



Research article

Frustration through futility: Least developed countries and the WTO's settlement of disputes

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Abstract

The lack of participation and engagement by Least Developed Countries (LDCs) in the World Trade Organization (WTO) in general, and in their use of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) in particular, has been a continuing problem facing the WTO, tainting not only the organization as a whole but also the DSU, its crown jewel. This article considers—from a commercial viewpoint—the many issues and barriers preventing LDCs from using the DSU, including capacity issues, costs, private sector involvement, and others. The article also considers specific provisional measures that are widely available and recognised within the national legal regime; have been adopted internationally by a plethora of divergent judicial, quasi-judicial, and arbitral fora; and are recommended by the WTO—but which are, significantly, missing from the DSU itself. The paper concludes that the addition of provisional measures to the DSU toolkit will enhance the effectiveness of the DSU by removing key structural obstacles that have prevented LDCs from exercising their right to prosecute trade disputes with other WTO members.

Keywords: WTO, DSU, LDC, participation, provisional remedies

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Background

In 2014, the global value of merchandise exports was US \$19.112 trillion.¹ The flow of international trade is, to varying degrees, critical to our way of life. International trade supplies us with foreign foodstuffs, automobiles, computers, domestic appliances, and even the clothes we wear. Trade in goods and services between countries creates and sustains employment while contributing to economic growth and development, particularly in developing countries.² Given the significance of the part played by international trade in our everyday lives, it is important that this trade be safe and secure. We must also understand what happens when the system breaks down or disputes arise.

The Understanding on Rules and Procedures Governing the Settlement of Disputes (the DSU) was one result of the 1986–1994 Uruguay Round of trade negotiations, which also created the World Trade Organisation.³ Article 3 of the DSU states that the DSU is to be a “central element providing security and predictability to the multilateral trading system.”⁴ Overall, the DSU mechanism was acclaimed as something of a panacea incorporating state of the art provisions,⁵ and it was widely regarded as a crown jewel of the then-new WTO system.⁶

Under the DSU, a WTO member who believes its rights under trade agreements have been violated or otherwise infringed can bring a dispute that will be settled by the Dispute Settlement Body (DSB).⁷ The DSU provides a mechanism whereby even small states can seek redress against larger countries notwithstanding the disparity in power between the parties.⁸

A good example of this situation can be found in *Antigua – U.S. Gambling Services*,⁹ in which the small twin-island state of Antigua and Barbuda (“Antigua”) successfully challenged the United States concerning the provision by Antigua of internet cross-border gambling services to the United States.¹⁰

¹The World Bank, *Trade graph: Merchandise exports (current US\$)*, <http://data.worldbank.org/topic/trade> (last visited Sept. 29, 2016).

²Ashford C. Chea, *Sub-Saharan Africa and Global Trade: What Sub-Saharan Africa Needs to Do to Maximize the Benefits from Global Trade Integration, Increase Economic Growth and Reduce Poverty* 2 INT'L J. ACAD. RESEARCH BUS. & SOC. SCI. 359, 359–60 (2012), <http://www.hrmars.com/admin/pics/726.pdf> (last visited July 1, 2015); Michael R. Mullen et al., *The Effects of International Trade on Economic Growth and Meeting Basic Human Needs*, 15 J. GLOB. MKTG. 31, 51 (2001), http://www.tandfonline.com/doi/abs/10.1300/J042V15N01_03 (last visited July 1, 2015).

³WTO, *Understanding the WTO: Basics - The Uruguay Round*, https://www.wto.org/english/thewto_e/whatis_e/tif_e/facts_e.htm (last visited May 6, 2016).

⁴Understanding on Rules and Procedures Governing the Settlement of Disputes art. 3, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, www.wto.org/english/docs_e/legal_e/28-dsu.pdf (last visited Jan. 17, 2015) [hereinafter DSU].

⁵Susan Esserman & Robert Howse, *WTO on Trial*, 82 FOREIGN AFF. 130, 131 (2003).

⁶*Id.*; Adam Gross, *Can Sub-Saharan African Countries Defend Their Trade and Development Interests Effectively in the WTO? The Case of Cotton*, 18 EUR. J. DEVELOPMENT RES. 368, 369, 386 (2006), <http://search.ebscohost.com/login.aspx?direct=true&db=bth&AN=22483097&site=ehost-live>.

⁷See DSU, *supra* note 4, art. 2.

⁸Richard L. Bernal, *Participation of Small Developing Economies in the Governance of the Multilateral Trading System* 10 (Ctr. for Int'l Governance Innovation, Working Paper: Developing Econs. No. 44, 2009), <https://www.cigionline.org/publications/participation-small-developing-economies-governance-multilateral-trading-system> (last visited Aug. 14, 2017) [hereinafter Bernal, *Participation*].

⁹Panel Report, *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc. WT/DS285/R (adopted Nov. 10, 2004) [hereinafter *Panel Report, U.S./Antigua*].

¹⁰Request for Consultations by Antigua and Barbuda, *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc. WT/DS285/1 (March 27, 2003), [hereinafter *Request, U.S./Antigua*]; see Sarita Jackson, *Small states and compliance bargaining in the WTO: an analysis of the Antigua–US Gambling Services Case*,

In 1997, in a bid to diversify its economy, Antigua started to licence the provision of internet-based gambling services.¹¹ The business expanded and by 1999 there were some 119 licensed operators generating some US \$7.4 million in licencing fees and some US \$12.9 million in wages and salaries, accounting in total for some ten percent of the country's GDP.¹²

In 2003, Antigua alleged that the United States had effectively made the provision of cross-border gambling and betting services illegal through the cumulative effect of measures taken by U.S. federal and state authorities in contravention of the General Agreement on Trade in Services¹³ (the GATS) Articles II, VI, VIII, XI, XVI and XVII.¹⁴ The economic impact of the U.S. measures was dramatic. By 2003, the number of licensed operators in Antigua had contracted from 119 to 28, there had been some 2,500 job losses, and governmental income from licensing fees had dropped by some 75% to US \$1.8 million.¹⁵

The United States rejected the claim that its actions breached the GATS provisions, averring first, that cross-border gambling services should be classified as "sporting" and thus exempt under GATS Subsector 10.D,¹⁶ and second, that the United States was acting to protect public morals, as permitted under GATS XIV.¹⁷ Regarding the first defence, the Panel ruled that gambling and betting services did not fall under Subsector 10.D,¹⁸ thus rejecting the U.S. position. Regarding the second defence, the Panel ruled that the United States had failed to show that the measures it had taken were essential to protect the morals of its citizens.¹⁹

The United States appealed the Panel ruling. The Appellate Body reversed the Panel determination that the United States had not demonstrated that the measures adopted by it were necessary to protect the public morals of US citizens. But the Appellate Body also ruled that the United States had failed to demonstrate it had applied the measures in a non-discriminatory way and, consequently, that the United States had failed to satisfy the requirements of the GATS. Accordingly, the Body asked the United States to take steps to ensure conformity with its WTO obligations.²⁰

The *Antigua – U.S. Gambling Services* case clearly demonstrates how small states can use the DSU to seek redress against larger countries, notwithstanding the power imbalance. But, as will be discussed below, it also highlights the issues faced by small countries in enforcing favourable rulings.

Footnote continued

²⁵ CAMBRIDGE REV. INT'L AFF. 367, 373 (2012), <http://www.tandfonline.com/doi/abs/10.1080/09557571.2012.710588> (last visited June 26, 2016).

¹¹First Submission of Antigua and Barbuda, *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, 9 WTO Doc. WT/DS285 (Oct. 1, 2003), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm (last visited Mar. 7, 2016) [hereinafter *First Submission, U.S./Antigua*].

¹²*Id.*

¹³General Agreement on Trade in Services, Jan. 1, 1995, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, https://www.wto.org/english/docs_e/legal_e/26-gats.pdf [hereinafter GATS].

¹⁴*Request, U.S./Antigua, supra* note 10.

¹⁵*First Submission, U.S./Antigua, supra* note 11, ¶ 37.

¹⁶Jackson, *supra* note 10, at 376.

¹⁷*Id.*

¹⁸*Id.*

¹⁹*Id.* at 377.

²⁰Albena Peters, *Latest Developments in the WTO Internet Gambling Dispute and Challenges Ahead*, 13 J. INTERNET L. 3, 4 (2010), <http://search.ebscohost.com/login.aspx?direct=true&db=bah&AN=49548594&authType=shib&site=ehost-live> (last visited June 26, 2016).

This paper includes seven sections. Section I analyses the effects of WTO violations, Section II examines Least Developed Country (LDC) non-engagement, Section III overviews provisional and protective remedies, Section IV outlines a prospective provisional measure, Section V describes the main benefits flowing from such a measure, Section VI considers how such a measure could be given effect, and Section VII provides some concluding remarks.

I. The Impact of a WTO infraction

Infringement or violation of a member's rights can have a debilitating effect on related domestic industries, resulting not only in enterprise failures and unemployment (as evidenced in the *Antigua – U.S. Gambling Services* case²¹ discussed above), but also in slowed growth of associated industries and enterprises. These developments, in turn, limit employment growth and growth of the economy as a whole.

Such effects apply uniformly: it is of no matter whether the infringed country is a developed or developing one. In 2003, for example, the U.S. Department of Commerce imposed tariffs ranging from 37%–64% on the import of certain types of Vietnamese catfish. The tariffs led to the virtual collapse of those exports to the United States.²² Between 2000 and 2002, before the tariffs, approximately half of all catfish exported from Vietnam had gone to the United States.²³ The effect of the 2003 tariff action on enterprises engaged in farming these catfish was striking: by 2004 between 25%–30% of all Vietnamese producers had abandoned fish farming.²⁴

At the other end of the development spectrum, in 2003 the United States, Canada, and Argentina lodged a complaint with the WTO against the European Union²⁵ concerning the European Union's introduction in the early 1990's of legislation restricting genetically-modified organisms (GMOs). GMO-producing and -exporting countries challenged the restrictions, culminating in the WTO action. In broad terms, the impact of the legislation was to effectively freeze the approval of GMO foodstuffs for production, importation, or consumption within the European Union.²⁶ Based on an econometric model, Disdier and Fontagne²⁷ estimate that the cumulative loss of exports to the European Union for the years

²¹Panel Report, *U.S./Antigua*, *supra* note 9.

²²Irene Brambilla, Guido Porto, & Alessandro Tarozzi, *Adjusting to Trade-Policy Changes in Export Markets: Evidence from U.S. Antidumping Duties on Vietnamese Catfish* 3 (Pol'y Res.: The World Bank Dev. Res. Group Trade & Integration Team, Working Paper No. WPS4990, 2009).

²³*Id.* at 6.

²⁴*Id.* at 27.

²⁵Collected documents, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds291_e.htm (last visited Oct. 8, 2016); see also DS292 for Canada, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds292_e.htm (last visited Oct. 8, 2016), and DS293 for Argentina, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds293_e.htm (last visited Oct. 8, 2016).

