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

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Abstract

Developing nations comprise more than four-fifths of the membership of the World Trade Organization (“WTO”). Yet, they seldom participate in the WTO’s powerful dispute settlement process. This is problematic because the WTO is essentially a self-enforcing system of reciprocal trade rights that relies on proactive monitoring and enforcement by all members. Use of the self-enforcement mechanism – by initiating cases under the WTO’s Dispute Settlement Understanding (“DSU”) - is critical.

There are five primary reasons why developing nations do not actively invoke the DSU. This Article argues that the most significant of these reasons is that the WTO’s remedies do not provide meaningful redress to developing nations, who remain largely absent from WTO litigation. This Article then contributes a workable proposal to reform the remedies structure of the WTO, particularly in light of the needs of developing nations. The availability of meaningful remedies lies at the heart of any viable legal system.

My proposal entails the use of a litigation strategy for developing nations which 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 is the regular joinder provision of the DSU. 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 DSB, for least developed nations.

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 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 class action might. In the remedies stage, all named parties would benefit. However, all parties would get to aggregate their level of harm, such that the threatened trade retaliation can be equal to the sum of all of the harm suffered by the class. The class can 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 amount of harm they suffered to another class member, allowing that member to exercise retaliation on its behalf.

The strategy can be implemented unilaterally by WTO members with only minimal procedural changes. It has the benefit of not requiring any amendment to WTO documents. Any amendment would be virtually impossible to achieve in the current political climate. It would provide a
meaningful way for developing nations to play an active role in dispute settlement. Most importantly, the proposal enables developing nations to have real clout in the trade arena, thereby making them more invested in the international trading system.

Phoenix X. F. Cai*

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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 no 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"). 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(s) can bring a complaint under the dispute settlement procedures of the WTO. When nations win cases at the WTO, the preferred remedy is that the losing nation withdraws the offending measure or rule. This 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. However, this remedy is not helpful for developing nations that do not possess sufficient economic power to meaningfully use the remedy. 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.

Of the 153 nations that are members of the WTO, more than of two-thirds are developing nations. Yet, despite their strengths in numbers, developing nations as a group rarely participate in dispute settlement, a

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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 See discussion, infra section II(C).


4 See World Trade Organization, The Sub-Committee on Least-Developed Countries,
core aspect of the WTO. This is problematic because the WTO is essentially a self-enforcing system\(^5\) of reciprocal trade rights that relies on proactive monitoring by all members. Use of the self-enforcement mechanism – initiating cases under the Dispute Settlement Understanding (“DSU”)\(^6\) - is

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\(^5\) **World Trade Organization, A Handbook on the WTO Dispute Settlement System** 7 (2004) (“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.”)

critical. No WTO police or prosecutor 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 it suffered, but also the opportunity to set precedent 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 under-represented. 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. One can trace five distinctive lines of reasoning within the 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).


existing literature. These explanations are: (1) lack of market share and ability to affect world markets,\(^9\) (2) fear of non-WTO or extra-legal retaliation by more powerful trading partners,\(^{10}\) (3) costs and resource constraints,\(^{11}\) (4) lack of legal capacity and expertise,\(^{12}\) and (5) asymmetries

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\(^{10}\) *Id.* at 104.

\(^{11}\) *Id.* at 105

\(^{12}\) *Id.* at 105
or unevenness in the effectiveness of remedies. 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, I have tackled the resource constraint and lack of legal capacity and expertise problems.

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. In light of the current deadlock in the Doha Round of WTO negotiations (which are not even primarily aimed at remedies), I argue 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. Indeed, any such explicit reference or incorporation of Rule 23 would vitiate one of the primary benefits of this proposal, i.e., the ease of implementation without formal amendments to WTO documents.

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13 Id. at 105
17 FED. R. CIV. P. 26
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 allows 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. 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 DSB, for least developed nations.

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 is the remedy implemented, just as all third parties currently do. However, if withdrawal does not occur, then all parties would get to aggregate their level of harm, such that the threatened trade retaliation can be equal to the sum of all of the harm suffered by the class. The class can 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 amount of harm 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

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18 DSU, supra note 6, Art. 10.
It is important for developing nations to make use of the DSU 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. This 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. 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 can not effectively enforce the rights they already have, why should they be bothered to negotiate for additional rights or to accept more obligations? Effective enforcement, through meaningful remedies, is a necessary pre-condition to developing nations’ greater participation in the WTO in general.

B. A Note on Scope

The challenges facing developing nations are each important and each have drawn attention, albeit unequally, in the existing literature. 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, I addressed the problems of costs and lack of legal capacity and expertise in a previous article on technical assistance or aid for trade. Solutions, such as private sector assistance to lower litigation costs for developing nations and procedural safeguards to enhance existing special and differential treatment provisions already in the DSU, are important proposals within the existing

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20 See Jayashree Watal, Developing Countries’ Interests in a Development Round, in THE WTO AFTER SEATTLE 71 (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).

21 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).


23 See Bown & Hoekman, supra note 21, at 873-888.
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 WTO Dispute Settlement Process and the Challenges Developing Nations Face

The WTO’s dispute settlement process has been described thoroughly elsewhere. For our purposes, it is sufficient to roughly sketch the process, for context. Although this section traces the contours of WTO dispute settlement 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: consultations, panel process, appeal (if any) and implementation. Cases arise in two ways: (1) violation complaints or (2) non-violation nullification/impairment complaints. In both cases, an aggrieved party must demonstrate that a trade benefit owed to it under WTO rules has been thwarted. Violations 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). 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


25 See generally, World Trade Organization, A HANDBOOK ON THE WTO DISPUTE SETTLEMENT SYSTEM (Cambridge, 2004) (hereinafter WTO Handbook); See also, Claus-Dieter Ehlermann, Experiences from the WTO Appellate Body, 38 TEXAS INT’L L.J. 469, 470 (2003); see also Bown, supra note 8.


