• GLOBAL ECONOMIC GOVERNANCE PROGRAMME •

Developing Countries in the WTO Dispute Settlement System

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January 2009

GEG Working Paper 2009/47

I. INTRODUCTION

One of the most noteworthy achievements of the establishment of the WTO in 1995 was the introduction of its binding dispute settlement system. Building upon GATT dispute settlement practice, the *Understanding on the Rules and Procedures Governing the Settlement of Disputes* ('DSU') contains innovations that resulted in a paradigm shift from a system based on economic power and politics to one based on the rule of law. The resulting increased legality of the WTO has been hailed to benefit considerably smaller countries, of which many are developing countries and least-developed countries ('LDCs'). As Steger and Hainsworth comment, the shift 'is particularly beneficial for smaller countries, as without the rules and procedures of the DSU... they would not have the necessary bargaining power *vis-à-vis* the larger powers.'[1] Similarly, Weiler notes the advantages of the legalised WTO model, 'especially for the meek economically and politically unequal.'[2]

Despite these perceived benefits, the vast majority of developing countries have not participated actively in the WTO dispute settlement system. This raises concerns that they are not benefitting fully from the WTO legal regime. As Bown and Hoekman observe, 'a systemic pattern of missing dispute settlement activity calls into question whether the full public good and positive externality benefits of the trading system are sufficiently exploited.'[3] Davey also has commented that '[o]nly an effective dispute settlement system can ensure rule enforcement, which in turn provides predictability and stability in trade relations.'[4]

In light of these concerns, this paper aims to evaluate critically developing-country participation in WTO dispute settlement. To that end, Part II reviews developing-country participation in WTO dispute settlement, observing the lack of engagement by the vast majority of developing countries. Part III assesses the four constraints commonly identified as explaining that lack of participation: (i) a relative lack of WTO legal expertise or resources to fund external WTO lawyers, (ii) an inability to enforce rulings through retaliation, (iii) a lack of domestic mechanisms to identify and communicate trade barriers faced to WTO lawyers, and (iv) the fear of political and economic retaliation. The paper observes that certain constraints have now been largely addressed while others, important when they arise, may not occur frequently in practice.

The purpose of the paper is to permit a re-direction of focus when thinking about how to improve developing-country participation in the WTO dispute settlement system. To that end, Part IV identifies other important constraints that have received little attention to date, including that a significant proportion of developing-country trade occurs under rules that are not part of enforceable WTO law and the time to complete proceedings. Part V concludes with a tentative outline of priorities to increase developing-country participation in the future.

II. THE PARTICIPATION OF DEVELOPING COUNTRIES IN WTO DISPUTE SETTLEMENT

Ambassador Bhatia of India recently stated that the 'WTO dispute settlement system is certainly one of the most valuable achievements of the Uruguay Round.'[5] He observed that the 'experience of the last thirteen years has been generally positive.'[6] The number of disputes brought to, and jurisprudence generated from, the WTO dispute settlement system since its inception is unprecedented for an inter-governmental dispute settlement system. Since its establishment, almost 400 disputes have been initiated resulting in just under 250 panel and

Appellate Body reports. This caseload rivals over 80 years of litigation in the International Court of Justice (and its predecessor the Permanent Court of International Justice) and is greater than that of 50 years of dispute resolution in the GATT.[7] Nonetheless, Ambassador Bhatia cautioned that the picture from a developing-country perspective is not all positive and that much can be done to make the WTO dispute settlement system 'more responsive and relevant' for those countries.[8]

Measuring the extent of developing-country participation in WTO dispute settlement activity depends on how one interprets the available data and statistics. A cursory analysis of the WTO Secretariat data for the first ten years of dispute settlement activity provides a relatively positive picture. 127 of the 335 consultations requests made during that period were from developing countries,[9] 40 of the 96 panel proceedings completed involved developing-country complainants,[10] and 33 of the 56 appearances before the Appellate Body in 2007 were from developing countries.[11] A further positive development is the increasing utilisation of the system over time. Davey notes that, by increasing their share of initiated consultations requests from 25 per cent in the first five years of the system's existence to over 60 per cent in the following five years, 'developing countries have become more frequent users of WTO dispute settlement, both in absolute and relative terms.'[12] The Consultative Board Report is equally positive commenting on the 'much greater participation of developing countries than was the case in the GATT dispute settlement system' and that 'developing countries – even some of the poorest... – are increasingly taking on the most powerful.'[13]

These figures and statements do not portray, however, the full picture. Statistical analysis illustrates that the dispute settlement activity of developing countries is highly concentrated with a few main users. Only five developing countries account for 60 per cent of activity.[14] Together with another eight developing countries, 90 per cent of activity is covered.[15] While this practice demonstrates that some developing countries, notably Brazil and India, are utilizing the system effectively; the strong concentration of activity in a few developing countries highlights that the vast majority of developing countries are largely absent from the process. This is particularly the case for LDCs, with Bangladesh the only LDC to have initiated consultations in a dispute to date.[16]

When the data is examined from this perspective, a more critical assessment of developing-country participation in WTO dispute settlement activity seems warranted. It has been commented that '[t]he poorest countries in the WTO system are almost completely disengaged from the enforcement of market access rights through formal dispute settlement litigation.'[17] Elsewhere, concerns regarding 'the absence from the game' of a large number of developing countries,[18] and the 'miniscule' participation of countries from Africa,[19] have been raised. Ambassador Bhatia concluded his comments on developing-country experience in WTO dispute settlement with the question "Why is it that, except for a few larger developing countries, dispute settlement as an option has not been exercised?"[20]

III. EVALUATION OF THE COMMONLY-IDENTIFIED CONSTRAINTS LIMITING DEVELOPING-COUNTRY PARTICIPATION IN WTO DISPUTE SETTLEMENT

There have been a number of analyses of the constraints limiting developing-country participation in WTO dispute settlement proceedings. This part evaluates the constraints commonly identified. It observes that some, relevant once, have now been largely addressed while others, important when they arise, may not occur frequently in practice.

A. LACK OF EXPERTISE IN WTO LAW OR RESOURCES TO FUND EXTERNAL WTO LAWYERS

1. The constraint

A number of WTO Members and commentators argue that WTO dispute settlement system is 'overly complicated and expensive' resulting in insurmountable 'human resource as well as financial implications' for developing countries.[21] Ambassador Bhatia of India observed that, even for a large developing country, the high costs of WTO litigation are a 'major deterrent' for using the system.[22]

Developing-country concerns with the high costs of WTO litigation stem from many governments lacking sufficient internal WTO legal expertise to conduct disputes themselves. Where internal expertise is lacking, governments are required to hire external legal counsel.

It is undeniable that the cost of hiring private legal counsel to litigate WTO disputes has increased exponentially in recent years. Commentators have estimated that 'a "litigation only" bill of US$500,000 to an exporter for a market access case is likely to be fairly typical.'[23] Legal fees can of course be much greater, with reports of fees for parties in panel proceedings in excess of US$10 million.[24]

These increased costs can be attributed, in part, to the multiple stages of WTO dispute settlement under the DSU whereby challenged measures may be subject to reviews by a panel, the Appellate Body, an arbitrator determining the reasonable period of time to comply, further reviews to determine compliance, as well as arbitration on the level of suspension of concessions.[25] The binding nature of WTO dispute settlement also means that governments (and the companies behind them) are taking each dispute far more seriously, which seems to lead to more detailed and costly submissions. It also has been observed that the lack of retrospective remedies for businesses affected by illegal protectionist measures gives respondents an incentive to further complicate, hence delay, the dispute settlement process.[26]

The costs of participation in these multiple stages of WTO dispute settlement are compounded by a trend towards increasingly complex and technical submissions. The WTO agreements that came into effect in 1995 include legal standards that hinge on detailed scientific or economic determinations that were not as central under the GATT. For example, with the introduction of the *Agreement on the Application of Sanitary and Phytosanitary Measures* ('SPS Agreement'), scientific evidence of human, animal and plant risks has been heavily litigated.[27] Similarly, provisions requiring detailed economic analysis have been the subject of a number of recent disputes under the *Agreement on Subsidies and Countervailing Measures* and the *Agreement on Agriculture* ('SCM Agreement').[28] In these disputes, success requires the input of technical experts that may also need to be contracted externally at additional costs. A lack of technical expertise is often given as an explanation why developing countries have hardly initiated WTO dispute settlement proceedings under the SPS Agreement.[29] In contrast, developed-country governments have brought a number of disputes under the agreement.[30] This situation is surprising as a large proportion of developing-country exports are in agricultural products and the SPS Agreement ensures that trade measures on animals, plants and their products are not used as disguised restrictions on international trade.

The cost problems faced by developing countries contemplating WTO dispute settlement are accentuated by their small trade shares and government budgets. Statistical analyses have found that developing countries tend to have smaller aggregate and disaggregate trading stakes.[31] Bown and Hoekman consider that these low volumes, often in competitive markets with low profit margins, 'make it difficult to charge mark-ups to cover any non-economic (*i.e.*, litigation) costs associated with maintaining or enforcing market access rights.'[32] The rationale being that claims involving smaller trade stakes are not offset by smaller litigation costs. If low levels of trade are affected, the *relative* costs of litigation are higher, especially in light of the high opportunity costs of investing in WTO litigation as opposed to other pressing social needs.[33]

While only governments can be parties in WTO dispute settlement proceedings, WTO litigation is often funded by private industries. This is a further area where developing countries may be at a disadvantage as they may lack support from well-financed private industries able to contribute resources to assist the government.

