THE UNIVERSITY OF PORTSMOUTH
SCHOOL OF LAW

THE WTO DISPUTE SETTLEMENT MECHANISM AND THE REFORM OF
THIRD PARTY RIGHTS: A STUDY FROM THE PERSPECTIVE OF
DEVELOPING COUNTRIES

Being a Thesis submitted in partial fulfillment of
the requirements for the Degree of PhD in International Economic Law
in the University of Portsmouth School of Law

By

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Dedication

To my Mother
Acknowledgements

I would like to thank Professor A F M Maniruzzaman, my supervisor during the research period, for his patient guidance and support. I admire not only his academic knowledge but also his personal qualities.

I would also like to thank my sponsors, Dubai Police Headquarters and the UAE Government, for giving me the opportunity to carry on my advanced studies and for their ultimate support.

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Finally, I would like to thank all my family members and friends, who have given me valuable support during my studies.
Declaration

'Whilst registered as a candidate for the above degree, I have not been registered for any other research award. The results and conclusions embodied in this thesis are the work of the named candidate and have not been submitted for any other academic award.'
Abstract

The WTO dispute settlement system has significantly improved the position of developing countries in the international trade arena over that which applied under its predecessor, the GATT dispute mechanism. However, while developing countries do not hesitate to evaluate the system positively, they are still facing certain difficulties, so that they cannot participate in it with full effect. The participation of developing countries in the WTO dispute settlement system is of great importance, since international trade regulations are developed there, and it is essential to safeguard their interests in the long run. In this respect, the procedural concerns of developing countries accompanied with the effect of the WTO decision making and jurisprudence on the development objectives of developing countries will be analysed.

The position of developing countries in system is certainly in need of review so that solutions can be identified and adopted. Solutions for reform are presented here in order to help developing countries to use the system effectively. One of the evolving issues that have stimulated a real debate among WTO members is the reform of third party rights. The aim of this research is to analyse the importance of such rights for developing counties, showing how exercising them more widely could give developing counties a real insight into the functioning of the DSM and allow them to familiarise themselves with the system. However, third party rights are often unclear and sometimes confusing; hence, proposals for reform of third party rights in both the consultation stage and the panel/AB processes will be evaluated with particular reference to developing countries.
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<td>Appellate Body</td>
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<tr>
<td>ACP</td>
<td>Africa, Caribbean and Pacific</td>
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<tr>
<td>ACWL</td>
<td>Advisory Centre for WTO Law</td>
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<td>ADR</td>
<td>Alternative Dispute Resolution</td>
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<td>AIDS</td>
<td>Acquired Immune Deficiency Syndrome</td>
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<td>DSB</td>
<td>Dispute Settlement Body</td>
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<td>DSM</td>
<td>Dispute Settlement Mechanism</td>
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<td>DSS</td>
<td>Dispute Settlement System</td>
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<td>DSU</td>
<td>Dispute Settlement Understanding</td>
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<td>EC</td>
<td>European Community</td>
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<td>EEC</td>
<td>European Economic Community</td>
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<td>EU</td>
<td>European Union</td>
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<tr>
<td>GATT</td>
<td>General Agreement on Tariffs and Trade</td>
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<td>GDP</td>
<td>Gross Domestic Product</td>
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<tr>
<td>ICJ</td>
<td>International Court of Justice</td>
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<tr>
<td>ICSID</td>
<td>International Centre for Settlement of Investment Disputes</td>
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<tr>
<td>ITLOS</td>
<td>International Tribunal for the Law of the Sea</td>
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<td>IMF</td>
<td>International Monetary Fund</td>
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<tr>
<td>IPRs</td>
<td>Intellectual Property Rights</td>
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<td>ITO</td>
<td>International Trade Organizations</td>
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<tr>
<td>LDC</td>
<td>Least Developed Country</td>
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<td>MEA</td>
<td>Multilateral Environment Agreement</td>
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<td>MFN</td>
<td>Most Favoured Nation</td>
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<td>NAFTA</td>
<td>North American Free Trade Agreement</td>
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<td>NGO</td>
<td>Nongovernmental Organization</td>
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<tr>
<td>OECD</td>
<td>Organization for Economic Co-operation and Development</td>
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<td>S&amp;D</td>
<td>Special and Differential Treatment</td>
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<tr>
<td>SSA</td>
<td>Sub-Saharan Africa(n)</td>
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<tr>
<td>TCTD</td>
<td>Technical Co-operation and Training Division</td>
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<tr>
<td>Acronym</td>
<td>Full Name</td>
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<td>TRIPS</td>
<td>Trade-Related Aspects of Intellectual Property Rights</td>
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<td>UN</td>
<td>United Nations</td>
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<td>UNCTAD</td>
<td>United Nations Conference on Trade and Development</td>
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<tr>
<td>USA</td>
<td>United States of America</td>
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<tr>
<td>UST</td>
<td>United States Trade Representative</td>
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<td>WTO</td>
<td>World Trade Organization</td>
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Introduction

1.1 Background to the Study

On taking up his post in 1999, Mike Moore, the former Director-General of the World Trade Organisation (WTO) stated that "No other issue is as important as addressing the plight of the poor nations"\(^1\).

The basis of the WTO dispute settlement mechanism is framed in Articles XXII and XXIII. These are the two provisions on which the GATT dispute settlement mechanism was developed, although there was no explicit reference to the term 'dispute settlement'. The General Agreement on Tariffs and Trade (GATT) was intended as a provisional agreement for tariff negotiations in anticipation of the Havana Charter\(^2\), which was to govern detailed dispute settlement proceedings. Despite the fact that developing countries accounted for about half of the twenty-three members of GATT, there were no specific rules concerning them\(^3\). These countries, therefore, had no confidence in the reliability of the dispute settlement system during the GATT period. Thus, developing countries rarely used the GATT dispute settlement process\(^4\).

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2 The International Trade Organization (ITO) did not come into existence due to the refusal of the United States Congress to approve it.
3 Hansel T. Pham, note 1, p.333.
In contrast, the WTO dispute settlement system has achieved a certain level of trust among developing countries. However, it has not obscured the fact that certain of these countries are the main participants in the dispute settlement system. This issue requires a reform of the Dispute Settlement Understanding (DSU) to guarantee that developing countries benefit more from the dispute mechanisms and that it does not work against their interests. Various developing countries still have faith that the current system can be enhanced in order to utilize the system more efficiently to protect their rights under the covered agreements.

The review of the DSU started in 1999 and all deadlines have been missed so far. Surprisingly, developing countries have participated effectively in the review process and several proposals have been introduced. Third party rights have proved to be a source of controversy among WTO members. This research will contribute to the current debate concerning the reform of the DSU, by analyzing the reform of third party rights with special reference to developing countries.

1.2 Objectives and Scope of the Study

A key concern regarding development vis-à-vis trade agreements in general is the disparity in benefits derived from the international trading system between developing and developed countries. Despite the objective of the WTO being the enhancement of development

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5 Developing countries have submitted significant proposals and suggestions during official sessions on the DSM expressing concerns and putting forward ideas for reform.

through trade, the continued lack of equal distribution of benefits arising from the international trading system has become a major obstacle to developing countries. The main advantage the WTO has over other international trade forums is its dispute settlement mechanism, which makes commitments undertaken by members binding. However, there has been growing concern that a certain bias concerning the application of the WTO dispute settlement has influenced poorer members' decisions not to participate in the process. Such a situation would eventually create circumspection regarding the regulation of new areas of international trade, leading to an overall welfare loss. The credibility of the DSU is, therefore, a crucial element in achieving the developmental objectives of the WTO.

Developing countries have been highly critical of several issues. These include special and differential treatment, third party participation and the enforcement process. It is also the case that developing countries do not have enough legal experts in the matter of WTO law, and that they cannot bear the financial costs of bringing a dispute. Indeed, developing countries are not economically strong enough to be the main party in a dispute. Third party participation is vital for developing countries in order for them to become familiar with the dispute settlement system, and to have an opportunity to present their arguments and points of view. This would strengthen their position.

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until a real improvement takes place in their economic and legal power.

This study seeks to examine the nexus between these two central developments in the current international trading system: the position of developing countries in the WTO dispute mechanism and third party rights. This study analyzes the difficulties facing developing countries in the DSM and links with third party rights in the DSU, to demonstrate that developing countries’ participation as third parties is an important tool that ought to be used on a regular basis. It then addresses third party rights in the consultative process, arguing that greater rights for developing countries as third parties are needed at this stage. Specific reform proposals that could be adopted in the DSU are also dealt with. Third party rights at the panel/appeal stage are then examined. It is argued that such rights are unclear, confusing and in need of strengthening. This argument is accompanied by detailed proposals for reform of the DSU.

1.3 Importance and Justification of the Study

Since the dispute settlement mechanism (DSM) is the distinguishing feature of the WTO, there is a growing debate as to whether it provides the required environment for members to participate effectively in the system. The present study will conduct a critical review of the DSM and explore the current debate on how third party participation could be enhanced in order to strengthen the participation of developing countries. This is accompanied by an analytical emphasis on the fundamental issue of development and the need for a fairer distribution of international trade to improve the credibility and effectiveness of the multilateral trading system. In the meantime, developing countries ought to be creative and seize any
opportunity to participate as third parties. However, they will not become main players in the conduct of international trade unless development targets are realised. Therefore, the original contribution of this research will be accomplished by analysing and explaining the application and reform of third party rules in the WTO dispute settlement system.

In sum, there is a call for reform of the DSM in favour of developing countries. Meanwhile, practice and the formal review process of the WTO dispute settlement system have revealed the need for the reform of third party rights. However, there is a research gap in this regard, as third party rights have not been looked at in connection with developing countries. The aim of this research is to fill this gap by conducting a politically independent analysis of the reform of third party rights with special reference to developing countries. Now is an appropriate time to judge its width and depth.

1.4 Research Questions

The reliability of the DSU is consequently an essential element in achieving the developmental aims of the WTO. There are a number of concerns relating to the DSU in this regard.

**Question 1:** What are the uncertainties concerning special and differential treatment provisions?

Developing countries have introduced criticisms during the review of the DSU, concerning their efficient engagement in the proceedings of the dispute system and uncertainty about the way in which the special and differential treatment rules are applied. They have complained that specific articles concerning special and differential treatment are
not expressed explicitly, and so need to be reconsidered. While the terms 'shall' and 'should' are used, it is argued that it is by no means guaranteed that these provisions can be applied to developing countries in reality\(^\text{11}\). It is regarded as uncertain that these special provisions will actually be applied, since they are merely hortatory, not compulsory\(^\text{12}\).

**Question 2:** Do developing countries lack the financial means and expertise to address their rights and high costs?

The disparity in the ability that the various WTO members have to bring disputes or to act as respondents, means that the WTO dispute mechanism is far from providing a “level playing field”\(^\text{13}\). The current dispute settlement system is regarded as too costly, since significant human and monetary resources are required to arrange and pursue a dispute from consultation to the appeal process, over a period of time which may be as long as three years. Developing countries, because they lack the proficiencies required to participate in such complicated and extended legal procedures, have no alternative to employing skilled legal specialists from developed countries\(^\text{14}\).

\(^{11}\) Note by the Secretariat, Concerns Regarding Special and Differential Treatment Provisions in WTO Agreements and Decisions, WT/COMTD/W/66 (16 February 2000), p.31.
\(^{12}\) For instance, Article 8.10 states that “When a dispute is between a developing country Member and a developed country Member the panel shall, if the developing country Member so requests, include at least one panellist from a developing country Member”.
\(^{14}\) TRADE, note 4, p.23.
**Question 3:** Do developing countries need the implementation of a new WTO dispute settlement system?

A key criticism made by developing countries is the impediment to the implementation of the rulings of a panel or the Appellate Body (AB) against a developed country member. Even where the AB rules that a particular trade measure taken by the respondent is in breach of the complainant’s WTO rights, the WTO has no power to oblige the violating member to abolish the measure in question, or even to deliver an obligation to bring the inconsistent measure to an end. Instead, the DSU implements its rulings mainly by authorizing the winning member to set up retaliatory trade barriers against the violating member until the latter chooses to meet the terms of the decision. Since retaliation worsens the matter by diminishing the benefits of trade for the disputing members, and can indeed have a negative consequence on the successful party, this mechanism has been severely criticized. Thus, the enforcement system neither repairs the injury which has occurred nor promotes conformity; instead, it imposes greater damage on the disputing members by implementing the simple economic notion of “an eye for an eye”\(^\text{15}\).

**Question 4:** The effect of the decisions and decision-making process of the WTO and its dispute settlement system on the development objectives of developing countries.

Resolving disagreements through decision-making in the WTO is not an easy task, which has left highly political matters lying on the negotiating table. On the other hand, the WTO dispute settlement system, especially the AB, has been active and does not hesitate to

\(^{15}\) Hansel T. Pham, note 1, pp.352-353.
deal with any disagreements, even highly political ones. But has the WTO dispute settlement been successful in restoring equality among all members? This question needs to be weighed against an outcome such as the Shrimp case,\textsuperscript{16} where the broader security and predictability goals of the WTO are compromised.\textsuperscript{17}

**Question 5:** Are third party rights vital for developing countries, and is reforming such rights important?

The study, then, will consider why third party rights are important for developing countries, and how they can be interrelated with problems facing developing countries in the DSM. Next, there will be an examination of the provisions dealing with third parties' rights at the consultation stage. Here, the problems will be analysed and the proposals made for the reform of third party rights during the consultative process will be assessed. Finally, the study will consider third party rights during the panel and AB processes from a critical perspective, illustrating the failure of the WTO panel and AB to establish a clear and practicable precedent for third party rights. These, in particular, have negatively affected developing countries as third parties. This part of the study will also examine the reform proposals related to third party rights during the panel and AB processes.


\textsuperscript{17} J. Jackson, 'International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to Buy Out', (2004), 98 American Journal of International Law, 109.
1.5 Methodology

Despite the growing debate on the position of developing countries in the WTO dispute settlement system, the area of third parties’ participation has not been well developed. Thus, there is a paucity of information and academic writing on this topic, indicating the need for a strong focus on primary methods of data collection.

The study will examine the academic literature for evidence of perceptions of the WTO dispute settlement system (some conflicting, since there are two sides to this matter). The literature will also be analyzed in parallel with the WTO members’ submissions made during the formal review process with regard to the reform of the current dispute settlement system, in order to identify the agreed difficulties and proposed solutions. The submissions of WTO members (both from developed and developing countries) provide an invaluable source to identify the positions of WTO members in general and developing countries in particular, thus compensating for the lack of academic publications, especially with respect to third-party rights. However, it is unfortunate that secrecy has, to a certain extent, also affected the negotiations on the DSU review process. This has led to a distinction between the TN/DS/ series of documents, which have been made public, and the Job/ series, which is unpublished and is restricted to WTO members. This study will draw on primary sources (original papers presented by institutions which deal with the WTO dispute settlement system, such as Oxfam, South Centre and the Third World Network) to cover the lack of information on the contents of these documents. In this regard, it is worth mentioning that the WTO

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18 Members’ submissions on the review of the WTO dispute settlement system are available on the WTO website, using a simple document search, starting with TN/DS/.
website is rich in original sources such as members' proposals, cases which have been dealt with under the DSM, and papers and books which explain the foundation of the DSM. In order to test the feasibility of the proposed reforms, whenever appropriate, a comparison will be drawn with other international judicial institutions, such as the International Court of Justice (ICJ) and the Law of the Sea Tribunal to draw parallels between international law and WTO law for a better understanding of the matters under discussion.

With regard to the existing literature, an issue that is worth mentioning is that although third parties have not been extensively dealt with, the WTO dispute settlement mechanism itself has attracted significant attention. This requires careful examination of the available sources in order to identify the most authoritative literature.

In addition to these written sources, the case study approach was considered useful in gathering data for this research, for a number of reasons. To start with, this approach is widely used in social science research, of which legal research is a part. The case study is a particularly useful tool, since it provides the researcher with a rich source of data, as well as facilitating the study of specific areas which have not been well understood or researched. It is useful in terms of comparing and contrasting organisations, and in testing theory against practice by examining the actual events taking place at a particular time. Thus, case studies have the benefit of linking the research with what is happening in reality.

It should be acknowledged that case studies have the drawback of tending to lead researchers into drawing early and misleading conclusions. This needs to be carefully thought about. Despite this weakness, the case study is a useful tool in the present research, particularly in the form of a pro-post case study. This would support my research by identifying the effects of the WTO law on a specific country. This would be achieved by examining the effect of the WTO law before and after it had been established; for instance how developing countries fared before (in the era of the GATT adjudication mechanism) and after the establishment of the WTO dispute mechanism. This would have the advantage of building the picture as the research is developing, and providing rich data which might help in understanding what is actually happening in the real world. This is especially important in testing the research questions, not only theoretically but also practically, and is a vital factor in discovering the relationship between theory and practice.

While case studies are considered to be in the field of longitudinal research, there is no specific or particular design to be followed in using case studies. It is be an approach to an issue and a useful tool which can take many forms; thus, it may be qualitative or quantitative, comparative or contrasting, and it can be a pro-post case study. In addition, the different designs which can be used in conducting case studies include surveys, focus groups, archival and theoretical data. There is thus great flexibility in designing a case study.

20 "Unlike other research strategies, a comprehensive 'catalogue' of research designs for case studies has yet to be developed. There are no text books like those in the biological and psychological sciences, covering such design considerations as the assignment of subjects to different 'groups.'" Robert K. Yin, Case Study Research, (second edition, SAGE Publications, London, 1994), p.18.
study. It was initially intended to use a group of countries from sub-Saharan Africa as a case study to collect data about developing countries in the WTO dispute settlement system and third party participation. However, early research indicated that countries from this region hardly ever participated in the WTO dispute settlement system\textsuperscript{21}. Therefore, the subject of the case study has been modified from developing country members to major disputes and disputes in which developing countries have participated as parties or third parties. An analysis has been made of the implications of these disputes for the position of developing countries in the WTO dispute settlement system and the reform of third-party rights.

Analyses of a wide range of disputes will be at the heart of this thesis, examining facts, legal reasoning and jurisprudence established by the panel or the AB regarding the participation of developing countries in the DSM and the function and reform of third-party rights. The World Wide Web provides a useful device for gathering additional information about a particular dispute. For the sake of originality, whenever appropriate original documents concerning these disputes have been downloaded directly from reliable websites such as that of the WTO. In the case study design, the geographical distribution of developing and less developed country (LDC) members has been considered to obtain the most comprehensive view of the status of developing countries and LDCs in the WTO dispute settlement system. Examples have therefore been selected from three continents: Asia, Africa and South America.

1.6 Structure of the Thesis

The body of the thesis is divided into nine different chapters. The first is an introductory one which serves as a road map of the rest of the research. The second chapter analyses the evolution of the GATT/WTO dispute settlement system and developing countries. Chapter three examines the obstacles facing developing countries in the DSM, Chapter four considers the effects of WTO decision-making as well as AB and panel decisions on the development objectives of developing countries, with special reference to trade-related issues such as intellectual property rights, the environment and human rights. Chapter five explores the justifications for the participation of developing countries as third parties. This is followed by Chapter six, which scrutinizes the role of informal third parties in the consultative process. Chapter seven evaluates the rights of third parties in the Panel and AB processes, leading to Chapter eight, which investigates proposals for reform of these rights. Chapter nine then draws together the research and offers concluding remarks.

Before embarking on a critical analysis of the significance, competence and reform of third party rights, it is essential to look at how developing countries have been treated under the GATT/WTO dispute settlement mechanism so far. Thus, Chapter two critically reviews the evolution of the GATT/WTO dispute settlement system with respect to developing countries.
The Evolution of the GATT/WTO Dispute Settlement System and Developing Countries

2.1 Introduction

Ironically, the present time represents the past for developing countries; as the current global financial crisis dominates the world, it has become clear that developing countries, especially the poorer ones, are subject to the most devastating consequences. Even when GATT was created to boost the world economy and improve the welfare of its members, developing countries’ problems and concerns were not at the heart of the international trade talks. This disadvantaged status will be explored here, with special reference to the evolution of the GATT/WTO dispute mechanism and the participation of developing countries.

This chapter is divided into two main sections. Firstly, the treatment of developing countries during the GATT adjudication system from 1947 to the 1990s will be analyzed; then the main deficiencies of the GATT

22 Robert Zoellick warned in a speech that the impact of the financial crisis would be most significant for the poorer countries by stating that “The events of September could be a tipping point for many developing countries. A drop in exports, as well as capital inflow, will trigger a falloff in investments. Deceleration of growth and deteriorating financing conditions, combined with monetary tightening, will trigger business failures and possibly banking emergencies. Some countries will slip toward balance of payments crises. As is always the case, the most poor are the most defenseless.” Cited online at http://web.worldbank.org/WSBSITE/EXTERNAL/NEWS/0,,contentMDK:21927606~pagePK:64257043~piPK:437376~theSitePK:4607,00.html, last seen on 15-10-08 at 6:16 pm.
adjudication system will be critically reflected upon. The next section evaluates the use of the GATT dispute mechanism by developing countries. Secondly, there will be an examination of the procedural aspects of the WTO dispute settlement system and how it might result in unsatisfactory outcomes for all members.

2.2 Developing Countries and the GATT Dispute Settlement System

2.2.1 GATT is a provisional treaty, not a permanent institution

"Whoever speaks of dispute settlement in GATT must start from nearly nothing."23 While for decades talks on how to regulate international trade have been conducted between states, the international trade arena did not recognize third-party adjudication until the GATT system was established in 1947.24 The process started during the Second World War, when the Allied leaders began to plan the post-war world economic order. The intention then was to reduce the risk of isolationism and economic depression which had characterised earlier post-war periods. In 1944, a conference was held at Bretton Woods, New Hampshire, as a result of which the Bretton Woods institutions were established. These are the International Bank for Reconstruction

and Development, which is known as the World Bank, and the International Monetary Fund (IMF). However, at Bretton Woods there was no agreement regarding international trade issues; indeed, these were not considered, since the conference was attended by delegates from the finance ministries only.\textsuperscript{25}

After the Second World War, there was a plan to establish an international institution to be known as the International Trade Organisation (ITO). The ITO was supposed to have a section to address trade in goods, as well as others dealing with various issues such as employment, economic growth, protective measures and inter-governmental commodity agreements. The ITO Charter was planned to create a set of legal rules governing the settlement of disputes and third party adjudication. Any conflict occurring among the ITO parties could be presented for a legal verdict by the Executive Board, drawn from eighteen Contracting members. This verdict could then be referred to an appeal process before the full membership at the ITO Plenary Conference. The ITO adjudication system also provided that members could obtain an advisory opinion from the International Court of Justice.\textsuperscript{26}

The ITO thus had a well-constructed dispute settlement system. In spite of this, when its Charter was completed in 1948 and submitted for endorsement it had lost its national political popularity in some of


the major member states. Consequently, the ITO Charter\textsuperscript{27} was not approved by the US Congress. This rejection took place mainly as a result of the growing dissatisfaction with international legal organisations in the atmosphere of tension and suspicion at the beginning of the Cold War era.\textsuperscript{28}

However, in 1947, during the discussions on the ITO, GATT was established in order to accomplish an urgent tariff reduction among the twenty-three contracting parties negotiating the ITO Charter. While GATT was considered an independent agreement which had been implemented directly, it was in fact established as a provisional agreement intended to serve only until the ITO came into force in 1948 or 1949. Therefore, GATT was actually created in 1947 by the negotiating parties on the understanding that it would ultimately be replaced by the more robust dispute settlement mechanism of the ITO.\textsuperscript{29} When the ITO was stillborn, this left the impermanent GATT agreement without a genuine organisational structure and a dispute settlement system governed by only two rules: Articles XXII and XXIII of GATT.\textsuperscript{30}

Thus, GATT was intended as a provisional agreement for tariff negotiations in anticipation of the Havana Charter,\textsuperscript{31} which would provide for detailed dispute settlement procedures.\textsuperscript{32} As a result of the

\begin{itemize}
\item \textsuperscript{27} It is also known as the Havana Charter.
\item \textsuperscript{28} Robert E. Hudec, note 24, p.102.
\item \textsuperscript{29} Ibid.
\item \textsuperscript{31} The International Trade Organization (ITO) did not come to existence due to the refusal of the United States Congress to approve it.
\end{itemize}
temporary status of the GATT dispute settlement mechanism, it was conceived with very limited provisions governing trade disputes. Its two procedural rules, taken from the anticipated ITO Charter (Article XXII and Article XXIII) addressed the issues of the consultation stage and of “nullification and impairment”. These procedural rules were fundamental to GATT adjudication, and remain fundamental to the WTO dispute settlement system.\(^\text{33}\)

The procedural rules for resolving a dispute under GATT adjudication are simple. The first stage is consultation, the only obligation at this stage being for the defendant to show “sympathetic consideration” to the case brought by the complainant. Then, if the disputing parties do not reach an agreed solution within a fixed time, the establishment of an \textit{ad hoc} panel can be requested by the complaining party in order to consider the disputed issue and render its verdict.\(^\text{34}\)

As far as developing countries were concerned, GATT 1947 did not officially acknowledge such a category, although when GATT was signed nearly half of the contracting parties (11 out of 23) were developing countries; nor did it acknowledge that any special treatment was required to respond to their particular needs in order to safeguard their trade interests.\(^\text{35}\)

\(^{33}\) David Palmeter and Petros C. Mavroidis, note 25, p.7.
Moreover, in GATT’s early years the panel process was fairly informal, most cases being sent to a Plenary Meeting of GATT contracting parties for a verdict. In response to increased criticisms, the tradition of bringing a case to a working party was extended to encompass the disputing parties as well as interested third parties. The practice of referring a complainant to the contracting parties was not considered a process of adjudication, but rather one of conciliation and negotiation.

From the perspective of developing countries, the conciliatory and negotiating nature of the GATT dispute settlement system would disadvantage them, since industrial competitors would be able to use their superior political and economic leverage against poorer countries. A rule-based dispute settlement system, on the other hand, would provide equal treatment for all members. Therefore, developing countries under GATT were always in favour of a more legalised dispute settlement system, because they believed that a rule-based system would be better for them.

After a while, the practice of working parties began to be criticized by GATT members for its lack of neutrality and independence, and there was a demand for a more legalised adjudication system. This

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39 Maria Marta, Maria Marta, ‘Evaluating the Effectiveness of the GATT Dispute Settlement System’, (1992), 16(2) World Competition 81, p.91.
atmosphere among the GATT contracting parties led to the establishment of the panel process. The parties had developed this in 1955, establishing *ad hoc* panels composed of three to five panellists selected from members not participating in the dispute. Unfortunately, as with the rulings on working parties, the decisions rendered by these panels were regarded as purely advisory.40 This development was considered to be a move from diplomacy towards the rule of the law, and the panel process was applied to nearly all the disputes arising in the GATT area.41 Nonetheless, it was argued that even with the foundation of the *ad hoc* panel procedure,42 the GATT dispute settlement system maintained its conciliatory and diplomatic nature, and it was not considered to be a judicial system.43 In addition, the 1950s procedures for *ad hoc* GATT panels were undermined by the practice of consensus, which led to the blocking of nearly all reports rendered by these panels.44

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42 In this regard it has been stated that "in 1955 the procedure was formalized, on the basis of a Secretariat report, which distinguished between Panels and Working Parties, stressing in particular that Panel members were appointed as individual experts, since their role should be 'to prepare an objective analysis for consideration by the contracting parties, in which the special interests of individual governments are subordinated to the basic objective of applying the Agreement impartially and for the benefit of the contracting parties in general.'" Sol Picciotto, 'The WTO's Appellate Body: Legal Formalism as a Legitimation of Global Governance', School of Public Policy Working Paper Series: ISSN 1479-9472, 2005, Working Paper 14, (2005), available online at http://eprints.lancs.ac.uk/29/1/wto-ab.pdf, last seen on 11-6-2008 at 8am, p.7.
43 "This procedure differs from the judicial approach in certain important respects. The disputants are permitted to see and comment on the report while in process. There is also considerable informal consultation with the disputants to find common ground which may be acceptable to both parties. But the responsibility for the final report which goes to the Contracting Parties rests with panel’" K.P. Gupta, *A Study of General Agreement on Trade and Tariff*, (S. Chand & Co, New Delhi, 1967), p.195.
At this early stage of the GATT adjudication system, developing countries felt that it was inadequate for them and that it did not give due consideration to their special requirements, so they rarely invoked it.\textsuperscript{45} Kufuor reports that from 1948 to 1966 developing countries invoked the GATT system on only ten occasions, amounting to 12 percent of total disputes in that period.\textsuperscript{46}

2.2.2 Developing countries lose confidence in the GATT dispute settlement system (Uruguay Dispute)

In the 1950s, a number of developing countries, including Pakistan, Cuba, Chile, Haiti and India, started to utilise enthusiastically the emerging GATT adjudication system to safeguard their trade interests. Conversely, the enthusiasm of developing countries regarding GATT soon began to diminish, since the agreement (especially the outcome of the Uruguay dispute) did not match their ambitions in this respect.\textsuperscript{47}

Uruguay initiated a significant dispute in 1962, arguing that several trade measures in a number of developed countries were inconsistent with GATT obligations. This case is of major significance, because on the one hand the panel established a \textit{prima facie} position, whereby according to article XXIII nullification or impairment is the foundation

\textsuperscript{45} Maria Marta, note 39, p.93.
\textsuperscript{46} Kofi Kufuor, 'From the GATT to the WTO: The Developing Countries and the Reform of the procedures for the settlement of international Trade Disputes, (1997), 31(5) Journal of World Trade 117, p.128.
of any dispute. The panel developed this rule further and decided that any breach of GATT obligations would be regarded as *prima facie* nullification or impairment. In this respect, the panel decided that the defendants must prove that no nullification or impairment of the GATT obligations had taken place.⁴⁸ On the other hand, because of the political pressure on developing countries challenging the measures of various industrial members, Uruguay merely alleged the nullification of benefits and did not challenge the legality of the 576 trade barriers applied by the developed country defendants. Because Uruguay did not explicitly dispute most of the inconsistent measures, “the panel issued what was essentially a default finding in favor of the developed countries in all but the most patently illegal measures”.⁴⁹

Hudec presents the reason behind this case as being that “the Uruguayan complaint was showpiece litigation – an effort to dramatize a larger problem by framing it as a lawsuit”.⁵⁰ Hence, the dispute would appear to demonstrate two facts: the first that the imposition of trade barriers impedes developing countries’ exports, and that, regardless of the legality of these trade measures, the GATT system was ineffective, as this was its best outcome. Secondly, although Uruguay avoided questioning the legitimacy of these measures, it is quite clear that these trade barriers demonstrate the weakness of the GATT system in safeguarding the trade interests of developing countries.⁵¹ It was reported that developing countries had to overcome a total of 576 inconsistent trade restrictions in order to penetrate the

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⁴⁸ Uruguayan recourse to Article XXIII, BISD 11S/95, also, John Jackson, note 41, pp.182-183.
⁵¹ TRADE, note 47, p.2.
markets of industrial countries. There was a demand from the panel that demonstrably inconsistent restrictions be eliminated. The Uruguayans then argued that although they were indeed eliminated, they were replaced by other trade restrictions.\(^{52}\)

The complaint brought by Uruguay also indicates the political pressures on developing countries when they engage in disputes with their developed counterparts. This deterred Uruguay from explicitly questioning the validity of these measures, so that they would not gravely upset the industrial countries. Therefore, developing countries would support the idea of introducing 'public prosecutors' in trade conflicts, to address their concerns regarding any aggressive response from developed countries against whom a case had been brought.\(^{53}\)

It has also been argued that as a consequence of publicity given to the Uruguay complaint, there was a shift against legalising the GATT system towards an "anti-legalistic' or pragmatic approach to dispute resolution".\(^{54}\) Legal procedures were attacked and described as unfriendly. The GATT dispute settlement mechanism had fallen into neglect by 1963 and the methods of diplomacy and negotiation were considered ideal.\(^{55}\)

The Uruguay case was indeed significant in terms of identifying the role of international trade restrictions in impeding exports from developing countries in the international trade arena. On the other hand, the Uruguay case failed altogether to remove or even reduce

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\(^{52}\) Hansel T. Pham, note 49, pp.343-344.

\(^{53}\) Ibid., p.344.

\(^{54}\) Ibid.

\(^{55}\) Ibid.
these restrictions.\textsuperscript{56} By this time, the majority of developing countries
did not consider GATT as an appropriate institution to address their
issues.\textsuperscript{57} In addition, the conciliation process provided by Article XXIII
of GATT would function effectively only between parties with the same
economic leverage; in this respect, developing countries simply do not
have enough power to influence the positions of developed countries in
trade disputes brought under GATT. There is also a perception of the
failure of the implementation system provided under Article XXIII,
which is grounded on the assumption that reciprocity governs the
relationships between developed and less developed parties. As a
result, efforts were made to establish special rules to be used in
disputes involving developed and developing countries as conflicting
parties.\textsuperscript{58}

2.2.3 The introduction of preferential treatment for
developing countries in the GATT DSM

While the participation of developing countries in the GATT dispute
settlement mechanism was declining subsequent to the Uruguay
complaint, they nevertheless made an attempt to reform the GATT
adjudication process in their interest by making formal reform
proposals.\textsuperscript{59} Significant events took place in 1964. In response to
increased criticism by developing countries of GATT (they argued that
it did not consider their special requirements) in 1964 the contracting
parties decided to add a fourth part to the GATT agreement in order to

\begin{footnotes}
\item[56] TRADE, note 47, p.2.
\item[57] Nigel Grimwade, 'The GATT, the Doha Round and Developing Countries', in Homi
Katrak and Roger Strange (eds), The WTO and Developing Countries, (Palgrave
\item[58] Abdulqawi Yusuf, Legal Aspects of Trade Preferences for Developing States: A
study of the influence of development needs on the evolution of international law,
\item[59] TRADE, note 47, pp.2-3.
\end{footnotes}
give preferential treatment to developing countries. This innovative provision led to developed countries beginning to give significant consideration to the trade interests of developing countries.  

The developing countries made an attempt to develop Part IV further in their interests. As far as the GATT dispute settlement was concerned, a significant proposal was put forward by two developing countries who were party to GATT: Brazil and Uruguay. The aim of the proposal was to enhance GATT rules for the settlement of disputes and to alleviate all the obstacles established before the date of the proposal, in particular what happened in the Uruguay complaint.

The proposal by Brazil and Uruguay required several amendments to Article XXIII of GATT in favour of developing countries. Firstly, Part 2 of the Article was to be expanded in order to give developing countries the right to exploit additional measures once they decided to take legal action. Secondly, if it was ruled that the trade measures applied by a developed country had undesirable consequences for the economy of a developing country, and it was unfeasible to remove such trade measures, the victimised developing countries ought to be granted financial compensation. Thirdly, if a trade measure applied by a developed country had a negative effect on a developing country’s import capacity, the latter should be consequentially freed from its GATT obligations towards the developed country in violation. Finally, if a developed member country failed to comply with the ruling of a panel within the time limit provided, the GATT Contracting Parties were to have the right of joint action against that member.

60 Nigel Grimwade, note 57, p.13.  
61 Robert Hudec, note 50, p.58.  
62 TRADE, note 47, pp.2-3.
Unfortunately, the attempt by Brazil and Uruguay to add these proposed reforms to the new Part IV faced opposition from developed countries, and it was unsuccessful. In spite of this failure, these proposals gave rise to the establishment of the 1966 Procedures, which provide special rules for developing countries in the GATT dispute settlement system.

However, the first instance of special treatment for developing countries was the inclusion of the consultation mechanism in Article 37 Para 2 of Part IV, to ensure that developed countries fulfilled their commitments in Article 37 Para 1. This gave developing countries the right to conduct consultations with contracting parties in order to find a satisfactory resolution among the parties involved in the disagreement, if their rights under Article 37 Para 1 were violated. This would have the benefit of guaranteeing developed countries' compliance with their commitment. It also introduced the idea of 'joint action' between the contracting parties. Unfortunately, this provision was never used by developing countries, since developed countries always favoured bilateral consultations.

2.2.4 The inclusion of the 1966 Conciliation Procedures for developing countries

For developing countries, the inclusion of the 1966 Procedures in GATT is considered a major event in the evolution of the dispute settlement system. These procedures dealt specifically with disputes involving

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63 Robert Hudec, note 50, p.58.
64 TRADE, note 47, p.3.
65 Abdulqawi Yusuf, note 58, pp.74-75.
developed and developing countries as disputing parties, and were added to Article XXIII of GATT. 66

First, with regard to the consultation stage, the 1966 Procedures give the right to a developing country, as a disputing party on its own, to seek the good offices of the Director General in order to settle the dispute once the consultation has been requested. In addition, the disputing parties are required to provide the Director General with all the data related to the dispute. 67

In relation to the panel stage, the Procedures helped to speed up the establishment of the panel. They stated that the Director General shall notify the contracting parties or the GATT Council of the process and present a report, if it is required by one of the disputants, and that a panel should be established immediately. 68 This was significant in helping developing countries to avoid the delaying tactics employed by more powerful developed countries in establishing the panel. 69 The 1966 Procedures require that the panel ruling be submitted within sixty days of its appointment, 70 and that once a report is issued the offending party must enact its stipulations within 90 days. 71

In addition to speeding up the submission and enforcement of panel rulings, the 1966 Procedures required a panel of experts to investigate the case in such a way as to provide the required resolutions. They also added new dimensions to the panel rulings by assessing the trade

67 Ibid., p.748.
68 Ibid., p.749.
69 Robert Hudec, note 50, p.66.
70 Jeff Waincymer, note 66, p.749.
71 Abdulqawi Yusuf, note 58, p.75.
and economic development consequences for the complainant party of the measures complained about.  

However, Kuruvila argues that the outcome of the 1966 Procedures for developing countries was “modest”. Although they established preferential treatment for developing countries, and enhanced the function of the GATT dispute settlement system in general, developing countries rarely invoked their preferential treatment provisions. The mediation of the Director General, for example, was requested in only three cases during the GATT period; furthermore, in none of these cases was a satisfactory outcome achieved, either with regard to implementing the resolution or to realising the incentive behind the initiation of these cases. Therefore, it could be claimed that the 1966 Procedures were merely “a symbolic achievement for developing countries”.

A number of attempts were made between 1967 and 1971 to modify the GATT 1947 rules for the settlement of disputes in favour of developing countries. The contracting parties decided in 1967 to establish a “self standing” panel to review the effect of “quantities restrictions” in the developed countries’ industrial systems on the developing countries’ trading systems. Nevertheless, the inclusion of the words “may be established” in the terms of the self-standing panel left it to the contracting parties to decide whether to apply such procedures. It was also weakened by the developed countries’

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72 Jeff Waincymer, note 66, p. 749.
73 TRADE, note 47, p. 3.
74 S. Narayanan, note 37, pp. 7-8.
75 Pretty Elizabeth Kuruvila, note 38, pp. 172-173.
76 Maria Marta, note 39, p. 107.
practice, since in reality they preferred bilateral talks and as a result avoided the establishment of the panel.\textsuperscript{77}

Moreover, in relation to the developed countries’ duties under Part IV, the creation of an automatic panel was introduced in 1970. It was suggested that there ought to be panels to evaluate the conformity of the developed countries with their obligations. The proposal was approved by the contracting parties. However, whereas it was suggested that the panel should be automatically appointed, the contracting parties’ approval required the consent of the party in question. This considerably weakened the significance of the proposed modification.\textsuperscript{78}

The year 1971 witnessed another suggestion put forward by the developing countries with regard to the GATT adjudication system: the introduction of the Group of Three, consisting of the contracting parties, the Council, and the Trade and Development Committee. Its purpose was to identify inconsistent trade measures and to provide technical assistance in bringing these inconsistent measures into conformity with GATT, in order to safeguard developing countries’ trade interests. This proposal was adopted and functioned for three years, during which the Group of Three contributed to the removal of a number of trade barriers against access for developing countries. But the group was discontinued in 1974, so as not to clash with the Tokyo Round talks.\textsuperscript{79}

\textsuperscript{77} Kofi Kufuor, note 46, p.126.
\textsuperscript{79} Abdulqawi Yusuf, note 58, p.76.
2.2.5 Preferential treatment for developing countries from the Tokyo Round onwards

2.2.5.1 The 1979 Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance

One of the major outcomes of international trade talks in the Tokyo Round was the approval in 1979 of the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, and its annex, the Agreed Description of the Customary Practice of GATT in the Field of Dispute Settlement (Article XXIII:2). The main purpose of the Understanding was to regulate the customary procedures that evolved under the GATT; however, from the developing countries’ perspective, it contained few fundamental provisions which considered their special conditions.

The GATT contracting parties decided to give special consideration to the development of the trading systems of developing countries by carrying out regular reviews to identify difficulties in their progress. In addition, Para (iii) of the 1979 Understanding acknowledged the idea of selecting a panellist from a developing country in disputes involving developed and developing countries as complaining members. Furthermore, the consultation stage required that special consideration be given to developing countries and restated the provisions made for developing countries in the 1966 Procedures. Another preference, although it was not clearly stated, was that a developing country with

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80 S. Narayanan, note 37, p.8.
82 Ibid.
substantial interests in a case could present its interests to the panel. The panel could obtain professional assistance from any individual or organization, if it believed it necessary to do so. While this was conditional on the wishes of the panel, it was also considered a movement towards the third party\textsuperscript{83} participation that developing countries desired to be included in GATT 1947.\textsuperscript{84}

Moreover, developing countries' concerns regarding the aggressive response of developed countries when a complaint was filed against them were addressed in the 1979 understanding. A major concession granted to developing countries, which is still in place in the WTO dispute settlement system,\textsuperscript{85} was that they would be provided with technical advice by the GATT Secretariat once they had decided to initiate a complaint. In parallel with this, the Secretariat witnessed the creation of a more comprehensive new legal office, in order to provide such technical support for developing countries.\textsuperscript{86} The 1979 Understanding\textsuperscript{87} was reformed after three years by the 1982 Ministerial Declaration, which by adding new rules reinforced and clarified it.\textsuperscript{88} Although the 1982 Declaration was not particularly

\textsuperscript{83} The WTO officially recognizes third parties’ participation in Article 10 of the Dispute Settlement Understanding
\textsuperscript{84} Kofi Kufuor, note 46, pp.128-129.
\textsuperscript{85} Developing countries' lack of legal resources with regard to the WTO dispute settlement system is further analyzed in Chapter Three.
\textsuperscript{86} Kofi Kufuor, note 46, p.129.
\textsuperscript{87} One of the major criticisms of the 1979 improvement was "Neither the General Agreement on Tariffs on Trade (GATT) nor the various side-agreements signed in the Tokyo Round (the Tokyo Round «Codes») contained any specific provisions dealing with remedies in cases of violations. This is not an anomaly. It is often the case that drafters of a treaty leave to the discretion of the adjudicating body to recommend the appropriate remedy" in Henrik Horn, Petros C. Mavroidis, 'Remedies in the WTO Dispute Settlement System and Developing Country Interests', (1999), available online at, http://www1.worldbank.org/wbiep/trade/papers_2000/8Pdisput.PDF, last seen on 1-08-07 at 8pm, p.7.
\textsuperscript{88} S. Narayanan, note 37, p.8.
related to the status of developing countries, it did strengthen the GATT adjudication system taken as a whole. 89

2.2.5.2 The Decision on Improvements to the GATT Dispute Settlement Rules and Procedures 1989

During the Uruguay Round and after the mid-term review meeting, the contracting parties agreed to reform the GATT dispute settlement system in areas approved during the negotiation process of the Uruguay talks. This was in anticipation of the final result of the Round. Therefore, the decision on improvements to the GATT Dispute Settlement Rules and Procedures was implemented from 12 April 1989 to the conclusion of the Uruguay Round. A significant result of the 1989 improvements was that the panel was automatically adopted in the second assembly of the Council. In spite of this, the consensus for the approval of the panel ruling was retained. However, a vague provision especially intended for developed countries was added, stating that "the delaying of the process of dispute settlement shall be avoided". 90 As far as developing countries are concerned, the 1989 improvements provided technical assistance for developing countries in order to bring their cases to the GATT dispute settlement system. It also required the GATT Secretariat to appoint skilled legal specialists from the Technical Co-operation Division to provide the appropriate technical support for developing countries. 91

In addition, the disputing parties were required to inform the Council of any mutually agreed resolutions resulting from the GATT dispute settlement process or rendered by an arbitral tribunal, to be reviewed

89 Alain Freneau, note 78, p.16.
90 S. Narayanan, note 37, pp.9-10.
by the contracting parties. The reason for this provision was to ensure that any agreed solutions would be in conformity with GATT. This was significant for developing countries, since it would minimise the effect of superior leverage enjoyed by developed countries in disputes with their developing counterparts.

The 1989 decision also established a time limit of ten days for entering into consultation once it had been requested, and of thirty days for the formation of the panel for consultation. If the offending party failed to enter the consultation process within 10 days, or if the consultation phase exceeded 30 days, the panel would automatically be adopted. This addressed developing countries' concerns with regard to time limits in the dispute settlement procedure. The 1989 decision is considered to represent significant progress over the 1979 understanding in shortening the dispute process before the adoption of the panel. On the other hand, the 1989 improvements did not deal with the blocking of the adoption of the panel rulings, or with how these rulings should be implemented once they were approved. The contracting parties kept the 'negative consensus' condition, and were satisfied with merely making it more difficult to use a blocking order.

92 "Mutually agreed solutions to matters formally raised under the GATT Articles XXII and XXIII, as well as arbitration awards with GATT, must be notified to the Council where any Contracting Parties may raise any point relating thereto." 1989 improvement, cited in Terence P. Stewart, note 91, p.48.
93 Kofi Kufuor, note 46, p.131.
94 Terence P. Stewart, note 91, p.48.
95 Kofi Kufuor, note 46, p.131.
96 Maria Marta, note 39, p.91.
2.3 Critical Reflections on the GATT System

2.3.1 Testing the GATT panel procedures

One of the aspects of GATT which received criticism is that the defendant could block or delay the establishment of the panel, so that GATT was compared “to a court that could not deliberate (let alone rule) without the permission of the accused”.97 Notwithstanding that blocking of the establishment of the panel was not frequently practised by defendants during the GATT era, the hazards of doing so and the common utilisation of delaying strategies were enough to dissuade some complainants from bringing a dispute before a panel.98

The blocking of the establishment of the panel was valid even up to the 1989 Montreal Conference. For instance, the Argentina v. EU99 dispute illustrates the difficulties facing developing countries (in this instance Argentina) in presenting a case before a panel, because the panel was not automatically formed, even with the support of the GATT Council.100

Not only could the formation of the panel be blocked, but so could the adoption of its decision. Under the GATT adjudication system, any of the contracting parties as well as the offender had the right to veto the approval of the panel report, besides the power to block the panel from actually being held.101 In practice, the contracting parties did not commonly block the formation of the panel. Instead, what commonly happened was the blocking of the adoption of its ruling. For instance, the European Community (EC) in its two Bananas cases under the

97 Marc L. Busch, Democracy, note 34, p.428.
98 Ibid.
99 Argentina v. EU, GATT L/6201, 8 July 1987. [hereinafter Argentina v. EU]
100 Pretty Elizabeth Kuruvila, note 38, p.176.
101 Christina R. Sevilla, note 57, p.3.
GATT system, blocked the adoption of panel decisions, thus illustrating the difficulties of adopting successful verdicts against reluctant offenders. Providing the disputing parties with the opportunity to block the formation of a panel, as well as the ability to stop the implementation of its decisions, was described as one of the main reasons for the scant use of the GATT adjudication system, especially when compared to the WTO dispute settlement system.

2.3.2 Lack of rules and integration of the GATT adjudication system

The second criticism arises from the fact that GATT was intended as a provisional agreement for tariff negotiations, in anticipation of the entry into force of the Havana Charter for detailed dispute settlement proceedings. Despite the fact that they accounted for eleven of the twenty-three original members of GATT, there were no specific rules concerning developing countries. Therefore, they did not have confidence in the reliability of the GATT dispute settlement system and rarely used it.

Many commentators have wondered whether the GATT adjudication system ever functioned. One reason for this is that the system began with very few rules, being based on customary practice, augmented by the 1979 Understanding on Dispute Settlement and developed through

102 Bananas cases, GATT document C/M/264. (hereinafter Banana GATT dispute], also see Marc L. Busch and Eric Reinhardt, ‘The Evolution of GATT/WTO Dispute Settlement’, (2003), available at http://www.georgetown.edu/users/mlb66/TPR2003 Busch Reinhardt.pdf, last seen on 22/01/06 at 10am, p.150.
103 More detail on the provisional nature of GATT adjudication system in section 2.2.1.
104 Ernst-Ulrich Petersmann, note 32, p.70.
105 Hansel T. Pham, note 49, p.333.
106 TRADE, note 47, p.ii.
various negotiation rounds, especially the Tokyo Round 'Codes'. Thus, one commentator notes, the "GATT dispute settlement lacked not only teeth, but a consistent set of rules more generally".\textsuperscript{107} The issue of the enforcement of the GATT adjudication system will be discussed in the coming sections.

Hudec argues that "to the extent that the imperfections of the GATT legal system do in fact discourage smaller countries from using the GATT dispute settlement procedure, the legal system is obviously less successful than one would want it to be".\textsuperscript{108} In this respect, Jackson suggests that the fact that the GATT adjudication system was a provisional system (pending a more sophisticated dispute settlement procedure under the ITO) encompassing agreed arbitration and a system of appeal to the ICJ in some situations, was one of the main reasons for the 'birth defects' of the GATT adjudication system.\textsuperscript{109}

The Tokyo Round Codes were intended to regulate non-tariff restrictions, such as dumping, state procurement and subsidies, and customs valuation; these regulations were to be brought under the dispute settlement rules of individual codes, and GATT contracting parties could not dispute them unless they had ratified the exact code that had been violated. In addition, since GATT excluded several issues including trade services and intellectual property rights, "there was simply no adjudicatory recourse for states victimized in these

\textsuperscript{109}Jackson, John, note 41, pp.180-181.
areas". Furthermore, the GATT adjudication system was accused of suffering from lack of integration. This is because of the way the system evolved, from its origin in Articles XXII and XXIII in 1947, via the 1966 Procedures which were later codified in a number of Tokyo Round Codes.

### 2.3.3 Compliance problems

With regard to GATT 1947, there were a number of states with a reputation for non-compliance with the dispute settlement mechanism, particularly the EU with reference to its Common Agricultural Policy. As a result, there were repeated uses of the dispute mechanism under GATT for identical import measures. In theory, this can be prevented through a timescale being fixed for execution under the WTO process. Conversely, the current practice in some high-status cases (for instance, in a dispute which was brought against the EU regarding its banana import policy) suggests that a parallel difficulty can take place in the WTO. The WTO implementation process will be discussed in detail in Chapter three, Section 3.3.

The main objective of the GATT enforcement system was to put the disputing parties back on the negotiation trail, rather than to impose a penalty on the offending party. In cases where GATT ruled for retaliation, provided that the offending party apologized, it was subsequently supposed by GATT that the winning party would end its

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111 Pretty Elizabeth Kuruvila, note 38, p.177; and Surendra Bhandari, *World Trade Organisation (WTO) and Developing Countries: Diplomatic to Rule Based System*, (Deep & Deep Publications, New Delhi, 2002), pp.132-133.

retaliatory action, even if it had not started yet. The lack of other implementation methods under GATT meant that the most advantageous approach was to cheat until retaliation was approved, and once it was approved to apologize. This has led some to argue that the GATT was not even a self-enforcing treaty.\(^{113}\)

Interestingly, in the practice of the GATT dispute settlement system, retaliation was not often used. Among all the cases brought under Article XXIII, retaliation was endorsed on only one occasion. In response to the inconsistent trade barriers applied against its dairy exports, from 1952 to 1959 The Netherlands was authorised to restrict imports of wheat flour from the US. Considering the United States’ national power during the GATT period, the Netherlands, inevitably, did not retaliate against the import restrictions. What is more, given the GATT shortcoming that allowed the conflicting parties to block the panel decision (and accordingly avoiding retaliation), retaliation was an extremely unrealistic option.\(^{114}\)

It is argued that developed countries’ reputation for non-compliance with preferential trade measures designed to meet the needs of developing and least developed countries was in fact a manifestation of their wider non-compliance with the decisions of the GATT panel, which the panel clearly highlighted in these decisions. For instance, in the case of \textit{EC – Refunds on Exports of Sugar – Complaint by Brazil},\(^ {115}\) it was claimed by European Community officials that the principles and aims of Article XXXVI clearly did not impose any legal requirements.


\(^{114}\) Ibid., p.88.

Hence, it was unfeasible to determine whether any violation of a particular trade measure had occurred regarding the terms of Article XXXVI. Equally, in the *EEC – Restrictions on Imports of Apples – Complaint by Chile*\(^{116}\) dispute, in relation to the principles and aims set out in Articles XXXVI and XXXVII of GATT (especially Article XXXVII: 1(b)) it was claimed that it was unfeasible for the panel to decide that the attempts of the European Economic Community (EEC) to prevent the imposition of these trade barriers against Chile were insufficient. Thus, the panel could not rule that the EEC was in violation of Part IV of the former provisions.\(^{117}\)

As a result of the inability of the GATT adjudication system to enforce its rules, the final years of the GATT period witnessed aggressive unilateral actions by the United States and the creation of Section 301, or Super 301. There had been a growing fear among countries that they could be subject to unilateral US sanctions, which could take the form of retaliation, or even a total ban from the US market.\(^{118}\) In the early days of Section 301, the EC strongly criticised the US for its counterproductive unilateral actions, which were harmful to multilateral trade negotiations. In 1989, the US imposed Super 301 against Brazil and India in order to encompass trade services, investment and intellectual property rights in the GATT agreements. This forced the former GATT Director-General, Arthur Dunkel, to criticize publicly the unilateral US sanctions as illegitimate. As a


corollary to the excessive use of unilateral sanctions by the US, in March 1989 an exceptional summit was held to warn that these actions would destroy the multilateral trade negotiations in the Uruguay Round, and might result in joint cross-retaliation against the US.\(^\text{119}\)

2.3.4 Lack of trust and support for developing countries

It is argued that the GATT dispute settlement system was prejudiced against developing countries.\(^\text{120}\) Hudec, one of the leading academic critics of GATT, argues that

"The quantitative analysis of individual country performance makes it quite clear that the GATT dispute settlement system is somewhat more responsive to the interests of the strong than to the interests of the weak. The evidence for this hypothesis occurs in all phases of performance – in the rates of success as complainants, in the rates of non-compliance as defendants, in the quality of outcomes achieved, and in the extent to which complainants are able to carry complaints forward to a decision."\(^\text{121}\)

It is worth mentioning that instead of GATT, developing countries considered the United Nations Conference on Trade and Development (UNCTAD) to be the major trading organization, where they could safeguard and advance their trade interests more beneficially, especially in the 1960s and 1970s. This could be seen in their preference for sending official delegates to that body. Many developing countries did not sign the GATT agreement, and of those which did,

\(^{119}\) Alexander Thompson, note 110, p.12.  
\(^{121}\) Robert E. Hudec, note 108, p.97.
many did not have their delegates based in Geneva, preferring to use their official delegates in other European cities to deal with GATT issues. For instance, Brussels was the EU city where the African, Caribbean and Pacific (ACP) countries sent their delegations.\textsuperscript{122}

In addition, developing countries were always given ‘breakable’ promises under GATT. Article XXXVII is usually cited by GATT observers as an illustration of this:\textsuperscript{123} “The developed contracting parties shall to the fullest extent possible ... accord high priority to ...”. The language used in the legal texts relating to developing countries and LDCs is generally the same: “shall be facilitated through negotiated specific commitments”; “shall take account of the special needs”; “agree to facilitate”; “agree to ensure”; “shall consider”; and “sympathetic consideration shall be given”.\textsuperscript{124}

Under the GATT dispute settlement system, developing countries suffered from a lack of legal experts who could analyze the GATT Agreement and present strong arguments once a dispute was initiated. The lack of qualified experts increased the financial cost of bringing their cases to the GATT adjudication system.\textsuperscript{125}

\textsuperscript{123}Gustavo Olivares, note 117, p.547.
\textsuperscript{124}Article XXXVII of the GATT. Full text available at http://pacific.commerce.ubc.ca/trade/GATT.html#XXXVII, last seen on 06-03-06 at 11:35 am.
\textsuperscript{125}Kofi Kufuor, note 46, p.199.
2.4 Evaluating Developing Countries' Use of the GATT Adjudication System

The literature offers many negative assessments of the GATT adjudication system, of which the following are broadly representative:

"One could be forgiven for wondering why any country ever used GATT dispute settlement, let alone that developing countries seldom used it."\(^{126}\)

And

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"Dispute settlement under the GATT is generally noted more for its shortcomings than its strengths."\(^{127}\)

A small number of larger developed countries were the predominant participants in the GATT dispute settlement mechanism. Hudec argues in his statistical review of the cases brought under GATT that the United States, Canada, Australia, the EC and EC members initiated 73% of the disputes in the GATT period. Indeed, with regard to the complainant position, the predominance of the major developed countries was even greater: the EC, Canada and Japan acted as complainant in 83% of disputes brought under GATT. By contrast, developing countries made very little use of the system, being involved in 19% of cases (44 out of a total of 229). As complainants, developing countries acted in only 29 cases (13%).\(^{128}\) What is more, it is argued that this very low participation in the GATT adjudication system did not involve all developing countries. It was mainly used by

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\(^{127}\) Christina R. Sevilla, note 57, p.3.

larger or richer states such as, Brazil, India, Chile, Hong Kong and Argentina.\textsuperscript{129}

This disproportionate use of the system is illustrated by the involvement of Africa, which has a great number of developing countries. Mosoti observes that there was only one instance in which an African country participated in the GATT adjudication system as a main disputing party (defendant or respondent); this was South Africa. In the \textit{Canada – Measures Affecting the Sale of Gold Coins}\textsuperscript{130} dispute in 1985, South Africa successfully disputed the percentage of the tax imposed by Canada on its exports of gold coins.\textsuperscript{131}

The disappointment of developing countries regarding the effectiveness of the GATT adjudication system continued; this frustration is reflected in Brazil’s submission at the beginning of the Uruguay Round talks on the dispute settlement system. Brazil complained that insufficient special and differential treatments were provided for developing countries, highlighting their difficulties in retaliating against their developed counterparts. It was contended that this was because of the difference in power and the failure of Part IV to provide the required balance between developed and developing contracting parties. However, like the 1965 proposal, the Brazilian submission was rejected.\textsuperscript{132}

\textsuperscript{129} Pretty Elizabeth Kuruvila, note 38, p.182.
\textsuperscript{130} Canada – Measures Affecting the Sale of Gold Coins, Report of the Panel, GATT Doc. L/5863. [hereinafter Canada Measures]
\textsuperscript{131} Victor Mosoti. ‘Africa in the First Decade of WTO dispute settlement’, (2005), available at \texttt{http://www.worldtradelaw.net/articles/mosotiafrica.pdf}, last seen on 03-03-06 at 5pm, p.12.
\textsuperscript{132} TRADE, note 47, p.3.
In fact, up to the 1980s developing countries were involved very little in the GATT trade negotiation rounds, where they wished to gain preferential treatment to address their special status in the international trade arena. One reason for this is that until the 1980s developing countries, especially the larger ones such as India, China and Brazil, did not view the multilateral trade system as an appropriate method to achieve their development goals. Instead, they preferred to focus on internal elements to strengthen their economies.133

In addition, the multilateral trading system was mainly under the control of developed countries. The Kennedy negotiation round was initiated because the US wanted to gain better market access to the newly-founded European Common Market, while the Tokyo Rounds were initiated as a result of the broadening of EEC membership and the inclusion of the United Kingdom. Hence, trade negotiations under GATT were mainly between developed countries, and the global trading system worked in their favour. It was only during the Uruguay Round that developing countries started to participate effectively in international trade talks, marking what is considered a major shift in the multilateral trading system.134

Many GATT scholars also consider the role of the special and preferential treatments for developing countries to be insignificant, especially those introduced in the 1950s, in 1966 and in 1979. However, the 1989 improvements, provided some progress. The formation of an entirely new system for dispute settlement, which

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134 Ibid, pp.44-49.
could be considered a significant achievement of GATT and the Uruguay trade negotiations, was the WTO’s Dispute Settlement Understanding.135

2.5 The Establishment of the WTO Dispute Settlement System and Developing Countries

2.5.1 Procedural victory of the WTO Understanding on Dispute Settlement

The WTO Understanding on Dispute Settlement (DSU) was discussed in the Uruguay Round. This was considered by many to be the most significant set of negotiations in the international trade arena since 1947, and the new system came into force in 1995.136 It was designed to guarantee a level playing field for all members, so that poorer countries could safeguard their trade interests regardless of their economic power. This new system replaced the political process of the GATT system with a more rule-oriented system, applying public international law.137 The WTO dispute settlement system is considered an improvement on the old GATT system, and has been called the “backbone of the multilateral trading system”.138 While the shortcomings of the GATT adjudication system were frequently criticised, the WTO dispute settlement system is widely acknowledged

138 Marc L. Busch and Eric Reinhardt, note 102, p.143.
as enhancing confidence in a more legalized multilateral trading system.\textsuperscript{139} It is important to note that the role of the WTO is not limited to formulating sophisticated procedural rules for dispute settlement; it also seeks to ensure that these rules function properly, in order to provide certainty and predictability in the multilateral trading system.\textsuperscript{140}

The establishment of a single dispute settlement system\textsuperscript{141} for tackling disputes occurring under the numerous multilateral trade agreements is one of the achievements of the Uruguay Round and the founding of the World Trade Organization.\textsuperscript{142} Some of its most important aspects are considered below.

