

2006

Explaining the Broad-Based Support for WTO Adjudication

Leah Granger

Recommended Citation

Leah Granger, *Explaining the Broad-Based Support for WTO Adjudication*, 24 BERKELEY J. INT'L LAW. 521 (2006).
Available at: <http://scholarship.law.berkeley.edu/bjil/vol24/iss2/6>

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Berkeley Journal of International Law by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.

Explaining the Broad-Based Support for WTO Adjudication

By
Leah Granger

*"The dispute settlement system is only as good as the negotiations and political deals it serves to encourage."*¹

*"Although the WTO lacks direct enforcement powers, its decisions are taken seriously because its member nations have agreed to play by its rules. A WTO ruling gives the winning side the moral upper hand in a dispute, even if the winner chooses to negotiate a compromise rather than impose hefty penalties that could touch off a trade war."*²

I. INTRODUCTION

Critics of globalization point to the World Trade Organization ("WTO") as an unjust and biased system, dominated by rich and powerful nations, designed to force small and developing countries³ to open their markets to the forces of global capitalism.⁴ Indeed, the WTO has become a lightning rod for the anti-globalization movement, drawing protests whenever members meet. And yet,

1. David Woods, *Letter to the Financial Times*, FIN. TIMES (London), Nov. 1, 2002, at 20.

2. World Trade Organization, Trade Resources: Quotes, http://www.wto.org/trade_resources/quotes/mts/dispute.htm (last visited Mar. 11, 2006) (quoting Thomas S. Mulligan & Evelyn Iritani, DOW JONES INT'L NEWS SERV., Aug. 24, 2001).

3. I use "small," "small economies," and "developing" interchangeably throughout this article. I use "large," "large economies," and "developed" to mean the United States, European Union, Japan, Canada, and Australia. There is no universally accepted definition for a "developing" or "developed" country, and this is a very rough division. Developing countries are a diverse group, varying in physical size, population, and resources. The challenges facing geographically small countries with few natural resources differ from those facing economically poor countries that have sufficient natural resources. See FRANK J. GARCIA, TRADE, INEQUALITY, AND JUSTICE: TOWARD A LIBERAL THEORY OF JUST TRADE 20-26 (2003); WTO Committee on Trade and Development, *Small Economies: A Literature Review*, WT/COMTD/SE/W/4 (July 23, 2002) (thorough review of risk factors that make small states more vulnerable to marginalization in the WTO system).

4. See GRAHAM DUNKLEY, THE FREE TRADE ADVENTURE: THE WTO, THE URUGUAY ROUND AND GLOBALIZATION (2000); GARCIA, *supra* note 3.

when given the opportunity, most countries, large and small, are eager to join the organization. Why do less powerful nations assent to a process that critics say is biased against them? How does one reconcile images of massive protests broadcast on nightly news with the fact that most nations welcome WTO membership?

While developing countries may complain about a lack of fairness in trade talks and engage in heated discussions about other aspects of the WTO,⁵ virtually the entire membership supports maintaining a strong dispute settlement system. As I will explain below, the dispute settlement system supports the interests of both large and small countries. Developed countries agree to participate largely because the WTO legitimizes their penetration of new markets, whereas developing countries adhere because they need the power of the WTO to enforce trade agreements. The combination of centralized dispute resolution with decentralized enforcement of obligations makes members particularly willing to participate in the WTO.

II. THE ADJUDICATORY FUNCTION OF THE WTO

The WTO's primary mission is to "develop an integrated, more viable and durable multilateral trading system" with a view to "raising standards of living, ensuring full employment and a large and steadily growing volume of real income."⁶ The WTO promotes trade by reducing trade barriers and offering equal trade terms to all members.⁷ An essential element of the WTO's structure is a strong, rule-based dispute settlement system.⁸

Trade disputes are settled through the WTO's Dispute Settlement Body ("DSB"), which is composed of representatives from all WTO member states.⁹ When a member state brings a complaint to the DSB, a dispute panel is created at the Body's next meeting unless the entire membership, including the complainant, decides not to pursue the matter.¹⁰ Any member may bring a complaint against any other member.¹¹ The language of the WTO's Dispute Settlement

5. ZHEN KUN WANG & L. ALAN WINTERS, *BREAKING THE SEATTLE DEADLOCK* 42 (2000); CONSTANTINE MICHALOPOULOS, *DEVELOPING COUNTRIES IN THE WTO* 3 (2001).

6. Marrakesh Agreement Establishing the World Trade Organization, pmbl., Apr. 15, 1994, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* 4 (1999), 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994) [hereinafter WTO Agreement].