²⁶GMO technology has been used to create a range of insect-resistant and herbicide-tolerant crops, such as maize, soybeans, oilseed rape, etc. These crops benefit farmers by reducing input costs buying pesticides and increasing crop yields. Globally, farmers quickly embraced and adopted the new technology, which became "the fastest adopted crop technology in the history of modern agriculture." Gurdev S. Khush, *Genetically modified crops: the fastest adopted crop technology in the history of modern agriculture*, 1 *AGRIC. & FOOD SECURITY* 14 (2012), <http://www.agricultureandfoodsecurity.com/content/1/1/14>. See generally Clive James, *Global Status of Commercialized Biotech/GM Crops: 2008* (Isaaa Brief 39, 2008), <https://isaaa.org/resources/publications/briefs/39/download/isaaa-brief-39-2008.pdf>.

²⁷Anne-Célia Disdier & Lionel Fontagné, *Trade impact of European measures on GMOs condemned by the WTO panel*, 146 *REV. WORLD ECON.* 495, 512 (2010). <http://link.springer.com/article/10.1007/s10290-010-0057-7> (last visited Nov. 14, 2014).

2003–2005 amounted to US \$1.97 billion for the United States, US \$349.6 million for Canada, and US \$52.2 million for Argentina.

Where members' WTO rights are violated, the effects of the infringement can speedily decimate an industry. It is the speed of the devastation that drives the writer's recommendations for the additional measures proposed in Section IV of this paper. An especially potent example of this phenomenon took place in East Africa, where there was an outbreak of cholera in 1997. In response, in April 1997, the European Union imposed a ban on fresh fish imports from the region²⁸ without first having conducted an apposite risk assessment.²⁹ Although the ban was lifted after barely sixteen months—in June 1998—the Ugandan, Tanzanian, and Kenyan economies were decimated. Tanzania alone witnessed a 40% reduction in its fish processing industry workforce.³⁰

The failure to conduct a risk assessment is contrary to Article 2.2 of the WTO Agreement on Technical Barriers to Trade. It allows a member to apply trade-restrictive measures to protect human health and safety, but it also requires the member to take "account of the risks non-fulfilment would create"³¹ and that in "assessing such risks, relevant elements of consideration are, *inter alia*: available scientific and technical information."³² As Ochieng and Majanja note, the European Union failed to "tender scientific evidence or data confirming the possibility of cholera-causing pathogens being transmitted to humans through fish."³³

From this brief demonstration of the powerful effect trade right violations can have, it is not surprising that the DSU, as a vehicle designed to resolve such issues, has been heavily used. Since its inception, some 492 disputes have been filed.³⁴ Curiously (and significantly), however, in only one of these cases has the complainant been an LDC,³⁵ even though LDCs represent nearly one billion people in over 48 countries, 42 of which are either members of the WTO or are in the process of accession thereto.³⁶ This is a group for which, as Mosoti notes, there is no shortage of potential cases.³⁷

²⁸David Ouma Ochieng & David S. Majanja, *Sub-Saharan Africa and WTO Dispute Settlement: The Case of Kenya*, in DISPUTE SETTLEMENT AT THE WTO: THE DEVELOPING COUNTRY EXPERIENCE 310 (Gregory C. Shaffer & Ricardo Meléndez-Ortiz eds., 2010) [hereinafter DISPUTE SETTLEMENT AT THE WTO].

²⁹Sungjoon Cho, *Beyond Doha's Promises: Administrative Barriers as an Obstruction to Development*, 25 BERKELEY J. INT'L L. 395, 405 (2007), <http://scholarship.law.berkeley.edu/bjil/vol25/iss3/2>.

³⁰*Id.* at 405.

³¹Agreement on Technical Barriers to Trade, Jan. 1, 1995, 1868 U.N.T.S. 120, https://www.wto.org/english/docs_e/legal_e/17-tbt.pdf (last visited March 14, 2015).

³²*Id.* For the full series of agreements resulting from the Uruguay Round, see WTO, The WTO Agreements Series, https://www.wto.org/english/res_e/publications_e/tbttrade_e.pdf (last visited Sept. 12, 2017).

³³Ochieng & Majanja, *supra* note 28, at 310.

³⁴See WTO, FIND DISPUTES CASES, https://www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm?year=any&subject=none&agreement=none&member1=none&member2=none&complainant1=true&complainant2=true&respondent1=true&respondent2=true&thirdparty1=false&thirdparty2=false#results (last visited Feb. 24, 2016).

³⁵Panel Report, *India – Anti-dumping measure on batteries from Bangladesh*, WTO Doc. WT/DS306/R (adopted Jan. 28, 2004). There have been four cases where LDCs have participated as third parties. See WTO, WTO, FIND DISPUTES CASES, *supra* note 38.

³⁶See *Understanding the WTO: The Organization—Least-developed countries*, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm (last visited Oct. 8, 2016).

³⁷Victor Mosoti, *Does Africa Need the WTO Dispute Settlement System?* 79 (Geneva: Int'l Ctr. for Trade & Sustainable Dev., Resource Paper No. 5 (2003), http://mercury.ethz.ch/serviceengine/Files/ISN/93004/ichaptersection_singledocument/48402eca-52f5-4220-895d-30ccf43cf3ad/en/No_05_chapter_2_+Towards_a_Development_.pdf (last visited Dec. 8, 2014).

II. LDC/DSU non-engagement – Rationale and exemplar

The underlying causal reasons explaining the non-engagement anomaly have been the subject of much academic debate and discourse,³⁸ resulting in a bewildering array of diverse, yet inter-related, multi-dimensional explanations for what seems an intractable problem. For ease of comprehension these explanations can be summarized under six broad headings: (a) process issues; (b) capacity issues; (c) costs and cost-benefit; (d) political and retaliatory issues; (e) alternative dispute resolution strategies and methodologies; and (f) compensation, representation, and bias. It should, however, be remembered that many of these are overlapping and contemporaneous in nature.

Rather than delving into all six areas, this paper will focus its analysis on the impact of the DSU's lack of commonplace domestic and international legal procedures and practices—practices that have already been embraced by the WTO in other spheres of trade law. The absence of these elements, in combination with the barriers faced by LDC countries, largely explain the lack of participation and engagement by LDCs with and in the DSU. This paper's analysis suggests some limited, easily-understood, and effective reforms that would not only strengthen the DSU as a whole but also assist in fostering greater participation of LDCs in the DSU process. Accordingly, this paper will focus upon those elements critical to its analysis: process and capacity issues, and cost and cost-benefit, it being assumed that all other barriers identified above have been overcome.

For ease of comprehension, the paper will consider the simple hypothetical case of a small exporting company ("the Producer"), operating in an LDC. The Producer has been steadily growing, re-investing profits in expanding facilities and equipment. It has a small but growing workforce. It produces only one product, which it exports through an agent to one developed-country market. The Producer's success is due solely to its competitive advantage, which results from low labour costs and raw material inputs.

In a different, developed country, the local manufacturers of the same product have noticed a steady increase in overall in-country sales, fuelled by cheap imports emanating from a number of LDC countries. The success of these imports has not only suppressed the price in the developed country but also severely eroded the market share of the local manufacturers. In response, through a well-organised trade

³⁸See generally Roderick Abbott, *Are Developing Countries Deterred from Using the WTO Dispute Settlement System: Participation of Developing Countries in the DSM in the Years 1995–2005* (Ecipe Working Paper No. 1, 2007), http://www.ecipe.org/media/publication_pdfs/are-developing-countries-deterred-from-using-the-wto-dispute-settlement-system.pdf (last visited Jan. 10, 2015); Amin Alavi, *African Countries and the WTO's Dispute Settlement Mechanism* 25 *DEV. POL'Y REV.* 25 (2007), <http://onlinelibrary.wiley.com/doi/10.1111/j.1467-7679.2007.00358.x/abstract> (last visited Dec. 8, 2014); Jan Bohanes & Fernanda Garza, *Going Beyond Stereotypes: Participation of Developing Countries in WTO Dispute Settlement*, http://heionlinebackup.com/hol/cgi-bin/get_pdf.cgi?handle=hein.journals/traladpt4§ion=7 (last visited July 31, 2014); Marco Bronckers & Freya Baetens, *Reconsidering financial remedies in WTO dispute settlement*, 16 *J. INT'L ECON. L.* 281 (2013), <http://jiel.oxfordjournals.org/content/16/2/281.short> (last visited Nov. 8, 2014); Marc L. Busch, Eric Reinhardt & Gregory Shaffer, *Does legal capacity matter? A survey of WTO Members*, 8 *WORLD TRADE REV.* 559 (2009), http://journals.cambridge.org/abstract_S1474745609990085 (last visited Nov. 8, 2014); Mosoti, *supra* note 37; Hunter Nottage, *Developing Countries in the WTO Dispute Settlement System* (47 Global Econ. Governance Programme Working Paper 2009), http://geg-test.nsms.ox.ac.uk/sites/geg/files/Nottage_GEG%20WP%202009_47.pdf (last visited June 20, 2014); Håkan Nordström & Gregory Shaffer, *Access to justice in the World Trade Organization: a case for a small claims procedure?*, 7 *WORLD TRADE REV.* 587 (2008), http://journals.cambridge.org/abstract_S1474745608003996 (last visited Nov. 8, 2014); Gregory Shaffer, Victor Mosoti & Asif Qureshi, *Towards a Development-Supportive Dispute Settlement System at the WTO* (International Centre for Trade and Sustainable Development 2003), http://www.ictsd.org/downloads/2008/06/dsu_2003.pdf (last visited Dec. 16, 2014).

association, the local manufacturers have successfully pressured their government, which has, in response, imposed prescriptive tariffs on all LDC imports.

The Producer's first indication of a problem arises when orders from its agent cease. With no orders, no alternative market in which to sell existing inventory, and no cash inflow from sales, the Producer is immediately in trouble. Depending on its reserves, and unless another market can be quickly found, the Producer will have little option but to cease trading. Time will be a critical factor. Even if a WTO dispute is brought and succeeds, it may well be a pyrrhic victory: the remedy is at hand, but sadly, the patient is no more.

(i) Process and capacity issues

Assuming that a WTO dispute is brought, process and capacity issues will affect both the pre-litigation stage and the conduct of the litigation itself, resulting in a cumulatively debilitating and corrosive effect on our Producer's ability to survive beyond the resolution of the litigation.

