Guzman & Beth A. Simmons, *Power Plays & Capacity Constraints: The Selection of Defendants in WTO Disputes*, 34 J. LEGAL STUD. 557, 557–58 (2005); Robert Howse & Robert W. Staiger, *United States—Anti-Dumping Act of 1916 (Original Complaint by the European Communities)—Recourse to Arbitration by the United States Under Article 22.6 of the DSU, WT/DS136/ARB, 24 February 2004: A Legal and Economic Analysis*, 4 WORLD TRADE REV. 295 (2005); Jason Kearns & Steve Charnovitz, *Adjudicating Compliance in the WTO: A Review of DSU Article 21.5*, 5 J. INT'L ECON. L. 331

One can trace five distinctive lines of reasoning within the existing literature. These explanations are: (1) lack of market share and ability to affect world markets; (2) fear of non-WTO or extralegal retaliation by more powerful trading partners; (3) costs and resource constraints; (4) lack of legal capacity and expertise; and (5) asymmetries or unevenness in the effectiveness of remedies.¹² The first four reasons may be characterized as fact or status-based, which does not mean they are immutable or incapable of improvement. Indeed, the WTO system could be restructured to alleviate some of these status-based hardships. Elsewhere, this Author has tackled the resource constraint and lack of legal capacity and expertise problems.¹³

The fifth reason, unevenness in the effectiveness of remedies, is primarily a legal problem. Understandably, most scholars working in the field have proposed a legal solution to the problem—usually in the form of an amendment to the DSU.¹⁴ In light of the current deadlock in the Doha Round of WTO negotiations¹⁵—which are not even primarily aimed at remedies—this

(2002); Kofi Oteng Kufuor, *From the GATT to the WTO: The Developing Countries and the Reform of the Procedures for the Settlement of International Trade Disputes*, 31 J. WORLD TRADE 117 (1997); Pieter Jan Kuijper, *Remedies and Retaliation in the WTO: Are They Likely to Be Effective? The State Perspective and the Company Perspective*, 91 AM. SOC'Y INT'L L. PROC. 282 (1997); Nikolaos Lavranos, *Some Proposals for a Fundamental DSU Reform*, 29 LEGAL ISSUES ECON. INTEGRATION 73 (2002); Robert M. MacLean, *The Urgent Need to Reform the WTO's Dispute Settlement Process*, 8 INT'L TRADE L. REG. 137 (2002); Petros C. Mavroidis, *Remedies in the WTO Legal System: Between a Rock and a Hard Place*, 11 EUR. J. INT'L L. 763 (2000); Victor Mosoti, *In Our Own Image, Not Theirs: Damages as an Antidote to the Remedial Deficiencies in the WTO Dispute Settlement Process: A View from Sub-Saharan Africa*, 19 B.U. INT'L L.J. 231 (2001); Joost Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules Are Rules—Toward a More Collective Approach*, 94 AM. J. INT'L L. 335 (2000); Timothy M. Reif & Marjorie Florestal, *Revenge of the Push-Me, Pull-You: The Implementation Process Under the WTO Dispute Settlement Understanding*, 32 INT'L LAW. 755 (1998); Arvind Subramanian & Jayashree Watal, *Can TRIPS Serve as an Enforcement Mechanism for Developing Countries in the WTO?*, 3 J. INT'L ECON. L. 403 (2000); Joel Trachtman, *The WTO Cathedral*, 43 STAN. J. INT'L L. 127 (2007); Henrik Horn et al., *Is the Use of the WTO Dispute Settlement System Biased?* (Ctr. for Econ. Policy Research, Discussion Paper No. 2340, 1999). In addition to the academic literature, there are a number of proposals by states in connection with current WTO negotiations in the Doha Round. These are helpfully listed and summarized at *DSU Review*, GEO. L. (Mar. 2009), <http://www.law.georgetown.edu/iel/research/projects/dsureview/synopsis.html>. In particular, see Proposal by the African Group, *Negotiations on the Dispute Settlement Understanding*, TN/DS/W/15 (Sept. 25, 2002), which proposed “monetary compensation to be continually paid pending and until the withdrawal of the measures in breach of WTO obligations,” and included a number of proposals by commentators.

¹² See Bronckers & van den Broek, *supra* note 11, at 104–05.

¹³ See Phoenix X.F. Cai, *Aid for Trade: A Roadmap for Success*, 36 DENV. J. INT'L L. & POL'Y 101 (2008).

¹⁴ See Anderson, *supra* note 4, at 123–34; Bronckers & van den Broek, *supra* note 11, at 106; Charnovitz, *supra* note 11, at 755–72; Mavroidis, *supra* note 11, at 764–814; Reif & Florestal, *supra* note 11, at 756–57, 786–88; Subramanian & Watal, *supra* note 11, at 403–16.

¹⁵ Sungjoon Cho, *The Demise of Development in the Doha Round of Negotiations*, 46 TEX. INT'L L.J. 573, 574 (forthcoming 2011); Sungjoon Cho, *The WTO Doha Round Negotiation: Suspended Indefinitely*,

Author argues that any amendment to WTO agreements, including the DSU, would be extremely unlikely, perhaps even impossible.

This Article eschews legislative solutions that require lengthy negotiations and ratification of amendments in favor of a creative legal strategy solution that can be readily implemented unilaterally by developing nations. This Article proposes the use of “class actions” by developing nations as a litigation strategy. The term class action is used as a metaphor. It is not meant as an explicit reference of Rule 23 of the Federal Rules of Civil Procedure.¹⁶ Indeed, any such explicit reference or incorporation of Rule 23 would vitiate one of the primary benefits of this proposal—the ease of implementation without formal amendments to WTO documents.

This Article proceeds in six parts. Part I sketches out the proposed class action litigation strategy. Part II argues that the strategy is needed because developing nations are disadvantaged in every stage of the WTO’s dispute settlement process. Part III explains the inadequacies of current WTO remedies. The class action strategy is elaborated in detail in Part IV, which begins with a detailed example of how the proposal might work in real life. Part V provides an exhaustive list of criteria to use in evaluating this Article’s proposal. The Article concludes in Part VI with a call for reform.

I. THE PROPOSAL IN A NUTSHELL

This Article describes how developing nations could implement a litigation strategy by relying on a quasi “class action” model. Developing nations would be allowed freer rein to exercise third-party rights, through existing provisions for joinder, in a manner that would allow them to pool their complaints in cases against larger or more developed nations. The strategy could also be used against industrializing nations, such as China or India. The primary mechanism for this is the regular joinder provision of the DSU.¹⁷ However, the strategy would be strengthened by procedural changes to the right to join as a third party, such as making the right automatic, upon notification to the Dispute Settlement Body (“DSB”), for least-developed countries.

INSIGHTS (Am. Soc’y Int’l Law, Washington, D.C.), Sept. 5, 2006, available at <http://www.asil.org/insights060905.cfm>; *Doha Deadlock Continues*, FORBES.COM (Apr. 15, 2010, 6:00 AM), <http://www.forbes.com/2010/04/14/doha-trade-wto-business-oxford-analytica.html>; *In Quotes: The Doha Deadlock*, BBC NEWS (July 26, 2006, 10:20 AM), <http://news.bbc.co.uk/go/pr/fr/-/2/hi/business/5216080.stm>.

¹⁶ FED. R. CIV. P. 26.

¹⁷ DSU, *supra* note 9, art. 10.

Each nation would play an active role in the dispute settlement process, but one nation—generally either the nation that is most economically powerful or the most experienced in WTO litigation—would take a leading role and serve as the representative plaintiff, much in the way a named plaintiff in a real class action might. In the remedies stage, all named parties would benefit from prospective withdrawal if that were the remedy implemented, just as all third parties currently do. However, if withdrawal were not to occur, then all parties would get to aggregate their level of harm, such that the threatened trade retaliation could be equal to the sum of all of the harm suffered by the class. The class could then decide to exercise retaliation collectively, allowing, for instance, the representative plaintiff to impose countermeasures on their behalf. The choice to impose countermeasures individually or in the aggregate would lie with the class. More importantly, the class would have the right to trade the levels of retaliation unevenly within the class. This means that the smaller members of the class could grant the quantification of amount of harm that they suffered to another class member, allowing that member to exercise retaliation on its behalf.

A. The Need to Encourage Developing Nations to Participate More in Dispute Settlement

The need for developing nations to make use of the DSU is important for several reasons. Since its inception in 1995, the WTO has ushered in a welcome period of increasing engagement by developing nations in many crucial areas—such as participation in negotiations, particularly during the Doha Round.¹⁸ This increased engagement shows that developing nations see themselves as invested in the multilateral system and are willing to play an active role to ensure the system is responsive to their needs.¹⁹ Greater participation in the dispute settlement system is another critical facet of this endeavor. As the WTO is a system primarily based on self-enforcement, developing nations need to be able to actively enforce their rights within the system through dispute settlement. Put another way, if developing nations cannot effectively enforce the rights they already have, why should they be

¹⁸ See Pedro da Motta Veiga, *Brazil and the G-20 Group of Developing Countries*, WORLD TRADE ORG., http://www.wto.org/english/res_e/booksp_e/casestudies_e/case7_e.htm (last visited Mar. 12, 2011); see also Sonia E. Rolland, *Developing Country Coalitions at the WTO: In Search of Legal Support*, 48 HARV. INT'L L.J. 483 (2007).

¹⁹ Jayashree Watal, *Developing Countries' Interests in a Development Round*, in *THE WTO AFTER SEATTLE* 71, 71–72 (Jeffrey J. Schott ed., 2000) (explaining that for many decades, developing nations were not significant players in the rounds of multilateral trade negotiations under GATT).

bothered to negotiate for additional rights or to accept more obligations? Effective enforcement, through meaningful remedies, is a necessary precondition to developing nations' greater participation in the WTO in general.

B. A Note on Scope

Each of the challenges facing developing nations are important and have drawn attention, albeit unevenly, in the existing literature.²⁰ This Article focuses primarily on the unevenness in effectiveness of remedies structure and proposes a workable solution, in the form of a limited "class action" remedy for developing nations. The chosen focus of this Article does not undercut the importance of the other problems. Indeed, this Author addressed the problems of costs and lack of legal capacity and expertise in a previous article on technical assistance or aid for trade.²¹ Solutions, such as private sector assistance to lower litigation costs for developing nations²² and procedural safeguards to enhance existing special and differential treatment provisions already in the DSU²³ are important proposals within the existing WTO architecture. However, while helpful, they do not materially alter the underlying incentives for developing nations to bring suits at the WTO. Only a change to the underlying remedies structure would accomplish that. This Article proposes such a potentially game-changing structural reform.

II. BRIEF OVERVIEW OF THE WTO DISPUTE SETTLEMENT PROCESS AND THE CHALLENGES DEVELOPING NATIONS FACE

The WTO's dispute settlement process has been described thoroughly elsewhere.²⁴ For our purposes, it is sufficient to roughly sketch the process, for context. Although this Part traces the contours of WTO dispute settlement

²⁰ See, e.g., Chad P. Bown & Bernard M. Hoekman, *WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector*, 8 J. INT'L ECON. L. 861 (2005) (providing an in-depth exploration of how the private sector can better assist in alleviating the cost obstacles facing developing nations).

²¹ See Cai, *supra* note 13.

²² See Bown & Hoekman, *supra* note 20, at 873–88.

²³ See Andrea M. Ewart, *Small Developing States in the WTO: A Procedural Approach to Special and Differential Treatment Through Reforms to Dispute Settlement*, 35 SYRACUSE J. INT'L L. & COM. 27 (2007); see also Amin Alavi, *On the (Non)-Effectiveness of the World Trade Organization's Special and Differential Treatments in the Dispute Settlement Process*, 41 J. WORLD TRADE 319, 320 (2007).

²⁴ See generally WTO HANDBOOK, *supra* note 2; Claus-Dieter Ehlermann, *Experiences from the WTO Appellate Body*, 38 TEX. INT'L L.J. 469, 470 (2003); Bown, *supra* note 11.

procedures, it primarily serves to highlight the special problems developing nations confront in each step of the process. The emphasis on the challenges developing nations face in effectively utilizing the dispute settlement system underscores the need for creative solutions.

The dispute settlement process is divided into four stages: (1) consultations; (2) panel process; (3) appeal (if any); and (4) implementation and enforcement.²⁵ Cases arise in two ways, either as violation complaints²⁶ or non-violation nullification or impairment complaints.²⁷ In both cases, an aggrieved party must demonstrate that a trade benefit owed to it under WTO rules has been thwarted.²⁸ Violation complaints are based on the claim that the offending government has enacted a measure that allegedly violates either a negotiated WTO commitment, such as a tariff rate, or a substantive rule, such as national treatment or non-discrimination against imports.²⁹ In contrast, non-violation cases arise when the measure enacted is not in itself a violation of WTO rules, but nonetheless undermines or conflicts with a member's WTO obligations.³⁰ Almost all WTO cases are violation complaints.³¹

A. *Consultations*

The preliminary step in the formal dispute settlement process is an attempt to arrive at a mutually agreeable solution through consultation and mediation.³² It begins with a formal request by the complaining member nation for consultations "in good faith" within thirty days after the receipt of the request.³³ If the parties cannot reach agreement through bilateral consultations, they may request the good offices of the WTO Director-General as mediator.³⁴

²⁵ WTO HANDBOOK, *supra* note 2, at 43.