\textbf{2.5.1.1 An automatic system}

Under the GATT dispute mechanism, the approval of all of the contracting parties, including the respondent and the complainant, was required for setting up the GATT panel. This body could operate only by achieving what could be described as a positive consensus, making it easy for the respondent to block either the establishment of the panel or the adoption of its ruling. In contrast, under the WTO/DSU system the right to have a panel is automatic and guaranteed, and panel reports are adopted unless there is a consensus not to approve. In other words, a negative consensus, which means that all WTO members including the complainant have to agree not to set a panel or

\textsuperscript{139} Ibid.
\textsuperscript{140} Maria Marta, note 39, p.92.
\textsuperscript{141} Details of the phases of the WTO dispute settlement system in the figure in Appendix one.
\textsuperscript{142} The World Trade Organization Agreement was signed in Marrakech 1994.
adopt its ruling, makes it virtually impossible to block the establishment of a WTO panel or the ratification of its rulings.\textsuperscript{143}

This was expected to benefit developing countries\textsuperscript{144} in particular, as under the new rules they could take a case to the panel/AB process and obtain a favourable decision without fear of obstruction or the use of unilateral sanctions against them. Safadi and Laird predict that "the new provisions should increase pressure on parties to resolve disputes, leaving them less room for manoeuvre and intensifying pressure on countries to comply with rulings".\textsuperscript{145} This is believed vital for establishing a more stable global trading regime.\textsuperscript{146}

\textbf{2.5.1.2 A better enforcement system}

Other features of the DSU are enhanced measures for enforcement, the permitting of retaliation under particular conditions, and final compensation being regulated in the DSU.\textsuperscript{147} The replacement of the positive consensus requirement under GATT with the new dispute


\textsuperscript{144} A similar view is adopted by Hecht: "One of the central achievements proclaimed by proponents of the Uruguay Round was the new dispute settlement system. Whereas the General Agreement on Tariffs and Trade (GATT) previously allowed a single Party to block the adoption of a dispute settlement report, the new Round adopted a ‘negative consensus’ rule – providing that a panel report would be adopted unless all Members of the Dispute Settlement Body (DSB) voted to block it. At least superficially, this change would appear to provide far greater power and authority to panels to meaningfully review and judge national laws and policies’. James C. Hecht, ‘Operation of WTO Dispute Settlement Panels: Assessing Proposals for Reform’, (2000), Presented at The First Five Years of the WTO American Bar Association Section of International Law and Practice, available online at http://www.law.georgetown.edu/journals/gjil/symp00/documents/hecht.pdf, last seen on 23-03-09 at 8:15 pm.


\textsuperscript{146} Ibid.

settlement system resulted in automatic retaliation, which enhanced the potentiality of the enforcement mechanism against a hesitant offending member. Consequently, a defendant could no longer block an unfavourable report or the demand for retaliation. Hence, if a defendant was found inconsistent, it would be subject to potential retaliatory measures authorized by the WTO. 148 The position of LDCs is also considered in the new enforcement system in Article 24.1 of the DSU. This states149 that “if the defendant is a least developed member, the complaining country should ‘exercise due restraint in asking for compensation’”.150

2.5.1.3 The right to appeal

With the creation of the Appellate Body, the DSU introduced a judicial review system in order to guarantee greater reliability and consistency of panel decisions. The innovative AB, which consists of seven experts appointed for a four-year period, has the authority to assess and evaluate legal issues raised by the disputing parties concerning a panel decision.151

While the panellists are appointed ad hoc by the disputing parties, or by the Director General if the parties disagree, the AB is a standing body of well known figures with established reputations in international law and trade. Picciotto emphasises that they are

"‘unaffiliated with any government’, appointed by the DSB to ensure that it is ‘broadly representative’ of the WTO membership. Each appeal is heard by a Division of three members, assigned by rote, so that a judge may be a

149 Chad P. Bown, ‘Developing Countries as Plaintiffs and Defendants in GATT/WTO dispute trade’, (2004), 27(1) The World Economy 59, p.64.
150 Article 24. 1 of the DSU
151 Gustavo Olivares, note 117, p.545.
national of a disputing party; indeed this often occurs, since the AB has always included nationals both of the US and the EU, which have been parties to the majority of cases. Thus, a great deal of weight is given to the independence and judicial nature of the AB: members of the Appellate Body do not act as advocates for the national interests of their home countries.  

Picciotto further asserts that the AB provides the highest level of integrity and impartiality, equal to the best practices applied in national courts.

2.5.1.4 Strict timelines

The WTO has improved the timeframe of the dispute settlement system. Whereas under GATT delaying manoeuvres could be used and would result in an almost endless dispute settlement process, the WTO provides a rigorous schedule resulting in more timely procedures. This is one of the most widely appreciated advantages of the WTO dispute settlement system, under which delaying tactics are less successful.

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153 Ibid. In the same vein it has been argued that "The Appellate Body is also one of the outstanding innovations of the new procedure since each party can blame the conclusions of the panel by thus appealing of its decisions." Fabien Besson, 'Is WTO Dispute Settlement System Biased Against Developing Countries? An Empirical Analysis', (2004), available at http://www.univ-nancy2.fr/RECHERCHE/EcoDroit/DOWNLOAD/DROITSETDEVELOP/Besson-Mehdi05-04.pdf, last seen on 09-05-06 at 9:30am, p.5. See also an interesting analysis of WTO law and national law in Sharif Bhuiyan, National Law in WTO Law: Effective and Good Governance in the World Trading System, (Cambridge University Press, 2007).

154 Keisuke Iida, note 143, p.210. Safadi and Laird have also argued that "The Understanding on Rules and Procedures Governing the Settlement of Disputes brings the dispute settlement system of the GATT up to date by building on existing GATT practices, and extending them in significant ways. This has been achieved through the introduction of greater speed and automaticity into the dispute settlement procedures that eliminate competing fora or forum-shopping within the system. The integrated system seeks to ensure procedural and interpretive consistency in dispute settlement practices across all issues. It provides for greater automaticity in: (i) the establishment of a dispute settlement panel if bilateral consultations fail; (ii) the
It is claimed that, unlike GATT, the establishment of a strict time frame for the settlement of disputes under the WTO is vital. This would motivate complainants (both from developed and developing countries) to bring cases to the WTO dispute settlement system. On the other hand, it would motivate reluctant respondents to settle cases without delay.\(^{155}\)

### 2.5.1.5 Rule of law

The WTO rule-oriented DSM has many advantages for developing countries. Legalizing the dispute settlement system fosters the reliability and certainty of the system and the panel rulings. It limits the extent to which the domestic enterprises of a state member can apply pressure to maintain an inconsistent measure once there is a WTO ruling against it. State members would think carefully about such a demand in order to maintain their reputation in the international trade arena and to avoid the worry of facing retaliation.\(^{156}\)

Bown notes that some have argued that, as a result of the legalization of the WTO dispute settlement mechanism, the disadvantaged position of developing countries in the era of GATT diplomacy no longer applies. Now ‘right perseveres over might’ and developing countries

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\(^{155}\) Ibid.

can invoke the WTO dispute settlement system as much as their developed counterparts.\textsuperscript{157}

\textbf{2.5.1.6 Developing countries have the ACWL}

Between 1995 and 2001, developing countries were reliant upon Article 27.2 of the DSU, which requires the WTO Secretariat to provide legal assistance for a developing country wishing to bring a case to the DSM. In response to growing demands for tactical support for developing countries, the Advisory Centre on WTO Law (ACWL) was created in 2001 in order to fulfil developing countries' technical need to participate effectively in the WTO dispute settlement system. This independent international institution offers developing countries the required legal training, and operates as a legal consultant on WTO law and its application to the settlement of disputes at affordable cost\textsuperscript{158}. However, its function has received severe criticism from developing countries.\textsuperscript{159} The competence of both Article 27.2 of the DSU and the ACWL will be analysed in detail in section two of Chapter three.

The dispute settlement system was expected to benefit developing countries in particular. It was broadly anticipated that the new system would be a victory for developing countries, considering the conventional wisdom that creating a binding third party adjudication system in international law would tend to support smaller countries,


\textsuperscript{159} See Chapter Three.
since their bargaining power would be improved by the open support of impartial judges.\footnote{160}{Gustavo Olivares, note 117, p.543.}

\subsection*{2.5.2 Are all WTO Members happy?}

It has been argued that the WTO dispute settlement system has functioned more successfully than the GATT adjudication system in settling trade disputes, especially from the 1980s onwards.\footnote{161}{Nicholas Perdikis & Robert Read, 'The Operation of the WTO Dispute Settlement Understanding in the Light of Recent Trade Disputes between the European Union and North America', SMBA Research Papers 2004-7, (2004), p.5.}

The WTO has considerably enhanced developing countries’ status in international business, while the present rule-based mechanism of the WTO reflects the sovereign parity of international law. The likelihood of implementing rights relies on the strength of the legal arguments, instead of the economic power of the members.\footnote{162}{Kim Van der Borght, 'The Advisory Center on WTO Law: Advance Fairness and Equality', (1999), 2(4) Journal of International Economic Law 723, p.723.}

However, it has been argued that “as with sovereign equality in international law, the equality of members in the WTO is more akin to myth than reality”.\footnote{163}{Ibid.}

Although the WTO system under the DSU has been considerably enhanced in comparison with the former GATT dispute settlement mechanism, it is evident that within the DSU developing countries still experience certain difficulties.\footnote{164}{TRADE, note 47, p.ii., and Haider Khan and Yibei Liu, "Globalization and the WTO Dispute Settlement Mechanism: Making a Rules-Based Trading Regime Work", Munich Personal REPEC Archive, No.7631, (2008), available online at \url{http://mpra.ub.uni-muenchen.de/7613/1/MPRA_paper_7613.pdf}, last seen on 01-12-2008 at 10 am.}

Many developing countries have been amongst those criticising the new dispute settlement (DS) system since its creation. If one considers the DS review process in the Doha Round, it is clear that a
great many proposals concerning special and differential treatment were introduced, mainly by developing and the least developed countries. In a formal review of the DSU by member governments, delegates from both Indonesia and Malaysia noted that they would not rule out advocating its termination.

In this respect, Schaffer argues that “whatever one’s perspective on trade liberalization and its enforcement, developing countries and developing country constituents clearly are at a disadvantage before the WTO’s current dispute settlement system. Developing countries’ use of the WTO dispute settlement against developed countries is considerably less than their share of developed country trade.”

Table 1 lists the most frequent complainants and defendants.

According to the statistics, the number of cases of developing countries participating in the dispute settlement system has increased. Nevertheless, only a small number of developing countries are ‘repeat players’ in the dispute settlement system, and none in this category is from sub-Saharan Africa. It is the larger developing countries with larger revenues, such as Brazil, India, Korea and Mexico, that are the major participants. It is also the case that the growing number of developing countries participating do so mainly as respondents

165 Gustavo Olivares, note 117, p.547.
168 The most successful model among developing countries with respect to WTO dispute settlement system is Brazil, an interesting empirical study on how Brazil have accomplished such success through public-private sector cooperation in, Gregory Shaffert, Michelle Ratton Sanchez and Barbara Rosenberg, ‘The Trials of Winning at the WTO: What Lies Behind Brazil’s Success’, (2008), 41 Cornell International Law Journal 384.
169 Mary E. Footer, note 147, p.58.
rather than as complainants, while at the appellate stage, developing countries are more often involved as third parties than as main complainants or respondents.

Table 1: Most frequent GATT and WTO complainants and defendants

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<thead>
<tr>
<th>Country</th>
<th>GATT Complainant</th>
<th>GATT Defendant</th>
<th>WTO Complainant</th>
<th>WTO Defendant</th>
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<tr>
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<td>Australia</td>
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<td>Japan</td>
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<tr>
<td>US</td>
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<td>116</td>
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</table>


171 Hansel T. Pham, note 49, p.837.

What is more, Hudec argues that growing participation in the dispute settlement system is not due to growing confidence in the importance of the system as a tool to implement their rights to market access, but mainly because of the growth in legal duties in the WTO. The situation is one of "Lawyers, Lawyers, Everywhere". The legal costs that result from the growing use of the dispute settlement process are excessively difficult for developing countries and there is no participation by the least developed countries.\textsuperscript{173}

Unless the developing countries fully participate in the dispute settlement system, there cannot be a flourishing and comprehensive dispute settlement mechanism, which ought to be the objective of an international organization like the WTO. Real and effective incorporation of developing countries within the WTO depends on a guarantee that these nations can confidently bring disputes and take legal action, regardless of differences in political power. It must include a determined attempt to consider the observations of these nations in a review of the dispute settlement system and not to disregard their suggestions.\textsuperscript{174}

It is argued that the WTO dispute settlement system is crucial for developing countries on a number of issues. It is able to promote their rights under the covered agreements and to restrain the superior

\textsuperscript{173} Bernard M. Hoekman & Petros C. Mavroidis, 'Enforcing Multilateral Commitments: Dispute Settlement and Developing Countries', (1999), available on line at, http://www2.cid.harvard.edu/cidtrade/Issues/hoekman.pdf, last seen on 20-07-04 at 9 am, p.2; Amrita Narlikar, The World Trade Organisation: A Very Short Introduction, (Oxford University Press, 2005), p.96., Only Bangladesh and India have requested consultation in which the disputes have been settled without resourcing to the panel and appeal process.

\textsuperscript{174} Victor Mosoti, note 167, p.74; Chad P. Bown and Bernard M. Hoekman, 'Developing Counties and Enforcement of Trade Agreements: Why Dispute Settlement is not Enough', (2008), 42(1) Journal of World Trade 177, pp.198-200.
economic power of developed nations. The DSM is also vital in guaranteeing that developing countries’ interests and priorities are properly addressed by the “systemic changes brought about through the WTO jurisprudence”. 175

To sum up, the WTO dispute settlement system is much more widely used than was the GATT adjudication system; this, like the use of domestic courts, is considered a sign of legitimacy. However, it is neither an indicator of whether the system is actually being exploited by developing or developed countries, nor of who brings these cases, who wins them, with what consequences or how this has changed over time. These are surprisingly difficult questions to answer. 176

More recently, South Centre has urged developing countries to put forward reform proposals in the DS negotiations so as to enhance their position in the WTO dispute settlement system, by arguing that:

“Developing countries should strive to ensure that they participate fully when the negotiations get back on track and should make every effort to have their concerns discussed and addressed in the negotiations. They should refine and revise some of their proposals and should strongly push for acceptance of their proposals on remedies.” 177

177 Working Paper of South Centre, ‘Analysis Series, South Centre Analysis of the Hong Kong Ministerial Declaration’, Working Paper No, SC/TADP/TA/CC/1, 2006 p.1121. In this regard, the representative of Japan in the WTO has stated that “his delegation would continue to be active and constructive in the negotiations [and] that it was important for members to redefine their priorities in the negotiations and make as rapid progress as possible. He urged members to take into account the interests of developing countries in the negotiations.”, Minutes of Meeting, TN/DS/M/16, (7 June 2004), p.2.
2.6 Conclusion

The GATT adjudication system retained its diplomatic character, despite the fact that as it evolved it acquired some legal elements such as the GATT panel. The GATT dispute settlement mechanism suffered major problems such as the 'negative consensus' rules, which made it almost impossible to initiate a GATT panel. Its temporary character also meant that the GATT mechanism lacked clear integrated rules and was governed by only two articles. Compliance problems arose from its bias in favour of the more powerful and developed GATT members, which led the US to use its power outside GATT to retaliate against other members, imposing their own agendas in what is referred to as 'unilateral aggression'. Developing countries had very limited roles to play in the GATT adjudication system, and very little, if any, trust in it.

After over fifty years of negotiation, the WTO and its dispute settlement system were established. It was claimed that unlike the power-based GATT mechanism, the more legalized WTO system would treat all members equally, no matter how powerful or weak. In fact, it has since been recognized that the WTO agreement has not been a success for developing countries, yet it has been claimed that the WTO dispute settlement system is a most important victory for developing countries. It appears that what some have believed to be the single most important victory for developing countries is not without qualification. This observation leads on to the next chapter, where the aim is to analyze the obstacles facing developing countries in the WTO dispute settlement system.
Obstacles Facing Developing Countries in the DSM

3.1 Introduction

The establishment of a single settlement system for tackling disputes occurring under the numerous multilateral trade agreements is one of the achievements of the Uruguay Round and the founding of the World Trade Organization. Some of the most notable aspects are the specification of time frames for the dispute settlement process and the avoidance of obstacles, since panel reports are automatically adopted. Other important features are the creation of an appellate body, to enhance measures for enforcement, consideration of retaliation and compensation in particular conditions. The DSU also encompasses numerous provisions for special and differential treatment that recognize the asymmetries among WTO members. However, despite all the improvements that were incorporated into the WTO dispute settlement mechanism, developing countries are still facing practical difficulties that handicap them from participating in the system effectively.

The discussion begins by analyzing the lack of monetary and human resources faced by developing countries in pursuing a dispute. This is one of the weaknesses of the implementation procedures under the DSU. Other problems that will be dealt with are the enforcement of the

178 The World Trade Organization Agreement was signed in Marrakech 1994.
decisions of the panel or appellate body and the weaknesses of the special and differential treatment provisions. In examining these issues, a critical discussion will be presented with regard to the WTO dispute settlement system, together with suggestions and proposals for reform of the system. This, it is hoped, will create a better environment for developing countries to participate effectively and safeguard their interests.

3.2 Lack of Financial and Legal Resources

3.2.1 Critical reflections

The current dispute settlement system is regarded as too costly;\(^{180}\) it requires significant human and monetary resources to arrange and pursue the dispute from the consultation to the appeal process and it takes a long period of time – nearly three years on average. Developing countries, because of the shortage of skilled personnel needed to participate in such a complicated and extended legal procedure, have no alternative but to employ legal specialists from developed countries.\(^{181}\) Financially, they must pay their legal experts to plan and present their case in front of a panel, and also pay their diplomats to work the political channels with their opponent so as not to endanger their relationship. While countries pay the same amount for the services of legal officials and diplomats whether a dispute is

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pursued or not, there is a cost involved in dedicating such officials to a dispute. Politically, a disputing member could damage its relationship with its disputing counterpart, which would negatively affect the benefits of forthcoming trade negotiations.¹⁸²

From the point of view of developing countries, the new WTO dispute settlement system is very expensive, especially for smaller and less developed members. It is difficult for developing countries to identify their rights under the complicated WTO rules. Additionally, they cannot properly defend themselves once they are in a dispute, as this requires expensive legal resources. A dispute settlement mechanism that is more readily available to the richer nations will undermine the confidence of developing countries in the system.¹⁸³

The dispute settlement system has been criticized as leaving developing countries in a weak position, since they do not possess the legal expertise and financial means accessible to developed countries, although the WTO offers skilled legal professionals to help developing countries in their disputes (as will be discussed later). Developing countries would consequently rather end panel actions subsequent to a


bilateral resolution, which might sometimes be unfair, so as not to go through the dispute settlement process of the WTO.

In addition, if developing countries cannot afford to make their case to the WTO panel and appellate body, they will be unlikely to exercise their WTO rights even in cases of more explicit contraventions, as has been argued by India. In this case, an alternative would be bilateral negotiations. However the process of settling in this way will be undermined once the respondent recognized that its opponent cannot meet the expense of taking the case to the DSM.

Also, the appellate body and panels adopt a highly contextualized way of deciding a dispute founded on jurisprudence, so that their reports are extremely long and complex. Such complexity would demand ever more intensive and time-consuming efforts by private attorneys or official trade experts so as to effectively deal with the matter. For example, defining the terminology of the dispute can cause difficulties and can be time consuming. In the Sugar dispute, the disputing parties – Australia, Brazil and Thailand – took a considerable time to decide the definition of the amount of imported sugar from ACP/India which would be subject to export subsidies. This was a crucial point

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184 The issue of unfair settlement will be dealt with in more detail in chapter five.
187 Gregory Shaffer, 'How to Make the WTO Dispute Settlement System Work for Developing Countries', in Gregory Shaffer, Victor Mosoti, and Asif Qureshi, Towards a Development-Supportive Dispute Settlement System in the WTO, (ICTSD, 2003), available online at http://www.ictsd.org/dilogue/2003-02-07/Shaffer.pdf, last seen on 1-6-2008 at 9 pm., p.16.
which had to be resolved so that the EC could understand all the associations provided by the complainants. Finally, the disputing parties called it the “ACP/India equivalent of sugar”.  

Developing countries must therefore think carefully about the costs and benefits of pursuing a dispute, even if they are persuaded that their rights under the covered agreements have been violated or that other members have neglected their duties. Smaller developing countries must also take into account the potential political expense (in addition to the fiscal costs) when their rights have been violated by a developed country. This has a negative impact on the balance of rights and duties in the dispute settlement mechanism, since there is no equivalent pressure on developed countries from either financial or political costs.

In addition, it has been argued that when a country does not have adequate technical skills this reduces its ability to litigate and influences its bargaining power in disputes: a rich country will not take

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190 The political influence of the DSM on developing countries will be scrutinized in Section 3.3.3, when dealing with deficiencies in the implementation system.


192 This is a general problem facing DCs in all WTO issues: “A key question that arises at present is whether developing countries’ representation at the WTO is adequate for the pursuit of their effective participation in the activities of the Organization and, through it, the promotion of their interests in the expanding range of issues being addressed. This issue is of special importance because the WTO, like the GATT before it, is a member driven organization, meaning that the bulk of the analytical work, the development of proposals as well as the negotiation of agreements falls on the member countries and their representatives.” Constantine Michalopoulos, ‘The Participation of the Developing Countries in the WTO’, (1998), available online at http://www.worldbank.org/html/dec/Publications/Workpapers/WPS1900series/wps1906/wps1906.pdf, last seen on 22-07-06 at 3am, p.23.
seriously threats to litigate over its trade practices when it knows that a poorer one is not able to bring a case. Thus, developing countries are failing to pursue disputes because they lack the technical ability to do so. In addition, having no adequate legal experts leads to an incapacity to recognize breaches in their WTO rights and to bring disputes.193

Let us consider the position of developing countries as plaintiffs; the lack of legal and financial resources will hinder their use of the system. On the other hand, their appearances as respondents are becoming more frequent, and in this respect it is argued that even reputational considerations will not effectively prevent developed countries from increasing their legal actions against developing ones.194

With regard to technical assistance, there has been strong criticism of the role of the WTO as well as of the developed countries, which are said to have done nothing in this regard, although there is much that they could do, and such attempts as have been made have been considered “very poor and unorganized”.195 Thus, there is a need for pressure on developed countries to play a greater part in providing technical assistance. Their ineffectiveness, it has been claimed, is due to the concern that the dispute settlement mechanism will be used against them by developing countries.196 Therefore, they have no incentive to encourage the participation of developing countries in the system.

194 Keisuke Iida, note 186, p.218.
196 Ibid.
Additionally, as a result of the establishment of the WTO dispute settlement system in the Uruguay Round, the appellate body was introduced under Article 17. Its function was that of examining the legal findings of the panel after a request from the disputing members engaged in a case. The WTO takes the initiative in creating such a binding appeal process.\textsuperscript{197} The formation of the appellate body has been criticized for having a number of undesirable consequences. There has been a significant increase in the cost of bringing a dispute and in the length of time needed for settling a dispute. It is obvious that the first issue is not in the interests of developing countries and the second might affect either party. However, because dispute resolution usually takes place among members with asymmetrical strength, developing countries will generally realize that they can gain little from the lengthened period in which they must meet their WTO obligations; indeed, the longer it lasts, the higher the cost.\textsuperscript{198}

Besson has further developed the capacity argument by suggesting that a member with superior legal power would obtain positive rulings, since it could effectively deal with the complexity of WTO law and its dispute settlement procedures. In this respect, he argues, there is a wide capacity gap between developed and developing countries, allowing the former superior performance before the panel and the appellate body, thus reducing the likelihood of the latter winning their cases. Legal capacity includes a number of factors. First, developed


\textsuperscript{198} Bernard M. Hoekman & Petros C. Mavroidis, 'Enforcing Multilateral Commitments: Dispute Settlement and Developing Countries', (1999), available on line at, http://www2.cid.harvard.edu/cidtrade/Issues/hoekman.pdf, last seen on 20-07-04 at 9 am, p.28.
countries are more able to bear the expenses of a case brought to the DSM than developing ones. Also, there is disparity in the number of WTO officials representing developed and developing countries. 199

This problem is not limited to the least developed countries; even Thailand, an advanced developing country which is more familiar with the dispute settlement process, can be shown to face difficulties arising from a lack of resources. Firstly, although it has trade officials who could evaluate and prepare economic cases, it lacks the international and trade lawyers required to present them before a panel or the appellate body. This deprives their rulings of protection from the Vienna Convention on the Law of Treaties. 200 Secondly, Thailand has found it challenging to recruit enough staff with experience of the multilateral trading system to work on a case, since there must be staff not only in Geneva but also in Bangkok, to communicate the progress of the case. This is made more difficult by the time difference between the two cities. 201 Lack of legal and financial resources has left many developing countries and LDCs not even knowing if the DSM could work. 202

3.2.2 Law firms

First, it is worth mentioning that, according to the Dispute Settlement Understanding, only government officials were originally allowed to present a case before a panel or the appellate body. This put

200 Ibid., p.12.
201 Pornchai Danivivathana, note 189, p.5.
additional strain on the developing countries with a restricted number of official legal specialists, since private law firms were not allowed to be involved in a WTO dispute. It was only after a number of rulings issued by a panel and the appellate body that private law firms were allowed to participate. This is described by Michalopoulos as "a rule that inadvertently may prejudice developing country participation in the WTO".

With regard to law firms, the lack of in-house legal capacity means that developing countries may have to resort to private law firms for the support required to present cases to the WTO. These are usually based in developed countries. It has been argued that due to growth in the number of disputes brought under the WTO, private law firms play an important part in assisting developing countries to participate in the system. On the other hand, the role of such firms has been severely criticized by the developing countries that have used them. It has been described as a catastrophe, in that private law firms deliberately extend disputes to earn more money. What is more, law firms that represent developing counties in a dispute do not play any role in training domestic equivalents, but instead develop their own legal experts. Therefore, it has been suggested that law firms

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203 This important precedent has been first set by the AB in the Banana III dispute at the request of St Lucia who has participate as third party, more detail also in chapter four.
204 Constantine Michalopoulos, note 129, p.27.
ought to support the developing countries that they represent by training local experts and using them to participate in disputes. 207

There is no denying that law firms are extremely costly, 208 and although private ones deal with developing country disputes, there is still the problem of lack of monetary means in developing countries. 209 Hiring private legal experts would cost them $200-$600 or more per hour for counsel and representation in their disputes. In the Japan - Photographic Film dispute, 210 Kodak’s and Fuji’s private legal representatives cost them about 10 million US dollars. Such financial costs are unimaginable for the majority of developing countries. Even in a fairly small dispute, a law firm would charge about $200,000 to represent a developing country, just during the panel process. 211

3.2.3 Developing countries’ position in comparison to developed countries

To develop in-house legal experts is not cheap. The position of developed countries in this respect differs from their developing counterparts. The former are “well equipped with legal talent, are well briefed by export interests, and have a worldwide network of commercial and diplomatic representation that feeds their systems with relevant data”. 212 Furthermore, there has been significant growth

207 Ibid.
208 IPRs-online document, WTO dispute settlement, (1 December 2004), http://www.iprsonline.org/unctadictsd/docs/RB5.3_Dipute_Settlement_update.pdf, last seen on 11-06-06 at 9:00am, p.688.
211 Gregory Shaffer, note 187, p.16.
in education with regard to WTO law in the United States, where every year there are more than one hundred lectures on different aspects of the WTO rules and more than two thousand candidates studying WTO law. Unlike the US and Europe, developing countries do not have domestic private lawyers who can give advice on WTO law and its functions to local firms and trade associations, enabling these countries to protect their interests in the WTO dispute settlement system. The small number of lawyers with expertise in WTO law greatly increases the cost for law firms and governments in developing countries of identifying WTO breaches, in addition to hiring and educating legal experts to dispute any violating trade measures.213 Regrettably, this does not make developing countries eligible for financial support, which leads to other difficulties about who ought to provide such support and whether developed countries are prepared to do so, especially when these capacities are developed to be used against them in the WTO dispute settlement system.214

It appears that developed countries benefit both from their own expertise and from that of students sponsored by developing countries to study WTO law in the institutions of developed countries, who, instead of returning home as intended, remain in the developed countries to gain further expertise in international law and trade.

http://www.nzier.co.nz/SITE_Default/SITE_Publications/x-files/1325.pdf, last seen on 3-04-06 at 1am, pp.15-16.; Also an interesting comparison between the number of trade representatives of developing and developed countries, in Constantine Michalopoulous, Developing Countries in the WTO, (Palgrave Macmillan, 2001), pp.158-160.

213 Chris Nixon, note 212, p.17.
214 Ibid., p.15-16.
3.2.4 Article 27.2\textsuperscript{215}

In order to help developing countries tackle this matter, the DSU contains a rule specifically established to meet their requirements. Legal support is provided under Article 27.2 of the DSU, which states that the secretariat may give legal assistance to developing countries on issues related to the dispute settlement system. Thus, the secretariat makes skilled legal experts from the WTO technical cooperation services available to developing countries upon request. In order to accomplish this duty, two legal affairs officers have been assigned by the secretariat to support developing countries. However, their role is confined to giving advice and clarification regarding WTO law and processes.\textsuperscript{216} Article 27.2 proscribes the legal advisor from acting as counsel or helping in writing submissions, because to do so could be a breach of the impartiality requirement of the secretariat. While the legal assistants are not held back in their work by this limitation, they are nevertheless constrained by the fact that they work only one day per week on these duties.\textsuperscript{217}

In the main, developing countries have not considered the legal assistance provided by the WTO in Article 27.2 particularly helpful to them, and it has been criticized for the quality and quantity of help provided. In terms of quantity, the WTO secretariat has assigned two legal experts from the GATT/WTO Legal Affairs Division to assist

\textsuperscript{215} Article 27.2 of the DSU states that “While the Secretariat assists Members in respect of dispute settlement at their request, there may also be a need to provide additional legal advice and assistance in respect of dispute settlement to developing country members. To this end, the Secretariat shall make available a qualified legal expert from the WTO technical cooperation services to any developing country member which so requests. This expert shall assist the developing country member in a manner ensuring the continued impartiality of the Secretariat.”


\textsuperscript{217} Ibid.
developing countries part-time with the support of two subordinate personnel. Additionally, a number of developing countries have claimed that in spite of the importance of legal advice offered, it is actually restricted in its scope, often merely evaluating potential claims and giving simple guidance regarding the WTO dispute settlement process.\textsuperscript{218}

Oxfam argues further that the WTO Technical Co-operation and Training Division (TCTD) cannot meet developing countries' considerable need for human and technical support, because, beside the impartiality barrier, they have a restricted number of staff: two full-time, two part-time and an additional one on a part-time basis as required.\textsuperscript{219} The quality of the counsel is not in question and it is suitable within the limited extent of technical support. What is more, at issue is the variety of assistance provided. In addition, the legal assistance is provided to the developing country only after the submission of their case to the WTO.\textsuperscript{220}

The language of the article itself is very broad and does not specify how such assistance could be executed in an acceptable manner. There is no article apart from this single provision which provides technical support from the DSU. Due to the restricted number of staff in the secretariat, it can devote only one legal consultant to a country in a dispute, which means that it would be extremely difficult to deal with the dispute settlement system with such limited support.\textsuperscript{221}

\textsuperscript{218} Mary E. Footer, note 179, p.74.
\textsuperscript{219} Oxfam GB Discussion Paper, Institutional Reform of the WTO, 2000, available at http://www.oxfam.org.uk, last seen on 21-06-06 at 9am,
\textsuperscript{220} Ibid.
3.2.5 The ACWL

The criticism of the lack of legal and financial resources available to developing countries was so serious that it resulted in the creation of the Advisory Centre on WTO Law, an innovative, non-governmental trans-national organization whose purpose is to provide developing countries with inexpensive legal assistance on the WTO rules and the dispute settlement system. The intention was to offer developing countries and LDCs equal access to the system. According to a representative from Colombia, the ACWL has so far been fairly successful. A number of developed and developing countries have given it their monetary and moral support. Frieder Roessler, the current Director of the ACWL, has a very good reputation with regard to the dispute settlement system. He developed his skill with the GATT dispute settlement mechanism, as a Director of the GATT Legal Affairs Division.

The Advisory Centre on WTO Law functions separately from the secretariat. Hence, it can act in a broader and more tactical manner with developing countries, while preserving the impartiality of the WTO secretariat. In a way, the ACWL performs the role of 'public defender'.

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224 Detail on the staff and member state of the ACWL, available online in, www.acwl.org, last seen on 23-6-08 at 6:50 pm
for the developing countries. The costs for developing countries are also generally lower and exist mainly to deter the bringing of cases on frivolous grounds, because the ACWL is mainly financed by a number of developed countries. In fact, the fees imposed by the ACWL are only a small part of the real cost of representing a developing country from the beginning to the end of the appeals process.227

The ACWL has played an active role both in advising developing countries on the process of a dispute and in training them to deal with the system.228 As an example of its positive role, it offered advice to the Thai government regarding anti-dumping matters in the Shrimp dispute229. In spite of the private sector’s desire to involve private lawyers, the government chose to work extensively with the ACWL. In this case the ACWL worked closely with private lawyers. The Thai government was thus able, by undertaking such collaboration with the ACWL, to reduce the cost of litigation to around half what it would have paid if the work had all been done by private law firms.230

With regard to the ACWL advice on WTO law, developing country members of the WTO ought also to be members of the Advisory Centre, in order to receive this advice free of charge. This is because non-members pay a higher rate and do not enjoy the benefits of membership. In terms of the WTO dispute settlement system, its members must pay fees in order to be represented. These fees differ according to members’ trade volume and GDP, with the less developed

227 Hansel T. Pham, note 209, pp.356-357.
228 William J. Davey, note 226, p.37.
230 Pornchai Danivivathana, note 189, p.7.
countries paying only 40 Swiss francs per hour. LDCs do not have to be ACWL members to receive assistance at the lower rate, but developing countries which do not have ACWL membership could theoretically receive such advice, but would pay higher charges than members. However, so far, only ACWL members and one LDC have benefited from such support in the WTO dispute settlement system.\footnote{William J. Davey, note 226, p.36.}

As a result, the ACWL has been criticized, because even though developing countries have admired its performance and targets, they also consider that it “should not be considered a panacea for all institutional and human capacity constraints of developing countries”.\footnote{Proposal by the African Group, Negotiations on the Dispute Settlement Understanding, TN/DS/W/15 (25 September 2002), p.2.} It has been argued by developing countries that the charges made by the ACWL for membership, which confers the right to use its facilities, are rather high for a number of less-developed countries that might have more urgent uses for its scarce resources. Furthermore, despite the fact that the ACWL’s legal representatives have been admired for their knowledge and skills, there are too few lawyers available to deal with all of the disputes involving developing countries.\footnote{Hansel T. Pham, note 209, p.357.}

In disputes where two developing countries are against each other, conflicts of interest may also arise.\footnote{Ibid.} An interesting example of this took place in the Sugar case\footnote{EC Sugar, note 188.}, in which Australia had its own legal experts, Brazil relied on a private law firm with monetary support from its sugar business and Thailand worked with the ACWL. In this
instance, despite the obvious beneficial factors (such as reasonable litigation costs for the Thai government, the quality of services provided and the expertise of its director) the Thai government had to take the initiative in order to be presented by the ACWL in the Sugar case, especially as the other disputing parties (Australia and Brazil) were also keen to be represented by the ACWL. In actual fact, the ACWL declined the demand of the other parties, because Thailand was the first to seek its involvement.\footnote{236}{Pornchai Danvivathana, note 189, p.7.} The ACWL also lacks the support of the major developed members: the US, Japan, France and Germany are absent, while few EU countries are members of the ACWL.\footnote{237}{Trish Kelly, The Impact of the WTO: The Environment, Public Health and Sovereignty, (Edward Elgar, Cheltenham, UK, 2007), p.191.} Indeed, the majority of developing countries are not members either\footnote{238}{Kim Van der Borght, 'The Reform of the Dispute Settlement System of the World Trade Organization: Improving Fairness and Inducting Fear', (2007), 4(2) Manchester Journal of International Economic Law 2, p.22.}; thus, of 153 WTO member states, only 20 developing and 9 developed countries are members of the ACWL. All of these countries are listed in Table 2.

**Table 2:**\footnote{239}{Source: ACWL website at http://www.acwl.ch/e/members/members_e.aspx, last seen on 11-11-2008 at 3.50 pm.} Members of the Advisory Centre on WTO Law

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<th>Members entitled to the services of the Centre</th>
<th>Developed Country Members</th>
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<td>1- Canada</td>
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<tr>
<td>2- Colombia</td>
<td>2- Denmark</td>
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<tr>
<td>3- Dominican Republic</td>
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<td>4- Ecuador</td>
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<td>5- Egypt</td>
<td>5- Italy</td>
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<td>6- Guatemala</td>
<td>6- Netherlands</td>
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<td>7- Honduras</td>
<td>7- Norway</td>
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<td>8- Hong Kong, China</td>
<td>8- Sweden</td>
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<td>9- India</td>
<td>9- United Kingdom</td>
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<td>10- Kenya</td>
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## 3.2.6 Options for Reform

### 3.2.6.1 Improvements to Article 27.2

Even after the creation of the Advisory Centre on WTO law, developing countries still suffer from the excessive costs of bringing a dispute to the WTO dispute settlement system.\(^{240}\) Thus, there is a strong call for a review of the role of Article 27.2 of the DSU, in order to make it conducive to the participation of developing countries in dispute settlement concerns.\(^{241}\)

The most straightforward demand is for an increase in the size of the team referred to in Article 27.2, which at present comprises two part-time legal advisers. In this regard, the strongest suggestion was made by Venezuela, which called for five advisors in an autonomous legal division. Such a structure would ensure that developing countries received autonomous legal assistance regarding the process of the DSM, and this would not affect the impartiality of the secretariat.\(^{242}\)

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<th>11- Nicaragua</th>
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<td>13- Panama</td>
<td>14- Paraguay</td>
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<td>15- Peru</td>
<td>16- Philippines</td>
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<td>17- Thailand</td>
<td>18- Tunisia</td>
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<td>19- Uruguay</td>
<td>20- Venezuela</td>
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\(^{240}\) Hansel T. Pham, note 209, p.364.


Additionally, there is a proposal for the creation of a Permanent Defence Council to provide legal and technical support to developing countries at any time they are involved in a dispute, and for such a council to be funded from the WTO budget surpluses. The function of this council could be improved if it were to play a more effective role in training the representatives of developing countries to deal with WTO issues, for example by holding seminars and hosting internships.

With respect to the WTO secretariat impartiality requirement, it is worth mentioning that there needs to be a more explicit (and possibly less restricted) execution of the principle of impartiality, because a narrow application of this rule restricts the range and character of the legal assistance provided to developing countries. It also restrains advisors from supporting developing countries in their disputes. In addition, a reform that could be considered is to remove the obligation of neutrality imposed upon consultants by Article 27.2, and to allow legal experts to fulfil their function as counsel. This has been suggested by the Less-Developed Country Group.

It has also been suggested that the theory of separation of powers ought to be applied to the WTO, thus making the panel and the appellate body autonomous within the WTO. Thus, their operation

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243 Ibid.
244 Thaddeus McBride, 'Rejuvenating the WTO: Why the U.S. Must Assist Developing Countries in Trade Disputes', (1999), 11 International Legal Perspectives 65, p.92.
245 Note by the Secretariat, note 241, p.33.
246 Proposal by the LDC Group, Negotiations on the Dispute Settlement Understanding, TN/DS/W/17 (9 October 2002), p.5.
would not be affected by any sort of political or administrative power, in the same way as applies in domestic legal systems. 247

Moreover, to assist developing countries to address the issue of cost, it is proposed that a WTO Trust Fund be set up to provide monetary support to retain external specialists like attorneys and advisors in private law firms. This would enable a wide range of consultancy and advisory services to be provided. 248 If this took place, the WTO Council could take the UN as a model; the United Nations secretariat-General requests monetary support through voluntary donations from several countries for the UN Trust Fund, which helps developing countries financially to bring cases before the ICJ. 249

In a parallel suggestion, Turkey proposed that the budget of the secretariat ought to be increased to improve its ability to support the positions of the legal experts and to employ full-time advisors. To fund the augmented technical support for developing countries, Turkey advocated, a budget of at least 250,000 Swiss francs should be drawn from the reserve fund. The Budget Committee accepted this allocation of budget surpluses and the General Council authorized it. 250 In January 2000, UNCTAD introduced an idea for an international training scheme to help people in developing countries to improve their expertise in international business law. Unfortunately, this was unsuccessful due to the lack of political and financial support from developed countries. 251

248 Note by the Secretariat, note 241, p.33.
249 Kim Van der Borght, note 242, pp.1231-1232.
250 Kim Van der Borght, note 216, p.724.
251 Thaddeus McBride, note 244, pp.69-70.
It has also been recognised that there is a clear need for extra training and financial support for developing counties to tackle the issue of imbalanced legal and monetary capacity. To realize this objective, the creation of a dispute settlement fund, receiving monetary support from the WTO budget, would result in the effective participation of developing countries in the WTO dispute settlement system. The African Group requested assistance in the form of “a pool of experts and lawyers in the preparation and conduct of cases, the payment of fees and expenses entailed, [and a detailed] compilation by the WTO secretariat of all applicable [panel and Appellate Body case] law”.  

In response to the increase in the cost of bringing disputes in the WTO, India suggested that where a developing and a developed country are the disputing parties and the ruling of the panel or appellate body is that the developed country is the offending member and that the developing country is thus successful, or where a dispute established between a developed country and a developing country member has been later declined, it ought to be ruled that the developed country should pay the legal costs incurred as a result of the litigation.  

In addition, it has been suggested that the number of disputes that can be brought by a developed country against a developing country ought to be restricted to two cases per year.

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253 Website, available online at http://www.freedominfo.org/ifti/wto.htm#2, last seen on 1-08-04 at 9pm
Such a scheme, if it were implemented, would improve the capability of developing countries to be involved in the dispute settlement system. It would encourage members to pursue settlement as opposed to formal disputes, and this payment as a result of the failure to comply would not be problematic for larger developed countries, which could easily afford it.  

3.2.6.2 Small claims procedures

It has been argued that one of the main reasons for developing and less developed countries not bringing disputes is the length of the process under the DSU, which can take up to thirty months. Introducing a simpler and faster dispute settlement process could help to resolve this matter. 

Many of the cases brought to the WTO dispute settlement system involve quite small trade volumes. Therefore, the system could be enhanced for developing countries by launching a ‘light’ dispute process involving, for instance, disputes in which the value of exports is under $1 million. In such disputes, the panel could be established with a sole panellist and the entire litigation accomplished in three months. This would particularly help developing countries, since the greater number of cases engaging developing countries are such ‘small’ disputes. It would also significantly reduce the cost of bringing disputes, as attorneys might not be considered necessary. At the same

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255 Gregory Shaffer, note 187, p.44.
time, this would be considered advantageous to the dispute mechanism, as it would diminish the burden that is placed on panels.257

Thus, it could produce a system for the quick review of disputes, which could be of enormous significance for the country initiating the dispute. As far as developing countries are concerned, what might be considered very little in dollars might represent a significant proportion of their overall exports.258 The suggestion of launching a *de minimis* kind of litigation in the WTO dispute settlement mechanism has also been put forward by India, as a developing country member:259

"In cases where a developed country is the complainant and a developing country is the respondent, the developed country should acquire the right to initiate dispute settlement action against the developing country, only if it is able to demonstrate that the alleged violation of a provision of a covered agreement by a developing country causes, to the developed country, trade impairment or trade loss above a threshold or *de minimis* level."260

India covered in its proposal the manner in which a such fast track method might be decided. For instance, it could be through a specific fixed percentage of the value of imports of the specific commodities in a case where a developing country is involved, or by the complete market volume of the specific commodities in the developing country involved.261 In this regard, the WTO can learn useful lessons from a comparable practice in resolving economic disputes under different

258 Ibid.
259 Mary E. Footer, note 179, pp.97-98.
261 Ibid.
mechanisms (for example, the Court of First Instance of the European Communities) in evaluating the application and related advantages that the creation of small claims procedures would bring for the settlement of trade disputes in the WTO.\textsuperscript{262}

\section*{3.3 Questioning the Enforcement Procedures}

\subsection*{3.3.1 Retaliation is not an option for developing countries}

It is claimed that as a trade sanction is not a prerequisite of a better compliance record in the WTO, there are other factors that put pressure on WTO members to respect their obligations under the covered agreements, such as domestic pressure, reputational penalties and unilateral sanctions, even without imposing trade sanctions. Moreover, the role of the dispute settlement system in clarifying and interpreting the rules and provisions of the WTO agreements is more important than imposing penalties on the offending member. Because of this, if the offending party withdrew the inconsistent measures according to the panel or appellate body rulings, they would pay no penalty.\textsuperscript{263}

In addition, several provisions indicate that its goals are obvious and that the preferred means of settling a dispute between two conflicting members in the DSM is to reach a mutually acceptable resolution that is compatible with the WTO rules. It is important to note that the main objective of the DSU is to ensure that all violations cease and that

\textsuperscript{262} Mary E. Footer, note 179, p.98.

measures are made consistent with WTO agreements.\textsuperscript{264} Retaliation is considered "the last resort”,\textsuperscript{265} but one may wonder for whom. It is relevant here to recall a recent answer by the WTO Director General, Paschal Lamy, when asked about the effectiveness of the WTO sanctions for developing countries:

"Strictly speaking, the WTO system has no sanctions. Members are supposed to comply with rulings from WTO panels or the appellate body. If they don't comply in a reasonable period of time, the complaining country may receive a temporal compensation or, lacking that, be temporarily authorized to suspend equivalent concessions. This is the closest we get to sanctions in the WTO system. This matter is being currently examined by Members under the Doha negotiations. One of the concerns is that small countries do not have the same capacity as large ones to impose countermeasures that induce compliance."\textsuperscript{266}

The Director General's words provide clear support to those who believe that the WTO remedies need to be reviewed and reformed.\textsuperscript{267} Nevertheless, the dispute settlement system itself seems to function fairly well, and it surely deserves to be preserved.\textsuperscript{268} In addition, Srinivasan rightly argues that any WTO member who suspends

\textsuperscript{264} Article 3.7 of the DSU states that, "The first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements"

\textsuperscript{265} William J. Davey, note 226, p.4.

\textsuperscript{266} Transcript of Internet chat with WTO Director-General Pascal Lamy, (21 February 2006), Available on www.wto.org, p.17.


concessions to an offending member will also tend to harm its own national trade interests. 269 Jackson argues in this respect that

"asking the winning country to impose so-called 'retaliatory measures' amounts to asking it to shoot itself in the foot, because the measures inflict an economic harm on the imposing country, and often affect third parties that usually have nothing to do with the case—in effect, innocent bystanders. These problems show clearly how the views of sovereign nations constrain the authority of the WTO." 270

With respect to developing countries, it has been strongly argued that one of the main reasons for the absence of developing and less-developed country members from the dispute settlement system is the structural inflexibility of the remedies presented to the poor nations to enforce a favourable decision. 271 The anticipated gain for a developing country that has obtained a positive ruling from a panel or the appellate body in a dispute against a developed country is restricted to the withdrawal of concessions under consideration by the developed country member. If the inconsistent measure is not removed, it may be awarded compensation for the damage suffered by the developing country because of the existence of the inconsistent measure, and the developing country has the right to retaliate. This is considered to be an improvement on the GATT 1947 dispute settlement mechanism. Nevertheless, with regard to the implementation of decisions under the DSU, because of the imbalance between them developing countries

271 Proposal by the LDC Group, note 246, p.3.
still experience certain difficulties, especially in disputes where developing and developed countries are the disputing parties.

As regards GATT 1947, there were a number of states with a reputation for non-compliance with the dispute settlement mechanism. This particularly applied to the EU and its Common Agricultural Policy. As a result, there were repeated uses of the dispute mechanism under GATT for identical import measures. In theory, this can be prevented in the WTO process through a timescale being fixed for the execution procedure. Conversely, the current practice in some high-profile cases (such as the one which was brought against the EU regarding its banana import policy) suggests that a parallel difficulty can arise in the WTO.

Developing countries do not have the privilege of deciding whether to meet the terms of the Dispute Settlement Body (DSB) decision or not. Their relatively weak economies place these countries in a poor position to withstand the retaliation they would face if they did not comply. An expert for a developing country articulated this briefly by saying that “developing countries do not have the luxury of choosing whether to comply”.

Secondly, the panels and the appellate body usually deliver verdicts by proposing remedies as broad “recommendations”. The ambiguity of

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275 Douglas Ierley, note 193, pp.625-626.
these legal rulings by the panels and appellate body do not affect all parties equally. They allow developed countries with greater economic power to escape conformity with a ruling if they lose the case, while doing nothing to prevent them when they are successful from using their great market power to push developing countries into meeting the terms of the ruling. 276

Thirdly, the present enforcement mechanism under the DSU generates an inducement, particularly for the United States and the EC, to extend the duration of the dispute for many years. Consequently, by the time a panel decides that they have breached their duties under the covered agreement, they will have blocked their markets with no effects on their industry. The side effects of this inducement have been apparent in the textile industry. Despite the fact that the United States has lost a number of disputes regarding textile safeguard measures (for instance in disputes involving Costa Rica and Pakistan) it closed its market to access by developing country imports for about three years without any negative consequences for itself. 277

Non-compliance by developed countries with the recommendations of the DSB also results in non-compliance by developing countries. This has been considered to be especially crucial and challenging for the continued operation of the dispute settlement system, and could be the major reason for encouraging non-compliance by developing countries. A further criticism of the weakness of enforcement under the DSU is that it will increase tension between developing and developed countries. In order to remedy this, developing countries must feel that the DSM works for them and that they can participate

276 Ibid.  
277 Gregory Shaffer, note 187, p.39.
fully in it, the matter of enforcement being one of their main concerns. In particular it is argued that, after the Banana dispute\textsuperscript{278}, developing countries have no confidence in the WTO dispute settlement mechanism.\textsuperscript{279}

Furthermore, since the use of enforcement measures would result in unwanted consequences for the complainant, the use of such measures (in this case, withdrawal of concessions) will not be invoked.\textsuperscript{280} Because the implementation mechanism under the DSU provides only prospective remedies, it gives the members an inducement to breach their duties to the WTO. The violator has to bring his violations to an end only after being caught, while the violating trade measures will be preserved at no cost during the whole process of the dispute settlement system. To sum up, the current system has left developing countries more prone to experiencing severe hardship than developed ones.\textsuperscript{281}

A more specific criticism is directed at the way in which sanctions are applied, by imposing authorized tariff barriers. According to the optimum tariff theory, the use of such barriers on imports is likely to result in a trade war, which would certainly be to the advantage of the more powerful disputing member. Therefore, developing countries are discriminated against in two respects. Firstly, not having sufficient financial and human resources handicaps their participation in the

\textsuperscript{279} Douglas Ierley, note 193, p. 626.  
\textsuperscript{281} Hansel T. Pham, note 209, p.354.
system. Secondly, the DSB may allow them to retaliate, but they cannot put such sanctions into action.  

Retaliation is an essential part of the dispute settlement process, since it discourages members from breaching their WTO obligations. Nevertheless, this function is undermined by the fact that the mechanism is limited by the severity of the credible threat of retaliation, since retaliation must have severe trade consequences if it is to persuade the offender to conform to the covered agreements. Hence, because developing countries cannot impose an adequate retaliatory threat, they consider that the enforcement system under the DSU disadvantages them.

Imposing retaliatory measures not only requires considerable economic strength to make them effective but may affect the economy of the member applying them. Another factor which favours larger members in this respect is that, unlike the smaller and poorer countries which rely heavily on importing goods, they do not suffer from such reliance. Furthermore, as the effects of countermeasures vary, they will tend to be more effective if the country in breach depends heavily upon the market of the complainant, while conversely, they will be less effective if the offender has a number of alternative markets available to it.

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283 Fabien Besson, note 199, p.7.

284 Bernard M. Hoekman & Petros C. Mavroidis, note 198, p.4.
3.3.2 The example of Ecuador

This is what actually happened in the Banana case, when Ecuador was authorized to take countermeasures against the EU. It considered that it would be likely to lose any trade war against the EU, or would be deprived of aid that was being given by larger members such as the EU. It also wished to be able to seek more favourable treatment when the Paris Club considered its debt.\textsuperscript{285} As Hoekman and Mavroidis point out: “Interestingly, the Banana arbitration acknowledges this point. Adoption of countermeasures is simply not an option poorer WTO Members should consider.”\textsuperscript{286}

Thus, the Banana case\textsuperscript{287}, in which developing countries gained a favourable ruling against their developed counterparts, is one of the cases that have made the implementation process under the DSU controversial. This dispute highlights the above-mentioned debate about the difficulties facing developing countries in implementing a ruling against a larger member. In this example, Ecuador had to depend very much on the retaliatory power of the US to influence the EU position in the dispute. Without such support from the US, which would not have been available if Ecuador had been the only disputing member, the effect of Ecuador alone on the EU would have been negligible. In fact, Ecuador requested and was given the right by the WTO to retaliate against the EU in European intellectual property rights, trade in services and product-based tariffs. However, in comparison to the EU, the Ecuadorian economy was too small and

\textsuperscript{285} Fritz Breuss, note 282, p.34.
\textsuperscript{287} EC Banana III, note 278.
weak to have any worthwhile effect on it; on the contrary, it would have harmed Ecuador’s economy and consumers.\textsuperscript{288}

It was argued that in the Banana dispute\textsuperscript{289} even the new rule-based system did not restore the power balance when Ecuador tried to retaliate against the EU. Ecuador was the first developing country since the establishment of the WTO dispute settlement system that asked for and was granted the right to suspend concessions against a rich member. In this case, the arbitration panel allowed Ecuador to suspend concessions up to 201.6 million US dollars. Its relative economic weakness meant that Ecuador found it difficult to suspend concessions, because if it imposed tariff measures on imported EU goods, it would lose a vital source of imports. This could lead to economic catastrophe, whereas blocking EU access to the Ecuadorian market would hardly affect the export potential of the EU’s multinational enterprises. The latter could simply turn to alternative and bigger markets than its own, such as the US and Japan.\textsuperscript{290}

The Ecuadorian plan was to withhold its obligations under Article 14 of the TRIPS agreement against the EC, which includes the protection of performers, producers of phonograms and broadcasting organizations. Hence, Ecuador would be capable of exporting to other WTO members regardless of the permission of the EC copyright owners. But Ecuadorian attempts to enhance its export volume were deceptive, because it was ruled by the arbitration panel that the remaining WTO


\textsuperscript{289} EC Banana III, note 278.