27 Id.


29 See GATT, supra note 28, 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.
member’s WTO obligations. Almost all WTO cases are violation complaints.

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. 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. If the parties cannot reach agreement through bilateral consultations, they may request the good offices of the WTO Director-General as mediator. If no mutual solution arises in the consultation/mediation stage, the complaining member has the right to request the Dispute Settlement Body (the “DSB”) to establish a panel to hear and adjudicate the complaint.

The consultations stage is a reflection of the power-based methods that characterized much of the dispute settlement process under GATT.

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30 See GATT, supra note 28, art. XXIII:1(b).
32 DSU, supra note 6, art. 4.3
33 Id.
34 DSU, supra note 6, art. 5.6.
35 The Dispute Settlement Body (DSB) oversees and implements all the dispute settlement functions of the WTO. It consists of the same membership as the WTO General Council, the standing body of the WTO membership, although it follows its own procedures. 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/retaliation for failure to comply with panel rulings. For a detailed description of the WTO dispute settlement process, see Understanding the WTO: Settling Disputes, http://www.wto.org/english/thewto_e/whatis_e/tif_e/displ_e.htm (last visited Aug. 15, 2010); ANDREW T. GUZMAN & JOOST H.B. PAUWELYN, INTERNATIONAL TRADE LAW, 116-26 (2009).
36 DSU, supra note 6, art. 4.7.
The WTO formalized a much more legalistic approach, 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 results 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 Property Rights (TRIPS), the United States and the European Union were able to obtain results in consultations that exceeded the negotiated WTO obligations of two developing nations, Pakistan and Argentina. 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. 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. In both cases, Pakistan and Argentina gave in after consultations and agreed to an

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 Montañà I 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).


40 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).

41 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).
earlier implementation period, even though they were not legally obligated to do so. 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 U.S. 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.\footnote{\textit{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. 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 to the U.S. Without GSP treatment, many developing nations’ exports would not be competitive in the U.S. market. Therefore, it is a potent threat. For the entire length of the WTO process mentioned herein, the U.S. had placed Argentina on the Special 301 Priority Watch List. \textit{See} 2001 Special 301 Report, available at http://www.cptech.org/ip/health/ustr/special301.pdf (last visited Aug. 19, 2010). The U.S. 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. \textit{See} Barbara Leitch LePoer, Cong. Research Serv., 93097: \textit{India - U.S. Relations} (1998), available at http://www.globalsecurity.org/wmd/library/report/crs/crs93097.htm (last visited Aug. 19, 2010).}

dragging, Antigua resigned itself to a negotiated settlement that gave it a fraction of what it wanted and won.\textsuperscript{48}

B. The Panel Process

If consultations fail, the establishment of a panel initiates the formal adversarial stages of the dispute. 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.\textsuperscript{49} 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. After the first session of meetings, parties may provide the panel with supplemental submissions. Occasionally a second set of meetings may take place. Panels must make an objective assessment of the facts and the legal basis of a dispute.\textsuperscript{50}

Panels are bound by the DSU to resolve disputes and issue a panel report within six to nine months.\textsuperscript{51} However, in practice, the timeline is often extended and the panel sometimes takes as much as two years to issue a report.\textsuperscript{52} Panel reports, once issued, are automatically adopted by the DSB unless there is a consensus to block adoption of the report, the so-called negative consensus rule.\textsuperscript{53}

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,\textsuperscript{54} which allows developing nations to insist that at least one panelist be a national of another developing country.\textsuperscript{55} However, a developing nation must formally request

\textsuperscript{48} Id.

\textsuperscript{49} See DSU, supra note 6, art. 6.2.

\textsuperscript{50} See DSU, supra note 6, art. 11.

\textsuperscript{51} See DSU, supra note 6, arts. 12.8, 12.9.


\textsuperscript{53} See DSU, supra note 6, art. 16.4.

\textsuperscript{54} DSU, supra note 6, art. 8.10

\textsuperscript{55} See DSU, supra note 6, art. 8.10. Panelists serve in their individual capacities as trade experts, not as representatives of any country.
such a panel member. It is not automatic, as some nations have insisted it ought to be.\textsuperscript{56} 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. A developing nation’s lack of financial resources for the comprehensive pre-litigation collection of information and evidence on the effects of WTO-inconsistent measures can seriously undermine the strength of its case before the panel. Indeed, pre-litigation research is an area in which NGOs and private industry groups can most assist developing nations by engaging in this type of critical pre-litigation preparation.\textsuperscript{57} Similarly, technical economic consulting services are essential to fully buttress certain claims, particularly in trade remedy investigations such as dumping or countervailing duties, in which the economic proof of injury to imports underlies the legal analysis. Developing nations are less likely to either have qualified economist available internally or be able to afford to hire them.\textsuperscript{58}

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 U.S. has shown itself to be especially adept at using delays to its advantage.\textsuperscript{59} Even when not deliberately pursued as a litigation strategy, delays can cause disproportionate harm to developing nations for two reasons. First, they often rely on one or two industries for the bulk of their export income. 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 the other major source of income, was vital to the nation’s economic survival.\textsuperscript{60} For the entire three year duration of the case, Antigua had no access to the U.S., the largest internet gambling

\textsuperscript{56} See Least Developed Counties, proposed amendment to Art. 10(a), TN/DS/W/17, available at \url{http://www.law.georgetown.edu/iel/research/projects/dsureview/synopsis.html} (last visited Aug. 18, 2010).