7. General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, art. 1, Annex 1A, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* 17 (1999), 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994). Offering equal trade terms to all members is known as "Most Favored Nation" status.

8. See Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* 354 (1999), 1869 U.N.T.S. 401, 405; 33 I.L.M. 1226, 1230 (1994) [hereinafter DSU].

9. WTO Agreement art. 4.3.

10. DSU art. 6.

11. *Id.* art. 1.

Understanding (“DSU”)¹² provides an opportunity for other member states to sign onto complaints.¹³ Once a Dispute Settlement Panel (“panel”) is created, an adjudicatory process is triggered in which both parties must participate.¹⁴ Consultation is attempted first to try to solve the problem without formal arbitration.¹⁵ If this step fails, an ad hoc panel of three judges is created that hears formal arguments from both parties.¹⁶ The panel reports its findings and recommendations to the full DSB.¹⁷ If the losing country objects to the findings of the panel, it can appeal a question of “law” to the permanent Appellate Body (“AB”).¹⁸ If a losing state refuses to bring its trade practices into compliance with WTO obligations, the winning state may take retaliatory measures in the form of trade sanctions.¹⁹ The DSU limits the form and scope of retaliations because the goal of dispute settlement is to support and maintain the integrity of the trading regime.²⁰ Since retaliation leaves both parties worse off (through increased trade barriers), the WTO strongly favors finding a mutually satisfactory solution to a dispute. The highly structured neutral arbitration process is central to members’ support of the dispute settlement system.

A. History of International Trade Dispute Settlement

The first international trade dispute settlement system, developed under the General Agreement on Trade and Tariffs (“GATT”), was signed in 1947.²¹ The GATT began with twenty-three signatories, in which countries made 45,000 tariff concessions, affecting one-fifth (\$10 billion) of the world’s total trade.²² Under GATT, the predecessor to the WTO, countries adjudicated disputes in an ad hoc manner.²³ Members could block the effective resolution of disputes through a variety of foot-dragging tactics, as well as outright refusals to participate in adjudication.²⁴ The lack of binding timelines or appellate procedures frustrated dispute settlement.²⁵ Losing parties could block adoption of the report documenting their violation and requiring corrective action.²⁶ This inefficient system

12. The DSU is the agreement governing the structure and functioning of the DSB.

13. *Id.* art. 10.

14. *Id.* art. 4.3-22.6.

15. *Id.* art. 4.3.

16. *Id.* art. 8.

17. *Id.* art. 16.

18. *Id.* art. 17. The Appellate Body is staffed by seven judges, each serving four-year terms.

19. DSU art. 22.

20. ROBERT Z. LAWRENCE, *CRIMES & PUNISHMENTS?: RETALIATION UNDER THE WTO* (2003); DAVID PALMETER, *THE WTO AS A LEGAL SYSTEM* 346 (2003).

21. *See* General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194; JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 35-43 (2d ed. 1997).

22. JACKSON, *supra* note 21, at 74.

23. JOHN H. JACKSON, *THE JURISPRUDENCE OF GATT AND THE WTO: INSIGHTS ON TREATY LAW AND ECONOMIC RELATIONS* 122-24 (2000).

24. *Id.*

25. *Id.*

26. *Id.*

resulted in significant cheating. States continued using prohibited quotas, developed an array of new subsidies, and enacted retaliatory sanctions without approval from GATT.²⁷ Developing countries focused their energy on the creation of alternative forums and developed countries pursued bilateral agreements.²⁸ The failures of the GATT dispute settlement system set the stage for countries to later support the WTO's stronger rule-based system.

By the 1990s, it became increasingly apparent to member nations that GATT needed reforming.²⁹ In 1994, a meeting of the GATT contracting parties resulted in the formation of a new World Trade Organization, which included a reformed and much strengthened dispute settlement system.³⁰ Under the WTO regime, membership has grown to 149 countries,³¹ trade barriers have been further reduced,³² and enforcement has become more effective.³³ Trade under the WTO system now accounts for ninety-six percent of all world trade.³⁴

The table below provides a rough sampling of the WTO's diverse membership. Together with the statistical data on the use of the dispute settlement system, it is a valuable reference point in an examination of the system.³⁵ The implications of having a large membership with widely varying ability to participate in a multi-lateral trading system will be discussed in the second part of this article.