Our Producer's LDC is of a type described as a "dollar a day economy,"³⁹ i.e., the country's total output (its gross domestic product), divided by the number of its citizens, equals approximately one dollar per day. In such a country, many of the accepted organs of the state as understood in the developed world are either missing or exist virtually in name only. Consequently, key ministries often lack the resources, manpower, and finances to even facilitate the identification of breaches of WTO law, far less to analyse the breaches or pursue litigating a dispute through the DSU procedures.⁴⁰

The WTO is a rules-based organisation.⁴¹ Its rules are embodied within a wide-ranging set of legally binding WTO agreements, all of which are both technically complex and lengthy.⁴² The DSU provides the mechanism whereby these trade rules can be enforced.⁴³ The process is characterized by complex, highly-specialised legal and procedural arguments that often require analysis of highly technical scientific and economic data.⁴⁴ The disputes that have already been resolved have resulted in an extensive and continually expanding body of case law, coupled with a complex set of procedural rules within the DSU itself.⁴⁵

As a result, pursuing a dispute requires specialised legal advocates⁴⁶ as well as the involvement of specialised experts to present and explain such economic, technical, and scientific data⁴⁷ as may be required. Ewart has pointed out that developing countries often do not have any personnel with the

³⁹Interview with a Senior LDC Ambassador to the WTO 3 (Oct. 2013) (transcript on file with author). The WTO recognises LDCs as defined by the United Nations: countries with GNP per capita not exceeding US \$1,000 (using a 1999 constant). Bohanes & Garza, *supra* note 38, at 52.

⁴⁰Geoffrey Antell & James W. Coleman, *Empirical Analysis of Wealth Disparities in WTO Disputes: Do Poorer Countries Suffer from Strategic Delay during Dispute Litigation?*, 29 B.U. INT'L L. J. 267, 270 (2011).

⁴¹THE WTO, https://www.wto.org/english/thewto_e/thewto_e.htm (WTO website information about the organization) (last visited Mar.16, 2016).

⁴²Peter Van den Bossche & James Gathii, *Use of the WTO Dispute Settlement System by LDCs and LICs: Hands-On Introduction and Simulation Exercise* 22 (Trade Pol'y Trading Ctr. in Africa Paper 2013), <http://new.trapca.org/wp-content/uploads/2016/04/TWP1304-Use-of-the-WTO-Dispute-Settlement-System-by-LDCs-and-LICs.pdf> (last visited Sept. 3, 2016).

⁴³UNDERSTANDING THE WTO: SETTLING DISPUTES, A UNIQUE CONTRIBUTION, https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (WTO website information) (last visited Mar. 16, 2016).

⁴⁴Van den Bossche & Gathii, *supra* note 42, at 23.

⁴⁵Bohanes & Garza, *supra* note 38, at 70.

⁴⁶These skills require a detailed working knowledge of the rules of WTO agreements and those of the DSU, as well as a detailed understanding of the growing body of case law that has resulted from the 492 disputes filed to date. See WTO, FIND DISPUTE CASES, *supra* note 34.

⁴⁷Van den Bossche & Gathii, *supra* note 42, at 323.

requisite experience and knowledge of trade law, thus limiting both their capacity and inclination to pursue a complaint.⁴⁸

Fattore, Hoekman, and Mavroidis have argued that countries with poor legal capacity are simply unable to defend their trade interests and are thus unable to engage with the DSU.⁴⁹ More specifically, Jobodwana has argued that LDCs lack the capacity to fully understand the terms of WTO agreements,⁵⁰ and Smith has argued along similar lines that lack of legal expertise and administrative capacity negatively impacts LDCs' ability to take note of and understand the growing body of WTO jurisprudence.⁵¹ Ewing–Chow, Goh and Patil have used Thailand as an example of “lack of legal capacity to handle the dispute settlement process.”⁵² Finally, Shaffer has noted that, in addition to the foregoing capacity issues, developing countries have not only have insufficient resources to defend their WTO rights,⁵³ but also lack the resources to implement WTO agreements, such as, for example, the creation of an authority to investigate anti-dumping actions.⁵⁴

Kongolo argues that developing countries lack not only the appropriate information but also both the human and administrative resources required to initiate a dispute,⁵⁵ an argument supported by Kessie and Addo, addressing the staffing of African Trade Ministries,⁵⁶ who note that the ministries often lack properly trained international trade lawyers.⁵⁷

Bohanes and Garza have eloquently summed up these systemic weaknesses, noting that LDCs suffer from “inadequate domestic governance, weak institutions, and the lack of a domestic trade policy

⁴⁸Andrea M. Ewart, *Small Developing States in the WTO: A Procedural Approach to Special and Differential Treatment through Reforms to Dispute Settlement*, 35 SYRACUSE J. INT'L L. & COM. 27, 40 (2007), http://heinonlinebackup.com/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/sjilc35§ion=6 (last visited Nov. 8, 2014).

⁴⁹Christina Fattore, *The Influence of Legal Capacity on WTO Dispute Duration*, 27 THE INT'L TRADE J. 450, 463 (2013), <http://www.tandfonline.com/doi/abs/10.1080/08853908.2013.827995> (last visited July 7, 2015); Bernard M. Hoekman & Petros C. Mavroidis, *WTO Dispute Settlement, Transparency and Surveillance*, 23 THE WORLD ECON. 527, 563 (2000), <http://onlinelibrary.wiley.com/doi/10.1111/1467-9701.00288/abstract> (last visited Nov. 8, 2014).

⁵⁰Z. Ntozintle Jobodwana, *Participation of African member states in the World Trade Organisation (WTO) multilateral trading system*, 1 INT'L J. AFRICAN RENAISSANCE STUDIES - MULTI-, INTER- AND TRANSDISCIPLINARITY 244, 258 (2006), <http://www.tandfonline.com/doi/abs/10.1080/18186870608529720> (last visited July 7, 2015).

⁵¹James Smith, *Inequality in international trade? Developing countries and institutional change in WTO dispute settlement*, 11 REV. INT'L POL. ECON. 542, 543 (2004), <http://www.tandfonline.com/doi/abs/10.1080/0969229042000252891> (last visited June 20, 2014).

⁵²Michael Ewing-Chow, Alex W.S. Goh & Akshay Kolse Patil, *Are Asian WTO Members Using the WTO DSU “Effectively?”*, 16 J. INT'L ECON. L. 669, 679 (2013), <http://jil.oxfordjournals.org/cgi/doi/10.1093/jiel/jgt023> (last visited May 9, 2014).

⁵³Gregory Shaffer, *The challenges of WTO law: strategies for developing country adaptation*, 5 WORLD TRADE REV. 177, 185 (2006), http://journals.cambridge.org/abstract_S1474745606002746 (last visited Apr. 7, 2015).

⁵⁴Committee on Anti-Dumping Practices, *Notification Under Articles 16.4 and 16.5 of the Agreement - Rwanda*, G/ADP/N/193/RWA (Feb. 26, 2010) (WTO Committee), https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_Soo6.aspx?MetaCollection=WTO&SymbolList=%22G/ADP/N/193/RWA%22+OR+%22G/ADP/N/193/RWA/*%22&Serial=&IssuingDateFrom=&IssuingDateTo=&CATITILE=&ConcernedCountryList=&OtherCountryList=&SubjectList=&TypeList=&FullTextHash=371857150&ProductList=&BodyList=&OrganizationList=&ArticleList=&Contents=&CollectionList=&RestrictionTypeName=&PostingDateFrom=&PostingDateTo=&DerstrictionDateFrom=&DerstrictionDateTo=&ReferenceList=&Language=ENGLISH&SearchPage=FE_S_Soo1&ActiveTabIndex=&languageUIChanged=true (last visited Mar. 8, 2016).

⁵⁵Tshimanga Kongolo, *The WTO Dispute Settlement Mechanism*, 4 J. WORLD INTELLECTUAL PROP. 257, 260 (2001), <http://onlinelibrary.wiley.com/doi/10.1111/j.1747-1796.2001.tb00089.x/abstract> (last visited Nov. 8, 2014).

⁵⁶Edwini Kessie & Kofi Addo, *African Countries and the WTO Negotiations on the Dispute Settlement Understanding* 4 (2008), <http://www.ictsd.org/downloads/2008/05/african-countries-and-the-wto-negotiations-on-the-dispute-settlement-understanding.pdf> (last visited Oct. 3, 2016).

⁵⁷*Id.* at 4; Mosoti, *supra* note 37, at 279.

community that would bring together the government, private companies, academic institutions, and civil society.”⁵⁸ Moreover, Shaffer notes that in developing countries the private sector views dispute settlement as being solely within the purview of government.⁵⁹ Against this backdrop, it would be highly unlikely that the fate of any small-scale producer would even appear on an LDC government’s radar, far less trigger an investigation as to possible WTO litigation.

Ab initio, our Producer faces a formidable array of challenges. Abbot has noted that developing countries may have difficulty identifying whether a breach of WTO rules has occurred, evaluating whether an action could be initiated, and forecasting the prospects of success.⁶⁰ Our Producer may operate in a country with the same challenges. These must be overcome before being able to request that its government even contemplate engaging with the DSU. Moreover, it has been argued that the existence and voracity of interest groups are what drive WTO disputes. The likely absence or inertia of strong lobbying groups regarding a company in our Producer’s situation may, in addition to other deterrents, result in there being “insufficient motivation to instigate trade disputes.”⁶¹

Clearly, where a producer is faced with a combination of inadequate governance and a lack of strong lobby groups, the tenacity, resilience and voracity of the producer becomes critical. These very qualities were clearly evinced by the producer involved in the only WTO dispute initiated by an LDC, *India-Antidumping Measure on Batteries from Bangladesh (India-Antidumping)*.⁶²

In 2002, India imposed anti-dumping measures against certain products exported from Bangladesh to India.⁶³ The notification,⁶⁴ *inter alia*, stated in justification that lead acid batteries had been exported to India from Bangladesh at below their normal value, causing injury to Indian industry.⁶⁵ The duties were imposed on all exports of industrial and automotive lead acid batteries from Bangladesh,⁶⁶ and export of lead acid batteries to India ceased.⁶⁷

In this instance, just as could be the case for our hypothetical Producer, the sole battery manufacturer, Rahimafrooz, “had no experience or knowledge in how to deal with the situation or whom to consult with.”⁶⁸ Rahimafrooz also confronted a lack of clear directives from any institutional body as to (a) how an exporter could proceed in situations where market access problems subsist in foreign markets or (b) how an exporter could discover or navigate the pathways to the relevant government departments or bodies.⁶⁹

⁵⁸Bohanes & Garza, *supra* note 38, at 79.

⁵⁹Shaffer, *supra* note 53, at 185.

⁶⁰Abbott, *supra* note 38, at 12–13.

⁶¹Jumoke Oduwale, *Nothing Ventured, Nothing Gained? A Case Study of Africa’s Participation in WTO Dispute Settlement*, 2 INT’L J. PRIV. L. 358, 362 (2009), <http://www.inderscienceonline.com/doi/abs/10.1504/IJPL.2009.024477?journalCode=ijpl> (last visited June 20, 2014).

⁶²Request for Consultations by Bangladesh, *India-Antidumping Measure on Batteries from Bangladesh*, WT/DS306/1, G/L/669, G/ADP/D52/1 (Feb. 2, 2004).