\textsuperscript{290} IPRs-online document, note 208, p.687-688.
members (apart from Ecuador) should comply with their TRIPS duties with regard to the EU. Accordingly, no other member could import EU phonograms from Ecuador, since they would be subject to Article 51 of the TRIPS agreement, which requires the customs authorities to prevent access to their markets by such phonograms. There was no way that Ecuador could apply the authorized cross-retaliation against the EU, a fact that was to some extent due to the country’s economic weakness in comparison to the EU.291

Even suspending its obligations under the TRIPS agreement, which was considered one of the most practicable ways in which it could impose some sort of threat to force larger members to comply with the panel and AB rulings, was proved in this example by Ecuador to be of little value.292 But it is worth mentioning that Ecuador did identify an area which could be used by developing countries as an important tool to retaliate against larger members in the future. Unfortunately, this was undermined by that fact that it was impossible to change the EU banana regime as a result of any retaliatory measures used by Ecuador, even in TRIPS. In this respect, it was claimed by domestic intellectual property lobbies in Brussels and Washington DC that “it is highly unlikely that the European Community will change its banana import regime because of Ecuadorian countermeasures in TRIPS”.293

To date, Ecuador and the other Latin American banana exporters have failed to make the EU comply with the DSB ruling in the banana dispute.294 There is a justified fear that EU non-implementation of the ruling reflects the wider non-conformance by developed countries in agriculture, the area in which the DSM should be the most beneficial.

291 Ibid.
292 Fritz Breuss, note 282, p.34.
293 Bernard M. Hoekman & Petros C. Mavroidis, note 198, p.4.
294 Bridges Weekly Trade News Digest, Vol.12, Number 41, released on 03-12-2008.
The US and EU have shown some hesitation in enforcing the AB rulings in the *Cotton*\textsuperscript{295} and *Sugar*\textsuperscript{296} disputes\textsuperscript{297}; these are vital developments whose results are yet to be seen.

3.3.3 Political dependence of developing countries

One of the main criticisms of the WTO Dispute Settlement Understanding is that it disadvantages developing countries, in that it does not entirely eradicate asymmetries among WTO members in a dispute.\textsuperscript{298}

To start with, a characteristic aspect of the WTO Agreement is that there is no external power that is intended to or capable of enforcing it. Rather, WTO members formulate approaches designed to deal with any offender. In addition, if enforcement methods under the DSU are ineffective, members are obliged to depend on other methods in order to implement the WTO Agreement. As a result, more powerful disputing members, who are capable of causing considerable trade damage at fairly little cost to themselves, have the upper hand in the multilateral trading system, while developing countries are in a weak position. Not only are they dependent on financial aid from the states


\textsuperscript{296} EC Sugar, note 188.


to which they export, but they also rely on them politically and occasionally militarily. 299

The enforcement mechanisms of the WTO dispute settlement system are structurally prejudiced in favour of states with more powerful economies in three ways. First, developing countries can be pressurised by the US and the EU to act in accordance with WTO obligations and resolutions, since access to their huge markets is vital to exporters from developing countries. Developing countries cannot exert similar pressure. The huge trade interests of the US, which exports all over the globe, would barely be affected by restricted admission to the market of any developing country. In disputes where there is US or EU political pressure to maintain the offending measures, developing countries have very little chance to make use of sanctions to oblige the United States and EU to bring these measures into conformity with the WTO Agreement. 300

One of the aspects of this unequal power relation is the political influence imposed by richer members on the smaller and less developed ones. Military force plays a significant part in this. It is argued that many developing countries have bilateral military cooperation with larger members and that there is a wide gap between the military spending and power between the two. This reduces the developing countries’ chances of winning a dispute, let alone enforcing

the DSM ruling. The DSU cannot shield developing countries from facing such pressure, which would as a result weaken their position in the DSM.\textsuperscript{301}

The impact of political and economic power on the relationship between states has been closely examined by the realist and neo-realist models. They have in particular considered the necessity of creating and preserving international organizations from the point of view of hegemonic countries. It is believed that international trade based on the free trade model would benefit states that have superior political leverage, while bringing the smaller countries under their control and diminishing their political leverage. The most powerful states established international trade organizations to enforce a system of free trade and tariffs that benefited them, while the inclusion of less powerful countries was a consequence of their comparative weakness and inability to defy the pressure of the global powers.\textsuperscript{302}

This is why the WTO was founded as a trans-national institution to govern and renovate the regulation of the international trading system. In the nineteenth century, military power was used to impose the free trade model on autocratic countries that did manage to operate outside the areas controlled by the hegemonic powers. Building upon this hypothetical example, because of the political power imbalance it can be seen how the ultimate outcome of the WTO dispute settlement process would not favour developing countries.\textsuperscript{303}

\textsuperscript{301} Fabien Besson, note 199, p.19.
\textsuperscript{303} Fabien Besson, note 199, p.12.
For example, Thailand, as a middle-income developing country, has had to end disputes at the consultation stage in about half of the 15 cases it has initiated since the GATT era, because of political considerations.\textsuperscript{304} In fact, all WTO members ought to think carefully about the political and economic elements before invoking the dispute settlement system or enforcing a favourable ruling where the political and economic cost is even higher.\textsuperscript{305}

\textbf{3.3.4 Panel/Appellate Body recommendations of specific methods}

The panel or appellate body can propose methods for enforcement, according to Article 19(1) which states, "In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations."\textsuperscript{306} However, so far, the panel and the appellate body have hardly ever done so.\textsuperscript{307} The use of this power is nonetheless essential if there is to be a more successful enforcement system, because in general enforcing legal rulings is similar to the application of legal provisions and is easier when they are more clearly defined.\textsuperscript{308}

Moreover, it has been argued that the panels and the appellate body have so far been unwilling to make precise suggestions, so as not to

\begin{footnotesize}
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\item[304] Pornchai Danvivathana, note 189, p.12.
\item[306] Article 19(1) of the DSU, available at www.wto.org, last seen on 19-08-04 at 10am.
\item[307] Lucas Eduardo F. A. S Padano, ‘Cross-agreement retaliation in the WTO dispute settlement system: an important enforcement mechanism for developing countries?’, (2008), 7(3) World Trade Review 511, p.515.
\end{itemize}
\end{footnotesize}
violate the principle of state sovereignty. On the other hand, the fact that WTO members have considerable freedom to plan their means of compliance has been strongly criticized throughout the evolution of the GATT and WTO dispute mechanisms. In addition, it has been argued by some academics that the Understanding has produced an inducement for members to interpret rulings in support of the preservation of the offending measures, which members have to do their best to remove.309

Furthermore, while a number of recent rulings show evidence of a tendency to make more specific suggestions, the ruling in the US – Shrimp case310 clearly shows that the appellate body is still reluctant to suggest specific methods of implementation, even though there is a clear need for the use of such powers.311

The US – Underwear dispute312 is the best instance of a case in which the panel suggested specific methods of compliance and where the respondent – the United States – immediately made its measures consistent with WTO Agreements according to the panel suggestion.313

In order to make further improvements to the rulings of the panel and the AB, it has been suggested that in cases involving a developing or less developed country as a disputing member under the DSU, they ought while making their rulings to pay particular attention to the development implications and to the potential effect of their rulings on

309 Ibid.
310 US Shrimp, appellate body report, note 229.
311 Christopher Duncan, note 308, pp.502-503.
313 Christopher Duncan, note 308, p.504.
the social and economic welfare of the developing or less-developed country, consulting with appropriate development institutions if required. The dispute settlement system is a significant tool for the achievement of the development aims of the WTO Agreements. 314 This proposal would be a useful guideline to be added to Article 19 (1). It could also be applied by the panel and the AB, while suggesting methods by which such rulings could be implemented in disputes where a developing country or LDC is a disputing party.

3.3.5 Dissatisfaction with the compensation process and the interaction of financial compensation

While the WTO Dispute Settlement Understanding offers compensation as an alternative to the use of retaliatory measures, there are difficulties attending this option. It has hardly ever been granted, which increases the potential for invoking retaliation to implement the panel or appellate body ruling. This practice would make retaliation the predominant method of implementation in the WTO dispute settlement system. 315 Furthermore, the way that compensation is granted, in line with Article 22:2 of the DSU, increases the opportunities for using trade sanctions rather than compensation, since it requires the consent of both parties. By contrast, if such consent is absent, the only

315 Alan Wm. Wolff, note 267, p.8; Bruce Wilson, ‘Compliance by WTO members with Adverse WTO dispute Rulings: the Record to Date’, (2007), 10(2) Journal of International Economic Law 397, p.399.
option is to invoke the suspension of concessions and other obligations against the offending party.\textsuperscript{316}

Compensation, rather than authorising them to suspend concessions and other obligations, is more beneficial for developing countries, because of their relatively restricted power. For this reason, there is a considerable demand on the DSM to force developed countries to pay compensation to their developing counterparts. In failing to do so, the DSM would be seen as dismissing the significance of the power imbalance between the two groups.\textsuperscript{317}

During the discussions of the Uruguay Round, a number of developing countries highlighted the vital importance to them of compensation when GATT obligations had been breached by a developed country. With regard to compensation, Nicaragua and Korea put forward some suggestions. The submission made by Nicaragua was related to the effectiveness of the GATT panels. Thus, in disputes brought by a developing country, in the recommendations of the contracting parties compensatory means ought to be considered if the amount of damages warrants such compensation. Additionally, the time limit for enforcement of the contracting parties' decisions should not exceed 90 days. Finally, the suspension of concessions ought not to be the only method considered by the contracting parties for enforcing panel recommendations.\textsuperscript{318}

\textsuperscript{318} Kofi Kufuor, 'From the GATT to the WTO: The Developing Countries and the Reform of the procedures for the settlement of international Trade Disputes', (1997), 31(5) journal of World Trade 117, p.139.
The Korean suggestion was that where a developing and a developed country are the disputing parties and the latter fails to execute Council verdicts, the former should be permitted to ask the panel to award compensation to it. Hence, it is clear that the requirement of compensation in the Dispute Settlement Understanding of the WTO is extremely significant for developing countries, and that it would improve developing countries’ confidence in the multilateral trading mechanism. On the other hand, developing countries consider the fact that compensation is only voluntary to be a weakness of the system.\textsuperscript{319} In addition, such compensation is not always monetary, but could also take the form of extra concessions.\textsuperscript{320}

Article 22 of the DSU is vague enough for WTO members to claim that they have the right to grant compensation, instead of bringing their violating measures into accordance with the WTO Agreement. Until full compensation has been made the issue stays before the DSB. Perhaps, by applying a more flexible interpretation of Article 22, developed countries could convince developing country members to agree to compensation, rather than modifying the offending measures.\textsuperscript{321}

The compensation provided under the DSU is inadequate for developing countries. In cases where the offending party withdraws the inconsistent measure without delay, the benefit of this withdrawal will be felt only once it is fully completed. From the time when the dispute was initiated to the time when the panel or the appellate body

\textsuperscript{319} Ibid, pp.139-140.
rules that the measure was inconsistent and it is finally withdrawn, no compensation will have been granted to the winning party. This applies no matter for how long a period the inconsistent measure was applied. This will have negative consequences for the economy of a developing country complainant, which would be negatively affected by the application of such inconsistent measures for such a long time.\footnote{Working Paper of South Centre, note 205, pp.43-44.} Developing countries can suffer from significant export injury during the thirty months that a case is proceeding, yet there is no rule for compensation for the injury caused, even if the disputing measures are considered to violate WTO law. Smaller developing countries that rely on a few exported goods or markets will suffer disproportionally serious injury.\footnote{TRADE, note 181, p.24.}

In this respect it is proposed that developing countries ought to be entitled to compensation for this period as preferential treatment. This would provide immediate respite for smaller and poorer members during the period in which such measures were being implemented. On the other hand, if a dispute involves developed and developing countries where the latter is the offending party, the present rules for dispute settlement ought to be applied.\footnote{Working Paper of South Centre, note 205, pp.44-45.} As a result, developed countries would be deterred from taking inconsistent trade measures on a frivolous basis against their developing counterpart. This would therefore fulfil a significant aim of the dispute settlement system: the avoidance of an increase in trade disputes.\footnote{TRADE, note 181, p.24.}
The Sutherland Report (2004) correctly finds that the current implementation system of the WTO does not favour developing countries when it states:

"To allow governments to ‘buy out’ of their obligations by providing ‘compensation’ or enduring ‘suspension of obligation’ also creates major asymmetries of treatment in the system. It favours the rich and powerful countries which can afford such buyouts while retaining measures that harm and distort trade in a manner inconsistent with the rule of the system."

The report, while noting that the current practice of compensation is to provide extra market access rather than "monetary payments ('cheque in the mail')" also suggests that it would be useful, especially for the poorer and least developed members, "to allow monetary compensation from the party required to comply with a dispute settlement report, to substitute for compensatory market access measures by the winning aggrieved disputant". Nevertheless, the report emphasizes that such financial compensation "must be exercised to be sure that monetary compensation is only a temporary fallback approach pending full compliance, otherwise ‘buyout’ problems will occur".

Indeed, applying financial compensation can create the motivation for developed countries not to comply with the WTO rules, thus invalidating the established trade measures. To avoid this, it could be included in the DSU that when a developed country declines to bring its inconsistent measures in accordance with a DSB decision within a

326 The Future of the WTO: addressing the institutional Challenges in the New Millennium, Report by the Consultative Board to the Director-General Supachai Panitchapdki (The World Trade Organization, 2004), p.54. [usually referred to as the Sutherland Report]
327 Ibid., p.53.
328 Ibid.,p.54.
329 Ibid.
specific time (for example, one or two years) then the amount of monetary compensation due would be increased by a specified percentage. In these disputes, a fixed time-limit for execution could also be included in the DSU; for instance, this could be six months from the DSB approval of the ruling of the panel or AB.\textsuperscript{330}

The purpose of a punitive rate would be to diminish the motivation for a developed country not to comply with WTO rules through the payment of financial compensation. The payment of a punitive rate could be avoided by a developed country in two ways: the first would be to act in full accordance with the ruling and the second would be to give compensatory market access of the same value as the amount decided by the panel. In this way, the prospect of paying a punitive rate could motivate a developed country to make more effort to give compensatory admission to its market.\textsuperscript{331}

The payment of monetary compensation ought to be independent of the obligation to abolish the violating measure. The amount ought to be decided with regard to elements such as the effect of that measure on the trade of the developing country, the length of time it has been in place and the time it takes for exports to recover after the elimination of the inconsistent measure.\textsuperscript{332}

\textsuperscript{330} Gregory Shaffer, note 187, p.42.
\textsuperscript{331} Ibid.
One problem arising from the adoption of monetary fines would be the power imbalance among WTO members. This would be created because larger members enjoying greater economic power could easily circumvent their obligations by paying any fine, a luxury that developing countries cannot afford. However, this problem could be resolved by deciding the amount of the fine according to the economic strength of the offending member; thus, a sliding scale of fines would minimize "discrimination" against poorer members.\footnote{William J. Davey, note 226, p.40}

Furthermore, to prevent fines from being used to avoid compliance with WTO rules, it has been suggested that their level should be monitored, with the potential to increase them over time. Such a mechanism for monetary fines would restore the balance among WTO members and would promote compliance in the DSM.\footnote{Ibid.} On the other hand, in spite of the fact that this idea has been granted some backing by the EC, international business academics expect that such a reform will not take place in the immediate future, because of the great hostility of developed nations.\footnote{Hansel T. Pham, note 209, p.363., Peter Van den Bossche, The Law and Policy of the World Trade Organizations: Text, Cases and Materials, (Cambridge University Press, 2006), p.296.}

**3.3.5.1 Ex post facto monetary damages**

It has been noted by Mexico that in the present WTO dispute settlement system compensation and suspension of concessions may only be used by members prospectively. Therefore, in the course of a dispute settlement, the offending measures will be preserved 'for free'. To address this, applying the principle of retroactivity would enable WTO members to benefit fully from the concessions and rights
obtained in consequence of the Uruguay Round, by removing the impact of this *de facto* waiver.\textsuperscript{336} Hence, it has been suggested that when a developing country wins a dispute against a developed one, the latter could be required to pay retrospective financial damages. These could be decided by the panel, and the DSU could include guidelines for the award of such damages.\textsuperscript{337}

Adding the payment of retrospective fines as compensation for the failure of a developed country to comply with a ruling would bring about an improvement in the developing countries' ability to bring pressure to bear in settlement negotiations. It would also improve their ability to pay for the legal protection of their interests under the covered agreements. Further, private law firms could offer special fee arrangements in relation to defending developing countries' rights in cases before the dispute settlement system. Under US law, private lawyers earn a percentage of the award in a winning case, but are paid nothing if they lose.\textsuperscript{338}

Damage awards of any kind could be made more reliable under the DSU by obligating all members to accept an award as binding. Additionally, they could implement the financial requirements of an award as if it were a binding ruling in their national courts, having the right to use the regulations concerning implementation of court

\textsuperscript{336} Proposal of Mexico, Negotiations on Improvement and Clarifications of the Dispute Settlement Understanding, TN/DS/W/23, (4 Nov 2002), p.3.

\textsuperscript{337} Gregory Shaffer, note 187, p.43.

\textsuperscript{338} Ibid. In the same vein, Malaysia has also expressed concerns that the settlement of disputes under the DSM is a lengthy process and that inconsistent measures remain in force until the adoption of the AB report, potentially causing severe damage to the interests of the complainant, especially a developing country. Malaysia therefore proposes the adoption of an 'interim remedy', which at the request of the complainant shall be applied by the panel against the inconsistent measure. The respondent would be required to guarantee to follow this until the final decision is rendered. In Minutes of Meeting, TN/DS/M/15, (4 June 2004), pp.2-3.
rulings. The International Centre for the Settlement of Investment Disputes (ICSID) uses the same technique to make sure that the monetary award given by ICSID tribunals will be awarded. If such a step were taken by the WTO, this would result in the levying of rates on a non-complying member's goods in any of the WTO member countries.\textsuperscript{339} This could be limited to cases between a developing and a developed country, where the latter is the offending party.

Bronckers and Broek argue strongly in favour of retroactive monetary compensation:

"Retroactivity in financial compensation would introduce a significant disincentive against foot-dragging, which is now perceived to be a major problem in the dispute settlement mechanism. As DSU proceedings can take a long time, some Members are seen to exploit this to maintain WTO-illegal measures. Also, retroactivity more accurately remedies the injury suffered by private traders by providing reparation for the period when the injury actually occurred."\textsuperscript{340}

One of the important changes to the DSU that developing countries would like to see is the inclusion of prospective remedies in either compensation or retaliation. The benefit of retroactive remedies is that they diminish the motivation of the disputing parties to delay the implementation process, which can occur when remedies are prospective only. Such a delay can be engineered by requesting a longer implementation timeframe under Article 21.5. Making the compensation retroactive would have the benefit of parties reaching an agreed solution as early as possible. They would be motivated by the fact that compensation would be calculated before the date that the

\textsuperscript{339} Amelia Porges, note 223, p.180.

report was to be enforced; for instance, from the time the report of the panel is adopted or from the time the panel is established.\textsuperscript{341}

\begin{section}{3.3.6 Options for the reform of retaliation}
Retaliation, which is the final remedy on which the GATT enforcement system is built, is considered difficult for the majority of developing states to utilize against developed ones. Since only a small number of developing countries constitute key markets for developed states' exports, the withdrawal of concessions would not in most cases constitute a strong sanction.\textsuperscript{342}

Implementing the final ruling of the appellate body is considered problematic for developing countries. The use of retaliation is not an operative device for states that have WTO membership. In spite of the rule-based dispute settlement system, only WTO members with great economic strength can use the enforcement system effectively.\textsuperscript{343} It is up to the member who has taken the violating measures to make them consistent with a covered agreement and with a DSB decision.\textsuperscript{344}

For instance, as a consequence of a dispute between the EC and the Ivory Coast, the permission to enforce countermeasures was given to the EC. Accordingly, it imposed a premium on coffee imported from the Ivory Coast, which in practice excluded Ivory Coast coffee from the EC market. Let us suppose, however, that the situation were reversed so that the Ivory Coast was permitted to take countermeasures by

\textsuperscript{341} William J. Davey, note 226, pp.39-40.
\textsuperscript{343} Kim Van der Borght, note 242, p.1232.
imposing a premium on cars imported from the EC, thereby excluding them from the Ivory Coast market. There is clearly a very great difference between the two countermeasures with regard to their success in deterring the offender. In this example, the natural outcome would be that it would be easier for the EU to sell elsewhere the few cars which had been excluded from the Ivory Coast market than for the Ivory Coast to sell a large proportion of its coffee to other buyers.\footnote{5 Henrik Horn & Petros C. Mavroidis, note 299, p.26.}

The dissatisfaction of developing countries with the current retaliation regime under the WTO dispute settlement mechanism is reflected in the wording of a proposal put forward by developing countries in the DSM review process, in order to begin to tackle the difficulties facing developing countries in retaliating against developed ones, even with the DSB’s authorization. It has been suggested that a solution would be to modify Article 22, first by adding a compulsory requirement to eliminate the inconsistent trade measures, which would encourage compliance by an offending developed country member.\footnote{TRADE, note 181, p.31.} A more severe way of reforming the retaliatory response would be to terminate the membership of offending members that did not comply with a ruling. However, policy makers would be unwilling to introduce such a reform, because of concern that their own states would have to undergo this sanction.

In addition, it has been argued that developing countries would not be able to retaliate effectively, because they have few if any trademarked or patented products of their own. One possibility, therefore, would be for the complaining developing country to be allowed to request
authorization for the suspension of concessions and other obligations in sectors of their own choice. Thus, they should not have to prove either that it was not “practicable or effective” to suspend concession in the same sector or agreement where the breach took place, or secondly that the “circumstances [were] serious enough” to request suspension of concessions under agreements other than those involving the violation. This burden of proof can be quite heavy, as Ecuador’s experience in the Banana dispute illustrates. Hence, it has been proposed that a new paragraph, 3 bis, be added to Article 22:347

“Notwithstanding the principles and procedures contained in paragraph 3, in a dispute in which the complaining party is a developing-country Member and the other party, which has failed to bring its measures into consistence with the Covered Agreements is a developed-country Member, the complainant shall have the right to seek authorization for suspension of concessions or other obligations with respect to any or all sectors under any covered agreements.”348

However, this last proposal regarding the choice of any sector in which to suspend concessions will still be problematic for developing countries, because the overall trade share of the majority of developing countries in all sectors is comparatively small.349

An interesting proposal was made by Mexico, applying to circumstances where WTO members may not have a trade sector in which to make use of retaliatory measures to enforce a ruling without harming themselves. This is obviously the case with regard to

348 Ibid.
developing countries, whereas others could retaliate more successfully. Mexico has proposed, therefore, that members be given the power to negotiate remedies.

"In other words, if the infringing Member has not negotiated acceptable compensation, the complainant may agree with a third Member the transfer of the right to suspend concessions in exchange for a negotiated benefit, i.e. 'A' may agree with 'B' the transfer of the right to suspend concessions or obligations to 'C' in exchange for a mutually agreed benefit, which may even take the form of cash."\(^{350}\)

Giving WTO members this right to negotiate remedies would have the advantage of creating an encouragement for compliance, since the offending parties would acknowledge that there was a stronger possibility of retaliation being taken against them and would, therefore, be more likely to comply with the ruling. In addition, this would result in a better readjustment of concessions, because the complainant would have the prospect of a tangible reward in exchange for its right to suspend the concessions of the respondent.\(^{351}\)

An equally interesting proposal, also put forward by a group of LDCs, proposed that collective retaliation by several members should be permitted once a developing country had brought a successful dispute against a developed country which failed to implement the ruling.

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\(^{350}\) Proposal of Mexico, note 336, pp.5-6.

\(^{351}\) Ibid. For further analysis and proposed framework for the negotiable remedies, see also Kyle Bagwell, Petros C. Mavroidis and Robert W. Staiger, 'Auctioning Countermeasures in the WTO', (2007), 73 Journal of International Economic Law 309; and Mateo Diego Fernandez, 'Compensation and Retaliation: a Developing Country's Perspective', in George A. Bermann and Petros Mavroidis(eds), WTO Law and Developing Countries: Columbia Studies in WTO Law and Policy, (Cambridge University Press, 2007), pp.242-244.
Thus, retaliation would be undertaken by all WTO members, not only by the winning developing country on its own.\footnote{352}

The benefit of collective retaliation is that it would move the system from one of bilateral action to providing a multilateral solution.\footnote{353} This is important, because the use of retaliation by an individual developing country member is not a successful penalty or disincentive to a developed country member.\footnote{354} As the African Group has suggested, “all WTO Members [should] be authorized to collectively suspend concessions to a developed Member that adopts measures in breach of WTO obligations against a developing Member”.\footnote{355} Only such a collective device would have the real power to encourage compliance, and would be advantageous to all members. However, the major drawback of the negotiable remedies and collective retaliation is that they would require the willingness of WTO members to adopt and implement such proposals in reality, whereas in this case especially the readiness of developed countries to support developing countries in enforcing a favourable decision appears to be absent.\footnote{356}

3.3.7 Reconsidering the time for enforcement

Under GATT, the respondent had no time restriction for enforcement, whereas procedures under the DSU specify a time limit for enforcing the panel or appellate body’s decision. Article 21 in respect of enforcing the DSB decision allows members a “reasonable period of

\footnote{352}{Bridges Weekly Trade News Digest, Vol. 6, number 31, released on 25 September 2002, p.3.}
\footnote{354}{Hansel T. Pham, note 209, p.363.}
\footnote{355}{Proposal by African Group, note 232, p.3.}
\footnote{356}{Hansel T. Pham, note 209, p.363-364., Dan Darooshi, note 249, p.149., collective retaliations will also be dealt with chapter 8 section 8.4.1.}
time”. There is also a guideline contained in Article 21 that a reasonable period ought not to exceed fifteen months, starting from the adoption of the decision by the DSU. The DSU puts the respondent “under surveillance” as soon as the reasonable period has started. Article 21, to assist the DSB in accomplishing this duty, requires the respondent to present frequent “status reports” at all programmed meetings of the DSB. Once the fifteen months have elapsed, if the complainant is dissatisfied with the way that the respondent has implemented the decision, the former has the right to ask another panel to examine the issue.

With regard to the period of implementation, if a developing country is participating as respondent, it has been proposed by the South Centre that a fifteen-month period is too short and ought to be doubled. This modification could be included as a special and differential treatment, because developing countries, unlike developed ones, are comparatively weak and undertaking such a change is more problematic and dangerous for them. In fact, this fifteen-month guideline period can be lengthened depending on the situation: it “may be shorter or longer, depending upon the particular circumstances”. Such an extension has been considered by the panel; however, there is no assurance that it will be adopted permanently, although

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358 Alban Freneau, 'WTO Dispute Settlement System and Implementation of Decision: A Developing Country Perspective', (2001), available online at http://lafrique.free.fr/memoires/pdf/200107AF.pdf, last seen on 5-08-08 at 7pm, p.55. In this regard Davy argues that the Quad (US, EU, Japan, Canada) and Australia most often delay the implementation of an adopted report. William Davy, 'Compliance and Remedies', in Federico Ortino and Sergry Ripinsky(eds), WTO Law and Process, (British Institute of International and Comparative Law, 2007), p.72.
359 TRADE, note 181, p.28.
360 Alban Freneau, note 358, p.55.
361 Section (c) of Article 21.3 of the DSU
commentators believe that it is essential for safeguarding developing countries’ interests.\textsuperscript{362}

Where a developing country is a complainant, fifteen months appears to be reasonable. However, in reality if the respondent is reluctant to implement the ruling, this period could easily be made longer to delay the dispute proceedings. This is because the complainant is dependent on the intention of the respondent to remove the inconsistent measures.\textsuperscript{363} Thus, it has been suggested by the South Centre that if a developing country which has been successful in a dispute raises an enforcement issue against a developed country, the enforcement challenge ought to be resolved by the primary panel and the 90-day period reduced to 30 days. Moreover, no further procedural obligation should be imposed.\textsuperscript{364}

However, unless stronger sanctions are introduced, the reform of the strict timeframe would be insignificant, although if the panel or appellate body made better use of detailed suggestions concerning the manner of implementation, this could avert the deliberate delaying of the proceedings by respondents.\textsuperscript{365}

3.4 Rethinking of Special and Differential Treatments of the DSU

Given that the notion of free trade is based on the principle that liberalism needs to be applied equally by all WTO members, a closer

\textsuperscript{362} Alban Freneau, note 358, p.56.
\textsuperscript{363} Ibid.
\textsuperscript{364} TRADE, note 181, p.28.
\textsuperscript{365} Alban Freneau, note 358, p.56.
look is required at the well established 'egalitarian theory'\(^{366}\) that lies at the heart of equality and fairness. This doctrine holds that all people in a society should be treated as equals having the same political, economic, social and civil rights; nevertheless, some will be less advantaged or have special needs and these must considered for an equal distribution of welfare, so that all individuals in that society have equal opportunities.\(^{367}\) Although this principle was originally established to address inequality at the domestic level and is actually applied by developed countries domestically,\(^{368}\) Garcia argues that it could also be applied to the WTO, bearing in mind the similarity between individual inequalities within a society and asymmetries—whether of wealth, income, natural resources or consumer and market strength—between states in the international trading community. In addition to these asymmetries, Garcia observes that the inclusion from the very beginning of S&D provisions in the international trading system, which was initiated by developed countries in the GATT era to address inequalities among member states, is based on the egalitarian approach and works by advantaging the less advantaged members.\(^{369}\)

Consequently, while developing countries should have the right to benefit form the anticipated gains of the WTO and fulfil their obligations in the same way as other WTO members, their special


\(^{368}\) In the United States, universities such as Harvard and Stanford apply a 'positive discrimination' system to accept students from poorer backgrounds even if they have not met the standard selection requirements, in order to give them better access and opportunities, see, also, website, [http://www.harvard.edu/](http://www.harvard.edu/), last seen in 27-03-2009 at 8:15 pm, and website, [http://www.stanford.edu/](http://www.stanford.edu/), last seen in 27-03-2009 at 8:15 pm.

requirements also need to be addressed in order to restore justice and fairness in the international trading system, until developing countries can compete equally in the international trade arena. Accordingly, there could be a 'welfare system' for the international community as a whole, as far as the WTO is concerned.\textsuperscript{370}

Indeed, unequal partners cannot be treated equally, so even if there is a legal obligation on developed countries to treat developing countries differently, there is an ethical duty to recognize the special requirements of developing countries until their development objectives have been realized. S&D treatments should be made obligatory rather than optional on the developed member countries of the WTO so as to protect the least developed and most vulnerable amongst them and to promote the establishment of justice in the international trade arena so that the poor do not become poorer.\textsuperscript{371}

Unfortunately, despite the fact that the WTO appears to follow this egalitarian principle in the form of S&D treatments which, if properly implemented, could result in fairer trade for all members, the manner in which they are actually implemented is ineffective, leading to a demand for the reform of S&D treatments and the establishment of a truly 'just' multilateral trading system.\textsuperscript{372}

Therefore, for the WTO to be a fairer medium for all its members, it has to recognize the differences between them. As a consequence, numerous special and differential treatment rules have been included in WTO treaties to pay special attention to developing countries. However, these rules have turned out to be unrewarding for

\textsuperscript{371} Frank J. Garcia, note 367, pp.1014-1023
\textsuperscript{372} Ibid, pp.1048-1049.
developing countries and LDCs, which are hesitant to use them. They feel that such rules highlight the weakness of their position, undermine their sovereign equality by linking their privileges to the concept of 'charity' and raise the fear that these rules would demoralize the enforceability of a favourable decision from the DSM if members invoke a formal dispute process. Despite the fact that the WTO dispute settlement mechanism is well known as an automatic system, many special and differential treatment rules are not mechanically applied whenever it is related to the subject matter of the dispute.373

Even the Sutherland Report recognises the doubts of developing countries regarding the special and differential treatment (S&D) provided in the WTO agreement, and properly questions the purpose of the S&D, included in several WTO Agreements.374 The Report argues that "S&D is part of the WTO legal 'acquis' and remains a valid concept, although the mechanisms of S&D have to be compliable with WTO aims. In light of the present characteristic of the trading system and global economic realities, these mechanisms require further study and research...".375 As the issue of the S&D is still highly political, there remains real pressure on the WTO to work harder to improve S&D provisions.376 The successful adoption of an effective S&D is vital for


374 Kim Van der Borght, note 238.


376 Kim Van der Borght, note 238, p.25., Hart and Dymond argue that "the appeal of special and differential treatment is thus wholly political and bereft of any economic underpinning". Michael Hart and Bill Dymond, 'Special and Differential Treatment and the Doha Development round', (2003), 37(2) Journal of World Trade 395, p.395. More detail on dissatisfaction with S&D in Bernard Hoekman, 'Operationalizing the
the development of WTO law as a whole, since this was one of the most important demands of developing countries that led to the collapse of trade talks in Seattle\textsuperscript{377} and was placed by all WTO members in the Ministerial declaration of the Doha development round, at the heart of the WTO structure\textsuperscript{378}.

The Dispute Settlement Understanding has been the subject of criticism concerning uncertainty about the way in which the special and differential treatment rules are applied. Developing countries argue that certain specific articles concerning such treatment\textsuperscript{379} are not written in explicit words, and need to be re-considered: namely Articles 4.10, 8.10, 12.11, 21.2, 21.7 and 21.8.\textsuperscript{380} Also, where the terms ‘should’, ‘may’, ‘might’ and ‘shall’ are employed, it is argued that it is by no means guaranteed that these provisions can in reality be applied on behalf of developing countries\textsuperscript{381} because they have recommendatory force only.\textsuperscript{382}

Therefore, it has been proposed that a monitoring system should be established in order to ensure the application of S&D rules in favour of developing countries, since practice shows the contrary.\textsuperscript{383} In addition,
the application of special and differential treatment can be made certain by improving the wording of these articles, replacing the weaker terms with stronger ones to guarantee that S&D provisions in the DSU are used in favour of developing countries once they are involved in a dispute before the DSM, rather than being included in the DSU merely to suggest that developing counties should be given special attention in the DSU. Further improvement could be accomplished by applying specific guiding principles to guarantee thorough application of these articles in support of developing nations. 384

This mode of criticism is not limited to the wording of references to S&D in the DSU; the weakness of the S&D is also alleged in terms of the capability to implement the rules as stated. Thus, when the WTO promises developing countries that it will provide special treatment in the form of technical support for them to bring their cases to the DSM and does not fulfil its promises effectively, this indeed weakens the benefit of such promises. This is the case in Article 27.2 of the DSU touched upon above.

The objectives of the S&D also need to be reconsidered and reformed, since its objectives are unclear and ambiguous and do not serve the member that invokes the provision. It is argued that this should be the first step taken, since “the provision must be proportional to the task assigned”. 385

A typical example of an ambiguous S&D provided for developing countries in the DSU can be seen in Article 21.2, which states that “particular attention should be paid to matters affecting interests of developing country Members with respect to measures which have been subject to dispute settlement”. At first glance, an obvious reform required is the replacement of the term ‘should’ with ‘shall’. This article is also considered to be unclear since (for instance) it does not say whether this provision is to apply when developed countries abuse the WTO law, when developing countries do so, or in cases where both developed and developing countries breach their WTO obligations. Nor is it made clear how and by whom special attention is to be paid. It may refer to the DSB, according to the surveillance article. However, it remains unclear how the requirement for special attention would be enforced, because “virtually all of the actions that the DSB takes in respect of specific disputes are by negative consensus”.

Another example can be found in Article 8.10, which states:

“When a dispute is between a developing country Member and a developed country Member the panel shall, if the developing country Member so requests, include at least one panellist from a developing country Member.”

Oxfam argues that:

“The DSS has sought to further protect the interests of developing country Members by recognising that there may be inherent biases in perspectives of industrialised country panellists, and that some developing countries may not have sufficient human and technical resources to take full advantage of the DSS. The DSS thus provides that a developing country Member, when it is involved in a dispute with a developed country Member, may request that at least one of the panellists is from a developing country.”

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386 William J. Davey, note 226, p.38.
387 Article 8.10 of the DSU.
country. Special, but rather vague provision is made to ensure that developing country Members involved in disputes are allowed sufficient time to prepare and present argumentation, and that their interests are taken into account in the design and surveillance of implementation of rulings and recommendations.  

This preferential treatment given to developing countries at the panel stage is believed by the South Centre (a leading organization dealing with developing countries, the WTO and trade and development issues) to be executed effectively through the practice of the DSM. It is also argued that the provisions in Article 8.10 have clear objectives, unlike those of the S&D, since “the action, the actor and the beneficiary are all clearly pointed out”.  

This provision has received criticism from different angles where it clearly misses its objectives. It is argued that making the inclusion of a panellist from a developing country subject to the request of the developing countries involved in the dispute is pointless and could be counterproductive. This is because developing countries still have little experience of the dispute settlement mechanism. So it would seem reasonable to include a developing country panellist whenever one is involved in a dispute. Therefore, it was suggested by the South Centre that removing the words ‘if the developing country member so requests’ from Article 8.10 would further improve the application of the provision.

From the outset there has been criticism of the functional effectiveness of the rule which provides that in disputes where a developing country

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390 Ibid.
is a party, the panel ought to include as a minimum one panellist from a developing country. The criticism put forward is that if, from a legal perspective, the case is not in favour of the developing country, the panellist’s attendance will not change matters. On the other hand, Victor Mosoti argues that Article 8.10 has more to do with encouraging developing countries’ faith in the dispute settlement mechanism, rather than obtaining their legal assistance. That is why it has to be improved and encouraged. 391

Nevertheless, the developing country panellist might sometimes have the opportunity to truly make use of the personal information he has in relation to the position of a developing country participating in a case. This could to some degree bias the dispute in favour of such a country. Certainly, in this rule-oriented dispute mechanism, it is not easy to see when the mechanism is being compromised in such a situation. However, the developing country panellist could interpret the facts in a more convincing way, consequently supporting the developing country’s position. 392

Therefore, it has been proposed by Jordan that the provision ought to be modified. Firstly, it should be changed so that in cases involving a developed and a developing country as disputants one panellist from a developing country should be included in the panel. Secondly, in cases involving a developed and a least developed country as disputing members, the panel selection should consist of one panellist from a least developed country. Finally, in cases involving a developing and a least developed country, one panellist each from a developing and a least developed country.

391 Victor Mosoti, note 320, p.83.
392 Ibid.
least developed country should be included in the selection of the panel.\textsuperscript{393}

In addition, Zambia has noted that least developed countries in particular are experiencing difficulties under the DSU and are at a disadvantage in a dispute in relation to other members.\textsuperscript{394} Thus, in order to improve the functional benefits of this article in their favour, it has been suggested by the LDC Group that this article be reformed to say:

"When a dispute is between a least-developed country Member and a developing or developed country Member, the panel shall include at least one panellist from a least-developed country Member and if the least-developed country Member so requests, there shall be a second panellist from a least-developed country Member."\textsuperscript{395}

This proposal is important, since it addresses the asymmetries among developing countries themselves. They are not all the same: there are larger developing countries, who are frequent users of the DSM, medium-sized developing countries like Thailand and Colombia, and the poorest and most vulnerable LDCs. For example, with two neighbouring countries such as India and Bangladesh, if a dispute takes place between them, Bangladesh certainly feels the pressure of a power disparity, making it think carefully before proceeding to a formal panel process. This example has, in fact, taken place and will be discussed in Chapter five.

\textsuperscript{395} Victor Mosoti, note 320, p.83.
Improving the S&D provisions in the DSU via a normal negotiation process would require significant time and effort, which would be very difficult for developing countries to achieve.\textsuperscript{396} This could also be used by developing countries as a tool to compromise in other areas. In addition to the political price that they would pay by compromising in this way, they would also need to consider carefully the legal and financial resources needed to reform S&D through the WTO negotiation process. This would bring to mind the price that developing countries had to pay to include and enhance the role of S&D in the current agreements throughout the Uruguay Round. This move made them part of the overall trade package, since they ought not to be used by the larger members as a tool to make compromises.\textsuperscript{397}

It is not easy, considering the differences between developing countries, to unify objectives in the S&D by the negotiation process. Thus, as argued by the South Centre, one key option is to rely on the ‘authoritative interpretation’ by the panel and appellate body (according to the Vienna Convention) as a useful device to clarify and mandate S&D provisions in the DSU.\textsuperscript{398}

Certainly, a more consistent use by developing countries of the special and differential treatment rules might be an additional solution. This would require more frequent invocation by developing countries, at every step in the dispute settlement proceedings. Nonetheless, it cannot be safely assumed that all developing countries have the

\textsuperscript{396} Working Paper of South Centre, note 221, p.6.
\textsuperscript{398} Working Paper of South Centre, note 221, p.6.
necessary understanding of and familiarity with the dispute settlement process.\textsuperscript{399}

LDCs take the South Centre proposal a step forward by arguing that there ought to be an explicit provision that requires the panel to take into consideration the preferential rules provided for developing and least developed countries whenever the panel comes across these rules, without a request from the disputing parties. Hence, Haiti has suggested that Article 12.11\textsuperscript{400} be modified in this manner: \textsuperscript{401}

"Where one or more of the parties is a developing or least-developed country Member, the panel's report shall explicitly take into account the provisions on differential and more favourable treatment for developing or least-developed country Members that form part of the covered agreements."\textsuperscript{402}

From the developing countries' point of view, the application of the S&D rules has not matched their expectations.\textsuperscript{403} One could deduce from the analyses above that S&D needs to be made mandatory and to be monitored in order to increase its effectiveness. Hence, the dispute settlement system could play a fundamental role in implementing the S&D rules more effectively.\textsuperscript{404}

\textsuperscript{399} Mary E. Footer, note 179, p.65.
\textsuperscript{400} Article 12.11 of the DSU states that: Where one or more of the parties is a developing country member, the panel's report shall explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favourable treatment for developing country members that form part of the covered agreements which have been raised by the developing country member in the course of the dispute settlement procedures."
\textsuperscript{401} Communication from Haiti, Text for LDC Proposal on Dispute Settlement Understanding Negotiations, TN/DS/W/37 (22 January 2003), p.2.
\textsuperscript{402} Ibid.
\textsuperscript{404} Working Paper of South Centre, note 221, pp.15-16.
The authoritative interpretation of the S&D provisions has been further developed by arguing that they are so unclear and ambiguous as to make it virtually impossible for the panel and the AB to develop guideline principles. Also that WTO members should go back to the negotiating table to come up with more clearly defined S&D provisions. Ultimately, it has also been argued that developed countries have interacted with developing countries and LDCs in preferential agreements and trade-for-aid programmes outside the WTO. These have constrained developing countries’ bargaining power at the consultation stage, in the establishment of panels and even in the negotiation of better S&D provisions in the WTO agreements, suggesting that ‘self-censorship’ could be functioning on the part of developing countries.


406 Kim Van der Borght, note 238, p.27.
3.5 Conclusion

"If the DSM is called a ‘jewel in the crown of the WTO’, there are visible flaws inside the jewel",\textsuperscript{407} in particular in respect of developing countries. This chapter has discussed many aspects of the reform of the WTO dispute settlement system in favour of developing countries. So far it appears to operate well, and developing countries have more confidence in the new system than they had in the GATT 1947 dispute settlement system. Thus, the present system is worth saving, and the suggestions and proposals made for its reform in favour of developing countries need to be given careful consideration.

In this study several issues have been considered, including the existence of disparities in financial and human resources. It has been shown that the rule-based process of the WTO dispute settlement system is time-consuming and that developing countries do not have sufficient money and technical expertise to bring a formal dispute, unlike developed countries. The situation is made worse by the disastrous effect of private law firms, whose costs are high and which do not support the training of developing countries’ experts. Moreover, the technical support provided by the WTO secretariat is inadequate. Even after the creation of the ACWL, developing countries face difficulties in this regard. Therefore, a number of proposals have been made with regard to the expansion of the capacity of the secretariat, the creation of an independent centre related to the WTO to provide such support and the establishment of small claims procedures.

Another issue discussed was that of the implementation of the panel or appellate body's decisions. It has been demonstrated that the enforcement mechanism works in favour of members with stronger economies, and that non-compliance has occurred in a number of disputes on the part of members like the EU with large economic and political power. In addition, the panel and the appellate body are hesitant in suggesting detailed methods of implementation. There is a great need for reform in this area.

Compensation should also be reformed to guarantee that developing countries can enforce favourable decisions, to which end suggestions have included prospective fines and retrospective monetary damages. In addition, retaliation measures and the time given for implementation could be effectively reformed. Suggestions have also been put forward whereby special and differential treatments for developing countries could be strengthened. Firstly, because most of these provisions are made with no clear indication of how they are to be implemented, there is a need for a reform in the wording of the relevant articles.

So far, in the foregoing pages, the structural and procedural faults within the WTO dispute settlement system have been discussed. We now turn to the substance of the decisions and decisional process of the WTO and its dispute settlement mechanism to analyse how developing countries fare within it.
4.1 Introduction

The aim of this chapter is to consider the role and function of the appellate body as stated in Article 3.2 of the DSU. The work of the appellate body has given rise to a real debate over whether or not it has overstepped its original function of interpretation of international and WTO law by starting to make new rules which are politically sensitive. Such judicial activism of the panel and AB will be linked to the development objectives of developing countries, by addressing the neglected though crucial issue of trade-related matters such as TRIPS, the environment and human rights.

The first section will deal with WTO decision-making and developing countries. Then the function and jurisprudence of the panel and the AB will be analyzed. After that, the dispute settlement system ruling in the Shrimp dispute[^408], environmental issues and developing countries’ concerns will be discussed. This will lead to a discussion of the absence of human rights considerations from WTO jurisprudence and the development objectives of developing countries. The chapter concludes with a summary.

4.2 The WTO Decision-making Process and Developing Countries

Unlike the situation of the IMF and the World Bank, whose decision-making is delegated to a board of directors or the organization's head, the WTO decision-making process is by its nature a very difficult way to resolve issues related to multilateral trade agreements. This is because it requires a consensus among all 150 member governments, by applying a one-member-one-vote system. In this regard it has been claimed\textsuperscript{409} that:

"Reaching decisions by consensus among some 150 Members can be difficult. Its main advantage is that decisions made this way are more acceptable to all Members. And despite the difficulty, some remarkable agreements have been reached. Nevertheless, proposals for the creation of a smaller executive body – perhaps like a board of directors each representing different groups of countries – are heard periodically. But for now, the WTO is a Member-driven, consensus-based organization."\textsuperscript{410}

However, what happens in practice is different; Maniruzzaman observes what is described as a "democratic deficit" in the WTO whose decision-making has developed into a so-called 'Green Room' process, whereby when major trade talks take place, the most powerful members (the US, EU, Canada and Japan, which are known as the Quad) choose a small number of developing countries to discuss major trade-related issues and disengage the rest. Only then is their decision subjected to a formal process for the rest of the members to approve it. During the Cancun ministerial meeting, developing countries and

\textsuperscript{409}WTO Website, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm#council, last seen on 21-05-2008 at 2.30 pm.
\textsuperscript{410}Ibid.
NGOs protested strongly against this practice, which led both to the collapse of the Cancun trade talks, which were held in 2003, and to the formal abandonment of the Green Room practice.\textsuperscript{411}

Maniruzzaman adds that this does not mean that developing countries will have equal treatment during future trade rounds, because many do not have sufficient experienced staff or resources to deal with the complicated trade talks that take place in the WTO. Therefore, developing countries would not be able to participate effectively in the WTO trade negotiations process. This would eventually lead to the larger and more powerful members imposing their decisions on the poorer and less developed ones. Hence, a democratic deficit will persist in the WTO decision-making process, leading to renewed calls for the creation of a fairer and more equal international trade arena to serve the interests of all members.\textsuperscript{412}

Indeed, Cancun has resulted in a serious breakdown in the complex trade negotiation process. There are many issues still on the WTO negotiating table\textsuperscript{413} which need to be resolved. Developing countries will remain silent no longer and their development concerns ought to be at the forefront of WTO trade talks for a fairer and more equal global trading system.\textsuperscript{414} Despite all the optimistic speeches by the

\textsuperscript{411} A. F. M. Maniruzzaman, ‘Managing Globalisation: Challenge Facing International Law in the Twenty-First Century’, Inaugural lecture held at the University of Portsmouth, (2-5-2007), 1, pp.34-35.
\textsuperscript{413} Such as the Singapore issues (competition polices and investment), agricultural, environmental and human rights.
WTO Director General, Pascal Lamy, that more fruitful trade talks will be carried out, nothing appears to be happening or on the horizon. In this regard it has been argued that:

"The WTO’s negotiating process is simply in a total mess. Developed countries have opposed the adoption of clear negotiating rules governing how all WTO Members arrive at decisions in a transparent, inclusive and participatory manner. Ministerial meetings are held over the space of a few days with the result that the negotiations are conducted in a pressure-cooker atmosphere. In addition, developed country Members use a panoply of negotiating strategies including threats towards poorer countries. These and other problems with the negotiating and decision-making process at the WTO have unsurprisingly contributed to the two failed ministerial meetings as well as the start-stop nature of the Doha Round."415

Table 3416 lists WTO ministerial meetings, the numbers of participants and observing organisations.

<table>
<thead>
<tr>
<th>WTO Ministerial Conferences</th>
<th>Date</th>
<th>Participant Members</th>
<th>Observing International Organisations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hong Kong</td>
<td>2006</td>
<td>149</td>
<td>76</td>
</tr>
<tr>
<td>Cancun</td>
<td>2003</td>
<td>146</td>
<td>76</td>
</tr>
<tr>
<td>Doha</td>
<td>2001</td>
<td>142</td>
<td>74</td>
</tr>
<tr>
<td>Seattle</td>
<td>1999</td>
<td>135</td>
<td>62</td>
</tr>
<tr>
<td>Geneva</td>
<td>1998</td>
<td>132</td>
<td>51</td>
</tr>
<tr>
<td>Singapore</td>
<td>1996</td>
<td>127</td>
<td>49</td>
</tr>
</tbody>
</table>

415 James Gathii, note 414, p.1370.
416 Source: WTO Gateway
4.3 The Functions and Powers of the Panel and the Appellate Body

The explanation of the function of the appellate body within the dispute settlement system is provided in Article 3.2 of the DSU. According to this, the function of dispute settlement is to “preserve and to clarify the rights and obligations under the covered agreements in accordance with customary rules of public international law”. The appellate body has taken this to mean working within the terms of the Vienna Convention rules of interpretation. Clearly, the function of the appellate body and the dispute settlement body in general is merely to implement the regulations of the WTO.

It is also stated in Article 3.2 that “recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements”. This clearly shows that the rights and duties of the members which are represented by the appellate body and the DSB in general are produced by international law, not by other laws.

One might conclude from a further analysis of Article 3.2 that the WTO is fated to live in a legal vacuum that would not supply safety and certainty to the mutual trading structure, and would possibly deprive the appellate body as well as the panels of important devices essential to protect the privileges and duties of the members under the covered agreements.

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418 Article 3.2 of the DSU.
420 Article 3.2, DSU.
treaties. However, it would be wrong to underestimate the importance of an appeal division, although appeals are merely on matters of law.

The DSU places a limitation on the operation of international law in every case that comes before the appellate body. This limitation is indicated at the end of Article 3.2 of the DSU and is shown again in Article 19.2:

"In accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements."

4.4 The Appellate Body: a Powerful 'Court'

4.4.1 Some independent features of the Appellate Body

The appellate body (AB) has been given the right to set its own working procedures after a discussion with the Chairman of the DSU and the Director-General and to correspond with members so as to make them aware of those procedures, according to Article 17.9 of the DSU. Moreover, the AB is provided by the DSU with four independent lawyers, a secretary and administrative personnel in order to give it proper managerial and legal backing. Interestingly, the nomination of three of the total of seven judges required to deal with a specific appeal has deliberately been made confidential, so as to stop anyone,

422 Lorand Bartels, note 417, p.506.
(even AB members, as well as the secretary) from speculating on who has been chosen to judge an appeal.\textsuperscript{424}

Furthermore, the AB, unlike the panel, is not obliged at the first stage to exclude from its composition a national from the disputing members, unless all the parties decide to accept such a judge. There are two reasons for this: it might eliminate a considerable number of the appellate members, which would affect the establishment of the division. Also, the division members might not be recognized. This recognition grants meaning to their function as international independent judges.\textsuperscript{425}

In addition, although the appellate body is hierarchically lower than the DSB, there is an important procedure that allows the AB to pass judgment. This is that its decisions will be accepted unless there is a negative consensus among the members; and from the WTO practice, it has been established that these decisions will inevitably be adopted, since the disputing members are not part of this consensus.\textsuperscript{426}

During the trade talks in the Uruguay Round the contracting parties agreed to establish an automatic panel process by creating the famous negative consensus rule. As a result, they foresaw that an important new appeal process, managed by the appellate body, would need to be added so “that appellate review would help ensure uniform

\textsuperscript{425} Ibid.
interpretation of Uruguay Round Agreements and guard against potential ‘bad law’ resulting from inconsistent panel reports”.

It was not long before the AB showed itself to be an active court. The way that the AB was actively developing its position in the WTO dispute settlement process was believed to be the most significant progress within the DSM. Among 12 cases that were taken to the appeal process, the AB reserved ten and successfully overturned one. The AB (unlike other appeal courts that examine the general wording of rulings) makes an in-depth inspection of the panel decision and is prepared to make any alteration that is needed to any panel report.

Furthermore, the appellate body has increased its own authority and weight, acting as a final court in the WTO dispute resolution process by using a collegial approach in rendering its decisions. This has its roots in the trade talks which took place after the Uruguay Round, when the US and the EU demanded (contrary to Article 17.3 of the DSU) that the AB’s membership ought to be as broad as possible and that four of its seven members should be chosen by the US and EU. However, as a result of stiff resistance by other members, they found it difficult to achieve such a demand. Instead, they insisted that the view of any AB member chosen by the US and the EU ought to be considered in every single dispute.

The AB developed this further, in practice, by taking the view of all of its members on any case taken to the appeal process. As a consequence, the AB has decided the cases brought to it after discussing and approving the decisions of all seven appellate members. The result is that not a single case has been decided with the disagreement of any of its members. From this perspective, it has been claimed that the AB has achieved its objectives and met expectations outstandingly well. As noted by Stoler, “judged against objectives and expectations in the negotiations, there is no doubt that the appellate body has proven to be a remarkable success story”.430

However, the functions of the panel and the AB are a source of dissatisfaction within the dispute settlement process. It is believed that the two bodies have moved from their original function of interpreting the covered agreements to actually making new laws. This contradicts Article 3.2 of the DSU forbidding a panel or the appellate body to “add to or diminish the rights of member countries without their consent”. Developing countries have had serious concerns in this respect. This was especially so in the Shrimp case431, which involved a number of developing countries against the US, due to the linkage by the AB of the environmental rules with trade liberalization under WTO law.432 This will be further discussed later in this analysis.

430 Ibid.
431 US Shrimp, appellate body report, note 408.
4.4.2 Appellate Body: strong jurisprudence or \textit{stare decisis}?

It has been argued by a member of the WTO's appellate body, James Bacchus, that its decisions, like those of the panel, do not formulate additional duties or rules: "[T]he fact that the meaning that one member may happen to see, however clearly, for a particular word or provision or obligation does not happen to prevail after a full and fair hearing ... does not mean that the DSB has either added or diminished the rights and obligations of that member that are provided in the covered agreement".\textsuperscript{433}

What is more, some would argue that the AB cannot go too far in developing laws, for two reasons. Firstly, in its reports and cases, emphasis is placed on the features of international law, which reflect the effort by the appellate division to tackle cautiously and specifically the legal issues as well as some of the matters treated in the AB's working procedures.\textsuperscript{434} Secondly, the appellate body has stated very clearly that the WTO and GATT are part of international law and that it will apply its principles as set out in the Vienna Convention on the Law of Treaties.\textsuperscript{435} Despite this, there is some evidence that the AB has exceeded its real functions and role by starting to make rather than interpret law.\textsuperscript{436}

\textsuperscript{434} John H. Jackson, note 424, p.98.
\textsuperscript{435} Ibid.
Since the appellate body is in fact a standing judicial court, it is possible for it to be even more determined than panels in pursuing its previous resolutions. Although only three judges of the seven participate in any one division to hear an appeal, the appellate body is designed to function on a collegiate foundation. Through this, the division is accountable for an appeal, while preserving the right to deliberate and consider the opinions of the other members before confirming its conclusion. Panels, by contrast, are served by judges sitting ad hoc on a specific panel. The appellate body’s judgments will thus tend to be followed by subsequent panels, in much the same way that occurs between an upper court and a lower one. This may be either a result of the formal requirements of the legal structure of the system or a function of the practical interaction between the two courts.\textsuperscript{437}

As a consequence, in considering previous decisions the AB judges are likely to be potentially considering decisions of their colleagues, if not their own personal decisions. This appears to indicate that a more powerful judicial body has already been formed.\textsuperscript{438} “Once standing judicial bodies have come into existence... they provide an additional mechanism for the further development of the law”.\textsuperscript{439}

Supporting evidence for this idea is seen in the fact that panels take into account the potential opinion of the appellate body, since the panel report is more likely to be rejected by the appellate body than by the voting of the DSB. Interestingly, the rule-oriented approach has

\textsuperscript{438} Ibid, p.46.
\textsuperscript{439} Ibid.
started to affect the choice of panellists by the states, which are more likely to choose one who is able to draw a 'good' conclusion, in order to convince the appeal division of their position.\textsuperscript{440}

The fact that the appellate body has been accused of developing law is an expected outcome of the complexity of using the official institutional mechanisms for law-making, such as "the amendment and, to a more limited extent, interpretation powers of the WTO".\textsuperscript{441} These accusations might also be expected because of particular disputes in the last stages of debates or, sometimes, because of the uncertainty of WTO members concerning the articles of WTO agreements. However, it is not always easy to distinguish between legal interpretation and developing law.\textsuperscript{442}

In the \textit{Banana} case\textsuperscript{443} (1997) the appellate body tackled one of the first disputes with a possible loophole in the law. Saint Lucia, a small country, sought to have lawyers from the private sector to represent it in the dispute. There was opposition to this from a number of states (such as United States and Mexico) who claimed that the position was unclear regarding the GATT performance, while in the DSU there was no regulation allowing private advisors. The appellate body rejected this objection immediately, stating that "it is for a WTO member to decide who should represent it...".\textsuperscript{444} This pronouncement, in the absence of any written rule, was subject to no other objection inside

\textsuperscript{440} John H. Jackson, note 424, p.98.
\textsuperscript{442} Ibid.
\textsuperscript{444} Ibid, para.10.
the WTO and met with further approval in the business sphere. It is also believed that the decision was in favour of developing countries in terms of developing laws.\textsuperscript{445} Then, in \textit{United States - Shirts and Blouses}\textsuperscript{446} (in which India challenged the US) India gave the AB the chance to set out the essential principles of the doctrine of burden of proof. These were gradually built up in subsequent disputes\textsuperscript{447}.