27. DUNKLEY, *supra* note 4, at 35; LAWRENCE, *supra* note 20, at 68-69 (noting examples of United States and European Community unilateralism and selective use of GATT); Eric Posner & John Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1, 44 (2005) (suggesting that the frustration countries felt over the blocking and delaying tactics of non-complying states led to evasion of the system through unilateral retaliation).

28. GARCIA, *supra* note 3, at 26-30.

29. JACKSON, *supra* note 21, at 69-73; DUNKLEY, *supra* note 4, at 102-03 (listing some of the common criticisms of the GATT).

30. WORLD TRADE ORG., A HANDBOOK ON THE WTO DISPUTE SETTLEMENT SYSTEM 12-17 (2004); *see also* THE WTO DISPUTE SETTLEMENT SYSTEM 1995-2003 (Federico Ortino & Ernst-Ulrich Petersmann eds., 2004).

31. WORLD TRADE ORG., UNDERSTANDING THE WTO 112 (3d ed. 2005) [hereinafter UNDERSTANDING THE WTO], *available at* http://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf. As of December 2005, another thirty-three countries have obtained observer status. *Id.*

32. ANWARUL HODA, TARIFF NEGOTIATIONS AND RENEGOTIATIONS UNDER THE GATT AND THE WTO 70-72 (2001).

33. JACKSON, *supra* note 21, at 341-45.

34. Progressive Policy Institute, WTO Members Account For 96 Percent of Trade, http://www.ppionline.org/ppi_ci.cfm?knlgAreaID=108&subsecid=900003&contentid=253607 (last visited Mar. 11, 2006). Members of the WTO include twenty-three of the world's twenty-five largest economies, thirty-eight of the world's forty largest exporters, and twenty of the world's twenty-five most populous countries. *Id.*

35. *See also* Nohyoung Park, *Statistical Analysis of the WTO Dispute Settlement System (1995-2000)*, in THE WTO DISPUTE SETTLEMENT SYSTEM 1995-2003, *supra* note 30, at 531-53.

	SMALL GNP		MEDIUM GNP		LARGE GNP	
SMALL POPULATION	Nepal (LDC)	\$1,382/ \$5,803	Iceland (IND)	\$29,749/ \$9,041	Australia (IND)	\$28,262/ \$485,640
		26,289p		294p		20,092p
	Haiti (LDC)	\$1,623/ \$2,851	South Africa (DEV)	\$10,152/ \$182,280	Switzerland (IND)	\$30,008/ \$339,642
8,549p		45,323p		7,175p		
MEDIUM POPULATION	Dem. Rep. Congo (LDC)	\$621/ \$4,660	Mexico (IND)	\$8,972/ \$374,729	Japan (IND)	\$26,937/ \$5,608,149
		56,079p		106,385p		127,914p
	Philippines (DEV)	\$4,171/ \$95,570	S. Korea (IND)	\$17,161/ \$680,293	Canada (IND)	\$29,484/ \$741,060
82,809p		48,182p		31,972p		
LARGE POPULATION	Bangladesh (LDC)	\$1,695/ \$53,751	Brazil (DEV)	\$7,752/ \$810,244	USA (G2)	\$35,749/ \$9,221,179
		152,593p		182,798p		300,038p
	Nigeria (DEV)	\$919/ \$32,953	India (DEV)	\$2,681/ \$517,843	China (DEV)	\$4,577/ \$1,206,605
130,236p		1,096,917p		1,322,273p		
KEY	Country (development status) ³⁶	GDP per capita income ³⁷ / 2002 GDP ³⁸	G2 – The European Community and the U.S.A. (16 countries). IND – Other industrialized countries (27 countries). DEV – Developing countries other than LDC (74 countries). LDC – Least developed countries (31 countries).			
		Population in 2005 ³⁹				

Table 1. Representative sample of WTO members. ⁴⁰ This table provides an

36. Development status as determined by HENRIK HORN & PETROS C. MAVROIDIS, *THE WTO DISPUTE SETTLEMENT SYSTEM 1995-2004: SOME DESCRIPTIVE STATISTICS 3* (2006).

37. *EARTH TRENDS, INCOME AND POVERTY 2005*, at 3 (2005) [hereinafter *INCOME AND POVERTY*], available at http://earthtrends.wri.org/pdf_library/data_tables/ecn3_2005.pdf.