²⁶ *Id.* at 30.

²⁷ *Id.*

²⁸ The WTO term for this requirement of harm is nullification or impairment of a trade benefit. *See* General Agreement on Tariffs and Trade art. XXIII, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

²⁹ *See id.* art. XXIII(1)(a). This type of case is commonly referred to as a violation case because the offending member government is accused of enacting a measure that is inconsistent with its WTO obligations in some way. WTO HANDBOOK, *supra* note 2, at 30–32.

³⁰ *See* GATT, *supra* note 28, art. XXIII(1)(b).

³¹ *See* Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 185, WT/DS135/AB/R (Mar. 12, 2001) (quoting Panel Report, *European Economic Community—Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins*, L/6627 (Dec. 14, 1989), GATT B.I.S.D. (37th Supp.) at 86 (Jan. 25, 1990)).

³² DSU, *supra* note 9, art. 4(3).

³³ *Id.*

³⁴ *Id.* art. 5(6).

If no mutual solution arises in the consultations stage, the complaining member has the right to request the Dispute Settlement Body³⁵ to establish a panel to hear and adjudicate the complaint.³⁶

The consultations stage is a reflection of the power-based methods that characterized much of the dispute settlement process under GATT.³⁷ The WTO formalized a much more legalistic approach,³⁸ but retained some aspects of the old system, such as consultations and mediation. While these informal methods can be valuable insofar as they advance judicial economy by resolving potential disputes amicably, they nonetheless present difficulties for developing nations. First, a negotiated solution is by its nature power-based. As a result, poorer and smaller developing nations are disadvantaged when they negotiate with more developed nations. In these cases, lack of economic power translates into a lack of bargaining power. Consultations are unlikely to yield favorable results³⁹ for developing nations due to their inability to leverage political and economic power to their advantage. For instance, in two cases involving the Agreement of Trade Related Aspects of Intellectual

³⁵ The DSB oversees and implements all of the dispute settlement functions of the WTO. *Understanding the WTO: Settling Disputes—A Unique Contribution*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (last visited Mar. 12, 2011). It consists of the same membership as the WTO General Council, the standing body of the WTO membership, although it follows its own procedures. *See id.* The DSB establishes panels, adopts panels' reports automatically (in the absence of a reverse consensus not to adopt reports), is responsible for the implementation of panel rulings, and approves sanctions and retaliation for failure to comply with panel rulings. *Id.* For a detailed description of the WTO dispute settlement process, see *id.*; see also ANDREW T. GUZMAN & JOOST H.B. PAUWELYN, INTERNATIONAL TRADE LAW 116–26 (2009).

³⁶ DSU, *supra* note 9, art. 4(7).

³⁷ See Michael K. Young, *Dispute Resolution in the Uruguay Round: Lawyers Triumph over Diplomats*, 29 INT'L L. 389, 399, 405–06 (1995). See generally ERNST-ULRICH PETERSMANN, THE GATT/WTO DISPUTE SETTLEMENT SYSTEM: INTERNATIONAL LAW, INTERNATIONAL ORGANIZATIONS AND DISPUTE SETTLEMENT, 66–70 (1997) (discussing the usage and justifications of power-oriented versus rule-oriented approaches for international trade dispute settlement); John H. Jackson, *The Crumbling Institutions of the Liberal Trade System*, 12 J. WORLD TRADE 93, 98–101 (1978) (detailing the distinction between power-based and rule-based diplomacy in trade).

³⁸ Proponents of the legalistic model “argue that the necessity for certainty and predictability in the management of international business transactions calls for a more rule-oriented system.” Miquel Montaña Mora, *A GATT with Teeth: Law Wins Over Politics in the Resolution of International Trade Disputes*, 31 COLUM. J. TRANSNAT'L L. 103, 129, 137–41 (1993) (discussing the “Improvements of 1989” as a harbinger for the eventual development of a more rule-oriented approach); see also Young, *supra* note 37, at 389–91 (surveying dispute resolution advances made in the Uruguay Round).

³⁹ See Request for Consultations by the United States, *Argentina—Patent Protection for Pharmaceuticals and Test Data Protection for Agricultural Chemicals*, WT/DS171/1 (May 10, 1999); Request for Consultations by the United States, *Pakistan—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS36/1 (May 6, 1996); see also Agreement on Trade-Related Aspects of Intellectual Property Rights art. 65, Apr. 15 1994, 1869 U.N.T.S. 299, 33 I.L.M. 1197 [hereinafter TRIPS].

Property Rights (“TRIPS”), the United States, and the European Union (“EU”) were able to obtain results in consultations that exceeded the negotiated WTO obligations of two developing nations, Pakistan and Argentina.⁴⁰ In both cases, the United States and the European Communities requested that the countries apply certain patent protection provisions of TRIPS for pharmaceuticals and agricultural chemicals as of the Agreement’s date of entry into force.⁴¹ However, under Article 65 of TRIPS, developing countries received a minimum period of five years from the January 1, 1995 date of entry into force to implement TRIPS.⁴² In both cases, Pakistan and Argentina gave in after consultations and agreed to an earlier implementation period, even though they were not legally obligated to do so.⁴³ Because consultations are held confidentially, it is not possible to know for certain why Pakistan and Argentina acceded to resolutions not only against their interests, but also exceeding their TRIPS obligations. However, one likely explanation is the implicit or explicit threat of unilateral retaliation by the United States under Section 301, which requires the U.S. Trade Representative to identify and impose sanctions on foreign nations that deny adequate intellectual property protection to U.S. companies.⁴⁴

⁴⁰ See Request for Consultations by the United States, *Pakistan—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, *supra* note 43; cf. Request for Consultations by the United States, *Argentina—Patent Protection for Pharmaceuticals and Test Data Protection for Agricultural Chemicals*, *supra* note 39.

⁴¹ See *id.*

⁴² See *id.*

⁴³ After consultations with the United States, Pakistan confirmed its obligations to implement patent protection for pharmaceutical and agricultural chemical products under TRIPS, retroactive to the start of the TRIPS Agreement on January 1, 1995. See Notification of a Mutually-Agreed Solution, *Pakistan—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS36/4 (Mar. 7, 1997). Similarly, Argentina acceded to the position of the United States and the European Communities after consultations, adopting a solution identical to Pakistan. See Notification of Mutually Agreed Solution According to the Conditions Set Forth in the Agreement, *Argentina—Patent Protection for Pharmaceuticals and Test Data Protection for Agricultural Chemicals, Argentina—Certain Measures on the Protection of Patents and Test Data*, WT/DS171/3, WT/DS196/4 (June 20, 2002).

⁴⁴ See 19 U.S.C. § 2242 (2000). The U.S. Trade Representative places nations under investigation, and hence under threat of sanctions, on a watch list. 2001 SPECIAL 301 REPORT 1, 3, 13, available at http://www.ipophil.gov.ph/document/3210ec2d_301Reports_2001.pdf (last visited Aug. 19, 2010). For developing nations, the typical sanction is removal from or curtailed access to the U.S. Generalized System of Preferences (“GSP”), which gives the products of developing nations low or zero tariff entry into the United States. *Id.* at 2. Without GSP treatment, many developing nations’ exports would not be competitive in the U.S. market. See *id.* Therefore, the watch list is a potent threat. See *id.* For the entire length of the WTO process mentioned herein, the United States had placed Argentina on the Special 301 Priority Watch List. See *id.* The United States has in the past exercised the sanctions under Section 301—for example, in 1992, when it suspended India’s GSP privileges with respect to \$80 million of its pharmaceutical exports. BARBARA LEITCH

Even worse, in some cases, consultations do not take place at all or if they do, only cursorily. For example, in the *U.S.-Gambling* case,⁴⁵ the United States initially refused Antigua's invitation to consult.⁴⁶ After a second invitation, the United States subsequently engaged in a perfunctory one-hour consultation with Antigua in which the United States refused to discuss the possibility of resolving the dispute through a mutually satisfactory regulatory framework.⁴⁷ Antigua moved forward with a formal request for consultations and the case proceeded to trial.⁴⁸ Antigua prevailed at both the panel and appellate body levels, only to face stonewalling from the United States at the remedies stage.⁴⁹ After years of American foot-dragging, Antigua resigned itself to a negotiated settlement that gave it a fraction of what it had wanted and won.⁵⁰

B. *The Panel Process*

If consultations fail, the establishment of a panel initiates the formal adversarial stages of the dispute.⁵¹ The written request for a panel must indicate whether consultations were held, identify the specific measures at issue, and provide a brief summary of the legal basis of the complaint.⁵² The panel, comprised of three to five independent trade experts, then sets a timetable for proceedings, specifying deadlines for submissions of written statements by the parties and for meetings, the WTO equivalent of hearings.⁵³ After the first session of meetings, parties may provide the panel with

LEPOER, CONG. RESEARCH SERV., IB93097, INDIA-U.S. RELATIONS 14 (1998), available at <http://fpc.state.gov/documents/organization/7930.pdf>.

⁴⁵ See Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R (Nov. 10, 2004) [hereinafter Panel Report, *U.S.-Gambling*]; Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (Apr. 7, 2005) [hereinafter Appellate Body Report, *U.S.-Gambling*].

⁴⁶ See Ewart, *supra* note 23, at 45. The Panel Report chastised the United States for its refusal to consult with Antigua. See Panel Report, *U.S.-Gambling*, *supra* note 45, ¶¶ 6.531, 6.608, 7.2.

⁴⁷ See Ewart, *supra* note 23, at 45; see also Panel Report, *U.S.-Gambling*, *supra* note 45, ¶ 3.14.

⁴⁸ See Panel Report, *U.S.-Gambling*, *supra* note 45, ¶ 3.79.

⁴⁹ *Antigua Threatens to Sanction US Over Internet Gaming Dispute*, JAM. OBSERVER (July 7, 2010), http://www.jamaicaobserver.com/news/Antigua-threatens-to-sanction-US-over-Internet-gaming-dispute_7775691; see also *Statement on the Non-Compliance of the USA with the 2007 Ruling of the WTO Dispute Settlement Body as It Relates to the Provision of Remote (Internet) Gambling Services*, CARIBBEAN COMMUNITY (CARICOM) SECRETARIAT (July 7, 2010), http://www.caricom.org/jsp/communications/meetings_statements/internet_gaming_31hgc_2010.jsp.

⁵⁰ See Decision by the Arbitrator, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/ARB (Dec. 21, 2007).

⁵¹ See DSU, *supra* note 9, art. 6.

⁵² *Id.* art. 6(2).

⁵³ *Id.* art. 8.

supplemental submissions.⁵⁴ Occasionally a second set of meetings may take place.⁵⁵ Panels must make an objective assessment of the facts, the legal basis of a dispute, and the applicability of the covered agreements, and make other findings and recommendations that will assist the DSU in its ruling.⁵⁶

Panels are bound by the DSU to resolve disputes and issue a panel report within three months for cases of urgency and six months for general cases.⁵⁷ When the panel cannot issue a report within six months, it submits a formal request in writing for an extension to the DSB; this extension cannot exceed nine months from the establishment of the panel.⁵⁸ However, in practice, the timeline is often extended beyond that and the panel can take as long as two years to issue a report.⁵⁹ Panel reports, once issued, are automatically adopted by the DSB unless there is a consensus to block adoption of the report—a mechanism known as the “negative consensus rule.”⁶⁰

Developing nations face particular challenges in the panel stage as well. One potential problem—lack of sensitivity to the special concerns of development—is addressed by Article 8(10) of the DSU, which allows developing nations to insist that at least one panelist be a national of another developing country.⁶¹ However, a developing nation must formally request such a panel member.⁶² The appointment is not automatic, as some nations have insisted it ought to be.⁶³ It is during the panel process that a developing nation’s comparative lack of financial resources, legal capacity, and human capital can be most damaging. WTO disputes are highly technical, complex to the point of opacity, and, in many cases, reliant on accurate and rigorous economic data and analysis.⁶⁴ A developing nation’s lack of financial resources for the comprehensive pre-litigation collection of information and evidence on

⁵⁴ *Id.* art. 12(6).

⁵⁵ *See id.* app. 3, para. 12(d).

⁵⁶ *See id.* art. 11.

⁵⁷ *See id.* art. 12(8)–12(9).

⁵⁸ *Id.*

⁵⁹ *See* William Davey, *WTO Dispute Settlement System: The First Ten Years*, 8 J. INT’L ECON. L. 17, 49 (2005).

⁶⁰ *See* DSU, *supra* note 9, art. 16(4); Yasuhei Taniguchi, *The WTO Dispute Settlement as Seen by a Proceduralist*, 42 CORNELL INT’L L.J. 1, 5 (2009) (explaining the “the famous ‘negative consensus rule’ embodied in articles 16.4 and 17.14 of the DSU”).

