ECIPE WORKING PAPER • No. 01/2007

Are Developing Countries Deterred from Using the WTO Dispute Settlement System?

Participation of Developing Countries in the DSM in the years 1995-2005

Roderick Abbott

Roderick Abbott (roderickabbott@compuserve.com), a member of ECIPE's Steering Committee and Advisory Board, was a Deputy Director General of the World Trade Organization until late 2005. Prior to his position in the WTO, Mr Abbott was the Deputy Director General of DG Trade in the European Commission and Ambassador to Geneva.

Abstract

The data issued by the WTO Secretariat on disputes shows that 'developing countries' have participated in one-third of the cases 1995-2005. The data should be corrected to exclude some OECD member countries and some others with high GDP per capita. These adjustments reduce by about 30 the number of cases and, in addition, analysis shows that the vast majority of the *developing country* cases were launched by just five members. If another eight members are added, you have 90 per cent of developing member dispute activity, which means that around 80-90 members have had no dispute participation at all. This paper discusses reasons for that passive attitude and concludes that there seems to be little in the WTO system *per se* that needs correcting in this context. It is rather problems of internal governance and organization in many capitals that may be responsible for the relative absence of many members from the WTO dispute scene.

Keywords: international trade, World Trade Organization, trade law, Dispute Settlement System, developing countries

JEL Code: F51, F53, F59, P45

www.ecipe.org

Phone +32 (0)2 501 53 08 Fax +32 (0)2 501 53 20 info@ecipe.org Rue Du Luxembourg 3, B-1000, Brussels, Belgium

1 INTRODUCTION *

The purpose of this paper is to examine the participation of developing countries in the WTO dispute settlement process. It has often been said that the DSU works more in favour of the richer members with their vastly greater resources, as well as an army of staff lawyers, to pursue trade problems, which is difficult, costly and time-consuming for the developing members to do.

On the other hand, one of the principal objectives of the Dispute Settlement Understanding (DSU) was to create a fairer system, in which every member could bring forward a complaint, have it fully investigated, obtain a ruling on the compatibility of the measure or practice with WTO rules, and – more generally – "to have its day in court". The guiding principle was intended to be: 'Every member is equal before the law', and this was designed to lead to fairer and more equal opportunities than a system where power politics could, and did, influence the results.

Few would dispute that the DSU has successfully introduced a more juridical approach to trade disputes, one that is based upon careful analysis of the rules and neutral interpretation of them. These changes have led to a situation where all stages of a dispute, from the first lodging of a complaint to securing a formal ruling, have become largely de-politicized, and the current area which can in certain cases create difficulties relates to the enforcement of the ruling following adoption of a panel report and often an Appeal Body report.

So, in this rather positive atmosphere, how have the developing countries been able to exploit their right to "a day in court"?

Any analysis of participation will have to take account of two main parameters. First, relevant data and statistics: the factual records of dispute cases (Who was involved, who began each case and against whom?) as well as some commentary on the data. As we shall see, there are lacunae and ambiguities, which could be misleading. Second, value judgments related to the facts (Why have some members been more active than others? Is there evidence that lack of resources has been a factor holding back complaints? Are there other features built into the system, which lead to a bias against developing member participation? and so on).

This study is based on available WTO secretariat data, which is extensive but raises a number of issues of definition and of presentation. Interpretation of the data is also a complex matter, but let us start with the simple approach.

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Box 1: The conventional WTO view

"This system has been successful largely because WTO Member governments have been prepared to implement panel and Appellate Body rulings and to bring their laws and regulations into conformity with WTO rules should a panel decision go against them. Similarly, *the increased utilization of the system by developing countries confirms that the multilateral approach protects all Members, not just the large, strong, or rich*."

Quote from Pascal Lamy in a speech in Peru, 31 January 2006.

2 THE SIMPLE APPROACH

The WTO Overview document issued at the end of 2005[1] showed that there had been 335 disputes (defined as requests for consultation, formally notified, with a DS number assigned) in the period studied; and that 125 of these were initiated by developing countries, with more than 50 of these against other developing members. Table 1 gives an overview.

Table 1: Complaints by developed and developing members

Complaints by developed country members	
Respondents – Developed	127
Respondents – Developing	77
Complaints by developing country members	
Respondents – Developed	72
Respondents – Developing	53
Complaints by both developed and developing country members	
Respondents – Developed	6
Respondents – Developing	0

Source: WT/DS/OV/25.

The table shows six disputes launched by both developed and developing members together. As a working hypothesis I have added these to the developing country total. Thus: 204 complaints by developed members and 131 by developing members, resulting in a ratio of 61:39.

An overall global picture in which about 130 formal complaints at the WTO have been initiated by around 35 developing countries[2] would normally suggest that their ability to participate in the system has not been a major problem. A much larger range of countries will have participated in less direct ways in the process, as third parties to consultations or before panels.

- Around 39 % of all complaints have been generated by developing countries, which would seem to give a positive answer to the basic question on participation.