\textsuperscript{57} See Bown & Hoekman, \textit{supra} note 21, 883, 887.

\textsuperscript{58} See Bown & Hoekman, \textit{supra} note 21, 876 (pointing out that the lack of professional economists on the staff of the Advisory Centre on WTO Law (ACWL) is a serious limit on its ability to provide meaningful legal assistance to developing nations).

\textsuperscript{59} Turab Hussain, \textit{Victory in Principle, Pakistan’s Dispute Settlement Case on Combed Cotton Yarn Exports to the United States}, available at \url{http://www.wto.org/english/res_e/books_e/casestudies_e/case34_e.htm} (last visited Aug. 18, 2010), (discussing United States - Transitional Safeguard Measures on Combed Cotton Yarn From Pakistan, WT/DS192/R (May. 31, 2001)).

\textsuperscript{60} See Dispute Settlement Body, Minutes of Meeting--Held in the Centre William Rappard on 24 June 2003, ¶ 42-43, WT/DSB/M/151 (Aug. 12, 2003).
market in the world. To an economy highly dependent on one or two 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 random rotations of three, to hear appeals from panel decisions. An appeal is limited to questions of law, as raised and developed by the panel. 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. This is because there is no remand mechanism in the WTO. 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. The Appellate body is also bound to issue its decisions within sixty to ninety days. Like panel reports, the DSB automatically adopts and implements Appellate Body decisions unless there is a consensus to block the decision.

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61 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 Laws, St. Legislatures, Oct./Nov. 2005, at 20, available at http://www.heartland.org/custom/semod_policybot/pdf/18376.pdf; (last visited Aug. 15, 2010) (focusing on the development dimension to the case resulting from Antigua’s perception that the industry was integral to its attempts to diversify its economy away from reliance on a struggling tourism sector).

62 DSU, supra note 6, art. 17.1.

63 DSU, supra note 6, art. 17.6.


66 DSU, supra note 6, art. 17.13.

67 DSU, supra note 6, art. 17.5.

68 DSU, supra note 6, art. 17.14.
D. Implementation/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.\(^69\) A report may recommend ways to comply, although a WTO member retains final say on the method.\(^70\) As discussed in greater detail \textit{infra} in section III(A), the preferred method of implementation is usually withdrawal of the measure. At this point, the DSB\(^71\) formally takes over the role of overseeing implementation. 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.\(^72\) The reasonable time for implementation may be reached by mutual agreement or by arbitration, under DSB supervision.\(^73\) The DSB also undertakes surveillance of compliance beginning with a compliance review six months after the reasonable period of time is set and continuing until the matter is resolved.\(^74\)

Sometimes the parties will not agree on whether the steps taken by the losing party constitute full compliance. In such cases, a “compliance panel” may be constituted to adjudicate the question.\(^75\) Generally, the compliance panel is the same as the original panel. Once again, the panel’s decisions may be appealed to the Appellate Body.\(^76\) Multiple rounds of compliance panels are possible.\(^77\)

If the offending party fails to bring a measure into conformity or fails to implement the recommendations of the DSB, the injured party is allowed to seek additional remedies. The remedies are, in order of preference: compensation, suspension of concessions and retaliation.\(^78\) The

\(^{69}\) DSU, \textit{supra} note 6, art. 19.1.

\(^{70}\) \textit{Id.}

\(^{71}\) The DSB, Dispute Settlement Body, administers the entire dispute settlement process, establishing panels and adopting panel and Appellate Body reports. It also monitors the implementation of rulings and may authorize the suspension of obligations under the relevant agreements. \textit{See} \textit{WTO HANDBOOK, supra} note 25, at 17.

\(^{72}\) DSU, \textit{supra} note 6, art. 21.3.

\(^{73}\) \textit{Id.} (DSU, art. 21.3)

\(^{74}\) DSU, \textit{supra} note 6, art. 21.6.

\(^{75}\) DSU, \textit{supra} note 32 art. 21.5.

\(^{76}\) \textit{Id.} (DSU, art. 21.5)


\(^{78}\) DSU, \textit{supra} note 32 arts. 22.2, 22.3.
parties must first enter into negotiations to determine mutually-acceptable compensation.\(^79\) If 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 and/or impose countermeasures equal to the amount of injury suffered by the losing party.\(^80\)

The next section will discuss in detail each of the remedies and critique their effectiveness for developing nations in the next section. Suffice it to point out here that the multi-stage implementation process creates opportunities of further delays which 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. Three years after Antigua began the dispute with its original, spurned request for initial consultation, Antigua sought a compliance panel.\(^81\) This began afresh the cycle of consultation, panel, and possible appeal. On the question of whether the United States had complied with the WTO rulings, the U.S. and Antigua held nominal consultations which lasted for fifteen minutes.\(^83\) Subsequently, Antigua requested that the DSB form a compliance panel.\(^84\) And once again, the panel found in Antigua's favor and ruled that the U.S. had not complied with the WTO ruling, giving Antigua, permission to unilaterally impose sanctions against the United States.\(^85\) For a small economy like Antigua, the right to impose sanctions is theoretical at best. Meanwhile, from March 13, 2003 (initial consultations) to March 30, 2007 (compliance panel gave permission to impose sanctions), Antigua had no access to the lucrative U.S. internet gambling market and its economy suffered significant revenue loss as a result. During that time, the U.S. had taken no action to remedy the

\(^79\) DSU, \textit{supra} note 32, art. 22.2.