38. "Gross Domestic Product, Constant 1995 Dollars is the sum of the value added by all producers in an economy. Data are expressed in millions of U.S. dollars. Currencies are converted to dollars using the International Monetary Fund's average official exchange rate for 2002. Gross domestic product estimates at purchaser values (market prices) include the value added in the agriculture, industry, and service sectors, plus taxes and minus subsidies not included in the final value of the products. It is calculated without making deductions for depreciation of fabricated assets or for depletion of natural resources. To obtain comparable series of constant price data, the World Bank rescales GDP and value added by industrial origin to a common reference year, currently 1995. National accounts indicators for most developing countries are collected from national statistical organizations and central banks by visiting and resident World Bank missions. The data for high-income economies are obtained from the Organisation for Economic Cooperation and Development (OECD) data files (see the OECD's monthly Main Economic Indicators). The United Nations Statistics Division publishes detailed national accounts for UN member countries in National Accounts Statistics: Main Aggregates and Detailed Tables and updates in the Monthly Bulletin of Statistics." *EARTH TRENDS, ECONOMICS AND FINANCIAL FLOWS 3* (2005) [hereinafter *ECONOMICS AND FINANCIAL FLOWS*], available at http://earthtrends.wri.org/pdf_library/data_tables/ecn1_2005.pdf.

39. Number is in thousands of people. Total Population refers to estimates and projections of de facto population as of July 1, 2005.

40. Data compiled from Earthtrends Data Tables, sources provided by the World Bank and

example of how it is difficult to neatly categorize countries, determine natural alliances, and ascertain economic interests. For instance, Nepal and Australia have similar size populations but drastically different GNP and GNP per capita. This table further illustrates the persistent economic inequality between countries.

While least developed countries are not utilizing the dispute settlement system at all, developing countries are bringing a significant number of violation claims. Henrik Horn and Petros Mavroidis have compiled data on the 311 cases heard by the DSB between 1995 and 2004.⁴¹ They divided the WTO membership into four economic development groups and examined each group's use of the dispute settlement system. The G2,⁴² IND,⁴³ and DEV⁴⁴ groups each brought about thirty percent of the complaints to the DSB. The G2 brought complaints equally against other G2, the IND, and the DEV groups. The IND and DEV groups both brought about forty percent more cases against G2 countries than against other IND or DEV countries.⁴⁵

According to the United Nations Council on Trade and Development ("UNCTAD"), Developed Countries produce sixty-five percent of the global trade with the European Union producing thirty-eight percent and the United States producing ten percent. Developing Economies produce thirty-two percent of global trade with China contributing six percent. The Least Developed Countries produce just one percent of global trade.⁴⁶ While these UNCTAD categories do not align perfectly with the Horn and Mavroidis categories, the UNCTAD data helps draw a relationship between global share in trade and use of the dispute settlement system. The data illustrates that participation rates are high among all groups except the LDCs, and not in proportion to either percentage of global trade or population. The G2 produce almost fifty percent of world trade, but only bring thirty percent of the disputes before the WTO. By this metric, their participation appears low; however, looking at participation based on number of countries bringing claims (the G2 make up about ten percent of the total membership but bring thirty percent of the claims), the G2 participation appears high. This data does not address the many complaints that are settled through informal mediation, nor does it say anything about how often countries actually comply with trade obligations.⁴⁷ The main point to draw from this data is that developing countries are participating in the dispute settlement system.

the United Nations Conference on Trade and Development. INCOME AND POVERTY, *supra* note 37; ECONOMICS AND FINANCIAL FLOWS, *supra* note 38.

41. There are a total of 856 bilateral complaints, counting complaints brought or joined by multiple countries. HORN & MAVROIDIS, *supra* note 36, at 5.

42. G2 includes the European Community and the United States (sixteen countries). *Id.* at 3.

43. IND includes other industrialized countries (twenty-seven countries). *Id.*

44. DEV includes developing countries other than least developed countries (seventy-four countries). *Id.* LDCs are least developed countries (thirty-one countries). *Id.*

45. *Id.* at 8.

46. United Nations Conference on Trade and Development, 3.2 Network of Exports by Group of Countries and Commodity Group, <http://stats.unctad.org/Handbook/TableViewer/tableView.aspx?ReportId=133> (last visited Mar. 18, 2006).

47. See *infra* Part II.

The question to ask is, given what the critics say about how biased the trade system is against developing countries, why do they participate?

B. The Scope of Trade and Trade Negotiations

The WTO covers both a greater quantity and variety of trade than did the GATT regime. The WTO currently has agreements covering goods,⁴⁸ services,⁴⁹ and intellectual property, with major negotiations occurring on an ongoing basis in all areas of trade.⁵⁰ Trade negotiations are complicated and dynamic, and contentious trade negotiations frequently revolve around the exchange of concessions.⁵¹ Developing countries tend to be the most vocal about the lack of fairness in trade negotiations, complaining trade deals are often largely negotiated without their input.⁵² Specifically, less formal, and often exclusive, meetings occur between a limited number of members, which frequently set the parameters of a deal prior to the issue being raised in the General Council. Such informal or exclusive meetings add another layer to the trade negotiation process.⁵³ It is important to discuss briefly those aspects of trade negotiations most relevant to understanding how they influence dispute settlement.