⁶¹ DSU, *supra* note 9, art. 8(10). Panelists serve in their individual capacities as trade experts, not as representatives of any country. *Id.* art. 8(9).

⁶² *Id.* art. 8(10).

⁶³ *See* Special Session of the Dispute Settlement Body, *Negotiations on the Dispute Settlement Understanding*, ¶ 4, TN/DS/W/17 (Oct. 9, 2002).

⁶⁴ Bown & Hoekman, *supra* note 20, at 876.

the effects of WTO-inconsistent measures can seriously undermine the strength of its case before the panel.⁶⁵ Indeed, pre-litigation research is an area in which non-governmental organizations and private industry groups can most assist developing nations by engaging in this type of critical pre-litigation preparation.⁶⁶ Similarly, technical economic consulting services are essential to buttress certain claims fully, particularly in trade remedy investigations regarding claims such as dumping or countervailing duties, in which the economic proof of injury to imports underlies the legal analysis.⁶⁷ Developing nations are less likely to either have qualified economists available internally or be able to afford to hire them.⁶⁸

Panels' lack of adherence to the timelines set forth in the DSU also harms developing nations severely. Delays, of course, frustrate everyone. However, in some cases, delays can be used as a tactical advantage. The United States has shown itself to be especially adept at using delays to its advantage.⁶⁹ Even when not deliberately pursued as a litigation strategy, delays can cause disproportionate harm to developing nations for two reasons. First, developing nations often rely on one or two industries for the bulk of their export income.⁷⁰ For example, in the *U.S.-Gambling* case, the Internet gambling industry in Antigua, which otherwise relied on tourism—much disrupted by recent hurricanes—as its other major source of income, was vital to the nation's economic survival.⁷¹ For the entire three-year duration of the case, Antigua had no access to the United States, the largest Internet gambling market in the world.⁷² To an economy highly dependent on one or two

⁶⁵ See *id.* at 883.

⁶⁶ See *id.* at 883, 887.

⁶⁷ *Id.* at 866, 876.

⁶⁸ See *id.* at 875–76 (pointing out that the lack of professional economists on the staff of the Advisory Centre on WTO Law is a serious limit on its ability to provide meaningful legal assistance to developing nations).

⁶⁹ See, e.g., Turab Hussain, *Victory in Principle, Pakistan's Dispute Settlement Case on Combed Cotton Yarn Exports to the United States*, WORLD TRADE ORG., http://www.wto.org/english/res_e/booksp_e/casestudies_e/case34_e.htm (last visited Feb 23, 2011) (discussing Panel Report, *United States—Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/R (May 31, 2001)).

⁷⁰ See, e.g., *id.* (“The importance of the textile sector, often referred to as the backbone of the Pakistan economy, cannot be overstated. It is the country's largest manufacturing sector with an 8.5% share in the nation's GDP. The sector's contribution to employment is 38% and it generates a phenomenal 60% of the total export earnings of Pakistan.”)

⁷¹ See Dispute Settlement Body, *Minutes of Meeting: Held in the Centre William Rappard on 24 June 2003*, ¶¶ 42–44, WT/DSB/M/151 (Aug. 12, 2003).

⁷² A 2005 statement by Christiansen Capital Advisors, which follows Internet gambling trends, valued the Internet gambling industry at \$5.5 billion and estimated that “of the 12 million people who gamble yearly on the Internet, some 7.5 million live in the United States.” See Garry Boulard, *Trade Rules Gamble with State*

industries, the delays in WTO dispute settlement can be economically crippling, as there are no temporary remedies under the WTO. Second, delays strain already thin resources dedicated to dispute settlement, making the costs of bringing a WTO case disproportionately high for a developing nation. While potential delays lurk in every stage of the process, panels should, at a minimum, strive to comply with the six-month deadline when an essential industry or small economy is involved.

C. *The Appeal*

The DSU creates a standing panel of nine eminent trade experts, sitting in rotations of three, determined by the working procedures of the Appellate Body, to hear appeals from panel decisions.⁷³ An appeal is limited to questions of law, as raised and developed by the panel.⁷⁴ However, as a practical matter, the Appellate Body has undertaken an active role and often extends its purview to legal issues or arguments not raised by the panel.⁷⁵ This is because there is no remand mechanism in the WTO.⁷⁶ Thus, the Appellate Body must fully resolve the dispute before it, which means it must fully complete the analysis in exercising its authority to uphold, reverse, or modify the panel decision.⁷⁷ The Appellate Body is also bound to issue its decisions within sixty days, but make take up to ninety days if it submits a request and receives an extension from the DSU.⁷⁸ Similar to its treatment of panel reports, the DSB automatically adopts and implements Appellate Body decisions unless there is a consensus to block the decision.⁷⁹

Laws, ST. LEGISLATURES, Oct.–Nov. 2005, at 19, 20 (focusing on Antigua’s perception that new U.S. laws regulating the cross-border Internet gambling industry were integral to its attempts to diversify its economy away from reliance on a struggling tourism sector).

⁷³ DSU, *supra* note 9, art. 17(1).

⁷⁴ *Id.* art. 17(6).

⁷⁵ See, e.g., Judith L. Goldstein & Richard H. Steinberg, *Negotiate or Litigate? Effects of WTO Judicial Delegation on U.S. Trade Politics*, 71 LAW & CONTEMP. PROBS. 257, 273–74 (2008) (citing fifty-one articles in U.S. and Canadian law journals that discuss expansive or “activist judicial lawmaking” by the WTO).

⁷⁶ Alan Yanovich & Tania Voon, *Completing the Analysis in WTO Appeals: The Practice and Its Limitations*, 9 INT’L J. ECON. L. 933, 937–38, 942 (2006) (citing frequent proposals by WTO members to introduce remand mechanism into WTO disputes).

⁷⁷ DSU, *supra* note 9, art. 17(13).

⁷⁸ *Id.* art. 17(5).

⁷⁹ *Id.* art. 17(14).

D. Implementation and Enforcement Mechanism

If a panel or Appellate Body report finds a measure to be inconsistent with WTO rules, the offending member must “bring the measure into conformity” with its WTO obligations.⁸⁰ Although a report may recommend ways to comply, a WTO member retains final say on the method.⁸¹ As discussed in greater detail in Part III.A, the preferred method of implementation is usually withdrawal of the measure. At this point, the DSB formally takes over the role of overseeing implementation.⁸² The DSB holds a meeting thirty days after adoption of the report, in which the losing party must indicate how it will implement the report within a reasonable time.⁸³ The reasonable time for implementation may be reached by mutual agreement or by arbitration, if the DSB approves this time period.⁸⁴ The DSB also undertakes surveillance of compliance both beginning with a compliance review six months after the reasonable period of time is set and continuing until the matter is resolved.⁸⁵

Sometimes the parties will not agree on whether the steps taken by the losing party constitute full compliance. In such cases, a panel may be constituted to adjudicate the question.⁸⁶ Generally, the compliance panel is the same as the original panel.⁸⁷ Once again, the panel’s decisions may be appealed to the Appellate Body.⁸⁸ Multiple rounds of compliance panels are possible.⁸⁹

If the offending party fails to bring a measure into conformity or implement the recommendations of the DSB, the injured party is allowed to seek additional remedies.⁹⁰ The remedies are, in order of preference: compensation; suspension of concessions of the same sector in the same agreement;

⁸⁰ *Id.* art. 19(1).

⁸¹ *See id.*

⁸² The DSB administers the entire dispute settlement process, establishing panels and adopting panel and Appellate Body reports. DSU, *supra* note 9, art. 2(1). It also monitors the implementation of rulings and may authorize the suspension of obligations under the relevant agreements. *See* WTO HANDBOOK, *supra* note 2, at 17.

⁸³ DSU, *supra* note 9, art. 21(3).

⁸⁴ *Id.* art. 21(3)(a)–(c).

⁸⁵ *Id.* art. 21(6).

⁸⁶ *Id.* art. 21(5).

⁸⁷ *Id.*

⁸⁸ *Id.* arts. 21(5), 17(1).

⁸⁹ *See, e.g.,* Appellate Body Report, *Canada—Measures Affecting the Importation of Milk and the Exportation of Dairy Products: Second Recourse to Article 21.5 of the DSU by New Zealand and the United States*, WT/DS103/AB/RW2 (Dec. 20, 2002).

⁹⁰ DSU, *supra* note 9, art. 22(3).

suspension of different sectors in the same agreement; and suspension under an entirely different agreement.⁹¹ The parties must first enter into negotiations to determine mutually acceptable compensation.⁹² If they are unable to agree within twenty days after the reasonable time period expires, the injured party is authorized to request permission from the DSB to suspend concessions or to impose countermeasures equal to the amount of injury suffered by the losing party.⁹³

The next Part discusses in detail each of the remedies and critiques their effectiveness for developing nations. Suffice it to point out here that the multi-stage implementation process creates opportunities of further delays that can severely disadvantage a developing nation party. For example, in the *U.S.-Gambling* case, the compliance proceedings were plagued by the same delays detailed above with respect to the panel proceedings, causing economic disadvantage to Antigua.⁹⁴ Three years after Antigua began the dispute with its original, spurned request for initial consultation, Antigua sought a compliance panel.⁹⁵ This began afresh the cycle of consultation,⁹⁶ panel, and possible appeal. On the question of whether the United States had complied with the WTO rulings, the United States and Antigua held nominal consultations that lasted for fifteen minutes.⁹⁷ Subsequently, Antigua requested that the DSB form a compliance panel.⁹⁸ Once again, the panel found in Antigua's favor and ruled that the United States had not complied with the WTO ruling, giving Antigua permission to unilaterally impose sanctions against the United States.⁹⁹ For a small economy like Antigua, the right to impose sanctions is theoretical at best. Meanwhile, from the initial consultations on March 13, 2003, to March 30, 2007, at which time the compliance panel gave Antigua permission to impose sanctions, Antigua had no access to the lucrative U.S.

⁹¹ *Id.* art. 22(2)–22(3)(c).

⁹² *Id.* art. 22(2).

⁹³ *Id.* art. 22(2)–22(4).

⁹⁴ See *supra* text accompanying notes 71–72.

⁹⁵ Agreement Between Antigua and Barbuda and the United States Regarding Procedures under Article 21 and 22 of the DSU, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, arts. 2, 7, WT/DS285/16 (May 24, 2006). Antigua began this dispute in 2003. See Dispute Settlement Body, *Minutes of Meeting: Held in the Centre William Rappard on 24 June 2003*, *supra* note 71.

⁹⁶ See Request for Consultations by Antigua and Barbuda, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/17 (June 12, 2006).

⁹⁷ See Ewart, *supra* note 23, at 56–57.

⁹⁸ Request for the Establishment of a Panel by Antigua and Barbuda, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/18 (July 7, 2006).

⁹⁹ See Panel Report, *United States—Measures Affecting the Cross Border Supply of Gambling and Betting Services*, ¶ 6.85, WT/DS285/RW (Mar. 30, 2007).

Internet gambling market, and Antigua's economy suffered significant revenue loss as a result.¹⁰⁰ During that time, the United States had taken no action to remedy the WTO violation.¹⁰¹ As Antigua pointed out, it was the first time in the history of the WTO that a country was called to justify itself before a compliance panel when it had done absolutely nothing to comply with a ruling.¹⁰²

III. EXISTING WTO REMEDIES

Current WTO remedies are, in order: cessation or withdrawal; voluntary compensation; DSB-imposed or non-voluntary suspension of concessions; and other obligations.¹⁰³ The ideal result in any WTO dispute is the cessation or withdrawal of the WTO-inconsistent measure.¹⁰⁴ If this occurs, no other remedies are available. If cessation or withdrawal does not occur, then the other remedies of compensation or concessions under the agreement may be exercised, but only after withdrawal fails to remedy the problem.¹⁰⁵ This Part examines each remedy with a focus on the ways in which each remedy is problematic for developing nations.

A. Cessation

Losers in WTO disputes have to bring the offending measure into compliance with WTO obligations within a reasonable period of time.¹⁰⁶ While the DSB, in adopting panel or appellate body reports, may recommend ways to accomplish this, sovereignty is preserved by vesting ultimate discretion with the member nation in selecting the means of implementation most consistent with its national law and processes.¹⁰⁷ Cessation or withdrawal of the WTO-

¹⁰⁰ *Id.*; see *supra* text accompanying notes 71–72.

¹⁰¹ Indeed, the only action undertaken by the United States could be said to have worsened the situation for Antigua. In December 2006, the United States enacted new legislation that criminalized the use of credit cards to pay for online betting transactions. Security and Accountability For Every Port Act, Pub. L. No. 109-347, §§ 801–02, 31 U.S.C. 5301 (2006) (exempting gambling activities permitted by the states on Native American Territory, as well as horse racing).

¹⁰² Dispute Settlement Body, *Minutes of Meeting—Held in the Centre William Rappard on 21 April 2006*, ¶ 38, WT/DSB/M/210 (May 30, 2006).