⁶³Mohammed Ali Taslim, M.A., *How the DSU worked for Bangladesh: The first least developed country to bring a WTO claim*, in DISPUTE SETTLEMENT AT THE WTO, *supra* note 28, at 231.

⁶⁴The text of the notification can found at <https://www.seair.co.in/custom-notifications/notifications-issued-in-the-year-2002-notification-no-12002-dated-2nd-jan-2002-63816.aspx>.

⁶⁵*Id.* at 4.

⁶⁶*Id.* at 6.

⁶⁷Taslim, *supra* note 63, at 237.

⁶⁸*Id.*

⁶⁹Shaffer, Mosoti & Qureshi, *supra* note 38, at 5.

Despite the roadblocks, Rahimafrooz persisted. Demonstrating the critical role that the private sector in an LDC must play in persuading its government to investigate, instigate, and prosecute a WTO case,⁷⁰ “an important factor that permitted Bangladesh to successfully contest the decision⁷¹ was the dogged pursuit of the case by the victim of the anti-dumping duties, Rahimafrooz.”⁷² As a result of these actions, in 2004 Bangladesh requested consultations with India,⁷³ averring that the anti-dumping duties imposed by India were not justified under either Article VI of the General Agreement on Tariffs and Trade 1994 (the GATT) or the Agreement on Implementation of Article VI of the GATT (the ADP).⁷⁴ Bangladesh also averred that by imposing anti-dumping duties, India had acted in a manner inconsistent with its obligations under Articles I.1 and II.1 of the GATT and the ADP, alleging that the benefits it should have accessed under the GATT Articles XXIII: 1(a) and (b) had been nullified and impaired.⁷⁵

On the 16th of February 2004, the European Communities, citing both substantial trade and systemic interests in the case, asked to join the consultations.⁷⁶ In 2006, Bangladesh and India notified the DSB that they had resolved the dispute by reaching a mutually satisfactory solution.⁷⁷ The agreement reached by the parties discontinued the anti-dumping duties by rescinding the notification imposing the anti-dumping duties.⁷⁸ This decision resulted from a review by the Indian Ministry of Commerce and Industry⁷⁹ that, *inter alia*, recommended their discontinuation.⁸⁰ It premised its recommendation upon the absence of “material injury [to the domestic industry] due to dumped imports”⁸¹ and the reasoning that the removal of anti-dumping duties would be unlikely to cause future injury to the domestic industry.⁸²

Unfortunately, this description of the *India-Antidumping* case presents only a partial picture of the obstacles to be overcome in pursuing a WTO dispute. Even if one assumes that obstacles such as those encountered in that case can be overcome, and the government can be stirred into action, yet more obstacles present themselves. First, there is the task of collecting, assimilating, and processing the data required to prosecute a case. This process can take weeks or months depending upon the number of experts, if any, that the government is able to deploy.⁸³ Such a delay could prove fatal if a company,

⁷⁰Gregory C. Shaffer, Michelle Ratton Sanchez Badin & Barbara Rosenberg, *Winning at the WTO: The Development of a Trade Policy Community within Brazil, in in DISPUTE SETTLEMENT AT THE WTO*, *supra* note 28, at 78.

⁷¹Other small states have used the DSU to successfully challenge much larger states. As discussed earlier in this article, Antigua and Barbuda, with a population of less than 100,000 people, successfully challenged the United States in a dispute over internet gaming. See Bernal, *Participation*, *supra* note 8, at 10.

⁷²Taslim, *supra* note 63, at 241.

⁷³Request for Consultations by Bangladesh, *India – Anti-Dumping Measure on Batteries from Bangladesh*, *supra* note 62.

⁷⁴*Id.* at 3.

⁷⁵*Id.*

⁷⁶Request to Join Consultations, Communication from the European Communities, *India – Anti-Dumping Measure on Batteries from Bangladesh*, WT/DS306/2 (Feb. 16, 2004).

⁷⁷Notification of Mutually Satisfactory Solution, *India – Anti-Dumping Measure on Batteries from Bangladesh*, WT/DS306/3, G/L/669/Add.1, G/ADP/D52/2 (Feb. 23, 2006).

⁷⁸*Id.* at 3.

⁷⁹Ministry of Commerce and Industry, Department of Commerce, Directorate General of Anti-Dumping and Allied Duties, *Notification, Final Findings, Mid-Term Review* (Oct. 26, 2004), (accessible via *The Gazette of India* search engine found at [http://egazette.nic.in/\(S\(kuwbhlcncqbzi1gjpkeyqsmxw\)\)/Search1.aspx](http://egazette.nic.in/(S(kuwbhlcncqbzi1gjpkeyqsmxw))/Search1.aspx)).

⁸⁰*Id.* at 58.

⁸¹*Id.*

⁸²*Id.*

⁸³Oduwale, *supra* note 61, at 364.

such as our Producer, cannot stay in business for that period of time. This factor alone may persuade a government to forgo taking action in the first place.

Second, this factor is further aggravated by the time needed not only to prosecute a case but also, if prosecution is successful, the time needed to implement or otherwise apply the decision, bearing in mind that the contested measure remains in full force and effect during this period. It is difficult to predict the total time any particular legal action will last. However, considering the range of cases one finds in Huerta-Goldman (from two to thirteen years),⁸⁴ and in Ewart, Breuss, and Curti (all reporting around three years),⁸⁵ the data provide yet more bad news for the producer and yet more reasons for government inaction.

(ii) Costs and cost-benefit

There has been much discourse on this subject, particularly in relation to the role of the ACWL (Advisory Centre on WTO Law)⁸⁶ in mitigating LDC legal costs.⁸⁷ For the purposes of this paper it will be assumed that the ACWL would act on behalf of the LDC. While this would be the least expensive option, it should be remembered that there would still be a fee payable to the ACWL in addition to the actual and potential costs associated with the prosecution of a WTO complaint. Perhaps the foremost of these costs arise as result of the growing technical complexity of cases: this complexity disadvantages developing countries, who may lack the funds necessary to collect technical data.⁸⁸ Such data collection may require not only costly and complex econometric modelling,⁸⁹ but also costly experts to compile, interpret, and explain the data.

On top of these costs, there are the logistical, accommodation, and subsistence costs of attending consultations, panel hearings, and other proceedings in Geneva—costs that, as the writer can attest, are not insignificant. Bronckers⁹⁰ has noted that where the costs of litigation significantly exceed the potential benefits accruing therefrom, access to the DSU becomes “in fact largely illusory.”⁹¹ Cho⁹² has graphically

⁸⁴Jorge A. Huerta-Goldman, *How Easy Is an Easy Case for a Complainant? Comment on US—Zeroing (Korea) DS402*, 12 *WORLD TRADE REV.* 427, 431 (2013), http://journals.cambridge.org/abstract_S1474745612000626 (last visited Nov. 8, 2014).

⁸⁵Ewart, *supra* note 48, at 61; Fritz Breuss, *WTO Dispute Settlement: Four EU—US Mini Trade Wars—A Rejoinder*, 4 *J. INDUSTRY, COMPETITION & TRADE* 373, 377 (2004), <http://www.springerlink.com/index/R3R2562432R1Q335.pdf> (last visited July 6, 2014); Andrea M. Curti, *The WTO Dispute Settlement Understanding: An Unlikely Weapon in the Fight Against AIDS*, 27 *AM. J. L. & MED.* 469, 473 (2001), http://heinonlinebackup.com/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/amlm-ed27§ion=29 (last visited Nov. 14, 2014).

⁸⁶Website of the Advisory Centre on WTO Law: <http://www.acwl.ch>.

⁸⁷Bohanes & Garza, *supra* note 38, at 71 *et seq.*; Chad P. Bown & Rachel McCulloch, *Developing Countries, Dispute Settlement, and the Advisory Centre on WTO Law*, 19 *J. INT'L TRADE & ECON. DEV.* 33, 36 (2010), <http://www.tandfonline.com/doi/abs/10.1080/09638190903327468> (last visited Nov. 8, 2014); Manfred Elsig & Philipp Stucki, *Low-Income Developing Countries and WTO Litigation: Why Wake up the Sleeping Dog?*, 19 *Rev. Int'l Pol. Econ.* 292, 295 (2012), <http://dx.doi.org/10.1080/09692290.2010.528313> (last visited May 9, 2014); Nottage, *supra* note 38, at 6.

⁸⁸Ewart, *supra* note 48, at 40.

⁸⁹Gross, *supra* note 6, at 377.

⁹⁰M Bronckers, *Financial Compensation in the WTO: Improving the Remedies of WTO Dispute Settlement*, 8 *J. INT'L Econ. L.* 101, 106 (2005), <http://jiel.oxfordjournals.org/content/8/1/101> (last visited Aug. 15, 2017).

⁹¹*Id.* at 106; see also Disdier & Fontagné, *supra* note 27, at 22; Elsig & Stucki, *supra* note 87, at 295; Hoekman & Mavroidis, *supra* note 49, at 535; Nordström & Shaffer, *supra* note 38, at 597; Luke Olson, *Incentivizing Access to the WTO's Dispute System for the Least-Developed Countries: Legal Flaws in Brazil's Upland Cotton Decision*, 23 *MINN. J. INT'L L.* 101, 125 (2014), <https://litigation-essentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&doctype=cite&docid=23+Minn.+J.+Int%27+L.+101&srctype=smi&srcid=3B15&key=8cdaa684773eod12e887266cd268fecd> (last visited Jan. 10, 2015). It should also be noted that costs were used as a mask to cover a lack of political will. See Bohanes & Garza, *supra* note 38, 78.

⁹²Cho, *supra* note 29, at 412.

illustrated this point using Mauritania's experience: in addition to lacking expertise and administrative capacity, "Mauritania could not sue the EU in the WTO ... only because the litigation costs would not justify Mauritania's annual export of US \$3 million."⁹³ Indeed, in the *India-Antidumping* case described above, an undertaking by the producer to pay all the litigation costs was a significant contributory factor in the decision by Bangladesh to proceed with an action.⁹⁴

A parallel with the Bangladesh situation can also be seen in the *Antigua – U.S. Gambling Services* case discussed above,⁹⁵ where it has been suggested that the "commercial interests concerned" probably were the source of the resources required to fund external lawyers, case preparation, and legal argument.⁹⁶ In yet another example, Ewing-Chow and his fellow authors have stated that where Asian developing countries initiate a complaint, the exporting industry concerned "would fund the litigation, at least in part."⁹⁷

Additionally, it should be remembered that the duration of an action is directly proportional to the costs incurred. Taking this to its logical conclusion, a prolonged case could lead to an action being simply abandoned—a point touched on by Bohanes and Garza.⁹⁸ Given this simple economic fact, it could be tactically opportune for a respondent country, when faced with an economically weak LDC complainant, to actively employ delaying tactics—thus allowing a potential trade infraction to remain in force for a longer period.⁹⁹

Thus far, with the exception of costs and the time taken to prosecute a case, most of the problems and issues raised in this article relate to matters outside the domain or purview of the WTO. Indeed, the WTO has been and is making strenuous effort to provide and disseminate information to LDCs and developing members through a series of measures, programmes, and activities.¹⁰⁰ Therefore, LDCs themselves must take steps to remediate structural weaknesses and remove barriers that presently frustrate engagement with the WTO. Interestingly, in relation to costs, the Chairman of the WTO Special Session of the DSB, which is tasked with promulgating reforms to the DSU, has reported ongoing negotiations about establishing a Dispute Settlement Fund with an initial investment of CHF 4 million. The precise scope and *modus operandi* of this fund, if created, is as yet unclear.¹⁰¹ Therefore it is impossible to determine whether, and to what extent, the cost issue will be remediated.