Trade concessions are developed during intensive meetings, called “rounds,” and are usually bundled together into a single agreement for approval by the entire membership.⁵⁴ This process allows countries to trade “losses” in one sector for “gains” in another. Because the talks are “multi-party,” a member may trade losses and gains between multiple countries and economic sectors. This centralization of negotiation brings diverse interests to the same forum and,

48. “Goods” include agreements on agriculture, health regulations for farm products (SPS), textiles and clothing, product standards (TBT), investment measures, anti-dumping measures, customs valuation methods, preshipment inspection, rules of origin, import licensing, subsidies and counter-measures, and safeguards.

49. “Services” include movement of natural persons, air transport, financial services, shipping, and telecommunications.

50. See World Trade Organization, The Sixth Ministerial Conference, http://www.wto.org/english/thewto_e/minist_e/min05_e/min05_e.htm (last visited Mar. 11, 2006).

51. Barbara Koremenos et al., *The Rational Design of International Institutions*, 55 INT’L ORG. 761, 776 (2001).

52. In addition to all the formal meeting bodies, there are a number of “informal” negotiating bodies where most of the real work of the WTO takes place. These informal meetings can vary in size from all 148 Heads of Delegations to groups of two to three meeting with the chairperson of a subcommittee. The smaller informal meetings have raised cries of a need for transparency and inclusiveness. The most notorious of these informal meetings are known as the “Green Room” negotiations, named after the director-general’s conference room. Delegates complain about not having access to Green Room negotiations, so that by the time issues are raised in the General Council the parameters of an agreement are more or less set in stone. On the other hand, it is politically more difficult for delegates to make compromises and deals in the larger setting of the General Council. The official opinion is that a delicate balance must be maintained between the informal meetings, which accomplish a lot but exclude the majority of the members, and the meetings of the full membership, which are inclusive but less productive. See KENT JONES, WHO’S AFRAID OF THE WTO? 160-166 (2004); DILIP K. DAS, THE DOHA ROUND OF MULTILATERAL TRADE NEGOTIATIONS: ARDUOUS ISSUES AND STRATEGIC RESPONSES 18-20 (2005).

53. HODA, *supra* note 32.

54. DAS, *supra* note 52, at 3-4.

because tariff reductions are extended equally to all members, everyone enjoys the benefits of greater market access. Since the trade negotiation process is not open to the public, evidence of “trades” must be gathered circumstantially. For instance, during the Uruguay Round developing countries agreed to stop importing generic drugs and honor drug patents while developed countries agreed to adopt maximum agricultural tariffs on all products.⁵⁵ Since Uruguay, developing countries are increasingly taking a more active role in trade negotiations. The Uruguay Round convinced many developing countries that the foundation for an equitable trading regime is created in the negotiation process.⁵⁶ A strong dispute settlement system will be of no avail if trading rules are biased. For their part, developed countries continue to advance their own issues. The next section examines challenges for developing countries in enforcing trade obligations of other members.

III. ENFORCEMENT OF TRADE OBLIGATIONS

While the dispute resolution system is highly structured and institutionalized, it lacks any independent enforcement rules. There are no prosecutors or police officers in the WTO. Rather, enforcement is structured as follows: if a violation has occurred, then the DSB will call for corrective measures, which in turn allows the harmed country to implement retaliatory tariffs and duties.⁵⁷ The fact that there are no independent enforcement rules affects the operation of the entire organization. Small and developing countries express concern about their ability to enforce trade obligations effectively against more powerful trading partners.⁵⁸ The WTO acknowledges that enforcement of concessions is a considerable problem for less developed countries.⁵⁹ Despite this problem, less developed countries agree to be bound by the dispute settlement system.