All these factors have resulted in many developing countries facing undeniable cost and resource constraints in WTO dispute settlement proceedings.

2. Evaluation of the constraint

The DSU contains certain provisions designed to address these cost and resource constraints. For example, Article 27.2 of the DSU provides that the WTO Secretariat shall make available experts to provide 'additional legal advice and assistance' to developing countries. However, the utility of this provision is debatable. The experts may only assist 'in respect of dispute settlement' and cannot provide legal advice before a dispute is initiated. Furthermore, they may only assist the developing-country 'in a manner ensuring the continued impartiality of the Secretariat', making it impossible to act as an advocate in a legal proceeding.

While the effectiveness of Article 27.2 of the DSU at addressing developing countries' capacity constraints may be questioned, certain initiatives independent of the DSU appear to have been more successful. The most far-reaching initiative came in 2001, when a group of WTO Members established the Advisory Centre on WTO Law ('ACWL') as an independent inter-governmental organisation with the mandate to provide developing countries with support in WTO dispute settlement proceedings, as well as legal advice and training on WTO law.[34] The ACWL provides its legal services to developing countries for free or at heavily subsidised rates.[35] These services are financed largely by an endowment fund of developed-country and developing-country contributions.[36] The ACWL has been identified as being the first 'international legal aid' centre in international law.[37] Ehlermann, former Chairman of the Appellate Body, stated at the inauguration of the ACWL that the organisation 'will strengthen the notion that the dispute settlement system of the WTO is available to the economically weak as much as it is available to the economically strong.'[38]

It has been commented that since its establishment the ACWL 'has largely addressed many of the capacity constraints' faced by developing countries in WTO dispute settlement procedures.[39] At the time of writing, the ACWL has provided support in 25 dispute settlement proceedings which represents over 20 per cent of all proceedings initiated since 2001. The ACWL has provided hundreds of legal opinions on issues of WTO law, including the merits of potential dispute settlement proceedings. It also provides detailed training activities for Geneva-based delegates of developing countries and LDCs.[40]

One criticism of the utility of the ACWL for developing countries has been that it is unable to provide the non-legal technical inputs increasingly required in WTO disputes.[41] This concern has, however, been addressed. In recognition that successful WTO litigation will often depend on the quality of the technical expertise presented by the parties, the ACWL has a technical expertise trust fund specifically dedicated to subsidising the costs of contracting such expertise. The fund is currently over CHF 600,000 and has been used on four occasions to assist developing countries in acquiring scientific, economic and domestic law expertise presented in disputes. It has been referred to by the UNCTAD as an 'important development' as developing countries now 'have access to the Fund to help finance the scientific and technical expertise needed to participate in WTO dispute-settlement proceedings.'[42]

While the ACWL does not address all constraints faced by developing countries in accessing the WTO dispute settlement system, the extent to which a lack of expertise in WTO law and associated technical matters limits their participation is now considerably mitigated. The commonly-identified cost and resource constraints, while relevant once, appear to have been largely addressed.

B. INABILITY TO ENFORCE RULINGS THROUGH RETALIATION

1. The constraint

It has often been observed that a fundamental constraint limiting the utility of the WTO dispute settlement system for developing countries is the inability for many of them to enforce positive rulings against larger non-complying WTO Members. When there is an asymmetry in the market size of the developing country and the non-complying WTO Member, the WTO's retaliation rules have been characterised as 'virtually meaningless.'[43]

The DSU permits retaliation against non-complying WTO Members through the suspension of trade concessions or obligations as well as countermeasures.[44] The criticism of these retaliation rules, from a developing-country perspective, is that developing countries with small domestic markets are not able to impose sufficient economic or political losses within the larger WTO Members to generate the requisite pressure to induce compliance. In fact, the suspension of trade concessions may be more detrimental to the developing country than the non-complying Member. This criticism has resulted in what has been characterised as the 'conventional wisdom' that it is 'a waste of time and money for developing countries to invoke the WTO's dispute settlement procedures against industrialised countries' because 'the developing country has no effective way to enforce the ruling.'[45]

In the context of the DSU review negotiations, the LDC Group attributes the lack of participation of many developing countries in WTO dispute settlement to 'the inadequacies and structural rigidities of the remedies available to poor countries.'[46] The African Group, similarly, has observed that one of the 'major problems' in the WTO dispute settlement system is that 'the means provided for enforcement of findings and recommendations (trade retaliation) are skewed against and disadvantage African Members.'[47] These concerns may explain the range of current developing-country proposals to reform the retaliation rules including the use of compensation,[48] collective retaliation[49] and tradable retaliation rights.[50]

2. Evaluation of the constraint

The view that shortcomings in WTO retaliation rules are a constraint limiting developing-country participation in WTO dispute settlement is based on three arguments. First, that developing countries with small domestic markets are not able to impose sufficient economic or political losses within the larger WTO Members to generate the requisite pressure to induce compliance. Second, that the suspension of concessions may be more detrimental to the developing country than the non-complying WTO Member. Third, as a consequence, there is little purpose in developing countries bringing WTO dispute settlement proceedings as they lack capacity to enforce rulings.

The following sections segregate, and evaluate, each of the arguments. As will be demonstrated, the first two arguments make economic sense while the third requires a nuanced evaluation.[51]

(a) Developing-country sanctions are not able to generate sufficient pressure to induce compliance

The first argument why current WTO retaliation rules are skewed against developing countries is that developing countries with small domestic markets are not able to impose sufficient economic or political losses within the larger WTO Members to generate the requisite pressure to induce compliance. The argument has considerable merit.

Trade retaliation under the GATT and WTO has typically envisaged the withdrawal of tariff concessions with the effect of raised tariffs for specific imports from the non-complying Member. The theory being that by raising tariffs to inflict economic harm on exporters in the non-complying Member the respondent government will be placed under domestic pressure to remove the measures inconsistent with WTO law.

This ideal scenario, however, is dependent upon the size of the domestic market of the retaliating Member in relation to that of the non-complying Member. The retaliation request of Antigua and Barbuda, one of the smallest WTO Members with approximately 80,000 inhabitants, against the United States provides an illustration of retaliation difficulties where there is an asymmetry in market size. As Antigua and Barbuda stated in its request for retaliation, 'ceasing all trade whatsoever with the United States (approximately US$180 million annually, or less than 0.02 per cent of all exports from the United States) would have virtually no impact on the economy of the United States, which could easily shift such a relatively small volume of trade elsewhere.'[52] A similar statement was made by the Arbitrator examining the ability of Ecuador to effectively retaliate against the European Communities ('EC') by withdrawing tariff concessions. Ecuador imports less than 0.1 per cent of total EC exports, leading the Arbitrator to observe that 'given the fact that Ecuador, as a small developing country, only accounts for a negligible proportion of the EC's exports of these products, the suspension of concessions is unlikely to have any significant effect on demand for these EC exports.'[53] The Arbitrator queried whether the objective of inducing compliance 'may ever be achieved where a great imbalance in terms of trade volume and economic power exists between the complaining party seeking suspension and the other party.'[54]

For these reasons, it makes economic sense that developing countries with small markets are unlikely to be able to induce compliance in larger trading Members. As one commentator stated, retaliation through the suspension of tariff concessions 'cannot offer a realistic option to enforce WTO obligations if performed against considerably larger economies.'[55] Others have observed that the WTO 'sanctioning power tends to favour large economies over smaller ones'[56] and that 'as a practical matter' trade sanctions 'can probably only be adopted by developed country Members, or large, advanced developing countries.'[57] The WTO World Trade Report for 2007 synthesises the argument in the following manner:

> In applying retaliatory measures, large countries can cause economic harm to the party found not to be in compliance with its obligations.... [c]onversely, small countries, in view of their limited size are unable to exert sufficient pressure on larger Members to alter their behaviour.[58]

(b) Developing countries harm themselves by imposing sanctions

The second argument why WTO retaliation rules are skewed against developing countries is that the withdrawal of tariff concessions may be more detrimental to the developing country than the non-complying Member. The argument is also economically cogent. If one subscribes to the benefits of trade liberalisation it makes sense that retaliation will be a sub-optimal policy that often amounts to 'shooting oneself in the foot.'[59]

This concern with WTO retaliation was raised by Antigua and Barbuda and Ecuador in their requests for retaliation against, respectively, the United States and the EC. Antigua and Barbuda is a small island with negligible natural resources making it heavily reliant on imports. As 50 per cent of those imports are from the United States, Antigua expressed concern that retaliating through import restrictions would have a 'disproportionate adverse impact on Antigua and Barbuda by making these products and services materially more expensive to the citizens of the country.'[60] Retaliatory restrictions on goods or services from the United States were argued to have 'a much greater negative impact on Antigua and Barbuda than it would on the United States.'[61] Similarly, the Arbitrator examining Ecuador's request for retaliation against the EC noted that 'in situations where the complaining party is highly dependent on imports from the other party, it may happen that the suspension of certain concessions or certain other obligations entails more harmful effects for the party seeking suspension of concessions than for the other party.'[62]

The positions articulated by Antigua and Barbuda and Ecuador regarding the economic costs of trade sanctions on developing countries are sound. For these reasons, it has been commented that '[p]erhaps the biggest disadvantage of WTO sanctions is that they bite the country imposing the sanction.'[63]

Both arguments have led to the sound conclusion that 'countermeasures are a more or less ineffective instrument in the hands of "smaller" players'[64] and that 'there is indeed a practical problem for small countries and developing countries when they attempt to carry through with effective retaliation within the WTO system.'[65]

(c) A retaliation capacity constraint, important when it arises, may not occur frequently in practice

The consequential argument that these deficiencies in the WTO retaliation rules are a significant constraint limiting the utility of the WTO dispute settlement system for developing countries is, however, more controversial. Two differing perspectives can be discerned.