Another component of cost appraisal involves ascertaining whether the legal and other costs are justified by the benefits of the prosecution of a WTO complaint. As stated earlier, the reasons for non-engagement are intertwined, interlinked, and cross-causal in nature. Assessing the benefits of initiating a WTO dispute is a case in point, spanning both foreign affairs and domestic politics. For example, Brink has noted in the foreign affairs context that South Africa was afraid that instigating a trade dispute could

⁹³*Id.*

⁹⁴Taslim, *supra* note 63, at 242.

⁹⁵See text accompanying notes 9–21, *supra*.

⁹⁶Abbott, *supra* note 38, at 15.

⁹⁷Ewing-Chow, Goh & Patil, *supra* note 52, at 686.

⁹⁸Bohanes & Garza, *supra* note 38, at 103.

⁹⁹Ewart, *supra* note 48, at 58 *et seq.*

¹⁰⁰See, e.g., WTO, *WTO technical assistance and training*, https://www.wto.org/english/tratop_e/devel_e/teccop_e/tct_e.htm (explaining the WTO trade-related technical assistance (TRTA) activities) (last visited Sept. 14, 2017).

¹⁰¹Dispute Settlement Body Special Session, *Report by the chairman, Ambassador Ronald Saborio Soto*, TN/DS/26, 121 *et seq.* (Jan. 30, 2015) (accessible via use of the search engine *WTO Documents Online* found at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S005.aspx).

lead to closer scrutiny of its own trade policies, opening the doors for potential retaliation.¹⁰² Moreover, allocating scarce financial resources to conduct a trade dispute could potentially breach the lending rules of multilateral institutions.¹⁰³

In addition, a complainant must determine the effectiveness and usefulness of the outcomes of WTO litigation in terms of its ability to enforce the outcomes.¹⁰⁴ Where a Member does not comply with a WTO ruling the complainant may, with the approval of the DSB, take retaliatory measures equivalent to the economic harm and loss in trade benefits caused. Retaliatory measures are, however, only of use to countries capable of retaliating.¹⁰⁵ While in the case of Bangladesh in the *India-Antidumping* case,¹⁰⁶ the parties arrived at a mutually agreeable settlement,¹⁰⁷ the situation which confronted Antigua in the *Antigua-US Gambling Services* case was materially different. Following the adoption of both the Panel and the Appellate Body reports, the United States was given until early April 2006 to implement the recommendations.¹⁰⁸ In June, seeing no implementation, Antigua began the process of enforcing the rulings through a formal request for consultations.¹⁰⁹ Antigua requested authorisation to retaliate against the United States by suspending its obligations to the United States under both the GATS¹¹⁰ and the Trade-Related Aspects of Intellectual Property Rights Agreement (the "TRIPS Agreement")¹¹¹ to the annual value of US \$3.443 billion.¹¹²

Following the creation of a compliance panel, the United States was found to be in violation of its commitments under the original rulings and the matter was referred to arbitration.¹¹³ In June 2007, Antigua again requested authorisation to retaliate against the United States by, as requested before, suspending its obligations under both the GATS and the TRIPS Agreement to the annual value of US \$3.443 billion.¹¹⁴ Following arbitration this sum was modified to US \$21 million in relation to the TRIPS Agreement commitments.¹¹⁵

¹⁰²Gustav Brink, in *DISPUTE SETTLEMENT AT THE WTO*, *supra* note 28, at 263.

¹⁰³Richard L. Bernal, Special and Differential Treatment for Small Developing Economies, Presented at OECD Global Forum on Trade, Special and Differential treatment: Thinking outside the Box, Barbados, June 28–29, 2005, at 5.

¹⁰⁴Elsig & Stucki, *supra* note 87, at 295.

¹⁰⁵*World Trade Report, 2007: Six decades of multilateral trade cooperation: What have we learnt?*, 282 (WTO ed., 2007), https://www.wto.org/English/res_e/booksp_e/anrep_e/world_trade_report07_e.pdf (last visited Jan. 16, 2017).

¹⁰⁶Request for Consultations by Bangladesh, *India-Antidumping Measure on Batteries from Bangladesh*, *supra* note 62.

¹⁰⁷See Notification of Mutually Satisfactory Solution, *India-Antidumping Measure on Batteries From Bangladesh*, *supra* note 107.

¹⁰⁸Award of the Arbitrator, *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services, Arbitration under Article 213(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes*, WT/DS285/13, 25 (Aug. 19, 2005).

¹⁰⁹Agreement between Antigua and Barbuda and the United States Regarding Procedures under Articles 21 and 22 of the DSU, *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/16 (May 26, 2006) [hereinafter *Agreement, U.S./Antigua*].

¹¹⁰See GATS, *supra* note 14.

¹¹¹WTO Secretariat, *Annex 1C Agreement on Trade-Related Aspects of Intellectual Property Rights*, http://www.wto.org/english/docs_e/legal_e/27-trips.pdf (last visited Feb. 1, 2015).

¹¹²*Agreement, U.S./Antigua*, *supra* note 109.

¹¹³Recourse to Article 215 of the DSU by Antigua and Barbuda, Report of the Panel, *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/RW (Mar. 30, 2007); Jackson, *supra* note 10, at 378.

¹¹⁴Recourse by Antigua and Barbuda to Article 222 of the DSU, *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/22, 1 (June 22, 2007).

¹¹⁵Recourse to Arbitration by the United States under Article 226 of the DSU - Decision of the Arbitrator, *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/ARB, 77 (Dec. 21, 2007).

Not with standing the relatively small value of the modified sum, Antigua was for a number of years unable to enforce U.S. compliance either through negotiation or by exercising its retaliatory rights. The lack of retaliation on the part of Antigua was, as Panke has noted, due to the inability of Antigua to manufacture patented pharmaceuticals.¹¹⁶ In a final attempt to enforce U.S. compliance, in late January 2013 Antigua was authorised by the DSB to suspend concessions and obligations to the United States under the TRIPS Agreement.¹¹⁷ By March 2013 it was clear that this final negotiating initiative was fruitless.¹¹⁸

As the foregoing demonstrates, a negative assessment of a prospective case in any of several areas could result in inaction by the complainant; similarly, a negative cumulative assessment could have the same effect. The focus here will be on the narrow range of issues relevant to the central aims of the paper. Starting with costs, it would not be unreasonable to imagine a situation where a government carries out a simple cost-benefit analysis, weighing the likely costs of successfully pursuing a case against the likely financial loss that it would otherwise sustain.

At the most extreme, assuming this analysis leads the government to take a *laissez-faire* approach that results in the failure of the business in question, the losses incurred would extend to the loss of (i) direct corporate tax revenue charged on the profits/sales of the enterprise; (ii) indirect tax revenue such as the employer's national insurance contributions; (iii) any other revenue derived from any duties accruable from the importation of any inputs used by the industry concerned or the grant of export licences and so forth; and (iv) income or other tax revenue based on the emoluments of the employees. In addition to the loss of revenue, account would have to be taken of the costs arising out of the failure of the business, such as (a) the costs of welfare or other payments, if any, that would be payable by the government to the former employees and (b) the financial effects of the loss of export sales revenues on the balance of payments, together with any spillover or multiplier effect in the general economy.¹¹⁹

Given, as would be the case with our small Producer, that these financial effects would be minimal, litigation on behalf of small enterprises or industries would appear to be highly unlikely. Davis and Bermeo have gone further, stating that only "the highest economic stakes would motivate a poor country to undertake litigation."¹²⁰ Yet it is the very growth of these small embryonic industries that is of significant import if the word "least" is to be taken out of "Least Developed Country."

Drawing together the points from the two preceding sections, a picture begins to emerge: on balance, the outlook for our Producer is, to say the least, bleak. On the one hand, it would be highly likely that the costs of prosecuting a WTO complaint would—unless the exporter could either totally underwrite the same (as in the case of Bangladesh Batteries) or a least make a significant contribution thereto¹²¹—outweigh the

¹¹⁶Diana Panke, *Dwarfs in international negotiations: how small states make their voices heard*, 25 *CAMBRIDGE REV. INT'L AFF.* 313, 325 (2012). <http://www.tandfonline.com/doi/abs/10.1080/09557571.2012.710590> (last visited June 26, 2016).

¹¹⁷WTO Dispute Settlement Body, Minutes of Meeting Held in the Centre William Rappard on 28 January 2013, WT/DSB/M/328 (March 22, 2013) ¶ 6.12.

¹¹⁸Communication from Antigua and Barbuda, *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc. WT/DS285/26 (April 25, 2013) [hereinafter *Communication, U.S./Antigua*].

¹¹⁹For more information about the multiplier effect, see generally Michele I. Naples, *Business Failures and the Expenditure Multiplier, or How Recessions Become Depressions*, 19 *J. POST-KEYNESIAN ECON.* 511 (1997).

¹²⁰Christina L. Davis & Sarah Blodgett Bermeo, *Who Files? Developing Country Participation in GATT/WTO Adjudication*, 71 *J. POL.* 1033, 1040 (2009), http://www.jstor.org/stable/10.1017/s0022381609090860?seq=1#page_scan_tab_contents (last visited Aug. 15, 2017).

¹²¹The All Pakistan Textile Mills Association paid 50% of the costs in the Pakistan-Cotton yarn dispute. See Ewart, *supra* note 48, at 75.

fiscal and other benefits that might accrue from the prosecution. On the other hand, even if these barriers were removed and a case initiated, by the time the case was concluded, it is highly probable that the exporter would have ceased trading, which in itself justifies inaction on the part of the government in the first place. Thus, seeking a successful and equitable outcome to a violation of WTO rules through use of the DSU is rendered futile by a set of contradictory and self-reinforcing circumstances—the classic “Catch 22.”¹²²

III. Provisional and protective remedies

To resolve this conundrum, at least one or more of the causal factors would have to be removed, mitigated, or otherwise speedily and relatively cheaply overcome. This begs the question of what part, if any, the WTO can play. Logical possibilities include: (a) improving and financing the civil service of a particular country, thus enabling the speedier collection of data and evidence to support a possible DSU action; (b) reducing the logistical and legal costs of prosecuting an action; or (c) otherwise financially supporting a plethora of potential industries that may be the subject of a dispute. All these measures go beyond anything the WTO could reasonably be requested or mandated to do. Given these avenues are closed or impracticable, the question that remains is whether the WTO could effect a solution through changes to the DSU process, or whether LDCs could use alternative pathways within the WTO to resolve trade disputes.