A. Practical Participation in Enforcement

Membership driven compliance can mean several things. First, a country can violate its trade commitments if the cost it imposes on other members indi-

55. ALICE LANDAU, *THE INTERNATIONAL TRADING SYSTEM* 14 (2005); MICHALOPOULOS, *supra* note 5, at 129.

56. DAS, *supra* note 52, at 1-28.

57. WORLD TRADE ORG., *supra* note 30, at 74-86.

58. David Palmeter provides several examples of countries unable to enforce favorable rulings. “In *Bananas*, Ecuador was faced with the fact that shutting off imports of most goods from the EC would be highly detrimental to Ecuador.” PALMETER, *supra* note 20, at 360-61. Similarly, in a case won by Costa Rica, Palmeter describes: “[g]iven the disparity in the relative sizes of their economies, any action Costa Rica could have taken against the United States would have inflicted more pain on Costa Rica than on the United States. Had the situation been reversed, however, the United States undoubtedly could have taken action against Costa Rica that would have inflicted more pain on Costa Rica than on the United States.” *Id.*

59. UNDERSTANDING THE WTO, *supra* note 31, at 93.

vidually is less than the cost of an enforcement action.⁶⁰ This may result in “death-by-a-thousand-cuts” for a country with many trading partners who all “cheat” just a little. Second, countries may bring harassment-type claims.⁶¹ Third, as Jenny Martinez notes, strong enforcement of the WTO regime might come at the cost of overriding prior national decisions about health and safety priorities or values.⁶² A country may also choose non-compliance if the political costs of compliance are higher than the economic costs of sanctions that may be imposed by other members in retaliation for non-compliance.⁶³ Fourth, countries may buy their way out of compliance. For instance, a violation may hurt many countries, only one of which has the resource capacity to pursue a claim. The violating country may be able to cut a deal with the single capable country, leaving the remaining countries to suffer the harm of the violation with no recourse. Additionally, a country may choose not to enforce a DSB decision if the political gains of non-enforcement are larger than the economic gains of enforcement. Finally, even if a poor country wins before the DSB, the losing country’s compliance may not be forthcoming. The losing country may still be able to negotiate a compromise or may only superficially change its trade policy.

It appears unlikely that poor countries with small economies can ever exact effective remedies from big, rich countries. Countries that do not control a large share of a non-complying state’s exports will not be able to take effective individual action.⁶⁴ A less developed country that raises tariffs on essential goods is likely to harm the domestic population more than it harms the offending country. Raising tariffs on luxury goods is even less likely to have an economically significant impact on the offending country, especially if the offending country has a large share of the world market for a particular commodity. Countries without domestic production capacity are faced with the prospect of not being able to meet their citizens’ basic needs if they enact retaliatory measures. Despite these structural challenges, developing countries remain committed to a strong dispute settlement system, because an adverse ruling from the WTO is still the strongest compliance mechanism available to small countries.

60. UNCTAD Secretariat, *Notes on Developments in the International Trading System for the Review under Conference Resolution 159(VI), Paragraph 14, and Board Decision 320(XXXI)* (extract), in *PAVED WITH GOOD INTENTIONS* 14-22 (Yash Tandon & Megan Allardice eds., 2004).

61. Robert Lawrence characterizes the *United States-FSC* case as such. He suggests that Europe brought the case against the United States in response to the United States’s victory in *EC-Beef/Hormones*. LAWRENCE, *supra* note 20, at 1-3, 88-89, 91-92.

62. Jenny Martinez, *Towards an International Judicial System*, 56 *STAN. L. REV.* 429, 492 (1975). Developed countries especially express concern over the erosion of health and environmental standards, such as exploitative child labor and extinction of plants and animals.

63. See Panel Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/R/USA (Aug. 18, 1997); Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R (Jan. 16, 1998); see also JONES, *supra* note 52, at 111-12.

64. PALMETER, *supra* note 20, at 360-61.

B. Building Capacity

Under a rule-based enforcement regime, questions pertaining to fairness and accessibility arise. The huge financial costs and intellectual resources associated with bringing a claim can be insurmountable for less developed countries. Guaranteeing that less developed countries have access to the dispute settlement system on the same terms as economic giants does not mean that everyone has the same practical ability to participate. Without special assistance, less developed countries may not be able to take advantage of legal rights guaranteed to them as members of the institution. Without the ability to use the enforcement regime, the concessions exacted from developed countries during trade negotiations become meaningless. The WTO has created the Training and Technical Cooperation Institute and Advisory Centre on WTO Law (“ACWL”)⁶⁵ to address the concern that some members are unable to take advantage of available legal remedies due to inadequate domestic legal resources.

The WTO has devoted a great deal of institutional resources to investigating, holding meetings and training seminars, and establishing special committees to address the lack of capacity for full participation among less developed countries. However, many of the changes first demanded during the 1970s Tokyo Round have not occurred, and the symptoms of an unequal system persist.⁶⁶ Trade issues concerning textiles, agriculture, debt, international financing, and commodities have not been addressed to developing countries’ satisfaction.⁶⁷ For instance, developed countries’ tariffs on agricultural products from other developed countries are lower than tariffs on agricultural products from developing countries.⁶⁸

IV.