- The fact that seven out of the top eleven most active members in dispute settlement complaints are from the developing world (see Annex B and Table 4) would appear to confirm this.

Another measure of developing member participation is their presence in WTO panels. Here we find that, for the 96 panels that had been completed at the end of 2005, developing members have been active in 68 such cases. In these disputes they initiated 40 cases or 42 % of all cases, and defended another 28.[3] (An interesting statistic, this, since it shows that they have been active and able to pursue their interests, while suggesting that they are in general not being victimised.)

Another positive picture of participation has also been noted in the context of Appellate Body procedures (see Box 2). Furthermore, more detailed analysis shows that such complaints are more numerous against the major developed countries, even if there have also been frequent cases of one developing country making a complaint against another.

Box 2: Appellate Body views on participation

- "A total of 42 WTO Members appeared at least once as appellant, other appellant, appellee, or third participant in appeals in which an Appellate Body Report was circulated during 2005. Of these 42 WTO Members, 6 were developed country Members and *36 were developing country Members.*
- Of the 99 total appearances by WTO Members before the Appellate Body during 2005, 37 were by developed country Members and 62 *by developing country Members.*"

Quoted from AB report 2005, WT/AB/5, at page 5, on participation.

This would seem to demonstrate that there is a high level of confidence in their ability to challenge and succeed, even against the best-organized defendants.[4]

Box 3: Cases with several parties

One feature of the new system, which may have been helpful to developing members, is the fact that there have been a number of cases of disputes launched jointly by one or more developed member together with developing members. Clearly, in such cases, the fact that several parties are joined in making the same challenge will tend to reinforce belief in the strength of the case. While it would be too simplistic to say that the developed member was the leader and the others followed, there is no doubt that such cases would present fewer problems for developing members and it might be regarded, in some sense, as an ideal training ground. At a minimum, developing countries joining in such cases would gain valuable first-hand experience of the procedures, the preparation of submissions and of rebuttals, and the factors relevant to an appeal.

A few examples:

- The banana case against the EU (DS 27). This was launched by the USA together with Ecuador, Guatemala, Honduras and Mexico. The alliance made good sense from the US point of view, since their interests were directly related to obligations under GATS, while the other members were banana producers and had complementary interests under the GATT 1994 (goods). All parties objected to the EU licensing regime.[5] Given that the main pressure behind the US challenge was Chiquita, an American corporation, and given that Chiquita had production in, or marketing contracts with, at least Guatemala and Honduras, it is reasonable to suppose that there was considerable co-ordination of the legal case between the various members.
- The joint challenge by 11 WTO members to the so-called Byrd Amendment (DS 217/234). This case against the USA related to new anti-dumping legislation incompatible with the WTO agreement, and was 'led' by the EU and Japan together with Brazil, Chile, India, Indonesia, Korea and Thailand, and later also Mexico. The content of the new law had been heavily criticized by many countries prior to its passage, and there is little doubt that this case was well co-ordinated.
- The challenge by 8 WTO members to the American steel safeguard measures announced in 2002 (DS 248/249 etc). In this case each member made a separate complaint but all the disputes were joined together for examination in a single panel. The EU and Japan were once again 'in the lead', with three other developed members and with Brazil, China and Korea. Each member had its own different export interests, but the arguments alleging incompatibility with the WTO Safeguards agreement were identical.
- The challenge by Australia, together with Brazil and Thailand, against the EU export subsidies on sugar (DS 265/266/283). The three parties each had a strong export interest in the sugar trade (probably as much in non-EU markets as in the EU itself), and identical interests in the question of principle (compatibility with the WTO Subsidies agreement). In the case of Brazil, this dispute was launched about the same time as a second export subsidy case (DS 267, against the USA on cotton); while Brazil and Thailand joined together again to launch a later case against the EU (DS 269).

Some anecdotal evidence, perhaps, that such cases do encourage greater participation. The banana case had 19 other members coming forward to seek third party status (admittedly there were Caribbean and African interests as well as those of others in the Central/South American region). The Byrd legislation attracted 17 members as third parties (anti-dumping is always a hot subject), and the export subsidy case reached as many as 24 members as third parties.

3 A REVISED APPROACH

However, this picture needs to be examined and interpreted much further before we should draw any conclusions. Among the issues that we have to consider are two main problems:

- What is the definition of a developing country, how does the WTO Secretariat classify the members and how might the data be re-arranged to give a more representative result?

- What is meant by participation? Should we focus on who initiates a complaint, or should we also include responses to complaints from others? Do we use data at the initial stage of consultations, or data based upon pursuit of a dispute through a WTO panel and, if need be, to appeal? How do we treat data relating to third party involvement, whether in consultations or in panels and appeals?