On the one hand, a number of studies and commentaries contend that the capacity to retaliate *is* a critical component in ensuing that WTO Members comply with dispute settlement rulings. These analyses suggest that, if developing countries do not have the capacity to retaliate credibly, the likelihood of developing countries achieving successful outcomes through WTO dispute settlement is undermined. One empirical analysis of all GATT and WTO disputes between 1973 and 1998 finds 'substantial evidence that the threat of retaliation is an important influence determining a defendant country's ability to credibly commit to liberalisation.'[66] Its results were interpreted to 'suggest that the successful economic resolution to disputes is influenced by the concern for retaliation.'[67] Another study finds that 'implementation is much more likely in a developed against developing country scenario than vice-versa.'[68] As a result, that study concludes that 'there is indeed a problem in the functioning of the DSU in this respect' and that proposals to reform the retaliation rules to address these failings 'are addressing a real issue and not a ghost.'[69] The WTO World Trade Report for 2007 reflects the view that small countries are 'unable to exert sufficient pressure on larger Members to alter their behaviour' and that this retaliation impotence 'fails to deter economically powerful countries from committing a violation against small countries.'[70]

On the other hand, other evaluations of the GATT and WTO dispute settlement data demonstrate a high rate of compliance with dispute settlement rulings. One analysis of the first ten years of the WTO dispute settlement system indicates a successful implementation rate of adopted panel and Appellate Body reports of 83 per cent.[71] Only 10 of the 181 initiated disputes examined resulted in no implementation or disagreement over implementation.[72] As the author of that analysis concluded, 'it is the case that most reports are eventually implemented.'[73] A separate study, covering the period until March 2007, describes the 'generally positive record of Members in complying with adverse rulings.'[74] That study notes that of 109 panel and Appellate Body reports adopted, 90 per cent found violations of WTO law, and that in 'virtually all of these cases the WTO Member found to be in violation indicated its intention to bring itself into compliance and the record indicates that in most cases it has already done so.'[75]

A key finding for the purposes of this paper is that these high compliance rates with adverse WTO dispute settlement rulings are not limited to those disputes brought by developed countries. Similar compliance rates have been observed when smaller and developing countries have obtained favourable rulings. As one recent study found:

> WTO dispute settlement experience to date does not suggest that responding Members have a manifestly worse record of compliance with DSB rulings in cases where the complaining Member was a small or developing country than in cases where the complaining Member was another type of developing country or developed country.[76]

This practice of high compliance with dispute settlement rulings, even when the complainant is a small or developing country, is hard to reconcile with the abovementioned perspective that the capacity to retaliate is an 'important influence' in the resolution of WTO disputes. If retaliation were a significant factor for compliance with adverse rulings, one would expect low rates of compliance in those disputes where smaller or developing countries were complainants.

Based on the high compliance rates with dispute settlement rulings, even when the complainant is a small or developing country, this paper puts forward the proposition that the capacity to retaliate effectively is often not a significant factor for government compliance with adverse panel and Appellate Body rulings.

GATT practice supports this proposition. One of the key distinctions between dispute settlement under the GATT and the WTO was that GATT dispute settlement procedures required consensus permitting the defendant to veto both adverse rulings and any request for retaliation. As the defendant had the ability to veto retaliation, under the GATT regime complainants effectively did not have the capacity to retaliate against countries that did not wish to comply with adverse rulings.[77] Thus, GATT practice appears to provide an environment to test the extent to which the capacity to retaliate induces compliance with adverse rulings.

GATT practice suggests that retaliation capacity is often not a necessary component for compliance. Hudec's comprehensive study of GATT disputes found 'almost a 100 percent success rate' in producing satisfactory responses to legal rulings in the first three decades of the GATT.[78] While this fell to 81 per cent in the following period it was characterised as 'still a very impressive performance for an international legal regime.'[79] Significantly, 10 of the 11 GATT panel rulings in favour of developing countries had a successful outcome. Hudec's interpretation of this data was the following:

> The paradoxical contrast between the voluntary procedures and weak remedies of the GATT dispute settlement system, on the one hand, and its rather strong record of success, on the other, contains a lesson. It teaches that the enforcement of international legal obligations cannot be explained by superficial analysis of dispute settlement procedures and remedies.[80]

While the lesson from this GATT practice ought to be tempered somewhat when applied to the WTO environment,[81] the practice nonetheless suggests that there are factors other than retaliation capacity that result in governments complying with adverse dispute settlement rulings.[82] In the words of Hudec, 'enforcement is a more complex process than mere retaliation' and governments often comply with dispute settlement rulings for reasons other than a fear of retaliation.[83]

According to Hudec, these other factors include that: (i) some parts of the defendant government and its constituents usually want the conduct found inconsistent with WTO law to be removed simply because it is good policy; (ii) the defendant government is likely to see a long-term value in preserving the legitimacy of the legal system for when it may need to rely on it for its own purposes; and (iii) the shaming pressure caused by other governments wishing to preserve the legitimacy of the legal system should not be underestimated.[84] These factors would appear to apply equally in the WTO environment.

WTO practice also demonstrates that the high compliance rates observed in WTO dispute settlement have not required Members to regularly request or impose retaliatory measures. Of the sixty WTO disputes where retaliation was possible, as the reasonable period of time to comply had expired without compliance being achieved, Members only requested the right to retaliate in seventeen disputes.[85] The complainant pursued and gained retaliation rights from the WTO Dispute Settlement Body ('DSB') in nine of those disputes,[86] with retaliatory measures being imposed in five of them.[87] Thus, while the DSB has authorised retaliation on occasion, it is seems fair to say that 'retaliation has been the exception rather than the rule.'[88] From these figures one might extrapolate that, even in the WTO environment where retaliation can no longer be vetoed, in the vast majority of disputes the catalyst for compliance does not appear to have been the threat of retaliation.[89] As one observer noted, 'the overall positive record of Members in complying with adverse rulings is reflected in, and confirmed by, the low number of cases where Members have sought and received authorisation to impose retaliatory measures.'[90]

The purpose of this section is to highlight that in the majority of WTO disputes to date compliance has occurred, even when developing countries with little capacity to retaliate have been successful complainants. This practice suggests that an inability to retaliate effectively will often remain a theoretical constraint.[91] It is, however, undeniable that on those occasions where a defendant is a larger economy and does not voluntarily comply with adverse rulings, the weaknesses of WTO retaliation rules for many developing countries are real and will undermine the utility of dispute settlement. Current DSU Review proposals, as well as the potential for cross-retaliation, deserve continuing attention.

C. LACK OF DOMESTIC MECHANISMS TO IDENTIFY AND COMMUNICATE TRADE BARRIERS TO WTO LAWYERS

1. The constraint

Despite initiatives such as the ACWL, access to WTO lawyers is of little use if WTO Members lack domestic mechanisms to identify and communicate trade barriers to WTO lawyers in the first place. In this regard, Abbott notes that developing countries may still be at a disadvantage when initial steps are taken to 'identify the trade barrier' which 'clearly has to precede any help with legal evaluation.'[92]

2. Evaluation of the constraint

A WTO Member's participation in dispute settlement activities will be a function of its ability to identify trade barriers faced by the private sector. As Shaffer comments, pre-requisites for effective use of the WTO system are mechanisms to 'perceive injuries to its trading prospects, identify who is responsible, and mobilize resources to bring a legal claim or negotiate a favourable settlement.'[93]

This 'naming, blaming and claiming' process is dependent upon effective domestic procedures for gathering and processing information on trade barriers. It is an area where many developing countries lack capacity. This can be contrasted with the procedures in most developed WTO Members such as the EC, United States and Japan.[94] It has been suggested that developing countries should request the assistance of development agencies and foundations to assist them in identifying trade barriers faced by their private sectors.[95] A more radical suggestion has been for 'an independent Special Prosecutor or Advocate' mandated 'to identify potential WTO violations on behalf of developing countries.'[96] Perhaps the most pragmatic market-oriented solution would be the development of public-private networks for trade litigation to assist export sectors to communicate trade barriers to the government. The majority of developed-country governments have fostered such coordination with the private sector and certain of the more active developing country litigants, notably Brazil, have taken significant steps in this direction.[97] Nonetheless, for the majority of developing countries, the lack of effective domestic mechanisms to identify trade barriers and communicate them to WTO lawyers remains a severe limitation curtailing their participation in the WTO dispute settlement system.