¹⁰³ DSU, *supra* note 9, art. 3(7).

¹⁰⁴ *Id.* (providing that “[i]n the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned”).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* arts. 19(1), 21(3).

¹⁰⁷ See *id.* arts. 19(1)–19(2), 22(9).

inconsistent measure is the favored solution.¹⁰⁸ However, it is also possible to amend, modify, or supplement the affected measure or law to bring it into compliance.¹⁰⁹

Favoring cessation as the preferred WTO remedy is consistent with general international law. The Draft Articles on State Responsibility (“DASR”) issued by the United Nations International Law Commission,¹¹⁰ which serve a similar function to the American Law Institute in the drafting of Restatements,¹¹¹ affirm that a state is required to cease its violation of its international obligations.¹¹² However, the DASR also recognize that a state may choose to comply in greater or lesser ways than cessation.¹¹³

Cessation, on its own, however, is unsatisfactory as a remedy. As previously noted, cessation, once implemented, forecloses the possibility of other remedies. That is problematic because cessation is a purely prospective remedy.¹¹⁴ It does not advance or serve any values of a remedies system other than prospective removal of a violation. To take a simple domestic law analogy, this would be like telling a convicted embezzler to stop embezzling in

¹⁰⁸ The WTO term for this is implementation. The preference for implementation is explicit in Article 22(1). “However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements.” *Id.* art. 22(1); *see also supra* text accompanying note 106.

¹⁰⁹ DSU, *supra* note 9, art. 17(13). The Appellate Body has the power to modify any panel decisions. *Id.*

¹¹⁰ Int’l Law Comm’n, *State Responsibility: Titles and Texts of the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the Drafting Committee on Second Reading*, art. 30, U.N. Doc. A/CN.4/L.602/Rev.1; GAOR, 53d Sess., (July 26, 2001) [hereinafter DASR]. *See generally* Rep. of the Int’l Law Comm’n, 53d Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, U.N. Doc. A/56/10; GAOR, 56th Sess., Supp. No. 10 (2001).

¹¹¹ *About ALI: Institute Projects*, A.L.I., <http://www.ali.org/index.cfm?fuseaction=about.instituteprojects> (last visited Feb. 23, 2011).

¹¹² DASR, *supra* note 110, art. 30. Both panel reports and arbitrators’ reports explicitly referenced the DASR, treating them as a reflection of customary international law. As such, they are relevant to WTO bodies as a supplementary means of interpretation of WTO law. *See* Decision of the Arbitrator, *United States—Tax Treatment for “Foreign Sales Corporations,”* ¶ 4.7, WT/DS108/Arb (Aug. 30, 2002); Panel Report, *United States—Tax Treatment for “Foreign Sales Corporations,”* ¶ 4.570, WT/DS108/R (Oct. 8, 1999).

¹¹³ *See* DASR, *supra* note 110, arts. 31, 55.

¹¹⁴ Some panels have tried to impose retroactive remedies, but they were unsuccessful. It is now established that cessation is a purely prospective remedy. *Cf.* Gavin Goh & Andreas R. Ziegler, *Retrospective Remedies in the WTO After Automotive Leather*, 6 J. INT’L ECON. L. 545, 548 (2003). *But see* Panel Report, *Australia—Subsidies Provided to Producers and Exporters of Automotive Leather*, WT/DS126/RW (Jan. 21, 2000) (holding that Article 19(1) of the DSU does not limit remedies under Article 4.7 of the Subsidies and Countervailing Measures (“SCM”) Agreement to purely prospective action). In that case, both the United States and Australia argued against the retrospective component of this decision, and some member states severely criticized the panel report. *See* Dispute Settlement Body, *Minutes of Meeting: Held in the Centre William Rappard on 11 February 2000*, 5–7, WT/DSB/M/75 (Mar. 7, 2000).

the future, without making restitution to the victims, paying a fine, serving a jail sentence, or even being removed from his or her job. One can easily see that such a remedy does not advance values of equity and justice,¹¹⁵ restitution, punishment, or deterrence. Similarly, from a quantitative point of view, cessation is less than proportional and less than equivalent to an objective measure of damages. Indeed, no calculation of damages plays a part. Thus, in the WTO context, the injured party receives no recompense for lost revenue, profits, or trade volume. The multilateral trade system, as a whole, is unchanged, other than a return to a pre-violation status quo and the setting of a legal precedent.¹¹⁶ Nor is the case likely to have great deterrent effect on others, as there are no punitive or compulsory elements to the remedy.¹¹⁷

The WTO justification for this approach is founded on laissez-faire principles—cessation has the smallest impact on the trading system. It does no more than restore the status quo ante. Any more than that would introduce a new element of imbalance into the trading system.

B. Compensation

The remedy of compensation in the WTO is not the payment of monetary damages, as the term would ordinarily imply. Rather, it is the granting of additional trade benefits—such as favorable tariff terms—to the injured party.¹¹⁸ For example, the offending nation might agree to extend zero or low tariffs to the imports of the aggrieved nation. Such low tariffs would lead to increased trade flows, which would provide a financial benefit or compensation to the injured party. Compensation is a voluntary arrangement, to which both parties agree under consultation.¹¹⁹ It is meant to be temporary, with the view of inducing the offending party to bring its measures and laws into compliance with WTO rules.¹²⁰

¹¹⁵ See Trachtman, *supra* note 11, at 132 (noting that cessation “is not necessarily associated with either justice or efficiency except under an assumption that WTO law is consistent with justice or efficiency”).

¹¹⁶ The WTO does not officially recognize precedent as such. However, GATT and WTO panels and the Appellate Body have developed a practice of deferring to prior decisions and using them as guidance. Palmetier & Mavroidis, *supra* note 10, at 400.

¹¹⁷ See Mavroidis, *supra* note 11, at 812.

¹¹⁸ DSU, *supra* note 9, art. 22(2)–22(3).

¹¹⁹ *Id.* art. 22(1).

¹²⁰ *Id.*

Compensation has been used only once since the creation of the WTO in 1995.¹²¹ Various explanations account for the infrequency of use. First, it is voluntary and must be negotiated.¹²² Agreement on the level and scope of compensation has proven difficult.¹²³ Second, it is unclear if the country offering compensatory concessions or favorable treatment would have to extend such benefits to other WTO systems on a most-favored-nation (“MFN”) basis, as required under Article 1 of the GATT.¹²⁴ The source of the uncertainty is the requirement that remedies have to be consistent with the covered agreement, which includes MFN obligations.¹²⁵ Nations are understandably hesitant to agree to compensation if it has to be extended to all other WTO members on an MFN basis because such a remedy would be completely disproportionate to the violation. This might explain why suspension of concessions is more common—it is authorized only for the injured party and not on a MFN basis.¹²⁶

Due to the uncertainties around compensation and the infrequency of its use, it is little more than a theoretical remedy at this point. There have been some proposals to improve and strengthen compensation as a remedy. For example, one scholar has proposed setting out or pre-negotiating the types of compensation available as a way to bypass the bilateral deadlock that often mars compensation negotiations.¹²⁷ Others have suggested expanding the compensation remedy to include retroactive and prospective fines or other monetary compensation, which would give it more teeth.¹²⁸ However, these proposals, while helpful, do not alter the underlying lack of incentive for developing nations to bring suits before the WTO.

¹²¹ William J. Davey, *Compliance Problems in WTO Dispute Settlement*, 42 CORNELL INT’L L.J. 119, 122 (2009); see, e.g., Mutually Acceptable Solution on Modalities for Implementation, *Japan—Taxes on Alcoholic Beverages*, WT/DS8/17/Add.1 (Jan. 12, 1998) (providing autonomous tariff reduction).

¹²² DSU, *supra* note 9, art. 22(1).

¹²³ Negotiated compensation talks usually fail. 1 THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS 1365–66 (Patrick F. Macrory et al. eds., 2005).

¹²⁴ GATT, *supra* note 28, art. 1. Most-favored-nation status is one of the most important underlying principles of the multilateral trading system, a principle of non-discrimination that requires a WTO member to give equal treatment in trade advantages to all other members of the WTO. See *id.*

¹²⁵ DSU, *supra* note 9, art. 3(5).

¹²⁶ *Id.* art. 22(6).

¹²⁷ See LAWRENCE, *supra* note 11, at 10–11 (proposing a system of pre-negotiated “contingent liberalization commitments”).

¹²⁸ See generally Marco Bronckers & Naboth van den Broek, *Financial Compensation in the WTO: Improving the Remedies of WTO Dispute Settlement*, 8 J. INT’L ECON. L. 101 (2005); Victor Mosoti, Comment, *In Our Own Image, Not Theirs: Damages as an Antidote to the Remedial Deficiencies in the WTO Dispute Settlement Process; A View from Sub-Saharan Africa*, 19 B.U. INT’L L.J. 231 (2001).

C. *Suspension of Concessions or Retaliation*

If the reasonable period of time for compliance has lapsed and the parties cannot agree on compensation, then the aggrieved party may seek authorization¹²⁹ from the DSB to suspend concessions—in other words, to temporarily revoke trade concessions granted to the offending party.¹³⁰ This type of retaliation must be specifically requested and can be used only by parties directly involved in the dispute as complainants and interested third parties.¹³¹ In other words, it is clear that it is not available on a MFN basis.

The level of suspension authorized by the DSB must be “equivalent” to the nullification or impairment (harm) suffered by the aggrieved party.¹³² The remedy is only prospective—it extends forward only for the period of time authorized by the DSB for the recouping of “equivalent” harm. It does not cover the period in which the offending measure was in place or even for the duration of the dispute.

Suspension of concessions or retaliation can take three forms, in a strict order of preference, as dictated by the DSU. Retaliation, also referred to as countermeasures, must take place in the same sector¹³³ in which the offending violation occurs.¹³⁴ Thus, if the underlying dispute is related to Country A’s discriminatory treatment of automobile parts from Country B, Country B may impose countermeasures on automobile parts imports of Country A in retaliation. Obviously, sometimes this is not feasible. Country A might not produce or export any auto parts. In such cases, it is possible to impose

¹²⁹ Retaliation is allowed only with prior DSB authorization. However, some members and trade experts have argued that Articles 8(2) and 8(3) of the Agreement on Safeguards provide an exception that allows the suspension of concessions immediately after the adoption of the panel or Appellate Body report without prior authorization. See WTO HANDBOOK, *supra* note 2, at 81 n.97.

¹³⁰ DSU, *supra* note 9, art. 22(2).

¹³¹ See *id.*

¹³² DSU, *supra* note 9, art. 22(4).

¹³³ There are three sectors recognized by the WTO, each corresponding to one of the three substantive annexes to the WTO Agreement. They are goods, services, and intellectual property. Each is governed, respectively, by the General Agreement on Trade and Tariffs (Annex 1A), General Agreement on Trade in Services (Annex 1B), and Trade Related Aspects of Intellectual Property (Annex 1C). DSU, *supra* note 9, art. 22(3)(f). Within these three major sectors, all trade in goods falls into one sector. *Id.* art. 22(3)(f)(i). Within the General Agreement on Trade in Services (“GATS”) and TRIPS agreements, sectors are further subdivided. For purposes of dispute settlement, “sector” in GATS and TRIPS refers to the secondary sectors recognized under these agreements. *Id.* art. 22(3)(f)(ii)–(iii). Thus, for example, the response to a violation in the “sector” of patents should be limited to patents. See also WTO HANDBOOK, *supra* note 2, at 82.

¹³⁴ DSU, *supra* note 9, art. 22(3)(a).

retaliation in a different sector covered by the same agreement.¹³⁵ The WTO recognizes three sectors: goods, services, and intellectual property.¹³⁶ In our example, Country B may choose to impose its countermeasures on the agricultural imports of Country A into Country B. As both automobile parts and agricultural products are goods covered by the same agreement—GATT—this would be the second best option.¹³⁷ The third option is cross-retaliation, or the imposition of countermeasures on a different sector covered by another agreement.¹³⁸ In our example above, it might entail a response by Country B against the intellectual property or services trade of Country A. This response is allowed only if the first two options are impracticable or ineffective in order to avoid trade-restricting spillover effects into other sectors of trade.¹³⁹

Even though cross-retaliation is a remedy of last resort, its availability is particularly important for small economies, which may not benefit from the other two types of countermeasures. A country that engages in a limited volume of trade, in only a few sectors, may not, as a practical matter, be able to make use of same-sector retaliation. For example, in Ecuador's case against the European Communities in *EC-Bananas III*,¹⁴⁰ the remedy of imposing countermeasures on imports of European bananas would have been illusory. Similarly, it was likely to do the Ecuadorian economy more harm than good to impose countermeasures on other imported European goods¹⁴¹ on which Ecuadorian industries and consumers depend. Doing so may have crippled segments of the Ecuadorian economy by depriving industry and consumers of

¹³⁵ *Id.* art. 22(3)(b).

¹³⁶ *Id.* art. 22(3)(f).

¹³⁷ See DSU, *supra* note 9, art. 22(3)(b). In a TRIPS dispute, this would entail the imposition of countermeasures on copyrights or trademarks in an underlying patent dispute.