3.1 Defining a developing country

The WTO does not offer a definition of a developing country, the practice being that countries 'self-declare' their status. In line with this, WTO dispute settlement data – for example, in WT/DS/OV documents, such as the table quoted above – are based on an arbitrary split: most OECD members (Korea, Mexico and Turkey are excluded) are in the first group: developed countries; while all the rest are considered as developing countries. A group of least developed members (based on the UN list) is also recognized.

For the purpose of this study I decided first to treat the EU-25 as well as Bulgaria and Romania as developed countries. In practice the inclusion of all new EU members in 2004 as well as two future members does not make much difference to the basic data. Only three of the new members have been complainants and there are equally few respondents. Second, I decided to place Korea, Mexico and Turkey in the first group also, as well as counting Chinese Taipei, Hong Kong China and Singapore as developed. Apart from Korea and Mexico, who have been frequent participants in the system, this allocation makes little real difference in the statistics.[6]

The idea behind this allocation of countries is that it should better represent reality. Korea, Mexico, Hong Kong China, Chinese Taipei and Singapore are all in the top 10 as exporters and importers of trade in goods in 2004. Five of them are also in the top 15 countries for trade in commercial services, with Mexico not far behind.[7] By any measure, therefore, these WTO members are among the most advanced and most active in international trade; and if their participation had counted as developing country activity it would, in my view, have resulted in a false picture.[8]

3.2 How to define 'participation' in the system?

In its broadest sense, participation would cover any form of activity in the WTO system. But it is clear that it is much easier to engage in certain types of activity than in others: for example, to seek to join in (that is, to be present) as a third party during bilateral consultations does not take much effort (a simple request), nor require any active participation, whereas

the pursuit of a case into a panel procedure as a complainant does involve substantial, and at times prolonged, investment of resources in time and effort.

While, therefore, we have to bear in mind that developing countries will often have participated in the disputes launched by other members as third parties, it is difficult to take this as a fair measure of their ability to participate in the system as a whole. It is true that third party participation in panel meetings or appeal hearings will impose a somewhat heavier burden on members that decide to use these rights; but it is nevertheless not the principal area where problems for developing countries would be expected to arise.

The WTO considers that any complaint that is formally notified and therefore allocated to a DS number is a dispute. This could be argued differently, since the bilateral consultation stage is designed to yield further information and to exchange views about any violation of the rules that has been alleged. It is also intended to provide a last opportunity for the matter to be settled by amicable agreement prior to the full WTO procedure. However, such consultations can also become merely *pro forma* occasions.

As a matter of record, two in every three requests for consultation do not in fact lead to the establishment of a Panel (stage two in the process) and this suggests that some disputes (as notified) are less serious or more easily resolved than others (taken to a panel).[9]

My view is that we should measure participation *both* at the initial consultation stage, bearing in mind that many such cases have a short life, and also at the panel/appeal stage where the resource implications could be a serious deterrent. The data for participation at these later stages can be used to confirm or question the results obtained at the initial stage. I also incline to the view that *disputes initiated* by a developing member are a more relevant measure of their ability to participate effectively in the system than disputes where they are respondents. But again the level of overall activity, offensive as well as defensive, needs to be considered.

3.3 A revised picture

The 'simple approach' in Table 1 can now be re-arranged to reflect the choices made and indicated above. In summary terms, some 30 more disputes now appear in the 'developed' category, and this means that participation by the developing members is less impressive. When the 'mixed disputes' are added in, their total of around 100 complaints is down to one-third of all complaints.

Table 2: WTO dispute settlement statistics 1995-2005

	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	Total
Requests consultations	25	39	50	41	30	34	23	37	26	19	11	335
"Developed" members *	15	30	42	36	26	20	6	21	17	15	6	234
"Developing" members	9	7	8	5	3	13	16	16	9	4	5	95
Mixed disputes #	1	2			1	1	1					6

Source: WTO Secretariat table and website 'Disputes: chronological list'.

* this row includes the EU 25 plus Bulgaria and Romania; also Korea, Mexico and Turkey, as well as Chinese Taipei, Hong Kong China and Singapore.

as in Table 1, mixed cases involve both developed and developing members acting together.

The table shows that developing members have, in the years 2000-2002, hugely increased the number of complaints made, and in 2001 their total was double the one for developed members. However, from 2002 onwards, there has been a downward trend in all complaints.

The following table presents the same data aggregated into two sub-periods and shows the ratios Developed/Developing that result:

Table 3: WTO disputes: number of complaints made

	1995-2000		2001-2005		11 years	
All members	**219**		**116**		**335**	
'Developed'	**169**	77 %	**65**	56 %	**234**	70 %
'Developing'	**50**	23 %	**51**	44 %	**101**	30 %

The six 'mixed' cases shown in Table 2 have been allocated to 'developing'.

The initial 61:39 ratio for disputes launched by developed and developing members (see note to Table 1) has now become 70:30, but this ratio still represents a situation which might appear reasonably positive for developing country participation. Moreover, the higher ratio for the most recent period 2001-2005 suggests that developing members, after a slow start within a new system, are beginning to find it more familiar and learning how it can be used to best advantage. (There are of course many other factors which influence any decision to embark upon dispute settlement, notably the presence of a real problem affecting trade or the desire to tackle a question of principle e g subsidies).