\(^80\) \textit{Id}. (DSU art. 22.2)

\(^81\) 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).

\(^82\) Recourse to Article 21.5 of the DSU by Antigua and Barbuda--Request for Consultations, United States--Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/17 (June 8, 2006).

\(^83\) \textit{See} Ewart, \textit{supra} note 24, at 57.

\(^84\) Recourse to Article 21.5 of the DSU by Antigua and Barbuda--Request for the Establishment of a Panel, United States-- Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/18 (July 6, 2006).

WTO violation. 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 because it had done absolutely nothing.

III. Existing WTO Remedies

Current WTO remedies are, in order: cessation or withdrawal, voluntary compensation, DSB-imposed or non-voluntary suspension of concessions, or retaliation. The ideal result in any WTO dispute is the cessation or withdrawal of the WTO-inconsistent measure. If this occurs, no other remedies are available. If it does not occur, then the other remedies may be exercised, although never cumulatively. This section 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. 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. Cessation or withdrawal of the WTO-inconsistent measure is the favored solution. However, it is also possible to amend, modify, or supplement the affected measure or law to bring it into compliance.

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86 Indeed, the only action undertaken by the U.S. could be said to have worsened the situation for Antigua. In December 2006, the U.S. enacted new legislation that criminalized the use of credit cards to pay for online betting transactions. See SAFE Port Act, H.R. 4954, 109th Cong. §§801-802, available at http://www.osga.com/artman/publish/printer_4781.shtml (last visited Aug. 19, 2010) (exempting gambling activities permitted by the states and on Native American Territory and horse racing).

87 Dispute Settlement Body, Minutes of Meeting--Held in the Centre William Rappard on 30 May 2006, ¶ 38, WT/DSB/M/210 (May 30, 2006).

88 DSU, supra note 32 art. 3.7, which provides 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 measure concerned ...”

89 DSU, supra note 6, art. 19.1.

90 DSU, supra note 6, art. 21.3

91 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 agreement.” DSU, supra note 6, art. 21.1
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, which serves a similar function to the American Law Institute in the drafting of Restatements, affirm that a state is required to cease its violation of its international obligations. However, the DASR also recognize that a state may choose to comply in greater or lesser ways than cessation.

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. 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

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94 Both the panel and the arbitrators’ reports explicitly referenced the Draft Articles on State Responsibility, 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 United States – Tax Treatment for “Foreign Sales Corporations,” Recourse to arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement, WT/DS108/Arb (Aug. 30, 2002); Panel Report, United States – Tax Treatment for “Foreign Sales Corporations,” WT/DS108/R, (circulated Oct. 8, 1999), footnote 52.

95 See Articles on State Responsibility, supra note 94, art. 55.

96 Some panels have tried to impose retroactive remedies, but they were unsuccessful. It is now established that cessation is a purely prospective remedy. See c.f., Gavin Goh & Andreas R. Ziegler, Retrospective Remedies in the WTO After Automotive Leather, 6 J. INT’L ECON. L. 545, 548 (2003). But see Report of the Panel, Australia – Subsidies Provided to Producers and Exporters of Automotive Leather, Recourse to Article 21.5 of the DSU by the United States, WT/DS126/RW (Jan. 21, 2000) (holding that Article 19.1 of the DSU does not limit remedies under Article 4.7 of the SCM Agreement to purely prospective action). In that case, both the United States and Australia argued against the retrospective component of this decision, and the panel report was severely criticized by some member states. See Minutes of Meeting, Held in the Centre William Rappard on 11 February 2000, 5-7, WT/DSB/M/75 (Mar. 7, 2000).
embezzler to stop embezzling in the future, without making restitution to the victims, paying a fine, serving a jail sentence, or even removal from his or her job. One can easily see that such a remedy does not advance values of equity/justice,\textsuperscript{97} restitution, punishment or deterrence. Similarly, from a quantitative point of view, cessation is less than proportional, 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.\textsuperscript{98} Nor is the case likely to have great deterrent effect on others, as there are no punitive or compulsory elements to the remedy.

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 \textit{status quo ante}. Any more than that would introduce a new element of imbalance into the trading system.

\textbf{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 (e.g., favorable tariff terms) to the injured party.\textsuperscript{99} 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,\textsuperscript{100} agreed to by both parties under consultation. 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.

Compensation has been used only once since the creation of the WTO in 1995.\textsuperscript{101} Several explanations account for the infrequency of use. First, it is voluntary and must be negotiated. Agreement on the level and

\textsuperscript{97} See Trachtman, \textit{supra} note 8, 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).

\textsuperscript{98} The WTO does not officially recognize precedent as such. However, panels and the Appellate Body have developed a practice of deferring to prior decisions and being guided by them. Palmeter & Mavroidis, \textit{supra} note 7.

\textsuperscript{99} DSU, \textit{supra} note 6, art. 22.2.