STRUCTURE OF DISPUTE SETTLEMENT SYSTEM FOSTERS MEMBER SUPPORT

While arguably problematic, the decentralized enforcement structure of the dispute settlement system can be seen as key to the success of the current trading system. It is easy to understand why economically powerful countries, which dominate trade negotiations, would support a strong dispute settlement sys-

65. The Training and Technical Cooperation Institute is run by the WTO Secretariat. UNDERSTANDING THE WTO, *supra* note 31, at 109. The ACWL, created by thirty-two WTO members, operates independently from the WTO. The ACWL has provided legal assistance in eighteen DSB cases and/or consultations since its creation in 2001. Advisory Centre on WTO Law, Quick Guide, http://www.acwl.ch/e/quickguide_e.aspx#h (last visited Mar. 11, 2006).

66. Agriculture and textiles still have the highest tariffs of any products, and less developed countries complain of unequal status and access during trade talks. Of the fifty counties identified by the United Nations as least developed, thirty-two are members of the WTO. World Trade Organization, Understanding the WTO: Least-Developed Countries, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm (last visited Mar. 11, 2006). Eight other countries are in the accession process and two more have observer status. *Id.*

67. Miles Kahler & John Odell, *Developing Countries and the Global Trading System, in* PAVED WITH GOOD INTENTIONS, *supra* note 60, at 33.

68. DAS, *supra* note 52, at 147.

tem.⁶⁹ But it is not as immediately clear why less developed and smaller countries should support a strong system. After all, if negotiations favor developed countries and the dispute system is difficult to access, it would appear that small countries would have little reason to come back to the table.

A. Elements of an Effective System

The institutional structure of a dispute settlement system determines how effective the system is. An effective system, which adheres to its institutional goals, is perceived as more legitimate. This process builds on itself, increasing the use, effectiveness, and legitimacy of the institution over time. Laurence Helfer and Anne-Marie Slaughter propose that one must measure the effectiveness of an institution against the stated and implicit function of that institution.⁷⁰ The closer an institution's behavior follows its stated function, then the more legitimate the institution will be. Article 3 of the DSU identifies the dispute settlement system as "a central element in providing security and predictability to the multilateral trading system" which "preserves the rights and obligations" of members by providing for "prompt settlement" of disputes.⁷¹ Critics of the WTO say the dispute settlement system is a tool of powerful countries; an attempt to place the force of law behind their exploitative practices.⁷²

To build support among members, DSB and AB decisions must adhere to institutional rules and the dispute settlement system must appear to conform to its explicit purposes. Helfer and Slaughter identify several sources of "judicial" legitimacy at the domestic level, including impartiality, principled and reasoned decision-making, continuity of court composition over time, consistency of judicial decisions over time, respect for the role of political institutions at the federal, state and local levels, and provision of a meaningful opportunity for litigants to be heard.⁷³ The appearance of these factors at the international level can help inform our understanding of international judicial effectiveness.

69. MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 16-18, 52-54 (1981). Social control, according to Martin Shapiro, is one of the primary functions of a judiciary. Shapiro argues that social control manifests through the administration of a regime, lending legitimacy to its practices. Examples of this kind of social control are found in every empirical expansion and colonization. This explanation describes why dominant economies generally support a strong adjudicatory system in the WTO. Namely, the most developed countries dominate trade negotiations, creating a trading system that is beneficial to their respective interests.

70. Laurence Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 *YALE L.J.* 273, 284 (1997).

71. DSU art. 3.

72. See, e.g., Greenpeace International, *Why Is the WTO a Problem?*, <http://www.greenpeace.org/international/campaigns/trade-and-the-environment/why-is-the-wto-a-problem> (last visited Mar. 11, 2006); Friends of the Earth Australia, *National Campaigns*, http://www.foe.org.au/nc/nc_trade_wto.htm (last visited Mar. 11, 2006); People & Planet, *Trade Justice Campaign*, <http://www.peopleandplanet.org/tradejustice/whyvote.php> (last visited Mar. 11, 2006); Social Conscience, *Free Trade, WTO, and Colonialization*, <http://www.socialconscience.com/articles/2003/wto/> (last visited Mar. 11, 2006).