The data for WTO panels that have completed their work (96 cases) supports this broad picture. My calculations show that 75 % of panels were set up at the request of developed members and 25 % by developing members, as they have been defined above.

However, at this point, we have to introduce a new complication: the general pattern of members using the dispute settlement system reveals that less than 40 members have been initiating complaints, and most of these have been made by about 15 'main users'.[10] The corollary of this is that around 100 WTO members have never made any complaint at all (although they may have participated as third parties in cases brought by other members). This is illustrated in the Tables 4 and 5 and in the Charts on the following page.

Table 4: Main DS users

USA	EU	CAN	BZL	IND	MEX	KOR	JP	THAI	CHL	ARG
81	70	26	22	16	15	13	12	11	10	9

The top 11 users shown here account for almost 80 % of all complaints made (285/363). The US and the EU are the major users with half of this total, but one should note the position of Brazil and India. A similar pattern is observed when the complaints of developing members are studied, with the bulk of them made by a small group of about 12 members.

Table 5: Developing country users

Group 5	BZL	IND	THAI	CHL	ARG	Next 8
68	22	16	11	10	9	33

Source: WTO website, disputes by country (includes each party to a multiple complaint).

This group of users accounts for 90 % of all complaints made by developing members (101/113), with the first five (Brazil, India, Thailand, Chile and Argentina) responsible for no less than 68 cases or 60 % of the total.[11] There would seem to be little doubt that these members are well able to use and exploit the system. Some other developing members may have engaged on occasion as third parties; but it is clear that the vast majority of such members – around 60-70 in total – have had no involvement at all, at any stage.

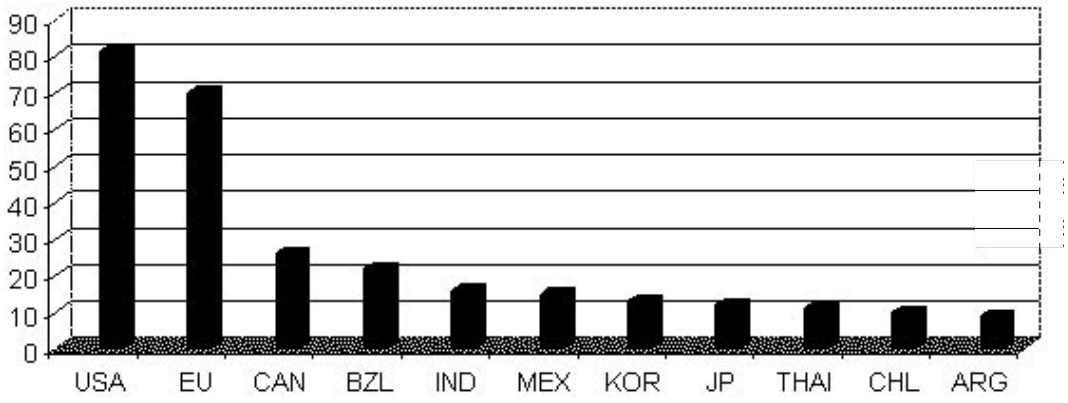
This new situation requires some further analysis. The picture that emerges here puts the tentative conclusions reached so far in doubt, since strong concentrations of activity by a few members inevitably mean that the role of others is reduced in significance.

The figures 1 and 2 show the same situation as the Tables in the text, but presented in a different way.

First, the main DS users among all WTO members. The eleven members shown in the chart below account for 285 complaints launched out of a total of 363 (measured by complainants, see footnote 11).

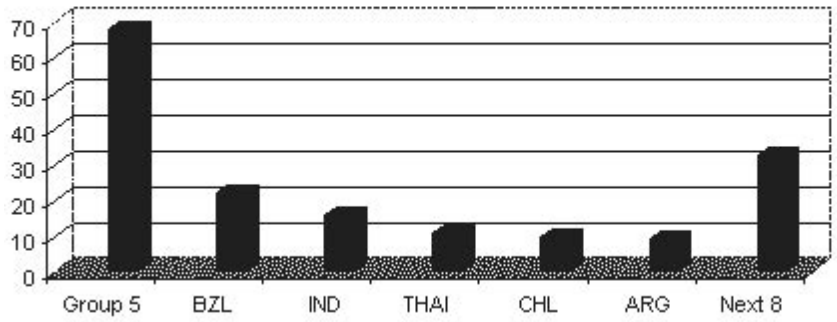
Clearly the US and the EU are the principal users, with more than half of the total. The EU figures have been adjusted to represent EU-25. Other developed members, such as Australia and New Zealand made fewer than 8 complaints.

Figure 1: Main DS users



Next, the main developing member users. The 13 members indicated in the chart and in footnote 11 account for 101 complaints out of a total of 113. In the second group of 8 members, each country made between 3 and 6 complaints.