¹³⁸ *Id.* art. 22(3)(c).

¹³⁹ *Id.*

¹⁴⁰ Decision by the Arbitrators, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/ARB/ECU (Mar. 24, 2000) [hereinafter Ecuador—Decision of Arbitrators]. Ecuador's level of nullification or impairment attributed to the offending EC regime was calculated at \$201.6 million per year. *Id.* ¶ 170. The arbitrators, in an Article 22(6) decision, authorized Ecuador to suspend concessions under both GATS and TRIPS for that amount. *Id.* ¶ 173(a). Ecuador subsequently faced significant problems in utilizing rights to retaliate against the European Communities. For example, the arbitrators specifically stated that they could not determine equivalence beyond trade in goods and services under Articles 22(6) and 22(7). *Id.* ¶ 159. Therefore, the arbitrators could not estimate the magnitude of non-compliance with TRIPS. *Id.* Furthermore, the arbitrators did not consider lost profits as part of their calculation, which further limited Ecuador's access to proportionate redress. *Id.* ¶ 160 n.52. "It is rumored that Ecuador was granted certain non-WTO benefits in order to settle this case informally." See Trachtman, *supra* note 11, at 139.

¹⁴¹ Suspension of concessions in such a case would likely lead to a decrease in supply or an increase in prices of the affected goods.

critical goods and materials. As a matter of necessity, Ecuador was authorized to suspend concessions on European trade of services and intellectual property under GATS and TRIPS, respectively.¹⁴²

There is another reason why cross-retaliation is an important remedy for smaller and developing nations. Even when it is possible to impose same sector countermeasures, doing so may not be effective due to asymmetries in trade flows. Developing nations may not trade in imported goods in sufficient quantities for a suspension of concessions in those areas to be felt by exporters in the offending nation, especially if the opposing party is a developed nation. For example, it would not make sense for Ecuador to impose trade sanctions on European fruit imports into Ecuador. Furthermore, an authorization to Ecuador to impose sanctions on other common European goods—such as electronics, cosmetic products, and wines—is unlikely to be felt by Europe due to the low volume of Ecuadorian trade in such products. In such a situation, the ultimate goal of retaliation, to compel compliance in the form of cessation, would not be advanced. When trade volumes in the affected sector are negligible, the impact of retaliation is likewise negligible. Thus, cross-retaliation may be the only means to advance compliance.

Retaliation is very rarely used. In the thirteen years since the formation of WTO, and in the course of over four hundred cases, countermeasures have been authorized in only eight cases.¹⁴³ Of these, very few have involved developing nations.¹⁴⁴ Because resort to countermeasures is quite rare, it serves primarily a threatening function. The possibility of retaliation is used as a bargaining chip to force implementation. Of course, for it to be useful as a threat, the level of retaliation needs to be painful enough to have persuasive power.

Notwithstanding the theoretical bases for retaliation, especially for developing nations, it is also imperfect as a remedy. Fundamentally, retaliation is at odds with the WTO's underlying trade liberalization philosophy. Retaliation is no more than the sanctioned imposition of a new trade barrier in

¹⁴² Ecuador—Decision of Arbitrators, *supra* note 140, ¶ 173.

¹⁴³ DANIEL C.K. CHOW & THOMAS SCHOENBAUM, *INTERNATIONAL TRADE LAW: PROBLEMS, CASES, AND MATERIALS* 58 (2008).

¹⁴⁴ *See, e.g.*, Decision by the Arbitrator, *United States—Subsidies on Upland Cotton*, WT/DS267/ARB1 (Aug. 31, 2009). *See generally* Kyle Bagwell, Petros C. Mavroidis & Robert W. Staiger, *Auctioning Countermeasures in the WTO*, 73 J. INT'L ECON. 309 (2007).

response to an unauthorized trade barrier.¹⁴⁵ The remedy is as trade-restricting as the violation. Moreover, retaliation comes at a cost not only to the trading system as a whole, but also to the nation imposing the measure as well as the one suffering it. Both bear economic losses, perhaps unevenly. Lastly, it is unclear if retaliation is compatible with the goal of promoting compliance in the form of cessation or other implementation of DSB recommendations. On one hand, it is clear that such implementation is the ultimate goal because the DSB will monitor retaliation until it is achieved.¹⁴⁶ On the other, retaliation can also be viewed as running counter to the goal because the offending member can simply choose to “pay the price” and accept retaliation.¹⁴⁷ The potential results of retaliation can thus be twofold. First, implementation and a restoration of the status quo prior to the violation might not occur. Second, retaliation introduces a new balance of trade, at lower and less liberal levels. For these reasons, retaliation is perhaps the most problematic of the WTO remedies.¹⁴⁸

IV. NEW PROPOSAL: CLASS ACTION LAWSUITS

The greatest shortcoming of the existing proposals for reform is that they all require an amendment to the WTO’s Dispute Settlement Understanding. As any amendment requires a two-thirds majority vote of all 153 WTO members, the process seems unlikely in light of Doha Round tensions and deadlocks.¹⁴⁹ Even if it were likely, it would not occur very quickly as each member would need to approve the amendment per its own national processes.¹⁵⁰ Meanwhile, disenchantment with the WTO dispute settlement system on the part of its developing nation members will continue to grow, deepening existing rifts in Doha. Therefore, for practical reasons, this Article eschews proposals that require amendments to the DSU.

¹⁴⁵ *The Process—Stages in a Typical WTO Dispute Settlement Case*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c6s10p1_e.htm (last visited Mar. 13, 2011).

¹⁴⁶ DSU, *supra* note 9, art. 22(8).

¹⁴⁷ John H. Jackson, *International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to “Buy Out”?*, 98 AM. J. INT’L L. 109, 121–22 (2004) (arguing that retaliation does little to advance rebalancing in trade relations).

¹⁴⁸ MITSUO MATSUSHITA ET AL., *THE WORLD TRADE ORGANIZATION: LAW, PRACTICE AND POLICY* 94 (2003).

¹⁴⁹ See Marrakesh Agreement Establishing the World Trade Organization art. 10(3), Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement].

¹⁵⁰ See *THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS*, *supra* note 123, at 85.

This Article suggests the use of a litigation strategy for developing nations that relies on a quasi “class action” model. Developing nations would be allowed freer rein to exercise existing third-party rights in a manner that allows them to pool their complaints in cases against developed nations. The primary mechanism for this exercise of third-party rights is the regular joinder or multiple complainants provision (Article 9), which is already part of the DSU.¹⁵¹ However, the strategy would be strengthened by procedural changes to the right to join as a third party under Article 10,¹⁵² such as making the right automatic, upon notification to the DSB, for least-developed countries.¹⁵³

WTO members could implement the strategy unilaterally, although its effectiveness would be enhanced by minor procedural modifications. Only minimal changes would be necessary. The first would be simply more frequent invocation of the existing joinder and third-party provisions of the DSU. That too could be done unilaterally without the need for an amendment to the DSU, pursuant to the proposed litigation strategy. The proposal envisages groups of developing nations, led by a larger or middle-income developing nation, such as Mexico, India, China, or Brazil, banding together as complainants in order to aggregate their WTO grievances and more effectively exercise remedies. The most important change would be the ability to trade countermeasures within the class.

A. *The Strategy Is Supported by WTO Text*

As we have seen, the DSU contemplates the consolidation of cases to be adjudicated by one panel.¹⁵⁴ WTO practice also confirms that the mechanism is often invoked by WTO members across a variety of substantive areas.¹⁵⁵ What about the ability to trade countermeasures among the class? As this is critical to the strategy’s success, it is indispensable to find some textual basis for the proposition. Here, the vagueness of the remedies provisions of the DSU is beneficial.

¹⁵¹ DSU, *supra* note 9, art. 9. Article 9 allows the consolidation of multiple cases concerning the same matter into one complainant to be handled by a single panel. *Id.* art. 9(1). Each complainant has the same rights under the DSU as if the complainant had been filed separately. “The single panel shall organize its examination and present its finding to the DSB in such a manner that the rights which the parties to the dispute would have enjoyed had separate panels examined the complaints are in no way impaired.” *Id.* art. 9(2).

¹⁵² *See id.* art. 10.

¹⁵³ This and other procedural improvements are elaborated in greater detail in Part IV.

¹⁵⁴ DSU, *supra* note 9, art. 9.

¹⁵⁵ *See* THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS, *supra* note 123, at 1203 n.17.

The only guidance that the DSU provides with respect to the calculation of remedies is Article 22(4), which provides that “[t]he level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment.”¹⁵⁶ So long as the total amount of retaliation does not exceed the level of equivalence, there is no direct conflict with the DSU. The DSU is silent on the allocation of countermeasures or retaliation among multiple complainants.¹⁵⁷ The only other relevant provision in the DSU is Article 22(6), which specifies that countermeasures are specific to the nation upon which they are imposed—that is, they are not applied on a MFN basis.¹⁵⁸ Again, the strategy proposed in this Article does not conflict with the DSU because the countermeasures would be imposed only on the offending party in the case.¹⁵⁹ Given the scant guidance from the DSU, there is a lot of flexibility in the exercise of remedies, so long as there is no conflict with other WTO agreements.

It is also possible to give positive support for the strategy in the form of guidelines, decisions, and judicial interpretations that give more content to the vague remedies provisions in the DSU. WTO law has evolved from GATT practice, and the DSU requires that WTO practice align with prior GATT practice.¹⁶⁰ GATT practice incorporates many interpretations, guidelines, and procedures that were not based on GATT text. Many of these were preserved as WTO practice. Thus, there is a long tradition of acts taken as interpretations or procedures that, over time, were hallowed into custom and accepted

¹⁵⁶ DSU, *supra* note 9, art. 22(4). The only exception to this statement, which is not relevant to the subject of this Article, may be export subsidies. Some arbitral panels have found that language in the SCM Agreement provides a special regime for remedies in response to export subsidies. *See, e.g.*, Decision by the Arbitrators, *Brazil—Export Financing Programme for Aircraft*, ¶¶ 3.54–3.60, WT/DS46/ARB (Aug. 28, 2000); Decision of the Arbitrator, *United States—Tax Treatment for “Foreign Sales Corporations,”* WT/DS108/ARB (Aug. 30, 2002).

¹⁵⁷ There is a potential conflict with the requirement of Article 9, which accords complainants all of the same rights they would have in an individual complainant. However, this conflict can be resolved in two ways. First, one can argue that the rights themselves are unaffected—only the exercise of those rights is affected. The right to grant the exercise of countermeasures to a co-complainant is not so different from the situation in which the exercise of the right would be meaningless anyway, as in the case of a small developing nation. Second, one can rely on the application of the doctrine of *pare in parem*. *See, e.g.*, ROSANNE VAN ALEBEEK, *THE IMMUNITY OF STATES AND THEIR OFFICIALS IN INTERNATIONAL CRIMINAL LAW AND INTERNATIONAL HUMAN RIGHTS LAW* 181 (2008). This principle is enshrined in general international law in the principle of sovereign immunity. *See* JAN WILLISCH, *STATE RESPONSIBILITY FOR TECHNICAL DAMAGE IN INTERNATIONAL LAW* 19 (1987).

¹⁵⁸ DSU, *supra* note 9, art. 22(6).

¹⁵⁹ In this respect, the proposed strategy is different from the auctioning proposal advanced by Bagwell, Mavroidis, and Staiger. *See generally* Bagwell, Mavroidis & Staiger, *supra* note 144.

¹⁶⁰ DSU, *supra* note 9, art. 3(1).

practice. As a practical matter, many of the customs evolved from the practices of developed nations, which have always been more active in shaping the WTO system.¹⁶¹ Now that so many developing nations are WTO members,¹⁶² the time is ripe for them to contribute to the tradition.

Additionally, there is support for clarifying existing WTO text with guidelines, decisions, or interpretations without amending the text. For example, the European Communities have proposed a number of ways to improve the functioning of existing special and differential treatment for developing nations through guidelines, decisions, or interpretations.¹⁶³ The common denominator of the EU proposals is that they eschew amendments in favor of clarifying, softer approaches.

B. *The Strategy in Action*

Let us formulate a hypothetical to see how the strategy would actually work. Assume that a number of corn-producing and exporting nations, including Brazil, contemplate a challenge to U.S. corn subsidies as inconsistent with both the Agreement on Agriculture and the Agreement on Subsidies and Countervailing Measures.¹⁶⁴ Among this group are a number of smaller nations, including active corn exporters like Argentina, South Africa, Ukraine, and Romania,¹⁶⁵ which are unlikely to pursue complaints independently. They may be discouraged by the length and cost of WTO litigation, as well as by their lack of prior experience and legal expertise in the area. They may not

¹⁶¹ See Joseph E. Stiglitz, *Two Principles for the Next Round or, How to Bring Developing Countries in from the Cold*, in *DEVELOPING COUNTRIES AND THE WTO: A PRO-ACTIVE AGENDA 7–9* (Bernard Hoekman & Will Martin eds., 2001) (noting that rich countries sometimes play down the political imbalances within developing countries); see also Wesley A. Cann, Jr., *Creating Standards and Accountability for the Use of the WTO Security Exception: Reducing the Role of Power-Based Relations and Establishing a New Balance Between Sovereignty and Multilateralism*, 26 *YALE J. INT'L L.* 413, 419–20 (2001) (recognizing the special needs of developing countries in the WTO agreements and arguing that the absence of standards, which is perpetuated by a minority of powerful countries, poses a threat to the security of the entire international trade system).