Finally, interpretation of WTO agreements is essential, but also difficult. Due to the problems of international conciliation and independence, introducing judgments in a global field intensifies the significance and complexity of this implementation. The idea that adjudication and rule-making ought to be kept separate is sound but nevertheless awkward to apply comprehensively, as there is a certain law-developing element in any form of adjudication. The reading of the WTO agreements is a process of dynamic rule-making.\textsuperscript{448}

In the view of Donald McRae, the dispute settlement system presents grounds for the advancement of international business law in the course of its judgments. Additionally, Lauterpacht believes that international courts are not restricted to an involuntary use of law


\textsuperscript{446} United States – Measure Affecting Imports of Wool Shirts and Blouses from India, appellate body report, WT/DS33/AB/R, adopted on 23 May 1997. [hereinafter Appellate body report on US Wool Shirts and blouses]

\textsuperscript{447} Steve Charnovitz, note 426, p.234.

similar to law development in national courts, where fairness is ensured by the judges.449

The appellate body has been fairly true to its aims in putting the main stress in the text of the agreements on its function of interpretation, and in using the customary rules of international law stated in the Vienna Convention; and it has ruled on many occasions against developed countries, the United States being one of them. On the other hand, there were considerable concerns expressed by some legal scholars before the establishment of the appellate body that it could apply a great deal of “political filtering”, and consequently could make uncertain progress in the direction of rule-making.450

4.4.3 Cases where AB decisions were followed by panels and by the AB itself

Panels follow the appellate body’s decisions and the AB follows its own precedents, which means that its reports establish rules. A good example is Wool Shirts and Blouses,451 where the panel adopted the appellate body’s statement: “[W]e note that the appellate body has made clear... the appellate body also concluded that...”.452 This indicates that in practice panels are likely to cite AB decisions in their conclusions. The panel, in referring twice to the findings of the AB, indicated a tendency towards considering AB decisions to guide the panels’ resolutions in subsequent cases. For this reason it appears that

449 Ibid.
452 Ibid., p.11., while dealing with standard of review.
a panel would be more likely to try to decide according to legal precedent than openly to contend a decision of the AB.\footnote{Palmeter & Mavroidis, note 437, p.405.}

An example where the AB followed its own previous decision as a model occurred in the Japan – Alcoholic Beverages case.\footnote{Japan – Tax on Alcoholic Beverages, appellate body report, WT/DS1/AB/R, WT/DS10/AB/R/, WT/DS22/AB/4, adopted on 1 November 1996, para.19. [hereinafter Japan Alcoholic Beverages]}

Here the AB referred to United States – Standards for Reformulated and Conventional Gasoline when it made one of its initial judgments in interpretation of the agreement. Firstly “[I]n United States – Standards for Reformulated and Conventional Gasoline, we stressed the need to achieve such clarification by reference to the fundamental rule of treaty interpretation set out in Article 31(1) of the Vienna Convention”; and secondly, “In United States – Standards for Reformulated and Conventional Gasoline, we noted that...”\footnote{Ibid., para.19.}

In a legal framework, the phrases ‘we stressed’ and ‘we noted’ are different from the words ‘we held’. Their use indicates that the appellate body considers that its earlier rulings were not mere opinions, but that those subjects were settled by them.\footnote{Palmeter & Mavroidis, note 437, pp.405-406.}

Apparently, the drafters of the WTO did not anticipate such a powerful adjudication mechanism. But has the WTO adjudication system shifted the power imbalance in the dominant WTO decision-making process and restored the balance in the WTO regimen, particularly for the economic development of developing countries.\footnote{John H. Braton, Judith L. Golostein, Timothy E. Josling and Richard H. Strinberg, The Evaluation of the Trade Regime: Politics, Law, and Economics of the GATT and The WTO, (Princeton University Press, Fourth printing, 2008).}
4.5 Developed Countries Bring Environmental Issues to the WTO via the DSM

The procedural aspects of the DSU have much to commend them. Nevertheless, the reports rendered by its panels and appellate body do touch on issues outside the covered agreements, such as security, labour, development and environmental issues, which may cause disagreements among the WTO members.\footnote{Kim Van der Borth, ‘Book Review, Dispute settlement in the World Trade Organization’, (2000), 94(2) American Journal of International Law 427, p.427; Tomer Broude, \textit{International Governance in the WTO: Judicial Boundaries and Political Capitulation}, (Cameron May, London, 2004).} Notably, in the \textit{Shrimp} case\footnote{US Shrimp, appellate body report, note 408.} the appellate body advanced the WTO obligations by allowing members to take trade measures to enforce their environmental agendas.\footnote{Richard Tarasofsky, ‘Report on Trade, Environment, and the WTO Dispute Settlement Mechanism’, (2005), available at \url{www.cat-e.org}, last seen on 23-02-06 at 9am, p.5.} The AB, in the \textit{Shrimp} dispute, concluded that the United States import ban on shrimps from any member did not meet the US criteria in protecting the sea turtles as consistent with Article XX (g). The appellate body also found the US to be in breach of Article XX, since it was discriminating unjustifiably and arbitrarily among the WTO members in applying its measures.\footnote{US Shrimp, appellate body report, note 408, pp.63-76.}

Accordingly, the US modified its trade measures by eliminating the discriminatory aspect of import bans, imposing the same trade restrictions on shrimp imports from all WTO members, together with Malaysia. Because the US maintained its trade restrictions against any member that did not apply US measures in protecting sea turtles, Malaysia appealed against the US measures that were applied to
comply with the appellate body decision. As a result of the Malaysian action in disputing US compliance with the appellate body report in the *Shrimp* dispute, the AB established in 2001 that the US trade measures which protect sea turtles did indeed conform to Article XX.

A number of criticisms have been made of the AB regarding its ruling in the *Shrimp* dispute. Firstly, it has been argued that the appellate body ruling in the case is very serious. By developing WTO law in conformity with environmental measures, developed country members gained from the dispute settlement system what they were not able to achieve in the Uruguay Round trade negotiations, even without acting properly in the trade negotiations to address the inclusion of environmental issues under the covered agreements.

For instance, from 1995, the EU was negotiating to modify the WTO law in a way which would allow the use of trade restrictions to impose the application of multilateral environment agreements on all members, whether they had signed these agreements or not. The EU was successful to a certain extent in the Doha talks. However, after the *Shrimp* dispute the EU does not need to negotiate the inclusion

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463 "As we have upheld the panel's finding that the United States measure is now applied in a manner that meets the requirements of Article xx of the GATT 1994, we do not make any recommendation to the DSB pursuant to Article 19.1 of the DSU" in US shrimp, appellate body, note 408, p.50.
466 US Shrimp, appellate body report, note 408.
of environmental issues in WTO law in order to pursue its environmental agenda.\textsuperscript{467}

Also, the inclusion of environmental issues through the WTO dispute settlement system has been severely criticized for the fact that the structure of the WTO dispute settlement system is not properly designed to deal with environmental cases. Neither the appellate body nor the panels have the required knowledge to examine environmental issues. They are composed of trade legal experts, not environmental specialists, not to mention the WTO secretariat’s inability to provide assistance on environmental issues.\textsuperscript{468}

In addition, the terms of reference which ought to be applied to the panel after the consultation phase place no obligation on the disputing members to discuss sufficiently the environmental aspects of the complaint. This is not their central concern regarding their obligations under the covered agreements.\textsuperscript{469} Furthermore, the WTO dispute settlement process is not transparent. The closed system policy of the DSM raises concerns among environmentalists themselves (let alone the developing countries) about the efficiency of addressing environmental issues in the system. There are growing demands to increase the transparency of the dispute settlement system. This will also support the call for multilateral trade talks to provide better access to the public.\textsuperscript{470}

\textsuperscript{467} Alan Oxley, note 462, p.2.
\textsuperscript{468} Richard Tarasofsky, note 460, pp.7-8.
\textsuperscript{469} Ibid.
The *Shrimp* ruling\textsuperscript{471} added to the WTO the duty of deciding environmental issues through its negotiation process. By doing so, it ignored the constant refusal of members to undertake such duties since 1996.\textsuperscript{472} Developing countries were considered to be strong opponents of the inclusion of environmental elements in the WTO negotiation agenda. In fact, developing countries have used these issues as bargaining tools in order to strengthen their position and obtain fairer concessions from their developed counterparts. In addition, one could view the Doha Round optimistically as a sign that environmental issues were being addressed, increasing the potential for extensive future negotiation.\textsuperscript{473}

One of the most serious concerns for developing countries is that developed ones (especially the US and the EU) are the most frequent users of unilateral trade barriers to address what they view from their perspective to be fundamental environmental issues. What is more, the use of these unilateral measures or sanctions can be seen as attempts to pressurise other members to meet their criteria, on pain of having their exports banned from access to these major markets.\textsuperscript{474} The approval of the use of unilateral trade sanctions by a state outside its boundaries would actually undermine the national sovereignty of WTO members. In addition, it would severely damage the international relations between states, which would in turn harm the global trading

\textsuperscript{471} *US Shrimp*, appellate body report, note 408.
\textsuperscript{472} Alan Oxley, note 462, p.11.
system.\footnote{Beatrice Chaytor and James Cameron, 'The Treatment of Environmental Considerations in the World Trade Organization', in Helge Ole Bergesen, Georg Parmann, and Øystein B. Thommessen (eds.), \textit{Yearbook of International Co-operation on Environment and Development} (Earthscan Publications, London, 1999), p.61.} Unilateral trade measures are in fact in favour neither of developing countries nor of the global environment. Therefore, WTO members need to find better ways to address these environmental issues through multilateral means, instead of acting individually.\footnote{Urs P. Thomas, note 473, pp.18-19.}

The \textit{Shrimp} ruling\footnote{US Shrimp, appellate body report, note 408.} by the AB overturned the established GATT precedent of fifty years’ standing regarding environmental issues.\footnote{Alan Oxley, note 462, pp.11-12.} In an extraordinarily similar dispute under GATT, the panel decided in the \textit{Tuna-Dolphin}\footnote{United States – Restrictions on Imports of Tuna, panel report, DS21/R, adopted on 3 September 1991. [hereinafter US Tuna]} case that the US unilateral measures to ban the import of tuna in order to protect dolphins were against the law of GATT.\footnote{R. Daniel Kelemen, 'The Limits of Judicial Power Trade-Environment Disputes in the GATT/WTO and the EU', (2001), 34(6) Comparative Political Studies 622, p.637.}

In relation to the notion that environmental issues would be effectively addressed through the political process of the WTO, not by the dispute settlement system, Bhagwati professes:

“some sympathy for [the] view that the dispute settlement panels and the appellate court must defer somewhat more to the political process instead of making law in controversial matters. I was astounded that the appellate court, in effect, reversed long-standing jurisprudence on process and production methods in the \textit{Shrimp/ Turtle} case. I have little doubt that the jurists were reflecting the political pressures brought by the rich-country environmental NGOs and essentially made law that affected the developing countries adversely.”\footnote{Jagdish Bhagwati, 'After Seattle: Free Trade and the WTO', in Roger B. Porter (ed), \textit{Efficiency, Equity, and Legitimacy: the Multilateral Trading System at the...}}
Developing countries have raised concerns regarding the manner in which the trade and environment discussion was developed, arguing that the inclusion of environmental issues in the WTO's deliberations would lead to the greater intervention of developed countries in the domestic affairs of developing ones, prejudicing their national sovereignty. Moreover, the issues brought for discussion regarding the inclusion of environmental matters were planned to address mainly the interests of OECD members and industrial countries.482

Furthermore, developing countries are in more danger of protectionist environmental measures applied by developed ones, since they are mainly reliant on trading agricultural commodities. By contrast, developed countries can simply change their agricultural providers with no consideration for developing countries' concerns. Indeed, developed countries were accused of not working hard enough to address global environmental problems.483 Another criticism is that the enforcement process in the WTO dispute settlement system was created and structured to impose economic and financial methods of retaliation, which would not be suitable for application in environmental disputes.484

The AB, in an attempt to justify the approval of sustainable development as an international objective, referred broadly to the 1992 UN Conference on Environment and Development and the WTO Committee on Trade and Environment. On the other hand, it

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482 Beatrice Chaytor and James Cameron, note 475, p. 57.
483 Urs P. Thomas, note 473, pp. 18-19.
484 Claude Martin, note 470, p. 143.
disregarded the fundamental principle established by these institutions that unilateral trade sanctions ought not to be employed to enforce environmental agendas unless this was the only option. Article 12 of the Rio Declaration affirms that "unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided".

The inclusion of the environmental measures in a way that would serve all members' interests under the WTO umbrella is not an easy task, and the link between trade and environment is controversial. Developing countries need to be more fairly treated and the special conditions of developing countries ought to be given particular consideration in multilateral trade negotiations. The breakdown of the Seattle trade negotiations is a good example, warning of the heavy burden which would be placed on the multilateral trading system.

Indeed, developing countries' development objectives can be seriously undermined, since they do not have the capacity to implement or identify high-cost environmental measures. These are the domain of their developed counterparts, and they require considerable support so as to be able to deal with environmental standards in relation to trade. In this respect, Francioni argues that:

"in the real world ... the great disparity in the level of the economic and technological development among states entails a different capacity of risk awareness and risk

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485 Alan Oxley, note 462, p.10.
487 Claude Martin, note 470, p.154.,
assessment as well as a different capacity in reactive and systematic monitoring of the use of hazardous products or technologies. It goes without saying that such inequality is magnified when on the export side we have a highly industrial country and on the import side there is a less developed country.  

Examining more closely the criticisms directed to the AB in the Shrimp dispute, one could divide these into two kinds: those regarding the procedures of the DSU and criticisms of the development objectives of developing countries. The AB has shown that procedural concerns (such as terms of reference and use of experts) would not be much of an issue in interpreting the WTO agreement in conformity with environmental measures, and they could be tackled practically. Nevertheless, the failure of the AB to consider and address the development objectives of developing countries as far as trade-related issues are concerned remains serious for the future of the DSM and the multilateral trading system.

A major environmental problem which has been largely caused by developed countries but which affects all countries equally (whether developed, developing or least developed) and which must be addressed by the WTO is global warming. Bangladesh and the Maldives are now facing rising sea levels as a result of atmospheric

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490 US Shrimp, appellate body report, note 408.
greenhouse gas emissions, to which the United States is by far the world’s greatest contributor. Unfortunately, however, they have been unable to take legal action against the United States so far. Bangladesh, in particular, faces serious problems, since its people are mostly dependent on growing rice. This crop is highly exposed to rising sea levels. It is estimated that as much as one third of Bangladeshi territory, including half of the land used for rice farming, will be submerged, leaving 145 million people stranded with even less land and lower incomes than ever. By the same measure, the people of the Maldives, a tiny Indian Ocean nation, are at risk of losing all of their 1,200 islands within 50 years if the present rate of sea level rise continues.492

The Kyoto Protocol took the first step towards the recognition of global warming and established dates and targets for the reduction of greenhouse gas emissions.493 Regrettably, it has no inbuilt enforcement mechanism and some countries—especially the United States—have shown reluctance to implement it, claiming that the cost of cutting emissions exceeds the anticipated gain. This claim is viewed as outrageous by many people around the world, who ask how the wealthiest member of the international community cannot afford to cut its emissions, while other developed nations like Japan, Germany, France and Sweden are working hard to do so successfully. These latter nations’ emissions are pro rata less than half of those produced by the United States, yet they enjoy a better standard of living than the US in certain measures.494

Bearing in mind the *Shrimp* dispute\textsuperscript{495}, in which the US compelled Thailand and its co-complainants to protect sea turtles via the DSM, it is argued that WTO law and the dispute settlement system need to play a role in saving the whole planet by reducing the effects of global warming caused by the market. This could be done by imposing higher tariffs or taxes on the most polluting manufacturers, or at least interpreting WTO agreements in conformity with climate change protection. Unfortunately, in an interview by Stiglitz with a number of senior officials of developed countries, while they agreed with the idea of climate change, they viewed the interpretation of WTO agreements as triggering a nuclear war.\textsuperscript{496}

The US and other western countries have retaliated significantly against North Korea’s nuclear programme, and have even contemplated militarily action. By the same token, the threat to the earth of global warming is such that all states should collectively combat it by the simple action of cutting their emission levels. The role of the WTO and its dispute mechanism could be invaluable, but this would require a significant shift of the industrialised members towards linking climate change issues with trade. Indeed, protecting sea turtles is important, but saving the planet is far more crucial.\textsuperscript{497}

Perhaps, if the US and the rest of the developed world\textsuperscript{498} can successfully establish an example of an energy-efficient market, the

\textsuperscript{495} *US Shrimp*, appellate body report, note 408.

\textsuperscript{496} Joseph E. Stiglitz, note 492, pp.176-178.

\textsuperscript{497} Ibid.

\textsuperscript{498} The most advanced climate change plan that will be implemented soon has received criticisms as it does not meet expectations and is simply not enough; Website, [http://news.bbc.co.uk/1/hi/world/europe/7765094.stm](http://news.bbc.co.uk/1/hi/world/europe/7765094.stm), last seen on 03-02-2009 at 8:37 pm.
whole world (especially the larger developing countries like China, India and Brazil) will be encouraged to engage in multilateral trade talks on effective measures to address global warming. This would entail setting WTO rules that are compatible with climate change, even without recourse to the WTO dispute settlement system,\textsuperscript{499} or the use of unilateral trade sanctions which the EU claims to hold against other member states.\textsuperscript{500}

4.6 Human Rights: Lessons from Shrimp/ Turtle

The 'judicial activism', 'constitutionalization' or 'interpretation' of the AB has led to a strong debate among commentators and WTO members. Some would like to abolish the system and others would rather enhance the power of interpretation of the AB.\textsuperscript{501} However, Pauwelyn argues that:

"... the imbalance between the WTO judiciary and its political branch is here to stay, at least for the foreseeable future. It is simply unrealistic to expect that in the Doha Round a WTO of 150 Members would somehow provide more specific and less ambiguous rules than the smaller and less diverse crowd of Uruguay Round negotiators did in 1994. If anything, new WTO agreements are destined to be even more vague than before."\textsuperscript{502}


As far as developing countries are concerned, the interpretation by the WTO of the development objectives of developing countries is vital, and developing countries have questioned the adequacy of the WTO’s jurisprudence in meeting their development objectives. The LDCs have argued that:

“A careful reading of the accumulated jurisprudence of the [dispute settlement] system thus far reveals that the interest and perceptions of developing countries have not been adequately taken into account. The panels and the Appellate Body have displayed an excessively sanitized concern with legalism, often to the detriment of the evolution of development-friendly jurisprudence.”

The AB in the Shrimp case (analyzed above) brought up trade-related issues and WTO agreements. This is not new; the WTO has an existing agreement on intellectual property rights (TRIPS) covering pure trade-related issues, despite the existence of a separate international institution that deals with intellectual property rights, known as WIPO. Intellectual property rights (IPRs) have even stronger provisions than trade agreements. They not only benefit from National Treatment and Most Favoured Nation (MFN) rules but also require members to adjust their domestic laws to ensure that these rights are properly enforced in their national systems. The inclusion of IPRs in the WTO has already been viewed as not particularly benefiting developing countries but undermining their development objectives. Therefore, this question needs to be revisited in order to produce more development-friendly intellectual property rights.

504 Proposal by the LDC Group, Negotiations on the Dispute Settlement Understanding, TN/DS/W/17 (9 October 2002).
505 US Shrimp, appellate body report, note 408.
506 Yong-Shik Lee, Reclaiming Development in the World Trading System, (Cambridge University Press, 2006), pp.123-132. It has also been argued that the
the TRIPS Agreement and the adoption of environmental measures by the AB in its ruling in the *Shrimp* dispute\(^{507}\), trade-related measures could be adopted in the WTO, and human rights could be a vital trade-related issue for the development objectives\(^{508}\) of developing countries that have not been adopted in the WTO agreements or jurisprudence.\(^{509}\)

If alleviating poverty and promoting the development of its developing country members is a major concern of the WTO free trade agreement,\(^{510}\) the WTO has failed in this task so far,\(^{511}\) the absence of human rights is believed to be a vital factor in this failure. Petersmann attributes "the paradoxical fact that many developing countries remain poor notwithstanding their wealth of natural resources (e.g. more than 90 per cent of biogenetical resources in the world) ... to their lack of effective human rights guarantees and of liberal trade and competition laws".\(^{512}\) Another valid criticism directed at the WTO because of the infringement of property rights has been used by developed countries when they were in their development stage; Ha-Joon Chang, *Kicking away the Ladder: Development Strategy in Historical Prospective*, (Anthem Press, London, 2002), pp.82-85.

\(^{507}\)*US Shrimp*, appellate body report, note 408.


\(^{510}\)The preamble of the Doha Round states that "International trade can play a major role in the promotion of economic development and the alleviation of poverty." See also World Trade Report 2008: Trade in a Globalizing World, (World Trade Organization, 2008), pp139-140.


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absence of human rights is that it is advancing the interests of transnational corporations rather than enhancing the welfare of the people through its influence on the economic development process.513

For example, in its early days the World Bank,514 an international economic organization that was created to promote development (which the WTO needs to consider as well515) in poor countries, took the view that human rights were not essential to its mission.516 This was in accordance with the World Bank Agreement, which contained no article relating to human rights. There is an argument that the denial of human rights as an economic issue, because of the perception of it as a political issue, could be derived from the interpretation of Article IV, Section 10:517


514 Even the EC have evolved from pure trade agreement to the human-rights-friendly argument as it argued that "As much as the European Communities evolved from a system built almost exclusively on economic integration to a comprehensive regime with counterbalancing rules on the environment, social life and human rights, equally, the WTO’s view of the world must and is expanding beyond merely liberalized trade. The inescapable reality is that, in a globalized economy, non-trade concerns simply cannot be separated from trade concerns". In Joost Pauwelyn, note 502, p.334.

515 "The WTO has a function as a development institution. The organization does betray some of the indicia of a development institution. Its constitution speaks about development: it gives technical assistance; its Ministerial declaration speaks about special and differential treatment being placed in the very architecture of the WTO". Asif H. Qureshi, 'International Trade for Development: The WTO As a Development Institution?', (2009), 43(1) Journal of World Trade 173, p.187. The article argues for reinforcing the obligation of the WTO to consider the development dimension of developing countries as a reply to the denial of such rights.


"The bank and its officers shall not interfere in the political affairs of any Member, nor shall they be influenced in their decisions by the political character of the Members concerned. Only economic considerations are relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article 1."\(^{518}\)

The attitude of the World Bank towards human rights has changed since the 1980s. The former General Legal Counsel of the World Bank, Ibrahim Shihata, has indicated clearly in his work that the adoption of human rights was derived from a re-interpretation of Article IV, Section 10. In his view, human rights will be of concern if the member’s breaches in respect of human rights are very invasive in a way that turns out to be alarming.\(^{519}\)

The World Bank has maintained its position as a politically impartial group excluding the human rights rule. Nevertheless, in September 1998 in commemoration of the 50\(^{th}\) anniversary of the Universal Declaration of Human Rights, it published a document in which it promised to foster human rights concerns in its operations.\(^{520}\)

Human rights are not a political issue and are closely related to the economic development of developing countries. Indeed, any international financial institution or investor wishing to secure an investment in any region, would take into account a range of other elements, not necessarily economic, before entering such a market. These elements of course include human rights factors. An extra

\(^{518}\) Article IV, section 10 of the International Bank for Reconstruction and Development agreement.

\(^{519}\) Koen De Feyter, note 517, p.273.

connection between human rights and economic development is that evidence of human rights applications will have a great effect on the amount of aid which could be given to any country, or the reduction of debt in the case of highly indebted poor countries.\textsuperscript{521}

Human rights have attracted international interest so that every state or international institution is responsible for the maintenance of human rights, as is obvious in conclusions made by the International Court of Justice. The ICJ emphasized that there are some requirements for every country in terms of fundamental human rights. Additionally, according to the international legal principle of \textit{jus cogens}, no state can be involved in human rights abuses and, it makes the protection of human rights a relevant issue, if not an essential part, of the projects of international institutions.\textsuperscript{522}

As far as human rights in the WTO are concerned, it has been suggested that Articles 3.2 and 19.2 do not prohibit the application of non-WTO law, but give WTO law the upper hand when it conflicts with non-WTO law. Therefore, the WTO panel and AB are free to apply international law, as long as it does not add to or diminish the rights of the members under the covered agreements.\textsuperscript{523} It has even been argued that the WTO dispute settlement system ought to deal directly with human rights violations, so as to benefit from the DSM enforcement mechanism to implement human rights, which suffer

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\item \textsuperscript{522} Gernot Brodnig, note 521, p.11-12., Mac Darrow, \textit{Between Light and Shadow: the World Bank, the International Monetary Fund and International Human Rights Law}, (Hert Publishing, 2003), pp.129-131.
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from poor enforceability.\textsuperscript{524} However, this proposal is problematic in the current political atmosphere, because the system would require major transformations so as to be capable of dealing with direct human rights violations. There would have to be a major modification in trade sanctions and how they are applied in cases of human rights violations, as well as a major change in the philosophy of trade in the WTO to accommodate human rights considerations. Theoretically, these issues can be resolved, but the current political division between developed and developing countries makes it very unlikely that such transformations will occur in the WTO regime.\textsuperscript{525}

A more sensible view is adopted by Petersmann, who argues that there is no reason why the panel and AB should not interpret WTO agreements in conformity with human rights; on the contrary, the universal recognition\textsuperscript{526} of human rights puts an obligation on the panel and the AB to take into account human rights while interpreting WTO law, although they could be prohibited from ruling on direct human rights violations. Furthermore, Petersmann contends, in

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support of the argument that the panel and the AB can interpret WTO law in conformity with human rights, that there have already been cases where the panel and the AB have ruled in favour of the protection of human health in disputes like EC Asbestos, EC Hormones and Thai Cigarettes. However, it would be naive to consider these rulings as recognitions of human rights within the WTO regime, since the term ‘human rights’ has not even been used.

The preamble to the Vienna Convention on the Law of Treaties, which has been used as a main tool in the interpretation of WTO agreements by the AB, necessitates respect for human rights, as it clearly states that it has:

"... in mind the principles of international law embodied in the Charter of the United Nations, such as the principles of the equal rights and self-determination of peoples, of the sovereign equality and independence of all States, of non-interference in the domestic affairs of States, of the prohibition of the threat or use of force and of universal

A lesson can be learned from the Shrimp dispute that, although the WTO dispute settlement mechanism cannot rule on a direct violation of human rights, it can interpret the WTO agreement in conformity with human rights. But another most important lesson could be that the AB needs to overcome the criticism directed against it in the Shrimp dispute that it promoted developed countries' environmental concerns, and so worsened protectionism against developing countries. While interpreting the WTO law in conformity with human rights, the AB needs to put the interests of developing countries at the forefront. It should begin by identifying how human rights can promote the interests of developing countries in international trade, rather than allowing the most expensive standards to be applied in the developed countries. Developing countries do not have the means and resources to apply or to examine these standards. This would ease the criticism directed at the AB regarding its ignorance of the development objectives of developing countries. It would also give more incentive for developing countries to participate in the political process for the comprehensive inclusion of human rights in the WTO regime and the balancing of environmental requirement for the development objectives of developing countries.

533 US Shrimp, appellate body report, note 408.
It has been claimed that, due to the significant influence of human rights on such agreements and their importance for developing countries' economic development, some WTO agreements cannot be interpreted without special reference to human rights. For example, to promote sustainable development in developing countries and LDCs, the TRIPS Agreement could be interpreted in conformity with the human right to health, to allow developing countries to manufacture and import affordable medicines. This is explicitly recognized by the WTO, and was adopted in the Doha Round in the Declaration on the TRIPS agreements and Public Health. In 2003, the General Council adopted the decision to implement the 2001 Doha Round and this Declaration. Then, in December 2005, the General Council adopted an amendment to the TRIPS Agreement, which "clarifies how the TRIPS Agreement provides flexibilities so as to enable WTO members to protect public health and promote access to medicines. This issue has been a major concern of developing countries facing severe AIDS crises".

Another area of the interpretation of human rights which can be applied to the WTO agreement is the human right to food. This is connected to the WTO agreement on agriculture. Hunger is on the

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535 Gabrielle Marceau, note 524, pp.786-787.
538 Amendment of the TRIPS Agreement, WT/L/641, adopted 8 December 2005.
540 In the same vein the preamble of the WTO agreement on agriculture reads: "Noting that commitments under the reform programme should be made in an
increase and people in many developing countries suffer severely, yet they are forced to open their domestic markets to agricultural imports which (as a result of heavy subsidies) are priced lower than local production costs. This has endangered poor farmers in developing countries and deprived poor people of the basic human right to food. It is argued that the right to food would compel the panel and AB to interpret the agreement on agriculture to guarantee that food is properly distributed all over the world. Such a right would also ensure that poorer farmers in the developing countries are properly protected.\(^{541}\)

From the perspective of development in poorer countries, it would be sensible to require the panel and AB to consider human rights in disputes brought before them whenever applicable, just as the European Court has played a vital role in promoting human rights in EU law, which was established mainly to regulate and facilitate trade between its Members, and the creation of the European Court of Human Rights and the European Convention on Human Rights, to give particular consideration to the role of human rights in relation to the WTO agreements.\(^{542}\) Only then will the right to development be truly equitable way among all Members, having regard to non-trade concerns, including food security....” Para (C) of Article 20 of the same Agreement also mentions “non-trade concerns, special and differential treatment to developing country Members, and the objective to establish a fair and market-oriented agricultural trading system, and the other objectives and concerns mentioned in the preamble to this Agreement”. The WTO agreement on agriculture is available online at, http://www.wto.org/english/docs_e/legal_e/14-ag.pdf, last seen on 3-11-2008, at 11:59am

\(^{541}\) Website, http://www.hrchina.org/public/contents/article?revision%5fid=26420&item%5fid=26396, last seen on 14-11-2008 at 1:30pm; Gabrielle Marceau, op. cit, p.788; Alberto Alemanno, Trade in Food: Regulatory and Judicial Approaches in the EC and the WTO, (Cameron May, 2007).

integrated into the WTO regime, which indeed would add a new dimension to the development objectives of developing countries in the multilateral trading system. The relationship between the right to development and human rights has been established by the declaration on the right to development, which states: “The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.”

As a result of the appellate body ruling on the Shrimp dispute, the WTO has been considered an environmentally friendly regime. Yet it remains inactive in the field of human rights. Just as the World Bank has done, it is a matter of time until the WTO as an international institution has to play a role in the protection of human rights. The WTO dispute settlement system can play a leading role in making the WTO regime also favourable to human rights, but from the perspective of developing countries’ development objectives on this occasion.

4.7 Evaluation of the Appellate Body Process

It can be argued that those who make decisions in the WTO, mainly the appellate body judges, appear to display a strong desire to give good reasons for their opinions by passing on the wisdom of an

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544 US Shrimp, appellate body report, note 408.

extremely experienced board of judges, more than was the case with their precursors in GATT. Moreover, “the wheel does not have to be reinvented”. Therefore, justice and legality are not the only basis for courts when they decide to pursue prior decisions; they do so also on the basis of effectiveness. At present, courts benefit from the efforts made in the recent past in addressing the same legal issues. What is more, the tendency to follow precedent leads to rules being made clearer and more definite, which is to the advantage of the legal system as well as the individuals who participate in it.

It can also be argued that it is desirable for countries to be bound by the rules they have approved willingly in a specific agreement and that no convention could be set up in a perfectly plain manner that is free from vagueness and debate. Thus, if the convention lacks a particular provision, it will be an expected part of the dispute resolution function to overcome such a shortcoming through the work of judges. Otherwise, the disputing members will not enjoy the benefit of such a function.

However, developing countries have fears that the interpretation of the panel and the AB could undermine their development objectives. They have expressed their concerns about the inclusion of environmental issues via the interpretation of the panel and the AB in the Shrimp/Turtle dispute. This has indeed prompted the interest of larger and more developed members and given them what they were not capable of getting through the negotiation rounds. Moreover, climate change which is vital for developing countries’ interest has not been

546 David Palmeter & Petros C. Mavroidis, note 437, p.408.
547 Palmeter & Mavroidis, note 437, p.402.
548 Ibid.
549 Jeff Waincymer, note 448, p.390.
brought into the equation. It has also deprived developing countries of strong bargaining tools to win more favourable concessions from developed countries in the trade rounds. Conversely, human rights, which represent a vital element of the development objectives of developing counties (especially the poorer people within the developing world) and an integral part of the universal right to development, have been ignored by the WTO agreement and the jurisprudence of its dispute settlement mechanism. The panel and the AB need to interpret the WTO agreement in conformity with human rights to promote its own legitimacy and reclaim the development objectives of developing countries. As Sengupta observes:

"The rights approach to development requires us to re-examine the ends and means of development. If improvement of well-being of the people based on the enjoyment of rights and freedoms is the objective of development, economic growth consisting of the accumulation of wealth and gross national product would not be an end in itself. It can be one of the ends, and can also be a means to some other ends, when 'well-being' is equivalent to the realization of human rights. ... [A] prosperous community of slaves who do not have civil and political rights cannot be regarded as a community with well-being."550

4.8 Conclusion

Difficulties in the decision-making process of the WTO have to lead to highly political issues, such as the trade-related issues of the environment and human rights, remaining unresolved. In their own interests, the developed countries have already included the TRIPS Agreement in the WTO during the Uruguay Round. The panel and the AB have developed a strong tradition of interpretation and clarification of the WTO law. Developing countries fear that the interpretation of the panel and the AB has been used against their developmental needs. They argue that the panel and the AB in the Shrimp dispute allowed developed countries to promote their agenda and obtain what they failed to win through the decision-making process, by legitimizing the environmental restriction by the US of imports from developing countries. Meanwhile, human rights in areas like IPRs and the right to health and food, which have the potential to do more good for vulnerable people in developing countries, have been ignored in the jurisprudence of the DSM.

Having considered how developing counties have been treated so far in the WTO dispute settlement system, we will explore next the importance of third-party rights for developing countries in the light of the obstacles discussed above.

551 US Shrimp, appellate body report, note 408.
5.1 Introduction

According to Chinkin, the definition of third parties in international law is “those outside a bilateral relationship, whether formally created, for example by treaty or the commencement of proceedings, or occurring through events such as the outbreak of armed conflict”. The Vienna Convention on the Law of Treaties applies the term ‘third parties’ to international persons who are not signatories to a particular treaty or convention, in other words, non-members. However, in international legal proceedings that come before international courts, third parties are members of such international institutions or treaties, not the actual disputing members who brought and initiated a particular case (normally identified as complainant and respondent) but who would have substantial interests in the application and interpretation of the decision.

Hence, contrary to the bilateral nature of the definition of international disputes given by the Permanent Court of Justice, many disputes may certainly be of a multilateral nature that encompasses the main

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553 Article 2 H of the Vienna Convention states: “A third State means a State not a party to treaty.”
554 This will be dealt with in section 5.2.
555 Chinkin, note 552, pp.7-9.
556 The definition of the Permanent Court is “a disagreement on a point of law or fact, a conflict of legal views or interests between two persons”, cited by Chinkin, note 552, p.15.
disputing parties and third parties.\textsuperscript{557} This is indeed the case in disputes brought to the WTO dispute settlement system. Most of these have a multilateral flavour and third parties’ rights are reserved in most of the cases that are dealt with in the DSM.\textsuperscript{558} However, the DSU could be criticised because its rules are less multilateral than its disputes. This reflects the increased tendency for countries to share trade interests.

Third party rights have received significant attention in WTO members’ proposals during their sessions on the review of the dispute settlement understanding.\textsuperscript{559} In contrast, little attention has been given by academics to the reform of such rights. Third party participation is restricted, confusing and in need of extensive reform. For instance, despite the fact that they can be fully represented during the appellate review, the presence of third parties in panel reviews is restricted.\textsuperscript{560} Yet again, the AB and panel have complicated the issue of third parties by allowing \textit{amicus curiae} to make their submissions case by case. This decision has divided opinion between members who reject such involvement\textsuperscript{561} and those who accept it and present guidelines on how it could take place.\textsuperscript{562}

To begin with, it would be reasonable to question why third parties matter in the WTO dispute settlement system. Is there any economic
benefit in acting as a third party, or would members gain a systematic legal advantage from their participation as third parties? It has also been suggested that there are special circumstances where a member ought to be deterred from participating as a third party, let alone as a complainant. These situations include when one country is being given preferential access by another to its market in breach of the core MFN rule. This states that exporters must not benefit from measures which are incompatible with WTO law.\textsuperscript{563} This is the case where developing countries have participated as third parties in the DSM. The *Banana* case,\textsuperscript{564} is one in point. Here, some countries from Africa, the Caribbean and the Pacific (ACPs) were on the side of the EU in defending their preferential access to the EU banana market,\textsuperscript{565} and more recently the *Sugar* dispute\textsuperscript{566} which also involved a number of developing countries attempting to defend access of their sugar to the EU.\textsuperscript{567} This will be examined later in the chapter.

This chapter presents an analysis of the importance of third party status for developing countries in order to support the argument that enhancing or extending third parties’ roles can do more good than harm for developing countries in the course of a dispute. Firstly, the function of third parties will be dealt with. Then a number of issues

\textsuperscript{563} Chad P. Bown, 'Participation in WTO Dispute Settlement: Complainants, Interested Parties and Free Riders', (2005), available online at http://people.brandeis.edu/~cbown/papers/free_ride.pdf, last seen on 10-01-07 at 11am, p.8.
\textsuperscript{565} More detail can be found in Timothy E. Josling and Timothy G. Taylor (eds), *Banana Wars: The Anatomy of a Trade Dispute*, (CABI Publishing, 2003)
\textsuperscript{567} More detail on the Sugar dispute is available on www.oxfam.org.
such as cost effective statutes, multilateral inspiration, access to justice and legal experience will be discussed.

5.2 Confusing rules of function

There are both implicit and explicit third party rights stated in the WTO dispute settlement understanding. The former arise in the first stage of the dispute process consultations, in that any WTO member who has a substantial trade interest is allowed to join the consultation. In this situation a member must register its interest with the disputing parties and the DSB within 10 days of the request for the establishment of the consultation. Such intervention in the consultation process is subject to the acceptance by the disputing parties that the substantial trade interest of the intervener is adequate. However, third parties are given the explicit right to participate in the panel and the appellate process. According to Article 10 of the DSU, every WTO member with a substantial interest in a dispute has the right to participate as a third party. Third parties are entitled to present to the panel their oral and written submissions and to receive the submissions of the disputing members to the first meeting of the panel. Submissions made by third parties shall be reflected upon in the final decision.

This issue has raised a number of controversies. The first relates to the extent of such rights: whether they ought to be extended or whether the current rules are sufficient, and whether extending the scope of third parties’ rights would place an extra burden on the parties. A

568 Article 4.11 of the DSU
569 Article 10.2 of the DSU explicitly states that “Any Member having a substantial interest in a matter before a panel and having notified its interest to the DSB (referred to in this Understanding as a ‘third party’) shall have an opportunity to be heard by the panel and to make written submissions to the panel.”
balance needs to be struck. On the other hand, since the rules are unclear in this regard, access to consultations as third parties could be facilitated, especially for developing countries.\textsuperscript{570}

With regard to the appeal process, although all parties (not only third parties) can make an appeal, those third parties which have reserved their third party rights according to Article 10.2 of the DSU will have the right to present written submissions and to be heard by the appellate body.\textsuperscript{571}

Hence, any member which may have an interest in a dispute can reserve its right to act as a third party. Generally speaking, there are many reasons for intervention in a dispute. The interest could be legal, economic, political, moral, ideological or all of these.\textsuperscript{572} WTO members with a substantial trade interest may participate in the consultation process, and a member with a substantial interest may participate in the panel and appeal processes. In this regard, one may wonder whether such issues are in need of reform,\textsuperscript{573} or whether it would be better not to attempt to mend something that is not broken.\textsuperscript{574}

If the significance of the interest is shown to be great, the panel and the AB will already allow enhanced third party rights for the participants, giving extra access to third parties. For example, in the

\textsuperscript{570} This issue will dealt with in more detail in the coming chapters.
\textsuperscript{571} Article 17.4 of the DSU.
\textsuperscript{572} Christine Chinkin, note 552, p.18.
\textsuperscript{574} More detail can be found in Marc L. Busch and Eric Reinhardt, 'Fixing What Ain't Broke?' Third Party Rights, Consultations, and the DSU', (2004), available online at http://www.georgetown.edu/users/mlb66/DSU.pdf, last seen on 22-02-07 at 10am.
EC - Tariff Preferences dispute, allowance was made for the enhancement of third party rights for all participants. This included additional rights allowing them to “observe the first substantive meeting with parties; receive the second submissions of the parties; observe the second substantive meeting with the parties; make a brief statement during the second substantive meeting with the parties; review the summary of their respective arguments in the draft descriptive part of the panel report”.576

However, the actual function of third party rules is not as straightforward as it might appear, but rather unclear and sometimes confusing. The panel and the AB have been criticized for the way they use their discretionary powers in granting so called ‘enhanced’ or ‘extended’ third party rights to countries with significant interests, according to Article 12 of the DSU.577 The AB has also been censured for adding a new context for the use of third parties’ rights by accepting an amicus curiae from a third WTO member, which is the case with Morocco in the EC – Sardine dispute.578

577 For example, the panel was criticized in the cotton disputes for not enhancing ACP third parties’ rights; more detail in chapter Seven.
578 More detail can be found in Nick Covelli, ‘Member Intervention in World Trade Organization Dispute Settlement Proceedings after EC-Sardines: The Rules, Jurisprudence, and Controversy’, (2003), 37(3) Journal of World Trade 763, p.673., third party participation in the EC Sardine will be dealt with, in chapter seven section 7.4.3.
5.2.1 Third parties are different from multiple complainants

In circumstances where two or more WTO members wish to bring a claim to the DSM on the same subject, Article 9 of the DSU allows for a single panel to deal with multiple complaints whenever it is feasible, adding that where more than one panel is set up the schedule for their proceedings ought to be coordinated. Article 9 states:

1. Where more than one Member requests the establishment of a panel related to the same matter, a single panel may be established to examine these complaints taking into account the rights of all Members concerned. A single panel should be established to examine such complaints whenever feasible.

2. The single panel shall organize its examination and present its findings 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. If one of the parties to the dispute so requests, the panel shall submit separate reports on the dispute concerned. The written submissions by each of the complainants shall be made available to the other complainants, and each complainant shall have the right to

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579 The EC has criticised the provision since it leads to delay in the process and proposed a new para three for article 9 as follows: "Experience has shown that this often leads to delay in the resolution of disputes. One way of limiting this problem and thus accelerating procedures would be to provide that Members that have either participated in consultations requested by another Member or requested their own consultations on the same matter should be entitled to become parties to a panel proceeding when a panel is established without having to wait for the requirements of the DSU to be met before requesting the establishment of a panel.”

Such an amendment could be effected by introducing a new paragraph 3 into Article 9 as follows: "In order to facilitate the establishment of single panels to consider multiple complaints, any Member that has participated pursuant to Article 4.11 in consultations requested by another Member may join in any request to establish a panel under Article 6.1 without having to request its own consultations and any Member that has held consultations concerning the same matter may make a request for the establishment of a panel for consideration at the same meeting of the DSB even if 60 days have not elapsed from the date that it requested the consultations.” In Communication from the European Communities, TN/DS/W/38, (23 January 2003), p.2.

580 Ibid.
be present when any one of the other complainants presents its views to the panel.

3. If more than one panel is established to examine the complaints related to the same matter, to the greatest extent possible the same persons shall serve as panellists on each of the separate panels and the timetable for the panel process in such disputes shall be harmonized.”

Multiple complainants’ provisions are different from those for third parties under the dispute settlement system. Complainants are the principal disputing parties which have to make requests for consultations, classify the inconsistent measures that apply to the respondent and find grounds for their claims in the covered agreement in which they claim that such measures are inconsistent. Co-complainants and third parties have different procedures as stated in the DSU. The WTO, therefore, clearly differentiates the two types of participant in its documents. The use of the multiple complainant provisions is popular in the WTO dispute settlement system. Members often intervene as co-complainants in the course of the consultation process. In such cases the requirement of a single panel will most certainly be met. As a result, complainants will be subject to the single panel rule stated in paragraph 2 of Article 9, which allows them to gain access to the written submissions of the parties, to attend the proceedings and to present their own views.


5.3 Development-friendly WTO rules

5.3.1 Third parties vs. free ride

Some academics have argued that developing countries, and least developed countries such as African countries, have no need for the dispute settlement system, because of their small amount of trade. Rather, they have other urgent concerns; for example, combating malnutrition, poverty and AIDS or developing better governance.\(^{583}\) Hence, developing countries ought not to be involved with the DSM, but should gain what benefit they can from ‘free-riding’ on other members’ cases.

To start with, as has been argued in Chapter four, despite the fact that the WTO ought to give particular consideration to developing countries’ development objectives, the WTO rules have the contrary effect. The dispute settlement system can be characterised as ‘development-unfriendly’, in that its rules tend to favour their developed counterparts. Hence, developing countries need to interact more with the DSM and to have their say on the evolution of WTO rules.

Whatever the truth of this argument, the function of the dispute settlement system is essential to the operation of the WTO. Thus, developing countries’ involvement in the DSM is essential for the accomplishment of the WTO dispute mechanism and for incorporating developing countries extensively into the multilateral trade sphere.\(^{584}\) Additionally, the dispute settlement system is founded on the idea that


any trade measures that have been undertaken by a state member could be disputed by other members, with the intention that any member, no matter what its economic status, can engage in an economic dispute with larger members. Large numbers of poorer members believe that their involvement is important to the credibility and acceptability of the dispute settlement mechanism, enabling them to protect their interests appropriately in the WTO.585

The significance of participation in the dispute settlement system ought not to be underrated. This is the medium in which the jurisprudence of GATT rules was once shaped. Hence, the dispute settlement procedure has grown to encompass policy-making procedures. If a country cannot participate strongly in the dispute settlement proceedings, it cannot influence the shaping of policy that might affect its interests in the long run.586

Thus, the dispute settlement system is concerned not only with disputes, but also with the development of a body of international business rules and jurisprudence which will lead the multilateral trading system for many years in the future. By not participating, developing countries will miss a significant opportunity to influence the development of international trade rules. For example, there is no reason why developing and least developed nations cannot be at the forefront of the continuing review of the system. Moreover, there is no justification for African states not to participate as third parties in the same way as the United States or the European Union do, and in the

585 Ibid.
same number of disputes. Indeed, those members that are the most deeply involved in the dispute settlement process will have the greatest chance to influence the interpretation and application of international trade law to their benefit.

Involvement in developing WTO law through its dispute settlement system can be argued on two grounds to be more significant than developing national law through the national judicial system. Firstly, it is hard to modify or interpret WTO law through political methods, which increases the effect of jurisprudence in the WTO. The WTO law-making structure is still rather ineffective, since unlike domestic or EC law, consensus is needed to amend WTO law. The process of modifying it occurs in irregular meetings, roughly once in every decade, and involves complex negotiations among nearly 140 members with different interests, principles, degrees of development and concerns. Additionally, the provisions in the WTO agreements are usually written in an obscure way, since bargaining practice is complicated. In this way, members have handed over important de facto authority to the dispute mechanism to interpret and actually develop WTO rules.

Secondly, the appellate body’s judgments will subsequently be followed by panels, in a process rather similar to that by which an upper court influences lower ones through the formal structure of a legal system, or otherwise through the practical interaction between

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587 Victor Mosoti, note 583, pp.73-74.
589 Ibid.
the two courts. The AB judges, in considering prior decisions, are likely potentially to be considering decisions of their colleagues, if not their own personal decisions. This appears to indicate that a more powerful judicial body has already entered into reality. "Once standing judicial bodies have come into existence ... they provide an additional mechanism for the further development of the law."

In addition, trade negotiations under the WTO are complex and the ability of developing countries to participate effectively in them is limited. Observers frequently state that developing countries have few trade representatives. They will often send only one diplomat to negotiate in the WTO and other international institutions. As a result, it is argued, developing countries ratified a number of policies in the Uruguay Round without actually knowing their contents. Therefore, developing countries may feel that their concerns have not been addressed properly in these trade negotiations. Thus, they would wish to pursue their interests by other means.

In addition, the development of international trade law taking place within the dispute settlement system has resulted in the DSM being accused of exceeding its function of interpretation by making new law. This could be turned to the advantage of developing countries which participate as third parties, as they would have the opportunity to present their arguments in front of panels and the appellate body.

591 Ibid.
592 Ibid.
Such participation would mean that their interests would be considered in the subsequent rulings, with considerable consequences for the jurisprudence and function of the DSU.  

One of the reasons why developing countries ought to pay particular attention to such participation is that it is believed that third party rights are vital for increasing the credibility of the WTO dispute mechanism, which gives every member a chance to have its say on the making of WTO rules as a main function.  

It has been argued by Japan that third parties may present valuable submissions that can shape the rulings of the panel and the AB. They can also provide important information for future cases, especially if they are brought on similar grounds, in which case the ‘arguments and rebuttals are resources’ of enormous significance.  

There is growing evidence in support of the Japanese idea. To start with, Shaffer argues that the EU and the US participate as third parties in all cases where they are not the complainant or the respondent. In this way, they do not miss the opportunity to be third parties at the appellate stage, where the effect on interpreting WTO rules is greatest. The EU and the US participate systematically as third parties so as to have their say on the development of the WTO law, in order to safeguard their trade interests. In particular, the US, EC and Japan  

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595 Minutes of meeting, TN/DS/M/14, (20 April 2004), p.16.  
597 Gregory Shaffer, note 588,p.11.
often take part as third parties, even if they do not have direct interests in the dispute.598

The dispute settlement system is used to ‘fill gaps’, sometimes even to overturn the conclusions of trade talks between WTO members. Therefore, by not seeking the opportunity to act as third parties in disputes where they might have an interest, developing countries will miss a vital chance to protect their development objectives. By contrast, by taking such roles they could help to create more development-friendly WTO rules that enhance their involvement in the multilateral trade arena.599

5.3.1.1 Australia: a medium-sized member’s views on third parties

As Shaffer has done in analysing the position of developing countries in the WTO dispute settlement, it is useful to consider what resources are available to developed countries and how they can develop their legal and financial capacity. By doing this, we can establish some strategies to be used by developing countries to maximize the use of their own resources. Hence, it is useful to consider how Australia, a medium-sized developed country, has dealt with third party rights.600

Australia faced difficulties in winning “concessions from larger Members and in influencing systemic change under the GATT”.601 It sees the WTO, and especially its new dispute settlement mechanism, as an improvement over GATT. This is particularly so in cases in which

599 Ibid.
600 Gregory Shaffer, note 588.
Australia has direct involvement as a principal party, or more often indirectly as a third party. 602

Therefore, Goh and Witbreuk argue, third party status has offered many advantages to the Australian position in the multilateral trading system by improving its market access. As we have seen in the Shrimp case 603, identifying whether or not the trade measures that are applied by its industries are consistent with WTO rules is important. In particular, shaping the interpretation of rules in trade sectors that are vital from the Australian perspective, such as agricultural export subsidies, the environment and trade-related intellectual property, by presenting its views as a third party. 604

Australia, as a medium-sized WTO member, views third party rights as a significant tool to protect its market interests by protecting its access to any WTO market, and its broader interests by having its say in the development of the WTO rules and jurisprudence. For example, by being a third party in the Shrimp dispute 605, it gained greater entry to the Spencer Gulf prawns market and clarity on the relationship between trade and the environment in the WTO. In other words, Australian prawns gained access to the United States market.

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602 Ibid., p. 47.
605 This case has been dealt with in chapter four section 4.5.
Furthermore, the "legitimacy of multilaterally pursued environmental concerns was upheld". 606

Australia is an active third party, having participated as such more often than as a main complainant or respondent. It has been a third party in 43 disputes, a complainant in seven and a respondent in nine. Another example of the significance of third party rights for Australia is EC – Hormones607, in which it secured access to the EU market by providing hormone-free beef. It also made its views clear regarding the Sanitary and Phytosanitary Agreement, which created important jurisprudence and practices from an Australian perspective.608

Tanakan argues that “the WTO Members, as principal parties, are entitled to efficient dispute resolution with stringent timetables, confidentiality, and limited appellate review. The WTO Members also maintain rights to intervention as third parties and the authority for final decision to secure their interests in multilateral trade.”609 These opportunities have been effectively understood and utilised by Australia in the dispute system for the good of its trade interests.

608 Gavin Goh and Trudy Witbreuk, note 604, pp. 28-29.
5.3.1.2 The Cotton dispute

The Cotton dispute,\(^{610}\) and in particular the 'peace clause', is argued by many to be a landmark in dealing with developing countries' concerns over agricultural subsidies that have been applied by their developed counterparts. This dispute set a precedent for future cases on agriculture subsidies. The Cotton dispute involved Brazil as complainant, the US as respondent and a number of third parties: Argentina, Australia, Canada, China, Chinese Taipei, the European Community, India, New Zealand, Pakistan, Paraguay, Venezuela, Japan, Benin and Chad. The last two are LDCs which had never before used the DSM. Brazil gained a favourable decision and the US agriculture subsidies were ruled to be inconsistent with WTO rules.\(^{611}\)

For Sub-Saharan Africa (SSA) an issue has arisen in the last two decades. It emerged when three West African countries – Benin, Burkina Faso and Mali – developed competitiveness in their cotton industries. They applied market-oriented rules and withdrew government support from their cotton manufacturers. On the other hand, the US increased its cotton subsidies up to 80%, a luxury which developing countries cannot afford. This significantly depressed the world cotton price and harmed unsubsidized cotton producers, including those in Africa.\(^{612}\) Such a situation is reminiscent of the Uruguay Round, where Brazil succeeded in challenging US cotton subsidies.

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\(^{611}\) More details can be found in Karen Halverson Cross, "King Cotton, developing countries and the 'peace clause': the WTO's US Cotton Subsidies decision", (2006), 9(1) Journal of International Economic Law 1.

However, with regard to our topic it would be useful to examine how the Sub-Saharan African LDCs of Benin and Chad gained from their involvement as third parties, bearing in mind that they were active in trade talks and the use of the DSM. There is no doubt that Benin and Chad reduced their financial costs, improved their familiarity with the dispute settlement system and overcame procedural inequities (such as the implementation process) which had been serious flaws in the DSU.

Firstly, in light of the fact that it is difficult to reach a conclusion through the WTO decision-making process, the Sub-Saharan African LDCs realized that the WTO dispute settlement system could be used as an effective tool to impose a trade-related agenda. They went through both the legal channel (represented in the DSM by being third parties) and the political channel, by putting the issue on the trade talk agenda, which was one of the main reasons behind the failure of the Cancun ministerial conference in 2003, making their views known to the public and to decision-makers. This use of the WTO dispute settlement system gave West Africa a stronger political position in the trade negotiations with regard to cotton subsidies, which was one of their key demands. In addition, as regards the political channel, they brought strong and convincing arguments against the US cotton subsidies, which were considered vital elements in the winning of the case. Oxfam has claimed that one of the main reasons that the US ought to enforce the Cotton ruling is because of its failure to refute the

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613 Ibid., pp.261-265.
convincing arguments presented by West African members from Cancun and beyond.615

Secondly, and most importantly, the two least developed SSA members were involved in developing DSM jurisprudence with regard to the enhancement of third parties’ rights. This involvement would benefit not only Chad and Benin, but all SSA members of the WTO. They engaged in a complex technical discussion with the panel to make a precedent on the issue of the enhancement of third parties’ rights,616 which although it was rejected, showed

"that the input of Benin and Chad caused the Panel to perform a legal evaluation of the issue which may act as a foundation for future argumentation. Thus, DS267 suggests that SSA Members should be encouraged to participate in the DSB – at least as third parties if not as complainants – in order to influence the evolving jurisprudence to better reflect their interests."617

This is a strong response by the panel, which will serve as a guide for future cases. It is a strong interaction with the system and provides potentially vital jurisprudence for developing countries.

The action by Chad and Benin established the precedent that third parties will have the opportunity to have their say in the evolution of the DSM. It confounds those who believed that third parties would be expelled from influencing the sprouting jurisprudence of the WTO dispute settlement system. This engagement in enhancing third parties’ rights could have been a vital precedent that SSA countries in particular, and developing ones in general, want to see in the evolution

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615 Ibid., p.17.


617 Ibid., p.383.
of the DSM. The panels “were responsive to the views expressed and as a result of those views they performed a thorough legal analysis.” This response was illustrated by the panel report from para 7.1396 to para 7.416, which, it is argued by Gross, “would not have occurred had Benin and Chad not called for it in their submissions. Moreover, this legal evaluation may provide a foundation for further argumentation in future disputes.”

Thirdly, Benin and Chad, by reserving third party status, have actively engaged in the panel process and have provided strong evidence against the negative consequences of the US cotton subsidies. They have certainly presented vital arguments that convinced the panel to make its decision in favour of Brazil. As Oxfam argues: “This evidence has certainly helped the panel to reach its conclusions.” In its ruling in this particular case, the panel considered views presented by Benin, Chad and other third parties as supportive arguments in favour of Brazil’s claims. The removal of the inconsistent measure will no doubt benefit the SSA countries as much as Brazil.

The panel stated that it had therefore

“taken into account serious prejudice allegations of other Members to the extent that these constitute evidentiary support of the effect of the subsidy borne by Brazil as a Member whose producers are involved in the production and trade in upland cotton in the world market. However, we have not based our decision on any alleged serious prejudice caused to them.”

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618 Ibid.
619 Ibid.
620 Ibid., pp.374-375.
621 Oxfam, note 614, p.11.
622 Ibid.
623 Karen Halverson Cross, note 611, p.36.
Nevertheless, there are some disadvantages without which third parties could have functioned in a more sophisticated manner. Chad and Benin, although even more affected than Brazil by the inconsistent measures implemented by the US, were denied the request for enhanced third party rights. They were also excluded from bilateral negotiation on the removal of the inconsistent measure between Brazil and the US.  

It is also obvious from the last part of the panel ruling that it did not consider the harm being caused by the US cotton subsidies regime to the third parties was the same as that suffered by Brazil. Should this remain unresolved, it could be a weakness with respect to third parties’ rights, so it needs to be reformed. This will be discussed in the next chapter, on the reform of third parties’ rights. But one ought to remember that third parties can make their own case if they believe that their interests have not been sufficiently addressed by the panel or the AB. Finally, Chad and Benin gained valuable experience as a result of being third parties in the Cotton dispute.