Figure 2: Developing country users



4 ANALYSIS OF THE DATA

The picture that has emerged of activity concentrated on relatively few main users is not new, and has already been noted by other commentators. William Davey, a former Director of Legal Affairs at WTO, in a study of the first 10 years of the DSU, had identified Brazil and India (with Korea) as principal users of the system (after the US and the EU).[12] Gregory Shaffer has also drawn attention to this phenomenon.[13] Reports from the Advisory Centre on WTO Law (whose role will be examined below) also amply confirm the same picture.

Nonetheless, the fact that five members account for just under 60 % of all activity by all the developing members (as plaintiff or respondent in consultations), and that they together with another 8 members[14] account for over 80 % of this activity, is a disturbing finding. It underlines the 'absence from the game' of large numbers of developing members, and makes us aware that Least Developed members have hardly been touched by the DS system at all (only Bangladesh has been active, with one single complaint) and that all African members (apart from S Africa and Egypt) have neither made any complaint nor been cited for alleged violation by others.

As we know, the developing countries are far from being a homogeneous group. One should therefore perhaps not expect an analysis of participation that offers valid conclusions for all countries in the group. It begins to look as if we can be reasonably satisfied that a small number of more advanced developing members have no substantial difficulty with the system, while a further group has established a record, albeit at a fairly low level of activity. For others, the data is silent.

Analysis of the data, however penetrating, is not enough and one needs to look at the wider WTO environment in which developing members have to operate to refine the picture.

4.1 Constraints that may hold back greater participation[15]

In the academic literature there is much discussion and analysis of two main types of constraint, which have been thought to hold back participation of developing members in the system. As expressed by Guzman and Simmons, these are "capacity constraints", a term which includes the limits imposed by shortage of skilled human resources or lack of finance for use of outside legal assistance, and "power constraints", a term which covers the impact of possible retaliatory action by major players if their policies or measures were challenged in the WTO.[16] To this one could add a potential "linguistic" constraint for non-English speaking members arising from the fact that most panels and appellate hearings are conducted in English.[17]

These constraints have been summarized by G Shaffer as follows:

> "Although developing countries vary significantly in terms of trading profiles, they generally face three primary challenges if they are to participate effectively in the WTO dispute settlement system. These challenges are: (i) a relative lack of legal expertise in WTO law; (ii) constrained financial resources, including the hiring of outside counsel;

> and (iii) fear of political and economic pressure. We can roughly categorize these as constraints of law, money and politics."[18]

Before entering into any discussion of such constraints it will be useful to look at the role and the record of the Advisory Centre on WTO Law (ACWL), which was set up to address some of these developing member problems and constraints, and which has to a large extent eliminated some of them over the last four years or more.

The ACWL, established in mid-2001 with financial support from a group of WTO members, provides general legal advice on the whole range of WTO agreements, rights and obligations to developing members, with a special focus on least developed members. In addition, it has a major role in actively assisting developing members who request its help in evaluating, preparing and pursuing dispute cases at the WTO. And, thirdly, ACWL also provides substantial help with training (six month part time courses) and with internships for least developed legal officials.[19] (See their website: www.acwl.ch.)

Recent ACWL reports[20] demonstrate that their assistance has been given in about 20 % of all dispute cases begun since mid-2001, mostly to developing members as *complainants*, less often as respondents or as third parties. One paragraph is worth quoting in full:

> "*Two-thirds* of the developing countries that have participated in the WTO dispute settlement proceedings as complainant or respondent have decided to become Members of the ACWL … Once Costa Rica is a Member of the ACWL, *all of the developing countries and customs territories that participated in WTO dispute settlement proceedings more than twice but fewer than 18 times will have joined the ACWL*. The only developing countries active in the dispute settlement process that have not joined the ACWL are Argentina, Chile, Brazil, Mexico, and Korea, all of which had extensive experience in the dispute settlement system and in using the resources available through private law firms even before the establishment of the ACWL."[21]

The key message here is that the ACWL has been providing a service, which its members clearly appreciate. Appendix 1 to the Report on Operations 2005 shows that among the main users of ACWL over the four years were Thailand, Guatemala, Pakistan, and the Philippines. These members have been relatively active in the disputes field, but seem nevertheless to feel that their experience of the procedures is not yet sufficient to go it alone. However, this may represent no more than some kind of extra insurance policy since it is certainly not the case that all complaints by developing countries have resulted from ACWL assistance. India which had used the ACWL services in one case that was already at the appeal stage, and in one other case (DS 246: the panel on EU preferences), has since then launched new disputes without assistance. It may be that they are graduating out and are now able to manage future disputes on their own.[22]

While, as stated above, these activities have largely addressed many of the capacity constraints, there is one area where a developing member might still be at a disadvantage. This is in the pre-litigation, pre-consultation stage, where first steps have to be taken to identify the existence of a trade barrier or of a measure which is perceived to be affecting exports in an

adverse fashion. Identification of such a case clearly has to precede any help with legal evaluation, designed to see whether any violation of WTO rules can be shown to exist and thus what chances there may be to initiate a WTO dispute with a prospect of success.