¹⁶² Developing countries comprise the majority of WTO members. *Understanding the WTO: Developing Countries—Overview*, *supra* note 6.

¹⁶³ *The WTO Work Programme on Special and Differential Treatment—Some EU Ideas for the Way Ahead*, at 5–7 [hereinafter *EU Proposals*], available at http://trade.ec.europa.eu/doclib/docs/2003/june/tradoc_111244.pdf (last visited Aug. 15, 2010).

¹⁶⁴ This Author has previously argued that in the aftermath of Brazil's victory in the *U.S.—Upland Cotton* case, the lack of meaningful reforms in the 2007 Farm Bill, and the current Doha deadlock, such a case is extremely likely. See Phoenix X.F. Cai, *Think Big and Ignore the Law: U.S. Corn and Ethanol Subsidies and WTO Law*, 40 *GEO. J. INT'L L.* 865, 866 (2009).

¹⁶⁵ *Briefing Rooms—Corn: Trade*, U.S. DEP'T AGRIC., <http://www.ers.usda.gov/Briefing/corn/trade.htm> (last visited Aug. 15, 2010).

engage in a sufficient volume of trade to justify the expense and time. They may also fear the possibility of unilateral retaliation by the United States, either through a decrease in development or military aid or by revoking access to the Generalized System of Preferences, which grants them preferential trade terms as developing nations.¹⁶⁶ Lastly, the lack of meaningful remedies may be the ultimate deterrent. Any threat of retaliation by them against a giant like the United States would sound hollow. As small players in the world economy, they will not be able to inflict enough pain through retaliation to force compliance with WTO recommendations should they prevail.¹⁶⁷

In such a case, collective action is necessary. Ukraine and Romania are not likely to file a complaint individually. In fact, even if they were to act together, their combined market power would not be sufficient against the United States to amount to a meaningful threat of retaliation. They also do not conduct enough trade volume with the United States,¹⁶⁸ across all sectors of goods, services, and intellectual property, to be able to exert the level of pressure sufficient to force the powerful U.S. corn and ethanol industries to urge compliance by withdrawal of the offending subsidies.

In contrast, Brazil may be able to exert enough pressure on the United States. As the world's eighth-largest economy,¹⁶⁹ a close trading partner of the United States, and a seasoned player in WTO dispute settlement,¹⁷⁰ Brazil's situation is markedly different.

¹⁶⁶ See Bown & Hoekman, *supra* note 20, at 863.

¹⁶⁷ Bown and Hoekman explain this well in economic terms:

[O]n the import side, potential developing country complainants are typically small consumers that are unable to affect world prices. Under the current 'retaliation-as-compensation' approach, this implies that they lack the capacity to impose the large political-economic welfare losses on potential respondent countries that would generate the internal political pressures in those countries that may be a necessary element to induce compliance with adverse DSU rulings.

Id.

¹⁶⁸ See *Foreign Trade Statistics—Trade in Goods (Imports, Exports, and Trade Balance) with Romania*, U.S. CENSUS BUREAU, <http://www.census.gov/foreign-trade/balance/c4850.htm> (last visited Feb. 23, 2011); *Foreign Trade Statistics—Trade in Goods (Imports, Exports, and Trade Balance) with Ukraine*, U.S. CENSUS BUREAU, <http://www.census.gov/foreign-trade/balance/c4623.html> (last visited Feb. 23, 2011).

¹⁶⁹ Economy size is here measured by gross domestic product. *The World Factbook*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2001rank.html?countryName=Brazil&countryCode=br®ionCode=sa&rank=10#br> (last visited Aug. 18, 2010).

¹⁷⁰ Brazil has been relatively active in dispute settlement. As a complainant, it has brought cases against the United States, the EU, Canada, the Netherlands, Argentina, Peru, and Turkey. It has brought twenty-five cases as a complainant and has been involved in fourteen cases as a respondent. *Disputes by Country/Territory*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.

V. CRITERIA FOR EVALUATING PROPOSED CLASS ACTION STRATEGY

There are a number of ways to evaluate the merits and drawbacks of this proposed class action litigation strategy. This Part presents the major evaluative criteria in six categories and offers an assessment of how the proposal fares in each criterion. First, how workable is the strategy as a practical matter and how likely is it to be adopted by developing nations? Related to this point, one must consider the obstacles to adoption developing nations face. Second, does the proposal contribute to the functioning of the WTO dispute settlement system as whole? Third, does the proposal advance or impede the multilateral trade negotiation process? Are there political costs to the strategy that might play out in the Doha Round and other negotiation processes? Related to this point, what are the challenges governments will face in implementing and overseeing this strategy in terms of loss of autonomy, settlement possibilities, and conflicts of interests? Fifth, what are the legal obstacles to implementation, both in terms of WTO law and domestic legal processes? Sixth, what are the broader implications of the proposal for public-private cooperation, including the participation of civil society actors in trade policy? In summary, the evaluative criteria are: (1) practicability; (2) systemic contribution; (3) impact on negotiations or the political implications of the proposal; (4) governmental coordination difficulties; (5) legal obstacles; and (6) public-private interaction.

A. *Practicability*

1. *Benefits*

The first criterion to evaluate is how practicable the proposed litigation strategy is in light of a number of factors. This Subpart begins by contrasting the reasons for the adoption of the strategy with the reasons against adoption. It then considers the major practical impediments against implementation of the strategy.

The primary reasons for developing nations to embrace collective litigation are strategic, political, and systemic. Strategically, class actions enhance the likelihood of achieving a positive outcome. Recall that the ultimate goal of dispute settlement in the WTO is to compel violators to prospectively withdraw offending measures, thereby restoring the status quo prior to

htm (last visited Aug. 18, 2010); Gregory Shaffer, Michelle Ratton Sanchez & Barbara Rosenberg, *The Trials of Winning at the WTO: What Lies Behind Brazil's Success*, 41 CORNELL INT'L L.J. 383, 464 (2008).

litigation. Collective action enhances the likelihood of this type of compliance insofar as the aggregated complainants have a larger market power together, and can therefore assert greater influence to compel compliance with panel decisions. A violator is much more likely to either settle a case or comply in a timely manner with an adverse judgment if the threat of retaliation is meaningful—in other words, if it is economically significant. While it may be impossible for many developing nations, acting alone, to make an economically credible threat of retaliation, it may be possible for a group of them to do so collectively. Even if the collective threat of retaliation is not overwhelming, in economic terms, a collective threat would still carry greater weight in terms of the reputational stigma associated with “naming and blaming”¹⁷¹ associated with the complaint.

A second reason that developing nations should be highly interested in adopting a class action strategy is that it would better enable them to bring suits that advance their own agenda and interests. This can occur in one of two ways. The most direct is that bringing complaints before the WTO enables the redress of harms that the complainant cares about. Even though most WTO cases are brought for economic reasons, one should remember that WTO agreements provide opportunities to address political or social harms as well. Measures to ensure currency stabilization,¹⁷² safeguards against import surges,¹⁷³ and import restrictions for health reasons¹⁷⁴ are good examples. One plausible explanation for the prevalence of cases dealing primarily with economic harms may be that developing nations as a whole are less active in dispute settlement.¹⁷⁵ As developing nations become more engaged in dispute settlement, one can expect to see more cases dealing with political and social harms, particularly as they affect developing markets. Similarly, the fact that certain substantive WTO agreements are invoked more frequently than others in dispute settlement reflects the relative quiescence of developing nations. GATT 1947, the original agreement dealing with trade in goods that was incorporated into the new WTO, dominates as the most frequently invoked,

¹⁷¹ See William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming* . . . , 15 *LAW & SOC'Y REV.* 631, 631 (1980).

¹⁷² See GATT, *supra* note 28, art. 15.

¹⁷³ See *id.* art. 19; Marrakesh Agreement, *supra* note 149, Annex 1A. See generally YONG-SHIK LEE, *SAFEGUARD MEASURES IN WORLD TRADE: THE LEGAL ANALYSIS* 5 (2d ed. 2005).

¹⁷⁴ See GATT, *supra* note 28, art. 20(b). See generally Katie A. Lane, Comment, *Protectionism or Environmental Activism? The WTO as a Means of Reconciling the Conflict Between Global Free Trade and the Environment*, 32 *U. MIAMI INTER-AM. L. REV.* 103, 109 (2001).

¹⁷⁵ See Davey, *supra* note 59.

accounting for 36% of all cases from 1995 to 2006.¹⁷⁶ Within GATT 1947 itself, the provisions most commonly invoked deal with basic non-discrimination principles (29.2% of all GATT cases during the same period),¹⁷⁷ quantitative restrictions (12.1%),¹⁷⁸ and complaints about the impositions of duties (10.3%).¹⁷⁹ After GATT 1947, the next most often-invoked agreements—all of three of them annexes to the GATT—account for only a total of about a quarter of invocations: the Agreement on Implementation of Art. VI of GATT 1994 (antidumping) (9.5%),¹⁸⁰ the Agreement on Subsidies and Countervailing Measures (9.3%),¹⁸¹ and the Agreement on Agriculture (7.5%).¹⁸² The other agreements and annexes that one would expect to be of great interest to developing nations, such as the Agreement on Textiles and Clothing (2.1%),¹⁸³ the Agreement on Safeguards (4.5%),¹⁸⁴ and the Agreement on the Application of Sanitary and Phytosanitary Measures (4%),¹⁸⁵ constitute a de minimis percentage of all cases. The fact that the Agreement on Textiles and Clothing—an agreement relevant to many developing nations—has been invoked in only 2.1% of all cases brought in the first decade of the WTO is highly suggestive of the types of cases that might be “missing” due to the current passive role developing nations play in dispute settlement.

In addition to vindicating the interests of more developing nations directly through litigation, a class action strategy may also advance their interests in negotiations conducted in the shadow of litigation. Most WTO complaints are settled.¹⁸⁶ Class action suits can strengthen a developing nation’s settlement position in three ways. First, power in numbers minimizes the risk or perceived risk of extrajudicial threats of retaliation—such as suspension of foreign aid, military aid or even food aid—by more politically powerful nations.¹⁸⁷ Second,

¹⁷⁶ Henrik Horn & Petros C. Mavroidis, *The WTO Dispute Settlement System 1995–2006: Some Descriptive Statistics* 12–13 (Research Inst. of Indus. Econ., Working Paper No. 740, 2008), available at <http://www.ifn.se/Wfiles/Wp/wp740.pdf>.

¹⁷⁷ *Id.* at 14.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 12.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.* at 13.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *See, e.g.*, Shaffer et al., *supra* note 170, at 464.

¹⁸⁷ *Id.* at 411 (arguing that developing nations face such political constraints in initiating a WTO complaint). *But see generally* Andrew Guzman & Beth Simmons, *Power Plays and Capacity Constraints: The*

the reputation harms of non-compliance or foot-dragging in compliance increases with the number of complainants. Third, the ability of a developing nation to succeed in dispute settlement strengthens its hand in future cases and in political negotiations.

2. *Practical Challenges of the Proposal*

A WTO member may raise a number of objections to adopting a class action strategy. Of these possible objections, this Subpart addresses the threshold questions of practicability. Broadly, practicability objections may be divided into four categories: (1) disincentives to act as lead plaintiff; (2) class action coordination challenges; (3) potential lack of alignment regarding outcomes; and (4) problems of information sharing, including confidentiality and attorney-client privilege.

a. *Burdens on the Lead Complainant*

The lead complainant or plaintiff in a WTO class action lawsuit must shoulder many burdens. The lead plaintiff must spearhead all aspects of the complicated and lengthy dispute settlement procedure, a process that requires difficult political and legal decisions. The lead plaintiff needs to coordinate with private outside counsel, now used in virtually all WTO cases,¹⁸⁸ even if the lead plaintiff member has sophisticated and experienced internal legal counsel, which most developing nations lack. Overseeing the class and coordinating class members' legal positions also requires considerable effort. It can be difficult to comply with the WTO's stringent procedural requirements, particularly its time-frames for legal submissions and responses to panel questions and requests.¹⁸⁹ Given the formidable amount of resources and time commitment required to mount a successful class action, it is not unreasonable to ask whether any developing nation would step up to the plate to take on the role of lead plaintiff.

Selection of Defendants in WTO Disputes, 34 J. LEGAL STUD. 557 (2005) (arguing that market capacity is more relevant to developing nations than power politics in the selection of defendants because those developing nations tend to bring complaints against those WTO members who represent their largest markets).