Two LDCs, Benin and Chad, put their views on the table by making submissions as third parties before the panel and the AB, arguing that their cotton industry was at stake because of US practices. This would also improve their bargaining position in the course of trade talks. Their involvement in the Cotton dispute is considered an important step towards enhancing developing countries’ participation in the dispute settlement system. It also refutes the argument that such

625 Adam Gross, note 616, p.375.
626 Article 10 requests the panel merely to reflect on third parties’ arguments.
628 US Cotton, note 610.
participation is undesirable for reasons of low trade volume, or other priorities such as poverty, education and health-related problems. This has opened the door for SSA members and other LDCs to participate in the DSM.\textsuperscript{629} There are, however, some disadvantages that need to be addressed.

5.4 Obtaining experience from participation as third parties

We have seen that one of the main problems that would face any developing country wishing to participate in the WTO dispute settlement system is the lack of legal resources. Such participation would increase its financial burden. As noted by Shaffer, there is a sharp contrast between developed and developing countries in the numbers and preparation of the legal staff dealing with the dispute settlement system.\textsuperscript{630} Djibouti has suggested that the fact that no LDC has ever participated in the DSM (so that they have no expertise and little idea how the system works) is the main reason for their absence and apparent lack of interest.\textsuperscript{631} As argued by Pornchai Danvivathana, "experience in the WTO dispute settlement mechanism cannot be gained ... overnight. Capacity-building, of which developing countries are badly in need ... and have called for repeatedly, is no exception."\textsuperscript{632}

\textsuperscript{629} Calvin Manduna, note 598, pp.6-7.

\textsuperscript{630} For more details see in general chapter two.

\textsuperscript{631} Minutes of Meeting, TN/DS/M/14, (20 April 2004), p.4.

While this problem was analysed in Chapter two (with reflections on major proposals invoking the rights of third parties where they have indirect interests) examining it from a different angle would make a great contribution to the legal capacity building of WTO officials and bureaucrats of developing countries. It would give them an actual insight into the operation of the dispute settlement system. By so doing, developing countries could achieve two goals: putting their development needs on the table and enhancing their legal resources.633

Developing countries are suffering from a lack of financial means to bring a dispute. They are also handicapped by a lack of legal experts on WTO law, as explained above. Participating as third parties would be fundamental to overcoming such weaknesses. Third party involvement is vital for developing countries in this respect. Through this participation they will significantly develop their knowledge regarding the process of the dispute and the functioning of the DSM, in a way that would not be possible by being passive members. “As one former Appellate Body Member has advised, developing countries should not hesitate to take up this role in appropriate conditions, because their familiarity with the inner workings of the system will stand them in good stead.”634

The participation of developing country members in the proceedings of the dispute settlement will improve significantly their understanding of how the dispute mechanism works. It will also enhance their familiarity with the internal workings of the mechanism in order to be well prepared to protect their interests. Therefore, one wonders why some would argue that in any case brought before the DSM in which developing countries have a substantial interest, they would have to reserve third party status in the case. Third party participation should be used on a regular basis so as to improve their involvement in the DSM.

It has been suggested that the obligation to provide trade or financial interest in the dispute as a condition for participating as a third party ought to be removed when a developing country wants to participate. Also, developing countries ought to have the right to participate as third parties at any step in the process of the dispute. In order to reach this target, there is a need for a reform of Article 4.11 by abolishing the condition of “trade” interests for developing countries. Third party developing countries should also be brought up to date with the events taking place among the disputing parties throughout the consultations. As argued by Costa Rica, the panel and the AB ought to give particular consideration to the claims made by third parties, rather than just indicating their arguments in the descriptive part of the ruling.

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636 Calvin Manduna, note 598, p.10.
Increasing the participation of developing countries in the process of dispute settlement would help them to obtain legal knowledge about the process and rules of the dispute system, and to become more familiar with its functioning. This, in turn, would safeguard their development interests in the long run. However, this could be negatively influenced by the ruling of the panel or appellate body. For this reason, a new rule must be included in order to ensure that third party developing countries can obtain access to all the papers and information, as well as have the right to play a part in the whole process. This would make a real contribution towards developing the ability and skills of the lawyers and government representatives of developing countries.

The appeal process, where the WTO jurisprudence and practices can be seen to evolve, is the most important part of the dispute process.\textsuperscript{638} It is also believed that the use of the appellate process is vital for the legitimacy of the DSM, which has been invoked by both developed and developing members.\textsuperscript{639} It is argued in this respect that developing countries which have utilized their third party rights in the appellate review have gained significant experience in the operation of the AB. Among these frequent users are India and Brazil. It is believed that third party rights represent a key solution to improving developing countries' experience of the dispute settlement system.

\textbf{5.4.1 The examples of Jamaica and Chile}

GATT was established mostly by developed countries, with little if any involvement by their developing counterparts. The international trade

\textsuperscript{638} This has been dealt with throughout chapter four.
\textsuperscript{639} For example, India and Brazil are larger developing countries which invoke the AB more frequently than others.
arena witnessed another major reform during the Uruguay Round, in which developing countries did not express their views and development needs adequately. This applies to the issues negotiated which favoured larger members with few concessions for smaller members (such as the TRIPS and Trade in Services agreements) and to negotiations conducted on the DSU which came into force in 1995 in Marrakech.

This situation changed after the review of the dispute settlement understanding agreed between WTO members in 1999. Developing countries made considerable contributions to the review process, and articulated their views in numerous proposals concerning what they want to be reformed in the DSM. Third party participation has played a role in this.

For example, Jamaica, a developing country that had never been a principal party before the DSB, but has participated as a third party in eight cases, 640 believes that its participation as a third party has improved its familiarity with the dispute settlement system. Additionally, it has given it a better understanding of the negotiations and of the dispute system review, which will enhance the position of developing countries in the dispute settlement system. 641 Apart from its own proposal on the reform of the DSU, it was able to consider views presented by other members. As a result of being a third party, Jamaica was “prepared to work with other participants in developing their proposals”. 642

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640 For Jamican cases as third parties, see http://www.wto.org/english/tratop_e/countries_e/jamaica_e.htm, last seen on 12-5-2008 at 12pm.
641 Minutes of meeting, TN/DS/M/5, (27 February 2003), p.5.
642 Ibid.
The representative of Chile, while presenting the Chilean views in a special session on the negotiation of the DSU conducted by the WTO, in order to strengthen its position in the special meeting on the review of the DSM and to add value to its argument, stated in his introduction that “Chile was not a frequent user of the dispute settlement mechanism, although in the past year it had become more involved as a third party and, on several occasions, it had provided its views on procedural issues.” In this particular meeting, Chile presented its views on certain aspects of the EU proposals and argued in favour of an increase in the number of appellate body members to operate on a full-time basis.

5.4.2 Gaining access to disputants’ submissions (enhancing internal transparency)

Third parties will benefit from receiving information related to a dispute (such as the parties’ submissions to the panel) and also from being heard by the panel and disputing members. Hence, the present situation is unlike that in national legal systems. There, the public are allowed to attend court hearings and all the information and submissions made by the parties are in the public domain, unless such

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643 Chile was a third party in 18 cases; for more details, see http://www.wto.org/english/tratop_e/countries_e/chile_e.htm, last seen on 23-06-2008 at 9:13pm.
644 Chile has also effectively participated in the discussion on the reform of third party rights, in Minutes of Meeting, TN/DS/M/4, 6 November 2002, p.3.
645 Minutes of Meeting, TN/DS/M/1, (12 June 2002), p.5.
646 Ibid., pp.5-6.
data is subject to the law of confidentiality, which restricts certain special data presented by the parties from being published. Confidentiality laws are subject to the power of the courts, whose decisions are published and are available both to the parties and to the public once the final ruling is issued. 648

Other international tribunals – for instance, the International Court of Justice, the International Tribunal for the Law of the Sea and the European Court of Human Rights – do, in fact, apply an open access policy that allows the public, not just members, to attend the dispute settlement process. However, this is regrettably not the practice applied in the WTO dispute settlement system. 649 In this, only the affected parties and third parties have the right to attend the panel and AB hearings, and to receive parties’ submission or make their own submissions. As a result, WTO members who participate as parties or third parties in a dispute before the DSM have the exclusive opportunity to observe directly the working of the system. 650 Therefore, third party status derives its importance from being the only formal method to gain access to the WTO settlement system for those who do not wish to appear as principal parties. This will allow such members to have an actual insight into the operation of the DSM. 651 One reason would be to achieve a prompt settlement of disputes between parties, as Maki Tanakan argues:

648 Donald McRae, note 560, pp.10-11.
"The WTO Members crafted the DSU and the Working Procedures to maintain a subtle balance between efficient dispute settlement and multilateral policy articulation. The DSU and the Working Procedures greatly emphasize confidentiality so as to facilitate extensive discussion about sensitive matters between parties to the dispute, while allowing broad participation of third parties in dispute settlement proceedings by using 'substantial interests' as a qualification without more articulation.\textsuperscript{652}

Since the arguments of the parties and third parties presented in their submissions may affect the rulings in WTO dispute settlements, they constitute important information for other members. This is particularly so for those which might turn to the dispute settlement procedure in a related case.\textsuperscript{653}

More telling still, it is believed that restricting access to the WTO disputes system process for parties and third parties is vital to accomplishing one of main objectives of the DSU: to secure a positive solution. As stated in Article 3.7 of the DSU, "the aim of the dispute settlement mechanism is to secure a positive solution to a dispute". It is also the case that the theory behind the confidentiality of the consultation could be applied to the panel and AB processes, under which a significant number of disputes are resolved.\textsuperscript{654} WTO members are also forbidden to attend the dispute process until the adoption of the final report of the panel or the AB.\textsuperscript{655}

\textsuperscript{652} Maki Tanakan, note 609, p.149.
\textsuperscript{653} Proposal by Japan, note 596, p.4.
\textsuperscript{654} Communication from the European Communities, TN/DS/W/1, (13 March 2002), p.6.
\textsuperscript{655} There is a debate in this respect, in which India has opposed the EU proposal, which states that "The EC is in principle of the view that all Member countries, independently of whether they are party to the dispute or not, should have right of attendance during panel/AB proceedings. There may be, however, a need to develop special rules to deal with business confidential information in specific cases" in Communication from the European Communities, TN/DS/W/7, (30 May 2002), p.6.
How much access to the process of the dispute settlement ought to be opened is subject to debate among WTO Members, mainly between developed and developing countries. The EU has proposed that the dispute process ought not only to be open to the public without the right to intervene, but also to allow access to amici curiae and to set guidelines for their intervention. There is also a relevant Japanese proposal that all the information presented during any dispute must be made available to all WTO members, without their needing to be parties or third parties to the dispute, and to the public.\(^{656}\)

However, developing countries believe that the public should not be allowed to attend the hearings. Nor should amici curiae have the right to intervene before the DSM. Article 13.1 is clear in respect of the latter and is in no need of reform.\(^{657}\) However, what is more interesting in this respect is that some of the major developing countries which have been fairly active in using the DSM argue that if the reformed DSU is to ensure greater transparency with regard to the dispute settlement system (especially internal transparency) there needs to be improved rights for third parties. As stated by the Malaysian representative in a special session of the review of the DSU, "Malaysia would support the idea of enhancing third-party rights, as this would be 'true transparency'."\(^{658}\) Until greater transparency rules

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656 Proposal by Japan, note 596, p.4. A similar view is held by the US; Communication from the United States, Further Contribution of the United States to the Improvement of the Dispute Settlement Understanding of the WTO Related to Transparency – revised legal drafting, TN/DS/W/86, (21 April 2006).

657 Details of amici curiae are given in chapter eight section 7.4.2.

658 The Malaysian view is presented in Minutes of Meeting, TN/DS/M/1, (12 June 2002), p15; India shares the same view, in Minutes of Meeting, TN/DS/M/4, (6 November 2002), p.3.
can be agreed,\textsuperscript{659} enhancing the access of third parties to the dispute settlement process is a more realistic option and articulates the demands of developing countries.\textsuperscript{660}

WTO members which have an interest in an issue raised before the DSM could choose to free-ride, benefiting from MFN rules. Alternatively, they could choose a more active approach by reserving their interest as third parties in a dispute. This would give them potential access to the system, and they would benefit from receiving the information presented by the parties. They could also make their own submissions to the panel or the AB, and obtain a hearing from the panel and the disputing members.\textsuperscript{661} However, it is argued that third parties' rights are restricted and sometimes confusing in ways that prohibit them from effectively defending their interests before the DSM. These need to be enhanced and clarified to achieve a better exercise of such rights. How third party rights can be reformed is the subject of later chapters.

It has been argued by the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu that:

"The current DSU regime only allows the third party to join in at the first substantive review stage. Given that resource and monetary constraints often preclude small and developing Member countries from making full use of

\textsuperscript{659} Jackson argues that there is nothing on the horizon for an immediate solution to opening up the WTO dispute settlement system to the public: John H. Jackson, \textit{Sovereignty, the WO and Changing Fundamentals of International Law}, (Cambridge University Press, 2006), pp.119-121.

\textsuperscript{660} As was argued in a special session of the DSU: "A primary objective of Chinese Taipei's proposal on transparency was to increase the access of third parties to relevant documentation and to increase generally their knowledge about the dispute settlement process. She said that Chinese Taipei would take into consideration the views expressed by participants when drafting its legal text for the consideration of the Special Session." Minutes of Meeting held in the Centre William Rappard, on 16-18 December 2002, TN/DS/M/7, (26 June 2003), p.6.

\textsuperscript{661} Website, \url{http://www.wto.org/wto/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6532p2_e.htm}, last seen on 12-03-2009 at 1:17 pm.
the system, we support a number of the amendments proposed by Costa Rica662, the EU663 and Jamaica664 to enhance third parties’ accessibility to information and knowledge of the dispute settlement system. At the same time, however, we do have certain reservations about other proposals...”665

Table 4:666 Internal transparency (incoming information to members)

<table>
<thead>
<tr>
<th>MEETINGS</th>
<th>Member (Not 3rd Party or Party)</th>
<th>Third Party to a dispute</th>
<th>Party to a dispute</th>
<th>DOCUMENTS</th>
<th>Member: Not 3rd Party or Party</th>
<th>Third Party to a dispute</th>
<th>Party to a dispute</th>
</tr>
</thead>
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<tr>
<td>A. DSB Meetings</td>
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<td>✓</td>
<td>✓</td>
<td>A. Public WTO documents671</td>
<td>✓</td>
<td>✓</td>
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</tr>
<tr>
<td>B. Consultation meetings</td>
<td></td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
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<tr>
<td>C. Hearings with the panel, the appellate body or arbitrator</td>
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<td>D. Oral hearings before the appellate body667</td>
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<td>✓</td>
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<td>✓</td>
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</tr>
<tr>
<td>E. Preparatory meetings with the panel, the appellate body or arbitrator668</td>
<td></td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
</tbody>
</table>

662 Costa Rica proposal, note 637.
663 Communication from European Communities, TN/DS/W/1, (13 March 2002).
664 Communication from Jamaica, TN/DS/W/21, (10 October 2002).
666 Source, Some Ideas by Mexico, note 573, p.37.
668 Article 12.3 of the DSU.
669 Article 4.11 of DSU.
5.4.3 The Sugar dispute

I have chosen to discuss the Sugar\textsuperscript{679} and Cotton\textsuperscript{680} disputes, since they concerned developing countries from sub-Saharan Africa that had never participated in the DSM, either as complainants or as respondents. These countries made their first appearance as third parties and faced difficult issues such as health and social problems. They also had small trade volumes, which made it virtually impossible for them to use the DSM. In these two cases, smaller developing countries decided to have their say about the evolution of WTO practices and jurisprudence.\textsuperscript{681}

An examination of the economies of developing countries reveals that their GDP is likely to come mostly from rural activities. Hence, advancing trade talks regarding agriculture would most benefit developing countries’ integration into the multilateral trading system. This is what most developing countries were expecting from the Uruguay Round. However, developed countries did not give actual concessions on agriculture, and negotiations were slow in this respect.\textsuperscript{682} In addition to the successful Cotton dispute, the Sugar
dispute was another victory in respect of developing countries and agricultural issues. In the first case, it was ruled that the direct cotton subsidies applied by the US were inconsistent with WTO rules, and that the indirect sugar subsidies applied by the EU were in breach of its own rules. In the Cotton dispute, the third parties were on the side of the complainant (Brazil) which won the case, whereas in Sugar they supported the respondent (EU) which lost. The perspective will also be different, addressing the argument that developing countries gain experience from acting as third parties.

In the Sugar case, which came before the DSM in 2002, the EU sugar regime was challenged by Australia, Brazil and Thailand. The complainants claimed that EU sugar was highly subsided in a way that considerably depressed market prices and the incomes of other sugar exporters. The EU – Sugar dispute is an example of where developing countries have participated as third parties and have made effective use of the DSU. Australia, Brazil and Thailand brought a dispute against the EU regarding its sugar regime. In this case, fourteen developing countries participated as third parties and presented their arguments. Seven were from Africa (Cote d’Ivoire, Kenya, Madagascar, Malawi, Mauritius, Swaziland and Tanzania), six were from the Caribbean (Barbados, Belize, Guyana, Jamaica, Trinidad & Tobago and St. Kitts & Nevis) and one (Fiji) was from the Pacific.

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684 ICOH online document, note 594, p.5.
The Sugar dispute set a record for the number of third parties participating in a single dispute, which was previously held by the Banana case. Third parties in the Sugar dispute were the fourteen ACP members plus India, China, the USA, Cuba, Canada, Colombia, Paraguay and New Zealand. With the four protagonists, this made 26 WTO members in total. In addition, this dispute was very important in two respects: the operation and jurisprudence of the DSU, and the process of the upcoming trade talks.⁶⁸⁵

In an ideal world, developing countries would have wished for the ruling to be in favour of the EU. This would have protected their preferential access to the EU market from any negative consequences that might result from a ruling against its regime. They would also have wished for the main reason to be given as the protection of their preferential access. In general, it is important for developing countries to submit their special circumstances and development needs to the panel for consideration in its report, and to create a precedent for future disputes that may be brought on similar grounds. This is especially the case for African third parties, which are widely absent from the process and which therefore miss the chance to have their development requirements taken into account in the evolution of the WTO Rules.⁶⁸⁶

It is also worth mentioning that although the above-mentioned wish was not met, the panel did consider the wider needs of developing countries. It found that for the EU to subsidize sugar and re-export Indian or ACP sugar was illegal. This was viewed by many observers to be harmful for the multilateral trading system and for developing

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⁶⁸⁵ Ibid.
⁶⁸⁶ Ibid.
countries.\textsuperscript{687} The panel also took into account the interests of developing countries which had reserved third party rights, by ruling that any reform which took place ought not to harm them.\textsuperscript{688} However, since the panel provided no guidelines, it is argued that this was undermined by the fact that it remained unclear how such a ruling could be implemented.\textsuperscript{689}

The experience that ACP countries have gained from their participation as third parties is invaluable. They have learned how to pool their resources, and to speak with one voice by electing a minister from Mauritius to represent them in the hearing. They have asked for their third party rights to be extended in order to be more effective in the second meeting and the drafting of the panel decision. Within their restricted access to the first meeting of the panel, ACP countries have also actively engaged in technical arguments to protect their development interests, which is the main objective of the WTO. Additionally, they have made it very clear that their economies and the

\textsuperscript{687} For example, Oxfam, Dumping on the world: how EU Sugar Policies hurt poor countries, No 61, April 2004; Also, Oxfam, the Great EU Sugar Scam, how the Europe’s Sugar regime devastating livelihood in the developing World, No. 27; and Kevin Watkins, ‘WTO Negotiations on Agriculture: Problems and Ways Ahead’, Background Briefing Paper for Session 1, (2004), available online at http://www.l20.org/publications/Phase%20II/Ag%20Subsidies/Background%20Papers/G20.Oxford.Watkins.pdf, last seen on 3-04-2008 at 11am.

\textsuperscript{688} “In this regard, the Panel notes the recent statement of the European Communities on 14 July 2004 that the European Communities ‘fully stands by its commitments to ACP countries and India’ and that with the reform of its sugar regime, the ACP countries and India will ‘get a clear perspective, keep their import preferences and retain an attractive export market.’” In EC Sugar, compliant by Brazil, panel report, note 566, para 8.8; see also paras.8.5-8.6-8.7.

welfare of their peoples are at stake, by referring to the *Banana* dispute with regard to the negative consequences it had on the economy of Dominica, a Caribbean island.

The least developed members from Africa, which participated for the first time in the DSM, have provided a greater insight into the operation and functioning of this body. In this, they have followed larger developing countries like Brazil and India, in that they have increased their confidence in the system by increasing their involvement. This is an effective way for developing countries to familiarize themselves with the dispute settlement system until they are effectively integrated into the multilateral trading system.

Apart from gaining experiences from their own efforts in preparing and presenting their case, the *Sugar* dispute witnessed a desirable form of collaboration between developing countries and their developed counterparts. There was a consultation between the EC and ACP members regarding the most appropriate method of preparing and presenting their legal arguments before the panel and the AB. The ACP countries also received legal advice from a private lawyer funded by the EC under the Cotonou Agreement Assistance Programme. There is no doubt that this collaboration has enhanced their experience of the DSM. The pattern of support which was found in the *Ec – Sugar* and *Banana* disputes is a desirable issue that would certainly benefit developing countries which are third parties to a dispute, and will

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690 "Raise the standard of living, provide full employment and a high and ever increasing level of real income..." ICOH online document, note 594, p.6.
691 ICOH online document, note 594, pp.6-7.
692 Ibid.
693 EC Sugar, note 566.
694 Calvin Manduna, note 598, pp.8-9.
695 EC Banana III, note 564.
enhance their familiarisation with the multilateral trading system. It is certainly advantageous that these improvements should be seen in the future, regardless of the existence of an agreement or convention to grant such support.

Despite the fact that the efforts of the ACP countries were not enough to win the case, "useful lessons were learned through the spirited, multi-pronged strategy adopted by the ACP sugar producers to defend their interests in this dispute".696 However, the access to disputes as third parties, as well as to the dispute data, is rather restricted and in need of reform. Such access would allow better functioning and insight for third parties in the course of disputes, but would not affect the rights of the principal parties.

5.5 Cost Effectiveness

5.5.1 Financial costs

It is argued by Mataitoga that "capacity development in the area of international trade law, international economic and public international law must now be a priority area for all developing country Members of the WTO, if they are to have a fighting chance of protecting their rights under the multilateral trading system".697

Therefore, one of the main reasons for the use of third party rights (rather than being a party in the WTO dispute settlement system) is that although "third parties enjoy significantly less rights than parties",

696 Calvin Manduna, note 598, pp.8-9.
the financial cost of being a third party is significantly lower. Thus, WTO members which reserve third party rights before the DSM will have their say on the disputed issues. This will gain them access and improve their familiarity with the system, but at reduced costs in time and money. 699

The Advisory Centre on WTO law provides support and legal advice for developing countries which share an interest in certain disputes. Because WTO decision-making is not really effective, each case brought to the DSM is important for the interpretation of WTO law. Hence, just as their developed counterparts use all their formal resources to register their interests as third parties (so that, for example, EC countries pool their resources over trade issues through the European Commission) so developing countries can improve their participation as third parties by “pooling their legal support from the Advisory Centre, although in a less formal way. By preparing joint third party submissions, the Advisory Centre could place the dispute settlement panels and the AB on notice of the views of developing countries in individual cases.” 700


700 Gregory Shaffer, note 588, p.50.
Developing countries have smaller economies than developed ones, so bringing a dispute as a main respondent could damage such an economy. An illustration would be as the one discussed above with regard to the implementation of the ruling of the panel and AB. This could have a disastrous effect on a developing economy. Nevertheless, developing countries ought to be practical and take advantage of any opportunity to participate in the DSU. This could be done by participating as third parties whenever their interests might be affected by a dispute.\footnote{ICOH online document, note 594, p.6.}

5.5.2 Political costs

Considering the process of the dispute settlement under the DSU, developing countries will pay the highest political and economic cost if they attempt to use the implementation tools provided by the DSU to enforce the final decisions that are approved by the DSM, especially against larger members.\footnote{Details are given in chapter three section 3.3.} However, as third parties are not part of the enforcement process, they cannot obtain compensation or request retaliation against the respondent if found guilty.\footnote{Gavin Goh and Trudy Witbreuk, note 604, pp.5-6.} As a result, being a third party would remove the political and economic risks that might threaten developing countries in the implementation process.

The concern about the power imbalances between developed and developing countries, which handicap the latter in bringing their cases to the DSM and stifle the creation of better opportunities for third parties, is clearly argued during the negotiation on the reform of the DSU.
“Furthermore, developing countries register their interest in cases by participating as third parties. In other words, account has to be taken of the free-riding within the system. Developing countries might not initiate cases also because of trade reasons. They might not feel comfortable in bringing cases to the system because of fear that this might in some way affect bilateral relations.”

In addition, although third parties do not have the right to participate in arbitration concerning enforcement matters, they will benefit from gaining access to the panel which examines the enforcement process. They will be able to decide whether such a dispute is important for them or not, and can bring their own dispute later if they believe that this is worth doing.

In fact, it is believed that third party status would particularly benefit those with no experience of the WTO dispute settlement system and those who are unable to stretch their budgets. This is the case for the bulk of developing countries. Third party status would allow them to build up their legal capacity, while paying less than they would as full parties:

“However, a third party does not need to spend effort in bringing a complaint to a panel and can attend the first meeting of the panel where it can present its own views. It will enjoy the benefits of a successful result for the plaintiff on an MFN basis. So for a new WTO member being a third party means gaining experience, while spending relatively little, and coming to integrate oneself into the system.”

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705 Third parties attempts to intervene in the compliance Arbitration process will be dealt with in chapter eight section 8.4.1.
706 Gavin Goh and Trudy Witbreuk, note 604, p.5.
An example of a WTO member that is aware of the reduction in cost achieved by participating as a third party is China. This is the most populous developing country, if not the most powerful. China has recently joined the WTO and has little experience of its dispute settlement system. It has been a third party in 60 cases since its entry in 2002 and finds that third party status is a less expensive and less challenging way of using the dispute settlement system. In fact, China was a third party in the Sugar dispute. Here, it presented the damage to its sugar industry as a result of the EU sugar regime as having led to a 35% reduction in Chinese sugar prices. More recently it presented its argument in the case of US measures against Korean semiconductors.

As far as self-confidence is concerned, having no experience of WTO law and little training in the dispute settlement system will hinder the position of developing countries during the meetings of the panel and the AB. They need to have high self-confidence in arguing their case during the course of litigation. Being a third party helps in improving this. China, although the largest developing country, is also fearful of any damage to its trade relations with other large WTO members like the US or the EU, as a result of disputes against them before the DSM. So it prefers to make indirect challenges through the exercise of its third party rights. This is even more of an issue for small and medium-sized developing countries. Being a third party "involves less financial expenditure and requires less legal skill than acting directly as a complainant". However, one ought to remember that third parties face the risk that their concerns may not be fully considered by the

708 EC Sugar, note 566.
709 Jin Gu, note 707, p.28.
panel or the AB, and that their participation has been described by some as ‘minimal usage’. This issue is on the reform agenda and will be dealt with in more detail in Chapters six, seven and eight.

5.4.3 Joint responsibilities

Third parties, by their nature, do not exist unless there is an actual dispute involving a complainant and respondent, to one of which they can add their support. This leads to a dispute of a multilateral nature. Hence, third parties will have the advantage of sharing the responsibilities of the dispute with the party they choose to support: the complainant or the respondent. The third party benefits from “this amendment would allow several developing countries to collaborate and unify their resources, experiences and legal expertise to give them a just opportunity to present their cases adequately and to minimize their costs”. Evidence of this has been seen in the EC – Sugar and Banana disputes, in which the EC supported ACP countries acting as third parties.

5.6 Multilateral Flavour

The two world wars resulted in the introduction of borders between states and the application of the protectionist approach all over the world. This has had a negative consequence on the world economy. As

711 Jin Gu, note 707, p.29-30.
712 Adam Gross, note 616.
713 Certain developing countries in East Asia, because of their character, would prefer to participate indirectly in the DSM, “Yet it is remarkable that Japan, despite its huge power and experience, chooses so often to come in as a third party. Hence, one might suppose that the character of East Asian countries is to become engaged in the DSS in this more indirect way.” Jin Gu, note 707, p.27.
715 EC Sugar, note 566.
716 EC Banana III, note 564.
a result, GATT was established to build a new multilateral trading system.

Originally, the GATT dispute mechanism was mainly the plaything of developed countries. Now, however, under the WTO, it is considered that the involvement of developing countries is vital for the survival of the multilateral trading system.\textsuperscript{717} Therefore, one could argue that third party participation will lead to trade disputes that have a multilateral flavour. Third parties will give panels and the AB a wider viewpoint from which to make to their final decisions, as well as covering the wider interests of WTO members in both developed and developing countries. In turn, this will strengthen the multilateral trading system\textsuperscript{718} and so boost the legitimacy of the dispute settlement system.\textsuperscript{719}

The fact that most international cases result in multilateral consequences that affect the interests of third parties must also be considered. Indeed, just like other international cases, the international trade disputes dealt with in the WTO have multilateral consequences, which often require the intervention of a third party to protect its substantial interest.\textsuperscript{720} Jordan has argued that "effective participation of third parties would enrich the dispute settlement process by allowing parties to a dispute, and Members with interests in

\textsuperscript{718} Marc L. Busch & Eric Reinhardt, note 581, p.1.
\textsuperscript{720} Communication from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, note 665, p.2.
the outcome of a certain dispute, to fully participate in the proceedings". 721

Nevertheless, a dispute is mainly about the principal parties, i.e. those who have the major rights and duties throughout the dispute process. It is also relevant that, unlike domestic courts, the DSM is not about strict enforcement of rulings. It is used as a tool to tell the disputing parties what is or is not consistent with WTO law. Hence, the DSU provides parties only with control over the dispute process and the panel or AB report until it is finally adopted by the DSB. However, admitting that the parties should have the main control of the dispute settlement process ought not to undermine the multilateral spirit of the international trade dispute mechanism. Therefore, third parties are not only vital, but their role also needs to be enhanced, albeit not in a way that would be identical to (or go beyond) the rights of principal parties. 722 The DSM has developed to be of a truly multilateral nature. 723 This would abolish any fear that multilateralism will weaken the system, contrary to those who believe that the DSM will crumple as a result of increasing intervention by third parties. 724 Additionally, in cases where there are multiple complainants, disputing members "could demonstrate wide support for their causes and possibly attract the attention of the public as well". 725

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721 Minutes of Meeting, TN/DS/M/8, (30 June 2003), pp.4-5.
722 Minutes of meeting, TN/DS/M/7, (26 June 2003), p.16.
723 The majority of disputes involve more than two parties; see WTO.org for details of cases.
725 Tamer Nagy Mahmoud, note 714.
5.6.1 Shared responsibilities

There are certain types of international issue that require a global effort so as to overcome the problem, and which cannot be resolved by the efforts of a single country. An example of such an issue was provided by Salvador, Guatemala, Honduras and Nicaragua, which participated as third parties in the EC tariff preference dispute. This dealt with drug trafficking and related crimes. Drug trafficking in this instance cannot be solved by the EC on its own. It is a worldwide problem which requires the efforts of the international community as a whole to apply the appropriate principles of the Charter of the United Nations and international law.

Drug trafficking, in other words, requires multilateral collaboration in order to fight against it. Third parties, both developed and developing, can help by adding a multilateral dimension to a global problem in a globalised world. It has been argued that, “the multinational dimension of drug trafficking is such that it does not lie within the power of any of the world’s countries single-handedly to eliminate this threat. In the fight against drugs, every State should have a task to accomplish that is commensurate with its own circumstances and capacities.”726

5.7 Access to Justice

Interesting work has been done by Asif Qureshi on the participation of developing countries in the dispute settlement system. While arguing that they face difficulties in gaining access to the DSM for several reasons, such as a lack of legal and financial resources, enforcement and procedural inequities, he also states that participating in the DSM

is vital for their future in the global trading arena. Furthermore, he holds that equality in the WTO ought to be restored by improving developing countries' access to justice. Qureshi suggests that enhancing third party rights has a role to play in this.\footnote{Asif H. Qureshi, 'Participation of Developing Countries in the WTO Dispute Settlement System', (2003), 47(2) Journal of African Law 174.} He argues that:

"procedural justice relates to fairness in terms of participation in the dispute settlement system at all levels and forms, including particularly the consultation, Panel, and Appellate processes. This involves, for example, the need to sanitize the consultation process from possible external linkages; the need to strengthen third party rights; being able to join as a co-respondent; and generally ensuring that all parties have similar rights of participation."\footnote{Ibid., p.194.}

This argument is based on the fact that many developing countries have gained access to WTO justice for the first time by participating as third parties. For example, El Salvador and Nigeria first accessed the system as third parties in the \textit{Shrimp} dispute\footnote{US Shrimp, note 603.}, while Nigeria took this further by intervening in the appellate process\footnote{Maki Tanakan, note 609, p.155.}. As of November 2008, the EU and the US have more balanced records. The EU has been a complainant in 76 cases, a respondent in 56 and a third party in 76 cases. The US has been a complainant in 85 cases, a respondent in 97 and a third party in 67 cases.\footnote{It is worth noting that Japan is slightly different from the EU and the US in that it has participated most often as a third party. This can be explained by the far-eastern culture of indirect confrontation and has nothing to do with the procedural inequality and power imbalance facing developing countries in the DSM.\footnote{It is worth noting that Japan is slightly different from the EU and the US in that it has participated most often as a third party. This can be explained by the far-eastern culture of indirect confrontation and has nothing to do with the procedural inequality and power imbalance facing developing countries in the DSM.}} All of the statutes applicable under the DSM have been invoked frequently by both countries.
The involvement of developing countries in the system tells a different story. From a regional point of view, Sub-Saharan African members have never sought access to the dispute settlement system as complainants or respondents, but they have done so as third parties. In addition to Nigeria who was a third party in the Shrimp dispute⁷³², ACP countries were third parties in the Banana ⁷³³ and Sugar ⁷³⁴ cases.⁷³⁵ There is no doubt that these disputes were fundamental for the development of WTO jurisprudence. Many Latin American and Caribbean countries have also accessed the system only as third parties, examples being Surinam, St. Lucia, St Vincent, Barbados and Jamaica. In Asia, most of the developing countries have been third parties far more frequently than principal participants. For example, India has been the complainant in 14 cases, the respondent in 17 and a third party in 48 others, while Thailand has been a complainant in 14 cases, a respondent in one and a third party in 34 instances. Finally, China has been a complainant in one case, a respondent in six and a third party in 60.

Developing countries thus tend to use third party status more than their developed counterparts, which have no problem with their access to the system. Indeed, some developing and less developed countries have only ever accessed the WTO dispute settlement system as third parties, because of the inequity and power imbalance in the multilateral trading system. Table 5 shows that developing countries have used the system in the main as third parties.

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⁷³² US Shrimp, note 603.
⁷³³ EC Sugar, note 566.
⁷³⁴ EC Banana III, note 564.
⁷³⁵ ICOH online document, note 594, p.2.
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736 Source: [www.wto.org](http://www.wto.org)
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5.8 Concluding remarks

As the world trading system becomes ever more globalised, this will lead to more disputes of a multinational kind. Consequently, third parties’ interests will most certainly be affected. Third party status is granted at the consultation stage to members with substantial trade interests, and at the panel and appellate stages to members with substantial interests. 737 If the interest is of special importance, third parties’ rights can be extended. This raises the question of whether all these peculiarities are for the good.

Third party participation is clearly vital for access to justice by developing and less developed countries since (unlike principal party status which has not been used by a great number of poorer countries) it has been invoked by both. Developing countries, by acting as third parties, are able to bring their views to the table. They can, as a result, make their views known to the public at reduced financial and political cost in comparison with participation as principal parties.

The involvement of third parties adds a multilateral flavour to a dispute, enabling the AB and panels to make their rulings in a way which will protect the multilateral trading system. There is also a set of shared responsibilities which require an effort from all members of the international community, developed and developing. However, disputes that are brought before the DSM are more multilateral than the procedures provided under the DSU, and the function of third party rights does not always meet their expectations.

737 This has been dealt with in section 5.2.
Developing countries argue that third party rights are restricted, unclear and confusing, and that they ought to be reformed to protect developing countries’ rights properly within the DSM. Many views have been put forward with regard to the reform of third party rights. These issues need to be examined, and proposals evaluated, in order to find the right balance in reforming third party rights without adversely affecting the rights of the main disputing parties.

There are a number of advantages for developing countries in being third parties. However, this status also carries a number of disadvantages, without which third parties would function better for the good of the multilateral trading system and the developing world’s integration in it. Thus, the next chapter deals with how third party rights and participation in consultation could be reformed in the interests of the members of developing countries.
6.1 Introduction

There are several political and legal means for the peaceful settlement of international economic disputes. The Hague Convention for the Pacific Settlement of Disputes has identified ten methods to settle such disputes: bilateral or multilateral negotiations, good offices, mediation, inquiries, conciliation, \textit{ad hoc} or institutionalized arbitration, judicial settlement by permanent courts, "resort to regional agencies or arrangements", "other peaceful means of their own choice" and dispute settlement by the UN Security Council (e.g. pursuant to Articles 34-38 of the UN Charter). This includes other UN organs or other international organizations. A mixture of these political and legal processes of peaceful dispute settlement is recognized and organized by existing international institutes such as the UN and the WTO.

The WTO dispute settlement understanding encompasses all the main means of peaceful dispute settlement recognized by public international law. These include bilateral and multilateral consultations, good offices, conciliation, mediation, panel and appellate review procedures and arbitration. More interestingly, however, Petersmann notes that the WTO dispute settlement process has become truly

\begin{footnotesize}
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\item[739] Ibid.
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multilateral. He argues that, unlike the narrow application of Articles 62 and 63 by the World Court, the GATT and WTO adjudication systems are “characterized by frequent participation of third parties in consultations, panel proceedings, and appellate review as a means of avoiding conflict and preventing separate, additional disputes”. In addition, such rights are being used at the very beginning of the dispute process (at the consultation stage, according to Article 4.11 of the DSU). This allows members who have substantial trade interests to join the consultation.740

Consultation is indeed an important stage of the WTO dispute settlement system. In fact, the first real dispute brought to the DSM, having been inherited from the GATT adjudication system, was settled quickly in consultation. This was the Malaysia – Prohibition of Imports of Polyethylene and Polypropylene dispute741 between Singapore as complainant and Malaysia as respondent. Consultation is also important in case of the escalation of a dispute, so that the parties can agree on the terms of reference which are to serve as guidelines for the panel and the AB during the course of the dispute.

In this chapter, the arguments and analyses of earlier chapters will be built on. This will be done by examining how the problem of developing countries is relevant when considering the reform of third party provisions in consultation. In addition to the importance of third party status for developing countries discussed above, there are specific issues related to intervention at the consultation stage by developing countries. The proposals of the member states and academics have

740 Ibid., p.302.
741 Malaysia – Prohibition of Imports of Polyethylene, request for consultations under Article XXIII.1 of the GATT 1994 by Singapore, WT/DS1/1, settled on 13 January 1995. [hereinafter Malaysia Polyethylene]
varied. We shall consider how third party intervention in consultation could be reformed to better serve the interests of the smaller and less developed countries.

Some have expressed concerns that enhancing third party participation in consultation would undermine the process of early settlement. However, this is not the case for developing countries. Many developing countries have no experience of the WTO dispute mechanism, and have extremely restricted legal and financial resources. Some cannot identify the existence of the inconsistent measures that affect their interest, and many (in cases where they wish to initiate a formal dispute) fear the political and economic strength of their larger and more developed counterparts. They are also apprehensive about the arbitrary discrimination that takes place against the participation of third parties in the consultation stage as a result of discretionary powers granted to the disputing parties under Article 4.11 of the DSU.

The next section will examine the function of the consultation process and what has been proposed so far. Next, the arguments will be considered in favour of the claim that third parties undermine early settlement. Then, the effectiveness of the conduct of the consultation process will be dealt with. After that the question of unfair settlement and third parties will be dissected, as will the role of the third party in encouraging the fact-finding process at the consultation stage. Finally, the proposed reform of third party provisions in consultation will be analysed and conclusions drawn.
6.2 The Consultative Process

The WTO dispute settlement process starts with a request for consultation. Provisions that deal with the consultation stage are stated in Article 4 of the DSM, according to which the party requesting consultation begins by preparing a document that explains the legal basis of the dispute presented to the DSM and the relevant Councils and Committees. The DSM encourages the disputing parties to make every effort to make the consultation successful. Once the request for consultation is made, the disputing parties have 30 days maximum to start the consultation process in good faith in order to reach a mutually agreed solution. Failure to do so by any of the participants leads to the establishment of a panel. Disputing parties will have 60 days to conduct consultation. Article 4 also allows for a shorter timeframe for consultation in cases of urgency in respect of perishable goods, and emphasises that the dispute process should be accelerated to the greatest extent possible.

More interestingly, para 6 of Article 4 requires the consultation process to be confidential, while Para 11 of the same article adds that members who have substantial trade interests in the consultation process have the right to joint consultations according to paragraph 1 of Article XXII, of GATT 1994, paragraph 1 of Article XXII of GATT, or the corresponding provisions in other covered agreements. Such rights

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742 Article 4.4 of the DSU
743 Articles 4.1 and 4.2 of the DSU
744 Article 4.3 of the DSU
745 Article 4.7 of the DSU
746 Articles 4.8 & 4.9 of the DSU
747 Article 4.6 states that "Consultations shall be confidential, and without prejudice to the rights of any Member in any further proceedings". Hence the advantages discussed in chapter four for third parties, which have the advantage of being entitled access to the dispute and its related information and facts.
748 See also chapter five, section 5.2.
are subject to a ten-day notice period after the date of the circulation of the request for consultations, and to the approval of the disputing parties which have requested consultation, if they find that the claim of substantial trade interest is well-founded. If the request for joint consultation is accepted, the DSM must be informed. Otherwise, if the request is rejected any interested party has the right to present its own request for consultation. Developing countries’ interests are also considered, by asking members to pay special attention to these during consultation.\textsuperscript{749}

It is worth mentioning that the DSU is somewhat confusing in using stricter language for members who want to participate in consultation. It requires them to have a “substantial trade interest”.\textsuperscript{750} It is more lenient with members seeking to participate in the panel stage, because it requires them to have a “substantial interest” without mentioning ‘trade’.

The provisions in paras 6, 10 and 11 of Article 4 of the DSU cover a number of issues that need to be carefully examined. They raise a number of controversies. The consultation is confidential and only ‘parties’ and ‘third parties’ are allowed to participate, while developing countries’ special needs are to be given special consideration. We have to ask if developing countries are satisfied with the current rules that govern the consultation process and whether those concerning third parties help developing countries in the process. If so, how can third party involvement in the consultation process be reformed in a way that would not undermine the aim of the consultation process, or should it be left as it is?

\textsuperscript{749} Article 4.10 of the DSU
\textsuperscript{750} See also chapter five, section 5.2
The review of the dispute settlement system has witnessed a varied participation by both developed and developing countries. Many proposals have been put forward, and while members were discussing the provisions that related to third parties in the dispute process, some proposals were made to reform the participation of third parties in the consultation process. These proposals need to be examined, and an evaluation needs to be made, in order to see how third party rules in consultation can be best reformed. But first, it will be helpful to review what has been suggested hitherto.

6.3 Existing Proposals on Third Party Rights in the Consultation Process

A number of proposals were put forward by WTO members concerning third party participation during the review of the dispute settlement understanding. These include some ideas on reforming third parties’ participation in the consultation stage. It should be noted that the nature of such reform proposals is “deeper procedural changes, more directly affecting the rights of Members”. Among the members, the need for the enhancement of third party rights is not the subject of much debate. The core issue is how far this enhancement should go. They certainly do not want to hinder the benefits of the principal parties in favour of extended third party rights. Hence, a balance needs to be restored. Such unanimity on the extension of third parties’ rights certainly applies to the reform of third party rules in the panel.

and the appellate process, but reforming third party provisions in the consultation stage has raised some controversies.

To start with, one of the most comprehensive proposals on third party intervention was put forward by Costa Rica. One of its main objectives was to extend third party rights in the consultation process. Costa Rica wanted the more restricted term ‘substantial trade interest’ in Article 4.11 to be replaced with the broader term ‘substantial interest’. Also, it wanted to remove the right of the principal parties to decide whether a third party has the right to intervene or not, by removing the last part of the same article, which states that this applies,

"provided that the Member to which the request for consultations was addressed agrees that the claim of substantial interest is well-founded. In that event they shall so inform the DSB. If the request to be joined in the consultations is not accepted, the applicant Member shall be free to request consultations under paragraph 1 of Article XXII or paragraph 1 of Article XXIII of GATT 1994, paragraph 1 of Article XXII or paragraph 1 of Article XXIII of GATS, or the corresponding provisions in other covered agreements."}

In line with the Costa Rican proposal (but in a more restrictive manner) African countries have proposed that developing countries be given a special right to access the system as third parties without being required to show a trade or economic interest as a prerequisite. They have also proposed that such preferential access should be allowed at any stage of the dispute (the consultation, panel and appellate phases) and that such rights be given only to developing

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752 Ibid.
754 Last part of article 4.11 of the DSU.
countries.\textsuperscript{755} It is worth mentioning that the EU, as a bloc of developed countries, has in its formal proposal agreed in principle with the Costa Rican proposal on opening up the consultation process to third parties.\textsuperscript{756} Furthermore, Jamaica has also expressed the wish to see Article 4.11 of the DSM clarified, especially concerning the terms ‘substantial trade interest’ and ‘substantial interest’. It believes that there should be such a guideline for third parties’ access to the consultation process, and prefers it to be that of ‘substantial interest’ in general.\textsuperscript{757}

In this regard, Chile has clearly argued “in support of a proposal that would make it mandatory for third parties to be joined in consultations. The distinction between Articles 4.11 and 10.2 of the DSU needed to be eliminated. It was imperative for there to be some sort of symmetry between the rights of third parties during the consultations and the panel phases of the dispute settlement process.”\textsuperscript{758} India has also clearly stated that it “could support the proposal aimed at expanding the rights of third parties during the consultation stage under Article 4.11 of the DSU”.\textsuperscript{759}

On the other hand, some members have approached the extension of the access of third parties to the consultation phase with caution. For instance, the proposal presented by Chinese Taipei is to enhance the transparency of the DSM, but not during the consultation process.\textsuperscript{760}

\textsuperscript{756} Communication from the European Communities, TN/DS/W/38, (23 January 2003), p.4.
\textsuperscript{757} Communication from Jamaica, TN/DS/W/21, (10 October 2002), p.2.
\textsuperscript{758} Minutes of Meeting, TN/DS/M/4, (6 November 2002), p.3.
\textsuperscript{759} Minutes of Meeting, TN/DS/M/5, (27 February 2003), P.10.
"We are not in favour of the proposal from Costa Rica to modify the 'substantial trade interests' provision. Our view is that, at the consultation stage, when the DSB has not yet been formally involved in its adjudication function, 'substantial trade interests' should continue to be a requirement for third-party participation. This is to ensure that the necessary space and simplicity for the disputing parties is retained in the consultation stage, and that consultation is preserved as an important method of settling trade disputes. We do agree fully, however, with Jamaica's proposal that guidelines be developed in order to prevent the arbitrary refusal of third party requests for consultations."⁷⁶¹

These proposals need to be further examined to see how reforms could be made to enhance the position of developing countries with regard to the DSM, but in a way that would not harm the dispute settlement process and the principal parties' rights. This current debate certainly requires further development, with a special consideration should be given to the practice of GATT/WTO cases.⁷⁶² There is a fear that third parties would undermine the principal parties' rights and place an unwanted burden on the dispute process.⁷⁶³

6.4 Early Settlement

As mentioned earlier, Chinese Taipei disagreed with the proposal presented by Costa Rica to extend the access of third parties to the consultation phase. The objection was on the grounds that it would place an additional burden on the disputing parties. These concerns were elaborated during a special session of the negotiation of the DSM. The Taipei representative, while agreeing with the principle of

⁷⁶¹ Ibid., p.3.
⁷⁶³ Communication from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, note 760, p.2.
increasing the access to information for third parties during the panel and the AB stages, stated that:

"Chinese Taipei was conscious of the uneasiness of some participants who seemed to be of the view that enhanced third party rights [would] make the dispute settlement process cumbersome and frustrate the efforts of the parties to find a mutually satisfactory solution to their dispute. In Chinese Taipei's view, these concerns were misplaced and did not take into account the profound effects a case could have on third parties." 764

This argument has been further developed in a number of interesting studies by Marc L. Busch and Eric Reinhardt, 765 who have argued that the multilateral nature of WTO disputes makes it more difficult for the disputing parties to reach an agreement, because of the complications resulting from the increased number of parties involved in the case. Thus, "defendants are least likely to concede in multilateral disputes, perhaps because they have more trade at stake, or because coordination of deals is necessarily more complex". 766

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764 Minutes of Meeting, TN/DS/M/6, (31 March 2003), p.6.
765 This is one side of the coin. Others believe that third parties' participation in consultation is vital. It is argued in this regard that "A quick survey carried out in Geneva showed that most of the senior diplomats tend not to deal with the DS in general or in the negotiations. It is usually the newer or younger diplomats who deal with it. Due to the breadth of issues they have to cover, the DS receives little attention. The consequence is that the issues are not receiving as much attention as they should due largely to resource constraints. We recommend that delegations should make an effort to attend DSB and DSB special session meetings and familiarize themselves with the issues at play. Setting up a legal monitoring unit within the African Group that could always explore possibilities of participating as third parties in disputes, joining consultation in ... many disputes and even bringing joint disputes when such an occasion presents itself should be encouraged." Victor Mosoti, 'Does Africa Need The WTO Dispute Settlement System?', in Gregory Shaffer, Victor Mosoti and Asif Qureshi, Towards A Development-Supportive Dispute Settlement System in the WTO, (ICTSD, 2003), p.23.
766 Marc L. Busch and Eric Reinhardt, 'Transatlantic Trade Conflicts and GATT/WTO Dispute Settlement', Conference on Dispute Prevention and Dispute Settlement in the Transatlantic Partnership European University Institute/Robert Schuman Centre, Florence, Italy (3-4 May 2002), available online at https://www.law.berkeley.edu/students/curricularprograms/ils/papers/Busch%20and
It has also been argued that consultation was a vital stage of GATT, at which most disputes were settled or otherwise withdrawn. It has even been argued that this stage was more important than the GATT panels. In addition, in their first study directly related to third parties, Busch and Reinhardt argued that the reform of third party participation in consultation would hamper the process and would be of no benefit to the dispute settlement system. This argument is based on the assumption that enhancing third party participation in the consultation phase could negatively affect the early settlement of disputes in consultations in which the disputing parties could have reached a mutually agreed solution. Even transparency ought not to be extended to the consultation process.

The same statistical model has also led to the main hypothesis that third party participation in the consultation phase would reduce the possibility of early settlement. Busch and Reinhardt claim that 60% of disputes have reached mutually agreed solutions without third party involvement. By contrast, only 26% of cases that have witnessed third party intervention have reached mutually agreed solutions. Furthermore, while 9 percent of the cases without third party intervention have been subject to a ruling, 45 percent of the cases with third party intervention have reached the ruling stage.

%20Reinhardt%20-%20Petersmann%20Project.pdf, last seen on 02-06-2008 at 9am, p.8.


769 Ibid., pp.11-12.
Busch and Reinhardt also argue that this can be generalized regardless of the issue, size or economic and power imbalance. Using the same dataset, they then claim that in disputes with no third party intervention the possibly of a ruling is 8%. In disputes in which third parties have intervened the possibility of a ruling rises to 29%.770 Hence, contrary to what has been proposed by Costa Rica, they suggest that the term 'substantial trade interest' ought to be retained for those parties wishing to intervene in the consultation process, while a party's right to deny access to third parties in consultation ought also to be retained. However, a guideline ought to be introduced to control such denials. Because most third parties will want to know what has led to the mutually agreed solution, the parties ought to present a report on their settlement to the DSB, with access allowed to all WTO members. By thus enhancing transparency in respect of the publication of the settlement report, the intervention of third parties in the consultation phase could be minimized.771

This argument has been developed further to prove Busch and Reinhardt's hypothesis. A recent study examines in more detail the statistical methodology applied to cases brought to the DSM up to 2002. It is claimed that third party interventions in consultations would undermine early settlement, since it would make negotiation more difficult by increasing the 'audience costs' and 'transaction costs' of the negotiation process before the formation of the panel.772

770 Ibid., pp.11-13.
772 Marc L. Busch and Eric Reinhardt, 'Three's a Crowd: Third Parties and WTO Dispute Settlement', (2005), available online at
Therefore, it can be seen that the consultation stage is vital. While enhancing third parties' participation in the consultation stage could undermine early settlement, this would hinder the efficiency and function of the DSM, especially at the pre-trial phase which third parties could severely damage. It is also clear that the term 'substantial trade interest' in Article 4.11 is there to preserve parties' autonomy and freedom to negotiate mutually agreeable solutions, without the interference of third parties which do not have crucial economic interests in the case. Busch and Reinhardt do recognize that transparency is vital for any judicial system, but they believe that this is outweighed by the argument that neither third party involvement nor transparency should apply at the pre-trial stage. This is because they would raise the transaction costs, and so

http://wage.wisc.edu/uploads/WTO%20Conference/busch_reinhardt_%20third%20parties.pdf, last seen on 23-10-2007 at 4pm, pp.2-3. It is also argued by Davy and Porges that "In at least nineteen cases, more than one Member has individually complained about a measure of another Member. In other cases, there have been joint consultation requests and/or joint panels. Some respondents in these cases have complained that such multiple requests put an inappropriate burden on them because they may end up having to conduct essentially the same consultation several times. This is a particular problem for Members with small delegations in Geneva. While joint consultations may be a useful mechanism to use, they may be viewed as undesirable from the respondent’s point of view to the extent that they make settlement negotiations with individual countries more difficult." William J. Davey & Amelia Porges, 'Performance of the System I: Consultations & Deterrence', 32 The International Lawyer 695, p.695.

773 Marc L. Busch and Eric Reinhardt, note 772, p.5.
774 See also chapter five, section 5.2.
775 Chinese Taipei further explained in a special session on the DSM that "while [it] was in favour of strengthening third-party rights, it was also of the view that their rights should be less than those of the parties to the dispute. In that context, it was not in agreement with Costa Rica that the 'substantial trade interest' provision in Article 4.11 of the DSU should be amended to make it easier for third parties to participate in consultations between the parties to the dispute". Minutes of Meeting, TN/DS/M/6, (31 March 2003), p.6.
776 Busch and Reinhardt, note 772, pp.9-10.
777 In connection with this, Lawrence argues that "There is some uncertainty concerning whether transparency interests should be extended to include the consultation phase of the process. Legitimacy is enhanced through public disclosure
make the bargaining process more difficult and hinder the reaching of a mutually agreed solution.\textsuperscript{778}

What makes third party intervention more awkward for the settlement process is that it may come from an active participant who could raise new issues and arguments that would sidetrack the disputing parties' focus on the matter under dispute. Moreover, although third parties cannot bring an argument not stated in the terms of reference, they could "draw attention to other arguments that fit within the terms of reference, but which the complainant and defendant had not thought to introduce or – worse still – do not favor".\textsuperscript{779} Therefore, third parties, by broadening the disputed issue to secure their interests, will limit the areas of agreement between the parties, hence reducing the prospect of settlement.\textsuperscript{780}

of the negotiations that take place among the parties prior to the panel process. Disclosure can serve to focus the discussion of the parties and promote settlement through a need to court public opinion. An argument can be made that public disclosure is appropriate given the existence of alternative general fora for the settlement of international disputes and that the overarching goals of the World Trade Organization are best served by confining the dispute process at all stages to issues solely related to the covered agreements. The benefits of transparency, however, appear to be less significant than at other stages of dispute settlement. This is due in part to the fact that the consultation phase is a negotiated process rather than an adjudicatory one. There is far less incentive to protect general notions of justice. The authority of the international institution is not threatened. The primary objectives of the negotiation phase are to reduce international tensions and conclude potential disputes rapidly and inexpensively whenever possible. The perceived loss of legitimacy is miniscule when compared to the benefits to operational efficiency and the international community afforded by the informality of the consultation phase. It may even be argued that the public filing requirements may impose excessive costs at the consultation phase. The added flexibility afforded to the parties to include issues not directly pertinent to WTO principles should not be discounted. This benefit also serves as an added incentive to the parties to conclude a settlement prior to the commencement of the panel phase." Lawrence D. Roberts, 'Beyond Notions of Diplomacy and Legalism: Building a Just Mechanism for WTO Dispute Resolution', (2003), 40 American Business Law Journal 511, pp.543-544.\textsuperscript{778} Busch and Reinhardt, note 772, p.13.\textsuperscript{779} Ibid.\textsuperscript{780} Ibid., p.15.
In the main, Busch and Reinhardt use a quantitative approach to gather evidence for their study, confirming the results of the above-mentioned statistical analysis. This found that a similar percentage of third parties might undermine the possibility of an early settlement in the consultation process. It also developed another method of quantitative examination which proved the same hypothesis: that third parties could undermine early settlement. This was done through developing models and variables to estimate their effects. For example, model IV indicates that 78% of the disputes involving third parties reach the stage of ruling. The results of the study show the following:

"With no third parties and the other variables held at their sample means, the probability that the dispute goes to a ruling is just 0.08. With third parties, the odds rise to 0.29. Add to this the complication of systemic issues, however, and the likelihood of witnessing a ruling soars to 0.71. In short, third party participation makes all the difference between whether a dispute gets settled early or goes to a ruling." 

As a result, it has been proposed that the term 'substantial trade interest' ought to be retained in Article 4.11, but ought to be more precisely defined to distinguish it from a systematic interest. According to the latter term, third parties would be willing to make early settlement even more difficult by raising broader issues that cannot be addressed properly outside the dispute process. In addition, while

781 Ibid., p.23.
782 Ibid., pp.23-25.
783 Chile's representative also "welcomed the proposal by Costa Rica and said that it was a major contribution to the work of the Special Session. He said that Chile was particularly interested in the issue of third-party rights having recently participated as a third party in a dispute. While supportive of the proposal to expand third-party rights, Chile was also of the view that the rights of third parties should never equal or exceed those of a party to a dispute. It should be borne in mind that the WTO dispute settlement system was designed in such a way to promote bilateral solutions to disputes. It flowed from this basic premise that some leeway should be given to
the members have the right to deny the access of third parties to consultation, the denial should be clearly stated to allow equal access to third parties during consultation. Furthermore, in cases where a settlement was agreed, there ought to be made available to all WTO members a detailed report of how the settlement took place between the parties. This would reduce the incentive of third parties who want to know what settlement is agreed upon.784

Along the same lines, a study by Henric Adey also used quantitative methods to examine cases brought to the DSM from 1995 to 2004. It had the same focus on the third parties in the pre-trial stage (consultation) and confirmed the finding that third parties could undermine early settlement and increase the possibility of a trial and ruling. It recognized that early settlement would give the most desirable result in terms of the cost, time and settlement of the dispute.785 Adey’s concern is the same: that third parties would increase the negotiation costs and serve to distract the disputing parties from the main issue under dispute.786

In fact, consultation is a vital stage in the dispute settlement process and, indeed, the analyzed hypothesis raises serious worries. However, four observations can be made. First, these studies are in the main

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784 Busch and Reinhardt, note 772, pp. 30-31.
786 Ibid., pp.2-4.
quantitative and there is a need for a qualitative examination. Secondly, it is the unique and interesting character that the WTO has given to the participation of third parties in the consultation process (allowing them to present interests which in some instances may be very broad or not precisely related to the disputed issue) that is beneficial to the application of the MFN principle and the wellbeing of the WTO system as a whole. In the meantime, the disputing parties are in full control of the consultative process, allowing them to respond to, and adopt, what they believe is in the interest of a particular dispute. Simultaneously, they keep the bigger picture in mind, without...