\textsuperscript{100} DSU, \textit{supra} note 6, art. 22.1

scope of compensation has proven difficult.\textsuperscript{102} 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.\textsuperscript{103} The source of the uncertainty is the requirement that remedies have to be consistent with the covered agreement, which includes MFN obligations.\textsuperscript{104} 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.\textsuperscript{105}

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 to be given as a way to bypass the bilateral deadlock that often mars compensation negotiations.\textsuperscript{106} Others have suggested expanding the compensation remedy to include retroactive and prospective fines or other monetary compensation, which would give it more teeth.\textsuperscript{107} However, these proposals, while helpful, do not alter the underlying lack of incentive for developing nations to bring suits before the WTO.

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 authorization\textsuperscript{108} from the DSB to suspend concessions, i.e., temporarily

\textsuperscript{102} Negotiated compensation talks usually fail.

\textsuperscript{103} GATT, \textit{supra} note 28, art. 1. Most favored nation is one of the most important underlying principles of the multilateral trading system. It is a principle of non-discrimination that requires a WTO member to give equal treatment in trade advantages to all other members of the WTO.

\textsuperscript{104} DSU, \textit{supra} note 6, art. 3.5.

\textsuperscript{105} DSU, \textit{supra} note 6, art. 22.6.

\textsuperscript{106} See Lawrence, \textit{supra} note 8, at 10-11 (proposing a system of pre-negotiated “contingent liberalization commitments”).


\textsuperscript{108} 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
revoke trade concessions granted to the offending party. This type of retaliation must be specifically requested and can be used only by parties directly involved in the dispute as complaints and interested third parties. 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. 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 sector in which the offending violation occurs. Thus, if the underlying dispute related to Country A’s discriminatory treatment of auto parts from Country B, Country B may impose countermeasures on auto parts imports of Country A in retaliation. Obviously, sometimes, this is not feasible. Country A may not produce or export any auto parts. In such cases, it is possible to impose retaliation in a different sector covered by the same agreement. The WTO recognizes three sectors: goods, services and intellectual property. In our example, Country B may choose to impose its countermeasures on the agricultural imports of Country A into Country B. As both auto parts and agricultural products are goods covered by the same agreement, GATT, this after the adoption of the panel or Appellate Body report without. See WTO, A Handbook on WTO Dispute Settlement System, supra note 25, at 81.

109 DSU, supra note 6, art. 22.3
110 DSU, supra note 6, art. 3.5.
111 DSU, supra note 6, art. 22.4.
112 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 are 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). Within these three major sectors, all trade in goods fall into one sector. DSU, supra note 6, art. 22.3(f)(i). Within the services (GATS) and intellectual property (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. DSU, supra note 6, art. 22.3(f)(ii) and (iii). Thus, for example, the response to a violation in the “sector” of patents should be limited to patents. See also WTO, A Handbook on WTO Dispute Settlement System, supra note 25, at 82.
113 DSU, supra note 6, art. 22.3(a)
would be the second best option.\footnote{DSU, supra note 6, art. 22.3(b). In a TRIPS dispute, this would entail the imposition of countermeasures on copyrights or trademarks in an underlying patent dispute.} The third option is cross-retaliation, or the imposition of countermeasures on a different sector covered by another agreement.\footnote{DSU, supra note 6, art. 22.3(c).} In our example above, it might entail a response by Country B against the intellectual property or services trade of Country A. This 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.

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 does 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,\footnote{European Communities – Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/ARB/ECU (2000).} 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 countermeasure on other imported European goods,\footnote{Suspension of concessions in such a case would likely lead to a decrease in supply or an increase in prices of the affected goods.} on which Ecuadorian industries and consumers may depend. Doing so may cripple segments of the Ecuadorian economy by depriving them of goods and materials critical to them. As a matter of necessity, Ecuador was authorized to suspend concessions on European trade of services and intellectual property under GATS and TRIPS, respectively.\footnote{European Communities – Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/ARB/ECU (2000).}
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, wines, etc.) is unlikely to be felt by Europe due to the low volume of Ecuadoran 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 400 cases, countermeasures have been authorized in only eight cases. Of these, only [___] have involved developing nations. 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 response to an unauthorized trade barrier. 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. On the other, retaliation can also be viewed as running counter to the goal because the offending member can simply choose to “pay the


120 DSU, supra note 6, art. 22.8.
price” and accept retaliation. The effect would be twofold. First, implementation and a restoration of the status quo before the violation may 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.

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 2/3 majority vote of all WTO members (currently 153), that process seems unlikely in light of Doha Round tensions and deadlocks. 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. In the 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.

This Article suggests the use of a litigation strategy for developing nations which 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 is the regular joinder or multiple complainants provisions (Article 9) already part of the DSU. However, the strategy would be strengthened by procedural changes to the right to join

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124 DSU, *supra* note 6, art. 9. Article 9 allows the consolidation of multiple cases concerning the same matter into one complainant to be handled by a single panel. DSU, *supra* note 6, 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.” DSU, *supra* note 6, art. 9(2).
as a third party under Article 10, such as making the right automatic, upon notification to the DSB, for least developed nations.

The strategy can be implemented unilaterally by WTO members, although its effectiveness would be enhanced by minor procedural modifications. Only minimal changes would be necessary. The first is simply more frequent invocation of the existing joinder and third party provisions of the DSU. That too can 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 is 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. WTO practice also confirms that the mechanism is often invoked by WTO members across a variety of substantive areas. 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.