Dealing first with the latter, alternative pathways, idea, the WTO ethos is that disputes should be resolved through negotiation. Indeed, Article 3(7) of the DSU clearly states that a “solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred.”¹²³ Jose and Perez have noted that in 2006, of the 365 complaints claimed by members, only one quarter led to adjudication.¹²⁴ Alschner has noted that in the five years leading up to 2009, many countries used alternative pathways to dispute resolution.¹²⁵ Alschner has consequently argued that, through the media of the Memorandum of Understanding and other *sui-generis* settlements, “WTO members have de facto introduced the new category of interim settlements into the WTO dispute settlement process.”¹²⁶ Horn, Mavroidis, and Wijkstroem have pointed out that two WTO committees, the Technical Barriers to Trade committee and the Sanitary and Phytosanitary Measure committee, also provide a forum to administer “specific trade concerns.”¹²⁷ Such a forum, the authors opine, is “akin to an informal form of resolution of trade conflicts that operates in parallel to the Dispute Settlement mechanism.”¹²⁸

While all of these options exist, to be effective, both parties must be willing to reach a settlement. In addition, negotiations could very easily become protracted, and if the “defending” party were aware of the fragility or embryonic state of the affected industry, it could, by cynically dragging out the negotiations, ensure that the matter is resolved simply by the industry ceasing operation. Therefore, while various

¹²²CATCH 22 is a satirical novel written by Joseph Heller in 1961.

¹²³DSU, *supra* note 4, at 354 (Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes).

¹²⁴José L. Perez Gabilondo, *Argentina's experience with WTO dispute settlement: development of national capacity and the use of in-house lawyers*, in DISPUTE SETTLEMENT AT THE WTO, *supra* note 28, at 122.

¹²⁵Wolfgang Alschner, *Amicable Settlements of WTO Disputes: Bilateral Solutions in a Multilateral System*, 1 WORLD TRADE REV. 4 (2014), http://journals.cambridge.org/article_S1474745613000165 (last visited Apr. 17, 2015).

¹²⁶*Id.*

¹²⁷Henrik Horn, Petros C Mavroidis & Erik N. Wijkström, *In the Shadow of the DSU: Addressing Specific Trade Concerns in the WTO SPS and TBT Committees* 729 (IFN Working Paper No. 960, Columbia Law and Economics Working Paper No. 464, March 8, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2478598 (last visited Sept. 27, 2015).

¹²⁸*Id.* at 730.

alternative resolution options may be open, it is questionable whether they are in any way practical, particularly in circumstances where the survival of the affected business is time critical.

Returning to the first idea, concerning changes to the DSU, Nordström and Shaffer¹²⁹ have proposed the creation of a small claims procedure within the WTO as an alternative to the DSU. While the arguments they proffer are meritorious, this would lead to a two-tier dispute settlement system with divergent rules and procedures, adding complexity to an already complex system. This, in itself, would increase the difficulties faced by LDCs, whose grasp of the existing WTO law may, at best, be limited and whose legal systems may be only rudimentary in nature. Moreover, a key component of the Nordström/Shaffer package is the introduction of compensation/damages as potential remedies. While these remedies may be attractive to a likely complainant¹³⁰ as well as its private sectors,¹³¹ they are both problematic and anathema to many of the members of the WTO.¹³² They also materially conflict with the preferred WTO remedy of amending or withdrawing an inconsistent measure.¹³³

Bartels has discussed the issue of monetary compensation in some detail, noting that developing countries have long argued for its inclusion within the DSU arena.¹³⁴ But, as Bartels has pointed out, compensatory payments may not be remitted to the affected industry,¹³⁵ which would be detrimental to the producer, and are voluntary in nature, which under the current regimen means they are *de facto* unenforceable.¹³⁶

In his influential report, Peter Sutherland has opined that when considering reform of the DSU, “an important underlying concern is . . . not ‘to do any harm’ to the existing system since it has so many attributes.”¹³⁷ Therefore, if it were possible to find a legal process that could strengthen the DSU while ameliorating or resolving the contributory causes of the conundrum, and which has both widespread currency and use in national and international legal systems and *fora*, then this process would appear to be in tune with Sutherland’s sentiments. It therefore might gain sufficient traction amongst WTO members to incorporate it into the DSU.

The use of provisional measures may be such a process. Virtually every legal system¹³⁸ offers disputants a system of provisional and interim remedies that, *inter alia*, include protective remedies

¹²⁹Nordström & Shaffer, *supra* note 38, at 5 *et seq.*

¹³⁰WTO Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding, Proposal by the African Group, TN/DS/W/15 (Sept. 25 2002) at 3 (addressing proposals by the LDCs to introduce compensation into the DSU).

¹³¹Bernard Hoekman, *Proposals for WTO Reform: A Synthesis and Assessment*, 20 MINN. J. INT’L L. 324, 324 (2011), http://heonlinebackup.com/hol/cgi-bin/get_pdf.cgi?handle=hein.journals/mjgt20§ion=17 (last visited Mar. 21, 2015).

¹³²*Id.*

¹³³J. Pufumorodze, *WTO remedies and developing countries*, 10 J. INT’L TRADE LAW AND POL’Y 83, 85 (2011), <http://www.emeraldinsight.com/journals.htm?articleid=1915644&show=abstract> (last visited Nov. 8, 2014).

¹³⁴Lorand Bartels, *Making WTO Dispute Settlement Work for African Countries: An Evaluation of Current Proposals for Reforming the DSU*, 6 L. & Dev. Rev. 2, 51 *et seq.* (2013), <http://www.degruyter.com/view/j/ldr.2013.6.issue-2/ldr-2013-0020/ldr-2013-0020.xml> (last visited Mar. 10, 2016).

¹³⁵*Id.* at 52–53.

¹³⁶*Id.* at 53.

¹³⁷Peter Sutherland et al., Report by the Consultative Board to the Director General Supachai Panitchpakdi, *The Future of the WTO: Addressing institutional challenges in the new millennium*, § 255 at 56, https://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.pdf.

¹³⁸This also extends to arbitral forums. See Convention on the Settlement of Investment Disputes between States and Nationals of Other States art. 47, Mar. 18. 1965, 575 U.N.T.S. 159 (the “ICSID Convention”), <https://treaties.un.org/doc/Publication/UNTS/Volume%20575/volume-575-I-8359-English.pdf>; 2010 UNCITRAL Arbitration Rules art. 26, G.A. Res. 65/22 (Aug. 15, 2010), <https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf>; 2012 International Chamber of Arbitration Rules art. 28 (*Arbitration Rules*, (in force as of Jan. 1, 2012, as amended in 2017), <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration>).

designed to ensure that the pre-litigation *status quo* is maintained not only during the course of litigation, but also during any remediation period following a successful case.¹³⁹ Within international courts and tribunals the power to grant provisional measures forms part of the inherent or incidental jurisdiction of the forum.¹⁴⁰ McLachlan notes that such remedies are justified where “the action of one party ‘pendente lite’ causes or threatens a damage to the rights of the other ... that it would not be possible fully to restore ... simply by a judgment in its favour.”

Whether at the national or international level, litigation can, like the DSU, be a lengthy business. Preventing failure or irreparable damage for the affected party is not only crucial to an effective and available process but also enables a court or tribunal to exercise its function. Consequently, these protective measures are viewed as indispensable in such fora¹⁴¹ and are common currency in most legal systems. They have “even greater force where the litigation is international in nature,”¹⁴² extending far beyond commercial and trade disputes¹⁴³ to areas such as conflicts and human rights.

Provisional measures are used in a number of international fora.¹⁴⁴ For example, Article 41 of the Statute of the International Court of Justice gives the court power, while a judgment is pending, to issue provisional measures both to preserve rights and to prevent incidents that may aggravate or extend a conflict.¹⁴⁵ Similarly, within the field of international investment disputes, Article 47 of the ICSID Convention provides that “the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.”¹⁴⁶ In the International Court of Arbitration of the International Chamber of Commerce (ICC), where the parties are often commercial entities as opposed to sovereign states, the tribunals have wide-ranging powers to grant provisional measures.¹⁴⁷ Article 28(1) of the ICC Arbitration Rules states that “the arbitral tribunal may, at the request of a party, order any interim or conservatory measure as it deems appropriate.”¹⁴⁸

¹³⁹Gerry Maher & Barry J. Rodger, *Provisional and Protective Remedies: The British Experience of the Brussels Convention*, 4 INT'L & COMP. L. Q. 302, 302 (1999), <http://journals.cambridge.org/production/action/cjoGetFulltext?fulltextid=1529944> (last visited Oct. 25, 2014).

¹⁴⁰Dan Sarooshi, *Provisional Measures and Investment Treaty Arbitration*, 29 ARB. INT'L 361, 361 (2013), <http://arbitration.oxfordjournals.org/content/29/3/361.abstract> (last visited July 17, 2016); Shabtai Rosenne, PROVISIONAL MEASURES IN INTERNATIONAL LAW: THE INTERNATIONAL COURT OF JUSTICE AND THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA 9 (2004).

¹⁴¹Karin Oellers-Frahm, *Expanding the Competence to Issue Provisional Measures-Strengthening the International Judicial Function*, 12 GERMAN L. J. 1279, 1279 (2011), http://heinonlinebackup.com/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/germlaj012§ion=66 (last visited Oct. 26, 2014).

¹⁴²Maher & Rodger, *supra* note 139, at 303.

¹⁴³For an example of the use of provisional safeguard measures in the trade arena, see Article 7 of the *Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area*, wits.worldbank.org/GPTAD/PDF/archive/ASEAN-Australia-NZ.pdf (last visited Aug. 15 2017).

¹⁴⁴Oellers-Frahm, *supra* note 141, at 1281.

¹⁴⁵Michelle Barnett, *Cambodia v. Thailand: A Case Study on the Use of Provisional Measures to Protect Human Rights in International Border Disputes*, 38 BROOK. J. INT'L L. 230 (2012–2013), http://heinonlinebackup.com/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/bjil38§ion=11 (last visited Oct. 25 2014); Alexandra C. Travis, *Temple of Preah Vihear: Lessons on Provisional Measures*, 13 CHI. J. INT'L L. 317, 321 (2012), http://heinonlinebackup.com/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/cjil13§ion=13 (last visited Oct. 25, 2014).

¹⁴⁶International Centre for Settlement of Investment Disputes, *ICSID Convention, Regulations and Rules* 24 (International Centre for Settlement of Investment Disputes 2003), <http://icsidfiles.worldbank.org/ICSID/ICSID/StaticFiles/basicdoc/main-eng.htm> (last visited Aug. 15 2017).