787 In this regard Qurashi argues that "some of these measures are more transparent and relevant than others in terms of shedding an accurate light on the participation of developing Members in the WTO dispute settlement process. Some quantitative measures based on the number of disputes resolved through the dispute settlement process involving developing Members are questionable. First, where they include disputes resolved through consultation. Whereas this process of the dispute settlement system is important, it contributes to the distortion of the results, in that the consultation process does not partake of the core of the litigation process. Further, it is a process where the 'power ratio' between Members can lend itself to the resolution of disputes; and arguably its inclusion can provide a measure of this 'power ratio', as much as anything else.

"The process of consultation between developed and developing Members takes place in an uncontrolled environment which allows for the possibilities of external linkages to the dispute. The discrepancy in the ratio of economic and political power between the two parties can open up the possibility of the more powerful Member linking external considerations to the settlement of the dispute. There is a case therefore for discounting the consultation process when measuring the frequency of the dispute settlement user by developing Members. Second, quantitative measures, which do not differentiate between the different forms of participation and their burdensome nature, need also to be noted. Thus, participation in the consultation process, as well as participation as a third party, is not as burdensome a process as participation as a complainant in the actual panel and appellate process of the dispute settlement system. Third, statistics on the number of times developing Members have engaged as complainants or third parties without further ado are incomplete because they do not have a reference point as a measure. Thus, what does '79 occasions of complaints on the part of developing Members' on its own convey? Finally, quantitative measures can be opaque in terms of whose participation within the Member State complaining is actually being recorded, i.e. the extent to which the complaint is government inspired and initiated, or results from requests made by the domestic industry, or other interested parties." Asif Qureshi, 'Participation of Developing Countries in the WTO Dispute Settlement System', (2003), 47(2) Journal of African Law 174, pp.181-182.
necessarily dealing with it in the consultation process.\textsuperscript{788} Thirdly, the overall number of disputes settled at the consultation stage is high. According to the WTO official website, 202 of the 332 disputes brought to the DSM in its first ten years of operation to July 2005 (that is, significantly more than half) have been settled without even reaching the panel stage.\textsuperscript{789} Fourthly, other scenarios, as far as developing countries are concerned, have not been considered. These need to be looked at with regard to third parties’ participation in consultation, apart from the issue of early settlement.

6.5 Awareness among Third Parties’ Not Escalate Disputes

Notwithstanding the statistics that show that third party participation in consultation would lead to a panel process in a way that would undermine early settlement, third parties could play a role in not escalating cases but instead encouraging early settlement during consultation. This is especially the case when a third party which has intervened in consultation sees that it would protect its interests more efficiently through a mutually agreed solution or through the withdrawal of the case to give more time for negotiation. Hence, third parties could try to put pressure on the disputing parties to convince them to resolve the case through negotiation, so as to reach a mutually agreeable solution that would protect the interests of all the disputing parties.

\textsuperscript{788} Qi Zhang, \textit{Consultation within WTO Dispute settlement: A Chinese Perspective}, (Peter Lang, 2007), pp.119-121.

\textsuperscript{789} Website, \url{http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm}, last seen on 10-02-2009 at 1:21pm.
There is evidence of this having taken place in the pre-trial stage of the Sugar case. This particular example involved a large number of third party interventions in consultation (about 25) due to the significance of the case for WTO jurisprudence. A number of third parties made attempts to persuade Australia, Brazil and Thailand to withhold their request for the establishment of the panel. As has been noted by Danvivathana, “some of these had called upon the complainants ... to withdraw their requests for the establishment of a panel, even though they were exercising their legitimate right to use the dispute settlement system of the WTO after they had exercised[d] [their] judgment as to whether action under these procedures would be fruitful”.

However, in this dispute Brazil and the rest of the co-complainants did not believe that it was in their interests to settle the case. They preferred to go to the panel. The unnecessary escalation of disputes is no more in the interest of the disputing parties than it is of third parties. Awareness among third parties that they should not overburden the dispute settlement process is evident during the panel and AB processes, which they have organized themselves to speak ‘with one voice’ instead of operating individually. Indeed, the consultation process is where disputes can be settled at a very early stage. Even so, it can be seen as the first step towards the panel and AB stages. Nevertheless, there is an awareness among third parties that they should not overburden the dispute settlement mechanism.

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790 More details in chapter four section 5.4.3.
792 More detail of this analysis in chapter five section 5.3.1.2.
but should continue to support the settlement of disputes, either through direct negotiation with disputing parties to settle their disputes promptly whenever it is appropriate, or by organizing themselves (i.e. by choosing a single spokesperson and position) for the sake of efficient negotiation at the consultation stage.

6.6 The Vital Role of Members’ Power and Ability in the Negotiation Process

6.6.1 Developing countries and the power-driven GATT process

Costa Rica argues that it is useful to look at the GATT dispute settlement process while analyzing the need for the reform of third party participation in the DSM. It is worth recalling the Uruguay dispute brought under GATT, which shows developing countries’ frustration with the diplomatic process and the pressure put upon them in this regard. This prevented them from protecting their interests at that time. Indeed, one common aspect of the GATT adjudication system and consultation in the WTO DSM is that the economic power of the disputing parties has a significant impact on the dispute process.

Alilovic argues that due to the absence of a binding panel procedure, the majority of cases under the GATT dispute system were settled by diplomatic means. Here, economic strength was a key element, if not the most important influence on the outcome. This certainly disadvantaged the poorer and less powerful GATT members. This is

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793 Communication by Cost Rica, TN/DS/W/12, (24 July 2002).
794 More detail of the Uruguay dispute is given in chapter one.
illustrated by the fact that developing countries offered absolute concessions in 82% of their GATT disputes, whereas the EC and Japan did so in only 46% and 54% respectively. Hence, the GATT adjudication system favoured the more economically powerful at the expense of the poorer and less powerful members.\textsuperscript{795}

For this reason, some developing countries, such as Venezuela, were not fully satisfied with the settlements taking place under GATT. Their requests for a panel (which were constantly denied) would have re-established their cases before the DSM, with a reduced incentive to discuss mutually agreed solutions at the consultation stage. It has been argued that this is because “with a binding dispute mechanism, a more judicial panel, and a standing AB, complainants are bringing forward cases which were once thought to be too complex or sensitive [so] they would have been blocked under the GATT rules. Such complex cases are not amenable to resolution through negotiation.”\textsuperscript{796}

Some tend to believe that the consultation phase is insignificant and that its sole function is as a preparatory stage for the panels. In these circumstances, the disputing parties engage in “nothing more than a fact-finding, legal discovery where the legal officials clamp down on incautious commentary and attempt to get as much out of the other side as they can”. On the contrary, the pre-trial negotiation stage ought not to be misjudged; it has a vital role to play in the dispute process. Indeed, there are many bureaucrats and trade attorneys who believe that crucial political and economic achievements can be accomplished during meaningful negotiation in the consultation

\textsuperscript{796} Ibid., p.296.
After all, a great proportion of WTO disputes are settled through consultation. Nonetheless, there is a great deal of dissatisfaction with the current procedures which govern consultation under the DSU. Among several aspects of the current pre-trial negotiations stages according to Article 4 of the DSM requiring serious review is the involvement of third parties.

6.6.2 Developing countries and the WTO consultation phase

6.6.2.1 Developing countries require special attention

Submissions by developing country members of the WTO indicate dissatisfaction with the level of seriousness with which members approach the need to obtain a satisfactory settlement of the matter at hand before resorting to seeking the establishment of a panel. Other developing country members have indicated the need to prevent the arbitrary refusal of third party requests for consultations, and the need for consultations to take into account the financial and human resource constraints (especially of the less developed countries) in the conduct of such consultations. This all indicates a need to strengthen the consultative process and to make developing country participation in such a process more effective. Third parties will be discussed in more detail later.

Developing countries, especially those which have no in-house legal counsel, encounter many difficulties with regard to consultation. This is because they do not have the resources required to carry out

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797 Ibid.
798 Submission by Jamaica, note 757.
799 Submission by the Separate Customs Territory of Taiwan, revision, TN/DS/W/36, (22 January 2003).
consultations. There are special arrangements for developing countries in Article 4.10 of the DSU, which calls for “special attention to the particular problems and interests of developing countries Members”. This provision could be made more effective if it were accompanied by technical assistance to enable developing countries to consult on an equal footing with other WTO members. 800

The provisions of Article 4.10 are a further example of the failure of the S&D to meet its aims: in this context to give developing countries particular consideration during the consultation stage. This makes one wonder whether this addresses the developing countries’ special circumstances in the consultation process. 801

It is true that developing countries are given extra time in consultations because they need to be treated differently from their larger counterparts. However, this is not sufficient on its own to improve their position in the consultation phase. In practice, developing countries find it difficult to decide on a place and a timetable for consultation. They also find it difficult to obtain all the information necessary to plan their arguments. These difficulties are of a procedural kind. 802

Another perspective would be that since the ‘special attention’ that is required is not clearly defined, it “should also be given to the efforts that developing countries are making to comply with their obligations,

802 Ibid.
since WTO agreements require many administrative and legislative reforms, which can be lengthy and difficult to accomplish". 803 Therefore, to enhance such provisions, authoritative interpretations need to be made by the panels and the AB to clarify the meaning of 'special attention'. This would develop a general guideline to be applied to all the problems in the consultation processes that involve developing countries. 804

Furthermore, as far as consultation is concerned, Article 12.10 805 of the DSU does in part give developing countries the right to extend the consultation timeframe, and, if the parties fail to agree on such an extension, the Chairman may intervene to decide the issue. The main objective of this provision is to give particular consideration to developing countries' limited legal and financial resources, allowing them to present their cases without the restriction of narrow timeframes. Bearing this objective in mind, it has been argued to the contrary that this would not save developing countries' limited resources. In practice, it has been pointed out, the shorter the dispute resolution process the better it is for developing countries. In this respect, it is suggested that the extension of the timeframe could be

803 Ibid.
804 Ibid.
805 Full text of Article 12.10 is: "In the context of consultations involving a measure taken by a developing country Member, the parties may agree to extend the periods established in paragraphs 7 and 8 of Article 4. If, after the relevant period has elapsed, the consulting parties cannot agree that the consultations have concluded, the Chairman of the DSB shall decide, after consultation with the parties, whether to extend the relevant period and, if so, for how long. In addition, in examining a complaint against a developing country Member, the panel shall accord sufficient time for the developing country Member to prepare and present its argumentation. The provisions of paragraph 1 of Article 20 and paragraph 4 of Article 21 are not affected by any action pursuant to this paragraph."
restricted to adding (for instance) 30 days under Article 4.7 and 10 days under Article 4.8.\textsuperscript{806}

Allocating more time for developing countries in the consultation process would on its own help to address their special needs and would make the consultation stage easier for them. The DSU has made separate provisions to assist in the granting of special attention for the developing countries in Article 4.10 of the DSU.\textsuperscript{807}

From the perspective of reform of the DSU, it has been suggested that, in order to strengthen Article 4.10, a provision ought to be added that if a developed and a developing country which are parties to a dispute decide to request a panel, the developed country member (whether complainant or respondent) should be required to explain to the panel how it had considered the particular problems and interests of the developing country member at the consultation stage.\textsuperscript{808}

6.6.2.2 Bona fides in consultation

The paradox is that it is believed that there is a trend for good faith not to be implemented appropriately during the consultation stage by the disputing parties. This makes the disputing parties in the consultation process relatively confident that neither party will be altogether truthful. There is then a recourse to a formal panel process, within a considerably short time on some occasions. This has undermined the process of reaching mutually agreed solutions during

\textsuperscript{806} Working Paper of South Centre, note 801, pp.9-11.  
\textsuperscript{807} Ibid.  
\textsuperscript{808} Communication from India on behalf of Cuba, Dominican Republic, Egypt, Honduras, Jamaica and Malaysia, Dispute Settlement Understanding Proposals: Legal Text, TN/DS/W/47, (11 February 2003), pp.2-3.
consultation. In addition, there is a serious criticism that disputing members are not sincere in the conduct of their consultations. In particular, developing countries argue that developed ones do not take into consideration the problems and interests of developing countries stated in Article 4.10 while they are at the consultation level. It is argued by Donald McRae that "there is a consultation obligation before requesting a panel. But in many respects that obligation is pro forma."

Moreover, the consultation phase is described as being conducted in a small room in the WTO headquarters in Geneva and lasting no more than two or three hours. The language normally used in consultations is English, with no interpreters, transcript or recording being involved.

The consultation rules under the DSU impose no clear obligations on the disputing parties to participate effectively in consultation, while the requirement "to engage in these procedures in good faith in an effort to resolve the dispute" is subject to the disputing parties' readiness to participate in good faith during the consultation stage. Not all disputant members have shown the same bona fides in the consultation process. Some appear to deliberately misuse the system's inherent flexibility to frustrate the conduct of fruitful consultations. This has resulted in many WTO members explicitly declaring their

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812 William J. Davey and Amelia Porges, note 772, pp.704-705.
concerns regarding the efficiency of the consultation phase, and calling for the enhancement of the relevant rules in the DSU so as to ensure that effective consultation can take place. 813

The absence of clear obligations on the disputing parties during consultation in the DSM means that all they have to do is to make their request, perhaps meet once, wait for the sixty-day period to end and then proceed to the panel stage. This encourages a negative attitude among the disputing parties. They feel that consultations are merely a pre-forum stage and “at best, a cooling-off period”. 814

“Generally speaking, consultations will encourage the resolution of disputes in the relatively straightforward cases, in the absence of overwhelming domestic political pressures. Even for those settled, the consultation itself is only a procedure to bring the parties to the table for serious negotiations and acts as one of the factors leading to the settlement, rather than as the single contribution to the resolution.” 815

Hence, when third parties are involved in high profile cases, they alone cannot be blamed for negatively affecting the settlement process in the consultation phase.

Indeed, as has been argued by Mitchell, one of the main drawbacks to the principle of good faith is that there is no underlying legal ground to decide if a member has acted in good faith or bad faith. This is the

result of the vagueness surrounding the definition of 'good faith' in international law, and of the hesitation of WTO panels and the AB to set out the general principles governing the use of the term in the context of WTO disputes. Establishing such detailed principles would certainly make it easier and more practical to decide whether a WTO member had acted in good faith or not.\(^\text{816}\) These underlying principles, having once been well defined, could later be formally adopted in Article 4 of the DSU. Given that members might not conduct consultations effectively, to increase effectiveness Jamaica proposed that members conducting consultations ought to present a written paper to the DSB. This would have to be truthful and brief, to enable an assessment of the likelihood of a mutually agreed solution. The paper would have the benefit of making the operation of the dispute settlement system more systematic, and one should be presented to the panel if it so requested.\(^\text{817}\) On the other hand, it is virtually impossible for the panel to guarantee that the measures that have been presented to it have not been properly executed during the consultation process. Nor can it effectively compel the disputing parties to conduct consultation against their will.\(^\text{818}\)


\(^{818}\) Kim Van der Bought, 'The Reform of the Dispute Settlement System of the World Trade Organization: Improving Fairness and Inducing Fear', (2007), 4(2) Manchester Journal of International Economic Law 2, p.35., The AB has clearly stated that, "consultations are by definition a process, the results of which are uncertain", US – Measures Affecting the Cross-Border Supply of Gambling, appellate
Improving the consultation stage would, in turn, improve the participation of developing countries in the dispute settlement system. It is not so costly and takes less time than starting a formal dispute, expenditure being a real concern for developing countries.\textsuperscript{819} However, most of the proposals that have been made to improve the consultative process have the drawback of increasing the formality\textsuperscript{820} of consultation, which by its character ought to remain an informal forum for dispute settlement.\textsuperscript{821} But there have been interesting proposals made to increase the firmness of the language used to conduct consultations, which would not affect the informal character of the process.

It has been suggested that although the WTO and NAFTA have different procedures for the settlement of disputes, they share the feature that the dispute is triggered by the request for consultation. However, NAFTA uses stronger language to encourage the disputing parties to negotiate effectively and reach a settlement, than the language employed in the WTO's procedural rules. The latter merely make it clear that reaching a mutually agreeable resolution is the preferred way to settle a dispute. Also, the disputing parties may request the use of good offices, mediation or conciliation by the Director General at any stage of the dispute process.\textsuperscript{822}

\textsuperscript{819} Ibid.

\textsuperscript{820} Consultation is defined as "negotiation between parties aiming to settle the issues concerned. With an informal character, it is a flexible instrument of implementation that is extremely suitable when States are reluctant to relinquish sovereign powers". Xin Zhang, note 815, p. 411.


\textsuperscript{822} Rafael Leal-Arcas, 'Choice of Jurisdiction in International Trade Disputes: Going Regional or Global', (2007), 16 Minnesota Journal of International Law 1, pp. 21-22.
NAFTA, by contrast, more robustly requires that

"The parties should make every attempt to come to a resolution of the matter between them in a mutually acceptable manner by a) providing sufficient information to each other regarding their rights which have been harmed under NAFTA, b) treating confidential or proprietary information with the same level of care as the other party, and c) trying to avoid a solution that adversely affects any other party".

Unlike the situation under the WTO rules, the use of good offices is also obligatory. In NAFTA, in case of a failure in the bilateral negotiations, a NAFTA Free Trade Commission, including a representative from a state which is a member of NAFTA, must be established within ten days. The Commission has the right to seek the views of experts, to recommend the use of good offices, mediation, conciliation or any other method of peaceful dispute resolution, or to propose principles and guidelines to support the disputing parties in reaching a mutually acceptable solution. Only after all attempts have failed can the disputing parties request the establishment of an arbitration panel.\footnote{Ibid.}

Thus, it can be seen clearly that the use of stronger language and two levels of consultation would make the process more meaningful and allow more time for the disputing parties to negotiate mutually agreeable solutions. Such proposals would not affect the informal nature of the consultation process in the WTO. Unfortunately, the difficulties facing developing countries are not limited to conducting effective consultations, as they are also most vulnerable to less
favourable settlements of disputes at the consultation stage, which is the subject of the following section.

6.7 Unfair Settlement

In general, trade disputes can be resolved either through negotiation (which is described as a power-based dispute settlement process) or through the adjudication of a third party (which is recognized as a rule-based approach). However, resolving trade disputes in a power-based dispute mechanism, in the form of negotiation between the disputing parties, tends to give control of the settlement of the case to the more powerful party, whether in economic, political or military terms. Hence, in such systems the trade interests of the smaller and less powerful parties tend to be undermined, especially when bargaining with a larger and more powerful party. In this regard, it is argued by Matsushita that “when the resolution of a dispute is negotiated between a party with more economic and political power and another party with less of such power, the weaker party is often pressed to make concessions against its will”.

On the other hand, a rule-based dispute mechanism, like the one in the WTO, is more beneficial for developing countries, as they can sue the larger and more powerful members, providing that they had the resources available to bring and pursue such a case. In fact, developing countries have brought a number of successful cases against developed members such as the EU and the US through the

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824 Kim Van der Borght, note 813, p.1232; Davey and Porges, note 722, p.4.
826 Ibid.

However, the WTO dispute settlement system is not merely a legal process. It has other features that allow negotiation between the disputing parties. In identifying the processes of dispute settlement in the WTO, and bearing in mind the economic and political power of the disputing parties, three stages can be identified. The first is the pre-trial stage, where power can play a significant role. At the second stage, the panel and AB processes are more legalistic and reduce the impact of any power imbalance between the disputing parties. Finally, at the post-trial stage, the economic and political power of the disputing parties may have a vital role in the dispute process. Here we shall examine the pre-litigation stage and consider the role of third parties.

Hoekman and Mavroidis argue that in cases where bilateral settlements take place between developing countries and their developed counterparts, the settlement is more likely to be unfair:

830 US Gambling, note 818.
831 Mitsuo Matsushita, note 825, p.4.
"When developing countries participate in such deals along with developed countries, because of the inequality of power between the two, they might be forced to non-WTO-compatible solutions. On the other hand, when they do not (which is the vast majority of cases) they might see their rights under the WTO contract diminished since the parties to such deals hardly have the incentive to respect MFN."832

According to Article 3 of the DSU, one of the objectives of the DSM is to confer security and predictability on the multilateral trading system.833 James Smith, a former AB member, argues that "these expectations reflected the conventional wisdom that moves to establish binding, third-party Arbitration in international law generally favor smaller, less powerful states, whose bargaining leverage in specific disputes is enhanced when impartial judges publicly endorse their position".834 This supports the contention of Shaffer that "fear of political and economic pressure from the United States and EC undermines their ability to bring WTO claims".835

Shaffer makes an interesting point in this regard. He argues that developed countries such as the EU and the US are well prepared to take up the cost of bringing their cases to the DSM. Developing countries, on the other hand, have a limited legal and financial

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capacity, which makes it harder for them to exploit the legal procedures under the DSU. This will increase the developing countries’ motivation to accept an unfair settlement outside the legalized WTO dispute settlement system. Shaffer argues:

“[W]hen developing countries are unable to mobilize legal resources cost-effectively, their threats to invoke WTO legal procedures against a developed country lack credibility. Unless developing countries are able to develop techniques to more cost-effectively mobilize legal resources, they actually could be worse off under a legalized system that has become much more resource-intensive in its demands.” 836

In connection with the significance of the economic power of the parties to the GATT dispute settlement system, Guzman and Simmons argue that in the WTO consultation process the economic or political influence of the parties also matters. In this respect, they assert that if consultation involves parties with unequal economic or political power, the most probable result is early settlement, because a smaller or less powerful defendant is more prepared to accept the demands of the larger and more powerful party. In addition, the more economically or politically powerful member “might be especially able to extract and employ implicit threats of retaliation in order to avoid a panel. On the other hand, fairly symmetrical disputing pairs might be more likely to resort to panels if neither side has the leverage to force a concession from the other.” 837

Guzman and Simmons have examined a number of cases involving disputing states of different strengths, in order to discover whether a power imbalance would mean that the dispute would not reach a panel but would be settled at the consultation phase. Guzman and Simmons considered cases which were brought both by developed and by developing countries in each of these categories. It was found that economic power imbalances could lead to cases not being taken to the panel stage. For instance, they examined the GDP of the disputing parties and found that, where the respondent or the complainant had a higher GDP, the weaker party would be more likely to settle at the consultation stage, rather than taking the case to the panel phase.\textsuperscript{838}

In addition, Guzman and Simmons looked at the ‘bilateral trading relationships’ of the disputing parties to examine the effect of any power imbalance on the settlement of the dispute at the consultation stage. This was done in light of the fact that it is one of the main tasks of the WTO to give market access to other members based on the MFN treatments. Such trade and economic dependence of the developing countries on their larger counterparts will negatively affect the negotiating power of the former. This could result in a dependent member making concessions during consultations, so as to avoid risking the preferential access to the respondent’s market. Hence, “the greater the dependence of the complainant on the export market of the defendant, the more willing the complainant should be to accept concessions, and the less likely it is that the case will escalate”.\textsuperscript{839} Many developing countries which are members of the WTO find that over 90% of their exports rely on special access to the markets of developed countries. As a result, if one of the disputing parties has a

\textsuperscript{838} Ibid., pp.217-218.
\textsuperscript{839} Ibid.
lower GDP than the other, and a greater market dependence, then whether as respondent or complainant, its bargaining power will be negatively affected. This would make it likely to accept an unfavourable settlement during the consultation phase, and lessen the likelihood of the case going to the panel phase.  

Petersmann argues that the ideal method of peaceful dispute settlement is one which is non-discriminatory, and one which provides equal rights to the disputing parties to defend their interests under fair and just procedural rules. In addition, he considers that both alternative dispute resolution (ADR) approaches (such as mediation, arbitration and conciliation) and binding dispute settlement systems (such as the WTO dispute mechanism) are useful and could be chosen to resolve any trade conflict, depending upon the conditions and circumstances of the dispute. Furthermore, he argues that a binding dispute mechanism is more likely to be preferred by the smaller and less powerful parties, since it reduces the power imbalance among the conflicting parties.  

Thailand was forced to settle early in seven disputes for political reasons. In addition, Petersmann contends that LDCs face difficult situations in the WTO and cannot seek the establishment of a WTO panel. This is not because they do not have enough cases to bring forward, but because they face many impediments, such as the high  

840 Ibid. Also, Zejan and Frank, in an empirical analysis, link the difficulties of facing developing countries, and particularly LDCs, when negotiating with their developed counterparts in the consultation phase over the amount of aid and preferential development programmes that they receive; Pilar Zejan and Frank L. Bartels, ‘Be Nice and Get Your Money: An Empirical Analysis of World Trade Organization Disputes and Aid’, (2006), 40(6) Journal of World Trade 1021, pp.1021-1023.  
841 Ernst-Ulrich Petersmann, note 738, pp. 303-307.  
842 This has been dealt with in chapter three, section 3.3.3.
cost of bringing a case, non-cooperation from the private sector and
the fact that their economies are often dependent on special trade
preferences awarded by the more developed members. It is possible
that an LDC, such as Bangladesh, could decide to use the DSM and try
to lessen the power imbalance. This could be achieved by seeking the
assistance of the ACWL (and to a limited extent the WTO secretariat)
according to Article 27.2 of the DSU. However, Bangladesh and many
other LDCs were advised by both the ACWL and the WTO secretariat
not to proceed to the WTO panel phase.843

The dispute that was brought by Bangladesh was concluded at the
consultation phase without a request for a panel. This is very
interesting in terms of illustrating how developing countries could
perhaps settle in consultation without gaining full concessions from the
defendant. More interestingly, it could show how they may be advised
to do so by those who were supposed to be defending them and
bringing their cases forward to the panel and the AB. This is explicit
evidence of how unfair settlements can happen during the consultative
process.

In addition, other interesting forms of misuse of the settlement
process in the consultation phase have been identified. Practice shows
that although the consultation phase has been successful to a certain
extent in settling disputes without the need to go to the panel and the
AB, the political nature of the consultation has been abused by some
members in order to delay cases and to avoid the establishment of
panels. This is because when the disputing parties have reached a
mutually acceptable resolution they could continue consulting with

843 Ernst-Ulrich Petersmann, note 738, pp.308-309.
each other even after the expiry of the 60-day limit. This is why some members agree to settle, not for the sake of the settlement, but for the sake of the delay and the avoidance of the initiation of a panel. In a great number of disputes, the consultation stage has taken up to 15 months to conclude, instead of the 60 days provided in Article 4.

It has been suggested by Okediji that multilateral negotiation could be a useful bargaining strategy, helping developing countries to reduce the power disparities between them and their developed counterparts, while negotiating the TRIPS agreement.\textsuperscript{844} He argues that:

"In short, the dichotomy between national and international affairs is increasingly difficult to sustain. The overlapping of domains with respect to just one state actor becomes unmanageable when multiple actors converge to negotiate a multiplicity of issues, as is typically the case in multilateral trade negotiations. Indeed, the characteristic use of coalitions in multilateral settings is one way to manage this complexity, even as it introduces an additional set of issues to the broader negotiation process."\textsuperscript{845}

A very recent case illustrates the importance of the role of third parties in helping to negotiate a settlement in support of a smaller and less developed member against a larger and more developed one. In this case, Antigua and Barbuda called for the support of other WTO members to support it in attempting to force the US to negotiate a compliance settlement regarding the Gambling dispute\textsuperscript{846}. It failed to convince the US to make its inconsistent measures comply with the WTO rules, despite the ruling of the panel and the AB against the US

\textsuperscript{845} Ibid., p.843.
\textsuperscript{846} US Gambling, note 818.
behaviour. Therefore, since Antigua’s retaliation would go unnoticed by the US, it asked other members to help it to put pressure on the US to meet its obligations and to implement an adopted ruling against its restriction of internet gambling. This is what happened when Antigua decided to negotiate a mutually acceptable resolution with the US (which they initially wanted) without seeking the DSM’s final decision. Mark Mendel, the leading counsel to the Antiguan government on the case,847

"reiterated to WTO Members at the 22 May meeting that what his government wanted most was a mutually acceptable compromise. However, he said, "The US never engaged with us in any discussions with a view to settlement or compromise. The only solution we were ever offered by the United States was for us to abandon our claim and go away."848.

This raises serious questions about the function of the WTO dispute settlement system for developing countries. In fact, a comparison could be drawn between the implementation stage and consultation stage, since the notion of power plays a vital role in both. Developing countries are less politically and economically powerful, have greater market dependence, and depend economically on the preferential access provided by developed countries. This makes it more difficult for them to negotiate settlements with their developed counterparts at the consultation and implementation stages of the WTO dispute process. For this reason, the African group proposed a joint implementation, which would allow a developing country to form a

848 Ibid.
coalition of WTO members to implement an adopted decision against developed countries.\textsuperscript{849}

The presence of the same ‘power ratio’ between developed and developing countries during consultation has also led Qureshi to propose the attendance of a third member or a WTO official in the course of the consultation phase. This presence would be for monitoring purposes, and could reduce the effect of the power difference between developed and developing countries during consultation.\textsuperscript{850} The approach taken by the African group regarding joint retaliation, and the idea put forward by Qureshi regarding the attendance of third members during consultation, also represent the views of both WTO members and academics. One can argue that third party intervention can play a role in reducing the power imbalances in negotiations. It can also back up the Costa Rican proposal for the enhancement of third party rights in the consultation process.

6.7.1 Pressure on violators to participate in fact finding

As has been discussed, mutually agreed resolutions are always preferable and are the prime objective of the consultation process under the DSU. However, this function has been undermined by the unwillingness of some of the disputing parties to negotiate in good faith. This is because they consider the consultation phase to be a pre-trial stage and do not participate in an effective fact-finding process during consultation.\textsuperscript{851} Indeed, engaging in fact-finding during the

\textsuperscript{849} More detail on the power imbalance at the enforcement stage and on the African proposal is given in chapter three section 3.3.6.
\textsuperscript{850} Asif H. Qureshi, note 787, p.197.
\textsuperscript{851} Alan Wm. Wolff, note 809, pp.422-423.
consultation phase is vital for defending the measures under dispute. This may both prove vital for the removal of some, if not all, of the measures under dispute. It will also help to identify and prepare for the issues and measures that will need to be discussed before the panel in case of an escalation of the dispute. Effective fact-finding processes will help to develop the legal bases and agreements of the dispute. Some claims could be eradicated if the complainants reached agreement, which would lead to better functioning of the panel. The absence of discussion and fact finding have undermined the effectiveness of the consultation stage.\textsuperscript{852}

The \textit{India – Patent} case illustrates how vital it can be for effective fact-finding processes to be undertaken during the consultation phase. During the consultation process, while investigating the factual matters of this dispute, the US requested some information about “an administrative system for receiving ‘mailbox’ patent applications”. India, however, refused to respond to the US queries.\textsuperscript{853}

The AB in the \textit{India – Patent} insisted on the importance of the fact-finding process in consultation and stated that:

“All parties engaged in dispute settlement under the DSU must be fully forthcoming from the very beginning both as to the claims involved in a dispute and as to the facts relating to those claims. Claims must be stated clearly. Facts must be disclosed freely. This must be so in consultations as well as in the more formal setting of panel proceedings. In fact, the demands of due process that are implicit in the DSU make this especially necessary during consultations, for the claims that are made and the facts that are established during consultations do much to shape

\textsuperscript{852} William J. Davey and Amelia Porges, note 772, p.705.  
\textsuperscript{853} Ibid., p.705., and Kim Van der Borght, note 813, p.1237.
Moreover, it has been argued that the majority of the proposals that have been put forward to strengthen the consultation process would lead to an increase in the formality of the process. This, by its nature, is informal and needs to remain so.\textsuperscript{855}

Apart from these proposals, it has been suggested that the fact-finding process between the disputing parties ought to be encouraged. It has even been suggested that a distinction could be made between the principle of good faith and fact finding in the consultation process, or that the principles and rules of the functioning of the fact-finding process in the consultation could be established, which would result in a more effective consultative process. The AB has explained the consequences of the good faith and due process during consultations in the above-mentioned statement. However, it is not the function of the AB to separate the fact-finding process from the exercise of good faith in consultation, since by “making it a separate function it would be likely to change the nature of consultations, which would be contrary to the spirit of the DSU”.\textsuperscript{856}

In parallel with fact-finding issues, it has been argued that third party intervention would have the advantage of enriching the consultative process by adding different dimensions and claims regarding the issue under dispute. This would result in stronger legal claims, in order to make more convincing arguments to win the case in favour of the

\textsuperscript{854} India - Patent Protection for Pharmaceutical and Agricultural Chemical Products, appellate body report, WT/DS50/AB/R, adopted on 12 December 1997, para.94. [hereinafter India Patent]

\textsuperscript{855} Kim Van der Borght, note 813, pp.1237-1238.

\textsuperscript{856} Ibid.
parties that they support. The third parties would also add multilateral pressure on reluctant respondents, in order to negotiate effectively and bring the breaching measures into conformity with WTO rules. 857

Another dimension regarding the facts being raised during the consultation process is that they can be unitized in the parties’ and third parties’ written submissions before the panel. The result is that a third party which had not participated in the consultation, or whose request to intervene in the consultation was declined by the disputing party, would be prevented from gaining valuable information about the dispute which would have strengthened its arguments before the panel and the AB. 858

6.8 Discrimination among Third Parties in Consultation

There are certain steps which need to be taken before a WTO member can intervene in the consultation process, according to para 11 of Article 4 of the DSU. Hence, any member that wishes to intervene must notify the DSB and the principal disputing parties of its interest and intention to intervene within a certain time limit. The principal disputing parties are then allowed to examine whether this interest is ‘well founded’. 859 This has resulted in many intervention requests being rejected. Para 11 gives an individual right to the principal parties (defendant and respondent) to accept or decline other members’ requests to intervene as third parties in the consultation process. Such

859 Article 4.11 of the DSU
declination of intervention is frequently based on the fact that the substantial trade interest\textsuperscript{860} is not satisfied.\textsuperscript{861} For instance, this unconditional power to reject third party intervention in the consultation stage is frequently used by the US, which will allow only a member with a direct trade interest in a dispute to participate and will decline those who have broader systemic interests in the dispute. This practice has led to a denial of some members’ requests to intervene in consultation, while others have been allowed to intervene. As a result, many allegations of discrimination and unfairness have been made.\textsuperscript{862} The use of the rights provided in para 11 of Article 4 are described by Davey as follows: “The absence of control over the respondent’s discretion has led to complaints of abuse and ‘stacking’ the consultations.”\textsuperscript{863} Distinguishing between parties which have and do not have substantial trade interests in the consultation is a general practice of the US. It requires third parties to provide information and take other measures to demonstrate that they have such interests when seeking intervention.\textsuperscript{864}

Even those who have some reservations concerning the enhancement of the rights of third parties in the consultation phase admit that the rights in para 11 of Article 4 have been used excessively. They argue

\textsuperscript{860} See also chapter five, section 5.2.
\textsuperscript{863} William J. Davey and Amelia Porges, note 772, pp.2-3.
\textsuperscript{864} Ibid., p.5.
that guidelines ought to be developed to overcome the excessive use of para 11 of Article 4 of the DSU.\textsuperscript{865} Third party intervention in consultation is vital, although in practice such participation is restricted. This validates members' calls for the reform of third party participation in consultation, which, therefore, needs to be dealt with. Practice shows that:

"the respondent has denied claims of 'substantial trade interest' from parties who both expressed and had obvious substantial trade interests, or accepted such claims only from parties likely to be sympathetic, or denied participation by any WTO Member that had requested consultations in its own right\textsuperscript{866}... In the end, the historical trend may overwhelmingly favor enforcement over settlement, particularly where it is clear that a respondent’s exclusion of parties from Article XXII consultations is not in aid of settlement but purely for obstruction and delay."\textsuperscript{867}

6.9 Developing Countries’ Direct Interests

It has been argued that the capacity of developing countries is restricted. This imposes a serious challenge in identifying valid trade barriers that affect their exports. Supporting developing countries to identify clearly and understand any existing inconsistent trade measures will allow them to pursue more legally robust and successful disputes.\textsuperscript{868} Also, once a request for consultation is made, a formal dispute is triggered under the WTO, a DS number is allocated and the request is published on the WTO website. Therefore, the consultation process plays a vital role in allowing members to gather more facts

\textsuperscript{865} Minutes of Meeting, TN/DS/M/7, (26 June 2003), p.6.
\textsuperscript{866} William J. Davey and Amelia Porges, note 772, p.701.
\textsuperscript{867} Ibid.
\textsuperscript{868} Roderick Abbott, 'Are Developing Countries Deterred from Using the WTO Dispute Settlement System?', (2007), available online at www.ecipe.org/archived-events/are-developing-countries-deterred-from-using-the-wto-dispute-settlement-system, last seen on 4-9-2007 at 3pm, pp.12-13.
and information related to the dispute and to “exchange views about any violation of the rules that has been alleged”. 869

In fact, many smaller developing countries have desired to participate as third parties in the consultation process, because they have real interests in a dispute and believe that by doing so they can discover whether such a dispute would negatively affect their interests. Enhancing third party rights would allow developing countries to intervene effectively in consultation without being obstructed. Then, a developing country which had intervened in a consultation could decide if it was in its interests to make its own request for a consultation regarding the issue under dispute. 870

There are various ways to participate in the different stages of the DSM; thus, the effort to participate will also vary according to how a member chooses to do so. Joint consultation as a third party is the easiest way for developing countries to be involved in the DSM. In Roderick Abbott’s words, “to seek to join in (that is, to be present) as a third party during bilateral consultations does not take much effort (a simple request), nor require any active participation, whereas the pursuit of a case into a panel procedure as a complainant does involve substantial, and at times prolonged, investment of resources in time and effort”. 871

869 Ibid., p.7.
870 S. Narayanan, note 861, p.46.
871 Roderick Abbott, note 868, pp.6-7.
6.10 The Reform of Third Party Rights in Consultation: Substantial Trade Interest vs. Substantial Interest

When making proposals to enhance the rules that govern the consultation phase, it is vital to consider and maintain the informal character of the process. Strengthening third party rights in consultation will not affect the informal character of the political process. More importantly, it is vital to consider the interests of the developing countries when analyzing the reform of third party intervention in the consultation process. This is because it is easier for developed countries to be involved in the consultation, panel and AB stages, as they have the legal and financial resources required. Additionally, they face less political restraint and have wider trade interests. This is reflected in the statistics on WTO cases, where developed countries account for an overwhelming majority of the disputes brought to the DSM, both as principals and as third parties.

Unlike their developed counterparts, developing countries face many obstacles once they have decided to bring a case to the WTO dispute mechanism. Their limited financial and legal resources, as well as political constraints such as military and trade dependence, could prevent them from bringing a dispute, despite the fact that they have often expressed their concerns regarding procedural injustices that

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872 Asif H. Qureshi, note 787, p.197.
873 In this respect the representative of China has argued that “Such an approach was too rigid and failed to take into account the differences among the requesting countries. Furthermore, it could also lead to a practice where the responding Member might be tempted to routinely reject all the requests, especially where they considered that one particular request was not justified.” Minutes of Meeting, TN/DS/N/32, (29 June 2006), pp.1-2.
restrict their interactions with the WTO dispute settlement system.\textsuperscript{874} For developing countries, the option of being a third party is vital. This helps them to develop their experience and familiarity with the system, and make their views and interests known. It is also a more cost-effective way, both financially and politically, to access the DSM.\textsuperscript{875}

Additionally, as far as consultation is concerned, third parties can help developing countries to avoid unfair settlements in the consultation phase. In addition, by encouraging the fact-finding process they can put pressure on the respondent to move towards a negotiated settlement in the consultation phase without resorting to the panel. Finally, third party status can assist developing countries to decide whether the case is significant enough to warrant the move to the panel stage.

The DSU has chosen a restrictive approach regarding third party intervention in all stages of dispute settlement, including the consultation, panel and AB processes. This is so even when third parties have a very substantial trade interest directly related to the dispute. This has raised objections to the present role of third parties in the dispute settlement process and to proposals for reform being made.\textsuperscript{876}

\textsuperscript{874} More detail on these issues in chapters two and three.  
\textsuperscript{875} More detail on these issues is given in chapter four.  
\textsuperscript{876} Minutes of Meeting, TN/DS/M/1, (12 June 2002), p.4.
6.10.1 Removal of Members' discretion to decline a third party's participation

The views of members and academics have varied on how third party intervention in consultation could be enhanced. These views need to be examined carefully. For example, Chinese Taipei and Jamaica have both proposed that principal parties should keep their right to decline third parties' requests to intervene in consultation. However, they argue that a guideline ought to be developed to prevent discriminatory rejection of such requests.

This proposal has been criticised as unrealistic on the grounds that it would be difficult to develop appropriate guidelines which would eliminate such discrimination without prejudice to the rights of principal and third parties. Indeed, it has proven difficult for WTO members to reach an agreed and unified definition of the term 'substantial trade interests'. In addition, it is argued that

"there appears to be no basis for the fear expressed by Chinese Taipei that if the rules relating to third parties joining in the consultations were relaxed, the sanctity of the consultation process would be adversely affected. Even under the existing provisions of Article 4.11 of the DSU, if a party's request to join the consultations is refused, that party can seek direct consultations, which cannot be refused."\(^{878}\)

It has been suggested that an 'all or nothing' approach should be set as a guideline for the rejection of third party intervention in consultation.\(^{877}\)

\(^{877}\)"There was also the risk of discrimination among Members requesting to be joined in the consultations. Practice appeared to indicate that it was the defending Member which usually rejected requests to be joined in the consultations by third countries. Attempts to address this issue in the past had focused on finding an appropriate definition for the term substantial trade interest". Such efforts had so far failed as participants could not agree on a common definition. Minutes of Meeting, TN/DS/M/23, (26 May 2005), pp.1-2.

\(^{878}\)S. Narayanan, note 861, p.45.
consultation. According to such a rule, the parties to a particular dispute would have to accept all the requests of third parties to intervene in consultation, or else decline them all. However, this proposal is weak, since the majority of third party requests are made on a genuine basis. So it would be unfair for those with a very significant interest in the dispute to be punished by the application of an 'all or none' rule.

Interestingly, the rule that allows disputing parties to decline third party intervention makes it more difficult for WTO members to act as third parties in consultation than to make a separate request for consultation as a co-complainant. Hence, all WTO members have unconditional rights to undertake their own consultations.

Bearing in mind that third parties have the inalienable rights to establish their own panel (according to Article 4) and to appear as co-complainants (according to Article 9) much time is wasted. The EC has argued that "third parties in consultations that decide that they want to lodge a request for a panel have to undertake new consultations of their own. As a result, considerable time is lost and several panels may come about on the same subject." Also, joining as a co-complainant would result in even more complicated disputes and would increase their transactional costs. This is because co-complainants have more

879 "The G-7 advocates an 'all or nothing' approach to third party participation – according to which the responding Member would have the option of accepting or rejecting all such requests, but would not have the option to discriminate among would-be third parties" Bridges Weekly Trade News Digest, Vol. 10, number 14, 26 April 2006.

880 S. Narayanan, note 861, p.45.

881 Then they could join the dispute as a co-complainant, according to Article 9.

rights than third parties and because third party claims and interests must be considered and examined by the panel and the AB. Therefore, it could be argued that third party rights should be enhanced at the consultation stage. Otherwise, members with interests in a case will be limited to being co-complainants, which would create an extra burden on the dispute process, especially in a multilateral world. Improving third party rights would be a better option, and would restore the balance in the system between being a complainant, a co-complainant and a third party. Therefore, third parties need to have better options available to them and their requests for participation should not be rejected on frivolous grounds.

The removal of the discretion that is currently given to the disputing parties is a simple and straightforward proposal. It would eradicate any misuse of power and discrimination against third parties who want to join the consultation stage.

6.10.2 Substantial interest only

Another issue raised by Chinese Taipei is whether 'substantial trade interests' ought to be kept as a requirement for third party intervention. It expressed a concern that to keep the restrictive approach of admitting only third parties who have substantial trade interests into the consultation is unjustified for a number of reasons. To start with, the DSU offers the disputing parties other diplomatic options.
settlement options and they could invoke Article 5, which allows the use of mediation and other forms of ADR. Also, the principal parties are not restricted to the mediation provided for in Article 5. They can use private mediation and any other diplomatic means to settle their dispute peacefully, without affecting other parties’ interests. This gives the principal parties greater flexibility regarding the participation of third parties. However, the principal parties have to notify the DSB of their settlement results, and third parties have the right to comment if they find that such settlements are against their interests, or else they can make their own request for a formal dispute process. This allows the disputing parties a greater degree of confidentiality. Also, if they feel that the involvement of a third party could affect the settlement process, this process would differ from the consultation that would take place within a formal settlement process.

In addition, using differing definitions of ‘substantial interests’ for accessing the consultation and panel processes would result in an incoherent and inconsistent approach, and in a discriminatory exclusion of third parties from the consultation phase. By contrast, unifying the definition of ‘substantial interest’ would result in more coherent, equal and fair access for third parties during all the stages of the dispute process. It has also been argued that the fact that the term ‘substantial trade interest’ is not defined in para 11 of Article 4 of the DSU makes it even more difficult to reach a consensus between the WTO members on an exact definition. The fact that there has been

887 Minutes of Meeting, TN/DS/M/7, (26 June 2003), pp.3-4.
no agreement between the members so far tends to reinforce this argument. 888

Thus, the term ‘substantial trade interest’ ought simply to be replaced by the term ‘substantial interest’ 889 to bring it into conformity with the provisions that govern third party intervention at the panel stage. As Carmody argues, in response to those who are worried about the collapse of the WTO as a result of third party intervention in disputes, the use of the term ‘substantial interest’ would be enough to guarantee the continuance of the DSM:

“There are also reasons to suggest that multipartite intervention may not become a problem in the future either. One reason is the inability of Members to show ‘substantial interest’, regardless of how illusory a standard that might be. Alternately, Members may not want to intervene, or as it appears from the Bananas Trilogy, may be content to allow other Members to appear on their behalf. A further pragmatic reason may be that not all Members have the resources to intervene. Even the redoubtable Office of the United States’ Trade Representative has recently stated that it is unable to pursue every trade-related matter in which the U.S. has an interest due to lack of resources. Thus, the argument that the WTO resolution system will collapse as a result of vigorous third party participation must be repudiated. The Bananas Trilogy is not the first, nor in all likelihood will it be the last time that multiple intervention will occur. There is every indication that WTO dispute resolution is becoming truly multilateralized, thereby fulfilling its original conception. This development should ensure that future possibilities for third party participation remain of substantial interest.” 890

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888 Ibid.
889 The interpretation of substantial interest is examined, infra, in chapter eight.
890 Chi Carmody, ‘Of Substantial Interest: Third Parties under GATT’, (1997), 18 Michigan Journal of International Law 615, p.615., the interpretation of the substantial interest will be dealt with in chapter eight section 8.4.2.
6.10.3 Notification of mutually agreed solutions and third parties

Practice shows that in a dispute involving two advanced developed countries, a mutually acceptable solution was reached, but notification of the mutually agreed resolution of the case was delayed and the third party that had intervened in the case (which was a developing country) had also not been notified. Therefore, it was suggested that a developing country intervening in the consultation process ought to be regularly informed of developments as they occur. It should also be informed of any settlement agreements that take place. The latter could be enhanced by adding a specific timeframe for the notification of the settlement of the DSM to Article 3.6 of the DSU. 891

In addition to a timely notification of any mutually agreed solution, an interesting point made by Switzerland could be supported in this respect: that the disputing party should not only notify the mutually agreed solution to the DSB and third parties, but also provide them with an account of the substance of the agreement, since the other WTO members and third parties would have a genuine interest in knowing to what extent such a settlement could nullify their trade interests. This suggestion was also aimed at improving the transparency aspect of the DSM. 892

One of the main points regarding the reform of third party rules is the need to maintain a balance between the rights of third parties and

those of the principal parties. It is clear that the former ought not to exceed the latter at the consultation stage. In this regard, one ought to remember that after all it is at the ultimate discretion of the principal parties to decide whether the dispute is to be withdrawn or settled, or whether other means provided by the DSU for peaceful settlement should be used, or even whether it should be escalated to the panel. This gives the principal parties priority over third parties in the consultation process.

Indeed, the enhancement of third party participation in the consultation process reflects a wider variety of developing countries’ views. For example, Colombia argued during a special review of the DSU that it “did not share the view that strengthening third-party rights would invariably delay the dispute settlement process. The rights of third parties should not be decided by the parties to the dispute.” 893 Mexico also argued that it “had been a third party in several disputes and was in support of the enhancement of third-party rights”, 894 while “the representative of Switzerland welcomed the proposal by Costa Rica and said that it was a major contribution to the work of the Special Session. He said that Switzerland could support most of the proposals, especially those relating to the granting of an unfettered right to third parties to join in consultations.” 895 Norway also said that it “could support most of the proposals advanced by Costa Rica”. 896

893 Minutes of meeting, TN/DS/M/5, (27 February 2003), p.11.
894 Minutes of meeting, TN/DS/M/7, (26 June 2003), P.5.
895 Minutes of Meeting, TN/DS/M/4, (6 November 2002), p.4.
896 Ibid.
6.11 Conclusion

So far we have seen how the relationship between developing countries and the GATT dispute mechanism has developed in such a way that many of them have participated only as third parties. Their participation in the WTO is increasing, but they have expressed many concerns regarding the function of the WTO dispute settlement system. Yet, many have experienced the WTO only as a third party. The majority of developing countries have restricted legal and financial means to bring their own cases. They are also under severe political, economic and even military pressures, which influence their decisions as to whether and how to pursue their cases. They have also complained in the appropriate forums that they suffer from procedural injustice. Their development objectives have, therefore, been undermined by the functioning of the WTO, AB and panels.

Third party rights are particularly important for developing countries during the consultation stage, allowing them to decide whether in a particular dispute it would be in their interests to bring their own case. The participation of a third party on the side of a developing country complainant would also help to increase the pressure on the respondent to conduct effective consultations in good faith, in order to reach an agreed solution and implement it. Such third party involvement would also prevent a developing country complainant having to accept an unfair settlement as the result of a power imbalance, whether financial, political or military.

Third party status gives developing countries a vital opportunity to develop their familiarity with the system in a more cost-effective manner. It provides them with access to the dispute mechanism with less political and economic restraints, and helps them to fulfil their
international responsibilities. However, third party intervention is not a straightforward process. The WTO allows its members to intervene in the consultation, panel and appellate stages, but the DSU has restricted the rights of third parties more at the consultation stage than at the panel stage, requiring a 'substantial trade interest' to be shown and making intervention subject to the principle parties’ consideration and acceptance.

Allowing easy access for third parties to the consultation stage would serve the interests of developing countries. This is exactly what the Cost Rican proposal intended to do. Therefore a number of steps can be taken to remove unnecessary obstructions that would impede third parties from participating in consultation when they have a substantial interest in the case:

- The removal of the discretion of the disputing parties to decline third party participation;
- The replacement of the term 'substantial trade interest' by 'substantial interest', to be coherent with the provisions that govern third party intervention at the panel stage; and
- Notifying third parties in the consultation stage of the progress of the consultation and any agreed resolution.

Controversy and ambiguity arise regarding the participation of third parties not only in the consultation stage, but also in the panel and appeal processes. Therefore, the subject of Chapter seven will broaden the discussion on third parties’ rights by analyzing their intervention in the course of a dispute.
Third Parties in the Panel and Appeal Process: How Much is Too Much?

7.1 Introduction

The DSM has considered the broader interests of all WTO members, and the multiplicity of its cases, by allowing a member with a substantial interest in a dispute to participate as a third party during the panel and the AB stages. According to a basic definition, a third party can be a person, a national group, a state or an international institution. The WTO has allowed the second and third in this list, but so far has not allowed an individual to become a third party, although some attempts have been made. NGOs can already join the DSM as amici curiae, after being allowed to do so by the panel and the AB. Evidence was shown in the Shrimp dispute and the Asbestos case. The intervention of an NGO would not be the subject of discussion. Rather, the access of a member state to the DSM as a joint third party would be dealt with.

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898 Prof Robert Howes, American law professor, submitted a brief during the EC – Sardine dispute. The AB declined to admit it, but retains discretion to accept such a brief.
At this point it is useful to link this chapter with previous ones. During GATT, developing countries rarely used the adjunction system. The WTO dispute settlement system was established on the assumption that developing countries could use it whenever they disputed an issue, regardless of their size and power. However, this has not happened and developing countries still face difficulties regarding the use of the WTO dispute settlement system. Nevertheless, there is an area in the DSM that is of particular importance for developing countries, and a considerable number of them have become involved in the DSM as third parties. Third party status appears to be vital for developing countries to be able to put forward their views and familiarise themselves with the system. It also helps protect developing countries from unfair settlements during the consultation stage. Having discussed the reform of third party status in the consultation phase, we will consider such reform during the course of a dispute. We will also examine how this could enhance the position of developing countries in the system without sacrificing balance and stretching third party provisions too far.

The issue of enhancing third party rights was put on the negotiation agenda during the review of the DSM. It has proved to be popular amongst the negotiating members, receiving considerable support. The DSM has allowed situations where third party rights can be extended, and so far this has been granted in four cases: EC – Banana III, EC – Trade Preferences, EC – Export Subsidies on Sugar,

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901 The Members’ opinions in the special session will be discussed in the coming section.
and EC - Hormones\textsuperscript{905}. Similarly, the request to extend third party rights has also been declined in many instances, such as the panel report in the \textit{US - 1916 Act}\textsuperscript{906}, \textit{Australia Salmon}\textsuperscript{907} dispute. Many ideas have been proposed to boost the participation of third parties in the DSM, including giving more rights for third parties to participate in the panel stage, allowing greater access to documents and the submissions of the participants, and giving them the opportunity to participate by direct intervention at the appellate stage without joining the dispute, according to Article 10.3 of the DSU. However, there is a question as to whether extending third party rights ought to undermine the main parties’ rights during the settlement process. More urgently, there is the question of how third party rights can be improved in a way that serves the interests of the developing members.\textsuperscript{908}

First, the current rights of third parties in the panel and the appeal process will be looked at. Then a comparison between third party rights in the WTO and ICJ will be made. Next, enhanced third party

\textsuperscript{903} EC - Tariff Preferences, panel report, WT/DS246/R, adopted on 01-12-03; appellate body, WT/DS246/AB/R, adopted on 20 September 2004. [hereinafter EC Tariff Preferences]


\textsuperscript{907} Australia - Measures Affecting Importation of Salmon, panel report, WT/DS18/R, adopted on 12 June 1998. [hereinafter Australia Salmon]

rights during the panel process will be analyzed with reference to developing countries. Finally, the evolution of third party rights in the appeal process will be discussed with reference to amicus curiae and developing countries. The chapter ends with a summary.

7.2 Third Party Rights in the Panel and AB Processes

Third party intervention during the course of litigation is governed by Article 10 for the panel process and Article 17 for the AB process of the DSU. As far as the panel process is concerned, Article 10 is divided into 4 sections. Para 1 recognizes that third parties have a right to participate in the DSM by stating: "The interests of the parties to a dispute and those of other Members under a covered agreement at issue in the dispute shall be fully taken into account during the panel process". Para 2 of Article 10 allows WTO members which are not party to a dispute and which have a substantial interest\(^{909}\) to join the dispute and present oral and written submissions. In addition, the submission of these parties "shall be reflected in the panel report".\(^{910}\) Para 3 allows third parties to access the submissions of the parties during the first meeting\(^{911}\) of the panel.\(^{912}\) Para 4 allows third parties to bring their own case against inconsistent measures and to invoke

\(^{909}\) This is different from the requirement to participate in consultation. More detail on 'substantial trade interest' versus 'substantial interest' in consultation can be found in chapter five.

\(^{910}\) In all of the decisions made by the panel, the view of third parties is stated in the panel report found on the WTO website.

\(^{911}\) Even in the first meeting they are limited: "But a third party cannot participate in meetings between parties, even, the first one. Third parties are not allowed to put questions to parties, although these, with the panel, can put questions to third parties." Pierre Monnier, 'Working Procedures: Recent Changes and Prospective Developments', in Dencho Georgiev and Kim Van Der Borght(eds), \textit{Reform and development of the WTO dispute settlement system}, (Cameron May, London, 2006), p.227.

\(^{912}\) The panel usually meets twice, according to the DSM.
“the original panel wherever possible”. Appendix 3, para 6 allows all third parties which have notified the DSB of their interest in a dispute to be invited in writing to present their views during a session of the first substantive meeting of the panel set aside for that purpose. All such third parties may be present during the entirety of this session.

There is a great difference between third party participation in the panel process and the consultation stage. A third party in the panel process does not have to be a third party in the consultation, and the access of a third party to the panel is easier than the narrow requirements of ‘substantial trade interests’ and the disputing parties’ approval to join the consultation. ‘Substantial interest’\textsuperscript{913} is the only requirement to join the panel process, and this is usually not even questioned, making it almost automatic to join the panel as a third party. In practice, members with broader systematic interests are allowed to participate as third parties during the panel stage.\textsuperscript{914}

What happens in practice is that the DSB gives other interested parties ten days from the initiation of the panel to show their intention to participate as third parties. In the DSB meeting which sets up the panel, it is sufficient to do so verbally. However, after that, and within or after this time period of the initiation of the panel, interested parties can make a written notification to the DSB via the WTO secretariat of their wish to participate as third parties during the panel process.\textsuperscript{915} A third party may intervene on behalf of a respondent or a complainant.