However, where this is a difficulty in fact, it has more to do with the state of governance and the capacity to monitor trade trends in the exporting country than it has to do with any defect in the DSU. One factor, which is present in the more successful developing users of the system (such as Brazil), is the degree of knowledge about trade rules and rights under the WTO in the industry of the country concerned, and how far it is motivated to exert pressure on the government for resolution of trade problems. To quote G Shaffer again:

> "If developing countries are to participate meaningfully in the WTO dispute settlements system, they will need to continue to increase institutional capacity and co-ordination of trade policy at (all) levels … they will need, in particular, to develop their own co-ordinative mechanisms to include the private sector and civil society representatives. If they are to deploy WTO law to their advantage they will need to maintain routine on-going procedures for gathering, processing and prioritizing information …"[23]

The ACWL is particularly concerned to assist least developed members (for whom their services are free) and, in effect, they did assist Bangladesh to make a complaint against India (later settled bilaterally). Such members have been absent from using the system, and from discussion with ACWL it appears that another factor may be at work in this case. Least developed members are faced with relatively few (and light) obligations in WTO, and their trade privileges (tariff preferences under GSP or special schemes for LLDCs) are not guaranteed in the way that bound duty rates are. Thus they are unlikely targets for complaints and they have relatively less scope for attacking others on market access. Lack of human resources with the skills required to conduct a panel case may also be a not unimportant factor.

Another factor may well be that for poorer members, with a more limited range of exports, the bilateral route to discussing and solving problems in specific markets has been found to be as effective as the more judicial rules-based approach at WTO. This might well account for the relative lack of activity of African members, especially in the context of their association with the EU and their focus on its market.

4.2 **Other factors that assist or discourage participation**

If these capacity constraints can be at least partly set on one side, what other factors may be relevant to participation in the dispute settlement process? Simple observation suggests that a member's level of participation reflects fairly closely its stake in world trade, in goods and services. This translates into its ability to deal with the costs and human resource issues posed by the WTO system. Thus, the EU and the US which have been responsible for setting up 25 and 24 of the 96 panels (including joint panels) completed by the end of 2005 – over half of them – have a combined share of world trade of 35-40 % (goods and services together); while Brazil and India who have requested 10 and 7 panels have smaller shares, in the region of 1-1,5 % each. One could argue that they have done better than might have been expected.[24]

Consistent with this idea, I placed six WTO members in the developed category largely because they were among the top ten trading nations,[25] and if we examine the situation further we find that India, Thailand and Brazil are in the top 20, with Chile and Argentina not far behind. This of course confirms that they have strong and varied trade interests, as well more generally the governance and administrative infrastructure to support such a position in the global market.

What is perhaps surprising is that some other WTO members, in a similar position, have not been more participative. The big absentee is of course China, now in third place for world trade in goods and fourth for services. Others such as Malaysia or S Africa have been almost entirely inactive, and some such as Indonesia or Philippines have been less active than their position might suggest. There is no easy explanation for such matters.

If one asks the question: 'Why did developing members not make more complaints?' the answer is not obvious nor is it easy to guess at the underlying reasons. For a start, there is no law that states that developing and developed members should be in parity in the dispute area. All depends on the perceived importance of the problem, the motivation and the circumstances. I have heard it said that many developing members have relatively few products to export, and in many cases their access to major markets is duty-free; or, if there are difficulties, they may well be due to specific measures e g in the TBT/SPS area, which are less easy to challenge, thus the motivation is less strong. Further, the major barrier faced by exports to other developing members may be a high tariff, unbound or below a ceiling binding, and this also offers no scope for reasonable challenge.

If this is so, it indicates that what one might call 'rational decision making' is at work. For many countries, as a practical matter, the benefits of GSP are a feature of primary importance to their exports, and if one adds access to schemes such as AGOA or 'Everything but arms' it is clear that maintaining such privileges would be a top priority. Such schemes are, in WTO terms, unilateral and voluntary (rather than a legal commitment), and a formal dispute becomes much less obvious as the way to go. Moreover, there is thought to be a risk that a complaint against a preference donor could lead to the privileged access being withdrawn, although there is not much empirical evidence that this has actually happened. One might note that India has taken a case against the EU for preferences that it argued (successfully) were illegal.

Is lack of resources, human or financial, one of the problems? It is hard to prove a negative, and to be certain why something has not been done. On the one hand the contribution of the ACWL has already been noted: lack of resources should no longer be a major problem. On the other, it can always be said that extra resources and especially manpower could always make a difference to countries that have small delegations in Geneva and/or are far away from WTO, and that have small budgets. But, increasingly, resource difficulties in Geneva seem less and less the problem.