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 Dispute Settlement Body (DSB) shall be equivalent to the level of the nullification or impairment.” So long as the total amount of retaliation does not exceed

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\[125\] DSU, supra note 6, art. 10.

\[126\] This and other procedural improvements are elaborated in greater detail infra in section IV.

\[127\] DSU, supra note 6, art. 9.


\[129\] The only exception to this, 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—Recourse to Arbitration by Brazil Under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement, ¶ 3.58, ¶¶ 3.54-3.60, WT/DS46/ARB (Aug. 21, 2000); Decision of the Arbitrator, United States--Tax Treatment for “Foreign Sales Corporations” - Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement, WT/DS108/ARB (Aug. 30, 2002).

\[130\] DSU, supra note 6, art. 22.4.
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. The only other relevant provision in the DSU is Article 22.6, which specifies that countermeasures are specific to the nation upon whom they are imposed, that is, they are not applied on a MFN basis. Again, the strategy proposed in this Article does not conflict because the countermeasures would be imposed only on the offending party in the case. 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 be in keeping with prior GATT practice. 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 practice. As a practical matter, many of the customs evolved from the practices of developed nations, who have always been more active in shaping the WTO system. Now that so many

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131 There is a potential conflict with Article 9’s requirement that complainants are accorded all 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 them 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, that one who holds a right has the power to waive it. This principle is enshrined in general international law in the principle of sovereign immunity.

132 DSU, supra note 6, art. 22.6.


134 DSU, supra note 6, art. 3.1.

135 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 perpetuated by a
developing nations are WTO members,\textsuperscript{136} the time is ripe for them to contribute to the tradition.

Additionally, there is support for clarifying existing WTO text with guidelines, decisions or interpretation 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.\textsuperscript{137} The common denominator of the E.U. proposals is that they eschew amendments in favor of clarifying, softer approaches.

\textbf{B. The Strategy in Action}

Let’s 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.\textsuperscript{138} Among this group are a number of smaller nations, including active corn exporters like Argentina, South Africa, Ukraine and Romania,\textsuperscript{139} who 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 do a sufficient volume of trade to justify the expense and time. They may also fear the possibility of unilateral retaliation by the U.S., either through a decrease in development or military said or by revoking access to the Generalized System of Preferences which grants them preferential trade terms as developing nations.\textsuperscript{140} Lastly, the lack of meaningful remedies may be the ultimate deterrent. Any threat of retaliation by them against a giant like the U.S. would sound hollow. As small players in the world economy, they will not to be able to inflict

\begin{footnotes}
\item[136] Developing countries comprise the majority of WTO members. \textit{Understanding the WTO, supra} note 3.
\item[138] I have previously argued that in the aftermath of Brazil’s victory in the Upland Cotton case, the lack of meaningful reforms in the 2007 Farm Bill, and the current Doha deadlock, such as case is extremely likely. \textit{See Phoenix X.F. Cai, Think Big and Ignore the Law: U.S. Corn and Ethanol Subsidies and WTO Law, 40 Georgetown Int’l L. J. 865, 866 (2009).}
\item[140] \textit{See Bown & Hoekman, supra} note 21, at 863.
\end{footnotes}
enough pain through retaliation to force compliance with WTO recommendations should they prevail.\footnote{Bown & Hoekman explain this well in economic terms. “[on] 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.” See Bown & Hoekman, supra note 21, at 863.}

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 U.S. to amount to a meaningful threat of retaliation. They also do not conduct enough trade volume with the U.S., 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 U.S. As the world’s tenth largest economy,\footnote{Measured by gross domestic product. CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK, https://www.cia.gov/library/publications/the-world-factbook/rankorder/2001rank.html?countryName=Brazil&countryCode=br&regionCode=sa&rank=10#br (last visited Aug. 18, 2010).} a close trading partner of the U.S., and a seasoned player in WTO dispute settlement,\footnote{Brazil has been relatively active in dispute settlement. As a complainant, it has brought cases against the U.S., the E.U., Canada, Netherlands, Argentina, Peru, Turkey, and the European Union. It has brought 25 cases as a complainant. As a respondent, it has been involved in 14 cases. World Trade Organization, Disputes by Country/Territory, http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm (last visited Aug. 18, 2010). See generally Shaffer et al, supra note 159.} Brazil’s situation is markedly different.

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 section presents the major evaluative criteria in six categories and offers an assessment 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 process? 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? Fifth, what the broader implications of the proposal for public-private cooperation, including the participation of civil society actors in trade policy? In summary, the 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

(i) Benefits

The first criterion to evaluate is how practicable the proposed litigation strategy is, in light of a number of factors. This subsection 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 ante 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, i.e., 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”144 associated with the complaint.

A second reason that developing nations should be highly interested in adopting a class action strategy is that it better enables 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

144 See William Felstiner et al., The Emergence and Transformation of Disputes: Naming, Blaming, and Claiming, 15 LAW & SOC’Y REV. 631, 631 (1980).
as well. Measures to ensure currency stabilization,\textsuperscript{145} safeguards against import surges,\textsuperscript{146} and import restrictions for health reasons\textsuperscript{147} 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.\textsuperscript{148} 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, accounting for 36\% of all cases from 1995 to 2006.\textsuperscript{149} 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),\textsuperscript{150} quantitative restrictions (12.1\%),\textsuperscript{151} and complaints about the impositions of duties (10.3\%).\textsuperscript{152} After GATT 1947, the next most often-invoked agreements, all of three of them annexes to the GATT, account for only a total of a quarter of invocations. They are antidumping (9.5\%),\textsuperscript{153} The Agreement on Subsidies and Countervailing Measures (9.3\%)\textsuperscript{154} and Agreement on Agriculture (7.5\%).\textsuperscript{155} 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\%),\textsuperscript{156} Agreement on Safeguards (4.5\%),\textsuperscript{157} and the Agreement