\textsuperscript{913} See also chapter five, section 5.2.
\textsuperscript{915} Ibid.
Third party intervention in the appeal process is governed by Article 17.4 of the DSU. Para 4 of Article 17 states that the right to appeal is an exclusive right of the main parties, and third parties cannot request an appeal on their own. However, it allows third parties who have participated in the panel to “be given an opportunity to be heard by the AB”. There are additional guidelines provided in the AB working procedures for participants, now called ‘third participants’ in the appeal process. However, the panel as well as AB have been very active in this regard, and has departed from the rules as originally set out in the DSU, as will be discussed later.

7.3 Extended Third Party Rights during the Panel Process

7.3.1 The EC – Banana III dispute

The *Banana* case\(^{916}\) is a landmark dispute in WTO jurisprudence and the evolution of third party rights. Apart from the significant number of third parties intervening in the case, the panel extended the right of third parties to participate at the request of the third parties themselves. More specifically, these members requested that they be granted the right of presence at all meetings of the panel with the parties, as well as the right to make statements at all such meetings. Furthermore, they demanded the right to receive copies of all submissions and other materials, and to be granted permission to make written submissions to both meetings of the panel. While the DSB took note of these statements, there was no consensus on such participation in the dispute and what broader rights should be granted.

\(^{916}\) *EC Banana III*, note 902.
beyond those provided in Article 10 of the DSU, which restricted participation in the first meeting of the panel.\footnote{Website, \url{http://www.wto.org/english/res_e/booksp_e/analytic_index_e/dsu_04_e.htm#fntext357}, last seen on 12-2-2008 at 10:20am.}

The panel accepted the request for an extension of third party rights and allowed members of governments of third parties to observe the second substantive meeting of the panel with the parties. The panel also envisaged that observers would have the opportunity to make a brief statement at a suitable moment during the second meeting.\footnote{EC – Bananas III, panel report, note 902, para.7.8.} The reasons for extending these rights were:

\begin{itemize}
\item[(i)] the economic effect of the disputed EC banana regime on certain third parties appeared to be very large;
\item[(ii)] the economic benefits to certain third parties from the EC banana regime were claimed to derive from an international treaty between them and the EC;
\item[(iii)] past practice in panel proceedings involving the banana regimes of the EC and its Member States; and
\item[(iv)] the parties to the dispute could not agree on the issue.
\end{itemize}

As a consequence of our ruling, the third parties in these proceedings enjoyed broader participatory rights than are granted to third parties under the DSU.\footnote{Ibid.}

Covelli observes that this ruling by the WTO panel was very “generous” and a departure from the practice of GATT,\footnote{The Banana III dispute was a departure from the GATT practice, as third party rights were extended when there was an agreement between the disputing parties to grant third parties such extended rights. The panel in Banana III extended the rights of third parties, with all the disputing parties agreeing with such an extension. Website,} approaching

\footnote{Website, \url{http://www.wto.org/english/res_e/booksp_e/analytic_index_e/dsu_04_e.htm#fntext357}, last seen on 12-2-2008 at 10:20am.}
closely the practice of the ICJ. He also distinguishes between two types of third party: the first are those who were party to a preferential trade agreement with the EC (the Laime Convention); and the second consisted of Canada and Japan, which were not party to a preferential trade agreement with the EC. In GATT there had to be an agreement between the parties to extend third party rights. However, after the panel ruling in *Banana III*, third party rights could be extended, even if the parties had not agreed to do so. Covelli also observes that the panel established a precedent by extending the rights of two members (Canada and Japan) who were not party to a ‘plurilateral trade agreement’ with any of the parties. In this regard, the panel’s decision can be criticized, as neither of the two members would suffer severe economic damage as a result of the measures imposed by the EC on the import of bananas. Nor were they party to any special trade agreement with disputing parties, as the *Banana II* had given extended rights only to those parties with special trade agreements with the EC.

While acknowledging that third party status is vital for developing countries, it is clear that they mostly make their case jointly with other members (either developed or developing countries) and in many cases where they have had a very special interest in a case they have intervened as third parties after the establishment of the WTO. Developing countries did not secure better third party rights as a result

http://www.wto.org/english/res_e/booksp_e/analytic_index_e/dsu_04_e.htm#fntext

_357_, last seen on 12-2-2008 at 10:20am


_922_ Ibid.

_923_ Most developing countries participate in the system as third parties. More details on recent trends are presented in chapter four.
of the request for enhanced third party rights in the EC – Banana dispute. They could not participate with parties after the second substantive meeting of the panel and their request for participation in the interim stage was declined by the panel, even though they had a very significant economic interest in the case. Also, as a result of the panel’s statement that they “enjoyed broader participatory rights than are granted to third parties under the DSU”, this ruling applied only to the EC dispute. Developing countries could not be guaranteed to have the same “limited enhanced third party rights” in subsequent cases initiated under the DSU. Therefore, the enhancement of third party rights on a permanent basis is a matter for the WTO, as a rule-making body through the DSB, to deliberate. Indeed, the strengthening of third party rights is just one of many issues that have been raised by WTO members during the course of the DSU Review Process. This early anticipation by Footer will be substantiated by an examination of some very recent disputes in the following sections.

7.3.2 EC – Hormones and US – 1916 Act

Canada and the US brought a dispute against the EC measures concerning meat and meat products (hormones) in which each complainant requested extended third party rights in the other’s case. The panel approved their requests, granted further rights to Canada and the US to access all the information in both disputes, and allowed

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924 EC – Bananas III, panel report, note 902, para. 7.9.
925 EC – Bananas III, panel report, note 902, para. 7.8.
927 EC – Hormones, panel report, note 905.
the US to attend the second meeting of the panel and to present its view to the panel in the proceedings initiated by Canada.\footnote{Website, http://www.wto.org/english/res_e/booksp_e/analytic_index_e/dsu_04_e.htm#227, last seen on 14-05-08 at 9:30pm.}

At the appeal stage, the EC expressed its disagreement with the panel’s decision to grant additional third party rights to Canada and the US, arguing that extending the rights of third parties was against the rules of the DSU, specifically Article 9.3, and was outside the panel’s terms of reference. It also argued that the decision to give Canada access to information that the EC had placed before the US panel prejudiced the EC’s right to defence.\footnote{EC Hormones, appellate body, note 905, para. 39.} The AB rejected the EC claims and showed strong support for the decision issued by the panel in this regard. The AB stated:

"We consider the explanation of the Panel quite reasonable, and its decision to hold a joint meeting with the scientific experts consistent with the letter and spirit of Article 9.3 of the DSU. Clearly, it would be an uneconomical use of time and resources to force the Panel to hold two successive but separate meetings gathers the same group of experts twice, expressing their views twice regarding the same scientific and technical matters related to the same contested European Communities measures. We do not believe that the Panel has erred by addressing the European Communities’ procedural objections only where the European Communities could make a precise claim of prejudice. It is evident to us that a procedural objection raised by a party to a dispute should be sufficiently specific to enable the panel to address it.\footnote{Ibid.}"

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"Having access to a common pool of information enables the panel and the parties to save time by avoiding
duplication of the compilation and analysis of information already presented in the other proceeding. Article 3.3 of the DSU recognizes the importance of avoiding unnecessary delays in the dispute settlement process and states that the prompt settlement of a dispute is essential to the effective functioning of the WTO. In this particular case, the Panel tried to avoid unnecessary delays, making an effort to comply with the letter and spirit of Article 9.3 of the DSU."\textsuperscript{931}

In addition to the disagreement expressed by the EC in this case, Covelli has linked the \textit{Hormones} dispute\textsuperscript{932} to \textit{EC - Banana III}\textsuperscript{933}, arguing that the panel unjustifiably granted addition rights to a third party in these cases, contrary to past practice, when there was no agreement between the principal parties to extend third party rights, and the third party was not part of any special trade agreement with the disputing parties.\textsuperscript{934}

Notwithstanding the above, in the \textit{US - 1916} dispute (similarly to the \textit{EC - Hormones} case) Japan and the EC initiated a separate dispute against the US 1916 Act, which deals with anti-dumping measures. Both Japan and the EC requested extended third party status in their cases against the US to allow them to access information and attend all of the proceedings before the panel.\textsuperscript{935} In particular, the EC requested permission to make a written statement to the second meeting of the panel.\textsuperscript{936} In this case, and counter to its ruling in the

\textsuperscript{931} Ibid.
\textsuperscript{932} EC Hormones, note 905.
\textsuperscript{933} EC Banana III, note 902.
\textsuperscript{936} US Act 1916 Complaint by Japan, panel report, note 906, para. 3.1.
Hormones case (in spite of the similarity) the panel declined the request of Japan and the EC to have extended third party status in each other’s disputes.

The panel based its ruling on the fact that the cases did not “involve the consideration of complex facts or scientific evidence”, which would justify enhanced third party rights, as well as the fact that the US refused to give extended rights to the EU and Japan. In addition, the panel did not consider that the maintenance of ‘due process’ in the case justified additional access of the third party to the second substantive meeting of the panel, finding that it was adequate to provide “in due course meaningful non-confidential summaries of their submissions to the Panel”, as required by Article 18.2 of the DSU and subject to a formal request to be made by the third party.

In this case, the AB had approved the panel’s rejection of the request of Japan and the EC to obtain enhanced third party status, and again the AB confirmed the ruling of the panel to grant extended third party status in the Hormones dispute. The AB found that it was at the absolute discretion of the panel to provide additional rights to third parties, “not unlimited and ... circumscribed, for example, by the requirements of due process”. It also concluded that neither Japan nor the EC had “shown that the Panel exceeded the limits of its discretionary authority”. This last sentence has led to criticism, in

937 Ibid. para .6.34.
938 Ibid.
939 In other legal systems, this is known as ‘natural justice’.
940 US Act 1916 Complaint by EC, panel report, note 906, para .6.35.
941 Ibid.
942 Ibid., para .147-148.
943 Ibid., para .150.
944 Ibid.
that the possibility of procedural prejudice was arguably even more pronounced in this case than in EC - Hormones one, because the panel seemed to have made up its mind about Japan’s request before Japan had raised it.\footnote{Nick Covelli, note 934, p.680.}

In spite of the similarities, the WTO’s website, while explaining the dispute settlement understanding, recognizes the contrast in the panel’s ruling in both disputes.\footnote{"In contrast to the EC - Hormones dispute, the Panel on US - 1916 Act refused to grant the European Communities and Japan enhanced third-party rights in each other's case". Available on line at http://www.wto.org/english/res_e/booksp_e/analytic_index_e/dsu_04_e.htm#article10, last seen on 12-12-2007 at 7pm.} Hence, so far, one can agree with the view of the panel, even though it has been inconsistent, unpredictable and sometimes unpersuasive in its rulings. While the grant of extended third party rights to the ACP countries in Banana is understandable, it is not justifiable to give Canada and Japan such rights. In addition, the panel did not give a clear answer as to why it was vital to give the US and Canada enhanced third party status in the Hormones dispute, while rejecting the request of the EC and Japan in nearly indistinguishable conditions in the US - 1916 Act dispute. In fact, “the only logical answer one can reach is that the leaving of the scope of third party rights to Panels has been a failure”.\footnote{Nick Covelli, note 934, p.680.} In addition, the panel in the 1916 Act dispute failed to consider the due process which served as grounds for granting enhanced third party rights in Banana, adding greater procedural hazard for the parties. The panel was writing its interim report on the EC complaint and holding the first and second substantive meetings of Japan’s case in the meantime. In this case, the EC and Japan would present the same arguments and facts to the panel, since they brought their case on the same subject.
As a result, Japan would be at risk of its case being decided even before it was looked at. Moreover, the US was at risk of its arguments not being considered in the Japan case, since they had been dealt with in the EC case. Moreover, the panel had considered the US arguments in the Japan case while writing the interim report of the EC case, then it prejudiced the EC’s position, since it did not have the opportunity to refute these arguments. This is surprising, since the factual particularities of the case posed a much greater risk for procedural prejudice than EC – Hormones.  

7.3.3 The ‘applicants’ in the EC – Trade Preferences and EU – Sugar disputes

The EC – Trade Preferences dispute witnessed a significant amount of third party intervention. In this case, Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Peru and Venezuela, which were called ‘the applicants’ by the panel, jointly requested enhanced third party rights. They claimed that their substantial interest was of special importance, because they were party to the special trade arrangement with the EC which was the subject of the panel’s involvement in the dispute. They linked their case to that of the ACP countries in Banana, in which third parties were granted additional rights. They argued that their position, as recipients of special access to the EC market according to the EC’s Drugs Arrangements, was very similar to the ACP countries’ position as

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949 About 18 WTO Members have participated as third parties.
950 EC – Trade Preferences, panel report, annex (A), note 903, para.1.
recipients of special access to the EC market according to the Lome Waiver.951

India argued that enhanced third party rights should be given not only to the applicants, but also to all developing countries intervening as third parties in the dispute, apart from the US (which did not present adequate justification for extra rights). India also warned the panel that the rights of the principal parties ought to be distinct from those granted to any third party.952 The EC, without objecting to the granting of additional rights to all third parties, viewed Uruguay and the US (unlike Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Peru and Pakistan) as ineligible for additional third party rights. The EC remained silent about Cuba, Mauritius, Sri Lanka and Venezuela.953 Pakistan, as party to a special trade agreement with the EC, joined the applicants and requested extended third party status. Brazil, Cuba, Mauritius, Paraguay and the US did not comment on whether or not they were entitled to be granted enhanced third party rights, but argued that additional rights for a third party, if granted, should be granted to all third parties in the dispute.954

The panel decided to grant enhanced third party rights to all third parties on the grounds that the case was like the EC – Banana one. The latter case, it argued, had a significant economic impact on all the developing countries which intervened as third parties in the case, be they members or non-members of the EC Drug Arrangement. The US could also “have a significant trade policy as a preference-giving

951 Ibid., para.3.
952 Ibid., para.4.
953 Ibid., para .5.
954 Ibid., para.6.
country”. In addition, according to the issue of due process, it was more appropriate to give all third parties the same enhanced third party status. The panel adopted India’s argument on the distinction between the rights of the parties and those of third parties, stating that when granting any additional rights to third parties it was important to guard against inappropriate blurring of the distinction drawn in the DSU between parties and third parties.\textsuperscript{955} Hence, all third parties were allowed to: (a) observe the first substantive meeting with the parties; (b) receive the second submissions of the parties; (c) observe the second substantive meeting; (d) make a brief statement during the second substantive meeting; and (e) review the summary of their respective arguments in the draft descriptive part of the panel report.\textsuperscript{956}

One obvious comment ought to be made: that third parties in \textit{EC – Trade Preferences} received the highest level of extended third party rights granted to any third party. They were allowed access to the descriptive draft of the interim review process. This will be discussed in more detail in the coming chapter on the reform of third party rights, where it will be argued that enhancing the access of third parties to both parts of the interim review process means that the descriptive draft and interim reports should be more formalized by the panel.

In the \textit{EC – Sugar} dispute, Kenya and Côte d’Ivoire registered their interest as third parties after the expiration of a 10-day time limit from the initiation of the panel. This was a practice in the GATT dispute mechanism which was carried over to the DSM. The disputing parties accepted Kenya’s intervention as a third party, but Brazil, Australia

\textsuperscript{955} Ibid., para.7.
\textsuperscript{956} Ibid., Para.8.
and Thailand (the complainants) objected to the intervention request made by Côte d’Ivoire.\textsuperscript{957} As Article 10 of the DSU does not specify a time limit for the notification of an interest to the DSU, the panel cited the ruling of the AB in the \textit{EC – Hormones} dispute. It found that it had ‘marginal discretion’ in this regard. However, there was a need to: (1) consider the due process of the dispute; (2) not adversely affect the composition of the panel; and (3) not hinder the panel’s process. Therefore, the panel accepted all requests for third party participation, including those of Kenya and Côte d’Ivoire.\textsuperscript{958}

The panel in the \textit{EC – Suger} dispute appears to have given particular consideration to the interests of developing countries. It allowed Kenya and Côte d’Ivoire to participate as third parties, even though they had not notified the DSB within 10 days of the establishment of the panel. Also, more importantly, the panel took the enhancement of third party rights a step further than in previous cases, by allowing developing countries who were third parties to review the descriptive draft of the interim stage. This was declined in the \textit{Banana} dispute.

From the outset of the EC sugar dispute, the ACP countries organized themselves and appointed Mauritius to make a request for enhanced third party rights in the panel’s proceedings. The panel decided to extend such rights to all third parties. In this case, however, the third parties were to receive a copy of the written questions to the parties posed in the context of the first substantive meeting of the panel. They would also receive the rebuttals made by the parties during the second meeting, attending the second substantive meeting of the panel passively and without making any submissions to the panel process as

\textsuperscript{957} \textit{EC Sugar}, complaint by Brazil, panel report, note 904, paras.2.1-2.2. \\
\textsuperscript{958} Ibid, paras .2.2-2.3.
observers only. They were to review the summary of their respective arguments in the draft descriptive part of the panel report.\textsuperscript{959}

Subsequently, the ACP countries again organized themselves and appointed Guyana to make a request to the panel to be permitted to make written and oral submissions during the second meeting of the panel. The panel declined their request and ruled that it was a matter of due process to give all third parties the equivalent extended third party rights.\textsuperscript{960}

The panel had been innovative again in this case, overturning the GATT practice by deciding that it had the right to admit a third party at any time. This was contrary to the opinion of many WTO members, who believed that the admission of a third party ought to be restricted to a certain time limit.\textsuperscript{961} There is also a clear contradiction between this ruling and the panel’s decision in the EC – Trade Preferences dispute. Both disputes had a mixture of third parties: some were party to a special trade agreement with the EC and some were not. However, although they were not allowed to make submissions during the second meeting of the panel, the outcome of the case was economically significant to all third parties.\textsuperscript{962} If we look at the second request made by the ACP to enhance third party rights, the panel was inconsistent with its ruling in Banana III, in which the ACP held that exact position.

\textsuperscript{959} Ibid, para.2.6.
\textsuperscript{960} Ibid, paras.2.7-2.8-2.9.
\textsuperscript{961} This will be looked at in more detail in chapter eight.
\textsuperscript{962} The panel stated that it ruling was made “in light of the importance of trade in sugar for many third parties”, EC Sugar, complaint by Brazil, panel report, note 904, para.2.5.
The responsibility of the panel to identify the best approach for a third party to defend its legitimate interest effectively is vital, especially for developing countries. In this regard the WTO secretariat has noted that:

"In a dispute, a developing country Member complained that if the Panel did not reconsider its position on third party requests and allowed third parties to present arguments in support of their legitimate trade interests as the process unfolded, third party developing country Members would not be able to adequately protect their interests in keeping with the commitments under the WTO Agreement which encouraged growth and development in a manner consistent with their respective needs and concerns at different levels of economic development."963

Until this point, the panel had failed to identify a consistent approach in dealing with the shortage of rights provided to third parties in the DSU.964 Developing countries in similar situations had been granted different rights. They had received the most enhanced ever third party rights in the Trade Preference case, but the panel in Sugar had overturned its practices on the enhancement of third party rights by granting developing country third parties even more restricted procedural rights than those given in the Banana III dispute. This, in fact, brought forth the argument made previously by Footer.965 She argued that developing country third parties will not have a guaranteed enhanced position in all cases in which they have a very special interest, unless the DSU is permanently reformed to

964 Argentina argued in this regard that "It was difficult to justify the current rules in the DSU which restricted third parties to receiving only the first written submission of the parties and to attending a special session of the first substantive meeting". Minutes of Meeting, TN/DS/M/23, (26 May 2005), p.2.
965 This is dealt with in Section 7.3.1, note 926, which deals with the EC-Banana dispute.
encompass better provision of rights to third parties. The practice of the panel in *Banana III, EC – Trade Preferences* and *EC – Sugar* did not give developing country third parties clearer or more predictable enhanced rights to defend effectively their rights as third parties. It has been argued with regard to *EC – Sugar* that "in light of this case law, it is very difficult for a third party to know whether the panel will grant extra rights".966

7.4 Extended third party rights during the appeal process

The practices regarding third party intervention in the appellate process have evolved and expanded over time. In the early stages of the DSM, interested parties which wished to participate in the panel had to make a submission to the AB in writing about their desire to participate in the appellate process as third participants, stating their legal reasoning. Such written submissions had to be submitted within 25 days after the notice of the appeal. Failure to do so would exclude the party from participating in the panel as a third participant in the appeal process.967 However, such procedures are no longer a main requirement for a third participant to participate in the AB process. The participation of third parties has been extended, and a new practice of ‘passive third participant’ has evolved as a result of the demands made (explicitly and tacitly) by disputing parties over time. Recently, the AB


967 It has been stated in the earlier working procedures of the AB that “any third party may file a written submission, stating its intention to participate as a third participant in the appeal and containing the grounds and legal arguments in support of its position, within 25 days after the date of the filing of the Notice of the Appeals”. Working Procedures for Appellate Review, (Dated 28-2-1997), WT/AB/WP/3.
has modified its work and allowed for the criteria set out below to be used by a third participant in the appeal process.\footnote{WTO Secretariat Publication, A Handbook on the WTO Dispute Settlement System, (Cambridge University press, Cambridge, 2004), pp. 65-66.} Now, as a result of the amendments made by the AB in 2002, its working procedures have made it easier for third parties to join in its oral hearings.\footnote{Peter Van Den Bossche, 'The Making of the 'World Trade Court': the origins and development of the Appellate Body of the World Trade Origination', in Rufus Yerxa and Bruce Wilson(eds), Key Issues in the WTO Dispute Settlement: the First Ten Years, (Cambridge University Press, Cambridge, 2005), p.71.}

The AB’s new working procedures distinguish between the terms ‘third party’ and ‘third participant’, the latter being one who participates in the appellate stage.\footnote{Article 1} According to the new working procedures, a ‘third participant’ can intervene in the appeal process in three different ways. Firstly, it can make a written submission within 25 days “after the date of the filing of the Notice of Appeal”,\footnote{Article 24.1} in line with the old rules, writing submissions “to facilitate their positions being taken fully into account by the division hearing the appeal and in order that participants and other third participants will have notice of positions to be taken at the oral hearing”.\footnote{Article 24.3} Secondly, a third party can intervene by notifying the secretariat in writing “if it intends to appear at the oral hearing, and, if so, whether it intends to make an oral statement” during the 25 days provided in Article 24.1.\footnote{Article 24.2} Thirdly, it can write to the appeal division expressing its wishes to be involved as a third party after the expiry of the 25 days of the notice of appeal.\footnote{Article 24.4} Before deciding whether or not to invite a third party to the AB hearing in this situation, the AB will weigh up the need to ensure due process for the
other participants and the need for an “orderly and efficient hearing”. 975

Those who make a written submission to the AB or notify the secretariat within 25 days of the notice of appeal will have the right to be present at the oral investigation and to present an oral statement. By contrast, for those who make a request after the 25 days, their right during the hearing is at the discretion of the AB. 976 Also, upon the request of the AB, a third party may be required to provide further submissions, depending on the circumstances of the dispute. 977 Furthermore, the AB has absolute discretion to grant a third party additional procedural rights in certain conditions; such rights must follow the “appropriate procedure for the purposes of that appeal” and be in the “interests of fairness and orderly procedure in the conduct of an appeal”. 978 The AB can also extend the timeframe for a third party to make written submissions whenever it sees that “strict adherence to a time period set out in these Rules would result in a manifest unfairness”. 979

7.4.1 The AB and passive observers

The device of passive third party observers was first used by the AB in the Argentina – Footwear dispute. Then, the US, Indonesia, Brazil, Paraguay and Uruguay participated as third parties in the panel stage. The US and Indonesia had followed the procedural rule stated in Article 24 of the original AB working procedures, and had been granted third

975 Article 24.4; Nick Covelli, note 934, p.681.
976 Rule 27.3
977 Rule 28.1
978 Rule 16.1
979 Rule 16.2
participant status in the appeal process. However, Paraguay did not follow the procedural rules stated in the original working procedures and had been allowed to observe the hearing of the appeal without presenting “oral arguments or presentations”. It acted only as a “passive observer”. This was decided on the grounds that no objection was made by the other participants, and that third parties had the right to intervene according to Articles 10.2 and 17 of the DSU. Consequently, and following the same line of reasoning, the AB granted passive observer status in the appeal hearings of the US – Lamb, EC – Asbestos and Chile – Price Band System disputes.

In this regard it has been argued that, like the panel, the AB has retained a wide discretion to decide what procedural rights are given to third parties in the appeal process. The AB has used such discretion at surprising and unexpected times, by creating the status of passive observer in the above-mentioned examples. The AB went even further, contradicting its own procedural rules by making new rules not stated in the original version of its working procedures. It is, therefore, the discretion given to the AB, similar to the panel’s use of discretionary

981 Ibid., para.7.
982 Ibid.
983 US – Safeguard Measures on Imports of Frozen, Chilled and Frozen Lamb form New Zealand and Australia, appellate body report, WT/DS177/AB/R, WT/DS/178/AB/R, adopted on 14-12-1999, para 9; [hereinafter US Lamb], Japan and Canada were passive observers
984 Appellate body report on EC Asbestos, note 900, para.4.
985 In this case Japan and Nicaragua were allowed to participate as ‘passive observers’, Chile Price Band System and Safeguard Measures Relating to Certain Agriculture Products, appellate body report, WT/DS207/AB/R, adopted 23 Oct 2002, para.6. [hereinafter Chile Price Band]
power, which has been executed ‘inconsistently’, ‘unpredictably’ and ‘controversially’. 986

7.4.2 The AB and amicus curiae briefs

The possibility of the AB accommodating amicus curiae briefs for those not party to a dispute, even as third parties, is a debatable matter. Nevertheless, the tendency of the AB to undertake amicus curiae briefs987 as a recognized rule is clear in its recent decisions.988

Regarding the panel stage, in the Shrimp/Turtle dispute989 the AB considered that the right to seek information ought to include the entitlement to undertake and regard amicus curiae briefs after reserving the panel report, according to Article 13.1 of the DSU. Thus, the AB gave consideration to two measures in the submission and acceptance of amicus curiae briefs. Any WTO member can submit an amicus curiae brief to a panel or the AB if it wishes to, and “private organizations and individuals” may submit amicus curiae briefs to a

986 Nick Covelli, note 934, p.682.
987 NGOs’ access to the DSM is an evolving issue and is highly debatable; developing countries fear NGOs are mostly based in developed countries and have not been very helpful for developing countries in terms of the WTO dispute settlement system. However, a more recent trend is developing since NGOs like Oxfam have shown support for developing countries and they could support developing countries to identify the inconsistent measures and help them to prepare and present the legal agreement, rebuttals and submission in the course of disputes. More detail on the debate over NGO access to the WTO dispute settlement system in Marco Slotboom, A Comparison of WTO and EC Law: Do Different Objectives and Purposes Matter for Treaty Interpretation, (London, Cameron May, 2006), pp.203-239; also Robert Howse, The WTO System: Law, Politics and Legitimacy: Law Politics and Legitimacy, (Cameron May, London, 2007); Michelle Ratton Sanchez, 'Brief observations on the mechanisms for NGO participation in the WTO', (2006), available online at http://socialsciences.scielo.org/scielo.php?pid=S1806-64452006000100004 &script=sci_arttext&tng=en, last seen on 21-6-2008 at 9am; and Marco M. Slotboom, ‘Participation of NGOs before the WTO and EC tribunals: which court is the better friend?’, (2006), 5(1) World Trade Review 69.
989 Appellate body report on US Shrimp, note 899.
panel or the AB according to Articles 13.1 and 17.9 of the DSU respectively.\footnote{Mitsuo Matsushita, note 988, pp.36-37.}

In the \textit{Shrimp/Turtle} case, the AB affirmed that the panel, by not accepting voluntary information from parties which were not members of the WTO (environmental institutes in this case) had initially made a mistake in limiting its power. The AB justified this, although the panel surely enjoyed the discretionary power to seek more information, including information from parties not members of the WTO (the environmental institutes). However, it was not specific as to how it should obtain this information.\footnote{Deborah Z. Cass, 'The Constitutionalization of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade', (2001), 12(1) Journal of International Economic Law 29, p.61.}

Regarding the appeal stage, in the \textit{Carbon Steel} case\footnote{United States-Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom, appellate body report, WT/DS138/AB/R, adopted on 7 June 2000. [hereinafter \textit{US Carbon steel}]} the AB's powers to allow \textit{amicus curiae} briefs from non-members of the WTO arose once more in the period of the appeal. Whereas the EU, a conflicting party, disagreed with the adoption of \textit{amicus curiae} briefs, as well as with Mexico and Brazil being third parties, the US argued for their adoption. The \textit{Carbon Steel} case raised many of the same issues as the \textit{Shrimp/Turtle} case. As it was aware that the DSU had not explicitly allowed or forbidden its approval of \textit{amicus curiae} briefs, the AB relied on the power vested in it by DSU Article 17.9 to establish its working procedures, and assumed the power to adopt \textit{amicus curiae} briefs.\footnote{Arthur E. Appleton, 'Amicus Curiae Submission in the Carbon Steel Case', (2000), 3(4) Journal of International Economic Law 691, p.694.} Here, the United States supported the decision that the AB division can consider an appeal in order to improve procedures in
particular conditions, when the existing procedures have not dealt with a procedural issue arising in a case. This power is mentioned in Rule 16(1) of the working procedures. 994

The decision of the AB to approve *amicus curiae* briefs in these cases met with opposition. To start with, some members of the WTO (particularly developing countries) argued that it was inappropriate to allow external participants to affect the interpretation and decisions of the WTO, since a WTO agreement is between the parties who have approved it. 995 Moreover, there was a real concern among the members of the WTO that this might threaten their rights and duties, and would modify the involvement of the organizations within the WTO system. Another argument was that the AB’s justification of using Article 16(1) was statutorily part of the General Council’s duty. 996 Furthermore, there was concern over a care issue. With the additional procedure, external persons and organizations would have a privilege which could not be enjoyed by the members of the WTO, permitting them to affect the interpretation of legal matters related to a particular case. In fact, that privilege is exclusive to the disputing parties and the third party. 997 On the other hand, in the *Carbon Steel* case, 998 the AB stressed that the privilege of submitting *amicus curiae* briefs was merely for WTO parties. In the case of submissions from persons not

994 Ibid.
995 Mitsuo Matsushita, note 988, p.37.
997 Ibid., pp.555-556.
998 *US Carbon steel*, note 992.
members of the WTO, the AB would decide whether or not to approve such requests.999

Finally, the AB clearly considers that it has the power to allow and examine *amicus curiae* briefs, and that this does not "add to or diminish the rights and obligations provided in the covered agreements". It is difficult to accept this view, because Article 13 of the DSU gives privileges to panels to seek information and make practical recommendations. Nevertheless, the DSU makes no parallel statement of equivalent rights to the AB. As far as Article 17.4 of the DSU is concerned, there is a restriction on WTO members' rights to make a submission before an appellate division. Consequently, the AB allows non-members to have rights which a number of WTO parties may not have. Therefore, it is difficult to see how the AB can allow itself the authority to accept *amicus curiae* briefs without adding to or diminishing "the rights and obligations provided in the covered agreements".1000

In the Asbestos case,1001 a debate took place among WTO parties concerning the possibility of adopting *amicus curiae* briefs by the AB according to Article 16(1) of the working procedure. As a result, it seems that the AB was advised by the Chair of the WTO General Council to deal with the matter of *amicus curiae* briefs extremely cautiously. Hence, in the appeal period, the Asbestos case witnessed 17 *amicus curiae* brief requests by non-WTO members. These were

1000 Geert A. Zonnekeyn, note 996, p.555.
1001 *Appellate body EC Asbestos*, note 900.
declined by the AB on the grounds that the requests did not satisfactorily fulfil the provisions made in the Additional Procedures. But, because of the strong criticism directed at it by states members that it had overstepped its rules, the AB did not clarify what these provisions related to.\textsuperscript{1002} Despite the opposition of WTO members to the acceptance of \textit{amicus curiae} briefs, in the \textit{EC – Sardine} dispute the AB developed this issue further and allowed WTO members to submit \textit{amicus curiae} briefs for the first time.

7.4.3 Members and \textit{amicus curiae} briefs: The case of Morocco (\textit{EC – Sardine})

In the \textit{EC – Sardine} dispute, Colombia, which was a third party in the panel process, missed the 25-day deadline.\textsuperscript{1003} However, it sent a request to the AB after the expiration of the 25 days to attend the appeal hearing without making a written submission. The AB informed the disputing parties that it wished to allow Colombia to participate as a ‘passive observer’. The EC and Ecuador raised the concern that there was no legal basis for the term ‘passive observer’, and that Colombia should have followed the rules. Regardless of the arguments raised by

\begin{footnotesize}
\begin{footnotes}
\item[\textsuperscript{1002}] Christine Chinkin and Ruth Mackenzie, note 999, pp. 151-152. Nathalie Bernasconi-Osterwalder(ed), \textit{Environment and Trade: A Guide to WTO Jurisprudence}, (Earthscan Publications, 2005), p.325. To illustrate the broader dissatisfaction of WTO Members, Mexico argued that “Regarding external transparency, \textit{amicus curiae} briefs had been submitted in just 9 per cent of all cases – 15 times – but in 13 of these cases, Members had expressed concerns at DSB meetings”. Minutes of Meeting, TN/DS/M/14, (20 April 2004), pp.2-3.
\item[\textsuperscript{1003}] In this case the old rule 24 was in function, which give third participant rights to those who filed a written request within 25 days of the notice of the appeal.
\end{footnotes}
\end{footnotesize}
Ecuador and the EC, the AB\textsuperscript{1004} allowed Colombia to participate as a `passive observer'.\textsuperscript{1005}

In this dispute, the AB was creative\textsuperscript{1006} on the issue of \textit{amicus curiae} briefs, despite the controversy and widespread dissatisfaction of WTO members, and developing countries in particular. The AB allowed Morocco, which had not even intervened in the panel process as a third party, to submit an \textit{amicus curiae} brief during the appeal process. Peru raised an objection to the AB’s decision to accept an \textit{amicus curiae} brief from a WTO member, arguing that:

"while it welcomes non-Member submissions where they are attached to the submission of a WTO Member engaged in dispute settlement proceedings, the DSU makes clear that only WTO Members can make independent submissions to panels and to the AB. Peru argues further that the DSU already provides conditions under which WTO Members can participate as third parties in dispute settlement proceedings. According to Peru, accepting \textit{amicus curiae} briefs from WTO Members that did not notify their third party interest to the DSB would be allowing a WTO Member impermissibly to circumvent the DSU."

Canada supported Peru’s view that the AB had exceeded its authority by accepting a Moroccan brief when it had not notified its interest to

\textsuperscript{1004} As a result of these cases the AB has modified its working procedures to allow the participation of third parties as passive observers, which applies to working procedures for appellate review, WT/AB/WP/4, 1 May 2003.

\textsuperscript{1005} EC – Trade Description of Sardine, appellate body report, WT/DS231/AB/R, adopted on 26 September 2002, para.18. [hereinafter EC Sardine]

\textsuperscript{1006} In this regard it has been argued that “Members could be tempted to view EC – Sardines as the high point of Appellate Body activism, which the Appellate Body will be advised not to repeat too quickly”. C. L. Lim, ‘The Amicus Brief Issue at the WTO’, (2005), 4(1) Chinese Journal of International Law 85, p.119. It has also been argued elsewhere that “Finally, and probably most importantly, in Sardines, the Appellate Body came back in style, as it were, not only accepting an \textit{amicus} brief from a private individual (myself), but also making clear for the first time that its discretion extends to briefs submitted by WTO Members themselves”. Robert Howse, ‘Membership and its Privileges: the WTO, Civil Society, and the Amicus Brief Controversy’, (2003), 9(4) European Law Journal 496, pp.506-507.

\textsuperscript{1007} EC Sardine, note 1005, paras.65-66.
the DSB at the beginning of the dispute, and emphasised that the issue of accepting *amicus curiae* briefs raised a wider controversy between WTO members during negotiation sessions. It argued that all briefs should be declined, since they were irrelevant to the dispute.\(^\text{1008}\) Similarly, Chile\(^\text{1009}\) and Ecuador agreed with Peru and Canada that the AB had acted contrary to the DSU, and by doing so the AB "would accord Morocco more favourable treatment than Colombia, which was accorded passive observer status in this appeal".\(^\text{1010}\)

The AB disagreed with the objection made in this regard. It considered that it did have the right to accept or reject *amicus curiae* briefs submitted in the appeal process, since "neither the DSU nor the Working Procedures explicitly prohibit acceptance or consideration of such briefs".\(^\text{1011}\) The AB argued that in using such power they did not differentiate between *amicus curiae* briefs submitted by WTO members and non-members.\(^\text{1012}\) The AB also stated that it agreed with the EU demand not to treat WTO members less favourably than non-members in accepting *amicus curiae* briefs.\(^\text{1013}\) The AB stated that the mere fact that Peru invoked the DSU rules on when and how a member can participate as a third party in a dispute "does not, in our view, lead inevitably to the conclusion that participation by a Member as an *amicus curiae* is prohibited".\(^\text{1014}\) In this regard, the AB did not share the view of Peru. It believed that whereas third party intervention is governed by the DSU, in particular Articles 10 and 17.4, the

\(^{1008}\) Ibid., para.103.

\(^{1009}\) Ibid., para.111.

\(^{1010}\) Ibid., para.115.

\(^{1011}\) *US–Lead and Bismuth II*, appellate body report, WT/DS138/AB/R, adopted on 7 June 2000, para.2601. [hereinafter *US Lead and Bismuth II*]

\(^{1012}\) *EC Sardine*, note 1005, para.162.

\(^{1013}\) Ibid., para.164.

\(^{1014}\) Ibid., para.165.
acceptance of amicus curiae briefs leads to "legal authority" being granted to the AB in Article 17.9 of the DSU to set up its working procedures.  

The AB also decided that its acceptance of amicus curiae briefs did not make this an automatic right. It should be examined on a case-by-case basis in a way that would not affect "fair, prompt and effective resolution of trade disputes." For instance, a request would be refused if made at the last minute of the appeal process, so that admitting such a brief "would impose an undue burden on other participants". After accepting the brief submitted by Morocco, the AB went on to address how relevant the brief was to the appeal process. The AB found that the brief provided factual data in the main but would conflict with the function of the AB, which had examined the legal aspects of the case only. It also found some aspects of the brief that would have been of legal help to the AB. However, it eventually decided not to consider the legal argument stated in the Morocco brief, since it would not be of "legal assistance" to the appeal.

During a special meeting to discuss the issues raised in EC – Sardine, members voiced strong dissatisfaction with the acceptance of the Moroccan brief in the appeal process. Colombia, supported by China, argued that it had participated as a passive observer because it had

1015 Ibid, para.166.
1016 Ibid., para.167.
1017 Ibid., para.169.
1018 "We indicated earlier in this Report that we would return to the question whether Morocco's amicus curiae brief assists us in this appeal when considering the issue of completing the legal analysis under Article 2.1 of the TBT Agreement and the GATT 1994. In the light of our decision not to complete the analysis by making findings on these provisions, we find that the legal arguments submitted by Morocco in its amicus curiae brief on Article 2.1 of the TBT Agreement and on the GATT 1994 do not assist us in this appeal." EC – Trade Description of Sardine, appellate body, note 1005, para.314.
strictly followed the AB procedural rules. These did not allow members’ *amicus curiae* briefs at the time it had made its request. Also, during the oral hearing Colombia had requested the appeal division to comment on the acceptance of the *amicus curiae* briefs without commenting on the substance of the dispute. The Colombian request was declined. It was also novel and included in the DSU; hence, Colombia argued that the AB had granted more advantageous treatment to non-parties than it had granted to third parties.\(^\text{1019}\)

Peru, Chile and Ecuador reaffirmed their disapproval of the acceptance of the Moroccan brief that was made in the course of the dispute. Canada warned that the AB had to deal with the issue of *amicus curiae* briefs with extreme caution, since the issue was still under discussion between WTO members. Mexico, India, Brazil, Egypt, Turkey, Indonesia, Uruguay and Malaysia had all disagreed with the AB’s acceptance of the Moroccan brief, arguing that the AB had exceeded its authority by establishing a new category which was not included in the WTO rules. This, they argued, disadvantaged third parties which had followed the rules, by not allowing them to participate in oral hearings. They urged the AB not to diminish the rights of WTO members by accepting such a brief, unless it was decided by the members themselves during the review of the DSB.\(^\text{1020}\)

Only Morocco agreed with the AB’s claim that it did not participate as a third party according to Article 10 because it had missed the 10-day deadline of notification of interest to the DSM. By accepting its brief, the AB had allowed Morocco to defend its legitimate interest in the dispute. This eventually led to many members denying that their

\(^\text{1019}\) Minutes of meeting, WT/DSB/M/134, (29 January 2003), p.15.

\(^\text{1020}\) Ibid., pp.11-21.
approval of the AB report of the EC - Sardine case signified their approval of the AB acceptance of amicus curiae briefs.\textsuperscript{1021}

It appears that as a result of its activism in earlier cases and by admitting amicus curiae briefs from non-WTO members, the AB was left with no choice in the Sardine dispute other than to act against the explicit rule of the DSU by which third parties were allowed to intervene in a dispute. It had allowed Morocco to intervene in the appeal without notifying its interest according to Article 10 of the DSU. Thus, the AB now had to respond to the accusation that it had granted more rights to non-members than WTO members themselves enjoyed.\textsuperscript{1022}

As far as the AB and third parties are concerned, it is argued that the AB extended the rights of third parties by allowing them to be ‘passive observers’, and by allowing members that had not intervened before the panel to participate as third parties in the appeal process. The AB considered the extension of third party rights in parallel with the effectiveness of the dispute process, without undermining parties’ rights, such as by allowing any severe delay in the dispute process. By the same token, the discretion of the AB also showed that there were shortcomings in the DSU rules governing third parties in the WTO dispute settlement system. These rules were sufficient neither at the panel stage nor in the appeal process, and thus they needed to be revisited. However, the unexpected creativity of the AB undermined the certainty and credibility of the WTO dispute settlement system.\textsuperscript{1023}

\textsuperscript{1021} Ibid.
\textsuperscript{1022} Bridges Weekly Trade News Digest, Vol.6, number 33, released on 2 October 2002, and C. L. Lim, note 1006, pp.115-116.
\textsuperscript{1023} Nick Covelli, note 934, p.686.
With regard to developing countries, making it easier for third parties to access the AB appeal process would certainly be in their interests. Developing countries can now more easily access and participate as passive observers, instead of going through the formality of the original working procedures of the AB. These require a written request to be made within 25 days of notice of the appeal.\(^{1024}\) They can also more easily participate in the appeal process without even participating as a third party in the panel, by submitting an *amicus curiae* brief to the AB. In fact, intervening with an *amicus curiae* brief is less costly than participating in the DSM. This is particularly helpful for poor and less developed members with considerable resource constraints.\(^{1025}\)

Developing countries which participate as passive observers are not able to participate in the oral hearing during the AB process.\(^{1026}\) The latter is considered the most important process of the AB for the participant to hear the matter under dispute.\(^{1027}\) Participating with an *amicus curiae* brief in the appeal process does not involve active participation in the DSM. It simply requires the sending of a written submission to the AB. This involves neither attendance at the appeal process nor participation in the oral hearing of the AB. Therefore, developing countries which intervene via an *amicus curiae* brief are deprived of gaining a true experience of the DSM. This leaves space for consideration of proposals made for the reform of third party rights during the AB process in favour of developing countries.


\(^{1025}\) Robert Howse, note 1006, p.509.

\(^{1026}\) Minutes of Meeting, TN/DS/M/5, (27 February 2003), p.3.

\(^{1027}\) James Smith, note 1024, p.542.
7.5 Conclusion

It appears that while third party status under the DSU is undeniably important, the rights provided for third party participation in the WTO dispute settlement system are insufficient. The DSU provides minimal rights for third parties, although these are increasingly exercised in the WTO. This has led the panel and the AB to use their discretion in enhancing the rights of third parties during the course of litigation. However, this has been at the expense of predictability and the security of the system. Third party rights have attracted WTO members’ attention during the review of the DSM.1028 There is general agreement amongst WTO members and academics that third party rights are in need of clarification and reform, but more debate needs to take place about how such reform should be implemented.

In particular, developing countries appear to be unable to secure better rights as third parties during the panel process. For instance, in EC – Sugar the panel gave them fewer rights than were provided in Banana III, even though these cases were almost identical. Developing countries have also been dissatisfied with their involvement as third parties at the AB level, although they have been allowed to participate directly as third parties in the appeal process without having notified their interest to the DSB according to Article 10 of the DSU. It would also appear that allowing amicus curiae briefs is not the ideal approach to this issue. This leads us to Chapter eight, which scrutinizes the

1028 "I am not surprised about the considerable number of proposals that tend to enhance these rights. There are good reasons to increase third party rights ... Enhancing third party rights seems to be the appropriate answer." C. D. Ehlermann, 'Process of Clarification and improvement of the DSU', in F. Ortino and E. U. Petersmann(eds), The WTO Dispute Settlement System 1995-2003, (Kluwer Law International, Netherlands, 2004), p.111.
reform of third party rights in the course of disputes in favour of developing countries.
The Reform of Third Party Involvement in the Panel and AB Processes

8.1 Introduction

It would be helpful to begin this review of the reform of third party rights in the WTO by reproducing an account of interesting comments made by the Venezuelan representative concerning the negotiation process of the DSU:

"It would make a useful contribution to the negotiations by helping Members to concentrate on the most important issues. He said that the lack of a common objective had contributed to the failure by Members to fulfil the mandate given by Ministers at Doha. He said that the mandate was intended to identify fundamental improvements and clarifications, rather than just problems. Members should have no difficulty in identifying the fundamental problems which exist."\(^\text{1029}\)

The AB and the panel have used their discretion and extended the procedural rights of third parties on a case-by-case basis. This has not only eased access, but also allowed wider participatory rights during the course of a dispute. However, such discretion has come at the expense of the predictability and credibility of the WTO dispute settlement system. As argued by Covelli, third party rights under the WTO are evolving to become broader, yet are still vague and confusing.\(^\text{1030}\)

\(^\text{1029}\) Minutes of meeting, TN/DS/M/14, (20 April 2004), p.13.
\(^\text{1030}\) Ibid., p.125-126.
Third party rights are an evolving issue in the international arena, and such rights are still unclear and limited,\textsuperscript{1031} despite efforts made by the AB and panels to enhance these rights during the course of litigation. As stated previously, there is a degree of agreement between WTO members and academics that third party rights during the panel and AB processes need to be clarified and reformed.\textsuperscript{1032} Nevertheless, they are divided on how far such reform should go. Developing countries also seem to have found a way to interact with the DSM through participation as third parties, and their interest is crucial. At the same time, the reform of third party rights must not be at the expense of the principal parties or of the effectiveness and fairness of the dispute settlement process. Hence, any reform proposal needs to be balanced. The reform of third party rights will now be discussed with special reference to developing countries.

Firstly, the views of WTO members will be analyzed by looking at their proposals and their participation in the special sessions held to review the WTO dispute settlement system. Then, a number of proposals will be discussed in connection with developing countries. The first reform issues to be considered will be the 'substantial interest'\textsuperscript{1033} qualification, and whether or nor it is fruitful to place a 10-day time limit on notification of interest. Access and participation by third parties during the panel process will then be discussed, as will the question of whether enhanced access and participation could allow for


\textsuperscript{1032} Thomas A. Zimmermann, Negotiating the Review of the WTO Dispute Settlement Understanding, (Cameron May, London, 2006), pp.176-182.

\textsuperscript{1033} See also chapter five, section 5.2.
more participation of third parties in the interim review process. This will be followed by an examination of the proposal for direct intervention in the appeal process, together with a consideration of third party concerns in the panel/AB report. The chapter will close with concluding remarks.

8.2 Members’ Proposals on the Enhancement of Third Party Rights

Proposals put forward by WTO members will first be looked at in this section. Costa Rica proposed that third parties ought to have access to all proceedings, hearings and information provided to the panel and the AB by the parties or third parties involved in a dispute. This is to address the concern raised that third parties ought to be considered in the panel and the AB report, and not just able to reflect on it. In addition, it was suggested that third parties ought to have a right to intervene in the appeal process even if they had not participated in the panel stage. It should be equivalent to the right given to third parties to join the panel stage, even if they had not joined the consultation process. Costa Rica also proposed that third parties should have access to the interim review stage, and to any consultation that takes place between parties in order to decide how best to implement a ruling.

On the other hand, Chinese Taipei, while accepting Costa Rica’s proposal on allowing third parties full access to all information and proceedings of the panel and the AB, disagreed on whether third

1034 In the interim review process the panel prepares and distributes the first draft of its ruling to the parties for their comments before the final adoption of the ruling of the panel.
parties should have access to the interim stage, since it could increase the complexity of the dispute process in a way that could also undermine the parties’ rights. Nor did Chinese Taipei believe that third party views ought to be considered in the panel and the AB report, because they should deal only with claims affecting the principal parties.\(^\text{1036}\)

Jamaica accepted that extended third party rights should be decided on a case-by-case basis under the current practice and that this should remain, as it does not affect the function of the DSM by increasing the burden. However, it stated that guidelines ought to be developed “such as agreement of parties to give enhanced rights, trade share of third parties, contribution to the economy, and existing legally binding agreements”, based on which third party status could be extended in a more coherent and transparent manner for parties having a substantial trade interest in a particular matter. This view is linked to a third opinion on the extension of third party rights during the consultation stage, namely that third parties should be required to have a ‘substantial trade interest’ and that guidelines ought to be developed to define this term. Furthermore, once the enhanced third party status is provided, access to all information and proceedings should be allowed.\(^\text{1037}\)

China\(^\text{1038}\) and Jordan also want to see third parties having access to all panel meetings. In addition, Jordan agreed with Costa Rica that third parties’ views ought to be considered in the panel report.\(^\text{1039}\) In their

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1036 Communication from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, TN/DS/W/25, (27 November 2002).
1037 Communication from Jamaica, TN/DS/W/21, (10 October 2002), p.3.
proposals, members of the African group agreed with Costa Rica that third parties should have access to all documents and proceedings during the panel stage. Similarly, they want third parties to have access to documents and proceedings of the AB, and to be given the opportunity to be heard. Similarly, they believed that their views should be reflected in the AB's decisions, by improving Article 17.4 of the DSU. The African group added that the interpretation of the term 'substantial interest' should be broadened when it is applied to third parties who are developing countries, by adding new wording to Article 10.2.

8.3 Minutes of Meetings

The proposal for enhancement of third party rights provided by Costa Rica generated much interest and was discussed in a special meeting. Some 17 WTO members, both developed and developing countries, participated in the discussion and their views were varied. Some fully agreed with the proposal. Others agreed in the main whilst holding some reservations. Only one member had strong reservations about the need to enhance third party rights.

The US, India, Norway, Peru, Mexico and Canada supported without reservation the proposal for the enhancement of third party rights provided by Costa Rica. For their part, the EU, Chile, Colombia,
Indonesia, Switzerland, Korea, Brazil, Hong Kong, Ecuador, Argentina and Japan agreed in the main with the enhancement of third party rights in the course of a dispute, whilst expressing some reservations. The EU and Indonesia believed that access to the interim stage need only be given to the parties involved, while Chile and Ecuador also argued that third parties ought not to have access to the interim stage and that their views ought not to be considered by the panel and AB. Colombia suggested that third parties be granted access at the interim stage, but had reservations about their being able to intervene directly throughout the AB stage.

Switzerland claimed that it was unfeasible to intervene directly in the AB process without joining the panel process, while Brazil generally agreed with the enhancement of third party rights. However, it expressed some reservations about the participation of third parties in the second substantive meeting of the panel, arguing that it should be allowed only for the parties involved. Hong Kong disagreed with Costa Rica that third parties should be able to intervene directly in the AB process, be granted access to the interim stage and have their views considered in the panel and the AB report. Argentina argued that third party views ought not to be dealt with in the panel and the AB report, and that third parties should not have the privilege of directly intervening in the AB stage. Finally, Japan believed that third parties should not be able to access the second meeting of the panel and the interim stage.\footnote{Ibid.}

Only Australia raised strong concerns about the enhancement of third party rights, stating that it would severely damage the function of the
DSM and would undermine the rights of the principal parties. Notwithstanding this one major reservation, the majority of members agreed that the issue of enhancing third party rights should be discussed and analyzed in more detail. This should be done in order not to hinder the process of the DSM and to restore a balance between the rights of the principal parties and those of third parties. Even Costa Rica stated that it had tried not to be exclusive.1044

8.4 Enhancing Third Party Access to the Panel Process

At the panel stage, third parties are limited to the first of the panel meetings and banned from accessing the second.1045 The panel has the right to enhance third party rights so that they can participate in all of the panel hearings. However, such a practice comes at the expense of the predictability of the system. Several reform proposals have been made to improve third party rights during the panel. These are: third party provisions to allow a third party with a substantial interest to attend and participate in both the first and second meetings of the parties; and third parties having the right to access all non-confidential

1044 Ibid.
1045 In this regard it has been argued that "At the panel stage, third parties can make oral presentations and submit their views in writing, but they can do so only at the start of the process (DSU Article 10 and DSU Appendix 3, paragraph 6, in WTO, 1995). "Panelists typically hold two substantive meetings, each of which may involve multiple sessions. Third parties are allowed to submit their views and be present during only one session of the panel's first substantive meeting. During other sessions and the entire second meeting, where the disputants' rebuttals and panelists' questions are addressed, they have no right to participate or observe. In terms of documents, third parties receive only the submissions of the disputants to the first meeting, not subsequent rebuttals or written responses to questions. The level of access for third parties at the panel stage is thus quite restricted under rules negotiated by WTO governments in the Uruguay Round". James Smith, 'Inequality in international trade? Developing countries and institutional change in WTO dispute settlement', (2004), 11(3) Review of International Political Economy 542, pp.552-553.
information presented in the first and second meetings of the panel.\textsuperscript{1046}

Such proposals appear uncontroversial. There has been a suggestion that enhancing the access of third parties would have the benefit of increasing transparency in the WTO, both external and internal. Granting third parties access to all information and proceedings of the panel would improve internal transparency, paving the way for opening the system to the public.\textsuperscript{1047} The first part of the proposal, however, has raised some objections. It has been argued that the second meeting is mainly for the principal parties. Third parties should have the right only to attend the second substantive meeting of the panel passively, without making written or oral submissions. Also, any additional participation should be left to the panel.\textsuperscript{1048} This line of reasoning is weak, because the panel has been 'inconsistent', 'unpredictable' and 'unpersuasive'. In particular, developing countries

\textsuperscript{1046} In this regard, Costa Rica presented an amendment to Article 10.2 as follows "Any Member having a substantial interest in a matter before a panel and having notified its interest to the DSB within 10 days after the date of the establishment of the panel (referred to in this Understanding as a "third party") shall have an opportunity to be heard by the panel, to make written submissions to the panel and to be present and participate at all the substantive meetings of the panel with the parties to the dispute. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report. The panel shall endeavour to address in its findings the arguments and views expressed by third parties as related to the terms of reference of the panel." Communication from Costa Rica, revision, note 1035, p.2. The same proposal has also been adopted by the African Group, in Communication from Kenya, note 1040, p.2.


\textsuperscript{1048} In this regard an amended proposal on article 10.3 was made by Costa Rica, in Communication from Costa Rica, revision, note 1035, p2; The EC, in Communication from the European Communities, TN/DS/W/1, (13 March 2002), p10, Chinese Taipei, in Communication from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, revision, TN/DS/W/36, (22 January 2003), pp.1-2.
which are third parties are barred from presenting their views in the second meeting of the panel, even if they have a very significant interest in the dispute, as in the *Sugar* case. In contrast, other third parties, like Japan and Canada, who had no real economic interest in the *Banana* case, were allowed to present their views to the second meeting of the panel.

At this point it is useful to compare the position of third parties in the WTO with the practice of the ICJ, since the AB has clearly stated that WTO law is part of international law by declaring at the initial stages that its rules cannot be interpreted in isolation from international law. Thus, "to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law," they will be applied in accordance with the Vienna Convention on the law of treaties:

"The 'general rule of interpretation' set out above has been relied upon by all of the participants and third participants, although not always in relation to the same issue. That general rule of interpretation has attained the status of a rule of customary or general international law. As such, it forms part of the 'customary rules of interpretation of public international law' which the AB has been directed, by Article 3(2) of the DSU, to apply in seeking to clarify the provisions of the General Agreement and the other 'covered agreements' of the Marrakesh Agreement Establishing the World Trade Organization (the 'WTO Agreement'). That direction reflects a measure of

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1049 These two cases have been dealt with in chapter seven, sections 7.3.1 and 7.3.3.
1050 Article 3.2 of the DSU.
The ICJ also allows for a third party to intervene in a case according to Articles 62 and 63 of the court statutes. Both articles deal with intervention before the ICJ, but according to Article 62 permission is required from the court for a third party to intervene, whereas under Article 63 it is automatic.\textsuperscript{1053} Also, unlike a third party intervening according to Article 62, one doing so under Article 63 is bound by the court's decision. However, the procedure is the same: Article 85 of the Rules of the court, which deals with procedures of Article 62, is copied in Article 86 of the Rules of the court, which deals with the procedures of Article 63. Both Articles are different from the rules provided to a third party in the WTO by Article 62. This article shares a common goal with Article 10 of the DSU, since both require the approval of the court and neither is bound by the ruling.

The rights provided to a third party in the ICJ are greater than those in a WTO case. According to Article 10 of the DSU, third party participation is restricted to the first meeting of the panel. Also, third parties are not allowed to participate in the interim stage before the final ruling of the panel. Third party intervention before the ICJ is


\textsuperscript{1053} Nevertheless, both articles 62 and 63 are very restrictively used. In this regard it has been argued that "despite the apparent wording of Article 63 according intervention as of right in the defined circumstances, the Court has still remained restrictive and unwilling in fact to allow it as of right". Christine Chinkin, "Intervention Before the International Court of Justice", in Weiss, Friedl(eds), Improving WTO dispute Settlement system Procedures, (Cameron May, London, 2000), p.112.
allowed for access to information and for participation in all proceedings before the court. Therefore, this improvement would be in the spirit of the rules of the ICJ.

Indeed, allowing third parties to attend and participate in all of the panel meetings is consistent with the spirit of international law, since third parties in the ICJ, once permitted to intervene in the case, are allowed to participate in all of the hearings before the court. It is also consistent with the spirit of multilateralism that dominates the WTO, in which third parties regularly intervene in the DSM. Allowing them to participate in the hearings would certainly improve their current rights, which are usually described as being limited, restrictive and sometimes minimal. This would also benefit developing countries, which are often quick to take the opportunity to participate in the DSM as third parties in order to improve their experience of the system. It would also create a means for their views to be heard on disputed issues that could affect their trade interests.