There are indeed signs to the contrary. At an early moment in the life of the DSU a panel was asked to rule on the issue whether external lawyers (not nationals of the member concerned) were permitted to attend panel sessions. This led to a ruling that members could designate

any person to be part of its delegation and thus attend, although active participation, e g presenting a submission or arguing legal points was apparently not envisaged.[27] (In practice I believe that sessions have become somewhat less formal over time, and a degree of active participation has been tolerated.)

What has become clear is that assistance from outside lawyers in the preparation of cases, and in drawing up legal arguments, has become the norm, and this does not appear to have caused any major problem. Cases such as the Antigua/Barbuda case on offshore gambling against the US amply demonstrate that financial resources can be made available, no doubt from the commercial interests concerned. Such trade interests in the EU banana trade or in export of shrimps to the USA would be other examples.[28] There can however be a downside to this situation where the aims of government and industry diverge, with one opting for a settlement where the barrier is addressed while the other insists on the advantages of a legal ruling.

Is there any other factor within the DSU system, which works against participation by developing members? As has already been mentioned, this is certainly not the case for a range of countries that have been relatively active in making complaints and in taking matters to the panel stage where need be. A further group has initiated one or two complaints, and they and others have been able, on occasion, to join in as third parties to complaints by others. Perhaps 50 such members in all have participated in this broad sense.

For the large number of developing members that have not been directly involved in disputes, it is impossible to say whether bias in the system is responsible. There is always a trade-off, when deciding whether to devote resources to a WTO challenge, between the importance of a barrier or of policies affecting the members' exports and the cost (in money terms and in human resources) of conducting a case. In many poorer members the administrative problems they face rather than the WTO system will be the determinant factor.

Having said that, there are some signs that the system does work to provide a 'level playing field' and that the opportunities are readily available to all members. Even if developed countries made the majority of complaints in the early years, there were cases of 'smaller or poorer' members using the DSU. Ten of the first 25 complaints were made by developing members, and these cases included complaints by Peru and Uruguay against the EU, as well as complaints by Costa Rica, Brazil and Venezuela against the USA. About half of the first 20 WTO panels established were examining developing member complaints, and in 7 cases these were challenges to major developed members. Since those times the picture has evolved and complaints by developing members (including against each other) have become more numerous.

In conclusion, the jury is still out on the question examined in this study. There is good news and some less good news. The situation continues to evolve, and with added experience and over time, a future study may find that the record has further improved.

ANNEX A

A general overview of WTO disputes – the historical patterns. *

Action	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004*	2005*	Total
Requests for consultations	25	**39**	**50**	**41**	30	34	23	**37**	26	19	11	335
Panels established**	5	11	**15**	**13**	**20**	11	15	11	**19**	7	8	135
Panel Reports adopted	–	2	5	**12**	**9**	**15**	**13**	11	8	8	**17**	100
Appellate Body reports completed	–	2	5	**8**	**7**	**8**	**9**	6	5	6	8	64

* Source: WTO Secretariat, internal documents and tables. Bold figures indicate peak levels of activity. The figures for panel reports adopted appear to show a big increase in 2005. But, to avoid any misunderstanding, the data does count reports, not panels. In fact 13 panels were concluded in 2005 but they produced 17 reports (see DS 174/290, and DS 265/266/283, and DS 269/283).

** Note: For the sake of simplicity, these figures exclude Art. 21.5 cases on implementation disputes. At least 25-30 of all the panels established were either not 'composed', in other words panel members were not appointed to start detailed examination of the case; or, in other instances, they were suspended and the parties reached some agreed solution without any report being adopted or any DSB ruling being made.

ANNEX B

Table 6: WTO disputes: table of leading complainants and respondents (December, 2005)

Country	Complainant	Respondent
USA	81	90
EU	70	53
Canada	26	13
Brazil	**22**	**13**
India	**16**	**17**
Mexico	15	13
Korea	12	13
Japan	12	14
Thailand	**11**	**1**
Chile	**10**	**10**
Argentina	**9**	**16**

Source: WTO website, Disputes by country.

Notes

1. WTO document, WT/DS/OV/25 of 12 December, 2005, "Update of WTO dispute settlement cases".

2. This figure is derived from the WTO website, where all disputes by country are listed.

3. WTO document, WT/DS/OV/25, pages x to xiv. Country breakdown by author. One could extend the analysis to include panels established and still at work, but the data would be less robust since not all the panels shown as active (section II) will complete their work and some cases may have been (or may be) settled.

4. For complaints, which went later before WTO panels, over 80 % were aimed at the major developed countries and the US, EU and Japan in particular.

5. The USA had already tried to challenge earlier banana import regimes in the EU during the GATT era, but the panel reports were never adopted.

6. I have noted that Prof Horn and Prof Mavroidis have adopted a broadly similar approach in the WTO Dispute Settlement database that they prepared for the World Bank, placing these members in the *developed* category (see World Bank website).