¹⁸⁸ See Roderick Abbott, *Are Developing Countries Deterred from Using the WTO Dispute Settlement System?* 15 (ECIPE, Working Paper No. 01, 2007), available at <http://www.ecipe.org/publications/ecipe-working-papers/are-developing-countries-deterred-from-using-the-wto-dispute-settlement-system/PDF> ("What has become clear is that assistance from outside lawyers in the preparation of cases, and in drawing up legal arguments, has become the norm . . .").

¹⁸⁹ See Shaffer et al., *supra* note 170, at 409 (arguing that government representatives and private attorneys particularly emphasize the problem of complying with dispute settlement deadlines).

While the burdens are not negligible, and are indeed daunting, they need to be balanced against the benefits. No developing nations should undertake the role of lead complainant out of pure altruism. Indeed, no developing nation could afford to act on altruism alone. The decision must make legal, economic, and political sense. Legally, a developing nation must be convinced that being part of a class increases its chances of success. This fact could be true either because it may be easier to demonstrate economic, material injury in the aggregate, or because information-sharing among class members strengthens the individual as well as collective case. Since so many WTO complaints require sophisticated econometric data, it is not unusual to engage outside economic consulting firms to analyze such data.¹⁹⁰ The benefits of economies of scale accrue in commissioning such economic analysis *en masse*.¹⁹¹ Cost savings of this type may justify the burdens of class action litigation. The ability to share the cost of outside legal counsel, usually paid at high U.S. or European billing rates,¹⁹² may also provide an economic incentive for the strategy. Politically, the decision to join or spearhead a class action will most likely be informed by the likelihood of success, the ability of a developing nation to initiate a case on its own, and the perceived risk of domestic or foreign opposition to the case, including the possibility of extralegal retaliation by the defendant. In summary, the decision to lead a class action lawsuit requires a careful balancing of delicate and complex considerations. It will not make sense to go forward in all cases. However, in some cases, the legal, economic, or political gains will outweigh the potential drawbacks.

b. Coordination Challenges

Once the decision to proceed with the class action occurs, other challenges arise. Coordinating decision-making among class members will not be easy. In addition to the logistical difficulties of complying with WTO dispute settlement timetables, the lead plaintiff must secure agreement regarding tricky strategic questions. Internal disagreements may arise among the class over litigation strategy, such as which claims to advance. Many WTO disputes present alternative legal theories.¹⁹³ It is not uncommon to base a violation

¹⁹⁰ See *id.* at 461 (describing how Brazil hired the economic consulting firm DATAGRO to provide sugar and ethanol market analysis in the *EC-Sugar* case).

¹⁹¹ See *id.* at 410–11.

¹⁹² See *id.* at 461.

¹⁹³ See, e.g., Request for Consultations by Indonesia, *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/1 (Apr. 14, 2010) (making claims under GATT, Sanitary and Phytosanitary Measures Agreement, and Technical Barriers to Trade Agreement); Request for Consultations

claim on general non-discrimination principles as well as specific provisions of the WTO agreements. For example, alleging violations of specific provisions of GATT, one might challenge a tariff structure on the grounds that it favors domestic producers (national treatment),¹⁹⁴ discriminates among foreign producers (MFN),¹⁹⁵ constitutes an unlawful imposition of duty (Article II),¹⁹⁶ or functions as a prohibited quantitative restriction (Article XI).¹⁹⁷ Each claim requires a different legal theory and factual support. There may be disagreements among the class over which claim or claims to advance. Disagreement may be based on differing, good faith assessments of the merits of each claim, but it could also be motivated by extralegal concerns like a country's broader negotiation strategy or political agenda. For example, whether or not a country is engaged in negotiations on regional or bilateral free trade agreements with a defendant may impact that country's choice of claims. It may be politically untenable to negotiate for lower tariffs on the one hand while claiming discriminatory application of tariffs on the other hand.

The potential for internal disagreements over allocation of remedies is also worrisome. One of the primary benefits of the strategy—the enhanced ability to secure compliance with panel rulings—would be severely compromised if the class were unable to agree on how to aggregate retaliation. A lack of

by the European Communities, *India—Certain Taxes and Other Measures on Imported Wines and Spirits*, WT/DS380/1 (Feb. 24, 2010) (making claims under GATT and Subsidies and Countervailing Measures Agreement).

¹⁹⁴ The national treatment clause in Article III of the GATT imposes the principle of nondiscrimination between domestically produced goods and similar goods produced abroad and imported. GATT, *supra* note 28, art. III. The clause prevents government practices that impose higher tariffs or restrict market access options for imported goods. *Id.* Several panels have explored this area of the GATT. In *United States—Section 337 of the Tariff Act of 1930*, the panel clarified two features of Article III(4): (1) that the article does not differentiate between substantive of procedural internal regulations; and (2) that the burden is on the contracting party imposing the different treatment to show that its treatment is not less favorable. Panel Report, *United States—Section 337 of the Tariff Act of 1930*, ¶¶ 5.10–5.11, L/6439 (Jan. 16, 1989). To illustrate these features, in *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, the Korean government required that stores separate domestic and imported beef by selling it in either different sections or in different stores. Panel Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 593, WT/DS161/R, WT/DS169/R (July 31, 2000). In this case, the different treatment would have created greater costs for imported beef because of the separate facilities—making the treatment less favorable. It should be noted that Article III only protects against government-imposed, less favorable treatment.

¹⁹⁵ At its most basic level, most-favored-nation treatment means non-discrimination between countries. See generally Martin Domke & John N. Hazard, *State Trading and the Most-Favored-Nation Clause*, 52 AM. J. INT'L L. 55 (1958). See also *Top 10 Reasons to Oppose the World Trade Organization? Criticism, Yes . . . Misinformation, No!*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/minist_e/min99_e/english/misinf_e/07ineq_e.htm (last visited Mar. 15, 2010).

¹⁹⁶ See GATT, *supra* note 28, art. II.

¹⁹⁷ *Id.* art. XI.

cohesion at this stage would undermine the effectiveness of the threat. Because retaliation is rarely implemented,¹⁹⁸ it is paramount that the class present a unified front on the possibility of collective retaliation to pressure defendants to comply with panel rulings. Therefore, the mechanics of implementing retaliation are less important than having agreement on what implementation might look like. The point is to present a unified front and a credible threat so as to have sufficient deterrent effect to enhance the chances of prompt compliance with WTO decisions.

It will be essential to clearly outline the contours of a retaliation strategy early on in the litigation process. Class members should formulate and agree upon a plan for collective retaliation early on in the litigation, ideally as early as the request for consultations stage. At the latest, a plan should be in place upon the establishment of a panel. In many cases, the lead plaintiff will be the obvious choice to impose retaliation because the lead plaintiff is generally the party with the greatest market power. However, it may not always be clear which country has the greatest clout. For example, identifying the party to exercise retaliation in a class action involving Argentina, Indonesia, and Thailand might not be so straightforward as one involving the same parties plus Brazil. In close cases, class members should engage a mediator to finalize a retaliation plan prior to the establishment of a panel. The plan ought to be part of the submissions to the compliance panel¹⁹⁹ and subsequent changes to the plan should require the approval of the compliance panel. These precautions are necessary to ensure that the threat of retaliation remains effective.

c. Lack of Commonality

Sufficient commonality of fact and law is an essential prerequisite for a class action. Some WTO causes of action do not lend themselves well to a collective litigation. For example, antidumping is too factually specific, and too tied to complicated calculations of material injury to a particular industry—dependent on unique variables like domestic prices—as to be generalizable. Antidumping currently comprises about 9.5% of all WTO disputes.²⁰⁰ However, while antidumping is significant as a percentage of all WTO cases, it is not an area in which developing nations are very active. For example,

¹⁹⁸ Retaliation has been used in only eight cases. CHOW & SCHOENBAUM, *supra* note 143, at 58.

¹⁹⁹ See DSU, *supra* note 9, art. 21(5).

²⁰⁰ See Horn & Mavroidis, *supra* note 176, at 12.

developing nations brought only ten cases out of 152 antidumping cases from 1995 to 2006.²⁰¹ Least-developed countries brought no antidumping cases in the same period.²⁰² Similarly, there may be some cases under the Safeguards Agreement wherein factual differences may preclude class action litigation. However, safeguards cases comprise only 4.5% of all cases from 1995 to 2006.²⁰³ In conclusion, the proposed class action strategy is not universally applicable for all WTO cases. Lack of commonality will preclude its deployment in approximately 15% of disputes.

d. Lack of Alignment on Outcomes

If settlement is offered on favorable terms to one member of the class, another potential problem may arise: a lack of alignment on outcomes for different class members. The risk is particularly of concern if a settlement is offered to the lead plaintiff to buy off the case. There are several ways to deal with this problem. One approach would be to negotiate a private agreement among the parties that requires the mutual disclosure of settlement offers and sets a voting mechanism to determine the acceptability of the settlement offer. Unless clear enforceable penalties are established, this approach is fraught with enforcement difficulties. A second approach would be to require the supervision of the WTO panel approve settlements and dismiss the case. A third, middle-ground approach would be for panels to accept partial settlements but dismiss the class without prejudice to enable the suit to continue under a different guise.

e. Confidentiality, Privilege, and Other Information-Flow Concerns

Some WTO members may hesitate to participate in a class action lawsuit due to concerns about confidentiality and privilege. These concerns are fair and should be thoughtfully addressed by class members. Careful pre-litigation planning is essential. Class members must formulate a comprehensive plan that details information flows, designates parties responsible for disseminating documents, and ensures that sensitive materials are adequately protected. The plan is particularly important when outside consulting firms are involved. If outside counsel is hired, the law firm will assume primary responsibility for coordinating with the WTO, national government officials, civil society

²⁰¹ *See id.* at 20.

²⁰² *See id.*

²⁰³ *See id.* at 13.

participants, and consultants. In addition, each class action member should designate a person within its government to act as the liaison for the duration of the litigation. Admittedly, identifying such an internal liaison will be difficult for many developing nations, especially those that lack a well-functioning trade ministry.²⁰⁴ Nonetheless, a developing nation should view the investment in resources as critical to build the capacity to meaningfully participate in the WTO.

Reluctance to share information is probably not as problematic as one might expect, at least among developing nations. Evidence suggests that developing nations are hungry for more information, even when they are not formal participants in a dispute. For example, one developing nation has requested that legal submissions be automatically made available to third-party participants, unless they are designated as factually confidential.²⁰⁵ Other groups of developing nations have proposed changes to the DSU to enable them to participate automatically as third parties and to gain greater access to proceedings and submissions as third parties.²⁰⁶ These proposed reforms show that developing nations crave greater access to dispute settlement information, while remaining cognizant of confidentiality concerns.

B. Systemic Contribution

Systemic benefits to class action litigation also accrue in a number of important ways. First, a class action strategy provides valuable opportunity for coordination and cooperation that will enable developing nations to build new coalitions and strengthen existing trade ties with other developing nations. Second, one cannot underestimate the benefits of greater developing-nation participation in the WTO system as a whole, especially in terms of perceived legitimacy. Participation in class actions will widen the pool of developing nations using the WTO dispute settlement system. This in turn will deepen the

²⁰⁴ See Shaffer et al., *supra* note 170, at 424 (“[M]any developing countries lack experienced trade policy and dispute settlement professionals.”); see also Marc L. Busch et al., *Does Legal Capacity Matter?: Explaining Patterns of Protectionism in the Shadow of WTO Litigation 3* (Aug. 25, 2008) (unpublished manuscript), available at <http://userwww.service.emory.edu/~erein/research/capacity.pdf> (“To varying degrees, developing countries . . . lack . . . legal capacity, impeding their ability to participate fully in WTO dispute settlement . . .”).

²⁰⁵ See Proposal by Costa Rica, *Third Party Rights*, TN/DS/W/12/Rev.1 (Mar. 6, 2003) (suggesting that third parties should receive a copy of all documents or information submitted to the panel, at the time of submission, except for certain factual confidential information designated as such).

²⁰⁶ See, e.g., Proposal by African Group, *Negotiations on the Dispute Settlement Understanding*, TN/DS/W/15 (Sept. 25, 2002) (suggesting that developing nations should be automatically admitted as third parties without having to demonstrate a trade or economic interest in the case).

commitment of developing nations to the WTO by making one of its core functions available to a previously disenfranchised group. Collective litigation will begin to redress existing asymmetries in the use of the DSU. Without it, developing nations are likely to remain largely marginalized in WTO litigation. Another related benefit is the development of more case law and procedural precedents on issues of particular interest to developing nations. Lastly, developing nations risk being further left behind in the process of the WTO's deepening judicialization as more issues are handled via dispute settlement due to negotiation gridlock. Class action litigation is an efficient way to widen as well as deepen the process of WTO judicialization.