D. FEARS OF POLITICAL AND ECONOMIC PRESSURES

1. The constraint

Commentators have noted that developing and least-developed countries may be unwilling to initiate WTO dispute settlement proceedings against developed countries due to their particular vulnerability to 'retaliation' in other areas such as development assistance or preferential market access.[98] It has been observed that 'there may be little that a small developing country can do to counter threats to withdraw preferential tariff benefits or foreign aid ... were the country to challenge a trade measure.'[99]

2. Evaluation of the constraint

It is difficult to determine whether these pressures are applied in practice.[100] Nevertheless, it is apparent that many developing countries' *perceive* that such consequences might flow from the initiation of a WTO dispute. This in turn may indeed have a chilling effect on their participation. Romano has written that of all the factors affecting the decision to litigate 'perhaps the most fundamental one, is … the willingness to utilise international judicial bodies.'[101] That said, the lack of participation of certain developing countries in dispute settlement activity may be a rational decision not to dedicate resources to a dispute that is already being litigated by another WTO Member. Where restrictive measures are applied to imports of all origins, or relate to subsidies that affect the trade a number of WTO Members, there is a degree of logic behind smaller WTO Members not actively participating in disputes initiated by other WTO Members and consciously 'free-riding' on the implementation positive rulings through the operation of the various MFN clauses of the WTO agreements.

IV. ADDITIONAL CONSTRAINTS LIMITING DEVELOPING-COUNTRY PARTICIPATION IN WTO DISPUTE SETTLEMENT

There are two additional constraints limiting developing-country participation in WTO dispute settlement that have received relatively little attention to date. First, that a significant proportion of developing-country trade occurs under rules that are not part of enforceable WTO law; and second, delays in gaining relief due to the time it takes to complete proceedings.

A. A SIGNIFICANT PROPORTION OF DEVELOPING-COUNTRY TRADE OCCURS UNDER RULES THAT ARE NOT PART OF ENFORCEABLE WTO LAW

A significant constraint limiting developing-country participation in WTO dispute settlement, that has not received much attention to date, is that a high proportion of developing-country trade falls under preferential rules that are not enforceable in WTO dispute settlement proceedings.[102]

A WTO Member may enforce the rules under which it trades in WTO dispute settlement proceedings only if those rules are part of enforceable WTO law. Article 1 of the DSU limits the scope of rights and obligations enforceable through the DSU to those in the Agreement Establishing the World Trade Organisation ('WTO Agreement'), the multilateral trade agreements annexed to it, as well as the two remaining plurilateral trade agreements (collectively the 'covered agreements'). Treatment bound in a WTO Member's individual WTO schedules is also part of enforceable WTO law as WTO schedules are an integral part of the GATT 1994 and the General Agreement on Trade in Services ('GATS').[103] Consequently, enforceable WTO law has a limited scope. As the Appellate Body confirmed, the WTO dispute settlement system cannot be used 'to determine rights and obligations *outside the covered agreements.*'[104]

Analysis of *actual* developing-country trade illustrates that a significant portion is regulated by rules that are not part of enforceable WTO law. In particular, many developing countries and LDCs access markets in developed countries through preferential schemes that do not create rights enforceable in WTO dispute settlement proceedings.

For example, since the early 1960s, most developed countries have provided non-reciprocal preferential access through Generalised System of Preferences ('GSP') schemes for which the Enabling Clause was obtained.[105] Other preferential schemes, limited to subsets of developing countries, include the preferential treatment granted to the EC market for goods of African, Caribbean and Pacific ('ACP') origin as required by the Cotonou Agreement and the recent Economic Partnership Agreements, and preferential treatment granted to the United States market for goods of African, Andean Community and Caribbean origin as required by the African Growth and Opportunity Act, the Andean Trade Preferences Act and the Caribbean Basin Economic Recovery Act. A number of WTO Members also provide duty-free and quota-free access to LDCs under 'Everything But Arms' schemes justified by the Enabling Clause.

A comprehensive OECD study finds that approximately half of all imports from eligible developing countries into the EC and Australian markets and approximately one third of all such imports into the United States, Canadian and Japanese markets enter under preferential rules.[106] For many developing countries the value of trade under preferences is considerable.[107] While a proportion of imports from larger developing countries also enter these markets under MFN tariffs, LDCs and small developing-country suppliers have the highest shares of trade falling under preferential rules.[108]

When developed countries provide preferential market access to developing countries, they have tended to not include that treatment as part of enforceable WTO law. Such treatment has never been incorporated in a WTO agreement and tends not to be bound in the preference provider's WTO schedule. Unless treatment is bound in a WTO Member's schedule, failure to accord that treatment cannot be raised as a claim in DSU proceedings.[109]

The fact that a significant portion is of developing-country trade is regulated by preferential rules that are not part of enforceable WTO law is a key constraint limiting developing-country participation in WTO dispute settlement. Unless addressed, it should come as no surprise that those developing countries that trade most under preferential rules, especially the LDCs, are not particularly active in WTO dispute settlement activity.

B. LENGTH OF TIME TO COMPLETE PROCEEDINGS

Article 3.3 of the DSU emphasises that 'prompt settlement of [disputes]… is essential to the effective functioning of the WTO and a proper balance between the rights and obligations of WTO Members.' Despite this goal of prompt settlement of disputes, delay is one of the major criticisms of litigation undertaken in the WTO dispute settlement system. Davey, concludes an analysis with the observation that 'experience to date suggests that one problem with the WTO dispute settlement system is that in too many cases, it takes too long to resolve disputes.'[110] WTO Members have noted in the context of DSU review that 'time-savings in the WTO dispute settlement procedures are both desirable and achievable.'[111]

By way of illustration of the time periods typical for litigation in the WTO, normal panel proceedings have taken an average of 15 months from the date of establishment of the panel to the date the DSB considers the panel report for adoption.[112] This period of time surpasses the general rule in Article 20 of the DSU to 'not exceed nine months' for this stage of the litigation. Furthermore, panel proceedings must be preceded by formal consultations that in general require a minimum two-month period.[113] Members also have the right to appeal the panel report to the Appellate Body, an appeal process that may add a further three months to the litigation process. The period before a business may see redress as a result of WTO dispute settlement will be longer where it is impracticable to comply immediately with the DSB recommendations and rulings. In those instances, a defendant will be granted a reasonable period of time to do so that, on average, has been ten months.[114]

The constraint of the length of time it may take to gain redress through the WTO dispute settlement system for businesses in developing countries should not be underplayed. Davey notes that 'the delays do make the system less attractive to businesses and could in the long run lead to less and less use of the system.'[115] This is particularly so for businesses that have little capital and are highly dependent on annual revenues for survival. When faced with the option of challenging a trade barrier through WTO dispute settlement, that may take several years before there is redress, or simply transferring exports to another market that does not have the same barrier, many businesses in developing countries may be forced to focus on the latter option. While both options are not mutually exclusive, businesses with limited resources have less ability to invest in long-term strategies such as multi-year WTO litigation.

It should be noted that the time frames for completion of WTO litigation compare favourably to those of many international courts.[116] The problem, in the context of WTO dispute settlement, is the absence of retrospective remedies. Remedies only commence at the end of the reasonable period to comply. The combination of the time it takes to complete proceedings and a lack of retrospective remedies may detract many businesses from lobbying their governments to engage in WTO dispute settlement.

V. TENTATIVE SUGGESTIONS TO INCREASE DEVELOPING-COUNTRY PARTICIPATION IN WTO DISPUTE SETTLEMENT

A. IMPROVE DOMESTIC MECHANISMS TO IDENTIFY AND COMMUNICATE TRADE BARRIERS TO WTO LAWYERS

An inability to identify and communicate trade barriers to WTO lawyers is arguably the most significant of the four commonly-identified constraints limiting the participation of developing countries in WTO dispute settlement. The current proposals in the DSU review negotiations do not address this limitation to the effective use of the system for many developing countries. The development of public-private networks to assist export sectors to communicate trade barriers to the government, and for increased capacity building to ensure that governments are able to convey those barriers to WTO lawyers for legal assessment, appears to be an area where initiatives will be of enormous benefit for many developing countries. Such mechanisms already exist in most developed countries and some developing countries most active in WTO dispute settlement. Until the poorest WTO Members have similar domestic mechanisms the utility of WTO dispute settlement at securing their rights under WTO law is likely to be significantly undermined. The identification of this constraint is not new. Over five years ago, it was commented that '[b]uilding requisite developing country public-private partnerships will take time... [y]et, it is an essential task if the WTO dispute settlement system is to work for them.'[117] It still remains a priority area for many developing countries.

B. INCREASE THE SCOPE OF RULES UNDER WHICH DEVELOPING COUNTRIES TRADE AS PART OF ENFORCEABLE WTO LAW

As noted above, a key constraint limiting developing-country participation in WTO dispute settlement is that a significant proportion of developing-country trade is regulated by preferential rules that are not part of enforceable WTO law. As long as the multilateral trading system continues to segregate the rules under which the poorest trade from those enforceable in WTO dispute settlement one can expect that countries that trade most under preferences will not be particularly active in WTO dispute settlement activity.