7. See WTO International Trade Statistics 2005, Appendix tables 1.6 and 1.8. In these tables the EU.25 is shown as a single unit, thus excluding intra-EU trade flows. For trade in services this is a 'first', previously only data with intra-EU flows included were available.

8. This decision is of course arbitrary. On a different measure, the size of the economy and of GDP, Korea is ahead of *Brazil, then India,* then Mexico and all between $768 and $793 Bn, which is not far behind Canada. So they could also be classified in the higher category.

9. See **Annex A** for a general overview of disputes. Of 335 consultation requests by the end of 2005, no more than two in five (135 cases) have been pursued into a panel and just over a quarter or so (96 cases, with 100 reports) have been completed with some more still in the pipeline.

10. The source for this number and for the following tables is the WTO website, 'Disputes by country'.

11. Table 2, is based on measurement of complaints (by DS number) and shows a total of about 100 made by developing members. The tables here are based on measurement of the numbers of complainants (the individual members) and show 101 cases out of a total of 113 for developing members. *The difference arises from 'multiple complaints'*. These occur when a number of members join together to launch a case, which counts as one (a single DS number) but counts also as several when members are taken individually. Examples: DS 217, against the US on the 'Byrd amendment', covers 11 complainants and 7 developing members; or DS 58, against the US on shrimp, covers 4 different developing members. Numbers are therefore higher when individual complainants are counted.

12. Davey, W J, "The WTO dispute settlement system : the first decade", article in *Journal of International Economic Law*, March 2005.

13. Shaffer in an article (forthcoming) for the ICTSD programme 'South America dialogue on WTO Dispute settlement and Sustainable Development' examines in detail Brazil's arrangements for handling WTO litigation cases.

14. The eight members are Guatemala, Honduras 6 complaints each; Colombia, Costa Rica, Philippines on 4; Ecuador, Indonesia, Pakistan on 3. There are serious doubts about the real

value of the data for this group due to duplication in the cases. Both Guatemala and Honduras have three complaints against the EU on bananas, but these are not separate cases, merely the same dispute revised and modified as time goes by. Similarly, the Philippines has two virtually identical complaints against Australia, and Honduras (again) has two related to cigarettes against the Dominican Republic. Such duplication does arise throughout the WTO database, but in this context it weakens the argument for strong participation of developing members.

15. Many of the ideas in the following section have been inspired by conference papers presented at the University of Wisconsin-Madison (WAGE) in May 2005, including the paper by Guzman & Simmons that is cited in note 16; and in particular by an article by Gregory Shaffer, "The challenges of WTO law : strategies for developing country adaptation" in the *World Trade Review*, July 2006, and his on-going work for ICTSD in its South America dialogue on WTO dispute settlement and sustainable development.

16. WAGE Conference, "Power plays and capacity constraints", article by A Guzman & B Simmons presented in May 2005.

17. If submissions are made in French or Spanish, these are of course translated in accordance with regular WTO practice. But the process implies delays, which may impact on the members' arguments. The process of oral questions and answers is also almost always in English, the *lingua franca* for most panellists. There are also major delays in translating panel reports, especially as these are growing in size (over 1,200 pages in one recent case), although AB reports seem to receive special priority treatment.

18. Gregory Shaffer, article in the *World Trade Review*, July 2006, at page 177.

19. In addition, the WTO itself provides some (rather limited) help for developing members in assessing the legal case for or against a challenge, and there are regular short training courses for officials to learn more about the DSU.

20. See the progress report published in October 2005 by the Management Board, entitled "The ACWL after four years" and the Report on Operations, 2005 issued by the Executive Director in January 2006.

21. From ACWL/MB/2005, para 9.

22. Appendix 5 to the Report on Operations 2005 lists the active developing members in disputes: the top six have not used ACWL (or only sparingly – India) but the next 14 have all asked for ACWL membership.

23. G Shaffer, from the article cited in footnote 18 above, at page 197.

24. Calculations by the author for goods and services based on WTO International Trade Statistics 2005, already cited above. Data for panel participation is taken from WT/DS/OV/25.

25. #6 Hong Kong China; #7 Korea; #8 Mexico; #9 Chinese Taipei; #10 Singapore. Turkey is lower down.

26. There are of course quite understandable reasons for this. China is still a fairly new member of WTO, and has been adopting a low visibility position generally in WTO debates. Further, it is defending the position that concessions made upon accession are enough of a contribution to the Doha round. Nevertheless, it has been notably restrained in the disputes area, with only one complaint made (with others against the US steel measures) and four to defend (including three current cases related to auto parts).

27. WTO Panel, The EC-Bananas case. While the panel in fact ruled against attendance when the same issue was raised during the Appeal, the AB ruled in the opposite sense. See WT/DS27/AB/R, paras 5 – 10.

28. The Brazilian example is instructive. It is well known that Brazil (government or commercial interests) have been supported over the years by a leading US law firm, and that was probably a contributing factor behind several success stories in complex export subsidy cases (v. Canada on regional aircraft, v. USA on cotton, v. EU on sugar).

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