73. Helfer & Slaughter, *supra* note 70, at 284.

B. Evidence of Institutional Effectiveness

According to Helfer and Slaughter, international tribunals must rely on additional factors because they lack a “direct coercion mechanism to compel either appearance or compliance.”⁷⁴ These factors include (1) the immediate perceived interests of states involved in particular disputes in securing judicial settlements; (2) the institution’s legitimacy and the legitimacy of any particular judgment reached; and (3) the strength and importance of the international legal rules governing a specific dispute and the general force of normative obligations.⁷⁵ The degree to which the dispute settlement system evinces these factors should directly affect its perceived legitimacy.

Perceived Self-Interest: The WTO’s dispute settlement system is structured such that it is in each country’s self-interest to help make it effective and respected. Members benefit from maintaining good standing within the organization. A country’s perceived willingness to play by the rules increases its bargaining power in trade talks. States are aware of the importance of maintaining healthy long-term relations because they understand their trade prospects are integrally linked to their economic welfare. Countries believe that their future gains will be higher if the dispute settlement system has a high rate of compliance. States that lack the economic capacity to enforce compliance maintain a strong interest in encouraging the legitimacy of the institution because a decision from the DSB is the strongest tool available to them. Countries with small economies exert compliance pressure most effectively by appealing to powerful countries’ respect for rule of law.

Legitimacy: Less developed countries who feel that the WTO may not be taking their interests seriously have a stake in not questioning the legitimacy of the DSB and AB because their only hope of exacting compliance from powerful countries comes from the perceived legitimacy of the adjudicatory body.⁷⁶ These states want the dispute settlement system to have legitimacy because it is one of their only leverage tools. The losing country cannot challenge the legitimacy of the decision if it hopes to employ the dispute settlement system credibly in the future. For example, if a developed country uses the DSB to enforce patent compliance in a less developed country, it becomes difficult for the developed country to shirk compliance with a DSB decision on agricultural tariff obligations that favors the same less developed country. Economically powerful countries may have very different reasons for promoting legitimacy than less powerful states.⁷⁷ Large states may want the dispute settlement system to be

74. *Id.* at 285.

75. *Id.*

76. David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT’L L. 552, 558 (1993). Concerns over illegitimacy may play out differently, depending on which members are concerned.

77. Large states want the DSU to have legitimacy because they want access to LDC to extract natural resources and sell finished products. The argument stems from the idea that large states believe that they have enough power to structure trade deals so that they are never on the “losing”

perceived as legitimate because they want access to less developed countries to extract natural resources and sell finished products.⁷⁸

Strength and Compliance: As long as large states have enough power to structure trade deals so that they are never on the “losing” end of a trade negotiation, the large states will have an interest in a strong compliance mechanism to lend credibility to retaliatory actions taken in response to violation of trade agreements. Any gains made by developing countries through trade talks can only be enforced through the pressure to comply with the ruling of the DSB/AB.

This analysis shows that the WTO dispute settlement system meets Helfer and Slaughter’s criteria, which helps explain why the DSB and AB are perceived as legitimate and why states abide by the decisions.

V. CONCLUSION

The WTO altered multilateral trading practices forever by introducing a strong and important set of international legal rules. Its large membership and share of total global trade encourage members to reconcile trade disputes through structured proceedings. The perceived legitimacy of the dispute settlement system and the perceived self-interest of member states in the outcome of its decisions explain why WTO members adhere to DSB and AB holdings.

It is often difficult to ascertain exactly when and how questions of legitimacy matter in practice.⁷⁹ However, the interrelated processes of trade negotiations and dispute resolution at the WTO seem to strengthen each other’s perceived legitimacy. Fairness in one setting encourages cooperation and compromise in the other. This appears to be an important function of subcommittees established to address challenges facing less developed countries; this type of “good faith effort” by larger economies and by the organization as a whole, helps keep less developed countries involved in the organization. Most countries, developed and developing, will likely continue to participate in the dispute resolution process and lend it legitimacy by abiding its decisions. However, granting developing countries greater access to critical negotiation forums and addressing problems facing countries that are often outmatched in trade negotiations, may go a long way toward reducing the resentment and anger we see expressed in the form of protests.

end of a trade negotiation. It is in their interest to have a strong compliance mechanism and a credible institution to lend credibility to retaliatory actions taken for violation of trade agreements. Small states (measured by GNP) want the DSU to have legitimacy because it is one of their only leverage tools and any gains made through trade talks can only be enforced through the pressure to comply with the ruling of the institution.

78. See SHAPIRO, *supra* note 69; JACKSON, *supra* note 21, at 6-9, 11-18.

79. Caron, *supra* note 76, at 558.