This constraint has broader implications regarding the treatment of developing countries in the multilateral trading system. The perception that developing countries benefit from the increased legality of the WTO brought about by the DSU stems from the view that a rules-based system where legal rights and obligations are enforceable through a binding dispute settlement process is preferable for the economically weak than a power-based system. The DSU itself proclaims to provide 'security and predictability to the multilateral trading system' and to ensure a 'proper balance between the rights and obligations of Members.'[118] When developing and least-developed countries trade under preferential rules that are not part of enforceable WTO law they are effectively excluded from the security and predictability provided by the WTO legal regime. This has led to unbound preferential treatment being described as a 'strategy that is fundamentally unstable' with 'scope for *ad hoc* decisions' whereby preferences are 'withdrawn at the discretion of the preference-provider.'[119]

The lack of legal security and predictability when trading under preferential rules has led to a number of calls by beneficiary developing countries for tariff preferences to be bound in Members' WTO schedules. These calls are not limited to binding concessions in goods schedules. In 2006, the LDC Group put forward a proposal whereby developed countries 'shall' provide 'non-reciprocal special priority' in services sectors and modes of supply of interest to LDCs 'on a permanent basis and in a manner that ensures security, stability and predictability.'[120]

This paper does not suggest that *all* preferential rules should be incorporated into WTO law. Such a suggestion would require economic evaluation of the benefits of non-reciprocal preferential rules for developing countries. This has been done extensively elsewhere and assessment 'is not straightforward.'[121] Some believe that 'special and differential treatment has had only a marginal effect on country economic performance, especially through GSP'[122] and that 'empirical studies of the impact of GSP schemes conclude that little benefit has in fact accrued to developing countries.'[123] Furthermore, preferential schemes that differentiate between developing countries are considered by many to have unduly negative economic impacts on those excluded developing countries. This concern has manifested itself in various WTO disputes initiated by non-beneficiary developing countries against preferential rules. For example, EC preferential tariff treatment to bananas of ACP origin has been challenged in numerous WTO disputes brought by non-beneficiary Latin American banana producing countries.[124] Similarly, in *EC – Tariff Preferences*, India claimed successfully that aspects of the EC GSP scheme, from which it was excluded, were not applied in accordance with the conditions of the Enabling Clause that they be 'generalized, non-reciprocal and non-discriminatory.'[125]

The economic concerns with preferential rules warrant ongoing analysis. At the same time, few would challenge the proposition that, on occasion, some differentiation of substantive rules is required to accommodate the special position of developing countries in world trade. The economic evaluation at this juncture is, therefore, not whether to have preferential treatment, but where and in what form it is most effective.[126] In this regard, where there is a consensus among WTO Members that certain preferential rules are of economic benefit for developing countries, there seems little reason to not incorporate those preferences as part of enforceable WTO law. Unless this occurs, the poorest WTO Members will be largely excluded from the benefits of the security and predictability of the DSU enjoyed by other WTO Members.

Currently, the only area where there seems to be a nascent consensus to incorporate preferences as part of enforceable WTO law relates to the granting of duty-free and quota-free market access to products from LDCs. The Hong Kong Ministerial Declaration states that by 2008, or the start of the Doha Round implementation period, 'developed-country Members shall' provide duty-free and quota-free market access 'on a lasting basis... in a manner that ensures stability, security and predictability.'[127] It is likely that this declaration would need to be re-stated in separate instrument before being enforceable.[128] This would appear to be an area where preferential treatment could be bound in WTO Members' schedules or incorporated into a separate WTO agreement. Unless this occurs, LDC beneficiaries will not be able to enforce the preferential rules under which they trade through WTO dispute settlement.

A further constraint to developing-country participation in WTO dispute settlement that could be mitigated as a result of incorporating certain preferential rules into enforceable WTO law is the fear of 'retaliatory' withdrawal of preferential treatment if a dispute is initiated against a preference provider (referred to in Part III.D of this paper). As noted above, some commentators have argued that developing and least-developed countries may be unwilling to initiate WTO dispute settlement proceedings against trade barriers of developed countries due to their particular vulnerability to retaliation in other areas such as withdrawal of preferential market access. Once part of enforceable WTO law, preferences could only be withdrawn through formal changes to WTO law.[129] This would largely insulate developing-country beneficiaries from the 'rataliatory' withdrawal of preferences if they were to initiate a WTO dispute against a preference provider.

C. MAKE USE OF EXISTING DSU PROCEDURES TO EXPEDITE PROCEEDINGS

A further constraint that may, in part, explain developing countries limited participation in WTO dispute settlement to date are delays in gaining relief. Some WTO disputes proceedings will provide timely relief, with a relatively high proportion of disputes resulting in mutually agreeable solutions following the initial consultations stage.[130] Nonetheless, where further stages in the proceedings are required it may be several years before illegal trade barriers are brought into conformity with WTO law. As noted, this reduces the attractiveness of WTO dispute settlement for many businesses in developing countries.

The DSU contains certain procedures that could *currently* be utilised to expedite dispute settlement proceedings brought by developing countries.

Article 3.12 of the DSU allows a developing country to invoke the provisions contained in the 1966 Procedures[131] in any dispute against a developed country. The 1966 Procedures envisage an expedited panel process of only two months compared to the fifteen month period it takes to complete normal panel proceedings on average.[132] The 1966 Procedures require an additional period, following consultations, for the Director-General to use 'good offices' to attempt to facilitate a solution. While the time-period for these 'good offices' is not fully defined in the 1966 Procedures, an additional period of two months before the establishment of the panel would seem likely.[133] Thus, the use of Article 3.12 of the DSU and the 1966 Procedures provides developing countries with the possibility of an overall time saving of eleven months.

When one considers that delays are a constraint affecting the utility of WTO dispute settlement proceedings for many developing countries and their businesses, there would appear to be benefit to expediting proceedings through the use of these existing procedures. In 2007, the Article 3.12 of the DSU and the 1966 Procedures were invoked for the first time since the establishment of the WTO.[134]

Other procedures that may potentially expedite WTO dispute settlement are the existing options in the DSU for alternative dispute resolution ('ADR'). Article 24.2 of the DSU contemplates LDCs requesting the alternative procedures of 'good offices, conciliation and mediation' by the Director-General. In addition, Article 5 ('Good Offices, Conciliation and Mediation') and Article 25 ('Arbitration') of the DSU provide for alternative approaches available to all Members.

Since the establishment of the WTO, Members have rarely utilised to these alternative procedures. Notable exceptions were resort to an arbitration pursuant to Article 25 of the DSU in the Copyright Arbitration of 2001,[135] to sui generis arbitrations in the Banana Tariff Arbitrations in 2005[136] and to mediation by the Philippines, Thailand and the EC in 2002.[137]

The practice from these occasions demonstrates that ADR can result in extremely expeditious WTO dispute settlement compared to normal panel and Appellate Body proceedings.[138]

For example, a principal motivation behind the parties resorting to Article 25 of the DSU in the Copyright Arbitration was a desire to obtain a rapid decision. As the arbitrators noted, 'one of the main concerns expressed by the parties when this matter was referred to arbitration was the we proceed expeditiously.'[139] In response to that desire, the entire proceedings, from the request for arbitration to notification to the DSB and TRIPS Council of the award was completed in less than four months.[140]

Similarly, the period between the request for the First Banana Tariff Arbitration and the issuance of the award was four months, a time period that was reduced to a mere one month for the Second Banana Tariff Arbitration.[141] The speed with which these arbitrations were completed is notable as it required adjudication of a complex dispute involving a workload comparable to those of many panel and Appellate Body proceedings. The Arbitral Tribunal examined written submissions of ten parties[142] and fourteen third parties[143] and held oral hearings that extended over five days.[144]

Both proceedings illustrate that expeditious dispute settlement is possible within the WTO. It is a curiosity that at a time when domestic legal systems and private international commercial disputes are increasingly turning to alternative forms of dispute settlement to address delays with the litigation model, WTO Members have not made further use of these alternative procedures.

Admittedly, the ADR options in the DSU require the consent of both the plaintiff and the defendant. This may not occur often as a defendant may have little incentive to accelerate proceedings in a system that does not have retrospective remedies. This characteristic of ADR options in the DSU may explain their limited the use to date. In contrast, the possibility of expediting proceedings through Article 3.12 of the DSU and the 1966 Procedures is a right of all developing countries taking disputes against developed countries. Use of these procedures may, therefore, become more common in the future.

VI. CONCLUSION

The introduction of binding WTO dispute settlement is perceived to be of considerable benefit for developing countries. The shift from a power- to a rules-based system is seen to permit even the smallest and weakest economic powers to enforce the rules under which they trade and consequently to provide unprecedented security and predictability in their trading relations.

This paper evaluated that perception with a focus on the reality that the vast majority of developing countries have not participated actively in the WTO dispute settlement system. It assessed the various constraints commonly identified as explaining that lack of participation observing that some are less pertinent than they once were while others, important when they arise, may not occur frequently in practice. At the same time, a lack of domestic mechanisms to identify and communicate trade barriers to WTO lawyers is a severe limitation for many developing countries and appears to be a priority for assistance. The paper also identifies other important constraints that have received little attention to date, including that a significant proportion of developing-country trade occurs under rules that are not part of enforceable WTO law and the time it takes to complete proceedings.

The analysis in this paper leads to certain important conclusions. First, that increasing the participation of developing countries in WTO dispute settlement requires a re-direction of focus on certain key, and other neglected, constraints. Second, that addressing these constraints will often require solutions beyond those discussed in the current DSU review negotiations such as assistance in creating domestic mechanisms to identify and communicate trade barriers and incorporating the rules under which the poorest trade as part of enforceable WTO law. Third, that certain constraints may be partially mitigated by using *existing* procedures in the DSU such as the possibility to accelerate proceedings pursuant to Article 3.12 of the DSU and the 1966 Procedures.

The paper does not intend to undermine the utility the current proposals made in the DSU review negotiations. The proposals for additional dispute settlement funding and improved enforcement could benefit developing countries. At the same time, until other constraints are addressed, it should come as no surprise that many developing countries are not particularly active in WTO dispute settlement activity.