In addition, it can be observed that although the GATT practice was for third parties to organize themselves and choose one of their number to present all their views during the course of the dispute, this has not happened in the WTO. Therefore, it is proposed that the DSU allow one member to participate as a third party on behalf of a group of interested WTO members. This would particularly benefit developing countries, as they would be able to pool their resources when

\[1054\] Ibid., pp.126-130.
intervening as third parties, holding as they do many views in common.\textsuperscript{1055}

8.4.1 Article 18.2 of the DSU and better access

According to Article 18.2 of the DSU, the submissions of the disputing party to the panel or the AB are treated as confidential documents. They are made available only to the parties involved in the dispute and to third parties. It also grants the disputing parties the right to make submissions of their own positions to the panel or the AB, as well as to disclose them to the public if they so wish. In addition, parties which are not third parties have the right "upon request of a Member, [to] provide a non-confidential summary of the information contained in its written submissions that could be disclosed to the public".

China and Costa Rica proposed that the provision stated in Article 18.2 of the DSU ought also to be extended to third parties, so that they are able to access the submissions made by parties and third parties to the panel or the AB. China rightly argued that confidential data in the parties' submissions ought to be excluded, while Costa Rica argued for a 15-day deadline for the non-confidential summary, or a time limit agreed between the party and requesting party. A better proposal to extend third party access to the parties' communications with the panel, AB, or arbitrator was made in the Chairman's text:\textsuperscript{1056}

\textsuperscript{1055} However, there are examples where developing countries as third parties have organised themselves and chosen one to present their case during the course of a dispute.

\textsuperscript{1056} In this regard the arbitrator means those who deal with level of compliance with adopted reports and the suspension of concessions as stated in Para 6 of Article 22: "...if the Member concerned objects to the level of suspension proposed, or claims that the principles and procedures set forth in paragraph 3 have not been followed where a complaining party has requested authorization to suspend concessions or other obligations pursuant to paragraph 3(b) or (c), the matter shall be referred to arbitration. Such arbitration shall be carried out by the original panel, if Members are
"Written submissions to the panel, or the AB or the arbitrator shall be treated as confidential, but shall be made available to the parties to the dispute, and to third parties as foreseen in Article 10. Nothing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the panel or the AB which that Member has designated as confidential. Members may designate certain information that they submit to the panel, the AB or the arbitrator as '[privileged}'. Such information shall be treated in accordance with procedures to be established by the DSB.1057

"A party to a dispute shall also, upon request of a Member, provide a non-confidential summary of the information contained in its written submissions that could be disclosed to the public. [A: After each meeting of a panel or oral hearing of the AB], each party and third party to a dispute shall, if requested by any Member, provide a non-confidential version of the written submissions it has made to the panel [A: prior to that meeting], that could be disclosed to the public within [fifteen days] [30 days] after the date of such request. The Secretariat shall establish and administer a dispute settlement registry at the WTO to facilitate access to these non-confidential versions of written submissions. The DSB shall establish rules and procedures governing the Secretariat’s administration of the registry."1058
The chairman's proposed text is preferable to the proposals made by Costa Rica and China, by adding the access of the third party to the arbitrator according to Article 22.6\textsuperscript{1059} of the DSU. Practice shows that the third party would have valid concerns at this stage. This would also be a better formulation of the practice of the arbitrator regarding Article 22.6 of the DSU, where the third party has failed to obtain consistent access to the arbitration procedures. In \textit{EC Banana III} (which was complained about by the US) the arbitrator declined to allow Ecuador to participate as a third party, since it had a very special interest in the dispute. It claimed that Article 22 does not contain any rules related to third parties, and the arbitrator did not see that Ecuador's interests could be harmed as a result of the arbitration process.\textsuperscript{1060}

However, in \textit{EC - Hormones}, the arbitrator granted Canada and the US third party status on three grounds:

(i) that the interests of the EC would be affected and the EC did not object to Canada and US participation as third parties;

(ii) that both Japan and the US could be affected by the outcome of the arbitration procedure; and

\textsuperscript{1059} Usually carried out by the original the panellist, in Kara Leitner and Simon Lester, 'WTO dispute settlement 1995-2007: a statistical analysis', (2008), 11(1) Journal of International Economic Law 179, p.188.

\textsuperscript{1060} \textit{European Communities - Regime for the Importation, Sale and Distribution of Bananas}, recourse to arbitration by the European Communities under Article 22.6 of the DSU, WT/DS27/ARB, adopted on 9 April 1999, para.2.8. [hereinafter \textit{EC Banana III recourse to arbitration by EC}]
due process. Both the US and Canada were permitted to participate in arbitration hearings, to make a statement towards the end of each hearing and to obtain a copy of the written submissions presented in the arbitration process.  

By contrast, in the Brazil - Aircraft dispute, the Australian request to participate as a third party in the arbitration proceedings was declined. The reasons were that there were no rules relating to third parties in Article 22 of the DSU, and the arbitrator did not see that Australian interests could be affected as a result of the arbitration process.  

The arbitrator stated:

"We note in this respect that third party rights were granted in the Article 22.6 arbitrations concerning European Communities – Measures Concerning Meat and Meat Products (Hormones) and rejected in the EC – Bananas (1999) Article 22.6 arbitration. We do not consider that Australia in this case is in the same situation as Canada and the United States in the EC – Hormones arbitrations, nor even in the same situation as Ecuador in the EC – Bananas (1999) arbitration. Indeed, Australia never initiated dispute settlement proceedings against Brazil with respect to the export financing programme at issue. Moreover, Australia did not draw the attention of the Arbitrators to any benefits accruing to it or any rights under the WTO Agreement which might be affected by their decision."  

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1061 European Communities – Measures Concerning Meat and Meat Products (Hormones), recourse to arbitration by the European Communities under Article 22.6 of the DSU, WT/DS26/AR, adopted on 12 July 1999, para.7. [hereinafter EC Hormones recourse to arbitration by EC]  
1062 Brazil - Export Financing Programme for Aircraft, recourse to arbitration by the Brazil under Article 22.6 of the DSU, WT/DS46/ARB, adopted on 28 August 2000, paras.2.4-2.5. [hereinafter Brazil Aircraft recourse to arbitration by Brazil]  
1063 Ibid, para. 2.6.
The adoption of the 'chairman text' proposal on Article 18 of the DSU would guarantee that third parties would at least have access to the submission made by the disputing parties to the arbitrator, without disrupting the arbitration process. This would notably also be important for developing country third parties. These third parties often do not have the resources to follow all stages in the dispute, and may sometimes intervene in the panel stage but find themselves unable to go further, to the appeal process or, indeed, the arbitration procedures. As a result of this proposal, developing country third parties would have access to information on the arbitration process at considerably reduced cost, without disrupting the arbitration process. This would bolster the transparency of the WTO, as well as giving developing country third parties a better insight into the submissions prepared. Thus, it would enrich their experience of the DSM. It would certainly help with preparing and debating their own submissions to the panel, AB, or arbitrator in future disputes. This would be in the spirit of international law, which allows third parties complete participation in the ICJ dispute process once admitted to intervene in the case. It would also enhance internal transparency as a step towards opening the whole system to the public in the future.

At this stage it is useful to look at the relationship between third parties’ rights and the enforcement mechanism under the DSM. In an attempt to strengthen the retaliatory power of developing countries, it has been suggested that third parties ought to be allowed to retaliate against the offending member.\textsuperscript{1064} But a closer examination of this proposal suggests that it would not add significantly to the retaliatory

power of a complainant developing country, especially when the complainant and third party intervening on its side are developing countries. To clarify this issue, consider the example of the US – Underwear\textsuperscript{1065} dispute. Here, it would still have been difficult for Costa Rica to retaliate against the US and force it to comply with DSB rulings, even if it had been allowed to do so collectively with India, a larger developing country which actually participated as a third party in this dispute. Nor, in the US – Cotton Yarn\textsuperscript{1066} dispute, would it have substantially reduced the economic and political costs to Pakistan (the complainant) of retaliating against the US. This could have led to a trade war, even if done jointly with India as a third party. This proposal also suffers from a lack of support from both developed and developing member countries, since there has (as of December 2008) been no proposal for extending third party rights to retaliation and suspension of concessions.

The same arguments apply even when a developed country intervenes on the side of a developing one. Ecuador and the other Latin American co-complainants and third parties are still struggling to implement the AB ruling in the Banana dispute\textsuperscript{1067} against the EU, while the US has settled its own concerns in this respect. If a real collective element is to be added to retaliation, then the collective relation scheme suggested by the African group, which allows all WTO members to


retaliate against the offending party, would be preferable to collective retaliation by the complainant and third parties. The former would add real strength to the retaliatory power of a developing country complainant, and mark a significant movement from unilateralism to multilateralism.  

The most beneficial method of implementation for developing countries might be monetary compensation, which could be usefully extended to developing countries as third parties. Unfortunately, however, monetary compensation is not part of the practice under the WTO dispute settlement mechanism. Thus, third parties are denied a right that the main disputing parties have. Considering the current credibility of the WTO rules and their implementation, it could be argued that it is an advantage for a third party, especially a developing country third party, to be outside the current enforcement mechanism of the DSM.

8.4.2 The interpretation of ‘substantial interest’

The DSU has a strict requirement at the consultation stage of ‘substantial trade interest’ being present for a party to intervene, subject to the approval of the disputing parties. It is, however, more lenient on the intervention of a third party in the panel and AB stages, with ‘substantial interest’ being the only requirement. There is widespread agreement among WTO members and academics

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1068 More detail in chapter three section 3.3.6.
1069 Analyses of the monetary compensations in chapter three section 3.3.5.
1070 More detail in chapter five section 5.2.
1071 This view was expressed in the proposal made by Costa Rica note 1035, Jamaica note 1037, Jordan note 1039 and Taiwan note 1036.
that the term 'substantial interest' ought to remain as a requirement for intervention in the WTO dispute settlement process. The rationale behind this is to sustain the balance between the rights of the parties and those of third parties, whilst not overburdening the system by allowing third parties without a real interest to intervene in a dispute. However, the question could be raised as to how the term 'substantial interest' should be interpreted: narrowly, to cover legal or direct trade interest in a dispute, in line with the ICJ interpretation; or more broadly, to include those with wider systemic interests in a dispute.

The AB succinctly reflected on the term 'substantial interest' of Article 10.2 of the DSU in the Banana dispute by adopting a broader interpretation. It said that this ought not to be limited to 'a legal interest' in the dispute, by stating:

"We agree with the Panel that 'neither Article 3.3 nor 3.7 of the DSU nor any other provision of the DSU contains any explicit requirement that a Member must have a “legal interest” as a prerequisite for requesting a panel'. We do not accept that the need for a 'legal interest' is implied in the DSU or in any other provision of the WTO Agreement. It is true that under Article 4.11 of the DSU, a Member wishing to join in multiple consultations must have 'a substantial trade interest', and that under Article 10.2 of the DSU, a third party must have 'a substantial interest' in the matter before a panel. But neither of these provisions in the DSU, nor anything else in the WTO Agreement, provides a basis for asserting that parties to the dispute have to meet any similar standard. Yet, we do not believe that this is dispositive of whether, in this case, the United States has 'standing' to bring claims under the GATT."\(^{1073}\)

1073 EC – Bananas III, appellate body, note 1067, para.132.
The AB also emphasised in the following paragraphs its belief

"that a Member has broad discretion in deciding whether to bring a case against another Member under the DSU. The language of Article XXIII:1 of the GATT 994 and of Article 3.7 of the DSU suggests, furthermore, that a Member is expected to be largely self-regulating in deciding whether any such action would be ‘fruitful’."\(^{1074}\)

In the same vein, a group of LDCs has proposed that substantial interest ought to be interpreted as follows:

"For purposes of developing and least-developed country Members, the term ‘substantial interest’ shall be interpreted to include any amount of international trade; trade impact on major domestic macro-economic indicators such as employment, national income, and foreign exchange reserves; the gaining of expertise in the procedural, substantive, and systemic issues relating to this Understanding; and protecting long-term development interests that any measures inconsistent with covered agreements and any findings, recommendations and rulings could affect."\(^{1075}\)

An alternative suggestion is "that each WTO Member should be allowed to exercise its own judgement as to whether participation as a third party would be fruitful. This ... is the only guideline on initiating action as a main party under the DSU".\(^{1076}\) This is indeed consistent with the current practice of the DSM, which allows automatic access for third parties without inspection of whether they have a specific trade interest in the outcome of a case, or a broader interest in the interpretation of the covered agreements.\(^{1077}\) Indeed, WTO members, and particularly developing countries, have so far intervened on a

\(^{1074}\) Ibid, paras.135-136.

\(^{1075}\) Communication from Kenya, note 1040, p.2.

\(^{1076}\) Ng'ong'ola Clement, note 1047, pp.18-19.

genuine basis only when they have a real interest in a particular case.\textsuperscript{1078}

Further relaxation of the requirements for third party participation would also encourage greater involvement of African and LDC member States in DSU proceedings.\textsuperscript{1079} There is, for example, currently no time limit for third parties to register their interest with the DSB, as stated in Article 10. It has been proposed that third parties should have the right to participate before a panel if they register their interest within 10 days of the initiation of the panel.\textsuperscript{1080} This proposal is more concerned with the establishment of the panel, since parties and third parties cannot serve as panellists, and establishing a 10-day deadline\textsuperscript{1081} would help to prevent delays during the selection of panellists.\textsuperscript{1082}

Such a proposal is described as a modest contribution to the process of review of the DSM. This is true, since the panels have already adopted the past practices of GATT, and have denied interventions by third parties which have not met the 10-day deadline for notification of

\textsuperscript{1078} More detail in chapter six section 6.9.
\textsuperscript{1079} Ng'ong'ola, note 1047. pp.18-19.
\textsuperscript{1080} This could be added to article 10.2 of the DSU: "Any Member having a substantial interest in a matter before a panel and having notified its interests to the DSB within 10 days after the date of the establishment of the panel (referred to in this Understanding as a "third party")....
\textsuperscript{1081} "Regarding third-party rights, she said that Colombia was supportive of the proposal by Jamaica. Colombia did not share the view that strengthening third-party rights would invariably delay the dispute settlement process. The rights of third parties should be not be decided by the parties to the dispute". In Minutes of Meeting, TN/DS/M/527, (February 2003), p.11.
\textsuperscript{1082} Communication from Jordan, note 1039, p.4.
their interest. The panels have also adopted a number of conditions under which developing countries are allowed to participate as third parties, even if they have not notified the DSB within 10 days. These include: (1) considering the due process of the dispute; (2) not adversely affecting the composition of the panel; and (3) not hindering the panel process. This is in the interests of developing countries such as Morocco, which had in the past missed such a deadline and so would have been banned from intervention in the panel process. Therefore, the current practice of the panel appears to be more sensible than the introduction of a 10-day deadline in Article 10 of the DSU.

The proposals on the term 'substantial interest' would perhaps best characterise the advantage that the DSM has over the ICJ, in allowing easier access for third parties. They also support the proposition that the WTO dispute settlement mechanism can be described as a true multilateral process, since there are few bilateral disputes and the majority of cases involve more than two disputing parties. Third parties have always been allowed to intervene and their requests have never been denied. In contrast, third party intervention has very

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1085 "There are also some key differences between the ICJ and DSU of the WTO in the settlement of disputes. In the case of the ICJ, third parties can intervene in the case before the court if they can convince the court that they have an interest of a legal nature that is likely to be affected by the decision. In practice, the ICJ will rarely allow a third party intervention. On the other hand, Article 10 and Appendix 3 of the DSU permit third parties an opportunity to be heard and to make written submissions; they can also make oral submissions. For example, in the EC - Banana case there were six parties (including the European Commission (EC)), which represented 15 States and 20 third parties. The Appellate Body in the EC - Banana
rarely been applied in the case of the ICJ. As has been discussed, Article 62 states that it is for the court to decide whether such a member has a valid interest in intervening or not. This was very narrowly applied by the court, with many requests being denied. Examples include that made by Malta in 1981 to intervene in the dispute between Tunisia and the Libyan Arab Jamahiriya. The situation changed in 1990, when the court allowed Nicaragua to intervene in the Land, Island and Maritime Frontier Dispute, which involved El Salvador and Honduras. This was considered a breakthrough for third parties in the World Court, being the first case to examine third party rights in the ICJ. In this regard, any member wishing to intervene according to Article 62 has to present convincing proof to the court to show that such an interest in a dispute exists; and legal grounds must be explained in detail by the interested member. The court has absolute power to decide whether such a legal interest in a dispute is valid or not. Therefore, it could be suggested that the current case clarified that a State could seek the establishment of a panel even if did not have a legal interest or could not show an actual trade impact. The interest in ensuring free international trade in goods and services, as well as the interest in clearly determining rights and obligations under the WTO Agreement, provide sufficient grounds to pursue WTO dispute settlement. However, the difference between the ICJ and the DSU in allowing third party intervention is a difference of a procedural nature and is otherwise justified by the specialized character of the legal regime to which the DSU is organically linked". Pemmaraju Sreenivasa Rao, 'Multiple international judicial forums: a reflection of the growing strength of international law or its fragmentation? in Symposium: Diversity or cacophony? New sources of norms in international law', (2004), 25(4) Michigan Journal of International Law 929, pp. 954-955.

In this regard it has been argued that "third parties can intervene in the case before the court if they can convince the court that they have an interest of a legal nature that is likely to be affected by the decision. In practice, the ICJ will rarely allow a third party intervention." In Rao, note 1085, p.954.


status quo practice of the DSB regarding a broader interpretation of the term ‘substantial interest’ (which is virtually automatic for access of third parties to the panel process) ought to be retained. This should apply whether the substantial interest is a legal, trade or even broader systematic interest in the dispute, without being restricted to a certain time-limit. In line with this scheme, the African group has recently revised its proposal and suggested that Article 10.2 ought to be modified to state:

"Any Member may participate as a third party before a panel by notifying its interest to do so to the DSB and shall have an opportunity to be heard by the panel and make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the report."\(^{1090}\)

### 8.5 Interim Report

The interim review process is for the panel to prepare its final report and to consider the final comments of the parties before the adoption of the panel report. The interim review consists of two steps. The first is the descriptive draft, which is prepared by the panel after the second meeting and presents the facts and arguments submitted in the dispute. This descriptive draft is distributed to the parties, who should comment on it within a certain time limit to be decided by the panel.\(^{1091}\) After this, the second step starts, when the panel provides the parties with the interim report. This comprises the facts, arguments and findings of the panel. The parties can ask the panel in writing to review certain elements of its interim report within a certain time limit, again set by the panel. In such a case, the panel will meet with the party to discuss its written comments. If no comments on the

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\(^{1090}\) Communication from the delegation of Côte d'Ivoire on behalf of the African Group, TN/DS/W/92, (5 March 2008), p.1.

\(^{1091}\) Article 15.1 of the DSU
interim report are made by the parties, then “the interim report shall be considered the final panel report and circulated promptly to the Members”. The interim review stage must not exceed the time limit stated in Articles 8 and 12 of the DSU.

In this regard, the DSU has no provision that allows third parties to intervene during the interim review stage, this being an exclusive right of the principal parties. In practice, however, panels have adopted a contradictory position in this regard. In Banana III the panel declined a request made by developing countries to be allowed to participate during the interim review process. However, in the EC – Trade Preference dispute, the panel enhanced the rights of third parties to allow them to access the descriptive draft without making any comments. The second and more recent rulings allow third parties to be even more important than the drafter of the DSU, and the current provision under the DSU fails to provide sufficient rights for third parties in the course of a dispute. However, in EC – Sugar, the panel overturned its practice in EC – Trade Preferences, and did not allow ACP third parties to participate in the interim review process. Therefore, the opportunity for a third party to access the interim review process exists, but it is vague and unpredictable, not a guaranteed right.

The most interesting proposals were made by Costa Rica in connection with paras 1 and 2 of Article 15. Indeed, a number of submissions have been made. As far as para 1 is concerned, it was proposed that third parties should have the right to receive a copy of the descriptive

1092 Article 15.2 of the DSU
1093 Article 15.3 of the DSU
1094 More detail in section 7.3.3 of chapter eight.
draft and to make comments on it. With regard to para 2, it was suggested that third parties should have the right to receive a copy of the interim report without having the right to make comments on it. Such a right was to remain exclusive to the disputing parties.

Adopting reforms that would allow third parties to participate in the interim review stage would certainly contribute to the transparency and multilateralism of the WTO, as would allowing third parties to participate in all meetings of the panel. In addition, this would follow the past practice of GATT, in which it appears that third parties had broader procedural rights, which were limited only by the panel’s terms of reference. Moreover, it was important not to modify the second part of para 2 of Article 15. This allows for disputing parties to make further comments and meet again with the panel with regard to certain aspects of the panel report, while maintaining restricted rights for the disputing parties only, without interference from third parties, so as not to increase the complexity of the dispute by adding to the burden on the disputing parties. This would also sustain the judicial

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1096 Communication from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, revision, note 1048, p.2.


1098 In this regard it has been argued that “The primary aim of the WTO dispute settlement mechanism is to secure a ‘positive solution to a dispute’ for the parties to the dispute, at all stages. The participation of the third party should not be allowed to increase the complexity of the dispute process”. Communication from the Separate Customs Territory of Taiwan, revision, note 1048, p.4.
economy of the parties, to allow them to negotiate and decide on how the dispute should continue.1099

The advantage for developing countries acting as third parties is that allowing them to access all the stages of the panel, including the interim review process, would give them first-hand experience of the function of the DSM step-by-step, without their being restricted to a certain aspect of the panel procedure. The Costa Rican proposal on third party access to the interim review process is a better formulation of the panel practice regarding the extension of third party rights, without sacrificing the balance between parties’ and third parties’ rights.

8.6 Articles 8.10, 12.10 and 27.2 of S&D and Third Parties

The analysis of the S&D provisions of the DSU in Chapter three above indicated the need for further improvement and clarification by WTO members on how these rules operate. However, it must also be determined whether the S&D provisions benefit a developing country third party as far as the dispute settlement understanding is concerned. In Banana III, ACP countries raised the question of the interrelationship between third parties and S&D during the panel process. ACP developing countries acting as third parties argued that they did not have sufficient time to prepare and present their arguments and submissions, contrary to Articles 12.2 and 12.4 of the

1099 This concern has been brought forward by the EC: “Another aspect of the Costa Rican submission which required further consideration was the proposal to allow third parties to present comments during the interim review stage. Since the parties to the dispute could negotiate a mutually agreed solution at this stage, it might not be prudent to allow third parties a right to comment on the interim review stage.” Minutes of Meeting, TN/DS/M/4, (6 November 2002), p.2.
More importantly, they also stated that this was in particular a violation of Article 12.10 of the DSU, "which specifically provided that, when examining a complaint against developing country, a panel must accord sufficient time for the developing country Member to prepare and present its argumentation". The panel refused to deal with the issue raised regarding Article 12.10, indicating that its provisions applied only to developing countries which had participated as respondents, not as third parties. This eventually led to the proposal that Article 12.10 of the DSU should be applied to developing countries not only as principal parties, but also as third parties.

Although participating as a third party means that considerably fewer resources are needed than if participating as a disputing party, it is not totally cost free. It raises a legitimate concern about how to improve the resources available for developing countries so that they can effectively participate as third parties in the DSM. In this regard, one could also propose that Article 27.2 of the DSU should provide legal assistance from the WTO secretariat for developing countries to act not only as complainants or respondents, but also as third parties.

With regard to Article 8.10, this allows a developing country as a disputing party to have its own panel member so as to safeguard more

1100 "Which require that Panel procedures provide sufficient flexibility so as to ensure high quality reports and for the parties to prepare their submissions", EC Bananas III, panel report, note 1067, para 5.17.
1101 Ibid.
effectively the concerns and interests of such countries participating in a dispute before the DSM. Third party developing countries ought not to be deprived of such rights, especially in cases where a country is participating as a third party only, which is the most common scenario for the majority of developing countries.

In addition, the more third parties intervene in a dispute the more difficult it will be to find a panel, since the panel members must not be of the same nationality as any of the parties or third parties. Adopting this proposal could be seen as a solution to this, reducing the difficulties of allocating a panel.

8.8 Direct Appeal to the AB

Currently, according to Article 10 of the DSU, any third party that wishes to intervene in the appeal process must register its interest with the DSB. However, in practice, the AB in the Sardine dispute allowed a WTO member (Morocco) to intervene in the appeal process without being a third party before the panel, as a form of amicus curiae brief. This proved to be very unpopular with WTO members. In this regard, a major proposal for the enhancement of third party rights is to allow members to intervene directly at the appellate level and to participate as third parties in the panel stage subject to Article 10, or in the consultation stage subject to Article 4.11. Recently, the

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1106 Communication from Costa Rica, revision, note 1046, p.3; Also, in this regard, "The EC was supportive of the Costa Rican proposal to allow Members to participate as third parties during the Appellate Body stage, regardless of whether they participated in the panel proceedings. The issues on appeal might have a direct relevance for Member which wanted to participate as a third party in the Appellate Body proceedings." Minutes of Meeting, TN/DS/M/4, (6 November 2002), p.2.
African group proposed that third parties be given the right to intervene directly in the appeal process, even if they have not notified their interest according to Articles 4.11 or 10 of the DSU. Costa Rica suggested that Article 17.4 be reformed as follows:

"Only parties to the dispute, not third parties, may appeal a panel report. Third parties which have notified the DSB of a substantial interest in the matter pursuant to paragraph 2 of Article 10 may make written submissions to, and be given an opportunity to be heard by, the Appellate Body. Any Member not having notified its interest pursuant to Article 10.2 but having subsequently notified its substantial interest to the Appellate Body and the DSB, within 10 days immediately following the date of the notice of appeal, may make written submissions as a third party to, and be given an opportunity to be heard by, the Appellate Body. The Appellate Body shall endeavour to address in its findings, the arguments and views expressed by third parties, as related to the matter of the appeal."

The oral hearing is an essential part of the appeal process. In this, the AB often asks questions in an aggressive and inquisitorial style, anticipating responses from the participants during the hearing process. The hearing is unlike the practice of the panel, which usually allows the participants to respond in writing after the end of the oral hearings. The participation of third parties during the oral hearings of the appeal process plays a key role in supporting the AB in making a ruling. This is particularly true when the AB deals with hazy provisions under the agreements covered that would have broader implications for all WTO members and for future disputes. In this regard, the AB can put extra emphasis on third party participants during the oral hearings, to deal with issues not included in their written submissions. When no third-participant input is available, the AB may find itself in a

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1107 Communication from the delegation of Côte d'Ivoire on behalf of the African Group, note 1090, p.1.
1108 Communication from Costa Rica, revision, note 1046, p.3.
difficult position. Such a situation occurred when it confronted the standard for the proper burden of proof during the early Wool dispute\textsuperscript{1109} between the US and India. The decision would have inevitably affected all future WTO disputes, but the AB heard only the arguments of India and the US. This example shows the substantial incentive for the AB to increase the level of access for third parties in order to obtain valuable information regarding the views of the broader WTO membership.\textsuperscript{1110}

The current attempt of the AB to broaden third party participation during the appeal process includes the establishment of ‘passive observers’. Developing countries with limited financial and legal resources do not really benefit from the current procedural rules governing the participation of third parties during the appeal process, which were established by the DSU and the AB. In fact, even developed countries with more sophisticated resources have found it difficult to appear as third party participants before the AB. For instance, Canada and Australia gave notice of intention to intervene, but failed to appear as third parties during the appeal process.\textsuperscript{1111}

In this regard, Smith argues:

"A simple frequency count, of course, says nothing directly about the impact of different third participants on Appellate Body rulings. Nevertheless, it is clear that the US and EU have taken advantage of chances to present their views during appeals significantly more often than other WTO members. In fact, ... the US thus far has participated as complainant, defendant, or third party in every single

\textsuperscript{1109} United States – Measure Affecting Imports of Wool Shirts and Blouses from India, panel report, WT/DS33/R, adopted on 6 January 1997. [hereinafter Panel report on US Wool Shirts and Blouses]
\textsuperscript{1110} James Smith, note 1045, p.553.
\textsuperscript{1111} Ibid., pp.553-554.
Appellate Body proceeding but one (Turkey - Textiles). Looking ahead, the EU has reportedly taken a similar policy decision to reserve its rights as a third party in every case in which it is not a litigant. Few if any developing countries have the resources to make such a commitment. Appearances do not necessarily imply influence, but governments that fail to engage as third participants clearly forgo potentially valuable opportunities to pursue their interests during Appellate Body hearings with a direct impact on the future of the WTO.  

Allowing third parties to intervene directly at the AB stage could be advantageous to developing countries, as it would require fewer resources to intervene at the AB level than to do so from the beginning of a dispute. Furthermore, it could be more difficult for developing countries than for developed ones to clarify their interests at a very early stage of a dispute, and to identify cases that are of special interest to them as they are processed at the appellate level. This would give more incentive for developing countries to participate before the AB, and to have their say in the development of WTO jurisprudence, which takes shape at the AB stage.

Argentina made this recent contribution to the debate:

"The third element related to permitting Members which did not participate as third parties in the panel proceedings to join the dispute as third parties at the appeals stage. Under the current provisions of the DSU, Members were obliged to notify their substantial interest in the case at the panel stage before they could participate at the

\footnote{1112}{Ibid., p.561.}
\footnote{1113}{"This stipulation has created some difficulties for some Members in certain situations. Sometimes, panel reports come out with some findings or observations, which could not have been even remotely anticipated at the time the panel was being constituted. In the light of this some Members might want to become Third Parties at the appellate stage." S. Narayanan, "Dispute Settlement Understanding of the WTI: need for improvement and clarification", Indian Council for Research on International Economic Relations, Working Paper no.117, 2003, available online at http://www.icrier.org/pdf/wp117.pdf, last seen on 3-6-2008 at 1 pm, p.48.}
appeals stage, where issues of law and interpretation were essentially discussed. At the same time, it was possible for new third parties to be admitted as third parties to participate in compliance with panel proceedings occurring after both panel and appellate proceedings. Given the systemic interest in issues considered at the appellate stage and the interest of Members to make their views known, there was no valid reason for denying them that opportunity. Additionally, amending Article 17.4 of the DSU to incorporate the right of Members to join as third parties at the appeal stage would allow Members with limited resources to participate in the process. They would not have to participate in the panel proceedings before they could be allowed to participate in the appellate proceedings.1114

Allowing third parties with a substantial interest to intervene directly at the AB level would be a better method of formalizing the practice of the AB in the Sardine dispute1115. This allows members who have not notified their interest to the DSB and have not participated at the panel stage to participate with amicus curiae briefs in the appeal process. Such a concession would also guarantee a better position with superior procedural rights for developing countries which intervene as third parties, rather than sending only a written submission to the division, without attending the appeal process or being heard by the AB.1116

8.8.1 The AB oral hearing and third parties

Originally, third parties that intervened in the appeal process, unlike the panel, would have full access to the appeal proceedings: "The status of third parties during appeals, in other words, is comparable to that of the disputants. They enjoy complete access to any written

1115 More detail in chapter seven, section 7.4.3.
1116 Minutes of Meeting, WT/DSB/M/134, (29 January 2003), p.15.
submissions and to all oral hearings. Third parties have a comparable opportunity to persuade and rebut, both orally and in writing, throughout the appellate process. However, the practices of third parties have evolved alongside the practices of the AB, creating a new category of third parties, namely that of the 'passive observer'. Although these can more easily access the appeal process, they can be cut off from participating in the oral hearings of the AB. Considering the importance of these hearings, India made a proposal stating that third parties needed to be given the opportunity to participate in them in all situations. Hence, developing countries which are third parties would not be banned from having their say in the oral proceedings of the appeal process.

8.9 Consideration of Third Party Views in Panel and AB Reports

The introduction of the US submission on transparency states that

"over 10 years of experience under the WTO dispute settlement system has demonstrated that the recommendations and rulings of the Dispute Settlement Body can affect large sectors of civil society. At the same time, increased membership in the WTO has also meant that more governments and their citizens have an interest in those recommendations and rulings."  

The DSU does not require the AB and the panel to decide issues related to third parties in their reports. The current practice is that the

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1118 Passive observers have been discussed in chapter eight section 7.4.1.
arguments of third parties are merely stated in the panel and AB reports, or attached as appendixes. Similarly, it has been argued that addressing the issues raised by third parties in the same original process would reduce the cost, effort and time required for multiple panels to establish a ruling on the same matter of dispute as a result of third parties requesting the initiation of their own panel.\(^{1121}\) In this regard, two proposals could be considered that would result in resolving the issues raised by third parties. The first is to allow third parties to become co-complainants during a dispute.\(^{1122}\) The second is for issues raised by third parties to be directly decided by the panel and the AB in their final reports.\(^{1123}\)

The aforementioned proposals need to be looked at in more detail. The main object of the DSU is to resolve disputes between parties; hence, the interests of the main disputing parties ought not to be undermined. Increasing the number of third parties participating in WTO disputes and suddenly turning them into co-complainants during the course of a dispute would, however, increase the complexity of the dispute. The proposal would also encourage an increase in the number of co-complainants with procedural rights equivalent to those of the principal parties. Furthermore, this would also raise confusion about the terms of reference. They could have their own terms of reference, and even raise arguments outside the terms of reference of the


\(^{1123}\) Communication form Costa Rica, note 1035, and Communication from Kenya, note 1040, p.2.
original disputing parties. They could also have full participatory rights in the interim review process, in both the descriptive draft and the interim report, which would significantly increase the burden on the main disputing parties. In addition, third parties already have the option of making their own cases, either by themselves or jointly with other members, if they believe that they have a distinct matter to raise which differs from the one being discussed by the principal parties to the original dispute. Moreover, being a co-complainant is still not the best option for developing or developed countries under current circumstances, as they are subject to financial, legal, economic and political restraints. Many developing countries would rather choose to intervene as third parties, depending on the degree of interest they have in a dispute.

Allowing the AB and the panel to decide all matters in a dispute would not intensify the complexity of the dispute as much, since third parties are bound by terms of reference and are not allowed to raise issues outside such terms. These terms are established by the panel with the

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1124 Article 9.2 clearly states that “The single panel shall organize its examination and present its findings 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”; World Trade Organisation, Dispute Settlement Reports, (Cambridge University Press, Cambridge, Volume 5, 1998), p.2154.

1125 More detail on the current position of developing countries in the DSM chapters one, two and three.

1126 Elsewhere it has been argued by South Centre that “Third party participation in disputes shows that developing countries are aware that the dispute settlement system is more than just a mechanism for the main disputing parties to settle their differences. It demonstrates that they appreciate the systemic impact of dispute settlement reports. This is also reflected in the DSU negotiations where some proposals are either based on, or aimed at enhancing, the broad reach of dispute settlement. The proposals on external transparency exemplify this.” South Centre, ‘The WTO dispute settlement system: issues to be considered in the DSU negotiation’, Trade Analysis No.SC/TADP/TA/DS/1, October 2005, p.16.
principal parties and outline the main criteria of each dispute.\textsuperscript{1127} Developing countries also prefer to interact indirectly with the DSM by participating as third parties, allowing the panel and the AB to deal with issues related to third parties in their report. This would especially benefit developing countries acting as third parties.\textsuperscript{1128} By doing this, developing countries would not waste scarce resources (which could be employed elsewhere) in starting a new claim under the DSU. Moreover, as discussed earlier, in the oral hearing process the AB pushes third parties to raise new issues that are not covered in their written submissions, but which are within the terms of reference, in order to cover the broader views of the WTO membership. Allowing

\textsuperscript{1127} "Chinese Taipei was of the view that the extensive involvement of third parties in the dispute settlement process could compromise its basic function of the dispute settlement process, which was to secure a positive solution to the dispute between the parties. If panels and the Appellate were to reflect the arguments of third parties in their reports, it could delay the process and consequently undermine one of the basic tenets of the dispute settlement system." Minutes of Meeting, TN/DS/M/6, (31 March 2003), p.6. "Costa Rica welcomed the clarification by Chinese Taipei, in relation to its comments with regard to third-party arguments being reflected in panel reports and the possibility of their being able to comment on the interim report. Costa Rica proposed that these arguments, in addition to being included in the report, should also be taken into consideration by the panel, provided that they are limited to the terms of reference established by the parties to the dispute. A third party, he suggested, might contribute different arguments and points of view in relation to some of the points under discussion and the panel should take such arguments into consideration." Minutes of Meeting, TN/DS/M/7, (26 June 2003), p.4, "Chile, however, had strong reservations against the proposal that would require panels and the Appellate Body to give due consideration to the arguments and opinions of third parties in their rulings. This would not only complicate their main task, but could also distract their attention from the main issues and arguments raised by the parties to the dispute. Besides, it was not certain that such a proposal would benefit small delegations who were already finding it difficult to prepare and submit arguments either as complainants or respondents. In all likelihood, this proposal would only benefit a few important Members. It would also not be appropriate to involve third parties in deciding the panel’s timetable and working procedures." Minutes of Meeting, TN/DS/M/4, (6 November 2002), p.3.

\textsuperscript{1128} In this regard it has also been argued that “a complementary approach would be to press for an enhancement of third party rights in disputes, for example by giving third party arguments more weight in rulings. This would enhance the incentive for African countries to take third party statues in disputes, thus allowing them to benefit from the accompanying capacity building in a non-resource-intensive way”. Amin Alavi, ‘African Countries and WTO’s Dispute settlement Mechanism’, (2007), 5(1) Development Policy Review 25, pp.33-34.
the AB and the panel to address directly the concerns of third parties in their reports can be seen as a step towards establishing true multilateralism, not only for disputes but also for trading systems.

In the US – 1916 Act dispute, the AB also declined to give third parties the same rights of co-complainant stated in Article 9, asserting that the status of a co-complainant is distinct from that of a third party. The AB stated:

"Although the European Communities and Japan invoke Article 9 of the DSU, and, in particular, Article 9.3, in support of their position, we note that Article 9 of the DSU, which concerns procedures for multiple complaints related to the same matter, does not address the issue of the rights of third parties in such procedures. Under the DSU, as it currently stands, third parties are only entitled to the participatory rights provided for in Articles 10.2 and 10.3 and paragraph 6 of Appendix 3."\(^{1129}\)

Allowing the panel and AB to address the concerns of parties is preferable to allowing third parties to reassert themselves as co-complainants. The former permission is compatible with the original functions intended for third parties: to help the panel and AB to resolve complicated issues in one dispute but not in another, "which is the function of Article 9 of the DSU that deals with co-complainants". In this regard it has been argued that

"...the judicial policy underpinning third party intervention stems from the preference for resolving one complex dispute at a time, rather than sorting out the conflicting claims of multiple parties in a single action. This contrasts markedly with the policy underlying the rules and procedures for ‘Multiple Complaints’ contained in Article 9 of the DSU, which demonstrates a clear preference for the

resolution of multiple complaints concerning the same matter by a single panel and if this is not possible that 'to the greatest extent possible the same persons shall serve as panelists on each of the separate panels and the timetable for the panel process in such disputes shall be harmonized'."

Enhancing the rights of third parties by guaranteeing better access and participation, and allowing the AB and the panel to decide on issues related to third parties in their rulings, is a better option for developing countries and the DSM than turning them into co-complainants in the course of a dispute. Benin and Chad clearly requested the AB to do so in the Cotton case, in spite of the fact that the AB has no authority to deal with issues related to third parties in a dispute. They argued that:

"Benin and Chad argue that the Appellate Body should take into account the impact of United States upland cotton subsidies on the "fragile economies of West and Central Africa", as reflected in the Panel’s findings and evidence on the record. Benin and Chad point out that Article 24.1 of the DSU, which requires particular consideration to be given to the special situation of least-developed country Members, would be given meaning if the Appellate Body acknowledged that the increase in the United States’ world market share caused serious prejudice to Benin and Chad by reducing their market share. Furthermore, nothing in the text of Article 6.3(d) limits a finding of serious prejudice to the complaining party. Therefore, Benin and Chad urge the Appellate Body to draw conclusions under Article 6.3(d) that would require the United States to withdraw the subsidy or remove the adverse effects, not only with respect to Brazil, but also with respect to Benin and Chad."\(^{1131}\)

This proposal on allowing the panel and AB to deal with issues related to third parties in the same dispute is not alien to international law, as

\(^{1130}\) John P. Gaffney, note 1084, pp.1212-1213.

can be seen by considering the International Tribunal for the Law of the Sea (ITLOS). This allows requests to intervene according to Article 31 of the tribunal Rules within 30 days after the counter-memorial becomes available, similarly to Article 10 of the DSU, which is governed by Rule 99 paras 1, 2 and 3 of the Procedural Rules of the tribunal. Once a third party is allowed to intervene according to Article 31, ITLOS will deal with an issue brought by that party which is related to the dispute.1132

8.10 Conclusion

The drafters of the DSU added an important element to it by regulating the rules related to third parties. However, it appears that the role of third parties has developed to be more important than the original drafters had envisaged, particularly for developing countries. This has made the current rules for third parties in the DSU important, but not sufficient. There is certainly room for improvement.

The issues which need to be considered in the reform of third party rights in the panel and AB process include the following:

- The condition for the intervention of third parties should remain that of 'substantial interest', without modifying Article 10 of the DSU to be within 10 days of the establishment of the panel.

- Third parties should have complete participatory rights in the first and second meetings of the panel, and full access to the submissions made by the parties during the panel and AB processes.

1132 Article 31 of the Statues of the Tribunal for the Law of the Sea, available online at http://www.itlos.org/, last seen on 06-06-2008, at 10am. Unfortunately this is not concrete disputes in this respect.
- It should be guaranteed that developing countries which are third parties will benefit from the S&D provided for developing countries in the DSU.

- Third parties should have the right to intervene in the appeal process without being third parties in the panel process.

- Third parties, especially developing countries, ought to have more guaranteed rights to participate in the oral hearings of the AB.

- Third party concerns need to be addressed in the panel and AB reports, instead of their being merely reflected upon.
Concluding Remarks

The settlement of trade disputes on third party adjudication started when GATT was established. Because of its temporary character, the GATT dispute mechanism was governed by procedural rules: Articles 22 and 23 of GATT. Developing countries outnumbered their developed counterparts as members, yet no specific provisions considered their special requirements. This led the GATT system to be classified as a power-based dispute mechanism, rather than a rule-based one. Nevertheless, the GATT adjudication system evolved to be more legalized, especially when the GATT panel was created in the 1950s. It developed to give special and preferential treatment to developing countries, especially following the 1966 improvements to the system.

Despite all the improvements that took place between 1947 (when the GATT was established) and 1994 (when it was replaced by the WTO) GATT suffered from severe deficiencies and failed to safeguard the interests of its poorer and less developed members. For instance, its dispute mechanism lacked clear rules because of its temporary character. There was no proper enforcement system. Most importantly, the ‘birth defect’ of easy blockage of the establishment of the GATT panel and the adoption of the GATT panel report prohibited developing countries from taking their cases to the GATT adjudication system\textsuperscript{1133}.

\textsuperscript{1133} Developing countries and the GATT dispute mechanism been dealt with in chapter two.
During the Uruguay Round, developing countries supported the US calls for the establishment of a more law-based dispute settlement system that would treat all members equally, irrespective of wealth and power. In 1994, the WTO dispute settlement system came into existence. It then became clear that the Uruguay Round was not meant to serve developing countries and did not consider their development needs. It has been argued that the WTO dispute settlement system would be the single most important victory for developing countries.

However, it does appear that what has been considered as a victory for developing countries is not without faults. In particular, this becomes clear if we examine the most fundamental principle of the DSM: that which allows fair and equal treatment for all members. Indeed, the DSU demolished the negative consensus rules and now all members have the right to a panel. It also has more sophisticated rules with an improved implementation system. In addition, it considers the special circumstances of developing countries, and allows them preferential treatment under the so-called S&D arrangements. However, most developing countries do not have sufficient financial or legal professional resources to bring their cases to the WTO dispute settlement system, while most are either economically or politically (and sometimes militarily) dependent on the more powerful WTO members. This gives the latter an unfair advantage, especially in the consultation and implementation processes. The effectiveness of the S&D arrangements have also been questioned. In fact, the difficulties facing developing countries are not only procedural and structural. It is also difficult for them to shift

\[\text{Obstacles facing developing countries in the WTO dispute settlement system has been addressed in chapter three.}\]
the emphasis of the dispute settlement system and decision-making of the WTO to suit their development needs.\textsuperscript{1135}

Indeed, it cannot be said that all members have equal access; nor will they, unless they are given the tools to acquire it. Developing countries have used every possible occasion to express their dissatisfaction with the DSM and, and to propose ideas for reforms. Ironically, they have been active in participating in the official reform process, and did hesitate to express their concerns about the DSM. The reform of the DSM has, however, been conducted separately, and not as part of a single undertaking to restructure the WTO agreements. The reform of the WTO dispute settlement system started in 1999 and the last deadline (in 2004) has long been missed, leaving reform as an open-ended process.\textsuperscript{1136}

Among the matters discussed during the DSM negotiation process, third party rights appear of particular importance in terms of both the function of the DSM and of developing countries. Indeed, it can be suggested that developing countries ought to seek opportunities to identify where they have a special interest in a case, and to participate as third parties. This is because developing countries that have never participated in the DSM can gain first-hand experience and familiarise themselves with the WTO dispute mechanism at lower cost (financial and political) by participating as third parties than as principals. Third parties have the opportunity to attend the first meeting of the panel and to see the parties' submissions to that meeting, as well as

\textsuperscript{1135} Developing countries and the jurisprudence of the WTO dispute settlement mechanism has been dealt with in chapter four.
\textsuperscript{1136} More detail on the review process of the DSU in Thomas A. Zimmermann, 'WTO Dispute Settlement: General Appreciation and the Role of India', in K Padmaja(ed), the WTO and Dispute Resolution, (The Icfai University Press, India, 2007), pp.165-173.
participating in the oral hearings before the panel. They also have the right to participate in the appeal process, to read the parties' submissions and participate in the oral hearing of the AB. With regard to the function of the DSM, third party involvement enhances the legitimacy of the panel and AB rulings. Finally, it would also appear to broaden the view of the panel and AB, allowing them to better represent the wider membership of the WTO in the era of international trade.\footnote{137}

Against these advantages, it has been argued that third parties should continue to have restricted access. Indeed, many third parties, especially developing countries, have been denied access to the consultation stage on discriminatory grounds. Third parties are also excluded from the second meeting of the panel and the interim review process. They have no right to intervene directly in the AB process. Sometimes, especially in the case of developing countries, they are not allowed to participate in the oral hearings of the AB either.

Although the majority of WTO members believe that third party rights need to be reformed, there has been a vigorous debate on how much they can be extended. To summarise, having examined the reform of third party rights with particular reference to the interests of developing countries, this thesis makes the following two sets of suggestions:

\footnote{137} The importance of third party rights for developing countries examined in chapter five.
First, certain proposals should be adopted when considering the reform of third party rights in the consultative process:\(^{1138}\):

- The discretion of the disputing parties to decline third party participation at the consultation stage should be removed; the arbitrary discrimination against the access of third parties, especially developing countries, to the consultation process should be eliminated; and equal access should be granted to all third parties in consultation.

- The term 'substantial trade interest' ought to be replaced by the term 'substantial interest' to be coherent with the provisions that govern third parties' intervention in the panel; the coherence of third party provision should be improved by making the requirement for access to the consultation the same as the requirement for access to the panel and appeal processes; and easier access should be granted to developing countries, since they have difficulties in anticipating their interest until they have actually received the necessary information about the dispute during the consultative process.

- Third parties in the consultation stage ought to be paid sufficient attention, kept up-to-date and notified of the progress of the consultation and any solution that is agreed; steps should be taken to eliminate the practice of the third party, especially in developing countries, being excluded from being notified about the mutually agreed solution; and such parties should be kept informed of all the developments in a dispute, so that they can make a decision as to whether to establish their own panel.

\(^{1138}\) More analyses on third party participation in the consultation stage and detailed reform proposals in chapter six.
Other proposals should be adopted when considering the reform of third party rights in the panel and AB processes\textsuperscript{1139}:

The intervention of third parties should continue to be conditional on 'substantial interest', without modifying Article 10 of the DSU to require it to be within 10 days of the establishment of the panel; this should apply, especially to the current practice of the panel, which allows automatic access for third parties to the panel process and which increases the incentive of developing countries to participate as third parties without obstruction. Another current practice of the panel which should be preserved is that regarding the time limit on the notification of interest, which would give further flexibility to the participation of third parties and be particularly beneficial for developing countries. Third parties should have complete participatory rights in the first and second meetings of the panel, and full access to the submissions made by the parties during the panel and AB processes. Against the tenor of its rules, the WTO dispute settlement system has become multilateral, with extensive intervention by third parties. The panel and the AB have realized this and extended third party rights on several occasions. However, they have added even more ambiguity to the existing vagueness of third party rights. The aim of this proposal to improve the access and participation third parties is in the spirit of the multiplicity of WTO disputes, and guarantees that developing countries can enjoy effective participation as third parties and gain real experience of the dispute settlement mechanism.

\textsuperscript{1139} More detail on third party intervention in the course of the dispute and detail reform proposals in chapters seven & eight.
It should be guaranteed that developing countries which are third parties will benefit from S&D provisions for developing countries in the DSU. This thesis proposes that the term 'third party' be added to Articles 12.10, 8.10 and 27.2, so as to facilitate the participation of developing country third parties. They would then have sufficient time to prepare their arguments, to benefit from the technical assistance of the WTO Secretariat and be able to have panellists of their own in the Panel Division.

Third parties should have the right to intervene in the appeal process without being third parties in the panel process; in practice, the AB has allowed WTO members to intervene in the appeal process without notifying an interest according to Article 10.3 of the DSU, in the form of amicus curiae. It is true that the issue of amicus briefs is highly political, and the practice has faced stiff resistance from many WTO members. Nevertheless, allowing third parties to intervene directly in the appeal process is the most cost effective manner for developing countries to participate in the most important stage of the dispute process, a stage in which they rarely participate. Therefore, a better codification of the AB practice is to regulate the possibility of direct intervention by third parties in the appeal process.

Third parties, especially developing countries, ought to have more guaranteed rights to participate in the oral hearings of the AB. If the AB is the most important part of the DSM, the oral hearing is an important part of the appeal process. Thus, developing country third parties ought not to be 'passive' participants. They should have a secured right to present their views at the oral hearings of the AB.
Third party concerns need to be addressed in the panel and AB reports, instead of merely reflecting upon them, given the fact that considering the view of third parties in the panel and AB report will encompass the wider interest of WTO members. This is vital for the predictability and security of the multilateral trading system and the avoidance of the duplication of the dispute process on the same subject matter. This proposal is thus in the interests of the membership as a whole. But they are primarily intended to address the needs of poorer members. Third party participation appears to be the form of involvement in the WTO dispute settlement mechanism preferred by developing countries. They have the advantage of their concerns being dealt with without bearing the cost of the initiation of a new panel, unless they have a very distinct concern that is not included in the terms of reference. In this case they can still initiate a new panel as a last resort.

Indeed, these proposals are without prejudice to the parties’ rights to establish a panel, or to settle or withdraw the dispute at any stage of the dispute.
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Appendix One

Segments of the WTO dispute settlement mechanism

<table>
<thead>
<tr>
<th>Consultations (Art. 4)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Panel established by Dispute Settlement Body (DSB) (Art. 6)</td>
</tr>
<tr>
<td>Terms of reference (Art. 7) Composition (Art. 8)</td>
</tr>
<tr>
<td>Panel examination Normally 2 meetings with parties (Art. 12), 1 meeting with third parties (Art. 10)</td>
</tr>
<tr>
<td>Interim review stage Descriptive part of report sent to parties for comment (Art. 15.1) Interim report sent to parties for comment (Art. 15.2)</td>
</tr>
<tr>
<td>Panel report issued to parties (Art. 12.8; Appendix 3 par 12(j))</td>
</tr>
<tr>
<td>Panel report issued to DSB (Art. 12.9; Appendix 3 par 12(k))</td>
</tr>
<tr>
<td>DSB adopts panel/appeal report(s) including any changes to panel report made by appellate report (Art. 16.1, 16.4 and 17.14)</td>
</tr>
<tr>
<td>Implementation report by losing party of proposed implementation within 'reasonable period of time' (Art. 21.3)</td>
</tr>
<tr>
<td>In cases of non-implementation parties negotiate compensation pending full implementation (Art. 22.2)</td>
</tr>
<tr>
<td>Retaliation If no agreement on compensation, DSB authorizes retaliation pending full implementation (Art. 22)</td>
</tr>
<tr>
<td>Cross-retaliation: same sector, other sectors, other agreements (Art. 22.3)</td>
</tr>
<tr>
<td>During all stages good offices, conciliation, or mediation (Art. 5)</td>
</tr>
<tr>
<td>Expert review group (Art. 11; Appendix 4)</td>
</tr>
<tr>
<td>Review meeting with panel upon request (Art. 15.2)</td>
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<tr>
<td>... 30 days for appellate report</td>
</tr>
<tr>
<td>Appellate review (Art. 16.9 and 17)</td>
</tr>
<tr>
<td>Dispute over implementation: Proceedings possible, including referral to initial panel on implementation (Art. 21.5)</td>
</tr>
<tr>
<td>... 90 days after DSB's decision to have a panel</td>
</tr>
</tbody>
</table>
| TOT. IF OR report unless appealed ...

'Reasonable period of time' determined by: member proposes, DSB agrees; or parties in dispute agree; or arbitrator (approx. 15 months if by arbitrator) |

Appendices Two

Articles mentioning developing country in the DSU

Article 3:12

“Notwithstanding paragraph 11, if a complaint based on any of the covered agreements is brought by a developing country Member against a developed country Member, the complaining party shall have the right to invoke, as an alternative to the provisions contained in Articles 4, 5, 6 and 12 of this Understanding, the corresponding provisions of the Decision of 5 April 1966 (BISD 14S/18), except that where the Panel considers that the time-frame provided for in paragraph 7 of that Decision is insufficient to provide its report and with the agreement of the complaining party, that time-frame may be extended. To the extent that there is a difference between the rules and procedures of Articles 4, 5, 6 and 12 and the corresponding rules and procedures of the Decision, the latter shall prevail.”

Article 4.10

“During consultations Members should give special attention to developing country Members' particular problems and interests.”

Article 8.10

“When a dispute is between a developing country Member and a developed country Member the panel shall, if the developing country Member so requests, include at least one panelist from a developing country Member.”
Article 12.10

"In the context of consultations involving a measure taken by a developing country Member, the parties may agree to extend the periods established in Article 4:7 and 4:8. If, after the relevant period has elapsed, the consulting parties cannot agree that the consultations have concluded, the Chairman of the DSB shall decide, after consultation with the parties, whether to extend the relevant period and, if so, for how long. In addition, in examining a complaint against a developing country Member, the panel shall accord sufficient time for the developing country Member to prepare and present its argumentation. The provisions of Article 20:1 and of Article 21:4 are not affected by any action pursuant to this paragraph."

Article 12.11

"Where one or more of the parties is a developing country Member, the panel's report shall explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favourable treatment for developing country Members that form part of the covered agreements which have been raised by the developing country Member in the course of the dispute settlement procedures."

Article 21.2

"Particular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement."
Article 21.7

“If the matter is one which has been raised by a developing country Member, the DSB shall consider what further action it might take which would be appropriate to the circumstances.”

Article 21.8

“If the case is one brought by a developing country Member, in considering what appropriate action might be taken, the DSB shall take into account not only the trade coverage of measures complained of, but also their impact on the economy of developing country Members concerned.”

Article 24:1

“At all stages of the determination of the causes of a dispute and of dispute settlement procedures involving a least-developed country Member, particular consideration shall be given to the special situation of least-developed country Members. In this regard, Members shall exercise due restraint in raising matters under these procedures involving a least-developed country Member. If nullification or impairment is found to result from a measure taken by a least-developed country Member, complaining parties shall exercise due restraint in asking for compensation or seeking authorization to suspend the application of concessions or other obligations pursuant to these procedures.”
Article 24:2

“In dispute settlement cases involving a least-developed country Member, where a satisfactory solution has not been found in the course of consultations the Director-General or the Chairman of the DSB shall, upon request by a least-developed country Member offer their good offices, conciliation and mediation with a view to assisting the parties to settle the dispute, before a request for a panel is made. The Director-General or the Chairman of the DSB, in providing the above assistance, may consult any source which either deems appropriate.”

Article 27.2

“While the Secretariat assists Members in respect of dispute settlement at their request, there may also be a need to provide additional legal advice and assistance in respect of dispute settlement to developing country Members. To this end, the Secretariat shall make available a qualified legal expert from the WTO technical cooperation services to any developing country Member which so requests. This expert shall assist the developing country Member in a manner ensuring the continued impartiality of the Secretariat.”
Appendix Three

Third party provisions

Article 4.11: third party participation in Consultations

Whenever a Member other than the consulting Members considers that it has a substantial trade interest in consultations being held pursuant to paragraph 1 of Article XXII of GATT 1994, paragraph 1 of Article XXII of GATS, or the corresponding provisions in other covered agreements(4), such Member may notify the consulting Members and the DSB, within 10 days after the date of the circulation of the request for consultations under said Article, of its desire to be joined in the consultations. Such Member shall be joined in the consultations, provided that the Member to which the request for consultations was addressed agrees that the claim of substantial interest is well-founded. In that event they shall so inform the DSB. If the request to be joined in the consultations is not accepted, the applicant Member shall be free to request consultations under paragraph 1 of Article XXII or paragraph 1 of Article XXIII of GATT 1994, paragraph 1 of Article XXII or paragraph 1 of Article XXIII of GATS, or the corresponding provisions in other covered agreements.

Article 10: Third Parties participation in the panel process

1. The interests of the parties to a dispute and those of other Members under a covered agreement at issue in the dispute shall be fully taken into account during the panel process.
2. Any Member having a substantial interest in a matter before a panel and having notified its interest to the DSB (referred to in this Understanding as a "third party") shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report.

3. Third parties shall receive the submissions of the parties to the dispute to the first meeting of the panel.

4. If a third party considers that a measure already the subject of a panel proceeding nullifies or impairs benefits accruing to it under any covered agreement, that Member may have recourse to normal dispute settlement procedures under this Understanding. Such a dispute shall be referred to the original panel wherever possible.

**Article 17.4: Third Parties participation in the appeal process**

Only parties to the dispute, not third parties, may appeal a panel report. Third parties which have notified the DSB of a substantial interest in the matter pursuant to paragraph 2 of Article 10 may make written submissions to, and be given an opportunity to be heard by, the Appellate Body.