\textsuperscript{145} See GATT, supra note 28, art. 15.
\textsuperscript{147} See GATT, supra note 28, art. XX(B), Apr. 15, 1994, 55 U.N.T.S. 194; see generally, Katie Lane, Protectionism or Environmental Activism? The WTO as a Means of Reconciling Global Free Trade and the Environment, 32 U. MIAMI INTER-AM. L. REV. 103, 109, 113 (2001).
\textsuperscript{148} See Davey, supra note 52.
\textsuperscript{150} Id. at 14.
\textsuperscript{151} Id.
\textsuperscript{152} Id.
\textsuperscript{153} Id. at 12.
\textsuperscript{154} Id.
\textsuperscript{155} Id.
\textsuperscript{156} Id. at 13.
on the Application of Sanitary and Phyto-Sanitary Measures (4%),\textsuperscript{158} constitute a de minimus 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.\textsuperscript{159} 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 extra-judicial threats of retaliation (such as suspension of foreign aid, military aid or even food aid) by politically more powerful nations.\textsuperscript{160} Second, 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.

(ii) 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 subsection addresses the threshold questions of practicability. Broadly, practicability objections may be divided into four categories: disincentives to act as lead plaintiff, class action coordination challenges, potential lack of alignment regarding outcomes, and problems of information sharing, including confidentiality and attorney-client privilege.

1. 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 which requires difficult political and legal decisions. The lead plaintiff needs to coordinate with private outside counsel, now used in virtually all

\textsuperscript{157} Id.

\textsuperscript{158} Id.

\textsuperscript{159} See e.g., 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).

\textsuperscript{160} Id. at 411 (arguing that developing nations face such political constraints in initiating a WTO complaint). \textit{But see generally}, Andrew Guzman & Beth Simmons, Power Plays and Capacity Constraints: The Selection of Defendants in WTO Disputes, 34 J. Legal Studies, 557 (2005) (arguing that market capacity is more relevant than power politics to developing nations in the selection of defendants because they tend to bring complaints against those WTO members who represent their largest markets).
WTO cases, 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 timeframes for legal submissions and responses to panel questions and requests.\footnote{See Shaffer et al, \textit{supra} 159, 409 (arguing that government representatives and private attorneys particularly emphasize the problem of complying with dispute settlement deadlines).} 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.

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 of altruism alone. The decision must make legal, economic or political sense. Legally, a developing nation must be convinced that its chances of success are increased by being part of a class. This 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. Because so many WTO complaints require sophisticated econometric data, it is not unusual to engage outside economic consulting firms to analyze such data.\footnote{See Shaffer et al, \textit{supra} note 159, 461 (describing how Brazil hired the economic consulting firm DATAGRO to provide sugar and ethanol market analysis in the EC – Sugar case).} Economies of scale benefits accrue in commissioning such economic analysis \textit{en masse}. 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,\footnote{See \textit{id.}, at 461.} 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 perceived risk of domestic or foreign opposition to the case, including the possibility of extra-legal retaliation by the defendant. In summary, the decision to lead a class action lawsuit requires the 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.

2. \textbf{Coordination Challenges}
Once the decision to proceed with the class action is taken, 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 class over litigation strategy, such as which claims to advance. Many WTO disputes present alternative legal theories. It is not uncommon to base a violation claim on general non-discrimination principles as well as specific provisions of the WTO agreements. For example, one might challenge a tariff structure on the grounds that it favors domestic producers (national treatment), discriminates among foreign producers (most favored nation), constitutes an unlawful imposition of duty (Article II of GATT), or functions as a prohibited quantitative


165 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 tariff and/or restrict market access options for imported goods. Several panels have explored this area of the GATT. In United States—Section 337 of the Tariff Act of 1930, the panel clarified several features of article III(4): (1) the article does not differentiate between substantive or procedural internal regulations; and (2) 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, ¶ 5.10-.11, L/6439 (Nov. 7, 1989), GATT B.I.S.D. (36th Supp.) at 385-86 (1990) [hereinafter United States—Section 337 of the Tariff Act]. 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 create greater cost 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.

166 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 http://www.wto.org/english/theWTO_e/minist_e/min99_e/english/misinf_e/07ineq_e.htm (last visited Aug. 18, 2010).

167 See GATT, supra note 28 , art. II.
restriction (Article XI of GATT). 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 good faith but differing assessments of the merits of each claim, but it could also be motivated by extra-legal 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 political 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 cohesion at this stage would undermine the effectiveness of the threat. Because retaliation is rarely implemented, it is paramount that the class presents a unified front on the possibility of collective retaliation to pressure defendants to comply with panel rulings. Therefore, the mechanics of implementing retaliation is 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 panel and subsequent changes to the plan will require the approval of the compliance panel. These precautions are necessary to ensure that the threat of retaliation remains effective.

3. Lack of Commonality

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168 See GATT, supra note 28, art. XI.

169 It has been used in only eight cases.

170 See DSU, supra note 6, art. 21.5
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, as 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. 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, developing nations brought only ten cases out of 152 antidumping cases from 1995-2006. Least developed nations brought no antidumping cases in the same period. 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 1995-2006. 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.

4. Lack of Alignment on Outcomes

If settlement is offered on favorable terms to one member of the class, another potential problem may arise. 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.