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[1] D. Steger and S. Hainsworth, 'World Trade Organization Dispute Settlement: The First Three Years' 1998 *JIEL* 1(2) 199, at 225.

[2] J. Weiler, 'The Rule of Lawyers and the Ethos of Diplomats Reflections on the Internal and External Legitimacy of WTO Dispute Settlement' 2001 *Journal of World Trade* 35(2) 191, at 192.

[3] C. Bown and B. Hoekman, 'WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector' 2005 *JIEL* 8(4) 861, at 863.

[4] W. Davey, 'The WTO Dispute Settlement System' 2000 *JIEL* 3(1) 15, at 15.

[5] H.E. Mr. Ujal Singh Bhatia, Ambassador and Permanent Representative of India to the WTO, "Settling Disputes Among Members", Presentation at the WTO Public Forum 2008, Session 6, 24 September 2008. Available at: http://www.wto.org/english/forums_e/public_forum08_e/programme_e.htm

[6] Ibid.

[7] Donald McRae, 'What is the Future of WTO Dispute Settlement?' 2004 *JIEL* 7(1) 3, at 9.

[8] Presentation by Ambassador Bhatia of India, above footnote 5.

[9] WTO Secretariat Document, 'Update of WTO Dispute Settlement Cases, New Developments since last Update (Until 1 December 2005)', WT/DS/OV/25, 12 December 2005, at iii-iv. A similar trend can be observed through to May 2008. See WTO Secretariat Document, 'Update of WTO Dispute Settlement Cases, New Developments since last Update (From 22 January until 30 May 2008)', WT/DS/OV/33, 3 June 2008.

[10] R. Abbott, 'Are Developing Countries Deterred from Using the WTO Dispute Settlement System? Participation of Developing Countries in the DSM in the years 1995-2005', *ECIPE Working Paper No. 01/2007*, at 4.

[11] WTO Secretariat Document, 'Appellate Body - Annual Report for 2007', 30 January 2008, WT/AB/9, at 17. Developing country Members made 1 appearance as appellant, 3 as other appellants, 5 as appellees, and 24 as third participants.

[12] W. Davey, 'The WTO Dispute Settlement System: The First Ten Years' 2005 *JIEL* 8(1) 17, at 24. See Abbott, above footnote 10, at 8 ('the higher ratio for the most recent period 2001-2005 suggests that developing members, after a slow start within a new system, are beginning to find it more familiar and learning it can be used to best advantage').

[13] Report of the Consultative Board to the Director-General Supachai Panitchpakdi, *The Future of the WTO: Addressing institutional challenges in the next millennium*, 2004, at 50.

[14] See Abbott, above footnote 10, at 9-11. The main developing-country users are Brazil, India, Thailand, Chile and Argentina. The People's Republic of China could be added to this list as of it has been an active complainant (3 disputes), respondent (11 disputes) and third party (62 disputes) in WTO dispute settlement since its accession to the WTO in 2001.

[15] Ibid.

[16] Request for Consultations by Bangladesh, *India – Anti-Dumping Measure on Batteries from Bangladesh*, WT/DS306/1, G/L/669, G/ADP/D52/1, 2 February 2004.

[17] Bown and Hoekman, above footnote 3, at 862.

[18] See Abbott, above footnote 10, at 11.

[19] V. Mosoti, 'Africa in the First Decade of WTO Dispute Settlement' 2006 *JIEL* 9(2) 427, at 435.

[20] Presentation by Ambassador Bhatia of India, above footnote 5.

[21] This view has been espoused by the African Group in the context of negotiations on DSU review. Proposal by the African Group, Negotiations on the Dispute Settlement Mechanism Understanding, TN/DS/W/15, 25 September 2002, at 2. See also Bown and Hoekman, above footnote 3, at 889 ('This paper focuses on the costs of the WTO litigation process as a potential explanation for the limited participation of poor countries in dispute settlement').

[22] Presentation by Ambassador Bhatia of India, above footnote 5.

[23] Bown and Hoekman, above footnote 3, at 870. Nordström and Shaffer come to a similar conclusion for a dispute of medium complexity through to the Appellate Body stage. See H. Nordström and G. Shaffer, 'Access to Justice in the World Trade Organization: A Case for a Small Claims Procedure', *ICTSD Dispute Settlement and Legal Aspects of International Trade Issue Paper No. 2*, June 2007, at 9-10.

[24] Nordström and Shaffer, above footnote 23, at 9. Referring to the legal fees in the context of the Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper ('Japan – Film')*, WT/DS44/R, adopted 22 April 1998. Presumably that figure will have been exceeded in subsequent complex disputes.

[25] These stages are set out in, respectively, Articles 11, 17, 21.3(c), 21.5 and 22.6 of the DSU.

[26] M. Busch and E. Reinhardt, *Testing International Trade Law: Empirical Studies of GATT/WTO Dispute Settlement* (Paper presented at the University of Minnesota Law School Conference on the Political Economy of International Trade Law, 15-16 September 2000).

[27] The fifth, and latest, reports being the Appellate Body Reports, *Canada/United States - Continued Suspension of Obligations in the EC - Hormones Dispute*, WT/DS320/AB/R and WT/DS321/AB/R, 16 October 2008.

[28] For example, the Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R, and Corr.1, adopted 21 March 2005, modified by Appellate Body Report, WT/DS267/AB/R; the Panel Report, *European Communities – Export Subsidies on Sugar*, WT/DS265/R, WT/DS266/R WT/DS283/R, adopted 19 May 2005, modified by Appellate Body Report, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R; and the ongoing disputes based on the Request for the Establishment of a Panel by the United States, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, *(Second Complaint),* WT/DS347/3, WT/DS316/6, 11 April 2006; and Request for the Establishment of a Panel by the European Communities, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS317/5, WT/DS353/2, 23 January 2006.

[29] The only developing countries to have initiated dispute settlement proceedings under the SPS Agreement are Argentina (in WT/DS293) and the Philippines (in WT/DS270 and WT7DS271).

[30] The United States, Canada, EC and New Zealand have initiated 5 disputes under the SPS Agreement.

[31] See Nordström and Shaffer, above footnote 23, at 1-8.

[32] See Bown and Hoekman, above footnote 3, at 863.

[33] G. Shaffer, 'The Challenges of WTO law, Strategies for Developing Country Adaptation' 2006 *World Trade Review* 5(2) 177, at 185.

[34] As of December 2008, the services of the ACWL were available to 28 developing countries that had become Members of the ACWL and the 42 LDCs that were WTO Members or in the process of acceding to the WTO. See ACWL webpage at http://www.acwl.ch (last visited 5 December 2008).

[35] Legal advice and training is provided for free to all ACWL developing-country Members and all LDCs. Support in dispute settlement proceedings is charged according to hourly rates that vary between CHF 40 and CHF 324 according to each country's share of world trade and income per capita. These rates are applied in conjunction with a time budget established by the Management Board. *Ibid*.

[36] The 10 developed country ACWL Members that have made contributions to the ACWL are not entitled to its services. LDCs are exempt from the requirement to make a financial contribution. *Ibid*.

[37] Speech delivered by the Director General of the WTO, Mike Moore at the Inauguration of the ACWL on 5 October 2001. *Ibid*.

[38] Speech delivered by the Chairman, Appellate Body, Claus-Dieter Ehlermann at the Inauguration of the ACWL on 5 October 2001. *Ibid*.

[39] Abbott, above footnote 10, at 12. Also Bown and Hoekman, above footnote 3, at 875 ('The ACWL may do much to offset the lack of legal assistance available to poor countries').

[40] ACWL Document, 'How to Use the Services of the ACWL: A Guide for Developing Countries and LDCs', October 2007. See ACWL webpage at http://www.acwl.ch (last visited 5 December 2008).

[41] Bown and Hoekman, above footnote 3, at 876.

[42] See UNCTAD Report of the Commission on Trade in Goods and Services, and Commodities, at its Seventh Session, 3-6 February 2003, TD/B/EX(31)/4, TD/B/COM.1/58, p. 33, paras. 107-8.

[43] M. Footer, 'Developing Country Practice in the Matter of WTO Dispute Settlement' 2001 *Journal of World Trade* 35(1) 55, at 94.

[44] Article 22 of the DSU and Articles 4.10 and 7.9 of the SCM Agreement. This paper refers to these enforcement options, collectively, as "retaliation rules".

[45] R. Hudec, 'The Adequacy of WTO Dispute Settlement Remedies: A Developing Country Perspective' in B. Hoekman, A. Mattoo, P. English, *Development, Trade and the WTO* (Washington D.C., World Bank, 2002), at 81.

[46] TN/DS/W/17, para. 12.

[47] TN/DS/W/15, paras. 2 and 6.

[48] E.g. TN/DS/W/33 (Ecuador), TN/DS/W/17 and TN/DS/W/37 (LDC Group) and TN/DS/W/15 and TN/DS/W/42 (African Group).

[49] E.g. TN/DS/W/47 (India, Cuba, the Dominican Republic, Egypt, Honduras, Jamaica and Malaysia).

[50] E.g. TN/DS/W/23 (Mexico).