¹⁴⁷Sarooshi, *supra* note 140, at 370.

¹⁴⁸ICC Arbitration Rules, *supra* note 138; Sarooshi, *supra* note 140, at 370. The arbitral tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate.

Significantly, both the WTO as a body and its membership are familiar with the provisional measure concept. The TRIPS Agreement incorporated provisional measures, with Article 50(2) of Part III, Section 3 (Provisional Measures) providing, “The judicial authorities shall have the authority to adopt provisional measures *inaudita altera parte* where appropriate, in particular where any delay is likely to cause irreparable harm to the right holder.”¹⁴⁹

Given the foregoing analysis, the inclusion of provisional measures within the DSU, even if their use were restricted to LDC-instigated cases, should be a relatively straightforward undertaking. Moreover, because the legal approach is so widely used, the degree of legal specialisation needed, as well as time and cost, are all minimised. If such a proposal was put forward by an LDC and subsequently rejected, an argument could be made that the rejection effectively nullified the LDC’s ability to obtain a remedy to a trade dispute through the auspices of the DSU, thus creating a breach of Article 26.1 of the DSU itself. This breach, in turn, could lead a panel or the Appellate Body to recommend under Article 26.1(b) that the rejecting members make a mutually satisfactory adjustment.

IV Outline of a prospective provisional measure

First, the availability of a provisional measure under the DSU should be restricted to LDC cases because the typical extremely low level of international trade would mean that any action needed would likely be modest. Second, the scope and provisions setting out the requisite conditions governing the use of provisional measures should be incorporated into and form part of the general body of the DSU and be administered by the DSB and the WTO secretariat. Applications for provisional measures would be determined by a sub-division of the Appellate Body which would, to ensure a speedy hearing of the application, require only a single Appellate member sitting in *solus*.

Provisions already exist within the Appellate Body’s procedures to facilitate consideration of representations and pleadings in special circumstances,¹⁵⁰ their adjudication, and the communication of the decision to the parties concerned and other members of the Appellate Body.¹⁵¹ Therefore, as a first step, the LDC member would have to request consultations under Article 4.3 of the DSU. If, as per Article 4.3, there is no response to the request, or it appears to the LDC that no mutually acceptable agreement can be reached within 30 days, then the LDC could also exercise a new right to seek the issuance of a provisional measure. Since the provisions and procedures associated with provisional measures exist in most national legal systems, an LDC government possessed of a rudimentary legal system and framework should have little difficulty conceptualising, understanding, and using a similar system, albeit tailored to operate within the DSU framework.

The process to request a provisional measure would take the form of an application by the LDC complainant presenting a *prime facie* case that, *inter alia*, (a) the measure at issue is in violation of one or more of the covered agreements and is causing nullification or impairment, and (b) the measure at issue is causing or within a very short period will cause irreparable harm to the stakeholders of the rights

¹⁴⁹Agreement on Trade-Related Aspects of Intellectual Property Rights, Part III, art. 50(4) (Jan. 1, 1995), https://www.wto.org/english/docs_e/legal_e/27-trips.pdf (last visited Aug. 15 2017).

¹⁵⁰Julio Lacarte-Muro & Petina Gappah, *Developing countries and the WTO legal and dispute settlement system: a view from the bench*, 3 J. INTL ECON. L. 395, 400 (2000), <http://jiel.oxfordjournals.org/content/3/3/395.short> (last visited Dec. 8, 2014).

¹⁵¹See Working procedures for appellate review, WT/AB/WP/6, Rule 16.(1) (Aug. 16, 2010), https://www.wto.org/english/tratop_e/dispu_e/ab_e.htm.

holder. The application would also require an audited or otherwise certified submission as to the monthly amount of nullification or impairment.

The application would include a prayer craving the grant to the complainant of an interim measure. The prayer would, *inter alia*, request that until such time as the dispute has either been settled to the satisfaction of the LDC complainant or has otherwise been dealt with, the respondent shall either (i) within five days from the date of the granting of the application remove or suspend the measure at issue and so confirm in writing to the chairman of the DSB, or, failing this, (ii) remit on a monthly basis to the WTO Secretariat a sum equal to the monthly amount of nullification or impairment.

The application would be adjudicated within ten days by a lone Appellate Board Member, who would be empowered to (a) grant or decline the application *in toto*, (b) grant the application but adjust the quantum of the monthly nullification or impairment, or (c) grant the application, amended where applicable, subject to a periodic review. Given that the measure would be granted on the basis of a *prima facie* case, the inclusion of a periodic review represents a critical safeguard within the mechanism: as the case progresses and more evidence and legal arguments are presented, the Appellate Body could reconsider the decision as necessary.

In the event of the submission being granted, and the measure at issue not being removed or suspended, the Secretariat would be responsible for disbursing the monthly remittances directly to the stakeholders on whose behalf the LDC initiated the dispute. From this point, the litigation would continue in all other respects in accordance with the provisions of the DSU, with the only additional feature being the review of the provisional measure.

V. Benefits accruing from the provisional measure

In order to explain how a provisional measure would work in practice, we will return for a moment to our hypothetical case, where our Producer is *de facto* unable to trade and is therefore likely to remain in business only for a few months. If adopted and implemented, the provisional measure approach would help ensure that our Producer's business could survive until the outcome of the dispute settlement process. Granting provisional measures would remove one of the main causal factors of the LDC conundrum described in this article.

The provisional measure approach can help ensure the survival of LDC businesses over the course of a dispute and thereby remove some other obstacles to the use by LDCs of the DSU. This solution, however, does have possible challenges. The challenges are all chiefly resource-based. For example, could the Secretariat receive payments from a respondent and administer payments to affected producers? In this regard a senior WTO manager confirmed to the author that the Secretariat already administers similar payments – albeit in relation to other matters – and that the addition of this extra responsibility was not foreseen by the manager as being either overly onerous or expensive.¹⁵²

However, there are other resource-based challenges that would have to be considered. Has the current Appellate Board sufficient capacity to deal with additional hearings or would more members have to be appointed? Similarly, does the ACWL, as the cheapest legal provider, have sufficient capacity to facilitate an increased case load? If the ACWL cannot act (for example, due to a conflict of interest arising from having accepted instructions to act by another party), should a dedicated LDC-only ACWL be created to

¹⁵²Interview with WTO Secretariat Senior Manager (Oct. 2013) (transcript on file with the author).

circumvent the latter point? While these matters clearly would have to be addressed, the scope of this paper does not permit a detailed analysis. But they do not at first sight appear to be insurmountable and therefore do not appear to threaten the addition of provisional measures.

The principle disadvantage that remains should provisional measures become available is that the ACWL fees and other additional costs of prosecuting the case will remain. Thus, if a cost-benefit approach is taken, then the LDC government in question may still be hesitant to proceed. But since the practical effects of the measure can reduce the gap between cost and benefit, the impact of the costs that continue is decreased, thus softening the impact and the influence of this argument.

The benefits flowing from the proposed provisional measures can be grouped under five broad headings, (i) social and economic benefits, (ii) correction of negotiatory power asymmetries, (iii) fostering of early dispute settlement and increased DSU usage, (iv) creation of political space, and (v) attunement with WTO principles and scalability. This paper will outline the salient features.

(i) *Social and economic benefits*: Where the respondent removes or suspends the inconsistent measure, this would allow the business to resume trade, thus generating revenues and continuing in business as before. Where the respondent does not take this option, then the monthly impairment payment which the producer would receive from the Secretariat would provide the business with sufficient funding to meet its on-going financial commitments while allowing it the time either to diversify or to seek out alternative markets or other sales channels for its products. Either of the outcomes produces upside benefits to the LDC government in terms of continuing tax revenue, avoiding the costs of social or other welfare payments for the producer's employees, and reversing any wider multiplier effects, all as discussed above. Moreover, the government could reasonably ask the producer, which under these proposals would remain a going concern, for a contribution toward the on-going costs of the dispute.

(ii) *Correction of negotiatory power asymmetries*: Under the current DSU regime, prolonging litigation not only increases the costs of pursuing the action *in toto* but also increases the likelihood of the business or industry at the centre of the dispute failing. Logically, therefore, it is in the interest of the respondent to prolong consultations and/or offer what would normally be regarded as a derisory settlement offer, such as that offered by the United States to Antigua in *Antigua-US Gambling Services*¹⁵³ in settlement of the dispute. Equally aware of both the time and cost implications¹⁵⁴ of prolonged litigation, the complainant may be minded simply to accept the offer.¹⁵⁵ In its most extreme form the respondent may flatly refuse even to enter into consultations in the first place, assuming that its weaker opponent will opt not to proceed any further.¹⁵⁶

The introduction of a provisional measure changes this dynamic. It eliminates the threat that the affected industry or enterprise will cease to exist. In addition, through the guarantee of the additional benefits discussed above, prolongation of the litigation ceases to be such a powerful disincentive to the complainant, allowing it to take a more aggressive stance in consultations and in negotiating any settlement. On the other side of the dispute, the respondent knows that simply rebuffing initial consultation requests, adopting delaying tactics during either the consultation phase or the litigation

¹⁵³Jackson, *supra* note 10, at 380.

¹⁵⁴Magda Shahin, *WTO dispute settlement for a middle-income developing country: The situation of Egypt, in DISPUTE SETTLEMENT AT THE WTO*, *supra* note 28, at 284.

¹⁵⁵Ewart, *supra* note 48, at 36.

¹⁵⁶*Id.* at 35–36.

process as a whole, proffering derisory settlement offers, or—as was the case with the United States in *Antigua-US Gambling Services*¹⁵⁷—simply failing to comply with a favourable ruling,¹⁵⁸ would be materially pointless and costly exercises.

The effects of this change on the negotiating powers of the parties should not be underestimated. Busch and Reinhart argue that in the main, respondents offer the greatest concessions during the consultation phase, which takes place in what they describe as the “shadow of the law”¹⁵⁹ prior to any judicial ruling. Shahin goes further, opining that this shadow even extends to dispute negotiations outside the WTO framework.¹⁶⁰ In this light, the introduction of what is essentially a minor procedure within the DSU has potential repercussions well beyond the aegis of the WTO.

(iii) *Fostering of early dispute settlement and increased DSU usage*: A consistent feature of the DSU has been the high number of early settlement cases, cases resolved before the exhaustion of the litigation process. In 2005 no more than two in five of all disputes proceeded beyond the consultation stage of a dispute,¹⁶¹ while by 2008, of the 369 cases raised, only 136 proceeded to the panel stage.¹⁶²

The introduction of a provisional measure would yet further increase not only the total number of cases, but also the propensity for early settlement. Indeed, in other areas of the law where such measures are already used, many court actions do not, where a provision remedy has been awarded, proceed beyond the initial phases.¹⁶³ The very granting of such a measure creates “an irresistible imperative for a defendant to settle a case.”¹⁶⁴ These experiences suggest that use of a provisional measure within the DSU mechanism should make engagement with the DSU by LDCs a far more attractive, potentially cost-effective, and possibly even domestically popular option whether the action is successful or otherwise. All of these consequences would help address the DSU engagement issue that lies at the core of this paper.