5. 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

171 See Horn & Mavroidis, supra note 149, 12.
172 See id., 20.
173 See id., 20.
174 See id., 13.
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 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.\textsuperscript{175} 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.\textsuperscript{176} 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.\textsuperscript{177} 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


\textsuperscript{176} See Proposal by Costa Rica, Proposal to Amend Article 10, Third Parties, TN/DS/W/12/Rev.1 (Sept. 25, 2002), available at http://www.law.georgetown.edu/iel/research/projects/dsureview/synopsis.html (last visited Aug. 15, 2010) (suggesting that third parties shall 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).

\textsuperscript{177} See \textit{e.g.}, Proposal by African Group, Automatic Admission as Third Party for Developing Nations TN/DS/W/15 (Sept. 25, 2002), available at http://www.law.georgetown.edu/iel/research/projects/dsureview/synopsis.html (last visited Aug. 15, 2010) (suggesting that developing nations should be automatically admitted as third parties without having to demonstrate a trade or economic interest in the case).
nations to build new coalitions and strengthen existing trade ties with other developing nations. Second, one cannot under-estimate 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 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 caselaw 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 Doha 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 basis of commonality among member, 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 it gathered for litigation in the U.S. – Cotton and E.C.- Sugar cases to catapult it into the influential G-4, a group comprised of the U.S., E.U., India, and Brazil, which played a large role in shaping the agenda for agricultural negotiations in the Doha Round.

To be weighed against the above four advantages in negotiations are three risks. 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 small developing nation in particular is vulnerable to offers to abandon

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178 See Shaffer et al, supra note 159, 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).

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 on-going class actions. Third, and most worrisome, is the possibility that the collective action advantages described above crumple under the pressures of prolonged Doha negotiations. Coalitions based on shared experience can prove to be fragile. Nonetheless, one should note that all three risks are that the negotiation gains of class action litigation may not be fully realized in some circumstances, not that there would be no gains.

**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.\(^{180}\) Many more have no or at best one or two trade lawyers qualified to practice WTO law.\(^{181}\) Personnel constraints are exacerbated by resource shortages. Developing WTO members have less 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.\(^ {182}\) Richer nations with resources earmarked for WTO litigation do not face the same difficult trade-offs.

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 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 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

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\(^{180}\) See Cai, *supra* note 22, at 312.

\(^{181}\) See Shaffer et al, *supra* note 159, at 409.

strengthen inter-governmental ties, not just in trade disputes, but 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. Inter-governmental 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 of 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.

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.\textsuperscript{183} Success in WTO dispute settlement requires private sector participation in three main areas. Industry groups identify violations

\textsuperscript{183} See e.g., Shaffer et al, supra note 159, at 456 (describing how private sector involvement was pivotal to Brazil’s success).
that may form the basis of a WTO complaint. Industry is often best placed to gather and analyze econometric data to support a WTO complaint. Lastly, the private sector can help pay for outside counsel, which 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. Moreover, where there are less transparent societies or non-vibrant democracies, distrust of the government can hinder private collaboration. 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, 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 actors 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


185 See Christina Davis & Sarah Blodgett Bermeo, *Who Files?: Developing Country Participation in WTO Adjudication* 15 (Jan. 17, 2008) (unpublished manuscript), available at http://www.princeton.edu/~cldavis/files/who_files.pdf (noting “a high correlation between democracy and patterns of participation in WTO adjudication ... Democratic states are likely to face pressures for accountability to interest groups that will lead them to take strong trade enforcement measures, including WTO adjudication).

186 See BEN ROSS SCHNEIDER & SYLVIA MAXFIELD, *BUSINESS, THE STATE, AND ECONOMIC PERFORMANCE IN DEVELOPING COUNTRIES, IN BUSINESS AND THE STATE IN DEVELOPING COUNTRIES* 12, 14 (Sylvia Maxfield & Ben Ross Schneider eds., 1997) (pointing out that “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.”)
as many developing and least developing nations use the services of the Advisory Centre on WTO Law (the “ACWL”), a non-profit that provides basic legal services and advice (but not representation) to developing nations at nominal cost, the ACWL will be better able to provide coordinated support to a class. Other civil society organizations, such as Oxfam, who can provide data gathering and analysis support or write amicus briefs, will also be better able to provide coordinate assistance. Lastly, any involvement by civil society actors constitutes a valuable gain in transparency, which is one of the WTO’s primary goals.

VI. 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 who have little incentive to participate in dispute settlement into the system. Smaller and developing nations who 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. Showing a willingness to enforce 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

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188 See Shaffer et al, supra note 159, at 463, 464 (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).

189 See About the WTO: What is the WTO, A Statement by the Director-General, available at 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).

190 See e.g., Shaffer et al, supra note 159, at 451.
some of the missing developing nation cases that are not making it on the DSB docket.\textsuperscript{191} In particular, the strategy may entice least developed nations, who are mostly absent,\textsuperscript{192} 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.\textsuperscript{193} 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.

Class actions serve important societal functions. They are often used as a tool to compensate for small losses\textsuperscript{194} and enforce regulations\textsuperscript{195} They enable less powerful groups to act as private attorneys general.\textsuperscript{196} They have also been effectively employed as a means for lasting social change, as during the civil rights era.\textsuperscript{197} 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.

\textsuperscript{191} See Bown & Hoekman, supra note 21, at 862.
\textsuperscript{192} Id. (Bown & Hoekman, at 862.)
\textsuperscript{193} For example, the G77, a coalition of 77 founding developing nation 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).
\textsuperscript{196} See Hensler et al, supra note 194, at 72-71.
\textsuperscript{197} STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION, 240-45 (1987).