[51] This section is based, in part, on a larger piece in H. Nottage, 'Evaluating the Criticism that WTO Retaliation Rules undermine the utility of WTO Dispute Settlement for Developing Countries' in C. Bown & J. Pauwelyn, *The Law, Economics and Politics of Trade Retaliation in WTO Dispute Settlement* (Forthcoming, Cambridge University Press, 2009).
[52] Recourse by Antigua and Barbuda to Article 22.2 of the DSU, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, *(*herein *US – Gambling)*, WT/DS285/22, 22 June 2007, para. 3.
[53] Decision by the Arbitrator, *European Communities – Regime for the Importation. Sale and Distribution of Bananas - Recourse to Arbitration by the European Communities under Article 22.6 of the DSU* (herein *EC – Bananas III (Ecuador) (Article 22.6 – EC))*, WT/DS27/ARB/ECU, 24 March 2000, para. 95.
[54] Ibid, para. 73.
[55] H. Grosse Ruse-Kahn, 'A Pirate of the Caribbean? The Attractions of Suspending TRIPS Obligations' 2008 *JIEL* 11(2), 313-364, at 332.
[56] S. Charnovitz, 'Should the Teeth Be Pulled? An Analysis of WTO Sanctions', in D. L. M. Kennedy and J. D. Southwick, *Political Economy of International Trade Law: Essays in Honor of Robert E. Hudec* (Cambridge, Cambridge University Press, 2002) 602-35 at 625.
[57] Y. Renouf, 'A Brief Introduction to Countermeasures in the WTO Dispute Settlement System', in R Yerxa and B. Wilson *Key Issues in WTO Dispute Settlement* (Cambridge, Cambridge University Press, 2005) at 118
[58] World Trade Report 2007, WTO, at 284.
[59] See M. Bronkers and N. Van den Brock, 'Financial Compensation in the WTO: Improving Remedies of WTO Dispute Settlement' 2006 *JIEL* 8(1) 101-126, at 103; P. Mavroidis, 'Remedies in the WTO Legal System: Between a Rock and a Hard Place', 2000 *Eur. J. Int'l. Law* 11(1); and B. Hoekman and P. Mavroidis, *WTO Dispute Settlement, Transparency, and Surveillance* (Washington D.C., World Bank, 1999) at 6.
[60] Recourse by Antigua and Barbuda to Article 22.2 of the DSU, *US – Gambling*, above footnote 52, paras. 2-3.
[61] Ibid.
[62] Decision by the Arbitrator, *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, above footnote 53, para. 73. See also para. 86.
[63] Charnovitz, above footnote 56, at 621.
[64] K. Bagwell, P. Mavroidis, R. Staiger, The Case for Tradable Remedies in WTO Dispute Settlement (Washington, DC, World Bank Policy Research Paper No. 3314, 2004), at 14-15.
[65] Mavroidis, above footnote 59, at 763-813.
[66] C. Bown, 'On the Economic Success of GATT/WTO Dispute Settlement', 2004 *Review of Economics and Statistics* 86, at 17.
[67] Ibid.
[68] Bagwell, Mavroidis, Staiger, above footnote 64, at 4.
[69] Ibid.
[70] World Trade Report 2007, WTO, at 284.
[71] Davey, above 12, at 46-48.
[72] Ibid, at 47.
[73] W. Davey, 'The WTO: Looking Forwards' 2006 *JIEL* 9(1) 3, at 12
[74] B. Wilson, 'Compliance by WTO Members with Adverse WTO Dispute Settlement Rulings' 2007 *JIEL* 10(2) 397, at 397.
[75] Ibid.
[76] R. Malacrida, 'Towards Sounder and Fairer WTO Retaliation: Suggestions for Possible Additional Procedural Rules Governing Members' Preparation and Adoption of Retaliatory Measures' 2008 *JWT* 42(1) 3-60, at 20.
[77] In fact, in GATT practice retaliation was only authorised on one occasion. See Determination by the CONTRACTING PARTIES of 8 November 1952, *Netherlands Measures of Suspension of Obligations to the United States*, BISD 1S/32-33. On four other occasions, the requests for retaliation authority were vetoed. See, e.g., the request vetoed by the United States following the adverse ruling in the GATT Panel Report, *United States – Taxes on Petroleum and Certain Imported Substances*, L/6175, adopted 17 June 1987, BISD 34S/136.
[78] R. Hudec, above 45, at 82.
[79] Ibid.
[80] Ibid.
[81] It has been observed that as the GATT dispute settlement regime permitted defendants to block both the establishment of panels and the adoption of adverse panel reports 'it is not surprising that if and when a contracting party accepted an adverse panel report... that contracting party then ordinarily went on to implement the ruling.' Malacrida, above footnote 76, at 8.

[82] If not, why was it that 'the great majority of [GATT] violation rulings were in fact adopted' and that 'the bulk of these violation rulings, including many of those not adopted, did produce a satisfactory correction of the practice at issue.' See Hudec, above footnote 45, at 82.
[83]Ibid, at 81.
[84] Ibid, at 82-83.
[85] Of the thirteen Members that made these requests, eight were developing-country Members. These developing countries had varying market sizes and trade shares, suggesting that a spectrum of developing countries saw utility in at least requesting retaliation. See Nottage, above footnote 51.
[86] Developing countries pursued their right to retaliate through to the arbitration stage in five of those disputes, suggesting that developing countries have seen merit in pursuing actual DSB authorisation to retaliate. Ibid.
[87] This is an area of marked discrepancy between developing-country practice and developed-country practice. Developed countries imposed measures on eight of the ten occasions where they were granted authorisation, while developing countries imposed measures on only one of the eight occasions where they were granted such authorisation. The extent to which this permits wider conclusions is limited, however, as the factual circumstances of the relevant disputes demonstrate that actual retaliation may no longer have been necessary or of limited incremental purpose. Nottage, above footnote 85.
[88] Ibid.
[89] On the other hand, it might also be noted that on a number of occasions mutually agreed solutions were apparently reached after authorisation to request retaliation was made.
[90] Wilson, above footnote 74, at 397.
[91] Acknowledging that this conclusion is based on statistics regarding disputes initiated by developing countries. This section does not account for any disputes that developing countries may not have *initiated* due to concerns that successful rulings would not result in compliance in the absence of retaliation. Evidence of this nature is hard to accurately document. It would only affect the conclusions of this section if it could be demonstrated that defendants would not have complied in the absence of retaliation. Otherwise it would only illustrate the assumption, often inaccurate and at the centre of this section's analysis, that retaliation is a requirement for compliance in dispute settlement.
[92]See Abbott, above footnote 10, at 12-13.
[93]See Shaffer, above 33, at 179.
[94]Resulting in the (i) the European Commission Market Access Database, (ii) the USTR Annual National Trade Estimate Reports on Foreign Trade Barriers and 'Special 301' Reports on intellectual property, and (iii) Japan's Ministry of Economy, Trade and Industry ('METI') Annual Reports on the WTO Inconsistency of Trade Policies by Major Trading Partners.
[95]See Shaffer, above footnote 33, at 184.
[96]B. Hoekman, 'Strengthening the Global Trade Architecture for Development', 2002 *World Trade Review* 1(1) 23, at 36.
[97]See G. Shaffer, *Defending Interests: Public-Private Partnerships in WTO Litigation* (Washington, DC: Brookings Institution, 2003).
[98]See Bown and Hoekman, above footnote 3, at 863.
[99]See Shaffer, above footnote 33, at 193.
[100]Shaffer states that threats of this nature have been 'confirmed in a number of interviews, including with a former member of USTR'. See Shaffer, above footnote 33, at 193 at fn 66. In contrast, Abbott notes that 'there is not much empirical evidence that this has actually happened'. See Abbott, above footnote 10, at 14. Bown and Hoekman, reflect the lack of certainty noting that the 'evidence as to whether such political arrangements affect the willingness of countries to engage in WTO dispute settlement activity relating to their trading interests is inconclusive'. See Bown and Hoekman, above footnote 3, at 863 at fn 9.
[101]Cesare Romano, *International Justice and Developing Countries: A Qualitative Analysis, The Law and Practice of International Courts and Tribunals*, Vol. 1 No. 2, August 2002, at 551-552.
[102] See H. Nottage, "Trade and Development" in D. Bethlehem, D. McRae, R. Neufeld, I. Van Damme (eds), *Oxford Handbook of International Trade Law* (Forthcoming Oxford, Oxford University Press, 2009).
[103]The Appellate Body has held that 'all the Schedules of the Members of the WTO, are an integral part of the GATT 1994 as well as the WTO Agreement, by virtue of Article II:7 of the GATT 1994.' See Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, and Corr.1, adopted 27 September 2005, para. 145. Pursuant to Article XX:3 of the GATS, commitments included in services schedules are an integral part of the GATS.

[104]Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and other Beverages,* WT/DS308/AB/R, adopted 24 March 2006, para. 56. See also Articles 1, 3.2, 7.1, 11, 19.2 and 23 of the DSU. Noting that while panels and the Appellate Body cannot *enforce* rules in instruments outside the covered agreements, they may examine those instruments as part of a legal justification for measures otherwise inconsistent with WTO law (for

example a regional trade agreement consistent with Article XXIV of the GATT or preferential agreement consistent with the Enabling Clause may be examined as justification for measures otherwise inconsistent with Article I:1 of the GATT).

[105] *Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries* (the 'Enabling Clause'), GATT Document L/4903, 28 November 1979, BISD 26S/203. Currently, the WTO Members that grant preferences under the Enabling Clause include: Australia, Belarus, Canada, the EC, Japan, New Zealand, Norway, Poland, Russia, Switzerland and the United States. See WT/COMTD/W/93.