(iv) *Creation of political space*: The proposed provisional measure facilitates the creation of political space for the respondent. When a provisional measure has been granted, the respondent knows that *prima facie* evidence of a violation of WTO law has been presented and accepted by a division of the Appellate Body. The respondent has two options: either suspend or remove the measure at issue, or make monthly nullification and impairment payments. A provisional measure would thus give the respondent the ability to pursue an otherwise unpopular measure by noting the negative implications of the measure: the potential that greater damage could result from non-action than prompt action.

For example, in our hypothetical case, the respondent imposed the WTO-inconsistent measure as a direct result of political activism on the part of indigenous producers in the respondent country. Suspending or removing the measure therefore might well be politically unpalatable to the respondent. But if a provisional measure were granted, the respondent could counteract the likely pushback by

¹⁵⁷Panel Report, *US/Antigua*, *supra* note 9.

¹⁵⁸*Communication, U.S./Antigua*, *supra* note 118.

¹⁵⁹Marc L. Busch & Eric Reinhardt, *Developing Countries and General Agreement on Tariffs and Trade/world Trade Organization Dispute Settlement*, 37 J. WORLD TRADE 719, 720 (2003).

¹⁶⁰Shahin, *supra* note 154, at 228.

¹⁶¹Abbott, *supra* note 38, at 7.

¹⁶²Richard Chisik, *Trade disputes, quality choice, and economic integration*, 88 J. INT'L ECON. 47, 58–59 (2012), <http://linkinghub.elsevier.com/retrieve/pii/S0022199612000116> (last visited Nov. 8, 2014).

¹⁶³Maher & Rodger, *supra* note 142, at 302.

¹⁶⁴Andrew Dickinson, *Provisional Measures in the “Brussels I” Review: Disturbing the Status Quo?* 6 J. PRIV. INT'L L. 519, 540 (2010), <http://www.ingentaconnect.com/content/hart/jpil/2010/00000006/00000003/art00001> (last visited Oct. 26, 2014).

pointing to the existence of the adverse WTO provisional judgment and the prospect of a more damaging loss of the whole case at a future date.

The tactic of using perceived international pressure to garner political support to effect and implement what may be a politically unpopular domestic policy is sometimes referred to as “gaiatsu,” which, as Charnovitz notes, was used to great effect to change Australian government policy in relation to a dispute over Canadian salmon.¹⁶⁵

A further benefit accruing to the respondent as a result of a provisional measure is that the respondent government may opt to soften its domestic political and economic impact by exercising the second option to make monthly reparatory payments for the duration of the case.

(v) *Attunement with WTO principles and scalability*: The insertion of a provisional measure in the DSU both incentivises and empowers an LDC to engage more actively with the DSU. It also increases the likelihood of the early settlement of a given dispute. This settlement would normally take the form of an agreement mutually acceptable to the parties and in accordance with the several agreements of the WTO, which in itself represents the preferred solution for the WTO as a body.¹⁶⁶

Overall, the likely outcomes of the proposed provisional measure approach are closely aligned with the aspirational goals of the WTO. The outcomes provide security and predictability in the global trading system: security for the business or industry affected by a violation of a WTO agreement, and predictability insofar as a remedy would exist that could preserve the affected business and industry as a functioning whole during the process of resolving the dispute through the DSU. Crucially, the possible financial outcomes flowing from the measure (a) do not represent an award of damages payable by one country to another, but instead, a provisional trade-balancing financial adjustment that will cease to exist or have effect at the conclusion of the case; (b) are payable through a third-party agency directly to the affected producers with a view to fostering either diversification or facilitating access to alternative markets, and as such are akin to developmental aid; (c) are subject to periodic review as the case progresses; and (d) do not by their very nature distort trade, all of which are in tune with the aims of the WTO in general.

While this discussion has revolved around a very simple one-business industry model, upscaling it to cater to a wide range of differing potential disputes should not prove an unduly onerous task for an LDC government, providing that (i) it can quantify in an auditable fashion the monthly level of nullification and impairment; (ii) it has at least a rudimentary system of recording its exports, capable, *inter alia*, of quantifying variations in the exports of any product or products affected by the imposition of a WTO non-compliant measure and (iii) it has the ability to identify the affected producer or producers. The relative simplicity of the collation and calculation of the monthly levels of impairment and nullification allows the measure to be deployable in even the most complex situations involving extended supply chains involving multiple inputs and multiple actors.

Crucially, these measures can equally be used to deal with the imposition of inconsistent measures whose effect is to distort global trade prices. One example is the effects of the U.S. policy of subsidising domestic cotton producers, which drove down the international market price and created “an imbalanced

¹⁶⁵Steve Charnovitz, *Rethinking WTO Trade Sanctions* 95 *AM. J. INT'L L.* 792, 814 (2001), <http://www.jstor.org/stable/2674626> (last visited Nov. 8, 2014).

¹⁶⁶Hélène Ruiz Fabri, *Is There a Case - Legally and Politically - for Direct Effect of WTO Obligations?*, 25 *EUR. J. INT'L L.* 151, 170 (2014), <http://ejil.oxfordjournals.org/cgi/doi/10.1093/ejil/chuo14> (last visited Jan. 9, 2015).

trade system that prejudicially affect[ed] developing countries.”¹⁶⁷ Clearly, while establishing and calculating the monthly level of impairment is considerably more complex in such cases, it should not in itself represent an insurmountable task for an LDC government.

VI. Enacting a provisional measure

Having considered the issues which give rise to the conundrum faced by LDCs in using the DSU, and having suggested a potential solution that addresses some of the fundamental causal factors underpinning the conundrum, the final part of this paper will explore a potential route and pre-existing vehicle that can be used to change theory into DSU practice. For this we must turn to the workings of the Special Session of the DSB.

This body was created following the Fourth Ministerial Conference in Doha in 2001, where ministers agreed “to negotiations on improvements and clarifications of the Dispute Settlement Understanding.”¹⁶⁸ In essence, this body is tasked with formulating changes to the dispute settlement regime.¹⁶⁹ Jo and Namgung have opined that the DSU reform process has largely failed to make significant progress since its establishment.¹⁷⁰ Against the backdrop of this stinging analysis, with which the writer takes issue, the Special Session of the DSB nonetheless provides both a vehicle and a window of opportunity for a member or group of members to submit a proposal and seek approval of its incorporation within the DSU.

The window of opportunity is, however, rapidly closing. The Special Session chairman, Ambassador Ronald Saborio Soto, indicated in his latest report his wish to bring the current negotiations to a rapid conclusion in order to “reap the fruits of all the efforts made since the beginning of these negotiations.”¹⁷¹ There is, therefore, a degree of urgency required if a proposal embodying the concepts and ideas contained in this paper—a tangible task to be accomplished, not a mere hypothetical—is to reach fruition and subsequently be incorporated into the DSU.

VII. Conclusion

The DSU has proven to be a highly efficient and generally effective vehicle for settling a variety of international trade disputes.¹⁷² For a variety of reasons, however, its use has largely been the preserve of developed and developing countries. LDC nations, comprising nearly one billion of the poorest, most underprivileged and deprived souls on the planet have, for a variety of reasons, been either unable or unwilling to seek redress of their trade disputes through the DSU.

Illustrated by a hypothetical scenario, this paper has described a conundrum faced by LDCs and highlighted the main reasons underpinning the problem. It has considered and discarded some potential solutions to this problem, examined and rejected the possibilities of using alternative pathways to achieve

¹⁶⁷Olson, *supra* note 91, at 108.

¹⁶⁸William J. Davey, *Reforming WTO Dispute Settlement*, Research Paper No. 04-01, Illinois Pub. L. & Legal Theory Res. Papers Series 9 (Jan. 29, 2004), http://www.peacepalacelibrary.nl/ebooks/files/DAVEY_Reforming-WTO-Dispute-Settlement.pdf (last visited Dec. 19, 2014).

¹⁶⁹Bernal, *Participation*, *supra* note 8, at 10–11.

¹⁷⁰Hyeran Jo & Hyun Namgung, *Dispute Settlement Mechanisms in Preferential Trade Agreements: Democracy, Boilerplates, and the Multilateral Trade Regime*, 56 J. CONFLICT RESOL. 1041, 1049 (2012), <http://jcr.sagepub.com/cgi/doi/10.1177/0022002712445731> (last visited June 20, 2014).

¹⁷¹Dispute Settlement Body Special Session, *supra* note 101, at 1.

¹⁷²Dan Sarooshi, *The Future of the WTO and Its Dispute Settlement System*, 2 INT'L ORG. L. REV. 129, 129 (2005), http://heinonlinebackup.com/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/iolr2§ion=8 (last visited Apr. 16, 2015).

dispute resolution, and reviewed the progress of the “internal” DSU review process. It is clear from this research that there is no “silver bullet” that would, at a stroke, correct all of these problems.

The answers, if they are to be found, will comprise a range of initiatives and measures that will be both exogenous and endogenous to LDCs in general and unique to some in particular. Many may simply be beyond the scope of the WTO remit, role, and budget. However, through the judicious introduction of the proposals in this article, the WTO could facilitate LDC engagement with the DSU.

This paper takes a problem-based approach to the subject, offering a radically new and practical solution. While it will not address all of the issues faced by LDCs in the settlement of trade disputes, it nonetheless presents LDCs with a simple, cost-effective way of seeking redress of grievances through the use of the DSU. The addition to the DSU of a simple, widely understood mechanism, in common usage in both national and international fora, could have a major impact on fostering LDC engagement with the DSU through the elimination or mitigation of key restraints on their participation. Not only does this measure enrich the WTO as a whole and the DSU in particular, as a byproduct it also remediates pre-existing asymmetries within the consultation process. Its very simplicity and ease of implementation would make it an attractive, easily-accessible legal device for LDCs to exercise.

The concept of incorporating provisional measures within the DSU is, as has been discussed above, not new; indeed it is a solution that has already been recommended and incorporated by the WTO in its TRIPS agreement as a template for the creation of national laws by WTO members. What is, however, new and unique is the introduction of such remedies at the consultation stage of the DSU dispute process. A key element contained within a provisional measure is the inclusion of a quantified monthly level of nullification or impairment. This solution is clearly different from the contentious issue of compensation and will provide a valuable lifeline for both small-scale LDC producers and embryonic industries alike.

The writer hopes that this paper will both inform and add to the rich debate surrounding wider LDC participation within the WTO and LDC usage of the DSU. The writer also hopes to encourage others in the wider academic, legal, and political spheres who, like the writer, are seeking solutions to what appears to be an intractable conundrum.