C. *Impact on Negotiations*

Implementation of a class action strategy will have a significant impact on the course of Doha²⁰⁷ and future rounds of WTO negotiations. From the perspective of developing nations, there are four major advantages. First, as collective litigation should lead to stronger, tighter-knit coalitions among developing nations, it should make it easier for these coalitions to push forward their agendas in negotiations. Second, developing nations can use the threat of collective litigation as leverage to lend weight to their positions in negotiations. Third, participation in class actions is likely to highlight other bases of commonality among members, creating the potential for collaboration in negotiations. Fourth, information development and sharing derived from litigation may enable litigants to develop more robust negotiation positions. For example, Brazil used its experience and econometric data that it gathered for litigation in the *U.S.-Upland Cotton* and *EC-Sugar* cases to catapult it into the influential G-4, a group comprised of the United States, EU, India, and Brazil that played a large role in shaping the agenda for agricultural negotiations in the Doha Round.²⁰⁸

Three risks must be weighed against the preceding four advantages of negotiations. First, it is possible that in the short term, a developing nation could gain more in negotiations by yielding to inducements to quit the class. A

²⁰⁷ *Understanding the WTO: The Doha Agenda*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/tif_e/doha1_e.htm (last visited Apr. 2, 2011).

²⁰⁸ See Shaffer et al., *supra* note 170, at 451 (describing econometric simulation analysis of the impact of tariff and subsidy reductions on Brazil as essential in helping Brazil formulate its negotiation position on agricultural issues in Doha); Ernesto Zedillo, *Summer of Setbacks*, FORBES, Aug. 13, 2007, at 31; see also Robert Wolfe, *Canada's Adventures in Clubland: Trade Clubs and Political Influence*, in CANADA AMONG NATIONS 2007: WHAT ROOM TO MANOEUVRE? 181, 192 (Jean Daudelin & Daniel Schwanen eds., 2008).

small developing nation is particularly vulnerable to offers to abandon the class in exchange for negotiated gains in Doha or other contexts. Second, there is a risk of fragmentation or even disintegration of negotiation blocs if defendants pursue divide-and-conquer strategies in settlement discussions in ongoing class actions. Third, and most worrisome, is the possibility that the collective action advantages described above might crumble under the pressures of prolonged Doha negotiations. Coalitions based on shared experience can prove to be fragile. Nonetheless, one should note that because of all three risks, the negotiation gains of class action litigation may not be fully realized in some circumstances—but not that there would be no gains altogether.

D. Governmental Coordination Difficulties

One of the greatest obstacles facing developing nations is a lack of national legal expertise in WTO law, both within the government and the domestic bar. Often, the lack of legal expertise correlates with a paucity of qualified human resources within both WTO missions and domestic ministries. Indeed, many developing nations lack a permanent presence in Geneva.²⁰⁹ Many more have zero or at best one or two trade lawyers qualified to practice WTO law.²¹⁰ Personnel constraints are exacerbated by resource shortages. Developing WTO members have less financial resources to spend on the direct costs of hiring outside legal counsel. But, they also have less leeway in the indirect or opportunity costs of dedicating government personnel to oversee and support a WTO case. Committing resources to WTO litigation involves significant costs for developing nations because those scarce resources could be devoted to other needs, including immediate social needs.²¹¹ Richer nations with resources earmarked for WTO litigation do not face the same difficult tradeoffs.

While these resource constraints are significant, particularly in the short term, they need to be weighed against the long-term gains of collective litigation, which may be the only way that many developing nations can afford to engage in WTO disputes. Engaging in class actions will lead to more governmental expertise in trade law and the WTO's dispute settlement procedures. While the initial commitment of human resources is costly, it will make it possible to develop gradually a competent bureaucracy to lead future disputes and to guide a developing nation's effective and full participation in

²⁰⁹ See Cai, *supra* note 13, at 312.

²¹⁰ See Shaffer et al., *supra* note 170, at 409.

²¹¹ See *id.* at 410–11.

the WTO. The fostering of personnel with legal, technical, and negotiation expertise in trade is a long-term investment. Developing nations must be careful to structure their civil service to ensure a continuity of personnel with expertise for handling WTO disputes and negotiations. They should create incentives to ensure that those who develop such expertise do not rotate out into other areas. Collective litigation can also strengthen intergovernmental ties, not just in trade disputes, but also in other areas related to economic growth. Trade personnel often need to work closely with other governmental institutions such as taxing authorities, health officials, and financial sector officials, to build effective cases. Intergovernmental cooperation of this type, sustained for long periods of time, will also benefit developing nations in the long run.

The need to husband scarce resources and balance competing needs presents unique coordination challenges for developing nations. Departments that have pressing immediate needs will argue that the legal costs of participating in a WTO dispute are too high, as the outcome is uncertain. Thus, proceeding with a WTO case could alienate domestic constituencies. Moreover, participating in a class action could be perceived as a loss of governmental autonomy, especially in cultures where collective action is unknown or rare. Lastly, there is a risk that being a class action member may compromise government positions in non-litigated arenas. This could occur in one of two ways. First, because WTO disputes can take a long time, a government may wish to pursue policies (including new litigation) that are incompatible with the litigation position it has taken in the class action. Similarly, pending litigation may make it tougher for a class action member to enter into favorable bilateral or regional trade agreements or to undertake independent negotiation positions.

E. Legal Obstacles

WTO textual obstacles are sparse. There is room within the DSU for nations to unilaterally adopt a collective litigation strategy without any amendments to the DSU. The parameter that must be followed is that the total amount of retaliation must not exceed the harm sustained by the class as a whole.²¹²

²¹² See DSU, *supra* note 9, art. 22(4).

However, despite the lack of textual prohibitions, there are legal obstacles to adoption. Developing nations will need to convince panels and the Appellate Body that the strategy works. The lack of precedent for the strategy will be troubling for some panels. Panels may also be troubled by the fact that class action litigation is a dramatic extension of the role of the third party. Traditionally, WTO members participate as third parties only when they have a systemic interest in the case. However, the DSU is characterized by much flexibility and a relative lack of procedural rules. It is likely possible to introduce and successfully pursue collective litigation.

F. Public-Private Interaction

It is very difficult to prosecute WTO disputes without the assistance of the private sector.²¹³ Success in WTO dispute settlement requires private sector participation in three main areas. First, industry groups can identify violations that may form the basis of a WTO complaint.²¹⁴ Second, in the area of information-gathering, industry is often best positioned to gather and analyze econometric data to support a WTO complaint.²¹⁵ Lastly, the private sector can help pay for outside counsel, which a government may not be able to afford on its own. In all three areas, developing nations are at a severe disadvantage compared to their more developed counterparts, due to resource constraints as well as a lack of functioning civil society watchdogs or active industry groups that can monitor and identify potential violations.

Developing nations face greater challenges in fostering effective public-private collaboration. They often lack established channels for such cooperation, both in terms of institutional and personnel deficits.²¹⁶ Moreover, where there are less transparent societies or non-vibrant democracies,²¹⁷

²¹³ See, e.g., Shaffer et al., *supra* note 170, at 456 (describing how private sector involvement was pivotal to Brazil's success).

²¹⁴ See *id.* at 470–77.

²¹⁵ *Id.*

²¹⁶ Timothy Stotsdad, *Trappings of Legality: Judicialization of Dispute Settlement in the WTO, and Its Impact on Developing Countries*, 39 CORNELL INT'L L.J. 811, 825 (2006).

²¹⁷ See Christina Davis & Sarah Blodgett Bermeo, *Who Files?: Developing Country Participation in WTO Adjudication*, 71 J. POL. 1033, 1039–40 (2009), available at http://www.princeton.edu/~cldavis/files/who_files.pdf (noting “a high correlation between democracy and patterns of participation in WTO adjudication” (citations omitted)). Democratic states are likely to face pressures for accountability from interest groups that will lead them to undertake strong trade enforcement measures, including involvement in WTO adjudication. *Id.*

distrust of the government can hinder private collaboration.²¹⁸ Lastly, developing nations simply have scarcer resources to devote to the institution-building necessary to enable effective public-private partnerships.

The class action proposal alleviates many of these disadvantages. The proposal provides a mechanism to spread the costs of litigation and economic analysis and to pool the resources of industry or nascent civil society groups to share the burdens of monitoring and information gathering. Thus, collective litigation can provide the catalyst for effective government-industry partnership.

Three other benefits may accrue. First, the diffusion of trade expertise across public and private sectors will foster the formation of a strong pluralist civil society. If consumer or industry watchdog groups realize they can play a pivotal role in trade policy formation or dispute settlement, they will have the incentive to be more active. Second, insofar as many developing and least developing countries use the services of the Advisory Centre on WTO Law (“ACWL”), a nonprofit that provides basic legal services and advice—but not representation—to developing nations at nominal cost,²¹⁹ the ACWL will be better able to provide coordinated support to a class. Other civil society organizations such as Oxfam,²²⁰ which can provide data gathering and analysis support or write amicus briefs, will also be better able to provide coordinated assistance. Lastly, any involvement by civil society actors constitutes a valuable gain in transparency, which is one of the WTO’s primary goals.²²¹

²¹⁸ See Ben Ross Schneider & Sylvia Maxfield, *Business, the State, and Economic Performance in Developing Countries*, in BUSINESS AND THE STATE IN DEVELOPING COUNTRIES 3, 12, 14 (Sylvia Maxfield & Ben Ross Schneider eds., 1997) (“In poor countries the lack of trust between economic agents can inhibit all types of beneficial exchanges and retard overall development . . . Trust increases the voluntary exchange of information, makes reciprocity more likely even without active monitoring and disciplining, and generally reduces uncertainty and increases credibility on all sides.”).

²¹⁹ See *The ACWL’s Mission*, ADVISORY CENTRE ON WTO L., http://www.acwl.ch/e/about/about_us.html (last visited Aug. 18, 2010); see also Gregory Shaffer, *How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies*, in TOWARDS A DEVELOPMENT-SUPPORTIVE DISPUTE SETTLEMENT SYSTEM IN THE WTO 1, 18–23, 26, 51–52, available at http://ictsd.org/downloads/2008/06/dsu_2003.pdf.

²²⁰ See Shaffer et al., *supra* note 170, at 463–64 (describing how Oxfam filed a statement in support of Brazil in *U.S.-Cotton* as submissions in favor of Chad and Benin as third parties in the same case).

²²¹ See *About the WTO—A Statement by the Director-General*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/wto_dg_stat_e.htm (last visited Aug. 18, 2010) (describing the WTO’s main mission as “the pursuit of open borders, the guarantee of most-favoured-nation principle and non-discriminatory treatment by and among members, and a commitment to transparency in the conduct of its activities”).

CONCLUSION

The class action strategy proposed in this Article offers numerous advantages for developing nations and the international trading system. It provides a means to bring those that have little incentive to participate in dispute settlement into the system. Smaller and developing nations that may have justifiably felt that the system was too costly and offered them little in meaningful redress would have a means to participate in a way that alleviates both problems. These nations would have the opportunity to share litigation costs, information, and legal expertise at comparably little expense. The experience would then broaden and deepen the necessary legal and economic capacity needed for them to play a more meaningful role not only in dispute settlement, but also in other arenas of trade law. The sort of in-depth familiarity with the WTO regime that comes from litigation enhances effectiveness in negotiations at ministerial conferences.²²² Showing a willingness to enforce its rights also strengthens a nation's negotiating position.

Most importantly, the strategy enables small economies and those with smaller claims to enforce their rights. It might therefore make up for some of the missing developing nation cases that are not making it on the DSB docket.²²³ In particular, the strategy may entice least-developed countries—which are mostly absent²²⁴—to engage in dispute settlement as complainants.

There are also advantages for the larger or middle-income nation to act as the named plaintiff. There are collective-action, prestige, and reputational benefits. Gratitude to the lead plaintiff may translate into a country's willingness to lend support in subsequent negotiations. The strategy allows developing nations to build networks for collective action. To some extent, this is already happening.²²⁵ There are also prestige and reputational gains in being viewed as both a leader and champion of weaker nations. Moreover, the ability to trade or pool retaliation within the class provides an incentive for large nation to participate. Smaller nations are more likely to gain compliance because they can leverage the greater economic power of the named plaintiff and other class members.

²²² See, e.g., Shaffer et al., *supra* note 170, at 451.

²²³ See Bown & Hoekman, *supra* note 20, at 862.

²²⁴ *Id.*

²²⁵ For example, the G-77, a coalition of seventy-seven developing-nation founding members, which now has 132 members, has coordinated opposition against weighted voting in the General Assembly. See Editorial, *Resolving the U.N. Power Struggle*, 184 N.J. L.J. 410 (2006).

Class actions serve important societal functions. They are often used as a tool to compensate for small losses²²⁶ and enforce regulations.²²⁷ They enable less powerful groups to act as private attorneys general.²²⁸ They have also been effectively employed as a means for lasting social change, as during the civil rights era.²²⁹ As a result of all these dynamics, class actions more deeply embed social values embodied in laws in the greater society by giving voice to the otherwise voiceless. Class actions in the WTO will give developing nations a voice in the WTO, provide them with a meaningful way to enforce rules, and enable them to participate more fully in the WTO.

²²⁶ DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 69–71 (2000).

²²⁷ See Harry Halven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 686 (1941).

²²⁸ See HENSLER ET AL., *supra* note 226, at 71–72.

²²⁹ STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION, 240–45 (1987).