[106] OECD, Trade Preference Erosion: Potential Economic Impacts, OECD Trade Policy Working Paper No. 17, TD/TC/WP(2004)30/FINAL, 26 April 2005, para 48 (OECD 2005) ('In absolute terms, there are substantial flows under preference programmes for all 5 destination markets, particularly when seen from the perspective of certain developing country exporters.')

[107] Ibid., para. 51. A number of developing countries exported over USD 100 million in trade to each of the 5 destination markets studied. At its peak in 1994, the US GSP system reportedly covered upwards of USD 19 billion worth of imports. J. Jackson, *The World Trading System: Law and Policy of International Economic Relations*, 2nd ed. (Cambridge, MIT Press, 1999) at 325.

[108] OECD 2005, above footnote 106, para. 7.

[109] A failure to 'accord to the commerce of [another Member]' the treatment bound in a goods schedule is a breach of Article II of the GATT. Similarly, a failure to 'accord services and service suppliers of any other Member' the treatment bound in a services schedule is a breach of Articles XVI:1 and XVII:1 of the GATS.

[110] Davey, above footnote 10, 50.

[111] Revised Australian Proposal, Possible Time-Savings in the WTO Dispute Settlement Procedures, Special Session of the Dispute Settlement Body, JOB(07)/66, 18 May 2007, at 2.

[112] As of 26 November 2008, the average number of days between the establishment of the panel by the DSB and the date the DSB considers the panel report for adoption for all disputes adopted by the DSB that were not appealed was 469 days, see http://www.worldtradelaw.net/dsc/database/adoptiontiming1.asp.

[113] Pursuant to Article 4.7 of the DSU, the period between the request for consultations and the establishment of the panel is normally 60 days (Article 4.7 of the DSU). Pursuant to Articles 4.3 and 4.6 of the DSU, this period may be shorter, between 10 and 60 days, in the exceptional circumstances that the Member being consulted does not respond within 10 days of receipt of the request, does not consult within 30 days of the receipt of the request, or agrees that consultations have failed to settle the dispute.

[114] This period reflects the average time to date to implement resulting from mutual agreement pursuant to Article 21.3(b) of the DSU (9 months) and resulting from arbitration pursuant to Article 21.3(c) of the DSU (12 months). See http://www.worldtradelaw.net/dsc/database/implementaverage.asp

[115] Davey, above footnote 73, at 12.

[116] Revised Australian Proposal, Possible Time-Savings in the WTO Dispute Settlement Procedures, Special Session of the Dispute Settlement Body, JOB(07)/66, 18 May 2007, at 2.

[117] G. Shaffer, V. Mosoti, A. Qureshi, 'Towards A Development-Supportive Dispute Settlement System in the WTO', ICTSD Resource Paper No. 5, March 2003, at 29.

[118] DSU, Articles 3.2 and 3.3.

[119] A. Keck and P. Low, 'Special and Differential Treatment in the WTO: Why, When and How', Economic Research and Statistics Division, WTO, January 2004, at 12.

[120] Communication from the Republic of Zambia on behalf of the LDC Group, A Mechanism to Operationalize Article IV:3 of the GATS, TN/S/W/59, 28 March 2006.

[121] Keck and Low, above footnote 119, pp. 10-14. Consultative Board Report, above footnote 13, paras. 93-102.

[122] J. Whalley, 'Non-discriminatory Discrimination: Special and Differential Treatment under the GATT for Developing Countries' 1990 *The Economic Journal* 100, at 1318-1328.

[123] See Consultative Board Report, above footnote 13, para. 99.

[124] The most recent reports being Appellate Body Report, *EC – Regime for the Importation, Sale and Distribution of Bananas*, Second Recourse to Article 21.5 of the DSU by Ecuador, WT/DS27/AB/RW2/ECU of 26 November 2008 and Appellate Body Report, *EC – Regime for the Importation, Sale and Distribution of Bananas*, Recourse to Article 21.5 of the DSU by the United States, WT/DS27/AB/RW/USA of 26 November 2008.

[125] Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, 7 April 2004, para. 145.

[126] See M. Pangetsu, 'Special and Differential Treatment in the Millennium: Special for Whom and How Different?', 2000 *The World Economy* 23(9), at 1295.

[127] Hong Kong Ministerial Declaration, WT/MIN(05)/DEC, adopted on 18 December 2005. Paragraphs 36 and 47, read with proposal 36 in Annex F.

[128] For a legal analysis of this question see H. Nottage and T. Sebastian, 'Giving Legal Effect to the Results of WTO Negotiations: An Analysis of the Methods of Changing WTO Law' 2006 *JIEL* 9(4) 989, at 1003-1010.

[129] Failure to accord preferential treatment bound in a WTO Member's schedule could be raised as a claim in DSU proceedings. See above, fn X. Of course, preferential treatment bound in a WTO Member's schedule could be modified in a manner consistent with the formal modification procedures in Article XXVIII of the GATT or Article XXI of the GATS. These, however, envisage compensation or the withdrawal of substantially equivalent concessions and commitments. Nottage and Sebastian, above footnote 128, at 998.

[130] See Report of the Consultative Board to the Director-General Supachai Panitchpakdi, *The Future of the WTO: Addressing institutional challenges in the next millennium*, 2004, at 50.

[131] Decision of 5 April 1966 on Procedures Under Article XXIII, BISD 14S/18.

[132] Noting that Article 3.12 of the DSU also provides that where the panel considers that the two month time-frame for completing the panel proceedings is insufficient 'that time-frame may be extended... with the agreement of the complaining party.'

[133] The parties are first requested by the Director-General to 'promptly furnish all relevant information' (paragraph 2 of the 1966 Procedures) and it would seem reasonable to assume that the period for 'promptly' furnishing all relevant information will not be greater than 21 days. This period is derived from the time-frames provided in the standard Working Procedures for panel proceedings in Appendix 3 of the DSU. These grant the complaining party 3-6 weeks to submit its written submission, and the party complained against 2-3 weeks from that date to submit a rebuttal. Within this range of 2-6 weeks, one might assume a period of 3 weeks for submissions under the 1966 Procedures on the basis that an underlying objective for those procedures is to achieve an accelerated settlement of a dispute. Once this information is received, the Director-General shall consult with the parties with a view to promoting a mutually satisfactory solution for a minimum 60 day period, following which, if no such solution has been reached, either party may request the Director-General to bring the matter to the attention of the DSB (paragraph 3 of the 1966 Procedures). At that point, the Director-General must submit a report to the DSB on the action taken by him together with all background information. While the 1966 Procedures could be interpreted to require the Director-General to immediately submit the report, it would seem reasonable to assume that there is a 7 day period in which to do so. Upon receipt of the report, the DSB is required to establish a panel (paragraph 5 of the 1966 Procedures). The sum of these time periods between the request for consultations and the establishment of the panel is 59 days.

[134] Request for Consultations by Colombia, *European Communities – Regime for the Importation of Bananas*, WT/DS361/1, 26 March 2007. Under the GATT, the provisions of the 1966 Decision were resorted to on 6 occasions between 1978 and 1993. *Analytical Index: Guide to GATT Law and Practice*, Vol. 2., WTO 1995, at 765-66.

[135] Award of the Arbitrators, *United States – Section 110(5) of the US Copyright Act*, Recourse to Arbitration under DSU Article 25, WT/DS160/ARB25/1, 9 November 2001 (the "Copyright Arbitration").

[136] On 1 August 2005 the Arbitrator issued its award in *European Communities – The ACP-EC Partnership Agreement – Recourse to Arbitration Pursuant to the Decision of 14 November 2001*, WT/L/616 (the "First Banana Tariff Arbitration"), and on 27 October 2005 the Arbitrator issued its Award in *European Communities – The ACP-EC Partnership Agreement – Second Recourse to Arbitration Pursuant to the Decision of 14 November 2001*, WT/L/625 (the "Second Banana Tariff Arbitration").

[137] Communication from the Director-General, *Request for Mediation by the Philippines, Thailand and the European Communities*, WT/GC/66 of 16 October 2002. This mediation was not requested pursuant to Article 5 of the DSU but followed the procedures in that provision.

[138] See H. Nottage and J. Bohanes, 'Arbitration as an Alternative to Litigation in the WTO: Observations in light of the 2005 Banana Tariff Arbitrations' in Y. Taniguchi, A. Yanovich and J. Bohanes (eds) *The WTO in the 21st Century* (Cambridge, Cambridge University Press, 2007).

[139] Award of the Arbitrators, *United States – Section 110(5) of the US Copyright Act*, Recourse to Arbitration under DSU Article 25, WT/DS160/ARB25/1, para. 1.13.

[140] The request for arbitration was made on 23 July 2001, the arbitrators selected by 13 August 2001, and the award issued to the parties two months later, on 12 October 2001. Ibid, para. 1.8.

[141] The First Banana Tariff Arbitration was requested on 30 March 2005, and the award of the Arbitral Tribunal issued four months later on 1 August 2005. This period of time included 30 days for the selection of the arbitrators and 90 days to then render an award. The Second Banana Tariff Arbitration was even quicker, as it was requested on 26 September 2005 and the award issued a mere 30 days later on 27 October 2005.

[142] Nine Latin American countries and the EC.

[143] Made up of relevant ACP banana exporting countries.

[144] See Nottage and Bohanes, above footnote 138.

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